



**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**INCORPORATION OF THE BEST INTERESTS OF THE
CHILD PRINCIPLE IN KENYA'S CLIMATE CHANGE
REGIME: AN ANALYSIS**

BY

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DECLARATION

I, ANNET NYUKURI hereby declare this work to be my original work and a result of my own research effort. Where other people's work has been referred to, due acknowledgment has been done in accordance with the regulations of the University of Nairobi.

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Date.....25th November, 2021.

DEDICATION

To Edward, Elton, Elvis, Elsen and Elvin. My blessed family. You make my life beautiful.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AMCEN	African Ministerial Conference on the Environment
ATAR	Adaptation Technical Analysis Report
BAU	Business as Usual
CCA	Climate Change Act
CDM	Clean Development Mechanism
COK	Constitution of Kenya
COP	Conference of Parties
CS	Cabinet Secretary
DC	Developed Country
DRR	Disaster Risk Reduction
EMCA	Environmental Management and Coordination Act
GHG	Green House Gases
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic and Social Rights
INDC	Intended Nationally Determined Contributions
IPCC	Intergovernmental Panel on Climate Change
KICD	Kenya Institute of Curriculum Development
KLR	Kenya Law Reports
LDCs	Least Developed Countries
NAP	National Adaptation Plan
NCCC	National Climate Change Council
NCCAP	National Climate Change Action Plan
NCCRS	National Climate Change Response Strategy
NDC	Nationally Determined Contributions
NEMA	National Environment Management Authority
NGO	Non-Governmental Organization

NDP	National Development Plan
NDMA	National Drought Management Authority
SDGs	Sustainable Development Goals
UN	United Nations
UNCRC	United Nations Convention on the Rights of Children
UDHR	Universal Declaration of Human Rights
UNFCCC	United Nations Framework Convention on Climate Change
UNICEF	United Nations Children’s Fund
WHO	World Health Organization

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International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, entered in to force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (ICESCR) (Adopted 16 December 1966, entered in to force 3 January 1976) 993 UNTS 3

Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 10 December 1997, entered in to force 16 February 2005) 37 ILM 22

Paris Agreement, (Adopted 12 December 2015, entered in to force 4 November 2016)
UN Doc. FCCC/CP/2015/L.9/Rev/1

United Nations Convention on the Rights of the Child (UNCRC) (Adopted 20 November 1989, entered in to force 2 September 1990) 1577 UNTS 3

United Nations Framework Convention on Climate Change (UNFCCC) (Adopted 9 May 1992, entered in to force 21 March 1994) 1771 UNTS 107, 165

Vienna Declaration of Programme of Action (Adopted 25 June 1993) A/CONF.157/23 (1993)

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Children Act No. 8 of 2001

Climate Change Act No. 11 of 2016

Environmental Management and Coordination Act (EMCA) No. 8 of 1999

Kenya Institute of Curriculum Development Act No. 4 of 2013

National Drought Management Authority Act No 4 of 2016

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ABSTRACT

The existing child protection legal framework, under both international and domestic regimes in Kenya is robust. Children are no longer defined from the perspective of being objects of care, attention and welfare, but from the perspective of being right holders whose views are important. This notwithstanding, children continue to bear the greatest brunt of the impacts of climate change, culminating in serious setbacks on the realization of their rights, which scenario if not given due attention, may translate child rights to paper rights.

It is, however, unfortunate that in the formulation and implementation of the climate change regimes the world over, the rights of children are persistently ignored. This disregard violates the principle of the child's best interests and children's right to be involved in decisions that impact their lives.

This study examines the extent of incorporation of the principle of the best interests of the child in Kenya's climate change regime. This was done by first analyzing the interface between climate change and best interests of the child. The study further highlights the extent to which the child's best interests are incorporated in the international climate change regime. In addition, the incorporation of best interests of the child in Kenya's national climate change legal framework is analyzed.

This study is anchored on the Human Vulnerability Theory, which is premised on the empirical realities of the human condition as a complex subject with different growth stages from birth to old age. These stages interact with the law uniquely, depending on the vulnerabilities of the physical embodiment of each stage, meaning that the law and more specifically the climate change regime, should be tailored to be sensitive to the vulnerabilities of childhood. Ultimately, the study makes recommendations for legislative, policy and administrative interventions required to achieve the incorporation of best interests of the child in Kenya' climate change regime.

Key words: climate change, vulnerability, child rights-based approach, incorporation, child-centred

CHAPTER ONE

INTRODUCTION

1.1 Background

Despite the catastrophic implications for children’s rights posed by climate change... recognition of children’s rights barely features in key international, regional and national decision-making frameworks related to climate change.... This oversight is a violation of the guiding principles of ...UNCRC, notably the best interests of the child as well as their right to be heard...¹

Climate change refers to “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”²

In this study, a child refers to “any human being under the age of 18 years.”³ The child’s best interests, have been expounded to mean that decisions that affect children, whether judicial, administrative, legal, statutory or policy or provision of services ought to consider best interests of the child principle.⁴ These include actions and omissions that may affect children directly, like services offered by schools, and actions that affect children indirectly, like transport and the environment.⁵

Embedding best interests of the child, in programmes, actions and projects geared towards implementing climate change laws, is underpinned by arguments of the UNCRC Committee that the neglect of rights of children is manifested in legislation and policy deficiencies.⁶ Formulation of climate change policies or standards ignore the Convention on the Rights of Children, while

¹Jonas Schubert, ‘The Global Climate Crisis: A child Rights Crisis’ (2019) Policy Brief, Child Rights Now.

² Article 1 of the United Nations Framework Convention on Climate Change; 1771 UNTS 107, 165.

³ Article 1 of the United Nations Convention on the Rights of the Child; 1577 UNTS 3.

⁴ UNCRC Committee on the Rights of the Child, General Comment No. 7 (2005)

⁵ Ibid.

⁶ UNCRC Committee on the Rights of the Child Report of the 2016 Day of General Discussion: ‘Child Rights and the Environment’ (2016)

policies, actions, programmes and laws concerning the rights of children do not consider climate change concerns.⁷ This double jeopardy culminates in a gap that hinders an approach that protects rights of children within the parameters of climate change challenges affecting children.⁸

Climate change has several direct and indirect impacts, which include floods, droughts, heat waves, increased temperatures, erratic rainfall, conflict and poverty. Though climate change impacts both children and adults, children bear the greatest impact of climate change which exposes them to disproportionate vulnerability. This fact notwithstanding, there has been a consistent trend of overlooking children in the formulation of the design and content of climate change laws, policies, actions, programs and strategies, the world over.⁹ Even at the global level, children's needs, rights, experiences and voices have been ignored in the climate change discourse and agreements, although climate change exposes them to greater risk.¹⁰ The United Nations Framework Convention on Climate Change (UNFCCC)¹¹ has not been accommodative of the rights and voices of children and its involvement with the youth is merely tokenistic, as their voices do not count in climate negotiations. This can be observed from the "Fridays for Future" Movement protests, championed by Greta Thunberg, a child activist from Sweden. Her call for deliberate climate action and serious commitments from world leaders to cut emissions so as to achieve the Paris Agreement target of 1.5 degrees Celsius, has gone unheeded. At COP 26, held between 31st October and 12th November 2021, Thunberg termed the conference a failure and a Public Relations exercise, for lack of sufficient commitments from world leaders to address global warming.¹²

Climate change not only presents immediate threats, but also creates far reaching risks to the achievement of the rights of children as provided by Kenya's Children Act.¹³ Consequently, climate change poses a real risk of rolling back many achievements made in the realization of

⁷ Ibid.

⁸ Ibid.

⁹ Joni Pegram and Cristina Colon, 'Are Climate Change Policies Child- Sensitive?' [2020] UNICEF.

¹⁰ Elizabeth Gibbons, 'Climate Change, Children's Rights and the Pursuit of Intergenerational Climate Justice' [2014] 16 Health and Human Rights Journal.

¹¹ United Nation Framework Convention on Climate Change; 1771 UNTS 107, 165 (UNFCCC).

¹² Alyssa Lukpat and Marc Santora, 'Greta Thunberg Joins a Protest in Glasgow' *The New York Times* (London, 1 November 2021) Available at <<https://www.nytimes.com/2021/11/01/world/eurpoe/greta-thunberg-cop26-glasgow.html>> accessed 19 November 2021

¹³ Act No 8 of 2001.

children rights in addressing malnutrition, vector and water-borne diseases, poverty reduction and making education accessible to all children.

1.1.1 Climate change legal framework at the international level

Climate change is not just a universal threat, but also the most pressing challenge of our time. The need and urgency to address climate change impacts became apparent when there was a general global agreement that anthropogenic activities are the real factors in the change of the planet.¹⁴ This change resulted in an increase in temperatures of the earth, serious pollution and biodiversity depletion.¹⁵

These concerns culminated in the 1992 Rio Summit which endorsed the UNFCCC with the goal of balancing greenhouse gas (GHG) emissions to a degree which would stop unsafe human meddling of the climate system, to allow the conventional adjustment of the ecosystems to climate change and to sustainably achieve economic growth.¹⁶ The UNFCCC calls for the preservation of global climate in order to protect present and future generations.¹⁷

Since UNFCCC was a structural compact whose implementation needed additional agreements or protocols, in 1997, the Conference of Parties (COP) 3 adopted the Kyoto Protocol¹⁸ that set distinct objects and schedules for decreasing emissions of GHG in Developed Countries (DCs).¹⁹ The UNFCCC 2011 statement of the COP on its 16th Assembly yielded the Cancun Agreements 2010 which recognized climate change consequences on human rights and its severe consequences on society's most vulnerable segments, including children.²⁰

¹⁴ Monirul Azam, 'A Journey from Rio to Paris via Kyoto to Facilitate Technology Transfer to the LDCs Under the UNFCCC' (2021) *Journal of Property, Planning and Environmental Law*.

¹⁵ *Ibid.*

¹⁶ *Ibid.* See also Article 2 of the United Nations Framework Convention on Climate Change; 1771 UNTS 107, 165

¹⁷ Preamble, United Nations Framework Convention on Climate Change; 1771 UNTS 107,165.

¹⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 10th December 1997, entered in to force 16 February 2005) 37 ILM 22 (1998).

¹⁹ *Ibid.*

²⁰ Decision 1/CP.16, "The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, in Report of the Conference of the Parties on its Sixteenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties; FCCC/KP/CM/2010/12/Add.1 (15 March 2011).

The COP 21 adopted the Paris Agreement in 2015²¹ whose preamble recognizes the need to respect human rights including, child rights and takes an integrated approach to human rights and environmental matters.²² Kenya ratified the Paris Agreement in 2015.

1.1.2 The regional legal instruments in respect of climate change

At the regional level, the 15th African Ministerial Conference on the Environment, held in Cairo, Egypt, in March 2015, emphasized that Africa's priority response on climate change remains adaptation and resilience. This Conference did not adopt any actions aimed at child protection.

The East African Community sub-region adopted a Climate Change Policy that steers Partner States in formulating and executing concerted actions that address climate change and simultaneously ensure economic and social development is achieved sustainably.²³ The Policy does not provide for child protection.

1.1.3 National legal and policy instruments on climate change

At the national level, the Preamble to the Constitution of Kenya (COK) highlights the peoples' respect of their heritage which is the environment and underscores the people's determination to sustain the environment for purposes of benefitting generations to come.²⁴ The right to a safe environment for every person is constitutionally guaranteed and it includes environmental protection for the good of current and succeeding generations.²⁵ Kenya endorsed Sustainable Development Goals (SDGs) in September 2015, which set bold targets whose main objective is to create accountable and proactive institutions that advance climate policies in Kenya. Some of those targets are child sensitive. For instance, combating malnutrition and infant avoidable deaths, commitment to provide quality, free and equitable basic education for children providing access

²¹ Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec.12, 2015)

²² Preamble, Paris Agreement; U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec.12, 2015)

²³ East African Community, 'East African Community Climate Change Policy' (2010) EAC Council.

²⁴ Constitution of Kenya, 2010.

²⁵ Ibid., Article 42.

to safe and sustainable transport to the citizenry, with special attention to children and other vulnerable persons.

Kenya's National Climate Change Response Strategy (NCCRS) 2010 was the State's initial approach to respond to climate change. It acknowledged the realities of climate change consequences by highlighting evidence of its negative impacts on the economy, and made proposals for mitigation as well as adaptation actions.²⁶ It recommended embedding climate change education within the country's school curricula.²⁷

In 2013, Kenya's 2013-2017 National Climate Change Action Plan (NCCAP) recommended climate actions that focused on climate change adaptation, resilience building as well as implementing mitigation action.²⁸ The NCCAP noted, among other issues, that low carbon climate development could bring benefits to the vulnerable, including improving the poor, women and children.²⁹

Kenya's 2015-2030 National Adaptation Plan (NAP) is the anchor upon which the adaptation element of Kenya's Nationally Determined Contributions is premised.³⁰ Significantly, it pointed out that stresses due to climate change such as drought, might lead to children's removal from school or might result in circumstances necessitating applying household resources meant for education to food, thereby negating children's right to education.³¹ It also recognized that vulnerable groups, like children, grapple with climate change consequences and the government should focus on children by providing them with basic rights.³²

Kenya's climate change response, enacted as Intended Nationally Determined Contribution (INDC), was presented to UNFCCC on how to help keep the earth's temperatures from increasing

²⁶ Government of Kenya, 'National Climate Change Response Strategy' (2010) Ministry of Environment and Forestry Nairobi Kenya.

²⁷ Ibid.

²⁸ Government of Kenya, 'National Climate Change Action Plan (Kenya), 2013 -2017' (2013) Ministry of Environment and Forestry, Nairobi Kenya.

²⁹ Ibid.

³⁰ Government of Kenya, 'National Adaptation Plan (Kenya) 2015-2030' (2015) Ministry of Environment and Forestry Nairobi, Kenya.

³¹ Ibid.

³² Ibid.

more than 2 degrees Celsius.³³ The country's INDC recognized vulnerable groups, among them children, for priority adaptation actions by committing to strengthen their adaptive capacity through social safety nets and insurance schemes.³⁴

Consequently, Kenya enacted the Climate Change Act³⁵ in 2016, which provides for the country's response action agenda to consequences of climate change. It is implemented through the 2018-2022 NCCAP.³⁶ The Act has put in place an institutional framework that adopts a model that mainstreams climate change implementation.³⁷ One of the objects of the Act is to mainstream intergenerational and gender equity in climate change responses in respect to every response.³⁸ It also provides that any state officer or state organ in discharging its functions shall bear in mind principles guaranteeing resilience of low carbon development to ensure both social inclusion and equity in allocation of costs, benefits and efforts to address the vulnerable.³⁹

The 2018-2022 NCCAP expands on the 2013-2017 NCCAP and is aimed at "furthering the country's sustainable development anchored on measures that guarantee low carbon climate resilience in a way that prioritizes adaptation."⁴⁰ Adaptation is prioritized in the NCCAP because vulnerable groups of society like children are severely impacted by climate change.⁴¹

1.1.4 Significance of climate change regime to child rights

The precision in interaction between climate change and child rights has undergone gradual growth over time as manifested in many suits filed by and on behalf of children seeking climate justice.

³³ Article 2 of United Nations Framework Convention on Climate Change; 1771 UNTS 107, 165.

³⁴ Government of Kenya, Intended Nationally Determined Contributions (2016) Ministry of Environment and Forestry, Nairobi, Kenya.

³⁵ Act No. 11 Of 2016.

³⁶ See Section 13 of the Climate Change Act.

³⁷ Robert Kibugi, 'Political Economy of Climate Change Interventions in Kenya; Who benefits and who loses?' (2018) Policy brief, Friedrich Ebert Stiftung.

³⁸ Section 3 (e) of the Climate Change Act.

³⁹ Ibid., Section 4 (2) (d).

⁴⁰ Government of Kenya, 'National Climate Change Action Plan, (Kenya) 2018-2022' (2018) Ministry of Environment and Forestry, Nairobi, Kenya.

⁴¹ Ibid.

For instance, the case of *Juliana et al v United States*⁴² filed by 25 young persons aged between eight and nineteen years, who sued the U.S government on allegations that their fundamental rights to life, liberty and property were violated as the State neglected to safeguard the atmosphere.

The Office of the High Commissioner on Human Rights has observed that climate change poses both direct as well as indirect consequences on an array of human rights including child rights, hence states are obligated to take in to consideration their human rights obligations, including child rights, in climate actions as envisaged under the Paris Agreement.⁴³ Climate change poses detrimental impacts on realization of children’s rights, such as rights to health,⁴⁴ education,⁴⁵ survival and development,⁴⁶ and culture.⁴⁷

Since climate change disproportionately affects children, incorporating children’s best interests in the climate change regime is fundamental. Kenya’s climate change laws and policies do not explicitly protect children, yet the Constitution is clear and demands that in every matter that concern children, the paramount consideration shall be their best interests.⁴⁸

1.1.5 The best interests of the child principle

The best interests of the child principle is anchored in Article 3 of the United Nation’s Convention on the Rights of the Child (UNCRC).⁴⁹ Article 3 (1) of UNCRC provides as follows,

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁴² 947 .3d 1159 (9th Cir.2020)

⁴³ The United Nations Human Rights Council, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights’ U.N Doc. A/HRC/10/61.

⁴⁴ See Elizabeth Gibbons (n 10)

⁴⁵ See Bangay Colin and Blum Nicole, ‘Educational Responses to Climate Change and Quality: Two Parts of the Same Agenda?’ [2010] 30 International Journal of Educational Development 335.

⁴⁶ See Janet Currie and Olivier Deschenes, ‘Children and Climate Change: Introducing the issue, The future of children’ [2016] 26 Children and Climate Change Springer.

