

A Critical Analysis of the Human Rights Approach in Environmental Management in Kenya

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Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death, based on universal values such as equality, fairness, dignity, respect and independence.¹ Applied to all regardless of origin of person, their beliefs or choice, they cannot be taken away but can be limited for security purposes and where the person breaks the law.²

At the international level, the Universal Declaration of Human Rights³ was the principal instrument which charted the way forward for the recognition of the various generation of rights enshrined in subsequent rights instruments such as The International Covenant on Civil and Political Rights (ICCPR)⁴, The International Covenant On Economic Social And Cultural Rights (ICESCR)⁵, The United Nations Convention on the Rights of the Child (CRC)⁶, The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)⁷, and regional rights chapters like The African Charter on People's and Human Rights (ACPHR)⁸.

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¹Equality And Human Rights Commission, What is the Universal Declaration of Human Rights?;

<https://www.equalityhumanrights.com/en/what-are-human-rights/what-universal-declaration-human-rights>

² ibid

³ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁴ <https://www.ohchr.org/>

⁵ <https://www.ohchr.org/>

⁶ <https://www.ohchr.org/>

⁷ <https://www.ohchr.org/>

⁸ <https://www.achpr.org/>

Under a rights-based approach, donors may support duty-bearer efforts to fulfil their human rights obligations or promote the legal rights and legal capacity building of under-privileged victims of right violations⁹. Promoting Legal empowerment programmes to defend the weak enhances accountability, reduces stigma and discrimination and contribute to altering unjust structures and systems.¹⁰

The journey to secure environmental rights to benefit all in Kenya has been long. Previously, the government followed a strict Command and Control management style limiting participatory conservation and requiring alternative or additional environmental management styles¹¹. However, persistent activism has seen the gradual elevation of public participation through a rights-based agitation approach.¹² Significant efforts include the *Hirola and Ogiek* cases (cited hereafter), *Friends of Lake Turkana*, *Friends of Lake Bogoria*, *Friends of Lake Naivasha* and *Green Peace* initiatives, among others.

The following section captures a few instances in which the human rights approach for environment matters has been applied in Kenya, challenges in adopting a rights based route and the way forward.

9 Morten Broberg & Hans-Otto Sano (2018) Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences, *The International Journal of Human Rights*, 22:5, 664-680, DOI: 10.1080/13642987.2017.1408591

¹⁰Gruskin S, Safreed-Harmon K, Ezer T, Gathumbi A, Cohen J, Kameri-Mbote P. Access to justice: evaluating law, health and human rights programmes in Kenya. *J Int AIDS Soc.* 2013 Nov 13;16(3 Suppl 2):18726. doi: 10.7448/IAS.16.3.18726. PMID: 24242267; PMCID: PMC3833108; <https://pubmed.ncbi.nlm.nih.gov/24242267/>

¹¹ Odhiambo Japheth, *Using corporate governance as a tool to ensure compliance with constitutional environmental rights in Kenya* (LLM thesis); University of Nairobi; <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/14908>

¹² Human Rights Watch, *Save Lamu and Lamu Youth Alliance “They Just Want to Silence Us” Abuses Against Environmental Activists at Kenya’s Coast Region* December 17, 2018; available at <https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast>;

1. A Recent Key Case Law - The Owino-Uhuru case KM & 9 others v Attorney General & 7 others[2020] eKLR¹³:

This intriguing case was filed at the Mombasa Environmental and Land Court. The key Petitioner, *Centre for Justice Governance and Environmental Action* suing on behalf of themselves and other Petitioners demonstrated among other things, how a human's rights based approach can be used to stress the need for proper environmental care.

The other Petitioners included village residents of *Kwale*, who lived near a lead processing plant. In spite of several complaints to the national and county government offices responsible for overseeing proper environmental safeguards around the plant, no serious action was taken and the residents continued to suffer from pollution related ailments.

The court found that the Respondents were complicit in abetting environmental pollution, resulting in grave public health concerns and environmental degradation. These included Evident from the constitutional provisions stated, this is an environmental landmark case in Kenya's current constitutional era. A number of rights and environmental Principles were invoked and duty bearers charged with responsibility as follows:

1.1 Laws and Rights Invoked

A class of rights invoked include fundamental freedom principles and rights, socio-economic rights, principles of inter-generational equity and Sustainable Development, and regional and international co-operation on enforcement of human and environmental rights.

