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**CRITICAL ASSESSMENT OF PUBLIC PARTICIPATION IN ENVIRONMENTAL  
IMPACT ASSESSMENT PROCESS IN THE UPSTREAM PETROLEUM SECTOR  
IN KENYA**

**SANDRA SOPHY NYANCHAMA**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
DEGREE OF MASTER OF LAWS AT STRATHMORE UNIVERSITY**

**STRATHMORE LAW SCHOOL  
STRATHMORE UNIVERSITY,  
NAIROBI, KENYA.**



## DECLARATION

I **Sandra Sophy Nyanchama** of Student Registration Number 133939, do hereby declare that this thesis is my original work and has not been submitted to any other learning institution for academic or any other award.

Signed:

Date:

I **Professor Damilola S. Olawuyi, SAN, FCI Arb** having supervised this thesis do hereby declare that the work submitted had been approved by myself and has not been submitted for assessment elsewhere.



## **ABSTRACT**

Public participation is at the centre of Environmental Impact Assessments (EIA) around the globe and is considered critical in environmental decision making. EIA in oil and gas projects are key indicators of whether a proposed project has positive or negative effects. Oil and gas projects have far-reaching environmental harm which may affect the local communities around the project area, the environment and property. Therefore, effective public participation is very important because it acts as a preventive measure in ensuring the safety of the environment at all stages of the project.

The EIA process in Kenya involves various process, public participation is the cornerstone and involves comments by lead agencies which play an advisory role and submission of comments and public hearing. In oil and gas projects, public participation involves an open, accountable and structured process involving mostly local communities and allied stakeholders through interactions, exchange of views and in certain cases some influence in government decision on granting licences to a project for exploration.

Public participation is not without challenges as there has been no defined structure of how the government has put in place capacity building initiatives on the citizens to enable them to engage effectively with this process and ensuring that the process is well informed, structured and meaningful to the target audience. This research study attempts to propose that a citizen-centred approach to public participation should be adapted because of its focus on public knowledge rather than a mechanical process of ticking boxes for compliance. The citizen-centred approach is how citizens exercise influence and control over the decisions that affect them.

This research study proposes to critically analyse the role of public participation in an EIA process in Kenya with a specific focus on the upstream oil and gas sector. This research seeks to identify the current legislative and institutional framework of public participation in an EIA process in Kenya, seeks to understand the nature, scope and content of public participation and identify any gaps in the process and finally conduct a comparative analysis with other countries to establish best practice and lessons that Kenya can learn.

This research study concludes that a citizen-centred approach is the most effective public participation approach to efficient EIAs in Kenya.

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*Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Laws of Kenya*

*Federation of Nigeria EIA Act (Act No. 86)*

*Localism Act 2011 (UK)*

*Petroleum Act (Act No. 2 of 2019)*

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*Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)*

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*United Nations Universal Declaration of Human Rights. 1948*

*UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994 (Stockholm Declaration)*

## LIST OF ABBREVIATIONS

CPP-Consultation and Public Participation

EIA- Environmental Impact Assessment

EPRA- Energy and Petroleum Regulatory Authority

EMCA- Environmental Management and Coordination Act

IOCs- International Oil Company

PRA-Participatory Rural Appraisals Techniques

RRA- Rapid Rural Appraisal Techniques

LAPSSET -Lamu Southern Sudan-Ethiopia Transport Corridor

NEMA- National Environment Management Authority



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## **DEDICATION**

I dedicate this thesis to Schatz, for the support and encouragement throughout the LLM program. My children Sugar and Spice for always having the warmest smiles that gave me the strength to work even harder.

To my late grandfather James Masese Ombiro: it is your inspiration and believe in me that gave me the motivation to write this piece, even thou you could not make it to my graduation, your spirit lives on!

I also dedicate this thesis to my parents, siblings, mother-in-law, Gunner's family for emotional support and encouragement and finally my nanny for helping out with my little ones while I spent a lot of time away from them. I am grateful.



# 1. CHAPTER INTRODUCTION

## 1.1. BACKGROUND

The discovery of oil in Kenya in mid-2012 raised a huge expectation on how this resource would transform the economy of the country drastically<sup>1</sup>. Oil is a major drive, in economic indicators around the globe, this is because the global economy heavily relies on the petroleum industry for its energy demands. The International Energy Agency predicts that energy demand is likely to rise by 1.3% annually up to the year 2040, an indicator that the need for energy is not about to end.<sup>2</sup>

While Kenya looks forward to commercially viable oil which could bring huge foreign earnings, deepen domestic revenues and other social-economic benefits, this is also likely to bring other detrimental impacts on the environment and society. There is, therefore, a need to have a good balance between the competing social, economic, and environmental interest.

A survey study was conducted by Nick Okello, Lindsay Beevers, Wim Douven and Jan Leentvaar on public involvement during environmental impact assessment (EIA) stages (scoping, EIA study Report and EIA follow-up activities) and whose respondents were employees of National Environmental Management Authority (NEMA) (15%), Investors (8%), affected public (8%), non-governmental organisations (31%), lead agents (11%) academicians and EIA practitioners and Consultants (27%) in Kenya.<sup>3</sup> The limitation of this survey was that it required accessibility through the internet and hence low percentages of the local communities. The finding was that 53% of the respondents opined that the role allocated to the affected public members during the early EIA study report was either inadequate or very inadequate. On the issue of monitoring and evaluation post-EIA activities, 70% of the respondent opined that the affected public was inadequately consulted and lacked awareness as the main obstacle to public participation in EIA.

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<sup>1</sup>Online: Akwiri J, 'Kenya's first crude oil export sparks demands over revenue sharing' Reuters 26 August 2019 <<https://www.reuters.com/article/us-kenya-oil-idUSKCN1VG1FQ>> on 24.05.2021

<sup>2</sup> International Energy Agency, 'World Energy Outlook' *International Energy Agency, Paris 2019* <<https://www.iea.org/reports/world-energy-outlook-2019>> on 05 February 2020

<sup>3</sup> Okello N., Douwen W., Leentvaar J., Beevers L., 'Breaking Kenyan Barriers to public involvement in environmental impact assessment' *IAIA Conference paper no 5*, 2010.

An analysis of the sentiments of the authors indicates that the gap that exists is in the implementation of public participation in EIA processes as inadequate more so considering that the study was conducted among the ‘elite’. This could be an indicator that the local communities are unaware of what an EIA process entails throughout the cycle.

The Early Oil Pilot Scheme Phase II ESIA non technically summary and the final ESIA report does not give much information on whether public participation was undertaken, the Early Oil Pilot Scheme Phase II ESIA non technically summary report being a non-technical summary (which ought to be an abridged version) does not give the reader the confidence that this critical process was undertaken in the preparation of the ESIA<sup>4</sup>. The non-technical summary further only has a *swahili* translation whereas the document is aimed at enabling the local communities access information on the adverse effects of the project, this makes it difficult for the communities to participate as they lack understanding of what the technical ESIA report entails especially considering the literacy levels of these communities.<sup>5</sup>

The environmental agency tasked with the EIA process is the National Environmental Management Authority (NEMA)<sup>6</sup>. NEMA is established in the Environmental Management and Coordination Act (EMCA) and its function is to coordinate and supervise environmental matters in Kenya and is mandated to implement environmental policies. NEMA implements the provisions of EMCA and overall matters on environmental protection including public participation before an EIA licence is issued taking into account government agencies such as EPRA for oil and gas-related environmental concerns. Some of the limitations of NEMA have been identified as lacking the adequate capacity to effectively guide EIA’s<sup>7</sup>, this possess a challenge because NEMA is the only agency tasked with the EIA decision-making process but with a consultation with County Environmental Committees.

The constitutional underpinning of the EIA process is anchored in Article 69(1)(f) which provides that the government shall establish systems of EIA, environmental audits and monitoring of the environment<sup>8</sup>. These EIA structures are outlined in the EMCA read together

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<sup>4</sup> Tullow Kenya BV, *Early Oil Pilot Scheme Phase II- Environmental and Social Impact Assessment: Non-Technical Summary*, November 2018, Nairobi Kenya

<sup>5</sup> Tullow Kenya BV, *Mpango wa Awali wa Majaribio ya kuchimba Mafuta Awamu ya Pili- Thathmini ya Athaei za Kimazingira na Kijamii: Muhasari Usiokuwa wa Kitaalamu*, Desemba 2018, Nairobi, Kenya

<sup>6</sup> Section 7, *EMCA* (1999)

<sup>7</sup> UNEP, *Environmental Assessment in the WIO Region: An Overview of the Policy, Legal, Regulatory and Institutional Frameworks Related to Environmental Impact Assessment in the WIO region*. Nairobi, Kenya, 2010.

<sup>8</sup> Article 69(1)(f), *The Constitution* (2010)

with Environmental (Impact Assessment and Audit) Regulations, 2003 (herein ‘Regulations 2003’).

Public participation is important in the upstream petroleum sector because during drilling operations, for example, methane which is at least 84% more harmful than carbon dioxide is emitted into the environment<sup>9</sup> which can affect communities in an area. This and other environmental risks necessitate the government of Kenya to put up a safeguard that is geared towards a sustainable environment.

Public participation in environmental matters is provided for in Article 69(1)(d)<sup>10</sup>. The Constitution<sup>11</sup> also provides that Parliament shall promote public participation and involvement in the legislative process in its general procedures and rules.

The principle of public participation was first coined in the Rio Declaration on Environment and Development<sup>12</sup>. The Rio Declaration proposed that environmental issues should involve the participation of citizens at all relevant levels including national and local level.

Public participation is usually paramount during project planning, project implementation and decommissioning stages between the affected persons, lead agencies, civil societies among other stakeholders<sup>13</sup>. The methodology used may be meetings and workshops with the affected communities who elect representatives to protect their interest; dialogue through county governments and local leaders; questioners and surveys for more Knowledgeable audience; participatory rural appraisals or rapid rural appraisal techniques (PRS/RRA)<sup>14</sup>.

This research study will critically analyse the role and importance of public participation in an EIA process. It discusses the need for a citizen-centred approach to consultation and public participation (CPP) as an important aspect of an effective EIA process and a cornerstone for project planning and successful implementation.

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<sup>9</sup> Online: United Nation Environment Programme ‘Greasing the wheels of Kenya’s nascent oil and gas sector’ United Nation Environment Programme, 18 July 2018 <<https://www.unenvironment.org/news-and-stories/story/greasing-wheels-kenyas-nascent-oil-and-gas-sector>> on 10 July 2020

<sup>10</sup> Article 69(1)(d), *Constitution of Kenya* (2010)

<sup>11</sup> Article 118(1)(b), *Constitution of Kenya* (2010)

<sup>12</sup> Principle 10, *Rio Declaration on Environment and Development* (1992)

<sup>13</sup> Okello N, Beevers L, Douven W & Leentvaar J, ‘The Doing and Undoing of Public Participation in Environmental Impact Assessment’ *Impact Assessment and Project Appraisal* (2009), 217-226

<sup>14</sup> Pretty J, Vadouche D, ‘Using Rapid or Participatory Rural Appraisal in Swanson.’ *A reference manual* (1997), FAO- Rome

This research study will consider the legal framework for enhancing citizen-centred public participation in EIA processes in Kenya. The research will analyse various decided cases including the Mui Coal Basin Local Community case<sup>15</sup> which provided the principles and elements for environmental governance in Kenya.

This research study hopes to investigate whether the country has robust and effective legislation, policies and programmes that are geared towards a citizen-centred approach to public participation to achieve environmental sustainability.

## **1.2. STATEMENT OF THE PROBLEM**

According to the Ministry of Energy and Petroleum, Strategic Environmental and Social Assessment of the Petroleum Sector in Kenya final report of 2016, there are inadequacies in the relevant guidelines and capacity that facilitate effective public participation in the sector.<sup>16</sup>

In terms of capacity the report indicates that the local communities have limited capacity in effectively participating during the EIA process and monitoring compliance of project proponents with licence conditions. The community is therefore unaware when there is a breach in the licensing conditions.<sup>17</sup> Turkana for example being a semi-arid area most of the communities have low literacy levels and therefore limited in capacity to understand the importance of participation.

Kenya has a legal framework that requires public participation under the EMCA, this is a positive step towards curing the inadequacies in the legislative framework. However, knowledge is limited on whether the mechanisms laid out in the regulations are stringent enough and effectively complied with in practice. Proactive public participation is necessary in order to determine the efficacy of the process. It is therefore important to find out whether extant mechanisms in place encourage the public to participate in environmental decision-making.

In the oil and gas context, for the country to attain sustainable development, all proposal for development project must consider EIA as paramount. A violation of this was experienced during the construction of the Lamu Southern Sudan-Ethiopia Transport Corridor (LAPSSET)

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<sup>15</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

<sup>16</sup> Ministry of Energy and Petroleum, 'Strategic Environmental and Social Assessment of the Petroleum Sector in Kenya' 2(1) *Kenya Petroleum Technical Assistance Project*, 2016, 40.

<sup>17</sup> Ministry of Energy and Petroleum, 'Strategic Environmental and Social Assessment of the Petroleum Sector in Kenya', 53

where the mangrove forests were destroyed and the local settlement disrupted, it seemed that the public/community participation on this was not considered in decision making therefore not subjected to EIA.<sup>18</sup> This move demonstrates that there are lapses in the conduct of the EIA process in Kenya. Another case in point is the Save Lamu case<sup>19</sup> wherein the National Environmental Tribunal was asked to determine the adequacy of a consultation process in an EIA study. In the case of Save Lamu, the question of the adequacy of Regulation 17 of Regulation 2003 was put in question and specifically what information is needed to form a comprehensive consultation process? The experience in the LAPSSET and Save lamu case alludes to the existence of gaps in both the process and the legislative and institutional framework.

If public participation is to take active and real consideration of the affected communities, then these communities should be at the centre of the decision making process in EIA licensing.

This research study proposes that for public participation to be effective and to have a meaningful impact to the local communities there is a need to have a citizen-centred approach to the EIA process as it creates accountability in planning and legitimizes the process.

### **1.3. JUSTIFICATION/RATIONALE OF THE STUDY**

The findings of this study will highlight the gaps in public participation in EIA process in terms of the legislative and institutional framework, further the study will inform the government and other oil and gas stakeholders on the necessary steps to improve public participation in an EIA process that will eventually lead access to information and proactive public participation.

The research study seeks to adopt the best practices concerning a citizen-centred approach to public participation in the selected counties.

This research study will undertake a comparative analysis to establish the international best practise. This research study in advancing its comparative analysis adopts Zweigert and Kotz's functionality theory. According to Zweigert and Kotz's theory what matters in selecting a country for a legal system comparative should be not just the similarities of characteristics between the corresponding countries but also the functionality of the proposal. If the policy,

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<sup>18</sup> Natural justice, 'One year after landmark judgement on Lamu port violations, construction continues unabated' *Natural Justice*, 2019 <<https://naturaljustice.org/one-year-after-landmark-judgment-on-lamu-port-violations-construction-continues-unabated/>> on 24.05.2021

<sup>19</sup> *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR

concept or law of a foreign country can work well, then the origin of that law should not matter.<sup>20</sup>

The research is alive to some of the cons such as the inherent difference in the level of civilization and societal underpinning of both countries especially England but still opines that policy choices, concepts and legislative solutions can be borrowed from other jurisdictions with similar legal systems as long as there is functionality and provision of a solution to social needs. The similarities of England with Kenya are evidenced in the fact that they are both common law countries with a somewhat similar legal system and therefore the concept of comparative analysis is likely to fit through the intricate balance of ambiguities and precisions. Nigeria even though of a different legal system, it operates within the African Continent with similar social struggles as Kenya.

#### **1.4. STATEMENT OF OBJECTIVE**

The general objective of the research study is to critically analyse the gaps that exist in Kenya's EIA process concerning public participation.

This study will focus on the following specific objectives:

- a) To investigate and establish the current challenges in public participation in the EIA process in Kenya, especially in upstream petroleum sector.
- b) To examine the nature, scope and content of citizen-centred participation in the EIA process globally, and in two comparator countries, namely England and Nigeria.
- c) To examine the legal, policy and institutional framework of Public Participation
- d) To propose reforms to the legal and institutional framework for transplanting and implementing a citizen-centred approach in Kenya.

#### **1.5. HYPOTHESES**

Hypothesis 01: Public participation procedures in EIA processes in Kenya currently fall short of international best practices

Hypothesis 02: A citizen-centred approach can improve the EIA process in Kenya

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<sup>20</sup> Zhuang S,' Legal transplantation in the People's Republic of China: A response to Alan Watson' *European Journal of Law Reform*, 2006, 215,223

Hypothesis 03: Existing legal frameworks on public participation in EIA processes in Kenya can be improved to make them more stringent and citizen-centred

## 1.6. RESEARCH QUESTIONS

1. To determine the nature, scope and content of citizen-centred participation in the EIA process
2. To determine whether the existing legal, policy and institutional framework of public participation in the EIA process in Kenya is stringent and in line with international best practices.
3. To identify and analyse the current gaps in public participation in the EIA process in Kenya.
4. To determine the framework for implementing a citizen-centred EIA process
5. To establish the lessons to be drawn from identifiable jurisdictions through comparative analysis.
6. To determine the reforms necessary in Kenya's EIA process to make them citizen-centred and effective.

## 1.7. THEORETICAL FRAMEWORK

This research study is based on the following theories; participatory development theory, deliberative democracy theory, comparative theory and public participation theory. These are discussed below:

The Participatory development theory suggests that the stakeholders including host country citizens should take part in the legislative process as equal partners<sup>21</sup>. They, therefore, have the right to access information that is necessary for a project and be consulted at all levels of an EIA including the right to oppose a project with valid reasons.<sup>22</sup> The Constitution of Kenya provides that natural resources belong to the people of Kenya but held in trust by the Government.<sup>23</sup> This affirms the sovereignty of the people of Kenya and inherently their right to participate in an EIA process. The International Oil Companies' together with the government ensure effective community participation in all project cycle phases. The principal

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<sup>21</sup>Bott, J.' Community participation and its relationship to community development', *Oxford University Press*,1995, Vol.30, No.2, 158-169

<sup>22</sup> Bott, J.' Community participation and its relationship to community development', *Oxford University Press*,1995, Vol.30, No.2, 158-169

<sup>23</sup> Section 14 (1), *The Petroleum Act* (2019)

theory was coined in the Aarhus Convention on Access to Information, public participation in decision making and access to justice in environmental matters.<sup>24</sup> It is also based on the Stockholm Declaration on the Human Environment under principle 1 and the Rio Declaration on Environment and Development<sup>25</sup>. As a matter of general practice and requirement, the EIA process is not to be considered complete until NEMA has involved all affected persons as equal partners and interest groups right from the initial EIA process.

