

Reconceptualising the Right to Clean and Healthy Environment in Kenya

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Abstract

This paper examines the right to clean and healthy environment as envisaged in the Constitution of Kenya 2010, its legal underpinnings and the extent to which the same has been realised for the Kenyan people. It traces the legal foundations of this right in the international environmental discourse as well as its place in the Kenyan law. The paper argues that there is need to redefine the right to clean and healthy environment as a fundamental right, classify it with the other basic rights as opposed to the existing notion that it is a third generation right. The writer asserts that this right to a clean and healthy environment can be equated to the right to life. Therefore, there is need to reconceptualise and enhance the same in our legal framework so as to make it a reality.

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By Kariuki Muigua*

1. Introduction

This paper examines the right to clean and healthy environment as envisaged in the Constitution of Kenya 2010, its legal underpinnings and the extent to which the same has been realised for the Kenyan people. It traces the legal foundations of this right in the international environmental law discourse as well as its place in the Kenyan law. The paper also argues that there is need to reconceptualise the concept of right to clean and healthy environment with a view to enhancing its protection and enforcement for the Kenyan people. The writer proffers the view that there is a need to clarify and define this right so as to make it realisable.

2. Defining the Right to Clean and Healthy Environment

Environment is defined as all the physical, chemical and biological factors external to a person, and all the related behaviours.¹ The *Environmental Management and Coordination Act, 1999* (EMCA), defines “environment” to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.² Environment has also been defined as “...the whole complex of climatic, adaptic and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community...”³ The *Draft International Covenant on Environment and*

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¹ World Health Organization, “Preventing disease through healthy environments,” (World Health Organization, Geneva, 2006).

² Act No. 8 of 1999, Laws of Kenya, s.2.

³ Webster’s *New World Dictionary* 3rd ed (Cleveland College, Cleveland, 1998) p.454; P. Birnie & A. Boyle, *International Law & the Environment*, 3rd ed. (Oxford University Press, Oxford, 2009), p. 3.

*Development*⁴ defines environment to mean “the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities.”⁵

It has been argued that the problem in declaring a *right to a clean and healthy environment* (emphasis added) as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated. Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?⁶ For instance, in the Kenyan case of *Pastor James Jessie Gitahi & 202 others v Attorney General*,⁷ the Court observed that “...prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibration transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the level of noise through the Regulations”.⁸ The Court also stated that “Part II of the *Regulations*⁹ has a general prohibition against, “loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. In determining whether the noise is loud several factors are considered including the time of the day, the proximity to a residential neighbourhood, whether the noise is recurrent intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making the noise.” According to the Court, “a violation of the general prohibition is an offence and attracts a penalty under the Act and the Regulations.”

Although there is no single universally accepted definition of what entails the environment, it is clear from the foregoing definitions that environment goes beyond the physical

⁴ International Union for Conservation of Nature and Natural Resources Environmental Policy and Law, Paper No. 31 Rev. 3, *Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL)*, 4th Ed., 2010.

⁵ Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 1991; *The Environment and Land Court Act, 2011*, No 19 of 2011, Laws of Kenya, s.2.

⁶ C. I., Okpara, ‘Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,’ *Journal of Politics and Law*, Vol. 5, No. 1; March 2012, pp. 3-8, p.6.

⁷[2013] eKLR, Petition No. 683 of 2009.

⁸ Para. 28.

⁹ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009, Legal Notice No. 61 of 2009.

surroundings to incorporate such issues as social and cultural conditions that influence the life of an individual or a community. It is, however, important to point out that the foregoing definitions of the right to a clean and healthy environment are now falling by the wayside in view of the fact that this right has been equated to life itself. It has been observed that while a number of States still refuse to recognize the human right to a clean environment, the international jurisprudence developed around numerous universally-recognized substantive rights, such as the right to life, health, food and housing, offers robust legal and conceptual bridges between the social, economic and environmental dimensions of sustainable development, and could shift priorities in the political economy of resource allocation and distribution.¹⁰ At the international level, it has been held that ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.’¹¹

The right to a clean environment openly became an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the environment and the enjoyment of basic rights.¹² However, it was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972)¹³. It declared that *man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations* (Emphasis added).¹⁴ It is noteworthy that the Declaration did not just recognise the right to a good quality environment but also placed a responsibility on human beings to protect and improve the environment for present and future generations. This position of rights and responsibility towards the environment is now widely accepted and it goes to the core of the sustainable development discourse.¹⁵

¹⁰ United Nations Non-Governmental Liaison Service, *Human Rights Approaches to Sustainable Development*, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015].

¹¹ ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 241, para. 29.

¹² United Nations General Assembly, *Problems of the Human Environment*, UNGA Res 2398(XXII) 3 December 1968.

¹³ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, UN Doc.A/CONF.48/14/Rev.1.

¹⁴ *Ibid*, Principle 1.

¹⁵ For instance, see Art. 69, Constitution of Kenya, 2010 (Government Printer, Nairobi).

Some human rights lawyers opine that the recognition of third generation rights will devalue the concept of human rights and divert attention from the already recognised first and second-generation rights.¹⁶ The right to a clean and healthy environment, as is with all environmental rights, has for a long time been grouped under the ‘third generation rights’ or ‘solidarity rights’. However, it is arguable that the right to clean and healthy environment is not a ‘third generation right’ but a *fundamental right*, (Emphasis added) a prerequisite for full enjoyment of all the other rights. It is a right, crucial for the realisation of the so-called first and second generation rights. Indeed, it has rightly been argued that when people must struggle to obtain the basic necessities of life, political freedoms and other human rights may appear meaningless to them.¹⁷ This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.¹⁸

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment to realisation of the other human rights especially the socio-economic rights.

