

**Entrenching the Right to a Clean and Healthy Environment through  
Enhanced Environmental Liability Compensation Framework in Kenya**

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**Kariuki Muigua**

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**Abstract**

*The growth of industrial technology has led to worldwide concerns over environmental pollution and devastation. To tackle this problem, it is necessary to have a combination of education, legal knowledge, technical progress, and enough financial means. The enforcement of environmental regulations is a shared obligation that goes beyond the government and includes community members, including households and individuals. Efficient cooperation requires a synchronized and coordinated strategy, supported by robust law enforcement. The primary objective of law enforcement is to create and implement the law, including both its precise provisions and its wider social consequences, in order to govern and control behaviour. Both citizens and law enforcement officials share this obligation. This paper proposes the integration of these initiatives with a robust compensation framework for environmental responsibility, specifically targeting individuals or entities accountable for causing environmental harm. The objective is to provide fairness and justice for people affected by environmental offences.*

**1. Introduction**

The issue of environmental pollution and destruction has become a significant concern at both national and worldwide levels, mostly owing to the notable increase in pollution and damage resulting from advancements in industrial technology.<sup>1</sup> In order to address the escalating environmental degradation, it is essential to consider other aspects such as education, legal awareness, technological advancements, and sufficient financial resources to foster a favourable environmental condition.<sup>2</sup> The enforcement of

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*\*PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Prof. at the University of Nairobi, Faculty of Law [June, 2024].*

<sup>1</sup> Maruf, A., 2021. Legal aspects of environment in Indonesia: An effort to prevent environmental damage and pollution. *Journal of Human Rights, Culture and Legal System*, 1(1).

<sup>2</sup> Ibid.

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environmental legislation is a collective responsibility that extends beyond the government to include all members of the community, including homes and people.<sup>3</sup> Effective collaboration among various authorities requires a harmonized, coordinated, and integrated approach, bolstered by strong law enforcement.<sup>4</sup> Law enforcement refers to the systematic endeavour to establish and uphold the law, including both its specific legal provisions and its broader societal implications, in order to guide and regulate the behaviour of those involved in legal activities.<sup>5</sup> This responsibility is shared by both the individuals subject to the law and the designated law enforcement authorities.<sup>6</sup>

This paper advances the argument that all these efforts should go hand in hand with an effective environmental liability compensatory framework that targets those found liable for environmental degradation. Arguably, this is one of the most effective ways that environmental justice can be realised for the victims of environmental crimes.

## **2. Global Environmental Liability Compensation Framework**

Throughout history, legal systems worldwide have recognised the notion that those who cause substantial and predictable injury to others should be held responsible for the resulting damage suffered by the victims.<sup>7</sup> Amidst widespread transnational environmental issues like air pollution, ocean contamination, hazardous waste ships, climate change, and the spread of invasive species and toxic chemicals, there have been multilateral negotiations regarding private liability rules.<sup>8</sup> Globalization has not only linked national economies but also created a complex network of exporting and

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Maruf, A., 2021. Legal aspects of environment in Indonesia: An effort to prevent environmental damage and pollution. *Journal of Human Rights, Culture and Legal System*, 1(1).

<sup>6</sup> Ibid.

<sup>7</sup> Percival, R.V., 2010. Liability for environmental harm and emerging global environmental law. *Md. J. Int'l L.*, 25, p.37.

<sup>8</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

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importing environmental dangers.<sup>9</sup> Global warming is a worldwide phenomenon that impacts ecosystems across several nations, since the emissions of one country have consequences for everyone.<sup>10</sup> The regulation of global climate change concerns has proven to be challenging owing to uncertainties arising from the inability of parties to international agreements such as the Kyoto Protocol and the Paris Agreement<sup>11</sup> to convert these agreements into enforceable laws or policies.<sup>12</sup> Because of the persistent interest, especially among developing countries, in creating more robust legal remedies for environmental damages, private law liability standards have emerged as a significant point of contention in environmental diplomacy.<sup>13</sup>

Internationally, the strengthening of liability principles may occur outside of the treaty-making process by promoting the spread of norms that discourage transboundary environmental harm.<sup>14</sup> Article 4 of the Basel Convention's Protocol on liability and Compensation for harm Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal imposes a legal responsibility on operational control bodies for any harm caused by the transfer of hazardous waste.<sup>15</sup> This duty is strict, meaning that the entities are held accountable regardless of fault or negligence.

