

**AN EXPLORATION OF THE IMPLEMENTATION OF THE RIGHT TO CLEAN AND
HEALTHY ENVIRONMENT IN KENYA: COMPARATIVE ANALYSIS OF KENYA'S
ENVIRONMENT AND LAND COURT AND NEW SOUTH WALES.**

JOYCE MWAURA

AD101996

**A RESEARCH PROPOSAL SUBMITTED IN PARTIAL FULFILMENT OF
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SCHOOL, RIARA UNIVERSITY**

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Declaration

I, JOYCE MWAURA declare that this research project An exploration of the implementation of the right to clean and healthy environment in Kenya: comparative analysis of Kenya’s Environment and Land Court and New South Wales is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

JOYCE MWAURA
AD101996

Sign..... Date.....

This research project has been submitted for examination with my approval as university supervisor

SUPERVISOR: WASHINGTON OMBIS

Sign..... Date.....

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Abstract

Article 42 of the Constitution of Kenya guarantees that every person has the right to clean and healthy environment. This right serves as a multiplier right and is interdependent with other human rights. More so it enables a country to achieve sustainable development by improving the standards of living of its citizens. However, Kenya is still faced with environmental challenges such as: pollution, waste management, climate change and deforestation. Hence the guaranteed right to a healthy environment is yet to be realized in Kenya.

This paper analyzes what constitutes a healthy environment and its relation to other human rights. The legal framework governing the right to clean and healthy environment is also evaluated and the roles played by institutions towards utilizing this right. Also, the research analyzes the roles of courts in the implementation and interpretation of this right. The scope of the study is mainly within the Kenyan and New South Wales jurisdictions. The research will analyze New South Wales jurisdiction to show the need for incorporation of the principles of sustainable development in a country's laws.

This research will critique some of the decided cases on the position of the country with regards to a healthy environment. Furthermore, this paper will contribute to the already existing literature on the right to clean and healthy environment and suggest recommendations that will enhance the implementation of this right.

Table of Abbreviations

ADR- Alternative Dispute Resolution

CoK- Constitution of Kenya 2010

CRC-Convention on the Rights of the Child

EIA- Environment Impact Assessment

ELC-Environment and Land Court

EMCA-Environmental and Coordination Act

ICCPR- International Covenant on Civil and Political Rights

ICESCR-International Covenant on Economic, Social and Cultural Rights

JSC- Judicial Service Commission

LEC- Land and Environment Court

NSW- New South Wales

SD- Sustainable Development

UDHR- Universal Declaration on Human Rights

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Table of International Instruments

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Land and Environment Court Act, No. 204 of 1979

Universal Declaration on Human Rights

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Climate Change Bill, 2014

Environmental and Coordination Act, 1999

Environmental and Land Court Act No.19 of 2011

Energy Act, 2019

Forest Policy, 2014

Land Act No. 6 of 2012

Mining Act No.12 of 2016

Mining Bill No.8 of 2014

National Land Commission Act, 2012

Petroleum Exploration and Production Act No.14 of 1984

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The Forest Conservation and Management Bill, 2014

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CHAPTER ONE

1.1 Introduction

Over the years Kenya has been faced with several environmental challenges and even though the country has set out to achieve a clean and sustainable environment by 2030 little has been done to address these issues. These environmental issues are primarily owed to the over utilization of – raw materials and release of by products into the surroundings leading to the deterioration of the environment.¹

The major environmental issues that Kenya faces include, deforestation, pollution, climate change and waste management. As a result, environmental degradation leads to the loss of biodiversity and causes depletion of the ozone layer. Furthermore, it also affects the tourism industry and acts as an economic setback for the country in terms of restoration of the environmental damage. Environmental degradation heavily affects the human health as areas exposed to toxic pollutants lead to respiratory problems.²

In 2017 the Kenyan government effectively outlawed single-use plastic bags. This was a step that sought to ensure that a clean environment is maintained. However, Kenya has failed to address waste management. This has led to an increase in environmental degradation. Due to their non-biodegradable nature, plastics stay in the environment long after they have been disposed.³ The effect of this is air pollution which caused when plastic is burned in open air realising toxics chemicals. This affects the human health once they inhale these toxins.⁴ It also leads to soil pollution, as when plastics start to gradually breakdown they leech toxic chemicals into the soils.⁵ This affects the soil's fertility depreciating its ability to support plant life.

¹ 'National Environmental Education And Awareness Initiative' (*Ministry of Environment and Forestry*, 2019) <<http://www.environment.go.ke/?p=91>> accessed 25 August 2019.

² 'Causes And Effects Of Environmental Degradation' (*Conserve Energy Future*) <<https://www.conserve-energy-future.com/causes-and-effects-of-environmental-degradation.php>> accessed 25 August 2019.

³ Flora Mutahi <<http://kam.co.ke/managing-plastic-waste-requires-fresh-thinking-and-a-holistic-approach/>> accessed 25 August 2019.

⁴ 'Causes And Effects Of Environmental Degradation' (*Conserve Energy Future*) <<https://www.conserve-energy-future.com/causes-and-effects-of-environmental-degradation.php>> accessed 25 August 2019.

⁵ 'Plastic In Our Soil - HMRP Packaging' (*HMRP Packaging*) <<http://hmrp.co.za/plastic-in-our-soil/>> accessed 25 August 2019.

Furthermore, improper disposal of waste leads to water pollution. Reports have shown that water pollution has been the main cause of cholera, pneumonia, body infections and cancer in certain counties.⁶

10% is the recommended minimum for a country's forest cover. However, deforestation has led Kenya to fall short of this by having an estimated 7.4%.⁷ It has also led to the deterioration of the climate. The effects of this include; a change in biodiversity, increased floods and droughts, rise in sea level, increased temperatures and migration. More so climate change is interwoven to human rights. The Office of the High Commissioner for Human Rights (OHCHR) Reports assesses that global warming "will potentially have implications for the full range of human rights."⁸ Climate change affects the right to life, which is the right that influences the enjoyment of all other rights. It also affects the right to food with the increase in temperatures and rise of sea levels as well as floods and drought. This negatively impacts crops, livestock, fisheries and people's livelihoods. More so the right to health is influenced by climate change and states are called upon to take measures in order to minimize the adverse effects of climate change on health.

1.2 Background

The repealed Constitution did not include environmental rights amongst the other human rights in Chapter V. The common law case of *Gouriet v the National Union of Post Worker (1978)*⁹ was heavily relied on to determine environmental cases. The principles that governed this case were premised on the fact that public rights could only be contended in a civil action by the Attorney General who represented the public. Therefore, private persons were only entitled to bring action that restrained a breach of law if it constituted a violation of their private rights or would impose special damage on them. Private persons could not bring action on environmental matters as it is seen in the case of *Wangari Maathai v Kenya Times Media Trust Ltd [1989]*,¹⁰ where it was established that only the Attorney General could sue on behalf of the public. Similarly, the case of

⁶ Nation Team, 'Athi River's Corridor Teems With Deadly Pollutants' *Daily Nation* (2019) <<https://www.nation.co.ke/news/Athi-River-corridor-teems-with-deadly-pollutants/1056-5237324-jp38o1/index.html>> accessed 25 August 2019.

⁷ (*Environment.go.ke*, 2018) <<http://www.environment.go.ke/wp-content/uploads/2018/08/Forest-Report.pdf>> accessed 25 August 2019.

⁸ (*Ohchr.org*, 2009) <<https://www.ohchr.org/documents/press/analyticalstudy.pdf>> accessed 25 August 2019.

⁹ AC 435, (1977) 3 All ER 70, (1977) 3 WLR 300, 141 JP 552, (44 CLJ 6).

¹⁰ eKLR

Kenya Bus Service Ltd & 2 others v The Attorney-General & 2 others [1997],¹¹ the court held that private persons had the capacity to bring action against the state but not against other private persons.

However, there was a paradigm shift with the enactment of the Environmental Coordination and Management Act (EMCA) which sought to ensure the realization of environmental rights. The Act recognized that every person was entitled to healthy environment that is clean and that every person has the capacity to seek redress for any environmental violation. This was seen in the case of *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited [2001]*,¹² where the court held that the deterioration of the environment serves to be a public loss. The public should be taken into consideration in matters of injunction. Therefore, non –issuance of an injunction would be to the detriment of the population.

The 2010 Constitution of Kenya saw the introduction of environmental rights in Chapter IV of the Constitution. Article 42 guarantees everyone the right to a healthy environment while Article 69 sets out the responsibilities that the government and individuals have in matters linked with the environment. Furthermore, Article 70 sets out the application of environmental rights.

It is with this background that this study seeks to analyze the content of a healthy environment provided for under the Constitution of Kenya 2010 and its relation with the other human rights. It seeks to establish the implementation of this right by analyzing the roles of the courts.

1.3 Literature Review

There is a variety of numerous literature on how the right to a healthy environment can be implemented.

¹¹ 1 KLR (E&L)

¹² eKLR

According to Bridget Lewis,¹³ the fulfillment of other human rights is dependent on a healthy environment. There is need to justify that the right to a good environment of a certain degree is crucial for human well-being. She contends that the right to clean and healthy environment should stand alone in order to avoid the replication of other existing rights and it still should be able to remain precise enough for meaningful implementation and enforcement. Furthermore she states that there is still some uncertainty on the definition of a healthy environment that can be able to incorporate human interest on the environment without having to infer to other human wants.