The deliberative democracy theory advocates for interpretive conceptualization, wherein the focus is that of citizens with diverse perspectives on environmental concerns exchange reasons and ideas for policy proposals and negotiate decisions that are likely to affect them<sup>26</sup>. The aim is to foster reasoned agreements in the presence of conflicting perspectives, values and ideologies, in this case, the environment. This theory could encompass civil societies that make unique contributions and make specific recommendations as an entry point in influencing policies regarding EIA. A case on point where this theory is effectively deployed and will be discussed in detail is *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*<sup>27</sup>, wherein the main question was the process of obtaining an EIA and role of public participation and the threshold thereof as some of the conflicting perspective from the petitioners and claimants.

The comparative theory will be used for purposes of comparing and establishing best practice. The research study will analyse the legal system in England on public participation because of its similarity to Kenya's legal system and further because of its ranking as 3<sup>rd</sup> in the resource governance index of 2017.<sup>28</sup> The other comparative state considered is Nigeria. Nigeria has been selected based on the fact that it is an African country therefore easily relatable based on jurisdictional and cultural factors. Nigeria has also been in the oil and gas industry much longer than Kenya and ranked 55<sup>th</sup> in the resource governance index of 2017. As a country of comparison Nigeria unfortunately still struggles with its public participation requirement albeit its federal law provisions. It has been observed that in Nigeria, in practice the decision on a

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<sup>24</sup> Economic Commission for Europe, 'Environment for Europe', Committee on Environmental Policy, Fourth Ministerial Conference Aarhus, Denmark, 23-25 June 1998, ECE/CEP/43 21 April 1998

<sup>25</sup> Principle 10, *Rio Declaration on Environment and Development* (1992)

<sup>26</sup> Dryzek JK, 'Deliberative Democracy and beyond: Liberals, Critics, Contestation' *Oxford University Press*, 2000

<sup>27</sup> [2019] eKLR

<sup>28</sup> Natural Resource Governance Institute, '2017 Resource Governance Index', *Natural Resource Governance Institute*, 2017, 5

<[https://api.resourcegovernanceindex.org/system/documents/documents/000/000/046/original/2017\\_Resource\\_Governance\\_Index.pdf?1498599435](https://api.resourcegovernanceindex.org/system/documents/documents/000/000/046/original/2017_Resource_Governance_Index.pdf?1498599435)> on 29 August 2020

project is already made and the participation only serves to sanitize the process and has little impact on the EIA decision to proceed with the project.<sup>29</sup> Kenya can therefore learn important lessons from some of the shortfalls in strengthening its legal and institutional framework.

Public participation theory advances the notion that there is a need to engage ordinary citizens directly in the policy process.<sup>30</sup> For participation to take place there has to be some form of communication, Haberman advances a theory of communicative action which suggests that communication is vital in shaping knowledge that guides action. It is on this basis that Webler<sup>31</sup> develops a theoretical model for public participation. This theoretical model offers guidelines for the assessment of public participation in environmental decision with consideration to three criteria fairness, competence and social learning as a strong basis to evaluate public participation processes. Fairness suggests that everyone should have an equal chance in defending interests that affect them as an individual or collectively as a community, for example, have equal access to knowledge. Competence suggests that the community or individual participating should have the capability to understand simple terms and concepts. Social learning suggests that once communities have an understanding only then will they be able to engage in finding mutually acceptable solutions to a project or problem that affects their community or individual lives.

## **1.8. LITERATURE REVIEW**

The literature review of this study is considered from three main points of reference. The first is to provide an examination of existing research in the area of public participation in the EIA process as the starting point in identifying information available. Secondly, to provide the study with a critical evaluation of the gaps in existing literature relating to EIA processes in Kenya. Finally, to offer an original contribution to the subject of this research study.

EIA is one of the oldest and most established environmental and risk assessment tools. EIA is practised in over 100 countries worldwide.<sup>32</sup> In the 1970's the issue of EIA as a tool of ensuring sustainable environment management was discussed and adopted first by the United States of America (U.S). The U.S enacted the National Environmental Policy Act (NEPA) in 1970. In

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<sup>29</sup> Agbazue E, Ehiemobi C, 'The challenges of the Environmental Impact Assessment Practice in Nigeria' *International Journal of Scientific List of references 119 Research Engineering & Technology*, 2016;5:338–46.

<sup>30</sup> Glock-Grueneich N., Ross N, 'Growing the field: The institutional, theoretical, and conceptual maturation of "public participation"' *International Journal of Public Participation*, 2008, 2(1), 1-32

<sup>31</sup> Webler O, Wiedelmann P, 'Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse' *Kluwer Academic Press*, 1995: 157-174

<sup>32</sup> Alshuwaikhat M, 'Strategic environmental assessment can help solve environmental impact assessment failures in developing countries' *Environmental Impact Assessment Review*, 2005.

1972, the United Nation Conference held in Stockholm was the first conference in the world that focused on environmental issues across the world<sup>33</sup>. The main objective of the Stockholm Declaration<sup>34</sup> was to develop practical guidelines to protect and improve the human environment and prevent further destruction.

The Stockholm Declaration was later after 20 years complimented by the Rio Declaration on Environment and development of 1992. The Rio Declaration provision that provides for EIA's is Principle 17 which calls upon states to assess, inform and consult with potentially affected states whenever there is a risk of significant harmful effects to the environment. This is to be done through EIA reports.

In the same year of 1992, the UN Conference on Environment and Development resulted in the formulation of a global plan of action, Agenda 21 which was adapted by countries. Agenda 21 emphasised the need to have among other things public awareness and training on environmental issues. Agenda 21 recognises the need for states, individuals and corporations to participate in EIA procedure and process, it also emphasizes decisions on the environment to integrate environmental considerations at all levels of assessment and ensure that the process is transparent and accountable to environmental implications to economies and policies.<sup>35</sup>

Gilpin's book will provide the definition and importance of EIA and how governments of the day have used EIA as a tool for decision making towards environmental sustainability.<sup>36</sup> The book also suggests various ways to reduce conflict between government, investors and communities. One of the suggested ways to reduce dispute is through public participation.

The International Association for Impact Assessment (IAIA) defines EIA as the process of identifying, predicting, evaluating and mitigating the social, biophysical, health and other effects of project's proposals before any decision to proceed or halt the project is arrived at.<sup>37</sup>

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<sup>33</sup> Stockholm Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14 1972

<sup>34</sup> Stockholm Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment*

<sup>35</sup> Philippe S, 'Principles of International Environmental Law' *Cambridge University Press*, 2012op. cit, p.802-803

<sup>36</sup> Gilpin, M., 'Environmental impact assessment: Cutting age for twenty-first century', *Cambridge University Press*, 1995

<sup>37</sup> International Association for Impact Assessment, 'Principle of Environmental Impact Assessment Best Practice' *International Association for Impact Assessment*, 1999

Oil and Gas production worldwide has had some damning negative effect on the environment, social and health of the populace. In particular, more adverse effects have been witnessed in countries with weak governmental and institutional commitment to environmental protection.<sup>38</sup>

The importance of EIA according to Gilpin is to ensure that environmental concerns are integrated into all development activities to contribute to sustainable development.<sup>39</sup>

André's publication will be used to provide the justification for public participation to be undertaken at the earliest stage and therefore supports Kenya's position of conducting public participation at the screening stage to achieve an effective and meaningful EIA process.<sup>40</sup> This read also offers information on the adequacy of the dissemination of information.

Kameri- Mbote's article will be resourceful in highlighting the role of civil societies in ensuring public participation in light of decisions made by the government on environmental matters and whether the consultation is adequate.<sup>41</sup> Kameri Mbote argues that even when public consultations are carried out, it is evident that the views expressed are rarely taken fully into account. She further adds that there is a need to fundamentally rethink the relationship between the government and the governed, and to allow greater public involvement. Understanding the barriers to public involvement is thus vital for any attempts to unlock the status quo.

The EMCA and Regulations 2003 will provide the steps in the Kenya EIA process including the role and conduct of public participation. Petroleum activities of exploration are listed under the 2<sup>nd</sup> Schedule of EMCA as one of the projects that require an EIA. An EIA is a mandatory legal requirement as an investor cannot implement a project or acquire the necessary licences without the approval of NEMA which is the institution in charge of environmental matters.<sup>42</sup>

On public participation, it is a requirement in Kenya for a project proponent in consultation with NEMA to seek the views of the people likely to be affected by a project through posters, newspapers and radio, hold at least three public meetings with those affected by the project.

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<sup>38</sup> Natural Resource Governance Institute, '2017 Resource Governance Index', 2017.

<sup>39</sup> Gilpin, M., 'Environmental impact assessment: Cutting age for twenty-first century'.

<sup>40</sup> André, P, Enserink B, Connor D, Croal P, 'Public participation international best practice principles' *International Association for Impact Assessment Special Publication Series No. 4*, 2006

<sup>41</sup> International Environmental Law Research Center, 'Strategic planning and implementation of policies involved in environmental decision-making as they relate to environmental assessment in Kenya', *International Environmental Law Research Center working paper*, East Africa Office. 2000

<sup>42</sup> Section 58, *EMCA* (1999)

The proof required to show there has been public participation is the submission of written or oral comments that are considered while reviewing the EIA study report.

Kenya's EIA process involves the following steps/stages; Screening which involves *inter alia* data analysis, Evaluation of significant environmental impacts and evaluation of alternatives, Consultation and Public participation among other exercises, Terms of reference which are developed during the scoping exercise by the proponent and approved by NEMA<sup>43</sup>, EIA study is to be conducted per the general EIA guidelines and sector EIA guidelines set out in the Third Schedule to the Regulations 2003<sup>44</sup>, Public participation which involves seeking the views of persons or communities likely to be affected by the project this is done during the EIA study by the investor in consultation with NEMA<sup>45</sup>, comments from lead agencies who review the report to ensure that it complies with the terms of reference under Regulation 11 and that it is comprehensive and finally submission of comments and public hearing under Regulation 21.

For an EIA Study to be approved by NEMA, on the area of public participation the investor has to show that<sup>46</sup>; firstly that they have publicized the project and its likely negative and positive impact through posting posters in strategic public places in the vicinity of the site of the proposed project; publishing a notice and radio announcement on the proposed project for 2 successive weeks in a newspaper and radio station that has a nation-wide circulation. Secondly, that they have held at least 3 public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments. Thirdly, that they have ensured that appropriate notices are sent out at least one week before the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties. Finally, they have consulted with NEMA on a suitably qualified co-ordinator to receive and record both oral and written comments and any translations thereof received during all public.

EIA itself has some deficiencies, Mulvihill & Ali provides some of these deficiencies applicable to EIA in Kenya and the likely conclusion that the already existent approaches to EIA's are inadequate in dealing with the impacts and risks to the environment<sup>47</sup>.

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<sup>43</sup> Regulation 11, *Environmental (Impact Assessment and Audit) Regulations*, 2003

<sup>44</sup> Regulation 12, *Environmental (Impact Assessment and Audit) Regulations*, 2003

<sup>45</sup> Regulation 17, *Environmental (Impact Assessment and Audit) Regulations*, 2003

<sup>46</sup> Regulation 17.2, *Environmental (Impact Assessment and Audit) Regulations*, 2003

<sup>47</sup> Mulvihill R., Ali H., 'Disaster incubation, cumulative impacts and the urban/exurban/rural dynamic', *Environmental Impact Assessment Review*, 2007, 27(4), 343-358

Arnstein will provide the different levels of public participation such as the lowest level which involves the search for information and the highest level where the public involved in the final decision<sup>48</sup>. Arnstein discusses 8 levels of public participation that can be classified into 3 main categories. The first category is the lowest level of participation where no impact is felt by the citizens and consists of the manipulation and therapy stage, the citizens at this stage participate following the directions of the authorities and are mostly involved in giving of information and education. The second category is the tokenism level, this involves some level of consideration by the authorities of citizen's views, it involves the information, consultation and placation stages. The citizens are in this stage able to participate by airing their views and are given an opportunity to be heard. The third category is citizen empowerment, it involves partnership, delegated authority and citizen control stage. The third category gives citizen the greatest power to influence decisions that affect them as they are considered equal partners and collaborators in decisions that are likely to affect them. According to Arnstein, the third category is what is considered in this research study as citizen centred participation. This research study will also examine the five levels of public participation according to the International Association of Public Participation to determine where Kenya lies within different levels<sup>49</sup>. The five levels include the information, the consultation, the public involvement, the collaboration and the empowerment stages of public participation.

C. Wood's book argues that the effectiveness of the EIA process is based on the opinions and attitudes of those affected directly by an EIA process<sup>50</sup>. His book will provide the study comparative analysis with the England on effective EIA process.

A book by Dietz will define public participation as a two-way communication process between the governed and the government and not one-way communication<sup>51</sup>. To expound on this concept of citizen-centred approach Canter distinguishes between information 'feed-forward' and 'feedback' wherein feed-back is the preferred approach to the dissemination of information given a citizen-centred approach to public participation<sup>52</sup>. Feedback is where citizens give information to the government and feed forward is the reverse, that is, the government gives information to citizens.

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<sup>48</sup> Arnstein, R., 'A ladder of public participation', *Journal of the American Institute of Planners*, 1969, 35(4), 216–224.

<sup>49</sup> IAP2, *International Association of Public Participation*; Public Participation Spectrum, 2008

<sup>50</sup> Wood C., 'Environmental impact assessment: a comparative review', *Longman Scientific & Technical*, 1995.

<sup>51</sup> Dietz, T, Stern P, 'Public Participation in Environmental Assessment and Decision Making,' *National Academies Press*, 2008. 321 p. ISBN: 9780309123990

<sup>52</sup> Canter, Larry W., *Environmental Impact Assessment*, 2nd Edition 1996

There has been a handful of books written on public participation in regards to the EIA process in Kenya more so on the specific industry of oil and gas. The citizen-centred approach is a relatively new concept that this research proposes to examine and research on, there is little existing written publication that addresses the scope, content and requirements of localizing the EIA process through a citizen-centred approach in Kenya. It can therefore be argued that there is a gap that needs research for a thorough understanding on the aspect of effective public participation through a citizen-centred approach in an EIA process in the context of oil and gas and makes recommendations on international best practices in this area. This is the gap that this research attempts to fill.

## **1.9. RESEARCH METHODOLOGY**

The methodology for this research shall be doctrinal research, this is research that interprets, assesses and develops principles, concepts and rules<sup>53</sup>. Doctrinal research is preferred as the most appropriate methodology because public participation is a concept that has developed over time and therefore this research does not develop any theory but focuses on the already existing underlying concepts, principles and rules. Doctrinal research will be achieved through the use of primary, secondary and tertiary sources of literature. It draws relevant knowledge from reports, statutes, textbooks, journal articles, judicial decisions (domestic, regional and international), national constitution and regional and international environmental law instruments.

The study will also incorporate the comparative study approach with a view of reviewing and comparing public participation in the EIA process of Nigeria and the England for the reason outlined in this research study.

### **1.10. CHAPTER BREAKDOWN**

The objectives of this study are met in five chapters as discussed below;

#### **Chapter 1: Introduction**

This chapter provides the background of the problem, a statement of the research problem, and the theoretical framework adopted in the research. It also sets out the hypothesis, research questions, methodology and chapter layout.

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<sup>53</sup> Olawuyi D, Ako S, 'Methodology, Theoretical Framework and Scholarly Significance: An Overview of International Best Practices in legal Research,' *Institute for Oil, Gas, Energy, Environment and Sustainable Development (OGEES)*, Afe Babalola University, Nigeria Vol 8 No. 2, 2017

## **Chapter 2: Nature, scope and importance of a citizen-centred approach to public participation in Environmental Impact Assessment process**

This chapter examines the nature, scope and importance of a citizen-centred approach to public participation. It identifies the elements of effective public participation and the essential requirements of a citizen-centred approach to public participation. The chapter also examines and analyses literature on the concept of public participation in international and regional law.

## **Chapter 3: Public participation in Kenya: Legal and Institutional framework**

This chapter assesses the legislative and institutional framework on public participation in Kenya. It assesses the application and gaps of the citizen-centred approach in Kenya's legislative framework.

## **Chapter 4: Comparative Analysis of Public Participation in Kenya and lessons from Nigeria and England**

This chapter examines lessons from Nigeria and England in terms of promoting a citizen-centred approach to public participation in EIA processes. By drawing lessons from a developed and developing jurisdiction, this chapter will be able to examine the strengths, gaps and overlaps in the frameworks of both countries in implementing the citizen-centred approach including identifying lessons for Kenya from both jurisdictions.

## **Chapter 5: Implementation of citizen-centred approach in public participation in Kenya**

This chapter will look at the legal and institutional framework for implementing a citizen-centred approach to public participation in Kenya, with a focus on necessary law reforms and innovations.

## **Chapter 6: Findings, Recommendations, and Conclusion.**

This chapter will provide the findings, recommendations and conclusion for the citizen-centred approach in the EIA process and report on the findings that are likely to shape the future developments of citizen-centred participation in the EIA system.

## **2. CHAPTER 2**

### **NATURE, SCOPE AND IMPORTANCE OF PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT PROCESS**

#### **2.1. Introduction**

This chapter will provide a thorough review of the nature and scope of public participation. It will identify the elements of effective public participation such as adequacy, effectiveness, access to information including the concept of a citizen-centred approach to public participation. It will identify the elements of a citizen-centred, as the most effective means of public participation. This chapter will demonstrate that there are various levels of public participation while recommending the level that is citizen-centred and further provides an analysis of where Kenya ranks in that hierarchy. The chapter will also examine and analyse literature on the concept of public participation in international and regional law.

This chapter is divided into five sections. The first section seeks to analyse the nature and scope of public participation, the second section identifies the different levels of participation and where Kenya ranks in its legislation provision and practise in the hierarchy, section three will discuss the elements of public participation including FPIC, section four will look into the citizen-centred approach for effective participation, section five will study the international and regional framework for public participation.

#### **2.2. Nature and Scope of Public Participation**

In discussing public participation, it is important to give the scope of who constitutes public because the EMCA does not define who is 'public' or what 'public participation' is. By providing the scope to this term, the research study can determine the effectiveness of public participation within the defined context.

Despite the lack of definition under EMCA of what public participation is, there has been several cases that have provided the nature of adequate and effective public participation in Kenya. The Mui Coal Basin case<sup>54</sup> set the following minimum elements of public participation; firstly, there has to be an established modality of public participation that is set out by the government or public officials having due consideration to quality and quantity of the

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<sup>54</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

concerned public to participate in the decision; secondly, public participation should consider the culture, logical constraints and innovation in achieving or determining that public participation has been conducted; thirdly, access to information and channel used to convey this information should be available to the relevant concerned citizens; fourthly, public participation does not mean that everyone should give their views on an issue such as environmental governance, it should however be evident that there has been inclusivity and diversity in the participation; fifthly, public participation does not mean that each individual view will be considered and accepted, it is sufficient to show that the government agency or public officials considered all views in good faith; lastly, the right to participate is aimed at enriching the views of those that are likely to be affected by the decision of government agencies.

