

**Joint Stakeholders Submission to the Universal Period Review of Kenya
presented by Freemuse and Nhimbe Trust**

**For consideration at the 49th session of the Human Rights Council
Universal Periodic Review
(28 April 2025 – 9 May 2025)**

Freemuse and Nhimbe Trust welcome the opportunity to contribute to the fourth cycle review of Kenya, under the 49th session of the Universal Periodic Review. This submission focuses on Kenya's international human rights obligations relating to freedom of expression, and raises concerns about the state of artistic freedom in relation to the following:

- The criminalisation of LGBTQ+ artistic expressions
- State-sponsored suppression of artistic content
- Restrictions to the right to public assembly

Freedom of expression: Third cycle recommendations and implementation of second cycle recommendations

1. Kenya's third cycle review under the Universal Periodic Review Mechanism was held on 22 January 2020, at the sixth meeting of the 35th session. In a report of progress made since the second cycle in 2015, Kenya's National Report of the third cycle, on page nine, titled a section *Access to information, freedom of expression and the right to privacy*, referencing recommendations of the second cycle relating to the same.¹ However, in paragraphs 39 and 40 Kenya reported only on progress made in giving effect to the right to access to information and the right to privacy. The submitting organisations note with concern that Kenya omitted reporting on progress made in implementing three supported recommendations on freedom of expression. These recommendations called on Kenya to "guarantee and ensure full freedom of expression, at the level of both implementation and legislation."²
2. Although Kenya reported that some noted recommendations from the second cycle review had been reconsidered, the submitting organisations observed that the recommendation from Greece on the "review of the penal treatment of freedom of expression"³ remained noted.

¹ Human Rights Council 35th Session, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*: Kenya, 11 November 2019, A/HRC/WG.6.35/KEN/1, p. 9.

² Human Rights Council 44th Session, Report of the Working Group on the Universal Periodic Review: Kenya, 20 March 2020, A/HRC/44/9, para 142.129, 142.31 and 142.38.

³ Human Rights Council 21st Session, Draft Report of the Working Group on the Universal Periodic Review: Kenya, 26 January 2015 A/HRC/WG.6/21/L.7, para 143.54.

3. In the third cycle review, Member States presented 319 recommendations for consideration by Kenya.⁴ 261 recommendations were supported, 53 noted and five considered for examination.⁵ All three recommendations on freedom of expression were supported by Kenya. These were: a recommendation made by Australia that called on Kenya to “uphold the right to freedom of expression, including for media organisations and human rights defenders, in accordance with Article 19 of the International Covenant on Civil and Political Rights;”⁶
4. Greece’s recommendation for Kenya to “take further measures towards ensuring the safety of journalists, as well as towards guaranteeing the freedoms of expression, of the press, of association and peaceful assembly,”⁷ and;
5. Uruguay’s recommendation that guarantees to freedom of expression be realised through the adoption of “comprehensive legislation on the protection of human rights defenders, and through investigations into all complaints and alleged violations.”⁸
6. Despite a commitment to guarantee freedom of expression in Kenya, we note with concern the existence of laws and state structures that unduly restrict the right to artistic expression in particular, as will be demonstrated in this submission.

Legislative protections of artistic freedom in Kenya

7. Kenya has an international and regional obligation to protect freedom of expression, as bound by the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and People’s Rights (ACHPR), standard setting instruments that the State Party has ratified.
8. Further, in accordance with Article 2(6) of the Constitution of Kenya, 2010 (herein the Constitution),⁹ Kenya has a duty to translate ratified treaties and conventions into domestic law.
9. As such, freedom of expression is protected under Article 33 of the Constitution. Article 33(b) in particular, expressly recognises and protects freedom of artistic creativity. Other rights that constitute artistic freedom are protected by the Constitution, including freedom of conscience, religion, belief and opinion (Article 32), freedom of association (Article 36), freedom of assembly (Article 37), and freedom of movement (Article 39).

Positive developments

10. The submitting organisations welcome a 2023 Kenya Supreme Court ruling on the right to association, which gave effect to Article 2(1) of the ICCPR on non-discrimination, as well as Article 27 the Constitution of Kenya which in sub

⁴ Human Rights Council 44th Session, Report of the Working Group on the Universal Periodic Review: Kenya, 20 March 2020, A/HRC/44/9.

⁵ Ibid.