2.1 Scope of the Right to Clean and Healthy Environment

The Constitution of Kenya¹⁹ guarantees the right of every person to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69²⁰; and to have obligations relating to the environment fulfilled under Article 70²¹.

¹⁶ See W.T., Olenasha, ‘The Enforcement Of Environmental Rights: A Case Study Of The New South African Constitutional Dispensation,’ *Thesis (LLM (Human Rights and Democratisation in Africa))* (University of Pretoria, 2001), available at http://repository.up.ac.za/bitstream/handle/2263/969/olenasha_wt_1.pdf?sequence=1&isAllowed=y [Accessed on 28/08/2015].

¹⁷ J.A. Downs, ‘A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right,’ *Duke Journal of Comparative & International Law*, Vol. 3, 1993, pp. 351-385 at p. 351.

¹⁸ *Ibid.*

¹⁹ Article 42, Constitution of Kenya 2010.

²⁰ Art. 69 outlines the State and individual obligations in respect of the environment. Clause (1) provides that the State shall—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree

These constitutional provisions do not clearly define what constitutes the right to clean and healthy environment. However, *Environmental Management and Coordination Act (EMCA)* defines the entitlement to a clean and healthy environment to include ‘access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes’.²² While the definition is broad, it may present a challenge in determining the mode of its enforcement. This is because of its main focus seems to be on ‘access’ to the environment as against concentration on the ‘status’ of the environment.

It is important to take cognisance of *Draft Principles on Human Rights and the Environment of 1994*,²³ an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles on Human Rights and the Environment* recognise the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

Principle 5 thereof declares that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. This is a broader description of the right to clean and healthy environment, which includes such aspects as elimination of environmental threats to life, health, livelihood, well-being or sustainable development. Indeed, this Declaration expressly states that such right must be recognised within and outside the national boundaries.

cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.

²¹ Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (2) thereof provides that on application under clause (1), the court may make any order, or give any directions, it considers appropriate—(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

²² S. 3(2), No. 8 of 1999, Laws of Kenya.

²³ Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

Principle 1 of the *Stockholm Declaration* refers to an ‘environment of a quality that permits a life of dignity and well-being’, while article 24 of the *African Charter on Human and Peoples’ Rights* (the African Charter)²⁴ refers to a ‘general satisfactory environment favourable for their development’. The broad definitions as offered by these legal instruments are important to ensure that the policy makers and other stakeholders consider all the important aspects of the environment. It is perhaps also on such broad definitions that courts and tribunals have declined to give narrow interpretation to the right to clean and healthy environment, even ruling that the right is equivalent to right to life.

The close link between economic and social rights and the environment was also affirmed in the Kenyan case of *Friends of Lake Turkana Trust v Attorney General & 2 others*²⁵ where the Learned Judge stated, *inter alia*, that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that “one set of rights is more important than another. All these rights of necessity need to be observed for a person to attain a reasonable livelihood.”²⁶

According to the World Health Organization (WHO), environmental health is concerned with all the physical, chemical, and biological factors external to a person, and all the related factors impacting behaviours. It encompasses the assessment and control of those environmental factors that can potentially affect health.²⁷ Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. WHO has reported that more than three million children under five die each year from environment-related causes and conditions. This, thus, makes the environment one of the most critical contributors to the global toll of more than ten million child deaths annually-as well as a very important factor in the health and well-being of their mothers.²⁸ WHO observes that polluted indoor and outdoor air, contaminated water, lack of adequate sanitation, toxic hazards, disease vectors, ultraviolet

²⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

²⁵ [2014] eKLR, ELC Suit No. 825 of 2012.

²⁶ *Ibid*, p.11.

²⁷ World Health Organization, *Environmental Health*, available at http://www.who.int/topics/environmental_health/en/ [Accessed on 1/09/2015].

²⁸ World Health Organization, *Children's environmental health: The environment and health for children and their mothers*, available at <http://www.who.int/ceh/publications/factsheets/fs284/en/> [Accessed on 1/09/2015].

radiation, and degraded ecosystems are all important environmental risk factors for children, and in most cases for their mothers as well.²⁹

On a general scale, it is believed that environmental hazards are responsible for an estimated 25% of the total burden of disease worldwide, and nearly 35% in regions such as sub-Saharan Africa.³⁰ In this regard, it has been argued that addressing the effects of the environment on human health is essential if we are to achieve the goal of health for all.³¹ Human health is believed to be connected to environmental health and that the two are mutually dependent.³²

The right to a clean and healthy environment is so interwoven with the realisation and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realisation of all the other basic rights, including life, health, livelihood and well-being, amongst others.³³ This right advocates for a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.³⁴

Human rights and the environment are said to be inherently interlinked, as the life and the personal integrity of each human being depends on protecting the environment as the resource base for all life.³⁵ It is noteworthy that the environment is the main reservoir for most of the resources necessary for realisation of economic and social rights. Therefore, efforts towards addressing threats to a clean and healthy environment must adopt an integrated approach that brings on board all actors, drawn from all the sectors especially those that address socio-economic needs of the society. For instance, with regard to health, it is rightly observed that the scope for creating a healthy environment is clearly not limited to hospitals and doctor's surgeries, but includes the myriad factors that influence health, agriculture and food, education, housing, employment status and working environment, water and sanitation, and health care

²⁹ World Health Organization, Children's environmental health: The environment and health for children and their mothers,' *op cit*.

³⁰ Health and Environment Linkages Initiative – HELI, *Health and Environment Linkages Initiative*, available at <http://www.who.int/heli/en/> [Accessed on 1/09/2015].

³¹ N. Higenbottam, 'Nurse's Role as an Environmental Activist,' p.2. Available at <http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf> [Accessed on 1/09/2015].