The foundation of public participation and which was echoed in the Mui basin case is principle 10 of the Rio Declaration on Environment and Development<sup>55</sup>. According to Rio Declaration the components of public participation are; involving all concerned citizens at all relevant levels; further that at all these levels, the citizens ought to have access to information that is held by public authorities; equal rights to participate in the decision-making process and finally there should be access to judicial and administrative redress and remedy. The Rio Declaration provides the nature of public participation and the Mui Basin Case provides the scope of public participation in this research study.

The 2010 UNEP guidelines for the development of national legislation on access to information<sup>56</sup>, public participation and access to justice in environmental matters has defined the public as one or more natural or legal persons and their association, organisations or groups. The guidelines have gone further to define the concerned public as those affected by or having an interest in an environmental decision that has direct effect on them<sup>57</sup>.

Sherry Arnstein analyses public participation as redistribution of power that enables citizens to make decisions in situations where they would be ruled out, by being allowed to make such decisions they are considered and included in decisions that affect them. Participation is

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<sup>55</sup> Principle 10, *Rio Declaration on Environment and Development* (1992)

<sup>56</sup> United Nations Environmental Program, 'Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters,' *decision SS. XI/5, part A of 26 February 2010*

<sup>57</sup> UNEP, 'Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters,'

anchored on the rationale that citizens should obtain greater control and power over issues that affect them.<sup>58</sup>

Public participation is important because it improves process quality by exerting pressure on project proponents to address the negative environmental impacts of its project. Public participation also extends and improves public awareness of environmental concerns through transformative learning conducted by public officials and project proponents hence increasing public confidence in the processes and promoting participatory democracy.

Public participation also promotes the sustainability of projects as it minimizes conflicts between the project proponents and the communities, it further improves community understanding of issues and responsibility early in the process and thus reduces delays.<sup>59</sup>

In the upstream petroleum sector, public participation in the conduct of EIA's is critical because it is at this stage of the petroleum cycle that the environment is most likely to be affected due to the various seismic activities of drilling, gas emissions among other environmental effects.

The three main stages involved in the issuance of an EIA license require public participation in different forms. These three main stages are; firstly, formulation of the terms of references<sup>60</sup>, public participation is not required in this stage; secondly, carrying out the EIA study<sup>61</sup> which leads to preparation of an EIA report, public participation is required after the approval of the project report and during the process of the study, the project proponent is required to publicize the projects and the benefits through posters, notices and radio for two successive weeks then followed up by meetings at least three meetings to be communicated to the affected parties one week before the meetings; finally, post study report that leads to the issuance of the EIA license<sup>62</sup>, public participation is required within 14 days of receipt of the ESIA study report, where the project proponent is required to invite members of the public to make oral or written comments on the report and cause them to be published in the Kenya Gazette and a newspaper of wide circulation in the area of the project, the notice shall be published for 30 days for comment.

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<sup>58</sup> Anstein S, 'A Ladder of Citizen Participation', 1967, 217

<sup>59</sup> Lekneses E, 'The Role of EIA in the Decision-Making Process' *Environmental Impact Assessment Review*, Volume 21, (2000) pp. 309-334.

<sup>60</sup> Regulation 11 *Environmental (Impact Assessment and Audit) Regulations* (2003)

<sup>61</sup> Regulation 16 to 17 *Environmental (Impact Assessment and Audit) Regulations* (2003)

<sup>62</sup> Regulation 18 to 22, *Environmental (Impact Assessment and Audit) Regulations* (2003)

Public participation has been viewed as a continuous two-way process, the first being involving the promotion of public understanding of the processes and mechanisms through which developmental problems and needs are investigated and solved. The second process being consultation as a tool to inform and educate stakeholders about the proposed action both before and after the development decisions are made.<sup>63</sup>

Kenyan courts have considered public participation in EIA's as extremely important and therefore held that it should not be treated as a formality or inconvenience as it is the core of an EIA process.<sup>64</sup>

Public participation has been criticised and it has been argued that it is better not to include the public in EIA as it will be quicker and most cost-effective, this is because project proponents fear that public participation may lead to delayed schedules and 'unnecessary' revisions of project plans<sup>65</sup>. Public participation has also been viewed as unnecessary because citizens lack project-specific expertise and therefore need training on the merits of the projects and the adverse effects.

To the project proponent, it may look more prudent to push the project through quietly rather than run the risk of a public process. However, bypassing the public does not make the project speedier or less costly. Alienated citizens tend to delay the implementation of the project through time-consuming legal action if they feel that their rights are curbed through project implementation<sup>66</sup>.

It is therefore established that an informed and consulted public make projects more transparent and legitimate more so because the communities affected by oil and gas projects have a right to be aware of the effects such a project would have on their environment, safety and health.

### **2.3. Identifying the Levels of Public Participation**

It is important to determine the different levels of participation as this is likely to influence how actively and satisfactorily participation practice is achievable.

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<sup>63</sup> Rowe G, & Frewer L J, 'Public Participation Methods: A Framework for Evaluation' *Science, Technology, & Human Values*, (2000). 25(1), 3–29.

<sup>64</sup> *John Kabukuru Kibicho & Another v County Government of Nakuru & Others* (2016) eKLR

<sup>65</sup> Rauschmayer F, Rissie N, 'A Framework for selection of participatory Approaches for SEA', *Environmental Impact Assessment Review*, 2005.

<sup>66</sup> Diduck A, Sinclair AJ, 'Public Involvement in Environmental Assessment: the case of the non-participant' *Pub Med Journal*, 2009, USA

The International Association of Public Participation (IAP2) has formulated a spectrum of public participation<sup>67</sup>. The spectrum is intended to assist with the selection of the level of public participation that outlines the public's role in the participation process. The spectrum consists of five key areas to be covered in decision making by a proponent.

First, there is the information stage. This propagates that the public should be provided with balanced and objective information that facilitates the understanding by ordinary citizens of the problem and the options to solving the problem. This is the lowest form of consultation which involves the dissemination of information and does not go beyond that. It is also considered a passive form of participation<sup>68</sup>.

Second, there is the consultation stage. This entails the project proponent obtaining feedback on analysis, the options and/or a decision. The proponent will listen to and acknowledge the concerns of the public and provide feedback so that the public can make an informed decision. This is a passive form of participation as the public is limited in its exercise of influence in the decisions<sup>69</sup>.

Third, the public is involved. This entails the commitment that the project proponent will work with the public throughout the process to ensure that the public's concerns are understood and considered<sup>70</sup>.

Fourth, is collaboration. This ensures that the consultation with the public is a collaboration in every aspect including coming up with joint recommendations for alternatives and preferred solutions to the best of the project proponent's ability and capabilities<sup>71</sup>.

Lastly, there is the empowerment stage. This enables the public to have the confidence through consensus that the proponent has had the concerns, provided alternatives and tried as much as possible to implement the decisions reached by the parties<sup>72</sup>.

In this spectrum, consultation, involvement, collaboration and empowerment is the highest form of participation that involves actual and active engagement that will eventually lead to a project decision. This is also the level of participation that encourages a citizen-centred

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<sup>67</sup> Susskind, L., Carson, L., 'The IAP2 Spectrum: Larry Susskind, in Conversation with IAP2 Members', *International Journal of Public Participation*, 2008, 2(2), 67-84.

<sup>68</sup> Susskind, L., Carson, L., 'The IAP2 Spectrum: Larry Susskind, in Conversation with IAP2 Members' 2008

<sup>69</sup> Susskind, L., Carson, L., 'The IAP2 Spectrum: Larry Susskind, in Conversation with IAP2 Members' 2008

<sup>70</sup> Susskind, L., Carson, L., 'The IAP2 Spectrum: Larry Susskind, in Conversation with IAP2 Members' 2008

<sup>71</sup> Susskind, L., Carson, L., 'The IAP2 Spectrum: Larry Susskind, in Conversation with IAP2 Members' 2008

<sup>72</sup> Susskind, L., Carson, L., 'The IAP2 Spectrum: Larry Susskind, in Conversation with IAP2 Members' 2008

approach in public participation. This simply means that the citizen is the centre of the participatory activity and the most important in an array of stakeholders and further that they take an active role in decision making and not a passive role of just being informed.

The level of participation of Kenya after analysis of the IAP 2 criteria, Kenya's level is between two and three, that is consultation and involvement respectively. The country has not been able to show or form strong collaboration and empowerment of the local communities meaning that the standards are relatively low. The aspect of collaboration and empowerment can only be evidenced through attached minutes or proper documentation on the consultative process in the EIA study report, currently, in the Kenyan framework, there is no legal obligation to attached this documentation especially signed minutes by both parties. There are outlined several ways of consultation, but the regulation falls short of mentioning public empowerment and collaboration<sup>73</sup>.

## **2.4. Elements of effective public participation**

### **2.4.1. Adequate and effective Public Participation**

The success of a project is highly dependent on the affected community understanding, approval and participation at all stages of the project cycle. Public participation entails two critical aspects, adequacy and effectiveness<sup>74</sup>.

In considering adequacy, it must be evidenced that the public is supported either through the provision of meeting halls, transport among other ways of facilitation of attendance to ensure that there is indeed the dissemination of information. The Court in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*<sup>75</sup> as discussed in this research study shows that public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

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<sup>73</sup> Okello N, Beevers L, Douven W, Leentvaar J, 'The undoing of Public Participation in Environmental Impact Assessment', *Impact Assessment and Project Appraisal*, 2009, 27 (3) 217-226

<sup>74</sup> Office of the Attorney General and Department of Justice, *Kenya draft policy on public participation*, September 6, 2018, 15

<sup>75</sup> [2015] eKLR

Effectiveness in public participation is the assessment that participation was done at the onset and not after the fact and in a meaningful way<sup>76</sup>. Further, that the comments during participation are seriously considered and can be traced in the decision-making process.

The court has emphasised that public participation ought to be meaningful, one such case is *Ken Kasing'a v Daniel Kiplagat & 5 Others*<sup>77</sup> where Justice Munyao opined that public participation for purposes of EIA ought to be real and actual and not to be undertaken as a meaningless process. The court viewed participation as a critical role that should be carried out in a meaningful manner to ensure that the person affected may offer alternatives to the project or propose important mitigation measures.

The court in its concluding remarks correctly pointed that public participation is not a window dressing exercise, and neither should it be looked at as a mere formality aimed at ticking the boxes.

Public participation must be effective both quantitatively and qualitatively. In discussing the threshold of effectiveness, the court in *Mohamed Ali Baadi and others v Attorney General & 11 others*<sup>78</sup> put some parameters of determining the effectiveness of public participation. The case revolved around the design of the Lamu Port-South Sudan-Ethiopia-Transport Corridor project ("the LAPSSET Project"). In particular, the Petitioners' case was to showcase that the manner in which the LAPSSET Project was being implemented violated statutory and constitutional principles and values among them public participation and the right to information. NEMA averred that the EIA License was issued as required. There were various issues for determination by the court among them was whether there was sufficient public participation in the conceptualization and implementation of the LAPSSET Project.

The court observed that the obligation of public participation by a project proponent is enshrined in the constitution under Article 10 and Regulation 17 of Environmental (Impact Assessment and Audit) Regulations, 2003. Regulation 17 (1) provides extensively how publicizing of the project is to take place. In addition to the provisions of Regulation 17, Regulation 21 and 22 requires further public involvement by NEMA before making any decision on an ESIA report. According to Regulation 21 and 22, NEMA is required to allow project proponent to make presentations and also respond to any concerns from the public on

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<sup>76</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR

<sup>77</sup> (2015) eKLR

<sup>78</sup> (2018) eKLR

the presentation. The court viewed public participation as a right guaranteed to protect human dignity under Article 28 of the Constitution, 2010. The court discussed public participation as an extension of environmental democracy which recognises that environmental issues must be addressed by all, or at least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors.

Public participation is effective if the public has access to environmental information, participate in decision making and the public can obtain justice.<sup>79</sup> The information is only beneficial if it is timely, that is before or at the time of decision making, timely access to information results in active public participation rather than passive participation. Active public participation is desirable as it increases vigilance and identification of anomalies that call for the engagement of the mainstream justice system in resolution.<sup>80</sup>

Another element of effectiveness is the inclusion of the varied views and values on environmental management held by communities affected by decisions on environmental resources.<sup>81</sup>

Any decision to exclude fundamental participatory rights must be proportionate to be lawful. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake.<sup>82</sup>

The standard of ascertaining whether there is adequate public participation in environmental matters is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. This means, for example, if you do not comply with the set statutory provisions, then *per se* there is no adequate public participation. And, the question is not one of substantial compliance with statutory provisions but one of compliance.<sup>83</sup>

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<sup>79</sup> Office of the Attorney General and Department of Justice, *Kenya draft policy on public participation*, 19

<sup>80</sup> Roberts C, Nancy J, 'Public deliberation in an age of direct citizen participation', *American Review of Public Administration*, (2004), 34 (4), 315

<sup>81</sup> Ministry of Devolution and Planning and the Council of Governors, *The County Public Participation Guidelines 2018*

<sup>82</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR

<sup>83</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR

The case reiterated the three pillars of the Aarhus convention with emphasis that the effectiveness of public participation must exhibit compliance with prescribed statutory provisions of public participation.

Another case on point in determining effectiveness is the *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*<sup>84</sup>. The case involved the construction of a coal plant in Lamu owned and operated by Amu Power Company Limited. The company proceeded to engage a third party to conduct an EIA study, which was completed and submitted to NEMA for licencing. NEMA proceeded to issue an EIA Licence. A Community-Based Organisation (CBO) being aggrieved by the issuance of the license filled a petition before the tribunal challenging the process and the issuance of the Licence by NEMA.

The issues raised by the CBO included insufficient scoping that lacked public participation, a flawed EIA report with misrepresentation and omissions among other issues.

The lead EIA expert for Amu Power Company Limited presented to the court as evidence a complete record of each meeting including completed registration sheets, photographic evidence and Issues and Response (I&R) Reports. The ESIA report also contained a very clear Stakeholder Engagement Plan, they also organised door to door campaigns in homes situated in the project area. Kiswahili was used in the meetings as it was a widely spoken language. The tribunal however observed that the meetings and all other activities took place before the study report had commenced therefore inconsistent with Regulation 17(2) that provides that views can only be sought after the approval of the project report. This gap was evidenced by the limited information that the company had on the adverse effects of the project.

The tribunal held that there was a lack of access to information that was a prerequisite to a meaningful exercise of public consultation and participation. The tribunal further observed that the comprehensiveness of the EIA Study report did not excuse the failure to carry out effective public participation. The EIA study and report thereof were thus never subjected to proper and effective public participation that would have covered most of the grievances raised in the appeal.<sup>85</sup>

The court set aside the EIA License issued by NEMA. In this matter, the tribunal is seen to apply the Participation, Accountability, Non-Discrimination and Equality, Empowerment and Legality (PANEL) Principle of participation and inclusion and also that an effective EIA

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<sup>84</sup> (2019) eKLR

<sup>85</sup> *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR

participation must be carried out as per the statutory provision under Regulation 17 and further that it is immaterial that the participation was carried out before the project approval phase.

#### **2.4.2. Free, prior and informed consent (FPIC)**

The Constitution of Kenya recognizes the right to participate as one of the country's national values and principles of governance.<sup>86</sup>

FPIC aims to provide the local community affected by a project the voice to air their concerns and also be involved in the decision-making process promptly, free from coercion and manipulation. FPIC also allows the local community to approve or reject a project before the commencement of the activities<sup>87</sup>. The opportunity given to local communities to be consulted activates their right to fully and effectively participate in policy and decision-making processes on matters that affect them. This right of consultation also means that they have the option of either giving consent or not because of their rights over the land where natural resources are located. The duty to consult is coherent with the human rights of the local communities<sup>88</sup>.

In discussing the FPIC, 'free' connotes the absence of manipulation or intimidation from the project proponent, the government or fellow local communities while making decisions. A decision taken by the local communities that are associated with bribery, threats among other vices cannot be said to be free. 'prior' connotes that consent must be sought first as a precondition for carrying out a proposed project. The period in which this consent is sought is to be considered in decision making as a process within the consultation. 'Informed' is critical as it forms a direct linkage to access to information which is core when discussing public participation. The duty to inform in a citizen-centred approach does not end there as this is considered passive participation, it goes further to show that the information shared has been understood. If necessary, to enhance understanding, information should be shared in a language that the local community understand and, in a manner, and form that can facilitate better understanding such as through the creative participation mechanism discussed further in chapter 6 of this research. The information shared should be able to clarify and enhance understanding of the adverse effect of a project for the collective decision of the community involved. The project proponent should be required to provide a social assessment report of the literacy and language comprehension of the community involved to showcase the efforts or

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<sup>86</sup> Article 10(2), Constitution, 2010

<sup>87</sup> *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others* (2010) Constitutional Court of South Africa

<sup>88</sup> Ministry of Environment and Natural Resources, *National Guidelines for Free Prior and Informed Consent for REDD+ IN Kenya*, 2012

mechanism in place to facilitate comprehension of the subject matter. In strengthening the aspect of informed, the project proponent and the government should be able to provide a clear process that can be followed by the local communities in obtaining additional information. The local communities should also have an avenue for review of their decision in the event of new information. Finally, 'Consent' is the independent assessment and acceptance of a decision. This in projects represents collective and informed decision making. consent does not mean consensus as there can be opposing views of a collective decision, but it must be demonstrated that the opposing persons to a decision agree to abide and respect the decision reached by the majority of the community. The outcome of the decision should reflect the views and interest of the community collectively. There could be instances where the majority of the public do not give consent for a proposed project, in this case the government and project proponent should not proceed with the project because the citizen who are the key stakeholders do not approve. To this end the balance of the environmental effects of a decision to proceed against the economic benefit to the state should be critical in arriving at the decision to not proceed.

In view of a citizen-centred approach to participation, project proponent should proceed with an understanding of the local communities' context including their governance institution; practices; their spirituality and cultural heritage; vulnerable status; any special status under national legislation/policy.

### **2.4.3. Access to Information**

Access to information informs the public on matters that affect their environmental rights when conducting EIA's. The public has a right to access or receive information and consequently, the state is obligated to obtain and publish information on the effects that a project may have on the environment. This is a constitutional and statutory requirement under Access to information Act<sup>89</sup>. The Act gives effect to Article 35 of the Constitution (2010).

