

# Journal of Conflict Management & Sustainable Development



Towards a Healthier Environment for All: Designing Smart Buildings for Sustainability

Hon. Prof. Kariuki Muigua

Rethinking Environmental Dispute Resolution in Kenya: The Case for ADR Integration in the National Environmental Tribunal

David N. Njoroge

Legal and Policy Reform to Cure the Epidemic of Medical Malpractice in Kenya: Comparative Lessons for Accountable Healthcare

Michael Sang

The Small Claims Court: An Adjudicator's Perspective

Viola S. Wakuthii Muthoni

Safeguarding the Environment during and after Armed Conflict

Hon. Prof. Kariuki Muigua

Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards

Michael Sang

Towards a Unified Competition Law in Africa: Prospects and Challenges in the Continental Free Trade Area (AfCFTA)

Murithi Antony

Biomass or Biomass? A Case For Reform of The Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya

Abuya John Onyango

Strengthening Legal Protection to Tackle Migrant Smuggling and Trafficking in Persons in Kenya: Proposals for Reform -

Michael Sang

Volume 12

Issue 1

2025

ISSN 8 3008-1238



# **Journal of Conflict Management and Sustainable Development**

**Volume 12 Issue 1**

**2025**

# **Journal of Conflict Management and Sustainable Development**

## **Typesetting by:**

Anne W. Kiramba  
P.O. Box 60561 - 00200,  
Tel: +254 737 662 029,  
Nairobi, Kenya.

## **Printed by:**

Mouldex Printers  
P.O. Box 63395,  
Tel - 0723 366839,  
Nairobi, Kenya.

## **Published by:**

Glenwood Publishers Limited  
P.O. Box 76115 - 00508  
Tel +254 2210281,  
Nairobi, Kenya.

**© Glenwood Publishers Limited**

All rights reserved. No article published in this journal may be reproduced, transmitted in any form, stored in any retrieval system of any nature without prior written permission of the copyright holder. The views expressed in each article are those of the contributors and not necessarily those of Glenwood Publishers Limited.

Editorial Board

*Managing Editor*

Hon. Prof. Kariuki Muigua

*Associate Managing Editor*

Hon. Dr. Kenneth Wyne Mutuma

*Senior Assistant Editors*

Ngararu Maina

Salome Karimi Ngore

Hon. Endoo Dorcas Chepkemei

*Editorial Team*

Emmanuel Mwati Muriithi

Natasha Wanjiku Kahungi

Anne Wairimu Kiramba

Grace Chelagat-Tanah

James Ngotho Kariuki

Silver Andrew

Paula Kilusi

*Advisory Board*

Dr. Lilian Namuma S. Kong'ani

Dr. Johana Kambo Gathongo

Dr. Jane Mutheu Mutune

James Ndung'u Njuguna

Dr. Peter Gitahi Munyi

Prof. Tom Ojienda Sc.

Abdirazak Mohamed

Dr. Naomi Njuguna

Prof. George Osanjo

Prof. Thuita Thenya

Dr. Fidele Masengo

Dr. Francis Kariuki

*This Journal should be cited as (2025) 12(1) Journal of cmsd ISSN: 3008-1238*

## Editor's Note

Welcome to Volume 12 Issue 1 of the Journal of Conflict Management and Sustainable Development. This is the first issue of the Journal in the year 2025 demonstrating our commitment towards spearheading scholarly discourse on the themes of Conflict Management and Sustainable Development.

The Journal has continued to grow as a key academic resource in the fields of Conflict Management, Sustainable Development and related fields of knowledge. It focuses on emerging and pertinent areas and challenges in these fields and proposes necessary legal, institutional and policy reforms towards addressing these issues.

The Journal is now one of the most cited and authoritative publications in the fields of Conflict Management and Sustainable Development. It adheres to the highest level of academic standards and is peer reviewed and refereed so as to ensure credibility of information and validity of data.

This volume covers relevant topics and themes on Conflict Management and Sustainable Development which include: *Towards a Healthier Environment for All: Designing Smart Buildings for Sustainability; Rethinking Environmental Dispute Resolution in Kenya: The Case for ADR Integration in the National Environmental Tribunal; Legal and Policy Reform to Cure the Epidemic of Medical Malpractice in Kenya: Comparative Lessons for Accountable Healthcare; The Small Claims Court; An Adjudicator's Perspective; Safeguarding the Environment during and after Armed Conflict; Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards; Towards a Unified Competition Law in Africa: Prospects and Challenges in the Continental Free Trade Area (AfCFTA); Biomess or Biomass? A Case For Reform of The Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya; and Strengthening Legal Protection to Tackle Migrant Smuggling and Trafficking in Persons in Kenya: Proposals for Reform.*

I wish to thank the contributing authors, Editorial Team, reviewers and all those who have made it possible to continue publishing this Journal whose impact has been acknowledged both in Kenya and across the globe.

The Editorial team welcomes feedback from our audience across the world to enable us continue improving the Journal and align it to current trends in academia and specifically in the fields of Conflict Management and Sustainable Development.

The Journal adopts an open publication policy and does not discriminate against authors on any grounds. We thus encourage submission of papers from all persons including professionals, students, policy makers and the public at large. These submissions should be channeled to [editor@journalofcmsd.net](mailto:editor@journalofcmsd.net) and copied to [admin@kmco.co.ke](mailto:admin@kmco.co.ke) to be considered for publication in subsequent issues of the Journal.

The Journal can be accessed on <https://journalofcmsd.net>

**Hon. Prof. Kariuki Muigua Ph.D,FCI Arb,Ch.Arb,OGW.**  
**Editor, Nairobi,**  
**March, 2025.**

## List of Contributors

### **Hon. Prof. Kariuki Muigua**

Prof. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Prof. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He is a member of the Permanent Court of Arbitration, The Hague. He also serves as a member of the National Environment Tribunal. He has served as the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa from 2019 -2022.

Prof. became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

Prof. is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Prof. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.

*Prof. Kariuki Muigua can be reached through [muigua@kmco.co.ke](mailto:muigua@kmco.co.ke) or [admin@kmco.co.ke](mailto:admin@kmco.co.ke)*

### **David N. Njoroge**

David Njuguna Njoroge, FCIArb, CPM, CS is a holder of a Master of Laws LL.M in International Dispute Resolution from Queen Mary University of London, Bachelor of Laws LL.B from Makerere University, and a Post Graduate Diploma in Law from the Kenya School of Law. He is an Advocate of the High Court of Kenya of Fourteen Years in good standing, an Arbitrator Fellow (FCIArb) of the Chartered Institute of Arbitrators, a MAC Accredited Certified Professional Mediator (CPM), and a Certified Secretary (CS) by KASNEB.

Vocational Call; David is the Senior Partner and Head of Dispute Resolution at Njuguna & Njuguna Co. Advocates, a boutique law firm based in Embu. He is an Adjunct Lecturer at the University of Embu, School of Law; a Director at the Chartered Institute of Arbitrators Kenya Limited; an Approved Tutor of the Chartered Institute of Arbitrators and a prequalified ADR Tutor at Nairobi Centre for International Arbitration NCIA.

David has received advanced training in Trial Advocacy skills by the NITA and Lawyers without Borders (LWOB) Program in 2012. He has been a long standing Pro Bono Lawyer at FIDA, KELIN, LRF, RCK, AMREF, KITUO, ICJ, LSK, IJM, AIK among others and has received numerous Awards and Certificates of Appreciation in recognition.

Service to the Nation; David is serving the Judiciary as a Member of the National Steering Committee for the Implementation of the Alternative Justice Systems Policy (NaSCI-AJS), has served as a Member of the State Corporations Appeals Tribunal (SCAT) 2019-2022; the National Steering Committee for the Formulation of the Alternative Dispute Resolution (NSC-ADR) 2020-2021; he is currently serving as the Chairman of the Embu County Court Accredited Mediators. David has a special interest in ADR and AJS generally and its growth and development in the country as the most ideal mechanism of dispute resolution and social transformation in the society.

Service to the Bar; David has served as a Council Member of the Law Society of Kenya (LSK) 2018-2020; where he was the Convener of the ADR Committee. In November 2016, he was elected among the three Kenyan Council Members to the Governing Council of the East Africa Law Society (EALS) 2016-2018 and served in its Young Lawyers Committee.

In February 2016, he was elected as Council Member of LSK 2016–2018 where he was the Convener of the Young Lawyers Committee. Further, he has previously served as a Council Member of the Mt. Kenya Law Society in 2014-2016, a Branch of the LSK.

Accolades; among others, David has been listed and awarded Certificates of Recognition for being among the ‘Top 100 Litigation Lawyers Kenya 2024’ and ‘Top 100 Arbitrators Kenya 2023’ by peer organization, The Lawyer Africa, a Leader in Legal News, Profiles and Insights in Africa.

- Interlude; David is an avid Golfer and the inaugural Captain of Embu Golf Club.
- Benevolence; He is a committed Rotarian and an Award Winning Past President of the Rotary Club of Embu.
- Kinsfolk; He is married to one Beautiful Wife and they have an Adorable Baby Girl!

*David can be reached through [dnnjoroge16@gmail.com](mailto:dnnjoroge16@gmail.com)*

### **Michael Sang**

The Author holds a Master of Laws (LLM) in International Law from the University of Cape Town, South Africa and a Bachelor of Laws (LLB) from Moi University, Eldoret. The author is also an Advocate of the High Court with a Post Graduate Diploma in Law and employed in public service as a Prosecutor currently holding the position of Acting Deputy Director of Public Prosecutions (Ag. DDPP).

The author is in charge of the Department of Regional, County Affairs and Regulatory Prosecutions and the Head of the Counter - Terrorism and Transnational Organized Crimes Division at the Office of the Director of Public Prosecutions and based in Nairobi.

The author can be contacted through emails [sang7michael@gmail.com](mailto:sang7michael@gmail.com) or [michael.sang@odpp.go.ke](mailto:michael.sang@odpp.go.ke)

### **Viola S. Wakuthii Muthoni**

Viola Wakuthii Viola Muthoni is an advocate of the High Court of Kenya currently serving as a Resident Magistrate and Adjudicator of the inaugural Small Claims Court- Mombasa. She holds an LLM Degree in Transnational Crime and Crime Prevention (2014) from the University of the Western Cape. Ms. Muthoni has a vast knowledge of the legal practice of criminal law in Kenya. She has previously served as a prosecution counsel at the Office of the Director of Public Prosecutions.

*Viola can be reached through: [violawaks@yahoo.com](mailto:violawaks@yahoo.com)*

### **Murithi Antony**

Murithi Antony is a dynamic and forward-thinking lawyer and an ardent researcher focusing on Climate Action and Environmental Sustainability, Alternative Dispute Resolution (ADR), Commercial Law, International Economic Law, Law and Development, Constitutional Law and Legal/Regulatory Compliance. His approach to complex legal challenges is strategic, driven by a commitment to achieving impactful, positive outcomes through innovative solutions and sound practices.

Murithi has undertaken extensive training and obtained certifications in climate change and environmental issues, leadership, project management and resource mobilization, and has served in various capacities in youth organizations dedicated to climate action. He has contributed to high-level research projects as a research assistant in prominent firms. Currently, he serves as a Graduate Research Assistant at Centre for Climate Change Adaptation and Mitigation (CCCAM) University of Embu, while undertaking the Advocates' Training Program (ATP) at Kenya School of Law.

Above it all, Murithi is committed to the principles of servant leadership, striving to make a positive impact in the world in every possible way.

*He can be contacted through [amurithi326@gmail.com](mailto:amurithi326@gmail.com).*

### **Abuya John Onyango**

Abuya John Onyango is a final year student of Law at the University of Nairobi, Parklands Campus. He is a Certified Professional Mediator and a member of the Young Arbiters Society UON Chapter. He is currently serving as an Associate Editor to the Editorial Board at the Young Arbiters Society UON Chapter. Contacts: +254794478421. Email: [johnabuya92@gmail.com](mailto:johnabuya92@gmail.com)

# Journal of Conflict Management and Sustainable Development

## Volume 12 Issue 1 2025

<b>Content</b>	<b>Author</b>	<b>Page</b>
Towards a Healthier Environment for All: Designing Smart Buildings for Sustainability	Hon. Prof. Kariuki Muigua	1
Rethinking Environmental Dispute Resolution in Kenya: The Case for ADR Integration in the National Environmental Tribunal	David N. Njoroge	16
Legal and Policy Reform to Cure the Epidemic of Medical Malpractice in Kenya: Comparative Lessons for Accountable Healthcare	Michael Sang	42
The Small Claims Court; An Adjudicator's Perspective	Viola S. Wakuthii Muthoni	69
Safeguarding the Environment during and after Armed Conflict	Hon. Prof. Kariuki Muigua	96
Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards	Michael Sang	123
Towards a Unified Competition Law in Africa: Prospects and Challenges in the Continental Free Trade Area (AfCFTA)	Murithi Antony	150
Biomess or Biomass? A Case for Reform of the Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya	Abuya John Onyango	181
Strengthening Legal Protection to Tackle Migrant Smuggling and Trafficking in Persons in Kenya: Proposals for Reform -	Michael Sang	211

## Towards a Healthier Environment for All: Designing Smart Buildings for Sustainability

By: Kariuki Muigua\*

### Abstract

*This paper examines the need to decouple natural resource use and environmental impacts from economic growth by designing smart buildings. The paper argues that the building sector is responsible for several environmental challenges including climate change, pollution, and depletion of natural resources. In light of these challenges, the paper asserts that designing smart buildings is a vital goal towards a healthier environment for all. The paper defines smart buildings and discusses their role in fostering sustainability. It also suggests approaches towards designing smart buildings for sustainability.*

### 1.0 Introduction

It has been noted that one of the greatest global challenges is to integrate environmental sustainability with economic growth and welfare by decoupling environmental degradation from economic growth<sup>1</sup>. The ideal of environmental sustainability involves conserving the environment and natural resources and protecting global ecosystems to support human health and well-being, now and in the future<sup>2</sup>. Environmental sustainability envisages the

---

\* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), OGW, LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Professor of Environmental Law and Conflict Management at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [January, 2025].

<sup>1</sup> United Nations Environment Programme., 'Goal 12: Sustainable Consumption and Production' Available at <https://www.unep.org/topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-12-9#:~:text=Sustainable%20Development%20Goal%2012%20encourages,are%20toxic%20to%20the%20environment> (Accessed on 22/01/2025)

<sup>2</sup> What Is Environmental Sustainability?., Available at

condition of resilience, balance, and connection to allow humanity to meet its requirements without surpassing the capacity of its supporting ecosystems and without harming biological diversity<sup>3</sup>. It focuses on issues such as reducing carbon emissions, promoting renewable energy, promoting effective waste management, curbing pollution, and ensuring equitable access and use of natural resources<sup>4</sup>.

Achieving environmental sustainability has become an urgent global concern in light of mounting environmental threats including depletion of natural resources, environmental degradation, desertification, drought, freshwater scarcity, pollution, loss of biodiversity, and climate change<sup>5</sup>. Due to these challenges, it is imperative to pursue economic growth without damaging or depleting the environment and natural resources<sup>6</sup>. Decoupling natural resource use and environmental impacts from economic growth is therefore vital for Sustainable Development<sup>7</sup>. This concept involves reducing the rate of use of (primary) resources per unit of economic activity<sup>8</sup>. It is based on using less material, energy, water and land resources for the same economic output<sup>9</sup>.

---

<https://sphera.com/resources/glossary/what-is-environmental-sustainability/>

(Accessed on 22/01/2025)

<sup>3</sup> Khan. N. H., 'Ecodesigning for Ecological Sustainability' *Frontiers in Plant-Soil Interaction.*, 2021. Pp 589-616

<sup>4</sup> Ibid

<sup>5</sup> United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 22/01/2025)

<sup>6</sup> Rowse. B., 'Economic Sustainability: Definition, Importance, and Examples' Available at <https://sustainabilityeducationacademy.com/economic-sustainability-defined/> (Accessed on 22/01/2025)

<sup>7</sup> United Nations Environment Programme., 'Decoupling Natural Resource Use and Environmental Impacts from Economic Growth (Summary)' Available at <https://www.unep.org/resources/report/decoupling-natural-resource-use-and-environmental-impacts-economic-growth-summary> (Accessed on 22/01/2025)

<sup>8</sup> Ibid

<sup>9</sup> Ibid

This leads to an increase in the efficiency with which resources are used therefore fostering environmental sustainability while promoting economic growth<sup>10</sup>.

This paper examines the need to decouple natural resource use and environmental impacts from economic growth by designing smart buildings. The paper argues that the building sector is responsible for several environmental challenges including climate change, pollution, and depletion of natural resources. In light of these challenges, the paper asserts that designing smart buildings is a vital goal towards a healthier environment for all. The paper defines smart buildings and discusses their role in fostering sustainability. It also suggests approaches towards designing smart buildings for sustainability.

## **2.0 Environmental Impacts of the Building Sector**

The building industry comprises various facilities including commercial buildings, infrastructure, industrial, and residential buildings<sup>11</sup>. The industry is a major source of employment and provides job opportunities for millions of people globally in areas such as construction, building supplies, and transportation services for products and materials required at construction sites<sup>12</sup>. The International Labour Organization (ILO) acknowledges that the construction industry generates jobs for large numbers of people all over the world<sup>13</sup>. The industry is also critical for delivery of critical buildings, facilities and infrastructure that are vital for human well-being and development including hospitals, office buildings, apartments, stadiums, roads, bridges, and

---

<sup>10</sup> Ibid

<sup>11</sup> Introduction to the Building Industry., Available at <https://psu.pb.unizin.org/introductiontothebuildingindustry/chapter/chapter-1/> (Accessed on 22/01/2025)

<sup>12</sup> Ibid

<sup>13</sup> International Labor Organization., 'Construction Sector' Available at <https://www.ilo.org/industries-and-sectors/construction-sector> (Accessed on 22/01/2025)

railway stations, and dams<sup>14</sup>. Despite its economic benefits, the building industry is associated with several environmental concerns.

The building sector is a major cause of climate change<sup>15</sup>. UNEP notes that the buildings and construction sector contributes significantly to global climate change, accounting for about 21 per cent of global greenhouse gas emissions<sup>16</sup>. For instance, the building value chain alone is responsible for nearly 37 per cent of global carbon emissions involving multiple harder-to-abate sectors<sup>17</sup>. The building industry is therefore responsible for a significant amount of carbon dioxide emissions from buildings operation and material production<sup>18</sup>. Further, it has been noted that the production of materials used in the construction process including cement, steel, aluminium, bricks, and glass is major source of greenhouse gas emissions<sup>19</sup>. The building sector value chain thus involves harder-to-abate industrial sectors such as steel and cement, making its decarbonisation challenging<sup>20</sup>. As a result, it has been noted that the building sector is vital in the fight against climate change<sup>21</sup>.

---

<sup>14</sup> Introduction to the Building Industry., Op Cit

<sup>15</sup> United Nations Environment Programme., 'Sustainable Buildings' Available at <https://www.unep.org/topics/cities/buildings-and-construction/sustainable-buildings> (Accessed on 22/01/2025)

<sup>16</sup> United Nations Environment Programme., 'Global Status Report for Buildings and Construction' Available at [https://wedocs.unep.org/bitstream/handle/20.500.11822/45095/global\\_status\\_report\\_buildings\\_construction\\_2023.pdf?sequence=3&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/45095/global_status_report_buildings_construction_2023.pdf?sequence=3&isAllowed=y) (Accessed on 22/01/2025)

<sup>17</sup> World Economic Forum., 'The Building Sector is key to the fight against Climate Change' Available at <https://www.weforum.org/stories/2024/06/building-sector-climate-change-construction-materials/> (Accessed on 22/01/2025)

<sup>18</sup> United Nations Environment Programme., 'Global Status Report for Buildings and Construction' Op Cit

<sup>19</sup> Ibid

<sup>20</sup> World Economic Forum., 'The Building Sector is key to the fight against Climate Change' Op Cit

<sup>21</sup> Ibid

Energy efficiency is another major environmental concern in the building industry. According to the International Energy Agency (IEA), the building sector which includes energy used for constructing, heating, cooling and lighting homes and businesses, as well as the appliances and equipment installed in them, accounts for over one third of global energy consumption and emissions<sup>22</sup>. Operational energy demand in buildings is very high in order to support key services including space heating and cooling, water heating, lighting, cooking and other uses<sup>23</sup>. It has been noted that global floor area is growing rapidly, especially in developing countries, and growing wealth means more and more consumers are buying air conditioners and other appliances that heavily rely on energy<sup>24</sup>. Fostering energy efficiency is therefore crucial in the building industry.

The building industry is also responsible for environmental pollution<sup>25</sup>. For instance, it has been noted that liquid waste on construction sites is impacting productivity and contributing to urban wastewater pollution problems<sup>26</sup>. Construction sites often use large volumes of fresh water, turning it into liquid waste pollution that most sites discharge into sewage systems<sup>27</sup>. The production of materials used in the construction process and dust particles from construction sites further fuels air pollution<sup>28</sup>. The building industry also significantly changes the surface of a land due to clearing of vegetation and

---

<sup>22</sup> International Energy Agency., 'Buildings' Available at <https://www.iea.org/energy-system/buildings> (Accessed on 22/01/2025)

<sup>23</sup> United Nations Environment Programme., 'Global Status Report for Buildings and Construction' Op Cit

<sup>24</sup> International Energy Agency., 'Buildings' Op Cit

<sup>25</sup> World Economic Forum., 'As construction accelerates globally, implementing sustainable building practices is critical' Available at <https://www.weforum.org/stories/2024/02/construction-sustainable-building/> (Accessed on 22/01/2025)

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> How Does Construction Impact the Environment?., Available at <https://gocontractor.com/blog/how-does-construction-impact-the-environment/> (Accessed on 22/01/2025)

excavating for construction purposes causing environmental degradation and pollution<sup>29</sup>.

The building industry is therefore a major cause of several environmental concerns including climate change, pollution, and high energy use. UNEP points out that the buildings and construction sectors account for a significant proportion of global energy use, energy-related green-house gas emissions, municipal water use, and waste<sup>30</sup>. In light of these problems, implementing sustainable building practices is critical towards Sustainable Development<sup>31</sup>. It is therefore necessary to design smart buildings towards a healthier environment for all.

### **3.0 Designing Smart Buildings for Sustainability**

The environmental impacts of the building sector requires a shift towards sustainability. Smart buildings have been described as structures that utilise technology to optimise resource usage, efficiency and comfort for occupants<sup>32</sup>. Further, it has been pointed out that smart buildings use information and communications technology-based systems, services and technology to optimize the facility's performance<sup>33</sup>. In smart buildings, systems, including heating, ventilation and security, are equipped with networked sensors that provide information on a continuous basis about the condition and

---

<sup>29</sup> Ibid

<sup>30</sup> United Nations Environment Programme., 'Sustainable Buildings and Construction' Available at <https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/asia-pacific-roadmap-4> (Accessed on 23/01/2025)

<sup>31</sup> World Economic Forum., 'As construction accelerates globally, implementing sustainable building practices is critical' Op Cit

<sup>32</sup> Smart buildings, explained - here's what they mean for the built environment., Available at <https://www.ucem.ac.uk/whats-happening/articles/smart-buildings/> (Accessed on 23/01/2025)

<sup>33</sup> Smart Buildings/Smart Facilities., Available at <https://www.cognizant.com/us/en/glossary/smart-buildings> (Accessed on 23/01/2025)

performance of those systems<sup>34</sup>. Smart buildings are usually equipped with a variety of modern and innovative technologies including Artificial Intelligence (AI), Augmented Reality (AR), and the Internet of Things (IoT) in order to enhance their efficiency and optimise resource usage<sup>35</sup>. These advanced technologies enable efficient and automated control of various systems in smart buildings including lighting, heating, ventilation, air conditioning and security<sup>36</sup>.

It has been noted that initially, smart buildings focused on incorporating advanced technologies for automation and control systems<sup>37</sup>. However, with the growing concerns about the environmental impacts of the building sector, the concept of smart buildings has evolved to encompass key tenets of sustainability including energy efficiency, resource conservation, and occupant well-being<sup>38</sup>. Smart buildings therefore aim to reduce the environmental impact of the building and construction sector and contribute to the achievement of the Sustainable Development Goals (SDGs)<sup>39</sup>.

Smart buildings are vital in fostering sustainability. It has been noted that these buildings reduce energy costs through real-time adjustments of heating, cooling, lighting and other key systems based on changes in weather and building occupancy<sup>40</sup>. Smart buildings can also be monitored and adjusted remotely and are therefore ideal in reducing the carbon footprint of the

---

<sup>34</sup> Ibid

<sup>35</sup> Smart buildings, explained – here’s what they mean for the built environment., Op Cit

<sup>36</sup> Smart Buildings and Sustainable Development Goals: A Synergy., Available at <https://green.org/2024/01/30/smart-buildings-and-sustainable-development-goals-a-synergy/> (Accessed on 23/01/2025)

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> United Nations Environment Programme., ‘Buildings and Construction’ Available at <https://www.unep.org/topics/cities/buildings-and-construction> (Accessed on 23/01/2025)

<sup>40</sup> Smart Buildings/Smart Facilities., Op Cit

building and construction industry<sup>41</sup>. Further, smart buildings have the ability to enhance sustainability through improved insulation, the use of low energy appliances, and high efficiency ventilation, heating and cooling systems<sup>42</sup>. In addition, it has been noted that smart buildings that use surveillance and security systems improve the experience for occupants by providing a safer, better-protected place to live and work<sup>43</sup>.

Designing smart buildings is therefore paramount towards a healthier environment for all. These buildings foster energy efficiency and limit greenhouse gas emissions in the building and construction sector<sup>44</sup>. Through their advanced automation and control systems, smart buildings optimise energy consumption therefore enhancing energy efficiency<sup>45</sup>. Further, these buildings promote resource conservation and waste reduction by monitoring and managing resource usage<sup>46</sup>. Smart buildings also a positive impact on human health and well-being by optimising indoor air quality, temperature, and lighting thus ensuring healthier and sustainable living and working environments<sup>47</sup>.

The 2030 Agenda for Sustainable Development urges all countries to build resilient infrastructure including through enhancing sustainability and resource-use efficiency<sup>48</sup>. It also seeks to promote safe and secure working environments for all<sup>49</sup>. Designing smart buildings is key towards realising

---

<sup>41</sup> Ibid

<sup>42</sup> United Nations., 'Building for the Future: A United Nations Showcase in Nairobi' Available at <https://www.uncclearn.org/wp-content/uploads/library/unep148.pdf> (Accessed on 23/01/2025)

<sup>43</sup> Smart Buildings/Smart Facilities., Op Cit

<sup>44</sup> Smart Buildings and Sustainable Development Goals: A Synergy., Op Cit

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

<sup>49</sup> Ibid, SDG 8.8

these targets by optimising resource efficiency including energy and ensuring healthier and sustainable living and working environments<sup>50</sup>. It is therefore necessary to design smart buildings for sustainability.

Designing smart buildings requires the building and construction sector to embrace sustainable design practices<sup>51</sup>. It has been noted that early planning and design of buildings has a major impact on reducing energy use and pollution<sup>52</sup>. Sustainable design is key towards optimising resources including building materials and water, conserving energy, and minimising waste<sup>53</sup>. It is also necessary to promote circularity approaches in the building and construction industry through creating enabling frameworks for the responsible acquisition of building materials and disposal of waste<sup>54</sup>. It has been pointed out that by applying the principles of the circular economy in the way buildings are designed, it is possible to reduce greenhouse gas emissions, while creating urban areas that are more liveable, productive, convenient, and sustainable<sup>55</sup>. It is therefore necessary to strengthen circularity in the building and construction sector including through preventing, reducing, reusing, and recycling materials, embracing green procurement, and promoting smart renovation and retrofit of buildings<sup>56</sup>.

Fostering energy efficiency is also a key goal towards designing smart

---

<sup>50</sup> Smart Buildings and Sustainable Development Goals: A Synergy., Op Cit

<sup>51</sup> The 7 Principles of Sustainable Construction., Available at <https://buildpass.co.uk/blog/the-7-principles-of-sustainable-construction/> (Accessed on 23/01/2025)

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> United Nations Environment Programme., 'Buildings and Construction' Op Cit

<sup>55</sup> Ellen Macarthur Foundation., 'Reimagining our buildings and spaces for a circular economy' Available at <https://www.ellenmacarthurfoundation.org/topics/built-environment/overview> (Accessed on 23/01/2025)

<sup>56</sup> What does the Circular Economy mean for the built environment?., Available at <https://www.rpsgroup.com/services/environment/sustainability-and-climate-resilience/what-does-the-circular-economy-mean-for-the-built-environment/> (Accessed on 23/01/2025)

buildings<sup>57</sup>. It is therefore necessary to utilise energy efficient materials such as insulating concrete forms, low-emissivity windows, and structural insulated panels in designing buildings<sup>58</sup>. Furthermore, adopting energy efficient building methods which focus on key systems including air quality, insulation, heating, and cooling techniques<sup>59</sup>. In addition, utilising renewable sources of energy such as solar energy to meet the electricity needs of buildings is crucial towards fostering energy efficiency in the building and construction sector<sup>60</sup>.

Enhancing indoor air quality is also a crucial component in designing smart buildings<sup>61</sup>. Therefore, in designing buildings, it is paramount to ensure a comfortable, productive and healthy indoor environment by considering key parameters including temperature, lighting, noise pollution, adequate ventilation and the quality of air<sup>62</sup>. Improving indoor air quality requires buildings to have adequate ventilation and utilise heating systems that minimise exposure to particles<sup>63</sup>.

In designing smart buildings, it is also necessary to conserve water including through harvesting rainwater, utilising pressure reducing valves to reduce the flow of water in toilets, showers and kitchens, ensuring efficiency in detecting and addressing leakages<sup>64</sup>. Utilising sustainable construction materials is also crucial towards designing smart buildings for sustainability. It has been noted

---

<sup>57</sup> The 7 Principles of Sustainable Construction., Op Cit

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> United Nations., 'Building for the Future: A United Nations Showcase in Nairobi' Op Cit

<sup>61</sup> The Most Sustainable Building Is the One That Is Already Built: Multi-purpose and Healthy Spaces., Available at <https://www.archdaily.com/979371/the-most-sustainable-building-is-the-one-that-is-already-built-multi-purpose-and-healthy-spaces> (Accessed on 23/01/2025)

<sup>62</sup> Ibid

<sup>63</sup> The 7 Principles of Sustainable Construction., Op Cit

<sup>64</sup> United Nations., 'Building for the Future: A United Nations Showcase in Nairobi' Op Cit

that materials such as net-zero carbon dioxide concrete elements, carbon dioxide free steel with improved corrosion resistance, or fit-out materials with reduced volatile organic compound emissions are preferable and can enhance the sustainability of the building and construction industry<sup>65</sup>. In addition, adopting green construction materials including fly ash based bricks, Reinforced Cement Concrete (RCC) blocks, cellular lightweight concrete, bamboo-based materials and bagasse boards; efficient lighting system; and adoption of nature-based infrastructure can aid in the reduction of greenhouse gases in the building industry and improved efforts towards tackling climate change among other environmental impacts associated with the sector<sup>66</sup>.

#### **4.0 Conclusion**

Designing smart buildings is necessary in ensuring energy efficiency, limiting greenhouse gas emissions in the building and construction sector, conserving resources including water, minimising waste, and improving human health and well-being by optimising indoor air quality, temperature, and lighting towards ensuring healthier and sustainable living and working environments<sup>67</sup>. In order to actualise this goal, it is necessary to embrace sustainable design practices, promote circularity in the building and construction sector, foster energy efficiency, improve indoor air quality, conserve water, and utilise sustainable construction materials<sup>68</sup>.

Designing smart buildings is thus necessary and possible towards a healthier

---

<sup>65</sup> Milani. L., Mohr. D., & Sandri. N., 'Built to Last: Making Sustainability a Priority in Transport Infrastructure.' Available at <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/built-to-last-making-sustainability-a-priority-in-transport-infrastructure> (Accessed on 23/01/2025)

<sup>66</sup> Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Available at <https://thesciencepolicyforum.org/articles/perspectives/role-of-science-technology-and-innovation-in-addressing-climate-change-a-perspective/> (Accessed on 23/01/2025)

<sup>67</sup> Smart Buildings and Sustainable Development Goals: A Synergy., Op Cit

<sup>68</sup> The 7 Principles of Sustainable Construction., Op Cit

environment for all.

## References

Ellen Macarthur Foundation., 'Reimagining our buildings and spaces for a circular economy' Available at <https://www.ellenmacarthurfoundation.org/topics/built-environment/overview>

How Does Construction Impact the Environment?., Available at <https://gocontractor.com/blog/how-does-construction-impact-the-environment/>  
International Energy Agency., 'Buildings' Available at <https://www.iea.org/energy-system/buildings>

International Labor Organization., 'Construction Sector' Available at <https://www.ilo.org/industries-and-sectors/construction-sector>  
Introduction to the Building Industry., Available at <https://psu.pb.unizin.org/introductiontothebuildingindustry/chapter/chapter-1/>

Khan. N. H., 'Ecodesigning for Ecological Sustainability' *Frontiers in Plant-Soil Interaction.*, 2021. Pp 589-616

Milani. L., Mohr. D., & Sandri. N., 'Built to Last: Making Sustainability a Priority in Transport Infrastructure.' Available at <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/built-to-last-making-sustainability-a-priority-in-transport-infrastructure>

Rowse. B., 'Economic Sustainability: Definition, Importance, and Examples' Available at <https://sustainabilityeducationacademy.com/economic-sustainability-defined/>

Smart Buildings and Sustainable Development Goals: A Synergy., Available at <https://green.org/2024/01/30/smart-buildings-and-sustainable-development-goals-a-synergy/>

Smart buildings, explained - here's what they mean for the built environment., Available at <https://www.uce.ac.uk/whats-happening/articles/smart-buildings/>

Smart Buildings/Smart Facilities., Available at <https://www.cognizant.com/us/en/glossary/smart-buildings>  
The 7 Principles of Sustainable Construction., Available at <https://buildpass.co.uk/blog/the-7-principles-of-sustainable-construction/>

The Most Sustainable Building Is the One That Is Already Built: Multi-purpose and Healthy Spaces., Available at <https://www.archdaily.com/979371/the-most-sustainable-building-is-the-one-that-is-already-built-multi-purpose-and-healthy-spaces>

[sustainable-building-is-the-one-that-is-already-built-multi-purpose-and-healthy-spaces](#)

United Nations Environment Programme., 'Buildings and Construction' Available at <https://www.unep.org/topics/cities/buildings-and-construction>

United Nations Environment Programme., 'Decoupling Natural Resource Use and Environmental Impacts from Economic Growth (Summary)' Available at <https://www.unep.org/resources/report/decoupling-natural-resource-use-and-environmental-impacts-economic-growth-summary>

United Nations Environment Programme., 'Global Status Report for Buildings and Construction' Available at [https://wedocs.unep.org/bitstream/handle/20.500.11822/45095/global\\_status\\_report\\_buildings\\_construction\\_2023.pdf?sequence=3&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/45095/global_status_report_buildings_construction_2023.pdf?sequence=3&isAllowed=y)

United Nations Environment Programme., 'Goal 12: Sustainable Consumption and Production' Available at <https://www.unep.org/topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-12-9#:~:text=Sustainable%20Development%20Goal%2012%20encourages,are%20toxic%20to%20the%20environment>

United Nations Environment Programme., 'Sustainable Buildings and Construction' Available at <https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/asia-pacific-roadmap-4>

United Nations Environment Programme., 'Sustainable Buildings' Available at <https://www.unep.org/topics/cities/buildings-and-construction/sustainable-buildings>

United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

United Nations., 'Building for the Future: A United Nations Showcase in Nairobi' Available at <https://www.unclearn.org/wp-content/uploads/library/unep148.pdf>

Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Available at <https://thesciencepolicyforum.org/articles/perspectives/role-of-science-technology-and-innovation-inaddressing-climate-change-a-perspective/>  
What does the Circular Economy mean for the built environment?., Available at

<https://www.rpsgroup.com/services/environment/sustainability-and-climate-resilience/what-does-the-circular-economy-mean-for-the-built-environment/>

What Is Environmental Sustainability?., Available at <https://sphera.com/resources/glossary/what-is-environmental-sustainability/>  
World Economic Forum., 'As construction accelerates globally, implementing sustainable building practices is critical' Available at <https://www.weforum.org/stories/2024/02/construction-sustainable-building/>

World Economic Forum., 'The Building Sector is key to the fight against Climate Change' Available at <https://www.weforum.org/stories/2024/06/building-sector-climate-change-construction-materials/>

## **Rethinking Environmental Dispute Resolution in Kenya: The Case for ADR Integration in the National Environmental Tribunal**

By: *David N. Njoroge\**

### ***Abstract***

*This paper critically examines the integration of Alternative Dispute Resolution (ADR) into the National Environmental Tribunal (NET) to improve the efficiency and inclusivity of environmental justice and dispute resolution. It highlights the limitations of NET's current adversarial, litigation-driven framework, including high costs, lengthy processes, and limited accessibility for marginalized communities. The study argues that ADR is not a novel concept for NET, as Articles 159 of the Constitution mandate its application. It proposes measures such as preliminary ADR steps before formal hearings and dispute categorization based on complexity to facilitate ADR integration. While emphasizing the potential of ADR to enhance consensus-based resolutions, the paper acknowledges that formal adjudication remains crucial for cases involving severe environmental violations or significant public interest, positioning ADR as a complementary, rather than a replacement, to NET's processes.*

### **Introduction**

With the rise in environmental developments in Kenya, disputes have become more frequent and complex, justifying the need to tailor the existing dispute resolution framework to effectively address these emerging challenges.<sup>1</sup> The

---

\* LL.M (QMUL) LL.B (MUK) PG Dip (KSL), Adjunct Law Lecturer, University of Embu; Member - The National Environment Tribunal (NET); Member - National Steering Committee for the Implementation of the Alternative Justice System Policy (NaSCI-AJS); Director - Chartered Institute of Arbitrators, Kenya Branch (CIArb-K).  
Email: [dnn@njugunaadvocates.co.ke](mailto:dnn@njugunaadvocates.co.ke)

<sup>1</sup> Lemarkoko, Alexander L. "The Management of Natural Resource Based Conflicts in Africa: A Case Study of The Mau Forest Complex,(Kenya), 1963-2010." PhD diss., 2011.

National Environment Tribunal (NET) was established to provide a specialized legal platform to deal with appeals emanating from the National Environmental Management Authority (MEMA) and on matters that involve significant ecological, economic, and social implications.<sup>2</sup> Despite its specialized mandate, the tribunal's dependence on formal procedures often leads to outcomes that fall short of addressing the underlying causes of disputes.<sup>3</sup> The tribunal also faces challenges typical of formal litigation, including an adversarial nature, prolonged case resolution timelines, and high litigation costs.<sup>4</sup>

Alternative Dispute Resolution (ADR) comes as a solution that could address these challenges through its approaches that have reduced formalities and procedural technicalities, embrace mutual understanding, inclusiveness, and consensus building.<sup>5</sup> Incontestably, integrating ADR into NET could facilitate more inclusive and expeditious resolutions that benefit both the environment and affected communities.<sup>6</sup> This paper examines the legal framework and mandate of the National Environmental Tribunal (NET), explores Alternative Dispute Resolution mechanisms and how they could be integrated into the tribunal to handle cases more effectively, while highlighting approaches for effective integration. The paper ultimately argues that ADR could enhance

---

<sup>2</sup> National Environment Management Authority, *State of Environment Report 2019–2021* (National Environment Management Authority, 2021) <[https://www.nema.go.ke/images/Docs/EIA\\_1920-1929/NEMA%20SoE%202019-2021.pdf](https://www.nema.go.ke/images/Docs/EIA_1920-1929/NEMA%20SoE%202019-2021.pdf)> accessed 13 November 2024.

<sup>3</sup> *Ibid.*

<sup>4</sup> Ng, Iris. "Beyond the Litigation Narrative: The Place and Roles of ADR in Climate Change Disputes." *Asian Dispute Review* 24, no. 1 (2022).

<sup>5</sup> Alkhayer, J., N. Gupta, and C. M. Gupta. "Role of ADR methods in environmental conflicts in the light of sustainable development." In *IOP Conference Series: Earth and Environmental Science*, vol. 1084, no. 1, p. 012057. IOP Publishing, 2022.

<sup>6</sup> Osanan, Bruno O. "THE APPLICATION OF ADR IN RESOLVING CLIMATE-RELATED DISPUTES TO ACHIEVE SUSTAINABLE DEVELOPMENT IN KENYA." *University of Nairobi Law Journal* 10, no. 1 (2023).

sustainable environmental dispute resolution in Kenya.

### **1. Legal and Institutional Framework of the National Environmental Tribunal (NET)**

The National Environmental Tribunal is established under Part XII of the Environmental Management and Coordination Act (EMCA) of 1999, which outlines its composition and mandate.<sup>7</sup> The EMCA Act was enacted, pursuant to its long title, to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.<sup>8</sup> The act is central the quest to achieve the concepts of sustainable development and to regulate activities that have bearing on the environment.<sup>9</sup>

Principally, the National Environmental Tribunal was established to receive, hear and determine appeals arising from decisions of the National Environment Management Authority (NEMA) on issuance, denial or revocation of environmental impact assessment (EIA) licenses, among other decisions.<sup>10</sup> This was as a response to need to have a specialized institution capable of addressing the legal, technical, and procedural demand of such environmental disputes in an efficient manner.<sup>11</sup> To ensure the tribunal's efficiency in delivering justice, the EMCA Act, under Section 126, empowers the tribunal to regulate its own proceedings, exempting it from the rules of

---

<sup>7</sup> Cap 387, Laws of Kenya.

<sup>8</sup> The long title, EMCA, 1999.

<sup>9</sup> *Ibid*, Sec 125.

<sup>10</sup> See, Kenya Law Reporting, "Know your tribunals". Available at <[https://kenyalaw.org/kl/index.php?id=9050#:~:text=ENVIRONMENT%20TRIBUNAL%20\(NET\)-,Establishment,undertake%20developments%20of%20specified%20nature.>](https://kenyalaw.org/kl/index.php?id=9050#:~:text=ENVIRONMENT%20TRIBUNAL%20(NET)-,Establishment,undertake%20developments%20of%20specified%20nature.>)

<sup>11</sup> Kaniaru, Donald W. "Environmental courts and tribunals: the case of Kenya." *Pace Envntl. L. Rev.* 29 (2011): 566.

evidence set out in the Evidence Act.<sup>12</sup> It also grants flexibility in determining the times and locations of its sittings.<sup>13</sup>

The tribunal's mandate reflects and upholds Kenya's commitment to environmental justice as guaranteed by Article 42 of the 2010 Constitution, which assures every person the right to a clean and healthy environment.<sup>14</sup> In fulfilling this mandate, NET contributes to sustainable development by ensuring adherence to environmental principles, development objectives and consistent and fair enforcement of environmental regulations and public participation laws, especially in cases of large-scale development projects with potential ecological consequences.<sup>15</sup>

EMCA requires that specific environmental regulations and impact assessments be adhered to before projects can proceed.<sup>16</sup> This Act empowers the National Environment Tribunal (NET) to hear appeals and resolve disputes arising from decisions made by the National Environmental Management Authority (NEMA).<sup>17</sup> As a vital component of Kenya's environmental governance framework, the NET provides an independent forum where affected communities, developers, and other stakeholders can challenge NEMA's decisions, thereby promoting transparency and accountability.<sup>18</sup>

---

<sup>12</sup> EMCA Act, 1999.

<sup>13</sup> *Ibid.*

<sup>14</sup> Constitution of Kenya 2010, Article 42

<sup>15</sup> Mokeira, Nyangeri Rose. "States' obligations Under International Environmental Law: Case of Kenya's Devolved Governance System and Montreal Protocol." Phd Diss., Kenyatta University, 2022.

<sup>16</sup> Biamah, Elijah K., Jacqueline Kiio, and Benjamin Kogo. "Environmental impact assessment in Kenya." In *Developments in Earth surface processes*, vol. 16, pp. 237-264. Elsevier, 2013.

<sup>17</sup> Kaniaru, Donald W. "The National Environment Tribunal: A Review of its First Decade." *Env'tl. Pol'y & L.* 43 (2013): 333.

<sup>18</sup> Soyapi, Caiphaz B. "Environmental protection in Kenya's environment and land court." *Journal of Environmental Law* 31, no. 1 (2019): 151-161.

However, despite its critical role, NET's procedures are predominantly adversarial, often requiring formal legal representation, lengthy hearings, and strict procedural rules, which can be intimidating or inaccessible for marginalized communities and individuals with limited financial resources.<sup>19</sup> The adversarial nature of NET proceedings, although beneficial in some instances, has been criticized for its impact on accessibility and efficiency.<sup>20</sup> The high litigation costs and lengthy timelines often result in delays in decisions regarding environmental permits and regulatory enforcement, hindering NET's ability to address urgent environmental concerns in a timely manner.<sup>21</sup> Consequently, while NET was established to advance environmental justice, its dependence on traditional adjudicatory methods has constrained its effectiveness, underscoring the need for the adoption of more accessible, cost-effective, and flexible dispute resolution mechanisms.<sup>22</sup>

## **2. An Evaluation of Alternative Dispute Resolution (ADR) and Its Mechanisms**

Alternative Dispute Resolution (ADR) refers to a set of processes designed to

---

<sup>19</sup> Kaniaru, Donald W. "The National Environment Tribunal: A Review of its First Decade." *Env'tl. Pol'y & L.* 43 (2013): 333.

<sup>20</sup> Bosek, Joel Kimutai. "Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges." *African Human Rights Law Journal* 14, no. 2 (2014): 489-508.

<sup>21</sup> Murithi Antony and James Njuguna, "Harnessing appropriate Dispute Resolution (ADR) for Achieving Environmental Justice: A Path to Sustainable Development." ((2024) 2(2) *Journal of Appropriate Dispute Resolution & Sustainability*) Page 57-82. Available at <https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>

<sup>22</sup> Ingonga, Renson Mulele. "Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya." *See also*, Mwanza, Rosemary Mutheu. "Harnessing the transformative potential of the constitutional human right to a clean and healthy environment in the context of corporate environmental damage in Kenya: A critical perspective." *Journal of Human Rights and the Environment* 10, no. 2 (2019): 215-238.

resolve disputes without resorting to court.<sup>23</sup> ADR is an efficient, inclusive, collaborative, and more friendly method of resolving dispute, especially due to its informal nature as compared to traditional litigation.<sup>24</sup> ADR is recognized locally and internationally and has been codified in different legal instruments.<sup>25</sup> The constitution of Kenya, for instance, provides that Alternative form of Dispute Resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted.<sup>26</sup> This is a restatement of Article 33 of the United Nations Charter which precisely states as follows:

*"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."*<sup>27</sup>

ADR mechanisms are specifically crafted to resolve disputes by addressing their underlying causes and emphasizing the restoration of relationships rather than rigid adherence to procedural technicalities.<sup>28</sup> Different types of disputes require distinct ADR approaches tailored to meet the unique needs of

---

<sup>23</sup> See, Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Greenwood Publishers Limited, 4<sup>th</sup> Edition, 2022, Pg 1.

<sup>24</sup> Muigua, K. "Effective Justice for Kenyans: Is ADR Really Alternative?" *The Law Society of Kenya Journal* 2, no. 1 (2015): 49-62.

<sup>25</sup> Murithi Antony, "Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR" ((2023) 11(3) *Alternative Dispute Resolution*) Page 123-141. Available at < <https://ciarbkenya.org/wp-content/uploads/2023/07/Vol-113-1.pdf>>

<sup>26</sup> The Constitution of Kenya 2010, Article 159 (2) (c), Government Printer, Nairobi.

<sup>27</sup> *Ibid.*

<sup>28</sup> Murithi Antony, "Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR" ((2023) 11(3) *Alternative Dispute Resolution*) Page 123-141. Available at < <https://ciarbkenya.org/wp-content/uploads/2023/07/Vol-113-1.pdf>>

the parties involved. For instance, family disputes may benefit from mediation, while contractual disagreements might require arbitration, and workplace conflicts may be resolved through conciliation or negotiation.<sup>29</sup> This flexibility ensures that ADR methods are adaptable to the context of each dispute.<sup>30</sup> Notably, however, not all cases are suitable for resolution through ADR, particularly those involving significant public interest or requiring judicial intervention to uphold broader societal values.<sup>31</sup> This emphasizes the importance of selecting the appropriate ADR mechanism based on the specific nature of the dispute, the available methods, and the unique needs of the parties involved.

To select the most appropriate ADR method, one must basically understand the different ADR mechanisms and their guiding principles. For example, mediation involves a neutral third party who facilitates negotiation between disputing parties, helping them reach a mutually agreeable solution formalized in a mediation agreement, which can then be adopted as an order of court.<sup>32</sup> Arbitration, by contrast, is more akin to litigation, where an impartial arbitrator hears arguments from both sides and issues a binding and final award.<sup>33</sup> Unlike court proceedings, however, arbitration is typically less

---

<sup>29</sup> Murithi Antony, "Examining the Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges and Future Perspectives." ((2024) 12(3) *Journal of Alternative Dispute Resolution*) Page 261-280. Available at <https://ciarbkenya.org/wp-content/uploads/2024/04/Vol-123-2024.pdf>

<sup>30</sup> *Ibid.*

<sup>31</sup> Misra, Saksham. "Environmental Conflict Resolution: ADR Strategies for Sustainable Solutions." *ADR Strategies: Navigating Conflict Resolution in the Modern Legal World* (2022): 111.

