

Realizing Equitable Benefit Sharing in Kenya

Kariuki Muigua

Table of Contents

Abstract	3
1.0 Introduction	3
2.0 Legal Framework on Equitable Benefit Sharing.....	6
3.0 Realizing Equitable Benefit Sharing in Kenya: Problems and Promises	15
4.0 Way Forward.....	18
5.0 Conclusion	20
References	21

Kariuki Muigua*

Abstract

This paper critically appraises the concept of equitable benefit sharing in Kenya. It examines the legal framework governing equitable benefit sharing at the international, regional and national levels. The paper further discusses how the concept of equitable benefit sharing has been embraced in Kenya and explores the challenges thereof. The paper also proposes interventions aimed at realizing equitable benefit sharing for Sustainable Development in Kenya.

1.0 Introduction

Natural resources play a fundamental role in the life of human beings which may be classified as economic, social and cultural¹. Economically, natural resources are not only

* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [August, 2023].

¹ Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

a source of food and raw materials but are also a source of income for individuals and the state². Socially, natural resources like water bodies play recreational role amongst others and also contribute to the improvement of the quality of life of individuals³. Culturally, different Kenyan communities attach importance to some natural resources that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place⁴. The importance of natural resources therefore demands the effective use, access and management of natural resources for the benefit of present and future generations⁵. However, it has been observed that several challenges hinder effective natural resources management including failure to ensure equitable sharing of the benefits that accrue from natural resource exploitation⁶. This has led to the emergence of the concept of equitable benefit sharing⁷.

Equitable benefit sharing can be defined as the fair access to benefits that accrue from natural resources by all stakeholders including indigenous communities⁸. It has also been defined as the way in which natural resources including genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the resources (users) and the people or countries that provide them (providers)⁹. The international recognition of the right to benefit from natural resources wealth may be predicated upon such recognized rights of communities as the right to self-determination, right to development and the right of peoples to freely dispose of their

² Costanza. R., 'The Ecological, Economic, and Social Importance of the Oceans.' *Ecological Economics*, Volume 31, No. 2 (1999)

³ Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

⁴ Ibid

⁵ Child. B., et al. 'Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People.' *IUCN-ROSA Environmental Issues Series No. 2*, (1997)

⁶ Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Glenwood Publishers Limited, 2020

⁷ Ibid

⁸ Jonge, B., 'What is Fair and Equitable Benefit Sharing?' *Journal on Agricultural and Environmental Ethics*, Vol. 24, issue 2, (2011)

⁹ Convention on Biological Diversity., 'Introduction to Access and Benefit-Sharing.' Available at <https://www.cbd.int/abs/infokit/revised/web/all-files-en.pdf> (Accessed on 17/08/2023)

wealth and natural resources¹⁰. Equitable access and benefit sharing is based on Free Prior and Informed consent (FPIC) being granted by a provider to a user and negotiations between both parties to develop mutually agreed terms to ensure the fair and equitable sharing of natural resources and associated benefits¹¹.

FPIC has been described as concept that requires indigenous people and local communities to be adequately informed and participate in environmental decision making including the use and management of natural resources in order to foster Environmental Justice¹². It is a specific right granted to indigenous people recognised in the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which aligns with their universal right to self-determination¹³. FPIC allows Indigenous Peoples to provide or withhold/ withdraw consent, at any point, regarding projects impacting their territories¹⁴. It also allows Indigenous Peoples to engage in negotiations to shape the design, implementation, monitoring, and evaluation of projects¹⁵. It has been argued that free and prior informed consent of local communities and transparent and equitable benefit-sharing mechanisms can bring affected communities into the mainstream of a natural resource dominant development model¹⁶.

The concept of equitable benefit sharing envisages sharing of both monetary benefits such as sharing royalties when the resources are used to create a commercial product and non-monetary benefits such as the development of research skills and knowledge¹⁷. Concrete benefits to be shared have been identified as both monetary and non-monetary ones, such

¹⁰ Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

¹¹ Ibid

¹² Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf> (Accessed on 17/08/2023)

¹³ Food and Agriculture Organization of the United Nations., 'Free, Prior and Informed Consent.' Available at <https://www.fao.org/indigenous-peoples/our-pillars/fpic/en/> (Accessed on 17/08/2023)

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' *Law Society of Kenya Journal*, Vol. 15, No. 1 (2019)

¹⁷ Convention on Biological Diversity., 'Introduction to Access and Benefit-Sharing.' Op Cit

as revenue, information scientific and commercial cooperation, joint management of natural resources, and technical support¹⁸.