These rights included Enforcement Of The Bill Of Rights Under Articles 22(1) (2) (C) 23, 70, 162, 165(3) (B) And 258 of The Constitution Of Kenya (*enforcement of rights violated or infringed through court proceedings*) Alleged contravention of Articles 2(1) (5) (6), Kenya 10, 19(1) (2) (3), 20(1), (2), 21(1), (3), (4), 26, 35(1), (3), 42, 43(A) (D), 69(1)9d (F), (G), (2) and 70 of The Constitution of Kenya (*on the supremacy of the Constitution and other laws in the protection of the*

¹³Petition 1 of 2016 Kenya Law Reports

environment); alleged contravention of Articles 12(1), (2) (A) (B) of The International Covenant On Economic Social And Cultural Rights (ICESCR) (*respect for international obligations on the protection of socio-economic and cultural rights important in ensuring a clean and healthy environment*); alleged contravention of Article 24(2) of The Convention Of The Rights Of The Child (CRC) (*safeguarding inter-generational human and environmental rights*); alleged contravention of The Basel Convention and Technical Guidelines For The Environmentally Sound Management of Waste Lead-Acid Batteries (*regard for international obligations on controlling hazardous waste harmful to the environment*); alleged contravention of Articles 16 and 24 of The African Charter On Human And People's Rights (ACHPR) (*regional provisions on co-operation for the protection of the environment as human rights*); alleged contravention of Articles 111 of The Treaty For The Establishment of The East Africa Community (EAC) (*regional co-operation in the management of the environment*).

Sections 58 and 68 of The Environmental Management And Coordination Act Chapter 387 of The Laws Of Kenya (The Environmental Management And Coordination (Environmental Impact Assessment/Environmental Audit) Regulations of 2003 (*requirements of an Environmental Impact Assessment*); Environmental Management and Coordination (Water Quality) Regulations of 2006 (*maintaining safe water quality standards*); Sections 24, 36 and The Second Schedule of The Physical Planning Chapters 286 of The Laws Of Kenya (*proper physical planning to minimize environmental hazards within residential areas*); Public Health Act Chapter 252 of The Laws of Kenya (*protection of the human health as a human right*); and Section 23(2) (C) of The Export Processing Zones Act Chapter 517 Of The Laws Of Kenya (*duty to ensure that EPZ enterprises abide by all required zoning and environmental laws*).

1.2 Duty Bearers responsible

The *Honourable Attorney General* was tasked with properly guiding the government on all national and delegated legal requirements in the subject matter for government's positive compliance). *The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources* was to have provided guidelines for the relevant application of sound

environmental management rules pertaining to the business activities in question and enforcement of the same when disregarded. The *Cabinet Secretary, Ministry of Health* was required to have addressed any public health concerns swiftly and adeptly, *National Environment Management Authority (NEMA)* was mandated to continually supervise Environmental Impact Assessment and subsequent activities around the business interests of the offending parties and penalize any breaches of domestic and international laws which turned out to be hazardous to the social and they physical environment, including revoking issued permits and make restoration orders. The *County Government of Mombasa* as the host government unit had a duty to ensure compliance with environmental laws considering prudent local physical planning for its own sake and on behalf of the national government. The *Export Processing Zones Authority, Metal Refinery (EPZ) Limited*, and *Penguin Paper and Book Company* as the offending parties chose to pay no attention to or act in contempt of the environmental laws brought to their attention, court orders and to adequately compensate victims of their violations.

For non-action or insufficient responses towards the complaints raised by victims of the pollution, the Respondents bore the costs of the suit according to liability.

1.3 Penalties under domestic and International Environmental Law rules

The record compensation for damages of USD 12M was based on the Polluter Pays Principle¹⁴. The need for co-operation for environmental conservation at domestic and international level was confirmed by the court's punishment in shared costs by all the Respondent institutions which ought to have practiced a reasonable standard and duty of care to prevent the hazardous pollution of the environment as highlighted in the case, but did not.

¹⁴ Organization for Economic Cooperation and Development (OECD) Guiding Principles concerning International Economic Aspects of Environmental Policies (1972)

For the environment's good, the Court gave orders for the restoration of the said environment, and the implementation of appropriate regulations to avoid and minimize further degradation.

