

**COMPENSATION: AN ASSESSMENT OF THE COMPENSATION PROCESS
SYSTEM IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

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March 2024

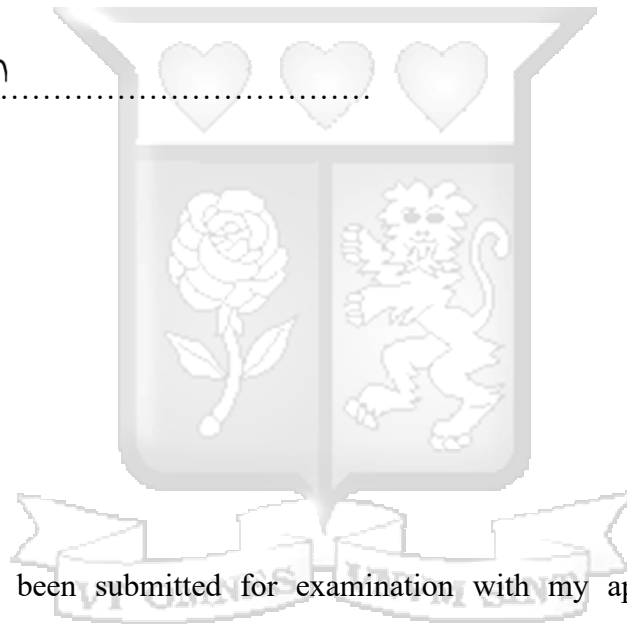
Word count 14732 (excluding footnotes and bibliography)



Declaration

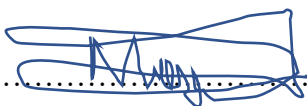
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Date: May 7, 2024

ACKNOWLEDGEMENT

I am extremely grateful to the almighty God for his steadfast guidance throughout my academic journey. My deepest gratitude also extends to my mother for the unwavering love and support she has shown me throughout the four years in school.



LIST OF LEGAL INSTRUMENTS

Legislation

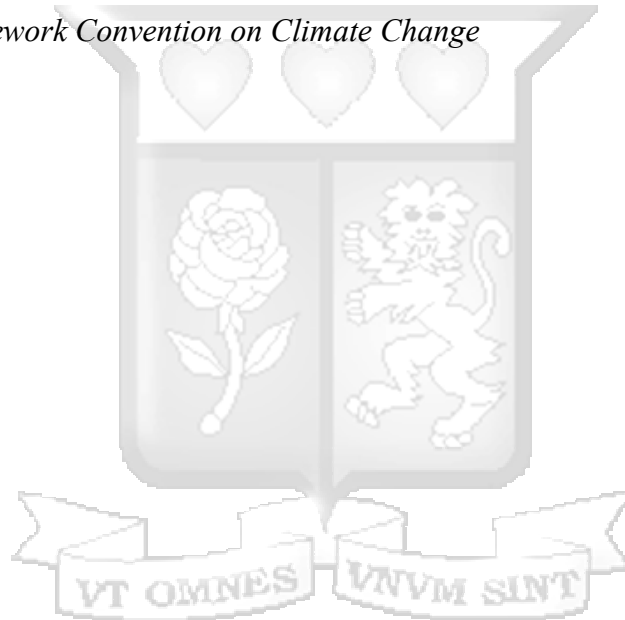
Constitution of Kenya (2010)

Environmental Management and Coordination Act

International Instruments

Rio Declaration on Environment and Development 1992

United Nations Framework Convention on Climate Change



List of Cases

Kenyan Case Law

KM and 9 others v Attorney General and 7 others (2016) eKLR.

County Government of Kitui v Sonata Kenya Limited (2018) eKLR.

Wangari Mathai v Kenya Times Media Trust (1998) eKLR.

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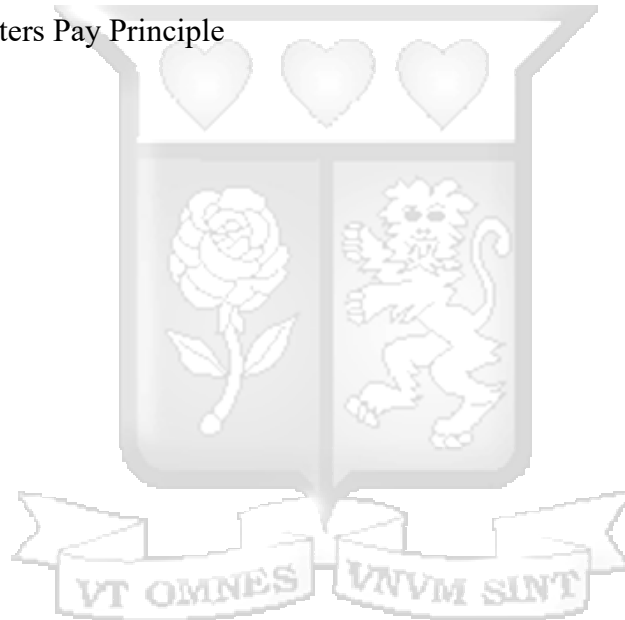
Deepak Nitrie v State of Gujarat (2004), The Supreme Court of India.

Mehta v Union of India (1986), The Supreme Court of India.



LIST OF ABBREVIATIONS

COK	Constitution of Kenya 2010
NEMA	National Environment Management Authority
EMCA	Environment Management and Coordination Act No 8 of 199
UNEP	United Nations Environment Program
NGT	National Green Tribunal
ELC	Environmental and Land Court
ICJ	International Court of Justice
PPP	Polluters Pay Principle



ABSTRACT

Despite the global concern over environmental issues, courts continue to grapple with the challenge of providing adequate compensation for environmental damage. Whereas other constitutional rights are fairly compensated in courts, the right to a clean and healthy environment is yet to reach the same level of recognition. There is a notable discrepancy amongst judges with some taking environmental damage on a serious note and awarding compensation accordingly, while others award comparatively lower compensation amount. This lack of uniformity underscores the need for a standardised approach in courts. The evaluation of damages by the judges in environmental cases still lacks clarity that often leads to a haphazard decision-making process. The absence of clear guidelines in this regard poses significant challenges in addressing compensation issues. Therefore, ensuring consistency in awarding damages is crucial to promote uniformity and environmental justice in court decisions.

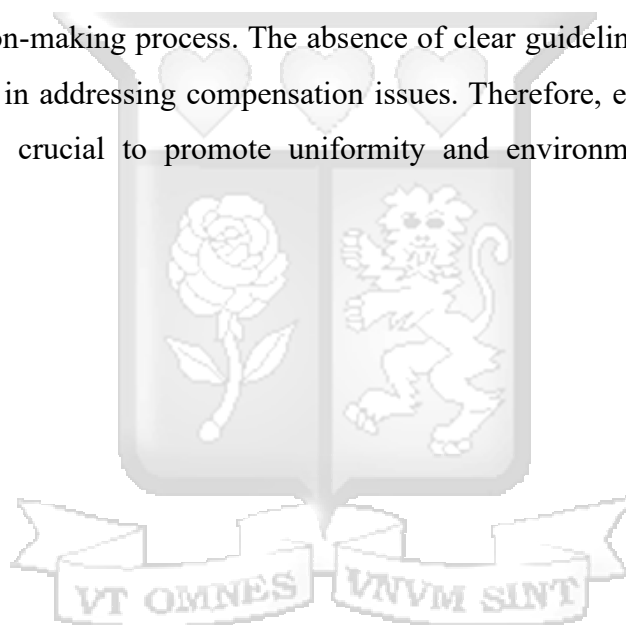


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Examining Judicial Approaches to Compensation in Environmental Liability Cases: Methods, Principles and Challenges.

1:1 Background

As science and technology continue to advance, human activities have become more complex and widespread.¹ Unfortunately, this increased level of human activity has led to increased environmental degradation and threats both human life and vulnerable species. The prevailing development path that advances exploitation of earth resources as if they have a finite capacity to absorb pollutants without detrimental consequences has resulted in actions that has only worsened the situation.² Additionally, the rapid expansion of the global population has led to an increased demand for the earth's resources, further stressing the already overburdened earth only leads to further environmental degradation. As a result, environmental protection and justice have become significant concerns for the global community both in Kenya and around the world. While significant efforts have been spent to compensate victims of environmental pollution, the compensation matrix and compensation determination framework on damages is yet to settle. This is exposing victims to uncertain and unpredictable situations greatly compromising conservation efforts and environmental justice. Establishing a clear mechanism for environmental liability and compensation is crucial in order to protect the environment from further damage.

The acknowledgment of the critical link between the exploitation of environmental resources and human rights was made during the Stockholm Declaration in 1972 which led to the development of environmental constitutionalism.³ This recognition sparked a global movement to embed environmental rights within constitutional framework as a strategy to achieve environmental protection. By doing so, environmental rights became justiciable not only making compensation to their infringement a right by government but also granted the courts a rare opportunity to assess and award damages in litigation.⁴

¹Lynda A, Supanto, Hari P, 'Principle of Obligation to Pay in Terms of Pollution at Sea' Atlantic Press, Advances in Social Science, Education and Humanities Research, Paper Number 2352, 2019,300, <https://www.atlantis-press.com/proceedings/icglow-19/125920822> on 20 December 2023.

² Louis J, Sam A, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope' Springer Publications, 2022,228.

³Boyle A, 'Human Rights and the Environment: Where Next?' 3, The European Journal of International Law vol 23, 2012,622.

⁴ Waweru M, 'Compensation in Environmental Liability Cases in Kenya' Published LLM thesis, University of Nairobi, Nairobi,2019,4.

Compensation questions in environmental cases are not new. The ICJ, the world's court in the case of *Costa Rica v. Nicaragua* 2018 marked the first time the ICJ was called upon to settle an environmental damage compensation claim between two states.⁵ However, the ICJ's approach to calculating damages, specifically the valuation method used faced significant criticism due to the lack of transparency in the judgement.⁶ This issue continues to persist in the international community, highlighting a significant gap in comprehensive laws concerning the compensation of victims in cases of environmental degradation.⁷ The absence of clear and established legal frameworks for determining compensation in the international community currently lacks comprehensive laws that clearly define the means and principles to be employed by the court when awarding compensation. As a result, the process and criteria for assessing the extent of environmental damage and quantifying appropriate compensation remain unclear.

Principles such as the polluter pays principle are effective in determining liability but fall short in specifying the appropriate amount of compensation for victims. The environment court has yet to address the issue of compensation in environmental cases, particularly the challenge of quantifying compensation for environmental degradation. Therefore, given the urgency of this matter there is need to promptly address this situation. By doing so, the utilization of environmental rights can become a more refined instrument for addressing issues of environmental injustice.⁸

Notably, Kenya has made commendable progress by incorporating legal frameworks and international treaties to address environmental concerns. Article 42 of the Constitution of Kenya 2010 (the constitution) provides the right to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations.⁹ Article 69 imposes obligations regarding the environment, mandating the state to guarantee the sustainable exploitation, utilization, management, and conservation of both the environment

⁵ *Costa Rica v. Nicaragua* (2018), The International Court of Justice.

⁶ M Mohan and Els R. Kini, 'Compensation for Environmental Damage: Progressively Casting a Wider Net, but What's the Catch?' 54 *Vanderbilt Journal of Transnational Law* 3, 2021,611-612.

⁷ M Mohan and Els R. Kini, 'Compensation for Environmental Damage: Progressively Casting a Wider Net, but What's the Catch?' 54 *Vanderbilt Journal of Transnational Law* 3, 2021,611-612.

