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COMPENSATION IN ENVIRONMENTAL LIABILITY CASES IN KENYA

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DECLARATION

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DR. KARIUKI MUIGUA

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Despite the much assistance I received from the above individuals and many not mentioned herein, I take responsibility for any errors either of commission or omission that might be contained herein.

Any omission in this brief acknowledgment does not mean lack of gratitude.

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Murimi Waweru

DEDICATION

This one is for you mom!

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LIST OF ABBREVIATIONS AND ACRONYMS

1.	ELC	Environment and Land Court
2.	EMCA	Environment Management and Co-ordination Act
3.	ICJ	International Court of Justice
4.	ILC	International Law Commission
5.	MEA	Multi-lateral Environmental Agreements
6.	NEAP	National Environment Action Plan
7.	NEMA	National Environment Management Authority
8.	OECD	Organization for Economic Co-operation and Development
9.	PPP	Polluter Pay Principle
10.	UNCED	United Nation Conference on Environment and Development
11.	UNEP	United Nations Environmental Programme
12.	TEEAC	Treaty for Establishment of the East African Community

When a man throws an empty cigarette package from an automobile, he is liable to a fine of $50. When a man throws a billboard across a view, he is richly rewarded.[1]

-ABSTRACT-

COMPENSATION IN ENVIRONMENTAL LIABILITY CASES IN KENYA

For the last three years, Kenya has seen an increase in large scale infrastructural projects in the country. Currently, there are about 365 wind turbines under construction in Lake Turkana, the Standard Gauge Railway (SGR) is half-way complete and a record of 87 projects in real estates have been initiated by both foreign direct investors and local investors. The prestigious Nairobi-Thika Highway Improvement Project (NTHIP) is complete among other projects. Such large scale infrastructural projects have adverse environmental impact hence the ever insistence of carrying out environmental impact assessment. This is a preserve of the National Environmental Management Authority (NEMA).

Due to these and many other human activities in Kenya and around the globe, environmental protection and justice has been a great concern for the global community let alone Kenya. Kenya boasts of being in possession of a fairly comprehensive legislation including statutes and subsidiary legislations, creating legal frameworks designed to protecting various ecosystems within the country. The international community has also made great strides in protection of almost every aspect of the global environment. This ranges from protection of the sea, to the ozone area, to the biodiversity among other parts.

[1] Pat Brown, quoted in David Ogilvy on Advertising, 1985 < http://www.quotegarden.com/environment.html > accessed on 10th October 2018

It is imperative to note that significant adverse effects on the environment do not respect national borders.[2] This has led to an increase in the need to affirming the protection of environmental rights and environmental justice at the global, regional and national level. Principles of environmental law, at the global level, have mostly been developed through customary law and later have led to their recognition by different treaties and statutes at the national level. Bills of rights and human rights conventions have also increasingly recognized the environment as a human rights aspect. At the national level, Article 42 of Constitution has provided for the right to clean and healthy environment. This has been coupled by Article 69 which provides for the principles to guide the state when dealing with issues of the environment, and Article 70 which provides for remedies where the right to clean and decent environment is infringed. Ambitiously, the Constitution proceeded to create the Environment and Land Court that would be specialized to adjudicate on environmental issues.

It is the desire of every citizenry to have a legal framework that is beneficial to them effectively implemented. The existence of a legislative framework is the first step to achieving the protection of the environment. The implementation of the legal framework is the second most vital step. Enforcement of environmental rights remains a challenge marred with financial implications of litigation and many uncertainties especially on the principles to be used in awarding of remedies and damages.[3] Further, the protection of the environment would be achieved where people are empowered and where public participation is practical.[4]

[2] InforMea 'Access to Information on Multilatera; Environmental Agreements' in < https://www.informea.org/en/terms/transboundary-effect > accessed on 16th October 2018
[3] Francesco Francioni 'Liability For Damage to the Common Environment: The Case of Antarctica' [1994] [Vol 4] < https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-9388.1994.tb00180.x > accessed on 10th October 2018
[4] ibid

The role of the judiciary in the protection of the environment and issues of environmental governance has been called into question in the last decade. *Civil disputes* are bound to increase within our courts with increase of information on environmental issues and environmental justice. The path of the law, on the role of the courts in adjudicating civil disputes is not yet well-trodden.[5] While no judicial officer is allowed to decline to resolve a dispute on the ground that the dispute falling within him/ her is too difficult, issues of how much to award compensation in case of environmental degradation is still unanswered within our legal framework. There may be a tendency to borrow heavily from the common law principles of damages, but are these principles effective in environmental law? There has been some reluctance by the legislature at the national Level and countries at the global level to provide for principles for determining compensation once polluter has been required to pay is alarming.

This study will therefore investigate the possible principles and considerations that a court in Kenya would apply in the process of determining the amount of compensation to be awarded to the complainant.

-End-

[5] JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' in <http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 16th October 2018

CHAPTER ONE

COMPENSATION IN ENVIRONMENTAL LIABILITY CASES IN KENYA

Here is your country. Cherish the natural wonders, cherish the natural resources, cherish the history and the romance as a sacred heritage, for your children and your children's children. Do not let selfish men or greedy interests skin your country of its beauty, its riches or its romance.

-Theodore Roosevelt

INTRODUCTION:

BACKGROUND TO THE STUDY

Environment is key to the survival of the human race. However, the environment is under attack from all spheres of life. The simple but profound words of William Shakespeare from *The Tragedy of Hamlet, '**to be, or not to be: that is the question**,'* echo the position of human life in the ever dwindling environment. Once the ecosystem and the natural resources are completely depleted, human life and other vulnerable species will be obliterated while the fate of the future generations will be in jeopardy. To save the world and future generations from such a dooms day, it is the obligation of the existing generation to jealously protect the world's ecosystem, beauty and its 'romance'. The profound words of Mahatma Gandhi that the '**earth provides enough to satisfy everyone's needs, but not everyone's greed**' are the cornerstone of this study.

Human activities leading to degradation of the environment have existed since prehistoric times. These activities can be traced back to the Paleolithic times where pre-historical evidence shows that the hunter-gatherers used fire and accidentally or intentionally burnt extensive areas of the forests.[6] During these early times, the agronomists burnt large tracts of land to create farmland or

[6] KT Pickering and LA Owen *An Introduction to Global Environmental Issues* (Routledge, London, 1998) [251]

pasture.[7] Unfortunately, this is a practice that has managed to survive to the present world where agronomists still burn large tracts of land to destroy the natural vegetation so as to create farm land. This was an early form of environmental degradation though a necessary evil then.

In the recent times, there has been numerous cases of severe damage of the environment that has negatively affected the world's population. Example: the 1984 Bhopal gas leak disaster[8] which occurred on the night of 2nd December, 1984 exposed more than 600,000 people to a deadly gas (methyl isocyanate).[9] The 1986 Chernobyl nuclear power disaster, the world's worst commercial nuclear disaster, led to numerous radiation related fatalities.[10] On 30th January 2000, the Baia Mare Gold Mine, a dam containing toxic waste material, heavily contaminated with cyanide, burst releasing 100,000 cubic meters of waste water into Lapus and other tributaries of river Tisza.[11]

The Niger Delta, Nigeria has been in the international light because of the increase in the menace of oil spillage resulting from exploration, processing and transportation of the crude oil.[12] This has subjected the region to serious environmental pollution from where the residents derive a means of livelihood.[13]

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[7] ibid

[8] This was an accident at the Union Carbide Pesticide Plant in Bhopal, India which released more than 30 tons of highly toxic gas called methyl isocyanate

[9] A Taylor 'Bhopal: The World's Worst Industrial Disaster, 30 Years Later' in *The Atlantic* < https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/ > accessed on 29th October 2018

[10] World Nuclear Association "Chernobyl Accident 1986' < http://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/chernobyl-accident.aspx > accessed on 29th October 2018

[11] J Kanthak 'The Baia Mare Gold Mine Cyanide Spill: Causes, Impacts and Liability' in < https://reliefweb.int/report/hungary/baia-mare-gold-mine-cyanide-spill-causes-impacts-and-liability > accessed on 30th October 2018

[12] MA Olukolajo 'Monetary Compensation for the Oil Spill Damage in Niger Delta Region, Nigeria: A Question of Adequacy' *Research Gate* in < https://www.researchgate.net/publication/320721314_MONETARY_COMPENSATION_FOR_OIL_SPILL_DAMAGE_IN_NIGER_DELTA_REGION_NIGERIA_A_QUESTION_OF_ADEQUACY/download > accessed on 6th November 2018

[13] ibid

Closer home, just a few kilometers from the UNEP Headquarters in Nairobi sits the Dandora dumpsite nightmare. It lies in Embakasi sub-county and its surrounding estates are Kariobangi, Baba Ndogo, Gitare, Marigo and Korogocho.[14] This is Nairobi's main sewer treatment works and it discharges processed water to Nairobi River.[15] Though it was opened by World Bank Funds in 1975, it was declared full in the year 2001, however, 17 years later, it is still in use.[16] This dumpsite has been confirmed to contain dangerous elements such as lead, mercury and cadmium which are serious health hazards.[17] Can residents of estates close to this dumpsite bring an action and what amount of compensation can be awarded? This is definitely a timed bomb which sooner or later will be an issue of litigation and numerous claims for compensation.

For the last three years, Kenya has also experienced an increase in large scale infrastructural projects. Currently, there are about 365 wind turbines under construction in Lake Turkana, the Standard Gauge Railway (SGR) is half-way complete and a record of 87 projects in real estate have been initiated by foreign direct investors. The prestigious Nairobi-Thika Highway Improvement Project (NTHIP) is complete among other projects. Such large scale infrastructural projects have adverse environmental impact hence the ever insistence of carrying out environmental impact assessment. This is a preserve of the National Environmental Management Authority (NEMA). Recently, in a judgment delivered in 2019 in ***Michael Kibui and 2 others (Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village in Uasin Gishu County) v Impressa Construzioni Giuseppe SPA and 2 others***[18] before the court was a

[14] International Solid Waste Association (ISWA) 'Special Report for Close Dumpsites: Kenya's Dandora Dumpsite- a Health and Environmental Tragedy' in <https://www.iswa.org/home/news/news-detail/article/special-report-for-closedumpsites-kenyas-dandora-dumpsite-a-health-and-environmental-tragedy/109/ > accessed on 2nd November 2018

[15] ibid

[16] P Barczak 'Dandora Landfill in Nairobi, Kenya' in *Environmental Justice Atlas* < https://ejatlas.org/conflict/dandora-landfill-in-nairobi-kenya > accessed on 2nd November 2018

[17] ibid

[18] [[2019] eKLR; Constitutional Petition No. 1 of 2012

petition for infringement of the right to a clean and healthy environment through excavation works as a result of rehabilitation of the Eldoret- Malaba Highway. The Petitioners succeeded in proving that this right had been infringed by causing water, air and noise pollution and excessive vibrations.[19] Such actions are only bound to increase with increased infrastructural development.

Rapid growth of the world's population has also led to an increase in demand of the world's earth's resources.[20] This increase in human activities in an endeavor to exploit the earth's resources has gradually led to increase in the deterioration of the quality of the environment. Scientific inquiries on environmental conservation point to the fact that regression on environmental quality is largely influenced by the misuse of the scarce natural resources, by pollution and from hazardous wastes from human economic and social activities.[21] Poor management of the environmental resources have also contributed largely to the dwindling of the quality of the environment.[22]

The international community has adequately articulated widely and effectively on almost all aspects of the ecosystems and their governance, nonetheless, little has been seen on compensation once liability has been established. Only recently in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* [2018] did the International Court of Justice (ICJ) get the opportunity, for the first time, to boldly address an issue of compensation.[23] Though the ICJ awarded a much less claim than what was claimed by Costa Rica, this remains an important precedent in shaping the future of awards in both the international and national level.

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[19] ibid
[20] KT Pickering and LA Owen *An Introduction to Global Environmental Issues* (Routledge, London, 1998) [251]
[21] JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' in *Kenya Law Review* Vol 1:19 < http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 29th October 2018 [19]
[22] Ibid [20]
[23] N Oral 'ICJ Renders First Environmental Compensation Decision: A Summary of the Judgment' in < https://www.iucn.org/news/world-commission-environmental-law/201804/icj-renders-first-environmental-compensation-decision-summary-judgment > accessed on 29th October 2018

International law establishes rules on civil and state liability for actions that lead to environmental and related damage.[24] However, international and national legal frameworks on environmental liability offer little financial incentives and most international civil liability conventions do not properly fulfill this function.[25]

Though the practicability of the polluter pays principles is an issue of debate amongst scholars, it is a principle that has gained prominence over the years. It is a principle that establishes the minimum rules on civil liability for environmental damage. It is premised on the requirement that the cost of pollution ought to be borne by the person responsible for causing pollution.[26] It holds persons responsible for pollution to pay costs of measures that are necessary to eliminate that pollution or to **reduce** it so as to comply with the standards set down.[27] In the end, this is a principle that is not concerned with providing compensation to the victims of pollution, primarily concerned with eliminating the effects of pollution and environmental damage. Though it's an important principle in determining who is culpable of actions leading to environmental degradation, it does not offer help in determining the amount of compensation payable to victims.

In the last decade, Kenya has witnessed an increase in environment and land related disputes. The forum for resolution of such disputes was envisaged by the creation of the Environment and Land Court. Due to the nature of complexity of such disputes, it was imperative to create a specialized court as opposed to have such disputes dealt with the High Court as it was prior to the 2010 Constitution.[28] This being a young court, it is yet to deal substantively with the nightmare of

[24] P Sands *Principles of International Environmental Law* (Cambridge University Press, New York, 3rd Edn, 2012) [129]
[25] ibid
[26] P Sands *Principles of International Environmental Law* (Cambridge University Press, New York, 3rd Edn, 2012) [228]
[27] Ibid; RA Robinson in *Training Manual on International Environment* has argued that the use of the term '*reduce'* herein ought to be interpreted envisage compensation of environmental damage.
[28] AIP Advocates 'Remedies Issued by the Environment and Land Court in Kenya' in < http://aip-advocates.com/wp-content/uploads/2017/10/Remedies-issued-by-the-Environment-and-Land-Court-in-Kenya.pdf > accessed on 24th October 2018

compensation in environmental cases. Unfortunately, Kenyans like the resident of the Niger Delta have started to pay the price of development with their lives, health and environment.

The role of the judiciary in the protection of the environment and its place in issues of environmental governance has been called into question in the last decade. Unfortunately, the path of the law on the role of the judiciary in adjudicating disputes of compensation in environmental liability cases is not yet well-trodden. While no judicial officer is allowed to decline to resolve a dispute on the ground that the dispute falling within him/ her is too difficult, issues of how much to award compensation in case of environmental degradation is a difficult issue. There may be a tendency to borrow heavily from the common law principles of damages, but are these principles effective in environmental law? The reluctance of the legislature at the national level and countries at the global level to provide for principles for determining compensation once the polluter has been found liable for the effects of their actions is alarming.

Therefore, in the face of these ever increasing human actions that negatively affect the ecosystems and the population, compensation for such actions has become a paramount issue for consideration. The court will be called upon such a time to provide for principles of granting compensation since the judiciary has an obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and are expected to respond to their aspirations.[29] While politicians and heavy polluters might resist such development, this dissertation assumes that the Kenyan public likes it when judges stand up for them against the state.

[29] *Nilabati Behera v State of Orissa* [1993] Supreme Court 1960, < https://www.srdlawnotes.com/2016/12/nilabati-behera-vs-state-of-orissa-1993.html > accessed on 10th December 2018

STATEMENT OF THE RESEARCH PROBLEM

In its broadest sense, environment is defined to include water, air, soil, sound, odor, the biological factors of animals and plants and includes natural and built environment.[30] It is a combination of material and social things which conditions the well-being of people.[31] At work place, it includes healthy working environment and at home, includes absence of excessive noise from neighbors or smoke from a demolition site.[32] Quality environment permits persons to lead a life of dignity.[33] Unfortunately, it was not until the Stockholm conference that the right to a clean, healthy and quality environment was recognized in the international environmental law.[34] Kenya had to wait till the Constitution 2010 for this right to be expressly recognized in our legislative framework.[35]

The right to clean and healthy environment has continuously been recognized as a human right across the world. This is a right that is viewed as a precondition for enjoyment of all other human rights.[36] This position was reiterated by Vice-President Justice Weeramantry in *Gabcikovo-Nagymaros* where he held that a damage to the environment can undermine the enjoyment of all human rights spoken of in the UDHR and other human rights instruments.[37]

Despite the encouraging development of environmental legal framework in the global and domestic spheres, the loss of the biodiversity, soil erosion and degradation on almost every aspect of the ecosystem had been a cause of great concern. Unfortunately, environmental damage is

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[30] Environment and Coordination Management Act, Section 2
[31] JB Ojwang 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' in < http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 10th December 2018
[32] ibid
[33] Stockholm Declaration, Principle 1
[34] Circle of Rights 'The Right to a Healthy Environment' < http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module15.htm > accessed on the 10th December 2018
[35] Constitution of Kenya, Article 42
[36] Lewis Bridget 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' in *Macquarie Journal of International and Comparative Environmental Law* (Vol 8(1), 2012) [36-47]
[37] *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Separate Opinion of Vice-President Weeramantry)* [1997] ICJ Rep 92

capable of causing death of its victims. Example, the horror stories of Hiroshima and Nagasaki nuclear weapons that led to massive environmental damage caused massive deaths and has had its effects felt down the generations.[38] The 1986 Chernobyl accident is a clear example where no claims of liability or compensation were made, though this was a clearly cut case where international law on liability and compensation would have been put to test. These environmental disasters have caused serious negative effects to the population within it. Coming closer home, persons living near the Dandora dumpsite have reported negative health effects as a result of the health hazards from the dumpsite. As a result, the international community and states have continuously accepted the role of liability in environmental damage. Such environmental liability rules are meant to impose sanctions for the damage caused, or to demand corrective measures meant to restore the environment.[39] These measures are therefore meant to ensure that the 'polluter pays' for the costs as a result of their actions.

However, compensation of victims of environmental damage remains a challenge at both the international and domestic level. This gap was vivid when Stockholm Conference appreciated the need of states to cooperate in developing international law on liability and compensation for victims of environmental damage.[40] The Rio Declaration only did a piecemeal improvement when it emphasized the need to develop domestic laws to deal with liability and compensation for the victims of pollution and environmental damage.[41] The national laws that were envisaged by the Rio Declaration are meant to complement the international rules to be developed in accordance to

[38] Martin Snapp 'An After Bomb Survivor Recalls the Horrors of Hiroshima' in *Cal Alumni Association* < https://alumni.berkeley.edu/california-magazine/just-in/2017-08-03/atomic-bomb-survivor-recalls-horrors-hiroshima > accessed on 10th December 2018

[39] P Sands *Principles of International Environmental Law* (Cambridge University Press, New York, 3rd Edn, 2012) [700]

[40] Stockholm Declaration, Principle 22

[41] Rio Declaration, Principle 13

the Stockholm Declaration.[42] While the 1982 World Charter for Nature did attempt to address the issue of liability on compensation, this was not comprehensive. It only encouraged states to ensure that individuals access to means of redress when their environment has been infringed.[43]

There has been an inertia by states since the 1972 Stockholm Conference in developing the rules of compensation of victims. Only recently, in the *Costa Rica v Nicaragua* [2018] did the ICJ determine an issue of compensation where there has been environmental degradation. Although numerous treaties on diverse environmental issues have been developed which establish civil liability, there is little to boast about compensation to the victims of the environmental degradation.

The principles that courts, the state or any other body, seeking to compensate adequately, should use in determining the amount of compensation to be awarded remain an unchartered territory. This study will therefore seek to establish such principles and/ or the tests to be used in determining the amount of compensation. Courts would rush to use the 'Common Law' principles for awarding damages but are these principles sufficient and efficient in cases of environmental damage? Do we need to conduct an assessment to understand the extent of damage before awarding the compensation? **This study will therefore seek to bring to light the principles and/ or tests that courts ought to use in the awarding of compensation in environmental cases.**

[42] P Sands *Principles of International Environmental Law* (Cambridge University Press, New York, 3rd Edn, 2012) [701]
[43] Paragraph 11(c) and Para 23

RESEARCH OBJECTIVES

The increase of human population has led to the increase of human activities which has subsequently led to the increase of pollution and environmental degradation. However, cases of compensation where environmental liability has been established has always been a thorny issue. This dissertation will therefore seek to establish the following:

1. The legal framework that courts use to determine environmental liability and awarding compensation in environmental cases.
2. The principles and/ or test for awarding compensation when environmental liability has been established.
3. The applicability of common law in determining the amount of compensation in environmental cases when there is no statutory provision.
4. The factors that a court ought to consider when determining the amount of compensation to be awarded in environmental liability cases.

While awarding compensation is key to the question under study, the heart of this study is to attempt and develop a road map and/ or test for awarding compensation. This is important as courts will have a road map in the exercise of their discretion and litigants will know what to expect every time they approach the court for compensation. This is key to establishing the certainty of the amount of damages to be awarded during determination of compensation. This study will therefore seek to develop a test and or principles that the courts would efficiently use in awarding of compensations.

RESEARCH QUESTIONS

This study is guided by the following research questions:

1. Is there an established legal framework for determining compensation in environmental cases?
2. What are the principles and test(s) for awarding compensation where environmental liability has been established?
3. Whether Common Law guidelines for awarding damages are applicable in the award for compensation in environmental liability cases.
4. What factors are to be considered in awarding compensation in environmental liability cases?
5. What is the role of Environmental Impact Assessment and other scientific inquiries in the award of compensation?

JUSTIFICATION OF THE STUDY

While there are many reasons for litigation, litigation will arise in environment related disputes where parties aim to get some form of compensation. The area of compensation in cases of environmental crimes remains unsettled and standardized tests for providing adequate compensation are yet to be firmly established. While attention has shifted to establishing principles in environmental law, little has been done on compensation of the victims of environmental crimes. Actions that lead to environmental degradation have over-stretching negative effects upon the population living within the concerned spot. A flexible approach needs to be established to provide a test to be used in determining the amount of compensation in different case scenarios that may arise.

Though this study appreciates the role of law-making bodies, it lays a great emphasis on the need of judges to develop a test and/ or principles to be used in the determination of the compensation to be awarded. It will go to the extent of recommending possible principles to be used and further suggest a test for awarding compensation that should be adopted.

LITERATURE REVIEW

Life is dependent on a clean and healthy environment.[44] Therefore, every person has an inherent right to a clean and healthy environment.[45] Environmental and natural resources must therefore be sustainably managed for the purpose of the present and future generations.[46] Despite the right to a clean and healthy environment being anchored in the Constitution, Kenya [and the entire globe] faces many environmental degradation issues.[47] Key to the environmental degradation in Kenya is the increase in population, inappropriate use of technology, unsustainable consumption and production patterns, lack of proper waste management systems, industry and transport pollution etc.[48] This trend has in the end perpetuated to the infringement of the right to a clean and healthy environment under Article 42.

Therefore, in environmental claims, the victim is most certainly seeking a permanent injunction to end the harmful act where it is continuous, restitution or ***financial compensation*** associated with

[44] Ministry of Environment, Water and Natural Resources *The National Environment Policy, 2013* < http://www.environment.go.ke/wp-content/uploads/2014/01/NATIONAL-ENVIRONMENT-POLICY-20131.pdf > accessed on 5th December 2018

[45] Constitution of Kenya, Article 42; Environmental Management and Co-ordination Act (EMCA), Chapter 387, Section 3(1)

[46] Ibid Article 42(a); Ministry of Environment, Water and Natural Resources *The National Environment Policy*, 2013 < http://www.environment.go.ke/wp-content/uploads/2014/01/NATIONAL-ENVIRONMENT-POLICY-20131.pdf > accessed on 5th December 2018

[47] ibid

[48] ibid

damage to environmental resources and/ or consequential damage to people.[49] Financial compensation associated with consequential damage to the people remains an unexplored area in environmental law both in the domestic and global legal framework.