<sup>32</sup> Murithi Antony and James Njuguna, "Harnessing appropriate Dispute Resolution (ADR) for Achieving Environmental Justice: A Path to Sustainable Development." ((2024) 2(2) *Journal of Appropriate Dispute Resolution & Sustainability*) Page 57-82. Available at <https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>.

<sup>33</sup> *Ibid.*

formal, private, and faster, making it suitable for time-sensitive disputes, such as those involving environmental concerns.<sup>34</sup> Negotiation and conciliation focus on collaborative problem-solving, fostering ongoing relationships and promoting environmental responsibility.<sup>35</sup> Additionally, ADR mechanisms through their inclusivity and participatory approaches provide a platform for open discussions on technical and scientific issues, a critical feature in resolving disputes involving complex environmental data and diverse stakeholder interests.<sup>36</sup>

### **3. Justification for using ADR in Environmental Disputes: The Case for Inclusion in NET**

The National Environment Tribunal is a statutory body vested with judicial authority and is thus required to adhere to Article 159 of the Constitution.<sup>37</sup> Precisely, Article 159(1) and (2) provides that judicial authority is derived from the people and vests in courts and tribunals established under the Constitution.<sup>38</sup> It further stipulates that, in exercising this authority, courts and tribunals must promote alternative dispute resolution and administer justice without undue regard to procedural technicalities, among other key principles.<sup>39</sup>

Consequently, article 159 (1) as read with (2) (c) and (d) gives a constitutional obligation to all tribunals, including the NET tribunal, to integrate alternative

---

<sup>34</sup> Muriithi, Emmanuel Mwati. "Application of ADR Mechanisms to Manage Sports Disputes in Kenya." *Journal of Appropriate Dispute Resolution (ADR) & Sustainability*: 59.

<sup>35</sup> Orago, Diana A. "Alternative Dispute Resolution in the Criminal Justice System in Kenya." PhD diss., University of Nairobi, 2020.

<sup>36</sup> Mutuku, Benson, Anja Krumeich, Jane Alaii, and Ingrid Westerndorp. "Formal Justice and Alternative Dispute Resolution on Land Based Conflicts in Kenya." *International Journal of Gender Studies* 7, no. 1 (2022): 1-19.

<sup>37</sup> Constitution of Kenya, 2010.

<sup>38</sup> *Ibid*, Article 159.

<sup>39</sup> *Ibid*.

justice systems in the execution of their mandate.<sup>40</sup> Therefore, the primary justification for integrating ADR into NET is that it is a constitutional obligation and an avenue to paving the path to accessible justice.<sup>41</sup>

Many cases handled by NET are, seemingly by their nature, best suited to be addressed through Alternative Dispute Resolution (ADR), particularly due to their complexity, multiple stakeholders involved, and the need for outcomes that are efficient, inclusive, and sustainable.<sup>42</sup> When disputes arise from EIAs, particularly regarding community concerns about the environmental and social impacts of displacement or developments such as infrastructure projects, extractive industries, or waste management facilities, ADR methods especially negotiation and mediation allow developers, regulators, and affected communities to reach compromises.<sup>43</sup> These approaches address environmental concerns without halting development entirely or infringing on fundamental rights, leading to outcomes that balance ecological preservation with economic growth.<sup>44</sup>

Additionally, cases involving pollution, land degradation, and resource use

---

<sup>40</sup> Murithi Antony and James Njuguna, "Harnessing appropriate Dispute Resolution (ADR) for Achieving Environmental Justice: A Path to Sustainable Development." ((2024) 2(2) Journal of Appropriate Dispute Resolution & Sustainability) Page 57-82. Available at <https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>

<sup>41</sup> *Ibid.*

<sup>42</sup> Kariuki, Dr Francis, and Vianney Sebayiga. "Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes." *Alternative Dispute Resolution* 10, no. 3 (2022).

<sup>43</sup> Crable, Stephen. "ADR: A Solution for Environmental Disputes." *Arbitration Journal* 48, no. 1 (1993).< <https://arbitrationlaw.com/library/adr-solution-environmental-disputes-dispute-resolution-journal-vol-48-no-1>.> Accessed on 13<sup>th</sup> November 2024.

<sup>44</sup> *Ibid*

conflicts could benefit from ADR's capacity to engage stakeholders directly.<sup>45</sup> In urban areas where pollution is high, ADR could facilitate dialogues between regulatory authorities, industries, and local communities, enabling all parties to collaborate on pollution reduction measures responsibly without resorting to litigation.<sup>46</sup> With this approach, NET could achieve resolutions that prioritize environmental and social welfare without compromising the principles of justice and accountability.<sup>47</sup>

The flexibility of ADR mechanisms make them well suited to accommodate the multi-dimensional nature of environmental disputes, often dealing with scientific evidence, social concerns, and long-term ecological implications.<sup>48</sup> ADR allows the parties to tailor the negotiations to suit their specific needs and to address the technical details procedural technicalities, as opposed to litigation.<sup>49</sup> Further, ADR is based on the principles of impartiality, confidentiality and focus on resolution, which can facilitate forthrightness and

---

<sup>45</sup> Misra, Saksham. "Environmental Conflict Resolution: ADR Strategies for Sustainable Solutions." *ADR Strategies: Navigating Conflict Resolution in the Modern Legal World* (2022): 111.

<sup>46</sup> Alkhayer, J., N. Gupta, and C. M. Gupta. "Role of ADR methods in environmental conflicts in the light of sustainable development." In *IOP Conference Series: Earth and Environmental Science*, vol. 1084, no. 1, p. 012057. IOP Publishing, 2022. <<https://iopscience.iop.org/article/10.1088/1755-1315/1084/1/012057>> Accessed on 13<sup>th</sup> November 2024.

<sup>47</sup> Ansari, Abdul Haseeb, Muhamad Hassan Bin Ahmad, and Sodiq Omoola. "Alternative Dispute Resolution in Environmental and Natural Resource Disputes." *Journal of the Indian Law Institute* 59, no. 1 (2017): 26-56.

<sup>48</sup> Kariuki Muigua and Francis Kariuki, 'ADR, Access to Justice and Development in Kenya' (2024) *ADR Journal* (May 2024) <<https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>> accessed 13 November 2024.

<sup>49</sup> Murithi Antony, 'Harnessing Appropriate Dispute Resolution (ADR) for Achieving Environmental Justice: A Path to Sustainable Development' (2023) <<https://www.researchgate.net/profile/Murithi-Antony/publication/381956630.pdf>> accessed 13 November 2024.

make it easier to deal with sensitive issues.<sup>50</sup> This could particularly guarantee companies of their reputational, confidentiality may protect the reputational concerns of companies while providing accountability to environmental standards.<sup>51</sup>

ADR has demonstrated significant success in resolving environmental disputes globally, offering a flexible and collaborative alternative to traditional litigation.<sup>52</sup> In **South Africa**, ADR mechanisms such as mediation have been particularly effective in addressing conflicts between mining companies and local communities.<sup>53</sup> For example, disputes over mining-induced environmental degradation and community displacement have been resolved through structured mediation processes.<sup>54</sup> These processes allow for open dialogue between stakeholders, fostering mutually acceptable solutions that balance economic development with environmental conservation and community welfare, which has mitigated the risk of prolonged litigation and enhanced trust between corporations and communities.<sup>55</sup>

In **India**, similarly, ADR has been instrumental in expediting resolutions to

---

<sup>50</sup> *Ibid*

<sup>51</sup> Wambua, Paul Musili. "The Challenges of implementing ADR as an Alternative Mode of Access to Justice in Kenya." *ALTERNATIVE DISPUTE RESOLUTION* 15 (2013).

<sup>52</sup> Misra, Saksham. "Environmental Conflict Resolution: ADR Strategies for Sustainable Solutions." *ADR Strategies: Navigating Conflict Resolution in the Modern Legal World* (2022): 111.

<sup>53</sup> Zhuwarara, Selina Kudzai. "Arbitration of Community Related Disputes in South Africa's Mining Industry." In *The Palgrave Handbook of Arbitration in the African Energy and Mining Sectors*, pp. 1-23. Cham: Springer International Publishing, 2023.

<sup>54</sup> *Ibid*.

<sup>55</sup> Oguntoke, Olusegun, and Harold J. Annegarn. "Effectiveness of mediation in the resolution of environmental complaints against the activities of gold mining industries in the Witwatersrand region." *Clean Air Journal= Tydskrif vir Skoon Lug* 24, no. 2 (2014): 17-23.

environmental disputes involving large-scale infrastructure projects.<sup>56</sup> Arbitration, for instance, has been effective in land acquisition cases, helping to reduce court backlogs.<sup>57</sup> This is also the case in **Australia** where environmental ADR has been effectively used in water resource management disputes, especially in regions affected by drought and competing water usage rights.<sup>58</sup> Mediation and facilitated negotiation have helped reconcile the interests of farmers, environmental groups, and government authorities, leading to sustainable water-sharing agreements.<sup>59</sup>

#### **4. Approaches to Integrating ADR in the National Environmental Tribunal**

Integrating ADR mechanisms within the National Environmental Tribunal could transform the tribunal's operations by enhancing efficiency, accessibility, and responsiveness to environmental grievances.<sup>60</sup> Currently, the adjudicatory process in the NET is often time-consuming, which can potentially delay crucial decisions on environmental permits or regulatory enforcement, particularly in cases that require urgent action.<sup>61</sup> In contrast, by offering alternative avenues for resolving disputes, ADR may reduce such delays especially by allowing disputing parties to amicably achieve consensual solutions in shorter time.<sup>62</sup> Integrating ADR to NET can be done in various

---

<sup>56</sup> Sekhri, Desh Gaurav, and NITI OSD. "Designing the future of dispute resolution: The ODR policy plan for India." *Message posted to* (2020).

<sup>57</sup> Sekhri, Desh Gaurav, and NITI OSD. "Designing the future of dispute resolution: The ODR policy plan for India." *Message posted to* (2020).

<sup>58</sup> Jeffery, Michael, and Donna Craig. "Application of environmental conflict resolution to public interest issues in water disputes." *International Journal of Regional, Rural and Remote Law and Policy* 1 (2011): 1-13.

<sup>59</sup> *Ibid.*

<sup>60</sup> Muigua, Kariuki. "Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya." *ALTERNATIVE DISPUTE RESOLUTION* (2013): 40.

<sup>61</sup> Muigua, Kariuki, and Kariuki Francis. "Alternative Dispute Resolution, Access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1.

<sup>62</sup> *Ibid*

ways, which can be both efficient and practical as recommended hereunder. First, ADR mechanisms like negotiation and mediation could be introduced as preliminary steps before formal hearings, allowing disputes to be resolved out of court whenever possible.<sup>63</sup> Section 126 of the Environmental Management and Coordination Act (EMCA) empowers the tribunal with flexibility in regulating its procedure.<sup>64</sup> In exercising these powers, therefore, the tribunal can mandate that parties engage in negotiation or mediation before resorting to adjudication.<sup>65</sup> This approach could simplify the complexity of contested issues and, in some cases, result in the complete resolution of disputes at the preliminary stage, obviating the need for a full trial.<sup>66</sup> As a result, it would enhance efficiency, foster consensus-building, promote inclusivity, and focus on achieving objective-based outcomes.

Additionally, to implementing ADR within NET could involve categorizing cases based on their suitability for out-of-court or tribunal resolution.<sup>67</sup> For example, disputes over Environmental Impact Assessment (EIA) license conditions or minor regulatory infractions could be referred for mediation, in which developers and affected communities would negotiate practical

---

<sup>63</sup> Gathumbi, Gabriel K. "Alternative Dispute Resolution Mechanisms as a Tool for Dispute Settlement in the Devolved Governance System in Kenya." PhD diss., University of Nairobi, 2018.

<sup>64</sup> EMCA Act, 1999.

<sup>65</sup> Ansari, Abdul Haseeb, Muhamad Hassan Bin Ahmad, and Sodiq Omoola. "Alternative Dispute Resolution in Environmental and Natural Resource Disputes." *Journal of the Indian Law Institute* 59, no. 1 (2017): 26-56.

<sup>66</sup> Ngombane, Sithe Odwa. "Alternative dispute resolution: a mechanism for resolving environmental disputes in South Africa." (2018).

<sup>67</sup> George Nyamboga Nyanaro et al., "Environmental Justice and Alternative Dispute Resolution" (2024),

<[http://repository.embuni.ac.ke/handle/embuni/4204/browse?rpp=20&etal=-1&sort\\_by=1&type=title&starts\\_with=C&order=ASC](http://repository.embuni.ac.ke/handle/embuni/4204/browse?rpp=20&etal=-1&sort_by=1&type=title&starts_with=C&order=ASC)> Accessed on 12<sup>th</sup> November 2024

solutions with the guidance of a neutral mediator.<sup>68</sup>

In doing so, however, the tribunal must approach each case with an understanding of the power dynamics at play between the parties, which could influence the willingness or ability of one party to participate equitably in negotiations.<sup>69</sup> Therefore, the tribunal must ensure a fair and balanced process that considers these dynamics, while also overseeing the resolution of disputes to guarantee that agreements are implemented smoothly.<sup>70</sup> For more complex cases involving major environmental impacts or significant regulatory questions, then the tribunal can deal with the issue while embracing the principles of ADR.<sup>71</sup> Therefore, integrating ADR mechanisms into NET's framework, the tribunal could enable disputants to resolve issues more efficiently and with greater emphasis on consensus-building and cooperation.<sup>72</sup> This will ensure that the outcome is sustainable and mutually acceptable, hence effectively and inclusively resolving the dispute while

---

<sup>68</sup> Gitari, Elizabeth. "Use of Alternative Dispute Resolution to Settle Conflicts from Infrastructural Development Activities: A Case Study of Standard Gauge Railway Project in Nairobi National Park." PhD diss., University of Nairobi, 2019.

<sup>69</sup> Murithi Antony, "Examining the Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges and Future Perspectives." ((2024) 12(3) *Journal of Alternative Dispute Resolution*) Page 261-280. Available at <https://ciarbkenya.org/wp-content/uploads/2024/04/Vol-123-2024.pdf>

<sup>70</sup> *Ibid.*

<sup>71</sup> Gitari, Elizabeth. "Use of Alternative Dispute Resolution to Settle Conflicts from Infrastructural Development Activities: A Case Study of Standard Gauge Railway Project in Nairobi National Park." PhD diss., University of Nairobi, 2019.

<sup>72</sup> Muigua, Kariuki. "Natural resource conflicts in Kenya: effective management for attainment of environmental justice." In *Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December*. 2015.< <http://kmco.co.ke/wp-content/uploads/2018/08/Natural-Resource-Conflicts-in-Kenya-Effective-Management-for-Attainment-of-Environmental-Justice.pdf>.>

Accessed on 12<sup>th</sup> November 2024.

dealing with the underlying issues.<sup>73</sup>

Further, the successful implementation of ADR within NET would likely require amendments to the Environmental Management and Coordination Act (EMCA) to formalize ADR processes within the tribunal's jurisdiction. These amendments could establish an ADR unit within NET, empanelled by mediators and arbitrators with expertise in environmental law, science, and policy.<sup>74</sup> Additionally, training programs could be introduced to equip NET staff and stakeholders with the skills needed to navigate ADR processes effectively.<sup>75</sup> Clear procedural guidelines on referring cases to ADR would also be important to ensure the introduction of ADR in an orderly and consistent manner.<sup>76</sup>

Notably, ADR is proposed as a complement to the NET tribunal for the efficient resolution of disputes, and is not intended to fully replace it.<sup>77</sup> Consequently, it must be acknowledged that some cases require direct adjudication by the tribunal, especially requiring formal adjudication to safeguard public interests.<sup>78</sup> For example, serious environmental violations, such as unauthorized deforestation, water contamination, or hazardous waste

---

<sup>73</sup> *Ibid.*

<sup>74</sup> Mbacho, Lydiah W. "Achieving Access to Justice Through Alternative Dispute Resolutions: a Critical Analysis on Kenyan Legal Framework." PhD diss., University of Nairobi, 2021.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Murithi Antony, "Examining the Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges and Future Perspectives." ((2024) 12(3) *Journal of Alternative Dispute Resolution*) Page 261-280. Available at <https://ciarbkenya.org/wp-content/uploads/2024/04/Vol-123-2024.pdf>

<sup>78</sup> Hermann, Michele G. "The Dangers of ADR: A Three-Tiered System of Justice." *J. Contemp. Legal Issues* 3 (1989): 117. < [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/contli3&section=11](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/contli3&section=11).> Accessed on 13<sup>th</sup> November 2024.

disposal, often demand strict enforcement measures achievable only through litigation.<sup>79</sup> Similarly, cases requiring constitutional interpretation of rights must be adjudicated formally to establish precedents that guide future disputes. In such instances, NET's formal adjudicatory powers are indispensable for imposing penalties, ensuring compliance, and deterring future violations.<sup>80</sup> A strategic approach to ADR referrals is, therefore, necessary; directing only appropriate cases to ADR while retaining oversight for critical enforcement.<sup>81</sup>

The integration of ADR into Kenya's National Environmental Tribunal (NET) presents several potential challenges that must be carefully navigated to ensure successful implementation.<sup>82</sup> One significant challenge is resistance from legal professionals who may be skeptical of ADR's perceived informality and its departure from conventional litigation procedures, by viewing ADR as lacking the procedural rigor and enforceability associated with formal processes.<sup>83</sup> There is need for targeted education and training programs tailored for environmental law practitioners, to overcome this challenge.<sup>84</sup>

Logistical and infrastructural challenges also pose significant obstacles, particularly in rural and remote areas where access to professional ADR

---

<sup>79</sup> Sternlight, Jean R. "ADR is here: Preliminary reflections on where it fits in a system of justice." *Nev. LJ* 3 (2002): 289. < <https://scholars.law.unlv.edu/nlj/vol3/iss2/6/>.> Accessed on 12<sup>th</sup> November 2024.

<sup>80</sup> Ruppel, Oliver C. "Environmental Justice and Litigation." In *Environmental Law and Policy in Namibia*, pp. 663-676. Nomos Verlagsgesellschaft mbH & Co. KG, 2022.

<sup>81</sup> Stukenborg, Charlene. "The Proper Rule of Alternative Dispute Resolution (ADR) in Environmental Conflicts." *U. Dayton L. Rev.* 19 (1993): 1305.

<sup>82</sup> Murithi Antony and James Njuguna, "Limiting the Jurisdiction of the Arbitral Tribunal: A Necessity or an Issue Taken Too Far?" ((2024)13(1) *Journal of Alternative Dispute Resolution*) Page 97-115. Available at <https://ciarbkenya.org/journals/>

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

practitioners and legal resources may be limited.<sup>85</sup> The availability of trained ADR practitioners is crucial to ensure that disputes are handled professionally and equitably.<sup>86</sup> Without adequate infrastructure and resources, rural communities may struggle to access ADR mechanisms, thereby perpetuating the existing barriers to justice that NET aims to overcome.<sup>87</sup> Expanding ADR training programs and establishing regional ADR centers could help bridge this gap, ensuring broader accessibility.<sup>88</sup>

Further, power imbalances between disputing parties, particularly in cases involving large corporations and marginalized communities, is of particular concern.<sup>89</sup> Corporations often have greater financial resources, legal expertise, and negotiation power, which could lead to unequal outcomes in ADR processes.<sup>90</sup> This can be mitigated by establishing robust safeguards including legal aid for disadvantaged parties, and or mechanisms for monitoring the fairness of proceedings, to ensure that the processes are transparent and to maintain public confidence and prevent the exploitation of vulnerable groups.<sup>91</sup>

---

<sup>85</sup> Monsma, David. "Equal rights, governance, and the environmental justice principles in corporate social responsibility." *Ecology LQ* 33 (2006): 443.

<sup>86</sup> Murithi Antony, "Examining the Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges and Future Perspectives." ((2024) 12(3) *Journal of Alternative Dispute Resolution*) Page 261-280. Available at <https://ciarbkenya.org/wp-content/uploads/2024/04/Vol-123-2024.pdf>

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Shilling, Fraser M., Jonathan K. London, and Raoul S. Liévanos. "Marginalization by collaboration: Environmental justice as a third party in and beyond CALFED." *environmental science & policy* 12, no. 6 (2009): 694-709.

<sup>90</sup> Hong, Sang-Pyo. "Feasibility Study of Environmental Impact Assessment as Instrument for Alternative Dispute Resolutions-Case Study: Environmental Conflicts of Mungjangdae Hot Spring Resort Development." *Journal of Environmental Impact Assessment* 26, no. 6 (2017): 495-507.

<sup>91</sup> *Ibid.*

There is also lack of legislative clarity to ADR integration.<sup>92</sup> While Article 159 of the Constitution mandates the promotion of ADR, the Environmental Management and Coordination Act (EMCA) does not currently provide explicit guidelines for incorporating ADR into NET's procedural framework.<sup>93</sup> Amending EMCA to formalize ADR processes within NET's jurisdiction will likely be necessary but could face bureaucratic and political delays.<sup>94</sup> Until then, there is need for continuous engagement of key stakeholders, including legislators, environmental advocacy groups, and legal professionals, to help hasten the reform process will be critical to ensuring that the necessary legal changes are enacted efficiently and effectively.<sup>95</sup>

## 5. Conclusion

The integration of ADR into the National Environmental Tribunal of Kenya could present a significant step toward achieving sustainable, efficient, and inclusive environmental dispute resolution, and consequently environmental justice. By offering flexible mechanisms such as negotiation, mediation and conciliation, ADR aligns seamlessly with NET's mandate to address environmental grievances equitably and transparently. Achieving this will require procedural reforms, capacity-building efforts, and possible amendment of the EMCA Act to firmly embed ADR within NET. This approach promises not only effective dispute resolution but also cultivates a

---

<sup>92</sup> Murithi Antony and James Njuguna, "Harnessing appropriate Dispute Resolution (ADR) for Achieving Environmental Justice: A Path to Sustainable Development." ((2024) 2(2) *Journal of Appropriate Dispute Resolution & Sustainability*) Page 57-82. Available at <https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>

<sup>93</sup> Muigua, Kariuki. "Reflections on ADR and Environmental Justice in Kenya." Available at < <http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-ADR-and-Environmental-Justice-in-Kenya.pdf>>

<sup>94</sup> *Ibid.*

<sup>95</sup> Muigua K, "Realizing True Sustainable Development." Greenwood Publishers, 2023.

*Rethinking Environmental Dispute  
Resolution in Kenya: The Case for ADR  
Integration in the National Environmental  
Tribunal: David N. Njoroge*

**(2025) Journal of cmsd Volume 12(1)**

culture of environmental responsibility, ensuring Kenya's commitment to a cleaner, healthier, and sustainable future for generations to come is ultimately achieved.

### **List of References**

Alkhayer, J., N. Gupta, and C. M. Gupta. "Role of ADR methods in environmental conflicts in the light of sustainable development." In IOP Conference Series: Earth and Environmental Science, vol. 1084, no. 1, p. 012057. IOP Publishing, 2022.

<https://iopscience.iop.org/article/10.1088/1755-1315/1084/1/012057>.

Ansari, Abdul Haseeb, Muhamad Hassan Bin Ahmad, and Sodiq Omoola.

"Alternative Dispute Resolution in Environmental and Natural Resource Disputes." *Journal of the Indian Law Institute* 59, no. 1 (2017): 26-56.

Biamah, Elijah K., Jacqueline Kiiro, and Benjamin Kogo. "Environmental impact assessment in Kenya." In *Developments in Earth surface processes*, vol. 16, pp. 237-264. Elsevier, 2013.

Bosek, Joel Kimutai. "Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges." *African Human Rights Law Journal* 14, no. 2 (2014): 489-508.

Cap 387, Laws of Kenya.

Crabbe, Stephen. "ADR: A Solution for Environmental Disputes." *Arbitration Journal* 48, no. 1 (1993). <https://arbitrationlaw.com/library/adr-solution-environmental-disputes-dispute-resolution-journal-vol-48-no-1>.

Gathumbi, Gabriel K. "Alternative Dispute Resolution Mechanisms as a Tool for Dispute Settlement in the Devolved Governance System in Kenya." PhD diss., University of Nairobi, 2018.

George Nyamboga Nyanaro et al., "Environmental Justice and Alternative Dispute Resolution" (2024),

[http://repository.embuni.ac.ke/handle/embuni/4204/browse?rpp=20&etal=-1&sort\\_by=1&type=title&starts\\_with=C&order=ASC](http://repository.embuni.ac.ke/handle/embuni/4204/browse?rpp=20&etal=-1&sort_by=1&type=title&starts_with=C&order=ASC).

Gitari, Elizabeth. "Use of Alternative Dispute Resolution to Settle Conflicts from Infrastructural Development Activities: A Case Study of Standard Gauge Railway Project in Nairobi National Park." PhD diss., University of Nairobi, 2019.

Hermann, Michele G. "The Dangers of ADR: A Three-Tiered System of Justice." *J. Contemp. Legal Issues* 3 (1989): 117. [https://heinonline.org/hol/cgi-bin/get\\_pdf.cgi?handle=hein.journals/contli3&section=11](https://heinonline.org/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/contli3&section=11).

Hong, Sang-Pyo. "Feasibility Study of Environmental Impact Assessment as Instrument for Alternative Dispute Resolutions-Case Study: Environmental Conflicts of Mungjangdae Hot Spring Resort Development." *Journal of Environmental Impact Assessment* 26, no. 6 (2017): 495-507.

Ingonga, Renson Mulele. "Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya."

Jeffery, Michael, and Donna Craig. "Application of environmental conflict resolution to public interest issues in water disputes." *International Journal of Regional, Rural and Remote Law and Policy* 1 (2011): 1-13.

Kaniaru, Donald W. "Environmental courts and tribunals: the case of Kenya." *Pace Env'tl. L. Rev.* 29 (2011): 566.

Kaniaru, Donald W. "The National Environment Tribunal: A Review of its First Decade." *Env'tl. Pol'y & L.* 43 (2013): 333.

Kariuki, Dr Francis, and Vianney Sebayiga. "Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes." *Alternative Dispute Resolution* 10, no. 3 (2022).

Kariuki Muigua and Francis Kariuki, 'ADR, Access to Justice and Development in Kenya' (2024) *ADR Journal* (May 2024) <https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>.

Kenya Law Reporting, "Know your tribunals." Available at [https://kenyalaw.org/kl/index.php?id=9050#:~:text=ENVIRONMENT%20TRIBUNAL%20\(NET\)-,Establishment,undertake%20developments%20of%20specified%20nature](https://kenyalaw.org/kl/index.php?id=9050#:~:text=ENVIRONMENT%20TRIBUNAL%20(NET)-,Establishment,undertake%20developments%20of%20specified%20nature).

Lemarkoko, Alexander L. "The Management of Natural Resource Based Conflicts in Africa: A Case Study of The Mau Forest Complex, (Kenya), 1963-2010." PhD diss., 2011.

Mbacho, Lydiah W. "Achieving Access to Justice Through Alternative Dispute Resolutions: a Critical Analysis on Kenyan Legal Framework." PhD diss., University of Nairobi, 2021.

Mokeira, Nyangeri Rose. "States' Obligations Under International Environmental Law: Case of Kenya's Devolved Governance System and Montreal Protocol." PhD diss., Kenyatta University, 2022.

Monsma, David. "Equal rights, governance, and the environmental justice principles in corporate social responsibility." *Ecology* LQ 33 (2006): 443.

Muigua, Kariuki. "Natural resource conflicts in Kenya: effective management for attainment of environmental justice." In Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. <http://kmco.co.ke/wp-content/uploads/2018/08/Natural-Resource-Conflicts-in-Kenya-Effective-Management-for-Attainment-of-Environmental-Justice.pdf>.

Muigua, Kariuki. "Reflections on ADR and Environmental Justice in Kenya." Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-ADR-and-Environmental-Justice-in-Kenya.pdf>

Muigua, Kariuki, and Kariuki Francis. "Alternative Dispute Resolution, Access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1.

Muigua, K. "Effective Justice for Kenyans: Is ADR Really Alternative?" *The Law Society of Kenya Journal* 2, no. 1 (2015): 49-62.

Muigua, K. "Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya." *ALTERNATIVE DISPUTE RESOLUTION* (2013): 40.

Muigua, K. "Settling Disputes Through Arbitration in Kenya." Greenwood Publishers Limited, 4th Edition, 2022, Pg 1.

Muigua K, "Realizing True Sustainable Development." Greenwood Publishers, 2023.

Murithi Antony, "Examining the Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges and Future Perspectives." ((2024)

12(3) *Journal of Alternative Dispute Resolution*) Page 261-280. Available at <https://ciarbkenya.org/wp-content/uploads/2024/04/Vol-123-2024.pdf>

Murithi Antony and James Njuguna, "Harnessing appropriate Dispute Resolution (ADR) for Achieving Environmental Justice: A Path to Sustainable Development." ((2024) 2(2) *Journal of Appropriate Dispute Resolution & Sustainability*) Page 57-82. Available at <https://adrjournal.co.ke/wp-content/uploads/2024/05/Vol-22-MAY-2024.pdf>

Murithi Antony, "Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR" ((2023) 11(3) *Alternative Dispute Resolution*) Page 123-141. Available at <https://ciarbkenya.org/wp-content/uploads/2023/07/Vol-113-1.pdf>

Muriithi, Emmanuel Mwati. "Application of ADR Mechanisms to Manage Sports Disputes in Kenya." *Journal of Appropriate Dispute Resolution (ADR) & Sustainability*: 59.

Mutuku, Benson, Anja Krumeich, Jane Alaii, and Ingrid Westerndorp. "Formal Justice and Alternative Dispute Resolution on Land Based Conflicts in Kenya." *International Journal of Gender Studies* 7, no. 1 (2022): 1-19.

National Environment Management Authority, *State of Environment Report 2019-2021* (National Environment Management Authority, 2021) [https://www.nema.go.ke/images/Docs/EIA\\_1920-1929/NEMA%20SoE%202019-2021.pdf](https://www.nema.go.ke/images/Docs/EIA_1920-1929/NEMA%20SoE%202019-2021.pdf)

Ng, Iris. "Beyond the Litigation Narrative: The Place and Roles of ADR in Climate Change Disputes." *Asian Dispute Review* 24, no. 1 (2022).

Ngombane, Sithe Odwa. "Alternative dispute resolution: a mechanism for resolving environmental disputes in South Africa." (2018).

Oguntoke, Olusegun, and Harold J. Annegarn. "Effectiveness of mediation in the resolution of environmental complaints against the activities of gold mining industries in the Witwatersrand region." *Clean Air Journal= Tydskrif vir Skoon Lug* 24, no. 2 (2014): 17-23.

Orago, Diana A. "Alternative Dispute Resolution in the Criminal Justice System in Kenya." PhD diss., University of Nairobi, 2020.

Osanan, Bruno O. "THE APPLICATION OF ADR IN RESOLVING CLIMATE-RELATED DISPUTES TO ACHIEVE SUSTAINABLE DEVELOPMENT IN KENYA." *University of Nairobi Law Journal* 10, no. 1 (2023).

Ruppel, Oliver C. "Environmental Justice and Litigation." In *Environmental Law and Policy in Namibia*, pp. 663-676. Nomos Verlagsgesellschaft mbH & Co. KG, 2022.

Sekhri, Desh Gaurav, and NITI OSD. "Designing the future of dispute resolution: The ODR policy plan for India." Message posted to (2020).

Shilling, Fraser M., Jonathan K. London, and Raoul S. Liévanos. "Marginalization by collaboration: Environmental justice as a third party in and beyond CALFED." *Environmental Science & Policy* 12, no. 6 (2009): 694-709.

Soyapi, Caiphias B. "Environmental protection in Kenya's environment and land court." *Journal of Environmental Law* 31, no. 1 (2019): 151-161.

*Rethinking Environmental Dispute  
Resolution in Kenya: The Case for ADR  
Integration in the National Environmental  
Tribunal: David N. Njoroge*

(2025) *Journal of cmsd* Volume 12(1)

Sternlight, Jean R. "ADR is here: Preliminary reflections on where it fits in a system of justice." *Nev. LJ* 3 (2002): 289. [https://scholars.law.unlv.edu/nlj/vol3/iss2/6/.](https://scholars.law.unlv.edu/nlj/vol3/iss2/6/)

Stukenborg, Charlene. "The Proper Rule of Alternative Dispute Resolution (ADR) in Environmental Conflicts." *U. Dayton L. Rev.* 19 (1993): 1305.

Wambua, Paul Musili. "The Challenges of implementing ADR as an Alternative Mode of Access to Justice in Kenya." *ALTERNATIVE DISPUTE RESOLUTION* 15 (2013).

Zhuwarara, Selina Kudzai. "Arbitration of Community Related Disputes in South Africa's Mining Industry." In *The Palgrave Handbook of Arbitration in the African Energy and Mining Sectors*, pp. 1-23. Cham: Springer International Publishing, 2023.

## **Legal and Policy Reform to Cure the Epidemic of Medical Malpractice in Kenya: Comparative Lessons for Accountable Healthcare**

By: *Michael Sang* \*

### **Abstract**

*This paper examines the pervasive issue of medical malpractice in Kenya, highlighting the systemic failures of the Kenya Medical Practitioners and Dentists Union (KMPDU) and the judiciary in enforcing accountability for resultant loss of life, impairments, and life-changing injuries. The analysis identifies significant gaps in the current regulatory framework, including the inadequacies of the Kenya Medical Practitioners and Dentists Act and the enforcement of socio-economic rights under the 2010 Constitution. Drawing comparative lessons from the United Kingdom and South Africa, the paper advocates for key reforms such as the establishment of independent medical malpractice tribunals, legislative clarity for prosecuting culpable homicide, and enhanced transparency and accountability in medical regulation. By implementing these measures, Kenya can develop a more effective and patient-centred healthcare system that ensures justice for victims of medical negligence.*

**Keywords:** *Medical Malpractice, Accountability, Kenya, KMPDU, Legal Reform, Medical Negligence, Healthcare.*

### **1. Introduction**

Medical malpractice in Kenya has reached epidemic proportions, posing severe threats to patient safety and undermining public confidence in the healthcare system.<sup>1</sup> The existing regulatory framework, primarily governed by

---

\* LLM, University of Cape Town, South Africa; LLB, Moi University; PG Dip. in Law Kenya School of Law. *The views expressed in this article are, of course, the author's own and do not express the views of the institution to which he is affiliated.*

<sup>1</sup> Omiti, Herman and Fundi, Elizabeth Cheupe, Assessing the Legal Mechanisms for Redressing Medical Malpractice in Kenya: Just How Effective are They? (September

the Kenya Medical Practitioners and Dentists Union (KMPDU) and the courts, has proven inadequate in enforcing accountability for the resultant loss of life, impairments, and life-changing injuries.<sup>2</sup> Despite the presence of legislative instruments like the Kenya Medical Practitioners and Dentists Act and the progressive provisions of the 2010 Constitution, victims of medical negligence frequently find themselves without sufficient redress, facing a system that appears more protective of medical professionals than of patient rights.<sup>3</sup>

The Kenya Medical Practitioners and Dentists Act, designed to regulate medical practice and ensure ethical conduct, suffers from significant limitations.<sup>4</sup> While it outlines disciplinary measures against practitioners who contravene established standards, it lacks robust mechanisms for compensating victims of medical malpractice.<sup>5</sup> The Act's disciplinary procedures are often lengthy and convoluted, as seen in cases like *J.O.O. and 2 others v Praxades P Mandu Okutoyi and 2 others*<sup>6</sup>, where procedural deficiencies and the protracted process of redress further disadvantage victims. Moreover, the Constitution of Kenya 2010, heralded for recognizing socio-economic rights, including the right to the highest attainable standard of health, has not fully translated into effective protections against medical malpractice. Articles 43 and 46 of the Constitution guarantee these rights and emphasize the need for quality healthcare services, yet enforcement remains weak.<sup>7</sup>

The KMPDU's entrenched protectionist tendencies exacerbate the issue.<sup>8</sup>

---

15, 2014). Available at SSRN: <https://ssrn.com/abstract=2496267> accessed 17 July 2024

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> *J.O.O. and 2 Others v Praxades P Mandu Okutoyi and 2 Others* [2011] eKLR

<sup>7</sup> Kifanya, A. I. (2017). Resolving medical malpractice claims: a critical study of disciplinary proceedings in Kenya.

Ibid

Disciplinary proceedings, as illustrated in *Republic v Kenya Medical Practitioners and Dentists Board and 2 others*,<sup>9</sup> often fail to hold practitioners adequately accountable, prioritizing professional protection over patient justice. This systemic bias discourages victims from pursuing their grievances through the Board, as the procedural focus remains on correcting practitioner conduct rather than addressing the patient's suffering.<sup>10</sup>

Comparative analyses provide valuable insights for reforming Kenya's approach to medical malpractice. The UK's emphasis on informed consent, established in *Montgomery v Lanarkshire Health Board*<sup>11</sup>, underscores the importance of patient autonomy and the duty of care in medical practice. South Africa's legal framework, as seen in *Goliath v MEC of Health, Eastern Cape*<sup>12</sup>, demonstrates the potential effectiveness of specialized tribunals in addressing medical negligence, while also highlighting the necessity of legislative clarity in prosecuting culpable homicide, as discussed in *Van der Walt v S*.<sup>13</sup>

Drawing lessons from these jurisdictions, Kenya can enhance its medical regulatory framework by: Establishing independent and transparent medical malpractice tribunals; implementing robust legislation to clearly define and enforce accountability for medical negligence; ensuring procedural reforms that facilitate fair and swift redress for victims and; Strengthening the role of informed consent in medical practice to uphold patient rights.

Addressing the epidemic of medical malpractice in Kenya requires a multifaceted approach that balances the protection of medical professionals with the imperative of justice for victims. By adopting these reforms, Kenya

---

*Republic v Kenya Medical Practitioners and Dentists Board and 2 Others* [2013] eKLR  
Kifanya, A. I. (2017). Resolving medical malpractice claims: a critical study of disciplinary proceedings in Kenya.

*Montgomery v Lanarkshire Health Board* [2015] UKSC 11

*Goliath v MEC of Health, Eastern Cape* [2015]

*Van der Walt v S* [2020] 2 SACR 371 (CC)

can build a more accountable, transparent, and patient-centred healthcare system.

## **2. Legal and Institutional Regulation of Medical Malpractice in Kenya**

### **2.1 Elements of Medical Malpractice**

Medical malpractice involves four critical elements that must be proven for a claim to be successful:

#### **1. Professional Duty Owed to the Patient:**

Healthcare professionals have a duty to provide care that meets established medical standards.<sup>14</sup> This duty is inherent in the doctor-patient relationship, ensuring that the patient receives competent and ethical medical treatment.<sup>15</sup>

#### **2. Breach of Professional Duty:**

A breach occurs when a healthcare provider fails to adhere to the accepted standards of practice.<sup>16</sup> This can include errors in diagnosis, treatment, aftercare, or health management, reflecting negligence or substandard care.<sup>17</sup>

#### **3. Injury Caused by the Breach:**

For a malpractice claim to be valid, it must be shown that the breach directly caused injury to the patient.<sup>18</sup> This causation link is crucial, demonstrating that the patient's harm was a direct result of the healthcare provider's negligence.<sup>19</sup>

---

<sup>14</sup> Kifanya, A. I. (2017). Resolving medical malpractice claims: a critical study of disciplinary proceedings in Kenya.

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

#### 4. **Breach Results in Damages:**

The final element requires proof that the injury led to specific damages.<sup>20</sup> These can include physical pain, emotional distress, additional medical bills, lost earning capacity, and other economic and non-economic losses.<sup>21</sup>

### **2.2 Kenya Medical Practitioners and Dentists Act**

The Kenya Medical Practitioners and Dentists Act (the Act) is a key statute that regulates medical practice in Kenya. The preamble of the Act highlights its purpose, which includes the regulation of the registration of medical practitioners and the conduct of medical practitioners through disciplinary measures. The Act contains provisions for disciplinary measures against medical practitioners found to have acted in contravention of established ethical standards. However, one major inadequacy of the Act is its lack of provisions for compensating the victims of medical malpractice. The Act establishes the Medical Practitioners and Dentists Board<sup>22</sup>, mandating it to conduct disciplinary proceedings under Section 20.

The procedure under the Act is implemented through the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules (the Rules). The disciplinary procedure has two main stages:

#### **Preliminary Inquiry Committee (PIC):**

Established under Rule 3 of the Rules<sup>23</sup>, the PIC comprises members of the Board and reviews complaints against medical practitioners, dentists, or institutions. The PIC determines whether there is a prima facie case warranting further inquiry by the Board. If no prima facie case is found, the PIC can reject the complaint under Rule 4, informing the Board chairman. If a prima facie

---

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Kenya Medical Practitioners and Dentists Act, section 4

<sup>23</sup> Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, rule 3

case exists, the complaint is referred to the Board with recommendations.

### **Professional Conduct Committee (PCC):**

Created by the Board, the PCC includes members such as an advocate who serves as a legal advisor.<sup>24</sup> This committee conducts inquiries into complaints, providing recommendations and sanctions.<sup>25</sup> Under Rule 4A (2), the PCC is responsible for convening sittings, promoting arbitration, and ensuring administrative and evidential arrangements are in place.<sup>26</sup> Sanctions imposed by the PCC, as per Rule 4A(3), can include orders for continuous professional development, suspension of licenses for up to six months, and closure of institutions until compliance with operating license requirements. Disciplinary proceedings can be initiated in two instances: Conviction of the medical practitioner in criminal proceedings<sup>27</sup> and Complaint of serious professional misconduct.<sup>28</sup>

### **Inadequacies and Challenges:**

The Act does not address compensation for victims, focusing solely on the conduct of the medical practitioner.<sup>29</sup> The lengthy and complex disciplinary procedure discourages patients from seeking redress from the Board.<sup>30</sup> Even when the Board finds a medical practitioner guilty of malpractice, the victim must file a separate medical negligence suit in court to receive damages, making the process costly and inaccessible for many.<sup>31</sup>

The Act's current framework prioritizes the regulation and correction of

---

<sup>24</sup> Ibid, Rule 4A 1 (e)

<sup>25</sup> Ibid, Rule 4A (2)

<sup>26</sup> Ibid, Rule 4A (2)

<sup>27</sup> Ibid, Rule 5(1)(a)

<sup>28</sup> Ibid, Rule 5(1)(b)

<sup>29</sup> Wanjohi, S. W. (2021). Appraising the legal and regulatory framework on medical negligence in Kenya.

<sup>30</sup> Ibid

<sup>31</sup> Ibid

medical practitioners' conduct over victim compensation, highlighting the need for reforms to balance both accountability and victim restitution.

### **2.3 Constitution of Kenya 2010**

The Constitution of Kenya 2010 brought significant reforms by recognizing social and economic rights as constitutionally protected and enforceable rights under the Bill of Rights.<sup>32</sup> Article 43(1)(a) and (2) guarantees every person the highest attainable standard of health, including healthcare services, maternal and reproductive health care, and the right to emergency medical treatment.<sup>33</sup> This provision underscores the state's obligation to ensure access to quality health services for all citizens. Article 21 mandates the state to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights. Article 56(e) ensures that marginalized groups, including the illiterate, medically incapacitated, uneducated, and uninformed, have reasonable access to healthcare services.<sup>34</sup> This emphasizes the importance of inclusivity in healthcare access.

Article 46(1) (c) and (d) guarantees consumers the right to goods and services of reasonable quality and the right to the protection of their health, safety, and economic interests.<sup>35</sup> Article 46(2) and (3) grants consumers the right to compensation for loss or injury arising from defects in goods and services, including unlicensed or fake pharmaceutical products or negligent medical services. This provision ensures that consumers can seek redress for harm caused by substandard medical care.

The Constitution thus places a duty on healthcare providers and the state to ensure that health services are not only accessible but also of high quality. It obligates duty bearers to perform their duties with diligence and care, ensuring

---

<sup>32</sup> Constitution of Kenya, 2010, Chapter Four

<sup>33</sup> *Ibid*, Article 43(1)(a) and (2)

<sup>34</sup> *Ibid*, Article 56(e)

<sup>35</sup> *Ibid*, Article 46(1)(c) and (d)

that healthcare services do not negatively affect consumers.<sup>36</sup> This constitutional framework reinforces the need for accountability and quality assurance in the healthcare sector, providing a robust foundation for addressing medical malpractice issues in Kenya.

### **3. The Practice of Regulation of Medical Malpractice and Negligence in Kenya**

#### **3.1 Tendency of KMPDB to Breach its Own Rules**

The Kenya Medical Practitioners and Dentists Board (KMPDB) has a history of breaching its own rules, particularly in the handling of complaints related to medical malpractice and negligence.<sup>37</sup> An illustrative case highlighting this issue is *Republic v Kenya Medical Practitioners and Dentists Board and 2 others*.<sup>38</sup> The case involved an application seeking orders of certiorari to quash the decision of the KMPDB and an order of mandamus to compel the Board to proceed with hearing the applicants' complaints. The complaint was against the Aga Khan Hospital, Dr. Heene Hooker, and Professor Aggrey Wasuna, alleging negligence that resulted in permanent disabilities to prematurely delivered twins.

#### **Procedural Breach:**

Under Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, the Preliminary Inquiry Committee (PIC) is empowered to either reject complaints that do not warrant further inquiry or refer valid complaints to the Board for a full inquiry. The Committee must carry out due diligence to ensure complaints are not frivolous, vexatious, or malicious.<sup>39</sup> In the aforementioned case, the court observed that the PIC failed

---

<sup>36</sup> Wanjohi, S. W. (2021). Appraising the legal and regulatory framework on medical negligence in Kenya.

<sup>37</sup> Ibid

<sup>38</sup> *Republic v Kenya Medical Practitioners and Dentists Board and 2 others* [2013] eKLR.

<sup>39</sup> Ibid

to fully discharge its mandate. The evidence indicated that the Committee did not thoroughly review or deliberate on the complaint before dismissing it for lacking merit.<sup>40</sup>

The court granted both orders of certiorari and mandamus, quashing the PIC's decision and compelling the KMPDB to proceed with the hearing. The court emphasized that the Committee must look at the whole matter attentively and carefully before reaching a conclusion.<sup>41</sup> This case is just one example of the KMPDB's tendency to breach its own procedural rules, leading to unprocedural dismissal of complaints by victims. The failure to conduct proper inquiries undermines the credibility of the regulatory process and denies justice to aggrieved parties. The court's intervention in such cases highlights the need for the KMPDB to adhere strictly to its rules and procedures to ensure fairness and accountability in handling medical malpractice complaints.

The tendency of the KMPDB to breach its own rules calls for reforms to strengthen its disciplinary processes, ensuring thorough and impartial investigations of complaints to uphold the rights of patients and maintain trust in the medical regulatory framework.

### **3.2 Procedural Deficiencies and Protracted Process of Redress**

The regulation of medical malpractice and negligence in Kenya is marred by procedural deficiencies and a protracted process of redress as seen in *J.O.O. and 2 others v Praxades P Mandu Okutoyi and 2 others*.<sup>42</sup> The applicants in this case argued that negligence is closely linked with professional misconduct. The case raised questions about whether "infamous" and "disgraceful" conduct are synonymous and whether they constitute separate offenses under Section 20(1) of the Medical Practitioners and Dentists Act. The High Court noted that the charges of infamous or disgraceful conduct imply serious misconduct.

---

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> *J.O.O. and 2 Others v Praxades P Mandu Okutoyi and 2 Others* [2011] eKLR

However, the Board did not consider the statutory or common law rights of the complainant while hearing the matter.

The High Court observed that the Board's scope cannot be equated with civil tribunals, as the Board's inquiries involve penalties and are not focused on civil claims. The Board's standard of proof is strict responsibility or preponderance of probability.<sup>43</sup> This distinction places victims in a challenging position, as they must pursue separate civil litigation to seek full redress, such as compensation or specific performance.

The case involved Dr. John N. Ondeko's complaint against Dr. Praxades Okutoyi, Dr. Chimmy Omamo Olende, and Nairobi Hospital following a botched nasal surgery on his son, leading to permanent brain damage. The Board found Dr. Okutoyi guilty of infamous conduct and suspended her for three years. However, the charges against Dr. Olende and Nairobi Hospital were dismissed due to insufficient evidence.<sup>44</sup> The Board's findings highlighted the oversight responsibility of medical practitioners and the institution but did not translate into civil liability for compensation.

The separation of disciplinary and civil proceedings results in a lengthy and expensive process for victims seeking justice. They must navigate through the Board's disciplinary procedures and then file civil suits for compensation. This procedural complexity discourages victims from pursuing claims, as the disciplinary process does not directly address their need for retribution and compensation.

### **Atsango Chesoni v Davis Morton Silverstein<sup>45</sup> [2005] eKLR**

The High Court emphasized that the Board's inquiry into professional misconduct is akin to a criminal proceeding, requiring strict proof of

---

<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> *Atsango Chesoni v Davis Morton Silverstein* [2005] eKLR

misconduct rather than a balance of probabilities. This criminal-like approach means the inquiry focuses solely on the practitioner's conduct, excluding consideration of civil claims by the victims. The High Court in this case awarded punitive costs to the respondent, Dr. Silverstein, against the appellant, Ms. Chesoni. The court justified the high costs due to the complexity and novelty of the medical negligence issues involved.<sup>46</sup> Such punitive cost awards deter victims from filing medical malpractice claims, as they risk incurring significant legal expenses if unsuccessful.

