

**Exploring Conflict Management and the Environment: The
Kenyan Journey**

Kariuki Muigua

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Exploring Conflict Management and the Environment: The Kenyan Journey

Kariuki Muigua*

Abstract

This paper is meant to capture the main themes that have featured in Kariuki Muigua's work, his contribution to the academia, policy and legal development in Kenya. It traces the running thread through his work with the aim of demonstrating that conflict management and environmental matters are not linear subjects and should be treated as such as they impact on every sphere of the human life. The paper is also important in that it traces the jurisprudential development of these themes within the Kenyan framework to show how far we have come as a country in guaranteeing environmental rights and creates an opportunity for the stakeholders in the justice sector and environmental management to reflect on the successes, challenges and the future prospects in ensuring that every Kenyan will access justice and a right to clean and healthy environment.

1. Introduction

The discourse on conflict management and the environment in Kenya has come a long way. Various authors have voiced their opinion on the debates based on the developing international jurisprudence and the evolving domestic laws. One author who has been very consistent in exploring the same has been Kariuki Muigua. He has explored different topics including but not limited to: Access to Justice; Alternative Dispute Resolution; Arbitration; Alternative Dispute Resolution and Access to Justice; Sustainable Development; Environment/Bridges; Mediation; Negotiation; and Democracy/Environmental Democracy. His immense knowledge and understanding of the topics has not only been instrumental in informing legal debates but also in creating real change as far as practical application to real situations is concerned. His expertise has earned him both national and international accolades, with him being described as *'a highly respected arbitrator and mediator with a sterling background in commercial and constitutional cases, as well as matters relating to the environment and natural resources'*.¹ His works have not only assisted students and

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academicians but also have been widely quoted by courts' decisions. This paper offers a recap of the works of Kariuki Muigua related to the above listed topics.

2. Exploring Conflict Management and the Environment: Tracing the Steps

2.1 Access to Justice

The quest for justice in Kenya predates the current Constitution of Kenya which was promulgated in 2010. Before then, there was little by way of statutory or legal instruments in Kenya that provided for the legal channels that guaranteed the citizenry's access to justice. Indeed, much of the debate surrounding access to justice were mainly based on enhancing the efficacy of the national courts and tribunals, which were considered as the major channels of accessing justice. While some of the works by Muigua that predate the 2010 Constitution acknowledged the place of Courts in the access to justice agenda, they also recommended the exploration of alternative means that would address such challenges as cost-effectiveness, time, physical accessibility and literacy levels among consumers of justice, among others.²

Kariuki Muigua has also published extensively after the 2010 Constitution on the subject of access to justice.³ Apart from the publications, Kariuki Muigua has also widely consulted on the subject for both public bodies and the Non-Governmental Organizations (NGOs).⁴

¹ <https://www.chambersandpartners.com/123/645/editorial/2/1/global-kenya-dispute-resolution-arbitrators>

² Muigua, K., Access to Justice: Promoting Court and Alternative Dispute Strategies (Available at <http://www.kmco.co.ke/index.php/publications/108-access-to-justice-promoting-court-and-alternative-dispute-resolution-strategies>.)

³ Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015; Muigua, K., Improving Access to Justice: Legislative and Administrative Reforms under the Constitution, Workshop on Access to Justice Tuesday, 23rd October 2012 at Sankara Hotel, Westlands. Available at <http://www.kmco.co.ke/index.php/publications>; Muigua, K. & Kariuki, F., 'ADR, Access to Justice and Development in Kenya,' Strathmore Law Journal, Vol. 1, No. 1, June 2015.

⁴ Engaged as a Consultant by the Commission for the Implementation of the Constitution and IDLO in preparing the report on the "**Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya**"- September to October 2012; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "**Report for Review of Policy, Legislation and Administrative Structures on Access to Justice: Existing Gaps and Proposed Reforms to Align with the Constitution**"- 2015; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "**Report for the Institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs) and other Community Justice Systems-2015**"; Engaged as a consultant by the International Law Development

Notably, Kariuki Muigua has also published some works exploring the link between access to justice and Alternative Dispute Resolution mechanisms⁵, access to justice and natural resources, among others. However, these will be revisited under different thematic subtitles in this paper.

2.2 Alternative Dispute Resolution Mechanisms

Before the current constitutional dispensation, there was little local literature on the topic of Alternative Dispute Resolution (ADR) mechanisms. When Muigua first set out to formally contribute to the debate on the role of ADR mechanisms in not only enhancing access to justice but also the applicability of these mechanisms to various conflicts such as natural resource related conflicts, he wrote his Master of Laws (LLM) Thesis on the topic of ‘resolution of natural resource conflicts in Kenya through arbitration and mediation’ in 2005⁶. This is however not to say that before then he had not written or published anything on ADR mechanisms.⁷ In 2011, he completed his Ph.D thesis on the applicability of mediation in resolving environmental conflicts in Kenya.⁸ The thesis critically examined the nature and scope of environmental conflicts in Kenya; the legal and institutional mechanisms in place at the time to address these conflicts; and their adequacy. The main focus of the discourse was if and how mediation could be applied in resolving environmental conflicts in Kenya.

His publications and writings cover the whole spectrum of ADR including arbitration, mediation, negotiation, conciliation and the hybrid methods falling under each of these.

Organisation (IDLO) in the Consultancy on “**Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes**”- January 2018;

⁵ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; He has also immensely contributed to the Chartered Institute of Arbitrators (Kenya) Journal, *Alternative Dispute Resolution*, where he is also the Managing Editor, among many other journals, both local and international. His publications dwell on various aspects of access to justice and their link with ADR mechanisms.

⁶ Muigua, K., “The Resolution of Natural Resource Conflicts in Kenya through Arbitration and Mediation”- A Dissertation submitted in partial fulfillment of the requirements for the Degree of Master of Laws of the University of Nairobi, March 2005.

⁷ His active membership and contribution to the activities of the Chartered Institute of Arbitrators goes beyond the year 2005.

⁸ **Doctor of Philosophy in Law (Ph.D.) -2011;**

Thesis titled “Resolving Environmental Conflicts in Kenya through Mediation” at the University of Nairobi on 02/12/2011 focusing on the areas of Public Participation, Mediation and Environmental Democracy.

2.2.1 Arbitration

Arbitration is one of the mechanisms that are commonly referred to as alternative dispute resolution mechanisms (ADR). Arbitration is defined as a mechanism for the settlement of disputes, which usually takes place in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable at law.⁹

In line with his vast experience in arbitration matters, Kariuki Muigua has papers and books on arbitration. ‘*Settling Disputes through Arbitration in Kenya*’ is a book that is currently in its third edition.¹⁰ The book’s publication was largely informed by the author’s desire to ensure that the continued growth and embracing of ADR as part of access to justice framework in Kenya is supported by progressive literature that would allow more people to appreciate the place of ADR. Before the publication of this book, there was little local literature to support the work of arbitration institutions that offer training services, such as the Chartered Institute of Arbitrators, among others. The book has been instrumental in not only making it easier for both practitioners and students to understand and appreciate the elements as well as stages of arbitration process but has also demystified the arbitration process for the general reader who is looking for general knowledge. Judges and magistrates looking for quick reference materials have also found the book and his other related articles useful.¹¹

⁹ Barnstein, R. *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998), p.313.

¹⁰ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017.

¹¹ See **Shafi Grewal Kaka (Chairperson) & 3 others v v International Air Transport Association (IATA), Civil Case 605 of 2015**, para. 38:

38. This was a clear intimation that the Plaintiff was not the appropriate party to seek the review and thus want of the locus standi.

In the treatise of **SETTLING DISPUTES THROUGH ARBITRATION IN KENYA BY DR. KARIUKI MUIGUA** page 46 the author opines that;

“Applicant must be a party to an arbitration agreement or at least a person claiming through is a personal representative or trustee in bankruptcy. This requirement is in view of the doctrine of privity of a contract which is to the effect that only parties to a contract can enforce it and a stranger to a contract cannot enforce it”

See also **Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017**:

Kariuki Muigua's work has been very instrumental in promoting the uptake of arbitration especially within the business and commercial community.¹²

2.2.2 Mediation

Mediation results from a process where two or more parties fail to resolve their differences through negotiation, hence the need to involve a third party to facilitate the

[121] Confidentiality is also important in many commercial transactions. Some parties do not want their business secrets to be divulged to the entire public as is often the case with litigation. In this regard, one of the reasons why Arbitration is preferred as a means of dispute resolution is because it enhances confidentiality and creates a less tense atmosphere of dispute resolution. As Dr. Kariuki Muigua has observed:

“Unless parties agree otherwise in an Arbitration agreement ... all the aspects of the case are confidential. ... For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure.”[\[13 Kariuki Muigua \(Dr.\), Constitutional Supremacy over Arbitration in Kenya, March, 2016, pp. 11\]](#)

[149] Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent[\[29 Kariuki Muigua \(Dr.\), Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited, 2015, pp. 116, 117.\]](#) of the Arbitration Act.