Despite the abundance of authorities, and literature on environmental law, little has been done on awarding of compensation in cases of environmental liability. There is limited material dealing with the issue of awarding of compensation in cases of infringement of the right to a clean and healthy environment. This chapter therefore seeks to review the existing material, information and knowledge on the issue of compensation of victims in environmental liability matters.

Framework Protecting the Right to a Clean and Healthy Environment

National Legal Framework- Kenya

The basic principles for protection of the environment in Kenya have been granted the constitutional and statutory force. Article 42 grants every person a right to a clean and healthy environment while Article 69(1) begins by mandating the state to take steps to protect and conserve the environment. Article 69(2) mandates every person to cooperate with the state and other persons to protect and conserve the environment. Article 72 mandates parliament to enact legislation to give effect to that Part on environment and natural resources. In similar vein, the Environmental Management and Co-ordination Act Section 3(1) provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution. However, this right is also pegged with the duty to safeguard and enhance the environment[50] which may require the citizen to cooperate with state organs in the protection and the conservation of the environment.[51]

[49] P Sands et al *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) [714]
[50] Environment Management and Co-ordination Act, Section 3(1)
[51] Ibid Section 3(2A)

When this right to a clean and healthy environment is infringed, denied and/ or threatened, the aggrieved person may approach the Environment and Land Court pursuant to Article 70(1) of the Constitution, for appropriate redress.[52] The Environment and Land Court is established pursuant to Article 162(2) of the Constitution which envisaged that Parliament was to establish courts of the status of the High Court to determine any disputes relating to use and occupation of, and title to land.[53] Parliament then moved to enact the ***Environment and Land Court Act***.[54] This court has jurisdiction to issue orders it considers appropriate to provide ***compensation*** for any victim of violation to a clean and healthy environment among other legal remedies.[55] The issue of compensation as a remedy has therefore been granted constitutional sanctity under the current legislative dispensation.[56]

Benedetta Wasonga in *Human Rights and Environmental Protection in Kenya- A Claim Right* opined that the state as the duty bearer of the right established in Article 42 has the obligation to ensure that the people enjoy this right without any form of infringement from persons who have the intention to pursue sole/ individual interest as opposed to a community interest.[57] The state as duty bearer of this right invokes Article 69 to ensure the enjoyment of this right.[58] This is guaranteed through ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources.[59] She proceeds to castigate majority of human rights organizations for having focused more on individual and group rights such as children's rights,

[52] Also, Environmental Management and Co-ordination Act Section 3(3) (e)
[53] Constitution of Kenya, Article 162(2) (b)
[54] No. 19 of 2011
[55] Constitution of Kenya, Article 70(2) (c)
[56] *Kiluwa Limited & Another v Commissioner of Lands and 3 others* [2015] eKLR
[57] Benedetta Wesonga 'Human Rights and Environmental Protection in Kenya- A Claim Right' (*Kenya Forest Service,* 2018) < http://www.kenyaforestservice.org/index.php/2016-04-25-20-08-29/news/599-human-rights-and-environmental-protection-in-kenya-a-claim-right > accessed on 4th June 2019
[58] ibid
[59] Constitution Article 69(1) (a)

disability rights, yet less emphasis on environmental rights which has led to continued negative effects on the right to life.[60] In the end, she noted that the right bearer [state] is committed to observance of Article 42 through relevant statutory authorities such as National Environment Management Authority, Kenya Forests Service, Kenya Wildlife Service, Kenya Water Towers etc.[61]

Justice J.B. Ojwang in '*The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'* opined that before the enactment of the Environmental Management and Co-ordination Act (EMCA), Kenya had no integrated body of national environmental law.[62] Instead, Kenya had scattered statutes on specific aspects of the environment e.g. forests, water, land, pests etc. However, the enactment of EMCA established a legal framework for ***civil litigation*** and further established the criminal jurisdiction of our courts.[63] He further noted that a civil process would normally involve issues of access to and utilization of land and water; disposal of waste matter by industrial plants; safety in the industrial working environment and environmentally-wasteful cultural practices.[64] However the Learned Judge missed the issue of remedies especially compensation being a topical issue. Importantly, the Learned Judge appreciated that most of these issues have no pre-determined answers and as such, a court must answer 'what decision is best within these circumstances?'

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[60] ibid
[61] Benedetta Wesonga 'Human Rights and Environmental Protection in Kenya- A Claim Right' (*Kenya Forest Service,* 2018) < http://www.kenyaforestservice.org/index.php/2016-04-25-20-08-29/news/599-human-rights-and-environmental-protection-in-kenya-a-claim-right > accessed on 4th June 2019
[62] JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' in *Kenya Law Review* (vol 1:19, 2007) < http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 5th December 2018 [22]
[63] Ibid [23]
[64] Ibid [23]

International Legal Framework

The international principles are applicable in Kenya through Article 2(5) and 2(6) of the Constitution. These Articles provide that the general rules of international law[65] and any treaty or convention ratified by Kenya[66] shall form part of the laws of Kenya.

The landmark *Stockholm Declaration* was the first global instrument to out-rightly establish the relationship between the environment and right to life. It appreciated that the 'environment was essential to the well-being and to the enjoyment of basic right even the right to life itself'.[67] It bestowed a responsibility on man to protect the environment for the present and future generations.[68] Though the *Stockholm Declaration* failed to explicitly proclaim the human right to environment, this Declaration showed the concern of the global community to environmental matters. This very *Declaration* was the beginning of a new wave in the international environmental law.

Moving fast forward, the basic principles for protection of the environment were to be established in 1992 in the *Rio Conference on Environment and Development* (1992). The *Rio Declaration on Environment and Development,* in principle 1, appreciated that **human beings** are entitled to a healthy and productive life in harmony with nature. Unfortunately, the *Rio Declaration* only used the term 'human rights' three times thereby offering no direct link between human and environmental rights.[69] Interestingly, Principle 13 to some extent dealt sparingly with the issue of compensation of victims of environmental damage. While offering no much help in the issue of

[65] Constitution of Kenya, Article 2(5)
[66] Ibid, Article 2(6)
[67] Stockholm Declaration Principle 1
[68] ibid
[69] Subin Nijhawan 'A Human Right to a Clean Environment' in *MA International Studies and Diplomacy* < http://www.subin.de/environment.pdf > accessed on 31st May 2015

compensation of victims, it only ***encouraged*** member states to develop domestic laws to deal with the issues of liability and compensation of victims of environmental damage.[70]

The *African Charter on Human and Peoples Rights* (ACHPR) Article 24 provides that '*all peoples shall have a right to a* ***general satisfactory*** *environment favorable to their development*.' This is viewed as a 'third generation human right' also called the 'solidarity rights'.[71] This is a milestone for the African people, however, it does not provide for the enforcement of this right. Courts can therefore develop principles to ensure the enforcement of this right including the compensation of any infringement of this right. The ACHPR was the first international instrument to expressly recognize the right to a clean and healthy environment.

The recognition of the right to a clean and healthy environment as a 'third generational right' has been met harshly by some human rights and environmental lawyers. Dr. Kariuki Muigua in *Re-conceptualising the Right to Clean and Healthy Environment in Kenya'*[72] argues that the right to a clean and healthy environment is not a 'third generation right' but a fundamental right whose observance is crucial for realization of the so-called first and second generation rights.[73] J.A Downs justifies this position by opining that the destruction of life sustaining ecosystems, pollution of waters, air and land and destruction of the environment prevents people from securing the minimum requisites for health and survival hence limiting the enjoyment of the human rights including the right to life.[74]

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[70] Rio Declaration on Environment and Development (1992); Principle 13

[71] Subin Nijhawan 'A Human Right to a Clean Environment' in *MA International Studies and Diplomacy* < http://www.subin.de/environment.pdf > accessed on 31st May 2015

[72] Kariuki Muigua 'Right to Clean and Healthy Environment' < http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf > accessed on 31st May 2019

[73] ibid

[74] J.A Downs, 'A Health and Ecologically Balanced Environment: An Argument for a Third Generation Right,' *Duke Journal of Comparative & International Law,* (Vol 3, 1993) [351-385]

UNEP in '*Healthy Environment, Healthy People'* argued that the vision 2030 Agenda which was ambitious and transformational addressed human rights and well-being on the common understanding that a healthy environment is integral to the enjoyment of basic human rights including the right to life and the quality life.[75] Further, the interlinking of human right issues and the environment is key to the meeting of the 2030 goals in a more cost-effective and beneficial manner.[76]

Dr. Mohd. Yousuf and Dr. Syed Damsaz in '*Right to Life in Context of Clean Environment: It's Significance under Various Laws'* opined that the Stockholm Conference gave nations across the globe the impetus to think that environment has to be protected for facilitating the right to life.[77] They argued that preservation of the environment was key to the promotion of human rights as was affirmed by United Nations Commission on Human Rights in a resolution adopted in 1990 entitled 'Human Rights and the Environment.'[78]

[75] United Nations Environment Programme 'Healthy Environment, Healthy People' (2016) *Thematic Report: Ministerial Policy Review Session* < https://wedocs.unep.org/bitstream/handle/20.500.11822/17602/K1602727%20INF%205%20Eng.pdf?sequence=1&isAllowed=y > accessed 3rd June 2019 [page 14]

[76] Ibid [Page 14]

[77] Mohd. Yousuf Bhat and Syed Damsaz Ali 'Right to Life in Context of Clean Environment: It's Significance under Various Laws' (2017, Vol. 22) *Journal of Humanities and Social Science* < https://www.researchgate.net/publication/317331615_Right_to_Life_in_Context_of_Clean_Environment_It's_Significance_under_Various_Laws/download > accessed on 6th June 2019

[78] ibid

Discerning the 'Right to a Clean and Healthy Environment'

What amounts to a '*clean and healthy environment*' has been an issue of debate amongst scholars. Dr. Kariuki Muigua in '*Re-conceptualizing the Right to Clean and Healthy Environment in Kenya'*[79] argued that though the right to a clean and healthy environment is found in various documents, there is yet no clear definition of this right. He poses this debate in the following terms:

> Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated- is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?

United Nations Environment Programme (UNEP) in *Healthy Environment, Healthy People,* argue that 'clean air and water, sanitation and green spaces, and safe workplaces enhance the quality of life of people and reduce mortality.'[80] Specifically, UNEP connotes that '*poor air and water quality are among the primary environmental risks'* affecting the health of citizenry across the world.[81] This was itself an attempt to describe the nightmare in discerning the right to a clean and healthy environment. Whether this forms the foundation for the minimum standards for this right is an issue open for debate.

Dr. Mohd. Yousuf and Dr. Syed Damsaz in '*Right to Life in Context of Clean Environment: It's Significance under Various Laws'* were close to discerning the right to a clean and healthy

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[79] Kariuki Muigua 'Right to Clean and Healthy Environment' < http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf > accessed on 31st May 2019

[80] United Nations Environment Programme 'Healthy Environment, Healthy People' (2016) *Thematic Report: Ministerial Policy Review Session* < https://wedocs.unep.org/bitstream/handle/20.500.11822/17602/K1602727%20INF%205%20Eng.pdf?sequence=1&isAllowed=y > accessed 3rd June 2019 [page 9]

[81] Ibid [Page 16]

environment when they opined that the right to a life is fundamental and it includes the right **of enjoyment of pollution-free water** and **air** for full enjoyment of life.[82]

The difficulty in defining this right makes it hard to make a further move. How can one seek compensation on a right that cannot in the first place be discerned? Ambiguity in this right makes it also difficult to determine the amount of compensation when this right has been infringed.

Compensation as Remedy in Environmental Cases

Dr. Kariuki Muigua and Francis Kariuki in '*Towards Environmental Justice in Kenya'* argue that environmental justice dictates that victims of environmental injustice have a right to receive full compensation and reparations for damage as well as quality health care.[83] They argue that access to courts is an important pillar in promoting environmental justice in Kenya.[84] Environmental justice can be achieved through the guaranteeing access of relevant information to the citizenry e.g. through public participation[85] may tilt an award for compensation in favour of a complainant.

This was further emphasized by the court in *Friends of Lake Turkana Trust v Attorney General and 2 others*[86] where it was opined that access of environmental information was a prerequisite to monitoring governmental and public sector activities on the environment.

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[82] Mohd. Yousuf Bhat and Syed Damsaz Ali 'Right to Life in Context of Clean Environment: It's Significance under Various Laws' (2017, Vol. 22) *Journal of Humanities and Social Science* < https://www.researchgate.net/publication/317331615_Right_to_Life_in_Context_of_Clean_Environment_It's_Significance_under_Various_Laws/download > accessed on 6th June 2019

[83] K Muigua and F Kariuki 'Towards Environmental Justice in Kenya' < https://profiles.uonbi.ac.ke/kariuki_muigua/files/towards_environmental_justice_in_kenya_kariuki_muigua__francis_kariuki.pdf > accessed on 5th December 2018 [29]

[84] Ibid [32]

[85] Bid [33]

[86] ELC Suit No. 825 of 2012

The *Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment* though was established for the member states of the Council of Europe is very instrumental in the determination of issues of liability.[87] In its preamble, it appreciates that the assessment of compensation can be problematic at the international level especially when damage is trans-boundary in nature. The main aim of this convention is to ensure adequate compensation for damage resulting from activities dangerous to the environment.[88] In Chapter IV, it provides for an action of compensation to be brought within a period of three years from the date which the claimant knew or ought to have known of the damage.[89] Where the damage consist of a series of continuous incidents, the period starts to run from the last occurrence.[90] Unfortunately, this Convention rests at that point and does not explain the factors, conditions or tests to be applied by such a court in determining the amount of compensation to be awarded.

Philippe Sands et all argue that the rules on liability provide an incentive to encourage compliance with environmental obligations.[91] This is achieved by the imposition of sanctions for environmental damage and/ or the provision of measures to restore the environment to its pre-damage conditions.[92] Such actions are an endeavor to implement the 'polluter pays principle'. They appreciate that though states have long recognized the role of liability for environmental damage, there exists great deal of gaps and inadequacies in this area.[93] It was for this reason that principle 22 of the *Stockholm Declaration* recognized the need of states to cooperate in the

[87] This Convention is also open for signature by non-member states of the Council of Europe
[88] Convention on Civil Liability for Damage from Activities Dangerous to the Environment, Article 1
[89] Ibid Article 17(1)
[90] Ibid Article 17(2)
[91] P Sands et al *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) [700]
[92] ibid
[93] Bid [701]

developing of international law regarding liability and compensation for victims of environmental damage.

Philippe Sands et all opine that there has been unwillingness among states to establish rules of international law on compensation of victims as this might impose excessive costs to the polluters.[94] An example is the Chernobyl incident in 1986 where no claims were made, though this provided a clear-case in which a compensation claim would have been successful. This example was a reflection of the limited developments on this area of the law since 1972. Unfortunately, most of the subsequent treaties committed their parties to develop rules on liability or responsibility.[95]

The ILC Articles on State Responsibility (2001)[96] envisage that every injury (including injuries as a result of environmental damage) caused by international actors, must be compensated and/ or restituted satisfactorily.[97] This principle of reparation had long been expressed by the Permanent Court of International Justice (PCIJ) in *Chorzow Factory* case.[98] The Court in this case opined that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-store the position that existed before the act was committed.[99] It proceeded to hold that 'damages for loss sustained which would not be covered by restitution ought to be provided for.[100] This though established the basis for compensation, the court did not proceed to provide for the principles a court ought to apply in the process of determining the amount of compensation payable to victims.

[94] P Sands et al *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) [701]
[95] ibid
[96] Part I, Chapter II
[97] Ibid, Article 34
[98] PCIJ (1927) Ser. A No. 17 [47]
[99] *Chorzow Factory Case* PCIJ (1927) Ser. A No. 17 [47]
[100] ibid

Not only has the oil boom in Nigeria been instrumental in yielding great economic rewards to the county, but has also led to profound environmental impacts.[101] The ever recurrent oil spills and other environmental stresses have led to habitat degradation, and severely compromised human livelihoods and health.[102] This has led to several court cases by the victims in claims for compensation among search of other remedies. In *the Bodo Community and others v the Shell Petroleum Development Company of Nigeria*[103] the Court noted that the existence of statutory measures (the Oil Pipeline Act-OPA) ***did not exclude common law*** being applied to determine the amount of compensation for people affected by oil spillages.[104] It proceeded to appreciate the existence of potentially arguable causes of action in respect to oil spillages in negligence, nuisance (private and public), in *Rylands v Fletcher*[105] and in the doctrine of *res ipsa loquitor.*[106] The creation or [absence] of statutory duty does not in itself abrogate a common law duty to do that thing unless the form of content provide otherwise.[107]

However, though there is a distinction between 'damages' and 'compensation' these two concepts will often overlap. 'Compensation' is usually imposed statutorily while damages are often compensatory (example punitive or exemplary damages).[108] Halsbury Laws has defined 'compensation' as a:

[101] E Ateboh et al 'Corporate Civil Liability and Compensation Regime for Environmental Pollution in the Niger Delta' in *International Journal of Recent Advances in Multidisciplinary Research*, Vol. 05, June 16 2018, Issue 06, pp. 3870-3893, June, 2018 < https://ssrn.com/abstract=3215036 > accessed on 26th November 2018
[102] ibid
[103] [2014] EWHC 1973 (TCC)
[104] *The Bondo Community and others v the Shell Petroleum Development Company of Nigeria* [2014] EWHC 1973 (TCC) Para 21
[105] [1868] E.R. 3, H.L. 330
[106] Ibid [Para 68]
[107] Ibid [Para 27]; *Leach v Republic* [1912] AC 305- 'Presumption against legislative interference with common law: Statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare.'
[108] *The Bondo Community and others v the Shell Petroleum Development Company of Nigeria* [2014] EWHC 1973 (TCC) Para 21

> [P]ecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered, *other than an actionable wrong,* litigated in the civil court, committed by the person bound to make the recompense. In this sense, 'compensation' is distinct from 'damages' which is recoverable in respect of an actionable wrong.[109]

The Nigerian Court of Appeal in ***Shell Petroleum Development Company v Councillor F.B. Farah***[110] a decision on blow-out from an oil well proceeded to hold that an award of compensation or damages is meant to restore the person suffering the *damnum* (loss without injury) as far as money can do to the position he was before the injury occurred. While this case was wholly statute based, the court relied on the common law guidelines for assessment of damages.[111] To that end, the principles of common law on damages which has a similar end would be helpful to a court in the determination of the amount of compensation payable. In determining 'fair and adequate compensation' the court awarded N4.6 Million, while the company had initially issued a compensation N2000.

On awarding of compensation, the Court in the *Bodo Community* litigation held that the determination of compensation is not an exercise to be conducted in the ether of judicial or common law experience or some sort of judicial discretion. The compensation must be just in the circumstances of the case and in reference to the factors such as extent of damage done to any of the buildings, crops or profitable trees; any disturbance caused by the activities; any damage

[109] Halsbury's Laws (Vol 12(1) Para 815; ibid [Para 100]
[110] [1995] 3 NWLR 148
[111] Aliyu Panti, 'Legal Remedies for Victims of Environmental Pollution in Nigeria' (LLM Thesis, Ahmed Bello University, Zaria Nigeria, 2014) [50] < http://kubanni.abu.edu.ng/jspui/bitstream/123456789/6188/1/LEGAL%20REMEDIES%20FOR%20VICTIMS%20OF%20ENVIRONMENTAL%20POLLUTION%20IN%20NIGERIA.pdf > accessed on 28th November 2018

suffered by any person; and any loss in the value of land or interests in land by reason of the oil spillages.[112]

Ugbe R.O. on polluter pays principles noted that various factors needed to be taken into consideration when determining compensation payable to pollution victims.[113] These factors include the population and the type of community affected; the size of crops affected; the area polluted; time of year (dry or rainy season); the fact that pollution at times act as fertilizer would be an advantage of the victim in the future; medical history of the complainant; and the before and after value of the impacted structure.[114]

Daniel Bodansky et al argue that financial compensation only arises where the damage is not made good by restitution.[115] They describe restitution as the re-establishment of the situation that existed before the environment damage or wrongful act was committed.[116] Compensation will only be awarded to cover **assessable damage** including loss of profit. Environmental harms maybe irreversible in some cases hence restitution may not be an option.[117] In such scenarios, restitution maybe complemented by compensation. Compensation is only payable for reasonable measures adopted by victims to contain the harm and only when a claimant has sustained an economic loss that can be quantified in monetary terms.[118]

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[112] Oil Pipeline Act Section 20(2) (a)-(e)
[113] R.O. Ugbe 'The Polluter Pays Principle: An Analysis' in *The Calabar Law Journal* (Vol vi-vii, 2002-03) [153; Aliyu Panti, 'Legal Remedies for Victims of Environmental Pollution in Nigeria' (LLM Thesis, Ahmed Bello University, Zaria Nigeria, 2014) [44]
[114] Aliyu Panti, 'Legal Remedies for Victims of Environmental Pollution in Nigeria' (LLM Thesis, Ahmed Bello University, Zaria Nigeria, 2014) [44] < http://kubanni.abu.edu.ng/jspui/bitstream/123456789/6188/1/LEGAL%20REMEDIES%20FOR%20VICTIMS%20OF%20ENVIRONMENTAL%20POLLUTION%20IN%20NIGERIA.pdf > accessed on 28th November 2018
[115] D Bodansky, J Brunnee and E Hey, *The Oxford Handbook of Environmental Law* (Oxford University Press, New York, 2007) [1018]
[116] ibid
[117] Ibid [1019]
[118] Ibid [1030]

Daniel Bodansky et al appreciate that the regime on civil liability on oil has been influential in the area of compensation. However, it is an area that has faced problems such as lack of certainty as to the precise, fixed and objective definition of damage; the difficulties relating to the interpretation of 'reasonableness'; and the high burden of proof.[119]

The 1999 Liability Protocol to the Basel Convention (though not yet in force) attempted to set up a 'compensation regime for liability and for adequate and prompt compensation for damage' deriving from the trans-boundary movement and disposal of hazardous wastes.[120] It defines damage as including loss of life or personal injury; loss or damage to property; loss of income deriving from an economic interest in use of the impaired environment.[121] However, this protocol though would have been a milestone on compensation on compensation of damage caused by the movement and disposal of hazardous wastes, it falls short of laying of principles to be considered in the award for compensation to the victims. Daniel Bodansky et al argue that civil liability treaties do not address the problem of compensation adequately.[122]

Alexandar Kiss and Dinah Shelton in their book *Guide to International Environmental Law* argue that it is becoming increasingly acceptable to transfer issues of compensation from the interstate level to the interpersonal level that is from public to private international law, where the polluter and the victim are brought before the competent authorities.[123] Before an award for compensation, a court needs to consider the amount of damage that has occurred. This means that the concept of harm to the environment must be viewed as a property concept, where economic value is placed

[119] ibid
[120] 1999 Liability Protocol to the Basel Convention, Article 1; D Bodansky, J Brunnee and E Hey, *The Oxford Handbook of Environmental Law* (Oxford University Press, New York, 2007) [1030]
[121] 1999 Liability Protocol to the Basel Convention, Article 2
[122] D Bodansky, J Brunnee and E Hey, *The Oxford Handbook of Environmental Law* (Oxford University Press, New York, 2007) [1031]
[123] A Kiss and D Shelton *Guide to International Environmental Law* (Martinus Nijhoff Publishers, Leiden-Netherlands, 2007) [136]

on the lost or damaged object.[124] This may include market value, loss of income, and damage to the moral, aesthetic and scientific interests.[125] For purposes of awards, measurement or evaluation of harm is important. This involves answering important questions of the threshold or *de minimis* [minimal] level of harm, proximity of harm and possible irreversibility of the harm caused.[126] To the core of this research, he notes that the issue of award of financial compensation is far largely ignored in international law.[127] The declaring of certain serious environmental damage as a war of crime is thus not sufficient.