This case exemplifies how a rights-based if well employed can provide a strong base for environmental justice.

2. Constitution and Statute Law

Noteworthy strides have been made in distinguishing environmental rights, claims and obligations in laws and institutions in Kenya.

For instance, under article 35 of the Constitution of Kenya on *Access to Information*, awareness of environmental protection and conservation is steadily rising in institutions of learning and education is an increased effort to involve the citizenry in good management. Concepts such as renewable energy, effective waste disposal, preservation of sensitive ecosystems, and individual responsibility are part of the education curriculum at all levels.

Under A.35 on right to information, *Employment of EITI* - Extractive Industry Transparency Initiative (EITI), founded in 2003 with the goal of strengthening governance by increasing transparency over revenues from the oil, gas, and mining sectors, encourages international best practices in the different levels of implementation, and also requires players to disclose information about their earnings from natural resources¹⁵. Currently, government contracts previously protected by Secrecy Acts and confidential clauses are limited by the *Kenya Treaties and Ratification Act (2012)*.

Under article 48 on *Access to Justice*, environmental justice activism of is developing in the courts and within the public sector. Cases like the *Green Belt Movement v Republic* - under Prof. *Wangari Maathai* saw the emergence of public environmental activism in Kenya.

Whereas the question of *locus standi* arose in this case and the case was quashed by the High Court's reasoning that only a person directly affected by an environmental harm could have *locus standi* in

¹⁵<http://www.osisa.org/other/global/existing-legal-and-institutional-framework>

environmental litigation claims, public awareness and outcry thereafter bore fruit and the intended building of a highrise structure by the government in the city's largest recreational public park was stopped. The seeds of current environmental activism were sown which later saw the scope of *locus standi* broadened in the new Constitution promulgated in 2010 and inclusion of the same in the various environmental sector Acts and regulations. *Friends of Lake Turkana*, *Friends of Lake Naivasha*, *Save Lamu* and *Green Peace* are other examples of environmental activists.

The role of Courts and other arbitral tribunals in enhancing environmental rights has been recognized with mandates for the resolution of disputes surrounding the environment to be addressed under rules of natural justice, access to justice and right to fair trial. This has paved way for the resolution of the disputes in the Environment and Land (ELC) Court (High Court), Magistrate courts, National Land Commission Tribunal, and NEMA Tribunal, among other institutions.

Under article 159 the Constitution has provided *Principles of Justice* by which dispute resolutions may abide to encourage speedy, fair and just trials, as well as promote the use of Alternative Dispute Resolution under common law and traditional dispute resolution rules. The Environment and Land Court was established to expedite claims and matters raised under A.42 (right to a clean and healthy environment) and A.43 (socio-economic rights) with regard to environmental protection and the socio-economic rights related to the realization of a clean and healthy environment.

Under A.41 on *Fair labour* practices, considering that a majority of labourers work in agriculture and related environment sectors, the Constitution provides for fair labour terms rooting for certainty in contractual terms, occupational safety and reasonable remuneration terms.

Articles 42 and 43 and section s. 36 of EMCA strengthen NEMA's role via a National Environmental Action Plan which sets out guidelines for the integration of standards of environmental protection into development planning and management. It is a requirement that development planning

must factor environmental safety needs to promote socio-economic rights. Section 31 of EMCA establishes a Public Complaints Committee (NEMA) where such disgruntlements with the way the environment is managed will be channelled.

Devolution in state management under Chapter Eleven of the Constitution has seen the inclusion of county governments being participators in sustainable development. Communities are involved in public participation processes during awareness campaigns and Environmental Impact Assessment activities. A multi-sectoral cooperation, particularly at the decentralised district levels, which are the focal points of service delivery and support to sustainable community management of natural resources.¹⁶

Article 10 acknowledges the Principle of Sustainable Development (SD) protecting present and future generations' human and environmental rights through inter and intra- generational equity, which is critical in ensuring that resources are managed in a sustainable manner. SD means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems¹⁷. Further it provides that rule of law and governance are part of national values.

In the area of natural resource management, Governance is a key mechanism of enforcing human rights through Environmental Justice. The sub- section below briefly shows how Governance Principles have been applied to manage the environment in Kenya.