Access to information is regularly used as a tool to secure greater transparency and accountability for both government and industry in their interactions with the environment and is a means by which the public is informed about environmental issues. Access to information has been viewed as a cornerstone for effective public participation various stakeholders such as the Office of the Attorney General of Kenya <sup>90</sup>.

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<sup>89</sup> Access to Information Act, (Act No. 31 of 2016)

<sup>90</sup> Office of the Attorney General and Department of Justice, *Kenya draft policy on public participation*, 16

When the local communities are able to access information, they can begin to raise concerns about projects that may have an effect to the environment they live in. This may result to disputes because the community is empowered, especially when there is no transparency and accountability from the state and the project proponent.

There is therefore the need to have a grievance mechanism as a step to access to information and dispute resolution avenues in the event that the parties involved are unable to resolve their differences.

This research study proposes that access to information by the local communities should be timely, comprehensible and disseminated through available and easily accessible channels and languages.<sup>91</sup>

### **2.5. The citizen-centred approach in effective public participation**

The citizen-centred approach is said to be enhanced when the process of participation is geared towards an engaged citizenry rather than a passive one.<sup>92</sup> It is therefore important for the state to have a collaborative approach that enhances decision through improving the quality of decisions by improving the quality of information. The ripple effect is that these actions increase the likelihood of success in implementing and providing meaningful feedback that improves the practice.

Public participation, for instance, can readily secure the use of local and contextualized knowledge needed to understand a problem and its required solutions.<sup>93</sup>

This approach involves the involvement of the citizen through active and responsible participation. It recognises the important role that citizens can play in promoting and enhancing environmentally sound decisions. The citizen-centred approach does not limit the level at which participation should take place, it argues that the process of participation should involve citizens of all levels of the society to change how decisions are made or taken.

This approach is characterized by the decentralization of decisions, in this case, environment decisions from being centralized in the government, its agencies, oil and gas corporations to

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<sup>91</sup> Office of the Attorney General and Department of Justice, *Kenya draft policy on public participation*, 17

<sup>92</sup> Irvin R, Stansbury J, 'Citizen Participation in Decision-making: Is It Worth the Effort?', 64(1) *Public Administration Review*, 2004, 55, 61-62

<sup>93</sup> Ortis E, 'Reflexive Environmental Law', 89 *North- Western University Law Review*, 1995, 1227, 1238

citizens as an equal and important stakeholder throughout the oil and gas value chain. The approach to environmental governance suggests that the involvement of the citizenry should be paramount irrespective of the scale and size of the project. It propagates that the citizen should be at the centre of the decisions that are likely to affect them whether positively or negatively<sup>94</sup>.

Active citizen-centred approach dates back to the history of public participation, as far back as Agenda 21 which requires broad participation of all groups of people for the common good of sustainable development.<sup>95</sup>

A citizen-centred approach to public participation negates the popular deliberative democracy by urging that the term goes beyond routine engagement to mean allowing citizens to ‘take part’ and ‘influence’ decisions. For this argument to be useful the authority, the project proponent and the government have to reach the grass-roots citizens and factor in their concerns in environmental issues and decisions.<sup>96</sup>

The citizen-centred approach increases the legitimacy of decisions as it allows the public to actively participate in decision making and promoting the democratic values of transparency and accountability.

One of the key benefits of a citizen-centred approach is that it provides an avenue to empower citizens to be involved actively in decisions that affect them especially in the conduct of EIA study.

The efficacy of public participation is affected by poor information sharing, unequal power relationships and inefficient enforcement of the participatory requirement. It, therefore, becomes important to restructure the relationship between the government, the project proponent and the local community affected by a project to create greater synergies between the parties<sup>97</sup>. It is important to understand the challenges that participation creates to have better and long-lasting solutions to the improved environmental impact that led to overall community satisfaction and reinforce the trust between the project proponent and local communities. By

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<sup>94</sup> Roberts N, ‘Public deliberation in an age of direct citizen participation’, *American Review of Public Administration*, 2004, 34 (4), 315–353

<sup>95</sup> Coenen F, ‘Local Agenda 21: ‘Meaningful and Effective’ Participation?’ In: Coenen F (ed), *Public Participation and Better Environmental Decisions*, Springer, 2009.

<sup>96</sup> Olawuyi D, ‘From Energy Consumers to Energy Citizens: Legal Dimensions of Energy Citizenship’, *Sustainable Energy Democracy and the Law*, 2021

<sup>97</sup> Wasserman J, ‘Application of Public Participation Principle in EIA’ *Jakarta Workshop*, 2012 July USA EPA

so doing, it can be said that such action will be geared towards affective public participation that is citizen-centred.

### **2.5.1. Elements of a citizen-centred approach to public participation**

The main elements of a citizen-centred approach to public participation in a country are the localism theory, active citizen engagement and proactive information disclosure. This section shall discuss these elements and how they improve public participation.

#### **2.5.1.1. Localism Theory**

The localism theory is a simple concept that local communities/ authorities are better placed to make decisions relating to the local area than central government. The rationale is that the central government cannot acquaint itself with the everyday dealings of the local communities/ authorities. This, therefore, means that when it comes to providing solutions for local issues such local communities or authorities are best placed to achieve optimum local solutions. The subsidiarity principle is closely linked to the localism theory. The principle suggests that those responsibilities that can be delegated to the lowest possible tier of government and which the local authorities or government can achieve more efficiently should be delegated as such. These responsibilities include participation in decisions of communities.<sup>98</sup> The principle complements and agrees with the Localism theory in this research study because the principle advocates that higher tiers of government, in Kenya the national government, should only fulfil a subsidiary function for tasks that cannot be dealt with by the lower tier of government (County Governments in Kenya). The principle further mandates for society oriented problem solving, this is including the need to ensure that individuals have the necessary information to fully participate in collective decision making on issues that affect them.<sup>99</sup>

The Localism theory and the subsidiarity principles advance the provisions of Principle 10 of the Rio Declaration by ensuring participation is attained at all levels including local authority/local community levels in decisions that affect the communities<sup>100</sup>.

Citizen-centred participation is not defined by the mere presence of established mechanisms in place to encourage participation<sup>101</sup>. The participation is only citizen centred if it accords the citizens through county governments a real chance of participation by putting up deliberate

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<sup>98</sup> Vischer, RK, 'Subsidiarity as a principle of governance: Beyond devolution' *Indiana Law Review*, 2001, 35: 103-142.

<sup>99</sup> Vischer RK, 'Subsidiarity as a principle of governance: Beyond devolution,103-142.

<sup>100</sup> Principle 10, *Rio Declaration on Environment and Development* (1992)

<sup>101</sup> Spalding K, "community Environmental Assessment: a tool for transformative learning and environmental awareness at community level in Kenya" Challenge program of water and food Conference paper, 2012

steps to ensure that the citizen participates effectively, this includes providing increased county government budget for participation.

The county government organizing a hearing is encouraging public participation but that alone does not constitute effective citizen-centred participation. The county government by providing training on, for example, the importance of EIA 's process and the adverse effects an oil and gas project could have on the environment and their health. This is an avenue to empower the local community by increasing the literacy on the subject of EIA and what to look out for when participating in public hearings.

### **2.5.1.2. Active Citizen Engagement**

In determining an active citizen engagement, one has to consider the elements that make a citizen active in the decision-making process. An active citizen in a public participation forum understands and can identify the roles and characteristics of their participation in decision making<sup>102</sup>. An active citizen can therefore be viewed as a macro-level community advocate<sup>103</sup>. EIA's are generally complex and technical documents, it, therefore, becomes important to have adequately trained personnel say NEMA who can provide or take up the responsibility of providing the public at large irrespective of their literacy level, concise, accurate and timely information on a proposed project.

Citizen engagement ought to be a continuous process and open dialogue. The project proponent, the local communities and the government has to maintain two-way communication. This can be achieved through having a monitored, participatory communication strategy as discussed in this research. Two-way communication is exhibited when the local government can listen and give timely feedback to the citizen or implementing the proposals from the citizens. Communication and corporation are the foundation and building block of sustainable citizen-centred participation<sup>104</sup>. It can therefore be said that communication is only effective if there is feedback, the lack of feedback means that there has been no communication and resultantly no active citizen engagement. Citizen-centred

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<sup>102</sup> Berner, M., Amos, J., Morse, R., ' What Constitutes Effective Citizen Participation in Local Government? Views from City Stakeholders' *Public Administration Quarterly*, 2011,35(1), 128-163

<sup>103</sup> Flynn B, 'Planning Cells and Citizen Juries in Environmental Policy: Deliberation and Its Limits. In: Coenen F. (ed), *Public Participation and Better Environmental Decisions*. Springer, Dordrecht, 2009.

<sup>104</sup> *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others* (2010) Constitutional Court of South Africa

participation must elicit some reaction to show that it was authentic and that the information was heard through the inclusion of some of the local community views in the final EIA<sup>105</sup>.

### **2.5.1.3. Proactive Information Disclosure**

Information disclosure enhances citizen-centred participation because the citizen can attend hearings with a clear understanding of the subject of discussion. It then becomes important for governmental agencies such as NEMA to train or conduct seminars together with other relevant stakeholders such as Energy and Petroleum Regulatory Authority (EPRA) to train the local communities as educated advocates on how to come up with clear and logical arguments for or against a proposed project. Whereas sometimes the cost of training and seminars may be prohibitive, the government can use focus groups that are inclusive of relevant community leaders who can then disseminate information to the rest of the community.<sup>106</sup>

In proactive disclosure, the local government needs to be able to assess the needs of the local community and put that into consideration when communicating and disclosing information. The local government and project proponents should be willing to disclose information without the local community necessarily requesting for it, they should not take advantage of the community ignorance to limit the disclosure.

## **2.6. International and regional framework on public participation**

The principle of public participation in decision making is affirmed in several binding and non-binding international instrument. This section will discuss some of these international instruments that are binding to Kenya by virtue of article 2(6) of the Constitution.

### **2.6.1. International Covenant on Civil and Political Rights (ICCPR)**

The right to participate in public affairs by citizens is codified in Article 25 of ICCPR Convention<sup>107</sup>. The ICCPR is a legally binding document and therefore provides binding obligations upon states. Article 25 of the ICCPR is further elaborated by General Comment 25 of the Human Rights Committee on the right to participate in public affairs, voting rights and the right of equal access to public service<sup>108</sup>. Under Article 25 as read together with the general comment, the right to participate is exercised: directly or through freely elected representatives,

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<sup>105</sup> King C, Feltey k, Susel B, 'The question of participation: towards authentic public participation process', 1998, 58, 317 -326

<sup>106</sup> Office of the Attorney General and Department of Justice, *Kenya draft policy on public participation*, 15

<sup>107</sup> Online: UN General Assembly, 'International Covenant on Civil and Political Rights,' *United Nations Treaty Series*, 16 December 1966, vol. 999, p. 171, <<https://www.refworld.org/docid/3ae6b3aa0.html>> on 31 May 2021

<sup>108</sup> ICCPR, 'The right to participate in public affairs, voting rights and the right of equal access to public service', *General Comment No. 25*, (Art. 25), 1966, CCPR/C/21/Rev.1/Add.7

through consultative process, through debate and dialogue, either individually and with others and establishment and being part of organisations, union and political parties that facilitate public participation. Public participation under this convention should not be discriminatory, it should therefore involve all citizenry including women, minority groups and persons with disabilities irrespective of their economic, social or cultural status. The states should ensure that they have put in special measures to encourage participation such as training, capacity building and education.

Under Article 19 of ICCPR also related to public participation, is the right to freedom of expression and access to information. This right includes the right to receive, seek and impart information for a more transparent and accountable governance. The citizens should be allowed to seek clarification on matters that affect them in order to have better understanding of policies, laws and determine priorities in the exercise of their human rights to a safe environment, education among others. To further emphasize the importance attached to public participation, Article 25 is non-derogable even in the period of conflict or insatiability.

#### **2.6.1. International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights provide global human right standards that are legally binding upon states.<sup>109</sup> The enjoyment of the right to participate in public affairs, unlike many other civil and political rights, can be determined to some extent by the degree to which social, economic and cultural rights are fulfilled and protected. The International Covenant on Economic, Social and Cultural Rights provides for the right to education which enable all persons to participate effectively<sup>110</sup> and the right to participate in cultural life that is fundamental in promoting equality, freedom of expression, right to receive and impart information<sup>111</sup> which all foster or enhance the right to participate.

#### **2.6.2. International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries**

The ILO convention is a binding international legal instrument that guarantees the right to participation of indigenous people in decision-making processes<sup>112</sup>. This right extends to the

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<sup>109</sup> UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights,' *United Nations, Treaty Series*, 1966, vol. 993, p. 3, <<https://www.refworld.org/docid/3ae6b36c0.html>> on 31 May 2021

<sup>110</sup> Article 13 'International Covenant on Economic, Social and Cultural Rights,' 1966

<sup>111</sup> Article 15 'International Covenant on Economic, Social and Cultural Rights,' 1966

<sup>112</sup> Article 2 of the ILO convention C169, 27 June 1989, C169

right to decide on their developmental priorities especially the ones that affect them.<sup>113</sup> States are called upon to ensure that they take the necessary measures in corporation with indigenous peoples, to protect and preserve the environment within the territories they live in.<sup>114</sup>

### **2.6.3. ESPOO Convention on Environmental Impact Assessment in Transboundary Context**

The convention is a binding international instrument that provides under Article 2(6) that the public shall be allowed to participate in areas or matters that are likely to affect them in EIA procedures concerning activities that affect them indiscriminately.

The convention further provides under Article 3 (8) that the states shall ensure that the affected public by an activity undertaken by the neighbouring state and has an element of transboundary harm, have a right to be informed of and provided with possibilities for making comments or objections on a proposed project either directly to the authority or through another party.

### **2.6.4. Rio Declaration, Principle 10**

Though not legally binding, the Rio Declaration<sup>115</sup> under principle 10 provides for the public participation aspect by stating that environmental issues are to be handled by participation by ALL citizens at the relevant levels. This means that participation of the public should not be discriminatory in its application for it to be effective.

The Declaration also articulated three principles that should inform the formulation of participation policy and regulations. The principles are access to information, access to participation and access to justice.

The Rio Declaration acknowledges that for all citizens to be engaged, access to information is paramount therefore all individuals must be able to access this information as this is likely to affect their decision on proposed project or activities.

The Rio Declaration on Environment and Development of 1992 solemnly adopted principles on public participation<sup>116</sup> and these are endorsed by Agenda 21<sup>117</sup>.

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<sup>113</sup> Article 7 of the ILO convention *C169*, 27 June 1989, C169

<sup>114</sup> Article 7.4 of the ILO Convention *C169*, 27 June 1989, C169

<sup>115</sup> Rio Declaration on Environment and Development, 'Report of the United Nations Conference on Environment and Development', *UN Doc. A/CONF.151/26* (Vol. I), 12 August 1992

<sup>116</sup> Principle 10, Rio Declaration on Environment and Development,

<sup>117</sup>Chapter 23 of Agenda 21 stating that "(o)ne of the fundamental requisites for the achievement of sustainable development is broad public participation in decision-making".

### **2.6.5. Universal Declaration on Human Rights (UDHR)**

Though not legally binding, this Declaration recognizes the widely recognized right to access to information and access to participation as an expression of human rights. The right to participate in the conduct of public affairs such as environmental decisions is recognized under Article 21 of the Universal Declaration of Human Rights. The right to participation has been recognized as an essential tool in the exercise of other rights such as the right to life, right to good health among other rights <sup>118</sup>.

### **2.6.6. Agenda 21**

The United Nations Conference on Environment and Development produced critical instrument for environmental governance such as Agenda 21. Agenda 21 is not legally binding but many countries have adopted it and used it to develop their policies, plans and laws that further its objectives. Related to this study is the objective of giving a broader range and meaning to public participation. The Conference recognized the commitment and genuine involvement of all social groups is critical to effectively implement Agenda 21. The effective implementation of Agenda 21's objectives, policies and mechanisms require 'genuine involvement' of all social groups<sup>119</sup>.

## **2.7. Regional Instruments**

### **2.7.1. The African Charter on Human and Peoples Rights**

The Charter entails a wide range of rights and duties that should be respected, among these rights are the right to receive information and express and disseminate their opinion<sup>120</sup>. Article 25 of the Charter provides that states must promote and ensure that their citizens through education, teaching and publication know of their rights within the Charter and further that the citizen understands these rights. The provision is centred around the citizen being able to understand their role in the protection and safeguarding of human rights and therefore encourages public participation. The Charter has also established the African Commission on Human and People's Right that oversees its implementation<sup>121</sup>. The Commission is however not a judicial body and therefore lacks enforcement mechanisms. It can only make

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<sup>118</sup> Report by the United nation special rapporteur on toxic waste

<sup>119</sup> These groups include women, youth, indigenous people, local communities, NGOs, workers and trade unions, business and industry as well as the scientific and technological community.

<sup>120</sup> Article 9, *The ACHPR* (1968)

<sup>121</sup> Article 30, *The ACHPR* (1968)

recommendations. The Commission has been instrumental within the oil and gas space as evidenced in the famous Ogoniland case<sup>122</sup> where the Commission found that Nigeria had violated several rights, including the rights to health, housing and life, through failing to take sufficient measures to protect the Ogoni people from the adverse effects of oil exploration in the Niger Delta. It also found that the right of the Ogoni people to dispose of their wealth and natural resources had been violated.

In Kenya, a case on point is the Ogiek case<sup>123</sup> where the Ogiek and the Endorois communities in Kenya filled a case against the Kenyan government. The two minority communities filed the suit before the African Commission on the Human and People's Rights over forceful eviction of the communities from their ancestral land without adequately prior consultation. The communities through their representatives argued that for a state to come to a conclusion that participation has taken place, it must be shown that the process of obtaining consent is fully informed and this therefore requires at a minimum that all members of a community are fully informed of the nature and consequences of the process and provided an effective opportunity to participate individually or collectively as a community.<sup>124</sup> The African Commission noted that a government must consult with indigenous peoples especially when dealing with sensitive issues as land. The commission agreed with the communities that the consultations with the community was inadequate and could not be effective participation. The commission opined that the community members were informed of the impending project as a *fait accompli* and not given an opportunity to shape the policies.<sup>125</sup>

### **2.7.2. African Convention on the Conservation of Nature and Natural Resources (ACHPR)**

The Convention sets as an obligation to the state to ensure that projects are environmentally sound and do not have adverse effects on natural resources and the environment in general. To fulfil these obligations states are required to conduct EIA's including environmental auditing and monitoring.<sup>126</sup>

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<sup>122</sup> *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (Communication No. 155/96)

<sup>123</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017)

<sup>124</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010,

<sup>125</sup> [http://www.achpr.org/public/Document/file/English/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/public/Document/file/English/achpr46_276_03_eng.pdf) on 08.09.2021

<sup>126</sup> Article XIV, *The ACHPR* (1968)

The Convention grants the right to participate under Article XVI. It requires that the state should adopt legislations that enable the public to participate in decision making, to access environmental decisions and to access the court for recourse for environmental injustice.