Proving an entitlement to an award for compensation is not a straight forward affair as was noted by Justice M.C. Oundo in ***Samuel Muniu Mugo –vs- County Government of Nyandarua.***[128] The Learned Judge held that the claim for compensation and infringement of Article 40, 42 and 47 could not be sustained as the Petitioner had not annexed any report from an independent and impartial party or an environmental-impact assessment report capable of guiding in making an informed decision.[129] The photographs attached by the Petitioner in the attempt to paint the Respondent's activities as having exposed a botanical garden to environmental waste and degradation was not sufficient.[130]

[124] Ibid [147]
[125] ibid
[126] Ibid
[127] ibid
[128] [2018] eKLR [Environment and Land Petition 22 of 2017]
[129] Ibid Para 69
[130] ibid

In conclusion- (The Gap)

It is a well-known principle that no judicial officer is to decline to resolve a dispute falling within his or her jurisdiction on the basis that the issues are too difficult.[131] Even where the Legislature or international principles have not made a law regulating the specific matter in detail hence outside the purview of the existing law.[132] From the above discussions, it is clear that issues of awarding of compensation in environmental degradation cases to victims is a path of law that is not yet well-trodden both at the domestic and international law. This study will therefore explore on how a judicial officer, in a situation of determining the compensation in cases of environmental degradation ought to award compensation to the victims. The principles and/ or factors to be considered by any court before an award for compensation will be established by this study.

THEORETICAL FRAMEWORK

The principle of legal certainty has over the years gained momentum in the legal fraternity. Certainty in law demand that the law to be accessible and predictable.[133] Legal questions and issues of liability ought to be resolved by application of the law and not exercise of discretion.[134] While this has been a position accepted over the years, the certainty of the law in cases of compensation in environmental degradation remain a nightmare. The amount of compensation to be awarded ought not to be left to judicial discretion. The need to provide a framework in this cases to avoid

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[131] JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' in *Kenya Law Review* (vol 1:19, 2007) < http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 5th December 2018 [24]

[132] ibid

[133] *Vallejo v Wheeler* (1774) 1 Cowp 143; Lord Mansfield- 'in all mercantile transactions the great object should be certainty.'

[134] J Mance 'Should the Law be Certain?' (The Oxford Shrieval Lecture in the University Church of St. Mary the Virgin, Oxford, 11th October 2011) < https://www.supremecourt.uk/docs/speech_111011.pdf > accessed on 6th November 2018

the uncertainty that currently exists forms the cornerstone of this study. Legal certainty and legitimate expectations are two Siamese twins.[135] The stakeholders need to provide legal certainty for attainment of the legitimate expectation in compensation cases due to environmental injury.

This study seeks inspiration from the theory of Legal Realism. Holmes in his heyday famously remarked that 'law' consists of the 'prophesies of what the courts will do in fact and nothing more pretentious.'[136] To understand and ascertain the nature of the law, the realists argue that one must visit and study the decisions of the courts and not the actions of the legislature.[137] The law is therefore not just concepts but the actual practice of the courts. Bishop Benjamin Hoadly in 1717, in a sermon preached before King George I remarkably stated that 'the true giver of the law is he who has an absolute authority to interpret written or spoken laws and not the person who first wrote or spoke them.'[138] Therefore, until the court has given a judgment on a particular set of facts, no law on that fact is still in existence.[139]

The theory of legal realism will therefore be imperative in emphasizing the need of the courts to be proactive in the developing of the tests and principles that are applicable in determining the amount of compensation payable. The importance of judicial decision as a secondary source of law is appreciated in Article 38(1) (d) of the Statute of ICJ.[140] This study therefore proceeds on the assumption that the courts put life into the dead words of the statute hence law is what the judge

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[135] ibid

[136] D'Amato, Anthony, "The Limits Of Legal Realism" (2010) In *Faculty Working Papers*. Paper 106. <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/106 > accessed on 6th November 2018

[137] ibid

[138] WE Keith 'Judicial Review and Interpretation: Have the Courts Become Sovereign When Interpreting the Constitution?' *Institutions of Democracy: The Judicial Branch* (Oxford University Press, New York, 2005) < https://scholar.princeton.edu/kewhitt/publications/judicial-review-and-interpretation-have-courts-become-sovereign-when-interpreti > accessed on 6th November 2018

[139] MS Green 'Legal Realism as Theory of Law ' in *William & Mary Law Review* (Vol 46, Issue 6, 2005) < https://pdfs.semanticscholar.org/1317/152420a59d066d493f5f564ff6b411aee2bc.pdf > accessed on 6th November 2018

[140] Though Article 59 of the Statute of ICJ provide that the decisions of ICJ have no binding force except between the Parties and in respect of that particular case.

declares. Kenya has in the recent years experienced an expansion of the jurisdiction of the courts, and there is a view of principle-embedded legal practice.

RESEARCH METHODOLOGY

By its nature, this study is mainly library research which will be based mostly on primary and secondary sources.

Primary data will include: the Constitution of Kenya, Acts of Parliament and other written laws, Subsidiary Legislation, Government Reports and Policies, substance of Common Law and Precedents

Secondary sources of data, will primarily include authoritative texts, articles, journals and internet sources including online libraries, conference papers and reports. It will therefore heavily rely on library and internet research.

Because of its nature, this research will be a qualitative research. The problem under investigation is a technical question of the law that will primarily be involving a review of the existing authorities to establish the existence of a lacuna in law and later recommend an appropriate principle to fill the gap.

CHAPTER BREAKDOWN

1. Proposal: Introduction

2. The legal framework on awarding compensation in environmental framework- Multilateral Environmental Agreements, Common Law and domestic statutes in Kenya).

3. Principle, test(s) and factors to be considered for awarding compensation where environmental liability has been established.

4. Comparative analysis of the Kenyan and Nigerian Jurisprudence on compensation.

5. Conclusion and Recommendation.

CHAPTER TWO
LEGAL FRAMEWORK OF AWARDING OF COMPENSATION TO VICTIMS IN ENVIRONMENTAL LIABILITY CASES

INTRODUCTION

Environmental and land degradation is a multi-faceted and complex phenomenal gazing the modern world.[141] This is threatening the livelihoods of millions of people in the world who rely on land ecosystem and other natural resources for survival.[142] Increase of human activities and the over-exploitation of the benefits nature provided to the world has influenced largely to the environmental degradation facing it.[143] Despite advanced environmental standards and policies being laid, negative environmental impacts are reaching to unprecedented levels.[144] Sadly even the global framework has left innocent victims without a proper framework to benefit from after suffering from heinous effects of environmental injustices. In Kenya, the totality of law envisaged to protect the environment is derived from national legislation, the regional and the international regulations.[145]

i. Regional Legal Framework

Though the **regional level** (East Africa) may not boast of having a comprehensive legal document principally dealing with protection of the environment, the East Africa Community is endowed with a wealth of natural resources, including some of the most spectacular wildlife and ecosystems

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[141] W Mulinge and others *Economic of Land Degradation and Improvement* < https://link.springer.com/content/pdf/10.1007/978-3-319-19168-3_16.pdf > accessed on 21st January 2019 [472]

[142] Ibid [473]

[143] Scott Cole and others *Environmental Compensation: Key Conditions for Increased and Cost Effective Application* (Nordic Council of Ministers, Denmark, 2015) < http://norden.diva-portal.org/smash/get/diva2:858413/FULLTEXT03.pdf > accessed on 21st January 2019

[144] Ibid para 1.1.

[145] Kameri-Mbote Patricia and Collins Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' in *Sustainable Development Law and Policy, Fall 2009* [31-38] <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp > accessed on 22nd May 2019

in the world.[146] The '***Treaty for Establishment of the East African Community***' (hereinafter referred to as the 'TEEAC) forms the bedrock upon which collaborated efforts and strategies among[147] the countries for the joint management of the shared natural resources and their conservation for the benefits of the communities. Article 5(3) (c) of the TEEAC Treaty, stipulate that the community shall promote the sustainable utilization of the natural resources of the partner states by taking measures that would promote the quality of lives of their population. Issues surrounding the protection of the environment and utilization of the natural resources are substantively dealt with in Chapter 19 and 20 of the TEEAC. The East African Community has in that vein proceeded to develop two protocols important for the protection and management of the environment: *Protocol for the Sustainable Development of the Lake Victoria* and the ***Protocol on Environment and Natural Resources***.

- ***Protocol for the Sustainable Development of the Lake Victoria***

This Protocol was signed by the three Partners of the East Africa Community (Kenya, Uganda and Tanzania) on the 29th November 2003. It was further to be ratified in November 2004. Article 3 of this Protocol outlines the fourteen areas where partner states are to cooperate in the conservation and utilization of the resources of the Lake Victoria Basin. This zeros mostly on the sustainable utilization of the resources around the Lake Victoria Basin. These resources include the fisheries, forestry and wildlife. This was therefore an attempt to protect and conserve the Lake Basin for the future generations.

[146] USAID 'Environment: East Africa Region' < https://www.usaid.gov/east-africa-regional/environment > accessed on the 22nd May 2019

[147] Kameri-Mbote Patricia and Collins Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' in *Sustaina Development Law and Policy, Fall 2009* [31-38] <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp > accessed on 22nd May 2019

Article 4 of this Protocol lays a background of the environment principles forming the bedrock of this Protocol. Key to this work is the '***polluter pays***' i.e. whereby a person who causes pollution is to bear any costs associated with it. Article 17 on the application of the '*polluter pays principle'* require that states to take steps to ensure that polluters pay the cost of the pollution. Such costs are envisaged to be used for cleanup operations and restoration of the Lake Victoria Basin.

- **The Gap-** *Protocol for the Sustainable Development of the Lake Victoria*

While the Protocol establishes an extensive legal framework on the conservation and the utilization of the resources around the Lake Victoria Basin, it falls short of protecting the victims of pollution. Though the '*polluter pay'* principle is well established, it envisages the provision of cleanup costs where there is pollution. It will therefore take the creativity of a judicial mind to offer protection of the victims under this principle. This is a gap that has to be filled.

- ***Protocol on Environment and Natural Resources***

This Protocol was meant to give effect to Chapter 19 and 20 of the ***Treaty for Establishment of the East African Community*** which required cooperation on environment and natural resources management.[148] This is a Protocol for conservation, management and preservation of natural resources within the East African Community. These resources include, trans-boundary resources, forest and tree resources, water resources, wetland resources, fisheries resources, mineral resources genetic resources, energy resources and coastal and marine resources.

Article 4 of this Protocol establishes the environmental principles to be applicable. Of interest to this dissertation is the recognition of the polluter pay principle.[149] Though this Protocol mentions

[148] The Protocol on Environment and Natural Resources, Preamble
[149] The Protocol on Environment and Natural Resources, Article 4 (2) (j) and (q)

the polluter pays principle, it does little to give it a context or an explanation. This will take judicial interpretation to give it a perspective.

This principle forms the basis of compensation of any person whose right to a clean and healthy environment has been infringed. Amazingly, the East African Community is a body corporate with perpetual succession hence can sue and be sued. Therefore, should it be the polluter, a person can successfully maintain a suit against.[150]

ii. National Legal Framework

At the **National level**, the legal framework for protection of the environment is derived from the Constitution, statutes, regulations and executive decrees. The Judicature Act, under Section 3 provides a comprehensive list of the sources of Law that any court including the Environment and Land Court should rely on. This list further includes the common law, doctrines of equity and statutes of general application in England on the 12th August 1897.[151] In upholding the sustainable management of the environment, any decision making body should also be cognizant with the customs and traditional rules and practices of local communities.[152] The only caveat with these principles and practices should not be repugnant to justice and molarity.[153]

- ***Constitution of Kenya***

[150] Treaty Establishing the East African Community, Chapter 2 Article 4
[151] Judicature Act Section 3
[152] Kameri-Mbote Patricia and Collins Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' in *Sustaina Development Law and Policy, Fall 2009* [32] <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp > accessed on 22nd May 2019
[153] Constitution Article 2(4); Judicature Act, Section 3(2)

Prior to the Constitution 2010, Kenya did not boast of constitutional underpinnings expressly providing for the right to a clean and healthy environment. However, the right to life was expansively interpreted by the courts to include for the right to a clean and healthy environment.[154]

The Kenyan Constitution 2010, on the other hand delved deeply on the importance of protection and management of the environment. It then set aside Article 42 [of the Constitution] to protect the right to a clean and healthy environment which should be protected for the benefit of the present and future generations. Further, Chapter 5 of Constitution was dedicated to deal with 'land and environment' and specifically part 2 deals with 'environment and natural resources'. The utilization of the natural resources should be done in a manner that conserves and achieves ecologically sustainable development.[155]

Of importance to this research is Article 70 which provides for the enforcement of environmental rights and Article 162(2) (b) which establish a court with a status of the High Court to determine any disputes relating to the environment and use of land. This was given into effect by the Environment and Land Court Act[156] that established the Environment and Land Court in accordance to Article 162 of the Constitution.

- ***Environment Management and Co-ordination Act (EMCA)***

The first statute to be exclusively dedicated with the protection of the environment in Kenya was the Environment Management and Co-ordination Act (EMCA) enacted in 1999. This established the platform for sustainable management of the environment and further established institutional

[154] *Peter K. Waweru v Republic* [2006] eKLR; *Joseph D. Kessy and others v The City Council of Dar es Salaam* High Court of Tanzania, Civil Case No. 29 of 1998 (unreported); ibid Kameri-Mbote and Collins Odote
[155] Constitution Article 69(2)
[156] No. 19 of 2011

frameworks responsible for the management of the environment.[157] This piece of legislation reiterated the right to a clean and healthy environment,[158] provided for the remedies that may be awarded by the Environment and Land Court[159] and establish a central environment authority (NEMA).[160] To complement this framework, there are additional legislations and regulations that are sector specific example Water Act,[161] Forest Conservation and Management Act,[162] Fisheries Management and Development Act[163] and Wildlife Conservation and Management Act.[164]

The EMCA laid down the legal and institutional framework for management of the environment and for matters connected with the environment.[165] This however did not seek to stop the development of other sectoral initiatives and possible legislative frameworks e.g. the Water Act and Forest Act could also be developed. This Act laid a foundation for other sectors by laying the principles to govern the management of environment and natural resources. The EMCA can be analogized to a skeleton while the other sectorial laws and regulations form part of the flesh nd blood.

It laid down principles to help safe guard the right to a clean and healthy environment. Section 3(5) requires that a court or any other body determining the question of a clean and healthy environment should consider the principle of public participation, pre-cautionary principle, principle of intergenerational and intragenerational equity and the **polluter pays principle**.

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[157] Kameri-Mbote Patricia and Collins Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' in *Sustaina Development Law and Policy, Fall 2009* [33] <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp > accessed on 22nd May 2019

[158] Environment Management and Co-ordination Act, Section 3(1)

[159] Ibid, Section 3(3)

[160] Ibid, Section 7

[161] Water Act No. 43 of 2016

[162] Forest Conservation and Management Act No. 35 of 2016

[163] Fisheries Management and Development Act No. 35 of 2016

[164] Wildlife Conservation and Management Act No. 47 of 2013

[165] Environment Management and Co-ordination Act, Preamble

The '*polluter-pays principle'* is defined by the Act as to include the 'cost of cleaning any element of the environment damaged by pollution, ***compensating victims of pollution*** and other costs connected to the incident (pollution) is paid or borne by the polluter.[166] This was a great journey started by the Act but not completed.

Though it appreciates the need to compensate victims of pollution, it fell short of stipulating a framework of how to achieve the compensation. Throughout, the Act uses the term '***adequate compensation***' however, it does not guide the judiciary and other bodies of how to achieve adequate compensation. This dissertation is therefore geared to providing a framework on the award of 'adequate compensation' by the courts.

iii. International Legal Framework

Kenya has also been greatly influenced by the global legal framework on the protection of the environment. The general principles of international law[167] and any treaty or convention ratified by Kenya form part of the laws of Kenya.[168] The **Rio Declaration on Environment and Development** boasts as the basis of the modern day environment management and planning in Kenya.[169] It influenced greatly in raising awareness of the link between environment and development.[170] It was after the RIO Summit that Kenya initiated the National Environment Action Plan (NEAP) that later recommended the establishment of an environmental policy and law on the environment (EMCA 1999).

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[166] Ibid Section 2
[167] Constitution Article 2(5)
[168] Constitution Article 2(6)
[169] Ministry of Environment, Water and Natural Resources *National Environment Policy 2013* < http://www.environment.go.ke/wp-content/uploads/2014/01/NATIONAL-ENVIRONMENT-POLICY-20131.pdf > accessed on 8th January 2019, p 2, Para 1.4
[170] ibid

The Rio Declaration declared that human beings are entitled to a healthy and productive life which need to be in harmony with nature.[171] While appreciating the integral part of the environmental protection in development,[172] it emphasized that any development and exploitation of earth's resources must to be consistent with the environmental needs of the present and future generations.[173] It therefore proceeded to lay the ***common but differentiated responsibilities*** to encourage states to conserve, protect and restore the health and integrity of the Earth's ecosystem.[174] This was to be achieved with the participation of all states at the global level and all concerned citizens at the national level.[175]

The RIO Summit also emphasized on the need to include the right of access of judicial and administrative proceedings which included the provision of redress and remedy.[176] Unfortunately, the mandate of developing principles of determining liability and compensation of victims of pollution and other environmental damage was abandoned to the national law of states.[177] It obligated the individual states to develop further laws and regulations for determining the issues of liability and compensation.[178] This was primarily meant to supplement the envisaged already existing national law.

Therefore, while the RIO Summit is the most influential work piece in environmental law, it fell short in the provision of the principles that ought to guide the judicial and administrative processes

[171] RIO Declaration on Environment and Development 1992, Principle 1
[172] Ibid principle 4
[173] Ibid Principle 3
[174] Ibid principle 7
[175] Ibid Principle 10
[176] ibid
[177] Ibid Principle 13
[178] ibid

and bodies. The short fall of it is that this would therefore largely be dependent on the judge's personal opinions, biases and experiences.

iv. Judicial Precedents

Interestingly, the modern jurisprudence all over the world agree that the right to life is inseparable to the 'right to a clean and healthy environment.' Indeed, in most jurisdictions, including Kenya, which for a long time did not have express constitutional provisions for the 'right to a clean environment'. This right was therefore interpreted by courts as envisaged under the right to life. The court in ***Peter K. Waweru v Republic***[179] opined that the word 'life' and 'environment' are inseparable and further the word 'life' means much more than the keeping body and soul together.[180]

Closer home, the Court of Appeal in Tanzania in ***Joseph D. Kessy v Dar es Salaam***[181] denied the Dar es Salaam City Council leave to continue dumping and burning waste at Tabata area. It held that such actions endangered the lives and health of the applicants hence a violation of their right to life. The words of Justice Lugakingira remain relevant to the present world when he remarkably stated that:

> *I have never heard anywhere before for a public authority, or even an individual go to court and confidently seek for permission to pollute the environment and endanger people's lives, regardless of their numbers. Such wonders appear to be peculiar Tanzanian, but I regret to say that it is not given to any court to grant such a prayer.* ***Article 14 of the Constitution provides that every person has a right to live and to protection of his life by***

[179] [2006] eKLR; (2006) 1 KLR 677-700 (H.C.K)
[180] This decision was delivered when Kenya was under the 1963 constitution dispensation.
[181] Civil Case No. 29 of 1998 (unreported); ibid Kameri-Mbote and Collins Odote

the society. It is therefore, a contradiction in terms and a denial of this basic right to deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the court in this infringement.

While courts all over have taken this interpretation to protect this right, under the current constitutional dispensation in Kenya, these two have been expressly provided as rights, they still co-exist as two Siamese twins. Right to life is expressly acknowledged under Article 26, while Article 42 expressly provides that every person has a right to a clean and healthy environment.[182] The right under Article 42 is primary for the survival of all creatures under the planet including human beings.[183] As noted by the Human Rights Council, activities infringing on the environment poses a far reaching threat to people and communities around the world and has negative implications to the full enjoyment of human rights.[184]

Countries all over world have experienced numerous cases of severe environmental damage both within their territorial jurisdiction and the global commons.[185] These activities raping and degrading the once nourishing and self-sustaining environment have awakened public conscience and the global concern on the need to have global approach in the protection of the global environment.[186] Sadly, negative environmental effects know no boundaries and has in the end had trans-boundary effects. Well known examples of activities leading to severe environmental

[182] Right to a clean environment is also provided under the Environmental Management and Co-ordination Act, Section 3

[183] Kariuki Muigua ' Re-conceptualizing the Right to Clean and Healthy Environment in Kenya' < http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf > accessed on 7th February 2019

[184] Human Rights Council Resolution 7/23, 7th Session, 28th March 2008, UN Doc A/HRC/RES/7/23; UN OHCHR, *Report on the Relationship Between Climate Change and Human Rights* (15th January 2009, UN Doc A/ HRC/ 10/61

[185] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [50]

[186] ibid

damage is the 1984 Bhopal gas leak disaster causing injuries to more than 200,000 people; the 1986 Chernobyl Nuclear power plant accident which caused radioactive contamination of the natural environment and substantial damage to human health.[187] Most accidents may have not attracted widespread media coverage range from land contamination from industrial accidents, water contamination as a result of discharge of untreated wastes into rivers etc.

The words of **Lord of Craighead** in ***Chester v Afshar***[188] rightly held that the main 'function of the law is to enable rights to be vindicated[189] and to provide for remedies when duties are been breached.' To that extent, the polluter pays principle (PPP) requires that the polluter should pay for the clean-up and restoration of the damaged environment.[190] However, to what extent should be acceptable for the clean-ups? Failure to hold the polluter responsible would mean placing the obligation of clean-ups and possible compensation of the victims on the community. Legal liability, which is a way of forcing the major polluters to repair the environmental harm, **ensures that the polluter compensates any person in terms of damages if the damage cannot be repaired**.[191] It is for this very reason that NA Robinson view compensation for damage in the law of tort.

While appreciating the importance of the law of tort in awarding damages, on the other hand, it is imperative to appreciate the fact that 2010 constitutional dispensation established the right to a clean and healthy environment.[192] Article 70 on the *enforcement of the environmental rights* require that where the right to a clean and healthy environment has been infringed, a court may

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[187] ibid
[188] [2004] UKHL 41; [2005] 1 AC 134 [Page 87]
[189] Vindicate describes the making good of a claimant's legal right by the grant of an adequate remedy.
[190] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [50]
[191] ibid
[192] Constitution of Kenya, Article 42

give an order to provide for compensation for any victim.[193] A complainant who chooses to use the constitutional remedy will have to approach the Environment and Land Court as envisaged under Article 162(2) (b) and the Environment and Land Court Act. The court in ***County Government of Kitui v Sonata Kenya Limited***[194] was approached by a constitutional petition and the court held that since the petition sought for remedies under Article 70, it had both the constitutional and jurisdictional mandate to determine the dispute.[195] Interestingly, such an applicant need not demonstrate that he has incurred loss or suffered injury.[196] This therefore raises the million dollar question that has always arisen over the years in environmental cases: does in it mean the proving of *locus standi* when pursuing compensation now a thing of the past? Can one seek compensation on behalf of another person and/ or even the public at large?