⁴⁷ See Volker Mauerhofer, Daniel Rupo, Lara Tarquinio (Eds) ‘Sustainability and Law: General and Specific Aspects’ (2020) Springer Science and Business Media, LLC.

⁴⁸ Article 53 of the Constitution of Kenya.

⁴⁹ United Nations Convention on the Rights of the Child; 1577 UNTS 3.

The local, regional as well as international instruments uphold safeguarding the child's best interests. The UNCRC,⁵⁰ the African Charter on the Rights and Welfare of the Child (ACRWC)⁵¹ together with the Children Act⁵² have given primacy importance to best interests of the child, in every action or decision that concerns the child or children.

The principle of the child's best interests has been conceptualized by the UNCRC Committee into three components, namely, as a core, interpretive notion of law, a procedural rule, as well as a substantive right.⁵³ Therefore, it is a tool of interpretation of the law where children are concerned, a guideline to determine what is good for a child or children, and a substantive stand-alone right.

The principle is to be applied broadly in every action concerning children. They encompass actions aimed at children, like care and health, together with actions which include children together with the rest of the population groups, like actions concerning transport, the environment and housing.⁵⁴ While Article 3 of the UNCRC refers to the obligation of legislative bodies to take into account the best interest principle, the UNCRC Committee stated that provisions of the UNCRC, particularly Article 3, relates to children both as individuals and children in general. It has further stated that the adoption of any law or regulation, whether or not they concern children, should be governed by children's best interests.⁵⁵ This obligation includes budgeting to ensure budgets are child-rights sensitive.⁵⁶

1.2 Problem statement

Although the climate change regime in Kenya provides a regulatory framework that promotes interventions to climate change, there is no provision within this framework on the protection of children's best interests, in violation to Article 53 of the Constitution of Kenya 2010. This makes

⁵⁰ Ibid., Article 3.

⁵¹ Article 4 of the African Charter on the Rights and Welfare of the Child; OAU Doc. CAB/LEG/24.9/49 (1990)

⁵² Section 4 of the Children Act No.8 of 2001.

⁵³ United Nations Convention on the Rights of the Child General Comment No. 14 (2013).

⁵⁴ Ibid., General Comment No. 7 (2005).

⁵⁵ Ibid., General Comment No. 14 of 2013.

⁵⁶ Ibid.

it difficult to protect the rights of children while planning, implementing or enforcing climate actions.

This study analyses this apparent gap in the regime and makes recommendations on ways of incorporating best interests of the child. The guiding issue here is: To what extent does Kenya's climate change regime incorporate best interests of the child? While children bear the greatest negative climate change consequences, climate change actions, programmes, and projects do not comprehensively cater for their interests. This creates gaps in climate change governance framework because it results in policies, programmes and actions that do not address the unique needs, circumstances, and vulnerabilities of children. Hence, if climate actions do not take into consideration interests of children, the same may not only ignore children's rights, but may also exacerbate their vulnerability. Therefore, the state is obligated, in the formulation and implementation of climate policies, to put into consideration, best interests of the child as children are both stakeholders and right holders, just like adults. They are the first and worst affected by climate change.

1.3 Hypothesis

Lack of incorporation of the best interests of the child principle in Kenya's climate change regime is attributable to non-recognition and non-appreciation of children as a unique group of individuals whose interests must be considered in fashioning and applying climate change laws, policies, actions and programmes.

1.4 Research questions

The research sought to answer the following questions, that is,

- 1 What is the interface between climate change and the best interests of the child?
- 2 To what extent have the best interests of the child been recognized and incorporated in the international climate change regime?
- 3 To what extent have the best interests of the child been recognized and incorporated in Kenya's climate change regime?

- 4 How best can the interests of the child be recognized and incorporated in Kenya's climate change regime?

1.5 Objectives of the research

The principal goal of this study is to explore the extent to which children's best interests have been incorporated in Kenya's climate change regime.

The specific objectives are;

1. To highlight the interface between climate change and the best interests of the child.
2. To analyse the international climate change regime and the best interests of the child.
3. To analyse Kenya's climate change regime and the best interests of the child.
4. To make recommendations on how to incorporate the best interests of the child in Kenya's climate change regime.

1.6 Justification of the study

Until now, the existing literature has failed to show the extent to which the climate change regime in Kenya has incorporated the best interests of the child principle.

Climate change results in infringement of child rights. Bearing in mind Kenya's constitutional fiat that children's best interests be accorded paramountcy, the State has a duty to safeguard children, both as individuals as well as a group. In Kenya, formulating the Children Act domesticated the UNCRC with the consequence of transforming children's status from objects of care into a subject of fundamental rights and liberties.⁵⁷

However, climate change creates far-reaching challenges on realization of rights in the UNCRC.⁵⁸ Consequently, climate change poses a real risk of rolling back many achievements made in the realization of children rights. These achievements include addressing malnutrition, climate induced diseases, poverty reduction plus making education accessible to every child. The fact that

⁵⁷ Adam Lopatka, 'An Introduction to the United Nations Convention on the Rights and Welfare of the Child' [1996] 6 *The Transitional Law and Contemporary Problems* 251.

⁵⁸ The UNCRC Committee on the Rights of the Child (n6).

children are impacted more profoundly by climate change than adults, and that children form the single largest group among the vulnerable groups, makes a case for the justification of entrenching the child's best interests in the formulation of climate change laws as well as policies. There is evidence that the population of children in developing countries is considerably higher than that of adults.⁵⁹ In Kenya, for instance, as at 2019, the population of children aged between 0 to 17 years was 21, 923, 187 representing 46% of the entire population.⁶⁰ This high percentage was not just unique for 2019 as it has always been the trend as evidenced by previous censuses. For instance, according to the 2009 Census, the population of children aged between 0-17 years was 19, 147, 737 which was 49.5 % of the entire population.⁶¹

The interplay between climate change and children's best interests has not explicitly been conceptualized, with the consequence that there is no clarity as to whether the climate change regime reflects the magnitude of the challenges experienced by children. This means that there is no clarity in whether what the law provides in the climate change regime is sufficient to protect children against impacts of climate change. UNICEF has argued that though children and adults are likely to face the same challenges, it may call for different remedies to address those challenges.⁶² Because children are at a greater risk to effects of climate change, the law and policy need to be shaped to respond to their unique needs and vulnerabilities.

The significance of addressing children's challenges as regards climate change today has the compound positive effect of addressing adult challenges in future, without further investment. Bruckauf and Cook⁶³ have asserted that protecting the comfort of children today results in the guaranteed well-being of adults in future as such interventions or "front-loading" measures guarantee better and greater returns on state expenditure. Therefore, entrenching the child's best interest in the climate change regime today, acts as a double edged sword against climate change

⁵⁹ Ibid.

⁶⁰ Government of Kenya, Kenya National Bureau of Statistics, '2019 Kenya Population and Housing Census' Volume III (2020) Kenya National Bureau of Statistics, Nairobi, Kenya.

⁶¹ Government of Kenya, 'Kenya Population and Housing Census' (2010) Kenya National Bureau of Statistics, Nairobi, Kenya.

⁶² UNICEF New York (2005)

⁶³ Zlata Bruckauf and Sarah Cook, 'Child-Centred Approach to Sustainable Development Goals (SDGs) in High-Income Countries: Conceptual Issues and Monitoring Approaches' [2017] UNICEF Innocenti Working Paper.

impacts by forestalling future climate related challenges for the same children in their adulthood together with their future generations. This is good for everyone, the children, the adults and the country's economy. Therefore, this study helps in front loading by yielding high returns on investing in children with the consequence of having future generations protected by present investments, actions and programmes. In addition, this research has bridged the gap between child rights and climate change by taking an integrative approach of climate governance and child rights.

1.7 Scope and limitations of the study

The scope of the study is a child rights-based approach in evaluating the climate change regime. In addition, the study is only concerned with children as defined under Kenya's Children Act,⁶⁴ which means that it is only concerned with persons aged below the age of 18 years.

The limitation was that the study was carried out during the third wave of the Covid-19 pandemic, which meant that the researcher applied technology in many aspects of the research, including accessing library resources and meeting with her supervisor online. This limitation was mitigated by keeping in touch with the supervisor as well as seeking clarifications where need arose and contacting the University library staff, to ensure the researcher had sufficient and relevant material for the research.

1.8 Theoretical framework

The theory relied upon in this study is the Human Vulnerability Theory. This theory was propounded by Martha Fineman who calls for "a more responsive State and a more egalitarian society by arguing that vulnerability should be understood to be constant and universal and inherent in the human condition."⁶⁵ The proponents of this theory dismiss proponents of the conventional equal protection analysis, like John Locke's philosophy of liberal individualism,⁶⁶ which define the subject of law in a strait jacket of a "reasonable man." The latter's definition of the subject of law does not include a child. Fineman advocates for a vulnerability approach in

⁶⁴ Children Act No. 8 of 2001.

⁶⁵ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' [2008] 20 Yale Journal of Law and Feminism 1.

⁶⁶ See John Locke, 'Two Treatises of Government' (1689) (Ian Shapiro, ed, Yale University Press 2003)

defining equality, which is concerned with the structures established by society to manage common vulnerabilities.⁶⁷ This theory is based on the empirical realities of the human condition which contextualize the person as a complex, multifaceted subject whose interaction with the law is in stages, beginning at birth, through childhood, adolescence, adulthood and old age.⁶⁸ Consequently, at every stage there is a vulnerability that arises from physical embodiment.⁶⁹ Hence, the proper perspective is to define this vulnerable subject as the true subject of law.⁷⁰ The vulnerable subject should, therefore, be situated at the core of State and institutional programs for purposes of enhancing resilience throughout the lifespan.⁷¹

Accordingly, the vulnerable subject is a legal entity that transcends the autonomous, independent, and liberal legal subject that focuses only on a single stage in the life course; that of the independent adult at the peak of physical resilience.⁷² The vulnerability theory is a critique of the contemporary legal subject, built on an ideology that elevates autonomy over equality and manipulates contractual concepts, like consent and choice, to validate structural inequalities and exploitation.

The Vulnerability Theory trashes the ideology of liberal legalism, asserting that it is a misconception that citizens are, or ought to be, autonomous, yet in reality, in every human society there is dependency and many people depend on others because of their stage in the life cycle.⁷³ Dependency, therefore, should be factored in the formulation of every law, policy, program, and action. In this case, due to age, capacity, and competency limitations, children are dependent on adults and, therefore, the law tends to treat them merely as victims in need of protection instead of treating them as right holders who are limited by their vulnerabilities. The law should not treat children like adults, as children are not autonomous and cannot fit the description of a reasonable man espoused by liberal legalism.

⁶⁷ Ibid.

⁶⁸ Mboya Atieno, 'Vulnerability and the Climate Change Regime' [2018] 36 UCLA Journal of Environmental Law and Policy 79.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Emory University, 'Definitions of vulnerability and the Human Condition Initiative'; *See also* Martha Fineman, 'Fineman on Understanding Vulnerability and Law: *NEW LEGAL REALISM*' (Word Press 2015).

⁷³ Ibid.

The contemporary structures put in place are meant to perpetuate a formal model of equality, which is premised on the myth that all people are equal; which does not serve best interests of the child. Therefore, the law has to be responsive to the vulnerability posed by childhood, so as to have a more egalitarian society. The climate change regime is fashioned in a manner that presumes that both children and adults encounter similar challenges from climate change. It provides for the same adaptation and mitigation measures for both children and adults, and fails to appreciate that children are a unique group of individuals whose interests, as well as rights, must be taken into account in formulating and implementing climate change laws, actions together with programmes. Therefore, the State in its role of observing, protecting, promoting, and fulfilling child rights must not simply apply formal equality by applying the same yardstick across the board, but it has to place the vulnerable subject, the child, as the true subject of the formulation and implementation of the climate change regime. For instance, children need not be assumed to be sufficiently protected in the rubric “every person has a right to a clean and healthy environment,” as stipulated in Article 42 of the Constitution, as realization of that right depends on the vulnerability of those being protected. Uniform measures aimed at protecting the entitlement to a safe environment cannot protect the whole population comprising of adults together with children. Hence, formulation of climate change laws and actions must consider children’s unique needs, rights and perspectives. This theory is important in addressing structural, institutionalized and systemic inequalities suffered by the vulnerable, where the law is blind to their vulnerabilities.

1.9 Literature review

Literature about the principle of the child’s best interests is readily available. Besides, literature on climate change impacts on children’s rights is also available. The gap that exists in the literature is absence of literature on the interface between Kenya’s climate change regime and best interests of the child. The two aspects have not been conceptualized with precision and, therefore, it is not clear whether the design and content of the climate change regime in Kenya takes into consideration best interests of the child and whether the same is responsive to children’s rights as contemplated under the UNCRC General Comment Number 14 of 2013, which provides that every law and policy adopted whether or not it affects children, must consider the best interests of the child.

This study highlights the interface between climate change and the best interests of the child in Kenya so as to analyse the extent of integration of the best interests of the child within laws, policies, actions, programmes and strategies in climate actions. The Constitution of Kenya affirms that best interests of the child, are of paramount significance in every situation touching on children.⁷⁴ Children's best interests in their individual and group capacities is a core principle in the UNCRC,⁷⁵ which has been domesticated in Kenya by the Children Act.⁷⁶ Pegram and Colon have discussed the gap between current practice in climate change governance and a child-sensitive approach to climate change policy making in respect of 160 NDCs and 13 NAPs, where they found that less than 2% of the NDCs mentioned the rights of children.⁷⁷ While their study defined child sensitive approach in terms of policies that mentioned children, this study goes beyond a mere mention of the term children in climate policies and considers whether the content and design of law, policy or action takes in to account children's best interests.

Because children are comparatively more severely affected by climate change, their rights ought to be considered in formulating climate change laws as well as policies at the global, continental, municipal and local levels. Punger argues that the many years spent in negotiations within UNFCCC have only culminated in inadequate climate change measures as well as poorly implemented commitments.⁷⁸ While his thesis sought to analyze the UNFCCC, Kyoto Protocol and the Paris Agreement's extent of their human rights protection generally, this study seeks to inquire into both the international and national climate change regimes protection of, not just human rights, but more specifically, children's rights.

Climate change stifles realization of child rights, which makes a case for incorporating best interests of the child in climate change regime. Scubert argues that climate change presents serious perils on the rights of children, yet key climate change legal instruments have failed to recognize

⁷⁴ Article 53 (2) of the Constitution of Kenya.

⁷⁵ The United Nations Convention on the Rights of the Child was promulgated in 1989.

⁷⁶ Children Act No. 8 of 2001.

⁷⁷ Joni Pegram and Cristina Colon (n9).

⁷⁸ Erik Punger, 'Climate Change Regime as the Basis for the Protection of Human Rights: Enforcing the UNFCCC, the Kyoto Protocol and the Paris Agreement Through Climate Litigation' (2017) European Master's Degree in Human Rights and Democratisation, University of Bochum 2016/2017.

children's rights.⁷⁹ While he looks at children's rights generally, this inquiry aims to specifically look at the protection of the principle of the best interests of the child, as an aspect of the rights of children, in climate change policies.

Susana Sanz-Caballero has looked at how climate change negatively affects children and child rights.⁸⁰ She separates child rights into four groups, namely, basic needs rights; specific children's rights; participation rights, together with civil and political rights and discusses the extent to which climate change affects the four groups of child rights.⁸¹ She however does not consider the extent of climate change regime's protection of child rights; which this study is focused upon.

The interface between climate change and child rights is still being conceptualized globally, which means that safeguarding children rights within climate change policies is yet to be meaningfully embraced by States. Joni Pegram observes that the interface between rights of children and climate change remains minimally understood and represented at the international, continental and municipal levels, which has led to child rights being largely ignored in negotiations of climate change policies at all these levels.⁸² He focused on the review of policy instruments and opportunities availed in the 2030 Sustainable Development Agenda to enhance clarity linking the States' obligations under the UNCRC with their endeavors to address climate variability.⁸³ While his study was at the international level generally, this study focuses more on Kenya's municipal climate change regime's incorporation of child rights.

To protect children from impacts of climate change, their best interests ought to be positioned at the core of climate change regime. Thomas Tanner argues that though literature on climate change and disasters treat children together with youths as victims needing protection by adults, this should not be the case as children are potential agents of change in adaptation and disaster risk management, hence, they should participate in climate governance.⁸⁴

⁷⁹ Jonas Schubert (n1)

⁸⁰ Susana Sanz-Caballero, 'Children's Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child [2013] 13 Ethics in Science and Environmental Politics.

⁸¹ Ibid.

⁸² Joni Pegram, *Overlooked and Undermined: Child Rights and Climate Change* (2018) Routledge Handbook of Human Rights and Climate Governance 259.

⁸³ Ibid.

⁸⁴ Thomas Tanner, *Shifting the Narrative: Child-led Responses to Climate Change and Disasters in El Salvador and the Philippines* [2010] 24 Children and Society 339.

Climate change affects children in different situations differently, depending on the vulnerability of each situation. A study done by the Human Rights Watch in Turkana region of Kenya, found that climate change has limited indigenous communities' access to food and clean water and, as a consequence, many children became sick due to lack of sufficient nourishment together with clean water.⁸⁵ Though that study addressed climate change consequences on children in one of Kenya's semi-arid lands which experience serious repercussions of drought, it did not touch on outcomes of climate change in other regions like those faced by floods and erratic rainfall and those in urban settlements. This study considers impacts of climate change on best interests of the child for every child in Kenya, including those affected by floods, droughts, and other impacts of climate variability.

Upholding children's best interests in climate change policies demands that their voices must be considered in formulation of such policies. Schubert notes that many children, especially the marginalized, lack capacity to meaningfully take part in climate change discourse because of neglect by states in implementing their duties stated under Article 29 of the UNCRC to avail environmental education to every child.⁸⁶ He, however, does not look at children outside the formal education system. This study considers all children within and without the formal education system.

