

# Kenyan Nationalism and Ideological Discourse: Rethinking Anti-Homosexuality

*Christian Higham*

## ***Introduction: A National Kenyan Family***

While homosexuality in Kenya is illegal and punishable, the state legislation that criminalizes homosexuality defines same-sex practices in incredibly vague terms, which—as I will later discuss—relate exclusively to a series of acts occurring between men. As a result, women who have sex with women are not recognized by the state, and the same applies to transgender and non-binary individuals—all of whom are regularly subject to violence but are not protected under the Kenyan Constitution, because according to the Constitution, they do not exist. In this way, the state not only discriminates against queer<sup>1</sup> people through law, but by refusing to recognize same-sex relations and thus leaving queer people vulnerable to sexual orientation-based violence.

Rather than expressing explicitly anti-homosexual language, Kenyan legislation affirmatively promotes heteronormativity and heterosexual citizenship. As reinforced by political leaders, lawmakers, and media censorship bodies like the Kenya Film Classification Board (KFCB), the ideology of Kenyan nationalism

---

<sup>1</sup> The term queer is used here to describe sexual and gender minorities, including those who are not heterosexual or cisgender. Though not all communities prefer the term queer, the decision to use the term is informed by the Kenyan and African sexuality scholars whose work I consulted in my research for this paper. The term LGBTQ also appears due to its usage in Kenyan legal contexts.

naturalizes anti-homosexuality by rendering it incompatible with the forms of heterosexual marriage and family practices that appear to be the basic unit of Kenyan society. Yet what this discourse *really* does is disguise efforts to maintain a patriarchal order that relies on the heteronormative family for its reproduction. As I intend to argue, it is through this process of enforcing traditional marriage and family practices as emblems of society that the family institution secures Kenya's patriarchal nationalism.

In the pages that follow, I turn to a recent instance of media censorship—the banning of Wanuri Kahiu's queer Kenyan film *Rafiki* (2018)—to demonstrate how the ideology of Kenyan nationalism is not directly against homosexuality but fears the potential for queerness to disrupt the familial order. Building on my analysis of the banned film, I then trace the development of homosexual legislation and public attitudes toward same-sex practices, particularly as they intersect with early forms of Kenyan nationalism. I hope to show how homosexuality today is explained as something that threatens the order of Kenyan society, though what it truly threatens is a long history of patriarchal dominance in the country. Most importantly, this paper does not attempt to criticize Kenya by pinning its anti-homosexual rhetoric next to that of more queer-inclusive (or seemingly pro-queer) nations. Rather, my goal in writing this as a non-Kenyan is to bring attention to how colonial ideology laid the foundations for a breed of nationalism dependent on the suffering of sexual and gender minorities. This includes relying on the visualization of homosexuality as incompatible with happiness or societal prosperity, as illustrated by Kenya's engagement with the film *Rafiki*.

## ***Fearing Queer Futures: Kenya's Response to Rafiki***

*Rafiki* (2018) is a Kenyan drama film directed by Kenyan film producer Wanuri Kahiu. It tells the story of a forbidden romance between two young women, Kena and Ziki, navigating their lives as recent high school graduates living in Nairobi, Kenya. The women fall in love over the course of their many secret interactions together—their secrecy due to the fear of being outed in public and faced with the harsh consequences of being discriminated against by society. Despite their efforts to remain hidden, the women end up getting caught and are forced to separate; Ziki's parents punish her by sending her overseas to London so that she can no longer see Kena, who remains in Nairobi. Though the film exhibits the many tensions of Kena and Ziki's relationship—including their forced separation—it culminates in an optimistic final scene where the lovers appear to be reunited. Unlike many queer-themed African films that maintain heterosexual order by killing off the queer characters or negotiating homosexuality for political considerations, *Rafiki* stands alone as the only full-length Kenyan feature film to welcome queerness in this way (Johnstone 40). More than just that—the film's hopeful ending offers a future for queer Kenyans.

