

Information from Civil Society Organizations for the consideration of the initial report on Malawi

Nyasa Rainbow Alliance

**Report for the Committee against
Torture (CAT)**

75th Session (31 Oct 2022 - 25 Nov 2022)



With the support of

30. Please provide information on the measures taken to ensure that all crimes and acts of violence that target persons on the basis of their sexual orientation or gender expression or identity are properly and promptly investigated and prosecuted.

1. Legal framework

In Malawi, the Constitution is ranked supreme and superior over any other law or authority.

Section 4 as read with section 20 of the Constitution of Malawi clearly provides that all people have an equal right to be protected from violence, persecution, discrimination and stigma. Similarly, under section 12 (1) (d) of the Constitution of Malawi, the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups **and minorities**.

According to section 46 (3) of the Constitution, where a court finds that rights or freedoms conferred by the Constitution have been unlawfully denied or violated, **it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.**

It is clear that the Constitution of Malawi guarantees that every person, without distinction, can enjoy rights enshrined therein, including the LGBTIQ+ persons. Despite the safeguards enshrined in the Constitution for the enjoyment of rights by everyone without distinction, the LGBTIQ+ individuals and their families in Malawi face widespread human rights violations. This is cause for alarm – and action.

2. Violence and discrimination against LGBTIQ+ people

Thus, failure to uphold the human rights of LGBTIQ+ people and protect them against abuses, such as violence and discriminatory laws and practices, constitute serious violations of the Constitution of Malawi and international human rights law. Such violations have a far-reaching impact on society – contributing to increased vulnerability to ill health including HIV infection, social and economic exclusion, putting strain on families and communities, and impacting

negatively on economic growth, decent work and progress towards achievement of the future Sustainable Development Goals. As Malawi is planning towards the African Union's Agenda 2063, many stakeholders have been consulted to ensure that this vision leaves no one behind. Despite several lobbying efforts, the government is yet to consider the views of the LGBTIQ+ people to contribute towards this Agenda. This is also evidenced by the recent 3rd UPR cycle recommendations that were made to the Malawi State regarding the LGBTIQ+ community. None of the recommendations that mentioned LGBTIQ+ explicitly were accepted. The Malawi State simply noted those recommendations.

Malawi bears the primary duty, under both the Constitution and international law, to protect everyone from discrimination and violence. The violations that LGBTIQ+ persons are facing in Malawi, therefore, require an urgent response by the Malawi government, local human rights institutions, CSOs and international human rights organizations.

Human rights are universal, hence cultural, religious, moral practices, beliefs and social attitudes cannot be invoked to justify human rights violations against any group, including LGBTIQ+ persons.

Due to the Malawi government's failure to repeal laws that criminalize consensual same sex relationships between two consenting adults in private, the LGBTIQ+ persons continue to face homophobic violence, arbitrary arrest and detention, harassment, discrimination, sexual violence, extortion and other abuses (*see Annex 1 for recently documented cases*). For instance, section 153 (c) of the Penal Code prohibits any person from indulging in sexual intercourse against the order of nature, the act which includes oral-genital and anal-genital, but it is only the LGBTIQ+ community which is targeted by this law. The Constitution of Malawi clearly guarantees equal and effective protection against all forms of discrimination on grounds of race, color, sex, creed, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. Discrimination against LGBTIQ+ persons is, therefore, '*prohibited*'. However, the State has ignored this constitutional provision and decided to focus on the enforcement of sections 137A, 153, and 156 of the Penal Code, which contradict the Supreme Law of the land.

For example, on 20th October 2021, the Mangochi Police Station arrested transgender woman Jana Gonani on the allegation that she was identifying herself as a woman when she was a man. It is on record that, while at Mangochi Police Station, Gonani was forced to submit to genital verification without her consent by a male police officer where she was also placed in a male cell despite identifying herself as female. Gonani was also subjected to medical examination without her consent in order to verify her mental faculties simply because of her sexual orientation. Such examinations are conducted on the assumption that identifying oneself as LGBTIQ+ person is a sign of insanity. This is a gross violation of the right to dignity, which is enshrined under section 19 of the Constitution of Malawi.

Currently, Gonani is serving an 8-year jail term at Zomba maximum security prison simply because she identified herself as a female. This is a clear violation of the ‘liberty clause’ enshrined in section 18 of the Malawi Constitution. Thus, the right to liberty entails that the choice and freedom to decide on how to have consensual carnal knowledge with fellow adults, including gender of that person, is intimately linked with personal autonomy wherein an individual is entitled to be free from State interference.