⁶ Ibid, para 142.154.

⁷ Ibid, para 142.157.

⁸ Ibid, para 142.158.

⁹ See the Constitution of Kenya here <https://faolex.fao.org/docs/pdf/ken127322.pdf>.

clause (2) states that “equality includes the full and equal enjoyment of all rights and fundamental freedoms.”

11. On 24 February 2023, Kenya’s Supreme Court ruled that the right to association in Article 36(1) of the Constitution is guaranteed by “virtue of common humanity” provides no exception to sexual orientation and includes the right to form an association.¹⁰ The case followed a legal battle instituted in 2013 consequent to the Non-Governmental Organisations Coordination Board’s decision to disapprove an application to register an NGO with suggested name variations bearing the words ‘gay’ and ‘lesbian.’ Previously, a High Court in 2015, and Court of Appeal in 2019,¹¹ had ruled that a denial by the Board to register an NGO on considerations of sexual identity had been discriminatory.
12. While this Supreme Court decision is a positive development for the principle of non-discrimination in the implementation of human rights, we note with concern that Kenya’s President William Ruto classified it as being against the “country’s culture and religion,”¹² with the Attorney General expressing that the ruling would be challenged through public consultations as he did not consider it to be a legal matter requiring adjudication by a court.¹³
13. Such statements by high-ranking public officials with a duty to uphold human rights commitments to which Kenya is bound, are not only irresponsible but retrogressive. They not only undermine the right to freedom of association but the right to freedom of expression, including artistic expression, which in its mutations in application may rely on the right to form an association, join an association or opt out of an association.
14. Moreover, we are concerned that such public statements by officials of the stature of the President and Attorney General may enable discrimination and embolden violent protests against LGBTQ+ persons, including artists. In the aftermath of the Supreme Court ruling, violent protests ensued, with a High Court in Mombasa issuing an interim order on 29 April 2024 barring protests and other acts of suppression which include inciting the public to carry out extra-judicial killings, lynching, punishing, stoning, forcible conversion, expulsion from and within Kenya, as well as the forcible closure of LGBTQ+ organisations.¹⁴

Criminalisation of LGBTQ+ themed artistic content

¹⁰ Muiruri, P. (2023), ‘Kenya’s LGBTQ community wins bittersweet victory in battle for rights’, *The Guardian*, 3 March 2023, available at <https://www.theguardian.com/global-development/2023/mar/03/kenyas-lgbtq-community-wins-bittersweet-victory-in-battle-for-rights>, (accessed on 4 October 2024).

¹¹ Omondi, F. and Binley, A. (2023), ‘Kenya wrong to ban LGBT rights groups from registering – Supreme Court’, *BBC*, 24 February 2023, available at <https://www.bbc.com/news/world-africa-64491276>, (accessed on 4 October 2024).

¹² Musambi, E. (2023), ‘Kenya’s President criticises court ruling on LGBTQ group’, *APNews*, 2 March 2023, available at <https://apnews.com/article/lgbtq-rights-kenya-supreme-court-0bfec15f4fe8898a3cb548926ba0f5e9#>, (accessed on 4 October 2024).

¹³ Muiruri, P. (2023), ‘Kenya’s LGBTQ community wins bittersweet victory in battle for rights’, *The Guardian*, 3 March 2023, available at <https://www.theguardian.com/global-development/2023/mar/03/kenyas-lgbtq-community-wins-bittersweet-victory-in-battle-for-rights>, (accessed on 4 October 2024).

¹⁴ Iguar, R. (2024), ‘Kenya: Court issues order protecting LGBTQ+ people’ *Mambaonline*, 30 April 2024, available at <https://www.mambaonline.com/2024/04/30/kenya-court-issues-order-protecting-lgbtq-people/>, (accessed on 4 October 2024).