³² World Health Organization, *Human health under threat from ecosystem degradation*, 9 December 2005, available at <http://www.who.int/mediacentre/news/releases/2005/pr67/en/> [Accessed on 1/09/2015].

³³ See generally Y., Lador, 'The challenges of human environmental rights,' in *Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable*, (United Nations Environment Programme for the Geneva Environment Network, 2004).

³⁴ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' *op cit*, p. 5.

³⁵ F.X., Perrez, 'Key questions concerning the human rights and environment debate: An introduction,' in *Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable*, (United Nations Environment Programme for the Geneva Environment Network, 2004), p.4.

services.³⁶ Further, clean environment indicates freedom from dirt, noise, sound pollution, pollution, garbage, insanitary toilets, and improper disposal of animal waste, improper solid waste management systems.³⁷ These issues normally fall under the mandates of different authorities, as defined by law. This therefore calls for concerted efforts from various sectors to address the potential challenges that may arise in actualizing the right to clean and healthy environment.

The broad scope of the right to clean and healthy environment was affirmed by the Kenyan Courts in the case of *Peter K. Waweru v Republic*,³⁸ where the Court stated, *inter alia*, that ‘the right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.’³⁹ This right and the other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.⁴⁰

The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,⁴¹ that the “right to life guaranteed by article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life.” Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others*⁴², the Supreme Court interpreted the right to life to include the protection and preservation of the environment and ecological balance free from pollution of air and water.

In the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others* (smoking case), the Court stated that “*The word ‘life’ in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression ‘life’ to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by*

³⁶ N. Mohammad, ‘Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,’ *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192.

³⁷ *Ibid*, p.193.

³⁸ [2006] eKLR.

³⁹ *Ibid*, p.8.

⁴⁰ Principle 2.

⁴¹ AIR 1991 SC 420, 1991 (1) SCC 598.

⁴² 48 DLR 1996 (SC Bangladesh, 1996).

Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the “right to decent environment.”(Emphasis added)⁴³

In the case of *Peter K. Waweru v Republic*, the Court observed that “...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman...” It went further to state, “...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.”⁴⁴

In light of the foregoing case law, and in enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the right in question. These include the right, *inter alia*: to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; and to clean and safe water in adequate quantities.⁴⁵ Adequate fulfillment of these rights depends on proper and efficient mechanisms for protection of the right to clean and healthy environment.

The right to clean and healthy environment is inherently connected to the realisation of the other fundamental rights. Such broad approaches to realisation of other rights can go a long way in the protection of the right to clean and healthy environment, considering the central role played by the environment in meeting most the basic rights.

This is a demonstration of the broad definition that can be afforded the right to clean and healthy environment. It however remains a fluid concept that is largely determined or interpreted as per the prevailing law. There is a need to clearly and sharply define it in legal instruments so as to ensure its exercise.

⁴³ AIR 1999 Ker 385, p.11.

⁴⁴ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

⁴⁵ Constitution of Kenya, Art. 43(1).

2.2 National Courts and the Right to a Clean and Healthy Environment

It has been argued that while international law plays a vital role in establishing norms and offering a court of last resort for human rights violations, the reality is that most of the action to protect and fulfill rights occurs at the national level.⁴⁶ This is because, within countries, a constitution is the highest and strongest law, as all laws, regulations, and policies must be consistent with it. A constitution protects human rights, sets forth the obligations of the state, and restricts government powers. On a deeper level, constitutions are believed to reflect the most deeply held and cherished values of a society.⁴⁷

It has been pointed out that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.⁴⁸ Currently, a number of countries have devoted constitutional provisions to an enforceable right to a clean and healthy environment including, *inter alia*: Uganda⁴⁹, South Africa⁵⁰, Congo⁵¹ and Ecuador⁵². These provisions however mean little, because they cannot be enforced in the courts, which regard them as insufficient to provide legal standing to anyone who cannot give evidence of personal and direct environmental harm.⁵³

Where the requirement for *locus standi* has been dispensed with, the other impediment that comes in is the prerequisite that one must prove how their right to clean and healthy

⁴⁶ D.R. Boyd, 'The Constitutional Right to a Healthy Environment,' *Environment: Science and Policy for Sustainable Development*, July-August 2012, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html> [Accessed on 1/09/2015].

⁴⁷ *Ibid.*

⁴⁸ D.R. Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment,' *Review of European Community & International Environmental Law*, Vol. 20, No. 2, 2011, pp. 171-179 at p. 171.

⁴⁹ *Constitution of The Republic of Uganda*, 1995-S.39 provides that every Ugandan has a right to a clean and healthy environment.

⁵⁰ *Constitution of the Republic of South Africa*, 1996 –s. 24 provides that everyone has the right - to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁵¹ *Constitution of the Democratic Republic Of The Congo-Article 53* provides that all persons have the right to a healthy environment that is favorable to their development; they have the duty to defend it; The State ensures the protection of the environment and the health of the population.

⁵² Republic of Ecuador, *Constitution of 2008- Article 14* provides that the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (*sumak kawsay*), is recognized; Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

⁵³ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' *op cit*, p.6.

environment is likely to be denied, violated, infringed or threatened.⁵⁴ It seems that it would not suffice that the particular activity in question poses environmental threat, without necessarily proving direct threat to this right. Arguably, all one should be able to prove is likelihood of pollution or degradation of the environment. For example, in the Ugandan case of *The Environmental Action Network Ltd v Attorney General & NEMA*⁵⁵, the court held that the applicant, a public interest litigation group which had filed the application in its own behalf and on behalf of the non-smoking members of the public under Article 50 (2) of the Constitution, to protect their right to a clean and healthy environment, their right to life and the general good of public health in Uganda, could bring a public interest action on behalf of groups or individual members of the public although the applying organisation had no direct individual interest in the infringing acts it sought to have addressed. This is also to be found under Article 22(2) of the Constitution of Kenya.