Protecting children against impacts of climate change will call for an approach that integrates human rights in climate actions, and there is room to incorporate child rights in climate actions. Joy Guillemot and Jazmin Burgess have argued that there is need for joint effort in implementing CRC and UNFCCC so that rights of children are placed at the heart of their implementation.⁸⁷ While they look at joint implementation of the two conventions, and leans on elevating the UNCRC as a powerful framework for child protection in a changing climate, this research seeks for incorporation of best interests of the child within climate change regime, making it child rights compliant.

⁸⁵ Human Rights Watch, 'There is no time left': Climate Change, Environmental threats, and Human Rights in Turkana county, Kenya' (2015) Human Rights Watch. Available at <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> accessed on 20 September 2021.

⁸⁶ Jonas Schubert (n 1)

⁸⁷ Joy Guillemot and Jazmin Burgess, 'Child Rights at Risk: The case for joint action on climate change' (2014) UNICEF.

Safeguarding children against climate change challenges, requires states to position best interests of the child at the core of climate change actions. Human Rights Watch has asserted that even in the wake of Covid-19 pandemic, global focus should remain on environmental emergency which is sabotaging the rights of children.⁸⁸ It recommends setting the rights of children at the centre of actions of environmental significance.⁸⁹ Its study takes a broader view of environmental rights of children, without particularity on child rights and climate change. This study however focuses specifically on climate crisis as a child rights crisis.

Child participation in climate governance is key in achieving child protection in the climate change regime. The current climate change institutional framework pours cold water on children's efforts in policy making due to technicalities and complexities of climate change matters. UNICEF points out that lack of access to information and child-friendly policy briefs have inhibited child participation in climate policy formulation.⁹⁰ While their study focused on child participation in policy formulation, this study looks beyond child participation in policy formulation, and includes child representation in climate policy formulation and implementation.

For Kenya's climate change regime to be said to have incorporated the child's best interests, the State ought to promote children's access to climate justice. Liefwaard, in his study on what it means for children to access justice, has set out two key requirements, which are; legal empowerment of children and attainability of child-friendly proceedings.⁹¹ His study is generally about rights of children to access justice and not specifically climate justice. This study looks at the role of the state in enabling children access climate justice.

1.10 Research methodology.

Omondi and Sitawa have argued that since research is scientific and systematic, the method of inquiry is governed by universally recognized principles and processes for data collection, analysis

⁸⁸ Human Rights Watch, 'Realising Children's Right to a healthy Environment: A Joint Call to Action for the HRC Annual Full Day Meeting on the Rights of the Child' (2020) Human Rights Watch.

⁸⁹ Ibid.

⁹⁰ UNICEF (n 62)

⁹¹ Ton Liefwaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 International Journal of Children's Rights 195.

and interpretation.⁹² The methodology of the research was a textual analysis of both primary and secondary sources of legal instruments, policy documents, judicial pronouncements, soft law instruments, books, chapters in books, journal articles, reports from international agencies, and government reports, on climate change as well as best interests of the child principle.

1.11 Chapter breakdown

This study has five chapters broken down as highlighted here below.

The research is introduced in the first chapter. This chapter provides the study background, the research problem, the objectives of the research, the research questions, hypotheses, justification of the study, scope and limitations of the study, the theoretical framework, literature review, the methodology used in data collection, analysis and interpretation, and chapter breakdown.

Chapter two is a conceptual discussion of the interface between climate change and best interests of the child. The discussion highlights the intersection of the two concepts and related concepts.

Chapter three discusses the international climate change regime and best interests of the child. This discussion addresses the international, regional, together with sub-regional legal frameworks.

Chapter four analyses Kenya's national climate change regime and the best interests of the child.

Chapter five builds on chapter four and highlights the conclusion drawn from the research and makes recommendations on the reforms needed to incorporate best interests of the child, in Kenya's climate change regime, so as to facilitate the full realization of children's rights.

⁹² Scholastica Omondi and Michael Sitawa, 'Research Methodology Simplified' (2019) LawAfrica 5.

CHAPTER TWO

CLIMATE CHANGE AND THE BEST INTERESTS OF THE CHILD

2.1 Introduction

This chapter is a conceptual discussion of the interface between climate change and best interests of the child. In addition, it analyzes concepts that arise in the nexus between child rights protection and climate change. These include the best interests of the child principle, sustainable development, the right to a clean and healthy environment, intergenerational equity, child rights, and related concepts.

Climate variability is the most critical challenge facing humanity today. The intergovernmental Panel on Climate Change (IPCC), has pointed out that one of the main reasons for concern about climate change is the “distribution of impacts and vulnerabilities.”¹ This means that those in specific weak groups, like children, are highly at risk to climate change. For some time, there has been a growing concern over the interaction between climate variability and child rights protection.

Promulgation of the UNCRC had the consequence of transforming the status of children from objects of care into a subject of fundamental rights and liberties.² However, climate change not only presents immediate threats, but also creates far-reaching challenges to enjoyment of rights in the UNCRC.³ Consequently, climate change poses a real risk of rolling back many achievements made in the realization of children rights. These achievements include addressing malnutrition, vector and water-borne diseases, poverty reduction, and making education accessible to all children. The interaction between climate variability and children rights calls for a shift in climate

¹ Omar-Dario Cardona and others, ‘Determinants of risk: Exposure and Vulnerability’ In: (Field B., V. Barros, T.F Stocker et al eds *Managing of risks of Extreme events and Disasters to advance climate Change Adaptation*, A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change (IPCC) (Cambridge University Press 2012) 65.

² Adam Lopatka, ‘An Introduction to the United Nations Convention on the Rights of the Child’ (1996) 6 Transitional Law and Contemporary Problems 251.

³ UNCRC Committee on the Rights of the Child Report of the 2016 Day of General Discussion: Child Rights and the Environment (2016) OHCHR

policy formulation and implementation to incorporate best interests of the child so as to protect child rights.

2.2 The best interests of the child principle

Best interests of the child principle is provided for in the UNCRC,⁴ ACRWC⁵ and the Children Act of Kenya.⁶ While there has been a lot of debate on the real meaning of the best interests of the child principle,⁷ generally the same is accepted as that which seeks for the highest good of the child. Under section 4 (2) of the Children Act, in terms of legislative and administrative decisions concerning children, reference is made to the best interests of the child as a primary consideration. This can be countervailed against provisions in section 4(3) which states that for judicial and administrative decisions, the best interests of the child principle will be the first and paramount consideration.

Article 3 (1) of the UNCRC gives primacy significance to best interests of the child and makes provision as follows,

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Committee on the Rights of the Child conceptualized best interests of the child principle into three concepts; namely as a substantive right, as a fundamental, interpretive legal principle and as a rule of procedure.⁸ On the issue of that right being a substantive right, the Committee stated as follows,

⁴ Article 3 of CRC

⁵ Article 4 of the ACRWC

⁶ Section 4 (2) Of the Children Act

⁷ See e.g. Erica Salter 'In Deciding for a Child: A Comprehensive Analysis of the Best Interest Standard, (2012) 33 Theoretical Medicine Bioethics 179. Erica rejects the best interest standard as the most important, go- to ethical and legal threshold of decision making concerning children, arguing that it is narrow and has irrational dictates, has an inconsistent application and dishonours the family.

⁸ United Nations Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1) (2013)

The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

The Committee also explained that the child's best interests is a fundamental, interpretive legal principle, by stating as follows,

If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its optional Protocol provide the framework for interpretation.

On the aspect of the principle of the child's best interests being a rule of procedure, the Committee explained the same as follows,

Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child requires procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests: what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

Therefore, this principle applies in all actions concerning children and demands that every action relating to children either at individual level or as a group, must ensure that the primary consideration is to consider their best interests. The term "action" covers every act, inaction, plus other measures.⁹

⁹ Ibid.

The principle is to be applied broadly in all actions touching a child or children generally. These include actions aimed at children, such as care, health, and education, and actions that include children and other population groups like actions concerning transport, the environment, and housing.¹⁰ The term “concerning” is broad, and has been defined as referring to decisions and measures that directly affect children to other actions that touch children generally.¹¹ These include actions aimed at children, like actions related to education, together with actions that cover children and other population groups, like actions concerning the environment.¹² It is argued that where a state’s decision will significantly impact children, there is a duty to apply higher protection and comprehensive procedures to consider children’s best interests.¹³ A child is “any human being under the age of 18 years.”¹⁴

The duty of the State to consider best interests of the child are broad in the sense that it includes “all public, private, social welfare institutions, courts of law, administrative authorities or legislative bodies”¹⁵ concerning children. While referring to the obligation of legislative bodies to consider best interests of the child principle, UNCRC Committee stated that Article 3 of the UNCRC relates to children, not just as individuals, but children in general. It has further stated that the adoption of any law, regulation or peace treaties which touch children, whether or not they concern children, should be governed by the best interests of the child.¹⁶ This obligation includes budgeting to ensure budgets are child-rights sensitive.¹⁷

The term “primary consideration” means that the child’s best interests ought not be positioned on one level with other considerations, because of children’s vulnerability, manifested in maturity, dependence, legal status and voicelessness.¹⁸ To accord the best interests of children, primacy status, therefore, decision makers must always be conscious of the position that children’s interests

¹⁰ UNCRC General Comment No. 7 (2005)

¹¹ UNCRC General Comment No. 14 (2013)

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Articles 1 and 2 of the UNCRC.

¹⁵ Article 3 (1) of the UNCRC.

¹⁶ Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para.1), 29 May 2013 CRC/C/GC/14.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

must be accorded in all actions, and be ready to prioritize those interests in every situation, especially in instances where an action has obvious impacts on children.¹⁹ Since climate change has undeniable impacts on children, legislatures and other decision makers and implementers of laws and policies, should place primacy on the best interests of the child in climate change laws and policies.

In *NMM Vs. JOW*²⁰ Kenya's High Court observed that although there could be difficulty in defining that which is a child's best interest, there are some common factors in the best interest analysis comprising the child's views and a need for a stable home environment. Best interests of the child have the ultimate target of enhancing the child's mental health, happiness, development and a sense of security. Therefore, although the definition of best interests of the child is contested, it means that which seeks for the highest good and comfort of every child.

The best interests of the child need to be given first priority even as other interests are considered. Zermatten has argued that the concept of best interests principle places a duty on decision-makers to prioritize child interests.²¹

Consequently, in climate change laws, policies and actions, best interests of the child must be considered in the design and content of such laws.

2.3 Impact of climate change on the principle of the best interests of the child

Climate change bears a child rights dimension and the appreciation of the nexus linking child rights with climate change has increased. The Office of the High Commissioner on Human Rights has recognized the direct and indirect climate change outcomes on child rights, hence emphasizing the obligation of states to respect, promote and consider their child rights obligations in climate action.²²

¹⁹ Ibid.

²⁰ Kakamega High Court Civil Appeal No. 30 of 2016, [2016] e KLR, Para 69

²¹ Jean Zermatten, 'The best Interests of the Child, Literal Analysis, Function and Implementation' (2009) Working Report, International Institute for children Working Report 2.

²² The United Nations Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' U.N Doc. A/HRC/10/61.

Though climate change is a threat to the enjoyment of the rights of children, there is no international human rights treaty that explicitly addresses climate change to protect child rights. None provides the right to a safe, clean and healthy environment, despite the fact that environmental harm violates enjoyment of child rights. Article 42 of the Constitution safeguards every person's entitlement to a safe environment, which right comprises the right to safeguard the environment for this and succeeding generations and the right to have the State fulfil its obligations in Article 70 of the Constitution.

Article 69 (1) of the Constitution obligates the State to ensure "sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits." Hence the State has a duty to ensure that the atmosphere, as an environmental asset, is sustainably used and that every person whether a child or an adult share equitably in its benefits. Article 70 of the Constitution provides for enforcement of environmental rights by availing legal remedies to persons whose right to a clean and healthy environment, are denied, violated, infringed or threatened. Article 70 of the Constitution provides as follows,

70 (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;
or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

Therefore, Article 70 provides for enforcement of environmental rights. It allows any person to apply to a court for redress, besides other available remedies in the event of violation of environmental rights. In such instances, courts have wide powers to make any appropriate remedy including preventing, stopping actions that are harmful to the environment including compelling

state agencies to prevent any act that harm the environment or to make provision for compensation for victims of violation of the right to a clean and healthy environment. The Constitutional provision that states that any person seeking enforcement of environmental rights must not necessarily prove that he has suffered loss or injury, has removed the bottlenecks on capacity to enforce environmental rights that existed before the enactment of the 2010 Constitution.²³

The term “sustainable development” was coined by the 1980 World Conservation Strategy which asserted that to achieve sustainable development, social and ecological factors must be taken into account together with economic factors.²⁴ The Brundtland Report, clarified the tenets of sustainable development by defining the same as “development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”²⁵ The Earth Summit of 1992 demonstrated international commitment to sustainable development where strategies and action plans for sustainable development were drawn marking a shift towards sustainable patterns of development.²⁶

The World Summit of 2002 on Sustainable Development saw the repackaging of sustainable development into three pillars, namely; social, environmental and economic, which were symbolized by the summit motto of “People, Planet and Prosperity.”²⁷ Each country takes its own path to achieve sustainable development.

The sustainable development goals were adopted by the United Nations in 2015, as a universal call to action for purposes of ending poverty, protecting the planet and with the aim of having all people enjoying peace and prosperity.²⁸ Seventeen goals have been set with the target of being met by 2030. These include ending poverty and hunger, fostering good health and other goals.

Sustainable development, with all its facets and notions, may be summed up as centering around inter and intragenerational equity premised on three related pillars, namely; environment, economy

²³ See *Wangari Maathai Vs. Kenya Times Media Trust*, [1989] eKLR.

²⁴ IUNC, ‘World Conservation Strategy’ (1980) International Union for the Conservation of Nature.

²⁵ World Commission on Environment and Development, ‘Our Common Future’ (1987) Oxford University Press.

²⁶ United Nations Conference on Environment and Development, Agenda 21: Programme of Action for sustainable development, United Nations Dept. of Public Information, 1993. A/CONF.151/26/Rev.1.

²⁷ UN, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26th August-4 September 2002 United Nations New York (2002)

²⁸ United Nations Development Programme, 2021.

and society.²⁹ These three elements must guide decision makers at the international, municipal, and local levels, and efforts must be made to ingrain these notions to guarantee the society's ability to be sustainable development compliant, conscious, aware and cultured.³⁰ The fact that sustainable development is concerned with intergenerational equity is a key element in child rights protection, as it espouses sustainable use of environmental assets, by taking into account the needs of every person within this generation without forgetting the needs of future generations.

Article 10(2)(d) of the Constitution provides that sustainable development is one of the national values and principles of governance, which binds all state organs, whenever they apply or interpret the Constitution, or implement public policy decisions. In articulating the importance of national values in the Constitution, the court in *Republic vs. Attorney General & 3 Others Ex parte Tom Oduyo Oloo*,³¹ adopted the finding in the case of *Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others*³² that stated as follows:

The constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution, being a living tree with roots whose branches are expanding in natural surroundings, must have natural and robust roots, to ensure the growth of its branches, stems, flowers and fruits.

Therefore, national values provide the anchor upon which the Constitution finds nourishment, to influence every fabric of the Kenyan society. National values are the soul and spirit of the Constitution. When interpreting the Constitution, courts should consider whether their decisions foster the principle of sustainable development. Therefore, sustainable development as a national value should be ingrained in the national consciousness of the citizens of Kenya. It is the golden thread that should be visible in the thinking and decisions of policy makers. Thus, the Constitution requires that sustainable development, as a principle, be embedded in our national fabric. It should be a guiding light in the interpretation of the Constitution and statutes, and more especially where children rights are concerned.

²⁹ Justice Mensah, Sandra Ricart Casadevall (eds), 'Sustainable development: Meaning, history, principles, pillars and implications for human action, Literature review' (2019) Cogent Social Sciences.

³⁰ Ibid.

³¹ [2015] eKLR

³² [2007] 2 KLR 331

The requirement for sustainable development for Kenya as a nation, is not just a platitude with no relevance. It is anchored in the Preamble to the Constitution which provides that the people of Kenya are “respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations.”

Therefore, the soul of our Constitution bears the consciousness and the realization that this generation has received the planet and the environment from our forefathers, which then, we must use, as we also hold it in trust for future generations. That position places a responsibility on this generation to ensure that we do not use the environmental resources and, more particularly, the atmosphere, as though the same were infinite.

2.4 Intergenerational equity

Intergenerational equity means “with reference to equity among present and future generations and equity in the present generation”³³ This means that there ought to be fairness in the sharing of environmental assets by all persons in this generation as well as fairness between this and succeeding generations.

Just as envisaged in the Preamble, Article 42 of the Constitution confers environmental protection rights on both the current and coming generations, as well as equity within this generation. Thus, intergenerational equity is protected under the Constitution of Kenya. Environmental goods are our heritage, having been created by the Almighty God of all creation.³⁴ Hence, no person in this generation has a superior right over others. The adults of this generation have no superior right over the atmosphere than children. However, when adults elevate the economy above the environment, the result is that some environmental goods, and more specifically the atmosphere, will be degraded and this will make it impossible or too costly for children to enjoy their rights. For instance, if businesses are not regulated in the discharge of greenhouse gas emissions into the atmosphere, then they will inevitably release enormous amounts of GHG emissions, which would cause global warming and put lives of children at risk.

³³ Climate Change Act section 2.

³⁴ See the Preamble to the Constitution of Kenya 2010.