⁸ OECD, *Liability for Environmental Damage in Eastern Europe, Caucasus and Central Asia (EECCA): Implementation of Good International Practices*.

⁹ Article 42, *Constitution of Kenya* (2010).

and natural resources¹⁰ and Article 70 makes provision for the enforcement of environmental rights and redress in case of violation.¹¹

Article 165 of the constitution provides the court with competence to adjudicate the right violation claims. Article 23 of the Constitution empowers the court to fashion appropriate remedies for relief to address a claim for violation of constitutional rights. Article 23 leaves the court with wide powers to grant damages. While the discretion is commendable to allow courts deliver justice to the claimants, the manner of assessing damages, particularly in environmental matters is yet to be settled. While it might be relatively easier to award damages in many other constitutional rights, the peculiarity of the environment, a fact already recognised by the United Nations Environmental Programme (UNEP) warrants special attention. While commendably the judicial officers have raised to the occasion of asserting environmental rights and award compensation to the victims, differing courts are arriving at this decision in a haphazard manner following no predictable or coherent compensation framework. This among many other things saw the court in the case of *KM and 9 others v Attorney General and 7 others 2016* being remitted to the lower court by the appellate court disputing the manner of assessment of the damages and the quantum of damages as a wholly erroneous estimate of damage.¹² Nationally, legislative bodies seem hesitant to establish principles governing the assessment of compensation for the responsible party.¹³ The absence of guidance in this regard poses significant challenges in addressing compensation issues. The polluter pays principle is useful for identifying the responsible party, but it does not establish the specific amount of compensation owed.¹⁴ To address this gap, this study aims to formulate the appropriate principles/ frameworks that courts should employ and articulate a specific valuation method. In doing so, it seeks to contribute to the development of a more robust and transparent legal framework that can be applied; by delineating specific criteria, the argument aims to mitigate the discretionary powers of the judiciary in determining compensation and thereby helps prevent arbitrary decisions and promote fairness in assessing damages.

¹⁰ Article 69, *Constitution of Kenya* (2010).

¹¹ Article 70, *Constitution of Kenya* (2010).

¹² *KM and 9 others v Attorney General and 7 others* (2016) eKLR.

¹³ JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'

http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Ojwang_Paper.pdf

>Accessed on 20th December 2023.

Problem Statement

The awarding of compensation by the courts have seen an increase in inconsistency, uncertainty and differentiated compensations by the courts. This can be tied down to the absence of a compensation framework of awarding environmental damage in Kenya. The specific quantification and distribution of compensation remain areas where a more structured and principled approach is needed. A well-trodden compensation system would bridge this gap, offering a comprehensive and standardized methodology for determining the amount of compensation owed in the aftermath of environmental damage.

Research Objectives

- a) To examine the existing legal and institutional framework that regulates environmental compensation in Kenya.
- b) To identify the key considerations for awarding compensation in environment liability cases to ensure precision, fairness, and consistency in the assessment of damages caused by environmental degradation.
- c) To identify and analyse effective environmental compensation practices in Indian jurisprudence that could be adopted by Kenya to address environmental compensation issues.

Research Questions

- a) What is the current legal and institutional framework regulating environmental compensation in Kenya?
- b) What are the key considerations for awarding compensation in environmental liability cases that ensure precision, fairness, and consistency in the assessment of damages arising from environmental degradation?
- c) What specific environmental compensation practice from Indian jurisprudence could Kenya adopt to effectively combat environmental compensation issues?

1.5 Hypothesis

The absence of a concrete compensation principles and framework of awarding environmental damage compensation in Kenya is greatly contributing to unpredictability, uncertainty and differentiated compensations. While courts should possess discretion to award appropriate damages depending on the circumstances, for deterrent and consistent framework on damages, a concrete framework would alleviate this problem. In conclusion, the adoption of a well-trodden compensation system is paramount in addressing the challenges surrounding environmental liability cases. This system would provide clarity to the courts, ensure consistency in decisions, and act as a deterrent against irresponsible practices. Ultimately, it is through the establishment of such a system that the legal framework can effectively fulfil its role in fairly compensating victims and protecting the environment for the benefit of present and future generations.

1.6 Justification

Environmental damage, sometimes irreversible, necessitates a meticulous approach in determining compensation. A well-defined compensation system ensures fairness and consistency, thereby promoting responsible environmental practices and contributing to the preservation of our ecosystems for future generations. Additionally, it acts as a guiding framework for courts. While the environmental liability is well established, there exists a discernible gap in the regulation of compensation at both an international and national level necessitating the formulation of principles to guide this aspect of environmental jurisprudence. The specific quantification and distribution of compensation remain areas where a more structured and principled approach is needed. A well-trodden compensation system would bridge this gap, offering a comprehensive and standardized methodology for determining the amount of compensation owed in the aftermath of environmental damage. In light of the above, this study will prove fruitful to adjudicators in environmental courts, environmental academics and researchers.

1.7 Conceptual Framework

Polluters Pay Principle

The polluters pay principle, simply put, recognises the obligation of the responsible party by holds them liable to pay for the environmental damage the polluters created. The principle is

applicable when the polluters are identifiable, the damage is quantifiable and there must be a nexus between the polluter and the damage. Most legal academic literatures accredit the origin of the polluters pay concept to the 1972 Recommendation of the Council for Guidelines on International Economic Aspect for Environmental Policies.¹⁵ It defines the polluters pay concept as ‘the principle to be used for pollution costs, prevention and control measures to encourage rational use of scarce environmental resources.’¹⁶

Margaret Russo Grossman describes how the polluters pay concept previously applied to the society or taxpayers in general and not to the polluters. They were the ones who had the responsibility of paying for the pollution damage in the society. The burden then shifted to the Government as cost of administration up to the current application where it shifted to the polluters who are not only expected to pay for measures to control and prevent pollution, compensate the victims of the pollution but also to restore the damage inflicted on the natural environment.

Consequently, Sadeleer in his opinion points out that the polluters pay principle takes a curative and preventive model of thought.¹⁷ He further states that everything is capable to restore, cure, indemnify and compensate. With regards to the curative aspect, he opines that pollution just like a wound inflicted on the environment cannot cure itself, the inflictor’s help is required to cure the wound. In other words, he implies that the polluter is under the financial obligation to restore the damage done on the environment.¹⁸ Secondly, on the preventive aspect, he suggests that the polluters pay should not be seen as a policy through which arbitrary pollution is encouraged solely because the polluters are able to pay the pollution costs rather it should be seen as a management strategy through which the polluters are discouraged from their pollution acts and to be content with pollution costs.¹⁹ Lastly, he states that the concept of environment restoration should be based on individualistic approach that is the object of blame who is the polluter should bear the cost of the damage.²⁰ the polluters pay concept as a whole does not solely work to punish the polluters rather it introduces appropriate ways in the economic system

¹⁵ Organisation for Economic Co-operation and Development (OECD), Council Recommendation C (72) 128, 1972.

¹⁶ Organisation for Economic Co-operation and Development (OECD), Council Recommendation C (72) 128, 1972.

¹⁷ Sadeleer N, ‘Environmental Principles: From political Slogans to legal principles’, Oxford University Press, London, 2002, 1.

¹⁸ Sadeleer N, ‘Environmental Principles,’ 2.

¹⁹ Sadeleer N, ‘Environmental Principles,’ 3.

²⁰ Sadeleer N, ‘Environmental Principles,’ 4.

to include environmental costs as a result of pollution damage and it works to arrive at sustainable environmental friendly development by deterring future environmental pollution acts by the polluters. Four questions need to be answered to lay a hold of the polluter pays concept that is, What comprises pollution? Who is a polluter? How much should the polluter pay? Lastly, to whom is the payment made? The rationale behind this concept is that to avoid being responsible for pollution costs, the potential polluters will implement measures to control pollution.

1.8 Theoretical Framework

Compensation Deterrence Theory

The compensation Deterrence theory, initially proposed by legal scholar John Goldberg is generally premised on the idea that in providing redress mechanisms for the victims, there should be a just approach that has the purpose of compensating them as well as serving as a deterrent purpose. This theory stands as a cornerstone in the realm of tort law. At its core this theory proposes that the tort law operated to provide restitution to victims for the losses they endured but also to deter future harmful behaviours by holding the perpetrators accountable through liability. Moreover, the theory considers a conduct to be undesirable if it is “unreasonable” and results in more harm than good for the society as a whole. Thus, any loss suffered by an individual irrespective of the form it takes is deemed as harm under this framework. In practice, the compensation deterrence theory entails compensating the injured person by means of a payment borne by the wrongdoer, thereby discouraging similar acts in the future.²¹

The theory seeks to discourage negligent behaviours by emphasis on the importance of social responsibility and accountability. Within this framework, compensation plays a key role tasking the responsible parties to restore victims to their initial conditions that includes both economic and non-economic damages. Coherence and consistency in awarding damages are paramount to this theory, aligning the compensation amount with the objective of deterring future harm and ensuring just compensation for victims. Additionally, the theory acknowledges

²¹ Goldberg J, ‘Twentieth Century Tort Theory’ Vanderbilt University Law Scholl, Working Paper Number 02-15, 2002,15
<https://deliverypdf.ssrn.com/delivery.php?ID=066097067102105082091002006099022124029045066084038066109099005021092105020024044060014040054000086029065069110030078044041021090000089064121119095105068079093084053086103115071027127107120075067007087111085067120024125091070119103112112015083&EXT=pdf&INDEX=TRUE> on 15 April 2024.

the concept of social utility, recognising situations where the benefits of certain activities outweigh the risks of harm, thus influencing determinations of liability and compensation.²²

However, this theory has been met with several criticisms raising concerns about the fault standard within the compensation deterrence theory that requires the the plaintiff establish a causal link between their injury and the defendant's misconduct. Some compensation-deterrence theorists argue that this causation link between the plaintiff's injury and defendant's misconduct may fail to effectively serve the goals of compensation and deterrence, potentially leading to dysfunctional outcomes.²³

In conclusion, the compensation deterrence theory provides a comprehensive framework centred on fair compensation for individuals, environmental justice and deterrence of social harm. It's overarching goal is to mitigate societal harm by holding the wrongdoers accountable for their misconduct. This theory underscores the need for an efficient compensation mechanism system that ensures the victims are fairly compensated by the party responsible for the misconduct as well as serves to discourage detrimental future behaviours that pose risks to the environment and society. In doing so, it plays a vital role in delivering justice to people and promoting environmental justice.

1.8 Literature Review

1.8.1 Adequate Compensation

Burkett states that compensation is often used as a remedy as part of reparation for environmental damage as a result of climate change but there is still no easy interpretation of familiar claims and remedies.²⁴ The fate of those subjected to the effect of climate change should therefore not rest on disparate judges and jurisdictions as effective compensation cannot occur in a vacuum.²⁵ Despite effective compensation not occurring in a vacuum, efforts to design a comprehensive approach in the international arena is evident. An example is Verheyen and Roderick's attempt to provide clarity on damage and compensation in the United Nations

²² Goldberg J, 'Twentieth Century Tort Theory', 17-18

²³ Goldberg J, 'Twentieth Century Tort Theory', 21

²⁴ Burkett M, 'Climate Reparations' 10 *Melbourne Journal of International Law*, 2009, 2.

²⁵ Burkett, 'Climate Reparations', 3.