It is against this background that the Nyasa Rainbow Alliance (NRA) is challenging both the conviction and sentencing of Gonani through Criminal Appeal No. 4 of 2022, which has now been certified as constitutional matter and will be heard and determined by a panel of not less than three High Court Judges (*see Annex 2*). The date for the case has not been communicated yet. The NRA is yet to receive communication as to when the constitutional case will commence.

The NRA is also challenging the decision of the Malawi government through the Department of the Registrar General under the Ministry of Justice, which rejected the registration of the NRA as a non-governmental organization in 2017 on the account that its objectives were immoral and against public policy (*see Annex 2*).

The denial to register the NRA was a serious violation of the right to freedom of association, which is guaranteed under section 32 of the Constitution of Malawi. The NRA’s registration case was also certified by the Chief Justice as a constitutional matter which will be disposed of by a panel of no less than three judges of the High Court on a date that will be fixed by the Court.

The NRA, through the European Union (EU) co-funded Out and Proud project, conducted a risk and vulnerability assessment which provides evidence for vulnerabilities and risks that the LGBTIQ+ community faces in Malawi. “OUT & PROUD: LGBTI equality and rights in Southern Africa” is a three-year project (from 1st February 2020 to 31st January 2023), co-founded by the EU, that aims to contribute to improve the legislative framework and non-discriminatory environment in favor of lesbian, gay, bisexual, transgender, queer, intersex and other sexual and gender minorities people in Southern Africa. Its specific objective is the reinforcement of the capacities and opportunities for LGBTIQ+ human rights defenders (HRDs) and their organisations in Malawi, Eswatini and Zimbabwe to defend, advocate and promote their rights and fight discrimination. The implementing partners are Southern Africa Litigation Centre (SALC), Cooperazione per lo Sviluppo dei Paesi Emergenti (COSPE), Centre for Civil and Political Rights (CCPR), National Rainbow Alliance (NRA), The Rock of Hope (ROH), and Trans Research, Education, Advocacy & Training (TREAT).

The Risk and Vulnerability Survey has been the first research that the Out and Proud project has realized to give evidence-based visibility to the discrimination and social exclusion of LGBTIQ+ community members and HRDs in Eswatini, Zimbabwe and Malawi.

According to the research, LGBTIQ+ people in Malawi seem to be particularly vulnerable to forms of harassment, with a statistically significant association with their sexual orientation and gender identity expression (SOGIE). High levels of risks are reported for all SOGIE categories, with particular reference to the financial insecurity (57%), followed by family refusal (46%), online smear campaigns (45%), refusal from community/friends rejection and sexual violence (41%). The analysis reveals overwhelming evidence of police brutality for LGBTIQ+ individuals in Malawi. This factor indicates that the LGBTIQ+ community is at risk of experiencing so many other violations without receiving help from police officers in Malawi as police officers also take part in the violation of LGBTIQ+ people. Participants in Malawi considered themselves most vulnerable to the impact of risks due criminalisation (20%), lack of safe spaces (18%), financial insecurity (17%) and COVID/Quarantining (18%).

Annex 1: Recently documented cases

1. The Republic v Ganizani Eliya (decriminalization of consensual same sex activities)

On 5th June 2022, Ganizani Eliya, a 22-year-old gay man was arrested at Kabula Police Station in Blantyre, for allegedly having sexual relations with a 16-year-old boy, Michael Lameck, abiding to **Sections 153(a) (any person who has carnal knowledge of any person against the order of nature shall be guilty of a felony and shall be liable to fourteen years imprisonment) and 156 (any male person who whether public or private, commits any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years)** of the Malawian penal code.

Although records on the court-file from the State show that the two were in a consensual relationship, no evidence of sexual activity occurring between the two seems to be on such record. On the day of Eliya's arrest, Lameck was also arrested and they were both taken to Kabula Police Station (*see Annex 2*). The Nyasa Rainbow Alliance (NRA) heard the news of their arrest on the 6th of June 2022 and rushed to the station to investigate the facts of the case. During the NRA's visit, it was discovered that Eliya and Lameck were questioned in a very unusual manner, whereby they were ridiculed and asked questions such as, 'who is the woman in the relationship?', 'do you know that being gay is a sin?' and 'how do two men manage to have sex?', which Eliya found to be very offensive despite telling them countless times that they had never had sex. The general line of questioning had a nature of shame, blame and mockery, rather than of trying to serve justice or conduct an inquiry of the truth, especially on the fact that the only evidence they had against the accused was based on screenshots.