15. Although Kenya in the third cycle review¹⁵ supported a recommendation by Germany on adopting “inclusive non-discrimination law”¹⁶ and another by Argentina on combating violence against LGBTQ+ persons,¹⁷ 16 recommendations on the protection of LGBTQ+ persons were noted. They included the decriminalisation or repeal of laws prohibiting same-sex relations; the adoption of non-discrimination laws that protect all persons irrespective of gender and sexual identity; and the adoption of measures that combat stigmatisation, harassment and violence.¹⁸
16. We are concerned that the continued existence and application of anti-LGBTQ+ legislation deteriorates the rights of LGBTQ+ artists, justifies the censorship of LGBTQ+ themed artistic content and undermines Kenya’s commitment under Article 2(1) of the ICCPR which calls on the Member State to guarantee rights in the Convention without discrimination. This provision has been reinforced by the United Nations Human Rights Council in General Comment 34 through the assertion that laws enacted and enforced by Member States must not violate the non-discrimination provisions of the Covenant.¹⁹
17. Article 45 of Kenya’s Constitution exclusively recognises heterosexual relations, with the Penal Code (Chapter 63)²⁰ criminalising same-sex sexual relations. ‘Unnatural offences’ and attempts to commit unnatural offences are penalised in Articles 162 and 163 respectively, with imprisonment of 14 years prescribed for the former, and seven years for the latter. Article 165 penalises ‘indecent’ practices between males, through five-year prison terms.
18. Notably Kenya’s criminal justice system penalises same-sex sexual relations, and not LGBTQ+ identities, but in practice reference to the law often justifies the censorship of any film and broadcast content that is centered on characters of LGBTQ+ identity and sexual orientation. The Film and Stage Plays Act (Chapter 222),²¹ a law that regulates film and broadcast content, when read with the Constitution and the Penal Code, prohibits the broadcasting, exhibition, distribution and possession of creative content that may be deemed to promote or normalise same-sex relations.
19. The joint application of Article 45 of the Constitution, the Penal Code and the Film and Stage Plays Act (Chapter 222) is predominantly the employ of the Kenya Film Classification Board (KFCB), a state organ established by the Film and Stage Plays Act. According to the KFCB, its main function is that of ensuring that “content conforms to Kenya’s culture, moral values and national aspirations” as well as the “protection of children from exposure to inappropriate content.”²² The execution of this function, in relation to the regulation of

¹⁵ Human Rights Council 44th Session, Report of the Working Group on the Universal Periodic Review: Kenya, 20 March 2020, A/HRC/44/9.

¹⁶ Ibid, para 142.30.

¹⁷ Ibid, para 142.62.

¹⁸ Ibid, para 144.25 – 144.40.

¹⁹ Human Rights Committee 102nd session, General Comment No. 34: Article 19 – Freedom of Opinion and Expression, 12 September 2011, CCPR/C/GC/34, para 26.

²⁰ See the Penal Code here <https://www.interior.go.ke/sites/default/files/2024-09/44.%20Penal%20Code%20CAP%2063.pdf>.

²¹ See the Act here <http://www.kenyalaw.org/lex/actview.xml?actid=CAP.%20222>.

²² Kenya Film Classification Board, available at <https://kfcg.go.ke/who-we-are>, (accessed on 4 October 2024).

LGBTQ+ content, is exemplified by at least two instances recorded by the submitting organisations in 2021 and 2022.

20. In September 2021, KFCB banned a gay-themed documentary film, *I am Samuel*.²³ In February of the following year, an Indian drama comedy film *Badhaai Do* was also banned.²⁴ In both bans, the Board cited that the films violated the Constitution, Kenyan values protected by the Film and Stage Plays Act and Penal Code provisions prohibiting gay and lesbian sexual relations.²⁵ Among other scenes in the films, the Board referred to the depiction of same-sex relations, and argued that the producers of the films sought to deliberately promote and normalise same-sex relationships and marriages, adding that this was a propagation of the ‘perversion of children.’ Consequent to the bans, the exhibition, distribution, broadcasting and possession of both films was prohibited and penalised through prosecution.
21. Despite Article 8 of the Constitution asserting that there shall be no State religion, the ending of *I am Samuel* with a marriage within a Christian context, was deemed by the Board to be blasphemous, further providing grounds for prohibition.²⁶ We are concerned that the censorship of artistic expression, particularly within the context of regulating ‘indecenty,’ invokes patriarchal and conservative values in denial of the right to freedom of expression.
22. We are further concerned that restrictions that reference religion in isolation of what is permitted under Article 20(2) of the ICCPR arbitrarily violate the right to artistic expression. The UN Human Rights Council, in General Comment 34 on freedom of expression and opinion protections in the ICCPR, states that freedom of expression permits what is “deeply offensive”²⁷ and limitations based on blasphemy, or the disrespect of religion are incompatible with the ICCPR, unless demonstrated that Article 20(2) on “incitement to discrimination, hostility or violence” has been violated.²⁸
23. The Board’s conflation of fiction and real-life in judgments about artistic content that should be permitted, is disturbing. In *Badhaai Do*, a scene in which LGBTQ+ persons engage in a community campaign in advocacy of their rights through protests and petitioning was deemed by the Board to be an affront to societal values and an attempt to overtly normalise homosexuality.²⁹ We are especially alarmed that a state regulatory authority charged with governing the creation and distribution of artistic content systematically justifies censorship