The Convention Echoes Principle 10 of the Rio Declaration on the right of all individuals to access information and participate, also in the Aarhus Convention.

### **2.7.3. African Union’s 2012 Resolution on a Human Rights-Based Approach to Natural Resources Governance**

The African Union Resolution of 2012 acknowledged the need for states to ensure that there is meaningful, transparent and free participation. It recognised the importance of FPIC in decision making in matters to do with natural resource management and governance.

It strengthened the right to information being accessible to all citizen and also the need of such citizens to understand the information presented on the value, extent and importance of natural resources<sup>127</sup>.

### **2.7.4. Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector**

The Niamey Declaration requires that communities living in a natural resource area are adequately consulted and provided with the necessary information on exploration and development activities at the beginning of a project and well informed of their rights throughout the project cycle<sup>128</sup>. It has gone further to recommend that active participation should be conducted with representatives of affected communities and CBO’s during contract negotiation to ensure transparency and human rights protection.<sup>129</sup> This is a declaration that attempts to have a citizen-centred approach to participation by including participation at the contract negotiation stage as well.

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<sup>127</sup> Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance ACHPR/Res.224(LI)2012

<sup>128</sup> Resolution 367, Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector (2017).

<sup>129</sup> Declaration 1 (e), Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector (2017)

### **2.7.5. East Africa Guidelines for Transboundary Environmental Impact Assessment**

Kenya is one of the partners in the East Africa Community (EAC). The EAC recognizing that they share borders including terrestrial and ecological ecosystems especially Kenya with its Uganda and Kenya counterpart developed guidelines for transboundary environmental impact assessment. The guidelines are aimed at complementing national frameworks on EIA on the shared ecosystem in the context of transboundary or cross-boundary areas. The guidelines recognize the already existing Protocol for Sustainable Development of Lake Victoria Basin and Protocol on the Establishment of the East African Community Customs Union which take cognizant of the importance of entering into a protocol on the environment and natural resource management. The guideline provides the stages of the transboundary EIA process which includes holding public hearings for public consultation purposes. A 30-day notice is required before the public hearing. The environment management agency of the country of origin is required to notify the interested public in newspapers and mass media that the statement is available at designated locations accessible to the public. The project site should have a copy and another in a national public library.

In a recent case before the East African Court of Justice<sup>130</sup>, the Government of Uganda and Total International signed the Host Government Agreement for the East Africa Crude Oil Pipeline (EACOP) project and was in the process of lobbying for the signing of the agreement by Tanzania before a non- governmental organisation, Centre for Food and Adequate Living Rights (CEFROHT), Africa Institute for Energy Governance (AFIEGO), Natural Justice and the Center for Strategic Litigation in Tanzania filed for a temporary injunction.

The main arguments of the Non- Governmental Organizations were that Uganda and Tanzania went on to sign the agreements with Total E&P Limited without a transboundary Environmental and Social Impact Assessment being conducted and approved. This is required under two protocols: The Protocol on the Environment and Natural Resources Management and the Protocol for the Sustainable Development of the Lake Victoria Basin. The case is yet to be decided, this case however is important in gauging the importance of the guidelines in conducting EIA and public participation

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<sup>130</sup> Natural Justice, 'Natural Justice joins legal challenge against the East Africa Pipeline', Natural Justice, 2020 <<https://naturaljustice.org/natural-justice-joins-legal-challenge-against-the-east-africa-pipeline/>> on 08 April .2021

## 2.8. Conclusion

This chapter has established that consultation, involvement, collaboration and empowerment is the highest form of participation that involves actual and active engagement that will eventually lead to a project decision. This promotes the concept of a citizen-centred approach as the most effective form of public participation.

This chapter has also analysed the international and regional framework of public participation including the Rio Declaration which proposes three principles of public participation, that is, access to information, access to participation and access to justice. The Declaration is further supported by the PANEL principle which provides that public participation is a human right issue and for the public to participate it must be shown that there is inclusion, access to information, non-discrimination and equality, empowerment and accountability and legality and access to justice. It has also been established in this chapter that the elements of effective participation are adequacy and effectiveness, effectiveness has to have elements of quality and quantity in terms of its reachability to the affected communities, FPIC and ability of the participants to access information.

Public participation is even most effective if it is citizen-centred, this is because the citizens are the ones who interact and are affected by the adverse effects of the environment when a project commences. The emphasis of a citizen-centred approach to public participation is that citizens should be active participants in the decision-making process and also it is an avenue to empower citizens to be involved actively in decisions that affect them especially in the conduct of EIAs.



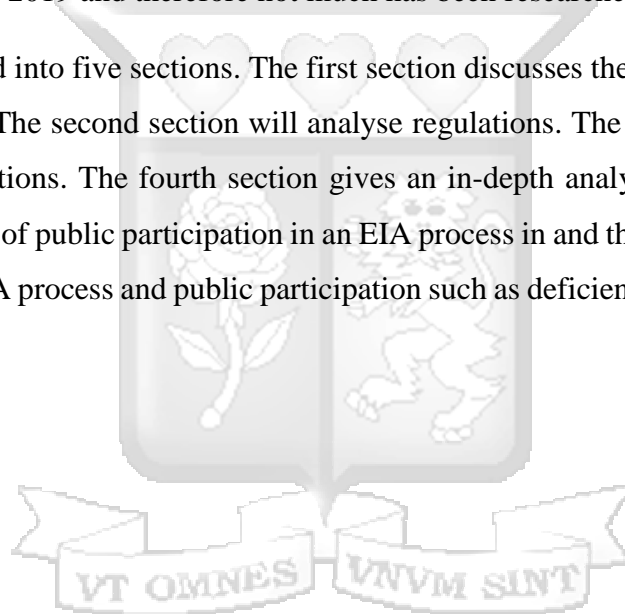
### **3. CHAPTER 3**

## **PUBLIC PARTICIPATION IN KENYA: LEGAL FRAMEWORK AND INSTITUTIONAL FRAMEWORK**

### **3.1. INTRODUCTION**

This chapter gives an overview of public participation and its legislative and institutional framework in Kenya. It will analyse the Kenyan legal framework and the institutional framework that enable and support public participation. It will assess the application of the citizen-centred approach or the lack thereof in Kenya's legislative framework. It will highlight the key gaps to efficient public participation through the citizen-centred approach in the EIA process. The legislative framework on oil and gas is still in its infancy, the Petroleum Act was revised and enacted in 2019 and therefore not much has been researched on its efficiency.

This chapter is divided into five sections. The first section discusses the Kenyan legislation on public participation. The second section will analyse regulations. The third section discusses Bills and draft legislations. The fourth section gives an in-depth analysis of the institutional and policy framework of public participation in an EIA process in and the last section identifies general gaps in the EIA process and public participation such as deficiency in law enforcement.



### 3.1. Kenyan Legislation on public participation

#### 3.1.1. The Constitution, 2010

The Constitution is the supreme law of Kenya and any provision of law that is contrary to the Constitution is considered null and void.

The structure of public participation is anchored in the Constitution and the core of these provisions relating to oil and gas are provided for in oil-related policies and legislations such as the Petroleum Act 2019.

The Constitution of Kenya<sup>131</sup> under Article 10(2) provides that public participation is one of the principles that guide the country in the pursuit of both social and economic benefits. This principle of public participation is also applicable to the management of natural resources. The Constitution encourages public participation in environmental management, protection and conservation<sup>132</sup>. The Constitution also tasks the state to set up systems of environmental impact assessment, environmental audit<sup>133</sup>.

The 4<sup>th</sup> schedule devolves environmental mandate to counties, this move is geared towards improving public participation<sup>134</sup>. This places the important role that the County Government undertakes in ensuring that the public participates as it is the closest to the communities if compared to the National Government. Due to the proximity of the community, this means that the community's interest is addressed with greater ease and precision.

The constitution also guarantees the right to access to information by the citizens, this is the cornerstone of public participation<sup>135</sup>. The access to information has further been given effect by the Access to Information Act. Article 33 provides that public participation should respect the freedom of expression of all participants.

The constitution recognises that inclusivity and equality in society are paramount in effective public participation. It, therefore, has provided for the inclusion of minorities and marginalized

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<sup>131</sup> Article 10 (2), *The Constitution* (2010)

<sup>132</sup> Article 69(1), *The Constitution* (2010)

<sup>133</sup> Article 69(1)(d), *The Constitution* (2010)

<sup>134</sup> Bosek, J, 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges,' *African Human Rights Journal*, 2014, 489- 508

<sup>135</sup> Article 35, *The Constitution* (2010)

groups in participation efforts<sup>136</sup>. These group of persons include women, children, persons with disability, youth, the elderly and other minority and marginalized communities.

In the matter of Robert N. Gakuru & Others v Governor Kiambu County & 3 others<sup>137</sup>, justice Odunga rightly observed that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the fulfilment of the Constitutional dictates. It should be both qualitative and quantitative.

The keynote of his judgement in the aforementioned Gakuru case, is that County Assembly should exhort its constituents to participate in the process of the enactment of legislation by making use of as many as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information for the intended action. This is one of the attempts to promote the citizen-centred approach by ensuring that all efforts are made to reach as many citizens as possible.

Effective public participation calls for more than a good constitutional foundation, it calls for a commitment through proper legislations that are implemented and monitored regularly.

### **3.1.2. Environmental Management and Coordination Act,1999 amended in 2015**

This is the primary legislation on Environmental matters in Kenya and that establishes the National Authority of the Environment, National Environment Council, National Environment Complaints Committee and National Environment Action Plan Committee.

EMCA gives effect to Article 42 and 70 of the Kenyan Constitution, 2010.

The Act's provision on EIA is under section 58 and 59 which obligates project proponents to undertake or cause to undertake at their own expense an EIA study and prepare a report to be submitted and approved by NEMA. In particular, section 58(2) provides the contents of displayed public notice and a time limit of 90 days within which the public can make either oral or written comments to the EIA study report. The notice of 90 days is not enough to ensure that the public participates, especially since oil and gas are located in regions where the communities are poor and are nomadic pastoralists with no permanent address. <sup>138</sup>

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<sup>136</sup> Article 53 to 57 and Article 100, *The Constitution* (2010)

<sup>137</sup> [2014] eKLR

<sup>138</sup> Kenya School of Government and Centre for Devolution Studies, *Building Public Participation in Kenya's Devolved Government*, Working paper overview note, February, 2015

The principle of public participation is only mentioned in the Act as a principle that is to be applied by the High Court to promote sustainable development. One of the critics of the Act is that it has not been quite clear on the definition of public participation to date.

The EMCA does not promote a citizen-centred approach to public participation mainly because it seems that the interest is to get the job done and not to effectively carry out the participation. In the case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*<sup>139</sup> the court observed that access to information for the persons affected is important for meaningful participation by citizens and it motivates them to participate in decision and policymaking processes in an informed manner as it seeks to take into account the community's and different stakeholders concerns. The court in its decision pointed out that public participation has to be done and not seen to be done.

The Act also does not provide for citizen empowerment for the citizen to understand the technical nature of the EIA documents and further provide a citizen-centred monitoring mechanism to ensure that the project proponent is conducting the project as required by the license.

### **3.1.3. Petroleum Act No. 2 of 2019**

The Petroleum Act regulates midstream and downstream petroleum operations in Kenya<sup>140</sup>.

On environmental provisions, the Act is guided by the Constitution and EMCA. In the Act, a contractor is required to conduct upstream operations within all applicable environmental, health and safety laws, regulations and policies and best petroleum industry practices<sup>141</sup>. The best petroleum industry practice refers to the practices of international regulators such as Accredited Petroleum Accountants (APA) and other documented oil and gas experiences of oil-producing countries over the years.

The Act requires that EPRA in collaboration with the project proponent to carry out public participation with the local community where upstream operations are to be carried out.<sup>142</sup> The participation should give these communities adequate opportunity to participate in the reviewing and awarding of the required permits such as the operational permit. The Act provides that the citizens should be well informed of any decision that affects them, should be

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<sup>139</sup> [2019] eKLR

<sup>140</sup> Section 1, *Petroleum Act* (No. 2 of 2019)

<sup>141</sup> Section 59, *Petroleum Act* (No. 2 of 2019)

<sup>142</sup> Section 24 (8), *Petroleum Act* (No. 2 of 2019)

given a 21 working days' notice of decision affecting them and have an opportunity to obtain information to any permit affecting them <sup>143</sup>.

The Petroleum Act does not adequately support the citizen-centred approach to public participation, this is because the citizen under the Act is only informed (passive participation) rather than being actively involved in decision making on the projects that affect them.

#### **3.1.4. Access to Information Act (No. 31 of 2016)**

This Act was enacted to give effect to Article 35 of the constitution on the right to information. This Act is important as communities can rely on it when requesting information on proposed projects during in the decision-making process. The Act is critical in public participation because access to information is considered essential in promoting participation.

The Act has set the Commission on Administrative Justice (CAJ) who has an oversight mandate of the Act<sup>144</sup>. The Act provides that when an administrative body fails to respond to a request for information within 21 days, the party seeking the information can file a complaint with the CAJ.

In the EIA context, the timeline of 21 days to file a complaint is too long considering that the notices for public hearings run for 14 days. There is a need to harmonize the provisions to suit the sector that may not have the time to wait 21 days before filing a complaint.

There is also the issue of, the functions of the CAJ, are not devolved, this makes it difficult for communities to access information speedily hence hindering the citizen-centred approach to participation.

The Senate has through the Commission on Administrative Justice (Amendment) Bill of 2019 made amendments for the national assembly consideration to devolve the office to the county level. If the Bill is passed into law, it will play a major role in access to information for communities and therefore enhancing a citizen-centred approach where citizen at the local level can be able to access information about a project.

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<sup>143</sup> Section 24 (9) (a)- (c), *Petroleum Act* (No. 2 of 2019)

<sup>144</sup> Section 20, *Access to Information Act* (No. 31 of 2016)

### **3.1.5. Physical and Land Use Planning Act, (Act No. 13 of 2019)**

The Physical and Land Use Planning Act under the third schedule requires that in development control process and procedures such as siting of base transmission station, power generation plants and major projects a County Government needs to ensure that the development Application has evidence that the development project has been subjected ESIA.<sup>145</sup>

Physical planning is also centralized in major towns and thus communities residing in remote areas remain marginalized in participatory planning. This is a hindrance to a citizen-centred approach to public participation especially for the northern parts of Kenya where the population is sparse and the nearest towns are quite far.

## **3.2. Regulations on public participation**

### **3.2.1. The Environmental Impact Assessment and Audit Regulations of 2003 (EIAAR)**

In the creation of an EIA Report, the views of the persons in the vicinity of the project must be consulted and their views are taken into account as required in Regulation 17 of Regulations 2003 which provides the parameters for public participation.

EIAAR also states that the execution and design of public participation is the responsibility of the project proponents, who are required to publicize the project and its anticipated impacts.<sup>146</sup>

Public participation should be a government-driven agenda and as such should not be left to the project proponent to execute and design the activity. The government should also play a key role especially in empowering its citizens through education on the technical aspects of the EIA process. The government can collaborate with NGO's and CBO to ensure that the participation factors in the right information and that it is not a mechanical process that project proponents are required to undertake. The central government needs to provide the financial support required in ensuring that the public is enlightened and aware of the decisions that they make from an environmental perspective.

### **3.2.2. The Environmental Impact Assessment Guidelines and Administrative Procedures of 2002**

The EIAGAP (2002) issued by NEMA, albeit not legally binding, gives a step-by-step procedural and methodological framework that is used by the project proponent and other

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<sup>145</sup> Section 55, third schedule, subsection 4 *Physical and Land Use Planning Act* (Act No. 13 of 2019)

<sup>146</sup> Regulation 17 (2), *Environmental Impact Assessment and Audit Regulations of 2003*

stakeholders in different sectors during the EIA process. Section 2.9 of Kenya's EIAGAP (2002) states that the '...methodology for consultation and public participation may include: meetings and workshops with affected communities, interpersonal contacts, dialogue with user groups and local leaders, interpersonal contacts, questionnaires/ surveys/interview and participatory rural appraisal or rapid rural appraisal (PRA/RRA) techniques<sup>147</sup>. This provides for additional methods that public participation can be carried out, by deploying some of the listed methods is likely to increase participation as the solutions are a citizen-centred solution to public Participation.

### **3.3. Draft regulations and Bills**

Draft regulations and Bills have not been gazetted as law but provide some guidance on Kenya's policy framework.

#### **3.3.1. Public Participation Bill 2019**

The Bill is to give effect to public participation constitutional provisions.<sup>148</sup>The Bill articulates and provides a framework for defining the parameters for assessing the effectiveness and setting out the role of the state and its officers when conducting public participation. The Bill affirms that Public Participation must be effective both quantitatively and qualitatively<sup>149</sup>.

The Bill however does not address citizen-centred participation at all village levels, it does not advocate for civil education for duty bearers and the local communities on the importance and significance of public participation.

#### **3.3.2. Draft Gender Strategy and Action Plan for the Mining Sector for the period 2019**

This was developed in response to the increased recognition of the marginalisation of women along the mining value chain. Therefore, it seeks to eliminate gender inequality in the mining sector and increase the participation of women by enhancing their capacity and creating greater spaces and opportunities for inclusion in 2023. This in turn increases inclusivity of all groups

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<sup>147</sup> Section 2(9), *Environmental Impact Assessment Guidelines and Administrative Procedures*, 2002

<sup>148</sup> Article 10(2)(a), 69(1)(d), 174(c), 184(1)(c), 196(1)(b), 201(a) and 232(1)(d), *The Constitution* (2010)

<sup>149</sup>Online: Kenya Law, Public Participation Bill

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj10qCeiYHzAhVihv0HHdxICm0QFnoECAQQAQ&url=http%3A%2F%2Fkenyalaw.org%2Fk1%2Ffileadmin%2Fpdfdownloads%2Fbills%2F2018%2FPublicParticipationBill\\_2018.pdf&usg=AOvVaw1BSFLzNik-l-rIE8ONJRaD](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj10qCeiYHzAhVihv0HHdxICm0QFnoECAQQAQ&url=http%3A%2F%2Fkenyalaw.org%2Fk1%2Ffileadmin%2Fpdfdownloads%2Fbills%2F2018%2FPublicParticipationBill_2018.pdf&usg=AOvVaw1BSFLzNik-l-rIE8ONJRaD) on 15 September2021

in public participation activity and therefore can be viewed as a positive step to enhancing a citizen-centred approach to public participation at all levels.