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<sup>9</sup> Ibid.

<sup>10</sup> Okumagba, E.O., 2021. Examining global court practices in reducing climate change impacts through litigation: Lessons for Nigeria. In *Implementing the Sustainable Development Goals in Nigeria* (pp. 98-118). Routledge.

<sup>11</sup> Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

<sup>12</sup> Okumagba, E.O., 2021. Examining global court practices in reducing climate change impacts through litigation: Lessons for Nigeria. *Op. cit.*

<sup>13</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>14</sup> Ibid.; see also Schmalenbach, K. (2023) 'States Responsibility and Liability for Transboundary Environmental Harm', in P. Gailhofer et al. (eds) *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective*. Cham: Springer International Publishing, pp. 43-84. Available at: [https://doi.org/10.1007/978-3-031-13264-3\\_3](https://doi.org/10.1007/978-3-031-13264-3_3).

<sup>15</sup> See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (1989); 1673 U.N.T.S. 125.

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The several unsuccessful agreements have had little practical effect on improving tort remedies via civil responsibility treaties.<sup>16</sup> The ratified civil liability treaties serve three primary purposes: firstly, they guarantee fair and unbiased treatment of foreign litigants and provide them equal opportunities to use national processes and remedies for resolving tort problems.<sup>17</sup> Furthermore, they tackle issues pertaining to jurisdiction, choice of law, and the execution of court decisions by establishing universally accepted criteria for determining the appropriate venue for legal actions.<sup>18</sup>

Due to the absence of explicit agreements establishing the regulations for tort lawsuits, persons who suffer injury from transboundary pollution have limited options for seeking compensation.<sup>19</sup> This is primarily due to the presence of "liability walls," which are procedural obstacles that impede the filing of transnational tort lawsuits.<sup>20</sup> As nations enhance their own internal norms of legal responsibility to address environmental damage, two factors will grow in significance: the willingness of states to consider cases brought by international plaintiffs and the establishment of criteria for acknowledging and enforcing foreign court decisions.<sup>21</sup> Transnational private litigation will eventually contribute to the establishment of global liability rules for environmental injury, which will play a significant role in shaping the new framework of global environmental law.<sup>22</sup>

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<sup>16</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*; see also Schmalenbach, K. (2023) 'International Standards for National Environmental Liability Regimes', in P. Gailhofer et al. (eds) *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective*. Cham: Springer International Publishing, pp. 131–173. Available at: [https://doi.org/10.1007/978-3-031-13264-3\\_5](https://doi.org/10.1007/978-3-031-13264-3_5).

<sup>20</sup> *Ibid.*

<sup>21</sup> Percival, R.V., 2010. Liability for environmental harm and emerging global environmental law. *Md. J. Int'l L.*, 25, p.37.

<sup>22</sup> *Ibid.*

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The global attention towards tort remedies for transboundary environmental harm has been a primary focus in the first stages of international environmental discussions.<sup>23</sup> The 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration both urged governments to collaborate in the establishment of international legal frameworks concerning accountability and compensation for individuals affected by pollution and other forms of environmental harm.<sup>24</sup> Nevertheless, in actual implementation, nations have mostly focused on enhancing private international law remedies.<sup>25</sup>

In recent years, there has been an increasing trend in using legal action to force governments to comply with their international obligations.<sup>26</sup> Climate change litigation has emerged as a significant tool in advancing the cause of a sustainable environment.<sup>27</sup> Climate change litigation is seeing a growing trend in domestic courts across the globe, with the majority of cases being argued on the grounds of human rights infringement.<sup>28</sup> Nevertheless, Africa presents a favourable regional setting for addressing climate change-related grievances, given its unique susceptibility to climate-induced impacts.<sup>29</sup> The increasing recognition by civil society of the detrimental effects of climate change on

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<sup>23</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>24</sup> Ibid. Principle 13 of the Rio Declaration obligates State parties to develop the law regarding liability and compensation of victims of pollution and other environmental damage.

<sup>25</sup> Ibid.

<sup>26</sup> Okumagba, E.O., 2021. Examining global court practices in reducing climate change impacts through litigation: Lessons for Nigeria. In *Implementing the Sustainable Development Goals in Nigeria* (pp. 98-118). Routledge.