Framework Convention on Climate Change (UNFCCC).²⁶ This is, however, not comprehensive as it fails to discuss ethics and justice which are incompatible in reparations for climate change damages.²⁷

Shue discusses reasons for allocating compensatory damages to be paid by the polluter and one is that the compensatory burden is enough to correct the inequality previously imposed by the polluter as a result of the damage.²⁸ Other scholarly work on liability agree that regimes implemented should achieve efficient levels of compensation and deterrence and that the compensation is on damages caused to natural resources, property, bodily injury or economic loss indirectly suffered from the damage.²⁹ Compensation that is properly assessed and awarded leads to benefits such as remediation of the environment and the injured party while also incorporating negative effects on the costs of pollution or environmental degradation which deters future activities by other market actors.³⁰ As a result, compensation can act as regulation that protects the environment due to the above benefits.

However, this applies only to compensation that is properly assessed and awarded which is not the case for most of the practical scenarios. Compensation awarded has faced several issues including differing interpretations on reasonableness, high burden of proof and lack of certainty.³¹

1.8.2: The Role of Judiciary in Promoting Environmental Compliance and Sustainable Development

In his paper Justice J.B. Ojwang explains in a detailed manner that prior to the enactment of the Environmental Management Coordination Act, Kenya lacked a comprehensive framework

²⁶ Verheyen R and Roderick P, 'Beyond adaptation: The legal duty to pay compensation for climate change damage' Worldwide Fund for Nature, Climate Change Programme Discussion Paper, 2008 - https://www.fint.awsassets.panda.org/downloads/beyond_adaptation_lowres.pdf November 2008, 5.

²⁷ Burkett, 'Climate Reparations', 3.

²⁸ Shue H, 'Global environment and international inequality' 75 *International Affairs* 1, 1999, 535.

²⁹ Monti A, 'Environmental risk: A comparative law and economics approach to liability and insurance' 9 *European Review of Private Law* 1, 2001, 55.

³⁰ Anderson M, 'Transnational corporations and environmental damage: Is tort law the answer?' 41 *Washburn Law Journal* 1, 2002, 408-409.

³¹ Bodansky D, Bruneel J and Hey E, *The Oxford handbook of environmental law*, Oxford University Press, New York, 2007, 1031.

of national environmental legislation. It had various statutes addressing different facets of the environment that created a fragmented and an inefficient legal landscape. The establishment of the Environmental Management Act marked a significant milestone providing a consolidated legal framework for both civil litigation and the criminal jurisdiction of courts in environmental matters.³² While commendably the judicial officers have raised to the occasion of asserting environmental rights and award compensation to the victims, different courts are arriving at this decision in a haphazard manner following no predictable or coherent compensation framework.

Consequently, he mentions that an issue still prevails in that the act fails to cater for compensation in environmental case. This involves determining the appropriate compensation amount and establishing the criteria guiding the court in making compensation decisions.³³ Thereby, he proposes that there remains a critical gap that has yet to be adequately addressed within the legal framework of the country. Therefore, there is a need for further discussion and exploration of potential solutions to address this gap effectively.

1.8.3 Contribution

The argument disclosed in this study as a whole, if implemented will lay a foundational basis for the establishment of a well-defined framework that courts can utilise when determining compensation for individuals affected by environmental damage and the complexities of environmental damage. Furthermore, it aims to enhance the effectiveness, fairness and consistency of the process surrounding environmental damage compensation.

1.9 Methodology

This study adopts a qualitative research approach, as it seeks to provide a deeper understanding of the relationship between law and environment. The qualitative method was chosen as the

³²JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'

http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Ojwang_Paper.pdf

>Accessed on 20th December 2023.

³³ JB Ojwang' 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'

http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Ojwang_Paper.pdf

>Accessed on 20th December 2023.

most suitable approach for this study, as it involves analysing and assessing primary and secondary resources related to the topic of liability and compensation in environmental cases. Primary sources collected for this study include legislative Acts and other legal instruments of international laws and conventions. Secondary sources such as case laws, journal articles, law reports and newspapers are also utilised to provide informative and in-depth into compensation in environmental damages. This research aims to provide a comprehensive context for understanding the workings of compensation in environmental regulation and pollution.

1.10 Chapter Breakdown

Chapter One serves as the introductory chapter, it lays the background of the study, defines the key concepts used and summarises the conclusion. It also, outlines the statement of the problem and provides a justification for the rationale of the research study. Finally, it provides literature review, research questions, research objectives and the hypothesis.

Chapter Two explores the comprehension of the essential legal framework required for the court to govern the process of awarding compensation in environmental cases. It delves into the understanding of the legal framework that should be established by the court to govern the process of awarding compensation in environmental cases.

Chapter Three assesses the most suitable valuation methods, establishes guiding principles for the court in awarding compensation in environmental cases and analysis of the factors that a court should consider when determining compensation in environmental cases.

Chapter Four conducts an analysis of the compensation system in India and highlights on the concepts that Kenya could borrow.

Finally, Chapter Five will conclude giving recommendations.

Chapter Two

Legal Framework for awarding Compensation in Kenya on Environmental Damage

2.0 Introduction

The escalation of environmental impacts is evident alongside the rising trends in urbanisation, residential and commercial development as well as rail and road constructions not only in Kenya but globally.³⁴ The frequent incidences of industrial pollution such as disposal of untreated effluent in Athi river by London Distillery company and the Owino Uhuru lead pollution case underscores the pressing environmental compensation challenges in Kenya.³⁵ Despite Kenya's constitution being notably 'green' providing a strong basis for environmental protection in the country, inconsistencies in compensation awards across different courts reveal a systemic lack of uniformity. This chapter aims to analyse the national and international framework that guide courts on the awarding of damages in environment liability.

Article 70 of the constitution mandates courts to provide compensation to victims of environmental rights violation, underscoring the crucial role of the Environment and Land Court.³⁶ Pursuant to Article 162 (2) (b) and Environment and Land Court Act individuals seeking constitutional remedies must approach Environment and Land Court.³⁷ A notable case, ***County Government of Kitui v Sonata Kenya Limited 2018***, saw the Environment and Land Court assert its authority in addressing disputes related to remedies sought under Article 70.³⁸ Historically the concept of locus standi has been a contentious issue however, applicants pursuing Article 70 remedies are not required to demonstrate personal harm or injury. This prompts significant inquiries into whether the concept of legal standing remains pertinent in modern legal landscapes and whether avenues exist for seeking compensation on behalf of third parties or the wider community.

2.1 LOCUS STANDI

³⁴ Nordic Council of Ministers, 'Environmental Compensation: Key Conditions for increased and cost-effective application, 2015.

³⁵ National Assembly, Departmental Committee on Environment and Natural Resources, Report on an Inquiry into Complaints of Environmental Pollution by London Distillers Kenya Limited, September 2021,19.

³⁶ Article 70, *Constitution of Kenya* (2010).

³⁷ Article 162 (2)(b), *Constitution of Kenya* (2010).

³⁸ *County Government of Kitui v Sonata Kenya Limited* (2018) eKLR.

Traditionally, courts in Kenya took a restrictive approach towards locus standi as was laid out in the case of *Gouriet v Union of Post Office Workers 1978*, where to effectively have a claim in court it had to be demonstrated that personal loss and injury was suffered, and the matter had to be within the realm of public law.³⁹ Consequently, the same approach was adopted despite the constitution acknowledging the right to a clean and healthy environment in Article 42 and Article 70 which allows redress in court in case of a violation.⁴⁰ In the case of *Wangari Mathai v Kenya Times Media Trust (1998)*, Wangari Mathai contested the construction of a 60 storey building in Uhuru Park, arguing that it contradicted the park's intended recreational purposes and was not environment friendly. The court, in addressing the locus standi issue, ruled that as a party not directly affected she lacked the legal capacity to bring the legal suit to court, thus lacking locus standi.⁴¹ The case posed as a drawback to individuals and organisations seeking legal standing to bring environmental cases before the court and was met with wide criticisms on the narrow application of the scope of locus standi and environmental rights.

However, in recent years there has been a discernible shift within the courts leaning towards a more liberal interpretation of *locus standi*, wherein individuals are granted standing in environmental cases notwithstanding personal injury or personal interest. This was particularly espoused by the high court in the case of *El Busaidy v Commissioner of Lands and 2 Others 2001*, where the court opined that upholding constitutional guarantee of the right of access to justice should also entail a liberal approach to the question of locus standi that also includes departing from the traditional view. The court also stated that as part of a fair and just procedure in upholding constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi one that extends beyond the traditional view.⁴² In 2001, in the case of *Rodger's Nzioka and 2 others v Tiomin Kenya Limited*, the petitioner sought an injunction against the mining of titanium in Kwale and was granted by the court. The court asserted that environmental degradation is not only an individual concern but also involves the protection of the public against any anticipated environmental deterioration, health risks and pollution. This stance by the Court indicated a shift deviating from the traditional rule of locus standi.⁴³ The rationale being that, in environmental litigation, the complainant is more than often a

³⁹ *Gourmet v Union of Post Office Workers (1978)*, United Kingdom House of Lords.

⁴⁰ Waweru M, 'Compensation in Environment Liability Cases in Kenya,' Published LLM Thesis, University of Nairobi, Nairobi, 2019, 45.

⁴¹ *Wangari Mathai v Kenya Times Media Trust (1989)* eKLR.

⁴² *El Busaidy v Commissioner of Lands and 2 others (2001)* eKLR.

⁴³ *Rodger's Nzioka and 2 others v Tiomin Kenya Limited (2001)* eKLR.

natural person, but the injury or harm is often suffered by the environment or an endangered species, a river, a mountain or the atmosphere.⁴⁴

Kenyan courts have consistently upheld the Polluter Pays Principle as paramount in addressing compensation for environmental damage inflicted upon victims. The principle operates on the basis of ‘strict liability’ where a polluter can be held accountable without the need to prove fault. In the case of *Michael Kibui and Others v Impresa Costruzioni Giuseppe Malturo and Others 2012*, the court found the first respondent guilty of violating the petitioner’s right to a clean and healthy environment as guaranteed by Article 42 of the Constitution through its excavation during rehabilitation of Eldoret-Turbo-Webuye Road causing water, air and noise pollution as well as excessive vibrations. The Court applied the polluter pays principle to hold the 1st respondent, the contractor, liable for compensation and went on to award the applicant Kshs. 30,000 only.⁴⁵ However, the awarded amount of Kshs. 30,000 for breach of the right to a clean and healthy environment was issued without clear guiding principles. Despite the polluter pays principle forming the foundation of compensation, challenges persist in its application, particularly concerning the scope and extent of payable costs. While the Kenyan legal framework consistently embraces the polluter pays principle, the specific rules and formulas for determining compensation remains elusive, leaving room for ambiguity in the process.

2.2 The Existing Legal Framework Regulating Compensation in Kenya.

2.2.1 The Kenyan Legal System

Prior to the 2010 Constitution Kenya lacked law provisions that provided for the right to a clean and healthy environment. It was after the enactment of the 2010 constitution that Kenya expressly acknowledged the right to clean and healthy environment for the benefit of present and future generations. The legal framework empowers courts to issue compensation orders either in addition to or in substitution for other forms of punishment.⁴⁶

⁴⁴ Murombo T, ‘Strengthening Locus Standing in Public Interest Environmental Litigation: Has Leadership moved from the United States to South Africa?’ 6 Law and Development Journal 2, 2010.

⁴⁵ *Michael Kibui and Others v Impresa Costruzioni Giuseppe Malturo and Others (2012)* eKLR.

⁴⁶ Article 69(2), *Constitution of Kenya* (2010).