The Court should be able to step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁵⁶ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.⁵⁷ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.⁵⁸

The implication of the foregoing is that if a party is unable to prove the denial, violation, infringement or threat for one reason or the other, then their guarantee to right to clean and healthy environment is likely to be defeated. Indeed, this was demonstrated in the case of

⁵⁴ See Constitution of Kenya, Art. 70(1).

⁵⁵ Misc. Application No. 39 of 2001 (High Court of Uganda).

⁵⁶ Art. 70(2).

⁵⁷ Art. 70(3); See also section 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

⁵⁸ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

*Republic v Lake Victoria South Water Services Board & another*⁵⁹ where the learned Judge observed that the applicants who claimed that their right to clean and healthy environment was likely to be contravened by the respondents if they were allowed to proceed with the implementation of a project, did not indicate clearly how their right to clean and healthy environment was likely to be infringed. However, the Judge went on to state that from the possible impacts set out in the Environmental Impact Assessment (EIA) Report that he had referred to in the case, there was no doubt that the applicants' right to clean and healthy environment would be breached unless adequate mitigation measures are put in place to meet these impacts.⁶⁰ The enforcement of the Constitutional provisions on the right to clean and healthy environment thus seems to be left to the discretion of the presiding Judge.

Recent decisions from the Kenyan Courts confirm this position. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*,⁶¹ the Learned Judge was of the opinion that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*⁶². The Court went further to state that the balance of convenience of jurisdiction lies with the Environment and Land Court by virtue of Article 70 of the Constitution which confers upon the court the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁶³

⁵⁹ [2013] eKLR, Miscellaneous Civil Application 47 of 2012; See also *John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others* [2014] eKLR, Formerly Petition No. 63 of 2012 Now ELC No. 867 OF 2012, where the Learned Judge stated that the Petitioners had not made any submissions to the effect that the projects undertaken by the Respondents, being expansion of a road/construction to a link road, would result to environmental degradation or in any way create unclean and unhealthy environment to the Petitioners. In the absence of specificity of the manner in which Arts 42, 69 and 70 had been violated, the Court found that there is no violation of the Petitioner's rights to a clean and healthy environment (p.13).

⁶⁰ Para. 14.

⁶¹ [2015] eKLR, Petition No. 6 of 2015.

⁶² No 19 of 2011, Laws of Kenya.

⁶³ Para 15.

In *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to entertain matters relating to violation of this right.⁶⁴ This case does not however seem to have settled the issue of jurisdiction.⁶⁵

Lack of clarity on which Court should handle matters relating to violation of the clean and healthy environment is, arguably, likely to affect efforts to realise the same for the Kenyan people.

To overcome such likely challenges, it is important to adopt a broader approach to protection of the right to clean and healthy environment. This should be an approach that does not only rely on proof by the complainant of actual or likely denial, violation, infringement or threat by the respondent, but one that also incorporates ecocentric values. It is also important to point out that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations, who may not be able to prove the likelihood of denial, violation, infringement or threat to the right. Courts have a duty to protect the right of such future generations.⁶⁶ The Court should, like in the case of *Peter K. Waweru (supra)*, be proactive in promoting environmental protection and conservation for sustainable development.⁶⁷

⁶⁴*Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others* [2015] eKLR, para.8.

⁶⁵ See also *Leisure Lodges Ltd v Commissioner of Lands And 767 others* [2016] eKLR; Mohammed Said vs. County Council of Nandi [2013] eKLR.

⁶⁶ See *Edgar Kipsase Choge, Harry Jumbati Mbiti, Fred Ombiri, Colleta Inzayi (Suing on behalf of Kamobon Village Residents) v China Overseas Engineering Group Co. Ltd & 3 others* [2017] eKLR where the learned Judge stated, inter alia:

As to irreparable loss which cannot be adequately compensated by an award of damages, I find the damage to the environment has far reaching effects which are not only confined to the current generation but to intrageneration. Even if individuals are compensated it can never be the same once the damage has been done. (Per M.A. Odeny, J., p.7).

⁶⁷ See also the case of *African Centre for Rights And Governance (ACRAG) &3 others v Municipal Council of Naivasha* [2017] eKLR, where the Learned Judge stated, inter alia:

16. I have considered the matter. This is an important if not welcomed public interest suit. It is vital that all persons be vigilant about the protection of the environment and any person litigating for the sustainability of the environment deserves applause. Of course, each case must be considered in light of the facts tabled and the applicable law.

The proposed approach was adopted in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*⁶⁸ where the Learned Judge observed that “...in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment....Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment....*”⁶⁹ (emphasis added)

As stated by the Judges in *Peter K. Waweru* case, “in the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.” Courts ought to protect this right, for all and going by the above decisions, it is arguable that courts have not done enough in playing this role. An approach that does not emphasize on the likely denial, violation, infringement or threat to the right to clean and healthy environment but one that focuses on the protection and conservation of the environment and its resources, is what is required if the Courts

20. It will be observed from Article 70 (3) above, that it is not necessary for one to demonstrate that they have suffered loss or injury, for them to move the court when claiming that the right to a clean and healthy environment has been violated or is under threat of violation. It is not therefore a requirement for the petitioners to show that they have personally suffered or that the presence of the dumpsite has directly caused them any direct harm. It is sufficient for the petitioners to point out, that there is an ongoing, or imminent threat of harm, to the environment.

33. I have no doubt in my mind that the facility in issue is a threat to a clean and healthy environment. Its operations are indeed illegal. The operation of the facility by the respondent and its successor, the County Government of Nakuru, violates the rights of the petitioners and indeed the rights of the residents of Naivasha, and of all persons resident in Kenya, to a clean and healthy environment as provided for in Article 42 of the Constitution. I do find that there has been a violation of this right by the respondent and now the County Government of Nakuru.