Such optimism came to a halt on April 27, 2018, when the Kenya Film Classification Board (KFCB)—a state corporation operating under the current government—released a statement announcing the banning of *Rafiki* for its “clear intent to promote lesbianism in Kenya contrary to the law” (E. Mutua 1). To justify the ban, the KFCB relied on the discourse of the family, which, as I will soon discuss, is a strategy used by Kenyan leaders both during debates over the historic Affiliation Act and in the recent court case on the Penal Code. In the statement on the ban, KFCB director Ezekiel Mutua cites Article 45 of the Kenyan Constitution, which relates to family. He explains that “Kenya is a country with a culture, beliefs and shared values,” while warning that “[c]ontent that undermines the

institution of family, which is recognized in the Constitution as the basic unit of society will be resisted” (2).

What is particularly interesting about the banning of *Rafiki* is the KFCB's attention to the film's final scene. As part of their reasoning for the ban, the KFCB indicates that the final scene differs significantly from that of the initially licensed film script. According to the KFCB, the alteration “[creates] the impression of a happy ending to a troubled relationship,” reinforcing the film's goal of normalizing Kenyan homosexuality (2). In an interview with NPR's Sacha Pfeiffer on the film's banning, *Rafiki* director Wanuri Kahiu discussed her conversation with the KFCB regarding the changes to the final scene. As Kahiu recounts, “during the meeting, not once did anybody say that the love scenes should be changed or the kiss should be changed or anything of that nature. The only thing they said is that the ending was not remorseful enough” (Kahiu 2019). For me, the KFCB's greater concern with the final scene than with displays of explicitly homosexual behaviour is telling. Their comments suggest that what is most problematic about the film is its potential to provide hope or inspiration for queer Kenyans—a threatening prospect for a government that depends on heteronormative families to secure its power.

Another point worth mentioning is that *Rafiki* was actually given temporary permission to be screened in Kenya. Shortly after *Rafiki* was banned, director Kahiu sued the KFCB, challenging their censorship ruling on the grounds that it violated her right to free speech and that it made the film ineligible for submission to a Foreign Language Film category at the Academy Awards; a film must be screened in its home country for seven days in order for it to be eligible for consideration for one of the Foreign Language awards categories (High Court of Kenya at Nairobi 2018). The ban was lifted for one week, during which Kenyans flocked to the theatres to catch a screening. In fact, the film had a full house for nearly all the screenings during its seven-day run. In this short time, *Rafiki*

managed to become the second highest-grossing Kenyan film of all time, earning more than \$33,000 (Rodriguez). The fact that the ban was temporarily lifted does not say anything definitive about the KFCB's stance. However, it does say something about the Kenyan public. The widespread interest in the film suggests that there are many Kenyans out there who are either queer themselves or interested in engaging with the themes that *Rafiki* promotes. Either way, to embrace the queer vision that *Rafiki* offers is a life-threatening proposal for many Kenyans.

### ***The Crimes of Homosexuality in Kenya***

Same-sex practices in Kenya are criminalized by sections 162 (a) and (c) and 165 of the Kenya Penal Code under Chapter XV, "Offences Against Morality." The Code declares the following (2012):

#### Section 162. Unnatural offences

Any person who— (a) has carnal knowledge of any person against the order of nature; or ... (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

#### Section 165. Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person ... is guilty of a felony and is liable to imprisonment for five years.

Despite recent efforts to repeal the Code, these offences continue to be reinforced by the state. In May of 2019, a group of Kenyan petitioners initiated a case to declare Penal Code sections 162 (a) and (c) and 165 unconstitutional and invalid, their main arguments being that the Code is vague and uncertain, that it degrades people's inherent dignity and violates access to healthcare services, and that

it directly and indirectly discriminates against LGBTQ persons (KELIN 2019). Petitioners testified to sexual orientation-based violence by community members and police. In addition, public health experts and advocacy groups explained to the Court the negative mental and physical health impacts of the Code, including the ways in which it creates barriers to HIV prevention and treatment (KELIN). One advocacy group brought forth evidence of government sponsored programs and policies that admit to the Code's violation of health rights and prevention of HIV treatment; they demonstrated that the government is aware that LGBTQ Kenyans are vulnerable to HIV and that discrimination is linked to lack of access to treatment.