This paper critically appraises the concept of equitable benefit sharing in Kenya. It examines the legal framework governing equitable benefit sharing at the international, regional and national levels. The paper further discusses how the concept of equitable benefit sharing has been embraced in Kenya and explores the challenges thereof. The paper also proposes interventions aimed at realizing equitable benefit sharing for Sustainable Development in Kenya.

2.0 Legal Framework on Equitable Benefit Sharing

The concept of benefit sharing was first mentioned in the *Universal Declaration of Human Rights*¹⁹ which stipulates the right of everyone to share in scientific advancement and its benefits²⁰. Further, the 1986 *United Nations Declaration on the Right to Development*²¹ referred to states' duty to ensure the active, free and meaningful participation in the fair distribution of the benefits resulting from national development for their entire population and all individuals. It has been asserted that these human rights are connected to international environmental law, notably technology transfer obligations²². The idea of benefit sharing is also captured in the 1989 *International Labour Organization's Indigenous and Tribal Peoples Convention* which provides that indigenous and tribal people shall, wherever possible participate in the benefits arising from the exploration and exploitation of natural resources pertaining to their lands²³.

¹⁸ Morgera. E., 'The need for an International Legal Concept of Fair and Equitable Benefit-Sharing.' *European Journal of International Law*, Volume 27, No. 2 (2016)

¹⁹ United Nations., 'Universal Declaration of Human Rights.' Available at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (Accessed on 17/08/2023)

²⁰ Ibid, Article 27 (1)

²¹ United Nations Declaration on the Right to Development., GA Res 41/128, 4 December 1986, Article 2(3)

²² Morgera. E., 'The need for an International Legal Concept of Fair and Equitable Benefit-Sharing.' Op Cit

²³ International Labour Organization's (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382

The notion of benefit sharing in natural resources was first formalised in international law in 1992 through the *Convention on Biological Diversity*²⁴ (CBD), a move that was at the time expected to address problems with the governance of socio-ecological systems in developing countries²⁵. The CBD is geared towards promoting the conservation and sustainable use biological diversity for the benefit of present and future generations²⁶. It recognizes the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components²⁷. The aim of the CBD is the conservation of biological diversity, the sustainable use of its components and *the fair and equitable sharing of the benefits* arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies²⁸. The CBD requires states to take legislative, administrative or policy measures, as appropriate towards realizing the idea of fair and equitable benefit sharing²⁹. Actualizing the provisions of the CBD is imperative in realizing equitable benefit sharing.

The *Nagoya Protocol*³⁰ is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way. It seeks to pursue implementation of the objective of the CBD on fair and equitable sharing of benefits arising from the utilization of genetic resources³¹. The Protocol seeks to pursue this objective through measures such as promoting appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby

²⁴ Convention on Biological Diversity., Available at <https://www.cbd.int/doc/legal/cbd-en.pdf> (Accessed on 17/08/2023)

²⁵ Pham, T.T., et al, 'Approaches to Benefit Sharing: A Preliminary Comparative Analysis of 13 REDD+ Countries,' Working Paper 108, 2013, CIFOR, Bogor, Indonesia, p. 1

²⁶ Convention on Biological Diversity., Op Cit

²⁷ Ibid

²⁸ Ibid, Article 1

²⁹ Ibid, Article 15 (7)

³⁰ Convention on Biological Diversity., 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to The Convention on Biological Diversity.' Available at <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (Accessed on 17/08/2023)

³¹ Ibid

contributing to the conservation of biological diversity and the sustainable use of its components³². With regards to fair and equitable benefit sharing, the Protocol stipulates that benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a *fair and equitable way (emphasis added)* with the party providing such resources that is the country of origin of such resources or a party that has acquired the genetic resources in accordance with the Convention³³. The Protocol further requires each party to take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are *shared in a fair and equitable way* with the communities concerned, based on mutually agreed terms³⁴.