Article 42 guarantees the right to a clean and healthy environment for all and places the responsibility to protect the environment on the state as well as on all persons.⁴⁷ Article 70, of the Constitution allows any person who alleges that a right to a clean and healthy environment is being or is likely to be denied, violated, infringed or threatened to apply to court for redress as well as pursue any other legal remedies available.⁴⁸ 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 that established the Environment and Land Court in accordance with Article 162 of the Constitution.⁴⁹ Article 23 of the Constitution empowers the court to fashion appropriate remedies for relief to address a claim for violation of constitutional rights and grants the courts powers to grant damages.⁵⁰

The Environment and Land Court Act vests authority upon the Environment and Land Court to exercise powers in line with the law aimed at achieving environmental justice. This includes the power to issue orders for the prevention, control or reduction of actions that cause environmental pollution. The legislation empowers the court to take actions necessary to address environmental issues and promote a just and sustainable use of land and natural resources such as issue a compensation and restoration remedy from the environmental damage.⁵¹

The EMCA outlines guidelines and principles to be implemented by a court when addressing the issue of compensation of violation of a clean and healthy environment that includes public participation, the precautionary principle, intergenerational principle, equity in general and the polluter pays principle, the attribution of liability for environmental harm and the issuance of compensation orders.⁵² These principles serve as a framework for evaluating the extent of damages and compensation in environmental cases. When courts assess compensation amounts, they may take into account the expenses associated with remediation and restoration efforts. This ensures that the compensation awarded aligns with the costs incurred in addressing and rectifying the environmental damage. The Kenya's legal framework for environmental liability is crafted to ensure that those responsible for environmental damage are held

⁴⁷ Article 42, *Constitution of Kenya* (2010).

⁴⁸ Article 70, *Constitution of Kenya* (2010).

⁴⁹ Article 162(2)(b), *Constitution of Kenya* (2010).

⁵⁰ Article 23, *Constitution of Kenya* (2010).

⁵¹ Preamble, *Environment and Land Court Act* (2011).

⁵² Section 3(5). *Environment and Management Coordination Act* (1999).

accountable and it aims to provide fair compensation to affected parties. However, though the Act stipulates the need for compensation, the act fails to stipulate how the courts should award adequate compensation as one of the reliefs that the court can give to enforce environmental rights.

2.2.2 International Framework

Kenya has incorporated the principles of 1972 Stockholm declaration through the Environmental Management and Co-ordination Act. This legislation imposes both civil and criminal liability for environmental damage, aligning with the international commitment to provide redress and compensation for those impacted by environmental degradation as well restoration orders for the environment.⁵³

The Rio Declaration on Environment and Development of 1992 encapsulates a set of principles designed to safeguard the integrity of the global environment and development system.⁵⁴ The principles include commitment to sustainable development, encouraging public participation in environmental decisions, inter and intra generational equity, precautionary principle and upholding the polluter pays principle that calls for internalisation of environmental costs. Principle 13 of the Rio Declaration explicitly advocates for compensation to be provided to the victims of pollution and environmental damage. It states that ‘states shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.’⁵⁵ Kenyan courts have applied the principles of environmental law in various cases, demonstrating a commitment to safeguarding the environment. In the case *Amina Said Abdalla and 2 others v County Government of Kilifi and 2 others 2016*, the court emphasized the principle of prevention, highlighting that environmental protection is most effective when harmful activities are prevented rather than relying solely on remedies or compensation after damage has occurred.⁵⁶ This aligns closely with the precautionary principle, which acknowledges the uncertainties in predicting environmental impacts and calls for caution in

⁵³ Section 142, *Environment and Management Coordination Act* (1999).

⁵⁴ Principle 13, Rio Declaration on Environment and Development (1992).

⁵⁵ Principle 13, Rio Declaration on Environment and Development (1992).

⁵⁶ *Amina Said Abdalla and 2 others v County Government of Kilifi and 2 others* (2016) eKLR.

decision making.⁵⁷ However, in the case of *KM and 9 others v Attorney General and 7 others* 2016 the appellate court overturned the compensation award by the trial court, citing an erroneously high estimate of damages and failure of the court in considering relevant factors and principles of law in its assessment, leading to interference with the judge's discretion case. Although the trial court relied on the precautionary principle to assign liability to NEMA it did not provide a clear framework for determining the awarded compensation of Kshs 1.3 billion.⁵⁸ While environmental principles are valuable, they often lack specificity in guiding courts on how to determine compensation amounts.

2.3 Human Rights and Tort Litigation

Human rights and tort litigation serve as crucial junctures for seeking compensation for violations of environmental rights in Kenya. The right to a clean and healthy environment as envisaged in article 42 of the Constitution is a fundamental prerequisite for the full enjoyment of other rights.⁵⁹ Article 70 constitutional empowers individuals and communities affected by environmental harm to seek remedies through courts and a court may issue a compensation order for any victim.⁶⁰ A petitioner opting for constitutional recourse must engage the Environment and Land Court as prescribed in Article 162(2) (b) of the constitution.⁶¹ This right is deemed crucial for the realisation of other fundamental rights as highlighted in the case of *Peter K. Waweru v Republic* 2006, where the Court stated '*that the right of life is not merely about sustaining the body and soul, it includes shielding individuals from environmental threats reinforcing the idea that the right to a clean and healthy environment is a integral within the wider spectrum of human rights, acknowledging its role in ensuring not just physical well-being but also safeguarding individuals from environmental hazards.*'⁶² Human rights litigation enables plaintiffs to hold polluters accountable for their actions and seek compensation for damages incurred.

⁵⁷ *Amina Said Abdalla and 2 others v County Government of Kilifi and 2 others* (2016) eKLR.

⁵⁸ *National Environment Management Authority & another v KM & 17 others* (2020) eKLR.

⁵⁹ Muigua K, 'Reconceptualising the Right to Clean and Healthy Environment in Kenya,' 2017, 7 <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf> On 20 January 2024.

⁶⁰ Article 70, *Constitution of Kenya* (2010).

⁶¹ Article 169 (2)(b), *Constitution of Kenya* (2010).

⁶² *Peter K. Waweru v Republic* (2006) eKLR.

The principle that the right to a clean environment is intertwined with other human rights, including civil, cultural, economic, political and social rights has been affirmed by Kenyan courts as demonstrated in the case on *Friends of Lake Turkana Trust v Attorney General & 2 others* 2012. In this case, the judge emphasised the interconnected and indivisible nature of these rights stating that no single set of rights holds greater importance than another, and all are essential for individuals to attain a responsible standard of living.⁶³ Moreover, the judge highlighted the intimate relationship between human health and environmental health, emphasising their mutual dependence.⁶⁴ This showcased the inseparable link between human rights and environment. Therefore, the preservation of the environment is vital for protecting the life and dignity of each individual as it serves as the cornerstone of life itself. In the landmark case of *Subhash Kumbe v State of Bihar 1991*, the Supreme Court of India emphatically declared that the right to life enshrined in Article 21 of the constitution, encompasses the right to access pollution free water and air for the full realisation of life's enjoyment. The court acknowledged the profound link between environmental welfare and the fundamental right to life, affirming individual's entitlement to a clean and healthy environment as an inherent component of their constitutional rights.⁶⁵

In light of the aforementioned legal precedents, courts are urged to adopt broad interpretations of human rights with a commitment to upholding constitutional rights, particularly economic, social rights and the right to life. This is key to address any environmental factors that may obstruct access to resources crucial for the enjoyment of the specific rights in question. The effective fulfilment of these rights depends on proper and efficient mechanisms for protection of the right to clean and healthy environment. Importantly, the right to a clean and healthy environment is inherently intertwined with the realisation of other fundamental rights.⁶⁶ Taking a comprehensive and inclusive approach to realising these rights can significantly contribute to the protection of the right to a clean and healthy environment, recognising the pivotal role played by the environment in fulfilling a majority of basic rights. In essence this underscores the broad and wide definition that can be attributed to the right to a clean and healthy environment that emphasises the interconnectedness of environmental considerations with

⁶³ *Friends of Lake Turkana Trust v Attorney General and 2 others* (2012) eKLR.

⁶⁴ *Friends of Lake Turkana Trust v Attorney General and 2 others* (2012) eKLR.

⁶⁵ *Subhash Kumbe v State of Bihar* (1991) Supreme Court of India.

⁶⁶ Muigua K, 'Reconceptualising the Right to Clean and Healthy Environment in Kenya,' 2017, 12 <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf> On 20 January 2024.

other framework of fundamental rights.⁶⁷ Through this lens, a clearly established compensation grounded in law becomes apparent for ensuring a just reparation and a solid legal foundation for addressing grievances and seeking redress in violation.

In the legal matter of *Chester v. Afshar* 2004, Lord Craighead stated that a primary function of the law is to protect the rights of all individuals and provide a remedy for those whose rights have been violated.⁶⁸ Specifically in environmental contexts, this entails compensating individuals who have suffered from environmental harm and initiating efforts to restore the damaged environment to its initial form. However, the current challenge revolves around determining the appropriate compensation for environmental cleanup and for victims of the pollution. How the courts establish figures for compensation in cases of environmental damage and whether the process is discretionary or systematically derived. Failing to hold the accountable party responsible would only add to the already overwhelming burden faced by the victims of environmental pollution.⁶⁹

Litigation for environmental damage is pursued through various channels that aims to secure compensation for the harm inflicted, the other avenue for seeking compensation rights violation in Kenya includes Tort litigation. Environmental damage litigation seeking to remedy or prevent environmental harm mostly takes the form of private actions based on tort which is principally meant to achieve compensation for damage.⁷⁰ Tort law encompasses various legal principles, including negligence, nuisance and strict liability which can be applied to hold polluters accountable for environmental harm.⁷¹ Plaintiffs in tort litigation cases must demonstrate that the defendants' action or omissions directly caused harm to their property, health or well-being. Successful tort claims can result in monetary compensation for the plaintiffs and deterrence of future environmental wrongdoing.⁷² The core principles of tort law and damages revolve around providing general compensation. The foundational principles of liability and compensation originate from tort law, where a wrongful act resulting in injury enables the harmed party to seek redress, typically in the form of monetary damages, through a private legal action against the responsible party. Another applicable avenue for those seeking

⁶⁷ Muigua K, 'Reconceptualising the Right to Clean and Healthy Environment in Kenya,' 17.

⁶⁸ *Chester v Afshar* (2004) The United Kingdom House of Lords.

⁶⁹ Nicholas A. and Lal K: Training Manual on International Environmental Law, Pace University, New York, 2006, 33.

⁷⁰ UNEP Judicial Handbook on Environmental Law, 2005, 35.

⁷¹ *Ibid*

⁷² UNEP Judicial Handbook on Environmental Law, 2005, 35.

compensation for physical harm involves negligence and nuisance through tort litigation, which focuses on the victims of harm. This legal approach was established in the case of *Rylands v. Fletcher*, there has been recent developments that emphasize on foreseeability as a factor for establishing nuisance.⁷³ In Kenya, courts seems inclined to embrace the idea that foreseeability is a prerequisite for liability in nuisance, as evidenced by the Kenyan Supreme Court's decision in *Kenya Wildlife Service v. Rift Valley Agricultural Contractors Limited 2015*. The court noted, 'We hasten to add that there have been developments, acknowledging changes in the case and the addition of the element of foreseeability as a prerequisite.'⁷⁴ These advancements in tort law have introduced uncertainty regarding the potential for tort law litigation and of a promising avenue to pursue compensation by victims of environmental damage.⁷⁵

While recognising the significance of tort law in awarding damages it is essential to acknowledge that that 2010 constitutional framework established the right to a clean and healthy environment. As previously mentioned, individuals may opt for constitutional petitions as a venue to address their environmental right concerns initiating proceedings against the state which is deemed the primary duty bearer for human rights obligations. Such petitions grounded in the bill of rights can be pursued as either individual or public interest suits. Constitutional petitions provide a platform to seek financial compensation from both the state and culpable parties.⁷⁶ The Kenyan constitution establishes the horizontal application of human rights with the core idea that the 'Bill of Rights applies to all laws and binds all state organs and all persons.'⁷⁷ This horizontal application enables claimants to directly invoke human rights to pursue compensation from a private individual.⁷⁸

⁷³ *Rylands v Fletcher* (1861), The United Kingdom House of Lords.