In the opinion of Dinah Shelton,¹⁴ there must be a balance between the guaranteed right of a healthy environment which is clean and other rights should there be conflict. She states that the development of human beings is dependent on basic healthy surroundings which states have been mandated to protect and promote. She further states that there still has been some struggle in terms of giving significance to environmental rights without having to overstep the judicial function even though states have adopted constitutional provisions that promote environmental rights.

Chizoba Okpara¹⁵ states that the main beneficiaries of healthy environment are communities and individuals. He states that an individual can seek reparation for any loss incurred from an environmentally damaging activity. The state has a duty to resolve any environmental challenge that it might face. States also are under obligation to facilitate the progressive realization and the fulfilment of this right by conserving, providing proper management, as well as attempting to improve the natural environment. Furthermore, he states that if the right is to be declared the wordings must be explicit and after declaration the courts must give this right life and must not let it remain a dormant provision.

¹³ Bridget Lewis, 'ENVIRONMENTAL RIGHTS OR A RIGHT TO THE ENVIRONMENT? EXPLORING THE NEXUS BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION' (2019) 8 MqJICEL.

¹⁴ Dinah Shelton, *Whiplash and Backlash - Reflections on a Human Rights Approach to Environmental Protection*, 13 Santa Clara J. Int'l L. 11 (2015).

¹⁵ Chizoba I. Okpara, 'Right To A Clean And Healthy Environment: The Panacea To The Niger Delta Struggle' (2012) 5 Journal of Politics and Law.

Mariana and Violeta Radulescu¹⁶ both write on the need for educating people on their right to live in a healthy environment. They state that the right to a healthy environment has become a growing concern due to environmental damage in which billions of people suffer in one way or the other. Also people lack awareness of their entitlement to live in a healthy environment. Therefore, there is need for individuals to be educated in order for this right to be realized. There should also be provision that enables individuals to access information and justice on environmental matters.

Joel Bosek¹⁷ writes about the implementation of environmental laws and the possible challenges to its implementation. He states that regardless of appropriate laws there is still a high chance of lack of mutual support from the major stakeholders in the implementation process. He further states that the jurisdictional overlaps between both national and the county governments inhibit effective implementation of environmental rights. Therefore, institutions in charge of implementing environmental rights need to adhere to the provisions of the Constitution for these rights to be realized. Also in order to streamline the implementation of environmental rights there is need to establish a co-ordination agency.

Markowitz and Gerardu¹⁸ address the importance of courts in implementation of the guaranteed right to a healthy environment. They state that individuals and institutions need to have unswerving commitment. The judiciary's role is to make sure that the rule of law is upheld and ensure that national and international laws are interpreted and applied fairly, efficiently and effectively. Therefore, in a bid to strengthen environmental compliance the judiciary has the ability to influence public perception and discourse concerning environmental and social concerns.

Ben Twinomugisha¹⁹ opines that the substantive right to life can be applied by activist courts to protect the environment. This is because environmental deteriorations endangers the life of present and future generations. He finds that through a creative application of the guaranteed right to a

¹⁶ Dragos Marian Radulescu and Violeta Radulescu, 'Educating The Consumer About His Right To A Healthy Environment' (2011) 15 *Procedia - Social and Behavioral Sciences*.

¹⁷ Joel Bosek, 'Implementing Environmental Rights In Kenya's New Constitutional Order: Prospects And Potential Challenges' (2014) 2 *AHRLJ* 25.

¹⁸ Kenneth J. Markowitz and Jo J. A. Gerardu, 'THE IMPORTANCE OF THE JUDICIARY IN ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT' (2012) 538 *Pace Environmental Law Review*

¹⁹ Ben Kiromba Twinomugisha, 'SOME REFLECTIONS ON JUDICIAL PROTECTION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN UGANDA' (2007) 3 *Law, Environment and Development Journal*.

healthy environment, the judiciary has been able to hold the government, its agencies and private actors accountable for the violations of this right. He recommends not only an expanded application of relevant constitutional provisions but also he advocates for educating the public on how a healthy environment can be enforced and achieved.

Prof Patricia Mbote and Dr. Collins Odote²⁰, focus on the role that judiciaries play in sustainable development. They write on how Kenyan and Tanzanian courts have struggled with how to link the right to life with the environment. It has been questioned on whether the scope should be broadened to include a right to the means necessary for supporting life and it has been agreed in the various decided cases from both the Kenyan and Tanzanian courts that the scope is deemed to be extended. Furthermore, to protect this right the judiciary should align itself in order to be able to balance the interests between itself and state members.

The literature above has contributed to the advancement of this study. It is the gap in definition and the role in which the government should play in executing the right to clean and healthy environment that this work seeks to address.

1.4 Problem Statement

Article 42 of the Constitution of Kenya guarantees a healthy environment which is clean. This right enables the promotion and fulfillment of other human rights such as the right to life, health and food. It also promotes sustainable development by improving the standards of living. However, even with the right being guaranteed, Kenya is still faced with environmental challenges such as pollution, loss of biodiversity, deforestation and lack of proper waste management. Cases have shown that there is lack of directive on the implementation and interpretation of what constitutes to clean and healthy environment. As a result, the country is yet to achieve sustainable development goals.

²⁰ Kameri-Mbote, Patricia and Collins Odote. "Courts as Champions of Sustainable Development: Lessons from East Africa" *Sustainable Development Law & Policy*, Fall 2009, 31-38, 83-84.

In response to this problem, this study will propose several options that will guarantee the achievement of a healthy environment. It will also establish the roles and jurisprudence of the courts in the interpretation and implementation of this right.

1.5 Theoretical Framework

The following theories will be used to provide a foundation for the objectives of this study.

1.5.1 Utilitarianism Theory

The concept of this theory is that actions are morally permissible only if they produce as much net happiness as any other available action. Utility is related to the well-being sentient entities. It holds that consequences of any action dictate what is right or wrong.

The main proponents of this theory were, Jeremy Bentham and Stuart Mill. According to Bentham utility is defined as the aggregate pleasure after deducting suffering of all that are involved in any action. Therefore, an action is commendable if it produces benefits, advantages, pleasure, good or happiness, or it prevents mischief, pain or evil.²¹ Bentham viewed law as being the command of the Sovereign. Bentham posited that legislators need to study the law for them to be able to distinguish the good from evil. He argued that legislation should have three goals: to provide subsistence, security and diminish inequalities.²²

Stuart Mill expands on this theory of utilitarianism to include the quality of pleasure with a focus on rules rather than individual moral actions. He argues that moral rights and rules are beneficial for the common good of mankind. Mill supports that there is need for a balance between individual and government interests. More so, the government is entitled to interfere if a citizen's cause of action is likely to produce evil. Furthermore members of the society have a right to ensure that a Sovereign carries out and meets his obligations.

In relation to this study, Bentham's utilitarianism theory supports the need for government to protect environmental policies.²³ It is the government's obligation to promote the greatest good

²¹ Peter Curzon, *Jurisprudence* (2nd edn, Cavendish Publishing Limited 1993).

²² *Ibid*,67

²³ Colleen F Moore, *Silent Scourge: Children, Pollution And Why Scientists Disagree* (1st edn, 2009).

for the greatest number which entails protecting its citizens from harm, and this includes harm such as pollution and deforestation.²⁴ Thus the government should always ensure that the welfare of its citizens is protected. On the other hand, Mill contends that in as much as the government has duties and obligations that ensure the protection of its citizen's welfare, citizens also have obligations. They are entitled to ensure that the government carries out and meets its obligations in the implementation and protection of environmental laws. They are also entitled to preserve the quality of the environment that is protected by the government.

1.5.2 Public Trust Theory

Frank Grad established that the public trust doctrine is derived from the perception that the public holds inalienable rights to certain lands and resources and the state, notwithstanding private property ownership, has rights over them and holds them in trust for the public.²⁵ The main proponent of this theory was Joseph Sax. Sax posited that natural resources are limited and therefore there is need for the state to hold these resources for the benefit of the public.²⁶ According to Sax the government does not own any of the natural resources in the country, however they are considered as trustees who hold a fiduciary relationship with its citizens. The government is therefore expected to uphold the interests of its citizens and involve them in any decision making process that is concerned with the management of natural resources in the country. Furthermore the fiduciary duties of the government have been expanded in scope to include the right to a healthy environment.²⁷

In relation to this study, the public trust theory supports that there is a need to balance the economic benefits of development with the needs of a clean environment.²⁸ Therefore, the courts and the government need to take affirmative action to ensure effective control of natural resources. This in turn will ensure that the right to clean and healthy environment is upheld. Moreover, the theory posits that not only does the government have a duty to ensure that these resources are

²⁴ Ibid, 229

²⁵ Frank P. Grad, *Treatise On Environmental Law* 10.05[1] (1995)

²⁶ *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1969)

²⁷ Tanvi Kapoor, 'Public Trust Doctrine' (*Legalserviceindia.com*) <<http://www.legalserviceindia.com/articles/ptdoc.htm>> accessed 14 August 2019.

²⁸ Miscellaneous Civil Application No. 118 of 2004.

properly managed, the citizens of Kenya are also empowered to question any ineffective management of these resources.