²³ Press statement on the ban available at https://kfcg.go.ke/sites/default/files/2021-09/PRESS%20STATEMENT%20BY%20THE%20KENYA%20FILM%20CLASSIFICATION%20BOARD%20ON%20THE%20RESTRICTING%20OF%2027%20AM%20SAMUEL%27%20FILM%20ISSUED%20ON%20THURSDAY%2023RD%20SEPTEMBER%202021%20AT%2010%2000%20AM%20AT%20THE%20BOARD%27S%20OFFICES%20IN%20NAIROBI_0.pdf, (accessed on 4 October 2024).

²⁴ Press statement on the ban available at https://kfcg.go.ke/sites/default/files/2022-02/PRESS%20STATEMENT%20BY%20THE%20KENYA%20FILM%20CLASSIFICATION%20BOARD%20AG.%20CHIEF%20EXECUTIVE%20OFFICER%20MR.%20CHRISTOPHER%20WAMBUA%20ON%20THE%20RESTRICTED%20INDIAN%20FILM%20TITLED%20'BAD%20HAAI%20DO'%20ISSUED%20ON%20MONDAY%2014TH%20FEBRUARY%202022_1.pdf, (accessed on 4 October 2024).

²⁵ See two press statements in 19 and 20 above.

²⁶ See footnote 19 above.

²⁷ Human Rights Committee 102nd session, General Comment No. 34: Article 19 – Freedom of Opinion and Expression, 12 September 2011, CCPR/C/GC/34, para 11.

²⁸ Human Rights Committee 102nd session, General Comment No. 34: Article 19 – Freedom of Opinion and Expression, 12 September 2011, CCPR/C/GC/34, para 48.

²⁹ See footnote 20 above.

through arguing that dramatisations permitted under the remits of freedom of expression corrupt society.

New anti-homosexuality measures

24. The emergence of new measures that regulate or propose to regulate same-sex relations in Kenya present a worrying trend in the deterioration of LGBTQ+ rights and a worsening legislative landscape for the exercise of artistic expression.
25. The Family Protection Bill 2023, criminalises homosexuality,³⁰ same sex marriage³¹ and activities promoting the same,³² with the death penalty prescribed for aggravated homosexuality.³³ Article 12 of the Bill imposes a fine of one million Kenya shillings (approximately 7 000 euros), imprisonment of at least ten 10 years, or both, for participating in activities that seek to “indoctrinate a change of perception or public opinion” on prohibited acts.
26. It is concerning that by this subjective standard of interpreting the messaging of artistic content, for example, the reasons given by the Board in the banning of *I am Samuel* and *Badhaai Do* would make producers of similar films that are LGBTQ+ themed criminally liable. The tightening of punitive measures from censorship to criminal liability, including hefty fines and imprisonment of at least a decade, is a blatant violation of human rights and would significantly undermine Kenya’s obligations and duties under international law.
27. Equally worrying is Article 12(2)(c) of the Bill which criminalises the production, marketing, advertising, publishing, printing, broadcasting and distribution of any content, including of an artistic nature, which promotes or encourages homosexuality. Article 35 of this Bill states that while freedom of expression is protected under the Constitution of Kenya, including artistic creativity, this right could still be limited where “information, ideas, or artistic creativity relate to the acts and activities” prohibited under the Bill. This enables the possibility of wider derogations of the right to creative freedom despite the overall protections provided under Article 33 of the Constitution.
28. A further example of the growing intolerance of homosexuality within the legislative arm of Kenya is the March 2023 passage of a motion immediately banning LGBTQ+ themed public discussions, as well as the reporting and dissemination of LGBTQ+ themed content.³⁴ Justified as a restoration of family values, the motion was presented by a representative of the ruling party who argued that the proliferation of homosexuality was attributable to content disseminated through books, print media and broadcast media.³⁵

³⁰ The Family Protection Bill, 2023, Article 4.