⁷⁴ *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* (2015) eKLR.

⁷⁵ Mwanza R, 'Compensation Funds as a Remedial Mechanism for Victims of Corporate Pollution in Kenya: A Feasibility Study' *Journal of Environmental Law* 33, 2021, 563.

⁷⁶ Mwanza R, 'Compensation Funds as a Remedial Mechanism for Victims of Corporate Pollution in Kenya: A Feasibility Study' *Journal of Environmental Law* 33, 2021, 565.

⁷⁷ Article 20, Constitution of Kenya (2010).

⁷⁸ Mwanza R, *Compensation Funds as a Remedial Mechanism for Victims of Corporate Pollution in Kenya*, 565.

Conclusion

The primary aims of this chapter were to conduct a comprehensive examination of the existing legal structure governing compensation for environmental damage in Kenya. In doing so, this chapter examined pertinent provisions within key legislative instruments such as the 2010 Constitution of Kenya as well as international frameworks guiding courts in awarding compensation for environmental issues. Additionally, the chapter explored the avenues through which individuals can seek compensation for violations of their right to a clean and healthy environment that includes the human rights and tort litigation. In summary, while Kenya's legal framework offers avenues for seeking redress for environmental damage, there remains a need for further refinement and clarity in establishing an efficient compensation system that ensures fairness, accountability and environmental justice.



Chapter Three

Key Considerations for Awarding Compensation in Environmental Liability Cases

3.0 Introduction

The establishment of the Environmental Land Court was seen as a significant step in addressing the enormous backlog of cases in Kenya's judicial system and in achieving a new era of environmental justice. The creation of the Environment and Land Court was mandated under Kenya's 2010 constitution.⁷⁹ As custodians of the law, the Environment and Land Court are vested with the responsibility of establishing clear guidelines for the awarding of damages in environmental cases which is crucial for upholding Article 42 of the Constitution.⁸⁰ Compensation for injuries resulting from actions against the environment should be a fundamental aspect of environmental policies and legal frameworks. In simpler terms, the compensation awarded should be of proportional to the harm inflicted even if that it is impossible to fully restore the environment to its original state. This in turn enforces one's constitutional guarantee of a clean and healthy environment. The same was reiterated by the court in the case of *Miguna Miguna v Fred Okengo Matiang'I 2018*.⁸¹

While it is legal truism that no amount of damages can fully restore an injured party or compensate for their loss, the courts are obligated to assess reasonable damages proportionate to the injuries suffered.⁸² However, over time, courts have demonstrated inconsistency in the tests and principles used to determine and allocate compensation for environmental harm or damage. This inconsistency has led to decisions being made in a haphazard manner lacking a predictable or coherent compensation framework. This lack of uniformity in determining the quantum of compensation highlights the need for a standardised compensation system by the courts. Therefore, this research is grounded on the premise that a duty has been breached and damages have arisen the crucial question becomes how should these damages be evaluated? Additionally, the research aims to elucidate the principles, factors and criteria that should

⁷⁹ Joel Kim'staiBosek, 'Implementing Environmental Rights in Kenya 's New Constitutional Order: Prospects and Potential Challenges' (2014) 14 African Human Rights Law Journal 489, 490.

⁸⁰ Joel Kim'staiBosek, 'Implementing Environmental Rights in Kenya 's New Constitutional Order: Prospects and Potential Challenges' (2014) 14 African Human Rights Law Journal 489, 490.

⁸¹ *Miguna Miguna v Fred Matiang'i and 6 others* (2018) eKLR.

⁸² *Bernard Mutisya Wambua v Swaleh Hashil* (2017) eKLR.

inform's courts decision when awarding the environmental damage. The overarching objective is to establish a uniform compensation system by courts addressing discrepancies and promoting consistency. This involves evaluating the patterns and approaches courts have taken in these situations.

The pursuit of fair compensation in environmental damage cases is crucial for addressing harm and rectifying injustices. However, challenges arise as courts often differ in the amount of compensation awarded, leading to disparities and inconsistencies. Ensuring consistency in awarding damages is essential as comparable injuries should receive similar awards promoting uniformity and reasonableness in the compensation process.⁸³ Instances of inconsistencies in compensation awards have emerged within the Environment and Land Court and other Kenyan courts, revealing challenges in maintaining fairness and uniformity in decisions. These discrepancies often stem from varying interpretations of legal principles and individual judicial discretion. This underscores the need for greater clarity and consistency. Contrasting decisions involving similar environmental damages may result in significantly varied compensation amounts or even a denial of compensation by the appellate court after it was awarded by the Environment and Land Court. An example is in the appeal case of *National Environment Management Authority & another v KM & 17 others 2020*, the appellate court overturned the compensation award by the trial court, citing an erroneously high estimate of damages and failure of the court in considering relevant factors and principles of law in its assessment, leading to interference with the judge's discretion.⁸⁴ Additionally, the trial court made reference to the case of *Mohamed Ali Baadi & others v Attorney General & 11 others 2018*, that was deemed inappropriate as it involved different circumstances and facts. Further illustrating the inconsistencies compensation amounts in various cases differ significantly. In *Edward Akong'o Oyugi & 2 others v Attorney General 2019*, the petitioners were awarded Kshs. 20,000,000 and 6,000,000 respectively⁸⁵ while in *MWK & another v Attorney General & 3 others 2017*, the petitioner received Kshs 4,000,000.⁸⁶ In contrast *Mohamed Ali Baadi & others v Attorney General & 11 others 2018*, saw a global compensatory award of Kshs 1,760,424,000.00 that was based on a valuation report, with input from fishermen organised into beach management units, and was widely accepted by all parties involved.⁸⁷ *Hon Gitobu*

⁸³ *West (H) & Sons Ltd v Shepard* (1963), The United Kingdom House of Lords.

⁸⁴ *National Environment Management Authority & another v KM & 17 others* (2020) eKLR.

⁸⁵ *Edward Akong'o Oyugi & 2 others v Attorney General* (2019) eKLR.

⁸⁶ *MWK & another v Attorney General & 3 others* (2017) eKLR.

⁸⁷ *Mohamed Ali Baadi & others v Attorney General & 11 others* (2018) eKLR.

Imanyara & 2 others v Attorney General 2017, resulted in the Supreme Court enhancing damages from Kshs 25 million to Kshs 60 million.⁸⁸ These disparities underscore the need for consistency and clarity in compensation determinations within the Kenyan legal system.

3.1 Types of Damages

3.1.1 Compensatory Damages

Compensatory damages occur when one has suffered injuries or his property destroyed as a result of a third-party action, and they are made liable to compensate for the damages caused.⁸⁹ Deleterious acts to the environment have the potential of causing harm to individuals as well as properties.⁹⁰ The compensatory damages seek to redress the grievance caused. Compensatory damages are appropriate to redress grievances that are a product result of acts detrimental to the environment that led to destruction of the ecosystem, personal injuries, property and delineation of species that cause injury to an individual personally and the injuries can be attributable to environmentally harmful activities.⁹¹

The discussion regarding compensating victims of environmental harm should be a central focus in shaping environmental policies and laws. The courts have acknowledged that when awarding compensation, they must at all times exercise their discretionary powers based on legal and sound reasoning guided by legal principles to dispense justice at all times rather than personal whim as was upheld in the case of *MWK and another V Attorney General and 3 others 2015*, where the court emphasized that the awarding of damages involves the exercise of judicial discretion, which should be done thoughtfully and impartially, ensuring that justice is fairly served.⁹²

⁸⁸ Hon Gitobu Imanyara & 2 others v Attorney General (2017) eKLR.

⁸⁹ Love J, 'Presumed general compensatory damages in constitutional tort litigation: A corrective justice perspective' 49 Washington and Lee Law Review, 1992, 69.

⁹⁰ Pfennigstorf W, 'Environment, Damages and Compensation' 4 American Bar Foundation Research Journal 2 1974.

⁹¹ Ibid

⁹² *MWK and another v Attorney General and 3 others (2015)* eKLR.

While it true that compensation is at the discretion of the judge in awarding of damages as it entails the exercise of judicial discretion, it ought to be exercised in a manner consistent with the laws and principles without caprice or whim and on sound reasoning. In the case of ***Githiaka v Nduriri 2004***, Justice Ringera outlined the guiding principles for the exercise of judicial discretion emphasising on sound reason rather than whim caprice or sympathy and with the primary objective of the court is to ensure fairness and justice for all parties involved.⁹³ The allocation of compensation under Article 23(2) e and 70(2) (c) of the Constitution also falls within the realm of judicial discretion. A subsequent ruling by the High Court in ***MWK and another Vs Attorney General and 3 others*** further underscored the discretionary nature of awarding damages for rights violations under Article 25, 27, 28, 29 and 31. The court emphasized that such awards must be made judiciously, grounded in reason rather than arbitrary or personal inclination.⁹⁴ This reaffirmed the principle that the exercise of judicial discretion should always prioritise fairness and justice.

Significantly, in compensation cases it is essential that the plaintiff claiming compensation to express their particulars, damages being sought as well as provide proof for their claims. Likewise, the same is recorded in cases involving damages for environmental harm, the plaintiff must meticulously demonstrate and prove the specific damages outlined. This principle was reaffirmed by the Court of Appeal in the case of ***Cecilia w. Mwangi v Ruth W. Mwangi***.⁹⁵

3.1.2 Special Damages

In court, there are certain prerequisites that must be considered in the awarding of special damages in court. One crucial requirement is that the individual asserting the claims for special damage bears the responsibility of sufficiently proving them. Failure to do so can result in the dismissal of the claim for special damages due to insufficient evidence. This was reiterated by the Court of Appeal in ***Capital Fish Kenya Limited v The Kenya Power and Lighting Company 2014***, held that it is a settled principle in the award is special damages that they need to be specifically pleaded before they are awarded and must be strictly proved with as much particularity.⁹⁶

⁹³ *Githiaka v Nduriri* (2004) eKLR.

⁹⁴ *MWK and another v Attorney General and 3 others* (2015) eKLR.

⁹⁵ *Cecilia Mwangi v Ruth W. Mwangi* (1996) eKLR.

⁹⁶ *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* (2014) eKLR.

The reasoning behind the requirement for specific pleading and proof of special damages was recently clarified by the Court of Appeal in *Caltex Oil (Kenya) Limited V Rono Limited*. The court held that special damages must be specifically pleaded as the court cannot infer the circumstances under investigation. For one intending to prove their claim they can do so through medical or valuation reports depending on the nature of claim under determination.⁹⁷ The High Court provided a clear explanation regarding the granting of special damages in the case of *Wakim Sodas Limited V Sammy Limited 2016*, that it is as well-established legal principle that a claim for special damages must be clearly stated in the pleading, and it is the responsibility of the claimant to provide evidence supporting it.⁹⁸

3.1.3 General Damages

The court in *Michael Kibui and 2 others* (suing in their own behalf as well as on the behalf of the inhabitants of Mwamba Village Uasin Gishu County) *v Impresa Construzioni Giuseppe Malturo SPA and 2 others* awarded the petitioners Kshs.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.⁹⁹

3.2 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. Justice John Mativo in *Edward Akong'o Oyugi and 2 others Vs Attorney General* held that when a court grants compensation under Article 23 and Article 69 (2) of the constitution, its primary objective is to safeguard fundamental rights.¹⁰⁰ This serves as a mechanism of public law, not only to regulate public authority but also to ensure that citizens reside within a legal framework that safeguards their interests and rights. Therefore, compensation serves as a means by which public law holds wrongdoers accountable and assigns liability for the public wrongs that the state has failed to

⁹⁷ *Caltex Oil (Kenya) Limited v Rono Limited* (2008) eKLR.