<sup>27</sup> Ibid.

<sup>28</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>29</sup> Ibid.

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human rights, as well as the development of new national laws and policies aimed at mitigating climate change, are key elements driving this trend.<sup>30</sup>

Some of the ways to address and respond to those who cause pollution and environmental harm is by using civil, administrative, or criminal legislation.<sup>31</sup> The objective is to provide a favourable and pleasant environment that promotes the well-being of all individuals.<sup>32</sup>

Scientific data suggests that Africa will bear a disproportionate burden of the consequences of climate change in the future, which is likely to lead to more climate-related conflicts.<sup>33</sup> With a greater comprehension of the effects of climate change on health, livelihoods, and other essential rights, it is probable that there will be an increase in lawsuits based on the protection of these rights.<sup>34</sup>

Due to the forgoing, this paper is informed by the imperative for not only exploring the environmental liability compensatory mechanisms available for climate related harms but also all the other liabilities directly attributable to environmental degradation or wrongs caused by private persons as well as the government or state's omissions or commissions.

### **3. Right to a Clean and Healthy Environment Framework in Kenya**

At the regional level, Article 24 of the African Charter on Human and Peoples' Rights specifically states that all individuals have the right to a conducive environment that

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<sup>30</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>31</sup> Maruf, A., 2021. Legal aspects of environment in Indonesia: An effort to prevent environmental damage and pollution. *Journal of Human Rights, Culture and Legal System*, 1(1).

<sup>32</sup> Ibid.

<sup>33</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>34</sup> Ibid.

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promotes their growth.<sup>35</sup> In contrast to other regional human rights tribunals, the African Court has the authority to directly assess a State's adherence to its duties of upholding and safeguarding the human right to a healthy environment, which includes addressing concerns related to climate change.<sup>36</sup>

Since gaining independence, Kenya has encountered various obstacles in the implementation of environmental rights.<sup>37</sup> The government lacked any explicit legislation or policy aimed at addressing infringements of environmental rights, leaving individuals with little choice except to rely on contract and tort law to seek compensation for environmental violations.<sup>38</sup> The nation's environmental legal framework was distinguished by the presence of several sector-specific legislation addressing various aspects of environmental preservation, improvement, and conservation.<sup>39</sup>

The introduction of the right to a clean and healthy environment in Kenya's 2010 Constitution has substantial consequences for the enforcement of environmental rights by the people in the nation.<sup>40</sup> Article 42 of the legislation guarantees that every person is has a right to clean and healthy environment for the advantage of current and future generations. This right can be exercised through the implementation of laws and other measures, specifically those outlined in Article 69. Additionally, individuals have the right to ensure that environmental responsibilities are fulfilled as stated in Article 70.<sup>41</sup>

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<sup>35</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>36</sup> Ibid.

<sup>37</sup> Bosek, J.K., 2014. Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges. *African Human Rights Law Journal*, 14(2), pp.489-508.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1), pp.29-56.

<sup>41</sup> Mwenda, A. and Kibutu, T.N., 2012. Implications of the new constitution on environmental management in Kenya. *Law Env't & Dev. J.*, 8, p.76.



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The Environmental Management and Coordination Act (EMCA) has recognised the entitlement to a clean and healthy environment.<sup>42</sup> Nevertheless, the elevation of this right to constitutional status has only been accomplished via the implementation of the 2010 Constitution.<sup>43</sup>

Article 70 of the Kenyan Constitution pertains to the implementation of environmental rights. It guarantees citizens the right to seek legal recourse if they believe their entitlement to a clean and healthy environment has been violated, denied, infringed upon, or endangered. The court has the authority to issue orders or offer instructions to prevent, halt, or terminate harmful actions or omissions. It may also require public officials to take steps to prevent or cease harmful actions, and grant compensation to those who have suffered from a breach of their right to a clean and healthy environment.

EMCA is well recognised for introducing a significant advancement in allowing individuals to seek legal remedies for environmental concerns via the court system.<sup>44</sup> This, thus creates the basis for compensation for environmental wrongs.

### **4. Environmental Liability Compensation Framework in Kenya: Challenges and Prospects**

Despite extensive and prolonged attempts, the global community has faced difficulties in formulating legal solutions for individuals affected by environmental harm that crosses national boundaries.<sup>45</sup> Over a dozen civil liability treaties have been drafted to provide legal grounds for taking action and determine responsibility standards.<sup>46</sup> The principal opponents of new civil responsibility standards for transboundary environmental harm

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<sup>42</sup> See sec. 3, EMCA, 1999.