2.1 Human Rights in the Governance of the Natural Resources Sector in Kenya and the Region

Serious environmental disputes arise from the inequitable sharing of natural resources. The poor exploitation methods which degrade the environment and human health also create a clamour for the recognition of various human rights.

¹⁶ Denmark in Kenya: Natural Resources Management in Kenya, available at <http://kenya.um.dk/en/danida-en/nrm/> accessed 10/07/2016

¹⁷ S. 3 EMCA

Governance is a key component of article 10 of the Constitution of Kenya, premised with rule of law, democracy, principles of sustainable development, inclusivity, transparency, public participation, principles of among others. The promotion of good governance in the management of natural and human resources in the environment are crucial in ensuring sharing of salient information, equitable sharing of resources and public participation during key decision making processes by the state

Governance provides a mechanism for increased accountability to the body of human rights and environmental justice. The Business Dictionary defines governance as

“Establishment of policies, and continuous monitoring of their proper implementation, by the members of the governing body of an organization. It includes the mechanisms required to balance the powers of the members (with the associated accountability), and their primary duty of enhancing the prosperity and viability of the organization”.¹⁸

The concept of "governance" is not new but it is as old as human civilization.¹⁹ Governance can be used in several contexts such as corporate governance, international governance, national governance and local governance.²⁰

Principles of good governance include 8 major characteristics.²¹ It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law²². It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society

¹⁸<http://www.businessdictionary.com/definition/governance.html>

¹⁹ UN Economic and Social Commission for Asia and Pacific: What is Good Governance?; <http://www.unescap.org/sites/default/files/good-governance.pdf> accessed 10/03/2021

²⁰ibid

²¹ UN Economic and Social Commission for Asia and Pacific: What is Good Governance?; <http://www.unescap.org/sites/default/files/good-governance.pdf> accessed 10/03/2021

²²ibid

are heard in decision-making. It is also responsive to the present and future needs of society.²³

Africa Union has made provisions for governance in natural resource management. Kenya as a member is therefore guided by the principles promoted by the following actions by the AU: a) Lobbied for African Minerals Development Centre under UN Economic Commission for Africa, seeking to harmonize mining policies across the continent for maximum output and benefit in the mining sector; b) Integrated Geology and Mineral Information System (GMIS) Coordination systems; c) Engaged in collaborative efforts with the World Bank and European Union states in capacity building and social empowerment to compete with global players like China²⁴; d) Established the African Natural Resources Centre (ANRC)²⁵ for capacity strengthening in negotiating better natural resources contracts and refusing unethical practices such as illicit funding. It encourages sector-based transparency; and e) Sharing of periodic reports on natural resource management initiatives²⁶

2.2 Shortfalls in the Governance Approach in Environmental Management in Kenya

The Government's long-term development strategy, Vision 2030, accordingly includes strategies for action in the environment sector

²³ibid

²⁴ Chris Alden & Christina Ana Alves, *China and Africa's Natural Resources: Challenges and Implications for Development and Governance*; Governance of Africa's Resources Programme, Occasional Paper no. 41, September 2009; available at http://www.voltairenet.org/IMG/pdf/China_and_Africa_s_Natural_Resources.pdf

²⁵<http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-natural-resources-center-anrc/> accessed 17/07/2016

<http://www.nsi-ins.ca/wp-content/uploads/2014/01/Brief-Shaw-Post-2015-Natural-Resource-Governance-in-Africa-African-Agency-and-Transnational-Initiatives-to-Advance-Developmental-States.pdf> accessed 17/07/2016

²⁶Tim Shaw, *Post - 2015 Natural Resource Governance in Africa: African Agency and Transnational Initiatives to Advance Developmental States*; Massachusetts, Boston available at <http://www.nsi-ins.ca/wp-content/uploads/2014/01/Brief-Shaw-Post-2015-Natural-Resource-Governance-in-Africa-African-Agency-and-Transnational-Initiatives-to-Advance-Developmental-States.pdf> accessed 17/07/2016

include conservation of natural resources, pollution and waste management, high-risk disaster zone management, environmental planning and governance, and climate change adaptation.²⁷ Programmes and projects to be implemented in the environment, water and sanitation sectors within the period of the first Medium-Term Plan (2008-2012) are identified in sector-specific plans.²⁸

Unfortunately, though in the public domain, the challenge in inadequate dissemination of information (language and channel limitations) not many citizens are conversant with the Vision 2030 document thereby losing opportunity to engage on environmental matters in the context of general planning and continue to be victims of human rights violations. Planners of economic development programmes also on many occasions overlook the need to balance the protection of the environment and economic growth appetite.