⁹⁸ *Wakim Sodas Limited v Sammy Limited* (2016) eKLR.

⁹⁹ *Michael Kibui and 2 others v Impresa Construzioni Giuseppe Malturo SPA and 2 others* 2012 eKLR.

¹⁰⁰ *Edward Oyugi and 2 others v Attorney General* (2015) eKLR.

prevent. It is more or less another way of making monetary amends aimed at providing redress through monetary compensation under public law for the violation of fundamental rights.¹⁰¹

The tests and principles used to determine have been evolving, in creating a more uniform approach and a consistent framework, the court in *Jamlick Muchangi Milano v Attorney General*¹⁰² and *Edward Akong'o Oyugi and 2 others Vs Attorney General* discussed principles that ought to be applicable:

- 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.

The test was originally 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. Presently, the test is used by other courts.¹⁰³

3.3 Principles to be Considered in the awarding of Compensation and/ or Damages.

To begin with, the constitution of Kenya construes in place important principles in Article 10 that guides the actions of courts when exercising judicial duties, they include rule of law, human dignity, equity, equality, good governance, transparency, accountability, sustainable development and social justice.¹⁰⁴ In particular Article 69 embodies the principle of sustainable development which seeks to harmonise the competing interests of economic progression and

¹⁰¹ *Edward Oyugi and 2 others v Attorney General* (2015) eKLR.

¹⁰² *Jamlick Muchangi Milano v Attorney General* (2015) eKLR.

¹⁰³ *Jamlick Muchangi Milano v Attorney General* (2010) eKLR.

¹⁰⁴ Article 10, *Constitution of Kenya* (2010).

environmental conservation to ensure the benefit of development surpasses its drawbacks that includes harmful environmental impacts.¹⁰⁵ In addition to these principles, courts incorporate international principles such as precautionary principle. Section 2 of the EMCA defines the precautionary principle as “principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹⁰⁶ The same was applied in the case of *Patrick Kamotho Githinji and 4 others V Resjos Enterprises Limited and 4 others*. In this case, there was a violation of the right to a clean and healthy environment Justice S. Okong’o opined that it is best to use the precautionary principle, also called ‘*in dubio pro natura*’ which means when unsure, prioritise protecting nature. It’s better to be cautious and prevent harm to the environment than to argue overcompensating for damages as compensation often doesn’t fully fix the harm. However, if someone claims harm to the environment, they can still ask for compensation along with stopping the harmful action.¹⁰⁷ Principle 16 of the Rio Declaration encapsulates the polluter pays principle that states the cost of pollution control remediation are borne by the person who caused the pollution.¹⁰⁸

3.4 Factors to be Considered in the awarding of Compensation and/ or Damages.

Compensation varies from a case-to-case basis and each case has its unique circumstances and facts.¹⁰⁹ There are certain factors that must be put into consideration in the awarding of compensation. Although, they vary from case to case, the court must at all circumstances take into account relevant factors and leave out irrelevant ones so that the award is not too high or too low in line with environmental justice, as was held by the court in *Chief Land Registrar and 4 others v Nathan Tirol Koech and 4 others*.¹¹⁰ Justice Law in *Butt v Khan* held that an award would be disturbed by an appellate court if the judge proceeded on wrong principles, or that the misapprehension the evidence in some material respect hence arrived at a figure which was either inordinately high or low.¹¹¹

3.4.1 Nature and Evaluation of Damage

¹⁰⁵ Article 69, *Constitution of Kenya* (2010).

¹⁰⁶ Section 2, *Environment Management and Coordination Act* 1999.

¹⁰⁷ *Patrick Kamotho Githinji and 4 others v Resjos Enterprise and 4 others* (2016) eKLR.

¹⁰⁸ Principle 16 Rio Declaration on Environment and Development 1992.

¹⁰⁹ *MWK and another v Attorney General* (2017) eKLR.

¹¹⁰ *Chief Land Registrar and 4 others v Nathan Tirol Koech and 4 others* (2016) eKLR.

¹¹¹ *Bashir Butt v Uwais Khan* (1978) eKLR.

The burden of proof rests on the claimant to substantiate their entitlement to compensation even when it's evident that their right to a clean and healthy environment has been violated, the party must also demonstrate the nature and quantum of the compensation, this was made clear by the Environment and Land Court in ***Martin Osano Ribera and another v Municipal Council of Nakuru and 2 others*** where although quite evident that the petitioner's right to a clean and healthy environment under article 42, the court declined to issue an award for compensation. This was because the petitioner's failed to make submissions on the nature and quantum of such compensation. Compensation is therefore awarded according to the circumstance of the matter. Thereafter, before compensation is awarded or considered, it is important that the damage is evaluated. An evaluation report is mostly scientific and forms an important part of the evidence to prove the amount of damage incurred.¹¹²In the case of ***Mohamed Ali Baadi and others v Attorney General and 11 others***, concerned the traditional fishing rights of the fishermen. The court awarded them compensation based on a valuation report a sum of Kshs 1,760,424,000 as needed and proved by the valuation reports to compensate all the fishermen in Lamu County.¹¹³ Further, the importance of valuation reports and medical reports was emphasised 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) v impressa Construzioni Giuseppe Malturo SPA and 2 others***. The court began finding the 1st respondent to have breached the petitioners' right to clean and healthy environment by causing water, air and noise pollution through excessive vibrations. 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. However, the court declined to award the amounts prayed for as compensation by the petitioners as the petitioners failed to demonstrate how they arrived at the the figures they claimed for compensation as they did not provide valuation reports or medical reports given the intricate nature of some of environmental damages that are difficult to quantify the amount of damage caused hence the need of evaluation reports from experts.¹¹⁴

¹¹² *Martin Osano Ribera and Another v Municipal Council of Nakuru and 2 others* (2012) eKLR.

¹¹³ *Mohamed Ali Baadi and others v Attorney General and 11 others* (2018) eKLR.

¹¹⁴ *Michael Kibui and 2 others v Impresa Construzioni Giuseppe Malturo and 2 others* (2012) eKLR.

The fact that an evaluation or valuation report is produced and not controverted does not make the report justifiable and reasonable.¹¹⁵ In *Chief Land Registrar and 4 others v Nathan Tirop Koech and 4 others* consolidated with *National Land Commission v Nathan Kiprop Koech and 3 others* 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.¹¹⁶ 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 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.

3.4.2 Reasonableness

It is indisputable that courts use their discretion in awarding compensation, however the discretion must at all times be exercised judicially, aligning with principles, reasonableness and proportionate to the harm and danger suffered. The court in the case of *Gammel v Wilson 1982* emphasized on a fair compensation for the loss suffered by the deceased and in absence of cogent evidence of loss, the award should be modest however, where sufficient facts are established to reach a mathematical certainty, the court must make the best estimate it can from the facts.¹¹⁷

The 1984 Bhopal Gas Leak Disaster (industrial accident), which happened in India was as a result of leaking of forty (40) tons of methyl isocyanate (MIC) gas which leaked from the Union Carbide Factory to densely populated areas. It led to the death of more than 3800 people and half a million survivors suffered respiratory problems, eye irritation or blindness and other maladies as a result of the irritation. The award of damages to be awarded in this scenario, ought to be high due to the amount of damage including death of the residents.¹¹⁸

¹¹⁵ *James Mwangi Gatundu v Mastermind Tobacco (K) Limited (2019)* eKLR.

¹¹⁶ *National Land Commission v Nathan Kiprop Koech and 3 others (2016)* eKLR.

¹¹⁷ *Gammel v Wilson (1982)*, The Court of Appeal of England.

¹¹⁸ *Union of India v The Union Carbide Corporation (1989)* The Supreme Court of India.

In the legal precedent set by the case of *Board of Trustees of the Anglican Church Diocese of Marsabit v NIA and 3 others in 2018*, the High Court emphasized the importance of awarding damages that are reasonable and tailored to the specific circumstances of each case.¹¹⁹ The requirement for reasonableness in compensation awards has long been established within legal practice. Echoing this sentiment, the High Court in *Kenya Wildlife Service v Godfrey Kirimi Mwiti* endorsed the principle articulated by the court of Appeal in *Butler v Butler*, affirming that courts must consider the overall context and impact of injuries when determining appropriate amount of damages to be awarded.¹²⁰ This assessment therefore bestows discretion in the hands of the trial judge to do justice according to the specific circumstances under consideration. However, this discretion is subject to review by higher courts if it is exercised on erroneous principles or results in awards that are either excessively high or unreasonably low. In the civil appeal case of *National Environment Management Authority and another v KM and 17 others 2020* the appellate court set aside the compensation award of Kshs 1.3 billion and 700,000,000 costs of cleaning by the trial court stating that the court erred in awarding damages that were excessive, capricious and arbitrary based on wrong principles and unreasonable.¹²¹ It is important that comparable injuries be awarded almost similar awards. This is a way of creation of some of uniformity in the awarding of damages and ensuring that awards are reasonable the same was reiterated by Lord Morris in the case of *West (H) and Son Limited v Shepard*.¹²²

3.4.3 Breach of a Human Right

It is imperative that's the right to a clean and healthy environment should be perceived as of equal importance particularly in compensation just like my other right enshrined in the constitution. The constitution of Kenya under the Bill of Rights provides for the right to a clean and healthy environment under Article 42 and the right to life in Article 26¹²³. A violation of the right to a clean and healthy environment can also mean that the right to life is likely to be threatened in a polluted environment. The right to a clean and healthy environment is

¹¹⁹ *Board of Trustees of the Anglican Church Diocese of Marsabit v NIA and 3 others* (2018) eKLR.

¹²⁰ *Kenya Wildlife Service v Godfrey Kirimi Mwiti* (2017) eKLR.

¹²¹ *National Environment Management Authority and another v KM and 17 others* (2020) eKLR.

¹²² *West (H) & Sons Ltd v Shepard* (1963), The United Kingdom House of Lords.

¹²³ Article 26, *Constitution of Kenya* (2010).

intertwined to the right to life as was held by the court in *Waweru v Republic*, infringing the right to a clean and healthy environment would then mean violating one's right to life.¹²⁴ Consequently, for alleging the breach of right it has to be sufficiently proved that there has been a breach of one's human right. In addition, in the case of *Gitobu Imanyara and 2 others v Attorney General 2016* the court held that the quantum of damages to be awarded depends on the nature of the right that is proven to have been violated, the extent of violation and the gravity of the injury caused.¹²⁵ The right to a clean and healthy environment is just as paramount as any other constitutional right and warrants the same level of protection. However, there appears to be a discrepancy in how courts approach compensation for violations of this right compared to others. While the high court often awards substantially high compensation for various rights violations, the Environment and Land court seems to lag behind in this regard. It is crucial to recognise that environmental impacts directly affect human life, health, private life and property highlighting the significance of addressing these issues from a human rights perspective.¹²⁶

This will also deter its breach, punish those who are responsible. In the case of *Miguna Miguna v Fred Matiang'i and 6 others 2018* the plaintiff alleged violation of his rights and fundamental freedom that include being wrongfully arrested, he was held incommunicado in various police stations and deported out of his birth country without reason by the defendant on a second time arrival he was injected with tranquillisers and deported to Canada a second time. The court awarded him a general damage of Kshs 7,000,000.00.¹²⁷ Whereas in the case of *Odando & Another National Environmental Management Authority & 2 others, County Government of Nairobi and 5 others* the petitioners filed a petition seeking compensation of Kshs 70 billion for approximately 7 million people in the counties of Nairobi, Kiambu, Machakos, Makueni, Tana River and Kilifi counties affected by the pollution and degradation of the Nairobi and Athi river and were entitled to compensation for breach of their right to a clean and healthy environment.¹²⁸ Surprisingly, the court only awarded a sum of Kshs 10,000 to the 1st and 2nd petitioners against each respondent.