1.5.3 Theory of Justice

The concept of this theory is identifying what is truly unfair and how we might gather support for fixing things. The main proponent for this theory is, John Rawls. According to Rawls each person is entitled to an equal set of basic entities, which include civil rights and political rights. Rawls posits that there is need for proper structuring of institutions and the society. Rawls argues that for a society to be just there needs to be equal distribution of liberties, economies, duties and obligations.²⁹

Furthermore, Rawls states that rules are needed for social and individual good within the society.³⁰In relation to this study, for environmental challenges to be combatted there is need for environmental justice which the courts need to interpret and enforce. There is also need for the government to implement the obligations afforded to it by the society such as implementing laws that will enable effective management of resources and stricter sanctions for environment offenders. Moreover, the society has duties to respect the environment and protect it from degradation. The roles afforded to courts, the government and the society will lead to the attainment of sustainable development.

1.6 Research Questions

1. What is the content of a healthy environment as a guaranteed right?
2. What is the legislative framework that governs the right to clean and healthy environment?
3. Is the legal framework governing the right to clean and healthy environment sufficient?
4. How has New South Wales court implemented sustainable development in their laws?
5. What is the role of courts in attaining sustainable development?

1.7 Research Objectives

The objectives of this study are;

1. To establish the importance of a healthy environment to a country.

²⁹ Rawls J, *A Theory of Justice* Harvard University Press, Cambridge, 1971.

³⁰ Ibid, 11

2. To assess the content of a healthy environment as a guaranteed right.
3. To examine the legislative framework that governs the right to clean and healthy environment.
4. To compare and analyze how the New South Wales court has implemented sustainable development in their laws.

1.8 Justification of Study

For a country to maintain a sustainable environment it must ensure it upholds the right to a healthy environment. The enactment of the 2010 Constitution saw the inclusion of environmental rights. However, it has failed to ensure the protection and conservation of the environment. Therefore, there is need to evaluate the implementation of environmental laws in the country to ensure that sustainable development can be achieved. The analysis of this research will contribute to ensuring that environmental protection through sustainable development can be achieved.

There is also need to analyze the role of courts in Kenya. Environmental courts in Kenya have yet to implement the sustainable development principles in their decision making, therefore the study will contribute to the discussion on the attainment of sustainable development and environmental protection through the inclusion of these principles by the courts. The research expects that the outcome will lead to the inclusion of sustainable development principles in the courts decision making and may pave way for a shift in the structure of environmental courts.

1.9 Hypotheses

This research proceeds on the presumption that;

1. Everyone has the right to clean and healthy environment.
2. A clean and healthy environment is essential to the full enjoyment of human rights.
3. A clean and healthy environment promotes sustainable development.

1.10 Research Methodology

The research will use qualitative methods to analyse both primary and secondary data. This will entail the use of desktop review of secondary sources which include journal articles, international

instruments, newspaper articles and thesis. These provide useful ideas and solutions on the different aspects of this research.

Primary data was obtained from the cases contained in the Kenya Law Reports (KLR) and Environment and Land Reports (ELR). These cases proved useful in ascertaining the implementation of the environmental laws by the Kenyan courts.

The secondary and primary data obtained, from the above methods, was extensively reviewed and analysed. This was to provide answers to the research questions and as a consequence, the achievement of the research objectives. This method of data collection was the most preferred due to accessibility of research material.

1.11 Chapter Breakdown

This research paper will be divided into five chapters.

Chapter One

This chapter entails the research proposal. It encompasses an abstract, a brief introduction and background of the study, research questions, objectives and methodology. It also has the justification of study, problem statement, literature and theoretical framework as well as the hypotheses.

Chapter Two

This chapter includes the content of healthy environment. It discusses the interdependence of the right to clean and healthy environment with other human rights and the importance of maintaining a healthy environment for sustainable development and the fulfillment of other rights.

Chapter Three

This chapter discusses the legislative framework that governs the right healthy environment which is clean at both the national and county levels. It also discusses the institutional framework that governs this right.

Chapter Four

This chapter discusses how the New South Wales Environment Court has incorporated sustainable development principles. It analyses the history of the court and details a comparative analysis of the Kenyan environment court against the New South Wales environment court. It also gives suggestions on how the Kenyan court can incorporate sustainable development so as to promote the right to a clean and healthy environment.

Chapter Five

This chapter concludes the research. It contains a summary of the topic in discussion and the concluding findings of the research. It also contains recommendations gathered from the research that will enable the efficient application of the right by state actors and individuals.

CHAPTER TWO

THE INTERFACE BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT

2.1 Introduction

This chapter explores the relationship between human rights and the environment. The rights discussed in this chapter include; right to life, right to health, right to adequate food and right to sanitation.

2.1.2 Relationship between International Human Rights and the Environment

Human rights are rights entitled to human beings by virtue of them being human beings. These rights are all universal, interdependent, indivisible, interrelated and inalienable. They place obligations on the state and individuals. States have the obligation to protect, respect and fulfill human rights. Individuals when exercising state authority bear human right duties and more so they are obligated to respect the human rights of others.³¹

The enjoyment of many human rights depends on a healthy environment and the protection of the environment depends on the protection of human rights. Acknowledging the relationship between human rights and environmental protection serves as a catalyst for innovative action to address and empower people to achieve the Sustainable Development Goals (SDGs) and to overcome environmental challenges. It is therefore necessary to discuss the human rights pertinent to environmental law. The rights to be discussed include; right to life, right to health, right to adequate food, and right to sanitation.

2.2 Right to life

The right to life is a supreme right and it influences the enjoyment of other rights. It serves as a basic guarantee for the advancement of individuals, society and the nation. The Stockholm Declaration provided that the right to life is promoted by the advancement and protection of the

³¹ 'OHCHR | Special Rapporteur on Human Rights and the Environment' (*Ohchr.org*) <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx> accessed 5 March 2020.

environment.³² Furthermore, the Rio Declaration provided that '*[h]uman beings are entitled to a healthy and productive life in harmony with nature.*'³³

The CoK 2010 under Article 26(1) states that '*[e]very person has the right to life.*' This Article is supported by the Universal Declaration of Human Rights (UDHR) under Article 3 which states that '*[e]very human being has the right to life.*' More so, General Comment 36 in regards to Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that states are obligated to ensure that appropriate measures are taken in order to address any conditions that may have direct threats to individuals that will prevent them from fully enjoying the right to life.³⁴

The conditions which pose to be direct threats include; climate change, unsustainable development and environmental degradation. States are to ensure that they implement their obligation of respecting and ensuring that the right to life is upheld. They are required to do this by ensuring that they enforce environmental laws, oversee environmental impact assessments, deliberate with other states on matters concerning the environment and ensure that there is sustainable use of natural resources.³⁵

In the case of *Ogoni v The Government of Nigeria*,³⁶ the African Commission on Human and People's Rights reaffirmed, while interpreting Article 24 of the African Charter that social and economic rights are interlinked with the right to clean and healthy environment. It also stated that the quality of life and the safety of individuals are affected by the environment.

³² *REPORT ' OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRON,MENT* (United Nations Publication 1973) <<https://digitallibrary.un.org/record/523249?ln=en>> accessed 5 March 2020.

³³ 'Rio Declaration On Environment And Development' (*Cbd.int*, 2006) <<https://www.cbd.int/doc/ref/rio-declaration.shtml>> accessed 5 March 2020.

³⁴ *General Comment No. 36 (2018) On Article 6 of the International Covenant on Civil and Political Rights, On the Right to Life** (2018) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> accessed 5 March 2020.

³⁵ *Ibid*, 14-15

³⁶ Fons Coomans, *The Ogoni Case Before The African Commission On Human And Peoples' Rights** <<http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>> accessed 5 March 2020.

The Kenyan case of *Martin Osano and another v Municipal Council of Nakuru [2018]*,³⁷ the court stated that a clean and healthy environment is mandatory for life. It further stated that this prerequisite was the reason that the drafters of the CoK 2010 saw it fit to provide for the right to clean and healthy environment within the Bill of Rights.

The right to life is the most fundamental right. In its realization, individuals and the state both have the responsibility of preserving the environment. This is because the quality of life is affected by the quality of the environment.³⁸

2.3 Right to Health

The right to health is an umbrella right that extends to appropriate healthcare and to the underlying determinants of health such as a healthy environment.³⁹ The enjoyment of this right and other internationally-guaranteed rights is highly dependent on a sound environment.⁴⁰ Furthermore, the right to health facilitates the realization of other rights such as the right to education, human dignity and equality.⁴¹

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides under Article 12 (1) that '*[e]veryone has the right to the enjoyment of the highest attainable standard of physical and mental health.*' More so, Article 12 (2) (b) provides that state parties should ensure that steps are taken to improve the all aspects of environmental and industrial hygiene to facilitate the realization of the right to health. Furthermore, the Convention on the Rights of the Child (CRC) under Article 24 (1) provides that it is the right of the child to enjoy the highest standard of health. States are to ensure that they take into consideration the dangers of

³⁷ eKLR

³⁸ Dr. Mohd. Yousuf Bhat and Dr. Syed Damsaz Ali Andrabi, 'Right To Life In Context Of Clean Environment: It'S Significance Under Various Laws' (2017) 22 IOSR Journal of Humanities and Social Science <<http://www.iostjournals.org/iosr-jhss/papers/Vol.%2022%20Issue5/Version-10/L2205107985.pdf>> accessed 5 March 2020.