The Nagoya Protocol is limited to genetic resources within the scope of Article 15 of the CBD and to the benefits arising from the utilization of such resources, as well as to traditional knowledge associated with genetic resources within the provisions of the Convention and to the benefits arising from the utilization of such knowledge³⁵. It, however, also offers important guidelines on benefit-sharing. Of particular relevance is the *Annex to the Nagoya Protocol*³⁶ which provides for both monetary and non-monetary forms of benefits. It envisages monetary benefits which may include, but not be limited to: access fees/fee per sample collected or otherwise acquired; up-front payments; milestone payments; payment of royalties; licence fees in case of commercialization; special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; and joint ownership of relevant intellectual property rights³⁷. Non-

³² Ibid

³³ Ibid, 5 (1)

³⁴ Ibid, Article 5 (2)

³⁵ Ibid, Article 3

³⁶ Annex to the Nagoya Protocol on Access and Benefit-sharing

³⁷ Ibid

monetary benefits envisaged under the Annex to the Nagoya Protocol include the sharing of research and development results and collaboration, cooperation and contribution in scientific research and development programmes (particularly biotechnological research activities) where possible in the party providing genetic resources³⁸. It also envisages participation in product development; collaboration, cooperation and contribution in education and training; admittance to ex situ facilities of genetic resources and databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms³⁹. It has been argued that the approach by the Nagoya Protocol forms the core of an effective benefit sharing agreement and can be applied to the exploitation of other types of natural resources⁴⁰.

The idea of equitable benefit sharing is also recognized under the *2030 Agenda for Sustainable Development*⁴¹. Sustainable Development goal 2 is focused on ending hunger, achieving food security, improved nutrition and promoting sustainable agriculture while Sustainable Development goal 15 focuses on protecting, restoring and promoting sustainable use of terrestrial ecosystems, sustainable management of forests, combating desertification, and halting and reversing land degradation and biodiversity loss⁴². Among the targets under these two goals is promoting fair and equitable sharing of the benefits arising from the utilization of genetic resources and promoting appropriate access to such resources, as internationally agreed⁴³. Realizing equitable benefit sharing is therefore important in fostering Sustainable Development.

³⁸ Ibid

³⁹ Ibid

⁴⁰ Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' Op Cit

⁴¹ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 17/08/2023)

⁴² Ibid

⁴³ Ibid

At the regional level, the *African Charter on Human and Peoples' Rights*⁴⁴ provides that all peoples shall freely dispose of their wealth and natural resources⁴⁵. According to the Charter, this right is to be exercised in the exclusive interest of the people, and in no case should people be deprived of it⁴⁶. The free disposal of wealth and natural resources must however be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law⁴⁷. The Charter also obligates states to undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies, so as to enable their peoples to fully benefit from the advantages derived from their national resources⁴⁸. It also provides that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind and that states also have the duty, individually and collectively, to ensure the exercise of the right to development⁴⁹. The provisions of this Charter are vital in achieving equitable benefit sharing in Africa.

The *African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol*⁵⁰ provide strategic policy guidance to support the implementation of the Nagoya Protocol in Africa. The guidelines require African states to promote sustainable utilisation of genetic resources and associated traditional knowledge by instituting transparent and functional access regulations in accordance with Articles 6.3 and 12.1 of the Nagoya Protocol⁵¹. They further require African states as countries of origin or as countries having acquired genetic resources in accordance with the Convention on

⁴⁴ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

⁴⁵ *Ibid*, Article 21 (1)

⁴⁶ *Ibid*

⁴⁷ *Ibid*, Article 21 (3)

⁴⁸ *Ibid*, Article 21 (5)

⁴⁹ *Ibid*, Article 22 (2)

⁵⁰ African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation., Available at <https://snrd-asia.org/african-union-strategic-guidelines-for-the-coordinaetd-implementation-of-the-nagoya-protocol-on-access-to-genetic-resources/> (Accessed on 17/08/2023)

⁵¹ *Ibid*, Part 8

Biological Diversity to ensure that prior informed consent is required for access to their genetic resources and that such genetic resources shall only be utilised as authorised with their prior informed consent and specified in mutually agreed terms, in accordance with Article 6 of the Nagoya Protocol⁵². In respect of benefit sharing, the Guidelines require African Union Member States to ensure that benefits arising from the utilisation of genetic resources and associated traditional knowledge are shared in a fair and equitable manner with indigenous and local communities and all relevant stakeholders holding such resources and knowledge⁵³. They further urge African countries to cooperate, share information and coordinate their policies with a view to establishing transparent, fair, equitable and uniform benefit-sharing standards that uphold the intrinsic, cultural and socio-economic values of genetic resources and associated traditional knowledge⁵⁴. These Guidelines are pertinent in fostering equitable benefit sharing in Africa.