⁶⁸ [2013] eKLR, Environment and Land No. 273 of 2013.

⁶⁹ Paras 25 & 28.

are to ensure that all persons including those who cannot access justice through courts, enjoy the above right.

3. Reconceptualising the Right to Clean and Healthy Environment in Kenya

It is no longer in dispute, at least in Kenya, that there exists a human right to a clean and healthy environment recognised even by the Constitution. Ensuring full enjoyment of a clean and healthy environment, through effective environmental management, will provide multiple benefits to society and the economy.⁷⁰ This calls for a holistic, comprehensive and integrated approach to health and environment to protect both the environment and public health.⁷¹

Notable is the *European Charter on Environment and Health*⁷² which provides for both entitlements and responsibilities. Article 2 thereof provides that every individual has a responsibility to contribute to the protection of the environment, in the interests of his or her own health and the health of others. The Charter's provisions on principles for public policy are relevant to this discourse. It provides that, *inter alia*: Good health and wellbeing require a clean and harmonious environment in which physical, psychological, social and aesthetic factors are all given their due importance. The environment should be regarded as a resource for improving living conditions and increasing wellbeing; and that Governments, public authorities and private bodies should aim at both preventing and reducing adverse effects caused by potentially hazardous agents and degraded urban and rural environments.

The foregoing provisions, although not territorially applicable to Kenya, offer a stark reminder for the country on the special relationship between human health and environment and the best approaches to dealing with them. There is need for strengthening multisectoral cooperation, integrating environmental health concerns into all national and county environmental and health-related policies. Under the Fourth Schedule of the Constitution of Kenya, the National and County Governments have shared responsibilities when it comes to environment and natural resources. The National Government is tasked with protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—fishing, hunting and gathering; protection of animals

⁷⁰ United Nations Environmental Programme, "Human Health and the Environment," *UNEP Post 2015 Note No. 3*, available at <http://www.unep.org/roap/Portals/96/UNEP-Post-2015-Note-3.pdf> [Accessed on 2/09/2015].

⁷¹ J.P. Narain, "The challenge of health & environment: Profiling risks & strategic priorities for now & the future," *Indian Journal of Medical Research*, Vol. 136, No.2, August, 2012, pp. 185–191 at p. 186.

⁷²

and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.⁷³ It is also to come up with health policy; agricultural policy; and the energy policy including electricity and gas reticulation and energy regulation.⁷⁴ On the other hand, the functions and powers of the county are, *inter alia*: agriculture, including—crop and animal husbandry; livestock sale yards; plant and animal disease control; and fisheries.⁷⁵ They are also tasked with County health services, including, in particular— county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; and refuse removal, refuse dumps and solid waste disposal.⁷⁶ The other function of county governments is control of air pollution, noise pollution, other public nuisances and outdoor advertising.⁷⁷ The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment. The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness in the efforts to ensure realisation of the constitutional right to clean and healthy environment, for all.⁷⁸

⁷³ Fourth Schedule to the Constitution, Part I clause 22.

⁷⁴ Clauses 28, 29, 31.

⁷⁵ Fourth Schedule to the Constitution, Part II, Clause 1

⁷⁶ *Ibid*, clause 2.

⁷⁷ *Ibid*, clause 3.

⁷⁸ This was well articulated by the Learned Judge (Sila Munyao, J) in *African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR*, who ruled as follows:

44. This case has brought forth an important element touching on the management and conservation of our environment. I honestly do not know whether NEMA has conducted an audit of the manner in which all County Governments manage solid waste. I however doubt if NEMA has done so given what has revealed itself in this suit. I believe it is time that NEMA considered a countrywide audit and proceed to embark on measures to ensure that only licenced dumping facilities operate as required by law. NEMA also needs to introduce rules and regulations on the operation of such facilities and have mechanisms to ensure that these rules are followed. The aspect of licencing of transporters of waste also has to be considered. Rules need to be made and to be followed. The National Government also needs to get involved and work together with County Governments and NEMA so that solid wastes are properly managed. Funding will always be an issue and this should be looked at by both County and National Governments. We cannot continue risking the health and lives of Kenyans by failing to have properly managed solid waste management systems.

45. The time to act is now if we have to safeguard a good future for this and the future generations.

46. I therefore order that this judgment be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and to report to this court as earlier directed.

47. I also order that this judgment be served upon the Cabinet Secretary of the Ministry of Environment and Natural Resources and the Council of Governors to consider issues of policy, compliance with EMCA on the subject of solid waste management, cooperation, funding, and all other matters touching on this

Kenya's *Vision 2030* is the long-term development blueprint for the country, with various pillars that include economic, social and political pillars. The social pillar seeks to build a just and cohesive society that enjoys equitable social development in a clean and secure environment.⁷⁹ The transformation targets key social sectors, which include *inter alia*: water and Sanitation; the Environment and Housing and Urbanisation. Concerning the environment, the Blueprint seeks to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by 2030. This is to be achieved through: (i) promoting environmental conservation to better support the economic pillar's aspirations; (ii) improving pollution and waste management through the application of the right economic incentives; (iii) commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; (iv) enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.⁸⁰ It is important that these aspirations are achieved as they go to the core of the right to clean and healthy environment. Joint efforts from all the relevant stakeholders including private citizens, coupled with collaborative approach by all the Government authorities can enhance the country's efforts for a prosperous nation.