INSTITUTION OF ENVIRONMENTAL MATTERS: THE JINX OF *LOCUS STANDI*

The protection of the right to a clean and healthy environment through the court process has over the decades been undermined by the lack of *locus standi.* For a long time Kenyan courts have insisted that a litigant must pass the *locus standi* test before prosecution of any matter. The rule of *locus standi* require that a litigant must have a **direct personal** and **proprietary** relationship with the subject matter of litigation.[197] Failure to pass this test would warrant the dismissal of the matter before it sees the light of the day. The dismissal of a suit on lack of *locus standi* would, by the end

[193] Ibid Article 70(2) (c)
[194] [2018] eKLR; ELC Petition 2 of 2018
[195] Ibid Para 31
[196] Ibid Article 70(3)
[197] Kameri-Mbote Patricia and Collins Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' in *Sustaina Development Law and Policy, Fall 2009* [35] <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp > accessed on 22nd May 2019

of the day, mean that the party who brought the matter is slapped with costs despite having merit in the matter. This is best explained in the words of Justice Kirby in ***Oshlack v Richmond River Council:***[198]

> *I suppose the issue is whether there is a divorce between standing and costs. If, you do not have the impediments that used to exist, but you have got to conform to the normal rule. If you come you are going to impose costs on somebody, and if that is what you want to do, you have got to make sure that you can pay for it if you lose*.

The principle of *locus standi* has been developed over time in an effort to ensure only worthy and necessary parties are made part of any litigation. In essence, it served a gate keeping function by ensuring that busybodies don't take up actions regardless of their interest in the matter and outcome.[199] In *Adesanya v President of the Federal Republic of Kenya*[200] Bello J.S.C clearly pointed out that '*standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.*' In Kenya, this was evident in ***Wangari Maathai v Kenya Times Media Trust Limited,*** where the court dismissed the matter with costs after the Defendant successfully raised the issue of *locus standi*. This was necessary to ensure only worthy and necessary parties are made part of any litigation process.

The issue of lack of *locus standi* was most evident in 1989 in ***Wangari Maathai v Kenya Times Media Trust Limited***[201] where Lord Justice Dugdale dismissed the action by the Plaintiff opposing

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[198] [1998] HCA 11; 1997 152 ALR 83

[199] Tumai Murombo, 'Strengthening *Locus Standi* in Public Interest Environmental Litigation: Has Leadership Moved from the United States to the South Africa?' *Law, Environment and Development Journal* (2010) [Vol 6/2] [p163] in < http://www.lead-journal.org/content/10163.pdf > accessed on the 12th March 2019

[200] (1981) 1 ALL NLR 1

[201] [1989] eKLR (Civil Case No. 5403 of 1989)

the plan by the Defendant to build a sixty (60) storey building on Uhuru Park for lack of *locus standi*. The Learned Judge further noted that such an action would only be brought by the Attorney-General on behalf of the public. This action was brought at a time when the enforcement of the environmental rights in Kenya was largely left to the realm of common law. The court in *Wandari Maathai* case was following the position earlier on established in *Gouriet v the National Union of Post Office Workers*[202] where the court had held that 'unless a litigant demonstrated personal injury and loss, the matter was one within the realm of public law, where only the Attorney General had *locus standi* to institute the action.' It was therefore a fundamental principle of English Law that public rights could only be asserted in an action by the Attorney- General.[203] This approach rather barred private persons from instituting any actions of environmental in nature. This was rather a very rigid approach that the courts and the legal framework has since shifted from.

In Kenya, this traditional conservative approach on *locus standi* has over the years been replaced by more flexible rules. The courts started adopting a liberal interpretation of the rules of *locus standi*. This meant that in environmental cases, individuals have standing notwithstanding the lack of personal and proprietary interest in the matter.[204] The rationale being that, in environmental litigation, the complainant is more than often a natural person but the injury or harm is often suffered by the environment or an endangered species, a river, a mountain or the atmosphere.[205]

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[202] (1977) 3 All ER 71-72

[203] *Gouriet v Union of Post Office Workers* (1977) 3 All ER 71-72

[204] Kameri-Mbote Patricia and Collins Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' in *Sustaina Development Law and Policy, Fall 2009* [35] <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp > accessed on 22nd May 2019

[205] Tumai Murombo, 'Strengthening *Locus Standi* in Public Interest Environmental Litigation: Has Leadership Moved from the United States to the South Africa?' *Law, Environment and Development Journal* (2010) [Vol 6/2] [p163] in < http://www.lead-journal.org/content/10163.pdf > accessed on the 12th March 2019

In 2001 the court in *Rodgers Nzioka and 2 others v Tiomin Kenya Limited*,[206] in an action brought by petition, granted the Petitioners an injunction against the mining of titanium in Kwale. The court importantly held that environmental degradation is not necessarily an individual concern but also to a large extent is to be considered so that the injunction is issued for the protection of the public against feared degradation, danger to health and pollution. The courts proceeded shortly thereafter in *Albert Ruturi and another v Minister of Finance and others*[207] where the court held that in constitutional questions, human rights cases and public litigation and class actions, the traditional rule of Anglo-Saxon jurisprudence, that action must be brought by a person who suffers the legal injury must be departed.[208] This essentially meant that any person or public interest group could approach the court for judicial redress for a legal injury caused or threatened to be caused to a class of person. By its very nature, environment injury cause legal injury on a vast number of persons in our society.

This rigid approach by courts was however to take a statutory paradigm shift upon the amendment of the EMCA in 1999. Section 3(1) of the EMCA provide that every person in Kenya is entitled to a clean and healthy environment and has a further duty to safeguard and enhance the environment. This position was later rubber stamped by the Constitution 2010, which declared in similar terms that '*every person has a right to a clean and healthy environment which includes the right to have it protected for the present and the future generation*.'[209] In outright avoidance of doubt, Article 70(3) of the Constitution proceeds to declare that where a person has instituted an action under Article 42, an applicant does not have to demonstrate the loss or injury suffered.[210] In essence, the

[206] HCCC 97 of 2001
[207] (2002) 1 KLR 61
[208] *El Busaidy v Commissioner of Lands and 2 others* (2006) 1 KLR 479-501
[209] Constitution of Kenya 2010, Article 42(a)
[210] Ibid Article 70(3); EMCA Section 3(3)

principle of *locus standi* as known in and applied in common law is not applicable in Kenya on issues affecting the environment.[211]

Recently, the High Court in ***Joseph Leboo and 2 others v Director Kenya Forest Service and Another***[212]where the Respondent submitted that the Plaintiffs had no *locus standi* to sue in this matter since it an obligation bestowed upon the Kenya Forest Service. Learned Justice Munyao Sila was however quick to dismiss that assertion and proceeded to hold that the suit raised fundamental questions on the management of forests which is a public good.[213] Further, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such a person to demonstrate that he stands to suffer individually. In appreciating the position of locus standi in our legal framework, the court proceed to hold that:[214]

> Section 3(4) (of the EMCA) permits any person to institute [a] suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the *locus standi* rule, both under the Constitution and statute, and indeed in principle. ***Any person without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment***.

The court in this matter had been properly guided by Article 70(3) of the Constitution that provides that a petitioner or applicant who alleges that the right to a clean and healthy environment has been infringed does not have to demonstrate that any person has incurred loss and/ or suffered injury.

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[211] *Joseph Leboo and 2 others v Director Kenya Forest Service and Another* [2013] eKLR para 25
[212] [2013] eKLR [Environmental and Land No. 273 of 2013)
[213] *Joseph Leboo and 2 others v Director Kenya Forest Service and Another* [2013] eKLR para 25
[214] Ibid Para 28

The strict requirements of the principle of *locus standi* not only by the Kenyan legal frame work but also to varying degrees, in other jurisdictions across the world.[215] The rationale of this paradigm shift was best described by the Court of Appeal in ***National Environmental Tribunal v Overlook Management Limited and 5 others***[216] where the court proceeded to rely on the Hansard Report during the consideration and debate of the EMCA as follows:

> [T]he best thing about this Act is that now it gives *locus standi* to the ordinary Kenyan citizen to sue when he believes that his environment is affected. This was not there. It is the responsibility of ordinary Kenyans to be aware about the Act now in place so that whenever our environment is being polluted deliberately, they have go the legal framework within which to seek redress in our courts.

The legal framework therefore envisages a united front from the citizenry in the protection and agitation of a clean and healthy environment. The Constitution and the EMCA were therefore conceived in public interest and calls for interpretation that gives effect to the purpose and expanding *locus standi* in the protection of the environment.[217]

REMEDIES AVAILABLE

One of the greatest milestones of the law of equity is the ambitious maxim of *ubi jus ibi remedium*. It means that where there is a legal right or a prohibition of an injury, there is a corresponding legal remedy.[218] Where a person has a right provided either by common law, statute, constitution or any other source of law, there have to be a means to protect or vindicate the right when it is injured in

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[215] *National Environmental Tribunal v Overlook Management Limited and 5 others* [2019] eKLR (Civil Appeal No. 9 of 2011)
[216] [2019] eKLR (Civil Appeal No. 9 of 2011)
[217] ibid
[218] Duhaime *Legal Dictionary* < http://www.duhaime.org/LegalDictionary/U/UbiJusIbiRemedium.aspx > accessed on 20th March 2019

the process of its enjoyment.[219] The elementary principle is therefore that there is no wrong without a remedy.[220] Importantly, this ancient legal maxim is a constant reminder that the law provides for many types of remedies for breaches of a legal right, and a reminder that the superior courts have inherent jurisdiction to fashion novel remedies where there is insufficient remedies to redress violations of rights.[221]

In ***Marbury v Madison***[222] it was established that the 'very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.' Parliament has enacted legislative frameworks and mechanisms that provide remedies for protection of constitutional and/ or statutory interests. However, at times, such regulations lack sufficient remedies to remedy an infringement or there would be no existing remedy to protect a right.[223] In such circumstances where there exist no remedy, the courts must step to establish a remedy for those individuals. Example, it was in *Bivens v Six Unknown Federal Narcotics Agents*[224] where the US Supreme Court held that despite there being no explicit right to file a civil lawsuit against federal government officials who have violated the 4th Amendment, this right can be inferred hence monetary damages were an appropriate remedy for the unconstitutional conduct against private citizen. To that end, the Environmental and Land Courts also have the inherent jurisdiction to novel remedies where they are insufficient or none that exists. In Justice JB Ojwang's advice to the judges in the Environment and Land Courts:

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[219] ibid
[220] *Leo Feist v Young* 138 F. 2d 97 (1943)
[221] J manuel and C Martin '*Ubi jus ibi Remedium*? *Locus Standi* of Private Applicants under Article 230 (4) EC at a European Constitutional Crossroads' < https://www.researchgate.net/publication/313492997_Ubi_ius_Ibi_Remedium_-_Locus_Standi_of_Private_Applicants_under_Article_230_4_EC_at_a_European_Constitutional_Crossroads/download > accessed on 20th March 2019
[222] 5 US (1 Cranch) 137, 163 (1803)
[223] Heather J. Hanna and AG Harding, '*Ubi Jus Ibi Remedium*- For the Violation of Every Right, There Must Be a Remedy: The Supreme Court's Refusal to Use the Bivens Remedy in *Wilkie v Robbins,* in *Wyoming Law Review* (Vol 8, 2008) [194]
[224] 403 US at 389 (1971)

> It is well known principle that no judicial officer is allowed, as a matter of firmly established law to decline to resolve a dispute falling within his or her jurisdiction on the ground that the issues are too difficult. [W]here Parliament has not made law regulating a specific matter in detail, it does not necessary follow that the relevant question, therefore, lies outside the purview of the law. Therefore***, where a judicial officer comes face-to-face with the ill-defined contests touching on the environment, he or she must still decide the question***.[225]

The right to a clean and healthy environment has been expressly recognized by Article 42 of the Constitution. The enforcement mechanism to further protect this right is well enunciated under Article 70. A person who alleges that the right to a clean and healthy environment has been infringed may, in addition to other available remedies, apply to the Environment and Land Court (ELC) for redress.[226] The ELC on such an application may make any orders it considers appropriate so as to prevent, stop or discontinue the act or omission harmful to the environment, compel the any public officer to prevent the act or omission harmful to the environment and lastly, the court may provide *compensation for any victim of a violation to a clean and healthy environment*.[227] This position was later to reflect in the EMCA Section 3(e) which mandates the ELC to provide *compensation for any victim of pollution* and award ***the cost of beneficial uses lost as result of the act of pollution*** and ***other losses that are connected with or incidental to the pollution***.[228] Does

[225] JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' in *Kenya Law Review* Vol 1:19 < http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 29th October 2018 [24]
[226] Constitution of Kenya, Article 70(1)
[227] Ibid Article 70(2)
[228] Environment Management and Co-ordination Act, Section 3(e); This is an important section for consideration as it seems to set out the factors for consideration in awarding compensation.

Section3 (e) of the EMCA subtly seek to establish the criteria of awarding compensation in cases of environmental injuries.

The EMCA under Section 7 establishes the National Environment and Management Authority famously known as 'NEMA'. This is the Government's principal institution in the implementation of the EMCA and policies relating to the environment and has authority to supervise and co-ordinate over all matters relating to the environment.[229] In exercise of its objects and functions under the EMCA Section 9, NEMA may issue to any person, agency or institution an ***environmental restoration order.***[230] This is an order issued by NEMA or a court of competent jurisdiction against a person who has harmed, is harming or is reasonably likely to harm the environment[231] requiring actions to be taken to remedy the harm inflicted to the environment. This restoration order shall be issued to award compensation to be paid by the person on whom it is served to persons affected by the harm to the environment.[232] Unfortunately, statute however does not establish principles to guide NEMA in the provision of compensation.

INGREDIENTS OF THE 'ENVIRONMENT DAMAGE'

Philippe Sands and others in their book *International Environmental Law* begin Chapter 17 by lamenting that most definitions of 'environment' do not envisage people and their property. This was clear in the *Merlin v BNFL*[233] where though a house was rendered radioactive, the operator responsible for the installation was absolved from liability because there was no damage on the

[229] Ibid Section 9 (Objects and functions of NEMA)
[230] Ibid Section 108
[231] Environment Management and Co-ordination Act, Section 111
[232] Ibid Section 108 (2)
[233] [1990 2 QB 557

property despite the building's loss of the market value.[234] Most environmental problems emanate from the use of natural resources to unsustainable levels and the contamination of the environment through pollution and wastes to levels beyond what the environment can absorb.[235]

The term 'environment' has been widely defined. It is a term that broadly represents the totality of the surrounding such as plants, animals, micro-organisms, social economic and cultural factors.[236] It comprises physical, biological and social factors surrounding human beings.[237] Physical factors include land, water, atmosphere climate, sound, taste, odour; biological factors of animals and plants; and social factors of aesthetics and includes both the natural and the built environment.[238] The World Health Organization has defined 'environment' as all the physical, chemical and biological factors external to a person, and all the related behavior.'[239] Within the East African Region, Article 1 of the Treaty Establishing the East African Community defines 'environment' to mean the 'natural resources of the air, water, soil, fauna and flora, eco-systems, land, the ma-made physical features, cultural heritage, the characteristic aspects of the landscape and the social-economic interaction between the said factors and any living and non-living resource.'[240]

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[234] P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd Edn, Oxford University Press, New York, 2009) [324]

[235] D Shelton and A Kiss *Judicial Handbook on Environmental Law* (United Nations Environmental Programme, 2005) < https://www.ircwash.org/sites/default/files/Shelton-2005-Judicial.pdf > accessed on 3rd May 2019

[236] Ministry of Environment, Water and Natural Resources *National Environment Policy 2013* < http://www.environment.go.ke/wp-content/uploads/2014/01/NATIONAL-ENVIRONMENT-POLICY-20131.pdf > accessed on 8th January 2019

[237] Environment Management and Co-ordination Act, Section 2

[238] ibid

[239] World Health Organization, 'Preventing Disease Through Healthy Environments,' (World Health Organization, Geneva, 2006)

[240] Treaty Establishing the East African Community, Article 1; Protocol on Environment and Natural Resources Management, Article 1

Importantly, the survival and socio-economic well-being of any citizens including Kenyans is intertwined with the environment. This is because they depend heavily directly or indirectly on environmental goods and services.[241]

The debate of the relationship of quality of the environment and the enjoyment of basic rights began on the international platforms in the 1968, when the UN General Assembly passed a resolution seeking to show that they were Siamese twins.[242] The debate was intensified five (5) years later, in 1972 at Stockholm, when the right to a clean and healthy environment was expressly recognized as a fundamental human right.

This right was only to be recognized in Kenya in 2010 under Article 42 of the Constitution where it declared that every person has a right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generation.[243] The EMCA Section 3(2) further provides that this right includes the access to various public elements of the environment for recreational, educational, health, spiritual and cultural purposes.

DOES THE 'POLLUTER PAY PRINCIPLE' ENVISAGE COMPENSATION OF VICTIMS?

The increase in economic activity and global population to unprecedented levels has led to an increase in the damage to the environment and human health.[244] Among the steps the international

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[241] Ministry of Environment, Water and Natural Resources *National Environment Policy 2013* < http://www.environment.go.ke/wp-content/uploads/2014/01/NATIONAL-ENVIRONMENT-POLICY-20131.pdf > accessed on 8th January 2019, p 1, Para 1.2

[242] Kariuki Muigua ' Re-conceptualizing the Right to Clean and Healthy Environment in Kenya' < http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf > accessed on 5th February 2019

[243] Constitution of Kenya, Article 42

[244] HG Saiful 'Principles of International Environmental Law: Application in National Laws in Bangladesh' in <https://www.researchgate.net/publication/322664716_Principles_of_International_Environmental_Law_Application_in_National_Laws_in_Bangladesh/citation/download > accessed on the 5th May 2019

community has adopted to solve this problem is the establishment of environmental policies and development of environmental principles. Therefore, over the years, environmental law has developed some fundamental principles principally concerned with ensuring sustainable utilization of natural resources.[245] In an ideal setting, as population increase, there is an equivalent increase in human activities leading to an increased utilization of land and exploitation of natural resources.[246] This exploitation and utilization of land and land based resources should adhere to a number of principles.[247] These are the *principle that states have sovereignty over their natural resources and the responsibility not to cause trans-boundary environment damage,*[248] *principle of sustainability; principle of intergenerational equity; principle of prevention; the precautionary principle; the pollute pays principle* and *principle of public participation*.[249] These principles are primarily concerned with overseeing sustainable utilization and exploitation of natural resources in a sustainable manner.

Global concerns to the environment have a universal character hence the need for a common action.[250] The need for common action has led international community players to develop common action which include development of policies, treaties and principles. These general principles of international environmental law have been reflected in treaties, binding acts of international organizations, state practice and soft law commitments.[251] At the international platform, their applicability was affirmed by the arbitral tribunal in the *Iron Rhine* case.[252] These

[245] ***Amina Said Abdalla and 2 others –vs- County Government of Kilifi and 2 others*** [2017] eKLR; ELC NO. 283 of 2016 Paragraph 17
[246] ibid
[247] Ibid Para 17
[248] Stockholm Declaration Principle 21 and Rio Declaration Principle 2
[249] ibid
[250] P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd Edn, Oxford University Press, New York, 2009) [128]
[251] P Sands et al *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) [187]
[252] *Belgium/Netherlands (Iron Rhine Arbitration),* Award of 24th May 2005, Permanent Court of Arbitration Award Series Para 223

principles are therefore applicable to all actors of the international community in all aspects relating to the environment.[253] The characterization of environmental issues as '*common concern of human kind'* is important as it makes it a legitimate object of international regulation and supervision.[254]

These principles of international environmental law are applicable to Kenya pursuant to Article 2(5) and (6) of the Constitution. Article 2(5) of the Constitution validates the use of general principles of international law which form part of our laws while Article 2(6) validates the use of any treaty or convention ratified by Kenya. The EMCA Section 3(5) mandate courts while determining disputes in regards to the right to a clean and healthy environment to take into consideration certain universal principles.[255] It proceeds to highlight these universal principles to include the *polluter pays principle, pre-cautionary principle, principle of intergenerational and intragenerational equity and principle of public participation*.[256]

These principles of environmental law have to that extent been applied by Kenyan courts in different matters. Example: in ***Amina Said Abdalla and 2 others v County Government of Kilifi and 2 others***[257] the court in discussing the principle of prevention held that the '*protection of the environment is best achieved by preventing environmental harm in the first place rather than relying on remedies or compensation for such harm after it has occurred.*' This is closely related to the precautionary principle which recognize the limitations of science in being able to predict

[253] ibid
[254] P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd Edn, Oxford University Press, New York, 2009) [131]
[255] Environmental and Management Act, Section 3(5)
[256] ibid
[257] [2017] eKLR

the likely environmental impacts and thus calls for precaution in making environmental decision where there is uncertainty.[258]

When the term compensation is mentioned, the polluter pays principle (PPP) first comes into mind. It is a principle that has attracted broad support and is closely related to the rules governing civil and state liability for environmental damage.[259] It is a principle that loosely refers to the fact that a person who is responsible for creating pollution, should be responsible for the damages caused to others.[260] Interestingly, this is a principle that was meant to apply within a state and not between states.[261]This principle first appeared for international debate in 1972 through the Organization for Economic Co-operation and Development (OECD) Council on Guiding Principles concerning international Economic Aspects of Environmental Policies.[262]

Historically, the community at large was made to bear the pollution control costs despite private firms being the source of the pollution.[263] The PPP was therefore an effort by the OECD to ensure that companies would pay the full costs of not complying with pollution control laws.[264] However, the OECD defined PPP as requiring the polluter to bear the expense of carrying out measures decided by public authorities to ensure that the environment is in an '***acceptable state***' and that the '***cost of these measures should be reflected in the cost of goods and services which cause***

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[258] ***Amina Said Abdalla and 2 others –vs- County Government of Kilifi and 2 others*** [2017] eKLR; ELC NO. 283 of 2016 Paragraph 18

[259] P Sands et al *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) [229]

[260] HG Saiful 'Principles of International Environmental Law: Application in National Laws in Bangladesh' in <https://www.researchgate.net/publication/322664716_Principles_of_International_Environmental_Law_Application_in_National_Laws_in_Bangladesh/citation/download > accessed on the 5th May 2019

[261] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [33]

[262] ibid

[263] D Shelton and A Kiss *Judicial Handbook on Environmental Law* (United Nations Environmental Programme, 2005) < https://www.ircwash.org/sites/default/files/Shelton-2005-Judicial.pdf > accessed on 3rd May 2019 [22]

[264] HG Saiful 'Principles of International Environmental Law: Application in National Laws in Bangladesh' in <https://www.researchgate.net/publication/322664716_Principles_of_International_Environmental_Law_Application_in_National_Laws_in_Bangladesh/citation/download > accessed on the 5th May 2019

pollution in production and/ or in consumption.'[265] This was rather a conservative definition as it only envisaged damage caused to the environment and not the injuries that is caused to persons enjoying the fruits of the environment. This definition only internalized the economic costs of pollution control, clean up and protection measures.[266]

A year later in 1973, the European Union was to adopt this principle in its first programme action.[267] It adopted this principle to apply to EU nations to the effect that the persons responsible for pollution 'must pay the costs of such pollution as are necessary to eliminate the pollution or **reduce** it to the required standards.'[268] This too did not envisage the plight of compensation to individuals affected by the pollution.

This principle was to get international support as an environmental principle in the UNCED Conference in the Rio Declaration. Principle 16 of the Rio Declaration proceeded to provide that:

> National authorities should endeavor to ***promote the internalization of environmental costs*** and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Effectively, Principle 16 of the Rio Declaration protected the society at large from bearing the environmental costs of economic activities (including costs of preventing potential harm), but sought to have it internalized by being borne by the polluter.[269] However, this principle has been

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[265] P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd Edn, Oxford University Press, New York, 2009) [322]
[266] ibid
[267] P Sands et al *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) [231]
[268] Council Recommendation 75/436/EURATOM, ECSC, EEC of 3rd March 1975, Annex Para.2 OJ L169
[269] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019

criticized for not being legally binding and words thereof lack a normative character of a rule of law.[270] It has also been criticized as falling short when it comes to protection of victims of environmental damage.

A liberal interpretation of the principle 16 Rio Declaration would however mean that the victims of environmental damage and degradation should also be compensated. According the polluter pays principle a wide and liberal interpretation would ensure victims of environmental degradation and pollution are compensated of any injuries as maybe resulted from environmental damage. This approach was suggested by NA Robinson in *Training Manual on International Environmental* Law. Example: the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, Article 2(2) (b) envisaged the polluter pays principle to include the '*costs of pollution prevention, control and reduction measures are to be borne by the polluter.*' NA Robinson therefore opined that the element of '*reduction measures to be undertaken by the polluter'* ought to be interpreted to envisage compensation of victims of environmental damage.[271] The International Law Commission (ILC) in discussion on allocation of loss in 2006 noted that:

> *The commission considers the polluter pays principle as an essential component in underpinning the present draft principles to ensure that suffer harm as a result of an incident involving a hazardous activity are able to obtain prompt and adequate compensation.*[272]

[270] P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd Edn, Oxford University Press, New York, 2009) [324]

[271] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [34]

[272] ILC Report (2006) International Liability, commentary to the preamble, at para (2); Draft Principles on the Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities

This was a milestone for the protection of victims of any form of hazardous activity affecting the environment. Ambitiously, the Draft Principles on the Allocation of Loss in the case of Trans-boundary Harm arising out of Hazardous Activities defined 'damage' to means '*significant damage caused to persons, property or the environment and includes loss of life or personal injury*.' It is this very definition that forms the backbone of this research. Of importance is principle 4 which suggested that states should take all necessary measure to ensure **prompt and adequate compensation of victims** of trans-boundary damage.[273] Interestingly, on proof on liability on the on the polluter, it suggested that such **liability should not require proof of fault (*strict liability*)**.[274]

Kenyan courts have also been on the fore front in upholding the polluter pays principle as key to the issue of compensation of environmental damage victims. In ***Michael Kibui and 2 others (Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA and 2 others***[275] the court found that the 1st Respondent through its excavation during rehabilitation of Eldoret-Turbo-Webuye Road had breached the Petitioners' right to a clean and healthy environment by causing water, air and noise pollution and excessive vibrations which right is enshrined in Article 42 of the Constitution.[276] The Court applied the polluter pays principle to hold the 1st Respondent, the contractor (2nd Respondent was Kenya National Highways Authority while NEMA was the 3rd Respondent), as liable to pay for compensation.[277] Interestingly, the court then proceeded to award

[273] Draft Principles on the Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities, Principle 4
[274] Ibid
[275] [2019] eKLR; Constitutional Petition No. 1 of 2012
[276] *Michael Kibui and 2 others (Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA and 2 others*[2019] eKLR; Constitutional Petition No. 1 of 2012
[277] Ibid Para [64-65]

the Petitioner's Kenya Shillings Thirty Thousands (Kshs. 30,000.00) only for the breach of the right to clean and healthy environment. The court unfortunately did not provide a framework of how it got to provide the said award. This therefore begs the main question under determination, is the award dependent on how long the foot of the judge is?

The polluter pay principle operates on the '*strict liability'* notion. Where liability is 'strict' fault need not be established to hold a polluter liable.[278] A claimant need not prove any intention to violate the duty of care or a norm or prove negligence on the part of the polluter for a case to be successful. All the Claimant need to do is to prove the causal link between the action of the alleged perpetrator and the damage.[279]

While the ILC has without a doubt confirmed that the polluter pays principle (PPP) ought to form the basis of compensation, the formula of determining that compensation has remained a mystery. While the global environmental principles and the Kenyan Legal framework continuously embrace the 'polluter pays principle (PPP),' the scope of compensation and rules to be used to determine awards payable remain limited.

COMPENSATION UNDER CIVIL LIABILITY IN ENGLISH LAW

A significant amount of environmental injury is likely to remain uncompensated under civil liability in English Law, and the same is true of some other legal systems, though bot uniformly.[280]

[278] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [57]

[279] ibid

[280] P Birnie, A Boyle and C Redgwell *International Law and the Environment* (3rd Edn, Oxford University Press, New York, 2009) [324]

At the national level, civil liability operates by creating a relationship between the person liable and the person injured by conduct.[281] According to D Shelton and A Kiss in *Judicial Handbook on Environmental Damage* litigation seeking to remedy or prevent environmental harm mostly takes the form of private actions based on tort.[282] This is principally meant to achieve compensation for damage[283] (however, it is prudent to remember that under the current Kenyan Constitutional dispensation, it is possible to acquire compensation through a constitutional petition).[284] These claims are mainly on the traditional common law causes of action which may include private nuisance, strict liability, fraud, battery or trespass.[285] It is for this very reason that NA Robinson view compensation for damage in the law of tort in the following perspective:

> In general, concepts of liability and compensation stem from the principles of tort law in which a **wrongful act** causing injury permits the injured party to obtain compensation, usually in the form of money damages, through a private action against the person who caused the injury.[286]

This would therefore require a court faced with the issue of compensation to consider the traditional concept of awarding damages in the law of tort. From the very basics, the purpose of tort law and law of damages is to compensate the injured (victim) and not to punish the injurer

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[281] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [52]

[282] D Shelton and A Kiss *Judicial Handbook on Environmental Law* (United Nations Environmental Programme, 2005) < https://www.ircwash.org/sites/default/files/Shelton-2005-Judicial.pdf > accessed on 3rd May 2019 [11]

[283] ibid

[284] Constitution Article 42 read conjunctively with Article 70

[285] ibid

[286] NA Robison 'Training Manual on International Environmental Law (2006' < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty > accessed on 6th May 2019 [52]

(polluter) and 'punitive' or the 'exemplary' damages are only awarded when the injurer are guilty of contumelious disregard of the Plaintiff's rights.[287]

When a harm (as a result of activities harming the environment) has occurred, indemnities or compensatory damages may be sought by a party.[288] Compensatory damages are therefore meant to compensate for the losses suffered as well as expenses incurred to avert the environmental harm.[289] For the award of this damages requires the court to give an economic value to the losses suffered by considering the *nature of the harm, the technical capacity to repair the damage* and the *environment in question.*[290]

When the claim is based on negligence, before any damages are awarded, a plaintiff has the burden of proof to show that he was injured by the negligent act of the defendant and/ or for an omission which the defendant is responsible for.[291] This primarily goes down to the need of the plaintiff to prove a causal link breach of duty and the injury incurred by the Plaintiff.[292] Example: in ***African Centre for Rights and Governance (ACRAG) and 3 others v Municipal Council of Naivasha***[293] where the Petitioners complain was the manner in which the Respondent managed a dumpsite in Naivasha and was therefore a violation of the right to a clean and healthy environment.[294] The causal link was clear in paragraph 33 when the court held that the Respondent was responsible for the operation of the dumpsite.

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[287] Flemings 'The Law of Torts' < https://www.law.berkeley.edu/files/Flemings_The_Law_of_Torts_Damages.pdf > accessed on 9th May 2019
[288] D Shelton and A Kiss *Judicial Handbook on Environmental Law* (United Nations Environmental Programme, 2005) < https://www.ircwash.org/sites/default/files/Shelton-2005-Judicial.pdf > accessed on 3rd May 2019 [55]
[289] ibid
[290] ibid
[291] *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* Civil Appeal No. 93 of 2012 (Machakos)
[292] *Kenya Wildlife Services v Amos Mfwaya Kokoth* [2018] eKLR (Civil Appeal No. 12 of 2016) [Para 15]
[293] [2017] eKLR (Petition No. 50 of 2012)
[294] *African Centre for Rights and Governance (ACRAG) and 3 others v Municipal Council of Naivasha* [2017] eKLR (Petition No. 50 of 2012)

The law on special damages is quite clear. They must be specifically pleaded and proved before they are awarded by the court.[295] This is because they are not a direct consequence of the act complained of and may not be inferred from the act.[296] Justice Joel Ngugi in ***Christine Mwigina Akonya v Samuel Kairu Chege***[297] he restated the principles of special damages in following terms:

> [T]he general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.[298]

To this end, a person seeking to recover special damages in case of environmental damage must specifically plead and prove the amounts pleaded. A classic example is closer home at Dandora dumpsite where persons living closer to this site have in the past reported negative health effects due to the health hazards from this dumpsite. This dumpsite is reported to be highly contaminated with lead due to a dry battery manufacturing plant located nearby. According to UNEP, 50% of students living close to this dumpsite were found to have blood lead levels exceeding the toxicity level.[299] As such, to prove special damages, a Plaintiff in such matter will bring hospital receipts and receipts for any other expense that has been incurred in the process of dealing with such a menace. It is for that reason that Justice Joel Ngugi in the above matter of ***Christine Mwigina Akonya*** notably held the position that a plaintiff must demonstrate that they actually made the

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[295] *Christine Mwigina Akonya vs Samuel Kairu Chege* [2017] eKLR; Civil Case No. 12 of 2016 [Para 24]
[296] Ibid Para 24; *Hahn v Singh* [1985] KLR 716 [717-721] Kneller, Nyarangi JJA and Chesoni Ag. J.A
[297] [2017] eKLR; Civil Case No. 12 of 2016 [Para 25]
[298] Also see: *Total (Kenya) Limited Formally Caltel Oil (Kenya) Limited v Janevams Limited* [2015] eKLR
[299] World Health Organization 'Chemicals of Public Health Concern: and their Management in the African Region' (Regional Assessment Report 4th July 2014) < https://www.afro.who.int/sites/default/files/2017-06/9789290232810.pdf > accessed on the 14th July 2019 [12]

payments or suffered the specific injury. The general rule is therefore that *he who alleges must prove*.

CHAPTER THREE

PRINCIPLES, TESTS AND/ OR FACTORS TO BE CONSIDERED IN AWARDING COMPENSATION BY COURTS

Environmental courts and tribunals are a fact of life today… The environment court in Kenya [now] has the opportunity of developing environmental law in the county and the tremendous opportunity to apply the principle of sustainable development.[300]

Donald Kaniaru

INTRODUCTION

Donald Kaniaru describes the Constitution 2010 as being 'green in respects unknown previously in the country's [Kenya's] laws.'[301] It strengthens the environmental process by establishing an extensive legal framework that protects the right to a clean and healthy environment[302] and secondly by establishing a special court to deal with environmental issues.[303] The Constitutional requirement in Article 162(2) (b) for Parliament to establish a court with the status of the High Court with dual jurisdictional to handle land and environmental matter is indeed one of the novel and ingenious features of the Constitution 2010.[304] This is a court that has a major role in enforcing environmental law and developing environmental jurisprudence in the process of achieving environmental justice. In symposium on *Environmental Adjudication in the 21st Century* held in Auckland, New Zealand, Justice Samson Okong'o noted that:

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[300] D Kaniaru 'Launching a New Environment Court: Challenges and Opportunities' (2012 Vol 29) *Pace Environmental Law Review* < https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1701&context=pelr > accessed on 5th June 2019
[301] Ibid [Page 4]
[302] Constitution Article 42 and Chapter 5
[303] Ibid Article 162(2)
[304] Oscar Amugo Angote 'Environmental Law: A critical Analysis of the Environmental Caseload' (Master of Laws Thesis, University of Nairobi, 2018) Page 1

> *ELC is expected to develop **rich jurisprudence** to enable Kenyans realize the right to a clean and healthy environment conferred by Article 42 of the Constitution and social economic rights such as the right to clean and safe water, and a right to reasonable standards of sanitation which are conferred by Article 43 of the Constitution.*[305]

The remarks of Justice Samson Okong'o form the very foundation of the need of the Environment and Land Court to establish a pathway for awarding damages in environmental cases. Justice J.B. Ojwang in '*The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'* posits that the enactment of the EMCA established a framework for civil and criminal litigation.[306] The civil disputes envisage in the Act [including issues of compensation] have no pre-determined answers as the '*the path of the law is not yet well trodden enough*'.[307] No judicial officer is allowed to decline to resolve that issue on the ground that the issue [of compensation] is too difficult or there is no set law to determine the dispute.[308]

Of importance, our courts have been reluctant to allow persons to proceed with alleged actions likely to infringe the right to a clean and healthy environment on the undertaking that the defendants would provide damages. Justice Edward M. Muriithi in *Fadhila S. Ali and 2 others vs National Housing Corporation and another*[309] found out that an order for an undertaking for damages under Order 40 Rule 2 of the Civil Procedure Rules would render the constitutional protection under the Bill of Rights illusory and of no meaningful effect. Such an order meant that

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[305] Samson Okong'o, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation at the Symposium on Environmental Adjudication in the 21stCentury held in New Zealand) < https://environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf > accessed on the 6th June 2019
[306] JB Ojwang 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007, Vol 19) *Kenya Law Reports* < http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf > accessed on 6th June 2019 [19]
[307] Ibid [23]
[308] Ibid [24]
[309] [2012] eKLR (Environment and Land Case No. 5 of 2012)

a complainant would suffer a violation on the assumption that he would be amenable to damages.[310]

This research study is therefore premised on the assumption that an injury has already occurred or is a continuing injury that needs to be compensated for. Justice S. Okong'o in *Patrick Kamotho Githinji and 4 other (Suing on behalf of aggrieved residents of residents of Muthurwa Estate within Nairobi County) –vs- Resjos Enterprises Limited and 4 others*[311] held that where there was a clear case of violation of the right to a clean and healthy environment, it was appropriate to apply the precautionary principle also known as the *'in dubio pro natura'*. This means, if in doubt, favour nature. Taking precaution or preventing damage to the environment is preferable to having the hair splitting discourse on compensation because compensation rarely succeeds in giving the injured full satisfaction.[312] However, the party alleging the infringement may seek compensation in addition to the issuance of the injunction to stop the action being undertaken.

Compensation for injury caused by actions against the environment ought to be an integral part of the environmental policies and legal framework.[313] While it is the legal truism that no amount of damages can be awarded to fully restore an injured person or loss of related amenities, what the court of law is obligated to do is to assess ***reasonable damages*** that are proportionate to the injuries suffered.[314]

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[310] Ibid [Para 6]
[311] [2016] eKLR
[312] Werner Pfennigstorf, 'Environment, Damages, and Compensation' (1974, Vol 4, No.2) *American Bar Foundation Research Journal* < https://www.jstor.org/stable/828017 > accessed on 7th June 2019 [356]
[313] ibid
[314] Bernard Mutisya *Wambua –vs- Swaleh Hashil* [2017] eKLR (Civil Case No. 28 of 2015)

COMPENSATORY DAMAGES

Though, an act detrimental to the environment causes universal and trans-boundary negative effects, they often times cause distinct personal injuries to individuals and properties.[315] Injuries to individuals have over the years been accepted to also be a product of environmentally harmful human activities. However, though damage and/ or injury to property as a result of tortious acts have been compensated, there has been some reluctance to assign responsibility for such damages in our environmental policies.[316] The debate on the award of such compensable damages to victims of such injury need to take centre stage in the creation of environmental policies and discourse.

An award of damages as compensation entails the exercise of judicial discretion hence ought to be exercised judicially.[317] Exercise of judicial discretion ought to be exercised judiciously, meaning, without caprice or whim and on sound reasoning.[318] **Justice Ringera** in ***Githiaka –vs- Nduriri***[319] in setting out the principles of exercise of discretion held that discretion ought to be exercised on sound reason, rather than whim, caprice or sympathy and with the main of the court being to do justice to the parties before it. The award of compensation under Article 23(2) (e) and 70(2) (c) of the Constitution is also an exercise of judicial discretion. The High Court in ***MWK and another –vs- Attorney General and 3 others***[320] in determining an award for compensation for infringement of rights under Article 25, 27, 28, 29 and 31 held that an award for damages entailed exercise of judicial discretion which should be exercised judiciously and that meant that it muct be exercised upon reason and not upon caprice or **personal opinion**.[321]

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[315] Werner Pfennigstorf, 'Environment, Damages, and Compensation' (1974, Vol 4, No.2) *American Bar Foundation Research Journal* < https://www.jstor.org/stable/828017 > accessed on 7th June 2019
[316] Ibid [352]
[317] *Edward Akong'o Oyugi and 2 others –vs- Attorney General* [2019] eKLR; (Constitutional Petition No. 441 of 2015)
[318] *Farah Awad Gullet –vs- CMC Motors Group Limited* [2018] eKLR (Civil Appeal No. 206 of 2015)
[319] [2004] 2 KLR 67
[320] [2017] eKLR (Constitutional Petition No. 347 of 2015)
[321] Ibid [Para 118

The Court of Appeal set down the principles of determining the quantum of an award for damages in accident cases (tort-negligence) in ***Cecilia W. Mwangi –vs- Ruth W. Mwangi.***[322] The Court held it is not enough to write down the particulars of damages being sought, but also a Claimant must prove the said particulars before an award is issued. Similarly, in an award for damages for an injury as a result of infringement of the environment would require a claimant to strictly prove the damage as particularized in the claim documents.[323]

A CLAIM FOR SPECIAL DAMAGES

It is trite law that a claim for special damages must be expressly pleaded, and it is incumbent upon the claimant to prove it. Failure to specifically plead it disentitles the claimant special damages. The Court of Appeal in *Capital Fish Kenya Limited vs The Kenya Power and Lighting Company*[324] held that it is a settled principle in the award of special damages that they need to be specifically pleaded before they are awarded and must be strictly proved with as much particularity.[325]

A party seeking compensation in terms of special damages must not only specifically plead them, but must proceed to strictly prove them. The rationale of specifically pleading and proving special damages was recently explained by the Court of Appeal in *Caltex Oil (Kenya) Limited –vs- Rono Limited.*[326] The court held that special damages must be specifically pleaded and proved because they are not a direct natural or probable consequence of the act complained of and may not be inferred from the action under investigation by the court.[327] This can be done through medical or valuation reports depending on the nature of claim under determination.

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[322] [1997] eKLR (Civil Appeal No. 251 of 1996)
[323] *Bonham Carter –vs- Hyde Park Hotel* [1949] 64 T.L.R 177 (Lord Goddard C.J.)
[324] [2016] eKLR (Civil Appeal No. 189 of 2014)
[325] ibid
[326] [2016] eKLR (Civil Appeal No. 97 of 2008); ***Hahn vs Singh*** [1985] KLR 716
[327] ibid

The award for special damages was clearly explained by the High Court in ***Wakim Sodas Limited –vs- Sammy Limited***[328] where it held that:

> [A] party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present ***actual receipts*** of payments made to substantiate loss or economic injury… Our courts have held that an invoice is not proof of payment and that only a receipt meet the tests.[329]

In this award, the court will be restituting for any expenses incurred including medical expenses, funeral expenses (in case of death) and any other expense directly incurred as a result of the injury incurred and any hospitalization and ensuing medical treatment. This would also include calculation of lost wages and any future earnings, and any increased cost of her living due to the change of circumstances any special needs as a result.

GENERAL DAMAGES

The court in *Michael Kibui and 2 others (Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village Uasin Gishu County) –vs- Impressa Construzioni Giuseppe Maltauro SPA and 2 others* awarded the Petitioners Kes. 30,000.00, as general damages for breach of right to clean and healthy environment. This was awarded without setting down any principle that had guided the court in the determination of the award.

[328] [2017] eKLR (Civil Appeal 103 of 2016) Para 34
[329] Ibid Para 34; *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited –vs-Janevams Limited* [2015] eKLR; *Zacharia Waweru Thumbi –vs- Samuel Njoroge Thuku* [2006] eKLR

Compensation under Article 23(2) (e) and 70(2) (c) of the Constitution

The Constitution establishes compensation as an appropriate and effective remedy for redress of an established infringement of a constitutional right.[330] Justice John Mativo in ***Edward Akong'o Oyugi and 2 others –vs- Attorney General***[331] held that when a court is granting 'compensation' under Article 23 (and Article 69 (2)) of the Constitution, it is primarily seeking the protection of fundamental rights. This is a way of public law not only civilizing public power but also assuring citizens live in a legal system that protects and preserve their interests and rights.[332] Therefore, compensation is the means through which public law penalizes a wrongdoer and fixes the liability for the public wrong which the state gas failed to protect.[333] The payment of compensation where a right has been infringed should therefore not be viewed in terms of the civil action for damages under private law but should be viewed in a broader sense of providing relief by an order of making 'monetary amends' under the public law for the infringement of the fundamental right.[334]

The importance of awarding compensation for an infringed right in addition to an award for damages is necessary to reflect the sense of public rage.[335]

Justice Mativo in ***Jamlick Muchangi Miano vs Attorney General***[336]*and* ***Edward Akong'o Oyugi and 2 others –vs- Attorney General*** noted that jurisprudence that has emerged in cases of infringement of fundamental rights is clear on the nature and scope of this public law remedy. The Learned Judge discuss the following principles that ought to be applicable:

[330] *MWK and another –vs- Attorney General* [2017] eKLR (Constitutional Petition No. 347 of 2015) [Para 117]
[331] [2019] eKLR (Constitutional Petition No. 441 of 2015)
[332] *Edward Akong'o Oyugi and 2 others –vs- Attorney General* [2019] eKLR; (Constitutional Petition No. 441 of 2015)
[333] ibid
[334] ibid
[335] *MWK and another –vs- Attorney General* [2017] eKLR (Constitutional Petition No. 347 of 2015) [Para 120]
[336] [2017] eKLR (Constitutional Petition No. 300 of 2015)

a) *Monetary compensation for violation of fundamental rights is an acknowledged remedy in public law for enforcement and protection of fundamental rights;*

b) *Such a claim is based on strict liability;*

c) *Such a claim is distinct from, and in addition to remedy in private law for damages for tort;*

d) *This remedy would be available when it is the only practicable mode of redress available*

e) *Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable*

This test used by Justice Mativo in these two cases has also been used by other court within our legal framework and in other jurisdictions. It was borrowed from the works of Justice V.K. Sircar and Kanpur Nagar in *Compensation for Violation of Fundamental Rights: A New Remedy in Public Law Distinct from Relief of Damages in Tort.*[337]

Factors to be considered in the award of Compensation and/ or damages

Determination of the quantum of compensation is dependent upon the facts and circumstances of each case.[338] The Court of Appeal in ***Chief Land Registrar and 4 others –vs- Nathan Tirop Koech and 4 others***[339] held that it would not disturb the quantum of damages awarded by a High Court unless it is satisfied that the court in awarding the damages had taken into account an ***irrelevant factor***, or left out a ***relevant factor***.[340] Such an action would in the end lead to an award being inordinately high or low as was explained by Justice Law in *Butt –vs- Khan.*[341] Justice Law held that an award would be disturbed by an appellate court if the judge proceeded on wrong principles,

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[337] VK Sircar and Kanpur Nagar 'Compensation for Violation of Fundamental Rights: A Remedy in Public Law Distinct from Relief of Damages in Tort' (April- June 1995, Issue 2) *J.T.R.I. Journal* < http://ijtr.nic.in/articles/art7.pdf > accessed on 11th June 2019

[338] *MWK and another –vs- Attorney General* [2017] eKLR (Constitutional Petition No. 347 of 2015) [Para 117]

[339] [2018] eKLR (Civil Appeal No. 51 of 2016)

[340] *Kemfro Africa Limited t/a Meru Express Services (1976) and another –vs- Lubia and another* (No. 2) [1985] eKLR

[341] [1981 1 KLR 349

or that he misapprehended the evidence in some material respect hence arrived at a figure which was either inordinately high or low. Some of the factors to be considered by the court would include:

Nature and Evaluation of Damage

It is the duty of the petitioners or claimants to prove so that an award for compensation ought to be issued. However clear it is that the right to a clean and healthy of environment has been infringed, a party must go to the extent and prove that they are entitled to an award for compensation. This was made clear by the ELC in ***Martin Osano Rabera and another –vs- Municipal Council of Nakuru and 2 others***[342] where though the court found that the management and maintenance of the *Gioto waste disposal site* by the Respondent was an infringement of the Petitioners' right to a clean and healthy environment under Article 42, the court declined to issue an award for compensation. This was because, though the petitioners sought compensation, they made no submissions on the nature and quantum of such compensation.[343] Compensation is therefore awarded according to the circumstances of a matter.