³⁹ OHCHR | Special Rapporteur On The Right To Health' (*Ohchr.org*) <<https://www.ohchr.org/EN/Issues/Health/Pages/SRRRightHealthIndex.aspx>> accessed 7 March 2020.

⁴⁰ Dinah Shelton, *Human Rights, Health & Environmental Protection: Linkages In Law & Practice* (2002) <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> accessed 7 March 2020.

⁴¹ *Human Rights And The Environment* (2012) <https://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport_OHCHR_HRE.pdf?sequence=1&isAllo wed=y> accessed 7 March 2020.

environmental pollution when technology is applied to combat diseases and malnutrition.⁴² States should ensure that both parents and children have access to information that addresses environmental hygiene and sanitation.⁴³

In the case of *Free Legal Assistance Group and Others v. Zaire*,⁴⁴ the African Commission on Human Rights ruled that the failure of the government to provide safe drinking water constituted to the violation of Article 16 of the African Charter on Human and People's Rights which provides for the right to health. Furthermore, the landmark case of *Ogoni v Nigeria*,⁴⁵ the African Commission on Human Rights in assessing the violation of the right to health and the right to a healthy environment held that the right to a healthy environment places obligation on states to take reasonable measures to prevent environmental degradation.

The CoK provides under Article 43 (1) (a) that, '[e]veryone has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. Article 21(2) stipulates that the State should take measures to ensure the progressive realization of the rights under Article 43. The State can do this by ensuring that it refrains from supporting or carrying out activities that negatively affect human health such as pollution.⁴⁶ More so, the Health Act stipulates under section 12 (1) (b) that healthcare providers have the right to an environment that is safe for working and reduces the risk of disease transmission.⁴⁷

The interrelationship between the right to health and environmental protection is evident. A healthy environment promotes the human health and sustainable development. Therefore, in protecting the environment the right to health is achieved.⁴⁸

⁴² Convention on the Rights of the Child, Article 24(2) (c)

⁴³ *ibid*, Article 24(2) (e)

⁴⁴ Comm. No. 25/89, 47/90, 56/91, 100/93

⁴⁵ Fons Coomans, *The Ogoni Case Before The African Commission On Human And Peoples' Rights** <<http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>> accessed 7 March 2020.

⁴⁶ Manisuli Ssenyonjo, *Economic, Social And Cultural Rights In International Law* (Hart Publishing 2009).

⁴⁷ The Health Act No.21 of 2017

⁴⁸ *Human Rights And The Environment* (2012) <https://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport_OHCHR_HRE.pdf?sequence=1&isAllowed=y> accessed 7 March 2020.

2.4 Right to adequate food

The right to food is a fundamental and legal right. It ensures that all human beings have the capability of living in dignity by feeding themselves.⁴⁹ The realization of this right is dependent on whether or not people have physical and economic access to either adequate food or the means to procure it without encountering any discrimination.⁵⁰

The UDHR provides under Article 25(1) that, *'[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.'* More so, ICESCR provides under Article 11(1) that everyone is entitled to adequate food. It also provides that states should take measures through technology and science to ensure that food production, conservation and distribution is improved.⁵¹ Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women guarantees women the right to food security and provides that state parties ensure that there is adequate facilitation of this right.⁵²

The CoK under Article 43(1) (c) provides that everyone has the right, *'[t]o be free from hunger, and to have adequate food of acceptable quality.'* As a state, Kenya is required to contribute to a healthy environment that facilitates the procurement and production of adequate food or individuals and their families.⁵³ The state has obligations to facilitate the progressive realization of this right such as ensuring that there is no prevention of access to food, ensuring that there is no individual that is being deprived of their access to food and engaging in activities that will promote food security. Nevertheless, the state is prohibited to take retrogressive measures that will delay the fulfilment of this right.⁵⁴

⁴⁹ Jean Ziegler, 'What Is The Right To Food? | Right To Food' (*Righttofood.org*, 2012) <<https://www.righttofood.org/work-of-jean-ziegler-at-the-un/what-is-the-right-to-food/>> accessed 17 March 2020.

⁵⁰ 'Food Security And The Right To Food | Sustainable Development Goals | Food And Agriculture Organization Of The United Nations' (*Fao.org*) <<http://www.fao.org/sustainable-development-goals/overview/fao-and-the-post-2015-development-agenda/food-security-and-the-right-to-food/en/>> accessed 17 March 2020.

⁵¹ International Convention on the Economic, Social and Cultural Rights, Article 11(2).

⁵² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, Article 15.

⁵³ (*Ohchr.org*) <<https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>> accessed 17 March 2020.

⁵⁴ 'OHCHR | Special Rapporteur On The Right To Food' (*Ohchr.org*) <<https://www.ohchr.org/en/issues/food/pages/foodindex.aspx>> accessed 17 March 2020.

The case of *SERAC v Nigeria*⁵⁵ depicts the interrelation of the right to food with the environment. In this case the African Commission on Human and People's Rights held that the Nigerian government was liable for the destruction of food by the private oil companies which the government had failed to regulate and oversee and in turn caused environmental degradation.

The right to food is interrelated with the right to a healthy environment. The fulfilment of the right to food requires the fulfilment of the right to a healthy environment. States are required to ensure that the environment is sustainable in order to realize the right to food.⁵⁶ Therefore the interpretation of the right to food should include the right to a healthy environment.⁵⁷

2.5 Right to water and sanitation

The right to water and sanitation enables persons to live a life of dignity and it is central in upholding other fundamental human rights such as the right to life, health and food.⁵⁸ This right is enabled by a safe, clean and healthy environment.⁵⁹ The inability of a state to provide access to this right results in devastating effects on people's health and dignity.⁶⁰

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) under Article 14(2) (h) provides that in the elimination of discrimination against women in particularly those in the rural areas the state is required to take measures that will ensure they have adequate living conditions such as sanitation and constant water supply. Furthermore, the Convention on the Rights of the Child stipulates that every child has the right to the highest standard of health⁶¹ and that it is the duty of the state to ensure this right is implemented by taking measures that ensure that there is providence of clean drinking water and the risks of environmental

⁵⁵ (Communication No. 155/96)

⁵⁶ 40 Vermont L. Rev. 791 (2016).

⁵⁷Olivier De Schutter (*Ohchr.org*, 2012) <https://www.ohchr.org/Documents/Issues/Food/20120928_SRRTF_CFS39.pdf> accessed 17 March 2020.

⁵⁸ The Human Rights To Water & Sanitation | UN-Water' (*UN-Water*, 2017) <<https://www.unwater.org/human-rights-water-sanitation/>> accessed 23 March 2020.

⁵⁹ 'The Human Right To Water Extends To Ecosystems' (*UN Environment*) <<https://www.unenvironment.org/news-and-stories/story/human-right-water-extends-ecosystems>> accessed 23 March 2020.

⁶⁰ Human Rights | UN-Water' (*UN-Water*) <<https://www.unwater.org/water-facts/human-rights/>> accessed 23 March 2020.

⁶¹ Convention on the Rights of the Child, Article 24 (1)

pollution are considered.⁶² More so, children and their guardians are to be provided with information that highlights the advantages of environmental sanitation.⁶³

The CoK under Article 43 provides that '[e]veryone has the right to reasonable standards of sanitation'⁶⁴ and 'to clean and safe water in adequate quantities.'⁶⁵ These rights are to be fulfilled progressively.⁶⁶ In the case of *Adrian Kamotho Njenga v Council of Governors and 3others [2020]*,⁶⁷ the court held that Articles 42 and 43 on the right to clean and healthy environment are given effect by reasonable standards of sanitation. The respondents were to ensure that there was provision of sanitation facilities in order to promote the right to a healthy environment. The Water Act 2016 defines water pollution as anything that is harmful or potentially harmful to the environment.⁶⁸ Furthermore, it provides that it is the duty of a licensee who receives trade effluent to ensure that it has taken considerable measures to prevent environmental pollution.⁶⁹

The right to a healthy environment includes substantive elements such as the right to food and water.⁷⁰ The management of water and the provision of good sanitation facilities results in a healthy environment in which people can depend on.⁷¹ Furthermore, the environment is improved when access to water and sanitation is improved.⁷²

The state is obligated to protect, respect and fulfil the right to water and sanitation. In doing so it must ensure that its environmental legislation does not promote water pollution.⁷³ More so, it is obligated not to interfere with the enjoyment of right to water and sanitation either by destroying

⁶² *ibid*, Article 24 (2) (c)

⁶³ *ibid*, Article 24 (2) (e)

⁶⁴ Constitution of Kenya, Article 43 (1) (b)

⁶⁵ *ibid*, Article 43 (1) (d)

⁶⁶ *ibid*, Article 21 (2)

⁶⁷ eKLR.

⁶⁸ Water Act 2016, Sec.2

⁶⁹ *Ibid*, Sec.108(1) (a)

⁷⁰ RC Harry Oosterveen, 'World Water Day 2001: Water, Health And Human Rights' (*Who.int*, 2001) <https://www.who.int/water_sanitation_health/en/humanrights.html> accessed 23 March 2020.

⁷¹ (*Irishaid.ie*)<<https://www.irishaid.ie/media/irishaid/allwebsitemedia/20newsandpublications/publicationpdfsenglish/Environmental-key-sheet-11-water-sanitation.pdf>> accessed 23 March 2020.

⁷² 'Sanitation And The Environment' (*Lifewater International*, 2014) <<https://lifewater.org/blog/sanitation-environment/>> accessed 23 March 2020.