Ms. Chesoni had lodged a complaint of professional negligence against Dr. Silverstein following the death of her father, Justice Chesoni, under Dr. Silverstein's care. The Board cleared Dr. Silverstein, and Ms. Chesoni's appeal was dismissed with costs awarded to the respondent. The High Court's decision to award costs for two advocates due to the case's complexity exemplifies the financial burdens placed on victims seeking justice.

The procedural deficiencies and protracted process of redress in the regulation of medical malpractice in Kenya highlight significant challenges for victims. The separation of disciplinary and civil proceedings, coupled with punitive cost awards, creates a cumbersome and discouraging environment for those seeking justice against negligent medical practitioners. Reforms are necessary to streamline the process and provide comprehensive redress to victims.

### **3.3 Entrenched Protectionist Tendency of KMPDU in Relation to Its Members**

The Kenya Medical Practitioners and Dentists Union (KMPDU) exhibits a protectionist tendency in disciplinary proceedings involving its members. According to Rule 5(1) (a) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules,<sup>47</sup> disciplinary proceedings can

---

<sup>46</sup> Ibid

<sup>47</sup> Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, Rule 5(1)(a)

be initiated when a medical practitioner is convicted in criminal proceedings. The complainant must present evidence of the conviction to the Board. Proceedings can also commence if there is a complaint of serious professional misconduct. These complaints are evaluated under Part II of the Rules, which pertains to "Proceedings relating to conviction and infamous conduct in a professional respect."<sup>48</sup>

Rule 2 defines infamous or disgraceful conduct as serious misconduct according to the rules governing the medical and dental professions. The Board's role is to correct such misconduct through punitive measures. Sanctions include continuous professional development, suspension of licenses, and closure of institutions until compliance.<sup>49</sup> These measures aim to correct the practitioner's conduct rather than addressing the victim's grievances.

### **Protectionist Tendencies**

The KMPDU's disciplinary procedures focus primarily on the conduct of medical practitioners, aiming to reform and rehabilitate rather than penalize. This approach often neglects the needs and rights of victims, who seek direct retribution and compensation for their suffering. The procedure emphasizes corrective measures for the medical practitioner, which can be seen as protecting the practitioner rather than addressing the harm caused to the patient.

The current system often leaves victims without adequate redress. They endure pain, suffering, and loss without receiving the compensation or acknowledgment they deserve. The Board's focus on practitioner conduct over victim restitution discourages patients from seeking justice through the Board, as their grievances are not fully addressed.

---

<sup>48</sup> Ibid, Rule 5(1)(b)

<sup>49</sup> Ibid, Rule 4A(3)

The KMPDU's approach creates a perceived protection of medical practitioners at the expense of victim justice. Reforms are necessary to balance the interests of both practitioners and victims, ensuring that disciplinary procedures also provide meaningful redress for those harmed by medical malpractice. This includes integrating mechanisms for compensation and official apologies, thereby restoring confidence in the regulatory process and encouraging victims to seek justice.

### **3.4 Compensation Resulting from Medical Negligence**

The case of *Jimmy Paul Semenyé v Aga Khan Health Service Kenya T/A The Aga Khan Hospital and 2 Others*<sup>50</sup> serves as a significant example of compensation awarded due to medical negligence in Kenya. The plaintiff, Jimmy Paul Semenyé, brought a suit against Aga Khan Health Service Kenya and the doctor who conducted the delivery of his child, seeking compensation for medical negligence that resulted in his child suffering from Erb's palsy brachial plexus (paralysis to the shoulder, arm, or hand) after a normal spontaneous vaginal delivery on 13th March 2003. The court found the 1st defendant (Aga Khan Health Service Kenya) and the 2nd defendant (the doctor) 100% liable for the injuries sustained by the child. The 1st defendant was held vicariously liable for the actions of its agent or servant, the 2nd defendant.<sup>51</sup>

#### **Quantum of Damages:**

##### **1. General Damages:**

The court awarded Kshs. 800,000/- for pain, suffering, and loss of amenities.

##### **2. Special Damages:**

Nominal damages for expenses incurred in India: Rs. 115,823.

Hospital expenses in Kenya: Ksh. 70,000/-.

---

<sup>50</sup> *Jimmy Paul Semenyé v Aga Khan Health Service Kenya T/A The Aga Khan Hospital and 2 Others* [2006]

<sup>51</sup> *Ibid*

### 3. **Future Medical Costs:**

Nominal damages for future medical costs: Ksh. 50,000/-.

#### **Total Compensation:**

The total compensation awarded amounted to Ksh. 920,000/- plus Rs. 115,823. The court awarded the costs of the suit to the plaintiff, to be borne by the 1st and 2nd defendants. Additionally, the costs of the suit were awarded to the third party (the child's mother), to be borne by the 1st and 2nd defendants. Interest on special damages was to be paid by the 1st and 2nd defendants jointly from the date of filing the suit, and interest on general damages from the date of judgment.

This case underscores the court's role in awarding both general and special damages, as well as future medical costs, to victims of medical negligence. The vicarious liability of healthcare institutions for the actions of their staff emphasizes the importance of institutional accountability. The compensation framework provides a basis for financial redress for the pain, suffering, and economic losses endured by victims and their families.

The case of Jimmy Paul Semenyé illustrates the legal recourse available to victims of medical negligence in Kenya, highlighting the courts' ability to award substantial damages to address the physical and financial impacts of medical errors. It also demonstrates the potential for holding both individual practitioners and healthcare institutions accountable for negligent acts, providing a pathway for victims to seek justice and compensation.

## **4. Comparative Lessons for Securing Accountability for Medical Malpractice and Negligence**

### **4.1 Institutional Independence and Accountability of the Professional Body**

#### **4.1.1 United Kingdom**

In the United Kingdom, the General Medical Council (GMC) serves as the principal regulatory body overseeing medical practitioners. The GMC operates under the authority granted by the Medical Act 1983.<sup>52</sup> It is responsible for licensing doctors, setting standards for medical education and practice, and taking disciplinary actions against practitioners who fail to meet these standards. The GMC maintains a significant degree of independence from both the government and the medical profession itself. This independence is crucial for ensuring unbiased regulation and maintaining public trust. There have been movements to include more lay members (non-medical professionals) in the GMC's decision-making processes to enhance transparency and accountability.<sup>53</sup>

The GMC is required to conduct its regulatory functions openly, allowing public scrutiny and input into its processes. This includes public consultations on significant policy changes and publishing outcomes of disciplinary hearings.<sup>54</sup> The GMC's functions are subject to oversight by the Professional Standards Authority, which reviews the performance of health and care

---

<sup>52</sup> Medical Act, 1983

<sup>53</sup> Sylvia R. Cruess, MD and Richard L. Cruess, MD (2005) 'The Medical Profession and Self-Regulation: A Current Challenge' *AMA Journal of Ethics* <https://journalofethics.ama-assn.org/article/medical-profession-and-self-regulation-current-challenge/2005-04> accessed 17 July 2024

<sup>54</sup> Vanezis, P. (2013). Medical Responsibility and Liability in the United Kingdom. In: Ferrara, S., Boscolo-Berto, R., Viel, G. (eds) *Malpractice and Medical Liability*. Springer, Berlin, Heidelberg. [https://doi.org/10.1007/978-3-642-35831-9\\_7](https://doi.org/10.1007/978-3-642-35831-9_7) accessed 17 July 2024

regulators in the UK and reports to Parliament. These measures help balance the self-regulation by the medical profession with the need for accountability to the public. The inclusion of lay members and public consultations helps mitigate conflicts of interest that might arise from a purely self-regulated body.<sup>55</sup>

#### 4.1.2 Lessons for Kenya

Kenya can draw several lessons from the UK model to enhance the accountability and independence of its medical regulatory bodies:

##### 1. Increase Lay Participation:

**Inclusion of Non-Medical Professionals:** Similar to the GMC, incorporating lay members into the Kenya Medical Practitioners and Dentists Board (KMPDB) could help ensure decisions are made transparently and reflect public interest.

##### 2. Enhance Transparency:

**Public Scrutiny and Input:** Implementing mechanisms for public consultations and transparency in disciplinary procedures can help build public trust. Publishing the outcomes of disciplinary actions and allowing public access to such records would enhance accountability.

##### 3. Legislative and External Oversight:

**Independent Review:** Establishing an independent body to oversee the KMPDB's functions, similar to the UK's Professional Standards Authority, could provide an additional layer of accountability. This body could review the Board's performance, handle appeals, and report to Parliament.

##### 4. Strengthening Legal Frameworks:

**Clear and Enforced Regulations:** Ensuring that regulations governing medical

---

<sup>55</sup> Ibid

practice and malpractice are robust, clear, and strictly enforced can help reduce instances of negligence and improve overall healthcare quality.

## 4.2 Special Liability for Misconduct of Multiple Public Officials

### 4.2.1 South Africa

The case *Lushaba v MEC for Health, Gauteng*<sup>56</sup> illustrates significant legal principles regarding the liability of public officials in South Africa. In this case, Ms. Vuyisile Eunice Lushaba sued the MEC for Health, Gauteng, for damages after her baby suffered severe brain damage due to a delayed caesarean section performed at a provincial hospital. The court held certain public officials personally liable (*costs de bonis propriis*) for their gross negligence and indifference. This included a state attorney, a senior legal administrative officer, and a medico-legal advisor who failed to adequately defend the case despite the absence of a valid defence. The court emphasized that *costs de bonis propriis* are awarded in exceptional circumstances where there is serious negligence, dishonesty, or conduct that significantly deviates from expected standards.<sup>57</sup> The MEC for Health was found 100% liable for the damages, reinforcing the principle of vicarious liability where an employer (in this case, the State) is held accountable for the actions of its employees performed within the scope of their employment.<sup>58</sup>

The court noted that the habitual indifference and incompetence of public officials necessitated personal accountability to maintain public trust and uphold constitutional values of responsiveness and transparency<sup>59</sup>. The ruling aimed to set a precedent for holding public officials accountable for their actions to deter negligence and ensure better public service.

---

<sup>56</sup> *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ)

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*

<sup>59</sup> *Ibid*

#### **4.2.2 Lessons for Kenya**

Kenya can derive valuable lessons from South Africa's approach to handling misconduct by multiple public officials:

##### **1. Personal Accountability:**

Introducing mechanisms to hold individual public officials personally liable for gross negligence and misconduct, similar to the costs de bonis propriis in South Africa, can deter indifference and incompetence among public servants.<sup>60</sup> This would ensure that officials are personally responsible for their actions, thereby promoting diligence and accountability.

##### **2. Vicarious Liability:**

Strengthening the application of vicarious liability in Kenya can ensure that public institutions, such as health departments, are held accountable for the actions of their employees.<sup>61</sup> This would encourage better oversight and management practices within these institutions.

##### **3. Clear Legal Framework:**

Establishing a clear and robust legal framework that defines the circumstances under which public officials can be held personally liable would be essential. This should include detailed provisions on what constitutes gross negligence and the process for imposing such liability.

##### **4. Judicial Support:**

Encouraging judicial support for holding public officials accountable can help build a culture of accountability. Courts should be empowered to issue strong sanctions against officials who exhibit gross negligence, as seen in the *Lushaba case*.

---

<sup>60</sup> Okutoyi, L., Godia, P., Adam, M., Sitati, F., & Jaoko, W. (2024). Understanding Diagnostic Error Patterns and Contributing Factors: A Descriptive Analysis of Medical Error Reports at a Tertiary Hospital in Kenya 2019-2021. *medRxiv*, 2024-05.

<sup>61</sup> Ibid

## **5. Public Awareness and Transparency:**

Increasing public awareness about the rights of patients and the accountability mechanisms available can empower citizens to demand better service and seek justice when wronged. Transparency in handling medical negligence cases can also rebuild public trust in the healthcare system.

### **4.3 Judicial Innovation to Render Justice to Victims of Medical Malpractice**

#### **4.3.1 United Kingdom**

##### **Montgomery v Lanarkshire Health Board [2015] UKSC 11**

In the landmark case of *Montgomery v Lanarkshire Health Board*,<sup>62</sup> the UK Supreme Court fundamentally shifted the legal landscape regarding informed consent in medical practice. Nadine Montgomery, a diabetic woman of small stature, was not informed by her doctor of the 9-10% risk of shoulder dystocia during vaginal delivery. Her baby was born with severe disabilities due to complications from this condition. Montgomery sued for negligence, claiming that she should have been informed about the risks and the alternative option of a caesarean section.

The Supreme Court ruled in favour of Montgomery, establishing that doctors have a duty to disclose any material risks associated with proposed treatments, as well as any reasonable alternatives.<sup>63</sup> The decision emphasized that patient autonomy and informed consent are paramount, marking a departure from the previous reliance on the Bolam test, which focused on professional medical opinion over patient rights.

#### **4.3.2 India**

##### **Vinod Jain v Santokba Durlabhji Memorial Hospital and Another [2018]**

---

<sup>62</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

<sup>63</sup> *Ibid*

In this case, the Supreme Court of India addressed the issue of medical negligence in the context of failure to provide timely and adequate medical treatment. The court underscored the need for healthcare providers to adhere to established medical protocols and standards. The ruling highlighted the importance of holding medical practitioners accountable for lapses in duty that result in harm to patients.<sup>64</sup>

#### **A.S. Mittal and Another v State of Uttar Pradesh and Others [1989] AIR 1570**

This case involved a mass cataract surgery camp organized by the government, where many patients suffered severe complications and loss of vision due to negligence. The Supreme Court of India held the state government and the organizing doctors liable for the negligence. The court emphasized the need for strict adherence to medical standards and protocols, particularly in mass medical interventions, to prevent harm to patients.<sup>65</sup>

### **4.3.3 Lessons for Kenya**

#### **1. Emphasize Informed Consent:**

**Patient Autonomy:** Adopting the principles from *Montgomery v Lanarkshire Health Board*, Kenya can reinforce the importance of informed consent. Medical practitioners should be mandated to disclose all material risks and alternatives to patients, ensuring that patients can make well-informed decisions about their treatment.

#### **2. Accountability and Standards:**

**Strict Adherence to Protocols:** Learning from the Indian cases, particularly *Vinod Jain and A.S. Mittal*, Kenya should enforce strict adherence to medical protocols and standards. This includes holding healthcare providers accountable for negligence and ensuring that mass medical interventions are conducted with the highest standards of care.

---

<sup>64</sup> *Vinod Jain v Santokba Durlabhji Memorial Hospital and Another* [2018]

<sup>65</sup> *A.S. Mittal and Another v State of Uttar Pradesh and Others* [1989] AIR 1570

### **3. Judicial Support for Victims:**

**Judicial Innovation:** Kenyan courts can take a proactive role in supporting victims of medical malpractice by ensuring that legal standards evolve to protect patient rights. This includes adopting a patient-centric approach in negligence cases and ensuring that victims receive adequate compensation and justice.

### **4. Strengthening Legal Frameworks:**

**Legislative Reforms:** Kenya can benefit from legislative reforms that clearly define the duties of medical practitioners regarding informed consent and adherence to medical standards. This can provide a robust framework for holding practitioners accountable and ensuring justice for victims of medical malpractice.

## **4.4 Establishment of Medical Malpractice Tribunals**

### **4.4.1 South Africa**

#### **Goliath v MEC of Health, Eastern Cape [2015]**

In the case of *Goliath v MEC of Health Eastern Cape*,<sup>66</sup> the plaintiff, Cecilia Goliath, underwent a routine hysterectomy at a provincial hospital. A surgical swab was left in her abdomen, causing severe infection and requiring further surgery to remove it. Goliath sued the MEC for Health, alleging negligence on the part of the doctors and nursing staff. Initially, the High Court dismissed her claim, stating that Goliath failed to prove negligence. However, upon appeal, the Supreme Court of Appeal (SCA) overturned this decision, emphasizing that the presence of the swab in Goliath's abdomen after surgery constituted prima facie evidence of negligence. The SCA awarded her R250,000 in damages. This case underscored the application of the *res ipsa loquitur* doctrine in medical negligence cases, allowing courts to infer negligence from the mere fact of the occurrence, provided there is no plausible explanation from

---

<sup>66</sup> *Goliath v MEC of Health, Eastern Cape* [2015]

the defendant.<sup>67</sup>

#### 4.4.2 Lessons for Kenya

Kenya can learn valuable lessons from South Africa's handling of medical malpractice cases to enhance its own system:

##### 1. Establishment of Specialized Tribunals:

**Dedicated Malpractice Tribunals:** Kenya should consider establishing specialized medical malpractice tribunals. These tribunals would focus solely on cases of medical negligence, allowing for more efficient and expert handling of such matters. This specialization can lead to more consistent and fair outcomes.

##### 2. Application of Res Ipsa Loquitur:

**Inference of Negligence:** Adopting the res ipsa loquitur principle can simplify the burden of proof for plaintiffs in medical negligence cases. This doctrine allows courts to infer negligence from the mere occurrence of certain types of accidents, shifting the burden to the defendant to provide a satisfactory explanation.

##### 3. Legal and Procedural Reforms:

**Simplified Procedures:** Streamlining the procedures for filing and adjudicating medical malpractice claims can make the process less cumbersome for victims. This includes setting clear guidelines on the handling of evidence and expert testimonies.

##### 4. Comprehensive Compensation Mechanisms:

**Fair Compensation:** Establishing mechanisms to ensure fair and timely compensation for victims of medical negligence is crucial. This involves not only financial restitution but also addressing non-economic damages such as

---

<sup>67</sup> Ibid

pain and suffering.

## 4.5 Legislation on Culpable Homicide

### 4.5.1 South Africa

#### **Van der Walt v S [2020] 2 SACR 371 (CC)**

In the case of *Van der Walt v S*,<sup>68</sup> Dr. Danie Van der Walt, an obstetrician and gynaecologist, was convicted of culpable homicide after the death of his patient due to his negligent medical care. The patient, Ms. Pamela Noni Daweti, died following complications from a postpartum haemorrhage. Dr. Van der Walt was sentenced to five years in prison. He appealed the decision, arguing that his trial was unfair and that the sentence was excessive. The Constitutional Court upheld the conviction, emphasizing that severe negligence leading to death could be prosecuted as culpable homicide, reinforcing the accountability of medical practitioners for their professional conduct.<sup>69</sup>

This case highlighted the need for specific legislation addressing the culpability of medical practitioners in cases where their negligence leads to patient deaths. It sparked a debate on the adequacy of existing laws and the necessity for clear legal provisions to prosecute such cases effectively.

### 4.5.2 Lessons for Kenya

Kenya can learn several critical lessons from South Africa's approach to legislating culpable homicide in cases of medical negligence:

#### 1. **Clear Legal Framework:**

**Legislation Specific to Medical Negligence:** Kenya should consider enacting legislation that clearly defines the circumstances under which medical practitioners can be charged with culpable homicide. This would provide a clear legal basis for prosecuting cases of severe medical negligence resulting in

---

<sup>68</sup> *Van der Walt v S* [2020] 2 SACR 371 (CC)

<sup>69</sup> Ibid

death.

## 2. **Accountability and Deterrence:**

**Enhanced Accountability:** Implementing stringent legal measures to hold medical practitioners accountable for gross negligence can serve as a deterrent. Clear legal consequences for malpractice that leads to death will encourage adherence to high standards of medical care.

## 3. **Fair Trial and Due Process:**

**Ensuring Fair Trials:** It is crucial to ensure that medical practitioners receive fair trials, with clear guidelines on evidence admissibility and the right to challenge evidence. This safeguards the rights of the accused while ensuring justice for the victims.

## **Conclusion**

In addressing the epidemic of medical malpractice in Kenya, it is evident that the current regulatory framework and judicial mechanisms fall short in ensuring accountability and providing justice for victims. The Kenya Medical Practitioners and Dentists Union (KMPDU) and the existing legislative provisions have proven inadequate in enforcing accountability for the grave consequences of medical negligence, including loss of life and severe impairments.

Comparative lessons from jurisdictions like the United Kingdom and South Africa offer valuable insights into enhancing Kenya's approach to medical malpractice. The UK's emphasis on informed consent and patient autonomy, as established in *Montgomery v Lanarkshire Health Board*, underscores the necessity of a patient-centred approach. South Africa's robust legal precedents, illustrated in cases such as *Goliath v MEC of Health, Eastern Cape* and *Van der Walt v S*, highlight the importance of specialized tribunals and clear legislative definitions for prosecuting culpable homicide due to medical negligence.

For Kenya to effectively combat medical malpractice, several key reforms are essential: Establishment of Independent Tribunals; Legislative Clarity and Reform; Transparency and Accountability and Strengthening Informed Consent. Implementing these reforms will create a more accountable, transparent, and just healthcare system in Kenya, ultimately protecting patient rights and ensuring that victims of medical malpractice receive the justice and compensation they deserve.

## References

*A.S. Mittal and Another v State of Uttar Pradesh and Others* [1989] AIR 1570

*Atsango Chesoni v Davis Morton Silverstein* [2005] eKLR

Constitution of Kenya, 2010

*Goliath v MEC of Health, Eastern Cape* [2015]

*J.O.O. and 2 others v Praxades P Mandu Okutoyi and 2 others* [2011] eKLR

*Jimmy Paul Semenye v Aga Khan Health Service Kenya T/A the Aga Khan Hospital and 2 others* [2006]

Kenya Medical Practitioners and Dentists Act

Kifanya, A. I. (2017). Resolving medical malpractice claims: a critical study of disciplinary proceedings in Kenya.

*Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ)

Medical Act, 1983

Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules

*Montgomery v Lanarkshire Health Board* [2015] UKSC 11

Okutoyi, L., Godia, P., Adam, M., Sitati, F., & Jaoko, W. (2024). Understanding Diagnostic Error Patterns and Contributing Factors: A Descriptive Analysis of Medical Error Reports at a Tertiary Hospital in Kenya 2019-2021. *medRxiv*, 2024-05.

*Legal and Policy Reform to Cure the Epidemic of Medical Malpractice in Kenya: Comparative Lessons for Accountable Healthcare: Michael Sang*

(2025) *Journal of CMSD* Volume 12(1)

Omiti, Herman and Fundi, Elizabeth Cheupe, Assessing the Legal Mechanisms for Redressing Medical Malpractice in Kenya: Just How Effective are They? (September 15, 2014). Available at SSRN: <https://ssrn.com/abstract=2496267>

*Republic v Kenya Medical Practitioners and Dentists Board and 2 others* [2013] eKLR Sylvia R. Cruess, MD and Richard L. Cruess, MD (2005) 'The Medical Profession and Self-Regulation: A Current Challenge' *AMA Journal of Ethics* <https://journalofethics.ama-assn.org/article/medical-profession-and-self-regulation-current-challenge/2005-04>

*Van der Walt v S* [2020] 2 SACR 371 (CC)

Vanezis, P. (2013). Medical Responsibility and Liability in the United Kingdom. In: Ferrara, S., Boscolo-Berto, R., Viel, G. (eds) *Malpractice and Medical Liability*. Springer, Berlin, Heidelberg. [https://doi.org/10.1007/978-3-642-35831-9\\_7](https://doi.org/10.1007/978-3-642-35831-9_7)

*Vinod Jain v Santokba Durlabhji Memorial Hospital and Another* [2018]

Wanjohi, S. W. (2021). Appraising the legal and regulatory framework on medical negligence in Kenya.

## **The Small Claims Court; An Adjudicator's Perspective**

**By: Viola S. Wakuthii Muthoni\***

### ***Abstract***

*The Small Claims Court in Kenya plays a crucial role in providing accessible, cost-effective, and expedited justice for individuals and businesses with modest financial disputes. This article examines the law and practice of the court, offering insights into its adjudicative processes. It addresses common misconceptions, particularly the myth that the court permits unethical practices, and clarifies the procedural safeguards in place to ensure fairness. The article provides practical recommendations for litigants, legal practitioners, as well as adjudicators on how to navigate the system, to uphold the integrity of proceedings, and ultimately to achieve the purpose of the court. By demystifying the operations of the Small Claims Court, this paper aims to enhance public confidence and improve the efficiency of dispute resolution within this vital judicial forum.*

### **Background**

To promote a people-centered justice, the Chief Justice of the Republic of Kenya, the Hon. Martha Koome has launched 37 Small Claims Courts (SCCs) all over the country.<sup>1</sup> These include SCCs in 33 counties, including in the border towns of Kenya.<sup>2</sup> This is in line with the Chief Justice's blueprint, Social Access through Access to Justice (STAJ). The STAJ promotes a multi-door approach to justice, affording citizens several options to resolve their disputes,

---

\* *Resident Magistrate and Adjudicator, Small Claims Court, Mombasa-Kenya*

<sup>1</sup> Judiciary website <https://judiciary.go.ke/more-small-claims-courts-opened-in-the-country/>

<sup>2</sup> Nairobi, Kajiado, Kiambu, Kirinyaga, Kericho, Uasin Gishu, Machakos, Nakuru, Nyeri, Kakamega, Mombasa, Kisumu, Meru, Turkana, Wajir, Garissa, Migori, Marsabit, Mandera, Busia, Taveta, Murang'a, Makueni, Kitui, Kilifi, Narok, Kisii, Siaya, Lamu, Embu, Trans-Nzoia, Tharaka-Nithi and Laikipia..

one of which is the SCC.<sup>3</sup>

The SCC is a subordinate court, established in line with the Constitution of Kenya, 2010<sup>4</sup> and the Small Claims Court Act Cap 10A Laws of Kenya (SCC Act).<sup>5</sup> It is a specialized commercial court, handling civil disputes of a value less than Kshs 1,000,000/- (approx. USD 7,707).<sup>6</sup> The goal of the SCC is to promote the ease of doing business in Kenya, by creating an enabling environment for Small and Medium Enterprises (SMEs) to thrive.

Despite being at the bottom of the hierarchy of the courts,<sup>7</sup> the SCCs' contribution to access to justice in Kenya cannot be gainsaid. Since the launch of the inaugural Small Claims Court at Milimani, Nairobi in April of 2021, the SCCs around the country have resolved thousands of cases and released billions of money, which would otherwise have been held up in litigation.<sup>8</sup> The SCC has enhanced access to justice for the socially and economically disadvantaged citizens, who cannot otherwise afford expensive litigation, and whose disputes are of relatively low monetary value.<sup>9</sup>

The SCC can be termed as *korti ya mwananchi* (translated the ordinary citizen's court) as its processes are simple for use by the ordinary citizen.<sup>10</sup> The SCC also serves large enterprises and socially and economically empowered citizens, as

---

<sup>3</sup> Judiciary website, available at <https://judiciary.go.ke/download/social-transformation-through-access-to-justice/>.

<sup>4</sup> Article 169(1)(d) of the Constitution of Kenya, 2010.

<sup>5</sup> Section 4 Small Claims Court Act Cap 10A Laws of Kenya (SCC Act).

<sup>6</sup> Section 12(3) SCC Act.

<sup>7</sup> Article 162(4) of the Constitution of Kenya as read with Section 4 of the SCC Act.

<sup>8</sup> By May 2023, the SCCs had resolved 27,000 cases, valued at Kshs 4.6 billion as per the judiciary website <https://judiciary.go.ke/small-claims-court/>.

<sup>9</sup> Section 12(3) SCC Act envisages claims of a value between Kshs 1 to Kshs 1,000,000/-

<sup>10</sup> The court implements Article 48 Constitution of Kenya, which provides for access to justice to all, at a reasonable fee, and its low filing fees contained in the schedule to the SCC Act enable even the poor to access justice.

long as their disputes are within the Court's jurisdiction.<sup>11</sup>

Initially, the SCC began with 3 Adjudicators, deployed to the Milimani SCC in April of 2021.<sup>12</sup> This number has steadily risen, and currently, there are 53 adjudicators sitting in small claims courts across the country.<sup>13</sup> Although the SCC Act envisages that adjudicators would be recruited from advocates with 3 years' experience, the current adjudicators are taken from current two cohorts of Resident Magistrates, recruited in the years 2021 and 2023.<sup>14</sup>

### **The law, procedure and practice of the SCC**

The SCC's procedure is governed by the SCC Act and the Small Claims Court Rules (SCC Rules).<sup>15</sup> The court is not wholly bound by the rules of evidence,<sup>16</sup> and does not apply the civil procedure rules, except when it comes to execution procedures.<sup>17</sup> The court is however governed by other applicable civil laws such as the Limitation of Actions Act Cap 22 Laws of Kenya, hence actions brought should be within the statutory times provided for in the said Act.<sup>18</sup>

The SCC is also bound by decisions the high court and those of the Court of Appeal and Supreme Court in line with the doctrine of *stare decisis*.<sup>19</sup> The decisions of the Magistrates Court and Tribunals are persuasive and not

---

<sup>11</sup> Section 3(3)(b) provides for equal opportunity for all to access judicial services.

<sup>12</sup> Gazette Notice 2610 dated 16<sup>th</sup> March 2021.

<sup>13</sup> According to the annual SCC caseload statistics for the financial year 2023/24.

<sup>14</sup> Gazette Notice 6270 dated 1<sup>st</sup> May 2024. Also Inside the Judiciary Issue 18, January to April Issue Page 49, available at <https://www.judiciary.go.ke/wp-content/uploads/2024/06/ITJ-JANUARY-APRIL-ISSUE-18-2024-ITJ-MAGAZINE-Copy.pdf> (Accessed 5/11/2024).

<sup>15</sup> Legal Notice 145 of 2019.

<sup>16</sup> Section 32 SCC Act.

<sup>17</sup> *Biosystems Consultants v. Nyali Links Arcade Mombasa Civil Appeal E185 of 2023* (2023) KEHC 21068 (KLR) and Rule 25 SCC Rules.

<sup>18</sup> See *Uniglobe Northline Travel Limited v Maverick Picture Works Limited* (Civil Appeal E045 of 2022) [2022] KEHC 13531 (KLR) (Commercial and Tax) (7 October 2022) (Judgment)

<sup>19</sup> *Andala v FI (Suing through the next friend and mother RN) & another* (Civil Appeal E092 of 2024) [2024] KEHC 10042 (KLR) (9 August 2024) (Ruling)

binding on the SCC.<sup>20</sup> The SCC's guiding principles are: timely disposal of cases using the least expensive method, promoting equal opportunity for all to access justice, fairness of process and, simplicity of procedure.<sup>21</sup> These guidelines are further discussed below:

**Quick resolution of cases:** All cases filed at the SCC should be decided within 60 calendar days from the date of filing.<sup>22</sup> The e-filing system maintains a countdown of the lifetime of the case, from the date of filing.<sup>23</sup> Once the hearing of a case concludes, the adjudicator should make a decision within 3 days.<sup>24</sup> Adjournments are prohibited, except in exceptional circumstances, and are limited to a maximum of three.<sup>25</sup>

**Simplicity of procedure:** Cases at the SCC are initiated and carried on through standard forms, which are contained in the SCC Rules,<sup>26</sup> available judiciary website and the SCC registries. The parties, whether suing or being sued only need to fill them in, with necessary modifications to fit their case.<sup>27</sup> The Statement of Claim must bear details of both the Claimant and Respondent, and most importantly, it must contain a narration of how the amount sought has been arrived at.<sup>28</sup> The SCC Rules disallow objections to pleadings on grounds of want of form.<sup>29</sup>

---

<sup>20</sup> Magistrates' court are subordinate courts, as is the Small Claims Court Article 162(4) of the Constitution of Kenya.

<sup>21</sup> Section 3 SCC Act.

<sup>22</sup> Section 34(1) SCC Act.

<sup>23</sup> Judiciary Case Tracking System (CTS)

<sup>24</sup> Section 34(2) SCC Act.

<sup>25</sup> Section 34(3) SCC Act.

<sup>26</sup> Schedule 1 to the SCC Rules.

<sup>27</sup> Section 23(1) SCC Act.

<sup>28</sup> Section 24 SCC Act.

<sup>29</sup> Rule 32 SCC Rules.

On matters jurisdiction, the SCC's jurisdiction falls within four aspects, pecuniary,<sup>30</sup> territorial,<sup>31</sup> subject matter<sup>32</sup> and by virtue of the parties appearing before the court.<sup>33</sup> On pecuniary jurisdiction, parties can only recover up to 1 million shillings, and have to waive the excess, if their claim exceeds this amount.<sup>34</sup> The 1 million is exclusive of costs and interest. Parties are prohibited from filing several cases in division of the claim, so as to bring it within the SCC's jurisdiction.<sup>35</sup>

It may seem that a respondent who has a counterclaim which exceeds the pecuniary jurisdiction of the SCC is disadvantaged. The SCC Rules however provide a remedy for this. The respondent may seek to waive any amounts above Kshs 1 million and proceed with the counterclaim in the SCC, or file a separate claim to recover the whole of the counterclaim in the magistrates' courts.<sup>36</sup> On territorial jurisdiction, the same is determined vide gazette notice delineating the geographical limits of the particular SCC.<sup>37</sup>

Parties may apply to transfer a claim which falls under the territorial jurisdiction of an SCC, but such a transfer can only be ordered where there is an operational SCC in the destination county/sub-county.<sup>38</sup> There are some matters where the SCC's jurisdiction is excluded.<sup>39</sup> These are where the case is before another court or has been heard and determined by any other court; where the cause of action is in libel, slander, defamation, employment and

---

<sup>30</sup> Section 12(3) SCC Act.

<sup>31</sup> Section 11 SCC Act and the relevant Gazette Notice establishing the particular SCC.

<sup>32</sup> Section 12(1) SCC Act.

<sup>33</sup> Section 15 SCC Act.

<sup>34</sup> See the Statement of Claim Form SCC 1 in the First Schedule to the SCC Rules.

<sup>35</sup> Section 14 SCC Act.

<sup>36</sup> Rule 14 SCC Rules. Note that the SCC Rules provide the amount of the counterclaim to be Kshs 200,000/-, but the operative amount is Kshs 1 million, in line with the SCC Act.

<sup>37</sup> Section 12(4) SCC Act.

<sup>38</sup> Rule 34 SCC Rules.

<sup>39</sup> Section 13 SCC Act.

labour relations claims and claims that involve the possession and title to land.

40

When it comes to representation, parties may represent themselves, hire an advocate or be represented by an 'authorized representative'.<sup>41</sup> An authorized representative is a next of kin or close relative of a party to the case, approved by the court. Such a person files an *ex-parte* miscellaneous case, in which he/she applies for the court's approval and justifies that they have enough knowledge about the case and have authority to represent the party. Where there is more than one claimant, they can appoint one of them to conduct the case on their behalf, in writing.<sup>42</sup>

Cases may be filed by natural persons or legal persons, such as companies, in which case the representative files an authority to sue and a resolution by the company directors.<sup>43</sup> Following the launch of e-filing by the Chief Justice, all cases at the SCC are filed online through the judiciary online e-filing system.<sup>44</sup> Any party wishing to file or respond to a case and is unable to navigate the online system can visit the SCC registry of the court nearest to his/her location physically, where they will be assisted to open online e-filing accounts and to file their documents.<sup>45</sup>

Once a party files a case, they are automatically issued with the first mention notice, which operates as a summons to enter appearance issued in cases in the

---

<sup>40</sup> Section 13 (5) SCC Act.

<sup>41</sup> Section 2 and 20 SCC Act.

<sup>42</sup> Section 16 SCC Act.

<sup>43</sup> The SCC Act does not distinguish between natural or corporate persons in its interpretation Section 2. In practice, both natural and corporate persons sue and are sued before the SCC. Section 20 SCC Act provides for appearance by a duly authorized representative, which in practice is applied for corporate persons.

<sup>44</sup> <https://efiling.court.go.ke/>.

<sup>45</sup> The SCC registry runs an 'assisted filing desk' where unrepresented litigants are assisted to file cases by registry staff. See Section 23(2) of the SCC Act.

magistrates' courts.<sup>46</sup> This notice must be served together with the statement of claim and supporting documents, and this service sets in motion the events leading to hearing and determination of the case.<sup>47</sup>

No orders can be made against a party unless the court is satisfied that they were duly served with the claim and mention/hearing notices.<sup>48</sup> Rule 25 of the SCC Rules provides for personal service, with acknowledgment of service by the respondent by signing on the statement of claim, and the standard statement of claim form, SCC 1, has a section for this.<sup>49</sup> Proof of service is through a certificate of service (SCC 5), which should be detailed as to the mode of service, how the respondent was identified and the location where he/she was served.<sup>50</sup> The claimant should file proof of service, preferably before the first mention date.<sup>51</sup>

Although the SCC Act and Rules do not provide for electronic service, this is allowed, pursuant to the Electronic Case Management Practice Directions, 2020 by the Chief Justice Emeritus Hon. David Maraga.<sup>52</sup> Such service can be via the WhatsApp messaging application, in which case the claimant must annex to their certificate of service screenshots of the number served and proof that it belongs to the respondent.<sup>53</sup> In practice, adjudicators usually require the claimant to demonstrate that WhatsApp messages were delivered.<sup>54</sup>

---

<sup>46</sup> This notice is automatically issued by the e-filing system and is available for parties to download immediately on successful filing of their case.

<sup>47</sup> Rules 7,8 and 35 of the SCC Rules.

<sup>48</sup> Section 27(4) SCC Act.

<sup>49</sup> See Form SCC 1 in the First Schedule to the SCC Rules. Also Rule 35(3) SCC Rules.

<sup>50</sup> Form SCC 5 in the First Schedule to the SCC Rules.

<sup>51</sup> Rule 36 SCC Rules.

<sup>52</sup> Gazette Notice No. 2357

<sup>53</sup> The SCC Rule 36 only envisages service by mail and personal service where the respondent is a natural person. Rule 35(5) provides for service on a corporation by registered mail, at the registered office or to the company's director.

<sup>54</sup> See *Mwangi v Kidapu Sacco Limited & another* (Miscellaneous Civil Application E073 of 2023) [2024] KEHC 3739 (KLR) (18 April 2024) (Ruling) and *Equity Bank Kenya*

For email service, it is good practice for the claimant to demonstrate that the respondent's email is active, hence the service was effective. It has been held that service by email is acceptable.<sup>55</sup> Once a respondent is served with the statement of claim and supporting documents, they are allowed fifteen (15) calendar days within which to file a response to the statement of claim (Form SCC 2) and serve it on the claimant.<sup>56</sup> Where the respondent fails to defend the claim, the court enters default judgment against him/her/it.<sup>57</sup>

The respondent is also free to enjoin a third party, where they feel that someone else is liable for the claim.<sup>58</sup> This is done by filling in a third party notice (Form SCC 4), which does not require a formal application to court; and serving it on the third party.<sup>59</sup> The rules on service of the response/counterclaim and the third party notice apply in the same fashion as to the statement of claim.<sup>60</sup>

A respondent, once served with the claim can also admit the claim orally in court, or through the filed response to the claim.<sup>61</sup> The court records an admission as a judgment, and where the admission is for part of the claim, it fixes a hearing date for the balance of the claim.<sup>62</sup> Such an admission may be set aside on application by the respondent where it was not made by him/her or was made without his/her authority.<sup>63</sup> The SCC promotes the use of Alternative Dispute Resolution (ADR) mechanisms, with the concurrence of both parties, and agreements reached upon are recorded as binding orders of

---

Ltd v Hassan & 3 others (Civil Case E302 of 2022) [2023] KEHC 26558 (KLR) (Commercial and Tax) (8 December 2023) (Ruling) on service by WhatsApp.

<sup>55</sup> Heritage Roofing Limited v Lelo Investments Limited & another (Civil Appeal E323 of 2022) [2023] KEHC 17346 (KLR) (Civ) (12 May 2023) (Judgment).

<sup>56</sup> Section 25(2) SCC Act.

<sup>57</sup> Section 27 SCC Act.

<sup>58</sup> Rule 16 SCC Rules.

<sup>59</sup> Rule 16(1) SCC Rules.

<sup>60</sup> Rules 16(2) and (3)

<sup>61</sup> Section 26 SCC Act.

<sup>62</sup> Section 26(1) SCC Act.

<sup>63</sup> Section 26(6) and (7) SCC Act.

the court.<sup>64</sup>

The SCC is not strictly bound by the rules of evidence.<sup>65</sup> Even so, the Claimant must discharge the burden of proof on a balance of probabilities as is the case with other courts.<sup>66</sup> It is however easier for a party to discharge this burden at the SCC, as they are allowed to produce documents that would otherwise not be admissible, and the test is whether the adjudicator finds the evidence credible and trustworthy.<sup>67</sup> The court may also call for documentary evidence or summon a witness to testify where it opines that such evidence is crucial to the just determination of the case.<sup>68</sup>

This aspect makes the SCC an inquisitorial court set within an adversarial system.<sup>69</sup> The SCC is also empowered to determine its own procedures, with regard to the principles of natural justice.<sup>70</sup> Parties may agree to proceed by way of documents, after which the documents filed are admitted into evidence without calling their makers, and without oral evidence.<sup>71</sup> A party who has consented to proceeding as such cannot later challenge admissibility of documents.<sup>72</sup>

The SCC, being the ordinary citizens' court, often proceeds in Kiswahili, which is one of the 10 most widely spoken languages in Africa.<sup>73</sup> The SCC Act provides that the court should promote the use of Kiswahili, indigenous

---

<sup>64</sup> Section 18 SCC Act.

<sup>65</sup> Section 32(1) SCC Act and Rule 31 SCC Rules.

<sup>66</sup> *Mburu v Muhoro* (Commercial Appeal 2 of 2023) [2024] KEHC 8679 (KLR) (11 July 2024) (Judgment).

<sup>67</sup> Section 32(2) SCC Act.

<sup>68</sup> Section 19 SCC Act.

<sup>69</sup> Section 32(4) allow the court to seek and receive other evidence on its own initiative, as well as make such other investigations and inquiries as it may require.

<sup>70</sup> Section 17 SCC Act.

<sup>71</sup> Section 30 SCC Act.

<sup>72</sup> *Ominet Enterprises Ltd v. Iterkon Construction Ltd* (Civil Appeal E018 of 2024) [2024] KEHC 10747 (KLR) (Civ) (13 September 2024) (Judgment).

<sup>73</sup> Source- <https://www.unesco.org/en/articles/2024-edition-world-kiswahili-language-day> (Accessed 2/11/2024).

languages and those used by persons living with disabilities.<sup>74</sup> Though the parties may testify in these languages, the record of the SCC should be maintained in English.<sup>75</sup> The use of local languages has made it easier for persons without formal education to understand the procedure and workings of the SCC.

Once a case is heard and judgment delivered, the parties apply for a decree, which is signed and executed against the debtor, in line with the SCC Act and Civil Procedure Rules.<sup>76</sup> Parties aggrieved by the decision of an adjudicator may apply for review<sup>77</sup> or appeal to the High Court. The appeal is on grounds of law only and is a final appeal.<sup>78</sup>

Cost-effectiveness: The costs of filing a case at the SCC are considerably lower as compared with those at the magistrates' courts.<sup>79</sup> The fees are as follows:

1. Kshs 200/- for claims less than 50,000/-;
2. Kshs 400/- for claims worth Kshs 50,000-Kshs 100,000/-;
3. Kshs 600 for claims worth Kshs 100,000/- to Kshs 150,000/-and

---

<sup>74</sup> Section 21 SCC Act.

<sup>75</sup> Section 22 SCC Act.

<sup>76</sup> Sections 39 and 40 SCC Act and Rule 25 SCC Rules.

<sup>77</sup> Section 41 SCC Act and Rule 29 SCC Rules. The grounds include error apparent on the face of the record, as was enunciated by Judge F. Mugambi in *Easter Hellen Kojwang v. Kenneth Joe Kaunda* (Civil Appeal E238 of 2023) [2024] KEHC 11116 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)  
Neutral citation: [2024] KEHC 11116 (KLR)

<sup>78</sup> Section 38 SCC Act and Rule 30 SCC Rules. In *Kabibi Kitsao Changa V. Emmanuel K. Satari* (Civil Appeal E018 of 2022) [2023] KEHC 19129 (KLR) (27 June 2023) (Judgment) Neutral citation: [2023] KEHC 19129 (KLR) Judge Kizito Magare dismissed an appeal on grounds that it was based on facts and evidence.

<sup>79</sup> See the Fees Schedule contained in the Second Schedule to the SCC Rules as compared to the Court Fees Assessment Schedule of the Magistrates' Court in gazette number 4853 of 4<sup>th</sup> December 2020, available at [http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/12/G.N-NO\\_10181\\_Court\\_Fees\\_Assesment\\_Scedule.pdf](http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/12/G.N-NO_10181_Court_Fees_Assesment_Scedule.pdf).

4. Kshs 1,000/- for claims worth Kshs 150,000 to Kshs 1,000,000/-.

After the conclusion of a case, the SCC may award costs or disbursements to the successful party or may order that each party bears its own costs.<sup>80</sup> The court has discretion to award costs, as the wording in the SCC Act is not mandatory.<sup>81</sup> Where a party is represented by an advocate, the costs are awarded per the lower scale of the Advocates (Remuneration) Order.<sup>82</sup> The process of coming up with a scale specific to the SCC is ongoing at the time of publication of this paper.

### **Classification of cases at the SCC**

There are three classes of cases that one can file at the SCC. These are miscellaneous applications, civil and commercial cases.<sup>83</sup> Miscellaneous applications are brought by persons wishing to be authorized representatives, persons seeking leave to file suits out of time and other applications that may not require a substantive claim.<sup>84</sup>

Civil cases are those arising from torts of negligence, including personal injury and material damage claims, while commercial claims involve contracts including sale of goods, loans, services rendered and other debts.<sup>85</sup> Parties filing the cases are required to select the type of case on the e-filing system, hence they should select the correct classification.<sup>86</sup>

---

<sup>80</sup> Section 33 SCC Act.

<sup>81</sup> Section 33(1).

<sup>82</sup> Subsidiary Legislation to the Advocates Act Cap 16 Laws of Kenya

<sup>83</sup> Judiciary Case Tracking System and Registry Standard Operating Procedures.

<sup>84</sup> Section 20(3) SCC Act.

<sup>85</sup> Judiciary Case Tracking System (CTS).

<sup>86</sup> Judiciary Case Tracking System (CTS).

## **Highlights of some of High Court appeal decisions shaping the practice of the SCC**

### **1. Application of the Civil Procedure Rules to the SCC.**

Judge Kizito Magare in *Biosystems Consultants v. Nyali Links Arcade*<sup>87</sup> and Judge Majanja in *Uniglobe Northline Travel Ltd v. Maverick Picture Works Ltd*<sup>88</sup> held that the Civil Procedure Rules do not apply to the SCC. Therefore, the SCC being a specialized court applies the SCC Act and rules of procedure. The exception to this is with regard to execution, where Rule 25 of the SCC Rules provides for enforcement of decrees according to the Civil Procedure Rules.

Judge Wananda J.R Anuro in *Wanyiri v Eldoret Small Claims Court & 2 others; Wanjohi (Interested Party)*<sup>89</sup> declined to suspend a warrant of arrest issued against a Judgment Debtor in execution of the decree of the SCC. The Judge disagreed with the Petitioner's argument that rule 25 of the SCC rules is unconstitutional, given that no such pronouncement has yet been made. This finding buttresses the authority of the SCC to enforce its judgments and decrees.

### **2. Effect of exceeding the 60 days' timelines**

Judges have differed on the effect of the SCC determining a case beyond the 60 days' timelines. Judge Gichohi in *Kartan Singh Dhupar & Co. Ltd v. ARM Cement PLC (In Liquidation)*<sup>90</sup> held that judgment delivered outside of the 60 days' timeline is done without jurisdiction.

---

<sup>87</sup> Mombasa Civil Appeal E185 of 2023) (2023) KEHC 21068 (KLR).

<sup>88</sup> Nairobi Civil App E045 of 2022).

<sup>89</sup> (Constitutional Petition 21 of 2023) [2024] KEHC 10845 (KLR) (20 September 2024) (Ruling) Neutral citation: [2024] KEHC 10845 (KLR).

<sup>90</sup> Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax).

Judge AM Muteti, in *Asachi Works Limited v. Justus Mwendwa Kathenge*<sup>91</sup> held that the SCC had no jurisdiction to entertain a claim after the lapse of the statutory 60 days period.

On the other hand, Judge Kizito Magare in *Biosystems Consultants v. Nyali Links Arcade*<sup>92</sup> and Judge Majanja (may his soul rest in peace) in *Crown Beverages Ltd v. MFI Document Solutions Limited Nairobi*<sup>93</sup> found that the Court has jurisdiction even if the case exceeds the 60 days' timeline.

### **3. Personal injury claims arising from road traffic accidents**

There have been differing decisions on whether the SCC has jurisdiction to handle these claims. Judge Kizito Magare in *Jerusha Auma Ogwari v. Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim*<sup>94</sup>, held that the Small Claims Court is unsuited to handle personal injury claims arising from road traffic accidents. In *Andala v FI (Suing through the next friend and mother RN) & another*<sup>95</sup> Judge Nyakundi observed that the finding in the *Jerusha Ongwari* case above has left litigants at crossroads on whether to apply the decision, which is binding on the SCCs. The judge stayed proceedings pending determination of the matter by an uneven number of judges.

Judge F. Muchemi in *Naomi Wanjiru Irungu v. Francis Kimani Karanja*,<sup>96</sup> held that the Small Claims Court has jurisdiction to determine personal injury claims, subject to its pecuniary jurisdiction. This view was also held by Judge L. Njuguna in *Florence Murigi Gichovi v. Adams Mwiti Kilemi*,<sup>97</sup> and Judge

---

<sup>91</sup> (Civil Appeal E441 of 2022) (2024) KEHC 13167(KLR)(Civ)(15 October 2024) (Judgment)

<sup>92</sup> Mombasa CA E185 of 2023) (2023) KEHC 21068 (KLR).

<sup>93</sup> Civil Appeal E833 of 2021) (2023) KEHC 58 (KLR) (Civil).

<sup>94</sup> Mombasa HCCA No. 223 of 2022 (2023) KEHC 20111 (KLR).

<sup>95</sup> (Civil Appeal E092 of 2024) [2024] KEHC 10042 (KLR) (9 August 2024) (Ruling)

<sup>96</sup> Thika HCCA E037 of 2024.

<sup>97</sup> Embu HCCA No. E020 of 2024.

Dulu in *Jane v Runga*.<sup>98</sup>

Judge AM Muteti, in the *Asachi Works Limited case* (ibid) disagreed with Judge Magare, stating that the SCC has the power to determine any civil claim relating to compensation for personal injuries that do not attract damages that exceed Kshs 1 million.

#### **4. Declaratory suits**

The SCC has no jurisdiction to determine declaratory suits, as was held by Judge Aburili, in *Kenya Orient Insurance Limited v. George Otieno*<sup>99</sup>

#### **5. Rent, rent arrears and deposits**

Judge Majanja in the case of *Lisa Christoffersen v. Kavneet Kaur Sehmi T/A The Random Shop*<sup>100</sup> held that a claim for rent does not fall within the sphere of 'money held and received' and therefore a claim for rent or rent arrears is outside the jurisdiction of the Small Claims Court.

In *Mombasa Real Estate Agencis v. Ishram Shioji*<sup>101</sup> as consolidated with *Ishram Shioji v. Mombasa Real Estate Agencies*,<sup>102</sup> Judge Kizito Magare held that a complex real estate relationship cannot be pigeonholed into the SCC, and that the SCC is unsuited to deal with rent issues; even if the parties plead it so that it seems as a commercial claim.

When it comes to rent deposits where a tenant has not taken possession of the property, the SCC has jurisdiction. This was the holding of Judge Rutto in *Afzal Majothy Sadique v. Fridah Wambui Buru*, where she upheld Hon.

---

<sup>98</sup> Voi Civil Appeal E034 of 2024) [2024] KEHC 11036 (KLR) (18 September 2024) (Judgment).

<sup>99</sup> Kisumu Civil Appeal E166 of 2023 (2024) KEHC 7637 (KLR) (25 June 2024) (Judgment).

<sup>100</sup> (Civil Appeal E036 of 2022) [2022] KEHC 14035 (KLR) (Commercial and Tax).

<sup>101</sup> Civil Appeal No. 175 of 2022.

<sup>102</sup> Civil Appeal No. 163 of 2022.

Caroline Okumu (Adjudicator)'s finding that the Claimant was entitled to a refund of rent deposit where she did not take possession of the premises.<sup>103</sup> Judge Helene Namisi, in a recent case of *Michelle Muhanda v. LP Holdings*<sup>104</sup> held that the small claims court has jurisdiction to hear and determine a claim for refund of rent deposit. The judge held that this was not a claim for rent and rent arrears, but was a claim for breach of a contract for money held and received.

Judge WM Musyoka, in an earlier judgment in the case of *Maworks Investment Company Limited v Albert Mwilitsa*<sup>105</sup> took a contrary view, holding that the SCC has no jurisdiction to adjudicate over rent deposits. He held that such a matter turned on matters land, like rental income from landed assets, for which there are specialized courts and tribunals.

Judge F. Muchemi, in *Ng'ang'a v. Matheri*<sup>106</sup> held that the SCC has jurisdiction where the parties had entered a debt acknowledgment agreement. The agreement was for payment of accumulated of rental arrears, where the tenant had acknowledged owing the money and proposed a payment plan, which he later failed to honour.

## **6. Implied conditions in sale of goods contracts**

Judge M.A Odero, in *Julius Njogu Macharia v. Mary Wairimu Wandeto*<sup>107</sup> held that there was an implied contract of fitness for purpose in sale of goods contract, which the Respondent was in breach of. In this case, the Claimant had bought a cow from the Respondent, which later produced blood-stained milk, despite the Respondent having represented that the cow was fit for milk-

---

<sup>103</sup> [2024] KEHC 10652 (KLR) (Civ) (11 September 2024) (Judgment).

<sup>104</sup> Milimani HCCCOMMA No. E256 of 2023.

<sup>105</sup> Civil Appeal E686 of 2022) [2024] KEHC 10525 (KLR) (3 September 2024) (Judgment).

<sup>106</sup> (Civil Appeal 131 of 2023) [2024] KEHC 6713 (KLR) (6 June 2024) (Judgment).

<sup>107</sup> (Civil Appeal E060 of 2022) [2024] KEHC 11091 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11091 (KLR).

production. The learned judge upheld the Hon. E. Gaithuma (Adjudicator)'s finding in favour of the Claimant.

### **7. The rights of objectors in execution proceedings**

Judge F. Mugambi in *Patrick Mwaniki Nyoko & Anor v. Bapa Limited & 3 Others*,<sup>108</sup> restated the rights of objectors in execution. The Judge allowed the 1<sup>st</sup> Appellant's appeal on grounds that part of the attached goods were matrimonial property, which the 1<sup>st</sup> Appellant had proved purchase of. The Judge dismissed the 2<sup>nd</sup> Appellant's appeal on ground that he did not prove legal interest in the attached property, though the same was attached at his business premises.

### **8. Strict compliance with set timelines**

Judge Nyakundi in *St Mary's Tachasis Secondary School v Leev Contractors*<sup>109</sup> emphasized the need for parties to comply with timelines for filing pleadings in the SCC given its strict statutory timelines. In this case, the Judge declined to set aside default judgment issued by the SCC at Eldoret against the Appellant, who delayed to put in a response while being represented by State Counsel from the Office of the Attorney General.

### **9. The doctrine of subrogation**

Judge A.C Bett in *Juliah Wangari Mundia v. Irene Nyambura Kigo*<sup>110</sup> held that subrogation only applies where an insurer has obtained consent of the claimant (insured) to bring the claim. In this case, MUA insurance (formerly SAHAM Group) had brought the claim without the involvement of its insured. The Hon. V. Ogotu (adjudicator) dismissed the claim for failure to prove

---

<sup>108</sup> (Civil Appeal E002 of 2023) [2024] KEHC 11083 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11083 (KLR).

<sup>109</sup> (Civil Appeal E141 of 2023) [2024] KEHC 11021 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11021 (KLR).

<sup>110</sup> (Civil Appeal 153 of 2023) [2024] KEHC 10924 (KLR) (9 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10924 (KLR).

negligence, for absence of the claimant's driver's testimony. The Appellant appealed, and the appeal was dismissed on grounds of non-applicability of the doctrine of subrogation.

#### **10. Enforceability of contracts and the defence of duress**

Where parties have freely entered into a contract, the role of the court is to enforce the said contract. A party seeking to vitiate a contract on grounds of duress must specifically plead and prove such duress by adducing evidence. This was the holding of Judge Nyakundi R. in *Susan Ruto v. Kibiwott T Cherono*,<sup>111</sup> where he upheld a contract for payment of a commission to a land agent after a successful land transaction by the Appellant.

#### **Conclusion and recommendations**

It is appreciated that the SCC was designed to hear 'simple' cases. However, the SCC Act does not define what is a simple case, and the adjudicator at one time or the other may find him/herself handling a fairly complex case. Judge Magare in the *Mombasa Real Estate Agencis* (supra) found that a rent dispute involving a tenant, a management company and a buyer of an apartment to be complex and unsuited for the SCC.

Additionally, Judge Muteti in the *Asachi case* (supra), held that the SCC was not designed to hear complex matters, and proceeded to set out some of the factors that may determine the complexity of a matter. These include:

1. The nature of documents to be relied on at the hearing;
2. The number of witnesses to be called at the hearing;
3. The length of call of the witnesses;
4. The parties to the suit;
5. Number of counsel appearing and extent of their participation; and

---

<sup>111</sup> (Civil Appeal E200 of 2023) [2024] KEHC 10947 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10947 (KLR).

6. The need to call expert evidence and other considerations.

This means that a case with multiple issues for determination and requiring the evidence of many witnesses is not meant for the SCC, despite that the subject matter may be within the SCC's pecuniary, material, personal and geographical and jurisdiction. Parties in a complex case have the option of withdrawing the claim and filing it afresh at the magistrates' court.<sup>112</sup> The parties should also consider that their appeal options are limited to matters of law only, where the SCC has heard and determined their case.<sup>113</sup> The parties' retain the right to elect to lodge a claim that would otherwise fall within the SCC's jurisdiction in any other court.<sup>114</sup>

The adjudicator must balance between allocating sufficient time for the witnesses to give evidence, his/her heavy cause list and the need to sufficiently address his/her mind when retiring to write the judgment.<sup>115</sup> This can be done by use of active case management, by tracking closely the timelines for pretrial procedures, determining the number of witnesses to testify, gauging the complexity of the case, giving limited time for full compliance and narrowing down the non-contentious issues and other related issues.<sup>116</sup> The number of mentions per case should be limited and matters promptly fixed for hearings and consecutive dates can be reserved for lengthy hearings where possible.<sup>117</sup> In addition, the adjudicators should encourage parties to explore Alternative Dispute Resolution mechanisms early in the case, preferably during the first mention.<sup>118</sup>

---

<sup>112</sup> Section 35 SCC Act provides for withdrawal of a case at any time before final judgment.

<sup>113</sup> Section 38 SCC Act and Rule 30 SCC Rules

<sup>114</sup> Section 48 SCC Act.

<sup>115</sup> The Code of Conduct of Adjudicators requires them to maintain professionalism in its Section 10.

<sup>116</sup> Section 10(8) Adjudicator's Code of Conduct.

<sup>117</sup> Section 34(1) requires cases be heard on the same day or on day to day basis.

<sup>118</sup> In compliance with Section 18 SCC Act.

Such action allows the parties who agree to be referred to alternative dispute resolution such a Court Annexed Mediation (CAM) to go through the mediation process and come back within the lifetime of the case at the SCC. This is appreciating that the timeline for CAM is similar to that of the SCC, 60 days.<sup>119</sup> Once parties come back with a resolution, the SCC adopts it as an order of the court, which is enforced in similar fashion with judgments of the court.<sup>120</sup> Where parties do not agree in the CAM process, they can still be heard at the SCC.<sup>121</sup>

The adjudicator must also ensure that he/she steadily concludes cases and promptly write judgments. The SCC's performance is measured on a yearly basis on parameters, including conclusion of matter within the 60 days.<sup>122</sup> It is hence essential to manage the lifetime of each case. On the requirement to deliver judgments on the same date of the hearing or within 3 days of conclusion of hearing,<sup>123</sup> the SCCs has often been unable to comply with this requirement, which can be surmounted by requiring parties to file brief submissions and the court need not type its judgment.<sup>124</sup>

The main challenge of the Adjudicator is a heavy workload that often leads to burnout.<sup>125</sup> Although it is the duty of the adjudicator to maintain a cause list that he/she can comfortably manage, the case tracking system automatically allocates additional first mentions. In addition, the system does not anticipate the adjudicators going on leave, and keeps allocating them matters; while time keeps running for already existing files. For this reason, many cases are overtaken by time, where an adjudicator is unwell, away on official duty or on

---

<sup>119</sup> Rule 37 (2) of the The Civil Procedure (Court-Annexed Mediation) Rules (CAM Rules).

<sup>120</sup> Section 18(3) SCC Act and Rule 34(1) of the CAM Rules.

<sup>121</sup> Rule 34(7) CAM Rules.

<sup>122</sup> Through the Performance Measurement Management Understanding (PMMU).

<sup>123</sup> Section 34(2) SCC Act.

<sup>124</sup> Guidelines issued by Judge Magare in Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling).

<sup>125</sup> See the SOJAR report 2023/2024 on the workload versus number of adjudicators.

leave.<sup>126</sup>

To address this challenge, there is need for appointment of more adjudicators especially for busy stations like Nairobi, Thika, Eldoret, Nakuru, Machakos, Mombasa, Kisumu, Kakamega, Meru and Naivasha.<sup>127</sup> It has been suggested that it may be time for part-time adjudicators.<sup>128</sup> This remains an interesting proposition as part time adjudicators would assist-the full time adjudicators when the latter are unable to handle matters for one reason or the other. The volume of cases at the SCC compared with the number of adjudicators shows a heavy workload and the statistics should advice the distribution of adjudicators.

Claimants who intend to file their cases before the SCC should investigate the whereabouts of the intended respondent before lodging a Claim at the SCC. This ensures prompt service of the claim, leaving enough time for pre-trial, trial procedures and determination of the case. Proper certificates of service should be prepared in advance of the first mention date. In addition, parties should comply with pre-trial directions, by filing and serving documents within the timelines fixed by the court, to minimize objections that lengthen trials.

It is proposed that where possible, parties can agree on production of some documents and which witnesses need to be called to produce documents. A respondent who has properly analyzed the claimant's pleadings in advance of the pre-trial date is able to tell which documents are contentious and which are not, hence can waive the attendance of those who do not need to be cross-examined.

---

<sup>126</sup> Judiciary Case Tracking System.

<sup>127</sup> In descending order of the number of cases as per the SCC Caseload statistics of the year 2023-2024.

<sup>128</sup> Is it time for Part-Time Adjudicators? (2024) *Journal of cmsd Volume 11(2)* The Untapped Potential in the Small Claims Court Kenya: Henry Murigi.

During trial, parties and counsel should ensure that they have stable internet connections, to avoid wastage of time occasioned by unstable internet connections; where counsel or witnesses cannot be heard or keep dropping off the virtual court sessions. The adjudicator, being the umpire must allocate adequate but limited time for each case, considering the issues, number of witnesses and complexity of the particular case. Parties should endeavor to adhere to the allocated time.

The SCC serves many unrepresented members of the public and there is need for digital hubs within the court premises to enable such clients access online court sessions. This is because SCCs mostly proceed virtually.<sup>129</sup> There is also need for funding for the court to continue undertaking outreach to inform members of the public of the existence of the court and encourage them to uptake its services. Training of the SCC registry staff needs to be continuous, so they can properly advise unrepresented clients needing help with their cases. These can be achieved with the help of stakeholders, donors and well-wishers.

With regard to the law, there is need to amend the SCC Rules to bring them in conformity with the SCC Act. An example is the provision on the pecuniary jurisdiction of the SCC with regard to counterclaims, which is capped at Kshs 200,000/-<sup>130</sup> as opposed to the 1 million for claims. Of course the Act precedes the Rules, hence the court entertains counterclaims of a value of up to 1 million shillings, but the difference needs to be harmonized. Also the rules differ with the Act on the timeline to bring an application for review.<sup>131</sup> There is also need fast track the gazettement of the SCC's practice directions, as well as the remuneration order for advocates, specific to the SCC.

This paper is an invitation for the legal practitioners to appreciate the immense

---

<sup>129</sup> SOJAR report 2023/2024 Ibid.

<sup>130</sup> Rule 14 of the SCC Rules.

<sup>131</sup> Rule 29 that provides an application for review should be brought within 3 months, while Section 41 of the SCC Act provides for 30 days.

contribution that the SCC keeps making in dispute resolution in Kenya. The SCC is not a *kangaroo* court, as its procedures are laid out in the SCC Act and the rules. The simplicity of the procedures is not an invitation to unethical practice, including failing to secure practicing certificates; rather, they are a tool to enhance access to justice to many citizens of the republic. Indeed, the SCC has made, and continues making an immense contribution to Kenya's dispute-resolution landscape.

*The Small Claims Court; An Adjudicator's Perspective:* (2025) *Journal of cmsd Volume 12(1)*  
**Viola S. Wakuthii Muthoni**

## **Bibliography**

Statutes

Constitution of Kenya, 2010.

Small Claims Court Act Cap 10A Laws of Kenya.

Small Claims Court Rules Notice 145 of 2019.

Advocates Act Cap 16 Laws of Kenya.

Limitation of Actions Act Cap 22 Laws of Kenya.

The Code of Conduct of Adjudicators.

Civil Procedure (Court-Annexed Mediation) Rules (CAM Rules).

## **Article**

Henry Murigi, Is it time for Part-Time Adjudicators? The Untapped Potential in the Small Claims Court Kenya (2024) *Journal of cmsd Volume 11(2)*

## Publications

Social Transformation Through Access to Justice (STAJ) available at <https://judiciary.go.ke/download/social-transformation-through-access-to-justice/>.

The Small Claims Court reference for e-filing (Available at <https://judiciary.go.ke/download/reference-manual-for-scc-e-filing-system/>)

Performance Measurement Management Understanding (PMMU) report 2022/2023 (Available at <https://www.judiciary.go.ke/wp->

*The Small Claims Court; An Adjudicator's Perspective:* (2025) *Journal of cmsd Volume 12(1)*  
*Viola S. Wakuthii Muthoni*

[content/uploads/2024/07/PERFORMANCE-MANAGEMENT-AND-MEASUREMENT-UNDERSTANDINGS-EVALUATION-REPORT-20222023.pdf](https://www.judiciary.go.ke/wp-content/uploads/2024/07/PERFORMANCE-MANAGEMENT-AND-MEASUREMENT-UNDERSTANDINGS-EVALUATION-REPORT-20222023.pdf)).

SOJAR report 2023/2024 (Available at <https://judiciary.go.ke/sojar2023-2024/>)

Inside the Judiciary Issue 18, January to April Issue Page 49 (Available at <https://www.judiciary.go.ke/wp-content/uploads/2024/06/ITJ-JANUARY-APRIL-ISSUE-18-2024-ITJ-MAGAZINE-Copy.pdf>)

Court Fees Assessment Schedule of the Magistrates' Court in gazette number 4853 of 4th December 2020 (Available at [http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/12/G.N-NO-10181 Court Fees Assesment Scedule.pdf](http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/12/G.N-NO-10181-Court-Fees-Assesment-Scedule.pdf)).

### **Websites**

Judiciary e-filing system (Available at <https://efiling.court.go.ke/>).

Judiciary website (Available at <https://judiciary.go.ke/more-small-claims-courts-opened-in-the-country/>)

UNESCO website (Available at <https://www.unesco.org/en/articles/2024-edition-world-kiswahili-language-day>).

### **Caselaw**

Biosystems Consultants v. Nyali Links Arcade Mombasa Civil Appeal E185 of 2023) (2023) KEHC 21068 (KLR) and Rule 25 SCC Rules.

Uniglobe Northline Travel Limited v Maverick Picture Works Limited (Civil Appeal E045 of 2022) [2022] KEHC 13531 (KLR) (Commercial and Tax) (7 October 2022) (Judgment)

Andala v FI (Suing through the next friend and mother RN) & another (Civil

Appeal E092 of 2024) [2024] KEHC 10042 (KLR) (9 August 2024) (Ruling)

Mwangi v Kidapu Sacco Limited & another (Miscellaneous Civil Application E073 of 2023) [2024] KEHC 3739 (KLR) (18 April 2024) (Ruling)

Equity Bank Kenya Ltd v Hassan & 3 others (Civil Case E302 of 2022) [2023] KEHC 26558 (KLR) (Commercial and Tax) (8 December 2023) (Ruling) on service by WhatsApp.

Heritage Roofing Limited v Lelo Investments Limited & another (Civil Appeal E323 of 2022) [2023] KEHC 17346 (KLR) (Civ) (12 May 2023) (Judgment).

Mburu v. Muhoro (Commercial Appeal 2 of 2023) [2024] KEHC 8679 (KLR) (11 July 2024) (Judgment).

Ominet Enterprises Ltd v. Iterkon Construction Ltd (Civil Appeal E018 of 2024) [2024] KEHC 10747 (KLR) (Civ) (13 September 2024) (Judgment).

Easter Hellen Kojwang v. Kenneth Joe Kaunda (Civil Appeal E238 of 2023) [2024] KEHC 11116 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)

Kabibi Kitsao Changa V. Emmanuel K. Satari (Civil Appeal E018 of 2022) [2023] KEHC 19129 (KLR) (27 June 2023) (Judgment)

Wanyiri v Eldoret Small Claims Court & 2 others; Wanjohi (Interested Party) (Constitutional Petition 21 of 2023) [2024] KEHC 10845 (KLR) (20 September 2024) (Ruling) Neutral citation: [2024] KEHC 10845 (KLR).

Kartan Singh Dhupar & Co. Ltd v. ARM Cement PLC (In Liquidation) Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax).

Asachi Works Limited v. Justus Mwendwa Kathenge (Civil Appeal E441 of 2022) (2024) KEHC 13167(KLR)(Civ)(15 October 2024) (Judgment).

Crown Beverages Ltd v. MFI Document Solutions Limited Nairobi Civil Appeal E833 of 2021) (2023) KEHC 58 (KLR) (Civil).

Jerusha Auma Ogwari v. Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim Mombasa HCCA No. 223 of 2022 (2023) KEHC 20111 (KLR).

Andala v. FI (Suing through the next friend and mother RN) & another (Civil Appeal E092 of 2024) [2024] KEHC 10042 (KLR) (9 August 2024) (Ruling)

Naomi Wanjiru Irungu v. Francis Kimani Karanja Thika HCCA E037 of 2024.  
Florence Murigi Gichovi v. Adams Mwiti Kilemi Embu HCCA No. E020 of 2024

Jane v Runga Voi Civil Appeal E034 of 2024) [2024] KEHC 11036 (KLR) (18 September 2024) (Judgment).

Kenya Orient Insurance Limited v. George Otieno Kisumu Civil Appeal E166 of 2023 (2024) KEHC 7637 (KLR) (25 June 2024) (Judgment).

Lisa Christoffersen v. Kavneet Kaur Sehmi T/A The Random Shop (Civil Appeal E036 of 2022) [2022] KEHC 14035 (KLR) (Commercial And Tax).

Mombasa Real Estate Agencis v. Ishram Shivji as consolidated with Ishram Shivji v. Mombasa Real Estate Agencies Civil Appeal No. 175 of 2022 and Civil Appeal No. 163 of 2022.

Afzal Majothy Sadique v. Fridah Wambui Buru[2024] KEHC 10652 (KLR) (Civ) (11 September 2024) (Judgment).

Michelle Muhanda v. LP Holdings Milimani HCCCOMMA No. E256 of 2023.  
Maworks Investment Company Limited v Albert Mwilitsa Civil Appeal E686 of 2022) [2024] KEHC 10525 (KLR) (3 September 2024) (Judgment).

*The Small Claims Court; An Adjudicator's Perspective:* (2025) *Journal of CMSD Volume 12(1)*  
**Viola S. Wakuthii Muthoni**

Ng'ang'a v. Matheri (Civil Appeal 131 of 2023) [2024] KEHC 6713 (KLR) (6 June 2024) (Judgment).

Julius Njogu Macharia v. Mary Wairimu Wandeto Civil Appeal E060 of 2022) [2024] KEHC 11091 (KLR) (20 September 2024) (Judgment).

Patrick Mwaniki Nyoko & Anor v. Bapa Limited & 3 Others (Civil Appeal E002 of 2023) [2024] KEHC 11083 (KLR) (Commercial and Tax) (20 September 2024) (Ruling).

St Mary's Tachasis Secondary School v Leev Contractors (Civil Appeal E141 of 2023) [2024] KEHC 11021 (KLR) (20 September 2024) (Judgment).

Juliah Wangari Mundia v. Irene Nyambura Kigo (Civil Appeal 153 of 2023) [2024] KEHC 10924 (KLR) (9 September 2024) (Judgment).

Susan Ruto v. Kibiwott T Cheronno (Civil Appeal E200 of 2023) [2024] KEHC 10947 (KLR) (20 September 2024) (Judgment).

## **Safeguarding the Environment during and after Armed Conflict**

*By: Kariuki Muigua\**

### **Abstract**

*Armed conflicts are undesirable since they result in devastating loss of civilian life, massive displacement of people and violations of human rights and international humanitarian law. However, armed conflicts not only affect people, but also the environment. Therefore in addition to the protection of civilian population, it is necessary to safeguard the environment during and after armed conflict. This paper critically delves into the need to safeguard the environment during and after armed conflict. The paper asserts that the environment faces major threats during and after armed conflict. It examines some of the impacts of armed conflict on the environment. The paper also probes the progress made towards safeguarding the environment during and after armed conflict. Finally, the paper offers ideas towards safeguarding the environment during armed conflict.*

### **1.0 Introduction**

The term conflict generally refers to a situation in which two or more parties perceive that they possess mutually incompatible goals<sup>1</sup>. It has been pointed out that conflicts can also occur due to misalignment of goals, actions or motivations which can be real or only perceived to exist<sup>2</sup>. They are a common

---

\* *PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), OGW, LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; ESG Consultant; Advocate of the High Court of Kenya; Professor at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [March, 2024].*

<sup>1</sup> Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

<sup>2</sup> Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

occurrence in human relationships and interactions<sup>3</sup>. It has been asserted that conflicts are an inevitable part of living because they are related to situations of scarce resources, division of functions, power relations and role-differentiation<sup>4</sup>. Conflicts can occur in various types and forms and can involve individuals, groups, organizations, or states<sup>5</sup>. It has been noted that conflict is not in itself a negative phenomenon<sup>6</sup>. For example, non-violent conflict can be an essential component of social change and development, and is a necessary component of human interaction<sup>7</sup>. However, some types of conflicts are an undesirable and can affect peace, sustainability and development<sup>8</sup>. This category includes armed conflicts.

An armed conflict arises whenever there is fighting between states or protracted armed violence between government authorities and organized armed groups or just between organized armed groups<sup>9</sup>. Such conflicts can be international or non-international<sup>10</sup>. An international armed conflict arises

---

<sup>3</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfrican-CommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 05/03/2024)

<sup>4</sup> Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 05/03/2024)

<sup>5</sup> United Nations., 'Land and Conflict' Available at [https://www.un.org/en/land-natural-resourcesconflict/pdfs/GN\\_ExeS\\_Land%20and%20Conflict.pdf](https://www.un.org/en/land-natural-resourcesconflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf) (Accessed on 05/03/2024)

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>9</sup> International Committee of the Red Cross., 'Introduction to the Law of Armed Conflict' Available at [https://www.icrc.org/en/doc/assets/files/other/law1\\_final.pdf](https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf) (Accessed on 05/03/2024)

<sup>10</sup> Ibid

when one state or several states use armed force against another state or states<sup>11</sup>. On the other hand, non-international armed conflicts, which are also referred to as internal armed conflicts, take place within the territory of a state and do not involve the armed forces of any other state<sup>12</sup>. The International Committee of the Red Cross (ICRC) points out that an armed conflict exists whenever there is a resort to armed force between states<sup>13</sup>. It further notes that an armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons for or the intensity of the confrontation<sup>14</sup>. ICRC also points out that armed conflicts can be non-international (or "internal") in nature which refers to situations of violence involving protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a state<sup>15</sup>.

Armed conflicts are undesirable<sup>16</sup>. It has been correctly observed that armed conflicts mean devastating loss of civilian life, massive displacement of people and violations of human rights and international humanitarian law<sup>17</sup>. According to the United Nations, societies ravaged by armed conflicts have

---

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> International Committee of the Red Cross., 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Commentary of 2016' Available at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016#44> (Accessed on 05/03/2024)

<sup>14</sup> Ibid

<sup>15</sup> International Committee of the Red Cross., 'Internal Conflicts or Other Situations of Violence - What is the Difference for Victims?' Available at [https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm#:~:text=A%20non%2Dinternational%20\(or%20%22,the%20territory%20of%20a%20State](https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm#:~:text=A%20non%2Dinternational%20(or%20%22,the%20territory%20of%20a%20State). (Accessed on 05/03/2024)

<sup>16</sup> Amnesty International., 'Armed Conflict' Available at <https://www.amnesty.org/en/what-we-do/armed-conflict/> (Accessed on 05/03/2024)

<sup>17</sup> Ibid

paid a massive toll in loss of human life and economic, political and social disintegration<sup>18</sup>. It further notes that women and children, in particular, suffer severe atrocities in armed conflicts with sexual violence often being utilized as a weapon of war<sup>19</sup>. Armed conflicts result in widespread insecurity and trauma due to the atrocities and suffering of the civilian population which can persist for many decades<sup>20</sup>. It has been pointed out that armed conflict not only has harmful effects on people, but also on the non-human beings and the environment<sup>21</sup>. Therefore in addition to the protection of civilian population, it is necessary to safeguard the environment during and after armed conflict<sup>22</sup>.

This paper critically delves into the need to safeguard the environment during and after armed conflict. The paper asserts that the environment faces major threats during and after armed conflict. It examines some of the impacts of armed conflict on the environment. The paper also probes the progress made towards safeguarding the environment during and after armed conflict. Finally, the paper offers ideas towards safeguarding the environment during armed conflict.

## **2.0 Impacts of Armed Conflict on the Environment**

It has been pointed out that armed conflicts often lead to environmental degradation or destruction, with long-lasting effects that contribute to the increased vulnerability of the affected populations<sup>23</sup>. Armed conflicts can cause

---

<sup>18</sup> United Nations., 'Armed Conflict' Available at <https://www.un.org/esa/socdev/rwss/docs/2001/15%20Armed%20Conflict.pdf> (Accessed on 05/03/2024)

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Diakonia International Humanitarian Law Centre., 'International Humanitarian Law (IHL) and the Protection of the Environment during Armed Conflict' <https://www.diakonia.se/ihl/resources/international-humanitarian-law/protection-environment-natural-resources-ihl/> (Accessed on 05/03/2024)

<sup>22</sup> Ibid

<sup>23</sup> Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Available at

environmental damage, leading to food and water insecurity, loss of livelihoods, and biodiversity loss<sup>24</sup>. It has been observed that parties to armed conflicts have polluted water, torched crops, cut down forests, poisoned soils, and killed animals to gain military advantage<sup>25</sup>. Such acts result in environmental damage which threatens the well-being, health and survival of local populations, and this increases their vulnerability for years and even decades<sup>26</sup>.

According to the United Nations Environment Programme (UNEP), the environment continues to be the silent victim of armed conflicts worldwide<sup>27</sup>. UNEP points out that armed conflict causes significant harm to the environment and the communities that depend on natural resources<sup>28</sup>. Further, it asserts that direct and indirect environmental damage, coupled with the collapse of institutions, lead to environmental risks that can threaten people's health, livelihoods and security, and ultimately undermine post-conflict peacebuilding<sup>29</sup>. According to UNEP, environmental factors are rarely, if ever, the sole cause of violent conflict<sup>30</sup>. However, it has been asserted that the exploitation of natural resources and related environmental stresses can be

---

<https://www.genevaenvironmentnetwork.org/resources/updates/protecting-the-environment-in-armed-conflict/> (Accessed on 06/03/2024)

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> United Nations Environment Programme., 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law' Available at [https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict\\_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed=](https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed=) (Accessed on 06/03/2024)

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> United Nations Environment Programme., 'Curbing Negative Environmental Impacts of War and Armed Conflict' Available at <https://www.unep.org/news-and-stories/statements/curbing-negative-environmental-impacts-war-and-armed-conflict> (Accessed on 06/03/2024)

implicated in all phases of the conflict cycle, from contributing to the outbreak and perpetuation of violence to undermining prospects for peace<sup>31</sup>. For example, access and flow of water, land degradation, floods and pollution, in addition to competition over extractive resources, can directly worsen tensions and spur conflicts, similarly to resource depletion issues such as deforestation, soil erosion and desertification<sup>32</sup>.

In addition, it has correctly been observed that building and sustaining military forces during armed conflict can result in severe impact on the environment and natural resources<sup>33</sup>. For example, military vehicles, aircraft, vessels, buildings and infrastructure during armed conflict all require energy which is often in the form of oil<sup>34</sup>. This has severe environmental impacts and it is estimated that carbon dioxide emissions of the largest militaries may be far greater than many of the world's countries combined<sup>35</sup>. Armed conflict could also result in overexploitation of natural resources such as common metals, rare earth elements, water and hydrocarbons in order to sustain armed forces<sup>36</sup>. In addition, it has been observed that severe pollution incidents can be caused when industrial, oil or energy facilities are deliberately attacked, inadvertently damaged or disrupted during armed conflict<sup>37</sup>.

Some of the armed conflicts that have had negative impacts on the environment include the Vietnam War<sup>38</sup>. It has been observed that the war

---

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Conflict and Environment Observatory., 'How Does War Damage the Environment?' Available at <https://ceobs.org/how-does-war-damage-the-environment/> (Accessed on 06/03/2024)

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Available at <https://www.unep.org/news-and-stories/story/rooting-environment-times-conflict-and-war> (Accessed on 06/03/2024)

witnessed the use of the toxic herbicide Agent Orange which resulted in massive deforestation and chemical contamination<sup>39</sup>. Further, it has been observed that the widespread use of chemical defoliants during the war damaged public and ecological health across large areas of Vietnam<sup>40</sup>. It has been noted that the confluence of nature and war with its attendant ecocide and environicide produced extraordinary impacts on Vietnamese society<sup>41</sup>.

In addition, it has been observed that the ongoing Russia-Ukraine international armed conflict has had severe environmental impacts including chemical releases and pollution risks from damaged industrial and energy facilities<sup>42</sup>. Further, the war continues to pose ongoing environmental risks associated with the unprecedented militarisation of nuclear sites, threats associated with air quality and solid waste management from the devastation of towns and cities<sup>43</sup>. In addition, it has been pointed out that the war has resulted in ecological consequences such as damage to arable land, the pollution of water resources, and destruction of vital water infrastructure, pollution and ecosystem disturbance in coastal and marine areas, greenhouse gas emissions and increased vulnerability to the effects of climate change<sup>44</sup>.

It has also been observed that emissions from the Israel-Hamas armed conflict that resulted in Israeli invasion of the Gaza strip in 2023 have immense effect

---

<sup>39</sup> Ibid

<sup>40</sup> Conflict and Environment Observatory., 'How Does War Damage the Environment?' Op Cit

<sup>41</sup> Sudilovsky. D. L., 'The Saturated Jungle and the New York Times: Nature, Culture, and the Vietnam War' Available at <https://history.princeton.edu/undergraduate/princeton-historical-review/2021%E2%80%93issue/saturated-jungle-and-new-york-times> (Accessed on 06/03/2024)

<sup>42</sup> Weir. D., & Denisov. N., 'Assessing Environmental Damage in Ukraine' Available at [https://zoinet.org/wp-content/uploads/2018/01/Ukraine-assessing-environmental-damage\\_EN.pdf](https://zoinet.org/wp-content/uploads/2018/01/Ukraine-assessing-environmental-damage_EN.pdf) (Accessed on 06/03/2024)

<sup>43</sup> Ibid

<sup>44</sup> Ibid

on the climate crisis<sup>45</sup>. Carbon dioxide emissions from aircraft missions, tanks and fuel from other vehicles, as well as emissions generated by making and exploding the bombs, artillery and rockets are resulting in pollution and could worsen the problem of climate change<sup>46</sup>. The impacts of climate change such as sea level rise, drought and extreme heat were already threatening water supplies and food security in Palestine and the ongoing armed conflict could make the situation more severe<sup>47</sup>.

From the foregoing, it is evident that armed conflict has significant impacts on the environment. These impacts can be direct or indirect<sup>48</sup>. It has been observed that direct impacts relate to those whose occurrence may be physically linked to military action and which typically arise within the immediate short-term, whereas indirect impacts are those that can be reliably attributed to the conflict but they usually tangle with many factors and only fully manifest themselves in the medium to longer term<sup>49</sup>. Direct environmental impacts of armed conflict include deliberate destruction of natural resources, environmental contamination and pollution from bombing of industrial sites, and military debris and demolition waste from targeted infrastructure<sup>50</sup>. On the other hand indirect impacts include the environmental footprint of displaced populations, collapse of environmental governance and data vacuum as well as the lack of funding for environmental protection<sup>51</sup>. It is therefore necessary to safeguard the environment during and after armed conflict. According to the United Nations, protecting the environment during and after armed conflict is integral

---

<sup>45</sup> The Guardian., 'Emissions from Israel's war in Gaza Have 'Immense' effect on Climate Catastrophe' Available at <https://www.theguardian.com/world/2024/jan/09/emissions-gaza-israel-hamas-war-climate-change> (Accessed on 06/03/2024)

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Solomon. N et al., 'Environmental Impacts and Causes of Conflict in the Horn of Africa: A Review' *Earth-Science Reviews.*, Volume 177, 2018 (pp 284-290)

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

to conflict prevention, peacebuilding and Sustainable Development, since there can be no durable peace if the natural resources that sustain livelihoods and ecosystems are destroyed<sup>52</sup>.

### **3.0 Safeguarding the Environment during and after Armed Conflict: Progress and Challenges**

There has been progress towards safeguarding the environment during and after armed conflict. It has been observed that specific treaty and customary International Humanitarian Law (IHL) rules protect the environment during armed conflict<sup>53</sup>. Following the environmental impacts of the Vietnam war, the *Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques*<sup>54</sup> also known as the Environmental Modification Convention (ENMOD) was adopted. The Convention defines environmental modification techniques as any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space<sup>55</sup>. State parties under the Convention undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to other state parties<sup>56</sup>. ENMOD however allows the

---

<sup>52</sup> United Nations., 'Durable Peace not Possible if Natural Resources are Destroyed, Secretary-General Says on International Day for Preventing Exploitation of Environment in War' Available at <https://press.un.org/en/2021/sgsm21005.doc.htm> (Accessed on 06/03/2024)

<sup>53</sup> International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Available at [https://casebook.icrc.org/highlight/protection-natural-environment-armed-conflict#:~:text=International%20humanitarian%20law%20\(IHL\)%2C,a%20party%20to%20the%20conflict](https://casebook.icrc.org/highlight/protection-natural-environment-armed-conflict#:~:text=International%20humanitarian%20law%20(IHL)%2C,a%20party%20to%20the%20conflict) (Accessed on 06/03/2024)

<sup>54</sup> United Nations., 'Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques' Ch\_XXVI\_1, Volume 2, United Nations, New York, 10 December, 1976

<sup>55</sup> Ibid, article II

<sup>56</sup> Ibid, article I

utilization of environmental modification techniques for peaceful purposes in accordance with generally recognized principles and applicable rules of international law concerning such use<sup>57</sup>.

In addition, *Protocol I*<sup>58</sup>, an amendment to the Geneva Conventions was adopted in 1977 to include provisions prohibiting warfare that may cause widespread, long-term and severe damage to the natural environment. Under additional Protocol I, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment<sup>59</sup>. Further, additional Protocol I requires care to be taken in warfare to protect the natural environment against widespread, long-term and severe damage<sup>60</sup>. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population<sup>61</sup>. Further, additional protocol I prohibits attacks against the natural environment by way of reprisals<sup>62</sup>.

Further, the *Convention Respecting the Laws and Customs of War on Land*<sup>63</sup> and its annex: *Regulations concerning the Laws and Customs of War on Land* also known as the *Hague Convention* also envisage safeguarding the environment during armed conflict. Under the Convention and its Regulations, it is forbidden to

---

<sup>57</sup> Ibid, article III

<sup>58</sup> Protocols Additional to the Geneva Conventions of 12<sup>th</sup> August 1949., Available at [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf) (Accessed on 06/03/2024)

<sup>59</sup> Ibid, article 35 (3)

<sup>60</sup> Ibid, article 55 (1)

<sup>61</sup> Ibid

<sup>62</sup> Ibid, article 55 (2)

<sup>63</sup> Convention Respecting the Laws and Customs of War on Land; and Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907., available at <https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf> (Accessed on 06/03/2024)

destroy or seize the enemy's property during armed conflict unless such destruction or seizure be imperatively demanded by the necessities of war<sup>64</sup>. It has been argued that this provision is also aimed at protecting the environment by prohibiting the willful or unjustified destruction of property<sup>65</sup>. Further, under the Hague Regulations, an occupying State is regarded only as administrator and usufructuary of public buildings, real estate, *forests*, and *agricultural estates* belonging to the hostile State, and situated in the occupied country (Emphasis added)<sup>66</sup>. An occupying state is required to safeguard the capital of these properties, and administer them in accordance with the rules of usufruct<sup>67</sup>. It has been pointed out that under the rules of usufruct, the occupying power may administer public property situated in the occupied territory and enjoy the use of real property for the purposes meeting the needs of the army of occupation<sup>68</sup>. However, it cannot use any resources in a manner which decreases its value or depletes the resource<sup>69</sup>. The Hague Convention and its Regulations is therefore vital in safeguarding the environment during armed conflict.

The International Law Commission (ILC) has also formulated *Draft Principles on Protection of the Environment in Relation to Armed Conflicts*<sup>70</sup>. The Principles recognize that environmental consequences of armed conflicts may be severe

---

<sup>64</sup> Ibid, article 23 (g)

<sup>65</sup> Bouvier. A., 'Protection of the Environment in Time of Armed Conflict' Available at <https://www.icrc.org/en/doc/resources/documents/statement/5cjkjn.htm#:~:text=It%20is%20prohibited%20to%20employ,damage%20to%20the%20natural%20environment.&text=Care%20shall%20be%20taken%20in,long%2Dterm%20and%20severe%20damage> (Accessed on 06/03/2024)

<sup>66</sup> Hague Regulations, article 55

<sup>67</sup> Ibid

<sup>68</sup> Diakonia International Humanitarian Law Centre., 'International Humanitarian Law (IHL) and the Protection of the Environment during Armed Conflict' Op Cit

<sup>69</sup> Ibid

<sup>70</sup> International Law Commission., 'Draft Principles on Protection of the Environment in Relation to Armed Conflicts' Available at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/8\\_7\\_2022.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf) (Accessed on 06/03/2024)

and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss<sup>71</sup>. The Principles reiterate that there is need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation<sup>72</sup>. Further, under the ILC Principles, effective protection of the environment in relation to armed conflicts requires that measures are taken by states, international organizations and other relevant actors to *prevent, mitigate and remediate* harm to the environment *before, during and after* an armed conflict (Emphasis added)<sup>73</sup>. Under the Principles, states are required designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance<sup>74</sup>. In addition, states, international organizations and other relevant actors are also required to take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use<sup>75</sup>.

Under the Principle of state responsibility, an internationally wrongful act of a state, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that state, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself<sup>76</sup>. Further, in order to safeguard the environment before, during, and after armed conflict, the Principles envisage the application of the law of armed conflict to the environment<sup>77</sup>. The Principles provide that the law of armed conflict, including the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection<sup>78</sup>. The Principles also require occupying powers to ensure

---

<sup>71</sup> Ibid, Preamble

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid, Principle 4

<sup>75</sup> Ibid, Principle 5 (1)

<sup>76</sup> Ibid, Principle 9 (1)

<sup>77</sup> Ibid, Principle 14

<sup>78</sup> Ibid

sustainable use of natural resources and prevention of transboundary harm<sup>79</sup>. It is necessary to adopt and implement these principles in order to safeguard the environment before, during, and after armed conflict.

Further, the United Nations and its entities such as UNEP and the United Nations Environment Assembly (UNEA) have also attempted to foster the protection of the environment during and after armed conflicts. The United Nations General Assembly adopted a resolution on the *Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict*<sup>80</sup>. The Resolution acknowledges that damage to the environment in times of armed conflict impairs ecosystems and natural resources long beyond the period of conflict, and often extends beyond the limits of national territories and the present generation<sup>81</sup>. The Resolution invites member states, entities of the United Nations system and other international and regional organizations to observe 6 November each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict<sup>82</sup>. Further, on 27 May 2016, UNEA adopted a *Resolution*<sup>83</sup> for the protection of the environment in areas affected by armed conflict. The Resolution reiterates the importance of safeguarding the natural environment in times of armed conflict for the sake of future generations and to consolidate efforts for the protection of our common environment<sup>84</sup>. It also recognizes the role of healthy ecosystems and sustainably managed resources in reducing the risk of armed conflict<sup>85</sup>. The Resolution urges state to mitigate

---

<sup>79</sup> Ibid, Principles 20 & 21.

<sup>80</sup> United Nations General Assembly., 'Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' A/RES/56/4, 13 November, 2001

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> United Nations Environment Assembly of the United Nations Environment Programme., 'Protection of the Environment in areas affected by Armed Conflict' UNEP/EA.2/Res.15

<sup>84</sup> Ibid

<sup>85</sup> Ibid

and minimize the specific negative effects of environmental degradation in situations of armed conflict and post-conflict on people in vulnerable situations, including children, youth, persons with disabilities, older persons, indigenous peoples, refugees and internally displaced persons, and migrants, as well as to ensure the protection of the environment in such situations<sup>86</sup>. It also urges states to implement relevant laws and cooperate closely on preventing, minimizing and mitigating the negative impacts of armed conflicts on the environment<sup>87</sup>.

In addition, during its sixth session held in Nairobi, Kenya from 26 February-1 March 2024, UNEA adopted a *Resolution*<sup>88</sup> on environmental assistance and recovery in areas affected by armed conflict. The Resolution acknowledges that armed conflicts can impede the delivery of essential services and undermine effective environmental management, and that environmental degradation in situations of armed conflict and post-conflict, can impact human health, wellbeing and livelihoods, with people in all vulnerable situations including children, youth, persons with disabilities, older persons, Indigenous Peoples, refugees and internally displaced persons particularly exposed to such effects<sup>89</sup>. According to the Resolution, effective, inclusive and sustainable environmental assistance can play an important role in conflict recovery and Sustainable Development in areas affected by armed conflicts<sup>90</sup>. The Resolution encourages states to increase the effectiveness of environmental assistance and recovery in areas affected by armed conflicts<sup>91</sup>. It also urges UNEP in collaboration with other United Nations Agencies and relevant stakeholders to provide environmental assistance and recovery in areas affected by armed

---

<sup>86</sup> Ibid

<sup>87</sup> Ibid

<sup>88</sup> United Nations Environment Assembly of the United Nations Environment Programme., 'Draft Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' UNEP/EA.6/L.15

<sup>89</sup> Ibid

<sup>90</sup> Ibid

<sup>91</sup> Ibid

conflicts<sup>92</sup>. There is need to implement this Resolution in order to effectively safeguard the environment in areas affected by armed conflict during and after such conflicts.

Despite the adoption of Conventions, Rules, Principles, and Resolutions aimed at safeguarding the environment before, during and after armed conflict, it has been observed that armed conflicts continue to be a major cause of environmental damage, leading to food and water insecurity, loss of livelihoods, and biodiversity loss<sup>93</sup>. UNEP notes that in spite of the protection afforded by several legal instruments, the environment continues to be the silent victim of armed conflicts worldwide<sup>94</sup>. It has correctly been observed that damage caused to the natural environment by armed conflict can have a severe and lasting impact on people's life, and thus must be thoroughly addressed by all parties to an armed conflict<sup>95</sup>. It is therefore necessary to safeguard the environment during and after armed conflict.

#### **4.0 Way Forward**

In order to safeguard the environment before, during, and after armed conflict, it is vital to strengthen the implementation of treaties and conventions aimed at safeguarding the environment in such situations<sup>96</sup>. It has been observed that despite the protection afforded by several legal instruments, the environment continues to be the silent victim of armed conflicts worldwide which can be attributed to ineffective implementation of such legal instruments<sup>97</sup>. It has been asserted that International Humanitarian Law (IHL), along with other

---

<sup>92</sup> Ibid

<sup>93</sup> Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Op Cit

<sup>94</sup> United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

<sup>95</sup> International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Op Cit

<sup>96</sup> United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

<sup>97</sup> Ibid

branches of international law, provide a legal framework for the protection of the natural environment in armed conflict, both during the conduct of hostilities and when under the control of a party to the conflict<sup>98</sup>. With regard to implementation, it has been pointed out that the treaties of IHL provide various mechanisms for implementing their substantive provisions which include the system of Protecting Powers<sup>99</sup>; the International Fact-Finding Commission<sup>100</sup>; specific functions assigned to the ICRC to interpret and monitor the implementation of international humanitarian law<sup>101</sup>; the obligation to ensure respect for law<sup>102</sup>; the principle of individual penal responsibility<sup>103</sup>; and the obligation of states to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known and respected as widely as possible<sup>104</sup>. It is therefore necessary to comply with these mechanisms in order to ensure implementation of IHL treaties and conventions aimed at safeguarding the environment the environment before, during, and after armed conflict. In addition, it has been asserted that parties to armed conflicts have the obligation to respect and ensure respect of the rules protecting the natural environment and adopt all necessary measures to implement such protections<sup>105</sup>.