In a unanimous decision, the Kenya High Court determined that the Code does *not* violate the Constitution, thereby upholding the discriminatory laws. The state provided several statements to justify their decision and offered opinions from an array of medical professionals and political leaders. One politician, Irungu Kangata, argued that Kenyan society has historically punished homosexuality and that it is "inimical to the Kenyan state and public interest" because it is "against procreation" (Kenya Law Reports 17). Others said that homosexuality is a product of children being sexually abused, that sexual orientation can be unlearned, and that sexual orientation does not constitute a marginalized grouping because it is a choice (13, 27).

In summary, the Court held that the Code refers to "any person" and "any male person," revealing that it targets only men and therefore not a particular sexual orientation (46). On the matter of constitutional rights, the Court argued that the Constitution's protection of the right for two persons of opposite sex to marry requires the criminalization of same-sex practices. Here, the Court referred to Article 45 of the Constitution to reason that their view aligns with Kenya's moral and societal values—the same Article that KFCB director Mutua referenced in his statement on the banning of *Rafiki*. As per the Constitution (2010):

#### Article 45. Family

(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

I include this case not only for how it reflects the current position of sexuality based discrimination in Kenya, but because it exemplifies the state's reference to the family unit as justification for criminalizing homosexuality. The irony here—as will soon be apparent—is that both the anti-homosexuality sentiments and the legal frameworks that insist on the upholding of the family were essentially imported by colonial powers. As I intend to reveal, both of these practices were institutionalized not because of their relevance to traditional Kenyan values, but because they were a means of stabilizing the ideology of Kenyan nationalism in patriarchal form during the transition to Kenyan independence.

### ***Re-Writing “African Sexualities”***

To claim that homosexuality is un-African is a fundamental rhetorical strategy for political figures in many African nations—Kenya is certainly no exception. This, which I will return to, is closely related to the politics of post-colonial independence, during which it became increasingly important for new governments to emphasize national and traditional values against those which had been imposed by colonial forces. However, such anti-homosexual statements are as inaccurate as they are harmful, given that there are extensive historical and anthropological accounts of same-sex relationships in pre-colonial Africa, some of which date back to as early as the 16<sup>th</sup> century (see, for instance, Murray & Roscoe 1998; Epprecht 2008; Bennett & Tamale 2017). Included in these recordings are several

woman-to-woman marriages that existed in earlier African communities, such as the Nandi and Kisii peoples of Kenya (Oboler; Tamale 2009).

In addition to these early accounts of same-sex practices, the idea that homosexuality is un-African can also be challenged from a legal-historical standpoint. In many African states, including Kenya, homosexuality was first criminalized by legislation imposed by colonial powers that was supplemented by discursive control over sexual and cultural politics (Chacha; M. Mutua). When the British colonized Kenya in 1895, they introduced their own forms of justice and law, which continue to influence Kenyan legislation today. Along with their traditions and norms, the British instituted the Indian Penal Code and related acts, which remained in place in Kenya until 1930 (Cotran 44). The British then replaced the Indian Penal Code with the Colonial Office Model Code, which remains the basis of Kenya's current Penal Code and from which its anti-sodomy laws originated (Finerty 437).

As we can see, any history of African sexualities—from today's vantage point—is inseparable from European colonial projects; the same is true for the instigation of the paternal familial order. Here, I do not wish to suggest that Africa can be essentialized through a single history of same-sex practices. Rather, I use the term "African" in accordance with Sylvia Tamale, whereby "African" is "used politically to call attention to some of the commonalities and shared historical legacies inscribed in cultures and sexualities within the region by forces such as colonialism, capitalism, imperialism" and so forth (2011: 1).

