

*Effective Public Participation in the Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya: Aaron Masya Nzembei & Angelah A. Malwa*

**(2023) Journal of cmsd Volume 10(2)**

# Journal of Conflict Management & Sustainable Development



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|--|--|
| Realizing Environmental, Social and Governance Tenets for Sustainable Development                                  | Kariuki Muigua                         |
| Assessing the Jurisprudential gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya       | Michael Sang                           |
| Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya                    | Kariuki Muigua                         |
| Waking up to the call of Climate change: Challenges for Africa and Europe  | Gichinga Ndirangu                      |
| Effective Public Participation in Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya | Aaron Masya Nzembei & Angelah A. Malwa |
| An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective                            | Michael Sang                           |
| Safeguarding the Environment through Effective Pollution Control in Kenya  | Kariuki Muigua                         |
| Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms              | Vianney Sebayiga                       |

Volume 10

Issue 2

2023

ISBN 978-9966-046-15-4

## **Effective Public Participation in the Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya**

*By: Aaron Masya Nzembei \**  
**&**  
*Angelah A. Malwa \**

### **Abstract**

*Public participation as a governance principle promotes cohesion by involving persons most likely to be affected by an act in the decision-making process leading to the success in the implementation of such act. It is based on the neighbor principle and seeks to protect the interests of neighbors by incorporating their views in decision-making. In Kenya, The Constitution and various statutes provide a basis for public participation in decision-making. This paper seeks to assess the usefulness and effectiveness of the Laws guiding public participation in environmental governance and provides recommendations on opportunities available for improvement.*

### **1. Introduction**

Public participation is a process that allows individuals to express their views on different aspects of interest to them.<sup>1</sup> It is a consultative process, involvement of the public, inclusiveness, informAqwszszs

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*\* Aaron Masya is a student at the Kenya School of Law. He is a registered environmental impact assessment expert (associate) and holds a bachelor of science degree in Agriculture (Economics major), a bachelor of Laws degree (LL. B) and a post graduate diploma in human resource management (Higher Diploma HR). He has a keen interest in access to environmental justice and has taken part as a technical officer in the development of the Water towers bill 2022 and the National Environment Tribunal Procedure rules 2023.*

*\* Angelah Malwa is an Advocate of the High Court of Kenya. She holds a Bachelor of Laws (LL. B) degree from Kenyatta University and a Post-Graduate Diploma in Law from Kenya School of Law. She is currently working at the National Environment Tribunal and her interests include environmental law, civil litigation, constitutional law and commercial litigation.*

ation sharing, transparency and a process influencing outcomes in decision-making.<sup>2</sup> It has also been defined as a process by which public concerns, needs and values are incorporated in decision making by both the public sector and corporates.<sup>3</sup> Public participation seeks to break information asymmetry challenges through shared knowledge on a specific area of concern.<sup>4</sup> Public participation is not an arbitrary process. It is a structured process having a target group or individuals; however, the target group participates in the process at will and thus making it a democratic process.<sup>5</sup>

Public participation in decision-making plays the important role of informing through added information or knowledge decisions to be made, reducing areas of conflict through the incorporation of divergent views in decision-making, providing a platform for transparency and accountability, building public trust and confidence in decisions made, providing for the incorporation of traditional knowledge and beliefs, providing a platform for communication of needs and concerns in respect to projects, educative purposes and creation of awareness and lastly to legitimize decisions made and decision making processes.<sup>6</sup>

The core values in public participation are: that public contributions will influence decisions made, that the process communicates the interests and needs of the public; that those potentially affected by a decision participate in the decision-making process; that the public is involved in designing how

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<sup>1</sup> Marianela C, et al, Environmental Law in Developing Countries: Selected issue, Vol II, IUCN, 2004, P.7

<sup>2</sup> Philip M. Omenge et al, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management: Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector.

<sup>3</sup> Creighton, J.L., The Public participation Hand book: Making better decisions through citizen involvement (John Wiley & sons, 2005) p.7

<sup>4</sup> Fact sheet 27: Public participation in the legislative process, P.1.

<sup>5</sup> Ibid, P.1

<sup>6</sup> Philip M. Omenge et al, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management: Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector.

they participate; that information is shared between the public and the decision making organ to assist in making an informed choice and that the process provides a feedback mechanism on how the public's contribution influenced the decision made.<sup>7</sup>

In Kenya, public participation is anchored under the national values and principles of governance. Article 10(2) (a)<sup>8</sup> enlists public participation as a key governance principle. Under Article 69,<sup>9</sup> the role of public participation in the management, protection and conservation of the environment is affirmed. Article 70(3)<sup>10</sup> and Article 42 invites every person to affirm their rights to a clean and healthy environment without having to prove injury caused by any activity considered harmful to the environment. Based on Articles 70 and 42, participation of the public is not limited to the decision-making process but also the enforcement of rights considered to be infringed. Article 184(1)(c) of the Constitution further provides for the participation of residents in the governance of urban areas and cities. The constitutional provision places the neighbour principle at the heart of public participation. Public participation is also provided for under EMCA and the Environmental impact assessment regulations.

Noteworthy, any corporate or public body that invites the public to participate in decision-making retains the final decision-making authority. This has been argued as a necessity in apportioning liability for decisions made while raising criticism on the need for public participation.<sup>11</sup>

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<sup>7</sup> Ibid, p. 8

<sup>8</sup> The Constitution of Kenya

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> Creighton, J.L., *The Public participation Hand book: Making better decisions through citizen involvement* (John Wiley & sons, 2005) p.12

## **2. Analysis of Kenyan Legal Framework, Practice and International Law Provisions on Public Participation in Environmental Impact Assessment Processes**

### **2.1. The Constitution of Kenya**

The constitution of Kenya is the supreme law of the state.<sup>12</sup> Laws inconsistent with the constitution are void to the extent of their inconsistency.<sup>13</sup> The general rules of international law form part of the laws of Kenya<sup>14</sup> while treaties or conventions ratified by Kenya form part of the laws of Kenya under the constitution.<sup>15</sup> Therefore, all laws applicable in Kenya are anchored on the Constitution.

Article 10 of the Constitution gives life to public participation in governance within the legal framework of Kenya. Under section 2 of the Environmental Management and Co-ordination Act, Environmental Impact Assessment has been defined as “*a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment*”. Governing is defined as controlling a point in issue.<sup>16</sup> Therefore, Article 10 of the Constitution of Kenya speaks to among others, public participation in Environmental Impact Assessment processes which is a governing tool geared towards reducing negative impacts on the environment occasioned by human activities.

Under Article 69(1) (d),<sup>17</sup> the state has an obligation to encourage public participation in management, protection and conservation of the environment. Through the Environmental Impact Assessment process, the state is able to manage, protect and conserve the environment and ecologically sensitive areas. It is therefore an obligation upon the state to

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<sup>12</sup> Article 2(1) The Constitution of Kenya, 2010.

<sup>13</sup> Article 2(4) Ibid

<sup>14</sup> Article 2(5) Ibid

<sup>15</sup> Article 2(6) Ibid

<sup>16</sup> Bryan A. Garner, Black’s law dictionary, eighth edition, page 715.

<sup>17</sup> The Constitution of Kenya, 2010.

encourage the participation of the public in the Environmental Impact Assessment processes. Through various activities such as regulations, statutes, educative and public awareness forums, the state may dispense this obligation and encourage the public to participate in environmental impact assessment processes. Article 69 of the Constitution is reflected under regulation 16 of the Environmental (Impact Assessment and Audit) Regulations, 2003 which requires Environmental Impact Assessment processes to take into account among others, legal considerations and Sections 59 and 60 of the Environmental Management and Co-ordination Act which impose the obligation to effect public participation on the National Environmental Management Authority.

Under Article 42,<sup>18</sup> the Constitution grants every person the right to a clean and healthy environment. The Environmental Impact Assessment process as a governance tool to manage, protect and conserve the environment provides a basis upon which Article 42 of the Constitution is implemented. Article 42 (b) lifts the requirement of locus on persons approaching the court to effect their rights to a clean and healthy environment and thus inviting the general public in securing and enforcing such rights.

The question that arises and which this paper will seek to answer is, should effective public participation be localized to a project area given the provisions of Article 42 and Article 70 of the Constitution?

## **2.2. Environmental Management and Co-Ordination Act, 1999**

Under the Act,<sup>19</sup> Public participation has been provided for through participation of members of the public and lead agencies.

Lead agency has been defined as “*any Government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management of any element of the environment or*

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<sup>18</sup> Ibid

<sup>19</sup> section 59 and 60, Environmental Management and Co-ordination Act, 1999.

*natural resource*”.<sup>20</sup> Through lead agencies under Section 60 of the Act,<sup>21</sup> public participation is enhanced. Public participation through lead agencies is anchored under Article 1 of the Constitution of Kenya for the reason that state agencies draw their power from the people. In the Environmental Impact Assessment process, lead agencies are to be invited through a written request by the Director General of the National Environment Management Authority to submit their written comments on an Environmental Impact Assessment study, evaluation and review report.<sup>22</sup> The comments of the lead agencies are to be submitted within 30 days of the written request by the director general. The use of the word “shall” under Article 60 of the Act,<sup>23</sup> implies a mandatory obligation on lead agencies to submit comments on reports shared with them.<sup>24</sup>

Would the failure of a lead agency to submit comments in the Environmental Impact Assessment process thus lead to ineffective public participation and would a decision to grant a license without a lead agency's comments lead to a violation of the Environmental Impact Assessment process?

Under section 59 of the Act,<sup>25</sup> members of the public are to be invited for public participation through the gazette, in at least two newspapers in the area or proposed area of the project and over the radio. The notices to the public are to include “*a summary description of the project, the place where the project is to be carried out, the place where the environmental impact assessment study, evaluation or review report may be inspected, and a time limit of not exceeding ninety days for the submission of oral or written comments by any member of the public on the environmental impact assessment study, evaluation or review report*”.

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<sup>20</sup> section 2, Environmental Management and Co-ordination Act, 1999.

<sup>21</sup> Ibid

<sup>22</sup> Section 60, Environmental Management and Co-ordination Act, 1999.

<sup>23</sup> Ibid

<sup>24</sup> Bryan A. Garner, Black's law dictionary, eighth edition, page 1407; Shall defined as a duty to.

<sup>25</sup> Environmental Management and Co-ordination Act, 1999.

Based on Section 59 (1) (c) of the Environmental Management and Co-ordination Act 1999 the question that arises is whether this provision is effective in encouraging effective public participation in the Environmental impact Assessment process based on the provisions of Article 69 (1) (d).<sup>26</sup> Noteworthy, the Environmental Impact Assessment study reports and project reports are generated by experts<sup>27</sup> posing a challenge to the general members of the public with limited knowledge in environmental science to interrogate the findings and mitigation measures put in place to buffer against adverse impacts to the environment.

To facilitate effective participation of the general public, would pro bono services offered by experts in review of the Environmental Impact Assessment experts reports enhance effective participation of the public? Where pro bono services cannot be procured, could the National Environment Management Authority source experts to assist the general public in understanding the reports while maintaining the autonomy of the general public to select their preferred expert thus enabling a meaningful participation of the public in the environmental impact assessment process?

### **2.3. Environmental (Impact Assessment & Audit) Regulations, 2003**

Licensing of projects under the regulations is two fold. Approval by the National Environment Management Authority through project reports and study reports.<sup>28</sup>

A project report is a summary statement of the likely environmental effects of a proposed development.<sup>29</sup> Under Regulation 9 of the Environmental (Impact Assessment and Audit) Regulations, 2003, a project report is to be submitted to relevant lead agencies, relevant district environment committee

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<sup>26</sup> The Constitution of Kenya, 2010.

<sup>27</sup> Regulation 7 (3) and 13(2) of the Environmental (Impact Assessment and Audit) Regulations, 2003.

<sup>28</sup> Regulation 10 and 23, Environmental (Impact Assessment and Audit) Regulations, 2003.

<sup>29</sup> section 2, Environmental Management and Co-ordination Act, 1999.



or provincial environment committee where a project involves more than one district. Noteworthy, in the submission of project reports for comments, the general public is not factored under the regulations for participation.

Regulation 10<sup>30</sup> provides a basis upon which feedback for approval of a project through a project report or lack of is communicated to project proponents. The regulation fails to provide a basis upon which such feedback is communicated to the project affected persons and thus creating a gap in public participation in environmental impact assessment process. Feedback as noted by Omenge<sup>31</sup> is a key value in public participation and should seek to communicate how the participation of the public influenced decision making.

Under section 129(1) of the Environmental Management and Co-ordination Act, Aggrieved persons by the decision of the National Environment Management Authority touching on issuing or failure to issue a license have 60 days statutory limitation to Appeal such decisions. This, therefore, highlights the importance of communication of licensing decisions under project reports to both project proponents and the general public. Feedback provides a basis upon which aggrieved persons can participate in the environmental impact assessment process post-issuing of an Environmental Impact Assessment license.

A study report is a more detailed report preceded by a scoping exercise giving in detail the potential impacts, mitigation measures, and alternatives to the projects among other indicators. In developing a study report under regulation 17(1),<sup>32</sup> the project proponents in consultation with the National Environment Management Authority, are to seek the views of persons who

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<sup>30</sup> Environmental (Impact Assessment and Audit) Regulations, 2003.

<sup>31</sup> Philip M. Omenge et al, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management: Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector, page 8

<sup>32</sup> Environmental (Impact Assessment and Audit) Regulations, 2003.

may be affected by a project. Regulation 17(2) (a) (i)<sup>33</sup> seeks invitation of the public to participate in the Environmental impact assessment process through posting of posters in strategic public places in the vicinity of the site of the proposed project, this calls for questioning the technique to be implemented in identifying persons who may be affected by the impacts of the project against a backdrop of impacts that may spread beyond the locality of a project.

Under regulation 17(2)(c),<sup>34</sup> Venue and time for the meeting should be convenient for the affected communities and other concerned parties. The regulation is suggestive of a measure to engage the public or community leaders in determining convenient venue and timings for public hearings.

Regulation 17(2) (d) further provides for the appointment of a qualified coordinator to record both oral and written comments in public hearings, While the appointment is to be done in consultation with the National Environment Management Authority, the provision fails to accommodate the public involvement in selecting a coordinator yet the views and comments to be collected are in the interests of the public and thus the need to ensure objectivity and lack of bias.

Regulation 18 (1) (p)<sup>35</sup> seeks to mitigate and prevent cross border impacts of projects. This clause is important for the reason that identification of persons to be affected by a project for participation or localization of project impacts possess a great challenge for the reason that impacts may go beyond the areas identified.

Upon development and submission of the study report by the project proponent, the National Environment Management Authority is then called upon to submit the report to relevant lead agencies for comments.<sup>36</sup> The

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<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Regulation 20, Environmental (Impact Assessment and Audit) Regulations, 2003.

Authority is also obligated to invite the public to make oral and written comments on the study report.<sup>37</sup>

Regulation 23(4) provides a feedback mechanism for the decision made by the Authority; however, the communication obligation is limited to the project proponent without involving the public and interested parties who may be affected by the project.

In variation of a license, the regulations do not consider public participation as important. Under regulation 25(4)<sup>38</sup>, public participation in variation of a license is limited to lead agencies and thus the process does not benefit from the inputs of interested persons and project affected persons.

Regulation 28(2) (c)<sup>39</sup> and Regulation 28(2) (d) provides remedies for licenses issued without adequate information on environmental threats and impacts, or based on misinformation, false or incorrect information. Through cancellation, revocation or suspension of a license, information acquired post issuance of an Environmental Impact Assessment license can be used to safeguard the interests of the environment.

#### **2.4. Case Law Establishing Public Participation Guiding Principle in Kenya**

In the case of *British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) V Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance 7 Another (Interested parties); Mastermind Tobacco Kenya Limited (The Affected party) [2019] eKLR*,<sup>40</sup> the supreme court of Kenya established the guiding principles for public participation.

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<sup>37</sup> Regulation 21(1), Environmental (Impact Assessment and Audit) Regulations, 2003.

<sup>38</sup> Environmental (Impact Assessment and Audit) Regulations, 2003.

<sup>39</sup> Ibid

<sup>40</sup> Paragraph 96

The court determined that public participation applied to all aspects of governance, that the public officer or entity bearing the duty to perform a certain function had the onus to facilitate public participation, that the lack of a prescribed legal framework for public participation is not an excuse for not conducting public participation and that the public entity bears the responsibility to give effect to the constitutional principle of public participation using reasonable means.

The court also determined that public participation must be real and not illusory. It is not a mere formality to be undertaken as a matter of course just to fulfill the constitutional requirement. There is a need for both qualitative and quantitative components in public participation, It must be purposive and meaningful.

The Court further decreed that a reasonable notice and reasonable opportunity (reasonableness to be determined on a case-to-case basis) must be provided, that public participation does not mean oral hearings only but can also involve written submissions, that allegations of lack of public participation does not vitiate the process but must be considered based on the mode, degree, scope and extent of public participation.