Before compensation is awarded or considered, it is important that ***the damage is evaluated***.[344] An **evaluation report** is mostly scientific and a forms an important part of the evidence to prove the amount of damage incurred. The importance of valuation reports and medical reports was emphasized by the court in ***Michael Kibui and 2 others (Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) –vs- Impressa***

[342] [2018] eKLR (Petition 53 of 2012)
[343] *Martin Osano Rabera and another –vs- Municipal Council of Nakuru and 2 others* [2018] eKLR (Petition 53 of 2012) [Para 79]
[344] Adekunbi Imosemi and Nzeribe Abangwu 'Compensation of Oil Spill in Nigeria: The More the Oil, the More the Blood?' (2013, Vol. 2, No. 3) *Singaporean Journal of Business Economics, and Management Studies* < https://www.singaporeanjbem.com/pdfs/SG_VOL_2_(3)/4.pdf > accessed on 11th June 2019

Construzioni Giuseppe Maltauro SPA and 2 others.[345] The court began be finding the 1st Respondent to have breached the Petitioners' rights to a clean and healthy environment by causing water, air and noise pollution through excessive vibrations.[346] The next step the court took was to find that the Petitioners were therefore entitled to an award of damages due to the breach of the right to clean and healthy environment.[347] However, the court declined to award the amounts prayed for as compensation by the Petitioners noting that:

> *On compensation for damages caused by the excavation works, pollution and blasting, I do find that the petitioners have not demonstrated how they reached the figures they claim for compensation.* ***They do not provide valuation reports or medical reports***.[348]

Some environmental damages are difficult to quantify the amount of damage caused hence the need of evaluation reports from experts. Example let's consider noise pollution: The court in ***Pastor James Jessie Gitahi and 22 others vs Attorney General***[349] held that the prevention of noise is now a recognized component of a clean and healthy environment. This covers sound which can result to hearing impairment and vibrations transmitted to the human body through solid structures.[350] The issue of noise pollution is regulated by the ***Environment Management and Co-ordination Act*** *and the* ***Environment Management and Co-ordination (Noise and Excessive Vibrations) (Control) Regulation***. The two pieces of legislation has extensive provisions governing the issue of noise pollution. The Regulations prohibit any person from making any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the

345 [2019]eKLR (Constitutional Petition No. 1 of 2012)
346 Ibid [Para 58]
347 Ibid [Para 59]
348 *Michael Kibui and 2 others (Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) –vs- Impressa Construzioni Giuseppe SPA and 2 others* [2019]eKLR (Constitutional Petition No. 1 of 2012)
349 [2013] eKLR (Petition 683 of 2009) (Para 28)
350 ibid

comfort, repose, health or safety of others and the environment.[351] The contravention of this provision amounts to an offence. In determining whether the noise in loud, unreasonable, unnecessary or unusual, the court considers factors such as time of the day, proximity to the residential area, whether the noise is recurrent or constant, the level of intensity of the noise and whether the noise can be controlled without much effort or expense to the person making it.[352]

On evaluation reporting, Regulations 6 allows sound emission only to the permitted levels in the First Schedule (Attached herein is the Schedule).[353] The **measurements** to determine whether or not the n**oise or vibration levels exceed the permissible levels shall be taken by the relevant lead agency**,[354] or by any other person authorized by the Authority (NEMA) as knowledgeable in the proper use of the measuring equipment.[355]

Failure to have a report on the noise level from a person authorized by the NEMA would make it difficult to prove infringement of Article 42 of the Constitution let alone the amount of compensation. The court in ***Elizabeth Kurer and Detleg Heir (Suing on their behalf and on behalf of aggrieved residents of Watamu within Kilifi County) v County Government of Kilifi and 4 others***[356] held that while it admired the spirited nature in which the Petitioners followed up on their rights, the Petition must fail as the Petitioners were not authorized by NEMA to carry out the measurements nor had they knowledge in the proper use of the equipment as provided under the Regulations. In the end, the success in any petition for noise pollution would be likely where

[351] Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009, Regulation 3(1)
[352] Ibid Regulation 3(2)
[353] Ibid Regulation 6(1)
[354] Ibid Regulation 6(2)
[355] Ibid Regulation 6(3)
[356] [2018] eKLR (Petition No. 23 of 2016)

it is backed by a report from a lead agency or a person authorized to carry out measurements of sounds levels by NEMA.

The fact that an evaluation or valuation report is produced and not controverted does not make the report justifiable and reasonable.[357] In ***Chief Land Registrar and 4 others –vs- Nathan Tirop Koech and 4 others***[358] *consolidated with* ***National Land Commission –vs- Nathan Kiprop Koech and 3 others***[359] the Court of Appeal held that a court is under a duty to exercise an independent mind and determine if the valuation report is reasonable. This therefore requires the court to undertake an analysis and determine the accuracy, appropriateness and quality of the report.[360] It should also conduct as to the reasonableness of the data used, enquiries made and suitability of methods and technics employed and the opinions and conclusions. The court is not bound by an evaluation report or any report by an expert, it is bound to determine its reasonableness before adoption as a finding of the court.

In conclusion, the success of any environmental case depends on the reports produced by environmental experts. It is on such reports that the court is able to determine the extent of damage caused and are also helpful to determine the amount of damages to be awarded.

Reasonableness

An award for damages ought to be ***reasonable in the circumstances in question*****.** Let's consider the following scenarios:

[357] *James Mwangi Gatundu –vs- Mastermind Tobacco (K) Limited* [2019] (ELC NO. 95 of 2014-Embu)
[358] [2018] eKLR (Consolidated with *Civil Appeal No. 58 of 2016)*
[359] Civil Appeal No. 58 of 2006
[360] ibid

The 1984 Bhopal Gas Leak Disaster (industrial accident), which happened in India was a result of leaking of forty (40) tons of methyl isocyanate (MIC) gas which leaked from the Union Carbide Factory to densely populated areas.[361] It led to the death of more than 3,800 people and half a million survivors suffered respiratory problems, eye irritation or blindness and other maladies as a result of the irritation.[362] The award of damages to be awarded in this scenario, ought to be high due to the amount of damage including death that befell these residents.

Closer home, close to the UNEP Headquarters lies the Dandora dumpsite nightmare which is Nairobi's main sewer treatment. It was declared full in the year 2001 but 18 years later, it is still in use.[363] This dumpsite has overtime been accused for containing dangerous elements such a lead, mercury and cadmium. Following the decision of the ELC in ***Martin Osano Rabera and another –vs- Municipal Council of Nakuru and 2 others***[364] where the court found that the management and maintenance of the *Gioto waste disposal site* by the Respondent was an infringement of the Petitioners' right to a clean and healthy environment under Article 42. The maintenance of the Dandora Dumpsite and the Gioto Dumpsite in Nakuru are health hazards.

A comparison of the Bhopal Gas Leak and the negative health impact of the Dandora and Gioto dumpsite would offer a perfect scenario this discussion. Why would a court bestowed with the obligation to issue of an award in this case issue a different award for the circumstances though both amount to infringement of the right to a clean and healthy environment?

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[361] Edward Broughton 'The Bhopal and its aftermath: A Review' (2005) *Environmental Health* < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/ > accessed on 14th June 2019

[362] Adam Augustyn et al (eds) *Encyclopedia Britannica* < https://www.britannica.com/event/Bhopal-disaster > accessed on 14th June 2019

[363] P Barczak 'Dandora Landfill in Nairobi, Kenya' in *Environmental Justice Atlas* < https://ejatlas.org/conflict/dandora-landfill-in-nairobi-kenya > accessed on 2nd November 2018

[364] [2018] eKLR (Petition 53 of 2012)

It is important that comparable injuries be awarded almost and/ or similar awards.[365] This is a way of creation of some of uniformity in the awarding of damages and ensuring that awards are reasonable. In *West (H) and Son Limited –vs- Shephard*[366] **Lord Morris of Borth-y-Gest** held that:

> *But money cannot renew a physical frame that has been battered and shattered.* ***All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation****. In the process, there must be an endeavor to secure some uniformity in the general method.* ***By consent, consent awards must be reasonable and must be assessed with moderation.***[367]

Lord Denning was later to confirm this position in *Lim Pho Choo –vs- Camden and Islignton Area Health Authority*[368] when he held that it is prudent to remove the 'misapprehension, so often repeated, that the Plaintiff is entitled to be fully compensated for all loss and detriment she has suffered. That is not the law.' A plaintiff is therefore entitled to ***a fair compensation***. In his wisdom, the Learned Lord Denning viewed the Defendants as not wrongdoers but as persons who foot the bill.[369] It was for this reason the Court of Appeal in *Cecilia W. Wangui and another –vs- Ruth W. Mwangi* held that '*damages ought to be assessed so as to* ***compensate***, ***reasonably***, *the injured party but not so as to smart the* defendant.'

The Black's Law Dictionary defines '*reasonable'* as '*agreeable to reason; just or proper*'.[370] It is also defined as '*fit and appropriate'* to the issue under review. What amount of compensation is

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[365] *Cecilia W. Wangui and another –vs- Ruth W. Mwangi* [1997] eKLR (Civil Appeal 251 of 1996)
[366] [1964] AC 326 [345]
[367] *Cecilia W. Wangui and another –vs- Ruth W. Mwangi* [1997] eKLR (Civil Appeal 251 of 1996)
[368] [1979] 1 ALL ER 332 [Page 339]
[369] *Lim Pho Choo –vs- Camden and Islignton Area Health Authority* [1979] 1 ALL ER 332 [Page 339]
[370] HC Black *Black's Law Dictionary* < https://thelawdictionary.org/reasonable/ > accessed on 14th June 2019

reasonable depends on the circumstances of each case. Recently in 2018, the High Court in ***Board of Trustees of the Anglican Church Diocese of Marsabit –vs- NIA (Minor Suing through her next friend IAIS) and 3 others***[371] held that the quantum of damages must be reasonable, '*based on the* ***circumstances of each case****, guidance by* ***comparable precedents*** *on similar injuries and the* ***incident of inflation*** *within the parameters of the Kenyan Economy*.'

Therefore, since no particular circumstance of a case is exactly similar to another, a court will have to exercise discretion in the award of damages in each particular case, but noting to be reasonable. The award accorded to the victims of Bhopal Gas Leak will be higher to cover the deaths and the health ramifications of difficulties in breathing, eyesight etc. that have resulted. While the Gioto and Dandora dumpsites have not yet a death reported, the award to be issued would for those particular circumstance as has been proved by the claimants.

Though this was a motor vehicle accident, the court in ***Gammel –vs- Wilson***[372] offered an ace that we can borrow in awarding damages. The court held that at all times the principle must be that the damages should be a fair compensation for the loss suffered by [claimant or] deceased. The court further noted that in *absence of cogent evidence of loss, the award should be modest*. Where sufficient facts are established to reach a mathematical certainty, the court must make the best estimate it can form the facts.[373]

In conclusion, the requirement that any award of damages ought to be reasonable has existed for quite some time now. The High Court in ***Kenya Wildlife Service –vs- Godfrey Kirimi Mwiti***[374] thumb printed the decision of the Court of Appeal in *Butler –vs- Butler*[375] where it was held that a

[371] [2018] eKLR (Civil Appeal No. 4, 5 and 6 of 2018)
[372] (1981) 1 ALL ER 578
[373] *Gammel –vs- Wilson* [1979] 1 ALL ER 332 [Page 339]
[374] [2018] eKLR (Civil Appeal No. 12 of 2017)
[375] (1984) KR,225

court should consider *the general picture and all the prevailing circumstances and the effect of the injuries* when considering the amount of damages to be awarded. This assessment therefore bestows discretion in the hands of the trial judge to do justice according to the specific circumstances under consideration. This exercise of discretion will only be set aside by a higher court when acted on wrong principles or awarded so excessive or so little that no *reasonable* court would in the circumstances.

Breach of a Human Right

The relationship between human rights and environment has been a subject of discourse in the international level. Undisputedly, there seem to be a consensus that there is an overlap between human rights and the environment. Conversations around the interplay between the environment and human rights have been around us for the last few decades. The expansion of studies on linkages between environment and human rights has led the international community to create international legal instruments to respond to this concern.[376]

The Constitution of Kenya 2010 specifically under Article 42 (under the Bill of Rights) protected the right to clean and healthy environment. The Kenyan courts have exercised judicial mind on this right under Article 42 of the Constitution. The court in *Kiluwa Limited & Another v Commissioner of Lands and 3 others*[377] held that 'every person in Kenya is entitled to a clean and healthy environment, and has duty to safeguard and enhance the environment. This Court further thumb printed the decision in *Zia v WAPDA PLD*[378] where Justice Saleem Akhtar held as follows:

[376] D Shelton 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice- A Background Paper for the WHO' in http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf >accessed on 29th April, 2018

[377] [2015] eKLR Para 142

[378] 1994 SC 693

> The constitution guarantees the dignity of man and also the right "life" under Article 9 and if both are read together, questions will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, healthcare, clean atmosphere and unpolluted environment.

In *Waweru v Republic*[379] the Court observed that from the perusing of most important international instruments on the environment, it is evident that the word life and the environment are ***inseparable*** and the word "life" means much more than keeping body and soul together. In *Social and Economic Rights Action Centre et al v Nigeria*[380] the African Commission on Human and Peoples' Rights emphasized that the right to a clean and safe environment is critical to the enjoyment of economic, social and cultural rights.

By all means, the right to a clean and healthy environment ought to be jealously safeguarded like all other rights provided for in the Constitution. The right to a clean environment should not be seen as an inferior right especially in the awarding of compensation. There has been a tendency of courts awarding handsomely for other rights especially the High Court but the Environment and Land Court seems slow in following the pace set by the High Court. It is therefore important to note that human rights perspective directly address environmental impacts on the life, health, private life and property of individual humans.

In ***Miguna Miguna –vs- Fred Okengo Matiang'i; Ministry of Interior and Co-ordination of National Government and 6 others***[381] the High Court held that 'courts are protectors of the Constitution and the values therein including the basic principles of rule of law and bill of rights.[382]

[379] KLR E&L I, 677,
[380] Communication 155/96
[381] [2018] eKLR (Constitutional Petition No. 51 of 2018)
[382] Ibid Para 108

The court proceeded to declare that *courts grant compensation where there has been breach of rights and freedoms to act as a deterrent against similar violation and not to restore the already violated rights*. Compensation for breach of the right to the environment should not be confused with award of damages to restore a previous position. The court proceeded to hold that:

> *The purpose of awarding damages in Constitutional matters should not be limited to simple compensation, but such an award ought, in proper cases, to be made with a view of deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the Constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.*[383]

The court in ***Lucy Wanjiku (Suing as the legal representative of Mukaru Nga'ang'a-Deceased)-vs- Attorney General***[384] the court held that compensation in breach of bill of rights is upheld to live to the fact that there should be no right without a remedy and to remind the state and its agents that rights must be respected, enhanced and protected and their *violation will attract substantial compensation*. The court in ***Felix Njagi Marete –vs- the Attorney General***[385] held that the grant of compensation is a '*reminder that the constitution is neither a toothless bulldog nor a collection of pious platitudes but has teeth*.'

The Environment and Land Court should also make the statement that the right safeguarded in the Constitution under Article 42 is key to the enjoyment of all other rights. The constitution is therefore not a bulldog nor a collection of pious platitudes. It should therefore take serious steps to safe guard Article 42 of the Constitution jealously. This will also deter its breach, punish those

[383] *Lucy Wanjiku Mukaru (suing as the legal representative of Mukaru Ng'ang'a- Deceased)-vs- Attorney General* [2018] eKLR (Constitutional Petition No. 452 of 2016)
[384] [2018] eKLR (Constitutional Petition 452 of 2016), Para 66
[385] (1987) KLR 690

who are responsible or even secure effective policing around this right. The tabular presentation herein below shows how the High Court has awarded compensation for breach of rights in various cases (this can be heavily be borrowed by the ELC):

NO.	CASES	PARTICULARS	AMOUNTS AWARDED (KES)
1.	*Miguna Miguna –vs- Fred Okengo Matiang'i and 6 others* [2018] eKLR (Constitutional Petition No. 51 0f 2018) By: Justice E. Chacha Mwita	Violation of rights and fundamental freedoms. Petitioner was wrongfully arrested and held incommunicado in various police stations; was not produced in court as required by the Constitution and was deported out of his country of birth without reason or even following the law. As despite court orders issued in his favour, he was not allowed into his country and was again put on a flight deported to Canada a second time. He was injected with tranquilizers and his home destroyed.	General Damages Kes. 7,000,000.00 (7 Million)
2.	*Lucy Wanjiku (Suing as the legal representative of Mukaru Nga'ang'a-Deceased)-vs- Attorney General* [2018] eKLR	The deceased had been held incommunicado, badly tortured, assaulted, beaten and subjected to cruel and inhuman treatment. For violation of rights and fundamental freedoms	Kes. 15,000,000.00 (15 Million)

	By: Justice E.C. Mwita	including **torture and inhuman and degrading treatment**.	
3.	*Roshanara Ebrahim –vs- Ashleys Kenya Limited and 3 others* [2016] eKLR (Petition No. 361 of 2016) By: Justice Edward M. Muriithi	The Petitioner had been selected to represent Kenya in the 66th Miss World Competition 2016. However, by an email dated 28th July 2016, the 2nd Respondent received from the 3rd Respondent attachment of nude photographs of the Petitioner. They Respondents therefore proceeded to replace the Petitioner as the representative at the 66th Miss World Competition. For violation of the Petitioner's **right to privacy**, the court awarded a modest compensation to the tune of one million noting that the Petitioner had not sufficient evidence to enable the court assess the damages.	Kes. 1,000,000.00 (1 Million)
4.	*MWK and another –vs- Attorney General and 3 others* [2017] eKLR (Constitutional Petition No. 347 of 2015)	The Petitioner was a form 4 student who was travelling from school to Nairobi along Karatina/ Nairobi road. The Matatu was intercepted by traffic police along the said road and a search	Kes. 4,000,000.00

	By: Justice John M. Mativo	was conducted. During the search, the Police stripped her blouse, lifted her skirt and pulled her under wear exposing her private parts in from of other students. Her nude pictures were also taken and circulated on social media. The court found that this conduct by the Police Officers was an infringement of the Petitioner's right to **dignity, privacy and her right not to be subjected to degrading treatment**.	
5.			

The right to a clean and healthy environment is intertwined to the right to life as was held by the court in *Republic vs Waweru*. Jeopardizing this right would mean that all other rights provided under the chapter four of the bill of rights would not be effectively enjoyed. If the High Court has awarded four million for breach of the right to dignity then the right to a clean and healthy environment would attract a higher award.

Value of Life

'*You can't put a price on life*!' This is usually the reaction in the minds of many when the debate of 'Value of Statistical Life' arises. Environmental disasters highly jeopardize the right to life. They often result in the loss of human life.[386] Setting aside the fact that such fatalities are a direct

[386] UN Economic Commission for Latin America and the Caribbean. *Handbook for Estimating the Socio-economic and Environmental Effects of Disasters* (2003) <

loss to any country, there is intense suffering sustained by the families and society in general.[387] This therefore is a loss to human assets which should be attached a monetary value to enable award of compensation. It is important to note that valuation of human life depends on the context valuation is done and the purpose of the valuation.[388] A valuation of human life in the present circumstances would be for the sole purpose of determining the amount of compensation to be awarded in environmental injuries claims. Valuation of statistical life (VSL) forms an important role in formulating government policies and has previously been used in personal injury cases.[389]

The general rule of compensatory damages is to get a position of ***perfect compensation.***[390] This is achieved by ensuring that the victim has been put in the same utility level that he had before the tortuous act happened.[391] This is therefore meant to place him on the same indifference curve he was before the injury occurred. There has been a long standing debate amongst scholars on whether value of statistical life (VSL) ought to be adopted in assessing liability and determining damages.[392]

Establishing the value of statistical life in the award of compensation would require the joint contribution of economic and legal scholars. WK Viscusi in 'The Flawed Hedonic Damages Measure of Compensation for Wrongful Death and Personal Injury' argues that quite a substantial

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https://www.recoveryplatform.org/assets/tools_guidelines/Handbook_for_Estimating_Socioeconomic2003.pdf > accessed on the 17th June 2019

[387] ibid

[388] Spyros Vliamos and Aristides Hatzis 'The Assessment of Compensatory Damages for Medical Error by the Greek Courts: An Economic Analysis' (March 2009) *Research Gate* < https://www.researchgate.net/publication/228322702 > accessed on 17th June 2019

[389] WK Viscusi 'The Flawed Hedonic Damages Measures of Compensation for Wrongful Death and Personal Injury' (2007, Vol 20) *Journal of Forensic Economic* < https://law.vanderbilt.edu/files/archive/272_Flawed-Hedonic-Damages-Measure-of-Compensation-for-Wrongful-Death-and-Personal-Injury.pdf > accessed on 18th June 2019

[390] Spyros Vliamos and Aristides Hatzis 'The Assessment of Compensatory Damages for Medical Error by the Greek Courts: An Economic Analysis' (March 2009) *Research Gate* < https://www.researchgate.net/publication/228322702 > accessed on 17th June 2019

[391] ibid

[392] ibid

economics literature have viewed the VSL in terms of tradeoffs between money and small risks of death.'[393] This therefore emphasizes the need of the legal profession to get a helping hand from scholars in the economics discipline to effectively have VSL determine the amount of compensation. The formula developed therein ought to consider factors like those who are protected are young or old, sick or healthy, or involuntarily exposed to risk or voluntarily exposed to the said environmental risk.[394] The need of considering such factors have been emphasized by the courts for far too long in the award of compensation in accident cases. The High Court in ***Kenya Breweries –vs- Saro***[395] held that:

> [In] the assessment of damages to be awarded in this sort of action, the age of the child is a relevant factor to be taken in to account so that in the case of say a thirteen year old boy already in school and doing well in his studies, **the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law**.