On the other hand, Article 69 of the Constitution of Kenya, places obligations on the State to protect the right to a healthy environment. The obligation of the State in Article 69 of the Constitution is at the core of the right to a clean and healthy environment. Accordingly, the State is required to guarantee sustainability and conservation of the environment and natural resources, and put in place environmental impact assessment, audit and monitoring systems along with eliminating activities that may harm the environment. This means that the atmosphere should be sustainably used and environmental impact assessments on businesses and projects be applied to establish the impact of such projects on climate change so as to protect children rights. In addition, everyone is obligated to partner with the State in the latter's efforts in protecting and conserving the environment. Article 21 of the Constitution obligates the State to observe, respect, protect, promote and fulfill the right to a clean and healthy environment. The State should promote a healthy and clean environment by ensuring that environmental laws in place, and more particularly the climate change regime, is embedded with best interests of children to guarantee protection of child rights.

2.5 The right to a clean and healthy environment

The right to a clean and healthy environment is a right recognized by both international and regional instruments. The International Covenant on Economic Social and Cultural Rights (ICESCR) provides that every person has an inherent "right to the highest attainable standard of physical and mental health."³⁵ Picolotti has argued that this right is premised on a sustainable and safe environment as unhealthy environment of polluted air can cause diseases hence affecting human health.³⁶ Indeed, in recognizing the link between the right to health and a healthy environment, the Committee on Economic, Social and Cultural Rights stated as follows:

The Committee interprets the right to health, as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care, but also to the determinants of health, such as access to safe and potable water and adequate sanitation, an

³⁵ Article 12 International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered in to force 3 January 1976) 993 UNTS 3

³⁶ Picolotti Romina, 'Agenda 21 and Human Rights, The Right to Participate' in *Linking Human Rights and the Environment* (2003) (Romina Picolotti and Jorge Daniel).

adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health related education and information, including on sexual and reproductive health.³⁷

The ICESCR imposes on the State, obligations to respect, protect and fulfil the right to a clean environment. The obligation of the State to promote and fulfil the right to a clean and healthy environment requires the State to take up measures that include legislative, budgetary, judicial, promotional and other measures to realize that right. By enacting Kenya's Climate Change Act to make provision for an enhanced response to climate variability, the State has used legislative means to ensure the atmosphere is safeguarded so as protect the population from a harmful atmosphere. Regionally, the African Charter on Human and People's Rights has implicitly captured the right to a healthy and clean environment as being part of the right to health.³⁸ It grants all persons the right to a general satisfactory environment favourable to their development.³⁹ In the case of *Social and Economic Rights Action Centre (SERAC) and Another vs. Nigeria*,⁴⁰ the African Commission on Human and Peoples Rights, held that the African Charter protected the right to a safe environment that obligated the state to take actions to ensure an ecologically sustainable development.

Kenya's Constitution provides for many human rights. However, a healthy environment is the cornerstone for other rights. For instance, one cannot enjoy the right to life in an environment that is noxious. In *Peter K. Waweru vs. Republic*⁴¹ the court was confronted with the question of development that does not take into account environmental concerns. In this case, the applicants had been charged with discharging raw sewage in a public water source and the environment in violation to the Public Health Act⁴² Although the Applicants raised constitutional questions on the validity and constitutionality of the charges against them, the court, in its judgment, gave

³⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 11, UN Doc. E/C.12/2000/4 (August 11 2000).

³⁸ Article 24 African Charter on Human and Peoples Rights (Adopted 27 June 1981, entered in to force 21 October 1986) 1520 UNTS 217 (ACHPR).

³⁹ Ibid.

⁴⁰ (2001) AHRLR 60 (ACHPR) 201.

⁴¹ [2006] e KLR.

⁴² Section 118 (e) of the Public Health Act Cap 242 Laws of Kenya.

prominence to, and took time to address the twin questions of the right to a safe environment alongside sustainable development and their relevance in the contemporary enforcement of the Bill of Rights. The court emphasized the State's obligation and everyone to ensure that every development project undertaken must be ecologically sustainable. Defining the right to life, the Court stated that "the right to life is not just a matter of keeping body and soul together as that right can be threatened by many factors, including the environment."⁴³ While linking the right to a clean and healthy environment to the right to life, in the case of *Kenya Association of Manufacturers & 3 Others, vs. Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others*⁴⁴ the Environment and Land Court, at paragraph 133 of its judgment, held as follows:

In our view, the right to a clean and healthy environment is the highest form of right in the hierarchy of constitutional rights. This is because a clean and healthy environment is the sustainer of life itself which is the trajectory on which all other forms of rights gravitate. The right to a clean and healthy environment is fundamentally a right to life.

In the *Peter Waweru* case, the Court stated that the right to a clean environment is part of international customary law, and emphasized that any development that threatens life is not sustainable and ought to be halted. Further, the role of environmental audits and monitoring as well as impact assessment as tools to ensure a balance between economic development and environmental sustainability was emphasized. The questions of intergenerational equity and environmental justice were extensively discussed in that case and the Court urged State agencies to reflect on the situation created by unsustainable development and come up with scientific solutions.

An entitlement to a safe environment is compromised where climate change concerns are not addressed. Climate change impacts adversely on many systems upon which human rights are founded. Climate change leads to disasters like floods which damage ecosystems and infrastructure, coast systems, human settlements, livelihoods, health and security. While the entire population of society is harmed by climate variability, children bear its greatest brunt.

⁴³ *Republic vs. Peter Waweru* (n 41)

⁴⁴ [2018] e KLR.

Factors like children’s physiological vulnerabilities, the nature of childhood and weak healthcare systems in developing countries, exacerbate the health and survival risks of children.⁴⁵ As has been observed, children do not experience climate change consequences as adults do.⁴⁶ This is because children have greater vulnerability to extreme weather, floods and drought; they are more vulnerable to toxic environmental hazards, and diseases, while they have their whole life ahead of them.⁴⁷ As climate negotiations proceeded at COP 26 in Glasgow, Scotland, in the United Kingdom between 31st October and 12th November 2021, one of the serious issues that world leaders were asked to address was the question of intergenerational equity.⁴⁸ Will the efforts, commitments and ambitions made by the leaders in the global North result in protection of future generations? The reality that children do not participate in causing climate variability, yet they suffer worst from its consequences, calls for consideration of their unique vulnerabilities, needs and rights and their best interests to be incorporated in the climate change regime at the global, regional, sub-regional, municipal and community levels.

2.6 Climate change impacts on children’s rights

Although child rights are protected both internationally, regionally and nationally, climate change adversely affect the nature and extent of the enjoyment of those rights. The study highlights the extent some of these rights are impacted by climate change, in order to further elaborate the interface between climate change and the best interests of the child.

2.6.1 Climate change and children’s right to health

It is no longer contestable that climate change detrimentally affects children’s health, thereby curtailing their right to enjoy good health. Climate change results in extreme heat which has serious

⁴⁵ Elizabeth Gibbons, ‘Climate Change, Children’s Rights and the Pursuit of Intergenerational Climate Justice’ (2014) 16 Health and Human Rights Journal.

⁴⁶ UNICEF, ‘The Climate Crisis is a child Rights Crisis: Introducing the Children’s climate Risk Index’ New York, (2021) UNICEF.

⁴⁷ Ibid.

⁴⁸ See Jenny Uechi, Speech: Mia Mottley, Prime Minister of Barbados at the opening of the #COP26 World Leaders Summit Canada’s *National Observer* 10 November 2021

<https://www.nationalobserver.com/2021/11/10/video/speech-mia-mottley-prime-minister-barbados-opening-cop26-world-leaders-summit> accessed 17 November 2021.

impacts on children's health. Zivin and Shrader⁴⁹ and Deschenes⁵⁰ state that extreme temperatures occasioned by climate change have serious health implications for children as it causes death and heat related illnesses, like heat exhaustion and heat stroke, among others.⁵¹ Climate change is a catalyst to vector borne diseases. Kolstad and Johansson have stated that diarrhea and malaria are climate induced diseases in low latitude areas.⁵²

Climate change consequences on children's health is a serious concern to health professionals. Wooldridge and Murthy,⁵³ both health professionals concerned with pediatric care, have reiterated that climate change is responsible for vector-borne diseases like dengue, lung diseases caused by wild fires and food insecurity and scarcity of clean drinking water. The consequence of this is a heavier strain of pediatric critical illness that undermines healthcare systems.⁵⁴ In Kenya, cholera has been a persistent threat, especially in the informal settlements, which has been due to heavy rains coupled with poor hygiene practices and environmental sanitation and drinking contaminated water.⁵⁵ Many diseases that affect children in Kenya today are climate induced and include malaria, cholera, dengue fever, typhoid fever, dysentery and respiratory sicknesses.⁵⁶

2.6.2 Climate change and children's right to education

Children need a good physical environment to access their right to education. They also need to access proper educational infrastructure. However, climate change has caused droughts, floods and heatwaves, making schooling difficult. In addition, floods have swept away schools. Climate related conflicts have separated families and interrupted schooling. Droughts have affected

⁴⁹ Joshua Zivin and Jeffrey Shrader, 'Temperature extremes, Health and Human capital' (2016) 26 Springs.

⁵⁰ Olivier Deschenes, 'Temperature, Human Health and Adaptation: A review of the empirical literature' (2012) Working Paper 18345, National Bureau of Economic Research, Cambridge.

⁵¹ Ibid.

⁵² Erick Kolstad and Kjell Arne Johansson, 'Uncertainties associated with quantifying climate change impacts on human health: A case study for diarrhea' (2011) 119 Environmental Health Perspectives 299.

⁵³ Gavin Wooldridge and Srinivas Murthy, 'Pediatric Critical Care and the Climate Emergency: Our Responsibilities and a call for change' (2020) 8 Frontiers in Pediatrics 472.

⁵⁴ Ibid.

⁵⁵ Anne Weru, 'Cholera highlights urban risk factors' (2015) UNISDR. <http://www.unisdr.org/archive/44762> accessed 22 February 2021.

⁵⁶ WHO, 'Climate Change Adaptation to protect Human Health' 2016 <http://www.who.int/global-change/projects/adaptations/phe-adaptation-final-kenya.pdf> accessed 20 May 2021.

agriculture, resulting in poverty for those children whose parents rely on rain fed agriculture, resulting in malnutrition and poverty, making education inaccessible. Colin and Nicole⁵⁷ have stated that education is directly and indirectly affected by climate variability. These include severe weather events like flooding, droughts and heat waves. The long term effects, such as desertification and soil erosion, have consequences of deteriorating livelihoods that reduce household expenditure on schooling and the nutritional status of children.⁵⁸ Floods, for instance, result in damage on school infrastructure which increases the State's expenditure on the costs of reconstruction and repair. In addition, flooding disrupts school programs and results in school absenteeism and dropout.⁵⁹ The long term effects of deteriorating livelihoods influences decisions, such as the number and gender to be send to school. Frequent exposure to sicknesses, such as malaria, also affect school attendance.

According to the UNICEF Situation Report of 2017, in Kenya, drought has adversely impacted children's education to the extent that in 2016, it forced some schools to be closed.⁶⁰ In addition, drought forced many pastoralist families to remove their children from school, as they searched for pasture and water.⁶¹ Besides, drought caused lack of water and suspension of school feeding programs which, in turn, affected school attendance.⁶² Diseases, like cholera and dengue fever have detrimentally affected school attendance, thereby affecting learning outcomes.⁶³ Although the Basic Education Act⁶⁴ guarantees free and compulsory basic education in Kenya, there exists many barriers to that right, among them being harsh climatic conditions and poverty which are both consequences of climate change. Children most affected are those in the arid and semi-arid counties as well as those in informal settlements.⁶⁵

⁵⁷ Bangay Colin and Blum Nicole, 'Educational Responses to climate change and quality: Two parts of the same agenda?' (2010) 30 International Journal of Educational Development 335.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ UNICEF, 'Situation Analysis of Children and Women in Kenya 2017' (2018) UNICEF Nairobi, Kenya.

⁶¹ Ibid.

⁶² World Vision, 'Impact of drought on education' (27 February 2017) <http://www.wvi.org/kenya/article/impact-drought-education> accessed 22 February 2021.

⁶³ UNICEF Nairobi (n 61).

⁶⁴ Act No. 14 of 2013.

⁶⁵ Ibid.

2.6.3 Climate change and children's right to be protected from violence and harm

Climate change has resulted in poverty, meaning that many children are now exposed to violence from sexual exploitation and child labour. Besides, climate change may result in conflicts, which may expose children to violence. Akresh opines that children are highly vulnerable to conflict as it comes with violence and trauma and it has the effect of leaving children with physical injuries, hunger and psychological stress.⁶⁶

Drought and conflict increase child protection risks. The two factors necessitate movement, which inevitably leads to separation of children from their families.⁶⁷

Emergencies due to climate change impacts, like floods and wild fires, precipitate sexual violations with children at greater risk than adults.

2.6.4 Climate change and children's right to life, survival and development

Droughts, floods, water scarcity and poverty have a direct bearing on the survival of the child. Indirect consequences of climate variability, like disease, malnutrition, economic strain, forced migration and conflict, may derail children's developmental trajectories.⁶⁸

Climate change impacts, combined with other factors like population growth, compounds the pressure on children's access to food security in arid and semi-arid lands.⁶⁹ This has the effect of stunting their growth and negatively affecting their development.

Hanna and Oliva contend that developing countries already face serious challenges from weak healthcare systems, food insecurity, water and air pollution and high dependency ratios; climate change impacts dim the light for these populations, making child survival and development an

⁶⁶ Richard Akresh, 'Climate change, conflict and children' (2016) Spring

⁶⁷ OCHA, 2017 Flash Appeal: Kenya March 2017 [http://reliefweb.int/files/resources/kenya-flash- %20Appeal-15%20march%202017%20final.pdf](http://reliefweb.int/files/resources/kenya-flash-%20Appeal-15%20march%202017%20final.pdf) accessed 23 February 2021.

⁶⁸ Janet Currie and Olivier Deschenes, 'Children and Climate Change: Introducing the Issue, The future of Children' (2016) 26 Children and Climate Change.

⁶⁹ UN Committee on the Rights of the Child, Concluding Observations on the Combined Third to Fifth Periodic Observations of Kenya (21 March 2016) UN Document CRC/C/KEN/CO/3/5.

uphill task.⁷⁰ In Kenya, climate variability leads to food insecurity that culminate in child malnutrition and under-5 mortality, defects in growth and prevalence of infectious diseases.⁷¹

Gibbons has argued that climate change causes floods which contaminate clean water, thereby constraining access to clean water.⁷² In addition, floods cause sea level rise, while droughts dry water sources, hence concentrating the contaminants. All these result in diarrhea and flood related fatalities in children.⁷³

Drought is the major cause of food insecurity. The pastoral communities are affected by drought and erratic rains as they are dependent on rain for the sustenance of their livelihoods.⁷⁴

2.6.5 Climate change and children’s right to leisure and recreation

Children have an entitlement to “leisure, play and participation in cultural and artistic activities.”⁷⁵ This right is a pertinent aspect of every child’s growth and development. Because of the nature of childhood, it is natural that children’s play occurs outdoors. However, climate change impacts, like heat waves, make outdoor play significantly uncomfortable. On the other hand, floods and too much rain also have the consequence of interfering with children’s playing spaces.

2.6.6 Climate change and the right to culture

Every child has a right to participate in his or her culture.⁷⁶ Culture has been defined as beliefs, attitudes, values and behaviours.⁷⁷ Climate change results in diverse impacts which have negative

⁷⁰ Rema Hanna and Paulina Oliva, ‘Implications of Climate Change for Children in Developing Countries’ (2016) 26 Spring.

⁷¹ Kiersten Johnson and Molly E. Brown, ‘Environmental Risk Factors and Child Nutritional Status and Survival in a Context of Climate Variability and Change’ (2014) 54 Applied Geography 209 <http://dx.doi.org/10.1016/j.apgeog.2014.08.007> accessed 10 February 2021.

⁷² Elizabeth Gibbons, ‘Climate Change, Children’s Rights and the Pursuit of Intergenerational Justice’ (2014) 16 Health and Human Rights Journal.

⁷³ Ibid.

⁷⁴ UNICEF, ‘Situation Analysis of Children and Adolescents in Kenya: Our Children Our Future’ (2014) UNICEF <http://www.unicef.org/kenya/sitan-2014-Web.pdf> accessed 22 February 2021.

⁷⁵ Section 17 of the Children Act.

⁷⁶ Ibid., Section 8 (2).

⁷⁷ Fred Kruger and others (eds), *Cultures and Disasters: Understanding Cultural Framings in Disaster Risk Reduction*, (Routledge 2015).

effects on culture. In a study of the Torres Strait Islanders of Australia, it was found that in communities where their traditional and cultural activities are hinged on the environment, a change of such environment can have significant implications on that community's culture.⁷⁸ For most Kenyan communities, where their kin are buried and the attachment to ancestral land, is an important aspect of their cultures. However, inundation in coastal regions has had the effect of sweeping away community cemeteries leaving such communities in distress.

Children are entitled to participate in their cultures. However, climate change may result in destruction of plant and animal biodiversity which may not only change the cultural sites of a community, but may affect ecosystems leading to nutritional, as well as cultural ramifications.⁷⁹ In addition, long term effects, like sea level rise, may necessitate relocations which may force the child to move away from important cultural practices of his or her people.

Mbote and Nyukuri, in highlighting consequences of climate change on the culture of the Ogiek and Maasai of Kenya, have underscored the fact that cultural activities for rites of passage, like naming, initiation, graduation to adulthood and marriage, are traditionally held collectively as a community, but have now been affected by persistent droughts.⁸⁰ This has the consequence of delaying the rites of passage, thereby straining the capacity for sharing and perpetuation of indigenous knowledge systems among the Maasai and Ogiek.⁸¹ The link between climate change and cultural identity cannot be ignored. For indigenous children, climate change affects the natural world, thereby negatively impacting on their survival.