On the one hand, the regulation of African sexualities was a central means of control by colonizers. African colonial subjects, among others, were seen as "gender deviants, the embodiments of prehistoric promiscuity and excess" whose improper sexual relations posed threats to the order of the imperial state (McClintock 44). In

short, the regulation of racial and sexual “others” was fundamental to the pro-natalist attitudes held by British colonial forces in the project of empire building. Efforts to control sexualities emerged in response to newly formed public attitudes on population control—toward securing national power and increased resources—mainly inspired by scientism and eugenics movements in Europe that were aligned with imperialist and nationalist programs (Davin 10). This included a consolidated sex and gender system in support of the economic and social privileging of a rising bourgeois class.

At the same time, efforts to regulate African sexualities were not uniform for the normative genders of men and women. Women’s sexuality was subject to ever greater control, since, for patriarchs and male elites building on the logic of an impending imperial state, “control over women and their sexuality was central to their control over marriage and kinship, and hence over the society as a whole” (Vaughan 135). That being said, the regulation of African sexualities signified an early implementation of a patriarchal order, where the male figure—through the development of private property and control over resources—exercises dominance over women and children and through which the family becomes the economic unit of society (See Engels; Marx & Engels). Control over sexuality, and thus over marriage and the family, secured a male-dominated familial order as an indication of societal progress. The family order, as McClintock describes, “came to figure *hierarchy within unity* as an organic element of historical progress, and thus became indispensable for legitimizing exclusion and hierarchy within nonfamilial social forms such as nationalism, liberal individualism and imperialism” (45). As it was transformed into a narrative of historical progress, the family order would prove fundamental to Kenyan leaders in the post-colonial era.

## ***Establishing a Patriarchal Nation: Post-colonial Kenya***

With the independence of Kenya in 1963 came not only the demand to reconsider the country's laws and constitutional rights, but a widespread reconsideration of gender roles. This was because capitalism, in the post-colonial period, required a heightened form of patriarchy, one that "embraced a particular (monogamous, nuclearized, heterosexual) family form" (Tamale 2017: 22). During this period, the patriarchal family ideal played a central role in the development of Kenya's nationalist politics, particularly in the discourse on new legislation and post-colonial amendments. One of the major debates at the time surrounded the Affiliation Act that was passed by the colonial era Legislation Council in 1959, a few years prior to Kenyan independence. The Affiliation Act aimed to ensure the welfare of children born outside of marriage and the safeguarding of women's independence and legal rights; it was one of few acts that offered protection to women (Wipper 431). Opponents to the Affiliation Act were exclusively male government officials. They were attempting to construct a new vision for the Kenyan nation, particularly one that privileged male dominance and a revival of traditional values.

Controversy over the Affiliation Act reflected a broader dispute within post-colonial legislation making, namely the oppositions between "African" and "Western" ideals. These terms, according to Thomas (2003), "operated less as accurate descriptions of discrete political realms than as popular idioms through which to contest the nation's future" and "became powerful rhetorical tools for safeguarding men's privileged legal position and sabotaging efforts to legislate greater equality" (147). By 1969, the Affiliation Act had been branded by critics and government leaders as a colonial law that did not reflect the national values of post-colonial Kenyan society. For instance, MP Martin Shikuku had the following to say:

We, as Africans, in this country—and even on the Continent of Africa—believe that a man is in charge of the family ... Affiliation is encouraging the idea that the son or the daughter belongs to the woman. This is wrong. Where did we get this idea from? ... We are still clear in our thinking. Western civilization has not quite demoralized us. (National Assembly Debates, qtd. in Thomas)

The Kenyan government, led by its first official president Jomo Kenyatta (the father of Kenya's current president), introduced a repeal bill that would later be passed by an all-male National Assembly. To this day, no replacement legislation has been put in place, leaving women vulnerable to the oppressive, male-dominated marital and familial structures. The rhetorical strategies used to uphold the patriarchal order of post-colonial Kenya—within debates on the Affiliation Act and subsequent legislation—were fundamental to the development of Kenyan nationalism as an ideology. This ideological discourse continues to inform efforts to affirm Kenyan nationalism, as defined by male elites and government-sponsored bodies like the KFCB.