⁷³ RC Harry Oosterveen, 'World Water Day 2001: Water, Health And Human Rights' (*Who.int*, 2001) <https://www.who.int/water_sanitation_health/en/humanrights.html> accessed 23 March 2020.

water services or depleting water sources. In the fulfilment of this right the state is obligated to adopt legislative, administrative and other measures that will promote the full realization of the right to water and sanitation.⁷⁴

2.6 Conclusion

Human rights are integral in the achievement of environmental rights. The 2011 OHCHR Report notes that ‘[h]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policy making in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes.’⁷⁵ This chapter has demonstrated that human rights and the environment are interlinked. Furthermore, this chapter has discussed the obligation the state has in fulfilling human rights for the protection of the environment.

⁷⁴(*Knchr.org*, 2017) <<https://www.knchr.org/Portals/0/EcosocReports/PHE-Framework.pdf>> accessed 24 March 2020.

⁷⁵ UN Documents | UN Special Rapporteur On Human Rights And The Environment' (*UN Special Rapporteur /on Human Rights and the Environment*, 2011) <<http://srenvironment.org/un-documents>> accessed 7 July 2020.

CHAPTER THREE

LEGISLATIVE FRAMEWORK OF THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT IN KENYA

3.1 Introduction

This chapter discusses the legal and regulatory framework of the right to clean and healthy environment. It reviews the legal framework that governs environmental law and conservation in Kenya. It also reviews the institutional framework that assists in the promotion of environmental rights.

The promotion of the right to a healthy environment in a country's constitution is an indication of the importance that is attached to environmental issues. The protection of the environment is evidence that the law has the ability to address the felt needs of the community. The law serves as an avenue for systematic responses for national environmental issues.⁷⁶

Currently, the laws that govern the environment in Kenya include but are not limited to; The Constitution of Kenya, 2010, Environmental Management and Coordination Act, 1999, Environmental and Land Court Act No. 19 of 2011, Environmental (Impact Assessment and Audit) Regulations, 2003, Water Act, 2016, Land Act, 2012, Energy Act, 2019, Mining Act, 2016, National Land Commission Act, 2012, Petroleum Exploration and Production Act, 1984. Some of the sectoral laws that supplement the governance of the environment include; Climate Change Bill, 2014, The Forest Conservation and Management Bill, 2014, Forest Policy 2014, Mining Bill, 2014.

3.2 The Constitution of Kenya, 2010

The preamble of the CoK recognizes the importance of sustainable development through the protection of the environment.⁷⁷ It is also listed as a national value and a principle of governance.⁷⁸ The right to clean and healthy environment is provided for under Article 42 and is inclusive of the right to protect the environment through legislation and other measures.⁷⁹ Chapter five of the CoK

⁷⁶ Harold Leventhal, 'Environmental Decision making And The Role Of The Courts' (1974) 122 University of Pennsylvania Law Review.

⁷⁷ Preamble, Constitution of Kenya, 2010.

⁷⁸ Constitution of Kenya, Article 10(2) (d)

⁷⁹ Ibid, Article 42(a)

dedicates one part to land provisions and the other part is dedicated to the environment and natural resources. The four articles under the second part are detailed towards the obligations, enforcement, agreements and legislation of the environment by the state and its citizens.⁸⁰

Article 69 sets out the obligations of the state towards the environment. Among the obligations that the state has include; ensuring that there is sustainable development and continuous conservation of the environment and natural resources. Also it is required to ensure that its citizens enjoy equal benefits that have accrued from the environment.⁸¹ Moreover, it is mandated to ensure that the country's development does not interfere with the environment.⁸² The state is obligated to ensure that the utilization of its natural resources are for the benefit of its citizens.⁸³ Furthermore, recourse is provided to a person that claims that their right to clean and healthy environment has been violated.⁸⁴ This provision does not require them to prove loss or injury suffered.⁸⁵

The court has a mandate to prevent any act that would most likely harm the environment.⁸⁶ Superior courts such as the High Court have the jurisdiction of determining cases that relate to the environment.⁸⁷ Furthermore, courts such as the Environmental and Land Court (ELC) are to be guided by constitutional principles that include the provision of justice to all,⁸⁸ the provision of justice without delay⁸⁹ and its provision without undue regard of procedural technicalities.⁹⁰ The courts may also adopt alternative dispute mechanisms that will resolve environmental issues.⁹¹ However, these mechanisms are not to be repugnant to justice or in contradiction with the constitution.⁹²

⁸⁰ Constitution of Kenya, Chapter 5

⁸¹ Ibid, Article 69(1) (a)

⁸² Ibid, Article 69(1) (g)

⁸³ Ibid, Article 69(1) (h)

⁸⁴ Ibid, Article 70(1)

⁸⁵ Ibid, Article 70(3)

⁸⁶ Ibid, Article 70 (2)

⁸⁷ Ibid, Article 162(2) (b)

⁸⁸ Ibid, Article 159 (2) (a)

⁸⁹ Ibid, Article 159 (2) (b)

⁹⁰ Ibid, Article 159 (2) (d)

⁹¹ Ibid, Article 159(2) (c)

⁹² Ibid, Article 159(3)

3.3 Environmental Management and Coordination Act, 1999 (EMCA)

The enactment of this Act served as a turning point in environmental management in Kenya. It provided for the assimilation of environmental concerns into national policies and projects. The Act establishes a legal framework for environmental management and is inclusive of the structural and institutional framework.⁹³ It is also read together with the Environmental Management and Coordination (Amendment) Act, 2015.⁹⁴

The EMCA guarantees every person the right to a clean and healthy environment and bestows upon them the duty to protect and improve it.⁹⁵ The Act gives a person the right to seek redress from the High Court in instances where they feel that their entitlements have been infringed upon.⁹⁶ The High Court in exercising its jurisdiction will make a ruling in accordance with the principles of sustainable development.⁹⁷ However, a person must demonstrate that their actions were not frivolous, vexation or an abuse of the court process.⁹⁸

The EMCA establishes the National Environmental Council,⁹⁹ whose major function is to formulate national environmental policies¹⁰⁰ and promote cooperation of various departments and local authorities.¹⁰¹ The Act also establishes the National Environmental Management Authority (NEMA),¹⁰² whose duty is to supervise and coordinate matters relating to the environment.¹⁰³ It is also charged with monitoring the environment and its protection against environmental degradation.¹⁰⁴ Furthermore, it is suggested to be the principal instrument of Government in the

⁹³ Claire Nasike, 'How Familiar Are You With The Kenyan Environmental Laws?' (*The Environment Enthusiast*, 2016) <<https://conservationatheart.wordpress.com/2016/02/27/how-familiar-are-you-with-the-kenyan-environmental-laws/>> accessed 7 July 2020.

⁹⁴ David Okul, 'Review And Critique Of EMCA As Kenya'S Principal Tool Of Environmental Governance - Silvica: Blog For Sustainable Development' (*Silvica: Blog for Sustainable Development*, 2019) <<https://silvica.site/review-and-critique-of-emca-as-kenyas-principal-tool-of-environmental-governance/>> accessed 7 July 2020.

⁹⁵ Environmental Management and Coordination Act, Section 3(1).

⁹⁶ Ibid, Section 3(3).

⁹⁷ Ibid, Section 3(5).

⁹⁸ Ibid, Section 3(4).

⁹⁹ Ibid, Section 4(1).

¹⁰⁰ Ibid, Section 5(a).

¹⁰¹ Ibid, Section 5(c).

¹⁰² Ibid, Section 7(1).

¹⁰³ Ibid, Section 9(2) (a).

¹⁰⁴ Ibid, Section 9(2) (1).

implementation of environmental policies.¹⁰⁵ In respect of that, it advises the government on emerging conventions and treaties and their application in Kenya's legal framework.¹⁰⁶

Conservation of water resources is explicitly provided for under Section 42 and 43 of the EMCA. However, any development in water-catchment areas is possible only after an Environmental Impact Assessment (EIA). The Act also provides directives on the protection of other natural resources¹⁰⁷ and stipulates guidelines for orders for restoration, conservation and environmental assessment.¹⁰⁸ Furthermore, the Act stipulates that projects under the 2nd Schedule have to be subjected to an Environmental Impact Assessment in order for them to acquire licenses.¹⁰⁹ In addition, the Act provides for a committee that recommends water quality, radiation, noise, sewage and general pollutions standards.¹¹⁰

Lastly, the EMCA makes any form of pollution an offence and a person who contravenes any of its provisions, on conviction is liable for a fine and/or imprisonment.¹¹¹

3.4 Environmental and Land Court Act¹¹²

The Environmental and Land Court Act was assented on 27th August, 2011 and it commenced on 30th August, 2011. The Act was established pursuant to Article 162 (2) (b) of the CoK, 2010. With respect to the constitutional principles of administering justice,¹¹³ the Act's overriding principles include; the facilitation of just, expeditious, proportionate and accessible resolution of environmental disputes.¹¹⁴

The Act establishes the Environmental and Land Court (ELC).¹¹⁵ The CoK granted the ELC status of the High Court under Article 162(2) (b). Furthermore, Article 169(5), prohibits the High Court

¹⁰⁵ Ibid, Section 9(1).

¹⁰⁶ Ibid, Section 9(2) (f).