This zeros down to the value of life. The value of the four year old child in school has a higher value than that of a new born whose abilities are yet to be ascertained, while the value of life of an advocate in practice would be higher than that of the four year old who is still in early years of

[393] WK Viscusi 'The Flawed Hedonic Damages Measures of Compensation for Wrongful Death and Personal Injury' (2007, Vol 20) *Journal of Forensic Economic* < https://law.vanderbilt.edu/files/archive/272_Flawed-Hedonic-Damages-Measure-of-Compensation-for-Wrongful-Death-and-Personal-Injury.pdf > accessed on 18th June 2019 [113]
[394] Spyros Vliamos and Aristides Hatzis 'The Assessment of Compensatory Damages for Medical Error by the Greek Courts: An Economic Analysis' (March 2009) *Research Gate* < https://www.researchgate.net/publication/228322702 > accessed on 17th June 2019 [240]
[395] [1991] KLR 408

learning. VSL would offer a more accurate estimation of damages than the traditional award of damages.[396]

Calculating Value of Life in Kenya

Our courts have had the opportunity to determine the value of life in accident cases. This has famously been referred to as the 'loss of expectation of life'. The courts however have not provided a formula of calculating this value of life. This has been determined as a general damage which has been left to the discretion of the courts. Clearly, no amount of money would be equivalent to the life that has been lost.[397] However, setting a reasonable amount of damages for loss of life has had inconsistent in courts in different cases. The tabular presentation herein below expresses how courts have awarded damages previously:

NO.	CASES	AGE (Victim)	AMOUNT (KES.) (Awarded for Value for Life)	FACTORS (Considered)
1.	*Chen Wembo and 2 others –vs- IKK and another (suing as the legal representative of the estate of CRK [Deceased]* [2017][398]	12	80,000.00	No evidence that he was in school No level of his abilities
2.	*Chhabhadiya Enterprises Limited and another –vs- Gladys Mutenyo Bitali (Suing as the Personal*	12	100,000.00	Deceased was in class 4 and expected to be a lawyer

[396] ibid

[397] JH Arubdell and AR Watson, 'Loss of Expectation of Life' < http://classic.austlii.edu.au/au/journals/ResJud/1941/60.pdf > accessed on 28th June 2019

[398] [2017] eKLR (Civil Appeal No. 32 of 2014)

	Representative of the Estate of Linet Simiyu (Deceased) [2018][399]			Deceased could help in household duties
3.	*Kenya Wildlife Services –vs- Geoffrey Gichuru Mwaura* [2018][400]	13	150,000.00	Child was vibrant with no known discipline problem He was hoping to become an engineer
4.	*Cherengany Hills Limited –vs- BWM* [2018][401]	18	200,000.00	Form II student
5.	*Kimunya Abednego alias Abednego Munyao –vs- Zipporah S. Musyoka and another* [2019][402]	41	100,000.00	(Because it is the *conventional global figure ordinarily awarded by courts*)
6.	*JNK (Suing as the legal representatives of the Estate of MMM (Deceased) –vs- Chairman Board of Governors […] Boys High School* [2018][403]	16	100,000.00	Was celebrating his KCSE performance before death

[399] [2018] eKLR (Civil Appeal No. 10 of 2017)
[400] [2018] eKLR (Civil Appeal No. 6 of 2018)
[401] [2018] eKLR (HCCA No. 18 of 2017)
[402] [2019] eKLR (Civil Appeal No. 173 of 2017)
[403] [2018] eKLR (Civil Suit No. 12 of 2013)

7.	*Joseph Kahiga & Paul Mathaiya Kahiga (Suing as the Administrators of the Estate of the Late* ***Lydia Wanjiku Kahiga*** *and* ***Elizabeth Murugi Kahiga*** *– Both Deceased) –vs- World Vision Kenya and 2 others* [2014][404]	EMK - 35 LWK-57	60,000.00 60,000.00	An employee of KARI earning a net of Kes. 49,241.00 She was not married Did not have children Had adult children It was alleged she was in business but not proved
8.	*PNM and another (the legal representative of Estate of LMM) – vs- Telcom Kenya Limited and others* [2015][405]		100,000.00	(*Conventional sum based on the decision of* ***Makano Makonye Monyanche vs Elizabeth Njeri Obuong*** [2015]
9.	*Philip Wanjea and another –vs- Ahmed Liban and Shukri Ahmed Liban (suing for and on behalf of the Estate of Habib Liban* [2016][406]	60	100,000.00	The amount awarded of Kes. 750,000.00 by lower court set aside. Followed the decision in *Philip Musyoka Mutua – vs- Veronica Mbulo*

[404] [2014] eKLR (Civil Suit No. 63 of 2010)
[405] Civil Case No. 419 of 2011
[406] [2016] eKLR (Civil Appeal No. 343 of 2014)

				Mutiso [2013] where the court had awarded Kes. 100,000.00 for a deceased aged 65

It is important to appreciate that a value has to be attached in case of death including death of a child. The Court of Appeal in ***Kenya Breweries –vs- Saro***[407] rendered itself that in the Kenya society, the mere presence of child in a family, whatever the age and whatever the ability is a valuable asset. In the African society, young children help their family by looking for cattle or caring for young ones and once they become adult they are expected to and do in variably take care of their aged parents.[408]

From the precedents above, it is clear that courts have attached some value to a lost value. Interestingly, the courts have in most circumstances awarded an amount between Kes. 80, 0000.00 and 200,000.00 despite their varying differences. Having a *conventional global sum* awarded for all death would mean that persons who had special talents and abilities are paid similar amounts to every other person who were yet to discover their abilities. Taking a hypothetical analogy, the death of a deputy president or a school of law professor would be awarded almost a similar amount to the death of a form 4 student. From the above tabular presentation of cases that have been decided by our own courts, in *Kimunya Abednego alias Abednego Munyao* the court awarded Kes. 100,000.00 for a 41 year old arguing that it was the *conventional global figure ordinarily awarded*

[407] [1991] KLR 408
[408] *Kenya Breweries Limited –vs- Saro* (1991) eKLR

by courts. In contrast, a 13 year old was also awarded with Kes. 150,000.00 in *Kenya Wildlife Services –vs- Geoffrey Gichuru Mwaura*. Justice P Nyamweya in ***Hyde Nthenya Musili and another –vs- Chi Wu Yi Limited and another***[409] it is a generally accepted that a conventional award for loss of expectation of life is Kes. 100,000.00.

This is proof that the amounts awarded by our courts not only depend on the conscience of the judge or magistrate but also on no set principles. They are however justified by the phrase '*conventional global figure ordinarily awarded by courts.*' Such an award conventional figure does not effectively determine the factors that would determine the value of person's life. The death of school of law professor would have to be paid higher than his student because he could be in the pick of his years and his abilities are well established, his contribution well known. Therefore, in the endeavor to compensate for life lost, the court needs to take into account the different circumstances and abilities the deceased had.

Calculating the Value of Life using the future income approach

The **UN Economic Commission for Latin America and the Caribbean** in their 'Handbook for Estimating Environmental Effects of Disasters' have suggested that the estimation of '**Value of a Lost Life'** would possibly *would require calculating the **future income** the deceased would have generated **assuming** that each had fulfilled their normal life expectancy*.[410] This can be arrived by combining the *resulting number of **person-years*** with the expected ***average income*** *over the appropriate time span.*[411] However, it proceeds to acknowledge the short coming of such a process

[409] [2017] eKLR (Civil Case No. 53 of 2014)

[410] UN Economic Commission for Latin America and the Caribbean. *Handbook for Estimating the Socio-economic and Environmental Effects of Disasters* (2003) < https://www.recoveryplatform.org/assets/tools_guidelines/Handbook_for_Estimating_Socioeconomic2003.pdf > accessed on the 17th June 2019 [Para 11]

[411] ibid

is that ***per capita income*** varies from one country to another.[412] This would mean that a human life lost in an underdeveloped or developing country would be worth less than a life lost in a more developed country.

This method has, in different research, been referred to as the *human capital method*[413] and the *human life value approach*. This approach argues that the main impact of the injury is to displace a victim from the employment to a position of continued displacement.[414]

The calculation using the future income and an assumption of the normal life expectancy has previously been used in our courts in accident claims to calculate dependency. In the early days of interpretation of the *Fatal Accidents Act,* **Justice Ringera** (as he then was) in ***Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny and another***[415]held that in finding the annual dependency, (where there is a death), the value is called a ***multiplicand***. This is achieved by taking the *net earnings* [multiplicand] and multiply it with a reasonable figure representing years expected to live [multiplier].[416] In choosing the multiplier, the court considers the 'expectation of life and dependency of the dependents and the chances of life of the deceased and dependents.'[417] The choice of multiplier is a matter of the courts discretion which has to be exercised judiciously with reason.[418]

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[412] ibid

[413] Social Value UK 'Valuation of a Life' [9th June 2016] < http://www.socialvalueuk.org/app/uploads/2017/08/Valuation-of-a-life.pdf > accessed on 4th July 2019

[414] Z Butt, S Haberman and R Verrall 'Calculating Compensation for Loss of Future Earnings: Estimating and Using Work Life Expectancy' [2008] *Journal of the Royal Statistical Society* < https://www.researchgate.net/publication/4993242_Work_Life_Expectancy_Calculating_Compensation_for_Loss_of_Future_Earnings/link/5b54f9baa6fdcc8dae3c1728/download > accessed on the 4th July 2019

[415] Nairobi HCCC No. 1638 of 1988 (UR)

[416] *Ezekiel Wangui Thairu –vs- Hon. Ezekiel Barngetuny and another* Nairobi HCCC No. 1638 of 1988 (UR)

[417] *Chen Wembo and 2 others –vs- IKK and another (Suing as the legal representative and administrators of the estate of CRK (Deceased)* [2017] eKLR (Civil Appeal No. 32 of 2014)

[418] *Board of Governors of Kangubiri Girls High School and another –vs- Jane Wanjiku* Civil Appeal of 2014 (Nyeri) eKLR

According to the Court of Appeal in *Chunibahia J. Patel and another –vs- P.F Hayes and another*,[419] *w*hen considering such an award, the court considers the age and expectation of the working life of the deceased and *consider the ages and expectations of his dependent* and the *net earnings*. This enables the court determine the annual value of dependency which then established by multiplying a figure representing so many years purchase.[420]

Therefore, this formula is well entrenched in our legal system as a determinant of the amount of money the dependents will require as compensation for loss of the life. Use of income as a determinant of value of life is however faced by numerous challenges and criticism. The very proponents, the **UN Economic Commission for Latin America and the Caribbean** in their 'Handbook for Estimating Environmental Effects of Disaster' have argued that per capita income varies from one country to another. Therefore, the use of income as the yardstick to determine the human asset would trivialize a life lost in a developing state compared to that lost in a developed state. This becomes relevant in environmental law since most times, environmental injury have trans-boundary effect and compensation maybe sought in different countries. This would also encourage forum shopping.

VSL using this approach would require that several assumptions are made. These assumptions include age, life expectancy and the possible increases in future earnings likely to occur.[421] There is also the assumption that each victim will follow his or her pattern of life expectancy at successive ages.[422] Social Value UK argue that there would be a problem in the valuation as there exist income

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[419] (1957) EA 748; *Moses Akumba and another –vs- Hellen Karisa Thoya* [2017] eKLR (Civil Appeal No. 17 of 2015 and 18 of 2015)

[420] *Chunibahia J. Patel and another –vs- P.F Hayes and another* [1957]EA 748; *Moses Akumba and another –vs- Hellen Karisa Thoya* [2017] eKLR

[421] Social Value UK 'Valuation of a Life' [June 2016] < http://www.socialvalueuk.org/app/uploads/2017/08/Valuation-of-a-life.pdf > accessed on 4th April 2019

[422] Wendy Max and others 'Valuing Human Life: Estimating the Present Value of Lifetime Earnings, 2000' < https://escholarship.org/uc/item/82d0550k#page-1 > accessed 4th July 2019

inequalities between different groups, example a male life is likely to be valued much higher than a female life.[423] Worst case scenario, persons with low potential earnings such as long-term unemployed, persons living with disabilities or children will have a VSL of almost nil when this method is used. This is because they might not and/ or have no net income as envisaged in this approach. This approach therefore does not consider the intangible factors which dictate the value of life at different ages and levels in life.

CONCLUSION

Undoubtedly, the Environment and Land Court (ELC) has an obligation develop a rich jurisprudence on the issue of compensation when there is a breach under Article 42 of the Constitution. While it is a legal truism that no amount of damages can fully restore an injured person or loss amenities, it is imperative to assess what amounts to **reasonable damages** where an injury has occurred. An award for damages for compensation entails judicial discretion which should be exercised judicially.

As set out by the Court of Appeal in *Cecilia W. Mwangi vs Ruth W. Mwangi* a claimant strictly prove the particulars of damages sought in the claim documents. For special damages, they must be expressly pleaded and then strictly proven. This is because they are not a direct or probable consequence of the act complained of and may not be inferred from the action under investigation by the court.

[423]Social Value UK 'Valuation of a Life' [9th June 2016] < http://www.socialvalueuk.org/app/uploads/2017/08/Valuation-of-a-life.pdf > accessed on 4th July 2019

When awarding compensation, the court should bear in mind that this is a breach of fundamental right. The Court in *Jamlick Muchangi Miano vs the Attorney General*[424] set out the principles of awarding compensation to include:

a) *Monetary compensation for violation of fundamental rights is an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
b) *Such a claim is based on strict liability;*
c) *Such a claim is distinct from, and in addition to remedy in private law for damages for tort;*
d) *This remedy would be available when it is the only practicable mode of redress available*
e) *Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable*

This test ought to be used by courts in the award for compensation when the right under Article 42 of the Constitution.

When awarding damages, the court should strive to use the common law rules in a flexible manner. This is to ensure that each circumstance of the case is give its unique and special consideration. Example, while awarding damages for value of life lost, courts should endeavor to adopt more scientific methods before attaching a particular value.

[424] [2017] eKLR (Constitutional Petition No. 300 of 2015)

CHAPTER 4
COMPARATIVE ANALYSIS: KENYAN VIS-À-VIS NIGERIAN JURISPRUDENCE

Awarding compensation in cases of environmental injury is part of the greater plan of achieving environmental justice to our citizenry. Debates on environmental justice have been taken positively around the globe with countries such as Nigeria experienced a high number of such cases.

NIGERIA

Nigeria has witnessed the debate on environmental justice mostly focusing on distribution of resources and amenities within the country.[425] This debate was influenced by the discovery of large deposits of hydrocarbons at Oloibiri situated in the River Niger Delta.[426] The commercial exploration and exploitation of the said petroleum resources (hydrocarbons) began in 1965 hence had the debate on compensation of persons injured by these activities begin quite early in the day compared to Kenya.[427] Though Libya has larger oil reserve, Nigeria remains the largest producer of oil in Africa having produced 2.6 million barrels per day for the last eighteen (18) years.[428]

This is large statistics makes Nigeria a good country to study on the development of legal jurisprudence of environmental justice especially the issue of compensation of the victims in cases of oil leakages among other causes of injuries. The metaphor '***oil is black gold***' describe the economic importance of this resources as well as the dangers to the environment inherent to crude

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[425] George Nwangwu 'The Evolution of Environmental Justice and Trends: From Social Activism to Mainstream Movement' in *Journal of Environment and Earth Science* (Vol 6, No. 6, 2016) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=2ahUKEwiG5MuL5MHlAhWUfMAKHRZbCU4QFjAGegQICBAC&url=https%3A%2F%2Fiiste.org%2FJournals%2Findex.php%2FJEES%2Farticle%2Fdownload%2F31193%2F32030&usg=AOvVaw2ygx9xprL7adC5prrMuyLj > accessed on 29th October 2019

[426] Patrick D. Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' in *Journal of African Law* (Vol 41, No. 1, 1997) [43-67] < https://www.jstor.org/stable/745668?seq=1#page_scan_tab_contents > accessed on 29th October 2019

[427] ibid

[428] JW Carpenter 'The Biggest Oil Producers in Africa' in *Investopedia* < https://www.investopedia.com/articles/investing/101515/biggest-oil-producers-africa.asp > accessed on 29th October 2019

oil exploration.[429] The discovery of oil and the subsequent oil exploration led to an increase in the economic fortune of Nigeria but also an environmental misfortune due to the drilling and exploration activities.

Recently in 2012, Professor Olubayo Oluduro in '*Oil Exploration and Ecological Damage: The Compensation Policy in Nigeria*' also lamented that the compensation Nigerians receive is often not paid, and when compensation is issued, it is inadequate or delayed hence leaving a more pitiable situation and poorer.[430] Further, he argues that though there is a legal framework protecting the environment, there is no comprehensive legislation that addresses the issue of compensation on injury caused by environmental damage. As such, this is a country that has over the years over-relied on common law when questions of compensation arise.

Nigeria largely relies both on a legislative legal framework and the principles of Common Law in determination of compensation in cases of oil spillage and other environmental hazards. Mostly, the common law remedies have been sought through negligence, trespass to land, nuisance and the rule of *Rylands vs Fletcher*. In some circumstances the court seek refuge in the realm of Equity by granting injunctions to protect the victim from further pollution and injuries.

STATUTORY PROVISIONS

Most prominent is the ***Petroleum Act*** which mandate the oil operators to ensure '*fair and adequate compensation*' is accorded to an owner and/ or occupier of a property that is negatively affected

[429] Vitalis Obijiofor Aginam 'Exploring the Multiple Dimensions of Compensation for Oil Pollution in Nigeria: The Uncertain Promise of the Law' (Master of Laws Thesis, Queen's University, Kingston, Ontario, Canada, 1998)

[430] Olubayo Oluduro 'Oil Exploration and Ecological Damage: The Compensation Policy in Nigeria' in *Canadian Journal of Development Studies* (Vol 33, issue 2012) < https://www.tandfonline.com/doi/abs/10.1080/02255189.2012.693049 > accessed on 30th October 2019

by the oil exploration activities.[431] It further contemplates pollution to include pollution of farmlands, fishing rives by oil spillage, destruction of cash crops and economic trees. Unfortunately, it does not envisage personal injury of its citizenry e.g. noise pollution as a result of the exploration activities would be harmful to residents within that area.

Further, the ***Oil Pipelines Act,*** Section 11(5) obligates a holder of a pipeline to pay compensation to any person who suffers loss or damage as a result of a leakage or breakage of an oil pipeline. This Section envisages injury to any person whose land or interest to land has been infringed[432] and to personal injury caused by neglect of the holder of the oil pipeline.[433] However, it excludes compensation where the injury is caused by malicious activities of third parties or damage on the claimant's own default.[434] This is a provision heavily borrowed from the common law jurisprudence on negligence. Interestingly, the **Oil Pipelines Act** require that compensation payable to a party to be agreed amongst the parties to the dispute.[435] However, where these parties cannot agree on what amount to '*fair and reasonable compensation'* recourse from the court can be sought.[436]

On the other hand, the **Nigerian Minerals and Mining Act, 2007** require that all holders of mineral titles should minimize, manage and mitigate environmental impacts from mining activities.[437] Further, the exploration activities should not be undertaken without an environmental impact assessment report being carried out.[438] Of great interest is Section 125 of the Minerals and Mining Act which require that the holder of mineral titles shall pay compensation to the owner or

[431] Petroleum Act, 1st Schedule Article 36
[432] Oil Pipelines Act Section 11(5) (a)
[433] Ibid Section 11(5) (b)
[434] ibid
[435] Ibid Section 5(5)
[436] ibid
[437] Minerals and Mining Act Section 118
[438] Ibid Section 119

occupier of land which is affected exploration activities.[439] Further, compensation shall also be accorded to a person who suffers damages as a result of pollution of any source of water as a result of exploration activities by the holder of a licence.

These statutes among others have emphasized on the legal right for compensating victims of pollution and oil spillages adequately. Though, the above statutes amply and in depth provides for the right to receive 'fair and reasonable compensation' they have fallen short of providing for the principles applicable in determining the amount of the award. It is for this reason that the Nigerian Courts have over the ages sought for guidance under common law in determining this issue. And the short fall is that, these formal provisions have not resulted to ensuring victims are adequately compensated.

COMMON LAW

For a longtime, Nigeria applied the remedies in nuisance, negligence, trespass to land and the rule in *Rylands vs Fletcher* for determination of compensation arising from environmental degradation.[440] It was for this reason that scholars of different living in different times in Nigeria have complained of the insufficiencies of the law. As early as 1997, Patrick D. Okonmah in '*Right to Clean Environment: The Case for the People of Oil-Producing Communities in Nigerian Delta*'[441] lamented that the available statutory regulation in the oil industry provides little or no protection for the victims of oil pollution and as such the victims are left to the '*vagaries of common law regimes based on nuisance, trespass to land, rule in* ***Rylands vs Fletcher*** *and*

[439] Minerals and Mining Act Section 125(a)
[440] Ibid [35]
[441] Patrick D. Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' in *Journal of African Law* (Vol 41, No. 1, 1997) [43-67]

negligence. This would therefore demand that a complainant/ claimant proves the existence of a cause of action and discharge the burden of proof which includes causation, foreseeability and damage. However, despite discharging this burden of proof, the award issued by the court is inadequate to satisfy his loss.[442]

Application of Common Law in Nigeria

Though discovery of oil in Nigeria had a phenomenon influence to its economy which led to 90% reliance by the economy, the resultant oil spillages cannot be extremely eliminated.[443] Oil pollution is a common feature in Nigeria and other oil producing countries. This could manifest itself as an oil spillage, gas flaring or effluent discharge or any other form of pollution.[444] As a result of such spillages and activities involved in exploration of the oil, farmlands are destroyed, sources of drinking water are poisoned and the general wellbeing of the citizenry is greatly jeopardized.[445] The principles of awarding *special damages* and *general damages* as applicable in common law is used.

For ***special damages***, they must be specifically be pleaded and it is incumbent upon the claimant to prove them on a balance of probability. This is because they are not a direct natural or probable consequence of the act complained of and may not be inferred from the actions under determination by the court. Where payments were made, receipts must be produced before they are awarded. This is a restitution of the expenses incurred by the Claimant as a result of the activities involved by the Defendant.

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[442] ibid

[443] Patrick D. Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' in *Journal of African Law* (Vol 41, No. 1, 1997) [45]

[444] TC Eze 'Redress for Pollution Damage under Common Law in Nigeria: An Appraisal' in *Journal of Law and Global Policy* (Vol. 3 No.1 2018) < https://iiardpub.org/get/JLGP/VOL.%203%20NO.%201%202018/REDRESS%20FOR%20POLLUTION.pdf > accessed on 30th October 2019

[445] ibid

For **general damages**,

Trespass to Land

This is a tort that has traditionally been describe as to arise when there is the *intentional* and *wrongful* invasion of another's real property. This is the unjustifiable interference by a person with the possession of land of another.[446] This is a tort that maybe committed by the physical invasion by a person or causing objects to invade into another's property.[447] It may therefore be brought by a person who is in physical possession of the property.[448] Actions under this tort are actionable *per se* without the need to prove intention or negligence on the part of the tort feasor. Therefore, all a claimant needs to prove is that oil spilled to his property from the defendant's facilities and did some mischief hence the injuries.[449] Once these tenets of trespass to land are proved, the court shifts to determine the question of quantum of damages or restoration to the position was before the tort occurred.[450]

This action arises only when there is unlawful entry on another person's land. Where oil spillage trespasses to another person's property, the oil pipeline holder or the holder of the exploration is required to pay compensation. Part 111 of the *Petroleum (Drilling and Production) Regulations* require oil operators to obtain a licence or a lease of an area he prospects to produce oil. It is this licence or lease that obligates him to carry out operations within the area covered. Therefore, an action for trespass will lie against trespass if his actions are beyond the area of operation.[451] In

[446] WV Rogers *Winfield and Jolowicz on Tort* (18th Edn, Sweet and Maxwell, London, 2010)
[447] Patrick D. Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' in *Journal of African Law* (Vol 41, No. 1, 1997) [48]
[448] Clerks and Lindsell *Torts* (22nd Edn, Sweet and Maxwell, 2018)
[449] ibid
[450] ibid
[451] Vitalis Agina, 'Exploring the Multiple Dimensions of Compensation for Oil Pollution in Nigeria: The Uncertain Promise of the Law' (LLM Themis, Queen's University, Canada, 1998) < https://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0002/MQ28171.pdf > accessed on 5th November 2019 [54]

S.D. Lar vs Stirling Astaldi (Nigeria) Ltd[452] the Supreme Court of Nigeria had an opportunity to determine the question of award of damages where there was a question of trespass to land. The court held that the prima facie measure for determining damages for all torts affecting land is to determine the *cost of reasonable reinstatement*.