³¹ Ibid, Article 6.

³² Ibid, Article 12.

³³ Ibid, Article 5.

³⁴ Kisika, S. (2023), ‘Kenyan MPs approve resolution to ban public discussion of LGBTQ issues’, *Washington Blade*, 24 March 2023, available at <https://www.washingtonblade.com/2023/03/24/kenyan-mps-approve-resolution-to-ban-public-discussions-of-lgbtq-issues/>, (accessed on 4 October 2024).

³⁵ Ibid.

29. The KFCB, as the direct and most immediate regulator of artistic expression, has also introduced new measures to crackdown on LGBTQ+ themed content within the context of digital regulation. This has been rationalised as ensuring that streaming platforms comply with the provisions of the Kenya Film Stage Plays Act, with restrictions on digital accessibility of LGBTQ+ content as the intervention point. In 2021, the Board announced that it was negotiating with Netflix to block the availability of LGBTQ+ content in Kenya.³⁶ In the following year in 2022, it was announced that similar regulations were being negotiated with TikTok.³⁷
30. The limitation of the freedom to receive and consume artistic content through alternative platforms other than broadcast media, raises concerns about the over-reach of the State in dictating what ought to be accessed, and through what means. We are also concerned that the discriminatory targeting of LGBTQ+ artistic content emboldens both non-state and state actors to discriminate against those who are or are suspected to be of LGBTQ+ identity.
31. As already stated in paragraph 18 above, although current laws make a distinction between LGBTQ+ identities and same-sex consensual relationships, the consistent and discriminatory crackdown on platforms that provide for the fictionalisation or creative imagination of the experiences of LGBTQ+ persons, including LGBTQ+ artists, has the risk of propagating violence, stereotypes and gruesome killings.
32. It is especially concerning that a tightening of anti-homosexuality measures in Kenya has often coincided with incidents of murders suspected to be linked to homophobia. In April 2022, Sheila Adhiambo Lumumba, a lesbian, was reportedly attacked and raped before being killed,³⁸ and in January 2023, LGBTQ+ activist Edwin Chiloba was brutally murdered.³⁹ In light of the growing trend of murders with linkages to anti-homosexuality sentiment, Kenya Human Rights Commission has previously expressed concern over lack of accountability for perpetrators.⁴⁰
33. We submit that both the withdrawal and halting of discriminate measures prohibiting LGBTQ+ artistic content is an important contribution in the realisation of tolerance, a respect for diversity and the ultimate deterrence of hate crimes.

State-sponsored suppression of artistic content

³⁶ Kisika, S. (2022), 'Kenya seeks to ban LGBTQ+ content on Netflix', *Los Angeles Blade*, 29 September 2022, available at <https://www.losangelesblade.com/2022/09/29/kenya-seeks-to-ban-lgbtq-movies-on-netflix/>, (accessed on 4 October 2024).

³⁷ Kisika, S. (2023), 'TikTok in talks with Kenyan government to stop LGBTQ+ specific content', *Los Angeles Blade*, 27 September 2023, available at <https://www.losangelesblade.com/2023/09/27/tiktok-in-talks-with-kenyan-government-to-stop-lgbtq-specific-content/>, (accessed on 4 October 2024).

³⁸ Kilbride, E. (2022), 'Inadequate Kenyan police response to the brutal killing of non-binary lesbian', *Human Rights Watch*, 29 April 2022, available at <https://www.hrw.org/news/2022/04/29/inadequate-kenyan-police-response-brutal-killing-non-binary-lesbian>, (accessed on 4 October 2024).

³⁹ Ombuor, R. and Healy, C. (2013), 'Kenyan LGBTQ rights activist Edwin Chiloba found dead in metal box', *Washington Post*, 6 January 2023, available at <https://www.washingtonpost.com/world/2023/01/06/edwin-chiloba-kenyan-lgbtq-killing/>, (accessed on 4 October 2024).

⁴⁰ Mhaka, T. (2022), 'Homophobia: Africa's moral blindspot', *Al Jazeera*, 6 May 2022, available at <https://www.aljazeera.com/opinions/2022/5/6/homophobia-africas-moral-blind-spot>, (accessed on 4 October 2024).