See also **Cape Holdings Limited v Synergy Industrial Credit Limited [2016] eKLR, Miscellaneous Civil Application 114 & 126 of 2015 (Consolidated)**:

96. under section 17 of the Arbitration Act, the arbitrator is empowered to decide on the existence and validity of an arbitration agreement, however, the arbitrator is bound by the terms of the reference and the issues in dispute must be “contemplated by the parties in the agreement to arbitrate as a subject of a reference. See **Settling Disputes Through Arbitration In Kenya By Dr K Muigua page 93**”.

¹² See *Modern Holdings (EA) Limited v Kenya Ports Authority [2020] eKLR, Petition 20 of 2017*:

40. We agree with the appellant that arbitrations are private proceedings. As Dr. Kariuki Muigua has observed:

“Unless parties agree otherwise in an Arbitration agreement ... all the aspects of the case are confidential. ... For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure.”[\[4 Kariuki Muigua \(Dr.\), Constitutional Supremacy over Arbitration in Kenya, March, 2016, pp. 11\]](#)

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negotiation process. While a lot has been written on the advantages and disadvantages of mediation, Kariuki Muigua's writings on mediation are unique in a number of ways.

Kariuki Muigua has not only immensely contributed to the teaching of mediation in Kenya but has also consulted widely for the Judiciary and has been playing an instrumental role in setting up a formal framework for mediation practice in the country.¹³

His work titled *'Resolving Conflicts through Mediation in Kenya'*¹⁴ discusses the process of mediation in the context of African traditional setting. The book acknowledges the context within which mediation in the African traditional societies was conducted, and that is, the ultimate end was to foster peaceful coexistence through collaborative conflict resolution.¹⁵ The book also recognises the fact that mediation process involves more than appreciating the issues in conflict as it also encompasses the parties' psychological issues. The psychological issues as discussed in this book require the mediator to come up with creative solutions that would help them address the parties' needs.¹⁶

'Resolving Conflicts through Mediation in Kenya' is a book that prepares anyone willing to start their journey in mediation through first, understanding the basic concepts of mediation, secondly, the process of mediation in terms of dos and don'ts and finally, on the skills required to conduct a successful mediation. While it is acknowledged that one may require advanced professional training in mediation, this book is definitely an important resource in offering the first step towards this journey.

¹³ Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on "Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes"- January 2018; Engaged as a Consultant by CIC and IDLO in preparing the report on the "Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya"- September to October 2012; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "Report for Review of Policy, Legislation and Administrative Structures on Access to Justice: Existing Gaps and Proposed Reforms to Align with the Constitution"- 2015; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "Report for the Institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs) and other Community Justice Systems-2015; Muigua, K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa.

¹⁴ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

¹⁵ See Chapter Two, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017; See also Chapter Eight on the Mediation Paradigm.

¹⁶ See Chapter Nine, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

Kenyan Judiciary has since embraced and put in a place a framework for court-annexed mediation. The Court Annexed Mediation has so far played an important role in enhancing access to justice in Kenya. The judiciary acknowledges that for cases that have been referred to mediation, the average time for their conclusion is less in comparison to the time taken under the normal court process.¹⁷ Its continued success will however depend on how effectively the stakeholders preserve the positive aspects of the process which make it attractive. Even as the ADR Policy gears towards mainstreaming the mediation process, the key benefits of a mediation process must be upheld.

2.2.3 Negotiation

Negotiation has been part of the African culture for centuries since it has always been the first port of call in resolving conflicts among communities. The applicability of negotiation and its various forms has been discussed extensively in Kariuki Muigua's work.¹⁸ Notably, negotiation is the first step towards mediation process. Article 159 of the 2010 Constitution of Kenya acknowledges this as it lists negotiation as part of the acceptable ADR processes in Kenya. It is also a part of conciliation as confirmed by Kenyan courts.¹⁹ Negotiation becomes even more relevant with the formal introduction of mediation into the Kenyan judicial process.

¹⁷ Muigua, K., *Enhancing The Court Annexed Mediation Environment in Kenya*, A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4th to 6th March 2020 in Mombasa, Kenya. Available at <http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf>

¹⁸ See Chapter Seven, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

¹⁹ *Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union* [2018] eKLR, Civil Appeal 100 of 2013: "ADR mechanisms are flexible and parties retain control of their dispute settlement. The Industrial Justice System would be slowed down considerably, if parties went seeking for support of trade dispute proceedings from the Civil Courts. There were options open to the claimant, but the exercise of these options would have resulted in delay. The role of Labour Officers under the Employment Act 2007 is to facilitate parties in their attempt to arrive at a voluntary settlement. There is no obligation imposed on an employee who is unfairly dismissed to initially seek the intervention of the Labour Office. Failure to seek the assistance of the Labour Office in any event would not invalidate a claim filed in Court. It should always be understood that even in embracing the ADR mechanisms, parties are mindful of other statutory constraints such as time limits. A party should not be compelled to go through the non-adjudicatory mechanism if in so doing for instance, that party ends up having his/her claim time-barred under section 90 of the Employment Act. Diplomatic means of settlement should be seen as complimentary to Adjudication. **Negotiation in particular, as seen daily in the work we do here, is not closed out by initiation of litigation....**"

*'Resolving Conflicts through Mediation in Kenya'*²⁰, *Settling Disputes through Arbitration in Kenya*²¹ and *Alternative Dispute Resolution and Access to Justice in Kenya*²² books all carry comprehensive discussions on negotiation process and the various aspects of negotiation.

Notably, the Mediation Book, *'Resolving Conflicts through Mediation in Kenya'* does not discuss negotiation as an abstract process but ably establishes the relationship between negotiation and mediation. It clearly demonstrates the link between the negotiation process and the mediation process for both the general reader and the professional mediation enthusiasts.²³

2.3 Alternative Dispute Resolution and Access to Justice

The publication *'Alternative Dispute Resolution and Access to Justice in Kenya'* was written to not only expound on the role of ADR in enhancing access to justice²⁴ in Kenya but also exploring the foundations of ADR²⁵ as well as the legal and institutional frameworks governing ADR in Kenya as a tool for access to justice. The book also offers rich discussions on if and how ADR practice can be regulated for current and future purposes²⁶, in order to enhance its effectiveness. The book ably establishes the link between ADR and access to justice²⁷ in a way that has made it easier for the stakeholders in the local ADR industry to promote ADR as a tool for realisation of access to justice for all. This is in line with the provisions of Article 159 of the Constitution of Kenya which requires Kenyan courts and tribunals to promote ADR.

The book cautions the stakeholders in the justice system on the challenges that they are likely to face when putting in place the court-annexed ADR processes, and especially mediation.

²⁰Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi – 2013.

²¹Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017.

²²Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²³ See Chapters one and seven, *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi – 2013.

²⁴ See Chapter six, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁵ See Chapter Three, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁶ See Chapter Seven, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁷ See Chapter six, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

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However, it offers some possible considerations that may go a long way in overcoming such challenges.²⁸

The book on ADR and access to justice²⁹ paints a bright future for ADR practice in the country but subject to a few adjustments in its practice and regulation.³⁰ Some of the recommendations by Muigua as captured in this book are being implemented through different channels by the Judiciary as well as other policy makers.

The proposition of a lawyer as a negotiator, mediator and peacemaker³¹ has also seen such professional institutions as the Law Society of Kenya collaborating more with ADR professional training bodies to equip the lawyers and advocates with the necessary skills, a step in the right direction.

Muigua's publication³² also argues that with adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may well be aware of their right of access to justice but lacking means of realizing the same. It calls for consolidating and harmonizing the various statutes relating to ADR with the Constitution, in order to ensure access to justice by all becomes a reality. As advocated for in this publication, that continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible aspects as contemplated under the Constitution and various statutes, there have been an increase in efforts geared towards achieving this.³³ The book acknowledges that a full appreciation of the workings of ADR mechanisms is

²⁸ See Chapter five, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁹ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³⁰ See Chapter Nine, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³¹ See Chapter Eight, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³² Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³³ For instance, Kariuki Muigua was Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on “*Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*”- January 2018.