¹²⁴ *Peter K. Waweru v Republic* (2006) eKLR.

¹²⁵ *Gitobu Imanyara and 2 others v Attorney General* (2016) eKLR.

¹²⁶ Waweru M, 'Compensation in Environmental Liability Cases in Kenya' Published LLM thesis, University of Nairobi, Nairobi, 2019, 81.

¹²⁷ *Miguna Miguna v Fred Matiang'i and 6 others* (2018) eKLR.

¹²⁸ *Odando & Another National Environmental Management Authority & 2 others, County Government of Nairobi and 5 others* (2019) eKLR.

3.4.4 Value of Life

In cases involving compensation for loss of life, courts face the challenge of assigning a monetary value to the invaluable concept of life itself. While life is often considered priceless, environmental disasters that result in loss of life necessitates the quantification of this value for compensation purposes. The constitutional right to a clean and healthy environment safeguarded under article 42 forms the foundation of other rights including the right to life. However, courts have demonstrated inconsistency in their approach to valuing life during compensation proceedings.

In the case of **Chhabhadiya Enterprises Limited and another v Gladys Mutenyo Bitali (suing as the personal representative of the Estate of Linet Simiyu (Deceased)) 2018** the court awarded Kshs 100,000 a compensation of the victim aged 12 years.¹²⁹ Subsequently, in the case of **Kimunya Abednego Munyao v Zipporah S. Musyoka and another 2019**, a conventional global figure of Kshs 100,000 was awarded for the loss of life of a 41-year-old victim.¹³⁰ Contrary to these, **Wildlife Services v Geoffrey Gichuru** saw a 13-year-old being awarded Kshs 150,000.¹³¹

Despite these varying circumstances, it is notable that courts have consistently attached some monetary value to lost lives. Interestingly, the compensation amounts awarded by courts typically fall within the range of 80,000.00 and 200,000 demonstrate a similar approach by the courts despite their varying differences of the cases. Having a standard global sum awarded for all deaths implies that individuals with unique talents and abilities receive the same compensation as those who have yet to discover their potential. Justice Nyamweya, in the case of **Hyde Nthenya and another v Chi Eu Yi Limited and another**, emphasized the lack of set principles guiding compensation awards in our courts. He noted that the conventional award for loss of expectation of life is typically Kshs 100,000 indicating the arbitrary nature of compensation amounts.¹³² The conventional global figure ordinarily awarded by courts fails to consider factors that should determine the value of a person's life. In striving to compensate

¹²⁹ *Chhabhadiya Enterprises Limited and another v Gladys Mutenyo Bitali* (2018) eKLR.

¹³⁰ *Kimunya Abednego Munyao v Zipporah S. Musyoka and another* (2019) eKLR.

¹³¹ *Kenya Wildlife Services v Geoffrey Gichuru* (2018) eKLR.

¹³² *Hyde Nthenya and another v Chi Eu Yi Limited and another* (2017) eKLR.

for lost lives, court must consider individual circumstances and abilities if the deceased rather than relying on standardised approach.

Various factors should be taken into account when determining compensation for loss of life they include the age of the victim, life expectancy, potential earnings, quality of life, position held, and achievements made in life. The Value of Statistical Life (VSL) has emerged as a method to determine compensation of loss of a life. This method is faced with criticisms for being perceived as a trade-off between money and the risk of the death. Moreover, the VSL method fails to account for the age bracket and health assuming that all lives are of equal worth.¹³³ This then raises the question of whether some lives are considered more valuable than others. To address this question the high Court in *Kenya Breweries v Saro* where the court held that the age of the victim is of paramount importance in addressing compensation questions and assessment of damages in the case of a thirteen year old boy already in school and thriving in his education the damages to be awarded would be relatively high than that of a four year old who has not been to school and whose abilities are yet to be ascertained . The same applies in the scenario of ascertaining the value of a four-year-old child and a newborn. The value of a four-year-old in child is of a higher value than that of a newborn whose abilities is yet to be determined.¹³⁴

The awarding of compensation extends beyond merely compensation, it serves broader purposes such as discouraging future breaches, punishing those responsible and ensuring better protection of the constitutional rights. The court in *Lucy Wanjiku (suing as the legal representative of Mukaru Nga' ang'a Deceased) v Attorney General* 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.¹³⁵ The court in *Felix Njagi Marete v Attorney General* 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.¹³⁶

¹³³ Vliamos S and Hatzis A 'The Assessment of Compensatory Damages for Medical Error by the Greek Courts: An Economic Analysis' March 2009 < https://www.researchgate.net/profile/Aristides-Hatzis/publication/228322702_An_Economic_Analysis/links accessed on 30th March 2024.

¹³⁴ *Kenya Breweries Ltd v Saro* (1990) eKLR.

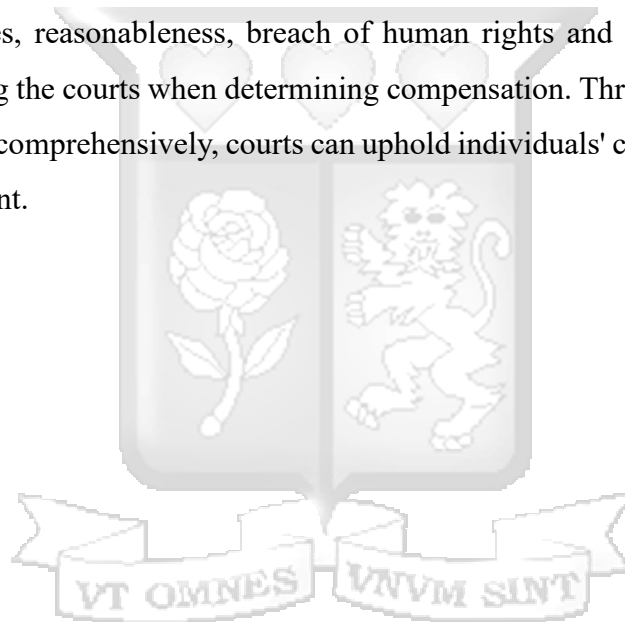
¹³⁵ *Lucy Wanjiku v Attorney General* (2018) eKLR.

¹³⁶ *Felix Njagi v Attorney General* (1987) eKLR.

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.

3.5 Conclusion

In ensuring that compensation awarded is just and fair, the courts must consider several key principles such as polluter pays principle, sustainable development and precautionary principle. To create uniformity in decisions of the courts when determining the quantum of compensation, it is important to establish a set of uniform principles. Furthermore, factors such as the nature and extent of damages, reasonableness, breach of human rights and the value of life plays crucial roles in guiding the courts when determining compensation. Through considering these principles and factors comprehensively, courts can uphold individuals' constitutional rights and protect the environment.



Chapter Four

A Study of The Indian Compensation System

4.0 Introduction

Environmental concerns arising from increased economic activities that threaten the environment have prompted nations to come up with compensation mechanisms towards propelling environmental justice. India is one such country where pollution is an eminent problem. It alone contributes to 8% of the world's pollution and is the third largest emitter of greenhouse gases after China and the United States of America. In response to the pressing environmental issues, India has taken steps to introduce compensation mechanisms aimed towards fostering environmental justice. These mechanisms seek to hold polluters accountable for the ecological damage they cause and provide restitution to affected communities and ecosystem.

India has experienced a swift surge in industrialisation and urbanisation that result to pollution of air, water and soil reaching alarming levels, with recent events where the city is seen to be engulfed in smogs, the rivers being used for dumping industrial waste. The people who are mostly affected are the local communities within the areas of the industries. The Supreme Court in India are guided by polluter's pay principle and international jurisprudence on the principles of sustainable development and the precautionary principle.¹³⁷ The courts are also guided by precedents of environment compensation cases. In furtherance of these trends, the principle polluter pays was well set out in the case of *Deepak Nitrie v State of Gujarat 2004* where the Supreme Court categorically held that there needs to be a clear finding of environmental harm broad correlation and capacity between the harm and the alleged perpetrator and they harm must be caused by them what follows then is the polluter pays principle.¹³⁸

4.1 The Indian legislation

The Indian legislation recognises the right of life to be a fundamental right under Article 21 of the constitution that includes the right of enjoyment of pollution free water and air for full

¹³⁷ Sharma A, Singh S and CAM Disputes Team, 'what is the Cost of Environmental Breaches? A look at the Evolving Jurisprudence of Environmental Compensation' Cyril Amarchand Mangaldas Dispute Resolution Blog, 29th June 2023.

¹³⁸ *Deepak Nitrie v State of Gujarat* (2004), The Supreme Court of India.

enjoyment of life which is now a well-established principle in Indian jurisprudence.¹³⁹In 2010, India enacted National Green Tribunal Act to establish the National Green Tribunal so that it could realise with its obligations under the Stockholm conference and for effective adjudication of environmental justice. This legislative measure aimed to meet India's environmental obligations while addressing the rising environmental concerns.¹⁴⁰ Moreover, Indian environment courts and NGT are mandated to appoint experts from government research institutions to aid in resolving complex environmental issues, thus ensuring clarity in decision making processes.¹⁴¹ These experts play a pivotal role in environmental compensation liability cases, providing valuable insights that inform court rulings than the usual where the courts largely rely on the parties to put evidence which can be inadequate especially in the context of complex cases with scarce evidence adduced by the parties.

The tribunal is bound by the principles of Sustainable Development, Precautionary principle and polluter pays principle while determining compensation.¹⁴²The tribunals may rule and issue orders on relief and compensation to the victims of pollution and other environmental damage but also for the restitution of the environment. India is one of the two countries that use punitive damages in environmental compensation cases. Similarly, in countries like India, the domestic courts may direct environmental regulatory bodies to develop a transparent method and formula for evaluating environmental damages which are otherwise difficult to ascertain. "Compensation is not paid in respect of claims for environmental damage based on an abstract quantification."¹⁴³

The methods used in computing environment compensation used by the NGT as established in the case of *Paryavaran Suraksha Samiti and Anvr v Union of India* include.

$$EC = PI \times N \times R \times S \times LF$$

¹³⁹ Sharma A, Singh S and CAM Disputes Team, 'what is the Cost of Environmental Breaches? A look at the Evolving Jurisprudence of Environmental Compensation' Cyril Amarchand Mangaldas Dispute Resolution Blog, 29th June 2023.

¹⁴⁰ Raghuvveer N and Dr. Armin R, 'Determination of Environmental Compensation: The Art of Living Case' 12 NUJS Law Review 1, 2019,2.

¹⁴¹ Mohan M and Els R. Kini, 'Compensation for Environmental Damage: Progressively Casting a Wider Net, but What's the Catch?' 54 Vanderbilt Journal of Transnational Law 3, 2021,659.

¹⁴² Mohan M and Els R. Kini, 'Compensation for Environmental Damage: Progressively Casting a Wider Net, but What's the Catch?' 54 Vanderbilt Journal of Transnational Law 3, 2021,652.