The *Sessional Paper on Vision 2030* notes that growth will be dependent on agriculture, tourism, manufacturing and the energy sector, which heavily rely on exploitation of natural resources and the environment.⁸¹ Further, major developments, anticipated by Vision 2030 will affect pollution levels and generate larger quantities of solid waste than at present. Anticipated growth in manufacturing activities will also give rise to an increase in effluents discharged, which will require effective disposal management. The Arid and Semi-Arid Lands (ASALs), which constitute approximately 80 per cent of the total land mass and support some 10 million people and more than 70 per cent livestock, will also undergo major changes as a result of new towns, better infrastructure and livestock based industries. All these changes will consequently exert immense pressure on the already declining natural resources base and on the country's fragile environment. The *Sessional Paper on Vision 2030* advocates for a strong policy on the

topic, so that countrywide and in the shortest time possible, we will have waste management systems that we can all be proud of.

⁷⁹Sessional paper No. 10 of 2012, On Kenya Vision 2030,

⁸⁰ Ibid.

⁸¹ Ibid, p.123.

environment in order to sustain economic growth while mitigating the impacts of rapid industrialisation.⁸²

The Blueprint also points out that Kenya's current institutional framework to manage the environment, which is characterised by fragmentation, has various aspects of the environment policy cutting across different institutions. Accordingly, policy and institutional reform for stricter enforcement, therefore, poses a big challenge that must be overcome by Vision 2030. However, policy and legal measures require determination and political goodwill from the citizenry and leadership, for their successful enforcement and compliance. Realising the right to clean and healthy environment requires an integrated approach that incorporates social, cultural and political measures from all.

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya elevates the environment as worthy of protection by stating in the preamble that the People of Kenya are respectful of the environment, which is their heritage, and are determined to sustain it for the benefit of future generations. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

3.1 Traditional Knowledge for Clean and Healthy Environment

“Traditional knowledge” is defined as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.⁸³ The term is not to be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.⁸⁴

Africa is believed to be endowed with rich and highly diverse biological resources and traditional knowledge which have been practised centuries before the advent of colonialization.⁸⁵

⁸² *Sessional Paper on Vision 2030*, p.123.

⁸³ African Regional Intellectual Property Organization (ARIPO), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

⁸⁴ *Ibid.*

⁸⁵ African Regional Intellectual Property Organization, available at

This knowledge reflects the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.⁸⁶ Traditional knowledge also encompasses belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.⁸⁷

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁸⁸ Particularly, it obligates the State to, *inter alia*, recognise the role of science and indigenous technologies in the development of the nation, and, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.⁸⁹ Further, with respect to the environment, the State is obligated to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.⁹⁰ The State should not just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for a clean and healthy environment.

It has been argued that traditional knowledge may contribute to improved development strategies in several ways such as by helping identify cost-effective and sustainable mechanisms for poverty alleviation that are locally manageable and locally meaningful; by a better understanding of the complexities of sustainable development in its ecological and social diversity, and helping to identify innovative pathways to sustainable human developmental that enhance local communities and their environment.⁹¹

Utilizing the traditional knowledge and avoiding or eliminating practices that contribute to deterioration or degradation of the environment can go a long way in promoting the realisation of the right to clean and healthy environment for all.

<http://www.aripo.org/index.php/services/traditional-knowledge> [Accessed on 1/09/2015].

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Constitution of Kenya, Art. 11(1).

⁸⁹ Ibid, Art. 11(2) (b) & (3) (b).

⁹⁰ Ibid, Art. 69(1) (c).

⁹¹ African Regional Intellectual Property Organization, *op cit*.

3.2 Scientific Knowledge for Clean and Healthy Environment

The Constitution of Kenya protects the right of every person to freedom of expression, which includes: freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.⁹² Further, as already pointed, the Constitution also obligates the State to recognise the role of science and indigenous technologies in the development of the nation.⁹³ These rights are important, not only for the individual citizens, but also for the country in adopting scientific knowledge especially local for eliminating unsustainable and harmful practices that adversely affect realisation right to clean and healthy environment for all.

Adoption of cleaner technologies in such areas as transport, energy production and food production can be an effective preventive measure. Scientific knowledge is also useful in helping the citizenry adopt healthy lifestyles for a better, cleaner and healthier environment. It is common knowledge that the public, mostly around urban areas, also greatly contribute to the violation of the right to clean and healthy environment mainly through pollution and other activities that lead to degradation of the environment.⁹⁴ This does not however mean that the rural folk is excluded. They also contribute to degradation through such means as production methods that lead to degradation, over-exploitation of the limited resources, deforestation, overstocking, amongst others.⁹⁵

Scientific knowledge can play a great role in dealing with the above problems through, *inter alia*, cleaner production methods, sustainable housing and effective treatment and disposal of wastes.⁹⁶

⁹² Constitution of Kenya, Art. 33(1).

⁹³ Ibid, Art. 11(2) (b).

⁹⁴ See T. Egondi, *et al.*, 'Community Perceptions of Air Pollution and Related Health Risks in Nairobi Slums,' *International Journal of Environmental Research and Public Health*, Vol. 10, 2013, pp. 4851-4868; See also S.M., Kithiia, 'Water Quality Degradation Trends in Kenya over the Last Decade, Water Quality Monitoring and Assessment, 2012. Available at <http://www.intechopen.com/books/water-quality-monitoring-and-assessment/water-quality-degradation-trends-in-kenya-over-the-last-decade> [Accessed on 02/09/2015].

⁹⁵ FAO, 'Land and environmental degradation and desertification in Africa,' available at <http://www.fao.org/docrep/X5318E/x5318e02.htm> [Accessed on 02/09/2015].

⁹⁶ See also United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015:

The Agenda calls upon all countries to ensure that by the year 2030 they upgrade infrastructure and retrofit industries to make them sustainable, with increased resource use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes, all countries taking action in accordance with their respective capabilities.