In addition, the *Africa Mining Vision*⁵⁵ seeks to realize a sustainable and well governed mining sector that promotes mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders⁵⁶. In respect of benefit sharing, the Africa Mining Vision acknowledges that increasing attention is now being paid to the benefits derived by the communities where mining operations take place to ensure that local and national-level concerns and interests are balanced⁵⁷. According to the Vision, the benefits to the local community may come in various forms including revenues which accrue to the community because of its location (property rates and land rents); benefits which are the community's share of central government revenues from mining and non-income benefits such as employment for local residents; assistance to community health and educational institutions; access to the use of mine

⁵² Ibid, Part 9

⁵³ Ibid, Part 18

⁵⁴ Ibid, Part 19

⁵⁵ Africa 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 17/08/2023)

⁵⁶ Ibid

⁵⁷ Ibid

infrastructure by the general public among others⁵⁸. The Africa Mining Vision can therefore enhance equitable benefit sharing in the mining sector in Africa.

Further, *Agenda 2063*⁵⁹ also enshrines the importance of equitable redistribution of returns from Africa's natural resources in fostering development in the continent. It seeks to ensure equitable access, use and sharing of benefits accruing from natural resources in the continent including land, minerals, water, forests, wildlife, fisheries, energy and genetic resources⁶⁰. The idea of benefit sharing is therefore well envisaged in Africa.

In Kenya, the Constitution enshrines national values and principles of governance which include, inter alia: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and Sustainable Development⁶¹. It has been argued that one of the ways of implementing these principles as far as natural resources governance and management is concerned is equitable benefit sharing⁶². A viable benefit-sharing framework should be able to reflect and promote the foregoing values and principles of governance⁶³.

The Constitution further guarantees every person's 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 70⁶⁴. The provisions of the Constitution on land are also pertinent

⁵⁸ Ibid

⁵⁹ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 17/08/2023)

⁶⁰ Ibid

⁶¹ Constitution of Kenya, 2010., Article 10 (2)., Government Printer, Nairobi

⁶² Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' Op Cit

⁶³ Ibid

⁶⁴ Ibid, Article 42

in realizing equitable benefit sharing in Kenya. The Constitution provides that land in Kenya must be held, used and managed in a manner that is *equitable*, efficient, productive and sustainable, and in accordance with the outlined principles that include *equitable access to land*(*emphasis added*); security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas⁶⁵.

The Constitution also outlines the obligations of the State in respect of the environment some which are vital in fostering equitable benefit sharing in Kenya. The State is required to, inter alia, ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and *ensure the equitable sharing of the accruing benefits* (emphasis added); protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and encourage public participation in the management, protection and conservation of the environment⁶⁶. The obligations also extend to the protection of genetic resources and biological diversity as well as establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment⁶⁷. Other obligations extend to elimination of processes and activities that are likely to endanger the environment and utilization of the environment and natural resources for the benefit of the people of Kenya⁶⁸. These provisions of the Constitution of Kenya are therefore important in realizing equitable benefit sharing in Kenya.

Further, there have been attempts to legislate the concept of benefit sharing in Kenya through the *Natural Resources (Benefit Sharing) Bill, 2022*⁶⁹. The Bill seeks to establish a system of benefit sharing in natural resource exploitation between resource exploiters,

⁶⁵ Ibid, Article 60 (1)

⁶⁶ Ibid, Article 69 (1)

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ The Natural Resources (Benefit Sharing) Bill, 2022., Available at <http://parliament.go.ke/sites/default/files/2022-12/The%20Natural%20Resources%20%28Benefit%20Sharing%29%20Bill%2C%202022.pdf> (Accessed on 18/08/2023)

the national government, county governments and local communities⁷⁰. It defines benefit sharing as the sharing of any benefits arising from the exploitation of natural resources in a *fair and equitable* manner⁷¹ (emphasis added). The Bill stipulates guiding principles of benefit sharing in Kenya which include transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; rule of law and respect for human rights of the people and sustainable natural resources management⁷². The Bill tasks the Commission on Revenue Allocation to implement benefit sharing arrangements in Kenya including coordinating the preparation of benefit sharing agreements between an affected county and an affected entity and reviewing, and where appropriate, determine the royalties payable by an affected entity engaged in natural resource exploitation⁷³. One of the most salient provisions of the Bill is the establishment of a revenue sharing ratio in natural resources exploitation⁷⁴. The Bill provides that twenty per cent of the revenue collected shall be paid into a sovereign wealth fund established by the national government; and eighty per cent of the revenue collected shall be shared between the national government and respective county governments in the ratio of sixty per cent to the national government and forty per cent to the county governments⁷⁵. The Bill further provides that at least forty per cent of the revenue assigned to county governments shall be utilised to implement local community projects and sixty per cent of that revenue shall be utilised for the benefit of the entire county⁷⁶.