<sup>43</sup> Mwenda, A. and Kibutu, T.N., 2012. Implications of the new constitution on environmental management in Kenya. *Law Env't & Dev. J.*, 8, p.76.

<sup>44</sup> Ibid.

<sup>45</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>46</sup> Ibid.

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are developed governments, who want to safeguard local enterprises and maintain liability barriers.<sup>47</sup> The process of engaging in multilateral negotiations to establish new responsibility standards is hindered by the significant expenses incurred in coordinating the interests and legal systems of several nations.<sup>48</sup>

The consequences of liability barriers are significant, since individuals who may have a valid claim are likely to hesitate in filing a lawsuit in unfamiliar and perhaps hostile courts against the parties responsible for the injury. Similarly, defendants will strongly oppose appearing in the courts of the victims.<sup>49</sup>

The minimal number of climate lawsuits so far may be attributed to internal hurdles, including inadequate legislative frameworks, sluggish court procedures, and insufficient financial resources.<sup>50</sup> These factors would usually prevent potential plaintiffs from fully using local legal options before resorting to the African human rights system.<sup>51</sup> Moreover, climate change in Africa has likely been given less importance compared to other more prevalent environmental conflicts that focus on land, property rights, or natural resources.<sup>52</sup>

The primary responsibility of the National Government is to safeguard the environment and natural resources, construct a resilient and sustainable development framework, and enforce particular regulations pertaining to natural resources and environmental protection.<sup>53</sup> County governments are tasked with the implementation of precise policies

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<sup>47</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Mwenda, A. and Kibutu, T.N., 2012. Implications of the new constitution on environmental management in Kenya. *Law Env't & Dev. J.*, 8, p.76.

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set by the national government for the management of natural resources and environmental preservation. This includes activities such as soil and water conservation, as well as forestry.<sup>54</sup>

The primary objective of the 2010 Constitution is to improve the availability of legal remedies for environmental rights disputes via two key approaches.<sup>55</sup> An environmental rights plaintiff is not required to demonstrate personal harm in order to get legal remedy from the courts.<sup>56</sup> Scientific imperatives are often used to establish evidence in environmental disputes, necessitating the expertise of highly-trained professionals to illustrate the extent of the harm incurred.<sup>57</sup> Furthermore, there has been a relaxation in the necessity for *locus standi*. Whistle-blowers and environmental activists in the Non-Governmental Organization (NGO) sector are granted the ability to initiate legal proceedings on behalf of vulnerable populations.<sup>58</sup>

According to Article 159(2)(d) of the Constitution, justice must be delivered without giving excessive importance to technicalities. Previously, significant environmental issues were disregarded based on procedural details, without taking into account their inherent value.<sup>59</sup>

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<sup>54</sup> Ibid.

<sup>55</sup> Bosek, J.K., 2014. Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges. *African Human Rights Law Journal*, 14(2), pp.489-508.

<sup>56</sup> Constitution of Kenya 2010, Article 70(3).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.; see Joseph Leboo & 2 others –vs- Director Kenya Forest Services & another, ELC No. 273 of 2013, (2013) eKLR.

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**5. Entrenching the Right to a Clean and Healthy Environment through Effective Environmental Liability Compensation Framework in Kenya**

While regional and international forums are important in pursuit of environmental justice, there is a need for countries to have strong domestic frameworks as they are usually the first ports of call when it comes to human rights protection. For instance, as per Article 56(5) of the African Charter and Article 6(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the African Commission and Court can only address complaints brought before them if all available legal options within the country have been utilised.<sup>60</sup> Applicants are more likely to be successful in the admissibility phase if they really try to use all available legal options inside their own country before taking their case to either the African Commission or Court.<sup>61</sup>

Since the promulgation of the 2010 Constitution of Kenya, courts and tribunals have commendably taken up the task of protecting fundamental rights and granting compensation even in environmental damage matters.<sup>62</sup> The case of *KM & 9 others v Attorney General & 7 others*<sup>63</sup> (Owino-Uhuru case) pertained to contamination caused by a lead acid batteries recycling facility, resulting in apprehensions over fatalities, land degradation, and water pollution. The court determined that the pollution infringed upon the rights of the petitioners, who experienced personal harm from inhaling or absorbing pollutants emitted by the factory, and also suffered adverse effects on their surroundings. The court granted a monetary compensation of Kshs. 1.3 billion and

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<sup>60</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>61</sup> Ibid.