In addition, it has been argued that there is need to consider ecocide as an international crime<sup>106</sup>. Ecocide refers to mass damage and destruction of

---

<sup>98</sup> International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Op Cit

<sup>99</sup> Bouvier. A., 'Protection of the Environment in Time of Armed Conflict' Op Cit

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Op Cit

<sup>106</sup> Sharma. K., 'Ecocide: Will it be the Fifth International Crime' Available at <https://www.sconline.com/blog/post/2021/11/26/ecocide/> (Accessed on 07/03/2024)

ecosystems and severe harm to nature which is widespread or long-term<sup>107</sup>. It has been observed that armed conflict could result in severe destruction or deterioration of nature that could be qualified as ecocide<sup>108</sup>. As a result, recognizing ecocide as a core international crime may prevent humanity from consequent atrocities as well as protect the environment from being damaged<sup>109</sup>. According to the United Nations there is need to accelerate legal recognition of ecocide as an international crime as an essential protective and preventive deterrent to severe and either widespread or long-term harm to ecosystems<sup>110</sup>. There have been proposals towards amending the Rome Statue of the International Criminal Court (ICC) in order to create an international crime of ecocide<sup>111</sup>. If these proposals are taken up by parties to the ICC, ecocide would become the fifth category of offences to be prosecuted under the court, alongside war crimes, crimes against humanity, genocide, and the crime of aggression<sup>112</sup>. It has been observed that the inclusion of ecocide as a fifth international crime holds great significance as it carries along with it various

---

<sup>107</sup> Stop Ecocide International., 'What is Ecocide?' Available at <https://www.stopecocide.earth/what-is-ecocide> (Accessed on 07/03/2024)

<sup>108</sup> Van Uhm. D., '22 Atrocity Crimes and Ecocide: Interrelations between Armed Conflict, Violence, and Harm to the Environment' Available at <https://academic.oup.com/edited-volume/42558/chapter-abstract/357099488?redirectedFrom=fulltext> (Accessed on 07/03/2024)

<sup>109</sup> Ibid

<sup>110</sup> United Nations., 'To accelerate, via Diplomatic Convening and Building of Cross-Sector Networks and Collaborations, the Introduction of Enhanced and Enforceable Legal Protections for Water ("Ecocide Law") into International, National and Regional Legislative Frameworks' Available at <https://sdgs.un.org/partnerships/accelerate-diplomatic-convening-and-building-cross-sector-networks-and-collaborations> (Accessed on 07/03/2024)

<sup>111</sup> United Nations Environment Programme., 'Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection' Available at [https://www.un.org/en/ga/sixth/75/universal\\_jurisdiction/unep\\_e.pdf](https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf) (Accessed on 07/03/2024)

<sup>112</sup> United Nations Environment Programme., 'How New Laws Could Help Combat the Planetary Crisis' Available at <https://www.unep.org/news-and-stories/story/how-new-laws-could-help-combat-planetary-crisis> (Accessed on 07/03/2024)

related advantages<sup>113</sup>. For example, the environment will gain its lost importance which has been sidelined due to overexploitation by human beings for economic advantages<sup>114</sup>. In addition, countries may get inspired and bring change in their national criminal laws which will boost the strictness of the crime and protection of the environment<sup>115</sup>. Further, recognition of ecocide as an international crime will help in the prosecution of environment law crimes that fall outside national laws<sup>116</sup>. It is therefore necessary to create and prosecute the international crime of ecocide in order to effectively safeguard the environment before, during, and after armed conflict.

In addition, it is important to strengthen environmental assistance and recovery in areas affected by armed conflict<sup>117</sup>. At UNEA-6, a *Resolution*<sup>118</sup> was adopted to provide environmental assistance in areas affected by armed conflict. The Resolution acknowledges that effective, inclusive and sustainable environmental assistance can play an important role in conflict recovery and Sustainable Development in areas affected by armed conflicts<sup>119</sup>. It calls for enhanced environmental assistance and recovery in areas affected by armed conflict<sup>120</sup>. If implemented, the Resolution will lead to the development of much-needed technical guidance for states and other stakeholders on how to measure environmental damage in times of armed conflict in order to provide

---

<sup>113</sup> Sharma. K., 'Ecocide: Will it be the Fifth International Crime' Op Cit

<sup>114</sup> Ibid

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Available at <https://ceobs.org/unea-6-passes-resolution-on-environmental-assistance-and-recovery-in-areas-affected-by-armed-conflict/> (Accessed on 07/03/2024)

<sup>118</sup> United Nations Environment Assembly of the United Nations Environment Programme., 'Draft Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Op Cit

<sup>119</sup> Ibid

<sup>120</sup> Ibid

effective assistance and recovery<sup>121</sup>. It is thus vital to implement the UNEA-6 Resolution in order to effectively safeguard the environment during and after armed conflict.

Finally, there is need strengthen international peace and security in order to prevent and manage armed conflicts<sup>122</sup>. These conflicts are a major threat to international peace, security, and stability<sup>123</sup>. They result in devastating loss of civilian life, massive displacement and violations of human rights and IHL<sup>124</sup>. They also result in environmental degradation or destruction, with long-lasting effects that contribute to the increased vulnerability of the affected populations<sup>125</sup>. Curbing armed conflicts is vital for economic development, social justice, respect for human rights, promoting good governance, strengthening the rule of law and fostering environmental protection<sup>126</sup>. Some of the approaches that can be utilized to curb armed conflicts and foster international peace and security include issuing ceasefire directives, deployment of United Nation peacekeeping operations to reduce tensions in troubled areas, keeping opposing forces apart, creating conditions for sustainable peace after settlements have been reached, use of economic sanctions such as trade embargoes, and collective military action when necessary<sup>127</sup>. Fostering international peace and security also has benefits on the environment since it helps to curb the negative environmental impacts of war

---

<sup>121</sup> Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Op Cit

<sup>122</sup> United Nations., 'Peace and Security' Available at <https://www.un.org/en/global-issues/peace-and-security> (Accessed on 07/03/2024)

<sup>123</sup> Amnesty International., 'Armed Conflict' Op Cit

<sup>124</sup> Ibid

<sup>125</sup> Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Op Cit

<sup>126</sup> United Nations., 'Working Together to Prevent and Manage Armed Conflicts' Available at [https://unsceb.org/sites/default/files/imported\\_files/prevent%20and%20manage%20armed%20conflicts.pdf](https://unsceb.org/sites/default/files/imported_files/prevent%20and%20manage%20armed%20conflicts.pdf) (Accessed on 07/03/2024)

<sup>127</sup> United Nations., 'Peace and Security' Op Cit

and armed conflict<sup>128</sup>.

## 5.0 Conclusion

Armed conflicts have severe impacts on the environment. They often lead to environmental degradation or destruction, with long-lasting effects that contribute to the increased vulnerability of the affected populations<sup>129</sup>. Environmental damage as a result of armed conflicts also leads to food and water insecurity, loss of livelihoods, and biodiversity loss<sup>130</sup>. It is therefore necessary to safeguard the environment during and after armed conflict. Protecting the environment during and after armed conflict is integral to conflict prevention, peacebuilding and Sustainable Development, since there can be no durable peace if the natural resources that sustain livelihoods and ecosystems are destroyed<sup>131</sup>. Despite the protection afforded by several legal instruments, the environment continues to be the silent victim of armed conflicts worldwide<sup>132</sup>. Safeguarding the environment during and after armed conflict therefore calls for strengthening the implementation of treaties and conventions on environmental protection in armed conflicts<sup>133</sup>; creating and prosecuting the international crime of ecocide<sup>134</sup>; strengthening environmental assistance and recovery in areas affected by armed conflict<sup>135</sup>; and promoting

---

<sup>128</sup> United Nations Environment Programme., 'Curbing Negative Environmental Impacts of War and Armed Conflict' Op Cit

<sup>129</sup> Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Op Cit

<sup>130</sup> Ibid

<sup>131</sup> United Nations., 'Durable Peace not Possible if Natural Resources are Destroyed, Secretary-General Says on International Day for Preventing Exploitation of Environment in War' Op Cit

<sup>132</sup> United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

<sup>133</sup> United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

<sup>134</sup> United Nations Environment Programme., 'Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection' Op Cit

<sup>135</sup> Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Op Cit

international peace and security<sup>136</sup>. Safeguarding the environment during and after armed conflict is an ideal that we need to achieve for the benefit of present and future generations.

---

<sup>136</sup> United Nations., 'Peace and Security' Op Cit

## References

Amnesty International., 'Armed Conflict' Available at <https://www.amnesty.org/en/what-we-do/armed-conflict/>

Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf>

Bouvier. A., 'Protection of the Environment in Time of Armed Conflict' Available at <https://www.icrc.org/en/doc/resources/documents/statement/5cjknj.htm#:~:text=It%20is%20prohibited%20to%20employ,damage%20to%20the%20natural%20environment.&text=Care%20shall%20be%20taken%20in,long%20term%20and%20severe%20damage>

Conflict and Environment Observatory., 'How Does War Damage the Environment?' Available at <https://ceobs.org/how-does-war-damage-the-environment/>

Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Available at <https://ceobs.org/unea-6-passes-resolution-on-environmental-assistance-and-recovery-in-areas-affected-by-armed-conflict/>

Convention Respecting the Laws and Customs of War on Land; and Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907., available at <https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf>

Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

Diakonia International Humanitarian Law Centre., 'International

Humanitarian Law (IHL) and the Protection of the Environment during Armed Conflict' <https://www.diakonia.se/ihl/resources/international-humanitarian-law/protection-environment-natural-resources-ihl/>

Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Available at <https://www.genevaenvironmentnetwork.org/resources/updates/protecting-the-environment-in-armed-conflict/>

International Committee of the Red Cross., 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Commentary of 2016' Available at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016#44>

International Committee of the Red Cross., 'Internal Conflicts or Other Situations of Violence – What is the Difference for Victims?' Available at [https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-internationalarmedconflict.htm#:~:text=A%20non%2Dinternational%20\(or%20%22,the%20territory%20of%20a%20State.](https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-internationalarmedconflict.htm#:~:text=A%20non%2Dinternational%20(or%20%22,the%20territory%20of%20a%20State.)

International Committee of the Red Cross., 'Introduction to the Law of Armed Conflict' Available at [https://www.icrc.org/en/doc/assets/files/other/law1\\_final.pdf](https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf)

International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Available at [https://casebook.icrc.org/highlight/protection-natural-environment-armed-conflict#:~:text=International%20humanitarian%20law%20\(IHL\)%2C,a%20party%20to%20the%20conflict](https://casebook.icrc.org/highlight/protection-natural-environment-armed-conflict#:~:text=International%20humanitarian%20law%20(IHL)%2C,a%20party%20to%20the%20conflict)

International Law Commission., 'Draft Principles on Protection of the Environment in Relation to Armed Conflicts' Available at

*Safeguarding the Environment during and after* (2025) *Journal of cmsd Volume 12(1)*  
*Armed Conflict: Kariuki Muigua\**

[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/8\\_7\\_2022.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf)

Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfrican-CommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution>

Protocols Additional to the Geneva Conventions of 12<sup>th</sup> August 1949., Available at [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf)

Sharma. K., 'Ecocide: Will it be the Fifth International Crime' Available at <https://www.sconline.com/blog/post/2021/11/26/ecocide/>

Solomon. N et al., 'Environmental Impacts and Causes of Conflict in the Horn of Africa: A Review' *Earth-Science Reviews.*, Volume 177, 2018 (pp 284-290)  
Stop Ecocide International., 'What is Ecocide?' Available at <https://www.stopecocide.earth/what-is-ecocide>

Sudilovsky. D. L., 'The Saturated Jungle and the New York Times: Nature, Culture, and the Vietnam War' Available at <https://history.princeton.edu/undergraduate/princeton-historical-review/2021%E2%80%939322-issue/saturated-jungle-and-new-york-times>

The Guardian., 'Emissions from Israel's war in Gaza Have 'Immense' effect on Climate Catastrophe' Available at <https://www.theguardian.com/world/2024/jan/09/emissions-gaza-israel->

[hamas-war-climate-change](#)

United Nations Environment Assembly of the United Nations Environment Programme., 'Protection of the Environment in areas affected by Armed Conflict' UNEP/EA.2/Res.15

United Nations Environment Assembly of the United Nations Environment Programme., 'Draft Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' UNEP/EA.6/L.15

United Nations Environment Programme., 'Curbing Negative Environmental Impacts of War and Armed Conflict' Available at <https://www.unep.org/news-and-stories/statements/curbing-negative-environmental-impacts-war-and-armed-conflict>

United Nations Environment Programme., 'How New Laws Could Help Combat the Planetary Crisis' Available at <https://www.unep.org/news-and-stories/story/how-new-laws-could-help-combat-planetary-crisis>

United Nations Environment Programme., 'Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection' Available at [https://www.un.org/en/ga/sixth/75/universal\\_jurisdiction/unep\\_e.pdf](https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf)

United Nations Environment Programme., 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law' Available at [https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/Protecting%20the%20Environment%20During%20Armed%20Conflict\\_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed](https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed)

United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Available at <https://www.unep.org/news-and-stories/story/rooting-environment-times-conflict-and-war>

*Safeguarding the Environment during and after* (2025) *Journal of cmsd Volume 12(1)*  
*Armed Conflict: Kariuki Muigua\**

United Nations General Assembly., 'Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' A/RES/56/4, 13 November, 2001

United Nations., 'Armed Conflict' Available at <https://www.un.org/esa/socdev/rwss/docs/2001/15%20Armed%20Conflict.pdf>

United Nations., 'Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques' Ch\_XXVI\_1, Volume 2, United Nations, New York, 10 December, 1976

United Nations., 'Durable Peace not Possible if Natural Resources are Destroyed, Secretary-General Says on International Day for Preventing Exploitation of Environment in War' Available at <https://press.un.org/en/2021/sgsm21005.doc.htm>

United Nations., 'Land and Conflict' Available at [https://www.un.org/en/land-natural-resourcesconflict/pdfs/GN\\_ExeS\\_Land%20and%20Conflict.pdf](https://www.un.org/en/land-natural-resourcesconflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf)

United Nations., 'Peace and Security' Available at <https://www.un.org/en/global-issues/peace-and-security>

United Nations., 'To accelerate, via Diplomatic Convening and Building of Cross-Sector Networks and Collaborations, the Introduction of Enhanced and Enforceable Legal Protections for Water ("Ecocide Law") into International, National and Regional Legislative Frameworks' Available at <https://sdgs.un.org/partnerships/accelerate-diplomatic-convening-and-building-cross-sector-networks-and-collaborations>

United Nations., 'Working Together to Prevent and Manage Armed Conflicts' Available at

*Safeguarding the Environment during and after* (2025) *Journal of cmsd Volume 12(1)*  
*Armed Conflict: Kariuki Muigua\**

[https://unsceb.org/sites/default/files/imported\\_files/prevent%20and%20manage%20armed%20conflicts.pdf](https://unsceb.org/sites/default/files/imported_files/prevent%20and%20manage%20armed%20conflicts.pdf)

Van Uhm. D., '22 Atrocity Crimes and Ecocide: Interrelations between Armed Conflict, Violence, and Harm to the Environment' Available at <https://academic.oup.com/edited-volume/42558/chapter-abstract/357099488?redirectedFrom=fulltext>

Weir. D., & Denisov. N., 'Assessing Environmental Damage in Ukraine' Available at [https://zoinet.org/wp-content/uploads/2018/01/Ukraine-assessing-environmental-damage\\_EN.pdf](https://zoinet.org/wp-content/uploads/2018/01/Ukraine-assessing-environmental-damage_EN.pdf)

## **Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards**

By: *Michael Sang* \*

### ***Abstract***

*This paper explores the evolving landscape of virtual asset trading in Kenya. It begins by examining the current state of virtual asset trading, noting the absence of specific regulations and the risks associated with unregulated transactions, including potential links to terrorist financing. The establishment of the National Treasury Working Group is discussed as a pivotal step towards addressing these challenges, with a focus on developing tailored regulations. Drawing insights from international best practices, the paper delves into key lessons for effective regulation. These include the importance of a multi-agency and whole-of-government approach, the inclusion of mobile money and payment service providers, the establishment of a distinct regulator for virtual assets, and the dual classification of virtual assets as commodities and securities. The paper highlights the need for a comprehensive regulatory framework in Kenya, emphasizing market integrity, investor protection, and compliance with international anti-money laundering standards. Lessons from jurisdictions like the United States of America, with specialized regulators such as the Financial Conduct Authority (FCA) and the Securities and Exchange Commission (SEC), provide valuable insights into effective regulation of virtual asset markets. Moving forward, Kenya has the opportunity to leverage these insights to develop a robust regulatory framework for virtual asset trading. This framework should encompass stringent registration requirements for virtual asset service providers, collaboration among regulatory agencies, and clear guidelines for mobile money and payment service providers. The paper concludes by emphasizing the importance of embracing international best practices to promote financial inclusion, innovation, and sustainable growth in*

---

*\* LLM, University of Cape Town, South Africa; LLB, Moi University; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.*

*Kenya's virtual asset market.*

**Key Words:** *Virtual Asset Trading; Regulation; Kenya; Anti-Money Laundering; International Standards; Financial Inclusion; Investor Protection*

## **1. Introduction**

The advent of virtual asset trading has presented both opportunities and challenges for financial markets worldwide.<sup>1</sup> Kenya, like many nations, has witnessed a rapid rise in the adoption of virtual assets, spurred by the convenience of fintech services and the emergence of peer-to-peer trading platforms.<sup>2</sup> However, this burgeoning market has also brought to light critical gaps in regulation, posing significant risks such as money laundering and terrorist financing.<sup>3</sup>

The regulatory landscape in Kenya concerning virtual asset trading is evolving.<sup>4</sup> Currently, the absence of specific regulations has led to a reliance on existing anti-money laundering and counter-terrorism financing laws.<sup>5</sup> This reliance, while necessary, underscores the need for a more tailored and comprehensive regulatory framework that addresses the unique challenges posed by virtual assets. The recent establishment of the National Treasury Working Group signals a proactive step towards developing regulations specific to virtual asset trading.<sup>6</sup> This technical working group is tasked with advising the Treasury and preparing draft regulations for consideration by the

---

<sup>1</sup> Mabunda S, 'Cryptocurrency: The New Face of Cyber Money Laundering', 2018 *International Conference on Advances in Big Data, Computing and Data Communication Systems* (icABCD) (2018).

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Munyua, A. M. (2021). *The Model of Regulation for Virtual Currencies in Kenya* (Doctoral dissertation, University of Nairobi).

<sup>5</sup> Ibid

<sup>6</sup> Ibid

Cabinet.<sup>7</sup> These regulations are not only expected to align with international anti-money laundering standards but also to address the growing concerns of exploitation due to the lack of oversight.<sup>8</sup>

Drawing lessons from international best practices, Kenya has the opportunity to shape its regulatory framework to enhance market integrity, investor protection, and compliance with global standards. The experiences of jurisdictions such as the United States of America, where distinct regulators like the Financial Conduct Authority (FCA) and the Securities and Exchange Commission (SEC) oversee virtual assets, provide valuable insights. In this paper, I delve into the intricacies of developing effective regulations for virtual asset trading in Kenya. I examine the current state of virtual asset trading, including the high volume of unregulated transactions and the risks associated with potential links to terrorist financing. I explore the proposed methodology for regulation, including the role of the National Treasury Working Group, the draft regulations as a basis for legislative framework, and the possibility of a distinct regulator for virtual assets.

Additionally, the paper discusses the lessons learned from international best practices, such as the inclusion of mobile money and payment service providers in the regulatory framework, the dual classification of virtual assets as commodities and securities, and the registration of virtual asset service providers to restrict trade to professional and institutional investors. By synthesizing these discussions, this paper aims to provide a comprehensive understanding of the challenges and opportunities in regulating virtual asset trading in Kenya. It is my hope that the insights presented herein will contribute to the development of a robust regulatory framework that ensures compliance with international anti-money laundering standards while fostering innovation and market growth in the virtual asset sector.

---

<sup>7</sup> Kibwage, C. B. (2021). *Consumer protection in Kenya in the age of decentralized virtual currency* (Doctoral dissertation, Strathmore University).

<sup>8</sup> Ibid

## **2. Virtual Asset Trading in Kenya in Light of International Anti-Money Laundering Standards**

### **2.1 The Regulatory Environment of Virtual Asset Trading in Kenya**

In recent years, the rise of virtual asset trading has presented both opportunities and challenges for economies around the world.<sup>9</sup> Kenya, like many other nations, is navigating this evolving landscape, where the lack of specific regulations for virtual asset trading has led to a reliance on existing Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) laws.<sup>10</sup> Particularly, Kenya has turned to the Proceeds of Crime and Anti-Money Laundering Regulations, 2023, and the Prevention of Terrorism (Implementation of UN Security Council Resolutions on Suppression of Terrorism) Regulations, 2023, to address the regulatory needs of this burgeoning sector.

### **The Regulatory Environment of Virtual Asset Trading in Kenya**

#### **Absence of Specific Regulations**

As of 2024, Kenya does not have specific regulations dedicated solely to virtual asset trading.<sup>11</sup> This regulatory gap has resulted in the adaptation of existing AML/CFT laws to oversee activities within the virtual asset sphere.<sup>12</sup> Virtual asset service providers (VASPs) in Kenya, such as cryptocurrency exchanges, must adhere to a patchwork of laws and guidelines to ensure compliance.<sup>13</sup> Given the absence of tailored regulations, Kenya has directed VASPs to comply with AML/CFT laws, most notably the Proceeds of Crime and Anti-Money Laundering Regulations, 2023.<sup>14</sup> These regulations, enacted to combat money

---

<sup>9</sup> Kibwage, C. B. (2021). *Consumer protection in Kenya in the age of decentralized virtual currency* (Doctoral dissertation, Strathmore University).

<sup>10</sup> Ibid

<sup>11</sup> Kiarie, J. (2024). Effect of Crypto Currency on Financial Market in Kenya. *Journal of Finance and Accounting*, 4(8), 31-45.

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Proceeds of Crime and Anti-Money Laundering Regulations, 2023

laundering and terrorism financing, require financial institutions, including VASPs, to implement robust customer due diligence (CDD) procedures.<sup>15</sup>

The Proceeds of Crime and Anti-Money Laundering Regulations, 2023, serve as a foundational framework for VASPs in Kenya.<sup>16</sup> These regulations mandate the establishment of effective risk-based AML/CFT policies, procedures, and controls.<sup>17</sup> VASPs must conduct customer identification and verification processes, monitor transactions, and report suspicious activities to the Financial Reporting Centre (FRC).<sup>18</sup>

The FRC is a crucial institution established for the receipt, analysis, and dissemination of reports of suspicious transactions from reporting institutions.<sup>19</sup> It plays a central role in the anti-money laundering (AML) framework by acting as the primary intelligence unit for financial crime.<sup>20</sup>

The regulations also outline the responsibilities and duties of institutions engaging in financial activities. Some key obligations may include:- Identifying and verifying the identity of customers; Conducting ongoing monitoring of customer accounts and transactions; Implementing risk-based customer due diligence measures; Training staff on AML/CFT measures; Appointing a Compliance Officer to ensure adherence to AML/CFT laws and; Reporting suspicious transactions to the FRC.<sup>21</sup>

Part IV details the specific due diligence procedures that reporting institutions must follow. This includes: Customer Due Diligence (CDD): Verifying the identity of customers and understanding the nature of their businesses; Enhanced Due Diligence (EDD): Applying additional scrutiny and monitoring

---

<sup>15</sup> Ibid, Part IV

<sup>16</sup> Proceeds of Crime and Anti-Money Laundering Regulations, 2023

<sup>17</sup> Ibid, reg 7,9

<sup>18</sup> Ibid

<sup>19</sup> Ibid, Part II

<sup>20</sup> Ibid

<sup>21</sup> Ibid, Part III

for high-risk customers and; Simplified Due Diligence (SDD): Allowing for reduced due diligence for low-risk customers.<sup>22</sup>

Reporting requirements are essential for the detection and prevention of money laundering and terrorist financing activities. Key points here include: Reporting suspicious transactions promptly to the FRC; Maintaining records of transactions for a specified period; Submitting regular reports to the FRC on transactions above certain thresholds and; Cooperation with law enforcement agencies and other reporting entities.<sup>23</sup>

### **Prevention of Terrorism (Implementation of UN Security Council Resolutions on Suppression of Terrorism) Regulations, 2023**

In tandem with AML regulations, the Prevention of Terrorism (Implementation of UN Security Council Resolutions on Suppression of Terrorism) Regulations, 2023, also apply to VASPs. These regulations extend the obligation to prevent terrorism financing, requiring VASPs to implement measures to detect and report suspicious transactions related to terrorism.<sup>24</sup>

The regulations grants authorities the power to freeze assets suspected to be linked to terrorism. They allow for the freezing of funds, financial assets, or economic resources that are directly or indirectly owned, controlled, or held by individuals or entities associated with terrorist activities.<sup>25</sup> The authority to freeze assets is crucial in disrupting the financial networks of terrorist organizations and preventing the use of funds for illicit purposes. The regulations outline the procedures and criteria for identifying and freezing such assets, as well as the mechanisms for notification and appeal.<sup>26</sup>

---

<sup>22</sup> Ibid, Part IV

<sup>23</sup> Ibid, Part V

<sup>24</sup> Prevention of Terrorism (Implementation of UN Security Council Resolutions on Suppression of Terrorism) Regulations, 2023

<sup>25</sup> Ibid, Part III

<sup>26</sup> Ibid

Part IV of the regulations imposes restrictions on travel and dealings in arms for individuals and entities suspected of involvement in terrorist activities. It includes provisions prohibiting individuals from traveling to certain countries or regions known to be associated with terrorism.<sup>27</sup> Restrictions on dealings in arms aim to prevent the acquisition or transfer of weapons and materials that could be used for terrorist purposes. These measures are designed to prevent the movement of terrorists and the acquisition of resources that could enable terrorist acts.

### **Challenges and Advancements**

Despite efforts to regulate virtual asset trading through existing AML/CFT laws, challenges persist. The dynamic and cross-border nature of virtual asset transactions can strain traditional regulatory frameworks.<sup>28</sup> However, Kenya has shown a commitment to enhancing its regulatory environment, with discussions underway to develop comprehensive guidelines specifically tailored to virtual assets.<sup>29</sup>

## **2.2 The Current Practice of Virtual Asset Trading in Kenya**

### **High Use of Fintech Services:**

Kenya has seen a significant rise in the use of fintech services, including mobile money banking, online digital credit and loan apps, online betting, and online forex trading.<sup>30</sup> The ease of access and convenience offered by these platforms has contributed to their popularity among Kenyan users.<sup>31</sup>

---

<sup>27</sup> Ibid, Part IV

<sup>28</sup> Ali R and others, 'Innovations in Payment Technologies and the Emergence of Digital Currencies' (Social Science Research Network 2014) *SSRN Scholarly Paper* ID 2499397.

<sup>29</sup> Kiarie, J. (2024). Effect of Crypto Currency on Financial Market in Kenya. *Journal of Finance and Accounting*, 4(8), 31-45.

<sup>30</sup> Ibid

<sup>31</sup> Ibid

### **Peer-to-Peer Virtual Asset Trading:**

Kenya is ranked among the top 10 countries in Africa with a large number of dealers engaged in peer-to-peer virtual asset trading.<sup>32</sup> Peer-to-peer trading platforms allow users to buy and sell virtual assets directly with each other, often through online platforms or mobile applications.<sup>33</sup>

### **Lack of Specific Regulations:**

Despite the growing popularity of virtual asset trading, Kenya currently lacks specific regulations governing this sector.<sup>34</sup> This has led to a reliance on existing AML and CFT laws, such as the Proceeds of Crime and Anti-Money Laundering Regulations, 2023.<sup>35</sup>

### **Exploitation of Lack of Regulations:**

The absence of dedicated regulations has created opportunities for exploitation, with reports indicating instances of money laundering and terrorism financing facilitated through virtual asset trading. Criminal elements may exploit the lack of oversight to engage in illicit activities, taking advantage of the anonymity and borderless nature of virtual assets.<sup>36</sup>

## **2.3 International Anti-Money Laundering Standards**

International Anti-Money Laundering (AML) standards are established by various international organizations and bodies to combat money laundering and terrorist financing on a global scale.<sup>37</sup> Some key international AML standards and guidelines include:

---

<sup>32</sup> Ibid

<sup>33</sup> Ibid

<sup>34</sup> Kibwage, C. B. (2021). *Consumer protection in Kenya in the age of decentralized virtual currency* (Doctoral dissertation, Strathmore University).

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

### **Financial Action Task Force (FATF) Recommendations:**

The FATF is an intergovernmental organization that sets global standards for AML and CFT.<sup>38</sup> The FATF Recommendations are a comprehensive set of measures covering the criminal justice system and law enforcement, the financial system and its regulation, and international cooperation.<sup>39</sup> These recommendations provide guidelines for member countries to implement AML/CFT measures, such as customer due diligence, reporting of suspicious transactions, and international cooperation.<sup>40</sup>

### **EU Anti-Money Laundering Directives**

The EU Anti-Money Laundering Directives (AMLDs) are issued periodically by the European Parliament to be implemented by Member States as part of domestic legislation.<sup>41</sup> The European Union has issued several directives aimed at preventing the use of the financial system for money laundering and terrorist financing.<sup>42</sup> These directives establish common standards for AML/CFT across EU member states, including requirements for customer due diligence, record-keeping, and reporting of suspicious activities.<sup>43</sup> For instance, The EU's 6 AML Directive (6 AMLD), which came into effect 3 December 2020 and was implemented by regulated entities by 3 June 2021, aims to strengthen anti-money laundering (AML) rules in the EU and place higher responsibility

---

<sup>38</sup> FATF Recommendations available at <https://www.fatf-gafi.org/en/topics/fatf-recommendations.html#:~:text=The%20cornerstone%20of%20the%20FATF,in%20the%20highest%20risk%20areas>. Accessed 3 March 2024

<sup>39</sup> Ibid

<sup>40</sup> FATF Recommendations available at <https://www.fatf-gafi.org/en/topics/fatf-recommendations.html#:~:text=The%20cornerstone%20of%20the%20FATF,in%20the%20highest%20risk%20areas>. Accessed 3 March 2024

<sup>41</sup> LSEG 'Anti-Money Laundering Directives' available at <https://www.lseg.com/en/risk-intelligence/financial-crime-risk-management/eu-anti-money-laundering-directive#:~:text=The%20EU's%206%20AML%20Directive,entities%20to%20fight%20financial%20crime>. Accessed 3 March 2024

<sup>42</sup> Ibid

<sup>43</sup> Ibid

on regulated entities to fight financial crime.<sup>44</sup>

### **Basel Committee on Banking Supervision (BCBS) Guidelines:**

The BCBS, part of the Bank for International Settlements (BIS), provides guidance on banking supervision and regulation.<sup>45</sup> The BCBS guidelines include measures related to AML/CFT, such as risk management and compliance programs for banks to prevent money laundering and terrorist financing activities.<sup>46</sup>

### **United Nations Conventions**

The United Nations has several conventions related to combating transnational organized crime and terrorist financing. The UN Convention against Transnational Organized Crime (UNTOC)<sup>47</sup> and the International Convention for the Suppression of the Financing of Terrorism<sup>48</sup> are among the key international instruments in this regard.

### **Wolfsberg Group Standards**

The Wolfsberg Group is an association of international banks that develops

---

<sup>44</sup> Ibid

<sup>45</sup> Bank for International Settlements (2016) 'Basel Committee on Banking Supervision: Guidance on the application of the Core Principles for Effective Banking Supervision to the regulation and supervision of institutions relevant to financial inclusion' available at <https://www.bis.org/bcbs/publ/d383.pdf> accessed 3 March 2024

<sup>46</sup> Ibid

<sup>47</sup> United Nations Office on Drugs And Crime (2004) 'United Nations Convention Against Transnational Organized Crime And The Protocols Thereto' available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf) accessed 3 March 2024

<sup>48</sup> International Convention for the Suppression of the Financing of Terrorism (1999) available at <https://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf> accessed 3 March 2024

AML/CFT standards and guidelines for the banking industry.<sup>49</sup> Their standards focus on due diligence, correspondent banking, and risk assessment to prevent money laundering and terrorist financing.<sup>50</sup>

These international AML standards aim to create a coordinated and effective framework for combating financial crimes on a global scale.<sup>51</sup> They provide guidance for countries and financial institutions to implement robust AML/CFT measures, ensuring the integrity and stability of the international financial system.<sup>52</sup> Compliance with these standards is crucial for countries to enhance their financial integrity and reduce the risk of money laundering and terrorist financing activities.<sup>53</sup>

#### **2.4 Gaps in Virtual Asset Regulation and Money Laundering Risks in Kenya**

Kenya currently lacks specific regulations governing virtual asset trading, leading to a high volume of unregulated transactions.<sup>54</sup> This lack of regulation creates loopholes that can be exploited by individuals or entities seeking to launder illicit funds or finance terrorist activities. Without clear guidelines and oversight, there is a risk of abuse of virtual asset platforms for illicit purposes.<sup>55</sup>

---

<sup>49</sup> Sanction Scanner (2024) 'What is Wolfsberg Group?' available at <https://sanctionscanner.com/knowledge-base/wolfsberg-group-230#:~:text=The%20Wolfsberg%20standards%20and%20objectives,their%20customers%20from%20financial%20crime>. Accessed 3 March 2024

<sup>50</sup> Sanction Scanner (2024) 'What is Wolfsberg Group?' available at <https://sanctionscanner.com/knowledge-base/wolfsberg-group-230#:~:text=The%20Wolfsberg%20standards%20and%20objectives,their%20customers%20from%20financial%20crime>. Accessed 3 March 2024

<sup>51</sup> Ofoeda, I., Agbloyor, E. K., Abor, J. Y., & Osei, K. A. (2022). Anti-money laundering regulations and financial sector development. *International Journal of Finance & Economics*, 27(4), 4085-4104.

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Munyua, A. M. (2021). *The Model of Regulation for Virtual Currencies in Kenya* (Doctoral dissertation, University of Nairobi).

<sup>55</sup> Kitami R and Shuto K, 'Study on Protection of Financial Services Users in view of International

The high volume of unregulated transactions in virtual asset trading poses significant money laundering risks.<sup>56</sup> Criminals may take advantage of the anonymity and borderless nature of virtual assets to move illicit funds across jurisdictions.<sup>57</sup> Bitcoin and other cryptocurrencies have been associated with cases of terrorist financing globally due to their pseudo-anonymous nature.<sup>58</sup> In Kenya, reports suggest potential links between bitcoin trade and terrorist financing activities.<sup>59</sup> Terrorist groups may exploit the decentralized and private nature of cryptocurrencies to transfer and raise funds without detection.<sup>60</sup>

### **3. The Proposed Methodology of Developing Virtual Asset Trading Regulations in Kenya**

#### **3.1 National Treasury Working Group**

The National Treasury Working Group is a technical working group that could be established to provide expertise and advice to the Treasury on matters related to virtual assets, including cryptocurrencies. The primary mandate of this working group will be to prepare draft regulations specific to virtual asset trading for consideration and adoption by the Cabinet. It likely will consist of experts in financial regulation, technology, law enforcement, and other relevant fields to ensure a comprehensive and well-informed approach to developing regulations.<sup>61</sup>

---

Development: International Comparison of Cryptocurrency Regulation and Possibility of Issuance of Digital Currency by Central Banks (2018).

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> Belomyttseva O, "Conceptual Framework for the Definition and Regulation of Virtual Currencies: International and Russian practices," *Our Economy* (2015) Vol. 61 No. 5.

The establishment of this working group will signal the government's recognition of the importance of regulating virtual asset trading in Kenya. It aims to harness expertise from various sectors to develop regulations that are effective in combating money laundering and terrorist financing risks associated with virtual assets. The working group's role is to draft regulations that align with international best practices and standards while considering the specific context and needs of the Kenyan financial system.<sup>62</sup>

### **3.2 Draft Regulations as Basis for Legislative Framework**

The Draft Regulations developed by the National Treasury Working Group will serve as the initial framework for regulating virtual asset trading in Kenya. These regulations will address the specific risks associated with virtual asset trading, such as money laundering and terrorist financing. They will outline the requirements and obligations for virtual asset service providers, including procedures for customer due diligence, reporting of suspicious activities, record-keeping, and compliance measures. The Draft Regulations should align with international AML/CFT standards, such as the FATF Recommendations, EU Directives, and other global best practices.<sup>63</sup>

The resulting Regulations from the Draft Regulations will serve as the foundation for legislation specifically targeting digital asset service providers in Kenya. They will define the licensing requirements, operational standards, and enforcement mechanisms for virtual asset service providers in Kenya.<sup>64</sup>

### **3.3 Projected Legislative Framework**

This framework will be based on the Draft Regulations developed by the National Treasury Working Group, which will form the foundation of the legislative process. It is expected to provide a clear legal structure for virtual asset service providers to operate within Kenya, outlining their rights,

---

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Ibid

responsibilities, and obligations. As part of the projected legislative framework, there is a possibility of establishing a distinct regulator specifically for virtual assets. This virtual asset regulator would be responsible for overseeing and regulating the activities of virtual asset service providers. The regulator's role would include granting licenses, conducting inspections, enforcing compliance with AML/CFT measures, and ensuring market integrity. Having a dedicated regulator for virtual assets would demonstrate Kenya's commitment to effectively regulating this sector and ensuring investor protection.<sup>65</sup>

The Projected Legislative Framework aims to create a robust and transparent regulatory environment for virtual asset trading in Kenya. It will likely include provisions for licensing requirements, operational standards, consumer protection measures, and penalties for non-compliance. The possibility of a distinct regulator for virtual assets reflects the growing recognition of the unique challenges and risks posed by this sector. This framework is essential for fostering investor confidence, mitigating risks of financial crimes, and promoting innovation in the virtual asset market.<sup>66</sup>

#### **4. Developing Effective Virtual Asset Trading Regulations in Kenya: Lessons from International Best Practice**

##### **4.1 Multi-Agency and Whole-of-Government Approach**

A multi-agency and whole-of-government approach involves collaboration and coordination among various government agencies to regulate virtual asset trading effectively.<sup>67</sup> In the context of the United States of America, the Federal Bureau of Investigation (FBI) and the Securities and Exchange Commission (SEC) are two key agencies that play significant roles in overseeing different

---

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Berentsen A and Schar F, 'A Short Introduction to the World of Cryptocurrencies' (Social Science Research Network 2018) *SSRN Scholarly Paper* ID 3105283.

aspects of virtual assets.<sup>68</sup> The FBI is the domestic intelligence and security service of the United States of America, responsible for investigating and enforcing federal laws.<sup>69</sup> In the realm of virtual assets, the FBI plays a crucial role in investigating crimes related to cryptocurrency, such as money laundering, fraud, and cybercrimes.<sup>70</sup> The agency's Cyber Division focuses on cyber-related investigations, including those involving virtual currencies.<sup>71</sup>

The SEC is a regulatory agency responsible for enforcing federal securities laws and regulating the securities industry, including cryptocurrency offerings.<sup>72</sup> The SEC oversees Initial Coin Offerings (ICOs) and token sales, ensuring compliance with securities laws. It also provides guidance on the classification of digital assets as securities and regulates cryptocurrency exchanges operating in the U.S.<sup>73</sup>

#### **Lessons from International Best Practice:**

The FBI and SEC in the U.S. demonstrate the effectiveness of a multi-agency approach in regulating virtual assets.<sup>74</sup> Collaboration among agencies with different expertise and mandates allows for a comprehensive oversight framework.<sup>75</sup> The FBI's focus on investigating criminal activities related to virtual assets complements the SEC's role in regulating the market and protecting investors.<sup>76</sup>

---

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Hrytsai, S. (2023). Prospects for introducing the concept of “digital things” and “digital content”: expanding the scope of regulation of virtual assets. *Krakowskie Studia Matematyczne*, 2(38), 7-25.

<sup>75</sup> Ibid

<sup>76</sup> Ibid

Kenya can learn from this approach by establishing a similar multi-agency framework involving agencies such as the Central Bank of Kenya (CBK), the Capital Markets Authority (CMA), the Financial Reporting Centre (FRC), and law enforcement agencies.

#### **4.2 Inclusion of Mobile Money and Other Payment Service Providers**

Mobile money and other payment service providers play a significant role in the virtual asset ecosystem, often serving as on-ramps and off-ramps for users to convert fiat currency into virtual assets and vice versa.<sup>77</sup> These providers are integral to the functioning of virtual asset trading platforms, acting as facilitators for deposits, withdrawals, and transactions.<sup>78</sup> In the context of Kenya, where mobile money services like M-Pesa are widely used, their inclusion in the regulation of virtual asset trading is essential for a holistic regulatory framework.<sup>79</sup>

Mobile money and payment service providers are adjuncts to virtual asset trading platforms, enabling users to easily transfer funds between their mobile wallets and virtual asset accounts.<sup>80</sup> Inclusion of these providers ensures that AML/CFT measures are applied throughout the entire transaction process, from fiat to virtual assets and back.<sup>81</sup> Regulations can help protect consumers using mobile money for virtual asset transactions, ensuring fair practices, transparency, and security of funds.<sup>82</sup> Their inclusion promotes market integrity by reducing the risk of illicit activities, such as money laundering and terrorist financing, through these payment channels.<sup>83</sup>

---

<sup>77</sup> Dabrowski M and Janikowski L, "Virtual Currencies and Central Banks monetary policy: challenges ahead." *Monetary Dialogue*.

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

### **Lessons from International Best Practice**

Many jurisdictions around the world have recognized the importance of including mobile money and payment service providers in the regulation of virtual assets.<sup>84</sup> Countries like Singapore, for example, have specific regulations for payment service providers involved in facilitating virtual asset transactions. These regulations typically include requirements for customer due diligence, reporting of suspicious activities, and compliance with AML/CFT standards.<sup>85</sup>

Kenya can draw from international best practices by developing specific regulations or guidelines for mobile money and payment service providers involved in virtual asset trading. This could include requirements for these providers to conduct customer due diligence on users transacting significant amounts of virtual assets, report suspicious transactions to authorities, and maintain transaction records. Collaboration between regulators such as the Central Bank of Kenya (CBK) and the Communications Authority of Kenya (CA) would be crucial to ensure a coordinated approach to regulation.

### **4.3 Distinct Regulator for Virtual Asset Trading**

A distinct regulator for virtual asset trading refers to the establishment of a specialized regulatory body responsible for overseeing and regulating activities related to virtual assets.<sup>86</sup> This regulator would focus specifically on issues related to virtual asset trading, such as licensing, supervision, enforcement, and policy development. The role of such a regulator is to ensure a focused and specialized approach to addressing the unique challenges and risks associated with the virtual asset market.<sup>87</sup>

---

<sup>84</sup> Hrytsai, S. (2023). Prospects for introducing the concept of “digital things” and “digital content”: expanding the scope of regulation of virtual assets. *Krakowskie Studia Matopolskie*, 2(38), 7-25.

<sup>85</sup> Ibid

<sup>86</sup> Ibid

<sup>87</sup> Ibid

### **Role Played by FCA in the United Kingdom:**

In the United Kingdom, the Financial Conduct Authority (FCA) serves as the regulatory body for virtual asset activities.<sup>88</sup> The FCA regulates firms and individuals that conduct certain crypto-asset activities, such as exchanging, transferring, and safeguarding virtual assets. It sets out requirements for firms engaged in crypto-asset activities, including anti-money laundering (AML) and counter-terrorism financing (CTF) measures. The FCA also provides guidance to market participants and consumers, conducts supervision, and takes enforcement actions when necessary.<sup>89</sup>

### **Lessons from the FCA:**

The FCA's role as a distinct regulator for virtual asset activities in the UK demonstrates the benefits of having a specialized regulatory body. The FCA's expertise in financial regulation allows for a nuanced approach to addressing the risks and challenges specific to the virtual asset market.<sup>90</sup> Having a dedicated regulator helps to enhance market integrity, protect consumers, and ensure compliance with AML/CFT standards.<sup>91</sup> The FCA's guidance and regulatory framework provide clarity and certainty for market participants, fostering innovation while mitigating risks.<sup>92</sup>

Kenya can learn from the UK's approach by considering the establishment of a distinct regulator for virtual asset trading. This regulator would be responsible for licensing and supervising virtual asset service providers, setting out regulatory requirements, and enforcing compliance. Collaboration with existing regulators, such as the Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA), would be crucial to ensure a coordinated

---

<sup>88</sup> Kitami R and Shuto K, 'Study on Protection of Financial Services Users in view of International Development: International Comparison of Cryptocurrency Regulation and Possibility of Issuance of Digital Currency by Central Banks™ (2018).

<sup>89</sup> Ibid

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> Ibid

regulatory approach. The regulator could also work closely with law enforcement agencies and the Financial Reporting Centre (FRC) to address potential money laundering and terrorist financing risks.

#### **4.4 Registration of Virtual Asset Service Providers**

Registration of virtual asset service providers involves the process of licensing and oversight by regulatory authorities to ensure compliance with regulations.<sup>93</sup> This process requires virtual asset service providers to meet specific criteria and obligations set by regulators, such as conducting customer due diligence, implementing AML/CFT measures, and maintaining transparency in operations.<sup>94</sup> The objective of registration is to establish a formalized system where only licensed entities are allowed to provide virtual asset services, thereby ensuring a level of professionalism and accountability in the market.<sup>95</sup>

One objective of registration may be to restrict lawful trade in virtual assets to professional and institutional investors. Professional investors typically have a higher level of understanding and risk appetite for virtual assets, making them better suited to engage in such transactions.<sup>96</sup> Institutional investors, such as banks, investment funds, and pension funds, bring stability and credibility to the market, potentially reducing risks associated with retail investors.<sup>97</sup> Registration helps to enhance market integrity by ensuring that only legitimate and reputable entities are operating in the virtual asset market.<sup>98</sup> It provides a layer of protection for investors, especially retail investors, by reducing the risk of fraud and misconduct.<sup>99</sup>

---

<sup>93</sup> Pavlidis, G. (2020). International regulation of virtual assets under FATF's new standards. *Journal of Investment Compliance*, 21(1), 1-8.

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Ibid

Registered entities are required to comply with AML/CFT regulations, which helps in mitigating money laundering and terrorist financing risks.<sup>100</sup> Restricting trade to professional and institutional investors can contribute to the development of a mature and sophisticated market over time.<sup>101</sup>

### **Lessons**

Many jurisdictions have implemented registration requirements for virtual asset service providers, including the European Union, Japan, and Singapore.<sup>102</sup> These countries have established licensing regimes that impose strict requirements on virtual asset service providers, ensuring compliance with AML/CFT regulations and investor protection measures.<sup>103</sup> By restricting trade to professional and institutional investors, these countries aim to create a safer and more stable virtual asset market.<sup>104</sup>

Kenya can consider adopting a registration system for virtual asset service providers to enhance market integrity and investor protection. The registration process should include stringent requirements for AML/CFT compliance, customer due diligence, cybersecurity measures, and transparency. Restricting trade to professional and institutional investors can help mitigate risks associated with retail investors who may be less knowledgeable about virtual assets. Collaboration between regulators, such as the Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA), would be essential to establish and enforce registration requirements effectively.

### **4.5 Dual Classification of Virtual Assets as Commodities and Securities**

In some jurisdictions, virtual assets can be classified as both commodities and

---

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Ibid

securities, depending on their characteristics and use cases.<sup>105</sup> This dual classification recognizes that some virtual assets may function as commodities, similar to physical goods or raw materials, while others may have characteristics of traditional securities, representing ownership in a company or project.<sup>106</sup>

### **Practice in the United States of America**

In the United States of America the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) are the primary regulatory bodies overseeing commodities and securities, respectively.<sup>107</sup> The CFTC regulates commodities, including certain virtual currencies like Bitcoin and Ethereum, under the Commodity Exchange Act (CEA). The SEC regulates securities, including Initial Coin Offerings (ICOs) and token offerings, under the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>108</sup>

Virtual assets classified as commodities are subject to regulation by the CFTC.<sup>109</sup> This includes futures contracts and derivatives based on virtual currencies. Virtual assets classified as securities fall under the jurisdiction of the SEC.<sup>110</sup> This includes tokens issued through ICOs that meet the definition of securities.<sup>111</sup> The dual classification allows for comprehensive regulatory oversight, with each regulator focusing on its respective area of expertise.<sup>112</sup> The SEC's oversight of securities helps protect investors by ensuring

---

<sup>105</sup> Emmert, F. (2023). The regulation of cryptocurrencies in the United States of America. *European Journal of Law Reform*, 25, 1-2.

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Middlebrook S and Hughes S, "Regulating Cryptocurrencies in the United States: Current Issues and Future Directions," *William Mitchell Law Review*. (2014). Vol. 40 Issue 2; Securities Act, 1933; Securities Exchange Act, 1934.

<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Ibid

<sup>112</sup> Ibid

disclosures, transparency, and adherence to securities laws. The CFTC's oversight of commodities helps maintain market integrity by regulating futures and derivatives markets.<sup>113</sup>

### **Implications and lessons for Kenya:**

Kenya can consider adopting a similar approach of dual classification for virtual assets as commodities and securities. This would involve the Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA) taking on regulatory roles similar to the CFTC and SEC, respectively. Virtual currencies like Bitcoin could be classified as commodities, subject to CBK regulation, while tokens issued through ICOs could be classified as securities, falling under CMA oversight. This approach allows for tailored regulation based on the specific characteristics and risks associated with different types of virtual assets.

The dual classification approach in the United States of America provides a model for effective regulation of virtual assets.<sup>114</sup> It recognizes the diverse nature of virtual assets and ensures appropriate oversight to protect investors and maintain market integrity.<sup>115</sup> By aligning with international best practices, Kenya can create a regulatory framework that fosters innovation while mitigating risks associated with virtual asset trading.

### **Conclusion**

The evolving landscape of virtual asset trading in Kenya presents a complex interplay of opportunities and challenges. The discussions within this paper have shed light on the current state of virtual asset trading, highlighting the absence of specific regulations and the risks associated with unregulated

---

<sup>113</sup> Middlebrook S and Hughes S, "Regulating Cryptocurrencies in the United States: Current Issues

and Future Directions," *William Mitchell Law Review*. (2014). Vol. 40 Issue 2

<sup>114</sup> *Ibid*

<sup>115</sup> *Ibid*

transactions. The establishment of the National Treasury Working Group will mark a significant step towards addressing these challenges, with the mandate to develop draft regulations tailored to the unique characteristics of virtual assets. Drawing from international best practices, I have explored key lessons, such as the importance of a multi-agency and whole-of-government approach, the inclusion of mobile money and payment service providers, the establishment of a distinct regulator for virtual assets, and the dual classification of virtual assets as commodities and securities.

These discussions underscore the need for a comprehensive regulatory framework that prioritizes market integrity, investor protection, and compliance with international anti-money laundering standards. The experiences of jurisdictions like the United States of America, with its specialized regulators such as the Financial Conduct Authority (FCA) and the Securities and Exchange Commission (SEC), provide valuable insights into effective regulation of virtual asset markets.