This tort is most relevant when damage has been incurred on the property. Where personal injury has occurred, the courts would be hesitant to rely on this tort in awarding the amount of compensation.

Nuisance

This arises when a person's act or omission causes interference, annoyance or disturbance to another person who is enjoying either a public right or private right. There hasn't been much success in actions of nuisance in oil pollution cases as courts have often concluded that the nuisance is of a public nature hence re-dressable only through the Attorney General.[453] This was the position the Supreme Court took in *Amos vs Shell B.P. Petroleum Development*[454] where the court insisted that activities leading to the blockage of Koko Creek a public waterway constituted to public nuisance and such an action may only be brought by the Attorney General. Alternatively, to get an award under public nuisance, the claimant must prove that he is the most affected and has a greater injury than the other members of the public.[455]

[452] (1977) LPELR-SC 392/ 1975; (1977) 11-12 SC, 53
[453] Patrick D. Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' in *Journal of African Law* (Vol 41, No. 1, 1997) [48]
[454] 3PLR/1977/12 (SC)
[455] Vitalis Agina, 'Exploring the Multiple Dimensions of Compensation for Oil Pollution in Nigeria: The Uncertain Promise of the Law' (LLM Themis, Queen's University, Canada, 1998) < https://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0002/MQ28171.pdf > accessed on 5th November 2019 [52]

Interestingly, the Supreme Court of Nigeria in ***Adediran and Akintyjoye vs Interland Transport Limited***[456] held that the restrictions borrowed from the common law in actions of public nuisance were inconsistent with the provisions of Section 6(6) of the 1979 Constitution. This had the effect of declaring locus standi on any person who is affected by such an action. Though the Constitution of Kenya 2010 has since allowed any Kenyan to institute action under Article 42 of the Constitution, courts should make a further step to allow Kenyans bring actions on public nuisance. In the end, this would imply that there is no difference between public and private nuisance. A nuisance is a nuisance despite the nature (whether private or public).

Justice Denning LJ. in ***Southport Corp vs Esso Petroleum Co. Limited***[457] famously noted that '*nuisance covers a multitude of sins, great and small*.' Thus, this action has been pursued in pollution by oil and noxious fumes from exploration sites, offensive smells from premises used to keeping animals or noise from industrial installation.[458] Lord Wright on his part noted that '*a balance has to be maintained between the right of the occupier to do what he like with his own, and the right of his neighbor not to be interfered with*.'[459]

Though nuisance is key in indemnifying victims for majority of sins, its application to environmental claims is faced with a multiple of challenges. The claimant must prove that there has been interference with his beneficial interests over a property and as result of the said unreasonable conduct of the polluter, he has suffered an injury.[460]

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[456] [1991] SC 119
[457] (1954) 2 QB 182 [196]
[458] Vitalis Agina, 'Exploring the Multiple Dimensions of Compensation for Oil Pollution in Nigeria: The Uncertain Promise of the Law' (LLM Themis, Queen's University, Canada, 1998) < https://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0002/MQ28171.pdf > accessed on 5th November 2019
[459] *Sedleigh-Denfield vs O'Callagham* (1940) AC 880 [903]
[460] Vitalis Agina, 'Exploring the Multiple Dimensions of Compensation for Oil Pollution in Nigeria: The Uncertain Promise of the Law' (LLM Themis, Queen's University, Canada, 1998) <

Negligence

Negligence is a *breach of duty* to take *care* not to *injure the Claimant or any other persons*, and as result of such a breach of duty of care, the claimant/ plaintiff has suffered a *legal injury*.[461] Unlike trespass to land, negligence is not actionable *per se* since it is only established when the plaintiff proves having suffered a legal injury as a result of the defendant's activities.[462] For this tort to be established, the plaintiff must prove complex tenets involving prove of ***causation***, ***duty of care, breach of duty of care*** and ***damage or injury suffered*** because of the ***breach of duty of care***.[463] It is for these tenets that this tort becomes the most complex to prove. The most difficult tenet to prove in cases of oil pollution is that the '*pollution was caused by the defendant's failure to adhere to proper and accepted practices*.'[464] The fact that a claimant may not possess the necessary knowledge required in the oil production and exploration field makes it more difficult to prove this fact. The Supreme Court of Nigeria in *Justice K.O. Anyah (ltd) vs ICH*[465] summed that the plaintiff has to prove on a balance of probability that:

i) The defendant owed him a duty of care

ii) There was a breach on the duty of care

iii) Causal connection between the defendant's careless conduct and the damage

iv) The defendant suffered an injury arising from the breach of duty of care

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https://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0002/MQ28171.pdf > accessed on 5th November 2019 [52]

[461] Amaka G Eze 'The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria' in < *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjKvYrYtNjlAhVMqxoKHaSKDmEQFjAAegQIAxAC&url=https%3A%2F%2Fwww.ajol.info%2Findex.php%2Fnaujilj%2Farticle%2Fdownload%2F136282%2F125771&usg=AOvVaw1brLIOUrk8ZNzXvVYrgMH* > accessed on 7th November 2019

[462] ibid

[463] WV Rogers *Winfield and Jolowicz on Tort* (18th Edn, Sweet and Maxwell, London, 2010)

[464] Patrick D. Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' in *Journal of African Law* (Vol 41, No. 1, 1997) [49]

[465] (2003) 4 WRN 1

Key to proving this tort is the neighbor principle which help in establishing sufficient proximity between the plaintiff and the defendant such that the defendant owes a duty of care to the plaintiff.[466] This was first established by the House of Lords in *Donoghue vs Stevenson*[467] where the court held that a manufacturer shall be liable in negligence to the plaintiff consumer in respect of a bottle containing its product in which noxious matter is found.[468] Lord Atkin reasoned that:

> The rule you are to love your neighbor as yourself becomes in law that you must not injure your neighbor… you must take *reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbor*. Who then is your neighbor? The answer seems to be *persons who are closely and directly* affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Exploration activities and oil spillages are potential environmental hazards and lead to degradation of the ecosystems damaging the beaches and coastlines, farm lands, forests and worse of it affecting human health. When an oil spillage occurs, the first headache for a plaintiff is to establish the existence of a duty of care owed to the person or property affected by the incident.[469] Example, when it is wild birds and free swimming fishes, the plaintiff has to establish some proprietary or possessory interests in respect to such things before damages are awarded.[470] Such strict requirements make it difficult to benefit from this tort.

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[466] WV Rogers *Winfield and Jolowicz on Tort* (18th Edn, Sweet and Maxwell, London, 2010)
[467] (1932) A.C 562
[468] [468] Amaka G Eze 'The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria' *supra*
[469] ibid
[470] ibid

Most of the claims brought under this tort have however been countered with an avalanche of defences.[471] In *Shell Petroleum Development Company vs Chief Otoko and others*[472] the Plaintiffs sought damages arising from negligence of the defendants who had allowed an oil spillage to the farmlands and fishing ponds. The High Court awarded them damages. However, on Appeal, the Court noted that the oil spillage had been caused by an act of third parties who had unscrewed a valve in the pipeline facility.[473] The simple argument by the Appellant that any person who can handle a spanner could unscrew the valve took the day thereby denying compensation to thousands of claimants. The Court of Appeal noted that the incident was not foreseeable hence negligence was not proved.[474] The Claimants' efforts to insist that due to the volatile political climate in the Niger- Delta, the Appellant ought to have built a their facility in way that malicious third parties could not have been able to unscrew the pipeline manifold did not see the end of the day. This was however, circumstances which the court ought to have applied the rule in *Rylands vs Fletcher*.[475]

In *Chinda and 5 others –vs- Shell Petroleum Development Company Limited*[476] where the Plaintiffs had sued under negligence for compensation doe damage to their trees, buildings and land occasioned by gas flares from the Defendant's gas flare site. The court held that the Plaintiffs had not proved how the Defendant was negligent in operation of its flare site. It was unthinkable

[471] TC Eze 'Redress for Pollution Damage under Common Law in Nigeria: An Appraisal' in *Journal of Law and Global Policy* (Vol. 3 No.1 2018) < https://iiardpub.org/get/JLGP/VOL.%203%20NO.%201%202018/REDRESS%20FOR%20POLLUTION.pdf > accessed on 30th October 2019
[472] [1990] 6 NWLR 693
[473] *Shell Petroleum Development Company vs Chief Otoko and others* [1990] 6 NWLR 693
[474] ibid
[475] TC Eze 'Redress for Pollution Damage under Common Law in Nigeria: An Appraisal' in *Journal of Law and Global Policy* (Vol. 3 No.1 2018) < https://iiardpub.org/get/JLGP/VOL.%203%20NO.%201%202018/REDRESS%20FOR%20POLLUTION.pdf > accessed on 30th October 2019
[476] [1974]

how the court would expect the plaintiffs to know the technicalities of operating a gas flare site.[477] The court ought to have appreciated that the Defendant in having flaring unused gas, for which it would have been **strictly liable** to the victims, whether negligence is proved or not.[478]

Strict Liability: The Rule in *Rylands vs Fletcher*[479]

This is best explained in the words of Justice Blackburn that '*any person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, if* ***prima facie*** *answerable for all damages which is the natural consequence of its escape*.' Lord Cairns on Appeal remarked that the defendant is liable because he had made a *'non-natural use'* of his land. This is was the notable introduction of the principle of **absolute liability**.[480] This rule has been used has been used for explosions, gas, fire, electricity, oil noxious fumes, vibrations etc.[481]

This rule envisions the concept of strict liability making it very relevant to the redressing of environmental damage. Therefore, in the context of oil and gas as used in Nigeria: *a person or a company who is engaged in a business or activity that is likely to endanger the lives and/ or properties of the members of the host community, will be* ***strictly liable*** *for any damage and/ or harm caused to the said members of the host community as a result of failing to keep the said oil and gas from escaping from their confinement*.[482]

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[477] TC Eze 'Redress for Pollution Damage under Common Law in Nigeria: An Appraisal' in *Journal of Law and Global Policy* (Vol. 3 No.1 2018) < https://iiardpub.org/get/JLGP/VOL.%203%20NO.%201%202018/REDRESS%20FOR%20POLLUTION.pdf > accessed on 30th October 2019

[478] ibid

[479] (1868) LR 3 HL 330

[480] WV Rogers *Winfield and Jolowicz on Tort* (18th Edn, Sweet and Maxwell, London, 2010)

[481] Ibid

[482] ibid

The application of this rule in Nigeria is best explained in *Umedge vs Shell B.P. (Nigeria) Limited*[483] where the Plaintiffs sought for damages after the Defendants allowed crude oil to escape from their facility and drip into fishing ponds and lakes thereby causing damage to the Plaintiffs. This action was brought under the rule of *Rylands vs Fletcher*. Trial court gave judgment in the favour of the Plaintiffs by upholding this rule. The Supreme Court in upholding the judgment by lower court held that:

> [L]iability on the part of the owner or the person in control of an oil waste pit such as the one located in location E in the case in hand exist under the rule in *Rylands v Fletcher, although the escape has not occurred as a result of negligence on their part*.

This was the position of the Court in *SPDC vs Anaro*[484] where though the court dismissed the arguments on the principle of *res ipsa loquitor,* it upheld the rule of *Rylands v Fletcher*. It held that since the Defendant Company had built pipelines carrying crude oil across the land, which oil was capable of endangering farmlands of the Plaintiffs, the Defendants are **strictly liable** when such an escape occurs. The court declared that a person who is in control of petroleum products will be strictly liable for any damage arising from the escape of the petroleum products.[485]

In Conclusion

Though Nigerians have witnessed inadequate or delayed compensation which has left a more pitiable situation, it has a diverse legal framework that requires compensation where injuries have

[483] (1975)
[484] (2000)
[485] TC Eze 'Redress for Pollution Damage under Common Law in Nigeria: An Appraisal' in *Journal of Law and Global Policy* (Vol. 3 No.1 2018) < https://iiardpub.org/get/JLGP/VOL.%203%20NO.%201%202018/REDRESS%20FOR%20POLLUTION.pdf > accessed on 30th October 2019

been incurred as result of exploration activities. Interestingly, the Oil Pipelines Act and the Petroleum Act require that parties attempt an out of court settlement before approaching the courts. This is a way to have the compensation issued without undue delay as well as decongest the justice system. This is a notable thing that Kenya would heavily borrow to its legal framework.

The downside of the Nigerian jurisprudence is that they have used the traditional doctrines of torts under common law strictly. This is without the appreciation that most of the litigants do not have information about the oil and gas trade. The conversation that common law is not static has begun amongst the scholars and it is our hope that the same shall be upheld by the courts therein.

On the other end, this country has placed over reliance on common law in the determination of compensation. Though this has at times been fine tuned to meet the specific needs of this country. An example is the holding by the Supreme Court in *Adediran and Akintyjoye vs Interland Transport Limited*[486] that there is no distinction between public and private nuisance. This would mean that Kenyans would still get recourse even where the legislative framework of compensation is not yet developed. In any case, there is no injury without a remedy.

[486] [1991] SC 119

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

Introduction

The main objective of this study was to establish a pathway that may be used by judicial officers in determining the amount of awards to be given in cases where there is a blatant breach of the right to a clean and healthy environment. This was therefore an effort to identify the principles and/ or tests which a court a seized with the breach of the right under Article 42 of the Constitution would rely on in determining the amount of compensation. This study further considered the applicability and relevance of the common law principles on award of damages in such cases. Finally, the study considered the factors to be considered in in determining the amount of compensation is such cases.

Courts play a critical role in any country as they give effect to legislative framework and executive decrees. Further, with the rise of judicial activism, the judiciary have been an important arm of government in the protection of the bill of rights. Courts have also been in the forefront in determining disputes that have a direct bearing on the environment. It is undisputed that the Environment and Land Court (ELC) has the responsibility to develop environmental law and jurisprudence. Further, climatic change has become a concern of the global community. As such, principles applied by judicial officers in determining the amount of compensation to be awarded to victims of environmental 'raping' ought to be certain and well established. This was there an attempt to set down the basic factor which a court seized with the question of compensation ought to consider.

In the Constitution 1963, the right to a clean and healthy environment was envisaged in the right to a life as explained in *Republic vs Waweru.* Amazingly, the Constitution 2010 proceeded under Article 42 to expressly emphasize on the need of having a clean and healthy environment.

Summary Findings

However, despite such a bold statement on the right to a clean and healthy environment, the Kenyan legal system has not offered the pathway of determining compensation when this right is infringed. This has seen judges award as low as Kes. 30,000.00 for breach of this right despite it having serious health and mental consequences to the present and future generations. The right to life and other rights in the Constitution cannot be effective be enjoyed without jealously safeguarding the right to a clean and healthy environment. It is therefore time that the courts and/ or policies developed a framework and/ or guide for determining awards for breach of this right.

The study established that the Kenyan legal system does not offer a pathway to the award of compensation in cases of environment degradation cases. Though the legal framework has afforded a superb framework for protection of the right to a clean environment and offers remedies for it, it does not offer the way of determining the compensation to be paid as a remedy. This is a luxury that we cannot afford.

In an effort to lay a pathway for awarding compensation in cases of environmental injuries, this study strived to answer the following research question:

a) **Which is the established legal framework for determining compensation in environmental cases?**

The Kenyan legal framework boasts of an extensive and expansive jurisprudence that protects the right to a clean environment. This is a right that enjoys constitutional recognition. Further, the Environmental Management and Co-ordination Act (EMCA) and its subsequent regulations have been key in the establishment of the legal framework. The award of compensation where the right to a clean and healthy environment has been infringed is first envisaged under Article 70(2) (c) of the Constitution. This is further envisaged in the Environmental Management and Co-ordination

Act under Section 3(3) which require compensation for any victim of pollution. The *polluter pays principle* has also been influential in the award of compensation. This is a principle that require the person who is responsible for the creating pollution to be responsible for the damages caused to others. These form the backbone of the discussion of compensation of victims.

b) **What are the principles and test(s) for awarding compensation where environmental liability has been established?**

Throughout the research, it was a clear fact that there is no particular test of awarding compensation in these cases. From a comparison of the jurisprudence from the High Court and the Environment and Land Court, it was clear that the ELC has awarded relatively low awards on the breach of this right under Article 42 of the Constitution.

First, this study concluded that the importance of protection of the right to a clean and healthy environment cannot be overemphasized. Secondly, enjoyment of the other rights including right to life will be jeopardized if the right under Article 42 of the Constitution is not protected. It was for that reason that this study recommended that the Environment and Land Court should borrow heavily from the High Court on award of compensation where there is a breach of this right. The test for award of compensation for breach of rights was well enunciated in the case of *Jamlick Muchangi Miano vs Attorney General*[487] (this is in Chapter 3).

c) **Whether the Common Law guidelines for awarding damages are applicable in the award for compensation in environmental liability cases**

It was clear that courts throughout have heavily borrowed a leaf from the common law in the award for compensation. This is especially evident from the comparative analysis of the Nigerian

[487] [2017] eKLR (Constitutional Petition No. 347 of 2015)

jurisprudence. For a longtime, claims have been instituted and determined under the torts of negligence, trespass to land, nuisance and the rule of *Rylands vs Fletcher*. These rules have mainly been used because of the gap present in law while awarding compensation.

It was clear how some of the stringent requirements under negligence have been used to deny litigants compensation. An example is when the claimant is required to prove how the respondent acted in a negligent manner. For that reason this project proceeded to suggest that in such matters, the court ought to adopt the *strict liability* principle.

Further, where life is lost, the courts award a conventional amount between Kes. 100,000 and Kes. 200,000. It was for that fact that this study recommended that the courts ought to consider the age, achievements among other factors in the awarding. This would ensure that a university professor who is inspiring students is not awarded the same amount as his student.

d) **Factors to be considered in awarding compensation in environmental liability cases**

It was a clear fact that the quantum of compensation is dependent upon facts and circumstances of each case. A court of appeal will set aside an award where the wrong principles have been applied by a court. Factors to be considered by court include the circumstances as stipulated in expert's reports, reasonable damages awardable in the circumstances, breach of a human right and value of life. Most importantly, the court should take the unique circumstances of the case before it before awarding any damages.

e) **What is the role of Environment Impact Assessment and other scientific inquiries in the award of compensation?**

Courts have clearly emphasized the need to have environmental impact assessment reports and other scientific reports as the main basis of proving the extent of the injury. These reports offer the direction in the award.

RECOMMENDATIONS

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

Short-Term Recommendations

The journey in this study was mainly to establish the principles that the court ought to apply in the awarding compensation. The court in the short term (before establishment of the regulations) ought to apply the following principles for the establishment of the jurisprudence:

1. The principles for awarding compensation in cases of environmental liability need to certain, predictable and transparent. Currently, we are in a scenario similar to when equity law developed and it was according to the conscience of him that is the Chancellor. Therefore, the amount of an award is dependent on who is the judge today. To ensure we get similar awards for similar breaches of the right to a clean and healthy environment, principles should be developed to guide the judge's conscience in determining the award.
2. The Environment and Land Court ought to take steps in developing jurisprudence on the '*compensation'* as a remedy. This court should borrow a leaf from High Court in jealously safeguarding the bill of rights. This would mean that awards would be dependent on the circumstances of each case. Therefore, serious violations of this right would receive high compensation awards.
3. The study proceeded to establish the factors that a court ought to consider in awarding compensation for environmental injury cases. This effectively established the principles and/ or test applicable. The said factors include:

a) ***Evaluation as to the nature of Damage-*** *Before an award is issued, an evaluation report is required by the court to enable it determine the nature and the extent of the damage. This would also mean the production of medical reports to ensure that the injury is not only directly linked to the alleged action but also to determine the severity of the injury caused. The severe the injury the higher the award to be issued by the court. Example: The noise evaluation report envisaged in Regulation 6 of the Environment Management and Co-ordination (Noise and Excessive Vibrations) (Control) Regulation ought to enable the court determine the severity of the*

b) ***Reasonableness****- An award for personal injury should be reasonable considering the unique circumstances of each case. An injury as a result of the 1984 Bhopal Gas Leak Disaster which wiped out over 3,800 people and left over half million survivors would demand a higher award to victims of noise pollution who are neighbors to a night club. When considering the circumstances of each case, a court would have to exercise discretion as circumstances of a case will always be unique.*

c) ***Breach of a Bill of Right-*** *Undoubtedly, there is an overlap between human rights and the environment. The right to a clean and healthy environment is protected in Article 42 of the Constitution. Undisputedly, the right to life and other rights would not be effectively enjoyed if a clean and healthy environment is not maintained. Therefore a leaf should be borrowed from the High Court in the award of compensation where there has been a breach of rights.*

d) ***Value of Life-*** *Environmental disasters highly jeopardize the right to life. More often than not, these disasters lead to loss of human life. This therefore would lead to loss of human assets hence the need to attach some monetary value to enable*

award compensation. The determination of value of human life would therefore be for the purpose of determining the amount of compensation in cases of fatalities. This would require a consideration on different factors such as the age of victim, life expectancy, possible incomes, quality of life, and position held and achievements made in life etc.

4. The determination of an award is not a walk in the park but an exercise that requires through proper exercise of judicial mind to ensure there is proper jurisprudence. Therefore, this research is not a conclusive study on determining the award to be issued by a court. Without a doubt, there is so much discretion to be applied by a court in the award of the compensation.
5. The Kenyan Courts could follow the footsteps of Nigerian Court by placing reliance over common law to ensure that all injuries are remedied. This will take care of the gap before the legislature enacts a legal framework for determining the amount of compensation. Though these rules ought to be fine-tuned according to the circumstances of each case.
6. Borrowing a leaf from Nigerian Supreme Court, the courts should readily allow private individuals to institute action in public nuisance hence defying the traditional rules of common law. This is from the understanding that nuisance covers a multitude of sins both great and small. This is to ensure Kenyans are greatly protected.

Medium Term Recommendations

7. **Parliament-** The debate on awarding compensation should be ignited by parliament through public participation. This will ensure that we have a feel what Kenyans feel in their interaction with the jurisprudence on this area. This will form a basis of establishment policies and regulations around this area to cure the existing gap.

Long-term Recommendations

8. The requirement of certainty in law cannot be overemphasized. For that fact, **parliament** ought to move to ensure that policies and regulations around this area are well developed. This will act as the compass in the award of compensation by the courts. Further, the citizens will have an expectation before they move the court in the award of compensation.
9. The principle of polluter pay ought to be given a backing by a statute. This is the principle that forms the basis of compensation around the world and in most international environmental agreements. Since it is well accepted principle around the world, it ought to be given a serious backing of the law and not left for the imagination of the courts.
10. Due to the serious backlog experienced in our courts, the discussion of establishing a body to determine the issue of compensation can be entertained. This can form part of a future research and the public participation recommended to happen first. This would be an effort to ensure such cases are determined by experts.

Future Research

This research is not conclusive on the issue of awards in the injuries cause by environmental disasters. It should be the beginning of this conversation to ensure we get certain and predictable awards. The factors to be considered as outlined in this research is not conclusive but a tip of the iceberg and as such we need to see more ideas on this issues. Judges out there have an opportunity to take this discussion to another level. It is time to borrow a leaf from the High Court on the amazing job it is doing in the protection of the Bill of Rights. As such, it is time the ELC rose to protect the right under Article 42 of the Constitution.

Given another opportunity, the future research would seek to study on the viability of establishing a tribunal to deal with the issue of compensation in environmental cases. This would require the members to have the necessary expertise in environmental cases.

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