<sup>62</sup> See National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (Judgment), Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated).

<sup>63</sup> *KM & 9 others v Attorney General & 7 others*, Petition No. 1 of 2016 (2020) eKLR,

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ordered the defendants to remediate the soil, water, and eliminate the accumulated trash within the settlement.

The Court of Appeal revised the decision made by the Environment and Land Court on the matter of quantum in the case of *National Environment Management Authority – vs- Kelvin Musyoka & Others*<sup>64</sup>. The Court of Appeal restated the principles of Environmental Justice and instructed the National Environment Management Authority to determine the scope of contamination and pollution resulting from the activities of Metal Refinery EPZ Ltd in the Owino-Uhuru Settlement. They were also required to eliminate any contamination and pollution in the affected areas, rehabilitate the environment of Owino-Uhuru Settlement and its ecosystem, and provide regular updates every three months to the Environment and Land Court in Mombasa regarding the progress made in these efforts.

In the case of *Edward Akong’o Oyugi & 2 others v Attorney General [2019] eKLR*<sup>65</sup>, the High Court observed as follows:

109. *The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting ‘compensation’ in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution. (Emphasis added)*

110. *It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and*

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<sup>64</sup> National Environment Management Authority –vs- Kelvin Musyoka & Others<sup>64</sup>, Mombasa Civil Appeal No. E004 of 2020.

<sup>65</sup> Edward Akong’o Oyugi & 2 others v Attorney General [2019] eKLR, Constitutional Petition 441 of 2015.

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*circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.*

*111. Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Court. The following principles clearly emerged from decided cases;*

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;*
- iii. This remedy would be available when it is the only practicable mode of redress available;*
- iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.*

The *Peter K. Waweru –vs- Republic*<sup>66</sup> case in Kenya included the settlement of environmental justice concerns via litigation in the courts. The court deliberated on the issue of whether the petitioners were charged appropriately and if courts had a responsibility in promoting Sustainable Development.<sup>67</sup> It emphasised the inviolable significance of the right to a clean environment, which is fundamental to all living beings, including humans, and inherent from the beginning of existence.

The court restated the stance of Section 3 of EMCA, which mandates courts to consider certain universal principles while deciding environmental disputes. Furthermore, it was said that these principles are a component of international customary law and should be acknowledged in all relevant circumstances.<sup>68</sup> In this instance, the court examined certain

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<sup>66</sup> Peter K. Waweru –vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

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tenets of Sustainable development, including the precautionary principle, polluter pays concept, and public trust principle. The court ruled that a development posing a danger to life is not viable and should be stopped. Environmental offences include a wide variety of legal violations under the Water Act<sup>69</sup>, Public Health Act<sup>70</sup>, and EMCA. According to the Court in this case, these offences should be subject to strict penalties due to the comprehensive nature of the environmental restoration issue, which requires collective efforts from all individuals.

When coming up with an effective environmental liability compensation framework, there may be a need to consider specific design issues such as the choice between strict liability and fault-based liability, determining the types of environmental harm that should lead to liability, assigning liability to specific operators, and considering the impact of governmental permits on private liability.<sup>71</sup>

Climatic change litigation allows for the identification of certain climatic effects that may be linked to specific states, as determined by the Intergovernmental Panel on Climate Change (IPCC).<sup>72</sup> Each state has individual responsibility for its own actions or failures in connection to climate change and its contribution to it, notwithstanding the global collective aspect of the issue.<sup>73</sup>

Overall, climate litigation is made easier by the acceptance of public interest litigation and collective victimhood, provided there is compelling scientific data that clearly shows

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<sup>69</sup> Water Act, No. 8 of 2002 Laws of Kenya (Now Repealed).

<sup>70</sup> Public Health Act, Cap 242 Laws of Kenya.

<sup>71</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>72</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>73</sup> Ibid.