3.3 Poverty Eradication for Clean and Healthy Environment

It has been argued that conservation can contribute to poverty reduction, particularly through restoring ecosystems and by improving access by the poor to ecosystem services, thus contributing to secure livelihoods for the people who depend on them.⁹⁷ These two concepts are however mutually dependent in that if the State puts effective measures in place to address poverty, some of the contributing factors to violation of the right to clean and healthy environment can arguably be dealt with. Such include deforestation, unsustainable production methods and giving the people a voice to deal with any likely violation through ensuring that they have the means to seek redress from Courts.⁹⁸ Effective natural resources management, along with conservation and restoration, can protect and enhance biodiversity and ecosystem services.⁹⁹ The environment and the ecosystem services are so connected to the human wellbeing that it has been argued that the Millennium Development Goals (MDGs) reflect the relationship between the environment and sustainable development. This is because the targets and indicators are based on delivery of ecosystem services to the poor.¹⁰⁰ Where people engage in unsustainable production activities due to poverty, the State together with other relevant stakeholders can put in place measures that eradicate poverty but at the same time educating the concerned people on the best alternatives that can enhance their livelihoods while still conserving the environment.

3.4 Public Awareness and Participation for Clean and Healthy Environment

The 1994 Draft Declaration on Human Rights and Environment describes the procedural rights, such as the right to participation, necessary for realization of the substantive rights.¹⁰¹ It has been argued that procedural rights, such as rights to information, participation and access to justice, have the potential to empower civil society groups to make social and environmental claims and to hold State bodies and private sector actors accountable for their actions or omissions, while exercising basic civil and political rights to be free from harassment and

⁹⁷ IUCN – The World Conservation Union, *Depend on Nature: Ecosystem Services supporting Human Livelihoods*, 2005, *op cit*, p.13.

⁹⁸ Examples of unsustainable production methods and infringement on the environment include pollution especially by slum-dwellers, some of who have no sense of responsibility with regard to protection of the environment, and the people who cultivate along rivers and other water sources thus causing degradation of these resources.

⁹⁹ United Nations Environmental Programme, “Human Health and the Environment,” *UNEP Post 2015 Note No. 3*, *op cit*.

¹⁰⁰ IUCN – The World Conservation Union, *Depend on Nature: Ecosystem Services supporting Human Livelihoods*, 2005, p.5. Available at <https://portals.iucn.org/library/efiles/documents/2005-009.pdf> [Accessed on 1/09/2015].

¹⁰¹ Part 3 (Principles 15-24).

abuse.¹⁰² This is reiterated under Article 1 of the Aarhus Convention “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.”¹⁰³ It believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways and means to a realistic way for attaining the sustainable development.¹⁰⁴

Kenyans have a role to play in achieving the ideal of a clean and healthy environment. There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. The citizenry should be able to practise preventive measures while allowing the courts to come in only in cases of violation of environmental standards. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources. Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment. It has been argued that when the environment is destroyed, plundered, or mismanaged, we undermine our quality of life and that of our future generations. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁰⁵

The citizenry efforts can go a long way in creating a clean and healthy environment. There is therefore a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing

¹⁰² United Nations Non-Governmental Liaison Service, *Human Rights Approaches to Sustainable Development*, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015]

¹⁰³ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. Sales No. E/F/R.98.II.E.27.

¹⁰⁴ N. Mohammad, ‘Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,’ *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192; See Goal 16 of the Proposed Targets of the *United Nations Agenda 2030 on the Sustainable Development Goals 2015 – 2030* which seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

¹⁰⁵ ‘Wangari Maathai-an excerpt from the Nobel Peace Prize winner’s Acceptance Speech,’ *Earth Island Journal*. Available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 01/09/2015].

sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to-date environmental studies in learning institutions, at all levels. Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.¹⁰⁶

3.5 Enforcement and Compliance

It has rightly been observed that enforcing environmental standards and regulations is one of the surest ways governments can use to checkmate the negative impacts of corporation's activities (and even individuals) on the environment and on the lives of inhabitants of host communities.¹⁰⁷ As such, faced with environmental challenges which include: deforestation: biodiversity loss, drought and desertification, erosion, flooding, air, water and land pollution, industrial pollution, noise pollution, mounting solid wastes and generally unsanitary conditions, the need to effectively enforce environmental laws cannot be overemphasized.¹⁰⁸

Internationally and regionally, there are a number of instruments that strive to facilitate enforcement and compliance with environmental law, and ultimately realisation of the right to clean and healthy environment for all. Article 2 (1) of the *Vienna Convention*¹⁰⁹ outlines some of the States' general obligations towards the ozone layer. The Parties to the Convention are required to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party 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. The Convention requires Parties to, in accordance with the means at their disposal and their capabilities: Co-operate by means of systematic observations,

¹⁰⁶ International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at <http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf> [Accessed on 04/09/2015].

¹⁰⁷ Z.O., Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria,' *Journal of Sustainable Development in Africa*, Vol. 14, No.6, 2012, p. 262.

¹⁰⁸ Ibid.

¹⁰⁹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Kenya is a signatory to the Convention.

research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer; adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer; co-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes; and co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

These measures, as observed in the Convention, rotate around protecting 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. These measures, if implemented can contribute positively in the realisation of the human right to clean and healthy environment. However, since they are only recommendations, they require political goodwill from the States for their implementation.