¹⁴³Ibid.

In this formula EC stands for Environmental Compensation, PI stands for Pollution Index of industrial sector, N stands for Number of days the violation took place, R stands for a factor for compensation for the environmental harm caused by the industry, S stands for factor for scale of operation and LF is the Location Factor.¹⁴⁴

The NGT employs two approaches in determining and allocating compensation. Firstly, it imposes an environmental compensation ranging from 5-10% of the project cost if it finds the industry to be defaulting. Secondly, it calculates environmental compensation based on a percentage of the industry's annual turnover.¹⁴⁵

This begs the question whether the NGT has fully achieved its intended purpose. It is acknowledged that the tribunal has made remarkable strides towards environmental justice through reducing backlog of cases in courts and awarding fair compensation in some cases. However, the tribunal has over the years earned criticisms, this is because it often lacks a clear methodology for quantifying environmental damage.¹⁴⁶ Consequently, there is insufficient guidance with respect to determining compensation while adhering to principles such as sustainable development, polluter pays principle and precautionary principle when giving a compensatory order.¹⁴⁷

4.2 Exemplary Damages as Addressed by the Judiciary in India

At the face of large-scale harm and dangerous activities carried out by industries the courts in India impose the exemplary damages in environmental cases in addition to compensatory damages.¹⁴⁸ Punitive or exemplary damages in relation to environmental damage were first addressed in the case of the Minister of Environment and Forests of the time who had permit

¹⁴⁴ Sharma A, Singh S and CAM Disputes Team, 'what is the Cost of Environmental Breaches? A look at the Evolving Jurisprudence of Environmental Compensation' Cyril Amarchand Mangaldas Dispute Resolution Blog, 29th June 2023.

¹⁴⁵ Sharma A, Singh S and CAM Disputes Team, 'what is the Cost of Environmental Breaches? A look at the Evolving Jurisprudence of Environmental Compensation' Cyril Amarchand Mangaldas Dispute Resolution Blog, 29th June 2023.

¹⁴⁶ Raghuvver N and Dr. Armin R, 'Determination of Environmental Compensation: The Art of Living Case' 12 NUJS Law Review 1, 2019,3.

¹⁴⁷ Raghuvver N and Dr. Armin R, 'Determination of Environmental Compensation: The Art of Living Case' 12 NUJS Law Review 1, 2019,4.

¹⁴⁸ Mohan M and Els R. Kini, 'Compensation for Environmental Damage: Progressively Casting a Wider Net, but What's the Catch?' 54 Vanderbilt Journal of Transnational Law 3, 2021,650.

to change the natural course of a river to suit the requirements of their hotel business. The Supreme Court of India determined the case on its own motion imposing compensation by way of cost for the restitution of the environment, moreover, it held that “the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner.”¹⁴⁹

Additionally, in 1987 in the *Oleum Gas* case the Supreme Court in India started implementing additional societal damage as part of the total compensation calculation. Attempting to lay a path away for awarding compensation in cases of environmental injuries using the exemplary damages the court stated that compensation is to be weighed against the magnitude of the acts of enterprise that caused pollution and the capacity of the enterprise. The court also stated that the main aim of compensation is to have a deterrent effect. This would then mean that the more extensive and successful a company is, the higher the compensation it must pay for any harm resulting from the course of its actions. However, this varies in a case-to-case basis and is case specific given the unique circumstances of each case.¹⁵⁰

The NGT was put in place with a view to ease and solve the challenge of compensation in environmental cases and backlog of environmental cases with the many cases of industrial accident pollution that were increasingly reported. The NGT has achieved some milestones and has managed to solve many environmental compensation cases relatively reducing backlog and dispensing out fair and just compensation while on the other hand it has earned its fair share of criticisms of how they were awarding compensation that resulted in a scenario where the compensation is either significantly undervalues or overvalues the environment harm incurred due to absence of a clear methodology by the NGT to determine the compensation amount. While the judiciary courts in India rely on the experts and NGT to determine the compensation in complex environmental cases where there is insufficient evidence adduced by the parties, the NGT in some cases merely use their discretion and calculate compensatory damages to the environment based on equity and by imposing punitive damages.¹⁵¹

¹⁴⁹Ibid

¹⁵⁰ *Mehta v Union of India* (1986), The Supreme Court of India.

¹⁵¹ Mohan M and Els R. Kini, ‘Compensation for Environmental Damage: Progressively Casting a WiderNet, but What’s the Catch?’ 54 *Vanderbilt Journal of Transnational Law* 3, 2021,654.

Conclusion

The main objective of this chapter was to analyse the principles and measures used in the Indian jurisprudence in ensuring effective adjudication and administration of environmental justice in compensation. To do so, this chapter examined in brief the the tribunal established to deal with compensation of environmental cases and analysed the formula and measures adopted by the tribunal, from the research it can be concluded that although there are some challenges experienced to a certain extent, most of the measures adopted have proven effective in their purpose and thus can be emulated and applied in Kenya. The study then proceeds to provide recommendations that shall be handled in the next chapter.



Chapter Five

Conclusion and Recommendation

5.0 INTRODUCTION

This chapter will conclude the study and provide recommendations it considers optimal derived from the findings of each chapter. Thereafter, it will then provide guidance on the approach courts should employ in awarding a just and fair compensation for consistency and safeguarding individuals' right in instances of violation and prioritising protection of the environment.

5.1 CONCLUSION

This study embarked on analysing the current mechanism in place for awarding compensation, which remains inefficient, along with the principles and tests used by courts to guide the process of awarding compensation. The primary objective is to establish a clear methodology that provides court with guidance when awarding compensation. This methodology encompasses principles from Kenyan constitution, international jurisprudence, as well as various tests that courts should apply to ensure consistency in cases involving breaches of the right to a clean and healthy environment. As custodians of the bill of rights, court are tasked with averting disparities in compensation cases concerning environmental harm, ensuring that awards are neither overvalued nor undervalued. Recognising the critical role of courts in environmental adjudication, this study is structured into relevant chapters each pertinent laws and issued as they relate to the main objective of establishing equitable guidelines for awarding compensation in environmental cases.

In the first chapter, the research proposal outlined the introductory structure of the study, which included the background of the study. It highlighted that compensation remains a recourse for rights violations, yet it remains relatively unexplored and that there was a necessity to address this gap. Courts have a vital responsibility to ensure that compensation in environmental cases is fairly administered, balancing the protection of individuals' rights and the preservation of the environment. The lack of guidance in this area poses significant challenges in addressing compensation. While environmental principles such as polluter pays is effective in identifying the responsible party it falls short in quantifying compensation for environmental degradation.

In resolving this courts must develop comprehensive framework for determining compensation in environmental cases, taking into account the complexity of environmental damage and the the principles of fairness and justice.

Chapter two aimed at analysing the existing legal framework for awarding compensation in Kenya. It examined specific provisions of key legislative documents such as the 2010 constitution of Kenya, the international framework that provide principles used to guide the courts when awarding compensation in environmental cases and the human rights and tort litigation avenues for seeking redress. It shed light on challenge within the Kenyan legal framework that has inconsistent compensation mechanism systems and there is need for further refinement and clarity in establishing an efficient compensation system that ensures fairness, accountability and environmental justice.

Chapter three explores the factors essential for consideration when awarding compensation in environmental cases include the nature and evaluation of damage, reasonableness, breach of human right and the value of life.

Chapter four delves into the Indian environmental jurisprudence. The Indian environmental jurisprudence establishes a specialised body to address the compensation issues. This ensures that cases are adjudicated by experts in environmental matters and a uniform compensation other than varying judgments influenced by judges' discretion and different interpretations of the law. To achieve uniformity in compensation awards for breaches of the right to a clean and healthy environment, guiding principles should be developed to inform judicial decisions. These principles should be adaptable to the specific circumstances of each case, aligning with environmental justice principles. The establishment of a tribunal dedicated to environmental matters underscores the importance of safeguarding the right to a clean and healthy environment, emphasising its significance as a fundamental right enshrined in the constitution. The right to a clean and healthy environment should be treated with the same level of importance as other constitutional rights, particularity in the context of compensation awards. Kenya can borrow a leaf from the Indian jurisprudence, the country has implemented several practices that Kenya will benefit in emulating. Given the findings the following recommendations are made so as to ensure effective adjudication and environmental justice that inform the process of awarding compensation.

5.2 RECOMMENDATIONS

Given the findings of this paper, the following recommendations are made, the short-term recommendations include, the courts should endeavour to establish the factors that courts should consider in awarding compensation for environment liability cases such as the evaluation of the nature of damage so as to enable a court to determine the nature and degree of damage. The extreme the injury the higher the reward, however, is still applies that evidence or proof should be showcased to determine the severity of damage. Reasonableness, an award must at all times be reasonable in consideration of each unique circumstances of the case. In cases where the breach occurred is to a large extent and the casualties are many the court in exercising discretion should determine what is reasonable in that situation as compared to one where the level of damage is less, and casualties are few. Breach of a bill of right, it must be ascertained that the action by the alleged perpetrator indeed is categorised as an infringement of the rights and since the right to a clean and healthy environment is linked to the right to life what must be showed is the breaching of the right to a clean and healthy environment jeopardised their right to life. Value of life, more often than not the disasters that threaten and destroy the environment can also lead to the loss of lives, therefore, it is paramount to establish means through which the value of life is ascertained so as to enable fair and just compensation of the victims. This includes taking into consideration factors such as the age of the victim, life expectancy, possible incomes, quality of life, their positions and achievements.

Secondly Kenyan courts should establish guiding principles that informs the judge's decision when determining awards, given the significant discretion involved. Moreover, judges should ensure that their decisions are rooted in correct legal principles, fairness and a conscientious exercise of the judicial responsibilities. In case of legal uncertainty regarding the award of environmental damages, the court should rely on pertinent principles, including sustainability, which prioritises the conservation of the environment and natural resources.

Thirdly, the Kenyan could emulate the footsteps of Indian Courts by introducing exemplary or punitive damages to ensure exercise of care to the large corporations engaging in risky practices and ensure societal safety.

The long term includes, similarly to the Indian courts the Kenyan courts can establish an environment tribunal that is comprised of independent experts to guide the court in a more

objective manner through public participation and doing extensive research about it. To reduce the backlog of cases.



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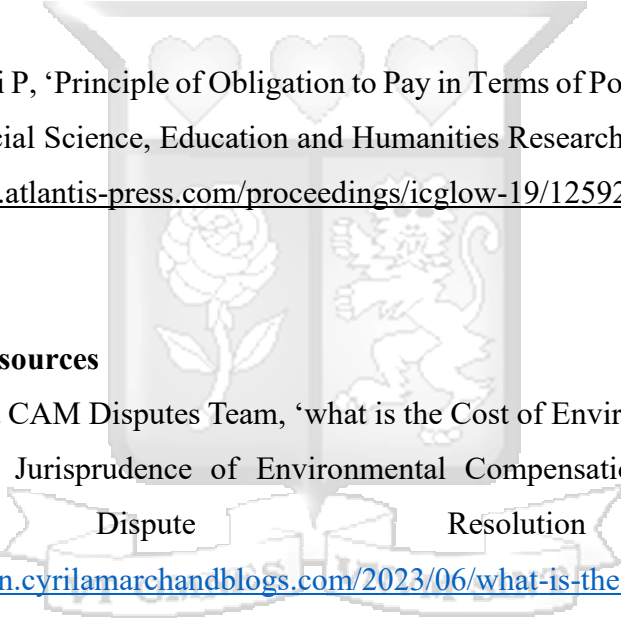
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