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the connection between the damage suffered by the plaintiff and the actions or lack of action taken by the government on climate change.<sup>74</sup>

### **5.1. Tort Remedies**

Tort responsibility is a legal principle that seeks to provide legal channels for compensation and remedy in situations involving harm to the environment.<sup>75</sup> The most tangible expression of the polluter pays concept is an efficient legal remedy for pollution damages.<sup>76</sup> Tort damages may provide reparation to individuals affected by significant transboundary environmental incidents or pollution incidents, such as oil spills in international waters, chemical pollution of rivers or lakes, or industrial mishaps resulting in the release of harmful substances into the atmosphere.<sup>77</sup> Tort law offers a financial solution that may directly benefit those affected by pollution, especially those who live outside the area where the damage occurred.<sup>78</sup> In addition, implementing stronger cross-border tort remedies might serve as a deterrent by compelling companies to bear the financial burden of any environmental harm that occurs across borders, as well as the expense of taking preventative actions.<sup>79</sup>

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<sup>74</sup> Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

<sup>75</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.; see the case of National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (Judgment).

<sup>79</sup> Ibid.



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## 5.2. Environmental Litigation

The worldwide response to global climate change consequences has been the implementation of the United Nations Framework Convention on Climate Change (UNFCCC)<sup>80</sup>, which includes the Kyoto Protocol and the Paris Climate Agreement.<sup>81</sup> Nevertheless, the Kyoto Protocol has been deemed insufficient in its ability to effectively mitigate the consequences of climate change, while the 2015 Paris Climate Agreement still lacks the necessary legal enforceability to compel nations to reach their commitments for reducing emissions.<sup>82</sup>

There is a need for a more robust action by lawyers based on the Climate Change Act 2016<sup>83</sup> and other environmental laws to pursue climate change related harms attributable to both State and private persons, both local and multinational. The challenge that remains to be overcome is how to establish and apportion the blame.

In order to strengthen the effectiveness of litigation as a means of achieving Environmental Justice, it is necessary to improve practices such as public interest litigation<sup>84</sup>, tackle the issue of costs particularly in public interest litigation<sup>85</sup>, expedite the determination of environmental disputes, and make well-founded decisions that support

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<sup>80</sup> United Nations, United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

<sup>81</sup> Okumagba, E.O., 2021. Examining global court practices in reducing climate change impacts through litigation: Lessons for Nigeria. In *Implementing the Sustainable Development Goals in Nigeria* (pp. 98-118). Routledge.

<sup>82</sup> Ibid.

<sup>83</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>84</sup> Sang, B., 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and its Prospects Within the New Constitutional Order.' *Journal of African Law*, Volume 57, No. 1 of 2013.

<sup>85</sup> United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at [https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE\\_Access2Justice\\_Study\\_Final\\_logos.pdf](https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf) (Accessed on 29/06/2024)

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and safeguard environmental rights while promoting the achievement of Sustainable Development.<sup>86</sup>

**5.3. Need for Comprehensive and Effective Environmental Impact Assessments and Audits**

Environmental Impact Assessment (EIA) and the process of environmental auditing are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999<sup>87</sup> (EMCA). Generally, there is little proof that most businesses consistently prioritize environmental sustainability after the Environmental Impact Assessment (EIA) procedure and infrequent audits by the National Environmental Management Authority (NEMA), which mostly focus on sectors with a greater risk of significant environmental damage.<sup>88</sup>

The Environmental Management Coordination Act<sup>89</sup> (EMCA) includes provisions for environmental impact assessments (EIA) as a regulatory instrument for the purpose of protecting the environment from the effects of anthropocentric activities. EMCA encompasses a range of regulations that specifically address the implementation of Environmental Impact Assessments (EIA), Strategic Environmental Assessments (SEA), Environmental Audits (EA), as well as the management of air, water, wastes, and

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<sup>86</sup> Ibid.

<sup>87</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].

<sup>88</sup> *National Environment Management Authority (NEMA) - Environmental Auditing* (no date). Available at: [https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=11&Itemid=321](https://www.nema.go.ke/index.php?option=com_content&view=article&id=11&Itemid=321) (Accessed: 29 June 2024); *National Environment Management Authority (NEMA) - Environmental Audit (EA)* (no date). Available at: [https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=155&Itemid=274](https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274) (Accessed: 29 June 2024); *National Environment Management Authority (NEMA) - Environmental Regulations (EIA/EA)* (no date). Available at: [http://www.nema.go.ke/index.php?option=com\\_content&view=article&id=27&Itemid=167](http://www.nema.go.ke/index.php?option=com_content&view=article&id=27&Itemid=167) (Accessed: 29 June 2024); Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101 of 2003, Laws of Kenya.