The *Ratification of International Instruments* such as UN Convention on the Law of the Seas (UNCLOS), ICESCR, ICCPR, UNEP's working documents, etc meets with the suspicion of elitism from their original creating organizations whose implementation priorities are wont to differ from the local context's priorities. These could aggravate human and environmental rights where there are economic inequalities.

Regarding the impact of *Extractive Industry Transparency Initiative (EITI)* whose goal is to strengthen governance by increasing transparency over revenues from the oil, gas, implementation is yet to be fully felt.²⁹ The government still retains confidential clauses in natural resource exploitation contracts contrary to A.35 of the Constitution which compels required persons to disclose relevant information pertaining matters of public interest. Information and educational and skills gaps contribute to poor pay working conditions, health complications from pollution and open shafts breeding water borne pathogens, ill equipping for tasks and little or no compensation for victims of these errors.

²⁷Denmark in Kenya: Natural Resources Management in Kenya, available at <http://kenya.um.dk/en/danida-en/nrm/> accessed 10/02/2021

²⁸ *ibid*

²⁹<http://www.osisa.org/other/global/existing-legal-and-institutional-framework>

The *Constitution of Kenya (2010)* has been hijacked by political interests which have undermined the place of Articles 42, (the right to a clean and healthy environment) and Article 71 covering transactions requirements regarding exploitation of Kenya's natural resources³⁰ local citizens' participation is minimal but become greater victims of human and environmental rights abuses in the process. A. 35 on Access to information and public participation is sometimes ignored. The implementation of Chapter 5 on Land and Environment is a political tussle between government and commercial interests.- A, 69 on ensuring sustainable, exploitation, utilization, management and conservation of the environment and natural resources, in an equitable and beneficial sharing of revenues accruing thereof seems a subject for the Courts only whereas Chapter Six on Leadership and Integrity dictates ethics for public officials but some corrupt economic deals have negatively affected the environment in terms of haphazard construction without due regard to EIA triggering climate change-like impacts like flooding and environmental degradation in many other ways.

The *Mining Act 2016* and the *National Minerals and Mining Policy (Final Draft) of 2010* of Kenya seek to put in place a simple, stable, predictable, efficient and unified regulatory framework and stimulate investment in the minerals and mining sector while ensuring that small scale mining companies use well-integrated, efficient and modern technology. However, many of these have not been brought into the formal economy so that they contribute fairly to the tax base—and Kenya's future as a mining economy.³¹³² Investment demands are too steep for local citizens who are left to the whims of market dynamics and do not benefit much, furthering increasing economic inequalities between the mining entities and local communities.

³⁰Hayward T, *Constitutional Environmental Rights*, (2005), Oxford University Press; also David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012), Law and Society

³¹ Osborne Wanyoike, *New Dawn for Mining Sector in Kenya, But There Are Risks Ahead*, The East African, Posted Saturday, July 20 2013 at 11:17; *Osborne Wanyoike is a senior manager in tax, PwC and an expert in oil, gas and mining.*

<http://www.theeastafrican.co.ke/OpEd/comment/New-dawn-for-mining-sector-in-Kenya--but-there-are-risks-ahead-/-/434750/1920686/-/27hs7fz/-/index.html>

³² *ibid*

Political manipulation and sometimes, harassment, cripples the efficiency of the enforcement roles of the *Environmental Management and Co-ordination Act, 1999 (Kenya)* and *The National Environmental Management Authority of Kenya (NEMA)*, in facilitating social and environmental accountability, compliance and appropriate regulation³³. Regrettably, even with a *vast environmental framework* in place, a lot is yet to be achieved. It takes citizen diligence and civil society activism to hold government accountable for environmental degradation.

Many local communities decry poor compensation for land rights given up in compulsory acquisition by the government. Unemployment is rife, resulting in high levels of poverty. Apathy in public resources management is endemic, due to perceived corruption, political cronyism in high offices, bias in resource distribution and lack of responsiveness to major NRM issues by government agencies.