2.6.7 Climate change and children's right to be protected from armed conflict and child labour

Every child has the right to be shielded from "economic exploitation or any work that may be hazardous or may interfere with the child's education or may be harmful to the child's health or

⁷⁸ Donna Green, 'How Might Climate Change Affect Island Culture in the Torres Strait: Climate Change Impacts and Risk' (2006) CSIRP Marine and Atmospheric Research Paper 011

⁷⁹ Ibid.

⁸⁰ Patricia Kameri-Mbote and Elvin Nyukuri, 'Climate Change, Law and Indigenous Peoples in Kenya: Ogiek and Maasai Narratives' in *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (eds Randall S. Abate and Elizabeth Ann Kronk Warner 2013) 545.

⁸¹ Ibid.

physical, mental, spiritual, moral or social development.”⁸² In addition, every child is protected from taking part in hostilities, and in the event of the occurrence of armed conflict, children are entitled to protection within the law.

Climate change has often resulted in extreme weather, with the consequence of scarcity of resources like water. This has often led to armed conflict between communities where children participate in the conflict in one way or the other. Even where children are not participating in the conflict, they are the worst traumatised by conflict.

2.6.8 Climate change and children’s right to be protected from harmful cultural rites, customs and traditions

Climate change impacts lead to socio-economic factors like poverty and illiteracy. Where no interventions are made, poverty and illiteracy continue in a vicious cycle. These factors are some of the causes of harmful practices like child marriages. In situations of extreme poverty, girls are viewed as burdens or capital meant to be exchanged for money or livestock.⁸³ Climate change induced conflict and natural disasters form the breeding grounds for child marriages.

It has been noted that the rate of child marriages increases when there are natural disasters and conflicts, such as during famine and drought, because such factors as institutional protection of the child, family structures and support systems are weakened or destroyed altogether.⁸⁴

2.6.9 Examples of Integration of best interests of the child in climate change regime.

Integration of best interests of the child in climate change regime is possible, as has successfully been done in the Philippines and Zimbabwe. In the Philippines, the Climate Change Act of 2009 is deliberately pro-children and provides that the State is obligated to embed a pro-children perspective in climate change action.⁸⁵ In the same vein, in 2014, with input from children,

⁸² Section 10 (1) of the Children Act No. 8 of 2001.

⁸³ Government of Kenya, Ministry of Public Service, Youth and Gender affairs, ‘Draft National Plan of Action for ending Child Marriages in Kenya’ 2016-2015.

⁸⁴ UNICEF, ‘Situation Analysis of Children and Women in Kenya, 2017’ (2018) UNICEF Nairobi Kenya.

⁸⁵ Section 2 of the Climate Change Act 2009 of the Philippines.

Zimbabwe adopted its National Climate Change Strategy.⁸⁶ It positions children and youths as stand-alone stakeholders in climate governance and commits to forestall negative impacts of climate change on children, considering child views in preparation of mitigation and adaptive actions.

2.7 Conclusion

This chapter has given a conceptual discussion of the interface between the best interests of the child and climate change. Recognition of the nexus between climate change and child rights has grown internationally. Climate change has both direct and indirect impacts on realization and enjoyment of children's rights, which calls for incorporation of best interests of the child in the climate change regime. Concepts of sustainable development, intergenerational equity and environmental rights within the context of child rights protection point to the need for integration of child rights protection in climate actions. The next chapter discusses the extent to which the international climate change regime incorporates best interests of the child principle and, thereby, provides the benchmark for replication by individual states in their domestic regimes.

⁸⁶ Government of Zimbabwe, Zimbabwe's National Climate Change Response Strategy (2014) Ministry of Environment, Water and Climate Change.

CHAPTER THREE

INTERNATIONAL CLIMATE CHANGE REGIME AND THE BEST INTERESTS OF THE CHILD

3.1 Introduction

Climate change is not simply an environmental crisis. It's a children rights crisis. Climate change threatens the right to food and water, homes, health, and education.

Despite being the least responsible for climate change, children and young people around the world will bear the brunt of its damage- now and in the future.¹

This chapter discusses the extent to which best interests of the child principle is embedded in the international climate change regime. It examines the conventions, treaties, agreements, and resolutions adopted at the international, regional and sub-regional levels. Conventions, treaties, and resolutions reflect international commitments that are implemented at national level.

The discussion of the best interests of the child principle and the international climate change regime is done against the backdrop of the UN Convention on the Rights of the Child, the overarching legal framework on rights of the child. The Convention identifies the best interests of the child principle as one of the four pillars of children rights. The other pillars are non-discrimination, the right to life, survival and development, and the respect for the views of the child.

3.2 International climate change regime's incorporation of best interests of the child

3.2.1 United Nations Framework Convention on Climate Change

The 1992 Earth Summit in Rio de Janeiro, Brazil, led to adoption of the United Nations Framework Convention on Climate Change (UNFCCC). This Convention aimed at balancing GHG

¹ Open letter by the UNICEF UK Youth Advisory Board addressed to world leaders in Glasgow, Scotland, UK, ahead of UN Climate Change Conference, published in the *Times* on 1st November 2021.

concentrations at a level that stops harmful human meddling of the climate system so as to let ecosystems to naturally adjust to climate variability as well as allow states attain development sustainably.² The Convention does not specifically mention children or child rights. However, it obligates state parties to protect the climate in a manner that will guarantee the safeguarding of rights of current and coming generations.³ Besides, the Convention safeguards the right of states to sustainable development and upholds their duty to promote the same.⁴

In addition, the Convention obligates states to engage in the promotion and cooperation in climate public awareness, education together with training, and encourages broad and most inclusive participation in the process.⁵ This is significant in ensuring children have access to climate information. Although the Convention fails to specifically make reference to children, this omission has not dampened the persistent considerable attempts by young people and children to sway the COP meetings by redirecting their attention to intergenerational climate justice.⁶ Nonetheless, this persistence has not borne any fruit as children's voices and concerns remain conspicuously missing in UNFCCC. The Convention's policy debates have continued to make children invisible.⁷ However, the youths, through YOUNGO,⁸ have fought and found their space at the UNFCCC ensuring that their perspectives are considered in the decision making processes of UNFCCC.⁹

The efforts by children and the youths to advocate for inclusive, child-centred climate policies at both international as well as domestic levels can no longer be ignored as they have received recognition at the international level. Indeed, at the COP 25, on 9th December 2019, in Madrid,

² Article 2 of the UNFCCC 1771 U.N.T.S 107, 165

³ Ibid., Article 3 (1).

⁴ Ibid., Article 3 (4).

⁵ Ibid., Article 4 (1) (i).

⁶ Youth Portal COP 19 on UN Joint Framework Initiative on Children, Youth and Climate Change. <http://unfccc.int/cc-inet/youth-portal/items/6519.php> accessed 12 May 2021.

⁷ Elizabeth Gibbons, 'Climate Change, Children's Rights and the Pursuit of Intergenerational Climate Justice' (2014) 16 Health and Human Rights Journal.

⁸ YOUNGO is a Youth NGO recognized as a constituency of UNFCCC formed in 2009 and consisting of many youth-led organizations, groups and individuals working in climate change related areas with the aim of ensuring youths' perspectives are considered at UNFCCC negotiations.

⁹ United Nations, 'Youth Participation in the UNFCCC Negotiation Process: The United Nations, Young People, and Climate change' (2010) UN Joint Framework Initiative on Children, Youth and Climate change UN.

Spain, youth activists and governments united in adopting an Intergovernmental Declaration on Children, Youth and Climate Action.¹⁰ The Declaration takes note, among other matters, of the Human Rights Council Resolutions 37/8, 35/20 and 40/11 and commits to do several matters, including strengthening child and youth capacities in mitigation and adaptation; adopting institutional and administrative measures and upholding meaningful child and youth participation in climate change processes.”¹¹

While the Convention requires industrialized countries to provide finance and technology transfer to developing countries to enable them comply with their obligations for adaptation and mitigation, this has not been complied with.¹² This is a key provision, that if complied with, would enable developing countries put in place adaptation measures and transition to low carbon development, with the consequence that children in developing countries would benefit. Therefore, climate actions on the financing and technology transfer lack binding GHG emissions or enforcement mechanism, but only provides a framework for negotiation of further instruments.

The Convention establishes the principle of common but differentiated responsibilities.¹³ This principle refers to the idea that the responsibilities of states were common in that all contribute to GHG emissions, but differentiated, in taking remedial measures so that states that emit more GHG have more responsibility in the clean-up.¹⁴ While it has been argued that this principle is crucial to the stability and integrity of the climate regime,¹⁵ developed countries do not give it the significance it holds as they have not been able to bear their share of the climate burden. This leaves the developing countries without the necessary financial support and technology and the exposure to more climate variability effects, resulting from GHG emissions from the developed world. There has been no consensus between the developed world and the developing world on the interpretation of this principle, as some countries in the developed world consider the principle

¹⁰ The governments who were signatory to the Declaration include Bangladesh, Mexico, Saint Lucia, Luxembourg, Chile, Nigeria, Fiji, Peru, Monaco, Slovenia, Uruguay, Panama, Costa Rica, Sweden, and Chile.

¹¹ United Nations, (n 9)

¹² Article 4 (3) of the United Nations Framework Convention on Climate Change 1771 UNTS 107, 165

¹³ Ibid.

¹⁴ Jutta Brunee, Charlotte Streck, ‘The UNFCCC as a Negotiation Forum: Towards Common but More Differentiated Responsibilities’ (2013) 13 Climate Policy 589.

¹⁵ Ibid.

as overburdening the industrialized countries in favour of the developing countries.¹⁶ For instance, the U.S rejected taking up binding obligations until key developing countries participate meaningfully.¹⁷ Such conflicts have hampered the momentum of the Convention, rendering it ineffective in terms of rallying global participation and keeping timelines to achieve the required international cooperation.¹⁸ This has, therefore, created a gap as some developing countries may perceive that they have no role to play within the international climate regime.

Agenda 21 was adopted in 1992, and made specific provisions on children. The Agenda 21 noted that children are not only inheritors of the responsibility of taking care of the earth, but in most countries in the Global South, they comprise nearly 50% of the populace.¹⁹ Further, it pointed out the high vulnerability of children to environmental degradation in both industrialized and developing countries²⁰ and obligated states to guarantee safeguard, survival and progress of children and protect child interests in the participatory process for sustainable development.²¹

The UNFCCC 2011 COP 16 Report yielded the Cancun Agreements which recognized human rights infringements on account of climate change and its severity upon segments of the society that are most vulnerable, including children.²²

3.2.2 The Kyoto Protocol

This Protocol to the UNFCCC was adopted with a purpose of committing industrialized countries to limit collective greenhouse gas emissions.²³ It was the first international treaty to limit

¹⁶ Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime' (2000) 9 Rev. Eur. Comp & Int'l Env'tl L.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Paragraph 25.12 of Agenda 21.

²⁰ Ibid.

²¹ Ibid., Paragraph 25.13.

²² United Nations Framework Convention on Climate Change, 1771 UNTS 107, 165.

²³ See Article 2 and Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 10th December 1997, entered in to force 16 February 2005) 37 ILM 22 (1998).

greenhouse gas emissions. The Protocol provides that the industrialized countries named in Annex 1 are obligated to reduce their GHG emissions.²⁴

A clean development mechanism (CDM) is established in the Protocol, for assistance of developing state parties to attain sustainable development as well as ultimately contribute to UNFCCC and support industrialized nations to comply and keep within their emission limitation quantities and commitments to reduce emissions under the protocol.²⁵

Besides not making any reference to children, the Kyoto Protocol has been termed as too weak for only deterring non-participation but for failing to deter noncompliance.²⁶ It is also observed that the Protocol may not achieve the promised greenhouse gas emission reduction as promised either because emissions will move to countries outside Kyoto prescribed ceilings or because paper trades will be promoted by the Protocol's mechanisms.²⁷ Those in support of the Protocol celebrated it as a success for the international climate regime, while its critics asserted that its perspective is severely defective.²⁸ Even though it failed to achieve its objectives, it sets an important starting point to shape efficient climate policies in future.²⁹

For its failure to protect children, Gardiner has argued that the Protocol fails to safeguard coming generations, but only constitutes a "wait-and-see policy for the present generation."³⁰ He argues that states that adopted the Protocol should be "wary of looking their children in the eye and none should relish facing their children's children".³¹ This means that there is no attempt within the Protocol to protect future generations. Until its intergenerational provisions are upheld, it remains an ineffectual environmental policy.³² Though the Protocol calls for financial support together with transfer of technology by industrialized states, for enhancing low carbon technologies,

²⁴ Article 3 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 10th December 1997, entered in to force 16 February 2005) 37 ILM 22 (1998).

²⁵ Ibid., Article 12.

²⁶ Scott Barrett, 'Political Economy of the Kyoto Protocol' (1998) 14 Oxford Rev. of Economic Policy 20.

²⁷ Ibid.

²⁸ Christoph Bohringer, 'The Kyoto Protocol: a Review and Perspectives' (2003) 19 Oxford Review of Economic Policy 451.

²⁹ Ibid.

³⁰ Stephen Gardiner, 'The Global Warming Tragedy and the Dangerous Illusion of the Kyoto Protocol' (2004) 18 Ethics and International Affairs 23.

³¹ Ibid.

³² Ibid.

developed countries have often viewed this requirement as acts of charity and not as legal obligation or investment in to global clean energy.³³ This scenario impacts negatively on child protection in developing countries against climate change effects.

3.2.3 The Paris Agreement

The Paris Agreement aims to “strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty by holding the increase of global average temperature to well below 2°C degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C degrees Celsius above pre-industrial levels.”³⁴ The Agreement’s Preamble makes reference to children’s rights by stating the following,³⁵

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.

Therefore, the Preamble emphasizes that climate change is a concern to the entire society and places a duty on states to consider their human rights responsibility, including children rights and intergenerational equity.³⁶ This was a significant and positive step towards protecting children in the climate change legal framework. Besides the preamble, the Paris Agreement has no special reference to children.

³³ UNDP, ‘Human Development Report 2007/2008 Fighting Climate Change: Human Solidarity in a Divided World’

(2007) NY. US.

³⁴ Article 2 (1) of the Paris Agreement U.N. Doc. FCCC/CP/2015/L.9/Rev/1

³⁵ Ibid., Preamble.

³⁶ Ibid.

Adelman maintained that while the Paris Agreement's mention of human rights, demonstrates a stride in the right direction, it nevertheless fails to match the severity of climate change.³⁷ With its flaws, the Paris Agreement remains an important tool towards addressing climate variability. This Agreement has set the stage for more achievements as it stipulates that with time, goals for reducing GHG emissions are strengthened, both in purpose as well as the scope.³⁸ Being the initial global environmental pact to specifically mention human rights, it has been argued that, that helps to mainstream human rights into the growth of the climate regime.³⁹ This means that countries have an opportunity to strengthen their commitments to fulfil those obligations within the human rights prism.

The Agreement's provisions on countries' nationally determined contributions are entirely the discretion of individual states.⁴⁰ The Agreement promises provision of support to developing countries to enable them achieve higher ambitions.⁴¹ This support is key in ensuring developing countries enhance their adaptation and mitigation actions, which may benefit children. The challenge in respect of the application of the Paris Agreement is establishment of credible commitments on the part of nations and other actors in respect to planning, budgeting and adaptation.⁴²

One of the core mechanisms of the Paris Agreement is the Nationally Determined Contributions (NDCs), that provide for measures which states commit to do to address climate change. Countries' first NDCs were submitted before the Paris Agreement in 2015, while they had a chance to enhance them in 2020. In line with the Agreement, states set climate targets according to their individual circumstances and priorities. Those who celebrate the adoption of the Agreement have observed that if the international community proceed along its business-as-usual (BAU) and high-emissions

³⁷ Sam Adelman, 'Human Rights in the Paris Agreement: Too Little Too Late?' (2017) *Transnational Environmental Law*.

³⁸ *Ibid.*

³⁹ John Knox, 'The Paris Agreement as a Human Rights Treaty, Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment' (2018) (Akande et al eds.) Oxford University Press.

⁴⁰ Article 3 of the Paris Agreement U.N. Doc. FCCC/CP/2015/L.9/Rev/1

⁴¹ *Ibid.*, Article 4.

⁴² Alexandra Lesnikowski and others, 'What Does the Paris Agreement Mean for Adaptation?' (2017) 17 *Climate Policy* 825 <http://dx.doi.org/10.1080/14693062.2016.124889> accessed 21 May 2021.

pathway, then a child born in this decade will experience a world 4 degrees warmer than preindustrial average, with the consequence that their health will be plagued by wild fires, undernutrition, increased vector borne diseases, a less stable world, migration and conflict.⁴³ But the alternative presented by the Paris Agreement, if embraced by countries through clean energy, plant-rich diets, coal-power phase-out and transport electrification, then a child born today will enjoy clean air and less chronic diseases.⁴⁴

The Agreement makes contribution to sustainable development by stating that parties should balance emissions with sinks within the second half of this century.⁴⁵ This provision is significant in pursuit of child protection, as tenets of sustainable development demand that use of environmental assets by this generation, ought not undermine the coming generations' ability to use those assets. Although the Agreement expects progression on ambitions in the NDCs, some countries have not been able to progress.⁴⁶

The demand for clarity, transparency and understanding in states' communication of their NDCs, is a provision that would allow states to report on what actions they intend to take in respect of each vulnerable group, including children and the clarity required for child rights protection as envisaged in the Preamble.

The Agreement calls for adaptation measures whose benefits are important to children as they enhance the right to clean air, thereby reducing the avenues for climate induced diseases for children.

While the Agreement advocates for a gender-responsive adaptation action for states, while considering vulnerable groups, communities and ecosystems,⁴⁷ it does not promote child-responsive adaptation actions.

⁴³ Courtney Howard, Yassen Tcholakov and Christian Holz, 'The Paris Agreement: Charting a Low-emissions Path for a Child Born Today' (2020) 4 The Lancet Planetary Health.