For purposes of ensuring equitable benefit sharing between entities involved in exploitation of natural resources and local communities, the Bill provides that every affected entity shall enter into a benefit sharing agreement with the relevant county

⁷⁰ Ibid

⁷¹ Ibid, S 2

⁷² Ibid, S 4

⁷³ Ibid, S 5

⁷⁴ Ibid, S 8

⁷⁵ Ibid, S 8 (1)

⁷⁶ Ibid, S 8 (3)

government before the exploitation of a natural resource in the affected county⁷⁷. It further provides that the benefit sharing agreement shall include non-monetary benefits that may accrue to the county and the contribution of the affected entity in realizing the same⁷⁸. The Bill also requires every benefit sharing agreement to be approved by the respective county assembly prior to the execution of the agreement by the respective county government⁷⁹. In order to foster the principle of public participation and realization of FPIC which is pertinent in realizing equitable benefit sharing, the Bill establishes a Local Community Benefit Sharing Forum in each affected local community where exploitation of natural resources is conducted⁸⁰. The local community benefit sharing forum is tasked with ensuring that the respective local community benefits from the exploitation of natural resources are realized by collecting and collating the views of the local community and represent the interests of the local community in the negotiations with the respective County Benefit Sharing Committee and in the implementation of a Benefit Sharing Agreement; identifying in consultation with the local community projects to be supported by money allocated to the local community by the County Benefit Sharing Committee and overseeing the implementation of projects undertaken in the relevant local community using funds devolved as per the provisions of the Act⁸¹. Enactment of the Natural Resources (Benefit Sharing) Bill, 2022 into law will enhance the realization of equitable benefit sharing in Kenya.

3.0 Realizing Equitable Benefit Sharing in Kenya: Problems and Promises

It has been observed that natural resources benefit sharing in Kenya has been inequitable where local communities that interface with the resources and who bear the highest costs of overexploitation and conservation being the least beneficiaries⁸². Further, benefit

⁷⁷ Ibid, S 9 (1)

⁷⁸ Ibid, S 9 (2)

⁷⁹ Ibid, S 12 (1)

⁸⁰ Ibid, S 13 (1)

⁸¹ Ibid, S 13 (6)

⁸² Kenya Wildlife Conservancies Association., 'Factsheet: Natural Resources (Benefit Sharing) Bill 2022.' Available at <https://kwcakenya.com/download/factsheet-natural-resources-benefit-sharing-bill-2022/> (Accessed on 18/08/2023)

sharing regimes are currently fragmented and are being governed by different legislations and subsequently overseen by different government ministries and agencies⁸³. The current benefit sharing regime in Kenya is regulated by many entities including the Kenya Wildlife Service (KWS), Kenya Forest Service (KFS) and Kenya Plant Health Inspectorate Service (KEPHIS) among others⁸⁴. Such a framework is cumbersome and negatively impacts safe and secure research, innovation, conservation and sustainable use of biological resources⁸⁵. Lack of harmonized legal framework is a major problem in realizing equitable benefit sharing in Kenya⁸⁶.

Further, limited awareness and access to information on Access and Benefit Sharing can hinder effective realization of the concept of equitable benefit sharing⁸⁷. In order for an Access and Benefit Sharing process to be fair and equal, it is important that communities have knowledge of their rights, including their rights over their traditional knowledge and their rights as Indigenous Peoples, and have understood what Free, Prior and Informed consent entails⁸⁸. The quest towards realizing FPIC in Kenya has been faced with several challenges including failure to promote effective public participation and failure to obtain consent of local communities in the exploitation of natural resources⁸⁹. It is imperative to uphold the right to FPIC in Kenya in order to realize equitable benefit sharing⁹⁰.

It has also been argued that one of the main concerns regarding the *Nagoya Protocol* is the lack of systems and capacity to implement it efficiently in resource-poor countries⁹¹.