On *Climate Change*, change in climatic patterns has exposed ill-preparedness in mitigating the same; floods, landslides, famine, pollution of wetlands, deforestation and injuries or damages from open cast mining are common place. In spite of the numerous EIA requirements, Investors in economic activities like mining are not held responsible for degradation as result from their activities. However, to safeguard the right of life, the government is compelled to act upon the effects of climate change in designing disaster preparedness, disaster mitigation, adaptation and resilience plans.

The Judiciary, commendably, have made an attempt to enforce environmental justice and governance to promote human rights under right to a clean and healthy environment and public participation. Notable claims in pushing for good governance of environmental resources include the *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*³⁴ (*Endoroi/Ogiek*) case for the recognition and protection of indigenous

³³ibid

³⁴<https://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/>

land and cultural rights to land³⁵, *Peter K Waweru v Republic* for the recognition of the Principle of Sustainable Development in physical planning and land use and the right to a clean and healthy environment as right to life and the *Abdulahi Ali Abdi & another v Cs, Ministry of Lands & 6 others [2021] eKLR ('Hirola')*³⁶ for the preservation of the Endangered *Hirola* Antelope (*Beatragus Hunteri*) cases.

3. Criticisms to Using the Human Rights Approach in Environmental Management in Kenya

A few challenges exist that impede the growth of human rights use in environmental management:

a)The framing of legal issues around the environment require more than stating Article 42, the right to a clean and healthy environment in order to bear weight. The environmental right has to be pegged on a fundamental right which would attract constitutional attention. This means that other components of the environment like biodiversity and flora and fauna can easily be damaged if sufficient scientific proof around them is not linked to the right to life to justify better management or conservation techniques. A recent innovative strategy has been to attach the right to life as the basis for the environmental right.

Looking at the *Owino Uhuru* case mentioned earlier, it is clear that the Petitioners embraced a wider scope of human rights to incorporate socio-economic rights, intra and inter-generational rights and Principles of International Environmental Laws such as Polluter Pays Principle, among others, to bring serious attention to state responsibility on conservation .

b)Rights claims would demand a complex compensation scheme based on multiple factors such as scientific assessment, studying ecological linkages to different environmental media,demographics concerned, social and economic losses and abatement costs³⁷

³⁵ African Court on People's and Human Rights 276/03

³⁶ Petition E 255 of 2020 Kenya Law Reports

³⁷ UNEP, Enforcement of Environmental Law: Good Practices from Africa and Asia (Volume II);

c)The generally held realization that socio-economic rights are to be achieved in a progressive manner as provided for in A.20(5) of the Constitution makes it a challenge to enforce environmental rights if a minimum standard of realization is not yet prescribed by law or judicial authority.

d)Further, the inter-play between climate action and trade or foreign business investment creates an awkward situation for arbiters in Investor-State Dispute Settlements (ISDS) claims where business interests have to be considered against environment claims. A host state may be heavily penalized for cancelling, say, a coal powered plant contract in the interest of environmental protection. If Kenya had not argued a strong case against unlawful mining operations discounting the need for a proper Environmental Impact Assessment among other conservation safeguards by the *Cortec Mining Company*, Kenya would have been liable to pay a hefty compensation amount to the Company for its licence's cancellation³⁸.

e)As a result of (a) above, it appears a hurdle to persuade public institutions to take favourable actions to protect the environment in the absence of significant loss of lives or property.

f)Whereas the matter of *locus standi* has been expanded in the Kenyan Constitution since the ruling in the *Green Belt Movement v Kenya Times Media Trust Ltd (Wangari Maathai)*³⁹ ruling, the question of whether to charge or compensate corporate persons alongside natural persons in environmental claims remains mysterious, although the *Owino Uhuru* case is an apparent development in this area.. Some corporate persons could be violators or victims of the claims in question.