The NRA also found out that Lameck was released after an hour of being arrested. The NRA approached the Southern Africa Litigation Centre (SALC) for legal support. It was also brought to our attention that Eliya's statement had not yet been taken. He was arrested for over 48 hours without being charged nor taken to court, and he was supposed to be released following the 48 hour rule enshrined in the Criminal Procedures Evidence Code (**if the accused has not been charged nor taken to court within 48 hours he/she should be granted a police bail**).

On 9th June 2022, Eliya was taken to Chichiri Magistrate Court, and the SALC's lawyer Luntha Chimbwete represented him. During the plea taking, Eliya pleaded not guilty to both offenses, and Chimbwete requested that the accused be released on bail, which was denied by the Magistrate Court. The case was meant to commence for trial on 20th June 2022, but the Magistrate did not attend the Court on the material day. Another date of hearing is yet to be provided.

On 20th July, SALC's lawyer filed preliminary objections to the proceedings, as they are based on an arrest for acts that do not constitute an offense; the charges the accused pleaded to are defective, therefore rendering the entire proceedings irregular and warranting a dismissal by the Court. She also filed a notice of adjournment where a date of hearing is yet to be provided.

Current situation:

- Eliya is being held at Chichiri Prison in Blantyre, where the NRA has been visiting him every fortnight and providing him with basic necessities, such as groceries and toiletries. We await another date of hearing to be provided.
- 16th August 2022 was given as a date of hearing. Unfortunately, the judge cited logistical challenges and the case was adjourned indefinitely due to this.
- The NRA has been visiting Eliya at Chichiri Prison, and he seemed to be facing a lot of challenges like lack of healthy food, being assaulted by inmates for being gay, lack of medical attention when needed and, because of fear of making things worse, he does not report any of these challenges faced.
- On 22nd August 2022, Eliya and Lameck's family met and agreed to undergo mediation to withdraw the case. The Prosecutor Counsel, Louis Makiyi, is still insisting on prosecuting the case despite all parties involved agreeing to withdraw the case.
- On 5th September, 2022, Eliya was released from prison upon the families agreement to withdraw the case. The case was finalized at Chichiri Magistrate Court in Blantyre, Malawi.

2. Asante Nkhoma (assault)

In June 2021, Asante Nkhoma, a lesbian woman aged 23, reported a case of assault to the SALC's Counsel Chikondi Chijozi, who referred her to the NRA. Following up the case, the NRA found that:

- Mr. Dickson Kapapa, who works for the Malawian Defence Force (MDF), attacked and accused Nkhoma of sleeping with his wife in June of 2021.
- On hearing the allegations and seeing the extent of the assault, the mother of the victim got scared for their own safety and Nkhoma was kicked out of her parent's house.
- Kapapa was taken to Lilongwe High Court by the NRA with the SALC's lawyer Chikondi Chijozi representing the victim.
- A restraining order against Kapapa was issued.
- Nkhoma and her family moved to a different location to avoid any further threats from Kapapa and his friends at MDF.

Nkhoma's family hoped that their daughter would change her ways and give up being a lesbian, as they had moved to a new location and they did not want any incidents in there. On 23rd June 2022, the family found out that Nkhoma had not changed her ways and was still in fact a lesbian, and they heard rumors that some community members were planning on going to their house and threatening to force them out of the community. The mother threw her out on the 23rd of June 2022 because they did not want a similar incident to occur in the new location.

Current situation:

- Nkhoma has been moving from one place to another seeking refuge in fear of being attacked by community members in support of her mother's decision.
- Nkhoma is more likely to be attacked again since she has no safe place to stay in, and no one is willing to accommodate her in fear of also being labeled as lesbian and being attacked or targeted by the community.

3. Rodney Chiwere (assault and hate speech)

In July 2022, the NRA received a case of assault and hate speech involving Rodney Chiwere, a 24 year old gay man who was physically assaulted by a group of four men after being verbally assaulted (he was called degrading and homophobic names) by an individual named Tiyamike Chibambo. Chiwere reported the case to the police, and Chibambo was arrested and charged under section 181 of the Malawi penal code (any person who in any public place conducts himself in a manner likely to cause a breach of the peace shall be guilty of an offense and shall be liable to a fine of k3, 000 and to imprisonment for three months). The date of the hearing given was the 8th of July 2022. Unfortunately, Chiwere's witnesses were not given a chance to testify and Chibambo was granted court bail. The NRA is following the case and providing him with financial support (transport to court hearings) and legal advice. The case was adjourned to the 1st of August 2022.