¹⁰⁷ Ibid, Section 47-56

¹⁰⁸ Ibid, PART IX

¹⁰⁹ Ibid, Section 58

¹¹⁰ Ibid, Section 71

¹¹¹ Ibid, Section 144

¹¹² Cap 32, Laws of Kenya.

¹¹³ Constitution of Kenya, Article 159(2).

¹¹⁴ Environmental and Land Court Act, Section 3.

¹¹⁵ Ibid, Section 4

from dealing with disputes that are especially reserved for the ELC. The ELC has the jurisdiction to hear environmental and land disputes such as; environmental planning and protection, climate issues, land use planning...., compulsory acquisition of land, land administration and management, public, private and community land, contracts and any other disputes relating to environment and land.¹¹⁶

The ELC in exercising its jurisdiction is guided by the principles of sustainable development¹¹⁷ and is not bound by procedural technicalities.¹¹⁸ The principles include public participation, cultural and social principles, international co-operation, intergenerational and intragenational equity, polluter-pays and pre-cautionary principles.¹¹⁹ However, the ELC is not limited to these principles. Other guiding principles include; the principle of land policy,¹²⁰ judicial authority,¹²¹ national values and principles of governance¹²² and principles of public service.¹²³

Due to the complexity of environmental litigation, the ELC Act provides for strict qualifications for judges. It stipulates that judges of the ELC must possess the qualifications that have been provided for under Article 166(2) of the CoK. More so, they must have had at least ten years of experience as an academic or legal practitioner in the field of environment and land.¹²⁴ The judges once appointed are assured security of tenure in line with the constitution.¹²⁵

The ELC has power to give orders and grant reliefs.¹²⁶ Appeals from the ELC are taken and heard by the Court of Appeal.¹²⁷ In any event the court may employ Alternative Dispute Mechanisms in line with Article 159 (2) of the CoK.¹²⁸ More so, the court offers the possibility of self-

¹¹⁶ Ibid, Section 13(a)-(e).

¹¹⁷ Ibid, Section 18(a).

¹¹⁸ Ibid, Section 19(1).

¹¹⁹ Ibid, Section 18(a) (i)-(iv).

¹²⁰ Constitution of Kenya, Article 60 (1).

¹²¹ Ibid, Article 159.

¹²² Ibid, Article 10(2).

¹²³ Ibid, Article 232 (1).

¹²⁴ Environmental and Land Court, Section 7(1) (a) - (b).

¹²⁵ Ibid, Section 8.

¹²⁶ Ibid, Section 13(7).

¹²⁷ Ibid, Section 16.

¹²⁸ Ibid, Section 20(1).

representation in any of its proceedings.¹²⁹ The Act also provides sanctions under Section 29 of the ELC Act that may be employed when a person refuses or fails to obey an order or direction of the Court.

3.5 Institutional Framework

The Judiciary is an independent custodian of justice.¹³⁰ Its main function is to interpret and apply the laws of the country. It acts as the final arbiter in matters that touch on and concern the exercise of power, protection of legal rights and the enforcement of duty.¹³¹

Before the Constitution of Kenya 2010, Kenya had no environmental laws that addressed environmental rights violations. Environmental cases were a private law affair and litigants heavily relied on common law to redress environmental breaches.¹³² The narrow interpretation of *locus standi* led to the limitation of procedural access to environmental justice. Aggrieved parties were required to prove injury and a person could not institute a claim on behalf of another person.¹³³ During this period, the framework of common law proved to be too restrictive for environmental cases and there was need to develop environmental rights in the new Constitution.

The current constitution enables environmental protection and legislation. The new rules of *locus standi* display flexibility and aggrieved parties are not required to prove loss or injury.¹³⁴ In addition, the constitution divides the courts into two; Superior courts and Subordinate Courts. The Superior courts comprise of the Supreme Court, Court of Appeal and the High courts. The Subordinate courts consist of the Magistrates courts; the Kadhis' courts, the Court Martial and any other court or tribunal established by any legislation.¹³⁵

¹²⁹ Environmental and Land Court Act, Section 22.

¹³⁰ 'Overview – The Judiciary Of Kenya' (*Judiciary.go.ke*) <<https://www.judiciary.go.ke/about-us/overview/>> accessed 3 July 2020.

¹³¹ Maurice Odhiambo, 'The Role Of Courts In Environmental Management: The Case Of Kenya' (Post Graduate, University of Nairobi 2003).

¹³² Joel Bosek, 'Implementing Environmental Rights In Kenya's New Constitutional Order: Prospects And Potential Challenges' (2014) 2 AHRLJ 25.

¹³³ Maurice Odhiambo, 'The Role Of Courts In Environmental Management: The Case Of Kenya' (Post Graduate, University of Nairobi 2003).

¹³⁴ Constitution of Kenya, Article 70(2).

¹³⁵ *Ibid*, Article 169(1).

The Supreme Court is the highest court in the country and its decisions binds all other courts.¹³⁶ It has jurisdiction to hear appeals from the Court of Appeal and any other court or tribunal provided for by the national legislation.¹³⁷ The appeals involve matters relating to the interpretation of the Constitution or matters that are certified by the Supreme Court or Court of Appeal to be of public importance.¹³⁸ The Court, upon request, offers advisory opinion to the national government, county government and state organs.¹³⁹

The Constitution under Article 164 establishes the Court of Appeal.¹⁴⁰ It has jurisdiction to hear and determine appeals from the High Court and any other court or tribunal whose appeals lie to the Court of Appeal.¹⁴¹

Article 165 of the Constitution establishes High Courts. These courts have unlimited original jurisdiction to hear both civil and criminal matters. They also have the jurisdiction to determine whether any fundamental rights have been violated, threatened or infringed and can hear appeals from tribunals relating to the appointment or removal of officials. In addition, they can preside over matters that relate to the interpretation of the Constitution and they have supervisory jurisdiction over subordinate courts.¹⁴²

Magistrates' courts have the jurisdiction to hear both criminal¹⁴³ and civil matters.¹⁴⁴ Previously, they were empowered to hear environment and land cases. However, this position changed as the Court of Appeal in *Malindi Law Society v Attorney General & 4 others [2016]*, held that Section 26 of the ELC Act was unconstitutional and the conferment of jurisdiction to deal with land and environment matters to Magistrates' Courts was inconsistent with the Constitution.¹⁴⁵ The jurisdiction to hear and determine land and environment matters has now been limited to the ELC. Furthermore, the Supreme Court, following the decision of the Court of Appeal, ruled that judges

¹³⁶ Ibid, Article 163(7).

¹³⁷ Ibid, Article 163(3) (b).

¹³⁸ Ibid, Article 163(4).

¹³⁹ Ibid, Article 163 (6).

¹⁴⁰ Ibid, Article 164(1).

¹⁴¹ Jurisdiction Act, 2012, Section 3(1).

¹⁴² Constitution of Kenya, Article 165.

¹⁴³ Magistrates Act, 2015, Section 6.

¹⁴⁴ Ibid, 2015, Section 7.

¹⁴⁵ eKLR.

of the ELC were only to handle environment and land matters as per Article 162 of the Constitution.¹⁴⁶

3.6 Case Law

Overtime courts have promoted environmental protection by delivering decisions that have promoted sustainable development in several jurisdictions as discussed below.

In the case of *Waweru v Republic [2006]*,¹⁴⁷ the court affirmed the importance of achieving sustainable development in the country and that it is the responsibility of state parties to approve sustainable development. The Supreme Court in the case of *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*¹⁴⁸ ruled that the right to a clean environment is fundamental and that there is intergenerational responsibility of maintaining a clean environment for future generations. Furthermore, it is stated that the concept of sustainable development is interlinked with the right to a clean and healthy environment.

In addition, in the case of *Shell v Farah*,¹⁴⁹ the Court of Appeal in its decision was influenced by the concept of sustainable development despite there not being any reference to any constitutional provision, statute or treaty that dealt with the right to environment and sustainable development. By ordering for the rehabilitation of damaged land the court protected the interests of the future and present generations which is in line with sustainable development. Furthermore, in the case of *MC Mehta v Union of India and others*,¹⁵⁰ the court was guided by the principles of the Stockholm Declaration and the Indian Constitution which both promoted the right to a clean environment and stipulated that state parties are mandated to protect and improve the environment for future generations.

The cases reviewed show that courts have made strides in the implementation and enforcement of sustainable development. The application of guiding principles of sustainable development in

¹⁴⁶ Collins Odote, 'Will Supreme Court Ruling End Turf Wars?' *Business Daily* (2017).

¹⁴⁷ eKLR.

¹⁴⁸ 33 ILM 173 (1994) (Philippines).

¹⁴⁹ *Shell Petroleum Development Company Ltd v Councillor FB Farah and others* (1995) 3 NWLR 148 (Nigeria).

¹⁵⁰ 1988 AIR 1115, SCR (2) 530 (India).

rendering decisions by judges, has led to the promotion and enforcement of the principle of sustainable development.

3.7 Conclusion

Kenya has an elaborate framework that provides for the protection of the environment and sustainable development. The adoption of institutional and legislative mechanisms has enabled Kenya to protect its environment. Furthermore, the Constitution has sought to address environmental protection and sustainable. It is also evident that the judiciary has a crucial role in the attainment of sustainable development in a country. Since they are the final arbiters, they can be instrumental in the promotion of compliance and through the inclusion of principles of sustainable development in their decision making, the country can be geared towards achieving sustainable development.