### **3.3.3. Draft Model Community Agreement**

This is a basic agreement that includes provisions on community consultations, engagement and participation, responsibilities and obligations of parties; code of conduct; project and program implementation; dispute and conflict resolution mechanism.

The Mining (Community Development Agreement) Regulations provide a framework for model community agreements and specifically those regulating the manner in which mining companies engage with communities that are likely to be affected by their operations<sup>150</sup>. The Community Development Agreements (CDA) are agreements that a mining license holder gets into with an affected community. The regulation provides a criterion to identify affected communities as those identified during the ESIA in consultation with NEMA<sup>151</sup>. They are the communities that are likely to be impacted the most from a proposed operation. The regulations define consultation as a process involving a physical gathering of the impacted or affected communities and other interested parties at the village level. The regulation further provides that the gathering should be conducted in a place that is reasonably accessible by all the members of the communities. The regulation encourages wide consultation as consultation with a few people or opinion of elders sought is viewed as insufficient consultation. The community is obligate to conduct consultations on the draft CDA and provide comments back to the licence holder for implementation. The regulation also provides an avenue for capacity building for the communities in the event that the community lacks capacity to reasonably and effectively negotiate for a CDA<sup>152</sup>. The community is given an opportunity to participate in the planning, implementation, measurement and monitoring of activities carried out under the agreement<sup>153</sup>. The community can determine its role in formulating the community development programme plan, which may include the undertaking to ensure community participation throughout the life of the CDA aimed at optimizing its implementation.

Although the provision is quite elaborate on participation of affected communities, unfortunately it is only applicable in the mining sector. If the provisions are mirrored in the petroleum sector, then this move would translate to active public participation.

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<sup>150</sup> Mining (Community Development Agreement) Regulations 2017

<sup>151</sup> Section 5, *Mining (Community Development Agreement) Regulations 2017*

<sup>152</sup> Section 10 (7), *Mining (Community Development Agreement) Regulations 2017*

<sup>153</sup> Section 10 (3), *Mining (Community Development Agreement) Regulations 2017*

### **3.3.4. County Public Participation Guidelines, 2016**

County public participation guidelines were developed to provide the legal framework for public participation that is meaningful<sup>154</sup>. Even though the guidelines are not binding they were developed to provide a structured system for conducting public participation. The guidelines provide a direction on the structures, processes and recommendations of public participation standards. The guidelines recognize the right of all members of the public to participate either individually or through self-organized groups in decision making<sup>155</sup>. The guidelines also set the conditions for participation, this includes the clarity of the subject matter, clear structures and process, access to information and inclusivity<sup>156</sup>. These guidelines have been used by counties in the development of their own county public participation Act. This research will discuss the Turkana County Public Participation Act, the Act came before the guidelines, nevertheless, the County can still amend to suit its needs. Turkana County has been chosen mainly because oil and gas deposits have been found in the Lokichar basin, therefore relevant to this research.

#### **3.3.4.1. County – case study Turkana County Public Participation Act (2014)**

Turkana has enacted the Public Participation Act of 2014 in line with the requirement of the County Government Act (CGA).

The CGA of Kenya is the principal legislation that elaborates the constitutional principle of participation in the devolved governance system of the country.

Even though Turkana County have enacted the laws, the laws are mainly inoperative due to lack of political will, delays in establishing county administrative mechanisms, inadequate funding of public participation processes, poor organisation structures (mistrust and fights among implementers),and under budgeting for public participation processes.<sup>157</sup>

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<sup>154</sup> Ministry of Devolution and Planning and Council of Governors, County public participation guidelines, 2016

<sup>155</sup> Section 15, *County public participation guidelines*, 2016

<sup>156</sup> Section 17, *County public participation guidelines*, 2016

<sup>157</sup> Trócaire Kenya, 'Citizen participation in county integrated development planning and budgeting processes in Kenya; a case of five counties' *A Report of Trócaire Kenya*, 2019

Further, large parts of Turkana have reported rampant insecurities that hinder public participation. There is, therefore, a need for a conflict-sensitive approach to public participation otherwise public participation will remain highly theoretical<sup>158</sup>.

The Act however provides that 1% of the total county budget should be set aside for public participation<sup>159</sup>. This budget is too little to engage in any meaningful public participation. The county has further not been able to put up measures to monitor the spending of the budgeted amount in public participation either through the actual participation planning and facilitation or the accountability mechanism. The role of the citizen in ensuring transparency is therefore lost.

### **3.4. Institutional and Policy framework of public participation in an EIA process in Kenya**

#### **3.4.1. National Environment Management Authority (NEMA)**

NEMA is ultimately responsible for issuing, varying or cancelling EIA licenses and coordinates the EIA process. NEMA provides for public participation in projects that are likely to harm the environment.

For NEMA to exercise its powers it is expected to adhere to the principles of public participation. To ensure that it is efficient NEMA has devolved its functions to the Counties through the creation of County Environment Committees<sup>160</sup>.

While NEMA plays a critical role in ensuring public participation, it is important to ensure that the participation is effective by ensuring that it is holistic and that the affected communities have a clear understanding of the environmental concerns of the project and also that they participate effectively. This means that in practice, public participation that is citizen-centred must be evaluated on whether or not the members of the public are sufficiently informed and fully understand their rights and duties concerning matters that affect them in an EIA process and the extent to which the public has a say in the decision affecting them.

NEMA has been very progressive in its attempt to encourage public participation even amid the Corona Virus Pandemic. NEMA issued some guidelines in 2020, setting out the practical guidance in implementing meaningful EIA participation during the pandemic. The guidelines

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<sup>158</sup> Trócaire Kenya, 'Citizen participation in county integrated development planning and budgeting processes in Kenya; a case of five counties' 2019

<sup>159</sup> Section 14 (1), *Turkana County Public Participation Act* (2014)

<sup>160</sup> Section 29, *EMCA* (Act No. 8 of 1999)

provided that in conducting EIA's project proponents should incorporate ICT innovations such as online questionnaires/ surveys to undertake public consultation and provide reliable evidence of consultation for consideration by NEMA<sup>161</sup>. In sensitive projects where ICT technology is limited NEMA shall advise on submission of comprehensive public consultation and disclosure plans. Albeit, a positive step, these guidelines do not comprehensively factor in the illiterate communities and therefore does not meet the quantitative threshold of participation. The guidelines further provide that the hard copies be submitted to the NEMA offices and posted on its website. The mode of dissemination of information does not seem proportionate and applicable to the community level.<sup>162</sup>

NEMA has executed its mandate satisfactory but has also been found culpable by the National Environmental Tribunal in the matter of *No To Safaricom B.T.S Mast Residents of New Valley Kitengela (Suing Through Its Representatives) Jacqueline Makena Robert & another v Director-General NEMA & another*<sup>163</sup> the Tribunal set aside an EIA Report on the basis the EIA Report did not involve the residents that would be affected by the erection of telecommunication mast but instead sought the views of those unlikely to be affected by the activities of the project. The Tribunal also noted that the telecommunication company ought to have taken more active steps beyond the distribution of handbooks or ticking off boxes in a generic questioner.

Also, on 16<sup>th</sup> April 2019, NEMA was accused of flouting its regulations on EIA. There was an uproar by a section of Mombasa residents after NEMA issued and approved an EIA report concerning the construction of a liquefied petroleum gas store in Mombasa. The resident claimed that the EIA approval was obtained irregularly<sup>164</sup>.

### **3.4.2. National Environmental Complaints Committee**

The Committee is charged with the following functions: Investigating allegations/ complaints against any person or the Authority (NEMA) concerning the condition of the environment and

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<sup>161</sup> Online; NEMA Website

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjqp7n7k4HzAhUM\\_7sIHTXQC\\_8QFnoECAUQAQ&url=https%3A%2F%2Fwww.nema.go.ke%2Fimages%2Fdocs%2FGuidelines%2FPublic%2520participation%2520guidelines%2520during%2520COVID\\_19-min.pdf&usq=AOvVaw1Tm7PGSXDRUbi7F9g9XThK](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjqp7n7k4HzAhUM_7sIHTXQC_8QFnoECAUQAQ&url=https%3A%2F%2Fwww.nema.go.ke%2Fimages%2Fdocs%2FGuidelines%2FPublic%2520participation%2520guidelines%2520during%2520COVID_19-min.pdf&usq=AOvVaw1Tm7PGSXDRUbi7F9g9XThK) on 15 September 2021

<sup>162</sup>NEMA, Environment Guidelines and Administrative procedures, final draft, November 2002, 25

<sup>163</sup> [2020] eKlR

<sup>164</sup> Mosuko G, 'NEMA on the spot for allowing a Kes. 7.5 billion gas projects' The standard newspaper, 16 April 2019 <<https://www.standardmedia.co.ke/business-news/article/2001321182/nema-on-the-spot-for-allowing-gas-project>> on 26 May 2021

its management and therefore provides an administrative mechanism for addressing environmental grievances including lack of public participation in an EIA process. This provides an avenue for accountability for the lack of participation by the citizens but it does not have a mechanism for enforcing its decisions.

### **3.4.3. National Environmental Tribunal**

This Tribunal guides the handling of cases related to environmental violations. The Tribunal hears appeals against the decisions of NEMA. The tribunal is however limited to the matters provided for in section 129 of EMCA. The Tribunal has successfully determined various cases discussed in this paper.

The Tribunal can hear the plight of citizen and therefore accords then legal standing against project proponents who do not follow the due process or irregularly issued licences by NEMA.

### **3.4.4. Manifestation of public participation in Kenya's Judicial System**

*KM & 9 others v Attorney General & 7 others* is a case that involved residents of Owino Uhuru. The residents were subjected to lead poisoning by an iron smelting company (Metal Refinery (EPZ) Limited) from 2007 when the company began its operation until its permanent closure in 2014.<sup>165</sup> The court in its determination on whether there was any manifestation that public participation took place observed that there was no evidence that the residents were engaged through public participation before the commencement of the operations. The court questioned how an EIA licence could have been issued without the proper documentation including evidence of public participation. This case shows how the aspect of public participation has been undermined by the state and has resultantly led to irreversible harm to the environment and the health of communities.

*Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others*<sup>166</sup> (Kinangop wind park case) case involved the move to change and/or modify the initial project for a wind park, from the 2 km sq situated in one land parcel, to 16 km sq., situated in 38 land parcels through variations of the EIA licences. The court held that this was a substantial change or modification of the project. It opined that NEMA ought to have either revoked the initial licence, under Regulation 28, or at the very least, asked for a new EIA, before issuing a variation of the existing licence. The court held that the petitioners had demonstrated that there was impropriety in the manner in which the EIA licences were varied and in the manner in which the project proponents

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<sup>165</sup> [2020] Eklr

<sup>166</sup> [2016] eKLR

intended to implement the project on a site (the 38 plots) that has never before been subjected to full EIA. A new EIA would have meant that the project would have been subjected to public participation.

This goes to show the effects of arbitrary decisions by government agencies that hinder citizen centred public participation to EIA process. It should not matter the variation as long as the modification is going to have an effect to the communities, in that instant the decision should also be made by the local communities through participation, by so doing the citizens are considered equal partners in the decision making process.

### **3.5. Other gaps in the public participation process**

Kenya has a robust legal and institutional framework for public participation under various instruments as discussed in this research study. However, the law may be good but implementation is key for effective public participation.

In addition to the identified gaps throughout this chapter, the following are also identified deficiencies: Firstly, is the deficiency in law enforcement, NEMA's lacks its prosecutors as the government prosecutors' have limited knowledge of environmental crimes, and bureaucracy in prosecution further complicate efficiency. The described situation threatens access to justice and thus may be considered as undermining the Aarhus pillar on access to justice.

Secondly, EIA reports are accessible for free at the local authority offices, (most people are not aware of this), can be purchased or accessed through the NEMA website. Considering that most of the country's population is unemployed and that where oil resource is obtained is in semi-arid regions where the literacy levels are low makes this a hard nut to crack in terms of dissemination of information and the ability of a citizen to obtain information which is crucial in a citizen-centred approach.

Thirdly, the reports are too technical and in the English language making it difficult to pick out the main points and ascertain whether the proponents have incorporated or even offered solutions to their concerns during the participation process. Information including useful extracts from the EIA study reports should not only be widely available but also translated into indigenous languages with simple explanations and illustrations. The radio listening rate in the rural areas stands at 63%<sup>167</sup>. Radio is one of the avenues for encouraging public participation

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<sup>167</sup> Kenya Media Guide,' BBC Monitoring Report; Kenya Profile ', *Kenya Media Guide*, 25 January 2016<  
<https://www.bbc.com/news/world-africa-13681341>> On 01 June 2021.

and is proven to have a 33% chance of missing the target audience. This means for there to be an increased citizen awareness the county or local government should find other ways of sending out notices for public hearing such as through churches, social functions among others. Fourthly, there is no indication of how public input provided at the hearings is going to be used in the decision-making process. If the participation is meaningful, one should be able to trace the decisions made by the citizens back to the EIA study reports.

Lastly, the sanction for not conducting public participation is not provided under EMCA which is the primary legislation for environmental management. This means that project proponent may not be too keen to ensure that they comply with the law.

### **3.6. Conclusion**

It is eminent from the analysis of the Kenyan context that public participation is contemplated by the constitution and other laws in Kenya. Whereas the country has a robust legal framework on public participation, the provisions do not provide for a citizen-centred approach. The level and nature of public participation is unsatisfactory and inadequate in addressing effectiveness and adequacy under the tenet of citizen-centred approach. Both the National and County levels of government have not allocated adequate resources that would otherwise ensure that participation is at all levels of citizen involvement. The institutional framework does not give an avenue or provide critical direction on the empowerment of local communities on the importance and benefit of public participation.

Participation must be genuine otherwise participation becomes a procedural exercise rather than a democratic participatory process. It is also important for the project proponent to appreciate that public participation is geared towards providing a suitable environment for the public to accept and take ownership of the project. Finally, public participation is a critical and valuable source of expertise during the project planning and decision-making process.

## 4. CHAPTER 4

### COMPARATIVE ANALYSIS OF PUBLIC PARTICIPATION IN KENYA AND LESSONS FROM NIGERIA AND ENGLAND

#### 4.1. INTRODUCTION

This chapter will do a comparative analysis between Kenya, Nigeria and the England. The reason why these jurisdictions have been selected is because of their historical activeness in the oil and gas industry, level of maturity, accessibility to legislation instrument and their ranking 3<sup>rd</sup> and 55<sup>th</sup> respectively by the Resource Governance Index.<sup>168</sup>

The comparative analysis of Nigeria (developing) and England (developed) countries provide a good comparative mix for a robust and informed conclusion on the ‘international best practises on citizen-centred approach to public participation’ that Kenya can learn from. This chapter is based on the premise that England has robust and effective public participation due to its specific provisions on Neighbourhood planning that have increased public participation of the local communities.

The Kenyan courts have in several occasion deliberated the shortfalls of public participation in Kenya, the Mohammed Baadi case<sup>169</sup> for instance discussed at length the principle of public participation and how in that particular case public participation fell short. In the case, the government defended its public participation efforts, pointing to various meetings that had been held but the government failed to proof its case because they could not provide any details about the public dialogue or interactions at those meetings. This made the public participation inadequate. The court also touched on the right to access information. The court opined that given the size of the LAPSSSET project, it was the government responsibility to disseminate information to the public on its own initiative. This is a requirement under the ESIA and the government omitting to provide the information breached the community’s right to access information.

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<sup>168</sup> Natural Resource Governance Institute, ‘2017 Resource Governance Index’, *Natural Resource Governance Institute*, 2017.

<sup>169</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR

This chapter has three sections. The first section will critically examine public participation in the EIA process of Nigeria, it will consider and evaluate Nigeria's NESREA, EIA Act, and EGASPIN to establish if these legislative provisions reflect a citizen-centred approach to public participation. The second section will examine the legislative framework of public participation in England, the section shall examine and analyse the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulation 2020, the Town and Country Planning Acts 1990, the Town and Country Planning (Environmental Assessment) Regulations 2017 and Localism Act of 2011. The last section will provide a brief comparative analysis of the three countries to identify the best practice for Kenya.

## **4.2. Public participation in the EIA process of Nigeria.**

Nigeria is not an exception to the universal trend on the mandatory nature of public participation in the conduct of the EIA process. The country recognizes the importance of this process especially when it comes to projects that are likely to affect communities such as the activities of an oil project<sup>170</sup>. The objective is to identify at the earliest any adverse effects of a project and require the oil and gas company to formulate methods to mitigate these effects or enable stakeholders such as the government to pull out of the project if the environmental degradation outweighs the sustainable economic benefit. The importance of public participation has been domesticated to feature as a key component in the EIA law in Nigeria.

### **4.2.1. National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, 2007**

Following the illegal dumping of toxic waste at Koko in 1987, the Nigerian Government promulgated the Human Waste Decree<sup>171</sup> followed by the creation of the Federal Environmental Protection Agency (FEPA) in 1988<sup>172</sup>. FEPA is the chief regulatory body for environmental protection in Nigeria. It is established under the Federal Ministry of Environment Act No. 58 of 1988. FEPA was later replaced with the National Environmental Standards and Regulations Enforcement Agency (NESREA). NESREA is an agency under the Federal Ministry of the Environment.

NESREA Act is the primary legislation on environmental protection and management in Nigeria. NESREA was established by the Federal Government of Nigeria in line with section

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<sup>170</sup> Olawuyi D, 'Principles of Nigerian Environmental Law', *Afe Babalola University Press*, 2015

<sup>171</sup> Decree 42, *The Human Waste Decree* (1988)

<sup>172</sup> Decree 59, *The Human Waste Decree* (1988)

20 of the 1999 constitution of the Federal Republic of Nigeria. NESREA has responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology including coordination.

However, despite this provision on public participation, it has been observed that by the time the opportunities for public participation occur in practice, agencies and decision-makers have often become attached to a particular course of action, thus actual influence on the EIA decision is very limited<sup>173</sup>

NESREA Act lacks community-based organs and avenues for participation, especially in the oil-bearing communities. This means that there is no required awareness within the communities and also points to the lack of a platform through which the local people can participate in the formulation and implementation of Environmental Policies<sup>174</sup>. The finding is that although the Act provides for participation, the participation seems like passive participation that is needed for purposes of obtaining the necessary licences for oil and gas projects. This lacks the aspect of citizen-centred participation.

#### **4.2.2. Environmental Impact Assessment Act of Nigeria**

Public Participation is provided for in the Federation of Nigeria EIA Act No. 86 of 1992. The Act provides that before the Federal Ministry of Environment (FME) gives a decision on an activity that needs an EIA, the Agency has to give the concerned government agencies, members of the public, interested groups and relevant professions an opportunity to make contributions to the EIA report.<sup>175</sup> The procedure for public participation in the EIA process in Nigeria is set out in section 25,39 and 41 of the EIA Act

The Act provides in detail the stages of review in which the public is involved such as in house review, panel review (sitting in public), public review (Public display and review of documents for 21 working days), and mediation. The final EIA must include all issues that have been raised by stakeholders during the review process and the answers to those issues and any amendments that have resulted from the EIA report.