<sup>89</sup> Environmental Management Coordination Act, No. 8 of 1999, Laws of Kenya.

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noise. There are further responsibilities for the safeguarding of wildlife, the management of forests and water resources, and the assurance of workers' health and safety.

Kenya's Constitution and EMCA require frequent environmental audits and monitoring to achieve the obligations towards the environment.<sup>90</sup> Environmental audits and monitoring are used to examine the extent to which current operations align with the environmental impact assessment study report, addressing problems particular to the project at hand.<sup>91</sup>

Arguably, carrying out effective EIA and audit processes can go a long way in not only stopping environmental damage but also in identifying culprits where such damage occurs for purposes of liability and compensation.

## **6. Conclusion**

Liability regulations should serve as a supplementary, backup measure to fundamental treaties, since intricate ecological issues cannot be adequately resolved alone via tort law.<sup>92</sup> Addressing the challenges would need ongoing collaboration between governments, more financial resources, and new regulatory obligations.<sup>93</sup> While Kenya has made impressive progress in environmental liability compensation realisation through courts, there is a need for an enhanced framework that will ensure that victims of environmental degradation are well compensated as a way of promoting and guaranteeing their right to clean and healthy environment.

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<sup>90</sup> Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

<sup>91</sup> *National Environment Management Authority (NEMA) - Environmental Audit (EA)*. [https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=155&Itemid=274](https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274).

<sup>92</sup> Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

<sup>93</sup> *Ibid.*

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## References

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (1989); 1673 U.N.T.S. 125.

Bosek, J.K., 2014. Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges. *African Human Rights Law Journal*, 14(2), pp.489-508.

Climate Change Act, No. 11 of 2016, Laws of Kenya.

Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

Constitution of Kenya, 2010, Government Printer, Nairobi.

Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR, Constitutional Petition 441 of 2015.

Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].

Joseph Leboo & 2 others –vs- Director Kenya Forest Services & another, ELC No. 273 of 2013, (2013) eKLR.

KM & 9 others v Attorney General & 7 others, Petition No. 1 of 2016 (2020) eKLR.

Maruf, A., 2021. Legal aspects of environment in Indonesia: An effort to prevent environmental damage and pollution. *Journal of Human Rights, Culture and Legal System*, 1(1).

Mwenda, A. and Kibutu, T.N., 2012. Implications of the new constitution on environmental management in Kenya. *Law Env't & Dev. J.*, 8, p.76.

National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (Judgment), Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated).

*National Environment Management Authority (NEMA) - Environmental Audit (EA)*. [https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=155&Itemid=274](https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274).

National Environment Management Authority –vs- Kelvin Musyoka & Others, Mombasa Civil Appeal No. E004 of 2020.

*Entrenching the Right to a Clean and Healthy Environment through Enhanced Environmental Liability Compensation Framework in Kenya*

Okumagba, E.O., 2021. Examining global court practices in reducing climate change impacts through litigation: Lessons for Nigeria. In *Implementing the Sustainable Development Goals in Nigeria* (pp. 98-118). Routledge.

Percival, R.V., 2010. Liability for environmental harm and emerging global environmental law. *Md. J. Int'l L.*, 25, p.37.

Peter K. Waweru –vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR.

Public Health Act, Cap 242 Laws of Kenya.

Sachs, N., 2007. Beyond the liability wall: strengthening tort remedies in international environmental law. *UCLA L. Rev.*, 55, p.837.

Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1), pp.29-56.

Schmalenbach, K. (2023) 'International Standards for National Environmental Liability Regimes', in P. Gailhofer et al. (eds) *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective*. Cham: Springer International Publishing, pp. 131–173. Available at: [https://doi.org/10.1007/978-3-031-13264-3\\_5](https://doi.org/10.1007/978-3-031-13264-3_5).

Suedi, Y. and Fall, M., 2024. Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls. *Journal of Human Rights Practice*, 16(1), pp.146-159.

United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at [https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE\\_Access2Justice\\_Study\\_Final\\_logos.pdf](https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf) (Accessed on 29/06/2024)

United Nations, United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

Water Act, No. 8 of 2002 Laws of Kenya (Now Repealed).