



**Australian Government
Refugee Review Tribunal**

Country Advice Kenya

Kenya – KEN38789 – DFAT Advice on Homosexuality – Lesbianism

12 August 2011

Please seek clarification from DFAT on the following:

- 1. What is the specific offence (if any) with which a person would be charged if accused of being a homosexual man, or engaging in male same-sex sexual activity, in Kenya?**
- 2. What is the specific offence (if any) with which a person would be charged if accused of being a lesbian, or engaging in female same-sex sexual activity, in Kenya?**

These questions were sent to DFAT on 25 May 2011.¹ On 6 July 2011, DFAT provided the following response²:

Section 27(4) of Kenya's new Constitution, which was promulgated in August 2010, prohibits discrimination on a number of grounds (extract attached). The Constitution does not explicitly list sexual orientation as a prohibited ground for discrimination. The reference to "sex" is open to interpretation. Some activists have claimed that the reference to "sex" in the list of prohibited grounds for discrimination refers to sexual orientation. However, it is more likely intended to refer to gender. There is no other reference to gender in the anti-discrimination provisions. Politicians campaigning in favour of the new Constitution in the lead up to the referendum on its adoption sought to re-assure the Kenyan public that it would not override existing laws that criminalise homosexual acts (Section 2 of the new Constitution voids any law that is inconsistent with any of its provisions). To date, no legal challenge has been mounted against the homosexuality-related provisions of the Penal Code and Sexual Offences Act on the grounds that Section 27(4) of the Constitution covers homosexuality.

A. Legal treatment of male homosexuality and male same-sex sexual activity under Kenyan law:

A male accused of being a homosexual, or engaging in same-sexual activity, could be charged under sections 162-163 and 165 of Kenya's Penal Code (extract attached). Section 165 explicitly criminalises male homosexual acts: "any male person who... commits any act of gross indecency with another male person... is liable to imprisonment for five years". In addition, Sections 162-163 of the Code mandate that any person guilty of attempting or committing – or any male person guilty of permitting – consensual "carnal knowledge... against the order of nature" is liable to imprisonment for either seven or fourteen years.

Male homosexual acts are also captured by Section 11A of the Sexual Offences Act, 2006 (extract attached), which provides that "any person who commits an indecent act with an adult is... "liable to imprisonment for... (up to) five years...(and/) or a fine not exceeding fifty thousand

¹ RRT Country Advice Service 2011, Email to DFAT 'RRT Country Advice Service Request – KEN38789', 25 May – Attachment 1.

² Department of Foreign Affairs and Trade 2011, *DFAT Report No. 1305 – Kenya: RRT Information Request: KEN38789*, 6 July – Attachment 2.

shillings”. Section 11A(a) of the Act defines an “indecent act” as “any contact between the genital organs of a person, his or her breasts and buttocks with that of another person”.

The Kenya Human Rights Commission (KHRC) advised that there have been instances in which male homosexuals have been charged under Section 11A of the Sexual Offences Act. However, it was not aware of any cases in which police have laid charges under sections 162-3 and 165 of the Penal Code. Unless a suspect confessed to a homosexual act or voluntarily submitted to a medical examination, the police would find it difficult to gather sufficient evidence to press charges under the Penal Code. Even in high-profile cases where the police have publicly indicated that they would press charges under these provisions, charges have not ultimately been laid. The arrest in February 2011 of five men, who were handed over to police custody by a mob after allegedly attempting to organise a mock wedding ceremony for two homosexual males, is one such example. In a BBC news report, a Mombasa District Police officer was quoted as saying that the behaviour of five men was “repugnant to the morality of the people” and that they would “undergo a medical examination before we charge them with homosexuality”. KHRC engaged legal representation for the men, and they were released from police custody without being charged.

KHRC also advised it was aware of cases in which the police had charged males suspected of homosexual acts with a lesser crime such as drunken and disorderly behaviour. This sometimes occurred if the police had insufficient evidence to press charges under the Sexual Offences Act. In some instances, the accused would plead guilty to disorderly behaviour to avoid expensive and drawn-out court proceedings.

B. Legal treatment of female homosexuality and female same-sex sexual activity:

Kenya’s Penal Code does not include a specific offence for female homosexual acts: there is no equivalent of Section 165 dedicated to females. The applicability of Sections 162-163 to female same-sex sexual activity would depend on the legal interpretation of “carnal knowledge” and “order of nature”. KHRC advised that it believes that carnal knowledge excludes female homosexual acts. A female accused of being a homosexual, or engaging in same-sex sexual activity in Kenya could theoretically be charged under Section 11A of the Sexual Offences Act, 2006 for committing “an indecent act with an adult”.

KHRC advised that it was not/not aware of any cases in which homosexual females had been charged under Sections 162-163 of the Penal Code or Section 11A of the Sexual Offences Act. It had however dealt with cases involving alleged female homosexual acts in which the police had instead charged the accused with soliciting, which carries a prison sentence of up to six months or a fine of 5,000 – 50,000 Kenyan Shillings (AUD55 – 550). In some instances, the accused had pleaded guilty to avoid expensive and drawn-out court proceedings.

KHRC is comfortable with references to it in this cable being published in the RRT’s report – subject to being able to review a copy of relevant excerpts prior to its publication.

Attachments

1. RRT Country Advice Service 2011, Email to DFAT ‘RRT Country Advice Service Request – KEN38789’, 25 May.
2. Department of Foreign Affairs and Trade 2011, *DFAT Report No. 1305 – Kenya: RRT Information Request: KEN38789*, 6 July.
3. Department of Foreign Affairs and Trade 2011, ‘RRT Country Information Request – KEN38789: Extracts of relevant legislation’, 6 July.