This consultancy also involved several public for a where various stakeholders exchanged their views.

key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice.

The recommendations made in the ADR and Access to Justice Book were informed by the fact that the 2010 Constitution and the resultant statutes have been widening the scope of application of ADR mechanisms. The book could not therefore have come at a better time.

The timing of the ADR and Access to Justice Book was also critical considering that the Judiciary, the Nairobi Centre for International Arbitration and other key stakeholders in the justice sector has since come up with the *Draft National ADR Policy*³⁴ whose ultimate goal was to lay the framework for the ADR legislation.

2.4 Sustainable Development-The Bridges that Bind?

Sustainable development agenda has gained the support of the international community as part of adopting an integrated approach to development issues and environmental conservation and protection. Sustainable development seeks to ensure that all development activities are conscious of environmental conservation and protection. Kariuki Muigua's work, *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers, Nairobi – 2016) discusses in depth the various bridges that emerge from sustainable development and development activities. The underlying thread in this book is to promote sound environmental governance and management for sustainable development. The discourse recognises that sustainable development agenda not only deals with the environment, but it seeks to address all the factors that affect people's livelihoods and consequently the sustainability of environment and natural resources. This is in recognition of the fact that people's livelihoods mainly depend on the natural and other environmental resources. For instance, the book addresses the national obligations on environment and sustainable development; basic principles of sustainable development; general approaches to sustainability and sustainable development debate; the link between human rights and sustainable development; natural resources exploitation; climate change; environmental security; food security; trade; indigenous knowledge; gender equity; and natural resource conflicts, among others.

As rightly captured in Muigua's book on sustainable development, sustainable development agenda is not only concerned with environmental matters. Instead, it adopts both

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anthropocentric and ecocentric approaches. Muigua's work argues for promotion of sustainable development using the two approaches: Some of the running themes that are informed by the anthropocentric approach to environmental management include Poverty Eradication, Food Security, Environmental Democracy, Environmental Justice, Environmental Security, Public Participation, Gender Equity, Access To Information, Conflicts Management, amongst others. All these themes are discussed within the broader theme of human rights while emphasizing the special relationship between human rights and the environment. This is particularly important in light of the new Constitutional provisions on governance and in the Bill of Rights including Articles of the Constitution that touch on environment and natural resources.³⁵

Ecocentric arguments also inform the discussion on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature. However, promoting such rights as the right to a clean and healthy environment has both anthropocentric and ecocentric benefits and should therefore be pursued.³⁶

Thus, as seen in Muigua's work, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.³⁷ This is in line with the UNDP's approach in the recent past where it has been advocating for inclusivity, sustained political commitment and national ownership alongside the need to have gender equality, and integrated planning, budgeting and monitoring as part of achieving the 2030 Sustainable Development Goals (SDGs) agenda.³⁸ OECD also calls for an integrated approach to the implementation of sustainable development and argues that

³⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.

³⁶ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. xii.

³⁷ See also Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

³⁸ United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at <https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html> [Accessed on 6/4/2020]; See also Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <<https://aer.eu/integrated-approach-sdgs/>> accessed 6 April 2020;

many SDGs are interconnected with each other; an integrated approach implies managing trade-offs and maximising synergies across targets.³⁹

Muigua's work succinctly captures the interconnectedness of the various themes on sustainable development and ably captures the justifications for an integrated approach to the realisation of the sustainable development goals.⁴⁰ Notably, the themes of Poverty Eradication⁴¹, Food Security⁴², Environmental Democracy⁴³, Environmental Justice⁴⁴, Environmental Security⁴⁵, Public Participation⁴⁶, Gender Equity⁴⁷, Access To Information⁴⁸, Conflicts Management⁴⁹, combating climate change⁵⁰, impact of resource extraction⁵¹, environmental

³⁹ Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <<https://aer.eu/integrated-approach-sdgs/>> accessed 6 April 2020.

⁴⁰ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. 343.

⁴¹ Muigua, K., *Utilizing Africa's Natural Resources to Fight Poverty*, available at <http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf>

⁴² Muigua, K., *Achieving the Right to Food for Sustainable Development in Kenya*, Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf> ; Muigua, K., *Food Security and Environmental Sustainability in Kenya*. (Available at <http://www.kmco.co.ke/index.php/publications/129-food-security-and-environmental-sustainability-in-kenya>);

⁴³ Muigua, K., 'Enhancing Environmental Democracy in Kenya,' *The Law Society Law Journal*, Vol. 4, No. 1, 2008; Muigua, K., *Realising Environmental Democracy in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf>.

⁴⁴ Muigua, K., "Chapter 25: Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice", in Patricia Kameri-Mbote and Collins Odote, eds., *Blazing the Trail - Professor Charles Okidi's Enduring Legacy In The Development of Environmental Law* (University of Nairobi, March, 2019); Muigua, K. and Kariuki, F., 'Towards Environmental Justice in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017); Muigua, K., *Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice*, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at <http://www.kmco.co.ke/index.php/publications>); Muigua, K., *Reflections on ADR and Environmental justice in Kenya* (Available at <http://www.kmco.co.ke/index.php/publications/97-reflections-on-adr-and-environmental-justice-in-kenya>).

⁴⁵ Muigua, K., *Achieving Environmental Security in Kenya*, available at <http://www.kmco.co.ke/attachments/article/165/Environmental%20Security%20in%20Kenya%2027th%20October%202015.pdf>.

⁴⁶ Muigua, K., *Towards meaningful Public Participation in Natural Resource Management in Kenya*. (Available at <http://www.kmco.co.ke/index.php/publications/126-towards-meaningful-public-participation-in-natural-resource-management-in-kenya>).

⁴⁷ Muigua, K., 'Attaining Gender Equity for Inclusive Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 2, No 2, (2018).

⁴⁸ Muigua, K., 'Information Security Management: Demystifying the Role of the Company Secretary,' *The Professional Management Journal for the institute of Certified Public Secretaries of Kenya*, May, 2010.

⁴⁹ Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' *Journal of Conflict Management and Sustainable Development*, Volume 3, No 1, (May, 2019); Muigua, K. and Maina, N., 'Effective Management of Commercial Disputes: Opportunities for the Nairobi

health⁵², and environmental conservation for the sake of the Mother Nature are not only discussed in his text books but have also been critically explored in his other works published as academic papers and articles.

Centre for International Arbitration,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017); Muigua, K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa; Muigua, K., *Natural Resources and Conflict Management in East Africa*, Paper Presented at the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014. (Available at <http://www.kmco.co.ke/index.php/publications>); Muigua, K., Conflict Management Mechanisms for Effective Environmental Governance in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Conflict-Management-Mechanisms-for-Environmental-Governance-Kariuki-Muigua-September-2018.pdf> ; Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at <http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf>.

⁵⁰ Gichira, P.S, Agwata, J.F & Muigua, K.D, 'Climate Finance: Fears and Hopes For Developing Countries,' *Journal of Law, Policy and Globalization*, Vol. 22 (2014), pp. 1-7.

⁵¹ Muigua, K., "Utilising Kenya's Marine Resources for National Development", in Herausgegeben von Prof. Dr. Patricia Kameri-Mbote, Prof. Dr. Alexander Paterson, Prof. Dr. Oliver C. Ruppel, LL.M., Prof. Dr. Bibobra Bello Orubebe, Prof. Dr. Emmanuel D. Kam Yogo (eds), *Law / Environment / Africa*, January, 2019, 724 S., Gebunden, ISBN 978-3-8487-5287-4, Publication of the 5th Symposium | 4th Scientific Conference | 2018 of the Association of Environmental Law Lecturers from African Universities in cooperation with the Climate Policy and Energy Security Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung and UN Environment.; Muigua, K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya,' *The Law Society of Kenya Journal*, Vol. 15, No. 1, 2019: 1-42; Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' *Journal of Conflict Management and Sustainable Development*, Volume 3, No 1, (May, 2019); Muigua, K., 'Safeguarding Environmental Rights in Kenya,' *Kenya Law Review Journal*, Vol. IV, (2012-2013), pp. 279-294; Muigua, K., *Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice*, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at <http://www.kmco.co.ke/index.php/publications>); Muigua, K., *Multinational Corporations, Investment and Natural Resource Management in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf>; Muigua, K., *Devolution and Natural Resource Management in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Devolution-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-September-2018-1.pdf>; Muigua, K., *Balancing Trade Environment and Development for Sustainability*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Balancing-Trade-Environment-and-Development-for-Sustainability-Kariuki-Muigua-August-2018.pdf>; Muigua, K., *Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf>.

⁵² Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017.

2.5 Environment and Human Rights

2.5.1 Right to a clean and Healthy Environment

Even before the 2010 Constitution of Kenya which constitutionally guaranteed the right of every person to a clean and healthy environment and even provided for the legal basis for one to pursue justice before courts if the same is violated, Kariuki Muigua's scholarly work had argued for this approach in order to assure the justiciability of the same, seeing that environment is critical to the protection of the right to life. It is commendable that this right is no longer in doubt in Kenya and there even exists several court decisions affirming every person's right to pursue the same⁵³. However, this did not mark the push for clearer framework to protect and implement this right.

In his work, *Securing Our Destiny through Effective Management of the Environment*⁵⁴, Muigua revisits the missteps that as a country we may have made, inadvertently presenting new hurdles to its full implementation. He observes that where the existing jurisprudence is that that where a party is unable to prove the denial, violation, infringement or threat to environmental rights for one reason or the other, then the same risks being violated. His argument however, is that even in such scenarios, courts should step in and use their *suo motu* powers in respect of environmental protection and conservation to safeguard the right to clean and healthy environment of all and promote the sustainable development agenda.⁵⁵

2.5.2 Gender and Development

The call for public participation and the involvement of all stakeholders in the sustainable development agenda comes with the need to ensure that the gender aspect is also considered.

⁵³ Article 42 of the Constitution of Kenya provides that every person has the right 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 69; and to have obligations relating to the environment fulfilled under Article 70.

⁵⁴ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

⁵⁵ *Ibid*, see also Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017; Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, chapter Nine;

This position is also constitutionally supported by Article 27 of the Constitution which guarantees the right of every person to equality and freedom from discrimination.⁵⁶ Bearing that environmental and natural resources and the related conflicts impact on both men and women, Kariuki Muigua's work has substantively delved into the subject of gender. In his work, '*Attaining Gender Equity for Inclusive Development in Kenya*,'⁵⁷ Muigua advocates for more effective legal and institutional framework on gender equity and human rights with a view to making a case for the practical empowerment of all gender for national development.⁵⁸ His argument is based on a legal and moral argument in support of the need for full participation of both gender in the sustainable development efforts.⁵⁹

His work on gender and development also touches on inclusion of both men and women in conflict management efforts. While advocating for the use of ADR and TDR mechanisms in conflict management, Muigua rightly points out that traditionally, these mechanisms have often demonstrated some gender discrimination against women.⁶⁰ He points out that TDR mechanisms have traditionally had some disadvantages such as: potential disregard for basic human rights and gender imbalance in the composition of the committees, among others.⁶¹ It is in this recognition that the Land Act, 2012⁶² which is the substantive regime for matters pertaining to land in Kenya lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and

⁵⁶ 27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) *To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

⁵⁷ Muigua, K., '*Attaining Gender Equity for Inclusive Development in Kenya*,' *Journal of Conflict Management and Sustainable Development*, Volume 2, No 2, (2018).

⁵⁸ *Ibid.*

⁵⁹ See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, chapter Twelve.

⁶⁰ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

⁶¹ *Ibid.*

⁶² Land Act, No. 6 of 2012, Laws of Kenya.

practices related to land and property in land; participation, accountability and democratic decision making within communities, the public and the Government in land dispute handling and management.⁶³

Muigua correctly points out that some of the traditional practices have negative impacts such as discrimination of women and persons with disabilities,⁶⁴ and it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.⁶⁵ This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.⁶⁶

Kariuki Muigua thus asserts that in a community where gender and age is discriminated, these prejudices will continue to be perpetuated by their customs, unless the community is sensitized about these issues. Mainstreaming of gender and equality rights and what the law provides will go a long way in ensuring that ADR and TDR mechanisms respect the rights of all humans.⁶⁷

Environmental and natural resources exploitation and the resultant conflicts affect both men and women especially based on their perceived traditional roles and this creates the urgent need to ensure that both groups are actively and meaningfully included in all management issues. Kariuki Muigua observes that Women elders also played a key role in resolving conflicts.⁶⁸ This is buttressed by the fact that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.⁶⁹ Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part*, where he asserts as follows:

“...when a father beats his child, it seeks sympathy in its mother’s hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you”.⁷⁰

⁶³Ibid, S. 4.

⁶⁴ See generally, Muigua, K., “Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya”. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, World Report 2013, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf.

⁶⁵ Art. 159(3).

⁶⁶ Art. 23.

⁶⁷ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

⁶⁸ Ibid.

⁶⁹ Brock-Utne, B., “Indigenous conflict resolution in Africa,” *op cit.*, p.13.

⁷⁰ Achebe, C., *Things Fall Apart*, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., “Indigenous conflict resolution in Africa,” *op cit.*, p.13).

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.⁷¹

However, while the above is true, Muigua is quick to point out that a critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.⁷² Thus, while the Constitution of Kenya calls for empowerment and protection of traditionally marginalised and vulnerable groups such as women, it is important that these efforts are not only limited to national leadership positions but also ensure that they are reflected across the different spheres of everyday lives. Empowering both men and women individually will create stronger institutions even as the policy makers and legislators ensure that conflict management systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female conflict resolvers such as mediators and arbitrators when appropriate, like when land rights are involved.⁷³

2.5.3 Democracy/Environmental Democracy

Environmental Democracy in Kenya has come a long way from being a virtually non-existent concept under the laws of Kenya to one that is now prominently recognised both under the law and the case law emanating from the highest courts. The wording of the statutes may not specifically mention the words ‘environmental democracy’ but the idea is captured in various words, especially in the 2010 post-constitutional era. For instance, Article 10 of the Constitution provides for the following national values and principles: patriotism; national unity; sharing and devolution of power; the rule of law; democracy and participation of the people; human dignity;

⁷¹Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, *op cit*.

⁷² See Alaga, E., *Challenges for women in peacebuilding in West Africa*, (*Africa Institute of South Africa (AISA)*, 2010); Cf. Ibewuiké, V. O., *African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at <https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf> [Accessed on 6/4/2020].

⁷³ Fitzpatrick, D., “Dispute Resolution; Mediating Land Conflict in East Timor”, in AusAID’ *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from <http://www.ausaid.gov.au/publications/pdf>, [Accessed on 12/4/2020].

equity; social justice; inclusiveness; equality; human rights; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development. These values and principles ought to bind all state organs, state officers, public officers and all persons whenever any one of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁷⁴

The lack of environmental democracy was largely informed by the top-down approach previously adopted in Kenya.⁷⁵ Environmental democracy in environmental management matters led to the buttressing of the co-management of natural resources and environmental resources. Co-management of these resources has several advantages as it overcomes the many limitations and pitfalls of centralized, top-down resource management hence resulting in more efficient, appropriate and equitable resource management.⁷⁶ Further, it fosters meaningful communication in the decision-making process thus contributing to effective management of the marine resources.⁷⁷

Kariuki Muigua's work has largely contributed to the debate leading to this transition.⁷⁸ *In the Matter of the National Land Commission [2015] eKLR*⁷⁹, the Supreme Court of Kenya in its advisory opinion observed as follows:

Kariuki Muigua, Didi Wamukoya, Francis Kariuki in their book, [Natural Resources and Environmental Justice in Kenya (Glenwood Publishers Limited, Nairobi: 2015)] discuss the link between the growth of government structures, and the delegation of decision-making powers to state agencies, such as commissions. They observe as follows (pages 24 to 25):

“In Kenya today, as the size and scope of government continues to grow, decisions that have previously been made by elected officials in a political process are now being delegated by statute to technical experts in state agencies and constitutional commissions. The rationale is, therefore, to incorporate public values into decisions, improve the substantive quality of decisions,

⁷⁴ Article 10 (1), Constitution of Kenya, 2010.

⁷⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

⁷⁶ *Ibid*; Article 10, Constitution of Kenya.

⁷⁷ *Ibid*.

⁷⁸ Muigua, K., ‘Enhancing Environmental Democracy in Kenya,’ *The Law Society Law Journal*, Vol. 4, No. 1, 2008; see also **Doctor of Philosophy in Law (Ph.D.) -2011;**

Thesis titled “Resolving Environmental Conflicts in Kenya through Mediation” at the University of Nairobi on 02/12/2011 focusing on the areas of Public Participation, Mediation and Environmental Democracy; Muigua, K., *Realising Environmental Democracy in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf>.

⁷⁹ *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference 2 of 2014.

resolve conflicts among competing interests and build trust in institutions and educate and inform the public.”⁸⁰

The Supreme Court went further to capture the place of democracy (including environmental democracy) in the following words:

[348] *“It is thus clear that the principle of the participation of the people does not stand in isolation; it is to be realised in conjunction with other constitutional rights, especially the right of access to information (Article 35); equality (Article 27); and the principle of democracy (Article 10(2)(a)). The right to equality relates to matters concerning land, where State agencies are encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy is another national principle that is enhanced by the participation of the people.”⁸¹*

[352] *“The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State’s decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process.”*

[353] *“I agree fully with the views of Odunga J. in the case of **Robert Gakuru**, that public participation is not an abstract notion and, on matters concerning land, State organs, the Ministry, and the NLC must breathe life into this constitutional principle, and involve the public in land management and administration; legislative plans and processes; and policy-making processes. This is clear from the terms of Article 10 of the Constitution, which requires these bodies to:(a) apply or interpret this Constitution; (b) enact, apply or interpret any law; or (c) make or implement public policy decisions bearing in mind the participation of the people, and the goals of democracy, and transparency.”*

[354] *“I would refer to the Draft Public Participation Guidelines for County Governments, which is of persuasive authority in this Advisory Opinion. It states that the importance of public participation includes to: strengthen democracy and governance; increase accountability; improve process, quality and results, in decision-making; manage social conflicts; and enhance process legitimacy. Although these are not the final guidelines, they bear similar objectives of public participation as those articulated in the Constitution, and in the County Governments Act. Finally, the Draft Guidelines provide*

⁸⁰ Ibid, para. 346.

⁸¹ Ibid, para. 348.

conditions for meaningful public participation, such as: (i) clarity of subject-matter; (ii) clear structures and process on the conduct of participation; (iii) opportunity for balanced influences from the public in general; (iv) commitment to the process; (v) inclusive and effective representation; (vi) integrity; (vii) commitment to the value of public input; (viii) capacity to engage; (ix) transparency; and (x) considerations of the social status, economic standing, religious beliefs and ethnicity of the members of the public. These conditions are comparable to the constitutional values and principles of democracy, transparency, accountability and integrity.”

[355] “In conclusion, an array of rich ingredients of the participation of the people, emerge from various sources: decisions by superior Courts in Kenya; comparative jurisprudence from another jurisdictions; works by scholars; draft principles and guidelines bearing upon public participation by various State organs and governments; and relevant constitutional and legal provisions. The categories of these ingredients are not closed. It will devolve to the citizens, as well as stakeholders, to monitor the practicability of these ingredients, and to appraise the scope for improvement, so they may increasingly reflect the vision of the Constitution.”

2.5.4 International investments/Trade, Environment and Human rights

International investments and trade have come to be acknowledged to have a great impact on not only the environment but also human rights. Kariuki Muigua has ably discussed the relationship that exists between these concepts and how they affect each other. In his work, *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, he has discussed how they all relate to the sustainable development agenda. He bases his argument on the fact that trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.⁸² On the one hand, environmental law, both national and international, and environmental policies—such as promotion of renewable energy, environmental taxation and conservation measures—help define how countries will structure their economic activities.⁸³ On the other hand, trade law

⁸² *‘The Link between Trade and Development: What Role for the EU Trade Policy?’* AIF Conference, Christiansborg, 12 September 2000; See also Preamble, World Trade Organization, “Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods-Agreement on Trade-Related Investment Measures”, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (World Trade Organization, Geneva, 1995), pp. 163-167.

⁸³ International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook*, (International Institute for Sustainable Development, Geneva, 2014), pp. 3-4.

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affects the way in which countries design their laws and policies in areas—such as subsidies, technical regulations, investment policy and taxes—that are integral to environmental policy.⁸⁴

It has been argued that the main link between trade and sustainable development is the use of non-renewable raw materials to earn foreign exchange.⁸⁵ This, it has been suggested, is a result of a scenario where the dependence of the developed market economies on other mineral imports from the developing countries has also grown, and non-renewable resources like fuels and minerals, as well as manufactured goods, are now far more important than tropical products and other agricultural materials in the flow of primary products from developing to industrial countries.⁸⁶ This has been such a serious problem which has continually affected third world countries that the Agenda 2030 for Sustainable Development aims at ensuring that there is significant increase in the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020.⁸⁷

His work supports the assertion that equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer⁸⁸, ensure national economic security and support infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy.⁸⁹

Equitable trade may be more effectively harnessed in delivering sustainable development when integrated into the SDG framework as an SDG enabler, where it would serve as a promoter

⁸⁴ *Ibid*, pp. 3-4.

⁸⁵ *Report of the World Commission on Environment and Development, Our Common Future, op cit., para. 41. However, this is not to say that it is the only link. There are other links between trade and sustainable development; if protectionism raises barriers against manufactured exports, for example, developing nations have less scope for diversifying away from traditional commodities. And unsustainable development may arise not only from overuse of certain commodities but from manufactured goods that are potentially polluting. The Commission also observed that the increase in protectionism in industrial countries stifles export growth and prevents diversification from traditional exports. Consequently, if developing countries are to reconcile a need for rapid export growth with a need to conserve the resource base, it is imperative that they enjoy access to industrial country markets for non-traditional exports where they enjoy a comparative advantage. (para. 51).*

⁸⁶ *Ibid*, para. 40.

⁸⁷ *United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, op cit., para. 17.11.*

⁸⁸ *Art. 7 of the TRIPS states that: "The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."*

⁸⁹ Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in *United Nations, The Road from Rio+20: Towards Sustainable Development Goals, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf [Accessed on 05/04/2020].*

for potential goals such as poverty eradication, job creation, universal healthcare and education, and a healthy environment.⁹⁰

In his work, he acknowledges that trade can be instrumental for growth and development under appropriate conditions. Trade provides a means to overcome constraints posed by small domestic markets and allows countries to access larger external markets, as well as skills, technology and capital, which in turn enable a better use of productive resources to catalyse structural transformation.⁹¹

Muigua supports the idea that while environment, trade and development are clearly linked, an integrated approach that fully incorporates environmental concerns, fair trade and sustainable development is desirable.⁹²

He also promotes the idea that an effective investment law and policy regime should be geared towards promoting sustainable development. It should also ensure minimal or no environmental damage.⁹³ In addition, he argues that human rights must at all times be upheld. He argues that for long lasting and sustainable investment policies that positively impact on the lives of communities, there is a need to ensure that the same are in line with the principles of sustainable development especially those that seek to safeguard human rights as well as sound environmental management and governance.⁹⁴

2.5.5 Traditional Ecological Knowledge, Conflict Management and Environmental Management

While discussing the place of ecological knowledge in achieving effective environmental and conflict management for sustainable development, Kariuki Muigua's work extensively discussed not only the use of formal knowledge but also traditional ecological knowledge. His work explores the place of traditional or indigenous knowledge in environmental management

⁹⁰ *Ibid*, p.10.

⁹¹ *United Nations Conference on Trade and Development*, Towards an enabling multilateral trading system for inclusive and sustainable development, *op cit*, para. 5.
Available at http://unctad.org/meetings/en/SessionalDocuments/cimem5d5_en.pdf [Accessed on 05/04/2020].

⁹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, chapter Ten.

⁹³ Muigua, K., *International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development* - Paper Presented at the Africa International Legal Awareness (AILA) Africa International Legal Awareness (AILA) Conference Held on 5th November, 2018 at Riara University, Nairobi, Kenya.

⁹⁴ *Ibid*.

and conflict management. This is based on African traditional practices and the subsequent international recognition that that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.⁹⁵ His position therefore, has been that the international recognition of indigenous knowledge means that national governments ought to give this knowledge more recognition and facilitate active uptake and use of the knowledge by communities.⁹⁶

In addition, his position is that while there are commendable statutory and constitutional provisions in view of the fact that they have envisaged indigenous or traditional knowledge within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making. There is a need to move beyond recognition of traditional knowledge in Kenya to ensuring that the same has been fully incorporated and reflected in decision-making and also implemented where the Constitution so requires.⁹⁷

Furthermore, Muigua argues that there is a clear need to integrate traditional and formal sciences for participatory monitoring, and taking feedback to achieve adaptive strategies for management of natural resources.⁹⁸ His position is that management of natural resources cannot afford to be the subject of just any single body knowledge such as the Western science, but it has to take into consideration the plurality of knowledge systems. There is a more fundamental reason for the integration of knowledge systems. Application of scientific research and local knowledge contributes both to the equity, opportunity, security and empowerment of local communities, as well as to the sustainability of the natural resources. Local knowledge helps in scenario analysis, data collection, management planning, designing of the adaptive strategies to learn and get feedback, and institutional support to put policies in to practice. Science, on the other hand, provides new technologies, or helps in improvement to the existing ones. It also provides tools for networking, storing, visualizing, and analyzing information, as well as projecting long-term trends so that efficient solutions to complex problems can be obtained.⁹⁹ Through assimilation of indigenous knowledge, it is possible to capture the interests and genuine

⁹⁵ 61/295. *United Nations Declaration on the Rights of Indigenous Peoples, Preamble.*

⁹⁶ See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. 254.

⁹⁷ *Ibid*, pp. 257-258.

⁹⁸ Pandey, D.N., 'Traditional Knowledge Systems for Biodiversity Conservation,' available at http://www.infinityfoundation.com/mandala/t_es/t_es_pande_conserve.htm [Accessed on 13/04/2020].

⁹⁹ *Ibid*.

desires of the locals in natural resource exploitation activities. This reduces conflict, not only amongst the members of the concerned communities, but also between the communities and the authorities. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.¹⁰⁰

Traditional ecological knowledge is therefore an important part and parcel of solving environmental problems and effective conflict management, thus making Kariuki Muigua's work relevant and timely in the debate.

2.5.6 Role of science and Technology in environmental management

Kariuki Muigua has extensively contributed to the debate on the role of science and technology in environmental management. This is in line with the constitutional provisions acknowledging the place of science and technology in achieving sustainable development.¹⁰¹ This is an internationally agreed concept that indeed science, technology and innovation all have a role to play in realising the sustainable development agenda.¹⁰² This critical role also extends to environmental management, a central element of SDGs.¹⁰³ Science for sustainable development also forms the basis of Chapter 35 of Agenda 21 which calls for: strengthening the scientific

¹⁰⁰ Muigua, K., *Nurturing Our Environment for Sustainable Development*, p. 258.

¹⁰¹ See Constitution of Kenya, 2010, Article 11 (2) (b):

(2) *The State shall—*

(b) recognise the role of science and indigenous technologies in the development of the nation;

¹⁰² Florian Kongoli, 'Role of Science and Technology on Sustainable Development' [2016] *Sustainable Industrial Processing Summit, SIPS 1*; Kongoli, Florian. "Investments needed for new sustainable technologies." *Copper Worldwide* 6, no. 1 (2016): 3; See also Likens, Gene E. "The role of science in decision making: does evidence-based science drive environmental policy?." *Frontiers in Ecology and the Environment* 8, no. 6 (2010): e1-e9; Miller, Clark A., Paul N. Edwards, and Paul Edwards, eds. *Changing the atmosphere: Expert knowledge and environmental governance*. MIT press, 2001; Christmann, Petra. "Effects of "best practices" of environmental management on cost advantage: The role of complementary assets." *Academy of Management journal* 43, no. 4 (2000): 663-680; Cashmore, Matthew. "The role of science in environmental impact assessment: process and procedure versus purpose in the development of theory." *Environmental Impact Assessment Review* 24, no. 4 (2004): 403-426.

¹⁰³ See also *Sustainable Development Goals Targets 17.6 and 17.8* which respectively aim to "Enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism" and to "fully operationalize the technology bank and science, technology and innovation capacity-building mechanism for least developed countries by 2017 and enhance the use of enabling technology, in particular information and communications technology".

basis for sustainable management; enhancing scientific understanding; improving long-term scientific assessment; and building up scientific capacity and capability.¹⁰⁴

Kariuki Muigua's paper on "*Utilising Science and Technology for Environmental Management in Kenya*"¹⁰⁵ advocates for the use of science and technology for environmental management in Kenya. It critically discusses the various environmental management tools in Kenya. The paper argues that environmental management tools in Kenya have not been fully effective in environmental protection and conservation as evidenced by several environmental concerns such as pollution and degradation. Muigua calls for the enhancement of science and technology as an environmental management tool in Kenya in order to effectively achieve the right to a clean and healthy environment and promote sustainable development.¹⁰⁶

Muigua supports the view that while Science and technology have resulted in many environmental problems, they can and have provided effective solutions to most, if not all, environmental problems facing the world especially in relation to: climate change, waste management and environmental degradation.¹⁰⁷ This can be achieved through the use of science and technology in industrial waste management in order to enhance environmental management and protection; adoption of green and clean technologies; and climate change mitigation measures.¹⁰⁸ While Kenya has made some notable progress in adopting the same, Muigua argues for greater uptake and adoption of measures that will see more sectors embracing science, technology and innovation. He provides suggestions that would make this a reality.

These recommendations also notably feature in his other work such as the book on *Nurturing Our Environment for Sustainable Development*¹⁰⁹ and the 2020 book on *Securing Our Destiny through Effective Management of the Environment*¹¹⁰, whose main running themes include the Role of Law in Environmental Management and Governance; Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya; Role

¹⁰⁴ 'Science.: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/topics/science>> accessed 14 April 2020.

¹⁰⁵ Kariuki Muigua, 'Utilising Science and Technology for Environmental Management in Kenya' 23. Available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf> [Accessed on 10/4/2020].

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, p. 12.

¹⁰⁸ Ibid.

¹⁰⁹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

¹¹⁰ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited(2020), ISBN: 978-9966-046-06-1.

of Corporations in Environmental Conservation and Sustainable Development in Kenya; Achieving Environmental Security for Sustainable Development in Kenya; The Extractives Industry and Environmental Management in Kenya: the (Dis) Connect; Harnessing the Blue Economy: Challenges and Opportunities for Kenya; Environmental and Natural Resources and Equitable Benefit Sharing in Kenya; Adopting an Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya; Environmental Liability Regime in Kenya and Sustainable Development; Managing Environmental and Land Related Conflicts Through Traditional Dispute Resolution Mechanisms; Effective Environmental Management and Governance for Peace Building in Kenya and Environmental Justice.

The book links these themes with environmental conservation and management and argues a case for effective management of the environment through an integrated approach that brings all stakeholders on board. Notably, the publication acknowledges the interconnectivity among the various environmental themes and thus cannot have come at a better time. While Kenya has a Constitution that acknowledges this interconnectivity and the different but important roles of the stakeholders in social, economic and environmental sectors play, there have been some sectoral yet disjointed efforts and approaches towards achieving the same. Muigua provides the much needed insight on how these disjointed efforts cannot work thus creating the need for reevaluation.

2.5.7 Climate Change

Over the years, climate change has become an international concern due to its adverse effects on both the environment and human livelihoods. Kariuki Muigua has thus dedicated a good chunk of his scholarly works in addressing the challenge. He establishes a link that demonstrates that climate change is a serious problem that affects all sectors of the environment and human life.¹¹¹ This discussion is also based on the fact that climate change efforts are connected to the sustainable development agenda and poverty eradication. Muigua thus calls for combined efforts from national, regional to international community to tackle the problem of climate change and this will ultimately impact positively on the fight against poverty.¹¹² The

¹¹¹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

¹¹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

urgency to address climate change is informed by the fact that impacts of climate change are disproportionately felt by among others: women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly. The local communities, affected people and indigenous peoples have also been kept out of the global processes to address climate change. This is despite the fact that the impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the world-especially those who are vulnerable and marginalized, in particular children and elderly people.¹¹³

He thus offers practical recommendations geared towards addressing climate change through facilitative public participation such as: science based and ecosystem-based climate change mitigation and adaptation measures.

3. Telling the African Story: A Voice from the South

A noteworthy thread across Kariuki Muigua's scholarly work is that it not only focuses on the African continent's problems and challenges but also how the same can be solved using homegrown solutions; he seeks to tell the African story as seen from the eyes of the African people. The narrative of solving African problems using local solutions is based on the fact that Africa is well-endowed with natural resource wealth and as a result, there are many exploration and exploitation activities going on all over the continent.¹¹⁴ Africa has a large quantity of natural resources like oil, gold, diamonds, iron, cobalt, copper, bauxite, silver, uranium, titanium, petroleum among others.¹¹⁵ The natural resources wealth of Africa rightfully belongs to the people of Africa. The power to safeguard these resources is entrusted in the governments of African countries. The utilisation of Africa's resources should contribute to the realization of economic rights of the people of Africa as envisaged in various international law instruments and national laws.¹¹⁶

¹¹³ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹¹⁴ Rajaram, A., "Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor", available on <http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor> [Accessed on 10/04/2020].

¹¹⁵ World Resources, 'Natural Resources of Africa', available at www.worldresources.envi.org/natural-resources-africa/ [Accessed on 13/4/2020].

¹¹⁶ Muigua, K., *Nurturing Our Environment for Sustainable Development*, p. 107.

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Muigua has observed that while a cursory glance of Africa would paint a picture of a rich continent with the expectation of a people enjoying a high standard of living and excellent development; with good infrastructure, high employment levels, high quality education, good health and long life expectancy; and a conflict free zone where everyone is comfortable with life owing to the abundance of resources, ironically, the situation in Africa is strikingly the opposite.¹¹⁷ Instead of being used to solve African people's problems, Africa's resources are fueling the world economy while Africa itself remains economically crippled; exploited and neglected.¹¹⁸ He attributes the sad state of affairs largely to the national leaders who are entrusted with the mandate of safeguarding natural resources for the benefits of the people have betrayed the trust through: high levels of corruption in the application of revenue from the natural resources; and the fact that when they enter into resource extraction contracts, they do not carry people's interests at heart. In effect, Africans have been deprived of their right to benefit and control the utilisation of their natural resources. Poverty level is very high with a minority of extremely wealthy class and a majority of poor people.¹¹⁹

At the continental level, the *Africa Mining Vision 2009*¹²⁰ was expected to address most of these challenges including: exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements. The *Africa Mining Vision* was formally established in 2009 by the African Union (AU), to promote equitable, broad-based development through the prudent utilization of the continent's natural wealth.¹²¹ However, as Muigua observes, African countries still struggle with making the

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ World Bank, *Economic Survey for Sub-Saharan Africa, 2013, Africa Pulse October, 2013 Vol.8* available at http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol8.pdf [Accessed on 13/4/2020].

¹²⁰ African Union, *Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development"*, (United Nations Economic Commission for Africa (ECA), February, 2009). Available at https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf [Accessed on 13/4/2020].

¹²¹ African Union, *Africa Mining Vision, February 2009*. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf [Accessed on 13/4/2020].

This shared vision will comprise:

- *A knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:*

- o *Down-stream linkages into mineral beneficiation and manufacturing;*

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mineral resources work for them, in uplifting the lives of their people.¹²² For instance, this is demonstrated in the case of Nigeria where it has been reported that, despite the enactment of various acts, the culture of impunity and corruption has continued to occupy the country's oil industry and poverty reduction remains elusive.¹²³

Kenya is no exception as it has a number of mineral deposits albeit in smaller amounts, which, as already pointed out, have not contributed much to the country's GDP as would be expected. The communities are also yet to boast of any significant benefits from the mining

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- *Up-stream linkages into mining capital goods, consumables & services industries;*
 - *Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);*
 - o *Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and*
 - o *A comprehensive knowledge of its mineral endowment.*
 - *A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;*
 - *A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;*
 - *A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local & regional economic linkages;*
 - *A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;*
 - *A mining sector that harnesses the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and*
 - *A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets.*

¹²² See generally, Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018; African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, op cit.; Kimani, M., "Mining to profit Africa's people," *Africa Renewal* 23, no. 1 (2009): 4-5; Bush, R., "Conclusion: mining, dispossession, and transformation in Africa," In *Zambia, mining, and neoliberalism*, pp. 237-268. Palgrave Macmillan, New York, 2010. Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 13/4/2020]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

¹²³ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

activities going on within their regions.¹²⁴ The challenges affecting the extractives sector in Kenya are not only limited to those related to modes of benefit sharing. There has been a general lack of openness, transparency and accountability as far as the mining activities are concerned.

Despite its launch in 2009, the *Africa Mining Vision* which also binds the country and seeks to promote transparent, equitable and optimal exploitation of mineral resources is yet to have an impact in not only Kenya but also many other African countries as there are still rampant cases of illicit financial flows, lack of mineral value addition and poverty among communities living in mining areas.¹²⁵

The extractives industry in Kenya holds high hopes for the Kenyan people with not only increased revenues but also lowered cost of living as the prices of petroleum products have a significant effect on the cost of essential commodities in the country.¹²⁶ Some of the mechanisms that are meant to enhance the economies of the national, county governments and communities through benefit sharing include but not limited to: direct investment in projects that benefit the people, jobs and employment creation and technology transfer amongst others. Notably, this is in line with one of the EITI principles that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction.¹²⁷

While the current legislation on the extractives industry in the country has several requirements on disclosure and reports touching on various aspects, Kenya cannot currently

¹²⁴ Ndemo, B., "Kenya's mineral resources could pull millions out of poverty, *Daily Nation*, Monday June 24 2019. Available at <https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html> [Accessed on 13/4/2020]; Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County: HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti*, September, 2017. Available at <http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf> [Accessed on 13/4/2020]; cf. Base Titanium, "Response to Hakijamii's Draft Report on Base Titanium's Impacts on the Community," 25th August, 2017. Available at https://www.business-humanrights.org/sites/default/files/documents/Hakijamii%20Base%20Response%20Final%20-%202017%2008%2028_0.pdf [Accessed on 13/4/2020]; see also Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation*, Tuesday February 12 2013. Available at <https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html> [Accessed on 13/4/2020].

¹²⁵ Kitimo, A., "Call to adopt mining values and principles in East Africa," *The East African*, Saturday July 27 2019. Available at <https://www.theeastafrican.co.ke/business/Call-to-adopt-mining-values-and-principles-in-East-Africa/2560-5212362-hwctkgz/index.html> [Accessed on 13/4/2020].

¹²⁶ Munyua, J., & Ragui, M., "Drivers of instability in prices of petroleum products in Kenya," *Prime Journal of Business Administration and Management (BAM)* 3, no. 3 (2013): 919-926.

¹²⁷ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

pride itself as having transparency by governments (both national and counties) and companies in the extractive industries and thus, there is the need to enhance public financial management and accountability. There is hardly any publicly available information on the important aspects that shed light on the status of the revenues from the extractives industry. Its only recently when the President mentioned that the first batch of oil had been exported, and there was mention of the amount exported or its value.¹²⁸ The details of such deals remain few.

Kenya's scenario is not unique to this country but is also reflected across many African countries, to the detriment of the local communities.¹²⁹

In the spirit of ensuring that African countries and especially Kenya only adopts what works for them, Kariuki Muigua argues that while we push for adoption of best practices in management of revenues from the extractives sector in Kenya, and considering that Kenya has had no previous experience in oil production, there is a temptation to adopt frameworks from other countries despite the contextual differences between countries.¹³⁰ It is therefore recommended that the Government of Kenya has a responsibility to adopt frameworks that are consistent with the prevailing social, economic, political and cultural circumstances in the country so as to facilitate the development of the oil and gas industry.¹³¹

Muigua's work does not however only paint a grim picture of the continent as he also offers some success stories within the continent. For instance, Botswana has extractive mineral industries that have played a crucial role in the development of the country. Through proper management of its resources and thus achieving a mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country.¹³² Botswana mainly exports diamonds, as the world's

¹²⁸ Presidential Strategic Communication Unit, "Kenya in Sh1.3bn oil export deal," *Daily Nation*, Thursday, August 1, 2019. Available at <https://www.nation.co.ke/news/Kenya-joins-list-of-oil-exporters/1056-5219572-qkp633z/index.html> [Accessed on 13/4/2020].

¹²⁹ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹³⁰ Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda For The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014. Available at <http://kcspog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/> [Accessed on 13/4/2020].

¹³¹ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹³² Jefferys, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

largest producer in value terms, as well as copper and nickel.¹³³ Botswana's record of mineral-led development is remarkable and the country is also considered to be relatively free of the corruption and environmental damage that is often associated with mining industries. Public finances are strong, debt is minimal, and the country enjoys investment-grade credit ratings.¹³⁴

Thus, Kenya and the African continent in general, stands to benefit greatly from its oil, gas and mineral resources but only if the same are well managed through accountability and transparency in revenues declaration and ultimately, proper utilisation of such revenues in promoting growth, development and investment in other sectors of the economy.¹³⁵

Natural resources and the fight for control of these resources inevitably come with conflicts. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.¹³⁶ Sudan, DRC and Nigeria are just but few examples of African states that have gone on internal armed conflict because of their rich natural resources. There are natural resources in Democratic Republic of Congo in the tropical rain forest which covers more than 100 Million hectares. However, there have been recorded cases of terrible violence and immense human suffering.¹³⁷ The war has largely impacted on the environment and native wildlife. Parties to armed conflicts have resorted to occupying natural habitats thereby scaring animals away.¹³⁸ In addition to discussing how African resources can be used to benefit the African people, Muigua has thus also extensively written on conflict management in the African continent and how indigenous conflict management mechanisms can be utilised alongside the judicial systems to address the many conflicts that have ravaged the continent for long.

¹³³ *Ibid*, p.61.

¹³⁴ *Ibid*, p.61; See also International Monetary Fund, Botswana: 2017 Article iv Consultation—Press Release; Staff Report, August 2017, IMF Country Report No. 17/249. Available at <https://www.imf.org/~media/Files/Publications/CR/2017/cr17249.ashx> [Accessed on 13/4/2020].

¹³⁵ *Ibid*.

¹³⁶ United Nations, "Environmental Rule of Law," available at <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0> [Accessed on 13/4/2020].

¹³⁷ Samdong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 13/4/2020].

¹³⁸ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

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In his 2020 Book, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), Muigua rightly points out that natural resources are a source of livelihood for many, and any development activities that affect the same in any way ought to seek the social licence through engaging the affected communities through public participation. Competition for scarce resources may lead to a ‘survival of the fittest’ situation.¹³⁹ In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.¹⁴⁰ Even where resources are abundant, conflicts can arise when one group controls a disproportionate portion of the same (“Resource capture”). Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or demand increases (due to population and/or economic growth).¹⁴¹ This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.¹⁴² For instance, land has been an emotive issue in Kenya as it is in the hands of a few people in the country, and this has often led to tribal clashes.¹⁴³

Considering that most of these conflicts have underlying issues that may not be fully addressed through the adversarial court system, Kariuki Muigua has offered recommendations on the use of ADR and TDR mechanisms such as negotiation and mediation processes can cure this as they can help them in playing a more meaningful and active role in conflict management and decision-making processes. Having forums for negotiation and mediation between the stakeholders and communities can go a long way in averting conflicts and allowing proposed and ongoing developmental activities enjoy social acceptance in the community since concerns and expectations are more likely to be managed through such forums. Conflict resolution mechanisms such as negotiation and mediation are recommended because they afford the affected communities or sections of the public an opportunity to negotiate and reach a

¹³⁹ See generally, “Chapter 5: Survival at Stake: Violent Land Conflict in Africa,” *Small Arms Survey 2013*, available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf> [Accessed on 15/1/2020].

¹⁴⁰ See Bowman, K., et al, “Chapter 1: Environment for Development,” (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 15/1/2020].

¹⁴¹ Khagram, S., et al, “From the Environment and Human Security to Sustainable Security and Development,” *Journal of Human Development*, Vol. 4, No. 2, July 2003, pp. 289-313, p. 295.

¹⁴² *Ibid.*

¹⁴³ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, (the ‘Akiwumi Commission’), (Government Printer, Nairobi, 1999).

compromise agreement, where all sides get satisfactory outcome.¹⁴⁴ ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution of Kenya.¹⁴⁵ This is the true essence of environmental democracy; affording communities guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.¹⁴⁶

These processes have been indigenous to the African continent for centuries and as comprehensively discussed by Muigua in his other works on ADR and TDR mechanisms, hold a key in addressing these conflicts with a relatively high degree of success.¹⁴⁷ His works thus offers insights on addressing the natural resources and environmental related conflicts in Africa and Kenya in particular.

4. Entrenching Environmental Rights and Effective Conflict Management Mechanisms in Kenya: The Future of Environmental Governance

As observed in the foregoing discussion, the actualisation of environmental rights within Kenya's policy, legal and institutional frameworks has come a long way. If sustainable development is to be achieved in the country, then there needs to be struck a balance between active promotion and protection of the citizenry's environmental rights and the ecocentric approach that seeks to protect the environment from adverse human activities. Where conflicts related to environmental and natural resources arise, the same should be addressed effectively using mechanisms that address the concerns of all stakeholders. Muigua's work offers useful

¹⁴⁴ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April 2000), p. 16.

¹⁴⁵ See Art. 60(1) (g); Art. 159.

¹⁴⁶ Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 15/1/2020].

¹⁴⁷ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi – 2013; Muigua, K., "Chapter 25: Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice", in Patricia Kameri-Mbote and Collins Odote, eds., *Blazing the Trail - Professor Charles Okidi's Enduring Legacy In The Development of Environmental Law* (University of Nairobi, March, 2019).

insights for the policy makers on how these can be addressed. For instance, his book, *Nurturing Our Environment for Sustainable Development*, 2016 (op.cit.), carries the themes revolving around environmental resources management with the aim of achieving sustainable development. It is based on the idea that environment and its natural resources are a heritage that should be managed, conserved and protected not only for the sake of the current generation, but also for future generations. The book argues that due to its critical role in the human, social and economic development of the country, the environment is one of the most important elements necessary for the existence of the human life. Environment affects all the life on earth in various ways, be it directly or indirectly. The environment and the resources therein must be carefully nurtured to make sure that their health is not sacrificed at the altar of national development.¹⁴⁸

Muigua proposes that both scientific and traditional knowledge approaches can be applied in conflict management. He goes on to propose that harnessing this knowledge is not a one person affair but instead calls for concerted efforts from all quotas. Non-Governmental organisations, academia and government institutions directly concerned can collaborate in creating awareness of the ways in which the scientific knowledge can be applied concurrently with traditional or indigenous knowledge to manage environmental conflicts for peace and sustainable development.

Churches and other religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. Courts are also under an obligation to take lead role in promoting the use of traditional knowledge in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations.¹⁴⁹ He supports his proposition on involving everyone with the fact that it is affirmed in the Constitution which 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.¹⁵⁰

It is imperative for the policy makers to ensure that the best international practices do not remain on paper but they are fully implemented. However, as rightly observed in Muigua's work, these practices need to not only be domesticated but also customised through concurrent

¹⁴⁸ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. xi.

¹⁴⁹ *Ibid*, p. 264.

¹⁵⁰ Constitution of Kenya 2010, Art. 69(2).

application with local communities' traditional knowledge. This is not only important for enhancing their practicality but also ensuring that the local communities embrace them.

Environmental rights such as the right to clean and healthy environment are critical to the survival of the human race. As demonstrated recently by the *Covid-19* pandemic, a clean and healthy environment can indeed be equated to right to life as currently, the main preventive measure as currently advocated for by health professionals is maintaining personal hygiene and the environment around human dwellings.¹⁵¹

However, human health is not only dependent on hygiene but also food security, human security and access to proper healthcare. There is a need for concerted efforts from all stakeholders to ensure that human life is protected. Investment in terms of research, funding, science, technology and innovation should be encouraged. All these form part of the bigger puzzle-achieving sustainable development agenda.

5. Conclusion

Kariuki Muigua thus advocates for effective natural resources and environmental governance for fighting poverty, through accelerated economic growth and social empowerment of the people, effective and practical management of conflicts for peacebuilding, without which development cannot take place and ensuring that the right of access to justice is available to all regardless of their social, economic or political standing in the society. Environmental justice and democracy is also important for fighting climate change, environmental degradation and meaningful participation in environmental management and governance issues. These themes are evident across his work. He has also ably been able to establish the link between ADR and TDR Mechanisms and how the same can be used in enhancing access to justice for the Kenyan people and Africa in general.

This paper has offered an overview of the themes that have characterised Kariuki Muigua's academic journey and his contribution to the rule of law and sustainable development for a better future for the children of Kenya. Notably, the discussion is also intertwined with Kenya's story as far as achieving efficiency in the conflict management and environmental

¹⁵¹ 'WASH (Water, Sanitation & Hygiene) and COVID-19' <<https://www.worldbank.org/en/topic/water/brief/wash-water-sanitation-hygiene-and-covid-19>> accessed 14 April 2020.

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management framework for realisation of the sustainable development agenda. The academic work discussed in this paper aptly captures Kenya's successes, challenges and dreams as far as achievement of the sustainable development agenda is concerned. It offers valuable lessons on the thematic areas discussed for the policy makers and legislators in Kenya on the future of the country's aspirations on sustainable conflict management and environmental management. The work also offers a solid ground for current and future students of environmental law and conflict management for them to advance their research on the related areas of study.

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