⁴⁴ Ibid.

⁴⁵ Article 4 of the Paris Agreement U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

⁴⁶ Climate Action Tracker website <http://climateactiontracker.org/countries.html> accessed 9 November 2021.

⁴⁷ Article 7 (5) of the Paris Agreement U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

The requirement that states should engage in adaptation planning processes, that considers vulnerable groups and systems,⁴⁸ means that if states were to consider child rights dimensions of their climate actions, then they must take into account child rights. Minimizing climate related loss and damage, is noted in the Agreement.⁴⁹ Industrialized states ought to provide funds to address adaptation and mitigation actions for developing states.⁵⁰ This is key in ensuring that developing countries strengthen their systems to adapt to climate change, which means that systems like health care, infrastructure and transport are supported, leading to protection of child rights. The call for mobilization of climate finance in the Agreement is important for developing countries, yet developed countries have not taken that role seriously. The hesitancy by the developed countries to comply is mainly because there are no enforcement mechanisms in the Paris Agreement.

3.2.4 Sendai Framework for Disaster Risk Reduction 2015-2030

The Sendai Framework succeeded the Hyogo Framework for Action 2005-2015. It shifted from disaster management to disaster risk management.⁵¹ This means that what is addressed is not merely the disasters themselves but the risk of the disaster, which strategy prevents new risks, reduces existing risks and enhances resilience.

Sendai Framework has guiding principles which are its priorities for action.⁵² It also seeks to strengthen international partnerships and cooperation as well as the role of stakeholders.

The Framework notes that over time, disasters have adversely affected people, communities and countries, leaving many people dead, injured and homeless. Those disproportionately affected by disasters are children, women and those in vulnerable situations.⁵³ The link between disasters and climate change is underscored in the framework. It calls for governments to engage relevant stakeholders, including children and youth, in the design and implementation of policies and standards.

⁴⁸ Ibid., Article 7 (9) (c).

⁴⁹ Ibid., Article 8.

⁵⁰ Ibid., Article 9.

⁵¹ Sendai Framework for Disaster Risk Reduction 2015-2030 In: UN World Conference on Disaster Risk Reduction, 2015 March 14-18, Sendai, Japan. Geneva: United Nations for Disaster Risk Reduction, 2015.

⁵² Ibid.

⁵³ Ibid.

The Framework leverages on the role of the United Nations Framework Convention on Climate Change.⁵⁴ The Framework has seven global targets, one of them in ensuring child protection is to minimize disaster damage to critical infrastructure like health and educational systems.⁵⁵ This means disaster-proofing infrastructure like school buildings, routes and bridges to schools and other education related infrastructure to ensure access to the right to education. The framework recognizes that children and youths are change agents and need to be allowed the platform to participate in disaster risk management.⁵⁶

3.3 Regional instruments

3.3.1 African Strategy on Climate Change, 2014

This strategy provided for a framework for addressing challenges and established Africa's priorities to achieve SDGs with special focus on vulnerable groups, among them children. In 2015, the 15th AMCEN emphasized Africa's priority climate change response as making adaptation and resilience the focal point.⁵⁷ While prioritization of adaptation over mitigation seems to be the logical direction to take in view of Africa's low greenhouse gas emissions, failing to regulate businesses for purposes of mitigation is likely to lead to a situation where businesses driven by profits might be reckless, and emit more than what the continent's sink capacities can absorb accelerating global warming, thereby putting child rights at risk.

The Strategy had no provision for safeguarding child rights in the face of climate crisis.

3.3.2 The Draft Africa Climate Change Strategy 2020-2030⁵⁸

This draft Strategy aspires to have an Africa whose development is people-driven, caring for children and protecting children's rights.⁵⁹ It recognizes that nearly 20% of Africa's population is

⁵⁴ Paragraph 13 of the Sendai Framework for Disaster Risk Reduction 2015-2030 In: UN World Conference on Disaster Risk Reduction, 2015 March 14-18, Sendai, Japan. Geneva: United Nations for Disaster Risk Reduction (2015).

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ UNEP Website 2021. Available at < <http://www.unep.org>

⁵⁸ The Objective of the Draft Africa Climate Change Strategy 2020-2030 is the achievement of the Agenda 2063 Vision by building the resilience of the African continent to the impacts of climate change.

⁵⁹ Aspiration 6 of the Africa Climate Change Strategy 2020-2030 AU (2020).

comprised of youths aged between 15 years and 24 years and points out that this group is the most threatened by climate change, hence decision making processes must consider their welfare, interests and voices. Stakeholders drawn from both the South and East Africa met in Nairobi, Kenya in July 2021, for purposes of reviewing the draft Strategy. The Strategy is expected to guide the Continent's actions in enhancing adaptation and mitigation as well as building resilience and GHG emission reduction.⁶⁰ It, however, lacks specific actions aimed at child rights protection.

3.4 Sub regional instruments

The summit done in Arusha, Tanzania, of the East African heads of state on food security and climate change of 2010 declared the sub-region's commitment to urgently fight climate change to mitigate its consequences on the current and future generations by recommending the adoption of a regional climate change policy and masterplan.⁶¹

3.4.1 East African Community Master Plan 2011-2031

This Masterplan recognizes the disproportionate risk to children due to climate change impacts and recommends differentiated measures for addressing these impacts.⁶² In acknowledging that training together with education in respect of climate change matters from Primary school to tertiary level is nonexistent, it recommends introducing the discipline of climate change right from primary school curriculum up to tertiary institutions.

3.4.2 East African Community Climate Change Policy, 2010

The East African Community Climate Change Policy is anchored on three pillars, which are research, adaptation and mitigation. The aim of this policy is to steer partner states in the cooperation to combat climate change challenges for the good of this and coming generations.⁶³

⁶⁰ ECA, 'Africa Climate Change Strategy Nearing Completion' Nairobi 30 July 2021 United Nations Economic Commission for Africa. Available at <https://www.uneca.org/stories/africa-climate-change-strategy-nearing-completion> accessed on 20 November 2021.

⁶¹ Declaration of the 12th summit of the EAC Heads of state on food security and climate change, 2010.

⁶² Paragraphs 2.3.6 of the East African Community Climate Change Master Plan 201-2013, 2011.

⁶³ EAC Climate Change Policy, Arusha EAC, 2011-2031, (2010)

In addition, it recommends for capacity building through education, training and public awareness.⁶⁴ It also prioritizes adaptation over mitigation. The Policy aims to mainstream adaptation into regional as well as national development sectoral plans in respect of food security, water, ecosystem services, energy and agriculture. In so far as aspects, such as food security, water and agriculture are addressed, then this will culminate in child protection as cases of malnutrition as well as the right to education will be protected, since families will not divert resources meant for education to food.

However, the Policy lacks specific provisions for child rights protection.

3.5 The rights of the child under international law

At the international level, children have sufficient protection under the United Nations Convention on the Rights of Children (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).⁶⁵ The ACRWC has an African perspective and was enacted with the feeling that UNCRC failed to address significant societal morals and values as well as fiscal realities of the African experience.⁶⁶ But both legal instruments comprehensively and aptly capture the rights and principles for the protection of children. They provide an array of children's rights from rights for provision of social and other services like healthcare and education to rights for protection from all manner of violent acts and rights to participate in decisions affecting their lives and to have their views considered.

Besides, they also provide for the four pillars of children rights namely the right to life, survival and development; best interests of the child; nondiscrimination; and respect for the views of the child.

⁶⁴ Ibid.

⁶⁵ The ACRWC was adopted in 1990.

⁶⁶ Frans Viljoen, *The African Charter on the Rights and Welfare of the Child* in Boezaart T. (ed) *Child Law in South Africa*, Claremont (2009)

3.6 Conclusion

Even though the international climate change regime is sound in providing responses in terms of climate change adaptation and mitigation actions, it lacks significant provisions that would guarantee protection of the best interests of the child, hence failing to comply with the requirement of the UNCRC General Comment No. 14 of 2013 that adoption of any law or policy whether or not it concerns children, ought to be governed by children's best interests. The few scattered child friendly provisions remain merely descriptive platitudes with no enforcement mechanisms. The provisions in the UNFCCC and its related Protocol and agreements for support of developing countries by industrialized states in terms of funds and technology, to enhance adaptation and mitigation, has largely been ignored by the developed countries, to the detriment of countries in the Global South and, consequently, children who bear the greatest brunt of climate change effects in such countries, have suffered and their best interests not realized.

The next chapter moves from the international level to the domestic one by analysing Kenya's climate change regime and the extent to which it incorporates best interests of the child principle as articulated in the international climate change regime. Kenya, in exercise of its sovereignty, has the discretion to determine how best to discharge the obligations incumbent upon it under international law to implement and realise best interests of the child in its national climate change regime.

CHAPTER FOUR

KENYA'S CLIMATE CHANGE REGIME AND THE BEST INTERESTS OF THE CHILD

4.1 Introduction

This chapter is an analysis of Kenya's laws, policies and institutions that address climate change. It highlights the strengths, weaknesses and gaps in the incorporation of the best interests of the child principle. Kenya's climate change regime is a result of domestication of international instruments, starting with the UNFCCC, the Kyoto Protocol, Paris Agreement as well as regional and sub-regional instruments.

4.2 National climate change legal framework and best interests of the child

4.2.1 The Constitution of Kenya

The Preamble to the Constitution of Kenya (COK)2010,¹ underscores the people's respect of the environment as well as their commitment to preserve it. It provides that "Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations."² Every person's entitlement to a safe environment is guaranteed in the Constitution and it encompasses the right to have the environment safeguarded for the benefit of the current and coming generations by statutory as well as other means.³ The Constitution also provides for legal redress for any person whose rights, protected under Article 42, have been violated.⁴ By generally stating that every person is entitled to a clean and healthy environment without special regard to children's vulnerability to

¹ The Constitution of Kenya was promulgated in 2010.

² The Preamble to the Constitution of Kenya.

³ Ibid, Article 42 (a).

⁴ Ibid, Article 70.

environmental harm, and more specifically to climate change, the Constitution fails to protect the best interests of the child. In terms of child rights protection, the Constitution of Kenya places paramountcy on the best interests of children in all decisions touching them.⁵

However, the Constitution does not explicitly place an obligation on the legislature to ensure that the best interest of the child is considered in formulation of statutes, particularly climate change laws.

4.2.2 Environmental Management and Co-ordination Act. (EMCA)

The Environmental Management and Coordination Act (EMCA)⁶ provides for a legal and institutional framework for the management of the environment and for connected purposes.⁷ The Act defines intergenerational equity to mean “that the present generation should ensure that in exercising its rights to beneficial use of the environment, the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”⁸ On the other hand, intragenerational equity is defined to mean “that all people within the present generation have the right to benefit equally from the exploitation of the environment, and that they have an equal entitlement to a clean and healthy environment.”⁹

The Act entitles every person in Kenya to a clean and healthy environment.¹⁰ This means that there is no specific child protection provisions in the Act in respect of the right to a clean and healthy environment. The Act establishes the National Environment Management Authority (NEMA) with an overarching mandate of supervising and coordinating all matters touching on the environment.¹¹

⁵ Ibid, Article 53 (2).

⁶ Act Number 8 of 1999.

⁷ Preamble, EMCA.

⁸ Ibid., section 2

⁹ Ibid.

¹⁰ Ibid., section 3.

¹¹ Ibid., section 9.

While NEMA promotes integration of environmental considerations into development policies for the sake of proper management of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya, there is no provision for enhancing the quality of children's life in Kenya.¹² The generalization of effort to cover human life generally may not necessarily protect the best interests of the child principle.

The Act establishes a County Environment Committee whose mandate is to ensure proper management of the environment in the county as well as developing a county strategic environmental action plan every five years.¹³ Since the Children Services Department has no representation on this committee, the unique needs of children may not be considered in the preparation of the County Strategic Environmental Plan, which consequently jeopardizes the best interests of the child. The National Environment Action Plan which should be formulated by NEMA guides environmental actions for the national and devolved units.¹⁴ The Act does not state that the Action should have a human rights dimension, which means that child rights are not considered in its formulation, which gap also occurs in the County Environment Action Plan.

Provision of incentives to businesses to incorporate environmental considerations in their plan, in the Act,¹⁵ is a provision that would ensure businesses engage in mitigation activities, which eventually protect children as there will be minimized greenhouse gas emissions.

The provision of environmental impact assessment, monitoring and audit as a tool to ensure that all projects undertaken in the country comply with sustainable development tenets, is key in child protection as this locks out any development project that does not take in to account impacts of the project on climate change. Indeed, Kenyan courts have been vigilant to ensure that projects are in compliance with environmental laws, and more specifically that the State must assess a project to be sure that it will not exacerbate climate change. In

¹² Ibid.

¹³ Ibid., section 30.

¹⁴ Ibid., section 38.

¹⁵ Ibid.

In *Moffat Kamau & 9 Others v Aeolus Kenya Limited & 9 Others*¹⁶ the State argued that since the Kinangop Wind Power Project was a “green project” in tandem with low carbon development pathway of the country, environmental impact assessment on climate impacts was unnecessary and that the project had immense economic benefits to the country. The court in rejecting this perspective, stated that it does not matter whether a project is green or not, it must be implemented in conformity with the country’s environmental laws. The court insisted that it will not overlook the process allowing the project to ensure that the project does not exacerbate climate change. It was the court’s view that all persons had a higher mandate to ensure that the environment is protected for the current and future generations. It is typical for states to be preoccupied with economic progress without considering impacts of its projects on climate change. Therefore, courts and environmental tribunals must remain vigilant to protect the environment and to have clean development as envisaged under the Kyoto Protocol.¹⁷

While NEMA has the mandate of issuing emissions licenses to businesses,¹⁸ the factors to consider before issuance of such licenses do not include the possible effects of the emissions on climate change.¹⁹ This gap creates a likelihood of businesses obtaining emissions licenses that do not take in to account the impact of their emissions on climate change, hence failing to protect children against child rights violations by businesses.

4.2.3 The Climate Change Act

The object of the Climate Change Act is to avail a regulatory framework that promotes response to climate change and actions to achieve development anchored on low carbon.”²⁰ The Act defines “intergenerational equity” to mean equity between present and future generations and equity within this generation.²¹ An important purpose of the Act include

¹⁶ [2016] e KLR.

¹⁷ Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 10th December 1997, entered in to force 16 February 2005) 37 ILM 22 (1998).

¹⁸ Section 80 of EMCA

¹⁹ *Ibid.*, Section 81

²⁰ Preamble to the Climate Change Act No. 11 of 2016.

²¹ *Ibid.*, Section 2.

its application by the national and devolved governments in the entire economy and to mainstream intergenerational and gender equity in all aspects of climate change responses.²² This means that climate change responses must be responsive to child rights as well as the rights of succeeding generations. However, there are no measures in the Act or the National Climate Change Action Plan for the implementation of intergenerational equity.

Besides, the Act provides for facilitation of capacity building for public participation in climate change responses, by consultation, representation and creating awareness, access to information²³ and integration of sustainable development in planning and decision making in climate actions.²⁴ It means that the capacity of all stakeholders must be developed to enhance meaningful participation in climate change responses. However, children are not described as stakeholders to be included in public participation.

In implementing the Act, state officers and state organs are obligated by the Act to take in to account the guiding principles, which include the national values and principles of governance under Article 10 of the Constitution.²⁵ These include; human rights, equity, people's participation, equality, together with sustainable development. Other important guiding principle for state officers and state organs in discharging their functions is to be guided by the guiding values of low carbon climate change resilience and development to guarantee equity and social inclusion where benefits, effort as well as costs are applied to address disparities, vulnerabilities, special needs, capabilities, and responsibilities.²⁶ This means that children who are the biggest group among those most exposed to climate change are entitled to reasonable allocation of effort and benefits in implementing the Act to protect their rights, yet there are no mechanisms for actualization of this provision.

The National Climate Change Council (NCCC) is established in the Act and comprises of the Cabinet Secretaries for Environment, Energy, National Treasury, Economic planning,

²² Ibid., Section 3 (2) (e).

²³ Ibid., Section 3 (2) (h).

²⁴ Ibid., Section 3 (2) (k).

²⁵ Ibid., Section 4 (2) (a).

²⁶ Ibid., Section 4 (2) (d).

civil society representative, Council of governors chairperson, a representative of the academia, private sector representative, marginalized community representative, besides the President and Deputy President.²⁷ While the inclusion in the NCCC of the representative of the marginalized community is a positive step, the non-inclusion of the Cabinet Secretaries for children affairs, Cabinet secretaries for health as well as education, is a step backwards considering that the Council is the highest institution in climate change governance. Therefore, there is no child representation in climate governance.

One of the functions of the Directorate created by the Act is to harmonize execution of gender and intergenerational climate change learning and consultation at both levels of government.²⁸ The Act has put in place an institutional framework that adopts a model that mainstreams climate change implementation.²⁹ It also provides for embedding climate change in to the country's education curricula.³⁰ This is significant in recognizing the right of children to access climate information and enhancing child capacity in climate change adaptation. The Act fails to give guidelines on what should inform the content of the curricula, which is a gap in terms of pointing out the objective of teaching climate change in school.

The requirement for public participation and access to information in the Climate Change Act³¹ does not mention children as part of those to be considered in public participation in preparation of programmes, laws and policies concerning climate change. The proposed Public Participation Bill 2019 does not help either as it only obligates state organs or public offices to ensure information on public participation is fashioned to meet the needs of disabled persons, older members of the society and the less educated citizens and may include braille and local languages. Conspicuously missing from this list are children, because to enable them participate in climate change conversations they need child-friendly easy to read material. The Draft Regulations for Public Participation Consultations

²⁷ Ibid., Section 7.

²⁸ Ibid., Section 9 (8) (f).