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<sup>173</sup> Agbazue E, Ehiemobi C, 'The challenges of the Environmental Impact Assessment Practice in Nigeria' *International Journal of Scientific Research Engineering & Technology* 2016; 5:338–46.

<sup>174</sup> Wonah E, 'Participation and environmental policy formulation and implementation in Niger delta region of Nigeria' *Global Journal of Political Science and Administration*, February 2017, Vol.5, No.1, pp.1-8,

<sup>175</sup> Section 7 and 12, *Federation of Nigeria EIA Act* (Act No. 86)

The EIA Act of Nigeria is comprehensive on the role of public participation in environmental decisions through public participation programs, forums held for the public, public review of documents and public attendance in public hearings. Some of the challenges that have been documented on public participation in Nigeria are that the EIA documents are too technical, which means that the local communities will shy away from interacting with them with a view of understanding the effects that a project will have on their environment.

The Act provides for public participation but not for a citizen-centred approach this is because the Act does not provide specifically that project proponents should consult the local communities at their level. The Act also does not require the local community's views especially for projects that oil and gas companies are funding. <sup>176</sup>

#### **4.2.3. The Environmental Guidelines and Standards for the Petroleum Industry**

The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) is another critical environmental document in Nigeria's oil and gas industry that was issued by the Department for Petroleum Resources (DPR). EGASPIN expounds on environmental and safety standards that oil and gas companies must comply with.

One of the criticisms of the EGASPIN it is not clear on its provisions of FPIC. FPIC is an internationally accepted norm for resource development projects<sup>177</sup>. The EGASPIN provides for the identification and discussion of environmental impact with stakeholders, it however does not provide directions on who are stakeholders and the method of providing input by the stakeholders. The EGASPIN provides for discussion, these discussions do not mean the same thing as participation as required by FPIC. Participation involves giving the affected community a chance to air out their concerns that should be considered in the decision-making process. Another criticism of the EGASPIN is that it lacks a public database that contains accessible information about the history of environmental violation and action taken against violators such as what the US has. <sup>178</sup> This database is important because it allows for transparency in the process.

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<sup>176</sup> Ijaiya H, 'public participation in environmental impact assessment in Nigeria: prospects and problems' *The Nigerian Juridical Review* 2015 Vol. 13

<sup>177</sup> Ruggie J, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'; UN Document A/HRC/17/31 (21 March 2011), paras 8-12; also, UNEP (2012) *UN-REDD Programme Guidelines on Free Prior Informed Consent*, p. 7.

<sup>178</sup> United States Environmental Protection Agency, 'Enforcement and Compliance History Online,' *United States Environmental Protection Agency* < <https://echo.epa.gov/>> on 10 April 2021

Finally, there is a lack of procedures for auditing the activities of DPR as well as other regulators<sup>179</sup>. There is a need to have an independent body to audit the DPR as it discharges oversight function.

The aforementioned criticisms do not reflect a citizen-centred approach to public participation.

In conclusion after the analysis of the three major legislation on EIA and public participation, it is trite to say that even though Nigeria has robust provisions on public participation, the provisions are not effective because they are not citizen-centred. The process of participation exists only as a formality.

### **4.3. Public participation in EIA in England**

Public participation in England is at all levels of government and is observed in building citizen and stakeholder's engagement in the policy making process. Public participation is done through consultations, focus group research, online discussion forums or deliberative citizen journals.

NIMBY (Not In My Back Yard) is an acronym that has facilitated discussions of public participation at the citizen level in England. NIMBY refers to when residents of a particular location protest or opposes projects in their neighbourhood.<sup>180</sup> Anthony Jay defines NIMBY as any citizen that tries to defend their homes and neighbourhood from plans which would destroy the view or pollute the environment<sup>181</sup>. NIMBY is grounded on rational choices by people in an effort to protect their self-interest and also to propagate for attitudes such as fairness, sympathy, commitment and morality<sup>182</sup>. For example in opposing an offshore wind development off Cape Cod in the UK, it was established that the opposition of the project by the communities was due to the community belief that the project was uneconomical, and therefore would not make any significant contribution to the energy supply and worse still could not justify the adverse environmental impact<sup>183</sup>. This is one of the ways in which NIMBY has advanced the citizen centred approach to public participation. NIMBY enabled the public to make choices of whether they would like to proceed with a proposed project well

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<sup>179</sup> Olawuyi D, Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)' OGEES *Institute, Afe Babalola University* 2018

<sup>180</sup> Wolsink, M, 'Invalid theory impedes our understanding: a critique on the persistence of the language of NIMBY', *Trans Inst. Br. Geogr.* NS 31 85-91, 2006

<sup>181</sup> Anthony J 'Not in Our Backyard: How to run a protest campaign and save the neighbourhood' 2005

<sup>182</sup> Hunter, S, Leyden, K. 'Beyond NIMBY: Explaining opposition to hazardous waste facilities' *Policy Studies Journal*, 1995, Vol 23, No. 4 p601-619

<sup>183</sup> Kempton W, Firestone J, Lilley J, Rouleau T, Whitaker P, 'The Offshore Wind Power Debate: Views from Cape Cod' *Coastal Management*, 2005 33 119- 149

in advance before the local authority even have a chance to plan for the project. This is closely linked to the neighbourhood planning that is further discussed in this research study.

#### **4.3.1. Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulation 2020**

The Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 is concerned with the conduct of EIA's including the public participation aspect within the petroleum sector. The Regulation was triggered from decisions of two recent judicial review cases<sup>184</sup>. The cases exposed the inadequacies of the EIA procedures to inform and consult the public and the lack of clear procedures to challenge consent<sup>185</sup>.

The regulation removed the obligation requiring the developer to make EIA documentation available for inspection available at a UK address and replaced this with a provision to allow EIA documentation to be sent through post or email to anyone who requests it<sup>186</sup>. This move shows that England has deployed innovation in the dissemination of information and an attempt to adapt to the current and future means of communication. The constant innovation in the avenues of dissemination of information by England for offshore oil and gas exploration is an attempt to entrench the citizen centred approach to public participation, this is because the country is trying to find more appropriate channels to reach majority of its citizens.

#### **4.3.2. Town and Country Planning Acts 1990**

The Act provides that once a planning application has been made to the Local Planning Authority, the community groups can submit comments through an environmental statement. This ensures that the citizens have a voice in the preparation of the environmental statements proactively. Further, in support of a citizen centred approach the Act provides that if there is a public enquiry on a decision made or taken by the Local Planning Authority, the local communities can send written comments or present their views in person<sup>187</sup>.

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<sup>184</sup> The Colter Appraisal Well off the Dorset Coast and the Greenpeace case that challenged the drilling consent for the Vorlich oilfield in the North Sea.

<sup>185</sup> Business Energy and Industrial Strategy, 'UK government consults on revised EIA Regulations for offshore oil and gas' *CMS law*, 2020 <[https://www.cms-lawnow.com/ealerts/2020/08/uk-government-consults-on-revised-eia-regulations-for-offshore-oil-and-gas?cc\\_lang=en](https://www.cms-lawnow.com/ealerts/2020/08/uk-government-consults-on-revised-eia-regulations-for-offshore-oil-and-gas?cc_lang=en)> on 22.May 2021

<sup>186</sup> Article 6, *Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulation* (2020)

<sup>187</sup> Section 78, *The Town and Country Planning Act* (1990)

The Secretary of the state has the discretion to call for a public enquiry, if the proposed project in their view involves planning issues of local importance <sup>188</sup>. The role played by the Secretary of State can be considered a proactive engagement by the government to initiate public participation.

#### **4.3.2.1. Town and County Planning (Environmental Assessment) Regulations 2017**

The local planning authority (LPA) is responsible for issuing permits for development.

The process of public participation in the Town and County planning regulation of 2017 is similar to the process in the Town and County Planning Acts discussed in this research paper.

The Regulations require that the project proponent must publicize details of the planning application and advise where the public can get a copy of the Environmental Statement (ES) for inspection through a bill posting and publishing a notice in the local dailies. The public is given 21 days to comment on the ES and planning application through the LPA. The LPA receives comments from the public and statutory consultees and must consider these representations before deciding on whether to grant or refuse a license. A decision must be communicated within 16 weeks of receiving an application by the LPA unless extended by agreement. Following a decision being reached by the LPA, they must publish the decision and details of how the decision was arrived at. The project proponent must also ensure that there is a non-technical summary of the ES.

The citizen-centred approach in the Town and Country Regulation, is evidenced by the mandatory obligation imposed upon the project proponent to summarize the ES into a non-technical item and also publicize details of the planning application, this enhances public understanding hence effective participation.

#### **4.3.3. Localism Act, 2011**

The Localism Act provides for the concept of empowering local communities to make decisions that affect them at the local level. The Act is closely linked with a citizen-centred approach in participation in England<sup>189</sup>. The Localism Act is geared towards moving from centralized decision making to a more localised decision making hence encouraging community involvement and participation. It involves a radical transformation and devolution

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<sup>188</sup> Section 77, *The Town and Country Planning Act* (1990)

<sup>189</sup> Part 5, *The Localism Act* (2011)

of responsibilities to the local level, giving new powers and opportunities to local authorities and communities, to plan and design their communities and places.

The citizen-centred approach is quite elaborate in this piece of legislation in England. The Localism Act has provided an enhanced citizen centred approach to participation through the Neighbourhood planning (NP)<sup>190</sup>. The Neighbourhood planning is a local level initiative introduced by the Localism Act that allows communities to make decisions about their neighbourhood through policies. These policies are instrumental because they are documented and considered for any future activities made by the relevant LPA. The LPA must take into account the NP in making decisions that affect the relevant communities. The Town and Country Planning Act 1990, specifically section 61 E was amended by the Localism Act 2011 under Schedule 9 to introduce neighbourhood planning procedures. The neighbourhood planning procedures provides that a parish council or a neighbourhood forum can initiate a process for the reason of requiring an LPA to make neighbourhood development orders that grant planning permission in a particular neighbourhood.<sup>191</sup> This encourages the local communities to engage in public participation through ownership of projects within their localities. The NP requires that an application has been made to the LPA for the designated area, pre-submission consultation has taken place and draft plan submissions are availed, there is also examination of the NP by an independent examiner to ensure that the citizen's views have been considered, that a referendum has been conducted on the issues at hand through voting by registered voters of an area and that finally the NP has been adapted by the LPA. During the referendum the NP must receive over 50 % of the votes for it to pass.

The Act also encourages local authorities to do anything that an individual may do. This is a tool used to encourage decentralization of power from the national to local governments.<sup>192</sup>

This process of adaptation on an NP elaborates how the Localism Act is citizen centred and a great lesson for Kenya.

#### **4.4. Public participation in EIA in Nigeria, England and Kenya Compared.**

This research has established in this chapter that England has efficient public participation as it has entrenched the citizen-centred approach through the Localism Act.

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<sup>190</sup> Part 3, *The Localism Act* (2011)

<sup>191</sup> Section 61E (1) and (2), *The Town and Country Planning Act* (1990), amended by Schedule 9, *Localism Act* (2011).

<sup>192</sup> Bowes A, Stanton J., 'The Localism Act 2011 and the General Power of Competence' *Public Law journal* 401, 2014.

The NP process is one of several tools associated with the Localism agenda in England, it is an example of creative engagement created by the Localism Act. NP is promoted as a way to devolve power to citizens and away from local and central government and, indeed, potentially a citizen-centred approach to participation. Kenya's borrowing from the NP is that even though there is the County Government Act that devolves participation, the process of devolution of this function has faced many challenges such as the slow pace in operationalization and completion of public participation laws (public participation Bill has not been enacted to the law since 2018); limited citizen empowerment; and inadequate funding among others<sup>193</sup>. These challenges if resolved could indicate that the country is headed in the right direction in promoting participation that is citizen-centred.

England has also adopted other modes of ensuring public participation is effective through the interactive website where the citizen can interact with information available about a proposed project through the use of information technology, this has also been evidenced by the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 which allows EIA documentation to be sent through post or email to anyone who requests it.

Public hearing as a form of participation involves various participants who express their opinions and offer suggestions to proposed project. The conduct of public hearing is important because it improves public awareness of the environmental concerns<sup>194</sup>. Public hearing is integrated to the EIA process of England. Kenya's public participation would be citizen centred if it adopts mandatory public hearings in its EIA process such as how England has done.

The Localism Act has lifted the burden of bureaucracy by devolving power from the central government to the local communities, empowering communities to do things their way through community led initiatives and strengthening accountability to local people.

Nigeria has a robust legal provision on public participation, it however lacks a citizen centred approach. The level of participation is a passive rather than active participation in citizen centred approach. This undermines the contributions of the citizens in the environmental concerns.

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<sup>193</sup> Draft policy on public participation, 2018

<sup>194</sup> Kakonge. J.O. 1989. UK experience with environmental impact assessment: Relevance for the African countries. Unpublished thesis, Cambridge University. UK.

The EIA Act of Nigeria does not have a citizen empowerment program which is critical due to the low level of literacy in many of the oil and gas regions. This has been and continues to be a major barrier to effective public participation. The low literacy levels contribute to communication barriers, mainly because the project proponents are usually foreigners and also EIA are technical documents that are difficult to understand even by the ‘elite and learned’ in the society<sup>195</sup>.

The lack of clear provision on FPIC under the EGASPIN is a major shortcoming of Nigeria environmental standards and protection. These communities may not have the privilege to access information that is critical in a citizen centered approach<sup>196</sup>.

The lessons that Kenya can draw from these two countries is that public participation that is citizen centred has to be deliberate and should not only reflected in the legislative and institutional frameworks but also in real life practice. Nigeria having discovered oil and gas deposit in 1956 still struggles to incorporate an active role of participation upon its citizenry and as a result has faced many challenges<sup>197</sup>. England on the other had has managed to incorporate citizen centred approach through devolving this function to the local communities through the NP. This presents a good case study for Kenya as like the Nigeria counterpart it has excellent provisions but lack citizen centered approach in its legislative and institutional framework, discussed in detail in this research study.

Kenya which is largely constituted by youths<sup>198</sup> should be adaptive to technology and leverage on this by providing other means of participation other than the statutory public meetings to e-participation like the England counterpart.

England has also incorporated a citizen centred approach to participation through the requirement that LPA must publish details on how a decision was arrived at under the Town and County Planning (Environmental Assessment) Regulations 2017, a lesson that Kenya can learn to enhance citizen centred participation.

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<sup>195</sup> Ijaiya H, ‘public participation in environmental impact assessment in Nigeria: prospects and problems’ *The Nigerian Juridical Review* 2015 Vol. 13

<sup>196</sup> Olawuyi D, Tubodenyefa Z, ‘Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)’ 2018

<sup>197</sup> Adedoyin, L., ‘Public Participation in Environmental Impact Assessment: Case Study of Project in Lagos State, Nigeria’ *State Environmental Protection Agency Working Paper*, 2014, 32-37

<sup>198</sup> National Council for Population and Development, ‘The state of Kenya population’, *National Council for Population and Development*, June 2020

#### 4.5. Conclusion

Public participation in an EIA process provides an avenue for a democratic EIA process, transparency and accountability of the project. The analysis indicates that the factors that affect public participation within the Kenyan context are similar to those of the Nigerian counterpart because of the shared continental inclinations although Nigeria has many years of experience. Kenya however is set to benefit from these experiences and have an opportunity to strategize and adopt a citizen-centred approach to public participation through all the stages of an EIA process. Kenya through better funding and budgetary allocation for country governments especially in counties where oil and gas deposits have been found. Kenya can also ensure that public participation is carefully planned with proper monitoring and auditing mechanisms and there should be a proactive effort to ensure active participation and not mere dissemination of information, for example, ensuring that simple things such a mode of transport and convenient timing for all communities is factored in before planning a public hearing or meeting for consultation, being transparent so that all stakeholders including the communities can have confidence and trust in the process.

England on the other hand offers a hybrid solution to Kenya, the positives being that they have an adopted a more citizen involving public participation through NP and other community based public participation initiative.



## 5. CHAPTER 5

### IMPLEMENTATION OF CITIZEN-CENTRED APPROACH IN PUBLIC PARTICIPATION IN KENYA

#### 5.1. Introduction

This chapter will look into how Kenya can effectively implement the citizen-centred approach.

This chapter has one section that discusses the framework for implementing a citizen-centred approach to public participation in Kenya.

The citizen-centred approach can be implemented in four main ways within the upstream petroleum sector. This is through monitored, participatory communication strategy, community ownership of petroleum projects within their localities, encouraging deliberative democracy and County Government and citizen collaborations.

The monitored, participatory communication strategy has been chosen based on the fact that throughout the research communication has been established as a key component for effective participation.

The community ownership of the petroleum project has been chosen because, if the community does not feel involved then they will not want to participate. The Nigeria Ogoniland case<sup>199</sup> provides a lesson that Kenya can learn from.

The encouragement of deliberative democracy is also critical because, it provides a mix of alternative knowledge, support, understanding and problem-solving. The focus of this tool is that all people are involved to the largest extent. This is supported by the Localism Act 2011 of England.

Finally, County Government and Citizen collaboration provide a smooth process that refocuses the strategy from mere participation to effective public participation. These are all lessons that can be drawn from the England experience.

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<sup>199</sup> *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (Communication No. 155/96)

## **5.2. Framework for Implementing a Citizen-Centered Approach to Public Participation in Kenya**

### **A. Monitored, participatory communication strategy**

As can be learned from the England experience, a communication strategy is required to ensure that the government or project proponent while undertaking public participation have an understanding of how people in that society communicate, institutionally as well as individually<sup>200</sup>.

An effective communication strategy developed by the government ensures that there is effective community engagement on both project benefit and adverse effects that such projects might have on the environment, health and safety.

An effective communication strategy has to have the following tenets.<sup>201</sup>

Firstly, the project proponent must carry out a sociological study that will provide an overview, structure and dynamics of the affected community. This study will reveal the relevant social groups and general structure of leadership and how power is distributed in a particular society. This is important because project proponents can determine the social structure of the affected communities which is key for a citizen-centred approach to public participation.

Secondly, it should specify an institutional mechanism through which local representation is incorporated into the consultative process. This means that the communication channels between the project proponents and the affected communities are clearly defined and understood by both parties. This approach allows for the citizen-centred approach as it increases transparency between the parties and holds project proponents accountable to the affected communities especially when it comes to holding regular meetings that are prescribed in such a communication strategy.