New developments:

- The case was adjourned to the 16th of August 2022. The NRA managed to secure some funds and provide Chiwere with financial support for rent, water, electricity, local transport and communication.
- On 15th of August 2022, the Prosecutor Mr. Sezani informed the NRA that the case had been adjourned again; his exact words were “the Court is currently handling fresh cases”.

Annex 2: Other Source Documents for cases

FULL STATEMENT

NAME: GANIZANI ELIA
D.O.B: 19/06/1997
AGE: CHILOMONI
T/A: MACHINJIRI
DIST: BLANTIRE
OCC: TAILORING
TEL: 0888 465 785

STATE: I am a true bearer of the above particulars, currently residing at superate Nkhoma's plot.

I do recall it was on 28/05/2022 I was chatting with my friends at ~~the~~ facebook. Then while chatting, I came up with a certain boy ~~and~~ ^{name} by the name ^{nick} ~~nick~~ ^{nick}. Then ~~we~~ ^{his} ~~man~~ started chatting up to the extend of knowing him. The other day day, he proposed me to be his boy friend and I agreed because I have no feeling of dating girls. On 29/05/2022 he texted me by saying his account has been hacked and I believed him because I started receiving strange messages but we were still communicating. Then yesterday 05/06/2022 he visited me home ~~and~~ by then I was at the

'ADR 3'

RECEIVED
MISCELLANEOUS
21 FEB 2022
CRIMINAL REGISTRY
ZOMBA DISTRICT



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION NO. 48 OF 2022
BEFORE HONOURABLE JUSTICE V. P. Chipao

IN THE MATTER OF SECTION 349(4) OF THE CRIMINAL PROCEDURE AND EVIDENCE
CODE
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL OUT OF TIME
BETWEEN:
JANA GONANI..... APPLICANT
AND
THE REPUBLIC..... RESPONDENT

ORDER GRANTING LEAVE TO APPEAL OUT OF TIME

AND UPON READING the affidavit of BOB CHIMKANGO dated the 21st day of February, 2022;
AND UPON HEARING Counsel on behalf of the above-mentioned applicant, it is ordered as follows:

1. That an order granting leave to file an appeal out of time BE and is **HEREBY GRANTED**.
2. That the applicant shall file a notice of appeal within Days of this order.

Dated this 23rd day of February 2022

[Signature]
REGISTRAR

STATE ADVOCATE
CHAMBERS
28 FEB [Signature]
CRIMINAL REGISTRY
ZOMBA DISTRICT

*This document was filed by Messrs Robert Laiti Global Consultants, Legal Practitioners of 7th Floor Heritage House
Victoria Avenue, P.O. Box 31688, Blantyre 3*

JW & 4 OTHERS v STATE, MINISTRY OF JUSTICE & CONSTITUTIONAL AFFAIRS

Challenging the refusal to register Nyasa Rainbow Alliance
(NRA)

FACT SHEET

BACKGROUND TO THE CASE

On 26 July 2016, the Board of Trustees of Nyasa Rainbow Alliance (NRA) applied for the organisation to be registered as a Trust under the laws of Malawi. On 18 May 2017, the Ministry of Justice's Department of the Registrar General in Malawi sent a letter to the Nyasa Rainbow Alliance (NRA) rejecting the proposed registration.

Nyasa Rainbow Alliance (NRA) advocates for the rights of LGBTI persons in Malawi, including through the provision of support and referral to welfare and HIV services.

REASONS BY THE STATE TO REFUSE REGISTRATION

The Registrar General rejected the NRA's application for registration on the basis that the Penal Code criminalises consensual sex between same-sex partners, and that the NRA's membership engages in such unlawful practices. The State did not provide any evidence to support its claims.

IMPORTANCE OF ISSUES RAISED IN THE CASE

The case brought before the High Court of Malawi (sitting as a Constitutional Court) is not for the decriminalisation of same-sex sexual conduct but for the registration of the NRA as an organisation that strives to protect the rights and fundamental freedoms of all persons, including LGBTI individuals. The Penal Code prohibits same-sex sexual conduct or acts but does not criminalise individuals based on their sexual orientation.

In its submissions, NRA argues that the refusal to register the organisation violates human rights:

- The Constitution of Malawi protects the human rights of **all persons**, including LGBTI persons.
- The refusal to register NRA violates **the rights of all people to freely associate and express themselves**, including the right to communicate ideas and opinions. It also amounts to an infringement of the applicants' ability to form a legal entity to act collectively in a field of mutual interest.
- The refusal also violates the **right to dignity** and **right to equal treatment**.
- To refuse lesbian, gay, bisexual, and transgender people the opportunity to form an association while allowing other groups that right is to deny the former **equal protection of the law**.