According to Kenya's Ministry of Environment and Natural Resources, Kenya has made considerable progress in phasing out substances that deplete the Ozone layer that shields the earth from harmful ultra-violet radiation from the sun.¹¹⁰ The country has already phased out chlorofluorocarbons, halons and methyl bromides which are Ozone depleting substances (ODS) found in applications such as fire-fighting equipment and fumigation for soils and cereals.¹¹¹ The harmful effects of sun radiation include increased cases of skin cancer and eye cataracts among humans, reduced plant and animal activity, poor air quality, damage to plastics and negatively impact on the climate.¹¹²

The *Montreal Protocol*,¹¹³ also an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The protocol set

¹¹⁰ Per Principal Secretary for Environment and Natural Resources Dr. Richard Lesiyampe, available at <http://www.environment.go.ke/?p=600> [Accessed on 27/08/2015]

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987). Kenya is a signatory to the Protocol.

limits on the production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.¹¹⁴

*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*¹¹⁵ affirms that States are responsible for the fulfillment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law.¹¹⁶ The Convention is also based on the fact that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal. Under the Convention, “environmentally sound management of hazardous wastes or other wastes” means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.¹¹⁷

The Convention outlines general obligations of State Parties which include, *inter alia*: Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal should inform the other Parties of their decision pursuant to Article 13; Parties are to prohibit or should not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above; and Parties should prohibit or should not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.¹¹⁸ Further to the foregoing, each Party should take the appropriate measures to, *inter alia*: ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects; and ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that should be located, to the extent possible, within it, whatever the place of their disposal.¹¹⁹

¹¹⁴ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Arts. 2A-I.

¹¹⁵ Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

¹¹⁶ Preamble.

¹¹⁷ Art. 2.8.

¹¹⁸ Art. 4(1).

¹¹⁹ Art. 4(2).

The Convention requires Parties to co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.¹²⁰

The International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)¹²¹, observed that “the protection of the environment is...a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.” The Court held that the corpus of international law which relates to the environment now consists of the general obligation of states to ensure that activities within their jurisdiction and control respects the environment of other states or areas beyond national control. The concept of sustainable development is in consonance with the need to reconcile economic development with the protection of the environment. Hence, the terms of agreements to implement must be negotiated by the parties.¹²²

Locally, the Constitution of Kenya provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹²³ The Constitution goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate--to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹²⁴

The existing environmental laws such as EMCA 1999 provide for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts. EIA is defined as an environmental management tool aiming at identifying

¹²⁰ Art. 12.

¹²¹ *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7.

¹²² *Ibid.*

¹²³ Art. 70 (1).

¹²⁴ Art. 70(2).

environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.¹²⁵ EIA can be a powerful tool for keeping the corporate including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more meaningful participation in the same to ensure that the EIAs achieve their objectives. This is the only way that the affected sections of population appreciate the use of EIAs and also ensure that such exercises are not mere formalities on paper but are utilised fully for the protection of the right to clean and healthy environment. This is especially for projects taking place within the community dwellings, with potentially great effects on the people. An example of the same is the recent case of lead poisoning at the Coastal region of Kenya, due to unregulated mining activities.¹²⁶

It has been observed that investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children. It also benefits individuals, firms and others in the regulated community by ensuring a level playing field governed by clear rules applied in a fair and consistent manner.¹²⁷

Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment.¹²⁸ The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and effectively.¹²⁹ Concerted efforts from all the stakeholders, including the general public can ensure that the compliance and enforcement

¹²⁵ N.M. Al Ouran, 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

¹²⁶ B. Jenje, 'MP to compensate families injured by lead poison 'if guilty',' *Daily Nation*, Wednesday, April 29, 2015, available at <http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html> [Accessed on 05/09/2015]; See also M. W. Chege, *et al*, 'Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,' *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

¹²⁷ International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' *op cit*, p.2.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*.

framework in place is used to promote and safeguard the right to clean and healthy environment as envisaged in the Constitution and environmental laws.

4. Towards a Clean and Healthy Environment in Kenya

The realisation of the right to clean and healthy environment for the Kenyan people calls for the reconceptualization of the right. The existing framework on environment, including EMCA falls short of defining what entails a clean and healthy environment. From the foregoing argument, it is the author's assertion that the right to a clean and healthy environment can only be fully realised through addressing all issues that adversely affect the environment. The anthropocentric approach mostly adopted by most of the existing legal instruments creates the false impression that the environment should only be protected for the convenience of human beings. However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

Sustainable development efforts may not bear much if the country does not move beyond laws. There is need for educating the public on the subject, with emphasis on preventive and conservation measures. The same should include change of attitude by the general public. Through encouraging use of traditional knowledge in conservation and production to active and meaningful participation in decision-making, the citizenry can hopefully appreciate the fact that the creation of a clean and healthy environment is not a State's responsibility only but there is a requirement of cooperation between the State actors and the individuals. It is to be recalled that Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions.

One of the national values and principles of governance as provided under Article 10 of the Constitution is sustainable development. The principles of sustainable development as captured in EMCA¹³⁰ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality

¹³⁰ S. 3(5).

or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle. There is need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

There is also a need to diversify production methods and waste disposal through use of innovation and technology. The State departments tasked with encouraging innovation and science ought to work closely with communities as way of identifying the most appropriate technology, either arising from the communities themselves or elsewhere, to boost production and address poverty. This also calls for more scientific research to come up with crops that can do well in dry areas to tackle the problem of drought and ultimate desertification. This will also help in diversification in economic activities by the concerned communities.

Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals.

There is also need to sensitise the public on the dangers of environmental degradation through pollution, overstocking, over-exploitation of resources. Other professionals should be brought on board. These may be drawn from such fields as medical, agricultural, mining, amongst others.

When people appreciate that the state of environmental health directly affects their livelihoods, it is possible to engage them in creation of a better environment that is clean and healthy as the first step towards improving their lives.

5. Conclusion

From the foregoing, it is clear that it is possible for the right to clean and healthy environment to be enjoyed in Kenya. The same is protected by the Constitution and has been judicially interpreted. There is however a need to reconceptualise the right to a clean and healthy environment by clearly defining it and according it the correct place in the human rights discourse.

The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

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