CHAPTER FOUR

COMPARATIVE ANALYSIS ON THE INCORPORATION OF SUSTAINABLE DEVELOPMENT IN THE ENVIRONMENT COURT: A CASE OF NEW SOUTH WALES (NSW)

4.1 Introduction

The achievement of environmental sustainability is dependent on all arms of government as well as other relevant stakeholders.¹⁵¹ The judiciary's importance lies in its ability to promote environmental sustainability, uphold the rule of law and ensure that there is an equitable balance between environmental, social and developmental consideration in its judgements and declarations.¹⁵²

This chapter analyzes New South Wales Land and Environment Court, its history and the role played by the courts in solving environmental disputes. The Land and Environment Court (LEC) is globally considered as one of the best independent environment Court. It is a specialist court that gives considerable attention to ecologically sustainable development principles in its reasoning, thus increasing the confidence of the court as an institution that actively pursues the agenda of sustainability.¹⁵³ It is for these reasons that this study chooses to focus on New South Wales' experience to determine whether Kenyan courts can attain sustainable development.

4.2 History and Development of New South Wales Land and Environment Court

The Land and Environment Court Act established the LEC.¹⁵⁴ It was established as a superior court of record¹⁵⁵ in the era of tribunal creation in Australian administrative law.¹⁵⁶ Tribunals were

¹⁵¹ Honourable Justice Brian J. Preston (*Lec.justice.nsw.gov.au*, 2006) <http://www.lec.justice.nsw.gov.au/Documents/preston_the%20role%20of%20the%20judiciary%20in%20promoting%20sustainable%20development.pdf> accessed 8 July 2020.

¹⁵² United Programme, 'UNEP Global Judges Programme' (*Wedocs.unep.org*, 2005) <<https://wedocs.unep.org/handle/20.500.11822/8406>> accessed 8 July 2020.

¹⁵³ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁵⁴ Brian J. Preston, 'Benefits Of Judicial Specialization In Environmental Law: The Land And Environment Court Of New South Wales As A Case Study' (2012) 29 *Pace Environmental Law Review*.

¹⁵⁵ Land and Environment Court Act, Section 5(1).

¹⁵⁶ P. Ryan, 'Court Of Hope And False Expectations: Land And Environment Court 21 Years On' (2002) 14 *Journal of Environmental Law*.

established to hear merit appeals from administrative decisions. They relied on affordable and informal procedures and comprised of lay members with expertise in relevant areas to assist in challenging administrative areas.¹⁵⁷ However, the LEC was established as a court rather than a tribunal. This was to curb federal problems that arose from judicial institutions that were undertaking merit reviews.¹⁵⁸

The evolution of the LEC was due to the increase in focus of environmental protection in New South Wales (NSW) legislation.¹⁵⁹ The LEC has the same legal standing as the Supreme Court of NSW.¹⁶⁰ It comprises of judges and science-technical commissioners who are experts in areas of environmental planning. The Court is a ‘one-stop shop’ for deciding matters relating to land use and planning and environmental protection.¹⁶¹ Its main role is the interpretation of the new found environmental law in NSW and its operation. Furthermore, it provides guidance on how environmental law can develop as previously NSW did not have legislation on the environment.¹⁶²

The LEC’s jurisdiction is statutory and exclusive.¹⁶³ It is the only court in NSW that hears an extensive amount of disputes that relate to environmental planning. Its jurisdiction is also specific, in that there is distribution of the workload into seven different classes.¹⁶⁴ They include but are not limited to; merit appeals,¹⁶⁵ judicial review actions¹⁶⁶ and criminal matters.¹⁶⁷ These classes are

¹⁵⁷ Peter Cane and Leighton McDonald, *Principles Of Administrative Law: Legal Regulation Of Governance* (Oxford University Press 2008).

¹⁵⁸ Elizabeth Fisher, 'JURISDICTIONAL' FACTS AND 'HOT' FACTS: LEGAL FORMALISM, LEGAL PLURALISM, AND THE NATURE OF AUSTRALIAN ADMINISTRATIVE LAW' (2015) 38 Melbourne University Law Review.

¹⁵⁹ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁶⁰ Land and Environment Court Act, Section 7-9

¹⁶¹ The Hon. Justice Nicola Pain and Sarah Wright, 'The Rise Of Environmental Law In New South Wales And Federally: Perspectives From The Past And Issues For The Future' (*Lec.justice.nsw.gov.au*, 2003) <http://www.lec.justice.nsw.gov.au/Documents/pain_the_rise_of_environmental_law.pdf> accessed 14 August 2020.

¹⁶² Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁶³ Land and Environment Court Act, Section 16.

¹⁶⁴ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁶⁵ Land and Environment Court Act, Section 17-19

¹⁶⁶ *Ibid*, Section 20

¹⁶⁷ *Ibid*, Section 21-21B

subject to different rules depending on the composition of the Court and its procedures. The different classes allow the LEC to act as an appellate court in certain cases.¹⁶⁸ Furthermore, some cases are exclusively reserved for the judges and the court¹⁶⁹ while others such as merit appeals employ the guidance of both the commissioners and the judges.¹⁷⁰

The LEC's jurisdiction is equipped by fifty-nine environmental and planning statutes which comprehensively cover environmental issues.¹⁷¹ These acts also contain clauses that promote sustainable development.¹⁷² Furthermore, the LEC's adoption of arbitrary rules of procedure have ensured that there is efficient case management.¹⁷³

Distinct classes in the LEC's jurisdiction and its environmentalist agenda have furthered the development of sustainable development (SD) principles. Regardless of the administrative law doctrine being ambiguous, it has been central in the usage of SD principles in the LEC's case law. Since its application is dependent on a particular statutory framework, the LEC has employed judicial techniques that go beyond this doctrine enabling the SD principles to be considered as relevant justifications in the Court's reasoning.¹⁷⁴

Furthermore, the doctrine is significant in the LEC SD case law through the application of merit appeals.¹⁷⁵ These appeals are considered to be judicial decisions that the LEC relies and uses the

¹⁶⁸ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁶⁹ Land and Environment Court Act, Section 33(2)

¹⁷⁰ Ibid, Section 33(1)

¹⁷¹ Justice Peter Biscoe, 'LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES JURISDICTION, STRUCTURE AND CIVIL PRACTICE AND PROCEDURE' (*Lec.justice.nsw.gov.au*, 2010)

¹⁷² Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁷³ Brian J. Preston, 'Benefits Of Judicial Specialization In Environmental Law: The Land And Environment Court Of New South Wales As A Case Study' (2012) 29 *Pace Environmental Law Review*.

¹⁷⁴ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁷⁵ Stephen Tromas, *High Talk And Low Cunning*: 'Putting Environmental Principles Into Legal Practice' (1995).

SD principles to give a justification of its decisions which in turn become precedents relied on by the LEC.¹⁷⁶

4.3 Comparative Analysis

The most conspicuous difference between Australia's and Kenya's courts is the structure of the court systems and the composition of their environment courts. Australia's court system is one which is complex and primarily based on the United Kingdom's Westminster system. The hierarchy of the courts consists of the High Court being the highest court in Australia. It comprises of a chief justice and six other judges. Along with the High Court are three federal courts which are all headed by a chief justice. Lastly are the state courts which vary from state to state in terms of hierarchy. For example, in New South Wales where there is a Local Court, a District Court and the Supreme Court which is the superior court in the state.¹⁷⁷

The Kenyan court system is however different from the Australian court system. The court system in Kenya comprises of superior courts and subordinate courts. The superior courts are made up of the Supreme Court, Court of Appeal, High Court, Environment and Land Court and the Employment and Labour Court. The subordinate courts comprise of the Magistrate Courts, Martial Courts and Kadhi's Courts.¹⁷⁸

The NSW environment court comprises of 6 judges and 21 non-legally trained commissioners. The commissioners are chosen based on their science-technical knowledge and expertise on environmental matters.¹⁷⁹ The judges of the LEC have the same rank and status as those of the Supreme Court. They also have the capacity to act as judges of the Supreme Court.¹⁸⁰ In comparison to Kenya's ELC composition, the ELC has a presiding judge and a number of judges

¹⁷⁶ P. Williams, 'The Land And Environment Court 'S Planning Principles: Relationship With Planning Theory And Practice' (2005) 22 Environmental and Planning Law Journal.

¹⁷⁷ Jodie Thomson, 'How Does The Court System Work In Australia? | Legalvision' (*LegalVision*, 2016) <<https://legalvision.com.au/an-introduction-to-australian-court-hierarchy/>> accessed 16 August 2020.

¹⁷⁸ 'Overview – The Judiciary Of Kenya' (*Judiciary.go.ke*) <<https://www.judiciary.go.ke/about-us/overview/>> accessed 16 August 2020.

¹⁷⁹ George Pring and Catherine Pring, *Environmental Courts & Tribunals* (UN Environment 2016) <<http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf>> accessed 17 August 2020.

¹⁸⁰ Brian J. Preston, 'Benefits Of Judicial Specialization In Environmental Law: The Land And Environment Court Of New South Wales As A Case Study' (2012) 29 Pace Environmental Law Review.

that are determined by the Judicial Service Commission (JSC).¹⁸¹ The appointed judges of the ELC are required to have at least ten years of experience as an academia or legal practitioner and must have knowledge in land and environment matters.¹⁸² Experts are only called upon to provide evidence that sheds light on difficult or complex facts of a case.¹⁸³

In a bid to contribute towards sustainable development and environmental protection in Kenya, the inclusion of specifically science-trained judges in the ELC, acting as co-decision –makers, could potentially lead to the deliverance of comprehensive, fair and balanced judgements.