Moving forward, Kenya has the opportunity to leverage these insights to develop a robust regulatory framework for virtual asset trading. This framework should encompass stringent registration requirements for virtual asset service providers, collaboration among regulatory agencies, and clear guidelines for mobile money and payment service providers. Furthermore, the dual classification of virtual assets can provide clarity and oversight while restricting trade to professional and institutional investors. As the virtual asset market continues to evolve, it is essential for Kenya to stay ahead of the curve by fostering innovation while mitigating risks. By implementing effective regulations, Kenya can create a conducive environment for market growth, investor confidence, and the prevention of illicit activities such as money laundering and terrorist financing.

The path towards regulating virtual asset trading in Kenya requires a collaborative effort among regulators, market participants, and stakeholders.

*Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards - Michael Sang* (2025) *Journal of cmsd* Volume 12(1)

By embracing international best practices and tailoring regulations to the local context, Kenya can establish itself as a leader in the virtual asset market, promoting financial inclusion, innovation, and sustainable growth.

*Regulating Virtual Asset Trading in Kenya to Ensure (2025) Journal of cmsd Volume 12(1) Compliance with International Anti-Money Laundering Standards - Michael Sang*

## References

Ali R and others, 'Innovations in Payment Technologies and the Emergence of Digital Currencies' (Social Science Research Network 2014) *SSRN Scholarly Paper* ID 2499397.

Bank for International Settlements (2016) 'Basel Committee on Banking Supervision: Guidance on the application of the Core Principles for Effective Banking Supervision to the regulation and supervision of institutions relevant to financial inclusion' available at <https://www.bis.org/bcbs/publ/d383.pdf>

Belomyttseva O, "Conceptual Framework for the Definition and Regulation of Virtual Currencies: International and Russian practices," *Our Economy* (2015) Vol. 61 No. 5.

Berentsen A and Schar F, 'A Short Introduction to the World of Cryptocurrencies' (Social Science Research Network 2018) *SSRN Scholarly Paper* ID 3105283.

Dabrowski M and Janikowski L, "Virtual Currencies and Central Banks monetary policy: challenges ahead." *Monetary Dialogue*.

Emmert, F. (2023). The regulation of cryptocurrencies in the United States of America. *European Journal of Law Reform*, 25, 1-2.

FATF Recommendations available at <https://www.fatf-gafi.org/en/topics/fatf-recommendations.html#:~:text=The%20cornerstone%20of%20the%20FATF,in%20the%20highest%20risk%20areas.>

Hrytsai, S. (2023). Prospects for introducing the concept of "digital things" and "digital content": expanding the scope of regulation of virtual assets. *Krakowskie Studia Małopolskie*, 2(38), 7-25.

International Convention for the Suppression of the Financing of Terrorism

*Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards - Michael Sang* (2025) *Journal of cmsd Volume 12(1)*

(1999) available at <https://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf>

Kiarie, J. (2024). Effect of Crypto Currency on Financial Market in Kenya. *Journal of Finance and Accounting*, 4(8), 31-45.

Kibwage, C. B. (2021). *Consumer protection in Kenya in the age of decentralized virtual currency* (Doctoral dissertation, Strathmore University).

Kitami R and Shuto K, 'Study on Protection of Financial Services Users in view of International Development: International Comparison of Cryptocurrency Regulation and Possibility of Issuance of Digital Currency by Central Banks (2018).

LSEG 'Anti-Money Laundering Directives' available at <https://www.lseg.com/en/risk-intelligence/financial-crime-risk-management/eu-anti-money-laundering-directive#:~:text=The%20EU's%20AML%20Directive,entities%20to%20fight%20financial%20crime.>

Mabunda S, 'Cryptocurrency: The New Face of Cyber Money Laundering', 2018 International Conference on Advances in Big Data, Computing and Data Communication Systems (icABCD) (2018).

Middlebrook S and Hughes S, "Regulating Cryptocurrencies in the United States: Current Issues and Future Directions," *William Mitchell Law Review*. (2014). Vol. 40 Issue 2

Munyua, A. M. (2021). *The Model of Regulation for Virtual Currencies in Kenya* (Doctoral dissertation, University of Nairobi).

*Regulating Virtual Asset Trading in Kenya to Ensure Compliance with International Anti-Money Laundering Standards - Michael Sang* (2025) *Journal of cmsd Volume 12(1)*

Ofoeda, I., Agbloyor, E. K., Abor, J. Y., & Osei, K. A. (2022). Anti-money laundering regulations and financial sector development. *International Journal of Finance & Economics*, 27(4), 4085-4104.

Pavlidis, G. (2020). International regulation of virtual assets under FATF's new standards. *Journal of Investment Compliance*, 21(1), 1-8.

Prevention of Terrorism (Implementation of UN Security Council Resolutions on Suppression of Terrorism) Regulations, 2023

Proceeds of Crime and Anti-Money Laundering Regulations, 2023

Sanction Scanner (2024) 'What is Wolfsberg Group?' available at <https://sanctionscanner.com/knowledge-base/wolfsberg-group-230#:~:text=The%20Wolfsberg%20standards%20and%20objectives,their%20customers%20from%20financial%20crime.>

Securities Act, 1933

Securities Exchange Act, 1934.

United Nations Office on Drugs And Crime (2004) 'United Nations Convention Against Transnational Organized Crime And The Protocols Thereto' available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf)

## **Towards a Unified Competition Law in Africa: Prospects and Challenges in the Continental Free Trade Area (AfCFTA)**

*By: Murithi Antony\**

### **Abstract**

*The establishment of African Continental Free Trade Area (AfCFTA) represents a groundbreaking step toward economic integration across the continent, with the potential to unify 55 countries into the world's largest free trade area. Central to AfCFTA success is the establishment of a harmonized competition law regime that seeks to promote fair market practices and safeguard consumer welfare while fostering economic growth. However, achieving such a unified competition policy is immensely challenging, especially due to Africa's historical legacies, fragmented regulatory frameworks, and economic diversity. Against this backdrop, this paper analyzes the prospects and challenges involved in establishing a unified competition law under AfCFTA. By exploring the status and evolution of competition laws across Africa, the diversity in national policies, and jurisdictional overlaps among regional economic communities, this paper highlights how structural, political, and economic factors influence regulatory harmonization. Further, the paper discusses benefits of a unified competition, including market efficiencies, improved consumer welfare, and attracting investors. It concludes by underscoring the need to address gaps in institutional capacity and to foster a regulatory cooperation among African Countries to achieve AfCFTA agenda of economic integration and inclusive growth.*

### **1. Introduction**

The formation of the African Continental Free Trade Area (AfCFTA) marks a historic milestone in the economic development of Africa, with projections by the United Nations Economic Commission for Africa (UNECA) estimating a 15 to 25 percentage increase in intra-African trade by 2040.<sup>1</sup> This increase has

---

\* LL.B (Hons), University of Embu; PG Dip in Law (Cnd), KSL; Email: [amurithi326@gmail.com](mailto:amurithi326@gmail.com)

the potential to contribute significantly to the continent's combined GDP of approximately US\$3.4 trillion.<sup>2</sup> With a clear goal of making Africa a globally competitive economic bloc, AfCFTA seeks to remove trade barriers, enhance cross-border trade, and promote industrialization across the continent.<sup>3</sup> Despite its transformative potential, the success of AfCFTA relies heavily on the establishment of a unified competition law capable of ensuring fair trade practices and equitable market conditions.<sup>4</sup> Without a harmonized competition regulatory framework, AfCFTA risks perpetuating regulatory inconsistencies that lead to monopolistic practices, market inefficiencies, and insufficient consumer safeguards, ultimately defeating its purpose.<sup>5</sup>

The need for a unified competition law is justified by the quest to leveling playing field for all businesses, reducing transaction costs, and providing regulatory clarity for firms operating across multiple countries in Africa.<sup>6</sup> This will raise Africa's potential as a destination for foreign investors, since it will provide a stable and predictable environment that allows for sustainable

---

<sup>1</sup> Samunderu, E. (2024). Liberalisation of Trade Regime Under AfCFTA: A Perspective Analysis on Africa's Single Market. In *The Economic Effects of Air Transport Market Liberalisation: A Perspective Analysis of the Single African Air Transport Market (SAATM)* (pp. 641-730). Cham: Springer Nature Switzerland.

<sup>2</sup> African Union. *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*. African Union, 2020. <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>. accessed on 6<sup>th</sup> November 2024.

<sup>3</sup> Ogonna Beauty Ogbologu, 'Charting the Path to African Prosperity: Unravelling the Economic Dynamics of the African Continental Free Trade Agreement' (2024) 15 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 92, 92-102.

<sup>4</sup> Francisco Beneke, Eleanor M. Fox and Mor Bakhoun, 'Making Markets Work for Africa' (2020) 69 *GRUR International* 879, 879-81 <https://doi.org/10.1093/grurint/ikaa092> accessed on 6 November 2024.

<sup>5</sup> *Ibid.*

<sup>6</sup> Kamala Dawar and George Lipimile, 'Africa: Harmonizing Competition Policy under the AfCFTA' (2020).

economic growth and industrial diversification.<sup>7</sup> Similarly, a harmonized competition will also serve as critical tool for consumer protection, protecting market abuses and ensuring fair pricing and quality standards across the continent.<sup>8</sup> However, achieving this harmonization is surrounded by substantial obstacles, including political resistance, disparities in institutional infrastructure and enforcement capacity in different countries, and issues of jurisdictional overlaps created by Africa's regional economic communities (RECs).<sup>9</sup>

This paper looks closely at the prospects and challenges involved in harmonizing the competition law under AfCFTA.<sup>10</sup> It discusses, albeit briefly but precisely, the history of competition law in Africa and analyzes the regulatory on under regional economic communities and the *status quo* of competition law under the AfCFTA, and the barriers, including political and structural, that make it difficult to harmonize these regulations.<sup>11</sup> The paper proposes how the harmonization of the competition law under AfCFTA can be achieved and consequently drive Africa's economic integration and support sustainable development.

---

<sup>7</sup> Chantal Dupasquier and Patrick N Osakwe, 'Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities' (2006) 17 *Journal of Asian Economics* 241.

<sup>8</sup> Ohlhausen, Maureen K., and Alexander P. Okuliar. "Competition, consumer protection, and the right [approach] to privacy." *Antitrust LJ* 80 (2015): 121.

<sup>9</sup> Adetona, Temilola. "Competition and the AfCFTA: Building a Framework for Competition Regulation under the Free Trade Regime." *LL. B Thesis, University of Lagos* (2021).

<sup>10</sup> Samunderu, Eyden. "Liberalisation of Trade Regime Under AfCFTA: A Perspective Analysis on Africa's Single Market." In *The Economic Effects of Air Transport Market Liberalisation: A Perspective Analysis of the Single African Air Transport Market (SAATM)*, pp. 641-730. Cham: Springer Nature Switzerland, 2024.

<sup>11</sup> *Ibid.*

## **2. Competition Law in Africa: National Trends, Regional Economic Communities, and the African Competition Forum**

The legal, policy, institutional and regulatory framework on competition law in Africa has been distinctively molded by historical, economic, and political contexts.<sup>12</sup> From colonial era policies to contemporary regulatory frameworks, competition law has evolved in Africa under a wide array of influences that have resulted in fragmented policies and enforcement mechanisms.<sup>13</sup>

During the colonial era, the competition policies were devised not to create fair and equitable markets but rather to protect monopolistic rights that favored colonial administrations and corporate interests from Europe.<sup>14</sup> In several cases, these policies suppressed local competition to maintain dominance over strategic resources, perpetuating economic systems that prioritized resource extraction over industrial development.<sup>15</sup> This left an indelible mark on African economies, where market structures are often characterized by elevated levels of concentration in strategic sectors such as mining, telecommunications, and agriculture.<sup>16</sup>

Post independence, African countries inherited legal and economic frameworks that were not well-suited to promote local market competition or protect consumer interests.<sup>17</sup> Although some countries began to develop their own competition policies, the legacy of the colonial era policies has remained influential in further shaping African competition law, with most national

---

<sup>12</sup> Whish, Richard, and David Bailey. *Competition law*. Oxford University Press, 2021.

<sup>13</sup> *Ibid.*

<sup>14</sup> Fahmi, Chairul. "The Impact of Regulation on Islamic Financial Institutions Toward the Monopolistic Practices in the Banking Industrial in Aceh, Indonesia." *Jurnal Ilmiah Peuradeun* 11, no. 2 (2023): 667-686.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Ibidapo-Obe, Omobola. "Competition law and socio-economic advancement: Nigeria as a case study-giving a hungry man a silk tie?" PhD diss., Middlesex University, 2022.

frameworks retaining a mix of regulatory models that prioritize state control or monopolistic dominance over open competition.<sup>18</sup> Consequently, modern African markets feature a blend of market-oriented policies and lingering elements of centralized control, posing challenges for harmonizing competition laws under the AfCFTA.<sup>19</sup>

Over time, African countries have made significant strides in developing national competition policies, although progress has been uneven.<sup>20</sup> Countries like South Africa, Kenya, and Nigeria have been setting the pace in developing competition regulation regimes, with independent regulatory body empowered to enforce the competition law, preventing anti-competitive practices, and protecting consumer rights.<sup>21</sup> South Africa, for instance, enacted the Competition Act in 1998, laying the foundation for a sound framework to regulate monopolies, control mergers, and penalize collusive practices.<sup>22</sup> These developments show the increasing appreciation of the role that competition law can play in promoting fair markets and economic growth.<sup>23</sup>

However, many other African countries still lack fully developed competition policies or encounter enforcement challenges primarily due to resource and

---

<sup>18</sup> Ucaryilmaz, Talya. "Morality in competition law: the culture of honesty and trust in consumer protection." *Athens JL* 7 (2021): 189.

<sup>19</sup> Davidson, Paul, Céline Kauffmann, and Marie-Gabrielle De Liedekerke. "How do laws and regulations affect competitiveness: The role for regulatory impact assessment." (2021).

<sup>20</sup> Kigwiru, Vellah Kedogo. "Supranational or cooperative? Rethinking the African continental free trade area agreement competition protocol institutional design." *Journal of Antitrust Enforcement* 12, no. 1 (2024): 98-125.

<sup>21</sup> Okiche, Arinze Bryan. "The meaning and implications of flexibility in African regional trade agreement; consequences for the African continental free trade area (AfCFTA)." PhD diss., University of Birmingham, 2023.

<sup>22</sup> See, El-Gheriani, Moatasem, and Adham Hashish. "Egypt Amends its Competition Law to Establish a Pre-Merger Control System." *Journal of European Competition Law & Practice* 14, no. 2 (2023): 106-112.

<sup>23</sup> *Ibid.*

capacity limitations.<sup>24</sup> In low-income countries, competition authorities struggle with limited budgets and expertise, weakening their capacity to investigate anti-competitive behavior and address market abuses effectively.<sup>25</sup> This disparity in regulatory strength has led to a fragmented regulatory environment across Africa, with competition laws varying widely in scope, enforcement, and effectiveness, calling for the establishment of a unified competition law in Africa.<sup>26</sup>

In response to the need for greater regulatory harmonization, several African Regional Economic Communities (RECs), including the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and the East African Community (EAC), have developed regional competition policies with an aim to promote fair trade and consumer protection across their member states.<sup>27</sup> These regional frameworks are a substantial step toward regulatory coordination, as they provide the common ground for determining cross-border competition issues and laying down uniform standards of market behavior in their respective regions.<sup>28</sup> For instance, the COMESA Competition Commission is mandated to review mergers and acquisitions with effects on trade within the COMESA region and enforce the rules against anti-competitive conduct.<sup>29</sup> Similarly, SADC has developed guidelines that call upon the member states to harmonize their national competition laws in a manner that would allow for greater regulatory

---

<sup>24</sup> Farahane, Matias Jaime, and Almas Heshmati. *Trade and economic growth: Theories and evidence from the Southern African Development Community*. No. 13679. IZA Discussion Papers, 2020.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Khabo, Lebona. "An analysis of competition law implementation in the EAC, SADC, and COMESA and the problem of overlapping membership." (2020).

<sup>28</sup> *Ibid.*

<sup>29</sup> Khabo, Lebona. "An analysis of competition law implementation in the EAC, SADC, and COMESA and the problem of overlapping membership." (2020).

coherence across Southern Africa.<sup>30</sup>

Notably, while these regional frameworks on competition law represent progress toward regulatory harmonization, they also create challenges due to overlapping jurisdictions and conflicting regulations.<sup>31</sup> Firms operating across multiple RECs face complex regulatory environments, with varying legal standards and approval processes.<sup>32</sup> For instance, where a merger between two multinational firms requires approval from both COMESA and EAC competition authorities, it may lead to delays and increased operational costs due to the inconsistent requirements imposed by each authority. A unified competition law could inarguably iron out such regulatory overlaps and provide a unified approach toward competition issues in Africa.

In quest to foster greater cooperation and capacity building among African competition authorities' greater cooperation, the African Competition Forum (ACF) was established in 2011.<sup>33</sup> The ACF serves as a platform for sharing knowledge, best practices, and technical expertise, with the objective to strengthen enforcement capabilities across the continent.<sup>34</sup> Although the ACF has contributed immensely to improved collaboration among competition authorities in African countries, it does not have the authority to enforce regulatory standards or impose unified competition policies, because its role is primarily advisory.<sup>35</sup>

---

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Kigwiru, Vellah Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

<sup>34</sup> Gachuri, Elizabeth. *African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?* UN, 2020.

<sup>35</sup> Adetona, Temilola. "Competition and the AfCFTA: Building a Framework for Competition Regulation under the Free Trade Regime." *LL. B Thesis, University of Lagos* (2021).

Despite these limitations, the ACF's efforts have demonstrated the potential benefits of regulatory coordination and provided valuable insights regarding the challenges associated with harmonizing competition policies in Africa.<sup>36</sup> The lessons learned from the ACF's efforts could inform the development of a unified competition framework under AfCFTA, which would need to build on existing regional cooperation mechanisms while addressing the challenges of enforcement and jurisdictional authority.

Indeed, the quest to achieve a harmonized competition law in Africa has been there for quite some time, driven by the realization that fragmented regulatory frameworks hinder trade and economy.<sup>37</sup> While national trends and regional efforts through RECs have laid a strong foundation, they remain constrained by inconsistent enforcement mechanisms and overlapping jurisdiction. The AfCFTA, therefore, presents an unprecedented opportunity to address these challenges by establishing a unified competition law framework.<sup>38</sup> Leveraging the progress and lessons from initiatives like the ACF, AfCFTA has the potential to harmonize the regulatory framework, resolve cross-border competition issues, and promote fair and equitable markets across the continent.<sup>39</sup>

### **3. The Potential for Regulatory Cooperation of Competition Law Framework Under AfCFTA**

The current regulatory framework on competition law in Africa is highly fragmented, with significant variations in national policies, institutional infrastructure, enforcement capacity and mechanisms, which complicate the development of a unified competition law under AfCFTA as discussed

---

<sup>36</sup> *Ibid.*

<sup>37</sup> Dawar, Kamala, and George Lipimile. "Africa: Harmonising competition policy under the AfCFTA." (2020).

<sup>38</sup> Fox, Eleanor M. "Integrating Africa by competition and market policy." *Review of Industrial Organization* 60, no. 3 (2022): 305-326.

<sup>39</sup> *Ibid.*

hereunder.

First, competition law in Africa is characterized by a diverse array of national policies, reflecting the continent's economic, political, and legal diversity.<sup>40</sup> While some countries like Kenya and South Africa have well established competition frameworks with autonomous regulatory bodies, many other African countries either lack formal competition policies or, when such exists, their enforcement mechanisms are weak due to resource constraints.<sup>41</sup> In such countries, competition authorities usually operate on meager budgets, inadequate personnel and lack technical capacity to conduct proper investigations and sanctions against anti-competitive practices.<sup>42</sup>

This diversity in national competition policies creates regulatory fragmentation posing challenges for firms operating in multiple African countries due to inconsistency in enforcement standards that lead to legal uncertainty and increased compliance costs.<sup>43</sup> Moreover, the absence of harmonization allows firms to engage in regulatory arbitrage through exploiting relatively weak regulatory environments to serve their competitive advantages.<sup>44</sup> Addressing these discrepancies is essential for the success of AfCFTA, given that a single competition law will streamline the regulatory environment, hence lowering the operational costs.<sup>45</sup>

---

<sup>40</sup> Fox, Eleanor M., and Mor Bakhom. *Making Markets Work for Africa: Markets, Development, and Competition*. Oxford University Press, 2019.

<sup>41</sup> Fox, Eleanor M. "Integrating Africa by competition and market policy." *Review of Industrial Organization* 60, no. 3 (2022): 305-326.

<sup>42</sup> Kigwiru, Vellah Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

<sup>43</sup> Beneke, Francisco. "Eleanor M. Fox and Mor Bakhom Making Markets Work for Africa." (2020): 879-881.

<sup>44</sup> Cele, Simphiwe K., and Nhlanhla W. Mlitwa. "Fintechs in South Africa: Impact on regulation, incumbents and consumers." *South African Journal of Information Management* 26, no. 1 (2024): 1766.

<sup>45</sup> Samunderu, Eyden. "Liberalisation of Trade Regime Under AfCFTA: A Perspective Analysis on Africa's Single Market." In *The Economic Effects of Air Transport Market*

Second, there is noticeable institutional and enforcement capacity gaps in many African countries, with many of them lacking the institutional infrastructure and regulatory experience for the consistent enforcement of the competition laws.<sup>46</sup> These capacity gaps poses a significant challenge to the harmonization of competition law within the AfCFTA, as countries with robust institutional and regulatory frameworks are better equipped to enforce and comply with unified competition laws, granting them a competitive edge.<sup>47</sup> Conversely, those with weaker or underdeveloped frameworks face challenges in building the capacity required to align with standardized regulations.<sup>48</sup> This may create an uneven playing field, impeding efforts to achieve consistency and fairness across member states, and potentially exacerbating existing economic inequalities within the region.<sup>49</sup>

Precisely, to achieve the harmonization of the competition law under AfCFTA, there is need to invest in capacity-building programs, technical assistance, training, and offer financial support to strengthen the regulatory capabilities of struggling countries.<sup>50</sup> A unified competition law under AfCFTA could provide national authorities with guidance, expertise, and resources to enhance enforcement standards across the continent.<sup>51</sup>

Equally, given the inevitability of disputes in any societal context, formulating a dispute resolution framework that respects the sovereignty of all member

---

*Liberalisation: A Perspective Analysis of the Single African Air Transport Market (SAATM)*, pp. 641-730. Cham: Springer Nature Switzerland, 2024.

<sup>46</sup> Mondliwa, Pamela, Sumayya Goga, and Simon Roberts. "Competition, productive capabilities and structural transformation in South Africa." *The European Journal of Development Research* 33 (2021): 253-274.

<sup>47</sup> Dawar, Kamala, and George Lipimile. "Harmonization and integration in Africa-the case of competition law and policy."

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Dawar, Kamala, and George Lipimile. "Harmonization and integration in Africa-the case of competition law and policy."

<sup>51</sup> *Ibid.*

states while promoting fair competition is necessary.<sup>52</sup> Effective mechanisms such as arbitration panels, joint investigation protocols, and harmonized merger review processes could be relevant in this context, as they will help streamline efforts among multiple competition authorities, avoiding duplication and ensuring efficiency in regulatory oversight.<sup>53</sup>

Certainly, effective dispute resolution mechanisms and properly aligned laws would simplify compliance processes and costs for businesses, provide greater certainty for investors, and ensure consistent enforcement of regulations across Africa.<sup>54</sup> This would therefore make AfCFTA a key platform for cooperation between national and regional competition authorities in managing cross-border cases, hence advancing market integration, cohesion among member states, and fostering a cooperative regulatory environment consistent with the objectives of economic integration and inclusive development.

55

#### **4. Economic and Social Rationale for a Unified Competition Law in the African Continental Free Trade Area (AfCFTA)**

A harmonized competition law within the AfCFTA promise significant economic and social advantages that foster sustainable growth through promoting equitable market practices and consumer welfare protection.<sup>56</sup> By establishing a unified competition law, AfCFTA will not only enhance market efficiency and attract investments but also drive economic transformation and

---

<sup>52</sup> Fox, Eleanor M. "Integrating Africa by competition and market policy." *Review of Industrial Organization* 60, no. 3 (2022): 305-326.

<sup>53</sup> *Ibid.*

<sup>54</sup> Sebele-Mpofu, Favourate Yelesedzani, Eukeria Mashiri, and Patrick Korera. "Transfer pricing audit challenges and dispute resolution effectiveness in developing countries with specific focus on Zimbabwe." *Accounting, Economics, and Law: A Convivium* 0 (2021).

<sup>55</sup> *Ibid.*

<sup>56</sup> Fox, Eleanor M., and Mor Bakhom. *Making Markets Work for Africa: Markets, Development, and Competition*. Oxford University Press, 2019.

improve consumer welfare across the continent, as expounded hereunder.<sup>57</sup>

#### **4.1. Enhanced Market Efficiency and Resource Allocation**

Indisputably, a unified competition law within AfCFTA can potentially enhance market efficiency by creating a fair and transparent business environment that reduces regulatory inconsistencies and deters anti-competitive conduct.<sup>58</sup> Generally, competition laws address market distortions by limiting monopolistic tendencies, restricting unfair pricing, and increasing market entry by new businesses.<sup>59</sup> For Africa, a coherent competition can eliminate the operational redundancies and administrative complexities associated with circumnavigating multiple national competition regimes.<sup>60</sup> This would, in turn, make firms operating across different African markets benefit from reduced compliance costs and a clear set of regulatory standards, enhancing their ability to operate competitively and efficiently across borders.<sup>61</sup>

Evidence from other regions highlights the economic benefits emanating from harmonized competition law. The European Union (EU), for instance, has successfully utilized unified competition laws to create an integrated market where resources are allocated more effectively, and companies compete on a level playing field.<sup>62</sup> For AfCFTA, a similar approach could yield substantial

---

<sup>57</sup> *Ibid.*

<sup>58</sup> Fox, Eleanor M., and Mor Bakhom. *Making Markets Work for Africa: Markets, Development, and Competition*. Oxford University Press, 2019.

<sup>59</sup> Williamson, Oliver E. "Dominant Firms and the Monopoly Problem: Market Failure Considerations." *Harvard Law Review* 85, no. 8 (1972): 1512–31. <https://doi.org/10.2307/1339905>.

<sup>60</sup> Fox, Eleanor M. "Integrating Africa by competition and market policy." *Review of Industrial Organization* 60, no. 3 (2022): 305-326.

<sup>61</sup> Holland, Mike. "Transaction cost economics: Applications to competition policy in South Africa." In *Fifth Annual Conference on Competition Law, Economics and Policy*, University of Johannesburg. 2019.

<sup>62</sup> Nazzini, Renato. *The foundations of European Union competition law: The objective and principles of Article 102*. Oxford University Press, 2011.

efficiency gains, enabling firms to achieve economies of scale and reduce production costs by avoiding the complexities of fragmented regulatory landscapes.<sup>63</sup> Consequently, this would give a way to a more competitive market, reduce inefficiencies, and promote the optimal allocation of resources across the continent, furthering AfCFTA's goal of economic integration and industrialization.<sup>64</sup>

#### **4.2. Increased Foreign Direct Investment (FDI) and Economic Development**

Regions and markets with clearly defined, consistent, and predictable policies enjoy significantly higher volumes of foreign direct investments (FDI).<sup>65</sup> For instance, the harmonization of competition laws in the European Union resulted in a 20% increase in FDI flows within the bloc.<sup>66</sup> This is because investors tend to be more confident in markets with minimal regulatory risks and with low susceptibility to monopolistic practices.<sup>67</sup> Currently, however, there exists regulatory uncertainties in Africa due to fragmented competition policies that are hampering investment, particularly by multinational companies skeptical about inconsistent enforcement and protectionist policies at the country level.<sup>68</sup>

Undoubtedly, a unified competition law could reassure international investors of Africa's commitment to fair and open markets, thereby not only attracting more foreign direct investments but also encourages technology transfer, job

---

<sup>63</sup> Fox, Eleanor M. "Integrating Africa by competition and market policy." *Review of Industrial Organization* 60, no. 3 (2022): 305-326.

<sup>64</sup> *Ibid.*

<sup>65</sup> Choi, Sangyup, Davide Furceri, and Chansik Yoon. "Policy uncertainty and foreign direct investment." *Review of International Economics* 29, no. 2 (2021): 195-227.

<sup>66</sup> Choi, Sangyup, Davide Furceri, and Chansik Yoon. "Policy uncertainty and foreign direct investment." *Review of International Economics* 29, no. 2 (2021): 195-227.

<sup>67</sup> *Ibid.*

<sup>68</sup> Mondliwa, Pamela, Simon Roberts, and Stefano Ponte. "Competition and power in global value chains." *Competition & Change* 25, no. 3-4 (2021): 328-349.

creation, and innovation.<sup>69</sup> This would, in turn, bring about Africa's structural transformation, moving its economies beyond reliance on primary commodities to a more diversified industrial and service sector.<sup>70</sup>

### **4.3. Consumer Welfare, Fair Pricing and Quality Assurance**

Competition law is designed to protect consumers by regulating *inter alia*; price-fixing, monopolistic behavior, and deceptive practices, thereby creating a market environment that values fair pricing and high-quality products.<sup>71</sup> Notably, African markets are often characterized by overpricing of goods and services, hence a harmonized competition regulatory framework can greatly enhance consumer welfare.<sup>72</sup> Under the AfCFTA, a unified competition law will not only foster a competitive market by allowing consumers to access affordable and quality goods and services, but it will also enhance the economic growth of African countries.<sup>73</sup> For instance, countries with strong competition policies experience reduced prices for essential goods as competitive pressures force businesses to improve efficiency while reducing costs, making it particularly beneficial.<sup>74</sup>

Equally, a unified competition law will increase consumer trust in cross-border transactions within AfCFTA by providing a continent-wide standard of consumer protection, thus mitigating fraud, deceptive advertising, and

---

<sup>69</sup> Kigwiru, Velloh Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

<sup>70</sup> *Ibid.*

<sup>71</sup> Lee, Jyh-An. "Unfair competition and antitrust law." *Intellectual Property Law in China* (Peter Ganea, Danny Friedmann, Jyh-A Lee and Douglas Clark, Wolters Kluwer, 2nd ed. 2021), *The Chinese University of Hong Kong Faculty of Law Research Paper* 2021-17 (2021).

<sup>72</sup> Fox, Eleanor M. "Competition, development and regional integration: In search of a competition law fit for developing countries." In *Competition policy and regional integration in developing countries*. Edward Elgar Publishing, 2012.

<sup>73</sup> Kigwiru, Velloh Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

<sup>74</sup> Porter, M. E. [\*The Competitive Advantage: Creating and Sustaining Superior Performance\*](#). NY: Free Press, 1985. (Republished with a new introduction, 1998.)

substandard products.<sup>75</sup> This will help in infusing confidence among consumers in the single market, thereby making it easy for them to buy goods and services from other African countries and, hence, strengthening intra-African trade.

#### **4.4. Promotion of Innovation and Small and Medium Enterprises (SMEs)**

Innovation is often driven by competitive markets wherein firms are incentivized to improve their products and processes to acquire a competitive advantage.<sup>76</sup> A unified competition law encourages firms to invest in research and development to deliver unique products and services.<sup>77</sup> This drive for innovation, consequently, enhances quality across various industries such as in technology, healthcare, and agriculture, sectors where innovations are urgently needed to address Africa's unique challenges.<sup>78</sup> This way, it promotes the development of indigenous technologies and solutions for long-term growth and development in Africa. Moreover, a unified competition law creates a level playing field for small and medium enterprises (SMEs),<sup>79</sup> as they are more likely to thrive in markets where competition laws prevent market

---

<sup>75</sup> See, Huang, Shiu-Li, and Ya-Chu Chang. "Cross-border e-commerce: consumers' intention to shop on foreign websites." *Internet Research* 29, no. 6 (2019): 1256-1279.

<sup>76</sup> Canare, Tristan, and Jamil Paolo Francisco. "Does Competition Enhance or Hinder Innovation? Evidence from Philippine Small and Medium-Sized Enterprises." *Journal of Southeast Asian Economies* 38, no. 1 (2021): 24-50. <https://www.jstor.org/stable/27035505>.

<sup>77</sup> Roberts, Simon, Thando Vilakazi, and Witness Simbanegavi. "Competition, Regional Integration and Inclusive Growth in Africa: A Research Agenda." In *Competition Law and Economic Regulation in Southern Africa: Addressing Market Power in Southern Africa*, edited by Simon Roberts, Jonathan Klaaren, and Imraan Valodia, 263-87. Wits University Press, 2017. <https://doi.org/10.18772/22017070909.17>.

<sup>78</sup> *Ibid.*

<sup>79</sup> Foghani, Sara, Batiah Mahadi, and Rosmini Omar. "Promoting clusters and networks for small and medium enterprises to economic development in the globalization era." *Sage Open* 7, no. 1 (2017): 2158244017697152.

dominance by a few large players.<sup>80</sup> Given that SMEs account for a significant portion of economic activities in Africa and play an important role in job creation and poverty alleviation, fostering a competitive environment shall enable them to operate and expand seamlessly, hence achieving AfCFTA's socio-economic goals.<sup>81</sup>

#### **4.5. Reduction of Informal Market Activities and Improved Tax Revenues**

One of the largest components of economic activities in most African countries is dominated by the informal sector, which mainly operates outside formal regulatory frameworks.<sup>82</sup> While this sector is vital to livelihoods, it poses a challenge for fair competition as informal businesses may avoid taxes and regulations that formal enterprises are bound to follow.<sup>83</sup> Therefore, a unified competition regulatory regime can address these disparities by creating a regulatory environment that will incentivize informal businesses to transit to the formal economy.<sup>84</sup> This, in turn, would raise the tax revenues for African countries and consequently enhance their economic stability.<sup>85</sup>

Moreover, a formalized informal sector under a unified competition regime would advance consumer protection, assuring consumers of acquiring goods and services from businesses adhering to regulatory standards and quality

---

<sup>80</sup> Xia, Tianjiao, and Xiaohui Liu. "Foreign Competition, Domestic Competition and Innovation in Chinese Private High-Tech New Ventures." *Journal of International Business Studies* 48, no. 6 (2017): 716–39. <http://www.jstor.org/stable/45149348>.

<sup>81</sup> *Ibid.*

<sup>82</sup> Benjamin, Nancy, Ahmadou Aly Mbaye, and Ibrahima Thione Diop. *The informal sector in Francophone Africa: firm size, productivity, and institutions*. World Bank Publications, 2012.

<sup>83</sup> Goto, Hideaki, and Yukichi Mano. "Labor Market Competitiveness and the Size of the Informal Sector." *Journal of Population Economics* 25, no. 2 (2012): 495–509. <http://www.jstor.org/stable/41408924>.

<sup>84</sup> Kovacic, William E. "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement." *Chi.-Kent L. Rev.* 77 (2001): 265.

<sup>85</sup> *Ibid.*

assurance.<sup>86</sup> This formalization process would strengthen economic resilience, promote fair competition, and improve the overall economic health of the AfCFTA region.<sup>87</sup>

#### **4.6. Contribution to Poverty Reduction and Inclusive Economic Growth**

A unified competition law has the potential to achieve inclusive economic growth and reduce poverty by ensuring fair distribution of economic benefits.<sup>88</sup> Competition policies promote growth in an inclusive manner by creating opportunities for all enterprises, including SMEs, to access and thrive in the market.<sup>89</sup> Harmonization of the competition framework helps to prevent monopolistic practices that are disproportionately in favor of huge corporations, hence enabling smaller firms and entrepreneurs to seize market opportunities, generate an income, and create jobs.<sup>90</sup> This, consequently, leads to reduction in poverty particularly among the disadvantaged communities who suffer most from entry barriers in closed markets.<sup>91</sup>

### **5. Challenges to Harmonizing Competition Law under AfCFTA**

While the establishment of a unified competition law under the African Continental Free Trade Area (AfCFTA) promises substantial economic and social benefits, achieving this goal is not without a fair share of obstacles. These challenges are rooted in Africa's political diversity, differences in institutional capacity, and economic disparities amongst the countries.<sup>92</sup> This part discusses,

---

<sup>86</sup> Leary, Thomas B. "Competition law and consumer protection law: Two wings of the same house." *Antitrust Law Journal* 72, no. 3 (2005): 1147-1151.

<sup>87</sup> *Ibid.*

<sup>88</sup> Shukor, Siti Fazilah Abdul, Farahdilah Ghazali, Nur Yuhanis Ismon, and Aerni Isa, eds. *Regulating Fair Competition Toward Sustainable Development Goals*. IGI Global, 2023.

<sup>89</sup> *Ibid.*

<sup>90</sup> Hurshman, Heather L. *The Harmonization of Competition Policy: A Global Perspective*. Dalhousie University, 2004.

<sup>91</sup> Wood, Diane P. "International Harmonization of Antitrust Law: The Tortoise or the Hare?" *Chi. J. Int'l L.* 3 (2002): 391.

<sup>92</sup> Kigwiru, Vellah Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

albeit briefly, challenges hindering the unification of competition law in AfCFTA and proposes ways for overcoming them.

### **5.1. Political Resistance and Sovereignty Concerns**

Political resistance is one of the most significant obstacles to harmonization of competition law, especially in countries with established competition authorities.<sup>93</sup> A case study of the Tripartite Free Trade Area (TFTA) highlights similar challenges, with member states delaying implementation due to concerns over sovereignty and jurisdictional overlaps. Equally, some countries perceive a unified competition regime as a threat to their sovereignty through the ceding regulatory authority over domestic markets to a supranational body.<sup>94</sup> For instance, African countries with developed competition frameworks and regulatory agencies such as South Africa and Kenya may be reluctant to delegate their authority to a continental body.<sup>95</sup> This hesitance is mainly grounded on the concern that it might undermine their regulatory autonomy.<sup>96</sup>

This challenge is further exacerbated by the diversity of political systems and economic priorities across various African countries.<sup>97</sup> Countries with strong state-controlled economies may be hesitant to adopt a unified competition law, as it could constrain their ability to protect state-owned enterprises (SOEs) and other national champions that play significant roles in their economies.<sup>98</sup>

---

<sup>93</sup> Gadinis, Stavros. "The politics of competition in international financial regulation." *Harv. Int'l LJ* 49 (2008): 447.

<sup>94</sup> Sokol, D. Daniel. "Monopolists without borders: the institutional challenge of international antitrust in a global gilded age." *Berkeley Bus. LJ* 4 (2007): 37.

<sup>95</sup> Kigwiru, Vellah Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

<sup>96</sup> *Ibid.*

<sup>97</sup> Marques, José Carlos, and Burkard Eberlein. "Grounding transnational business governance: A political-strategic perspective on government responses in the Global South." *Regulation & governance* 15, no. 4 (2021): 1209-1229.

<sup>98</sup> Bernatt, Maciej. *Populism and antitrust: The illiberal influence of populist government on the competition law system*. Cambridge University Press, 2022.

Equally, in countries where state owned enterprises contribute to strategic sectors such as energy, telecommunications, or even banking, harmonization of competition laws under AfCFTA could threaten these industries' dominance, prompting resistance from governments intent on protecting their economic interests.<sup>99</sup> These political challenges underscore the diplomatic negotiation and flexibility that AfCFTA needs to accord member states a certain degree of autonomy within an integrated framework in pursuit of competition law.<sup>100</sup>

## **5.2. Disparities in Institutional Capacity and Enforcement Mechanisms**

Africa's vast economic diversity has resulted in noticeable disparities in the institutional capacity of countries in enforcing competition laws.<sup>101</sup> In countries like South Africa, for instance, there is a well-funded and staffed competition authority, while in other countries there is significant insufficiency in terms of financial resources, technical expertise, and institutional infrastructure necessary for effective enforcement of competition law.<sup>102</sup> In low-income countries or states just recovering from political turmoil, competition authorities may face budgetary constraints, limited regulatory experience, and high turnover rates, all of which undermine their ability to effectively enforce competition policies.<sup>103</sup> These capacity gaps pose a major barrier to a uniform competition law under AfCFTA, whereby weaker institutions will not be able

---

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> Canen, Nathan, and Leonard Wantchekon. "Political distortions, state capture, and economic development in Africa." *Journal of Economic Perspectives* 36, no. 1 (2022): 101-124.

<sup>102</sup> Odeyemi, Olubusola, Adedoyin Tolulope Oyewole, Omotoya Bukola Adeoye, Onyeka Chrisanctus Ofodile, Wihelmina Afua Addy, Chinwe Chinazo Okoye, and Yinka James Ololade. "Entrepreneurship in Africa: a review of growth and challenges." *International Journal of Management & Entrepreneurship Research* 6, no. 3 (2024): 608-622.

<sup>103</sup> Walters, Daniel E. "The administrative agon: A democratic theory for a conflictual regulatory state." *Yale LJ* 132 (2022): 1.

to implement and support the agreed-upon regulations.<sup>104</sup>

Challenges in technical expertise in various African competition authorities have further complicated institutional capacity insufficiencies.<sup>105</sup> Most of the authorities lack specialized personnel skilled to navigate complex cases involving mergers and acquisitions, anti-competitive practices, and abuse of dominant market position.<sup>106</sup> Additionally, some African countries may lack access to the legal and economic resources needed to challenge multinational corporations with substantial market power.<sup>107</sup> This asymmetry in enforcement capability could lead to stronger competition authorities dominating regulatory decisions and, eventually, undermine the principles of fairness and inclusivity that the unified regime seeks to establish.<sup>108</sup>

To address these issues, substantial investments in capacity-building and technical assistance are required.<sup>109</sup> AfCFTA could lead the way in capacity-building efforts through training programs and best practice sharing within member states.<sup>110</sup> However, unless there is significant support from international partners and commitment by the member states to prioritize competition law, bridging these capacity gaps will remain a challenge.<sup>111</sup>

---

<sup>104</sup> Samunderu, Eyden. "Liberalisation of Trade Regime Under AfCFTA: A Perspective Analysis on Africa's Single Market." In *The Economic Effects of Air Transport Market Liberalisation: A Perspective Analysis of the Single African Air Transport Market (SAATM)*, pp. 641-730. Cham: Springer Nature Switzerland, 2024.

<sup>105</sup> Boshoff, Willem H. "South African competition policy on excessive pricing and its relation to price gouging during the COVID-19 disaster period." *South African Journal of Economics* 89, no. 1 (2021): 112-140.

<sup>106</sup> Fox, Eleanor M., and Mor Bakhoun. *Making Markets Work for Africa: Markets, Development, and Competition*. Oxford University Press, 2019.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Buthe, Tim, and Vellah Kedogo Kigwiru. "The spread of competition law and policy in Africa: A research agenda." *African Journal of International Economic Law* (2020).

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

### 5.3. Economic Disparities and Market Structure Variations

The economy of different African countries differs widely in terms of structure, levels of development and market dynamics, posing a challenge to the harmonization of their competition laws.<sup>112</sup> For instance, whereas some countries have diversified economies with established industries, others rely heavily on informal markets and lack robust manufacturing or service sectors.<sup>113</sup> These economic disparities make it difficult to harmonize competition law, given that countries with high levels of informal trade may not easily enforce regulations that have been set for formal market transactions.<sup>114</sup> In addition, the competitive environment in Africa is highly fragmented, with a mix of multinational corporations, state owned enterprises, and small and medium enterprises operating across various sectors.<sup>115</sup> This, therefore, make it difficult to enforce a uniform competition law equitably across markets with such diverse structures.<sup>116</sup>

Moreover, some countries have more monopolistic or oligopolistic market structure, particularly in sectors that are critical for economic stability.<sup>117</sup> In countries where a few firms dominate essential industries, national

---

<sup>112</sup> Olayiwola, Wumi. "Governing the interface between the African continental free trade area and regional economic communities free trade areas: Issues, opportunities and challenges." *Opportunities and Challenges* (2020).

<sup>113</sup> Narula, Rajneesh. "Policy opportunities and challenges from the COVID-19 pandemic for economies with large informal sectors." *Journal of international business policy* 3, no. 3 (2020): 302-310.

<sup>114</sup> Silalahi, Udin. "The Harmonization of Competition Laws towards the ASEAN Economic Integration." In *ASEAN International Law*, pp. 175-192. Singapore: Springer Nature Singapore, 2021.

<sup>115</sup> Reurink, Arjan, and Javier Garcia-Bernardo. "Competing for capitals: the great fragmentation of the firm and varieties of FDI attraction profiles in the European Union." *Review of International Political Economy* 28, no. 5 (2021): 1274-1307.

<sup>116</sup> *Ibid.*

<sup>117</sup> Rashied, Ahmed Saeed, Siham Abd Ali Obaid, Omar Baban, and Aseel Ibraheem Muhsin. "The Effects of Market Structure and Competition Policy on Consumer Welfare and Economic Efficiency." *Journal of Ecohumanism* 3, no. 5 (2024): 949-962.

governments may be hesitant to reforms that weaken their market power, since such policies can have significant economic and social repercussions.<sup>118</sup> For example, a competition law that targets monopolistic practices could destabilize markets where state owned enterprises hold substantial power, potentially resulting in job losses and reduced government revenue.<sup>119</sup> To address this challenge, AfCFTA's competition law must take into consideration the variable market structures while ensuring regulations do not create barriers to fair competition and consumer protection without eroding national economic interests.

#### **5.4. Jurisdictional Overlaps and Legal Harmonization**

Jurisdictional overlap between national and regional authorities is perhaps one of the most complex challenges in harmonizing the competition law under AfCFTA.<sup>120</sup> Africa's regional economic communities including the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and the East African Community (EAC), have their own competition policies to regulate cross-border trade and ensure fair competition within their respective regions.<sup>121</sup> These RECs operate independently from the AfCFTA and, therefore, in instances where different regulatory authorities claim jurisdiction over the same cross-border transactions, there is a potential for jurisdictional conflicts.<sup>122</sup>

For example, in a merger between companies operating in both COMESA and SADC territories, regulatory approval may be required from multiple

---

<sup>118</sup> Zhou, Ziqi. "Market Competition and Monopoly Power: Insights from Oligopoly Structure." *Highlights in Business, Economics and Management* 24 (2024): 188-195.

<sup>119</sup> *Ibid.*

<sup>120</sup> Okadia, Fiona, Emmanuel Wa-Kyendo, Melody Njeru, Darmi Jattani, and Leo Kemboi. "Designing an AfCFTA-driven continent-wide competition policy around the regional economic communities." *The Antitrust Bulletin* 66, no. 4 (2021): 556-575.

<sup>121</sup> Khabo, Lebona. "An analysis of competition law implementation in the EAC, SADC, and COMESA and the problem of overlapping membership." (2020).

<sup>122</sup> *Ibid.*

authorities, resulting to lengthy procedures of approval, increased compliance costs, and potential regulatory conflicts.<sup>123</sup> Such overlaps complicate the regulatory environment for businesses and can discourage investment, as companies may perceive the multiple layers of regulation as punitive and costly.<sup>124</sup> Moreover, harmonizing of legal standards within these jurisdictions is even more difficult to achieve.<sup>125</sup> The member states have different legal traditions and regulatory philosophies, shaped by their unique political, economic, and social realities and experiences throughout history.<sup>126</sup>

In response to such challenges, the AfCFTA need to work with the existing regional economic communities in laying out clear lines of authority and developing mechanisms for regulatory cooperation that respect both AfCFTA and the REC competition bodies' jurisdictional autonomy.<sup>127</sup> Further, there is need reconcile the different legal frameworks and make provisions for standards that can meet the needs of the various member states.<sup>128</sup> Achieving this goal will without doubt require extensive negotiations, clear guidelines, and a commitment from member states to adapt their existing laws to align with AfCFTA's unified framework.<sup>129</sup> However, without a strong mechanism

---

<sup>123</sup> Mwemba, Willard. "Do Supra-National Competition Authorities Resolve the Challenges of Cross Border Merger Regulation in Developing and Emerging Economies? The Case of the Common Market for Eastern and Southern Africa." (2020).

<sup>124</sup> *Ibid.*

<sup>125</sup> Kuper, Hilda, and Leo Kuper, eds. *African law: adaptation and development*. Univ of California Press, 2022.

<sup>126</sup> Kuper, Hilda, and Leo Kuper, eds. *African law: adaptation and development*. Univ of California Press, 2022.

<sup>127</sup> Kigwiru, Vellah Kedogo. "Supranational or Confederate? Rethinking the African Continental Free Trade Agreement (AfCFTA) Competition Protocol Institutional Design." (*March 12, 2022*) (2022).

<sup>128</sup> See, Gbaya, Morison Siaffa. "The Legal Framework for Regional Organisations in Africa and the Proactive Role in Addressing Threats to International Peace and Security." *International Journal of Law and Policy* 2, no. 8 (2024): 12-31.