34. In the regulation of film and broadcast content, Kenya Film Classification Board has a broad mandate of overseeing registration, licencing and classification, as empowered by the Film Stage Plays Act.⁴¹ There however have been calls for the Act to be repealed due its “arbitrary, vague and overly broad” provisions⁴² which are inconsistent with artistic expression guarantees in Article 19 of the ICCPR, Article 9 of the ACHPR and Article 33 of the Constitution of Kenya.
35. We are concerned that although KFCB is constituted as a classification organ, its overarching functions allow for the exercise of discretionary authority to blanket ban and censor creative content. Artistic works are arbitrarily banned, with punitive measures such as fines imposed, without affording its creators the right of reply and appeal, a conduct that we submit unduly and unfairly makes the Board the sole holder of powers to complain, investigate, adjudicate and make a decision.
36. This conduct is evidenced by events of February 2024 in which the KFCB banned gospel songs *Niko Uchi* and *Yesu Ninyandue* for being blasphemous, offensive and insensitive to Christianity.⁴³ Broadcast media was ordered to cease playing the songs, with online streaming platforms ordered to remove the music. Although the KFCB did not make reference to the specific contents of the songs deemed problematic, media coverage made reference to lyrics and visual portrayals which may have been classified as such. *Niko Uchi* reportedly made reference to the act of sleeping with Jesus for conception,⁴⁴ with the music video of *Yesu Ninyandue* showing its creator dancing naked in a river.⁴⁵
37. As stated in paragraph 22 above, General Comment 34 expressly states that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy, are incompatible with the Covenant”⁴⁶ under which Kenya’s duties and obligations to protect freedom of expression guarantees are elaborated.
38. Although General Comment 34 further states that it is not permissible to “prevent or punish criticism of religious leaders or commentary on religious doctrine or tenets of faith”⁴⁷ based on prohibitions of disrespecting religion, the creators of the banned songs were issued with demand letters by the KFCB in March 2024. The Board argued that the songs and their respective music videos had been distributed in contravention of Sections 4 (filming without a licence) and 12 (distributing and exhibiting audio-visual content without a

⁴¹ Kenya Film Classification Board, available at <https://kfcg.go.ke/who-we-are>, (accessed on 4 October 2024).

⁴² ‘Kenya: Film classification board must stop stifling artistic expression’, *Article 19*, 29 September 2021, available at <https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/>, (accessed on 4 October 2024).

⁴³ Kamau, R. (2024), ‘KFCB issued demand letter to musicians Embaramba and Getumbe’, *Nairobi Wire*, 1 March 2024, <https://nairobiwire.com/2024/03/kfcb-issues-demand-letter-to-musicians-embarambamba-and-getumbe.html>, (accessed on 4 October 2024).

⁴⁴ Ajon, B. (2024), ‘Embaramba chides his compatriot William Getumbe for Yesu Ninyandue song: Alifanya Makosa’, *Tuko*, 3 March 2024, available at <https://www.facebook.com/photo/?fbid=7176399015791728&set=pcb.7176399105791719>, (accessed on 4 October 2024).

⁴⁵ Kamau, R. (2024), ‘KFCB issued demand letter to musicians Embaramba and Getumbe’, *Nairobi Wire*, 1 March 2024, <https://nairobiwire.com/2024/03/kfcb-issues-demand-letter-to-musicians-embarambamba-and-getumbe.html>, (accessed on 4 October 2024).

⁴⁶ Human Rights Committee 102nd session, General Comment No. 34: Article 19 – Freedom of Opinion and Expression, 12 September 2011, CCPR/C/GC/34, para 48.

⁴⁷ *Ibid.*

licence) of the Kenya Film and Stage Plays Act. The artists were ordered to remove the songs and all other offensive content from their streaming platforms within a specified period, to which they did not comply.