In NSW, SD principles have an independent role in the LEC’s decisions. The LEC employs SD’s principles mandatory considerations in its reasoning and does not require linking its reasoning to any applicable statutory framework. The SD’s require no legal reason for their relevance. By employing SD principles in this way the LEC has encouraged progressive reasoning and has ingrained these principles in its court’s case law.¹⁸⁴

Furthermore, the LEC has used these principles to inform its sentencing. This is seen in the case of *Bentley v Gordon [2005]*¹⁸⁵ where in the sentencing the judge gave a harsher sentence upon being informed by the SD principle of conservation of biological diversity. The application of SD principles especially in a court’s sentencing decision in criminal cases demonstrates how they are entrenched in the court’s reasoning.¹⁸⁶

Kenya’s ELC is guided by its statutory framework. The EMCA includes SD principles in its provisions. However, these principles are not mandatory considerations and their usage is either

¹⁸¹ Environment and Land Court Act, Section 5.

¹⁸² Ibid, Section 7(1) (b).

¹⁸³ (*Kptj.africog.org*) <<http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf>> accessed 17 August 2020.

¹⁸⁴ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

¹⁸⁵ NSWLEC 695.

¹⁸⁶ Eloise Scotford, 'THE ROLE OF ENVIRONMENTAL PRINCIPLES IN THE DECISIONS OF THE EUROPEAN UNION COURTS AND NEW SOUTH WALES LAND AND ENVIRONMENT COURT' (PhD, Magdalen College 2010).

guided by the environmental framework or left to the discretion of the court. Including these principles as mandatory considerations in the ELC will enable the court to progressively achieve sustainable development and the promotion of the right to a healthy environment.

More so, allowing the SD principles to inform the ELC in the sentencing of cases ensures the safeguarding of the right to a healthy environment and the promotion of sustainable development as these principle are entrenched in the court's reasoning.

The NSW has a comprehensive multi-door courthouse that offers a dispute resolution center that is well suited for resolving environmental disputes.¹⁸⁷ It has a host of dispute resolution services under one roof that enable the matching of a dispute to the appropriate dispute resolution process. The array of process include both in house and external. The in house services include mediation, conciliation, adjudication and neutral evaluation.¹⁸⁸ Parties are able to access these services both at the initial stage of the case and/or during the case. Such an approach is argued to be the cornerstone of achieving sustainable development.¹⁸⁹

The CoK under Article 159(2) (c) allows the ELC to invoke the use of Alternative Dispute Resolution (ADR) in the resolution of environmental disputes. Furthermore, the ELC Act makes provisions for the use of ADR under Section 20. However, the ELC is yet to fully implement the use of ADR in settling environmental disputes. It is therefore suggested that the ELC adopts either court- annexed ADR or match the disputes with appropriate dispute resolutions processes. In the implementation of ADR in its court, the ELC should take into consideration stakeholders' obligations, and sustainable development.

¹⁸⁷ George Pring and Catherine Pring, *Environmental Courts & Tribunals* (UN Environment 2016) <<http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf>> accessed 17 August 2020.

¹⁸⁸ Brian J. Preston, 'Benefits Of Judicial Specialization In Environmental Law: The Land And Environment Court Of New South Wales As A Case Study' (2012) 29 *Pace Environmental Law Review*.

¹⁸⁹ George Pring and Catherine Pring, *Environmental Courts & Tribunals* (UN Environment 2016) <<http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf>> accessed 17 August 2020.

Furthermore, the implementation of ADR requires the proficiency of those concerned with the ADR process. It should also take into consideration the nature of the case. The court process is tedious and long, and some cases require urgency as the deterioration of the environment may continue unless urgent measures are employed. Also, how a dispute might impact environmental protection and conservation should be taken into account. Sustainable development principles should highly inform the decision of the ELC to adopt and implement environmental ADR.¹⁹⁰

Public interest litigation has been at the forefront of NSW LEC throughout its history. The court's decisions have led to the advancement of public interest litigation. The facilitation of this litigation is seen through the court's decision to not require a public interest litigant to lodge security for the costs of the proceedings, not summarily dismiss proceedings on the ground of laches; and not necessarily require an unsuccessful public interest litigant to pay the costs of the proceedings.¹⁹¹ Kenya's ELC should borrow from this jurisdiction as such litigation has been able to make good contribution to environmental governance.¹⁹²

4.4 Conclusion

This Chapter outlines the environmental court in New South Wales and its experience in implementing sustainable development. Kenya in its law mentions sustainable development, however, it is yet to fully incorporate these principles as in the case of New South Wales. It has been established that it is of paramount importance that these principles are incorporated in an environmental court for a country to achieve and promote the right to clean and healthy environment.

¹⁹⁰ Renson Mulele Ingonga (*Journalofcmsd.net*, 2018) <<https://journalofcmsd.net/wp-content/uploads/2018/05/A-CASE-OF-THE-SPECIALIZED-ENVIRONMENT-AND-LAND-COURT-IN-KENYA.pdf>> accessed 18 August 2020.

¹⁹¹ Brian J. Preston, 'Benefits Of Judicial Specialization In Environmental Law: The Land And Environment Court Of New South Wales As A Case Study' (2012) 29 *Pace Environmental Law Review*.

¹⁹² Muigua Kariuki and Francis Kariuki, 'Kenya Law: Sustainable Development And Equity In The Kenyan Context' (*Kenyalaw.org*) <<http://kenyalaw.org/kl/index.php?id=1906>> accessed 18 August 2020.

CHAPTER FIVE

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes the research study. It includes the findings on the exploration of the right to clean and healthy environment in Kenya: comparative analysis of Kenya's Environment Land Court and New South Wales. It also includes conclusions and ties in recommendations that are in consonance with the research objectives and questions of the study. Conclusively, the conclusions and recommendations seek to test the hypotheses of the study.

5.2 Findings

The study began by shedding light on the depletion of Kenya's environment regardless of the laws and policies that have been enacted to ensure environmental protection and sustainability. The study shows that environmental law in Kenya has lagged behind even though public opinion has triumphed on matters of environmental protection. It further shows that the state has failed to provide provisions that ensure environmental rights and as a state it has given priority to its sovereignty over resources at the expense of its environmental security.

The study found that human rights and the environment are interlinked. Rights such as the right to life, health adequate food and the right to water and sanitation form an integral part in the achievement of environmental rights. The study established that the state has an obligation to ensure the protection and conservation of the environment in order for its citizens to enjoy other such human rights.

In discussing the right to life and its correlation with the environment, the study established that the quality of the environment affects the quality of life. The study relied on the Rio Declaration to lay emphasis on the linkage between life and the environment. Further development of the correlation was established through the case of Martin Osano, where the right to life, being a supreme right with influence over other rights, was stated as being dependent on a clean and healthy environment.

The study also revealed Kenya's adoption of an elaborate framework that seeks to protect the environment and implement sustainable development. It also found that the courts are instrumental in the promoting and ensuring compliance and inclusion of sustainable principles in their decision-making. However, regardless of Kenya having sustainable development in its laws and policies, the courts are yet to fully implement and incorporate sustainable development principles.

5.3 Conclusions

The conclusion of the study is tied in with the objectives of the research. The study proves the hypothesis that sustainable development is achieved through the promotion of a clean and healthy environment. Furthermore, the study shows that the inclusion, implementation and incorporation of SD principles through the courts, the right to clean and healthy environment can be achieved.

The first objectives of the study were to establish the importance and the content of the right to clean and healthy environment. The study concludes that the Kenyan government is yet to achieve the right to clean and healthy environment. From the findings of the study, it is evident that human rights are interlinked with the environment and it is the responsibility of the government to ensure the protection of the environment so as to guarantee other human rights. By failing to do so, the Kenyan government violates other human rights.

The second objective was to examine and expound on the legislative framework that governs the right to clean and healthy environment. The study concludes that although Kenya has made great stride in ensuring the inclusion of environmental laws, it lags behind in ensuring that environmental rights are guaranteed and protected.

The third objective of the research study was to compare and analyze how the NSW court has implemented sustainable development in its laws. The study concludes that the NSW LEC is a progressive court that has guaranteed environmental rights protection through the inclusion of SD principles. The findings of the study show how the structure and reasoning of a court can influence a court's ability to achieve sustainable development.

5.4 Recommendations

Based on the above findings and conclusions, the study recommends:

First, that the Kenyan ELC includes science trained judges as co-decisions makers. This will ensure that there is no barrier in accessing justice and judgements are comprehensively delivered.

Secondly, that the ELC includes SD principles as mandatory considerations rather than having to link its reasoning to applicable statutory laws. The ELC should also be informed by the principles in the sentencing of cases. This will ensure the progressive realization and the safeguarding of the right to clean and healthy environment.

Thirdly, that the ELC adopts court-annexed ADR or matches disputes with appropriate dispute resolution processes. Furthermore, the implementation of ADR in the ELC should be take into consideration relevant stakeholders' obligations and sustainable development.

Finally, that the ELC takes into consideration public interest litigation. It should be able to facilitate this type of litigation as it is a method used for environmental standard setting and promotes the advancement of environmental matters.

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