²⁹ Robert Kibugi, *Political Economy of climate change interventions in Kenya; Who benefits and who loses?* (2018) Policy Brief, Friedrich Ebert Stiftung.

³⁰ Section 21 (1) of the Climate Change Act.

³¹ Ibid., Section 24.

and Access to Climate Change Information, defines special interest groups who must be reached to include women, the youth, persons living with disabilities and marginalized and minority groups and communities.³² The omission of children from this list violates their right to participate in climate governance.

While the Act provides for climate duties for private entities which would place duties on businesses, it fails to provide for proper State regulation of businesses for the sake of protecting children. Businesses contribute to climate change in terms of emission of greenhouse gases, hence they need regulation.

4.3 National Climate Change Policy Framework and the best interests of the child

4.3.1 Vision 2030

Kenya's Vision 2030 is a policy which was launched in 2008 as "a vehicle for accelerating Kenya's transformation in to a rapidly industrializing middle income nation by the year 2030."³³ The objective of the Vision was to transform the country into a "newly industrializing, middle income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment."³⁴ The Vision has three pillars, namely; economic, social and political pillars. Under the social pillar, the Vision recognizes that about 42% of the country's GDP is derived from sectors anchored on natural resources like water, energy, agriculture, mining and tourism. It advocates for environmental conservation to safeguard environmental assets. It also calls for proactive management of the environment to preempt disasters like global warming, droughts and floods. It takes note of the likelihood of development projects adversely impacting on the environment and calls for effective effluent management.

³² Regulation 21 of the Draft Regulations for Public Participation Consultations and Access to Climate Change Information, 2021.

³³ Government of Kenya, 'Vision 2030: A Globally Competitive and Prosperous Kenya' (2008) Ministry of Economic Planning and Development, Nairobi, Kenya.

³⁴ Ibid.

The vision mentions climate change in passing and states that four community adaptation programmes were implemented. Therefore, the vision lacks adequate provisions on climate change, and although children are mentioned, there is no nexus drawn between children and climate change.

The failure of Vision 2030 to address climate change is noted in the country's National Climate Change Action Plan. Therefore, by merely focusing on the economic, social and political agenda, the Vision did not adequately address environmental concerns, leave alone climate change and child rights.³⁵

4.3.2 National Climate Change Response Strategy (NCCRS) 2010

The initial climate change national policy document in Kenya was the National Climate Change Response Strategy 2010, which acknowledged the reality of the climate change adverse consequences in Kenya by highlighting proof of climate change results on the economy and proposing adaptation and mitigation measures.³⁶ These impacts are both direct and indirect which comprise temperature increase, change in rainfall patterns, droughts, floods, crop failures, food insecurity, biodiversity loss and diseases like malaria, cholera and influenza.³⁷

The strategy pointed out Vision 2030's failure to problematize climate change consequences on Kenya's development and its vulnerability and noted that there is a pressing obligation to address these adverse consequences of climate change.³⁸ This Strategy had a primary aim of integrating both adaptation and mitigation actions in the country's development by mainstreaming climate change in the entire economy to achieve "climate-smart development."³⁹

³⁵ Ibid.

³⁶ Government of Kenya, 'National Climate Change Response Strategy' (2010) Ministry of Environment and Forestry, Nairobi, Kenya.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

In terms of resource mobilization, some of the areas of focus are education, children, social development and gender. The strategy proposes curriculum review to embed climate education. This is key in building the capacity of children in adaptation and mitigation and access to information to enable them make relevant contribution as regards climate discourse within the country.

4.3.3 National Climate Change Action Plan(NCCAP) 2013-2017

In 2013, Kenya adopted the National Climate Change Action Plan 2013-2017.⁴⁰ This Plan noted the country's risk to climate change and made a case for prioritization of adaptation, resilience building and enhancing adaptive capacity and implementing mitigation action.⁴¹ The Plan took forward the implementation of the NCCRS by proposing a pathway development founded on low carbon coupled with robust policy and regulatory framework. The NCCAP noted among other issues that, development anchored on low carbon has potential of several benefits including improving lives of those who are poor and the vulnerable like children and women.⁴²

It will be noted however that in terms of the Plan's perspective on vulnerability indicators, gender and household income are the primary focus. Age has not been given much significance, hence it sidelined children as a priority group facing vulnerability.⁴³ Children's needs were given more prominence under the proposal for climate education. This Plan recommends integration of climate education in the country's national curricula at all levels so as to give children information necessary for increasing their future capacities for mitigation together with adaptation.⁴⁴

⁴⁰ Government of Kenya, 'National Climate Change Response Action Plan 2013-2017' (2013) Ministry of Environment and Forestry, Nairobi, Kenya.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

4.3.4 The National Climate Change Action Plan (NCCAP) 2018-2022

The Climate Change Act places a duty on the Cabinet Secretary for climate change matters, in consultation with stakeholders, to formulate the NCCAP which is approved by the Council. The NCCAP must consider the entire economy and make provision for measures to integrate the NCCAP in to the economy sectors.⁴⁵ The State is obligated to formulate five-year Action Plans to address mitigation as well as adaptation programmes that are sector specific. The NCCAP contains measures that would ensure adaptation, mitigation, achieving low carbon climate resilience, sustainable development, mainstreaming programmes that reduce disaster risk in development, identifying strategic areas of the country's infrastructure that need to be climate-proofed, and timeframes to realize expected results and establish needed actions as promoters of climate change response among other functions.⁴⁶

The formulation of the NCCAP is informed by among other matters, the fiscal circumstances, and the likely consequences of programmes and actions on the marginalized and vulnerable groups.⁴⁷

Since Kenya is merely accountable for under one percent of global greenhouse gas emissions, the country has prioritized adaptation over mitigation measures as local communities mainly grapple with severe droughts, flash floods, shifting rain patterns and rising temperatures. In that regard therefore, the NCCAP 2018-2022 provides mechanisms and measures geared towards achieving development anchored on a low carbon in a way that focuses on adaptation.

The NCCAP 2018-2022 is guided by four important principles⁴⁸ which may be of significant assistance in implementing the CCA in a manner that protects children's best interests. The first principle is responsiveness.⁴⁹ Implementation of NCCAP should be in

⁴⁵ Section 13 (4) of the Climate Change Act.

⁴⁶ Ibid., Section 13 (3).

⁴⁷ Ibid., Section 13 (5) (d)

⁴⁸ Ibid.

⁴⁹ Ibid.

a way that answers to the real needs for the nation's mitigation and adaptation aimed at lessening devastating consequences as well as minimizing the triggers of climate change. This is important because the real needs of a significant group like children must be considered in the implementation of NCCAP.⁵⁰

Secondly, the principle of Equity and social inclusion must be observed.⁵¹ This means that the implementation of the NCCAP must take in to account needs of vulnerable persons like children. Stakeholder consultation and cooperation is another important principle. This calls for the implementation of the adaptive and mitigation actions through consultations by governments at both levels of governance as well as public and private sector including representatives of children offices mandated to protect children. Lastly, the principle of fairness must be observed to ensure no one sector obtains advantage from climate actions by government.⁵²

The NCCAP has pointed out that environmental impacts that result from climate change are droughts, acidification, increasing sea temperatures, rising sea levels, declining glaciers on Mount Kenya, desertification, deforestation, landslides, forest fires among other effects.

The National Climate Change Action Plan 2018-2022 builds on the 2013-2017 Action Plan and is aimed at furthering Kenya's sustainable development by availing measures to attain development based on low carbon in a way that puts preeminence on adaptation.⁵³ Areas given priority include water, health, manufacturing, the blue economy, human settlements, wildlife and tourism, forestry, transport, sanitation, and energy.⁵⁴

Adaptation is defined to mean "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects which moderates harm or exploits

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Government of Kenya, 'National Climate Change Action Plan 2018-2022' (2018) Ministry of Environment and Forestry, Nairobi, Kenya.

⁵⁴ Ibid.

beneficial opportunities.”⁵⁵ The mechanisms provided in the NCCAP and NAP are meant to focus on adaptation to attain development anchored on a low carbon climate resilience.⁵⁶ The State has set up mechanisms to bring down vulnerability as well as build capacity to adapt with a focus on actions to reduce disasters, humanitarian action as well as readiness and response actions.⁵⁷ In that regard, the National Disaster Management Authority is mandated to play a key role in ending drought emergencies, establishing a National Drought Emergency Fund and developing actions in the ASALs to assist those who are most vulnerable during droughts.⁵⁸

Development partners are expected to focus on agriculture sector adaptation in many aspects including irrigation and sustainable land management.⁵⁹

The climate action strategy applied in Kenya is the adoption of sectoral adaptive actions in the entire economy. In so far as devolution is concerned, the establishment of County Climate Change Funds, is meant for investment funding to lessen climate risk as well as attain adaptation priorities.⁶⁰

The adaptation actions provided under Kenya’s climate change regime are meant for the general population as no actions are specifically formulated for child protection. In addition, no assessment of the adaptation actions has been done to check their impact on child rights. Mitigation means “efforts that seek to prevent or slow down the increase of atmospheric greenhouse gas concentrations by limiting current or future emissions and enhancing potential sinks for greenhouse gases.”⁶¹ Mitigation actions in Kenya are intended for GHG emission reduction. Kenya has prioritized mitigation actions embedded with adaptation and sustainable development benefits.⁶² For instance, afforestation which not only acts as

⁵⁵ Section 2 of the Climate Change Act.

⁵⁶ Government of Kenya, National Climate Change Action Plan (Kenya) 2018-2022 (2018) Ministry of Environment and Forestry Nairobi, Kenya.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Section 2 of the Climate Change Act No. 11 of 2016.

⁶² Government of Kenya, ‘National Climate Change Action Plan (Kenya) 2018-2022’ (2018) Ministry of Environment and Forestry, Nairobi, Kenya.

carbon sinks but also as sources of livelihoods. In addition, using geothermal energy to generate electricity has not only lowered GHG emissions, but also reduced the sector's climate change exposure.

In mitigation, the private sector has not remained behind. Currently, companies are generating renewable energy including solar and biogas.⁶³ The Mombasa-Nairobi Standard Gauge Railway is an incentive to transition freight from road to rail hence reducing emissions from trucks.⁶⁴ Kenya is involved in the Clean Development Mechanism which has led to the registration of 16 CDM projects in many departments including reforestation and hydropower. Kenya is now involved in carbon credit market and was the first African country to trade in carbon credits for sequestration of carbon within the soil.⁶⁵ The climate regime in Kenya has no mitigation actions that are child-focused or aimed at child rights protection.

Adaptation is prioritized in the NCCAP 2018-2022 because of devastating climate change consequences on vulnerable groups of society.⁶⁶ This Action Plan recognizes that vulnerable groups like women, children, youth, the elderly, marginalized and minority communities together with persons with disabilities, are severely injured by climate change. While referring to vulnerability, the policy acknowledges results of climate change on the enjoyment of child rights by noting that flooding in 2018 displaced over 145,000 children culminating in closure of over 700 schools.⁶⁷ This acknowledgement notwithstanding, the Action Plan fails to make recommendation for specific measures of adaptation and mitigation targeting children's best interests. The failure to make specific proposals to protect children is due to the fact that, among the long list of stakeholders involved in its formulation, apart from youth representatives, there was no representation for young

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

children. National and County governments work harmoniously in implementing the Action plan.⁶⁸

The Action Plan's definition of the vulnerable excludes children. It also lacks specific adaptation and mitigation actions aimed at child rights protection.

4.3.5 National Adaptation Plan 2015-2030

The Constitution of Kenya as well as Vision 2030 are the foundations upon which the National Adaptation Plan 2015-2030 is founded. It expands the Adaptation Technical Analysis Report (ATAR), NCCAP and NCCRS.⁶⁹ Its aim is for enhancing the country's capacity for adaptation and resilience by consolidating macro-level adaptation in respect to all sectors of the economy.⁷⁰ Basing on the realization that achieving sustainable development against a changing climate is a mirage, this Plan acknowledges that the goals for adaptation and development must complement each other. Therefore, the country's approach is to mainstream climate adaptation in national and county development planning, budgetary and implementation.⁷¹ This is in line with Africa's priority response of prioritizing adaptation and response as articulated by the 15thAMCEN.⁷²

While noting that major climate hazards are droughts, floods and sea level rise, the Adaptation Plan highlights the impacts of these hazards on the economy's sectors. Sectors for prioritized adaptation actions include infrastructure, agriculture, tourism, energy infrastructure, water, environment and sustainable livelihoods.⁷³

The Adaptation Plan recognizes that children are part of those most at risk to detrimental consequences of climate change. Hence, this Plan points out that climate shocks like drought affect children's ability to be kept in school and notes that detrimental results of

⁶⁸ Ibid.

⁶⁹ Government of Kenya, 'National Adaptation Plan 2015-2030' (2015) Ministry of Environment and Forestry, Nairobi, Kenya.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

climate change may lead families to divert household resources from education to food hence they are a threat to Kenya's educational goals.⁷⁴ The Plan's approach is from the perspective of the economy and not a child rights approach as it makes the proposal to climate proof infrastructure majorly on power lines, bridges, roads and water pipelines, ignoring child- centred infrastructure like the educational systems.

Kenya's NAP 2015-2030 aims at promoting climate resilience towards the country's achievement of Vision 2030⁷⁵ Its objectives include investment in national transformation, integrating adaptive actions into both levels of government development budgeting together with planning processes, enhancing public and private sector resilience and enhancing resilience of vulnerable persons to climate shocks by actions that lessens disaster risks and adaptation.⁷⁶ NAP has aligned itself with the country's Medium Term Plan (MTP) whereby adaptive programmes are represented within the MTP II sectors.⁷⁷ NAP recommends adaptive actions plus sub-actions at a macro-level in twenty sectors and recommends adaptation indicators at all levels.⁷⁸

Though the Adaptation Plan places an implementation role on KICD for incorporation of climate education in national curricula, it does not go beyond access to information and include other child protection measures like climate proofing school infrastructure and the entire education systems to ensure no child is unable to access education due to climate hazards. In addition, besides an attempt to protect education goals, the Adaptation Plan has no specific reference to other children rights like health, recreation, culture and protection from harm and violence.

While the Plan specifically states that its implementation must take in to account gender considerations, it has no similar lenses for child protection.

⁷⁴ Ibid.

⁷⁵ Government of Kenya, National Adaptation Plan 2015-2030 (2015) Ministry of Environment and Forestry, Nairobi, Kenya.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid

4.3.6 Nationally determined Contributions (NDCs)

Although the realization of Kenya's NDC under the Paris Agreement largely depends on assistance from the developed world as regards, investment, finance, capacity development and technology transfer for the country's commitment is to lessen by 30% GHG emissions by the year 2030.⁷⁹ Besides, the country aims at achieving climate change resilience in achieving Vision 2030 targets by implementing adaptation actions and incorporating climate change in to the Medium Term Plans.⁸⁰

Kenya's INDC submitted on 28th December 2016, presented the country's obligation to COP 19 and 20 decisions and recognized vulnerable groups among them children as a group for priority adaptation actions by committing to strengthen their adaptive capacity by insurance schemes and social protection.⁸¹ The updated NDC was reviewed by committing to bring down by 32% emissions of GHG by 2030 as compared to the BAU scenario, in tandem with the Kenya's sustainable development agenda and its circumstances.⁸² It seeks to get 87% international support and provide domestic support of 13% to meet this target.

The NDC does not state specific adaptation and mitigation measures aimed at protecting children's best interests or rights.

4.4 National climate change institutional framework and the best interests of the child

4.4.1 National Environmental Management Authority (NEMA)

The Authority has mandate to act for the Council, to monitor as well as enforce adherence for climate change actions by embedding climate risk and exposure evaluation in to all forms of assessments.⁸³ This is an important tool in the regulation of private entities in the

⁷⁹ Government of Kenya, 'Nationally Determined Contribution' (2015) Ministry of Environment and Forestry, Nairobi, Kenya.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid., Section 20.

performance of their climate change duties. This is important in child rights protection as businesses are regulated so as to avoid global warming from greenhouse gas emissions from businesses.

NEMA is mandated under the Climate Change Act⁸⁴ to act on behalf of the National Climate Change Council for purposes of monitoring compliance with climate change duties, of both public and private entities. However, the Authority faces various challenges including insufficient funds, inadequate staff and resources and poor coordination between its departments.⁸⁵ Consequently, this inadequacy adversely impacts on its efficiency.

4.4.2 National Climate Change Council

The National Climate Change Council is mandated to provide an overarching climate change coordination mechanism. Some of its functions are to endorse and supervise implementation of NCCAP, ensure governments at both levels mainstream climate change functions, and administer the Climate Change Fund.⁸⁶

The Council is chaired by the President who is deputized by the Deputy President.⁸⁷ Nine members together with the President and His Deputy constitute the Council.⁸⁸ These are Cabinet Secretaries (CS) in charge climate change affairs, energy, National Treasury, economic planning together with the chairperson of council of governors, civil society representative, marginalized community representative, private sector representative and a representative of the academia. It is instructive to note that though children form the biggest group of those who are at great risk to consequences of climate change, they have no representation at the Council, and the Cabinet Secretary for children matters, health and education are not members of the Council. This gap has serious ramifications to the detriment of the best interests of the child as children's concerns, unique needs and rights

⁸⁴ Section 17 of the Climate Change Act No. 11 of 2016.

⁸⁵ Tialal Leparan, 'Challenges Facing the Implementation of Rapid Results Initiative Strategy at National Environment Management Authority.' (2010) A Thesis in Master of Business Administration, University of Nairobi.

⁸⁶ Section 6 of the Climate Change Act No. 11 of 2016.

⁸⁷ Ibid., Section 5.