39. Consequently, one of the musicians was arrested and detained within days of receiving the demand letter. He was charged of the act for filming without a licence, for not acquiring a certification of approval before distributing audio-visual content and Article 181 of the Penal Code prohibiting the exhibition of indecent shows or performances.⁴⁸
40. The other musician was fined 6,4 million shillings (approximately 44 506 euros) conditioned on seven years imprisonment for failure to pay.⁴⁹ He apologised to the Board, disclosing that he had deleted all 'indecent content' and was in the process of verifying that he had indeed removed all videos of such nature.⁵⁰
41. In a continuation of the worrying trend of issuing demand letters to creative content creators, the KFCB in May 2024 sent demand letters to YouTube content creators, including comedians, requiring them to acquire filming licences within a period of fourteen days or face legal action.⁵¹ They further were asked to submit videos for examination and classification by the Board, prior to distribution on YouTube, in accordance with Sections 4 and 12 of the Kenya Film Stage Plays Act.⁵² Although the decision was reversed by the chairman of the KFCB to enable stakeholder consultation before a final decision is made, concerns are that the demand letters are unconstitutional, unfair and unjust.⁵³
42. The use of demand letters as a mechanism of regulating artistic expression is an assault on the universally guaranteed right of freedom of expression. We submit that beyond the detailing of demands and the communication of punitive measures, these letters are a form of harassment that hinders the exercise and enjoyment of artistic expression. In the spirit of advancing democratic principles and entrenching a participatory democratic culture, all new regulatory measures must undergo consultation, including with all cultural stakeholders and artists. The haphazard introduction and application of new measures, however legitimate, severely undermines the right to freedom of expression.

Restrictions to the right to assembly

43. The right to freedom of assembly is one of several rights that give effect to the right to freedom of expression, as recently evidenced by artists' agency in participating in the anti-Finance Bill protests that were mobilised nationwide in Kenya between 18 June and 8 August 2024. Essentially, the largely peaceful

⁴⁸ Kenya Film Classification Board statement, <https://x.com/InfoKfcb/status/1767498204159918238>, (accessed on 4 October 2024).

⁴⁹ Weru, M. (2024), 'Embaramba lawyer decries KSh 6.4m fine over Niko Uchi song: He's a creative genius', *Tuko*, 6 March 2024, available at <https://www.tuko.co.ke/entertainment/music/540490-embarambambas-lawyer-decries-ksh-64m-fine-niko-uchi-song-s-a-creative-genius/>, (accessed on 4 October 2024).

⁵⁰ Namachanja, H. (2024), 'Embaramba deletes all indecent videos from his YouTube as ordered by KFCB', *Mideyah*, 15 March 2024, available at <https://mideyahdigital.co.ke/?p=33730>, (accessed on 4 October 2024).

⁵¹ Gachie, K. (2024), 'Uproar as KFCB now demands YouTube content creators get licences', *Citizen Digital*, 24 May 2024, available at <https://www.citizen.digital/entertainment/uproar-as-kfcb-now-demands-youtube-content-creators-get-licences-n342758>, (accessed on 4 October 2024).

⁵² *Ibid.*

⁵³ Mokeira, P. (2024), 'Activist sues KFCB over plans to regulate creativity online', *Kahawa Tungu*, 7 June 2024, available at <https://kahawatungu.com/activist-sues-kfcb-over-plans-to-regulate-creativity-online/>, (accessed on 4 October 2024).

protests were a site of creative expression that inspired and fuelled a movement.⁵⁴ Consequent to the protests, the President withdrew the Finance Bill and dismissed the Attorney General and almost the entire cabinet, to meet the demands of protesters who accused government officials of corruption, misgovernance and incompetence. The Inspector General of Police also resigned in the same period.

44. Although the protests achieved their intended aim, we are concerned that they were marred by police brutality⁵⁵ and the non-compliance to a High Court order barring police use of discretionary powers to ban protests scheduled for the capital, Nairobi.⁵⁶ Dozens of people were killed and injured, among them artists, due to police's excessive use of force. Police had banned protests on claims of difficulties of enforcing safety and protocol.⁵⁷
45. The banning of protests and the excessive use of force during protests undermines Kenya's commitments to human rights expressed in the third cycle review. Kenya supported all recommendations on police reform and human rights training, including that of Finland recommending that Kenya "enhance human rights training and awareness for law enforcement to end all violations, including excessive or arbitrary use of force and extrajudicial killings, and bring those responsible for human rights violations to justice, as well as continuing reforms."⁵⁸
46. In relation to freedom of assembly, Kenya supported a recommendation by Poland, to "ensure unimpeded functioning of democratic processes in the country, including transparent regulations on exercising the right of assembly and the use of force by police only as a means of last resort and solely in fully justified situations."⁵⁹ The lack of implementation of these supported recommendations is especially concerning for the exercise of civil and political rights in Kenya, including by artists.
47. Further, we are alarmed that there is an Assembly and Demonstrations Bill, which at the time of this writing, is being considered in Kenya's Parliament. In the regulation of the right to assembly provided in Article 37 of the Constitution, the proposed law, among other regulations, would authorise police to ban or disperse demonstrations and pickets,⁶⁰ and further requires those seeking to demonstrate to notify the police three days prior to and no more than fourteen days to the planned action.⁶¹ Once a clearance to demonstrate has been granted, protesters would be required by the Bill to confine their action to