Effective public participation was considered to include clarity of the subject matter for the public to understand, structure and processes of participation that are clear and simple, opportunity for balanced influence from the public in general, commitment to the process, inclusive and effective representation, integrity and transparency of the process and capacity to engage on the part of the public including the public being sensitized on the subject matter.

## **2.5. Rio Declaration on Environment and Development**

Principle 10 of the Rio declaration provides that, "*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public*

***authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”***

Within the Kenyan legal framework, public participation in environmental impact assessment processes is two fold as noted. Public participation through the general public affected by the projects and through lead agencies. In review of project reports, the lead agencies who seemingly must not share their comments as noted under regulation 9(2) and 20(3)<sup>41</sup> is the only form of public participation geared towards approval of projects. It is thus given that public participation at this level, even where the decision to be reached may negatively impact the health and safety enjoyed by the general public fails to adhere to the principle 10 of the Rio declaration.

Access to information through a well-structured feedback mechanism is also important towards an effective access to judicial and administrative proceedings given the time limitations such as under section 129(1) of the Environmental Management and Co-ordination Act. Failure on the part of state agencies to put effort towards communicating feedback to the general public handicaps the public in seeking legal redress where decisions to issue Environmental Impact assessment licenses infringe on their rights. The Environmental (Impact Assessment and Audit) Regulations, 2003 makes provisions for communication of feedback with reasons for decisions made to the project proponents leaving the general public and lead agencies who participated through shared knowledge and comments in the dark as to the important role they played in coming up with the final decisions. This makes the final process of decision making a peculiar reserve of the Authority and thus violating the principle 10 of the Rio declaration.

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<sup>41</sup> Environmental (Impact Assessment and Audit) Regulations, 2003.

Under Principle 20, “*women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.*” The Kenyan public participation legal framework as provided under case law seeks inclusivity and representation of all persons in public participation within the environmental impact assessment process and all governance process.<sup>42</sup> Noting the important role that women play as enumerated by the principle 20 of the Rio declaration, a well structured system of collecting public comments should not only focus at meeting ideal standards of public participation but ensure inclusivity and representation of women, youth and the marginalized groups in public participation within the environmental impact assessment process. The Environmental (Impact Assessment and Audit) Regulations, 2003 fails to provide a clear guideline on inclusivity while providing for public comments and thus a gap within the Kenyan legal framework on public participation within the Environmental Impact Assessment process. Failure to provide guidelines that ensure inclusivity also breach Principle 22 of the Rio declaration which provides for the support of indigenous people and their communities and enabling their effective participation in the achievement of sustainable development.

### **3. Developing Jurisprudence in Public participation**

The Rio declaration provides a general guideline on the application of public participation in environmental governance. The international instruments provide for three basic guides; access to information, access to justice and access to public participation as key guiding principles to public participation.<sup>43</sup>

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<sup>42</sup> British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) V Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance 7 Another (Interested parties); Mastermind Tobacco Kenya Limited (The Affected party) [2019] eKLR, paragraph 96

<sup>43</sup> A/CONF.151/26 (Vol. I) report of the United Nations conference on environment and development

In the guidelines for public consultations in the Covid-19 period<sup>44</sup> issued by NEMA, project proponents and the EIA experts are granted the autonomy to choose the most practical technique to be used in public participation during the development stage of an EIA study report.

A study that sought to determine the application of public participation in Kenya determined that the public is unaware of its role in environmental governance and that public participation framework was unsatisfactory.<sup>45</sup>

In the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*<sup>46</sup> the bare minimum for public participation was set as including; government agencies or public official has the mandate to fashion a programme for public participation with a great measure of discretion; in the measure of the adequacy of a public participation process, courts shall be guided by the measure of effectiveness; Environmental information sharing depends on the availability of such information and thus public participation is an ongoing obligation on the state through the process of EIA; Intentional inclusivity and diversity of participants in the EIA process should be shown with more weight placed on those affected by the project; Public bodies and government agencies are to take into consideration views submitted by the public on projects in good faith and the role of the public body as the final decision maker is not vacated by the public participation process.