⁸⁸ Ibid., Section 7.

are not mainstreamed into climate change policies. Besides, there has been contention on representation on the Council as manifested by the tussle in *Republic vs. National Assembly & 5 Others Ex parte Greenbelt Movement & 2 Others*.⁸⁹

4.4.3 Climate Change Directorate

Reporting to the CS, the Directorate is headed by a Director of Climate Change and is the lead State agency for climate change plans and actions for purposes of ensuring operational coordination.⁹⁰ While the Director is mandated to advise the CS on governance aspects of climate change matters, the Directorate functions on behalf of the Council.⁹¹

The Directorate plays a key role in the implementation of the Climate Change Act, by providing analytical assistance on climate change to state departments and devolved units, and providing technical support to county governments.⁹² The role of the Directorate in the implementation of intergenerational equity is not clarified and therefore even though it is an important role for child protection, the same remains vague on the mechanisms of implementation.

4.4.4 National Government (Including Ministry of Environment and Cabinet secretary (CS))

The sectoral agencies of the national government are obligated under the Climate Change Act, to incorporate the NCCAP in to all sectoral action plans and strategies.⁹³ To accomplish this mandate, they should each designate a climate change unit endowed with sufficient resources and staff to synchronize mainstreaming of NCCAP and other climate change duties into sectoral strategies for implementation.⁹⁴ There is no provision in the Climate Change Act that compels the national government sectoral agencies to take into

⁸⁹ [2018] eKLR

⁹⁰ Ibid., Section 9 (2) and (3)

⁹¹ Ibid., Section 9 (6) and (7)

⁹² Ibid., Section 9 (8)

⁹³ Ibid., Section 3 (1)

⁹⁴ Ibid.

account the best interests of the child while mainstreaming the Action Plan in to sectoral plans.

The CS for environment is mandated to oversee and steer governance and implementation of the Climate Change Act.⁹⁵ They formulate climate change policy, strategy, NCCAP and the strategy on climate change and implementation programme in respect to gender and intergenerational responsive public education and awareness⁹⁶ In addition, in consultation with the CS for foreign affairs, he/she coordinates all negotiations in respect of climate change matters, provides expert support on climate change responses to devolved units of governance as when need arises and reports to parliament on the State's compliance with national and international obligations together with achievements made towards development anchored on low carbon.⁹⁷

Apart from working in consultation with the CS for foreign affairs, the CS for climate affairs is not required under the Climate Change regime to consult the CSs for children matters, education and health. This state of affairs creates a gap in the protection of children's best interests.

4.4.5 County Governments

County governments are important implementers of the Climate Change Act. They incorporate and mainstream climate change actions and duties and the NCCAP into their various sectors.⁹⁸ Besides, while formulating, revising and endorsing County Integrated Development Plans (CIDPs) and County Sectoral Plans (CSPs), county governments mainstream implementation of the NCCAP taking into account national and county priorities.⁹⁹ In line with the Constitution, devolved units are mandated to enact climate change legislations so as to further define implementation of their obligations.¹⁰⁰ To this

⁹⁵ Section 8 of the Climate Change Act No. 11 of 2016.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid., Section 19 (1)

⁹⁹ Ibid., Section 19(2)

¹⁰⁰ Ibid., Section 10.

end, several county governments in Kenya have enacted Climate Change laws. Through the devolved system of governance, Kenya has pioneered a climate change governance system that has increased local climate action.¹⁰¹ This is implemented through County Climate Change Funds whose purpose is to finance climate projects identified and prioritized by local communities including mitigation measures.¹⁰² Just like their counterpart at the national level, county governments are not under any legal obligation to mainstream the best interests of children into their implementation of climate actions.

4.5 Conclusion

This chapter has analyzed the national climate change statutes, policies, strategies, programmes and institutions. It is clear from the analysis, that Kenya's climate change regime does not address the unique needs and rights of children. The formulation and implementation of these policies have not considered best interests of the child, and therefore, if the status quo is not addressed, the State will not have discharged its obligation towards protection of child rights.¹⁰³

¹⁰¹ Orindi Victor and Others, 'The County Climate Change Funds in Kenya: Real Practice in Collaborative Climate Action' Adelphi (2020).

¹⁰² Ibid.

¹⁰³ Ibid.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The key objective of this research project was to evaluate the extent to which best interests of the child principle is incorporated in the climate change regime in Kenya. Children have the greatest vulnerability to climate change which adversely impacts the enjoyment of their rights, yet their best interests are often ignored in the formulation and implementation of climate change laws, policies and actions. The United Nations Convention on the Rights of the Child (UNCRC),¹ the African Charter on the Rights and Welfare of the Child (ACRWC),² the Constitution of Kenya 2010 and the Children Act³ uphold the principle of the best interests of the child in all matters touching children.

Climate change is the greatest global threat. Efforts to address climate change have been made at the international, regional, sub-regional, national, and local levels. The key instrument to address climate change is the United Nations Framework Convention on Climate Change together with the Kyoto Protocol and the Paris Agreement, which have been domesticated by states, including Kenya as a response to climate change. The literature review pointed out that the gap that exists in literature is the fact that the interface between climate change and the best interests of the child principle has not been conceptualized with precision and hence the content and design of climate change laws, policies, actions and programmes in Kenya are not responsive to child rights, and do not bear the consideration of the best interests of the child. This is against the backdrop that the best interests of the child must be reflected in every law and policy adopted as required

¹ United Nations Convention on the Rights of the Child (Adopted 20 November 1989, entered in to force 2 September 1990) 1577 UNTS 3.

² African Charter on the Rights and Welfare of the Child; OAU Doc. CAB/LEG/24.9/49 (1990).

³ No. 8 of 2001.

under the UN Convention on the Rights of the Child, UNCRC General Comment Number 14 (2013), as well as Article 53 of the Constitution of Kenya.

The problem statement of the study was that, though the climate change regime in Kenya provides for a climate change response framework, there is no provision within that framework to favour the best interests of the child, which is contrary to the Constitution of Kenya and the principle of intergenerational equity. This jeopardizes children rights.

The justification of the study was that children constitute the highest population among the most vulnerable groups, hence child protection in climate governance is a frontloading strategy that guarantees higher and better returns on public investment. This study has bridged the gap created in the interface of climate change and child rights. It has also developed proposals for climate governance tempered with a child rights approach.

The research generated four research objectives, namely, to highlight the interface between climate change and best interests of the child principle; to assess the extent to which best interests of the child have been incorporated in the international climate change regime; to analyse the extent to which best interests of the child have been incorporated in Kenya's climate change regime; and to recommend how best interests of the child can be incorporated in Kenya's climate change regime. Research questions were drawn from the research objectives stated above.

The study concludes that the interface between climate change and best interests of the child call for incorporation of the best interests of the child in the climate change regime, and that both the international and Kenya's climate change regimes have not incorporated best interests of the child.

The study found that the United Nations Framework Convention on Climate Change,⁴ Kyoto Protocol⁵ and the Paris Agreement⁶ have not incorporated best interests of the child. Although the Paris Agreement mentions child rights in the Preamble, it lacks credible state

⁴ United Nations Framework Convention on Climate Change; 1771 UNTS 107, 165.

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 10th December 1997, entered in to force 16 February 2005) 37 ILM 22 (1998).

⁶ Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec.12, 2015).

commitments under its NDCs mechanism. The principle of common but differentiated responsibilities, under the UNFCCC, has received different interpretations from different countries resulting in ineffective implementation of the same. The legal obligation on developed countries, for provision of financial resources and technology transfer to developing countries has been viewed as a call to charity and not as a legal obligation, resulting in lack of capacity in poor countries for adaptation as well as mitigation. If developing countries lack capacity for adaptation and mitigation for the general population, then children are exposed to greater risk due to climate change. Agenda 21⁷ has child sensitive targets which safeguard children rights. The Sendai Framework for Disaster Risk Reduction,⁸ does not have disaster risk reduction measures that specifically respond to the unique needs of children.

As regards incorporation of best interests of the child in Kenya's national climate change regime, the study found that the Constitution of Kenya protects the best interest of the child in every matter that concerns children. In addition, the Constitution generally protects every person's right to a clean and healthy environment; which means that it lacks a child rights based approach in environmental rights protection.

The Climate Change Act⁹ provides for mainstreaming intergenerational equity and social inclusion, which appears to support intragenerational equity, yet no mechanisms have been provided for the actualization of the same. It also provides for integration of climate change in national curricula, but fails to provide guidance on what the content of the curricula should achieve. The Act's failure to recognize children as a vulnerable group whose interests should inform the formulation of the NCCAP, works against children's best interests. The NCCAP 2018-2022¹⁰ has excluded children in its list of the vulnerable groups and failed to espouse child-centred adaptation, mitigation and disaster risk

⁷ United Nations Conference on Environment and Development (1992) Agenda 21, Rio Declaration, Forest Principles [New York] United Nations.

⁸ Sendai Framework for Disaster Risk Reduction 2015-2030 In: UN World Conference on Disaster Risk Reduction, 2015 March 14-18, Sendai, Japan. Geneva: United Nations for Disaster Risk Reduction, 2015.

⁹ No 11 of 2016 Laws of Kenya.

¹⁰ Government of Kenya, 'National Climate Change Action Plan 2018-2022' (2018) Ministry of Environment and Forestry, Nairobi, Kenya.

management measures. The study also found that best interests of the child have not been incorporated in the Environmental Management and Coordination Act (EMCA).¹¹ In so far as Kenya's Vision 2030¹² is concerned, in so far as it focuses on its three pillars, namely, economic, social and political, it fails to adequately provide for environmental protection for the general population, leave alone children.

Further, the study found that implementers of the climate change regime have no specific child-sensitive actions meant to protect best interests of the child. There is no representation of children's interests on the National Climate Change Council. And the Kenya Institute of Curriculum Development has delayed in integration of climate change in national curricula.

Consequences of the failure to incorporate best interests of the child in climate change actions are serious violations of children rights. These consequences are manifested in poverty, child labour, malnutrition, early marriages, school absenteeism, climate-related diseases and unregulated businesses that do not respect children's right to a safe environment.

At the end of the study, it is apparent that the hypothesis, that lack of incorporation of best interests of the child in Kenya's climate change regime is attributable to non-recognition and non-appreciation of children as a unique group of individuals whose interests must be considered in formulation and implementation of climate change laws, policies, actions and programmes, has been confirmed.

5.2 Recommendations

Arising from the above study findings as well as conclusion, the following recommendations are made in order to have the best interests of the child principle addressed in Kenya's climate change regime.

¹¹ Environmental Management and Coordination Act of 1999 Laws of Kenya.

¹² Government of Kenya, Vision 2030: A Globally competitive and Prosperous Kenya, (2008)

5.2.1 Short term

1. Section 3 of the Environmental Management and Co-ordination Act (EMCA) provides for protection of every person's right to a clean and healthy environment. This generalization does not take into account the unique needs of children so as to protect their environmental rights within the context of obligations placed on the State by the United Nations Convention on the Rights of the Child. Therefore, section 3 of EMCA should be amended and expanded so as to include provisions that would guarantee child rights protection in respect to children's entitlement to a clean and healthy environment.
2. Sections 38 and 40 of EMCA provides for what ought to be included in the National Environment Action Plan and the County Environment Action Plans respectively. However, these provisions fail to include child rights protection as one of the matters that should be included in the two Action Plans. It is necessary that child protection is entrenched in the two Action Plans. Hence, among the matters that the respective Action Plans should take into account, should include child rights and the best interests of the child.
3. Global warming is mainly contributed to, by business who emit GHGs into the atmosphere. Section 81 of EMCA makes provision for the factors to be considered before issuance of an emissions license by the National Environment Management Authority to a business or industry. None of those factors touch on child rights, yet businesses owe horizontal constitutional duties to children to ensure they do not contribute to climate change. Therefore, section 81 ought to be amended so that factors to consider before issuance of an emission licence to any business should include the business' emissions on child rights to a clean and healthy environment.
4. The Climate Change Act (CCA), should be reviewed to allow it to be more deliberate and specific on its objects and purposes that touch on children. Section 3(2)(e), which provides for mainstreaming of intergenerational equity in climate change responses, should be expanded to include specific mechanisms for its actualization.

5. The requirement for public participation and access to information in section 24 of the Climate Change Act should include children as part of those to be considered in public participation in preparation of programmes, laws and policies concerning climate change.
6. There is need to ensure there is representation of children's voices at the National Climate Change Council. Therefore, section 7 of the Climate Change Act (CCA) ought to be amended to include Cabinet Secretaries in charge of children matters, education and health, in the Council's membership.
7. In formulating the National Climate Change Action Plan (NCCAP), the Cabinet Secretary should be informed by, among other factors, the likely impact of the Action Plans, strategies and policies on child rights. Therefore, section 13 (5) of the CCA should be amended to include the impacts of Action Plans, strategies and policies on child rights as one of the factors that inform the formulation of the NCCAP.
8. The Children Act ought to be amended to provide for child environmental rights protection.
9. The NCCAP should define with clarity the duties of the Climate Change Directorate in its role of implementation of intergenerational equity so as to protect children.
10. The adoption of the NCCAP that happens every five years should be done through a public participation process that includes children and, the NCCAP's definition of the vulnerable, should include children.
11. The National Climate Change Council in consultation with the Cabinet Secretary for climate change matters, may impose climate change duties on private entities. This is provided for, in section 16 of the Climate Change Act, and it creates duties without creating corresponding sanctions for noncompliance. Many private entities especially those engaged in fossil-fuel intensive ventures are ordinarily politically connected with substantial economic muscle. Without sanctions for default in the climate change

obligations, those obligations will remain mere suggestions. There is therefore, need to introduce sanctions for noncompliance with climate duties for private actors.

12. While integrating climate education in the national curricula is desirable, it is important that the objective of such education is clarified so that there is proper guidance to the curricula developers. Climate education should be designed in a manner that will enhance capacities of children for adaptation and mitigation and equip them with the relevant skills for mitigation as well as adaptation, now and in future. Integration of climate change education is not an end in itself. The content must be examined and well thought out to cover the relevant aspects of climate change like disaster response (what to do in the event of disasters), disaster preparedness specific to every region (including school safety actions and school risk management), environmental challenges (including the connection between climate crisis and biodiversity loss and the ozone layer) as well as solutions to climate crisis both at home, at school and at work.¹³ Therefore, section 21 of the CCA should be amended by including a guideline on the objective, content and design of the curricula.
13. There is need to fast-track the integration of climate change education in national curricula as this will build children's adaptive capacities and enhance their engagement in mitigation activities. This is in view of the fact that Draft Guidelines for Mainstreaming Climate Change in curricula at all Levels of Education and Training have already been formulated.¹⁴ Further, it is necessary that the Draft National Climate Change Learning Strategy 2021-2031¹⁵ is finalized.
14. Capacity building is needed for parliamentarians and other decision-makers to recognize child rights in the formulation of climate related laws and policies and to value children's voices in decision making.

¹³ UNICEF (2021).

¹⁴ Government of Kenya, 'Draft Guidelines for Mainstreaming Climate Change in curricula at all Levels of Education and Training' (2020) Ministry of Environment and Forestry Nairobi, Kenya.

¹⁵ Government of Kenya, 'Kenya Climate Change Learning Strategy' (2021) Ministry of Environment and Forestry Nairobi, Kenya.

15. The State should provide platforms that would enable child participation in climate governance, besides capacity building children to enable them make meaningful participation in climate governance.

5.2.2 Medium-term

1. Article 42 of the Constitution provides for protection of every person's right to a clean and healthy environment. This generalization does not take into account the unique needs of children so as to protect their environmental rights within the context of obligations placed on the State by the UNCRC. Therefore, the Constitution should be amended and expanded so as to include provisions that would guarantee child rights protection in respect to children's entitlement to a clean and healthy environment, addressing their unique needs.
2. In terms of implementing Vision 2030, the State should incorporate the environmental pillar and more specifically, climate change and child rights protection to ensure that economic, political and social development integrates the child environmental rights protection approach.
3. To protect child rights, there will be a cost element. Therefore, the NCCAP must have a child-focused budget for both adaptation and mitigation. The State should provide funds to take care of the child focused climate change adaptation and mitigation budget.

5.2.3 Long term

1. In implementation of the Climate Change Act, it is important that mainstreaming intergenerational equity in all aspects of climate change responses, is taken seriously and applied deliberately to entrench best interests of the child principle in all climate change policies, actions, responses and programmes.

4. Enhancing equity and social inclusion in allocation of effort, costs and benefits in a manner that will ensure child rights protections should be actualized. There should be specific resources targeting child rights protection in climate actions and programmes as well as specific resources for vulnerable children including the disabled, children in marginalized and minority communities and in urban poor settlements.
5. Systems that guarantee child rights protection should be climate proofed and their resilience enhanced. Climate proofing the education system to guarantee access to the right to education will protect the best interests of the child principle. This includes climate proofing school buildings, routes and bridges to schools, providing school feeding programmes and key skills for children to handle disasters.
6. The State ought to ensure protection of social economic rights of vulnerable families to ensure food security and enhance the resilience of health systems.
7. The role of the judiciary in climate justice for children is critical. There is need for judicial interventions to uphold environmental rights of children. children's right to be protected against climate change impacts should be upheld by the courts as a right to life.¹⁶ Courts should facilitate the right to access climate justice for children, by removing legal bottlenecks like legal fees and other barriers. The capacity of judges and judicial officers in regard to the protection of child rights in the context of climate change should continually be enhanced. Fashioning effective remedies in climate litigation by and for children should be mastered by the courts.
8. Creation of public awareness of the intersection between climate change and child rights is important in entrenching child rights protection in climate governance.

5.3 Further areas of research

Further research is needed in the following areas;

¹⁶ See *Peter Waweru v Republic* [2006] e KLR

1. Impact of statutory disaster risk management tools on the right to education.
2. Effectiveness of County Climate Change legislations in child rights protection.
3. Extend of child protection by mitigation activities against climate variability in Kenya.

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