<sup>129</sup> Nagu, Yakubu. "Implementing the African Continental Free Trade Agreement (AfCFTA): policies, regulations, laws and institutions required for development." (2023).

for resolving jurisdictional conflicts and standardizing legal requirements, the goal of this goal may remain unattainable.<sup>130</sup>

## 6. Conclusion

Establishing a unified competition law under AfCFTA is an ambitious but essential goal that promises to revolutionize the economic future of Africa. Particularly, a more harmonized competition framework will enhance market efficiency, fair trade, consumer welfare, and foreign investment.<sup>131</sup> UNECA's projections indicate that the harmonization of competition laws could enhance Africa's GDP by 1% annually while boosting consumer welfare and reducing monopolistic practices.<sup>132</sup> These outcomes align with AfCFTA's vision of a cohesive and competitive continental market. Achieving this vision, however, shall entail overcoming critical challenges hindering effective regulatory harmonization, including political resistance, resource and political disparities among national competition authorities, and the need for legal and institutional coordination across Africa's diverse economies.<sup>133</sup> By addressing these challenges, AfCFTA can lay the foundation for a robust competition law that not only promotes economic integration but also advances social equity and inclusive growth across Africa. The success of AfCFTA's competition law will not only be a triumph for the continent's economic development but will also serve as a model for other regions aiming to balance national interests with collective economic goals.<sup>134</sup>

---

<sup>130</sup> *Ibid.*

<sup>131</sup> Shukor, Siti Fazilah Abdul, Farahdilah Ghazali, Nur Yuhani Ismon, and Aerni Isa, eds. *Regulating Fair Competition Toward Sustainable Development Goals*. IGI Global, 2023.

<sup>132</sup> Samunderu, E. (2024). Liberalisation of Trade Regime Under AfCFTA: A Perspective Analysis on Africa's Single Market. In *The Economic Effects of Air Transport Market Liberalisation: A Perspective Analysis of the Single African Air Transport Market (SAATM)* (pp. 641-730). Cham: Springer Nature Switzerland.

<sup>133</sup> Gbaya, Morison Siaffa. "The Legal Framework for Regional Organisations in Africa and the Proactive Role in Addressing Threats to International Peace and Security." *International Journal of Law and Policy* 2, no. 8 (2024): 12-31.

<sup>134</sup> *Ibid.*

### **List of References**

Adetona, Temilola. "Competition and the AfCFTA: Building a Framework for Competition Regulation under the Free Trade Regime." LL. B Thesis, University of Lagos (2021).

African Union. Agreement Establishing the African Continental Free Trade Area (AfCFTA). African Union, 2020. <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>. Accessed on 6th November 2024.

Beneke, Francisco, Eleanor M. Fox, and Mor Bakhoun. "Making Markets Work for Africa" (2020) 69 GRUR International 879, 879-81 <https://doi.org/10.1093/grurint/ikaa092>. Accessed on 6 November 2024.

Boshoff, Willem H. "South African competition policy on excessive pricing and its relation to price gouging during the COVID-19 disaster period." *South African Journal of Economics* 89, no. 1 (2021): 112-140.

Buthe, Tim, and Vellah Kedogo Kigwiru. "The spread of competition law and policy in Africa: A research agenda." *African Journal of International Economic Law* (2020).

Canare, Tristan, and Jamil Paolo Francisco. "Does Competition Enhance or Hinder Innovation? Evidence from Philippine Small and Medium-Sized Enterprises." *Journal of Southeast Asian Economies* 38, no. 1 (2021): 24-50. <https://www.jstor.org/stable/27035505>.

Canen, Nathan, and Leonard Wantchekon. "Political distortions, state capture, and economic development in Africa." *Journal of Economic Perspectives* 36, no. 1 (2022): 101-124.

Cele, Simphiwe K., and Nhlanhla W. Mlitwa. "Fintechs in South Africa: Impact

on regulation, incumbents and consumers." *South African Journal of Information Management* 26, no. 1 (2024): 1766.

Chantal Dupasquier and Patrick N Osakwe, 'Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities' (2006) 17 *Journal of Asian Economics* 241.

Choi, Sangyup, Davide Furceri, and Chansik Yoon. "Policy uncertainty and foreign direct investment." *Review of International Economics* 29, no. 2 (2021): 195-227.

Davidson, Paul, Céline Kauffmann, and Marie-Gabrielle De Liedekerke. "How do laws and regulations affect competitiveness: The role for regulatory impact assessment." (2021).

Dawar, Kamala, and George Lipimile. "Africa: Harmonising competition policy under the AfCFTA" (2020).

Dawar, Kamala, and George Lipimile. "Harmonization and integration in Africa – the case of competition law and policy."

El-Gheriani, Moatasem, and Adham Hashish. "Egypt Amends its Competition Law to Establish a Pre-Merger Control System." *Journal of European Competition Law & Practice* 14, no. 2 (2023): 106-112.

Farahane, Matias Jaime, and Almas Heshmati. *Trade and economic growth: Theories and evidence from the Southern African Development Community*. No. 13679. IZA Discussion Papers, 2020.

Fahmi, Chairul. "The Impact of Regulation on Islamic Financial Institutions Toward the Monopolistic Practices in the Banking Industrial in Aceh, Indonesia." *Jurnal Ilmiah Peuradeun* 11, no. 2 (2023): 667-686.

Fox, Eleanor M. "Integrating Africa by competition and market policy." *Review of Industrial Organization* 60, no. 3 (2022): 305-326.

Fox, Eleanor M. "Competition, development and regional integration: In search of a competition law fit for developing countries." In *Competition policy and regional integration in developing countries*. Edward Elgar Publishing, 2012.

Fox, Eleanor M., and Mor Bakhoun. *Making Markets Work for Africa: Markets, Development, and Competition*. Oxford University Press, 2019.

Francisco Beneke, Eleanor M. Fox, and Mor Bakhoun. "Making Markets Work for Africa" (2020) 69 *GRUR International* 879, 879-81 <https://doi.org/10.1093/grurint/ikaa092>. Accessed on 6 November 2024.

Gachuri, Elizabeth. *African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?* UN, 2020.

Gadinis, Stavros. "The politics of competition in international financial regulation." *Harv. Int'l LJ* 49 (2008): 447.

Goto, Hideaki, and Yukichi Mano. "Labor Market Competitiveness and the Size of the Informal Sector." *Journal of Population Economics* 25, no. 2 (2012): 495-509. <http://www.jstor.org/stable/41408924>.

Holland, Mike. "Transaction cost economics: Applications to competition policy in South Africa." In *Fifth Annual Conference on Competition Law, Economics and Policy*, University of Johannesburg, 2019.

Hurshman, Heather L. *The Harmonization of Competition Policy: A Global Perspective*. Dalhousie University, 2004.

Khabo, Lebona. "An analysis of competition law implementation in the EAC,

SADC, and COMESA and the problem of overlapping membership." (2020).

Khabo, Lebona. "An analysis of competition law implementation in the EAC, SADC, and COMESA and the problem of overlapping membership." (2020).

Kigwiru, Velloh Kedogo. "The cooperation on competition policy under the African continental free trade area." *Manchester J. Int'l Econ. L.* 17 (2020): 98.

Kigwiru, Velloh Kedogo. "Supranational or Confederate? Rethinking the African Continental Free Trade Agreement (AfCFTA) Competition Protocol Institutional Design." (March 12, 2022) (2022).

Kovacic, William E. "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement." *Chi.-Kent L. Rev.* 77 (2001): 265.

Kuper, Hilda, and Leo Kuper, eds. *African law: adaptation and development*. Univ of California Press, 2022.

Leary, Thomas B. "Competition law and consumer protection law: Two wings of the same house." *Antitrust Law Journal* 72, no. 3 (2005): 1147-1151.

Lee, Jyh-An. "Unfair competition and antitrust law." *Intellectual Property Law in China* (Peter Ganea, Danny Friedmann, Jyh-A Lee and Douglas Clark, Wolters Kluwer, 2nd ed. 2021), The Chinese University of Hong Kong Faculty of Law Research Paper 2021-17 (2021).

Marques, José Carlos, and Burkard Eberlein. "Grounding transnational business governance: A political-strategic perspective on government responses in the Global South." *Regulation & Governance* 15, no. 4 (2021): 1209-1229.

Mondliwa, Pamela, Simon Roberts, and Stefano Ponte. "Competition and power in global value chains." *Competition & Change* 25, no. 3-4 (2021): 328-349.

Mondliwa, Pamela, Sumayya Goga, and Simon Roberts. "Competition, productive capabilities and structural transformation in South Africa." *The European Journal of Development Research* 33 (2021): 253-274.

Nagu, Yakubu. "Implementing the African Continental Free Trade Agreement (AfCFTA): policies, regulations, laws and institutions required for development." (2023).

Nazzini, Renato. *The foundations of European Union competition law: The objective and principles of Article 102*. Oxford University Press, 2011.

Ohlhausen, Maureen K., and Alexander P. Okuliar. "Competition, consumer protection, and the right [approach] to privacy." *Antitrust LJ* 80 (2015): 121.

Odeyemi, Olubusola, Adedoyin Tolulope Oyewole, Omotoya Bukola Adeoye, Onyeka Chrisanctus Ofodile, Wihelmina Afua Addy, Chinwe Chinazo Okoye, and Yinka James Ololade. "Entrepreneurship in Africa: a review of growth and challenges." *International Journal of Management & Entrepreneurship Research* 6, no. 3 (2024): 608-622.

Olayiwola, Wumi. "Governing the interface between the African continental free trade area and regional economic communities free trade areas: Issues, opportunities and challenges." *Opportunities and Challenges* (2020).

Okiche, Arinze Bryan. "The meaning and implications of flexibility in African regional trade agreement; consequences for the African continental free trade area (AfCFTA)." PhD diss., University of Birmingham, 2023.

Okadia, Fiona, Emmanuel Wa-Kyendo, Melody Njeru, Darmi Jattani, and

Joshua O'Chieng. "Exploring competition law and its role in Africa's economic integration." *African Journal of International Economic Law* 12 (2021): 15.

Omorogiuwa, Olubunmi, and Elijah Sola. "Digital trade and competition policy in Africa: Towards a new framework." *Journal of African Business* 24, no. 3 (2023): 323-344.

Osei, Kofi, and Emmanuella Awuah. "Regulation of monopolies in Africa: A comparative analysis of the South African and Kenyan competition laws." *African Journal of International & Comparative Law* 24, no. 3 (2021): 379-395.

Pistor, Katharina. "The Evolution of Corporate Governance and the Legal Basis of International Business: Comparative Perspectives." *European Business Law Review* 23, no. 4 (2022): 487-519.

Saba, Arif. *Competition law and policy in developing countries: A critical examination of African models*. Routledge, 2022.

Samunderu, E. (2024). Liberalisation of Trade Regime Under AfCFTA: A Perspective Analysis on Africa's Single Market. In *The Economic Effects of Air Transport Market Liberalisation: A Perspective Analysis of the Single African Air Transport Market (SAATM)* (pp. 641-730). Cham: Springer Nature Switzerland.

Schiff, Z. "Cross-border Competition Law Enforcement in the African Continent: Challenges, opportunities, and institutional responses." *Competition Law Journal* 48, no. 2 (2023): 107-135.

Shabalala, Lungile. "The Need for the Harmonization of Competition Laws in Africa: Achieving the Objectives of the AfCFTA." *Journal of African Law* 65, no. 2 (2021): 115-132.

Swartenbroekx, Paul. "The relationship between competition law and industrial policy in Africa: Complementary or contradictory?" *African Journal*

*Towards a Unified Competition Law in Africa: Prospects and Challenges in the Continental Free Trade Area (AfCFTA) - Murithi Antony*

(2025) *Journal of cmsd* Volume 12(1)

*of International Economic Law* (2020).

Tietze, Florian, and Julian K. Smits. "A comparison of the governance mechanisms of antitrust law and regulation: Africa's approach." *Antitrust Law & Policy Review* 52, no. 1 (2023): 107-130.

Twining, William. "Competition law and economic development." *African Journal of International & Comparative Law* 14 (2020).

Tuzzolino, Lory, and Lorie Hill. "A review of competition law and policy in Africa: Focus on the African Union and AfCFTA." *African Law Review* 25 (2024): 50-65.

UNCTAD. *The role of competition in fostering economic integration in Africa*. UNCTAD Trade and Development Report 2022.

## **Biomess or Biomass? A Case for Reform of the Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya**

By: *Abuya John Onyango*\*

### **Abstract**

*In Kenya, a larger population depends on the traditional biomass forms of energy such as charcoal and firewood for their daily use. This presents a setback towards environmental conservation where the tree cover in Kenya is constantly reducing due to tree felling for charcoal and firewood production. Traditional biomass also affects the health of the users as they are faced with respiratory diseases due to the smoke produced during use. There is therefore an urgent need to ensure sustainable production and use of biomass energy in Kenya. This will afford access to clean energy for Kenyans and augmenting environmental conservation efforts which guarantee the right to clean and healthy environment. However, the existing regulatory and institutional framework presents a mess in biomass energy regulation as there are various institutions and sectoral laws without a harmonized framework on the production and use of biomass energy. This has propagated the use of traditional biomass on charcoal and firewood and limited adoption of cleaner biomass such as bio-fuels. This paper appraises the regulatory and institutional framework on production and use of biomass energy in Kenya. It offers recommendations that could ameliorate the existing framework.*

### **Key Words**

*"Sustainable", "Biomass", "Regulation", "Clean-Energy"*

---

\* *Abuya John Onyango is a final year student of Law at the University of Nairobi, Parklands Campus. He is a Certified Professional Mediator and a member of the Young Arbiters Society UON Chapter. He is currently serving as an Associate Editor to the Editorial Board at the Young Arbiters Society UON Chapter. Contacts: +254794478421. Email: [johmabuya92@gmail.com](mailto:johmabuya92@gmail.com)*

## 1.0 Introduction

Biomass is one of the sources of renewable energy in Kenya.<sup>1</sup> Renewable energy means energy derived from natural resources that are replenished at a higher rate than they are consumed including but not limited to solar energy, wind energy, biomass energy, biological waste energy and hydro energy.<sup>2</sup> The Energy Act defines Biomass to mean non-fossilized and biodegradable organic material originating from plants, animals and micro-organisms and includes bioethanol, bio-diesel, biogas, charcoal, fuel-wood and Agro-waste.<sup>3</sup>

In Kenya, the energy matrix comprises 80% fossil fuels, 18% renewable energy and 2% coal.<sup>4</sup> Over 85% of the total population utilizes wood biomass.<sup>5</sup> This clearly shows that the country is dependent on Biomass as its source of energy. About 55% of the biomass is derived from farmlands in the form of woody biomass, crop residue and animal waste, while the remaining 45% is derived from government and communal forests.<sup>6</sup> This exerts pressure on the forest resources leading to increased deforestation that poses environmental challenges.<sup>7</sup>

It therefore calls for adoption of clean energy in realization of sustainable development goal 7 which aims to ensure access to affordable, reliable, sustainable and modern energy for all by 2030.<sup>8</sup> This is through the adoption

---

<sup>1</sup> <https://renewableenergy.go.ke/technologies/bioenergy/> accessed on 16 February 2025.

<sup>2</sup> <https://www.un.org/en/climatechange/what-is-renewable-energy#> accessed on 8 January 2025.

<sup>3</sup> Section 2 of Energy Act (CAP 314) 2019

<sup>4</sup> Ibrahim Kipngeno, "Renewable energy status and uptake in Kenya" Energy Strategy Reviews 54 (2024) 1.

<sup>5</sup> Ibid

<sup>6</sup> Bioenergy Strategy 2020-2027, 2020.

<sup>7</sup> Richard Birdsey, "Climate, economic, and environmental impacts of producing wood for bioenergy" Environmental Research Letters 13(5) 2018 2.

<sup>8</sup> <https://sdgs.un.org/goals/goal7> accessed on 10 January 2025.

of efficient, economic and cost-effective production and use of energy.<sup>9</sup>

One of the methods to achieve this is through clean cooking which involves the use of cooking fuels and technologies which are used without harm to the health of those in the household and which are more environmentally sustainable and energy efficient than inefficient biomass cookstoves and the three-stone fires<sup>10</sup>.

However, in the implementation of sustainable biomass production and use, there is a need for a comprehensive framework that offers guidance on its realization. In Kenya, the Constitution devolves the energy functions to county governments save for energy policy and regulation.<sup>11</sup> Currently, the framework is inadequate in augmenting the steps towards clean energy as it involves different sectoral laws that inhabit bureaucracy and complexities as to application.<sup>12</sup> This presents a *mess* in the biomass energy regulatory and institutional framework necessitating reforms.<sup>13</sup>

This calls for the development of a comprehensive framework that will synergize Kenya's steps towards sustainable energy for all.

An examination of the current framework will be essential in highlighting the progressive steps, gaps and challenges that call for recommendation.

## **2.0 Kenya's Regulatory Framework on Biomass**

This can further be grouped into International, Regional, Domestic and Sub-

---

<sup>9</sup> Ibid

<sup>10</sup> Bioenergy Strategy 2020-2027, 2020.

<sup>11</sup> The Constitution of Kenya 2010, Fourth Schedule.

<sup>12</sup> Hannah Wamuyu, "Investment in renewable energy in Kenya: Key legal issues, challenges and prospects" KAS African Law Study Library (11) 2024 12.

<sup>13</sup> Ibid

national frameworks.

## **2.1 International Framework**

Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC) provides that the ultimate objective of the Convention is stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>14</sup>

Article 2(1) of the Kyoto Protocol which is an enabling instrument of the UNFCCC provides that each party in achieving its quantified emission limitation and reduction commitments shall implement and further elaborate policies and measures in accordance with its national circumstances, such as enhancement of energy efficiency in relevant sectors of the national economy and research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies.<sup>15</sup>

Article 2 of the Vienna Convention for the protection of the ozone layer provides that the parties shall take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.<sup>16</sup> The use of traditional biomass like firewood in Kenya accelerates deforestation which in turn affects the ozone layer thus increasing climate change effects. The use renewable and sustainable biomass leads to the preservation of the ozone layer reducing the adverse effects in Kenya. Article 2(b) mandates the parties to adopt appropriate legislative or administrative measures and cooperate in harmonizing appropriate policies to control, limit, reduce or prevent

---

<sup>14</sup> Article 2 of the United Nations Framework Convention on Climate Change 1992.

<sup>15</sup> Article 2(1) of the Kyoto Protocol to the United Nations Convention on Climate Change 1997.

<sup>16</sup> Article 2 of the Vienna Convention for the Protection of the Ozone Layer 1985

human activities having adverse effects that modify the ozone layer.<sup>17</sup> This affirms the need to develop frameworks on the production and use of biomass that have huge potential in controlling human activities having adverse effects on the ozone layer.

## 2.2 Regional Framework

Africa Bioenergy Policy Framework and Guidelines provides for the guiding principles to harmonize the bioenergy sector with other sectoral and global processes.<sup>18</sup> These include embedding bioenergy development within poverty reduction policies and strategies and integrating bioenergy into energy mix strategies and national development strategies that improve energy access, particularly rural electrification.<sup>19</sup>

Biomass plays a big role in poverty reduction where the communities are empowered to adopt sustainable biomass production like the use of briquettes which lead to the creation of jobs and improvement of living standards.<sup>20</sup> The strategy also recognizes the importance of political goodwill in ensuring effective utilization of biomass energy through the integration of biomass strategy into the national development strategies.<sup>21</sup> The policy aims towards harmonizing sustainable bioenergy development in Africa and offers guidance for governments to provide legal, policy and institutional regulatory frameworks on sustainable use and production of biomass.<sup>22</sup> It is worth noting that many African countries have developed bioenergy regulatory and

---

<sup>17</sup> Ibid

<sup>18</sup> Africa Bioenergy Policy Framework and Guidelines 2013.

<sup>19</sup> Ibid

<sup>20</sup> Yustas Y M, "Towards adaptation of briquettes making technology for green energy and youth employment in Tanzania" *Journal of Power and Energy Engineering* 10 2022 1.

<sup>21</sup> Africa Bioenergy Policy Framework and Guidelines 2013.

<sup>22</sup> <https://www.fao.org/wood-energy/search/detail/en/c/1381183/> accessed on 16 February 2025

institutional framework.<sup>23</sup>

East African Community (EAC) Bio-economy Strategy focuses on the creation of new biobased products that add value to bioresources in the region and use of bioresources in novel, innovative and sustainable ways.<sup>24</sup> The strategy aims to ensure the optimization and innovative use of biomass and biological resources produced from agriculture, aquaculture, bioprospecting, and forestry.<sup>25</sup> It has four priority thematic areas including food security and sustainable agriculture, health and wellbeing, biobased industrial development and sustainable energy.<sup>26</sup> This is achievable through its coastal and freshwater biomass resources, some of which are shared like Lake Victoria. The EAC Energy Security Policy Framework 2018 compliments the strategy.<sup>27</sup> However, it is worth noting that the strategy and policy recognizes the efficiency of bioenergy but fails to obligate members to take legal and policy formulation to realize the same.

## **2.3 Domestic Legal Framework**

### **2.3.1 Energy Act**

The Energy Act 2019 is the primary legislation on Energy in Kenya.<sup>28</sup> It has been instrumental in the path to clean energy through the promotion of renewable sources of energy. Its recognition of renewable energy forms highlights Kenya's efforts towards the realization of sustainable goal number 7 on clean energy.<sup>29</sup>

---

<sup>23</sup> Samuel Olatunde Dahunsi, "Bioenergy technologies adoption in Africa: A review of past and current status" *Journal of Cleaner Production* 264 2020.

<sup>24</sup> East African Regional Bioeconomy Strategy 2021.

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

<sup>27</sup> East African Community Energy Security Policy Framework 2018.

<sup>28</sup> Energy Act (CAP 314) 2019.

<sup>29</sup> <https://sdgs.un.org/goals/goal7> accessed on 10 January 2025.

The Act mandated the Cabinet Secretary for Energy to prepare resource maps and renewable energy resources inventory within twelve months of coming into force of the Act.<sup>30</sup> This has been captured under the bioenergy strategy.<sup>31</sup> Resource maps and inventory are crucial in attracting private investors that play a big role in renewable energy production and their absence hinders the sustainable production and use of renewable energy and biomass in extension.<sup>32</sup>

Section 75 of the Energy Act provides that The Cabinet Secretary shall promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bioethanol, charcoal, fuelwood, solar, wind, tidal waves, hydropower, biogas and municipal waste.<sup>33</sup> In realization of this, the Cabinet Secretary in conjunction with other relevant agencies is to provide an enabling framework for the efficient and sustainable production, distribution and marketing of biomass, municipal waste, and charcoal.<sup>34</sup>

The Cabinet Secretary is to facilitate the country's progressive steps towards clean energy through the promotion of the use of fast maturing trees for energy production including biofuels and establishment of commercial woodlots including peri-urban plantations.<sup>35</sup> This is to be augmented by the development of appropriate local capacity for the manufacture, installation, maintenance and operation of basic renewable technologies such as bio-digesters, solar systems and turbines.<sup>36</sup> In the absence of a comprehensive framework, these remain to be written in statute without their implementation.

---

<sup>30</sup> Section 74 of Energy Act (CAP 314) 2019.

<sup>31</sup> Bioenergy Strategy 2020-2027, 2020 19.

<sup>32</sup> Energy Sector Management Assistance Program (ESMAP), "Assessing and Mapping Renewable Energy Resources" Report 2nd edition 2021 7.

<sup>33</sup> Section 75 (1) of Energy Act (CAP 314) 2019.

<sup>34</sup> Section 75 (2) Ibid

<sup>35</sup> Ibid

<sup>36</sup> Ibid

The Act also recognizes the importance of international cooperation, carbon credit trading and co-generation of electricity by sugar millers and sale of such electric power through the National Grid to the consumers.<sup>37</sup> There have been initiatives over the years in securing international cooperation mostly through clean cooking programs that have been beneficial to many Kenyans.<sup>38</sup> The sugar industry has faced many challenges over the past years leaving Mumias only as the one capable of co-generating electricity and selling to the national grid.<sup>39</sup>

### **2.3.2 Forest Conservation and Management Act**

This Act is crucial in regulating the production of charcoal and other bioenergy forms that depend on trees. Since most families in Kenya use charcoal and wood fuel in heating and cooking, it calls for regulation of their use as it poses a risk of deforestation which has adverse environmental impacts.<sup>40</sup> Section 8 mandates Kenya Forest Service to conserve, protect and manage all public forests and implement and enforce rules and regulations governing importation, exportation and trade in forest produce.<sup>41</sup> This is instrumental in realizing sustainable production of charcoal and encourages the production of briquettes which are better forms of renewable energy.<sup>42</sup>

The Act recognizes the need for sustainable production of wood and non-wood products<sup>43</sup> and community participation in forest conservation.<sup>44</sup> This is

---

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Stephen Kibet Kimutai, "Impact of biogas adoption on household energy use and livelihood improvement in Kenya: An overview on a road map toward sustainability" *International Journal of Energy Sector Management* 2024 2.

<sup>41</sup> Section 8 of Forest Conservation and Management Act (CAP 385) 2016.

<sup>42</sup> Navarro Ferronato, "Are waste-based briquettes alternative fuels in developing countries? A critical review" *Energy for Sustainable Development Journal* 68 2022 2.

<sup>43</sup> Section 42 of Forest Conservation and Management Act (CAP 385) 2016.

<sup>44</sup> Section 49 Ibid

important in educating the community about the sustainable ways of harvesting timber or wood fuel that allows the community to adopt bioenergy.<sup>45</sup>

### **2.3.3 Environmental Management and Conservation Act**

Section 49 of the Act mandates the National Environment Management Authority to promote the use of renewable sources of energy by promoting research in appropriate renewable sources of energy, creating incentives for the promotion of renewable sources of energy, promoting measures for the conservation of non-renewable sources of energy; and taking measures to encourage the planting of trees and woodlots by individual land users, institutions and by community groups.<sup>46</sup> The Act thus recognizes the close link between renewable energy and environmental conservation thus encouraging and ensuring adoption of land use methods compatible with conservation of biodiversity.<sup>47</sup>

The Act also recognizes the institution of programs aiming at eliminating substances that deplete the stratospheric ozone layer.<sup>48</sup> This allows room for the promotion of bioenergy shifting dependence on fossil fuels that deplete the ozone layers.<sup>49</sup>

### **2.3.4 Climate Change Act**

Section 23 provide for policy direction on carbon markets prescribing carbon reduction credits that aim to reduce emissions from current sources through projects and removal or sequestration credits that take carbon dioxide out of the atmosphere and either use or store it via afforestation, reforestation, nature-

---

<sup>45</sup> Abanikannda, "Fuel Wood Exploitation and Sustainable Forest Management" *Journal of Applied Sciences and Environmental Management* 25(6) 2021.

<sup>46</sup> Section 49 of Environment Management and Coordination Act (CAP 387A) 1999.

<sup>47</sup> Section 51 Ibid

<sup>48</sup> Section 56 Ibid

<sup>49</sup> <https://www.un.org/tr/node/189510> accessed on 16 February 2025.

based solutions or technology-based removal.<sup>50</sup> This offers the basis for introduction of carbon credits in bioenergy production that play a big role in reducing carbon emissions.<sup>51</sup>

### **2.3.5 Sustainable Waste Management Act**

Section 10 of the Act recognizes the need to develop regulations prescribing the promotion of health, safety and environmental standards including the facilitation of waste-to-energy and waste-to-manure projects.<sup>52</sup> This recognizes the use of municipal waste in production of bioenergy that play a big role in sustainable waste management.<sup>53</sup>

### **2.3.6 Feed-in-tariffs policy on wind, biomass, small-hydro, geothermal, biogas and solar resource generated electricity**

Feed-in-Tariff (FiT) is an instrument for promoting the generation of electricity from renewable energy sources allowing power producers to sell Renewable Energy Sources Generated Electricity (RES-E) to a distributor at a pre-determined fixed tariff for a given period.<sup>54</sup> This ensures environmental integrity including the reduction of greenhouse gas emissions, enhancement of energy supply security, reducing the country's dependence on imported fuels and coping with the global scarcity of fossil fuels and its attendant price volatility.<sup>55</sup>

The FiT-on biomass facilitates resource mobilization by providing investment

---

<sup>50</sup> Section 23 of Climate Change Act (CAP 387) 2016.

<sup>51</sup> Wei-Hsen Chen, "Achieving carbon credits through biomass torrefaction and hydrothermal carbonization" *Renewable and Sustainable Energy Reviews* 208 2025.

<sup>52</sup> Section 10 of Sustainable Waste Management Act 2023.

<sup>53</sup> Ruchi Bharti, "Municipal solid waste as a source of energy" *Materials today: proceedings* 81 2023.

<sup>54</sup> *Feed-In-Tariffs Policy on Wind, Biomass, Small-Hydro, Geothermal, Biogas and Solar Resource Generated Electricity*, 2012.

<sup>55</sup> *Ibid*

security and market stability for investors and reduces transaction and administrative costs and delays by eliminating the conventional bidding processes.<sup>56</sup> It also encourages private investors to operate their power plants prudently and efficiently to maximize returns.<sup>57</sup>

### **2.3.7 Bioenergy Strategy**

This strategy recognizes the commitment of the government of Kenya in achieving the target of its population enjoying access to modern bioenergy services including 100% access to clean cooking by 2028.<sup>58</sup> The strategy offers ways to achieve sustainable bioenergy in Kenya including the planning for sustainable bioenergy through innovation platforms and encouragement of investment in bioenergy.<sup>59</sup> It recognizes that this is achievable through capacity building of Kenyans, financial support, policy, regulations and institutions engagement and political leadership and support.<sup>60</sup>

Specific objectives of the strategy include: To promote sustainable production and consumption of bioenergy; To accelerate transition to clean cooking technologies and fuels; To provide potential investors with requisite information on viable opportunities for bioenergy development in Kenya and to serve as a framework for regional and international cooperation and trade in bioenergy and related feedstocks.<sup>61</sup>

It recognizes the role of clean renewable energy in empowering women and children who are always mostly affected by the traditional charcoal and wood

---

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> <https://www.undp.org/kenya/accelerating-clean-cooking-action-kenya#:~:text=The%20Accelerating%20Clean%20Cooking%20Action,climate%20and%20sustainable%20energy%20ambitions>. Accessed on 16 February 2025.

<sup>59</sup> Bioenergy Strategy 2020-2027, 2020.

<sup>60</sup> Ibid

<sup>61</sup> Ibid

fuel.<sup>62</sup> This is important in encouraging women participation in renewable energy production and use.<sup>63</sup>

The strategy documents the current state of biomass production clearly outlining its potential across the country.<sup>64</sup> It is an embodiment of the clean biomass pathway, and its implementation is essential in guaranteeing sustainable energy for all.<sup>65</sup>

### **2.3.8 National Energy Policy 2018**

This policy mandates the government to take part in a study on the potential of biomass energy and to disseminate information on biomass energy resources.<sup>66</sup> This is essential in the creation of an inventory that allows the effective implementation of the bioenergy strategy.<sup>67</sup> The policy provides for incentives for the participation of the private sector in the conversion of waste to energy initiatives.<sup>68</sup> This encourages the private sector involvement in bioenergy production which allows for capacity building on the communities that enables them to adopt clean biomass.<sup>69</sup> The policy therefore aims to promote sustainable production and use of cleaner biomass energy.<sup>70</sup>

---

<sup>62</sup> Njenga M, "Women's work is never done: Lifting the gendered burden of firewood collection and household energy use in Kenya" *Energy Research and Social Science* 77 2021.

<sup>63</sup> Ibid

<sup>64</sup> Bioenergy Strategy 2020-2027, 2020.

<sup>65</sup>

<https://www.seforall.org/taxonomy/term/46#:~:text=The%20country's%20Energy%20Transition%20and,driven%20substantially%20by%20income%20growth.>

Accessed on 16 February 2024.

<sup>66</sup> National Energy Policy 2018.

<sup>67</sup> Energy Sector Management Assistance Program (ESMAP), "Assessing and Mapping Renewable Energy Resources" Report 2nd edition 2021.

<sup>68</sup> National Energy Policy 2018.

<sup>69</sup> Bioenergy Strategy 2020-2027, 2020.

<sup>70</sup> National Energy Policy 2018.

The overall objective of the Energy Policy is to ensure sustainable, adequate, affordable, competitive, secure and reliable supply of energy at the least cost geared to meet national and county needs, while protecting and conserving the environment.<sup>71</sup> The adoption of this policy in the Kenya's development agenda will promote the use of cleaner biomass leading to a shift from traditional charcoal and wood fuel.<sup>72</sup> This will be instrumental in ensuring clean sustainable energy is accessible to all in Kenya.<sup>73</sup>

## **2.4 Institutional Framework**

### **2.4.1 Renewable Energy Resource Advisory Committee**

Section 76 of the Energy Act establishes the Renewable Energy Resource Advisory Committee which is to advise the Cabinet Secretary on criteria for allocation of renewable energy resources, licensing of renewable energy resource areas and management and development of renewable energy resources.<sup>74</sup> This is crucial in the management of biomass as a form of renewable energy as the committee should advise the Cabinet Secretary on its management and development.<sup>75</sup>

The Renewable Energy Resource Advisory Committee may upon request advice the County Governments on matters relating to renewable energy resources.<sup>76</sup> This enables the county governments to develop robust

---

<sup>71</sup> Ibid

<sup>72</sup> Caleb Balongo, "Alternative Source of Green Energy for Marginalized Groups in Kenya: An SDG Agenda 2030 Requirement" *Journal of the Kenya National Commission for UNESCO* 3(1) 2023.

<sup>73</sup> Kenya's Action Agenda, "Sustainable Energy for All, Kenya investment prospectus: Pathways for Concerted Action toward Sustainable Energy for All by 2030" 2015.

<sup>74</sup> Section 76 of Energy Act (CAP 314) 2019.

<sup>75</sup> Section 76 4(e) Ibid

<sup>76</sup> Ibid

frameworks that are suitable for their counties and population.<sup>77</sup> It is worth noting that many counties have not yet developed their county energy plans.<sup>78</sup>

#### **2.4.2 Energy and Petroleum Regulatory Authority**

The Energy Act establishes the Energy and Petroleum Regulatory Authority (EPRA) which is to regulate the exploration, extraction, production, transportation, storage exportation, importation and sale of coal bed methane gas and other energy forms.<sup>79</sup> This mandates EPRA to regulate the extraction, production and processing of biomass.<sup>80</sup> The Act also recognizes the need to develop guidelines on applicable treaties, conventions and protocols affecting the energy sector in consultation with other statutory authorities except those relating to nuclear energy.<sup>81</sup> This is important in promoting the use of renewable sources of energy which are advocated by several treaties.<sup>82</sup>

The Authority is to co-ordinate the development and implementation of a national energy efficiency and conservation action plan, in consultation with relevant statutory authorities and other stakeholders.<sup>83</sup> This is instrumental in biomass production and use as it forms a critical component of the national energy efficiency and conservation plan.<sup>84</sup>

---

<sup>77</sup> Ngaira, “Exploring Frameworks for the Aggregation of Sub-National Energy Plans in Kenya” 2023.

<sup>78</sup> Ibid

<sup>79</sup> Section 10 of Energy Act (CAP 314) 2019.

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> See the United Nations Convention on Climate Change 1992 and the Vienna Convention on the Protection of Ozone Layer 1985 as discussed under the international framework above.

<sup>83</sup> Section 10 of the Energy Act (CAP 314) 2019.

<sup>84</sup> Kenya National Energy Efficiency and Conservation Strategy 2020.

### **2.4.3 Rural Electrification and Renewable Energy Corporation**

It is established under Section 43 of the energy Act.<sup>85</sup> The corporation is to develop, promote and manage in collaboration with other agencies, the use of renewable energy and technologies, including but not limited to biomass which includes biodiesel, bioethanol, charcoal, fuelwood and biogas.<sup>86</sup> This has been achieved mainly through the adoption of clean cooking technologies across the country that offer a shift from traditional cooking stoves to improved jikos which conserve more heat.<sup>87</sup>

The Corporation is to provide an enabling framework for the efficient and sustainable production, conversion, distribution, marketing and utilization of biomass, promote, in conjunction with the agency responsible for forests, the use of fast maturing trees for energy production including bio-fuels, promote, in collaboration with other agencies, the development of appropriate local capacity for the manufacture, installation, maintenance and operation of renewable technologies such as bio-digesters.<sup>88</sup> It is also mandated to promote carbon trading in renewable energy sources and electricity generation through co-generation by sugar millers.<sup>89</sup>

### **2.4.4 National Environmental Management Authority**

It is the authority established to coordinate various environmental management activities.<sup>90</sup> Environmental conservation is crucial in the path to sustainable production and use of biomass, especially those that have trees as

---

<sup>85</sup> Section 43 of the Energy Act (CAP 314) 2019.

<sup>86</sup> Section 44(j) Ibid

<sup>87</sup> Moses Kirimi, "Cleaner Cooking with Charcoal in Kibera Informal Settlement in Nairobi, Kenya, and Its Implications for Livelihoods and the Environment" *Energies Journal* 16(19) 2023.

<sup>88</sup> Section 44(o) of the Energy Act (CAP 314) 2019.

<sup>89</sup> Section 44(q, r) Ibid

<sup>90</sup> Section 9 of the Environmental Management and Coordination Act (CAP 387) 1999.

their raw materials like charcoal and wood fuel.<sup>91</sup> Section 9 of the Environmental Management and Conservation Act mandates it to monitor and assess activities, including activities being carried out by relevant lead agencies, to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given.<sup>92</sup> This allows for regulated use of forest resources in biomass production in a manner consistent with conservation of biological diversity.<sup>93</sup>

## **2.5 Sub-national Framework**

The Fourth Schedule of the Constitution delegates energy functions to the county governments save for energy policy which is within the confines of national government.<sup>94</sup> Many of the counties do not have exclusive frameworks for energy and a few of them promote biomass production and use. An examination of the framework of Kisumu and Nakuru Counties paint a picture of the general outlook in Kenya.

### **2.5.1 Kisumu County**

Kisumu County lacks an Energy regulatory framework and renewable energy is captured in the Kisumu County Environment Policy of 2019.<sup>95</sup> The policy provides that the County Government will develop and promote an integrated county strategy for generation and sustainable utilization of renewable energy, promote adaptation of the cleaner production concept in all energy production and consumption activities, promote investments in clean energy, develop a system for energy management graduation for domestic, low and high

---

<sup>91</sup> Denzel Christopher, "Sustainable pathways for biomass production and utilization in carbon capture and storage" Biomass Conversion and Biorefinery 2024.

<sup>92</sup> Section 9 of the Environmental Management and Coordination Act (CAP 387) 1999.

<sup>93</sup> Denzel Christopher, "Sustainable pathways for biomass production and utilization in carbon capture and storage" Biomass Conversion and Biorefinery 2024.

<sup>94</sup> Fourth Schedule of Constitution of Kenya 2010.

<sup>95</sup> Kisumu County Environment Policy 2019.

industry consumers, create public awareness with respect to clean energy and energy efficient technologies and facilitate public access to clean and affordable energy sources.<sup>96</sup>

This promotes the use of clean energy thus offering the foundation for the implementation of clean cooking strategies and other projects within the county.<sup>97</sup> An example is the Water Hyacinth Biogas Project where Biogas International, a Kenyan energy technology company, is partnering with the drug manufacturing company AstraZeneca and the Institute for Sustainability Leadership at the University of Cambridge.<sup>98</sup> It uses digester machines that run on waste such as water hyacinth and can use 2-3kg of the weed at a time.<sup>99</sup> This leads to generation of clean fuel and at the same time promotes the conservation of Lake Victoria.<sup>100</sup>

This has enabled families in Kisumu to benefit from clean cooking.<sup>101</sup> However, the digesters are expensive and not affordable for many families hindering their adoption.<sup>102</sup> The presence of a framework would promote capacity building within the community for its adoption.<sup>103</sup> The absence of one hinders

---

<sup>96</sup> Ibid

<sup>97</sup> <https://iclei.org/e-library/roadmap-towards-100-renewable-energy-kisumu-county/#:~:text=The%20roadmap%20integrates%20baseline%20analyses,supported%20by%20biogas%20and%20hydropower>. Accessed on 16 February 2025.

<sup>98</sup> <https://www.weforum.org/stories/2021/08/kenyan-entrepreneur-hyacinth-sustainable-fuel-biomass/> accessed on 8 January 2025.

<sup>99</sup> Ibid

<sup>100</sup> Caleb Balongo, "Alternative Source of Green Energy for Marginalized Groups in Kenya: An SDG Agenda 2030 Requirement" *Journal of the Kenya National Commission for UNESCO* 3(1) 2023.

<sup>101</sup> <https://www.kisumu.go.ke/clean-cooking-initiative-kick-off-in-kisumu/> accessed on 16 February 2025.

<sup>102</sup> <https://www.reuters.com/world/africa/kenyan-entrepreneur-turns-water-hyacinth-weed-into-cooking-fuel-2021-07-27/> accessed on 16 February 2025.

<sup>103</sup> Ngaira, "Exploring Frameworks for the Aggregation of Sub-National Energy Plans in Kenya" 2023.

the path to clean sustainable energy for all.<sup>104</sup>

### **2.5.2 Nakuru County**

Nakuru county has adopted the Nakuru County Energy Plan 2022-2027 which offers a comprehensive framework on renewable energy resources in Nakuru.<sup>105</sup> The strategy recognizes the extensive use of biomass in the county.<sup>106</sup> It provides that the primary bioenergy sources in Nakuru County are woodlots cultivated by small holder farmers, gazetted forests (illegal logging), private forests, community forests and supplies from other counties.<sup>107</sup> Approximately 34% of biomass consumed in Nakuru County is non-renewable and analysis undertaken in 2012 showed that Nakuru County was a net firewood consuming county hence, it faces a significant firewood deficit potential.<sup>108</sup>

Nakuru has been able to venture into bioenergy production through briquettes made from human waste providing an effective and sustainable replacement of charcoal.<sup>109</sup> The Nakuru Water and Sanitation Services Company produces carbonized bio-briquettes from faecal sludge blended with sawdust at a ratio of 50:50 using molasses as a binder.<sup>110</sup>

Nakuru County is a witness to the importance of having a framework on biomass as it has been able to explore various forms of bioenergy production

---

<sup>104</sup> Ibid

<sup>105</sup> Nakuru County Energy Plan 2022-2027.

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Ibid

<sup>109</sup> <https://www.businessdailyafrica.com/bd/corporate/enterprise/how-briquettes-from-human-waste-sawdust-are-taking-place-of-charcoal-2256760> accessed on 16 February 2025.

<sup>110</sup> <https://nakuruwater.co.ke/hello-world/> accessed on 16 February 2025.

and use.<sup>111</sup>

### 3.0 Case Studies

#### 3.1 Java House on Biofuels

In 2024, Java House contributed to the reduction of 148 tonnes of carbon emissions using biofuel.<sup>112</sup> In partnership with renewable energy company Muenzer Kenya, it uses used cooking oil as feedstock for biodiesel production.<sup>113</sup> This highlights the potential of hotels and restaurants in bioenergy production. These efforts have led to environmental conservation, creation of employment opportunities and promotion of sustainable production and use of biomass as a form of renewable energy.<sup>114</sup>

#### 3.2 Oserian Flower Farm

Oserian Flower Farm in partnership with QUBE Renewables Limited has adopted sustainable flower waste management by transforming flowers waste into clean energy that is powering its operations.<sup>115</sup> This is achieved through containers having digesters, batch reactors, control rooms, laboratories and workshops.<sup>116</sup> Each reactor can accommodate up to three tones of flower waste leading to an effective waste management since it produces an average of 1825

---

<sup>111</sup> Nakuru County Energy Plan 2022-2027.

<sup>112</sup> <https://bioenergytimes.com/biodiesel-initiative-java-house-cuts-148-tonnes-of-carbon-emissions/#:~:text=Nairobi%3A%20Java%20House%20has%20reduced,promote%20sustainability%20and%20reduce%20waste>. Accessed on 16 February 2025.

<sup>113</sup> Ibid

<sup>114</sup> <https://econews.co.ke/2024/12/23/java-reduces-148-tonnes-of-carbon-emissions-through-biodiesel-initiative/> accessed on 5 January 2025.

<sup>115</sup> <https://aiph.org/floraculture/news/kenyan-flower-farm-turns-discarded-flowers-into-renewable-using-anaerobic-digestion/#:~:text=The%20biogas%20from%20the%20containers,the%20kitchens%20relied%20on%20firewood>. Accessed on 16 February 2025.

<sup>116</sup> Ibid

tonnes of waste each year.<sup>117</sup>

It applies anaerobic digestion which is environment friendly and the biogas from the containers is converted into electricity used to power the farm operations.<sup>118</sup> The other gas is compressed into cylinders and used in Oserian Kitchens leading to adoption of clean cooking strategy.<sup>119</sup> This innovation is timely as it reduces the production cost in flower farms in Naivasha.<sup>120</sup>

This project attests to the great potential of bioenergy in agricultural wastes that can be tapped into.<sup>121</sup> The development of an effective framework on sustainable production and use of biomass will offer an opportunity to many Kenyans and farmers in the rural areas to adopt sustainable clean energy.<sup>122</sup>

#### **4.0 Conclusion**

Kenya has a framework on the sustainable production and use of biomass that is faced with inherent difficulties in implementation.<sup>123</sup> This is clearly seen in the sectoral laws that provide for the use of renewable energy. Sectoral laws face challenges of implementation due to duplicity of roles and responsibilities between several agencies and institutions.<sup>124</sup> For example, in the production of briquettes and wood fuel, which depend on forest resources, the Kenya Forest Service and the National Environment Management Authority have same

---

<sup>117</sup> <https://www.energy.go.ke/biogas> accessed on 16 February 2025.

<sup>118</sup> <https://wardenbiomedia.com/case-studies/qube-renewables-selects-warden-biomedia-for-high-rate-anaerobic-digester-on-sustainable-flower-farm-in-kenya/> accessed on 16 February 2025

<sup>119</sup> Ibid

<sup>120</sup> Ibid

<sup>121</sup> Jo Dewulf, "Biowaste energy potential in Kenya" *Renewable Energy Journal* 35(12) 2010.

<sup>122</sup> Ibid

<sup>123</sup> Hannah Wamuyu, "Investment in renewable energy in Kenya: Key legal issues, challenges and prospects" *KAS African Law Study Library* (11) 2024 12.

<sup>124</sup> Ibid

roles in ensuring sustainable harvesting of forest resources. In licensing the production of biomass, the Energy and Petroleum Regulatory Authority and Kenya Forest Service and National Environment Management Authority should be involved leading to bureaucracy that may prevent many Kenyans from venturing into bioenergy production.

The absence of a comprehensive national framework on biomass has also contributed largely to the county governments not adopting policies and regulatory frameworks on the production of biomass.<sup>125</sup> Many counties are still relying on unsustainable forms of biomass like charcoal leading to environmental pollution and health issues.<sup>126</sup>

There is a great need for the formulation of a comprehensive national framework on the sustainable production and use of biomass to guarantee sustainable and clean energy for Kenyans.<sup>127</sup>

## **5.0 Recommendations**

### **5.1 Harmonizing Policy, Regulatory and Institutional Frameworks**

The adoption of a comprehensive framework on biomass will realize the sustainable production and use of biomass in Kenya.<sup>128</sup> This can be achieved through harmonization of the different sectoral laws into one framework that embodies the interests of all sectors such as forest management, environmental

---

<sup>125</sup> Ngaira, “Exploring Frameworks for the Aggregation of Sub-National Energy Plans in Kenya” 2023.

<sup>126</sup> Caleb Balongo, “Alternative Source of Green Energy for Marginalized Groups in Kenya: An SDG Agenda 2030 Requirement” *Journal of the Kenya National Commission for UNESCO* 3(1) 2023.

<sup>127</sup> Oseko Louis Obure, “Realising Sustainable Use of Biomass Energy in Kenya: Appraising the Regulatory and Institutional Framework” *Journal of Conflict Management and Sustainable Development* 8(2) 2022 5.

<sup>128</sup> *Ibid* 20

protection, sustainable waste management and energy sectors. The multiplicity of laws creates room for bureaucracy in the production of biomass energy making many Kenyans to shy away from venturing into clean biomass production.<sup>129</sup>

The harmonization of the regulatory frameworks is possible through the multistakeholder involvement where every affected party is involved in discussions around sustainable production and use of biomass. This leads to a comprehensive framework that augments the bioenergy strategy.

## **5.2 Institutional Structure**

There is a need to have an institution with not only duties and functions, but powers granted by statute to further its duties and functions. The current framework provides for several institutions that oversee the production and use of biomass creating an incentive for multiplicity of roles between certain institutions. This presents difficulty in choosing the institution to approach while seeking redress in any matter pertaining production and use of biomass.<sup>130</sup> A good institutional framework guarantees effective monitoring and evaluation of the steps taken towards the realization of sustainable energy for all through clean biomass production and usage.<sup>131</sup>

## **5.3 County Governments Legislations on Biomass**

The county governments are to be obligated to develop frameworks on biomass to ensure the implementation of clean renewable energy strategies within the counties. Lack of frameworks on biomass production and usage has led to the continued use of traditional biomass like charcoal and wood fuel

---

<sup>129</sup> Ibid

<sup>130</sup> Ayobami Adetoyinbo, "The role of institutions in sustaining competitive bioeconomy growth in Africa - Insights from the Nigerian maize biomass value-web" Sustainable Production and Consumption 30 2022.

<sup>131</sup> Ibid

which are not environmentally friendly.<sup>132</sup> Traditional biomass cause respiratory diseases to Kenyans affecting the well-being.<sup>133</sup> It also entrenches gender inequality within the counties where women continue to suffer under the traditional forms and are left out of the clean energy production campaigns.<sup>134</sup>

The implementation of regulatory frameworks on biomass will lead to adoption of clean energy through clean cooking and production of clean biomass that improves the living standards through poverty alleviation, creation of job opportunities, encouraging food security, promoting environmental conservation and promoting innovation within the counties. This leads to the realization of several sustainable development goals.