Thirdly, the medium through which information is exchanged is well provided for and understood by both parties. This means that the language of the local affected communities should be incorporated into the medium of communication. This can also be further strengthened by the government putting in place measures to ensure that the literacy levels of

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<sup>200</sup> Depoe SP, Delicath JW, Elsenbeer MF, 'Communication and Public Participation in Environmental Decision Making' *Suny Press*, 2004.

<sup>201</sup> Terry C, Bryer T, Meek J, 'Citizen-centered collaborative public management', *Public Administration Review*, 66 (S1), 76–88 2006

the community are improved through training to improve literacy levels. Where possible there should be the incorporation of more visual aids and site visits to the area of the proposed project to enhance understanding of the likely adverse effects of a project<sup>202</sup>.

Lastly, it should be an evolving practice depending on the community needs and technological advancement rather than a one-off exercise throughout the project cycle.

Kenya should make it a mandatory requirement for project proponents to undertake a sociological study on the relevant communities and all other tenets of a communication strategy. This is to establish the community structure and sociocultural context within the activities of the upstream sector. This should be a process that should be undertaken before the EIA process begins during upstream petroleum activities such as drilling. This will further assist both the government and project proponent in determining the best consultative process.

### **B. Community ownership of petroleum projects within their localities**

Community ownership of petroleum projects can provide an enabling role for the community to become active participants in petroleum projects. A Citizen-centred approach to participation gives a sense of ownership and autonomy of the project.

The project proponent and the government need to appreciate and recognize the ethics of the local communities<sup>203</sup>. This includes understanding the culture and what is valued by those communities.

The local communities need to be educated on the benefits of a citizen-centred approach to public participation for them to be able to appreciate it and engage more actively. This will also lead to community ownership of participation.

Collaborative efforts to encourage participation should be deployed, this includes partnering with local CBO and respected elders within the grassroots to be able to raise the visibility of the proposed projects and the effects of those projects. Normalizing the projects and involving the local communities is likely to create a sense of ownership and therefore increasing trust between the involved stakeholders<sup>204</sup>.

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<sup>202</sup> Terry C, Bryer T, Meek J, 'Citizen-centered collaborative public management', *Public Administration Review*, 2006, 66 (S1), 76–88

<sup>203</sup> Frank F, 'Citizens, Experts, and the Environment: The Politics of Local Knowledge, Durham' *Duke University Press*, 2000

<sup>204</sup> Terry C, Bryer T, Meek J, 'Citizen-centered collaborative public management', *Public Administration Review*, 2006, 66 (S1), 76–88

Access to information should be top of the agenda, this is because the lack of information or minimum sharing tends to breed distrust and hence hindering an effective citizen-centred approach to public participation in an EIA process. The information should be easily available even to the very illiterate in a manner that they can understand and appreciate the project and its effects on the environment. The dissemination of this information should take into consideration the culture of the communities to include all persons especially in patriarchal societies where women and persons with disability are not considered in decision making.

For Kenya to ensure that communities own the projects during the upstream petroleum cycle the country may advocate for neighbourhood planning and empowering of the local community through community advocacy, increasing literacy in the communities among other ways of increasing capacity and awareness in the regions of oil and gas deposits.

### **C. Encouraging Deliberative Democracy for wider Participation**

This simply means purposeful efforts to ensure that the will of the people is enacted, through practising inclusive, participatory governance.

Deliberative democracy involves decision making to be a two-way process, that is between citizen and decision-makers rather than through the traditional governance method where the citizens are passive participants in the decision-making process<sup>205</sup>.

The encouragement of deliberative democracy contributes to a mix of alternative knowledge, support, understanding and problem-solving. This mix of alternative knowledge is given by the citizens who interact with the environment regularly. This strategy improves the quality of decisions.

Deliberative democracy creates an avenue for different sectors of society to participate and hence bring in new ideas and experiences of environmental issues. This simulates more trust and acceptability of the process and in the decision<sup>206</sup>.

The country can consider several ways of entrenching deliberative democracy in its citizen-centred participation. These include citizen juries where a small number of citizens are selected from varied background and a representation of gender, age, ethnicity, disability, income,

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<sup>205</sup> Gutmann, A, Thompson, D, 'Why Deliberative Democracy?' *Princeton University Press*, 2004

<sup>206</sup> King C, Feltey K, Susel B, 'The question of participation: Toward authentic public participation in public administration', *Public Administration Review*, 1998, 58 (4), 317–326

locality, education and religion to participate in an EIA process<sup>207</sup>. Once these citizens have been identified, they engage in a deliberative process which results in an informed and public-spirited decision on issues after due consideration has been made on the existing evidence, perspectives and arguments<sup>208</sup>.

Another technique that can be used is involving a larger number of the citizen to engage in detailed discussions on a proposed project and the adverse environmental effect for a month, the group will then come up with a proposal that is presented to the government for consideration.

Digital participation is also an emerging trend that is likely to promote deliberative democracy. Kenya is fairly technologically advanced in Africa. This type of participation allows citizens to use digital platforms such as social media to participate. The challenge with this participation technique is that it is not possible to reach the widest coverage for the most efficient participation. Creative techniques such as the use of visual art, short films can be used to encourage public participation.

#### **D. County Government and Citizen Collaborations**

The county government should adopt an open-door policy allowing citizens to be able to engage with projects much more easily. This can be done through intentionally seeking citizen initiatives on how to deal with environmental degradation by project proponents and being involved in the shaping of the policies.

County Governments can also adopt participative governance strategies that allow for the citizens to participate and allow for their input. This can be benchmarked with the Localism Act of England.

County governments may conduct community profiling and needs assessments to inform capacity building. This will include the analysis of the technological capabilities of the communities, and an assessment of attitudes, value systems and literacy levels. It may also capture other social and economic indicators that may be useful in tailoring the training curricula and modes of delivery. The overall goal would be to empower stakeholders to

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<sup>207</sup> Escobar, O., Elstob, S, 'Forms of Mini Publics: An introduction to deliberative innovations in democratic practice' *Research and Development Note journal*, 2017

<sup>208</sup> Roberts, J., Escobar, O, 'Involving communities in deliberation: A study of 3 citizens' juries on onshore wind farms in Scotland', 2017

formulate proposals and plans, implement projects and ensure their sustainable management. County governments would need to organize continuous and refresher training courses for duty bearers on participatory methodologies. The training should facilitate attitudinal and behavior change within government organizations.

Community profiling and training need assessment may be done through neighborhood surveys, Focus Group Discussions and formal meetings with local leaders and CBOs. Identification of resource persons who may be trained as trainers may be useful to achieve this. Since it is an expensive venture to undertake it should thus be conducted through a staggered phase that will train the committees directly involved in participation. It could also be done through an initial baseline survey which can be a collaborative effort with the Kenya National Bureau of Statistics (KNBS)<sup>209</sup>.

### **5.3. Conclusion**

The citizen-centred approach to public participation can be strengthened through the sociological study of the structure and dynamic of communities that are likely to affect the effective participation of the affected communities. The government and project proponent should endeavour to increase community ownership of project decisions by involving them at all stages of the project cycle, this increases confidence and transparency in the project. The deliberative democracy is also critical in implementing the citizen-centred approach as it creates an avenue for different groups to participate in the decision-making process. Finally, the empowerment of local communities to take part in public participation breeds good ground for a citizen-centred approach, this is because when citizen understand the process, they appreciate it more and give more meaningful contributions to the decisions that affect them. This can be accomplished through education, training and community profiling to better understand the needs of particular communities and how that affects their participation. For example, the Turkana community in Kenya being pastoralists the government may need to find a meaningful way of ensuring participation such as providing the necessary support to participate like the door-to-door participation on an individual level.

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<sup>209</sup> Omolo A., 'Policy proposals on citizen participation in devolved governance in Kenya' *The Institute for Social Accountability (TISA) report*, 2011.

## **6. CHAPTER 6**

### **FINDINGS, RECOMMENDATIONS, AND CONCLUSION.**

#### **6.1 Introduction**

This chapter will provide the conclusion and recommendations for the citizen-centred approach in the EIA process and report on the findings that are likely to shape the future developments of citizen-centred participation in the EIA system in Kenya.

The general objective of this research study was to critically analyse the gaps that exist in public participation in Kenya's EIA process. The general finding is that there are several gaps that exist in Kenya's public participation despite the availability of legal and institutional framework. The conduct of the public participation is not meaningful or effective. The research study shows that the actual practice of public participation in EIA is often theoretical and that there are many reasons why effective public participation may be a challenge.

The first objective of this research study was to investigate and establish the current challenges in public participation in the EIA process in Kenya, especially in upstream petroleum sector. The research study has established that the upstream petroleum sector has many challenges such as low literacy levels that affect the quality of public participation; the citizens who interact with the environment on a day to basis are more often than not aware of the license requirement and therefore unable to monitor and report any violations by the project proponents; there are no defined structure of how the government has put in place capacity building initiatives on the citizens to enable them to engage effectively with this process and ensuring that the process is well informed, structured and meaningful to the target audience among other challenges discussed in the research study.

The second objective of this research study was to examine the nature, scope and content of citizen-centred participation in the EIA process globally, and in two comparator countries, namely England and Nigeria. This research study has established that the nature and scope of effective public participation include; quantity and quality of the concerned participants, that participation should be conducted at all level, that access to information is critical and public participation should be inclusive. Further that a citizen centred approach should be inculcated into the public participation for it to be effective and meaningful.

This research study has also established that the factors that affect public participation within the Kenyan context are similar to those of the Nigerian counterpart because of the shared continental inclinations. England on the other hand offers a hybrid solution to Kenya which it can implement.

The third objective of this research study was to examine the legal, policy and institutional framework of Public Participation. This research study has established that Kenya's legal, policy and institutional framework is robust and provides for public participation. The provisions however are not geared towards effective public participation that is citizen centred and therefore focused on the community at the lowest level of the communities. Having the communities participate assists in their involvement in the decision making process for activities that are likely to affect them.

The fourth and last objective of this research study was to propose reforms to the legal and institutional framework for implementing a citizen-centred approach in Kenya. Deliberative democracy has been identified as a critical element in effective implementation<sup>210</sup>.

When the concerns of the public are not incorporated into the EIA process, the likely effect of this is that the communities are demoralized in undertaking the next most important projects. It, therefore, becomes critical to create a sense of ownership for the decisions made. Oil and gas deposits have been found in the Northern part of Kenya which is characterized by poverty and illiteracy<sup>211</sup>, this is likely to hinder participation in a citizen-centred approach because the ability to participate is linked to a person's economic and political power<sup>212</sup>.

The lack of adequate funding inhibits citizen centred participation due to insufficient allocation of resources that would facilitate training of NEMA employees and therefore increase capacity that in turn reflects on better understanding and access to information. The financial cost of widening the area of public participation is high given that the northern part of Kenya is scarcely populated and lack access road, the population is poor and therefore may need transport or facilitation to attend the hearings and further in case of infringement on the right to participate legal cost is also too high.

One of the solutions to ensure a citizen-centred approach to participation is to shift some responsibility from project proponents and citizen. The government should initiate initiatives

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<sup>210</sup> Elster S, 'Studies in the Subversion of Rationality' *Cambridge University Press*, 1983, p 35-42

<sup>211</sup> Elkin S., Soltan K, 'Citizen Competence and Democratic Institutions' *Penn State University Press*, 2000, 52

<sup>212</sup> Hall S, 'Nicos Poulantzas: State, Power, Socialism' *new left review*, 1978, 42-55

such as what is done in the US under the good neighbour agreement, empower the citizens to be able to monitor and verify environmental decisions and hold project proponents accountable.

Public participation needs to go beyond information feedback. A Citizen-centred approach to public participation should involve a consultative process, for example, open planning, citizen monitoring and citizen assistance in environmental inspections. It should also absorb the fact that drawing on the resources of citizens can furthermore enrich and strengthen a country's environmental law compliance and enforcement regime where public participation has been encouraged in the creation of environmental laws and regulations.

This research study will proceed to discuss some of its recommendations as below:

### **A. Empowerment of local communities and capacity building**

Any meaningful public participation that is citizen-centred requires an empowered citizenry with relevant knowledge. The empowerment of the local communities can be achieved through education and training<sup>213</sup>. The acquisition of knowledge means that the local community understand the available information and appreciate the context of the knowledge in assisting them to make an informed decision. Empowerment is closely linked to access to information and an illiterate community cannot enjoy the full benefit of access to information. This, therefore, means that education is paramount for one to participate effectively. There is a need to establish and recognize the symbiotic relationship between environmental information, environmental education and environmental decision making.

If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a role, even the most sophisticated system of environmental protection laws may exist only on paper.

Capacity building empowers citizens to be able to monitor compliance of licenses condition and alert noncompliance faster than when this role is left to the central and devolved governments. Capacity-building should include hands-on technical skills, management, and leadership training.

### **B. Good Neighbour Agreements**

Another mechanism in the United States for achieving citizen-industry partnerships during the settlement of an enforcement case is the use of Good Neighbour Agreements. Under Good

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<sup>213</sup> Mansbridge, J., 'On the idea that participation makes better citizens', *Penn State University Press*, 1999

Neighbour Agreements, companies enter into negotiated contracts with workers, local community members and associations to establish a framework for public assessment of industrial environmental conditions. Common elements of these agreements include provisions for public disclosure of relevant company information and stakeholder audits, wherein citizens engage in direct, on-site evaluations of facilities to identify changes that may be needed to ensure environmental compliance, safety, and sustainability. Good Neighbour Agreements can also provide a forum for addressing community recommendations for improvements in the environmental protocol. Each Good Neighbour Agreement is unique because the parties, conditions, and issues vary significantly among cases.<sup>214</sup>

Citizen monitoring can help government agencies identify violations and are particularly important when resources for government monitoring are scarce or insufficient. Citizens can contribute to enforcement efforts by tracking industrial environmental performance through independently compiled emissions data or compliance reports produced by regulated entities<sup>215</sup>.

### **C. Reforms in the legal and institutional framework of public participation in Kenya**

Concrete provisions should be put in place to cater for social-economic challenges that affect the optimization of public participation. This may include the provision of participant incentives such as conducting meetings in more conducive places that the local communities can easily access such as churches, social events gatherings such as sports etc.

The government should insist that the PANEL principles become a threshold that project proponents need to demonstrate that they have complied with to get the necessary licences from project planning to execution of the project. The effects of a project not meeting all the five elements is that such a project should not get the necessary approvals from NEMA to proceed. This move would ensure the protection of the concerned public human right violations and injustice of failure to include the element of participation and inclusion.

There is need for amendment of the EMCA to provide for citizen empowerment for the citizen to understand the technical nature of the EIA documents and further provide a citizen-centered

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<sup>214</sup> Lewis S, Henkels D, 'Good Neighbour Agreements: A Tool For Environmental and Social Justice' *Social Justice*, 23(4 (66)), 134–151. <http://www.jstor.org/stable/29766980>, 1996

<sup>215</sup> Douglas S. Kenney et al., 'Evaluating the Use of Good Neighbour Agreements for Environmental and Community Protection' *Natural Resource Law centre*, University of Colorado, 2004

monitoring mechanism to ensure that the project proponent is conducting the project as required by the license.

Robert N. Gakuru & Others v Governor Kiambu County & 3 others<sup>216</sup> case provides an innovative overview of how public participation can be done at the mosques, barazas, markets among other place that the local community assemble at their convenience. This should be entrenched into the EMCA Act or its regulations.

NEMA should also have a specialized department that will have the necessary expertise for the upstream cycle within the petroleum sector that can be involved in civil education of the citizen within these areas on a regular basis.

#### **D. Creative participation mechanisms**

Meeting the public in places such as the church or the local market where they carry out their livelihoods is convenient for them and maybe more effective than inviting them to a local hotel, for example. This may also help target the interested public who had no idea of the imminent meeting. It is therefore important to understand the public dynamics: how they spend their time and where to get them.<sup>217</sup>

Additionally, increased application of interactive mechanisms of public participation at different stages may prove beneficial. For example, a visit to the successful development of a related project during scoping can help the affected community understand different aspects of the project and participate in an informed way.

Simple transportation to the venue of an EIA public participation forum may work in areas where distance is a factor and transportation costs are high. Perhaps another incentive would be to delegate power to the community on some aspects of the development proposals, as advocated by IAP2 (2008). Although the idea of incentives may be noble, caution should be exercised, as it is open to averting the focus of the public from the main issues of concern. Implementation of such a scheme should therefore be open and transparent

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<sup>216</sup> [2014] eKLR

<sup>217</sup> Innes JE, Booher DE, 'Reframing public participation: Strategies for the 21<sup>st</sup> century' *Planning Theory & Practice*, 5(4), pp. 419–436, 2004

## E. Conclusion

This research study was carried out with the aim of analysing public participation in the EIA process and establishing whether a citizen-centred approach to public participation is more effective. The research study examined the international, regional, national and institutional framework of public participation. The research study identified some of the gaps that inhibit a citizen-centred approach to participation including analysing the concept of a citizen-centred approach. The research study conducted a comparative analysis between Kenya, Nigeria and England to identify international best practices and thereafter propose ways in which Kenya can implement the citizen-centred approach.

This research has been able to analyse public participation and the role of the government in promoting a citizen-centred approach to its participation in EIA's. Effective EIA's cannot exist without an active citizen. The citizen knows the country's land and natural attributes and there can never be any government agency that can be more pervasive than the citizens who interact with the environment more intimately. Therefore, citizen-centred participation helps protect the government agencies and policies from isolation and builds popular based support for otherwise controversial enforcement actions <sup>218</sup>.

The recommendations are not exhaustive but provide a guide on how Kenya can benefit from a citizen-centred approach to public participation in the EIA process more so in the context of upstream oil and gas projects.

This research study pointed out that the right to public participation is both a constitutional and human right one. It is this evident as discussed throughout this research that the Constitution of Kenya provides an enabling environment for public participation but the same is not citizen-centred.

This research study has pointed out the importance of a citizen-centred approach to participation in a democratic society. The proposed citizen-centred approach of this research enhances the citizen's ability to frame important decisions on matters affecting them, in this case, environmental governance, they can offer solutions to the effects that affect them and hence feel part of the project through project ownership.

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<sup>218</sup> Lefkowitz S, Futrell J, Austin J, Bass S, 'The evolving role of citizens in environmental enforcement', *Paper delivered at the Fourth International Conference on Environmental Compliance and Enforcement*, Thailand, April 22-26, 1996, Volume 1

However, this research has established that for there to be a citizen-centred approach to participation there is a need to do more than just having laws and policies that reflect participation. It has been established that the government needs to increase public participation budgets, innovate ways of conducting participation to suit the specific community needs and learn the social and ethical fabric of a particular set of communities. There is a need to develop communication and monitoring strategies that facilitate greater public participation.



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