⁸³ Ibid

⁸⁴ Brink. M., 'Implementation of Access and Benefit Sharing Policies in Sub-Sahara Africa: Inventory, Analysis and Proposals.' Available at <https://edepot.wur.nl/280508> (Accessed on 18/08/2023)

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Natural Justice., 'Access and Benefit Sharing: Toolkit.' Available at https://naturaljustice.org/wp-content/uploads/2021/09/ABS-toolkit_MARULA_mailer-1.pdf (Accessed on 18/08/2023)

⁸⁸ Ibid

⁸⁹ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit

⁹⁰ Ibid

⁹¹ Ivey. P.J., 'Nagoya Protocol and Africa's Willingness to Share Biological Control Agents: Are we Deterred by Barriers Instead of Using Opportunities to Work Together?' *BioControl* (2023) 68:253–259

Factors including lack of awareness, insufficient relevant information and lack of capacity may cause delay in countries implementing access and benefit sharing legislation and processes in respect of resources such as biological control agents⁹². It is thus vital that there are the policies, processes and capacity in place in Africa to ensure equitable benefit sharing of and access to potential biological control agents among other natural resources⁹³.

The problem of corruption has also hindered equitable benefit sharing in Kenya through diversion of conservation funds for private use, systemic bribery, and rent seeking in wildlife and forestry contracts⁹⁴. Competition for natural resource benefits can result in a high level of corrupt rent seeking behavior leading to elite capture that disproportionately distributes benefits to well-connected individuals in society⁹⁵. It is thus imperative to curb corruption in order to realize equitable benefit sharing in Kenya.

These problems have contributed to disputes and disagreements over benefit sharing in respect of exploitation of natural resources in Kenya⁹⁶. It has been observed that exploitation of natural resources has not always spurred economic development but has in some instances resulted in low economic growth, environmental degradation, deepening poverty, and in some cases, violent conflict⁹⁷. Multinational Corporations

⁹² Ibid

⁹³ Ibid

⁹⁴ Mbeche. R., 'Anti-corruption and Equitable Benefit Sharing in Kenya's Wildlife and Forest Sectors: Gaps and Lessons.' Available at <https://www.worldwildlife.org/pages/tncr-topic-brief-anti-corruption-and-equitable-benefit-sharing-in-kenya-s-wildlife-and-forest-sectors-gaps-and-lessons> (Accessed on 18/08/2023)

⁹⁵ Mumma, A., 'Local Communities in Environment and Natural Resource Management' *Compliance and Enforcement of Environmental law in Towards More Effective Implementation*, Leroy Paddock et al. eds Cheltenham: Edward Elgar Publishing. (2011) p. 620.

⁹⁶ Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' Op Cit

⁹⁷ Alstine, J.V., et al, 'Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda,' *Resources Policy*, Vol. 40, 2014, pp.48-58

involved in exploitation of natural resources have often been accused of failing to enhance benefits to local communities by focusing on maximizing profits⁹⁸.

The foregoing challenges hinder the realization of equitable benefit sharing in Kenya. It is essential to solve these challenges so as to enhance realization of equitable benefit sharing in Kenya. It has been asserted that enactment of the Natural Resources (Benefit Sharing) Bill will foster equitable benefit sharing in Kenya and address conflicts between national and county governments over natural resource exploitation⁹⁹.

4.0 Way Forward

Realizing equitable sharing is essential to successful conservation efforts and sustainable use of natural resources¹⁰⁰. Effective benefit sharing, facilitated by transparent and informed decision-making, can help build community partnerships and support for conservation, facilitate law enforcement, and prevent conflicts and corruption¹⁰¹.

In order to realize equitable benefit sharing in Kenya, there is need to fast track enactment of the Natural Resources (Benefit Sharing) Bill into law. Enactment of this law will enhance equitable benefit sharing in Kenya by providing guidelines on aspects of benefit sharing such as revenue sharing ratio between the national and county governments in natural resources exploitation and formulation of benefit sharing agreements between entities involved in the exploration of natural resources and the relevant county

⁹⁸ 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> (Accessed on 18/08/2023)

⁹⁹ Otieno. R., 'Senate Bill Seeks to End Natural Resource Rows.' Available at <https://www.pd.co.ke/inside-politics/senate-bill-seeks-to-end-natural-resource-rows-171135/> (Accessed on 18/08/2023)

¹⁰⁰ Mbeche. R., 'Anti-corruption and Equitable Benefit Sharing in Kenya's Wildlife and Forest Sectors: Gaps and Lessons.' Op Cit

¹⁰¹ Ibid

governments¹⁰². Parliament should therefore expedite enactment of this legislation in order to realize equitable benefit sharing in Kenya.