Omeng P et al<sup>47</sup> notes that even with the weighty importance of public participation in environmental impact assessment processes, the design of

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<sup>44</sup> Guidelines on conduct of public consultations for EIA, EA & SEA during the period of the corona virus (Covid-19 pandemic); guide 5(i)

<sup>45</sup> Nick, O et.al., The doing and un-doing of public participation during environmental impact assessment in Kenya, 2012.

<sup>46</sup> Constitutional petition No. 305 of 2012; Mui Coal Basin local community & 15 others V Permanent secretary Ministry of energy & 17 others 2015 eKLR

<sup>47</sup> Philip M. Omeng et al, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management: Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector.

the process and implementation remain contentious with divergent views on how to effectively carry out public participation.

In the case of *Ken Kasinga V Daniel Kiplagat & 5 others [2015] eKLR* Munyao J states that “**public participation for the purpose of EIA ought to be real and actual**”. That the processes must not be for the purpose of merely fulfilling legal requirements. In this case, assessing whether an EIA process is real and actual is subjective and based on personal judgement. An objective measure of what a real and actual public participation process would look like is not provided.

In the case of *Getrude Mukoya Mwenda & 5 others v Cabinet Secretary Ministry of Infrastructure, Housing & Urban Development & 2 others [2020] eKLR*, the court in determining whether an EIA license was validly issued found the EIA license to have been validly issued and its variation to have been legal even where further public participation had not been conducted in variation of the license. This raises the question of the importance of new environmental information post issue of an EIA license and the place of public participation in variation of an EIA License. Regulation 25 of the **Environmental (Impact Assessment and Audit) Regulations, 2003**, does not obligate NEMA to undertake public participation before issuing of a variation certificate on a license and as such, variation can be done without public participation as supported by the *Getrude Mukoya Mwenda & 5 others v Cabinet Secretary Ministry of Infrastructure, Housing & Urban Development & 2 other* case.

The public participation function in environmental governance has various gaps in ensuring the process is effective. Noteworthy, the process as noted in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*<sup>48</sup> has not effectively covered public participation during the process of developing EIA and SEA study reports, Public participation feedback mechanism to determine how

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<sup>48</sup> Ibid



comments from the public influenced final decision of government agencies, the place of access to more information after issuance of an EIA license, the role of the public in choosing public participation techniques to be applied and guidelines to effectively determine relevant lead agencies to be involved in decision making.

Stewart and Sinclair noted that despite consensus on essential elements of a meaning public participation, often highlighted in laws, policy and regulations, actual public participation does not reflect the ideal practice standards.<sup>49</sup> Participation procedures are discretionary thus affecting value and effectiveness of public participation in EIA.<sup>50</sup> Earth care Africa and Wood aver that effective public participation ought to be backed by the force of law.<sup>51</sup> Laws should specify the role of the public in the Environmental Impact Assessment process.

Chigodora in his research found that there are limited opportunities for public participation in the Environmental Impact Assessment process, lack of social profiling and limited information availed beforehand.<sup>52</sup>

In the case *Greenbelt Movement & 4 others v National Environmental Management Authority & another; Kenya National Highways Authority (Interested Party)* [2020] eKLR, the National Environment Tribunal found public participation to have been effective even where final designs for the project had not been availed to the public. In the Appellants arguments, lack of final designs for the project had negated their ability to participate adequately in the process leading to the issue of the Environmental Impact Assessment License. Under paragraph 66 of the Judgement, the project

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<sup>49</sup>Elisha Toteng, et al, public participation in Environmental Impact Assessment: Review of 2005 to 2010 legislative and policy framework and its compatibility to international best practice.

<sup>50</sup> Ibid

<sup>51</sup> Fact sheet 27: Public participation in the legislative process.

<sup>52</sup> Elisha Toteng, et al, public participation in Environmental Impact Assessment: Review of 2005 to 2010 legislative and policy framework and its compatibility to international best practice.

proponents made it an obligation on the project affected parties and the public to seek the final designs to the project.

In the case of ***Republic Vs the Attorney General and Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No 374 of 2012)***, the court determined that environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment. The practice as established by the tribunal in finding that public participation was effective even where final designs for the project had not been provided, leaves for questioning the ideal position in practice of public participation before and after issue of an Environmental Impacts Assessment license.

In the case ***Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR***, it was established that government agencies or the public official involved in the Environmental Impact Assessment process are to fashion a programme of public participation that accords with the nature of the subject matter. It was also noted that the test that the courts use in determining the adequacy of public participation is that of effectiveness. A reasonable opportunity must be afforded to members of the public and interested parties to know about the issues and to have an adequate say. A reasonable opportunity is to be based on existing circumstances and is to be on a case-by-case basis. Based on the court's determination, discretionary powers and latitude has been given to project proponents and government agencies to determine what a reasonable opportunity to participate in the process of Environmental Impact Assessment would be and to design programmes for public participation.

In this regard, the existing laws and regulations seem inadequate in giving a clear direction on the importance of public participation in designing of participation programmes and determining what a reasonable opportunity to participate in the processes of Environmental Impact Assessment licensing would be.

#### **4. Significant gaps in the Legal Practice in Kenya**

The office of the Attorney General has drafted a Draft Policy on Public Participation. It is worthy to note that this Policy offers a definition of ‘Public Participation’, provides for information rights and it calls for inclusion of marginalized groups like the youth, the elderly, women and ethnic minorities.<sup>53</sup>

However, the Draft Policy fails to include discussions on the reasonable test, does not cover persons who can neither read nor write, does not guide on how to examine whether a particular exercise met the Constitutional threshold for Public Participation.

It is also worthy to note the existence of the Public Participation Bill of 2018. The Bill partly addresses some of the issues missing in the current framework. For instance, it provides for access of information rights in preparation of the participation.<sup>54</sup> It is sensitive to the rights of persons with disabilities<sup>55</sup> and offers special protection to persons who cannot read and write and the relevant authority is mandated to provide an interpreter for such persons.<sup>56</sup>

However, the proposed Bill does not cure the legal challenges identified and these pertinent legal issues on the concept and threshold of Public Participation would not seem to be addressed were the Bill to pass in its current form. The Bill does not define Public Participation, it does not offer a breakdown of gauging the ‘reasonable test’ and it does not provide special rights for marginalized and minority groups like the women and the youth. As regards timeframes for participation, the Bill leaves it at the discretion of the responsible authority making the legislation open to misuse because of its vulnerability.

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<sup>53</sup> Office of The Attorney General & The Department of Justice, *Kenya Draft Policy on Public Participation* 24

<sup>54</sup> The Public Participation Bill, 2018 s 10

<sup>55</sup> The Public Participation Bill, 2018 s 5(2)

<sup>56</sup> The Public Participation Bill, 2018 s 5

The Bill does not set a standard approach on the concept of Public Participation. It instead assigns this standard setting role to other persons like the Chief Justice, Cabinet Secretaries, County Assembly Committees and the relevant Parliamentary Committees.<sup>57</sup> This approach that the Bill adopts is likely to occasion jurisprudence that is unstructured in the definition, implementation and realization of the principle of Public Participation.

Such proposed legislations should be amended in a manner in which would adequately address the issues identified when it comes to Public Participation so as to come up with proper and well-founded jurisprudence in this area of law.

There also arises the negative attitude or apathy from the public that can be due to a lack of a common understanding of what constitutes Public Participation and the methods, processes and content needed to ensure effective engagement. It may also be lack of feedback from the previous consultations where the public feel that nothing ever comes out from their participation.

An increase in the amount and quality of civic education that citizens receive particularly through civil society mechanisms can greatly help in raising awareness and inspiring participation within the local communities.

Lack of an effective feedback mechanism on the decision made by the Authority (NEMA) to lead agencies and the general public may infringe on their rights to participate in the EIA process through legal redress. As highlighted, statutory provisions such as section 129(1) of EMCA has a limitation of time within which a person can seek legal redress. An effective feedback mechanism to all stakeholders would facilitate effective public participation in decision making.

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<sup>57</sup> The Public Participation Bill, 2018 s 5

Additionally, knowledge gaps within the general public in review of study reports may lead to ineffective participation especially where the public is not able to engage experts to assist in reviewing such reports with limited provisions on how to facilitate. There needs to be formulated a manner in which laypersons can access such relevant information so as to expose them adequately to be able to participate in reviews of study reports. Moreover, there needs to be a body formulated for experts that are within reach of the public and who are able to engage and assist on the various processes as regards public participation as they create awareness on the same.

Aside from this, localization of efforts geared towards public participation as per the EIA regulations seem to limit participation of the public in decision making and thus seemingly infringing on Article 42 and 70 of the Constitution of Kenya, 2010 for the reasons that impacts may not be localized. To curb this limitation, public participation at this stage should, instead of being a localized practice, be opened to the larger public so as to involve wider participation.

## **5. Recommendations**

To enhance access to environmental justice, the participation of persons in the Environmental Impact Assessment process is imperative. At the risk of over litigation, the development of public participation regulations would be timely in environmental governance. The regulations should seek to guide and bridge the gaps identified within the legal practice in Kenya.

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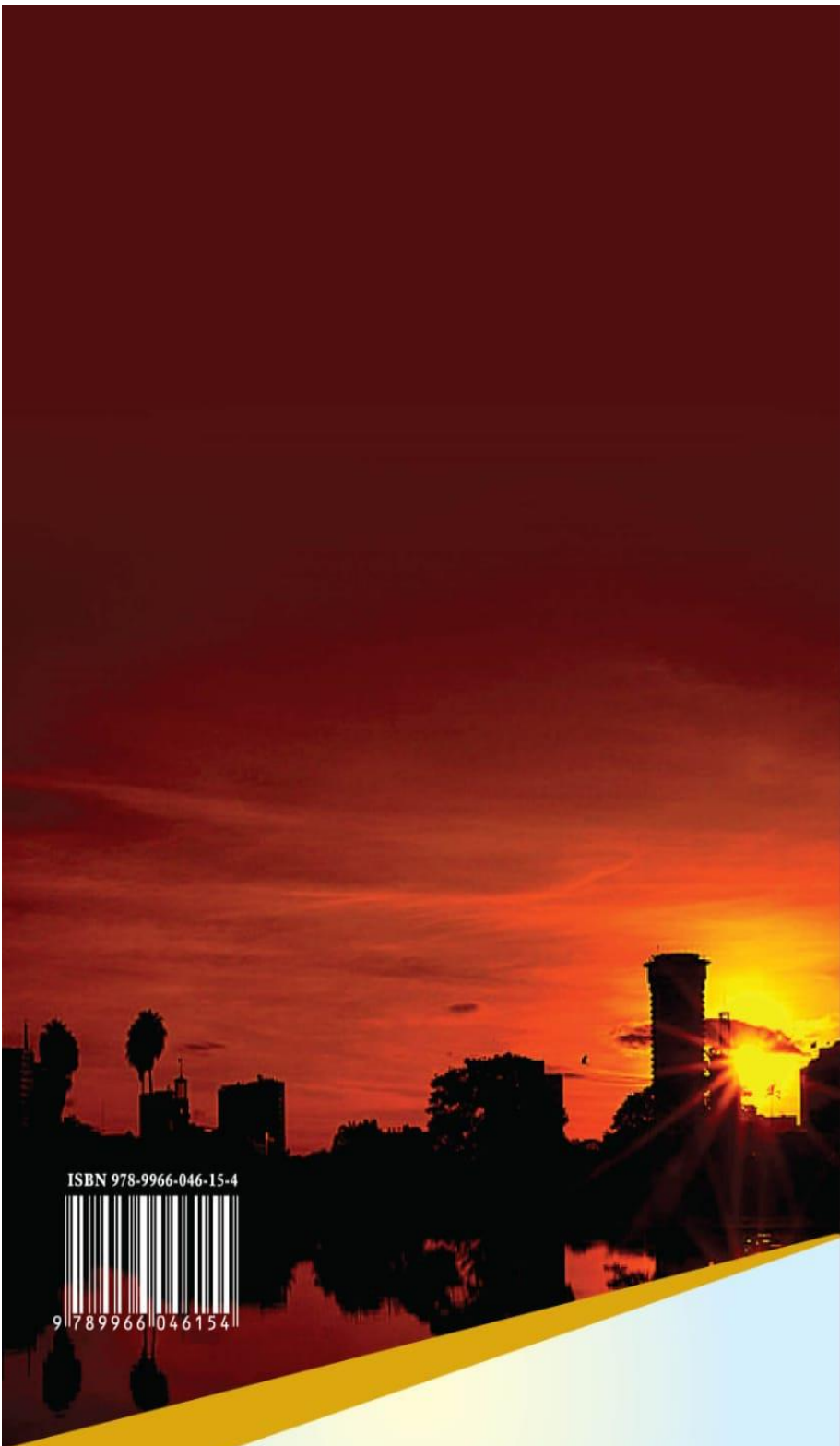
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ISBN 978-9966-046-15-4



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