#### **5.4 Biofuels Market Regulations and Standards**

The exploitation of bioenergy will promote the production of biofuels leading to the need for regulations on their standards and market. This is instrumental in ensuring good quality reaches the market and it is accessed by all Kenyans even those in the rural areas.

#### **5.5 Bioenergy Research and Development**

Good political will is required to provide policies and incentives for bioenergy research and development.<sup>135</sup> This will promote the invention of sustainable methods of bioenergy production and use thus augmenting the realization of sustainable energy for all.

---

<sup>132</sup> Stephane Ngueta, "Synthesizing the role of biomass energy consumption and human development in achieving environmental sustainability" *Energy Journal* 293 2024.

<sup>133</sup> Ibid

<sup>134</sup> Linda Lane, "Gender Empowerment and Community of Practice to Promote Clean Energy Sustainability" *Affordable and Clean Energy Journal* 2021.

<sup>135</sup> Jephtha Mensah Kwakye, "Policy approaches for bioenergy development in response to climate change: A conceptual analysis" *World Journal of Advanced Engineering Technology and Sciences* 12(02) 2024 2.

## **Bibliography**

### **International and Regional Instruments**

United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

Kyoto Protocol to the United Nations Convention on Climate Change, December 11, 1997, 2303 U.N.T.S. 162.

Vienna Convention for the Protection of the Ozone Layer, March 22, 1985 1513 U.N.T.S. 293.

### **Kenyan Domestic Statutes**

Constitution of Kenya 2010

Energy Act (CAP 314) 2019

Forest Conservation and Management Act (CAP 385) 2016.

Environment Management and Coordination Act (CAP 387A) 1999.

Climate Change Act (CAP 387) 2016.

Sustainable Waste Management Act 2023.

### **Policy Documents**

African Regional Bioeconomy Strategy 2021.

Bioenergy Strategy 2020-2027, 2020.

Africa Bioenergy Policy Framework and Guidelines 2013.

*Biomess or Biomass? A Case for Reform of the Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya: Abuya John Onyango*

(2025) *Journal of cmsd* Volume 12(1)

Feed-In-Tariffs Policy on Wind, Biomass, Small-Hydro, Geothermal, Biogas and Solar Resource Generated Electricity, 2012.

National Energy Policy 2018.

Kisumu County Environment Policy 2019.

Nakuru County Energy Plan 2022-2027.

Energy Sector Management Assistance Program (ESMAP), "Assessing and Mapping Renewable Energy Resources" Report 2nd edition 2021 7

Kenya's Action Agenda, "Sustainable Energy for All, Kenya investment prospectus: Pathways for Concerted Action toward Sustainable Energy for All by 2030" 2015.

Kenya National Energy Efficiency and Conservation Strategy 2020.

### **Journal Articles**

Abanikannnda, "Fuel Wood Exploitation and Sustainable Forest Management" *Journal of Applied Sciences and Environmental Management* 25(6) 2021.

Ayobami Adetoyinbo, "The role of institutions in sustaining competitive bioeconomy growth in Africa - Insights from the Nigerian maize biomass value-web" *Sustainable Production and Consumption* 30 2022.

Caleb Balongo, "Alternative Source of Green Energy for Marginalized Groups in Kenya: An SDG Agenda 2030 Requirement" *Journal of the Kenya National Commission for UNESCO* 3(1) 2023.

*Biomess or Biomass? A Case for Reform of the Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya: Abuya John Onyango*

(2025) *Journal of cmsd* Volume 12(1)

Denzel Christopher, "Sustainable pathways for biomass production and utilization in carbon capture and storage" *Biomass Conversion and Biorefinery* 2024.

Hannah Wamuyu, "Investment in renewable energy in Kenya: Key legal issues, challenges and prospects" *KAS African Law Study Library* (11) 2024 12.

Ibrahim Kipngeno, "Renewable energy status and uptake in Kenya" *Energy Strategy Reviews* 54 (2024) 1.

Jephta Mensah Kwakye, "Policy approaches for bioenergy development in response to climate change: A conceptual analysis" *World Journal of Advanced Engineering Technology and Sciences* 12(02) 2024 2.

Jo Dewulf, "Biowaste energy potential in Kenya" *Renewable Energy Journal* 35(12) 2010.

Linda Lane, "Gender Empowerment and Community of Practice to Promote Clean Energy Sustainability" *Affordable and Clean Energy Journal* 2021.

Moses Kiriimi, "Cleaner Cooking with Charcoal in Kibera Informal Settlement in Nairobi, Kenya, and Its Implications for Livelihoods and the Environment" *Energies Journal* 16(19) 2023.

Navarro Ferronato, "Are waste-based briquettes alternative fuels in developing countries? A critical review" *Energy for Sustainable Development Journal* 68 2022 2.

Ngaira, "Exploring Frameworks for the Aggregation of Sub-National Energy Plans in Kenya" 2023.

Njenga M, "Women's work is never done: Lifting the gendered burden of firewood collection and household energy use in Kenya" *Energy Research and Social Science* 77 2021.

Oseko Louis Obure, "Realising Sustainable Use of Biomass Energy in Kenya: Appraising the Regulatory and Institutional Framework" *Journal of Conflict Management and Sustainable Development* 8(2) 2022 5.

Richard Birdsey, "Climate, economic, and environmental impacts of producing wood for bioenergy" *Environmental Research Letters* 13(5) 2018 2.

Ruchi Bharti, "Municipal solid waste as a source of energy" *Materials today: proceedings* 81 2023.

Samuel Olatunde Dahunsi, "Bioenergy technologies adoption in Africa: A review of past and current status" *Journal of Cleaner Production* 264 2020.

Stephane Nguea, "Synthesizing the role of biomass energy consumption and human development in achieving environmental sustainability" *Energy Journal* 293 2024.

Stephen Kibet Kimutai, "Impact of biogas adoption on household energy use and livelihood improvement in Kenya: An overview on a road map toward sustainability" *International Journal of Energy Sector Management* 2024 2.

Wei-Hsen Chen, "Achieving carbon credits through biomass torrefaction and hydrothermal carbonization" *Renewable and Sustainable Energy Reviews* 208 2025.

Yustas Y M, "Towards adaptation of briquettes making technology for green energy and youth employment in Tanzania" *Journal of Power and Energy*

*Biomass or Biomass? A Case for Reform of the Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya: Abuya John Onyango*

(2025) *Journal of cmsd* Volume 12(1)

Engineering 10 2022 1.

#### **Websites**

<https://www.un.org/en/climatechange/what-is-renewable-energy#>

accessed on 8 January 2025.

<https://renewableenergy.go.ke/technologies/bioenergy/> accessed on 16 February 2025.

<https://www.undp.org/kenya/accelerating-clean-cooking-action-kenya#:~:text=The%20Accelerating%20Clean%20Cooking%20Action,climate%20and%20sustainable%20energy%20ambitions.> Accessed on 16 February 2025.

<https://www.seforall.org/taxonomy/term/46#:~:text=The%20country's%20Energy%20Transition%20and,driven%20substantially%20by%20income%20growth.> Accessed on 16 February 2024.

<https://iclei.org/e-library/roadmap-towards-100-renewable-energy-kisumu-county/#:~:text=The%20roadmap%20integrates%20baseline%20analyses,supported%20by%20biogas%20and%20hydropower.> Accessed on 16 February 2025.

<https://www.kisumu.go.ke/clean-cooking-initiative-kick-off-in-kisumu/> accessed on 16 February 2025.

<https://www.reuters.com/world/africa/kenyan-entrepreneur-turns-water-hyacinth-weed-into-cooking-fuel-2021-07-27/> accessed on 16 February 2025.

<https://www.businessdailyafrica.com/bd/corporate/enterprise/how-briquettes-from-human-waste-sawdust-are-taking-place-of-charcoal-2256760> accessed on 16 February 2025.

*Biomess or Biomass? A Case for Reform of the Regulatory and Institutional Framework on Sustainable Production and Use of Biomass Energy in Kenya: Abuya John Onyango*

(2025) *Journal of cmsd* Volume 12(1)

<https://bioenergytimes.com/biodiesel-initiative-java-house-cuts-148-tonnes-of-carbon-emissions/#:~:text=Nairobi%3A%20Java%20House%20has%20reduced,promote%20sustainability%20and%20reduce%20waste>. Accessed on 16 February 2025.

<https://bioenergytimes.com/biodiesel-initiative-java-house-cuts-148-tonnes-of-carbon-emissions/#:~:text=Nairobi%3A%20Java%20House%20has%20reduced,promote%20sustainability%20and%20reduce%20waste>. Accessed on 16 February 2025.

<https://aiph.org/floraculture/news/kenyan-flower-farm-turns-discarded-flowers-into-renewable-using-anaerobic-digestion/#:~:text=The%20biogas%20from%20the%20containers,the%20kitchens%20relied%20on%20firewood>. Accessed on 16 February 2025.

<https://wardenbiomedia.com/case-studies/qube-renewables-selects-warden-biomedia-for-high-rate-anaerobic-digester-on-sustainable-flower-farm-in-kenya/> accessed on 16 February 2025

<https://nakuruwater.co.ke/hello-world/> accessed on 16 February 2025.

<https://www.weforum.org/stories/2021/08/kenyan-entrepreneur-hyacinth-sustainable-fuel-biomass/> accessed on 8 January 2025.

<https://econews.co.ke/2024/12/23/java-reduces-148-tonnes-of-carbon-emissions-through-biodiesel-initiative/> accessed on 5 January 2025

<https://sdgs.un.org/goals/goal7> accessed on 10 January 2025.

<https://www.un.org/tr/node/189510> accessed on 16 February 2025.

*Biomess or Biomass? A Case for Reform of the  
Regulatory and Institutional Framework on  
Sustainable Production and Use of Biomass  
Energy in Kenya: Abuya John Onyango*

**(2025) Journalofcmsd Volume 12(1)**

<https://www.energy.go.ke/biogas> accessed on 16 February 2025.

## **Strengthening Legal Protection to Tackle Migrant Smuggling and Trafficking in Persons in Kenya: Proposals for Reform**

By: **Michael Sang** \*

### ***Abstract***

*This paper critically examines Kenya's legal framework for combating migrant smuggling and trafficking in persons, identifying key gaps and proposing reforms to strengthen protections. It highlights the importance of harmonizing laws, adopting a comprehensive National Migration Policy, and operationalizing victim support mechanisms. Drawing on lessons from South Africa's extraterritorial jurisdiction and other international best practices, the paper advocates for a more robust and coordinated response to these transnational crimes. The proposed reforms aim to enhance justice for victims and accountability for perpetrators.*

**Key Words:** *Migrant Smuggling, Human Trafficking, Legal Reform, Kenya, Victim Protection.*

### **1. Introduction**

Migrant smuggling and trafficking in persons are grave issues confronting Kenya, deeply intertwined with the country's strategic location as a transit point in the Horn of Africa.<sup>1</sup> These activities exploit the vulnerabilities of migrants, often leading to severe human rights violations. Despite Kenya's

---

*\* LLM, University of Cape Town, South Africa; LLB, Moi University; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.*

<sup>1</sup> United Nations Office on Drugs and Crime (UNODC) 'Kenya Directorate of Criminal Investigations Receives Equipment to Counter Trafficking in Persons and Smuggling of Migrants' available at <https://www.unodc.org/easternafrika/en/Stories/kenya-directorate-of-criminal-investigations-receives-equipment-to-counter-trafficking-in-persons-and-smuggling-of-migrants.html#:~:text=Every%20year%2C%20Kenya%20has%20thousands,units%20has%20the%20capacity%20to> accessed 23 August 2024

existing legal frameworks, such as the Counter-Trafficking in Persons Act, 2010, and various governmental initiatives, significant gaps remain in effectively combating these crimes.<sup>2</sup> This paper proposes reforms to strengthen legal protections, drawing lessons from both domestic challenges and international best practices, such as South Africa's extraterritorial jurisdiction under its Prevention and Combating of Trafficking in Persons Act.

Harmonizing laws, adopting a comprehensive National Migration Policy, and operationalizing support mechanisms like the National Victims Fund are crucial steps towards addressing these issues. Additionally, clarifying the legal distinctions between smuggling and trafficking and enhancing Kenya's extraterritorial jurisdiction will further bolster the country's response to these transnational crimes. These proposals aim to create a more robust legal framework that not only punishes perpetrators but also protects and rehabilitates victims of trafficking and smuggling in Kenya.

## **2. The Problem of Mixed Migration Movements in Kenya: Migrant Smuggling and Trafficking in Persons**

### **2.1 The Phenomenon of Mixed Migration**

Mixed migration refers to the complex and dynamic movement of people who travel together, often through irregular routes, but for different reasons.<sup>3</sup> This phenomenon encompasses various groups, including refugees, asylum seekers, economic migrants, and victims of trafficking. These individuals often undertake perilous journeys, facing significant risks of exploitation and abuse. In the context of Kenya, mixed migration is particularly pronounced due to the

---

<sup>2</sup> Ibid

<sup>3</sup> IOM UN Migration available at

<https://eastandhornofafrica.iom.int/kenya#:~:text=Mixed%20migration%20flows%20along%20key,smuggling%2C%20asylum%20seekers%20and%20others.> Accessed

23 August 2024

country's strategic location in the Horn of Africa, acting as a major transit point for migrants moving within and beyond the region.<sup>4</sup> The flows include people fleeing conflict and persecution, as well as those seeking better economic opportunities. The complexity arises as these groups may overlap, with some migrants starting their journey as economic migrants but later becoming victims of trafficking, or vice versa.<sup>5</sup>

Kenya's mixed migration is influenced by regional instability, especially from neighbouring countries like Somalia and South Sudan, where ongoing conflicts drive large numbers of people to seek refuge. Additionally, the presence of well-established smuggling networks exacerbates the situation, making it difficult to distinguish between voluntary migration and trafficking.<sup>6</sup>

Addressing this issue requires a nuanced understanding of the various drivers of migration, the risks involved, and the legal frameworks needed to protect vulnerable populations while managing border security and migration flows effectively.

## **2.2 Migrant Smuggling and Trafficking in Persons**

Migrant smuggling and trafficking in persons are critical issues in Kenya, both involving the exploitation of vulnerable individuals seeking better opportunities or fleeing conflict.<sup>7</sup> Migrant smuggling usually involves facilitating illegal entry into a country, often with the migrant's consent, while trafficking involves exploiting individuals through coercion or deception for forced labour, sexual exploitation, or other abuses.<sup>8</sup>

---

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> US Department of State '2023 Trafficking in Persons Report: Kenya' available at <https://www.state.gov/reports/2023-trafficking-in-persons-report/kenya/> accessed 23 August 2024

<sup>8</sup> Ibid

In Kenya, these issues are intertwined due to organized criminal networks that exploit weak border controls and migrants' vulnerabilities. Smuggling can easily turn into trafficking when migrants are coerced or forced into exploitative situations during their journey.<sup>9</sup>

Kenya's legal framework, including the Counter-Trafficking in Persons Act of 2010, is a step forward in combating these crimes. However, enforcement is inconsistent, especially outside major cities, where victim support and resources are limited. Despite efforts to provide services to victims, challenges like inadequate funding and limited shelters persist.<sup>10</sup>

International support from organizations such as INTERPOL, the [U.S. Department of State](#), and the [UN Migration Network \(United Nations Network on Migration\)](#) helps strengthen Kenya's capacity to address these challenges, though more work is needed to improve legal frameworks and victim support systems.<sup>11</sup>

### **3. Legal Framework and Governmental Responses to Migrant Smuggling and Trafficking in Persons**

#### **3.1 Statutory and Policy Framework**

##### **3.1.1 Counter Trafficking in Persons Act, 2010**

The **Counter-Trafficking in Persons Act, 2010** is a critical piece of legislation in Kenya that addresses the complex issue of human trafficking. Here are some

---

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> INTERPOL 'Human trafficking and migrant smuggling' available at <https://www.interpol.int/en/Crimes/Human-trafficking-and-migrant-smuggling> accessed 23 August 2024

key provisions from the Act:

➤ **Offense of Trafficking in Persons:**

Section 3 defines trafficking as the recruitment, transportation, transfer, harbouring, or receipt of persons for the purpose of exploitation, using means such as coercion, abduction, fraud, deception, or abuse of power.

Penalties for trafficking include imprisonment for not less than 30 years or a fine of not less than 30 million shillings, with life imprisonment for repeat offenders.<sup>12</sup>

➤ **Child Trafficking (Section 4):**

Specifically addresses acts that promote child trafficking, including adoption, fostering, or guardianship for the purpose of exploitation.

Offenders face imprisonment for not less than 30 years or a fine of not less than 20 million shillings.<sup>13</sup>

➤ **Promotion of Trafficking (Section 5):**

Criminalizes activities that promote trafficking, such as leasing premises, publishing materials, or managing recruitment agencies with the intent to facilitate trafficking.

Penalties include imprisonment for at least 20 years or a fine of at least 20 million shillings.<sup>14</sup>

➤ **Victim Protection (Sections 11-15):**

Ensures the confidentiality of victims during investigations and trials.<sup>15</sup>

Provides for restitution to victims, covering medical expenses, living costs, and

---

<sup>12</sup> Counter-Trafficking in Persons Act, 2010, sec 3

<sup>13</sup> Ibid, sec 4

<sup>14</sup> Ibid, sec 5

<sup>15</sup> Ibid, Section 11

other reliefs.<sup>16</sup>

Grants immunity to trafficking victims from prosecution for offenses related to their illegal presence in Kenya.<sup>17</sup>

Mandates support and protection for victims, including medical, legal, and psychosocial assistance, as well as safe repatriation.<sup>18</sup>

➤ **Establishment of the Counter-Trafficking in Persons Advisory Committee (Sections 19-21):**

Establishes an advisory committee to coordinate inter-agency efforts, advise the government, and implement programs aimed at combating trafficking and supporting victims.<sup>19</sup>

➤ **National Assistance Trust Fund (Sections 22-24):**

Establishes a fund to support victims of trafficking, which is financed through appropriations by Parliament, confiscated proceeds of crime, and donations.<sup>20</sup> These sections provide a robust legal framework to combat trafficking in persons, ensuring that both preventive and punitive measures are in place, along with comprehensive support for victims.

This Act forms the cornerstone of Kenya's legal response to trafficking, reflecting its commitment to both national and international obligations to combat human trafficking effectively.

---

<sup>16</sup> Ibid, Section 13

<sup>17</sup> Ibid, Section 14

<sup>18</sup> Ibid, Section 15

<sup>19</sup> Ibid, Sections 19-21

<sup>20</sup> Ibid, Sections 22-24

## **Counter-Trafficking in Persons (National Assistance Trust Fund for Victims of Trafficking in Persons) Regulations**

The **Counter-Trafficking in Persons (National Assistance Trust Fund for Victims of Trafficking in Persons) Regulations** provide detailed guidelines for the management and operation of the National Assistance Trust Fund established under the Counter-Trafficking in Persons Act. Here are some key provisions:

### **1. Appointment and Composition of the Board of Trustees (Regulations 3-6):**

Trustees are appointed to manage the Fund, with not more than two-thirds of the Board members being of the same gender.<sup>21</sup>

The process for filling vacancies, disqualification criteria, and conditions under which a member must vacate office are specified.<sup>22</sup>

### **2. Powers and Duties of the Board of Trustees (Regulations 7-8):**

The Board has the authority to acquire, control, and supervise the Fund's assets, formulate policies, receive donations, approve contracts, and manage investments.<sup>23</sup>

Members must act in the best interests of the Fund, exercise due diligence, and avoid conflicts of interest. They are required to disclose any conflicts and are liable under the Anti-Corruption and Economic Crimes Act if they fail to do so.<sup>24</sup>

---

<sup>21</sup> Counter-Trafficking in Persons (National Assistance Trust Fund for Victims of Trafficking in Persons) Regulations, reg 3

<sup>22</sup> Ibid, Regulations 4-6

<sup>23</sup> Ibid, Regulation 7

<sup>24</sup> Ibid, Regulation 8

### 3. **Financial Management and Accountability (Regulations 10-12):**

Trustees are entitled to allowances as determined by the Cabinet Secretary in consultation with the Salaries and Remuneration Commission.<sup>25</sup>

The Board is responsible for maintaining proper accounts, which must be audited in accordance with the Public Audit Act. The treasurer of the Board is the mandatory signatory for all financial transactions.<sup>26</sup>

These regulations ensure that the Fund is managed transparently and efficiently, with clear guidelines for governance, accountability, and the use of resources to support victims of trafficking in persons

#### **3.1.2 Victim Protection Act, 2014**

The **Victim Protection Act, 2014** is a critical legal framework in Kenya that provides comprehensive rights, protection, and services to victims of crime, including victims of human trafficking. Here are some key provisions:

➤ **Right to Privacy and Confidentiality (Section 8):**

Victims of trafficking have the right to privacy, particularly from media intrusion and unauthorized disclosure of their personal details. This is crucial in ensuring their safety and dignity during legal processes.<sup>27</sup>

➤ **Rights during the Trial Process (Section 9):**

Victims have the right to be present during the trial, to give their views during plea bargaining, and to have a fair hearing. This provision ensures that victims of trafficking are actively involved and informed throughout the judicial process.<sup>28</sup>

---

<sup>25</sup> Ibid, Regulation 10

<sup>26</sup> Ibid, Regulations 11-12

<sup>27</sup> Victim Protection Act, 2014, sec 8

<sup>28</sup> Ibid, sec 9

➤ **Right to Protection (Section 10):**

Victims are entitled to protection from intimidation, harassment, and any form of retribution by the offender. This section is particularly important for victims of trafficking who may be at risk of further exploitation or threats from traffickers.<sup>29</sup>

➤ **Security of the Victim (Section 11):**

Immediate measures must be taken to secure the victim from further harm, including providing a safe place, medical treatment, and psychosocial support. This section emphasizes the state's duty to protect victims from ongoing dangers.<sup>30</sup>

➤ **Victim Impact Statements (Section 12):**

Victims are allowed to present impact statements during sentencing, detailing how the crime has affected their lives. This provision gives victims of trafficking a voice in the sentencing process, potentially influencing the severity of the penalties imposed on traffickers.<sup>31</sup>

➤ **Rights of Vulnerable Victims (Section 17):**

Special protections are afforded to vulnerable victims, including those who are physically or psychologically impaired, children, and those dependent on the accused. This section ensures that the unique needs of trafficking victims, particularly those in vulnerable situations, are addressed.<sup>32</sup>

➤ **Right to Compensation (Sections 23-26):**

Victims have the right to compensation from the offender for economic loss, medical expenses, and other costs associated with the crime. Courts can also

---

<sup>29</sup> Ibid, sec 10

<sup>30</sup> Ibid, sec 11

<sup>31</sup> Ibid, sec 12

<sup>32</sup> Ibid, sec 17

order restitution as part of the sentencing, ensuring that traffickers contribute to the recovery of their victims.<sup>33</sup>

➤ **Victim Protection Trust Fund (Sections 27-30):**

A fund is established to support victims of crime, including those trafficked, ensuring that they receive the necessary financial assistance for recovery and reintegration.<sup>34</sup>

These provisions collectively ensure that victims of trafficking in persons in Kenya are protected, supported, and involved in the judicial process, reflecting the Act's commitment to upholding the dignity and rights of all victims of crime.

This Act complements other legislation, such as the Counter-Trafficking in Persons Act, by providing a robust framework for the protection and empowerment of victims of trafficking in Kenya.

### **3.1.3 Kenya Citizenship and Immigration Act, 2011**

The **Kenya Citizenship and Immigration Act, 2011** provides a comprehensive legal framework that addresses issues related to citizenship, immigration, and the management of foreign nationals. Several key provisions in this Act are particularly relevant to combating migrant smuggling and trafficking in persons:

➤ **Prohibited Immigrants and Inadmissible Persons (Section 33):**

This section defines prohibited immigrants as individuals involved in human trafficking, human smuggling, and related crimes. It also empowers immigration officers to refuse entry or deport such individuals from Kenya,

---

<sup>33</sup> Ibid, Sections 23-26

<sup>34</sup> Ibid, Sections 27-30

thereby helping to curb illegal activities related to trafficking and smuggling.<sup>35</sup>

➤ **Issuance of Permits and Visas (Sections 35, 40):**

The Act mandates that individuals must possess valid permits or passes to enter or reside in Kenya. This regulation is crucial in preventing the illegal entry and residence of persons involved in trafficking or smuggling. The Director of Immigration has the authority to reject visa applications from individuals who pose a threat to national security, including traffickers and smugglers.<sup>36</sup>

➤ **Removal of Persons Unlawfully Present in Kenya (Section 43):**

The Cabinet Secretary has the authority to order the removal of any person unlawfully present in Kenya, including those involved in smuggling or trafficking. This power is vital in ensuring that individuals who exploit or traffic others are not able to remain in the country.<sup>37</sup>

➤ **Duties and Liabilities of Carriers (Section 44):**

This section imposes obligations on carriers (e.g., airlines, shipping companies) to ensure that they do not transport prohibited immigrants, including traffickers and smugglers, into Kenya. Carriers that fail to comply with this requirement are liable to significant fines and penalties.<sup>38</sup>

➤ **Power of Immigration Officers (Sections 48-49):**

Immigration officers are granted broad powers to search, arrest, and detain individuals suspected of involvement in illegal activities, including trafficking and smuggling. These provisions empower officers to take immediate action to prevent and respond to such crimes.<sup>39</sup>

These provisions of the Kenya Citizenship and Immigration Act, 2011, work in

---

<sup>35</sup> Kenya Citizenship and Immigration Act, 2011, sec 33

<sup>36</sup> Ibid, secs 35 & 40

<sup>37</sup> Ibid, sec 43

<sup>38</sup> Ibid, sec 44

<sup>39</sup> Ibid, sec 48-49

tandem with other legal frameworks to strengthen the country's ability to combat human trafficking and migrant smuggling effectively. By regulating the entry, residence, and removal of individuals, the Act plays a critical role in preventing these crimes and protecting victims.

### **3.1.4 Refugees Act, 2021**

The **Refugees Act, 2021** is an essential framework in Kenya that governs the recognition, protection, and management of refugees, which has implications for addressing migrant smuggling and trafficking. Here are key provisions relevant to this context:

#### **1. Meaning of "Refugee" and Exclusion from Refugee Status (Sections 3 and 4):**

The Act defines who qualifies as a refugee, including those fleeing persecution, external aggression, or public disorder.<sup>40</sup>

It also details the conditions under which a person can be excluded from refugee status, such as involvement in war crimes, crimes against humanity, or posing a threat to national security.<sup>41</sup> This is particularly relevant to preventing traffickers from exploiting refugee status to avoid prosecution.

#### **2. Protection Against Refoulement (Section 29):**

This section enshrines the principle of non-refoulement, which prohibits returning refugees to a country where they face persecution or serious harm. This protection is crucial for victims of trafficking who may face further exploitation or persecution if returned to their country of origin.<sup>42</sup>

#### **3. Rights and Obligations of Refugees (Section 28):**

Refugees are entitled to the rights and obligations under international

---

<sup>40</sup> Refugees Act, 2021, sec 3

<sup>41</sup> Ibid, Section 4

<sup>42</sup> Ibid, sec 29

conventions, including the UN Convention on Refugees. This provision ensures that trafficked persons who are recognized as refugees can access protections and services, such as legal assistance and social services.<sup>43</sup>

#### **4. Reception and Status Determination (Sections 12-23):**

These sections outline the process for applying for refugee status, including the issuance of asylum seeker passes<sup>44</sup>, ensuring that individuals who may be victims of trafficking have the right to remain in Kenya during the status determination process.

#### **5. Special Protection for Vulnerable Groups (Sections 20 and 21):**

The Act mandates special measures for the protection of refugee women, children, and persons with disabilities or trauma.<sup>45</sup> This is critical in addressing the specific needs of trafficked persons who often belong to these vulnerable categories.

Section 21 further emphasizes the need for appropriate measures for the safety and care of these vulnerable groups, which is particularly important for trafficked individuals requiring specialized support.

#### **6. Criminalization and Penalties (Section 41):**

The Act criminalizes various offenses related to the misrepresentation or abuse of refugee status, such as providing false information or forging documents. These provisions are designed to prevent traffickers from manipulating the refugee protection system to facilitate their criminal activities.<sup>46</sup>

These provisions collectively enhance Kenya's ability to protect individuals

---

<sup>43</sup> Ibid, sec 28

<sup>44</sup> Ibid, Section 23

<sup>45</sup> Ibid, Section 20

<sup>46</sup> Ibid, sec 41

who may be victims of trafficking while ensuring that traffickers cannot exploit refugee status to evade justice. The Act integrates international standards and emphasizes the protection of human rights, making it a vital part of Kenya's legal framework against human trafficking and migrant smuggling.

### **3.1.5 Protocol Against the Smuggling of Migrants by Land, Sea, and Air**

The **Protocol Against the Smuggling of Migrants by Land, Sea, and Air** is a crucial international legal framework designed to prevent and combat the smuggling of migrants.<sup>47</sup> It is a supplement to the United Nations Convention against Transnational Organized Crime (UNTOC), often referred to as the Palermo Protocols. This Protocol has specific provisions that are particularly relevant to addressing migrant smuggling and trafficking in Kenya:

➤ **Criminalization of Smuggling (Article 6):**

The Protocol mandates that State Parties criminalize the smuggling of migrants, particularly when it involves endangering lives or involves inhumane or degrading treatment. This is crucial for Kenya as it provides a legal basis for prosecuting those involved in migrant smuggling activities, aligning national laws with international standards.<sup>48</sup>

➤ **Protection of Migrants' Rights (Article 16):**

Although the Protocol does not create new rights, it emphasizes the protection of the basic human rights of smuggled migrants. This includes the obligation to treat migrants humanely and to protect them from violence or threats. For Kenya, this provision ensures that victims of smuggling are treated with dignity and are provided necessary protection, especially when they are at risk

---

<sup>47</sup> Protocol Against the Smuggling of Migrants by Land, Sea, and Air supplementing The United Nations Convention against Transnational Organized Crime (2000) available at

[https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf) accessed 23 August 2024

<sup>48</sup> Ibid, art 6

of being trafficked.<sup>49</sup>

➤ **Cooperation Among States (Articles 7-9):**

The Protocol encourages international cooperation to prevent and combat smuggling, including the sharing of information and the coordination of measures to suppress the smuggling of migrants by sea. This is relevant for Kenya as it often serves as a transit point for migrants and would benefit from strengthened cooperation with neighbouring countries and international bodies to combat smuggling effectively.<sup>50</sup>

➤ **Seizure of Vessels and Vehicles (Article 11):**

States are required to take measures to ensure that vessels and vehicles used for smuggling migrants are identified and, where appropriate, seized. This provision supports Kenya's efforts in preventing the use of its territory and infrastructure for illegal smuggling operations.<sup>51</sup>

➤ **Legal Framework for Smuggling at Sea (Articles 8-9):**

The Protocol includes specific measures to address the smuggling of migrants by sea, which is particularly important for coastal states like Kenya. It allows for the boarding, search, and potential seizure of vessels suspected of being involved in smuggling, subject to international law.<sup>52</sup>

These provisions collectively enhance the legal framework within which Kenya can operate to combat migrant smuggling and ensure the protection of migrants' rights, aligning national efforts with global standards.

---

<sup>49</sup> Ibid, art 16

<sup>50</sup> Ibid, art 7-9

<sup>51</sup> Ibid, art 11

<sup>52</sup> Ibid, arts 8-9

### **3.2 Governmental Responses to Migrant Smuggling and Trafficking in Persons in Kenya**

#### **Promulgation of National Referral Mechanism (NRM) Guidelines**

The Government of Kenya has taken significant steps to combat migrant smuggling and trafficking in persons, one of which is the promulgation of the National Referral Mechanism (NRM) Guidelines. These guidelines are essential for coordinating efforts among various stakeholders, including government agencies, NGOs, and international organizations, to effectively identify, protect, and support victims of trafficking.

The guidelines outline procedures for systematically identifying victims of trafficking through screening vulnerable populations. This is crucial for ensuring that victims are not only recognized but also provided with the necessary support services, such as legal aid, medical care, and safe accommodation.<sup>53</sup>

The NRM facilitates a collaborative approach by clearly defining the roles and responsibilities of different stakeholders. This ensures that there is a seamless referral process between agencies, which is vital for the timely and effective assistance of victims.<sup>54</sup>

The guidelines emphasize the importance of training and capacity-building activities for law enforcement, immigration officers, and other frontline workers. This is to ensure that they can adequately identify and respond to trafficking cases, particularly in areas that are transit points for migrants.<sup>55</sup>

---

<sup>53</sup> National Referral Mechanism (NRM) Guidelines available at <https://www.socialprotection.go.ke/sites/default/files/Downloads/NRM-Guidelines-for-Kenya-law-res.pdf> accessed 23 August 2024

<sup>54</sup> Ibid

<sup>55</sup> Ibid

The NRM also includes provisions for monitoring and evaluation, ensuring that the implementation of these guidelines is effective and that there is accountability among the involved entities.<sup>56</sup>

By implementing these guidelines, Kenya aims to strengthen its response to human trafficking, ensuring that victims are treated with dignity and that traffickers are brought to justice.

### **Adoption of Guidelines for Identification of Victims of Human Trafficking**

The Government of Kenya, in collaboration with various international organizations, has adopted the **Guidelines for Identification of Victims of Human Trafficking** as part of its broader strategy to combat trafficking and provide support to victims.<sup>57</sup> These guidelines are crucial in enhancing the country's capacity to effectively identify and assist victims of human trafficking, ensuring they receive the necessary protection and services.<sup>58</sup>

The guidelines provide clear criteria and procedures for frontline workers, such as law enforcement and social services, to identify victims of trafficking. This ensures a consistent approach across the country, reducing the risk of victims being overlooked or misidentified.<sup>59</sup>

Emphasizing the need for sensitivity and respect for the dignity of victims, the guidelines advocate for a victim-centered approach in identification and assistance. This includes taking into account the trauma and specific needs of

---

<sup>56</sup> Ibid

<sup>57</sup> Guidelines for Assisting Victims of Human Trafficking in the East Africa Region available at [https://publications.iom.int/system/files/pdf/guidelinesforassistingvictims\\_en\\_a5.pdf](https://publications.iom.int/system/files/pdf/guidelinesforassistingvictims_en_a5.pdf) accessed 23 August 2024

<sup>58</sup> Ibid

<sup>59</sup> Ibid

victims, especially vulnerable groups such as women and children.<sup>60</sup> The adoption of these guidelines is supported by comprehensive training programs for government officials and other stakeholders involved in the identification process. This is crucial for building the necessary skills to recognize signs of trafficking and respond appropriately.<sup>61</sup>

The guidelines also integrate into the broader National Referral Mechanism (NRM), ensuring that once victims are identified, they are swiftly referred to appropriate services, including legal aid, healthcare, and shelter.<sup>62</sup>

These guidelines represent a significant step forward in Kenya's efforts to combat human trafficking, aligning with international best practices and strengthening the overall response to trafficking in the country.

### **Adoption of Standard Operating Procedure for Investigating and Prosecuting Trafficking in Persons**

The Office of the Director of Public Prosecutions (ODPP) in Kenya has adopted the **Standard Operating Procedure (SOP) for Investigating and Prosecuting Trafficking in Persons** as part of its efforts to combat human trafficking. This SOP is a comprehensive guideline aimed at enhancing the effectiveness and consistency of investigations and prosecutions related to trafficking cases.<sup>63</sup>

The SOP provides a clear framework for conducting thorough and systematic investigations into trafficking cases, ensuring that all necessary evidence is

---

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Ibid

<sup>63</sup> Standard Operating Procedure (SOP) for Investigating and Prosecuting Trafficking in Persons in Kenya available at <https://www.odpp.go.ke/wp-content/uploads/2023/11/STANDARD-OPERATING-PROCEDURES-FOR-INVESTIGATING-AND-PROSECUTING-TRAFFICKING-IN-PERSONS-IN-KENYA.pdf> accessed 23 August 2024

collected and preserved. This includes specific steps for coordinating between different law enforcement agencies and ensuring that victim testimonies are handled sensitively and securely.<sup>64</sup>

It offers detailed instructions on how to prosecute trafficking cases, including the identification of key elements of the crime, preparation of charges, and strategies for presenting evidence in court. This is crucial for ensuring that traffickers are held accountable and that cases are prosecuted to the highest standards.<sup>65</sup>

The SOP emphasizes the need to protect victims throughout the legal process, from investigation to trial. This includes ensuring their safety, providing legal and psychological support, and preventing secondary victimization.<sup>66</sup>

The SOP underscores the importance of collaboration among various stakeholders, including the Directorate of Criminal Investigations (DCI), Border Management Services, and other relevant agencies. This ensures a unified and coordinated approach to tackling trafficking.<sup>67</sup>

The adoption of this SOP marks a significant step forward in Kenya's ongoing efforts to combat human trafficking, demonstrating a strong commitment to enhancing the legal framework and improving the outcomes of trafficking cases.

### **3.3 Potential Gaps of Law and Policy in Kenya**

Despite Kenya's efforts to combat human trafficking and migrant smuggling, several gaps persist in its legal and policy frameworks:

---

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Ibid

- ✓ **Inadequate Resources and Funding:** Key government bodies like the Counter Trafficking in Persons (CTiP) Secretariat suffer from underfunding and limited staffing, which hampers their effectiveness.<sup>68</sup>
- ✓ **Overlapping Mandates:** There are overlaps between agencies like the CTiP Secretariat and the National Coordination Mechanism on Migration, leading to confusion and inefficiencies.
- ✓ **Outdated Action Plans:** The current National Action Plans are outdated, with delays in approving and operationalizing updated versions.
- ✓ **Limited Victim Support:** There is a shortage of shelters and specialized services, particularly for adult male victims and those in rural areas.<sup>69</sup>

Addressing these gaps is crucial for improving Kenya's response to trafficking and migrant smuggling.

#### **4. Proposals for Strengthening Legal Protection to Tackle Migrant Smuggling and Trafficking in Persons**

##### **4.1 Harmonization of Laws and Regulations**

Harmonization of laws and regulations is crucial for strengthening legal protections against migrant smuggling and trafficking in persons in Kenya.<sup>70</sup> This involves aligning national laws with international legal frameworks, such as the Palermo Protocols and other relevant treaties, to ensure consistency in definitions, penalties, and procedures across the board.<sup>71</sup>

---

<sup>68</sup> US Department of State '2023 Trafficking in Persons Report: Kenya' available at <https://www.state.gov/reports/2023-trafficking-in-persons-report/kenya/> accessed 23 August 2024

<sup>69</sup> Ibid

<sup>70</sup> Nzioka, P. S. (2021). *National security implications of human trafficking and migrant smuggling in Kenya (2009-2019)* (Doctoral dissertation, Strathmore University).

<sup>71</sup> Ibid

Harmonization would also require coordinating existing national laws, like the Counter-Trafficking in Persons Act, with immigration laws and labor regulations, ensuring that all legal instruments work cohesively. This approach minimizes legal gaps, reduces overlaps, and enhances the overall effectiveness of anti-trafficking measures.<sup>72</sup> Additionally, it facilitates better cross-border cooperation with other nations, which is essential in addressing transnational crimes like human trafficking and migrant smuggling.<sup>73</sup>

#### **4.2 Adoption of the Kenya National Migration Policy**

Adopting the Kenya National Migration Policy is vital for addressing the complexities of migrant smuggling and trafficking.<sup>74</sup> This policy would provide a comprehensive framework that integrates migration management with national security, human rights, and development goals.<sup>75</sup> It would ensure better coordination among government agencies, streamline processes related to legal migration, and enhance protections for vulnerable migrants.<sup>76</sup> Moreover, the policy would align Kenya's domestic laws with international standards, fostering regional and global cooperation in combating trafficking and smuggling effectively.<sup>77</sup>

#### **4.3 Formal Distinction between Smuggling and Trafficking**

Creating a formal distinction between smuggling and trafficking is crucial for effective legal enforcement and victim protection.<sup>78</sup> While both involve the illegal movement of people, trafficking includes exploitation, coercion, and

---

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> Makokha, R. S. (2020). *Enforcement Challenges in Addressing Migrant Smuggling Into Kenya-a Case of Moyale Border* (Doctoral dissertation, University of Nairobi).

abuse, while smuggling typically involves voluntary participation for a fee.<sup>79</sup> This distinction ensures that victims of trafficking receive appropriate protections and that legal actions are correctly targeted.<sup>80</sup> It also helps in better resource allocation, training of law enforcement, and the development of tailored policies to combat each issue effectively.<sup>81</sup>

#### **4.4 Operationalize the National Victims Fund**

Operationalizing the National Victims Fund is crucial for providing financial support to victims of trafficking and smuggling in Kenya.<sup>82</sup> This fund would cover essential services such as medical care, legal aid, psychosocial support, and safe repatriation for victims.<sup>83</sup> By ensuring that the fund is fully functional, Kenya can offer timely assistance to victims, helping them recover and reintegrate into society.<sup>84</sup> Additionally, a well-managed fund would enhance the effectiveness of the country's overall response to trafficking and smuggling, making it more comprehensive and victim-centred.<sup>85</sup>

#### **4.5 Extraterritorial Jurisdiction**

##### **4.5.1 The Experience of South Africa**

Section 12(1) of South Africa's Prevention and Combating of Trafficking in Persons Act, 2013, establishes extraterritorial jurisdiction over trafficking offenses committed outside the country if they involve South African citizens or residents. This provision allows South Africa to prosecute traffickers who exploit its nationals abroad, thereby strengthening its legal reach and

---

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid

protecting its citizens globally.<sup>86</sup>

#### **4.5.2 Lessons for Kenya**

Kenya can adopt a similar approach by extending its legal jurisdiction to cover offenses committed against its citizens abroad. This would enhance the country's ability to combat trafficking networks that operate across borders and provide better protection for Kenyans who are vulnerable to trafficking in foreign countries.<sup>87</sup> This strategy would require robust international cooperation and clear legal frameworks to ensure effective implementation.<sup>88</sup>

#### **Conclusion**

In tackling the complex issues of migrant smuggling and trafficking in persons, Kenya faces significant legal and policy challenges.<sup>89</sup> While existing frameworks like the Counter-Trafficking in Persons Act provide a foundation, gaps in enforcement, resource allocation, and international cooperation persist.<sup>90</sup> This paper has outlined key proposals for reform, including harmonization of laws, the adoption of a comprehensive migration policy, and the operationalization of victim support mechanisms. By drawing on international best practices and addressing these gaps, Kenya can strengthen its legal protections and more effectively combat these transnational crimes, ensuring justice for victims and holding perpetrators accountable.

---

<sup>86</sup> Prevention and Combating of Trafficking in Persons Act, 2013, Section 12(1)

<sup>87</sup> Makokha, R. S. (2020). *Enforcement Challenges in Addressing Migrant Smuggling Into Kenya-a Case of Moyale Border* (Doctoral dissertation, University of Nairobi).

<sup>88</sup> Ibid

<sup>89</sup> Ibid

<sup>90</sup> Ibid

## References

Counter-Trafficking in Persons (National Assistance Trust Fund for Victims of Trafficking in Persons) Regulations

Counter-Trafficking in Persons Act, 2010

Guidelines for Assisting Victims of Human Trafficking in the East Africa Region available at [https://publications.iom.int/system/files/pdf/guidelinesforassistingvictims\\_en\\_a5.pdf](https://publications.iom.int/system/files/pdf/guidelinesforassistingvictims_en_a5.pdf)

INTERPOL 'Human trafficking and migrant smuggling' available at <https://www.interpol.int/en/Crimes/Human-trafficking-and-migrant-smuggling>

IOM UN Migration available at <https://eastandhornofafrica.iom.int/kenya#:~:text=Mixed%20migration%20flows%20along%20key,smuggling%2C%20asylum%20seekers%20and%20others.>

Kenya Citizenship and Immigration Act, 2011

Makokha, R. S. (2020). *Enforcement Challenges in Addressing Migrant Smuggling Into Kenya-a Case of Moyale Border* (Doctoral dissertation, University of Nairobi).

National Referral Mechanism (NRM) Guidelines available at <https://www.socialprotection.go.ke/sites/default/files/Downloads/NRM-Guidelines-for-Kenya-law-res.pdf>

Nzioka, P. S. (2021). *National security implications of human trafficking and migrant smuggling in Kenya (2009-2019)* (Doctoral dissertation, Strathmore University).  
Prevention and Combating of Trafficking in Persons Act, 2013

*Strengthening Legal Protection to Tackle Migrant Smuggling and Trafficking in Persons in Kenya: Proposals for Reform:*  
**Michael Sang**

(2025) *Journal of cmsd* Volume 12(1)

Protocol Against the Smuggling of Migrants by Land, Sea, and Air supplementing The United Nations Convention against Transnational Organized Crime (2000) available at [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf)

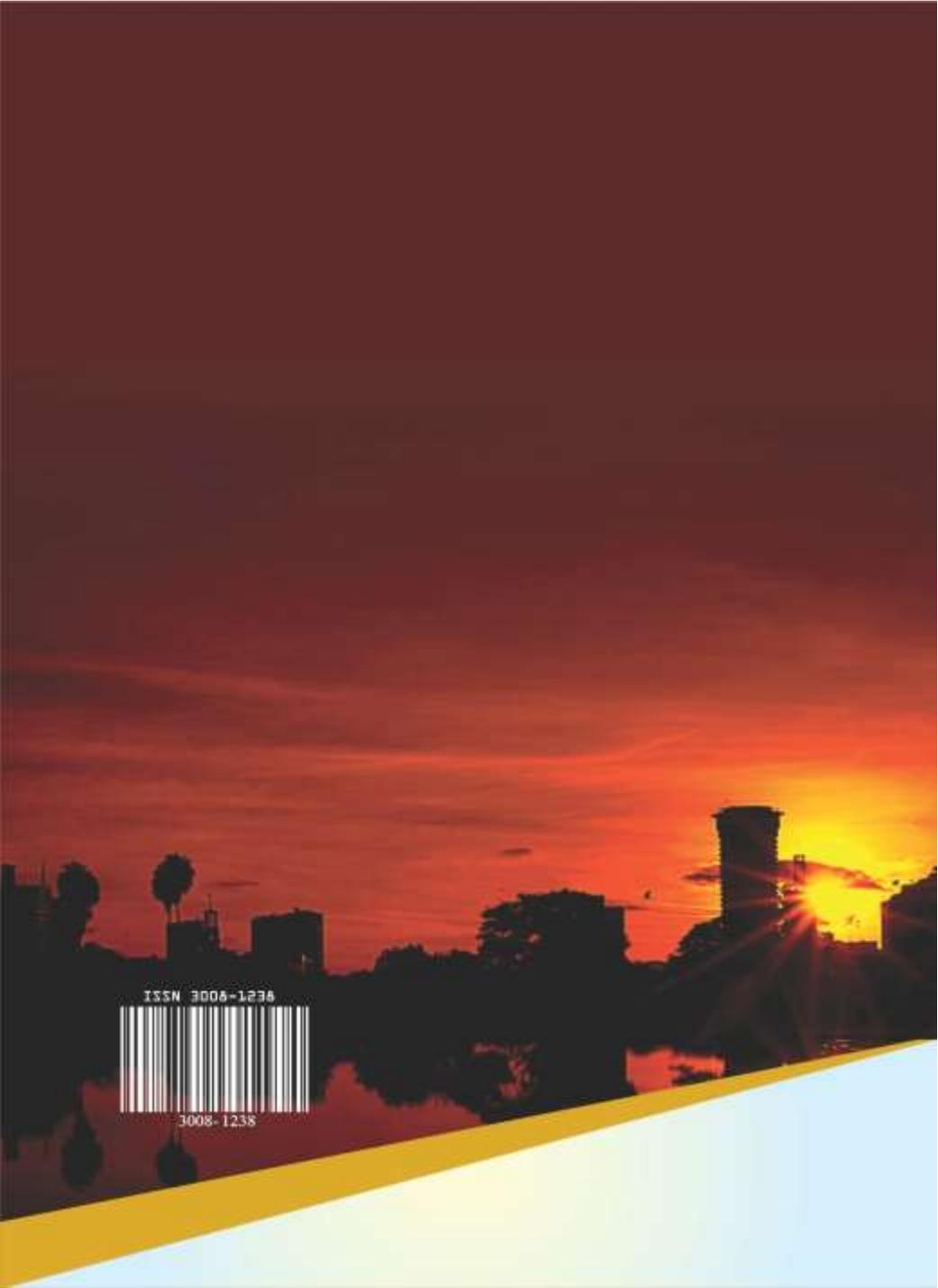
Refugees Act, 2021

Standard Operating Procedure (SOP) for Investigating and Prosecuting Trafficking in Persons in Kenya available at <https://www.odpp.go.ke/wp-content/uploads/2023/11/STANDARD-OPERATING-PROCEDURES-FOR-INVESTIGATING-AND-PROSECUTING-TRAFFICKING-IN-PERSONS-IN-KENYA.pdf>

United Nations Office on Drugs and Crime (UNODC) 'Kenya Directorate of Criminal Investigations Receives Equipment to Counter Trafficking in Persons and Smuggling of Migrants' available at <https://www.unodc.org/easternafrika/en/Stories/kenya-directorate-of-criminal-investigations-receives-equipment-to-counter-trafficking-in-persons-and-smuggling-of-migrants.html#:~:text=Every%20year%2C%20Kenya%20has%20thousands,u nits%20has%20the%20capacity%20to>

US Department of State '2023 Trafficking in Persons Report: Kenya' available at <https://www.state.gov/reports/2023-trafficking-in-persons-report/kenya/>

Victim Protection Act, 2014



ISSN 3008-1238



3008-1238