### ***Conclusion: Critiquing Ideology Beyond Kenya***

Through a brief account of some of Kenya's political history related to gender and sexuality, I have attempted to demonstrate the integral role of the patriarchal family order in the ideological discourse of Kenyan nationalism. To reiterate, this nationalism is an ideology that appears to target homosexuality on the basis that it does not fit within the traditional values of Kenyan society. However, after taking a closer look at Kenyan history—the early existence of same-sex practices, the pre- and post-colonial forms of anti-homosexual legislation, and the long lineage of defending male dominance—it is clear that Kenyan nationalism cares less about the issue of queer rights than about doing whatever it takes to maintain a patriarchal order. As the example of the banning of *Rafiki* further

shows us, Kenyan nationalism instills a male-centred family discourse into all areas of society. The question that remains is this: what can the unveiling of Kenyan nationalism do for the critique of ideology more broadly?

For starters, the case of Kenya shows us how difficult it is to simply look at a societal problem, such as homophobia, and immediately link it to a political or structural body. For instance, even with what I have provided above to suggest the intricate causes of sexual orientation-based discrimination in Kenya, there are still many factors—like religion or class—that contribute to the discourse that informs public attitudes on queer people in the country. In these cases, examining ideological discourse and conflicts contained therein can also point to debates on broader issues like violence, racism, and so forth. In looking at Kenya, there are clearly conversations about women, reproduction, and civil rights occurring alongside homophobic rhetoric. Not to mention, there are many analyses—including my own—that are limited by their proximity to Western theoretical and analytical frameworks. But perhaps the most important takeaway from the case of Kenyan nationalism for ideological criticism more broadly is an understanding that ideology rarely finds its roots in the present. This is something that Kenya's post-colonial years—as a redefining nation—surely prove. Ultimately, it is important to constantly interrogate our standpoints and relationality when tracing national and discursive histories—and in any approach, we must *always historicize*.

## Works Cited

- Bennett, Jane, and Sylvia Tamale, editors. *Research on Gender and Sexualities in Africa*. CODESRIA, 2017.
- Chacha, Babere Kerata. "Rethinking Sex and Secrecy in Precolonial African History: A Focus on Kenya." *Research on Gender and Sexualities in Africa*, edited by Jane Bennett and Sylvia Tamale, CODESRIA, 2017, pp. 65-76.
- Constitution of Kenya, 2010. Published by the National Council for Law Reporting (Kenya Law), 2021. <http://kenyalaw.org/kl/>.
- Cotran, Eugene. "The Development and Reform of the Law in Kenya." *Journal of African Law*, vol. 27, no. 1, 1983, pp. 42-61.
- Davin, Anna. "Imperialism and Motherhood." *History Workshop*, vol. 5, no. 5, 1978, pp. 9-65.
- Engels, Friedrich. *The Origin of the Family, Private Property, and the State*. Pathfinder Press, 1972.
- Epprecht, Marc. *Heterosexual Africa?: The History of an Idea from the Age of Exploration to the Age of Aids*. Ohio University Press, 2008.
- . *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*. Zed Books, 2013.
- Finerty, C.E. "Being Gay in Kenya: The Implications of Kenya's New Constitution for Its Anti-Sodomy Laws." *Cornell International Law Journal*, vol. 45, no. 2, 2012, pp. 431-460.
- High Court of Kenya at Nairobi. *Wanuri Kahiu v CEO, Kenya Film Classification Board*, Published by the National Council for Law Reporting (Kenya Law), 2018, pp. 1-10. <http://kenyalaw.org/kl/>.
- Johnstone, Lyn. "Queer Worldmaking in Wanuri Kahiu's Film Rafiki." *Journal of African Cultural Studies*, vol. 33, no. 1, 2021, pp. 39-50.
- Kahiu, Wanuri. Interview with Sacha Pfeiffer, NPR. "'Rafiki': The First Kenyan Film to Premiere At Cannes, Banned At Home." *NPR*, 20 April 2019, <https://www.npr.org/2019/04/20/715533608/rafiki-the-first-kenyan-film-to-premiere-at-cannes-banned-at-home>. Accessed 2 April 2021.
- Kenya Law Reports 2016, Petition 150 & 234 of 2016 (Consolidated). Published by the National Council for Law Reporting (Kenya Law), 2019, pp. 1-63. <http://kenyalaw.org/kl/>.

- Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN). "Kenyan High Court upholds the Penal Code provisions criminalizing same-sex relations." *KELIN Kenya*, 24 May 2019, <https://www.kelinkenya.org/kenyan-high-court-upholds-the-penal-code-provisions-criminalizing-same-sex-relations>. Accessed 5 April 2021.
- Kenya, *National Assembly Debates* (12 June 1969), 1125; (10 June 1969), 990–92; (11 June 1969), 1070–71. Quoted in Thomas, Lynn M. *Politics of the Womb: Women, Reproduction, and the State in Kenya*. University of California Press, 2003.
- Marx, Karl, and Friedrich Engels. *Manifesto of the Communist Party*. Foreign Languages Press, 1973.
- McClintock, Anne. *Imperial Leather: Race, Gender, and Sexuality in the Colonial Conquest*. Routledge, 1995.
- Murray, Stephen O, and Will Roscoe. *Boy-Wives and Female Husbands: Studies in African Homosexualities*. St. Martin's Press, 1998.
- Mutua, Ezekiel. "Statement by the Kenya Film Classification Board Chief Executive Officer Dr. Ezekiel Mutua, MBS on the Banning of Film 'Rafiki' Issued on 27th April 2018." *Kenya Film Classification Board*, 2018, pp. 1-3.
- Mutua, Makau. "Sexual orientation and human rights: putting homophobia on trial." *African Sexualities: A Reader*, edited by Sylvia Tamale, Pambazuka Press, 2011, pp. 452-62.
- Oboler, Regina Smith. "Is the Female Husband a Man? Woman/Woman Marriage Among the Nandi of Kenya." *Ethnology*, vol. 19, no. 1, 1980, pp. 69–88.
- Penal Code of Kenya, revised edition 2012 [2010]. Published by the National Council for Law Reporting (Kenya Law), 2021. <http://kenyalaw.org/kl/>.
- Rodriguez, Matthew. "'Rafiki' Was Banned in Kenya and Is Now the Second-Highest Grossing Kenyan Film of All Time." *Into*, 2 October 2018, <https://www.intomore.com/culture/rafiki-was-banned-in-kenya-and-is-now-the-second-highest-grossing-kenyan-film-of-all-time/>. Accessed 2 April 2021.
- Tamale, Sylvia. *African Sexualities: A Reader*. Pambazuka Press, 2011.
- . "A Human Rights Impact Assessment of the Ugandan Anti-homosexuality Bill 2009." *Equal Rights Review*, vol. 4, 2009, pp. 19-57.

- . "Exploring the Contours of African Sexualities: Religion, Law and Power." *Research on Gender and Sexualities in Africa*, edited by Bennett and Tamale, CODESRIA, 2017, pp. 15-42.
- Thomas, Lynn M. *Politics of the Womb: Women, Reproduction, and the State in Kenya*. University of California Press, 2003.
- Vaughan, Megan. *Curing Their Ills: Colonial Power and African Illness*. Stanford University Press, 1991.
- Wipper, Audrey. "Equal Rights for Women in Kenya?" *Journal of Modern African Studies*, vol. 9, no. 3, 1971, pp. 429-42.