³⁸ *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others (Civil Appeal 105 of 2015)* also *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29*

³⁹ *Green Belt Movement (Wangari Maathai) v Kenya Times Media Trust Ltd. Civil Case 5403 of 1989 -Kenya Law Reports*

g) Under article 40 of the Constitution of Kenya, Intellectual Property right to Traditional Knowledge has yet to be fully exploited, with limited codification and value calculation of the unique species. Local communities may be aware of these resources and have norms which endorse a communal system of conservation but are not equipped with economic information to benefit significantly and therefore become vulnerable to unfair commercial exploitation. This right remains a right in name only.

a) *Competing rights; civil and political rights around resources:* Any positive developments on agriculture, trade and commerce, social and cultural harmony could be destroyed in a few hours by effects of political and armed strife and create environmental refugees and further resource conflicts. Further, Globalization brings about more competing rights and values which relegate environmental protection matters to the periphery. For example, the current pressure for minority, gender and reproductive rights and religious rights do not focus on the environment unless matters of exclusion from environmental public participation interests therein come up.

b) With stronger emphasis on economic objectives during national planning, the government tends to ignore environmental claims which seem not to have weight on the economy even if those rights concern the survival of the people concerned. In spite of indigenous communities having legal respite against such national actions as was seen in the case of *The Endorois Community v Lake Bogoria Game Reserve* through the African Court on Human and Peoples Rights there is not much progress on resettling the community in their native land.⁴⁰ This erodes the generational meticulous conservation carried out over years and without due care from the government, their forest habitation would degrade faster.

c) The Human rights approach requires consistent and aggressive activism to remind planners to include key environmental stakeholders.

d) *Rapid population growth:* Human needs have increased and with competing rights requiring the use of more resources. The result has been deforestation through logging to clear land for settlement, industrial and

⁴⁰Pambazuka News, *Kenya: From Non-Beneficiaries to Active Shareholders, The Endorois* ;<http://allafrica.com/stories/201004150930.html>

agricultural activities, mining activities for economic growth, large-scale fishing, among others. Competing economic needs make it difficult for the enforcement of socio-economic rights for the most disadvantaged demographic groups in society.

e) Technology and Scientific Advancements increasing mechanization of work and production minimizes opportunities to self determination and the realization of socio-economic rights with better environmental conservation. To some extent, poverty has been blamed for wanton environmental destruction. SDG 1 implores states to eradicate poverty for sustainable development.

f) Lack of political goodwill to enforce environmental rights: If the democratic tenets of public participation, inclusion in decision making, respect for human rights and rule of law are not adhered to, the negative effects resulting will trickle down to every aspect of society. Laxity by the government to act on the *Endorois* case ruling is an example. Environmental matters will take a back seat in government policy and planning, yet the environment is the bedrock upon which human activities are conducted. It is usually more difficult to deal with the adverse impacts of environmental degradation as opposed to planning and implementing environmental protection and conservation.

g) *Poverty creates apathy*. The need for poor populations to meet their daily needs removes any notion of conservation of natural resources. In most cases, this particular group will be at the centre of resource depletion by middlemen as they are only interested in eking out a living.⁴¹

Consequently, they become both cause and victims of political instability, bad governance, resource depletion and environmental degradation.⁴²

h) *Economic incapacity* – many African states including Kenya have human and natural capacity and potential but are not adequately equipped financially to exploit natural resources and management to their advantage. There is over-dependency on foreign input. Lack of ownership affects governance attitudes.

⁴¹ Denmark in Kenya: Natural Resources Management in Kenya, available at <http://kenya.um.dk/en/danida-en/nrm/>

⁴² *ibid*

4. Way Forward

It is crucial for both public and private state actors to collaborate in efforts and address the challenges and shortfalls mentioned above. When environmental matters are looked at in context of these factors during national planning, the governance of natural resources will be enhanced. These disadvantages can be turned around by good governance principles of inclusivity, transparency, fairness, consistency, accountability, regard for human rights and justice and faster realization of socio-economic rights.

Environmental activism must go beyond litigation of environmental claims and include consumer awareness of conservation and protection and the requirement of prudent economic development planning processes. Capacity building to heighten environmental justice among people affected should continue. Another useful approach would be to explore the base of inter-generational equity and justice to inspire future generations to pursue their environmental rights for greater impact. Environmental courts and judicial personnel in environmental matters should be prioritized.

5. Conclusion

Considering that man plays an important part in the appropriation of environmental goods and services, respect for human rights must continue to be upheld. Environmental justice through a rights based route will always be a going concern. We may not be there yet, but there is lot of room for growth. What Kenya needs is a strong supervisory function and periodic audits on progress on natural resource management. The spirit of the Constitution requires active citizen participation in governance, and the citizens, too, must aggressively take up their role.

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