There is also need to foster effective public participation in the management of natural resources in order to realize equitable benefit sharing in Kenya¹⁰³. Public participation allows individuals to express their views on key governmental policies and laws concerning conditions in their communities including the use and access to natural resources¹⁰⁴. It is imperative to foster public participation in order to ensure that the views of all stakeholders including local communities are taken into account in the management of natural resources and allocation of benefits accruing from the exploitation of such resources¹⁰⁵. Fostering the right to Free, Prior, And Informed Consent (FPIC) is vital in ensuring effective public participation especially by local communities in the management of natural resources¹⁰⁶. In order to foster the principle of public participation and realization of FPIC, the Natural Resources (Benefit Sharing) Bill establishes a Local Community Benefit Sharing Forum in each affected local community where exploitation of natural resources is conducted¹⁰⁷. It can therefore be argued that public participation is integral in realizing equitable benefit sharing Kenya.

It has also been argued that decentralization of the management of natural resources through mechanisms such as devolution can enhance effective use of these resources in a manner that ensures that local communities reap full benefits from them¹⁰⁸. Devolution

¹⁰² The Natural Resources (Benefit Sharing) Bill, 2022., Op Cit

¹⁰³ Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' Op Cit

¹⁰⁴ Ibid

¹⁰⁵ Luseno. S., 'Benefit Sharing Principles must apply to Water Resources.' Available at <https://kcspog.org/2020/12/15/benefit-sharing-principles-must-apply-to-water-resources/> (Accessed on 18/08/2023)

¹⁰⁶ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit

¹⁰⁷ Natural Resources (Benefit Sharing) Bill, S 13 (1)

¹⁰⁸ Lohde, L.A., 'The Art and Science of Benefit Sharing in the Natural Resource Sector,' International Finance Corporation, February 2015., Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+S+aring_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b (Accessed on 18/08/2023)

has the ability to enhance allocative efficiency since by being closer to the people, decentralized governments can more accurately determine local needs and find appropriate solutions¹⁰⁹. In Kenya, county governments are in a better position to identify the most viable and sustainable projects hence it is important to make use of the devolved system to empower communities and build capacity through investing the accrued benefits from exploration of natural resources in Sustainable Development projects¹¹⁰.

Finally, in order to realize equitable benefit sharing in Kenya, it is important to curb the corruption menace¹¹¹. The problem of corruption has hindered equitable benefit sharing in Kenya through diversion of conservation funds for private use, systemic bribery, and rent seeking in wildlife and forestry contracts¹¹². It is therefore imperative to curb corruption through measures such as enhancing transparency and accountability in the allocation and management of resources, imposing civil and criminal sanctions on those involved in corruption and fostering regional and global cooperation towards combating corruption¹¹³. These measures will enhance realization of equitable benefit sharing in Kenya.

5.0 Conclusion

The concept of equitable benefit sharing is fundamental in natural resources management¹¹⁴. This idea has been enshrined under *Convention on Biological Diversity*¹¹⁵

¹⁰⁹ Ibid

¹¹⁰ Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' Op Cit

¹¹¹ Mbeche. R., 'Anti-corruption and Equitable Benefit Sharing in Kenya's Wildlife and Forest Sectors: Gaps and Lessons.' Op Cit

¹¹² Ibid

¹¹³ Lawson, T. R. & Greestein, J., 'Beating the Resource Curse in Africa: A global Effort',., Op Cit

¹¹⁴ Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

¹¹⁵ Convention on Biological Diversity., Op Cit

and *Nagoya Protocol*.¹¹⁶ There are attempts towards legislating equitable benefit sharing in Kenya through the *Natural Resources (Benefit Sharing) Bill, 2022*¹¹⁷. Realizing equitable benefit sharing in Kenya has been hindered by several problems including lack of a harmonized framework on benefit sharing, limited awareness and access to information and the problem of corruption¹¹⁸. Measures that can be adopted towards realizing equitable benefit sharing in Kenya include fast tracking the enactment of the Natural Resources (Benefit Sharing) Bill into law, fostering effective public participation in the management of natural resources; embracing devolution in the management of natural resources and curbing corruption¹¹⁹. Realizing equitable benefit sharing in Kenya is an attainable endeavour.