⁵⁴ 'What role have artists played in the Kenya's anti-government protests', *Al Jazeera*, 28 August 2024, available at <https://www.aljazeera.com/program/the-stream/2024/8/28/what-role-have-artists-played-in-kenyas-antigovernment-protests>, (accessed on 4 October 2024).

⁵⁵ 'Kenya: Police must be held accountable for brutality against protesters' *Article 19*, 20 June 2024, available at <https://www.article19.org/resources/kenya-police-must-be-held-accountable-for-brutality-against-protesters/>, (accessed on 4 October 2024).

⁵⁶ Rukanga, B. (2024), 'Kenyan court suspends police ban on protests', *BBC*, 18 July 2024, available at <https://www.bbc.com/news/articles/cx72e3xv50no>, (accessed on 4 October 2024).

⁵⁷ *Ibid.*

⁵⁸ Human Rights Council 44th Session, Report of the Working Group on the Universal Periodic Review: Kenya, 20 March 2020, A/HRC/44/9. para 142.56.

⁵⁹ *Ibid.*, para 142.153.

⁶⁰ The Assembly and Demonstrations Bill 2024, Article 8.

⁶¹ *Ibid.*, Article 7(2).

approved routes and designated areas,⁶² and would also be prohibited from wearing face coverings that obscure their identification.⁶³

48. Off the back of the proposed law, the Ministry of Interior has drafted regulations of the Public Order Act, introducing measures that would require protesters to keep to specific designated areas approved by the police.⁶⁴

49. Any excessive regulation of freedom of assembly undermines freedom of expression guarantees, including artistic expression and artists' right to protest. It is a clear violation of Kenya's commitments under international human rights treaties and conventions. We also note with concern that Kenya noted all recommendations on the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶⁵ thus undermining international oversight on measures taken to protect those victimised during protests, including artists.

Recommendations

50. Freemuse and Nhimbe Trust make the following recommendations to Kenya:

- a) Ensure that limitations to artistic expression are exclusively imposed by courts of law and are as permitted under Article 19(3) and 20 of the ICCPR;
- b) To consider the disbandment of the Kenya Classification Board to replace it with a non-state independent organ tasked exclusively with content classification and age ratings, to ensure full protection of freedom of artistic creativity;
- c) Ensure that the proposed Assembly and Demonstrations Bill and the draft regulations of the Public Order Act, do not extend derogations of the right to freedom of assembly and are in strict compliance to the ICCPR and the ACHPR;
- d) Decriminalise consensual same sex relations, including through the repeal of Articles 162, 163 and 165 of the Penal Code;
- e) Ensure that proposed laws and other regulatory measures do not criminalise consensual same sex relations and LGBTQ+ themed artistic content, and also have measures of punishing homophobic crimes;
- f) Ensure that all state organs tasked with the regulation of artistic content fully comply with freedom of expression guarantees, including through human rights training on the acceptability of artistic expressions that disrespect religion and other belief systems;
- g) Review all punitive measures against freedom of artistic expression imposed under the Kenya Film and State Plays Act (Chapter 222), and ensure that any punishments that are still valid are withdrawn immediately;

⁶²Ibid, Article 13.

⁶³Ibid, Article 11(c).

⁶⁴Otieno, O. (2024), 'Kenya parliament debate controversial Bill restricting protests by citizens', *East African*, 25 August 2024, available at <https://www.theeastafrican.co.ke/tea/news/east-africa/kenyan-mps-debate-bill-curbing-protests-by-citizens--4737422>, (accessed on 4 October 2024).

⁶⁵Human Rights Council 44th Session, Report of the Working Group on the Universal Periodic Review: Kenya, 20 March 2020, A/HRC/44/9. para 144.15 – 144.17.

- h) Ensure that all supported recommendations on freedom of expression from the second and third UPR cycles are implemented accordingly.