References

Africa Union., 'Africa Mining Vision: February 2009.' Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf

¹¹⁶ Convention on Biological Diversity., 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to The Convention on Biological Diversity.' Op Cit

¹¹⁷ The Natural Resources (Benefit Sharing) Bill, 2022., Op Ci

¹¹⁸ Brink. M., 'Implementation of Access and Benefit Sharing Policies in Sub-Saharan Africa: Inventory, Analysis and Proposals.' Op Cit

¹¹⁹ Muigua. K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' Op Cit

Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf

African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation., Available at <https://snrd-asia.org/african-union-strategic-guidelines-for-the-coordinated-implementation-of-the-nagoya-protocol-on-access-to-genetic-resources/>

Alstine, J.V., et al, 'Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda,' *Resources Policy*, Vol. 40, 2014, pp.48–58

Brink. M., 'Implementation of Access and Benefit Sharing Policies in Sub-Sahara Africa: Inventory, Analysis and Proposals.' Available at <https://edepot.wur.nl/280508>

Child. B., et al. 'Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People.' *IUCN-ROSA Environmental Issues Series No. 2*, (1997)

Constitution of Kenya, 2010., Government Printer, Nairobi

Convention on Biological Diversity., 'Introduction to Access and Benefit-Sharing.' Available at <https://www.cbd.int/abs/infokit/revised/web/all-files-en.pdf>

Convention on Biological Diversity., 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to The Convention on Biological Diversity.' Available at <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>

Convention on Biological Diversity., Available at <https://www.cbd.int/doc/legal/cbd-en.pdf>

Costanza. R., 'The Ecological, Economic, and Social Importance of the Oceans.' *Ecological Economics*, Volume 31, No. 2 (1999)

Food and Agriculture Organization of the United Nations., 'Free, Prior and Informed Consent.' Available at <https://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>

International Labour Organization's (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382

Ivey. P.J., 'Nagoya Protocol and Africa's Willingness to Share Biological Control Agents: Are we Deterred by Barriers Instead of Using Opportunities to Work Together?' *BioControl* (2023) 68:253–259

Jonge, B., 'What is Fair and Equitable Benefit Sharing?' *Journal on Agricultural and Environmental Ethics*, Vol. 24, issue 2, (2011)

Kenya Wildlife Conservancies Association., 'Factsheet: Natural Resources (Benefit Sharing) Bill 2022.' Available at <https://kwcakenya.com/download/factsheet-natural-resources-benefit-sharing-bill-2022/>

Lohde, L.A., 'The Art and Science of Benefit Sharing in the Natural Resource Sector,' International Finance Corporation, February 2015., Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b

Luseno. S., 'Benefit Sharing Principles must apply to Water Resources.' Available at <https://kcsfog.org/2020/12/15/benefit-sharing-principles-must-apply-to-water-resources/>

Mbeche. R., 'Anti-corruption and Equitable Benefit Sharing in Kenya's Wildlife and Forest Sectors: Gaps and Lessons.' Available at <https://www.worldwildlife.org/pages/tnrc-topic-brief-anti-corruption-and-equitable-benefit-sharing-in-kenya-s-wildlife-and-forest-sectors-gaps-and-lessons>

Morgera. E., 'The need for an International Legal Concept of Fair and Equitable Benefit-Sharing.' *European Journal of International Law*, Volume 27, No. 2 (2016)

Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf>

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., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya.' *Law Society of Kenya Journal*, Vol. 15, No. 1 (2019)

Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Glenwood Publishers Limited, 2020

Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

Mumma, A., 'Local Communities in Environment and Natural Resource Management' *Compliance and Enforcement of Environmental law in Towards More Effective Implementation*, Leroy Paddock et al. eds Cheltenham: Edward Elgar Publishing. (2011) p. 620.

Natural Justice., 'Access and Benefit Sharing: Toolkit.' Available at https://naturaljustice.org/wp-content/uploads/2021/09/ABS-toolkit_MARULA_mailer-1.pdf

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Otieno. R., 'Senate Bill Seeks to End Natural Resource Rows.' Available at <https://www.pd.co.ke/inside-politics/senate-bill-seeks-to-end-natural-resource-rows-171135/>

Pham, T.T., et al, 'Approaches to Benefit Sharing: A Preliminary Comparative Analysis of 13 REDD+ Countries,' Working Paper 108, 2013, CIFOR, Bogor, Indonesia, p. 1

The Natural Resources (Benefit Sharing) Bill, 2022., Available at <http://parliament.go.ke/sites/default/files/2022-12/The%20Natural%20Resources%20%28Benefit%20Sharing%29%20Bill%2C%202022.pdf>

United Nations Declaration on the Right to Development., GA Res 41/128, 4 December 1986, Article 2(3)

United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

United Nations., 'Universal Declaration of Human Rights.' Available at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf