

UNIVERSITY OF NAIROBI
SCHOOL OF LAW
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**CRIMINAL LIABILITY OF CORPORATIONS FOR UNLAWFUL DISPOSAL
OF HAZARDOUS WASTE**

A thesis submitted in partial fulfillment of the requirements for the award of the degree of
Master of Laws (LLM) of the University of Nairobi

ABENE LORINE NALEMBA

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SUPERVISOR

PROF. ALBERT MUMMA

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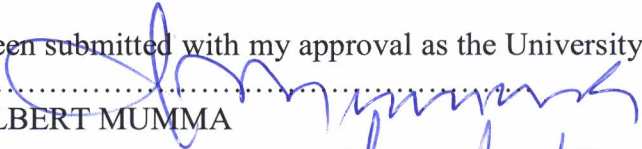


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DECLARATION

I Abene Lorine Nalembe the undersigned hereby declare that this is my original work and that it has not been presented in any other university or institution. Where other works have been used, reference have been provided. In this regard, it is hereby presented in partial fulfillment of the requirements for the award of the LLM Degree in Environment and Natural Resources Law.

Signature: .....
ABENE LORINE NALEMBA

This thesis has been submitted with my approval as the University of Nairobi Supervisor.
Signature: .....
PROFESSOR ALBERT MUMMA



DEDICATION

I dedicate this work to my children, David and Luca. May you never give up on your dreams.

ACKNOWLEDGEMENT

I would like to express my gratitude to my supervisor, Prof Albert Mumma and my reader Doctor Robert Kibugi. Their brilliant advice and input made it possible for me to finish this thesis on time.

Much appreciation to my parents, for believing in me even when I didn't.
To the Almighty God, the giver of perfect gifts.

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CHAPTER ONE

1.0 INTRODUCTION

Corporations are important both at the local and international level because they not only create employment, but also drive the economy. However, there are some corporations that pose a great risk to human health and the environment due to the activities they engage in. A notable example are those corporations, which generate municipal, industrial, bio medical waste, e waste and agricultural waste. These corporations if left unregulated can dispose hazardous waste to the environment.

Hazardous waste according to the Black's Law Dictionary, has been defined as "waste which because of its physical, chemical or infectious characteristics may pose substantial or potential harm to human health or the environment".¹ The effect of the toxic substance emitted from the disposal of this waste can affect the environment and human health.² To prevent the effect of this waste, it is recommended that safety measures need to be taken by the waste generators. Corporations therefore need to adopt precautionary measures when disposing this waste or else they can be liable for harm. Liability can either be civil or criminal. This project focuses on criminal liability of corporations for unlawful disposal of waste. This is because, criminal penalties are more deterrent than civil remedies.

The decision in *Salomon v Salomon*³ opined that a company is a separate legal entity distinct from its shareholders.⁴ This decision meant that a company could not be criminally liable for the acts of its shareholders. Over the years, the doctrine of corporate personality has developed.⁵ Under this doctrine, a corporation has been given a legal entity just like humans.⁶ The doctrine, suggests, a corporation can be prosecuted for crime.

Kenya being a common law country borrowed most of its laws from England.⁷ The applicable laws that were relevant in England remain relevant to Kenya as on the reception date.⁸ This means that some of the principles common law that apply in England should

¹ Bryan A Garner, *Black Law Dictionary* (9th Ed 2009) 1728.

² Acts UNEP, *The Making of a Framework Environmental Law in Kenya*, (Acts Press 2000) 12.

³ [1897] AC, 22HLA.

⁴ Susan Mc Laughlin, *Unlocking Company Law*, (1st Hoddler Education 2009) 68.

⁵ Zuhairan Ghadas, 'Real or Artificial? Jurisprudential Theories on Corporate Personality' (2007) 4(6) US-China Law Review

<https://vpn.uonbi.ac.ke/proxy/21794921/http://heinonline.org/HOL/Page?handle=hein.journals/uschinalrw4&div=59&start_page=6&collection=journals&set_as_cursor=6&men_tab=srchresults> accessed on 21st November, 2016

⁶ Ibid.

⁷ George Ochich, 'The Company as a Criminal: Comparative Examination of Some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008) 11(1) Kenya Law Journal, <<http://kenyalaw.org/kl/index.php?id=1919>> accessed on 24th November, 2016.

⁸ Ibid.

also apply in Kenya.⁹ In England, a corporation may be held criminally liable under; the principle of identification, vicarious liability and breach of statutory duty.¹⁰ Under the principle of identification, to prove mensrea, which is criminal intent, a corporation may be held liable if the prosecution is able to identify the persons within the company structure who are the directing mind and will of the company. Under the principle of vicarious liability, a corporation as an employer automatically becomes criminally liable for the acts done by its employees.¹¹ Finally under the principle of breach of statutory duty a corporation becomes criminally liable for offences if there is a statute that expressly makes a corporation liable.¹² These principles will later be discussed in detail.

In addition, to the above, Kenya has a comprehensive legal framework on hazardous waste. For example, Section 141 of the Environmental Management and Coordination Act provides for Offences relating to hazardous wastes. In the Act, a person who disposes hazardous material is guilty of an offence and shall, on conviction, be liable to a fine of not less than one million shillings, or to imprisonment for a term of not less than two years, or to both.

The Act further provides as follows;

When an offence against this Act, is committed by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence.¹³

It is hereby suggested that by virtue of section 141 and 145 of the Environmental Management and Coordination Act, a corporation in Kenya can be prosecuted for disposal of hazardous waste, through its directors or officers.

Internationally, several corporations have been sued for environmental crimes. A notable example is the Exxon Valdez case, where Exxon, being a corporation spent huge sums of money to settle both the civil and criminal charges that had been caused by the oil spill in Alaska.

⁹ Ibid.

¹⁰ Jacqueline Martin and Tony Storey, *Unlocking Criminal Law* (3rd Edition Hodder Education 2010) 162.

¹¹ Ibid 167.

¹² Ibid 168.

¹³ Ibid Section 145(1)

Locally, there has been a public outcry of the effects of industrial waste disposal by the residents who lived near Kel Chemicals in Thika and Webuye Paper Factory.¹⁴ Recently, the effect of unlawful hazardous disposal of waste was witnessed by the residents of Owino Uhuru slum, in Mombasa County.¹⁵ The effects of lead poisoning as per the Human Rights watch report was as follows;

Lead can interrupt the body's neurological, biological and cognitive functions. Children are particularly susceptible. The World Health Organization says that high levels of lead exposure in children can cause brain, liver, kidney, nerve and stomach damage as well as permanent intellectual and developmental disabilities.¹⁶

As a consequence many people died, while others acquired permanent intellectual and physical disabilities.¹⁷ However, the residents of Owino Uhuru slum are currently pursuing a civil claim. The case is still ongoing in court.

In addition to the above, the effects of waste disposal was well discussed in *African Centre for the Rights and Governance and 3 others verses Municipal Council of Naivasha*¹⁸ where the Applicants were arguing;

the dumpsite is a breeding ground for flies; that these flies expose them to nuisance and diseases; that the dumpsite causes air pollution by emitting foul smell; that the smoke that is emitted when waste is burnt causes them chest complications; that there are dead wild animals on the site which decompose and emit a bad smell; that polythene papers are blown from the dumpsite and litter their properties; that garbage has spilled over the road making it almost impassable as the waste contains broken glass; that scavengers who visit the site are a risk to their security; that their livestock sometimes consume the polythene papers blown by the wind from the dumpsite which leads to their death; that they are unable to enjoy their property to the fullest; that the land was designated a dumpsite without following the law; that there is a government school just next to the dumpsite and sometimes school children play there and eat some of the dumped leftover food which causes them diarrhea; that when it rains, water from the dumpsite flows along the road and into their compounds spilling waste; that the public is exposed to dangerous animals

¹⁴ Ibid.

¹⁵ Human Rights Watch, Kenya: Toxic Lead Threatening Lives, at < <https://www.hrw.org/news/2014/06/24/kenya-toxic-lead-threatening-lives>> last accessed on 21st November, 2016

¹⁶ Human Rights Watch, Kenya: Toxic Lead Threatening Lives, at < <https://www.hrw.org/news/2014/06/24/kenya-toxic-lead-threatening-lives>> last accessed on 21st November, 2016

¹⁷ Ibid.

¹⁸ Petition 50 of 2012.

such as stray dogs, hyenas and snakes; that this exposes them to danger and diseases such as rabies; that there is no fence to stop the animals from accessing the dumpsite; that some of the waste include dead fetuses and hospital waste such as needles.¹⁹

Although this case does not directly relate to the consequences posed by unlawful disposal of waste by corporations it's a good example of how the dumpsite violated the rights of the applicants to enjoy a right to clean and healthy environment as guaranteed in the Constitution.

1.1 STATEMENT OF THE PROBLEM

The Constitution under Article 260 defines a person to include a corporation. Article 69(1) of the Constitution also obligates the State to eliminate processes and activities that are likely to endanger the environment. The activities contemplated in this provision include unlawful disposal of hazardous waste. Article 69(2) of the Constitution further obligates every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

The Environmental Management and Coordination Act is also fairly comprehensive on management of hazardous waste. For instance under section 141 it creates offences that relate to hazardous waste. The section provides that "a person who disposes hazardous material is guilty of an offence and shall on conviction, be liable to a fine of not less than one million, or to imprisonment for a term of not less than two years or both". It is further provided in section 145(1) that "when an offence against this Act, is committed by a body corporate, the body corporate or every director or officer of the body corporate who had knowledge of the commission of the offence and who did not e, is committed by a body corporate, the body corporate or every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act shall be guilty of an offence"

However a review of decided cases illustrate difficulty in enforcement of the conviction and sentences against corporations. It appears the conviction and sentencing principles set out in the law are more tailored towards serving individual persons and not corporate entities. This study therefore seeks to interrogate the legal framework in place and analyse decided cases to determine the sufficiency of the law on criminal liability of corporations especially at conviction and sentencing stages.

¹⁹ Ibid.

1.2 ASSUMPTIONS/ HYPOTHESIS

Kenya has no capacity to prosecute corporations for disposal of unlawful hazardous waste.

1.3 THEORETICAL FRAMEWORK

Sustainable development has been defined in several ways. The most common definition comes from Brundtland Report. In the report, sustainable development has been defined as 'development that meets the needs of the present generation without compromising the ability of in the future generations to meet their own needs'²⁰

Over the years the definition of sustainable development has grown. The current definition of sustainable development seeks to integrate environmental, social and economic concerns in decision making.²¹ These definition, has been adopted at the international level in various conferences by member States notable examples being in the 1997 Earth Summit, 2000 Millennium Summit, 2002 World Summit and the Rio + 20 Conference.²²

Locally, the Constitution of Kenya under Article 10(1) provides for the principle of sustainable development. According to Kariuki Muigua the principle is related to the principles of intragenerational and intergenerational equity.²³ These two key principles asserts that all generations, both the current and future generation, have an equal entitlement to enjoy a clean and healthy environment.²⁴

Therefore, sustainable development from these definitions seeks four key things;

- (1) to preserve natural resources for the benefit of future generations (the principle of intergenerational equity);
- (2) to exploit natural resources in a manner which is sustainable (the principle of sustainable use);
- (3) to promote equitable use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use, or intragenerational equity); and

²⁰ At <[http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/Desarrollostenible/Documents/Informe%20Brundtland%20\(En%20ingl%C3%A9s\).pdf](http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/Desarrollostenible/Documents/Informe%20Brundtland%20(En%20ingl%C3%A9s).pdf)> last accessed on 12th July, 2018.

²¹ Kariuki Muigua, *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers Limited 2016) 10.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

(4) to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration).²⁵

The objective of sustainable development as per the Brundtland report is to meet the needs of the present generation without compromising the needs of future generations to meet their own needs. Sustainability has been categorized into three main areas also known as “three pillars of sustainability”. These three elements correspond to social, economic and environmental aspects. These three aspects are interconnected and when appropriately merged, they can enable a steady base for a sustainable world from which every inhabitant benefits. Thus where natural resources are preserved, the environment is protected and consequently the economy and quality of life of the people is maintained or even improved. Sustainable development is only achievable where there is a nexus of the three elements and if one of the pillars is missing or weak then sustainability becomes unachievable.²⁶

Environmental sustainability is achievable where the natural environment is allowed to maintain its integrity and total functionality without unnecessary interruptions. Actions that interfere with the natural environment should be kept at the lowest level with environmental impact of any action on environment being taken into account. The main objective of environmental sustainability is to minimize the impacts of human activities such as waste generation on the environment and encourage restoration and conservation of natural habitats.²⁷ It is hereby suggested that the corporations that generate unlawful waste should bear the cost of containment or abatement. It requires the corporation to take responsibility for the costs arising out of its unlawful waste generation. Further, the corporation as the polluter should clean up the unlawful waste caused by its acts and restore the environment as far as is practicable to the condition it was before the pollution. The corporation is also under an obligation to pay compensation for any irreparable damage occasioned by its acts.²⁸

²⁵ Ibid.

²⁶ The Environmental, Economic, and Social Components of Sustainability. 2015. The Environmental, Economic, and Social Components of Sustainability. [ONLINE] Available at: < <http://cwanamaker.hubpages.com/hub/The-Environmental-Economicand-Social-Components-of-Sustainability> > last accessed on 5th May, 2018

²⁷ The three pillars of sustainability(2015) viewed at: <<http://www.thwink.org/sustain/glossary/ThreePillarsOfSustainability.htm>> last accessed on 5th May, 2018

²⁸ Environment Protection Authority v Waste Recycling and Processing Corp [2006] NSWLEC 419; (2006) 148 LGERA 299 at [230]

Moffet and Bregha aptly put:

“.....the community effectively owns the environment and forces users to pay for the damage they impose. By contrast if the community must pay the polluter, the implicit message is that the polluter owns the environment and can use and pollute it with impunity.²⁹

Economic sustainability refers to the ability of an economy to support a defined level of economic production indefinitely. Economic sustainability is achievable through prudent economic decisions made in relation to other pillars of sustainability. Some of the practices that promote economic sustainability include subsidies and tax breaks for green development achievable through accessing relevant information to the public and encouraging public participation and research programs.³⁰ Corporations are encouraged to adopt green development mechanisms in order to enjoy tax breaks and subsidies. Further, corporations should not only exist to make profits but should also put social and environmental concerns at the center of their decision making.

Social sustainability is mainly epitomised through the concept of intergenerational equity. It calls for the fair redistribution of social goods and opportunities at both the National and International levels while at all times having due regard to intergenerational equity. Social equity enables all people to have equal opportunities at survival and promote freedom while eradicating discriminations based on gender, race, religion, status and others.³¹ It is important to note that environmental degradation arising out of pollution and climate change effects exposes the poor to more vulnerability with the risk of widening the economic inequalities. Social sustainability is important because it enables corporations to take into account human right issues in decision making process.

Therefore, sustainable development does not pin economic growth against the environment but rather acknowledges that none of the two can be neglected at the expense of the other.

³² The theory reaffirms the need to balance between economic development social development and environmental protection. ³³

²⁹ Moffett J and Bregha F. “The Role of Law in the Promotion of Sustainable Development” (1996) 6 Journal of Environmental Law and Practice 3 at 8

³⁰ Ibid.

³¹ The Environmental, Economic, and Social Components of Sustainability. 2015. The Environmental, Economic, and Social Components of Sustainability. Viewed at: <http://cwanamaker.hubpages.com/hub/The-Environmental-Economicand-Social-Components-of-Sustainability>

³² Philippe Sands, *Principles of International Environmental Law* (3rd ed, Cambridge University Press, Cambridge, 2012) 293.

³³ Ibid.

This research project will be guided generally by the perspective of this theory because it fits the purpose of the study and it provides the general outline and structure of this study.

1.4 ISSUES TO BE ADDRESSED

- a. What is the law on criminal liability of corporations?
- b. What is the law on disposal of hazardous waste in Kenya?
- c. Are there challenges in enforcing criminal liability of corporations in Kenya?
- d. What can be done to prevent the challenges raised in (c) above?

1.5 LITERATURE REVIEW

Over the years, the doctrine of corporate personality has developed.³⁴ As a result, many jurisprudential theories on corporate personality have developed with some theories such as fiction, concession and symbolist theories still taking a traditional approach on corporate personality.³⁵ These theories suggest that a corporation is artificial person, distinct from its shareholders and as such not capable of committing crimes.³⁶ They are a creation of the law and are not real in nature.³⁷ These theories suggest that corporations cannot be prosecuted for unlawful disposal of hazardous waste. However, there is another theory called the realist theory on corporate personality.³⁸ Under this theory, a corporation is a reality.³⁹ It is a reality since it is created by law and exists within the confines of the society.⁴⁰ Since a corporation exists within the confines of the society, actions of the corporation are deemed to be the actions carried by the men employed by the corporation.⁴¹ According to the realists, a corporation can be held criminally liable for unlawful disposal of hazardous waste since they owe a duty to the society in which they operate in.

George Ochich,⁴² in discussing corporate criminal liability in Kenya, states that the Kenyan courts have erroneously convicted or acquitted corporations without a sound jurisprudence in the area. According to him, by virtue of section 23 of the Penal Code a

³⁴ Zuhairan Ghadas, 'Real or Artificial? Jurisprudential Theories on Corporate Personality' (2007) 4(6) US-China Law Review
<https://vpn.uonbi.ac.ke/proxy/21794921/http/heinonline.org/HOL/Page?handle=hein.journals/uschinalrw4&div=59&start_page=6&collection=journals&set_as_cursor=6&men_tab=srchresults> accessed on 21st November, 2016

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid 10.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² George O. Otieno Ochich, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 2008, <http://kenyalaw.org/kl/index.php?id=1919#3> Accessed on 12th June 2018.

corporation is criminally culpable on its own right.⁴³ Ochich argues that the Kenyan courts have ignored section 23 of the Penal Code by convicting or acquitting natural persons and not corporations for an offence.⁴⁴ His work is important because it highlights the problem that Kenya has in relation to corporate criminal liability. At the time he wrote, the Constitution of Kenya had not been enacted. The constitution now recognizes the right to a clean and healthy environment. The seriousness of this provision is that an aggrieved party can seek for an appropriate relief at the High Court. Judicial officers should follow the law as it is or else their decisions will be appealed. Corporations should be prosecuted for unlawful disposal of hazardous waste.

Patricia Kameri Mbote,⁴⁵ agrees that a corporation in Kenya can be prosecuted for environmental offences. According to her, environmental offences under the *Environmental Management and Coordination Act* fall under strict liability offences.⁴⁶ She argues that criminal law is intended to serve as a deterrent measure to ensure there is no harm done to the environment.⁴⁷ I agree with the authors reasoning. Strict liability offences in prosecuting environmental crimes is important because it makes it easier to prosecute corporations for environmental crimes. It is easier to prosecute corporations because the prosecution does not have to establish *mensrea*, proof of *actus reaus* is sufficient to warrant a conviction.

Kariuki Muigua⁴⁸ while discussing the role played by multinational corporations in natural resource management in Kenya opines as follows “corporations are capable of protecting the environment due to the financial, managerial and technological advantage that they have. I agree with Doctor Muigua and from his argument it is my considered view that corporations should buy modern technologies that are capable of recycling and reusing waste. This will prevent the adverse effects of the waste to the environment. Also corporations should employ competent personnel and remunerate highly since it is them who are able to take sufficient measures to protect both the environment and human health.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Patricia Kameri Mbote, *Environmental Governance in Kenya: Implementing the Framework of the Law, The Use of Criminal Law in Enforcing Environmental Law*, East African Publishers 2008

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ In *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited 2015) 380.

Ethan Jessup⁴⁹ justifies the use of criminal sanctions on corporations for disposal hazardous waste.⁵⁰ According to him, criminal sanctions unlike civil sanctions have two effects. The deterrence effect, which allows for corporations to comply with the law and the retribution effect, which allows for corporations to operate within the confines of the society.⁵¹ I agree with Jessup's reasoning. Unlawful disposal of hazardous waste causes harm to the environment and humans if unregulated. Criminal sanctions unlike civil sanctions due to their retributive and deterrent effect ensures the environment is protected.

Robert H Iseman,⁵² argues that criminal sanctions provided for in environmental protection are rarely used by the courts. According to him, most judges still have the traditional misconception where a corporation is considered an artificial person incapable of committing a crime.⁵³ Iseman argues the reason why courts rarely punish corporations is because, most often, it is the corporation that directly becomes responsible for the environmental crime caused by the individual actors.⁵⁴ He suggests to escape liability, corporations are encouraged to have a company policy that prohibits environmental crime.⁵⁵ The policy will make individual actors within the corporation be liable for their actions.⁵⁶ This policy has to be known by all the individual actors within the corporation.⁵⁷ To counter this argument, I am of the opinion that judges should follow the law as it is. Failure to follow the law by the judges will open room for appeals brought about by erroneous convictions. I am also of the view that by a company having an environmental policy, the corporate officials will take more active steps to find out whether an environmental statute has been violated. This will make corporations be liable for unlawful disposal of hazardous waste.

Anca Lulia Pop⁵⁸ also justifies the use of criminal sanctions to attain environmental protection. According to her, criminal sanctions are 'deterrent, retributive and rehabilitative in nature. It is hereby suggested that the deterrent, retributive and rehabilitative nature of

⁴⁹ 'In Environmental Crimes and Corporate Liability: The Evolution of the Prosecution of Green Crimes by Corporate Entities' (1998) 33(3) New England Law Review <https://vpn.uonbi.ac.ke/proxy/21794921/http/heinonline.org/HOL/Page?handle=hein.journals/newlr33&div=32&start_page=721&collection=journals&set_as_cursor=3&men_tab=srchresults > accessed on 21st November, 2016.

⁵⁰ Ibid.

⁵¹ Ibid 731.

⁵² In The Criminal Responsibility of Corporate Officials for the Pollution of the Environment (1972) 37 (61) Albania Law Review < <http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/albany37&id=72>> accessed 21st June 2018

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ In Criminal Liability of Corporations; Comparative Jurisprudence, Michigan State University College of law <<http://digitalcommons.law.msu.edu/king/81> > last accessed on 5th December, 2016.

criminal sanctions are important because, they prevent future environmental crime, allow the victim to be compensated for the harm done and enables the corporation to operate within the confines of the society respectively. I also agree with Anca Lulia Pop. The main objective of criminal prosecution of corporations for unlawful disposal of hazardous waste should be to deter the vice, compensate the victim for the harm done while at the same time allow for corporations to still operate within the confines of the society.

In addition to the above, Anca Lulia Pop opines that criminal sanctions against corporations are justified if the prosecution is able to prove;

- 1.) The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime.
- 2.) The pervasiveness of wrongdoing within the corporation, including the complicity in, or condemnation of, the wrongdoing by corporate management.
- 3.) The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it.
- 4.) The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.
- 5.) The existence and adequacy of the corporation's compliance program.
- 6.) The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.
- 7.) Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable.
- 8.) The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.⁵⁹

It is hereby suggested, the factors listed above offer guidance to the prosecution in determining whether or not the charges preferred against the corporation will lead to a conviction. These factors are also important in justifying the need for prosecuting corporations for unlawful disposal of hazardous waste.

⁵⁹ Memo: Department of Justice, Bringing Criminal Charges against Corporations, <www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> last accessed on 5th December, 2016.

Jeffrey Parker and George Mason⁶⁰ argue the doctrine of corporate environmental crime is considered as a crimes done by the corporation. However, under the identification principle, it is the employees of the corporation who are considered to have done the offence. ⁶¹ This principle allows the court to fine both the individual employee and the corporation. ⁶² By fining both the individual employee and the corporation, the corporations profits are greatly affected due to the double fines imposed⁶³ According to them this is wrong and should stop. To counter this argument I suggest, since corporations exist to make profit, the effect of the double fine will enable corporations adopt environmental friendly policies. Corporations should also use their profits to ensure they comply with the necessary environmental laws including criminal law. In addition not all sanctions that are imposed by courts are monetary in nature. Sanctions such as retribution, is non-monetary in nature and allow for corporations to still operate within the confines of the society.

Alan Sykes and Daniel Fischel,⁶⁴ are of the view that criminal sanctions on corporations are a waste of time. According to them, corporations do not suffer from moral stigma. ⁶⁵ In addition, they argue that civil liability is sufficient and that criminal corporate liability is more deterrent and does not add any value. ⁶⁶ To counter this argument I am of the opinion that corporations suffer moral stigma. Criminal sanctions have the effect of affecting a corporation's reputation within the society. Therefore criminal sanctions add more value as compared to civil sanctions.

Sara Sun Deale,⁶⁷ argues that some scholars such as Professor Alschuler, argue that since a company is a fictitious entity punishing it for criminal culpability means punishing the innocent shareholders. According to the Professor it is the innocent shareholders who bear the direct burden when a company is found to be criminally culpable while the company employees and stakeholders only bear the indirect burden of the criminal sanctions.⁶⁸ To counter this argument, it is my considered view that since the company shareholders should

⁶⁰In 'Doctrine of Destruction, the case of Corporate Criminal Liability' (1996) 17(4) Managerial and Decision Economics < www.jstor.org/stable/2487974?seq=1&cid=pdf-reference#references_tab_contents> accessed on 21st November, 2016.

⁶¹ Ibid

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Daniel R. Fischel & Alan O. Sykes, "Corporate Crime," 25 Journal of Legal Studies 319- 49 (1996).

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Sara Sun Beale 'A response to the critics of corporate criminal liability'

<www.law.yale.edu/documents/pdf/cbl/Beale_paper.pdf> Accessed on 12th June, 2018.

⁶⁸ Ibid.

not only bear the company successes while sharing the profits but also the company's misconduct when it arises.

David M Ong⁶⁹ is of the view that the international principles established at international environmental law seek to ensure compliance by member states on various ways to protect the environment. As a result, most member states have adopted imposition of both civil and criminal liability to corporate offenders through domestication of laws.⁷⁰ According to him, having both civil and criminal remedies makes it impossible to meet environmental considerations through corporate governance.⁷¹ Though his work is important as it shows the various remedies that are available to an aggrieved party against a corporation, he however fails to explain the circumstances in which civil remedies might be sought as opposed to criminal remedies. This two areas of law are different and a distinction is necessary.

Antonio Vercher Noguera⁷² in discussing the challenges raised in criminal protection of the environment argues that the use of fines to achieve environmental protection is unfair. He suggests the focus should be on the individual actors and not the corporation because the corporation is an artificial person with no legal mind therefore incapable of committing a crime.⁷³ He further states that the area of environmental law is still undeveloped and judges require special training to achieve environmental protection.⁷⁴ Antonio Vercher wrote this article in the year 2002. Currently, most jurisdictions prosecute corporations for environmental crime. This means a corporation is no longer considered an artificial person incapable of committing a crime. In addition to this, most Constitutions around the world provide for environmental rights. Environmental law is developed and most judges are aware of what must be done to achieve environmental protection. This notwithstanding, fine is not the only punishment that can be used by the courts to ensure compliance as previously discussed.

⁶⁹ 'In The Impact of Environmental Law on Corporate Governance' (2001) 12(4) European Journal of International Law

⁷⁰ *ibid*

⁷¹ *Ibid.*

⁷² 'In Some Reflections on Use of Criminal Law for the Protection of the Environment', (2002) 10(3) Environmental Liability Law Practice and Policy

⁷³ *Ibid.*

⁷⁴ *Ibid.*

In conclusion, whereas it is settled in law that a corporation can be criminally liable just like natural persons, there is no clear guidelines on how the sanctions can be imposed against a corporation in Kenya. Corporations need to be liable for acts of omission or commission which if ignored can cause harm to both the environment and humans. To deter this criminal sanctions are more efficient due to its deterrent nature. Therefore, corporations should be advised to adopt the three objectives of sustainable development in their policy framework. This policy framework must be made known to all the directors of the company. In addition to the above, the corporation and the employees should further endeavour to understand the legal system in place. The legal system on the other hand should be drafted in such a way that it would make corporate offenders liable for their actions.

1.6 OBJECTIVE

Main Objective

- To examine the efficacy of the Kenyan legal system in prosecuting corporations for unlawful disposal of hazardous waste

Specific Objectives

- To determine whether the Kenyan legal system is sufficient in prosecuting corporations for disposal of hazardous waste.
- To determine the challenges if any that exist, in prosecuting corporations for disposal of hazardous waste.
- To formulate recommendations on prosecuting corporations for disposing hazardous waste in Kenya

1.7 METHODOLOGY

The research will be purely desk study. In carrying out the study, the researcher relied on primary and secondary sources of data. The primary source of data relied are statutes and international conventions. The secondary source of data on the other hand included books, review of case law, articles, internet sources and journal articles.

1.8 CHAPTER BREAKDOWN

Chapter one will be the contents of the research proposal.

Chapter two the researcher will discuss the law on criminal liability by corporations.

Chapter three the research will focus on the Kenyan law on disposal of hazardous waste

Chapter four: the research will address the process of prosecuting corporations for unlawful disposal of hazardous waste in Kenya.

Chapter five: the researcher will discuss recommendations and conclude based on the findings found from my discussions in chapter one to four

CHAPTER TWO

GENERAL NATURE OF CRIMINAL LIABILITY

2.0 Introduction

In this chapter, the researcher discussed the general nature of corporate criminal liability in England. The focus was in England because Kenya as a British protectorate, borrowed most of its laws from England. One of the fundamental doctrines of common law is the doctrine of precedent. The doctrine means, cases that involve similar circumstances should be decided by the application of similar principles of law. Therefore, the standards discussed in this chapter as well as the case laws can be applied by the Kenyan judges and magistrates when writing judgments and rulings.

In the course of the study, the researcher came across the American model of imposing criminal liability on corporations. This model is considered the best in the world as it reflects a better model best suited to punish corporate crime.⁷⁵ However, this model was not utilized as the researcher chose to focus solely on England. The chapter begins with discussing a brief history on the development of corporate criminal liability in England and thereafter discusses the standards set under common law for imputing criminal liability on corporations.

2.1 The Law on Criminal Liability.

The general rule under criminal law is that an accused person cannot be convicted of an offence unless he 'acted in a prohibited way with a defined state of mind'.⁷⁶ This rule is stated in the maxim *actus non facit reum nisi mens sit res* which means an act does not make a person guilty unless the mind is legally blameworthy.⁷⁷ The act is called *actus reus* while the state of mind is called *mensrea*.⁷⁸

However, there are two exceptions to this general rule and one of the exceptions relate to strict liability offences.⁷⁹

The researcher will only focus on strict liability offences because environmental crimes fall under this category. In strict liability offences, the prosecution don't have to prove *mensrea*, prove of *actus reus* is sufficient to warrant a conviction. The justification of

⁷⁵ Anca Lulia Pop, 'Criminal Liability of Corporations- Comparative Jurisprudence', (King Scholar Program, Michigan State University 2006) <www.law.msu.edu/king/2006/2006_Pop.pdf> accessed on 24th August, 2018.

⁷⁶ Roger Geary, *Essential Criminal Law*, (Cavendish Publishing Limited) 7.

⁷⁷ Ibid.

⁷⁸ Ibid,

⁷⁹ Ibid.

imposing strict liability is twofold. One, is to protect the public from the harmful activity and two, to ensure the guilty are convicted without proof of *mensrea*.⁸⁰ The effect of this is that a corporation can be convicted of an offence on proof of *actus reus* element. The conviction will be passed regardless of whether the corporation had knowledge of the circumstance or not.

In *Alphacell Ltd verses Woodward*⁸¹ where the appellants had been charged under the Rivers Prevention of Pollution Act 1951. The Act provided that a person will be guilty of an offence if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter. In this case, the appellants in the course of their business caused large quantities of polluted effluent to flow and pollute a river. What led to the river being polluted is the vegetation which grew into the pumps and as such prevented the propellers from working. In their defense, they argued that the company had taken all the necessary steps to prevent the pollution. They further stated they had constructed pumps to keep the level of the water in the tanks low enough to prevent an overflow. The House of Lords dismissed the appellant's defense and found the appellants to be liable. The court found that it would be impossible not to find the appellants responsible for the pollution because in strict liability offences proof of *mensrea* does not apply. According to the Justices the appellants knowingly permitted a polluted effluent to flow into the river therefore they should be liable.

This case illustrates how strict liability is applied in environmental crimes. Therefore, when a corporation emits hazardous waste and disposes it in an unlawful manner and as a consequence there is harm done to the environment or to humans, it is presumed that the corporation foresaw the harm and therefore such a corporation cannot escape liability.

2. 2 Brief History of Corporate Liability in England

Before industrialization, the concept of corporate criminal liability did not exist in England.

⁸² It was non-existent because at the time, the assumption was that a corporation lacked a guilty mind therefore it was incapable of committing a crime. ⁸³ This assumption was highly influenced by the church. ⁸⁴ The Church had insisted that a corporation was distinct

⁸⁰ Ibid.

⁸¹ 1972 2 ALL ER 475

⁸² Raveena Sethia, 'The Development of Corporate Criminal Liability in the Common Law-an Overview' (International Journal of Law, 6th June, 2014) < <http://ijlljs.in/wp-content/uploads/2014/06/Corporate-Criminal-Liability2.pdf> > accessed on 1st September, 2018.

⁸³ Ibid.

⁸⁴ Ibid.

from the individual persons constituting it, it is a fictitious entity, incapable of committing any wrong.⁸⁵

In the 16th and 17th Century, corporations became common.⁸⁶ Most of them were joint stock companies.⁸⁷ These joint stock company's evolved their own methods of regulations, the regulations however, were not legally binding.⁸⁸ The notion that still existed then was:

First, criminal acts could not be attributed to corporations because they lacked a guilty mind.

Second, corporations could not be morally blamed for committing a crime since they were artificial entities.

Third, the Criminal Procedure Code at the time required that an accused person has to appear physically in court to plead to the charges. This was impossible if the person charged was a corporation.

Finally, the doctrine of *ultra vires* which meant that corporations being creatures of the law, it was impossible for them to act beyond what the law provides.

In the 18th Century, the joint stock companies began to indulge in fraud.⁸⁹ A notable example is the South Sea Company.⁹⁰ Consequently, the United Kingdom parliament enacted the Bubble Act, 1720.⁹¹ This Act provided that corporations could only be established by an Act of Parliament and existing companies could not act outside the remit of their constitutions.⁹² The Act was later on repealed in 1825 when the number of corporations began to increase.⁹³

By early 19th Century, corporations began to be more dominant in the society.⁹⁴ The dominance was brought about by the industrial revolution which was spreading across Britain.⁹⁵ As a result several disasters were experienced.⁹⁶ These disasters were connected

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Kristen Wong, 'Breaking The Cycle: The Development Of Corporate Criminal Liability' (LLB University of Otago, 2012) < www.otago.ac.nz/law/research/journals/otago041733.pdf > accessed on 1st September, 2018.

⁹⁰ Ibid.

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid.

⁹⁴ Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (7th Edition Oxford University Press 2013) 147.

⁹⁵ Ibid.

⁹⁶ Ibid

to corporate activities.⁹⁷ It was for this reason that corporations could no longer be immune from prosecution.⁹⁸ There became an urgent need to alter the framework of corporate criminal liability in order to make corporations accountable for their actions.⁹⁹

As a consequence, several standards have been developed in England for imputing criminal liability on corporations.¹⁰⁰

- a) The first standard imposes criminal liability on corporations for the acts of their employees when done in the scope of their employment- vicarious liability.¹⁰¹
- b) The second standard imposes criminal liability on corporations for breach imposed on them by statute.¹⁰²
- c) The third standard imposes criminal liability on corporations if the court is able to identify a person/ persons within the company structure whose mind is the directing mind or will of the company.¹⁰³

These standards are discussed under the following specific heads;

2.3 Liability of Corporations for Breach of a Statutory Duty

Common law recognizes that a corporation can be criminally liable if it commits an offence that is contrary to statute.¹⁰⁴ Statute ensures that a corporations conducts itself in a particular way, failure of which it can be prosecuted for noncompliance.¹⁰⁵

In *Birmigham and Gloucester Rly Co*¹⁰⁶

A corporation was convicted for failing to fulfil a statutory duty.

Jacqueline Martin and Tony Storey are of the opinion that the effect of imputing criminal liability on corporations under common law is that, the corporation can be criminally culpable for a crime as an occupier (if an offence is committed within the company's premises) or as an employer.¹⁰⁷

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Jacqueline Martin & Tony Storey, *Unlocking Criminal Law* (3rd Edition Hoddler Education 2010) 161-168.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ David Ormerod, *Smith and Hogans Criminal Law Cases and Materials*, (10th Edition Oxford University Press 2009) 259.

¹⁰⁵ Ibid.

¹⁰⁶ [1842] 3 QB 223.

¹⁰⁷ Supra note 14.

For example in *Evans & Co Ltd vs London County Council*¹⁰⁸

A company being the occupier of a premise was charged for failing to disclose in the afternoon of an early closing day which was in breach of the duty impose on the occupiers of shops by the Shops Act 1912 (since been repealed). The Divisional Court held that the company was liable for breach of this statutory duty.

Compliance with statute law is important. Failure to comply with a laid down statute often leads to prosecution.

2.4 Liability of Corporations for the Acts of their Employees when done in the Scope of their Employment- Vicarious Liability

Vicarious liability means liability for the acts of another.

In civil law, employers are generally liable for the tortious acts of their employees if committed in the course of their employment. ¹⁰⁹ The justification for this is under civil law, the employee is rarely in position to compensate the victim of a tortious act. Consequently, it is the employer who bears the consequence even though most often he may be blameless.¹¹⁰ In contrast, the function of criminal law is not to offer compensation to the victim but to punish the wrong doer.¹¹¹ The second and final reason why employers are liable for the acts of their employees done while in the course of the employment, is because the employer is considered to be in a better position to ensure precautionary measures are taken to prevent harm at the work place. ¹¹² In case of harm, the employer should be liable.

The general rule under common law is that liability should always be attached to the person who committed the offence and therefore an employer cannot be vicariously liable. ¹¹³ However, there are two exceptions to this general rule. The first exception is offences relating to public nuisance. If such an offence is committed within the property of the employer, even if the employer had forbidden the employee from committing such a nuisance then the employer will be liable.¹¹⁴ The second exception is that an employer is vicariously liable for any defamatory libels published by his employees unless he proves

¹⁰⁸ (1914) 3 KB 315 DC.

¹⁰⁹ Supra note 24

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Matsiko Godwin Muhwezi, 'The Case for Corporate Criminal Liability' <www.researchgate.net/publication/309041784> accessed on 24th August, 2018.

¹¹³ Allan Reed & Ben Fitzpatric, *Criminal Law*, (3rd Edition Sweet and Maxwell 2006) 153.

¹¹⁴ Ibid

that he did not authorize such a publication.¹¹⁵ The third exception is when an Act of Parliament expressly provides for imposition of criminal liability on corporations.¹¹⁶

Several cases have been decided in England where a corporation has incurred criminal liability vicariously. Many corporations have been held to be vicariously liable for the acts of its employees. This is justified because it is the employees who control the corporation affairs and intentions. Therefore, it is assumed that the acts done by the individual employees are deemed to be the acts or the intentions of the corporation.¹¹⁷ The rational imputing criminal liability on corporations is to ensure that corporations follow the law and regulations to in order avoid liability.

*In Tesco Stores Ltd vs Brent London Borough Council*¹¹⁸

The company was held to have supplied a video to a person under the age stated in the classification certificate contrary to the Video Recordings Act, 1984. The video was sold to a child by an assistant of the company. The court found that the company assistant had reasonable grounds to know that the video was being sold to a child. It was a defense under the Act to prove the accused neither knew nor had reasonable grounds to believe that the buyer had not attained the specified age. This defense was not available to the company.

*In Harrow London Borough Council vs Shah and Shah*¹¹⁹ The Shah's news agents were charged with selling a national lottery ticket to a boy under 16 contrary to the National Lottery Act 1993 s 13 (1) (c) and the National Lottery Regulations 1994 regulation 3. They had taken all reasonable steps to ensure that the regulations were complied with and they were not present in the shop when the lottery ticket was sold by their employee. The magistrate court dismissed the company's application and found that the company is liable for the acts done by its employees

Although vicarious liability has been used to solve many corporate criminal offences, it has been criticized for being too narrow or too broad. It is narrow because liability is normally attached to the person who committed the offence. Most often it is the individual working in the company. If the fault cannot be attributed to the individual working in the company, then the corporation cannot be liable. On the other hand, it is broad because

¹¹⁵ Ibid

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ 1993 2 All ER 718

¹¹⁹ 1999 3 All ER 302 [2000] CRIM CR 692, DC

liability of an individual automatically makes the corporation liable even in absence of corporate fault.

2.5 Liability of Corporations based on the Identification Doctrine

Under common law, the company can be held to be liable by what is known as the identification doctrine.¹²⁰ This doctrine is also known as the alter ego doctrine.¹²¹ This form of liability is distinct from vicarious liability as it attempts to narrow the corporation's liability to its key personnel who work for the corporation.¹²² It seeks to place liability on the senior officers of the corporation because they are considered the directing mind and will of the corporation.¹²³ Under this doctrine, the acts done by these senior officers is deemed to be done by the corporation. The identification doctrine was first discussed in the case of

*Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd*¹²⁴

In this case, a cargo of Benzene was lost at sea due to defective condition of the boilers. Mr. Lennard had been the managing director of Lennard's Carrying Co. Ltd., which had been appointed for the maintenance of the ship. He was also the registered manager of the ship and was thus, responsible for ensuring the ship's seaworthiness. The court sought to hold the corporation liable for its negligence in maintenance of the boilers. It was observed that corporation n did not have a mind or body of its own and could not be held accountable per se. However, liability of the company could be sought in the negligence of the person who was the directing mind and will of the company. Mr. Lennard had not only been actively involved in the management of the ship, but was also the director of the company appointed for the ship's maintenance. Thus, the Court observed that the acts and omissions of the controlling officer, Mr. Lennard, could be identified as the actions and omissions of the company itself.

This case is important because it narrows down the personnel who are liable for corporate crime. Therefore, their actions are deemed to be that of the corporation.

Following the decision in *Lennard's Carrying Co. Ltd*, several cases were later on decided using the identification doctrine

¹²⁰ Supra note 33.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Supra note 20.

¹²⁴ [1915] AC 705.

In *DPP vs. Kent Sussex Contractors Limited*¹²⁵

In this case the transport manager submitted on behalf of the company a false document on the mileage of the company vehicle. Where the court held that intent of the transport manager was held to be the intent of the company since the transport manager was in a senior management position.

In *Moore vs. Bresler Limited*¹²⁶

The company was convicted for making false returns with intent to deceive contrary to the Finance Act No 2 of 1940. The returns had been made by the company secretary and a branch sales manager who were considered to be the directing mind and will of the company.

Subsequently, in *HL Bolton (Engineering) Co. Ltd v TJ Graham and Sons Ltd*¹²⁷

The scope of the doctrine was well clarified compared to the previous case of *Lennard's Carrying Co. Ltd*. In this case, Lord Denning likened a company to an individual. According to him, the individuals were considered the brain and the nerve center of the company. As the nerve center for the company, they control what the company does. These individuals were the directing mind and will of the company. Therefore, any actions done by them is deemed to be the actions of the company.

In addition, a case in point that drew a very clear distinction on who are the identifying persons in the company to have the company criminally culpable was the case of;

*Tesco Supermarkets Ltd v. Natrass*¹²⁸

In which Tesco Supermarket had been charged under the Trade Descriptions Act of 1968 for falsely advertising. They had sold washing powder at a normal price instead of the reduced price as advertised in the supermarket. The manager had failed to take the advertisement signs down therefore, customers were charged a higher price. In its defense, Tesco argued that as a company they had taken all reasonable precaution to ensure that the advertisement was followed to the latter, therefore, they could not be liable for the actions of the store manager. The House of Lords agreed with the company's defense and noted that the branch manager was not high enough in the corporate structure, such that his acts could be identified as the acts of the company itself. He was the highest officer only in the

¹²⁵ [1944] 1 KB 146

¹²⁶ [1944] 2 KB 515

¹²⁷ [1957] 1 QB 159

¹²⁸ [1972] AC 153

particular store. Tesco Supermarkets was allowed to use the defense of due diligence at the top level of management. The Lords could not, however reach consensus on who would be high enough to be identified as the company. Lord Reid suggested that the doctrine would only include the board of directors, the managing director and perhaps other superior officers of a company who carried out the functions of management and spoke and acted for the company. Lord Diplock on the other hand opined, liability can only be placed on the corporation by identifying those natural persons who are given powers under the memorandum and articles of association.

A more recent decision that expanded the application of the identification doctrine was the case of *Meridian Global Funds Management Asia Ltd v Securities Commission*¹²⁹ In this case the Privy Council held whether or not an act can be attributed to a corporation will depend on the interpretation of the statute in which the corporation has been charged with.

Following the decision in Tesco above, the doctrine has been criticized for being unpredictable. It is unpredictable since it is difficult to establish the controlling officer in the company whose actions can be deemed to be that of the company.¹³⁰ As a result, some corporations have escaped liability due to the unpredictable nature of the identification doctrine.

¹²⁹ [1995] 2 AC 500; [1995] 3 All ER 918; [1995] 3 WLR 413.

¹³⁰Amrit Mahal, 'Challenges to the Doctrine of Identification in Complex Corporate Structures: The Way Ahead?' <http://ijlljs.in/wp-content/uploads/2016/07/CHALLENGES_TO_THE_DOCTRINE_OF_IDENTIFICATION_IN_COMPLEX_CORPORATE_STRUCTURES1.pdf > accessed on 17th August, 2018

2.6 Conclusion

As previously discussed at the beginning of this chapter, Kenya is a common law country. As a common law country, it borrowed its legal system from the British.¹³¹ One of the fundamental doctrines of common law is the doctrine of precedent.¹³² This is captured in the latin maxim: '*stare decisis et non quieta movere*, meaning: it is best to adhere to decisions and not to disturb questions put at rest'.¹³³ The doctrine means that in cases that arise out of a similar transaction then they should be decided by the application of similar principles in law.¹³⁴ It is hereby suggested that if there is a settled principle in common law then the judges and magistrates in Kenya should endeavor to apply the same principles in their reasoning. The principles discussed in this chapter as well as the decisions of the court should be used by our judges and magistrates in imposing criminal liability to corporate offenders. Corporations are therefore advised to adopt sound environmental practices in order to prevent harm or else they will be prosecuted.

¹³¹ < <http://kenyalaw.org/kl/index.php?id=124> > last accessed on 13th October, 2019.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK ON HAZARDOUS WASTE DISPOSAL IN KENYA

3.0 Introduction.

The chapter focuses on some specific issues in the Kenyan law in prosecuting corporations for unlawful disposal of hazardous waste. Some of the laws to be discussed include; the Constitution, the Interpretation and General Provisions Act, the Penal Code, the Companies Act, The Occupational Safety and Health Act, the County Government Act, the Forest Conservation and Management Act and Environmental Management and Co-Ordination Act.¹³⁵ The chapter will also take into account the Waste Management Regulations 2006 and the Environmental Impact Assessment and Audit Regulations 2003. The regulations are important because under section 147 of EMCA the National Environment Management Authority¹³⁶ is mandated to come up with regulations that will give effect to the Act. As a consequence the regulations were enacted. The chapter will consider the National Sustainable Waste Management Bill, 2018 that is yet to become law but has some key provisions on hazardous waste management in Kenya. Further analysis will be made on some specific articles under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.¹³⁷ Kenya ratified the convention on 1st June 2000. In addition to the Basel Convention, the chapter will discuss a few articles under the Bamako Convention on the Ban of the Import into Africa and Control of Transboundary movement of Hazardous Waste within Africa.¹³⁸ This convention, was ratified by Kenya in the year 2003. The Conventions are important because the Constitution of Kenya recognizes general rules of international law to form part of the Kenyan law.¹³⁹ Furthermore, treaties or conventions ratified by Kenya become part of the law of Kenya.¹⁴⁰ Similarly, under section 9 of EMCA, NEMA plays a key role on conventions, treaties and agreements that affect the environment. The chapter also discusses the institutions created by the law that are tasked with the responsibility of dealing with hazardous waste in Kenya. These institutions are established under various statutes such as the Constitution, EMCA, National Police Service Act, Pharmacy and Poisons Act, Use of Poisonous Substances Act,

¹³⁵ Herein after referred to as EMCA

¹³⁶ Hereinafter referred to as NEMA.

¹³⁷ Hereinafter referred to as Basel Convention.

¹³⁸ Hereinafter referred to as Bamako Convention.

¹³⁹ Constitution Article 2(5)

¹⁴⁰ Ibid article 2(6)

Dangerous Drugs Act, Pest Control Product Act, Magistrate Court Act and the Office of the Director of Public Prosecutions Act.

3.1 Criminal Liability of Corporations and Corporate Officials under the Kenyan Law

There are several legislations in Kenya that anticipate for offences committed by corporations and their officials.

To begin with, Article 260 of the Constitution, defines a “person” to include ‘... a company, association or other body of persons whether incorporated or unincorporated.’¹⁴¹ This provision implies the rights that are available to individual persons are also available to juristic persons. One of the rights being, the ability of corporations to be prosecuted for crime.

In addition to the above, the Interpretation and General Provisions Act, fails to define what a corporation is. It nonetheless defines a person to include “a company or association or body of persons, corporate or incorporate.”¹⁴² The same approach has been adopted under the Forest Conservation and Management Act. In this Act, the definition of a person includes a corporation.¹⁴³ The effect of this provisions is that a corporation can independently be prosecuted for crime.

Furthermore, the Penal Code under section 23 anticipates offences committed by a corporation.

The section provides as follows;

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.¹⁴⁴

¹⁴¹ Ibid, Article 260.

¹⁴² Interpretation and General Provisions Act, Cap 2 Laws of Kenya, Section 3.

¹⁴³ Forest Conservation and Management Act, Act No 34 of 2016, section 2.

¹⁴⁴ Penal Code, Section 23.

The applicability of section 23 of the Penal Code is twofold. First, it anticipates that a corporation in Kenya can automatically be charged with an offence. Second, it adopts the identification doctrine in imputing criminal liability of corporations where managers of the company who were in control of the company's affairs at the time, can be liable under criminal law. In *Samuel Ndung'u Gitau vs Senior Resident Magistrate, Kiambu & 3 others*¹⁴⁵, the petitioner was charged with issuing bad cheques, he filed a constitutional petition seeking an injunction to stop the criminal proceedings. One of the grounds for the petition was that the cheques in question had been issued in the name of the company in which he was a director and so he could not be held liable for the acts of an independent corporate person. In its determination, the court found that section 23 of the penal code which provides that "where an offence is committed by any company or other body corporate or by any society, association or body of persons, every persons charged with or concerned or acting on the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being committed and or was intended or about to be committed or that he took all reasonable steps to prevent it's commission". Court held that a limited liability company though it has a personality in law, has no mind of it's own and acts through it's directors who are criminally liable for it's acts or omission. That it is not open to a party to hide behind the veil of incorporation to escape criminal culpability.

Similarly in *Ruth Mutete Mutuku vs. Inspector General, National Police Service & 2 Others*¹⁴⁶ the court held that the offence created under section 316A(1) is to be read together with section 23 of the Penal Code dealing with liability of officer of corporations for offences committed by corporations.

In *Republic vs. Kenya Revenue Authority & 2 others*¹⁴⁷, the applicant challenged his prosecution on grounds that the charges did not disclose any offence he had committed personally since the cheques that formed the subject of the case had been issued in the name of the company in which he was a director. He relied on the doctrine corporate personality and cited the case of *Solomon vs. Solomon. (1897)AC 22*. In its ruling, the court while recognizing that the doctrine of corporate personality was a fundamental one, stated that it had been raised at the wrong forum. Court stated that the question as to whether and

¹⁴⁵ Petition 238 of 2011

¹⁴⁶ Constitutional Petition 39 of 2015, High Court of Mombasa, eKLR

¹⁴⁷ Milimani Law Courts, Judicial Review Division, Misc Appl, Judicial Review No 186 of 2013, EKLR

to what extent sec 23 and 316A of the penal code encompass liability of directors of a company was not for the court to determine at that stage.

In *Rebecca Mwikali Nabutola and Another versus Republic*¹⁴⁸ the question that arose was whether there was duplicity in charges by charging the director and the company with an offence by virtue of section 23 of the Penal Code. The company and the directors had been charged with several offences under the provisions of the Anticorruption and Economic Crimes Act. In dismissing the Appeal, Justice Ngenye reaffirmed that the charges were proper and no question of misjoinder arose. According to him, section 23 of the Penal Code imposes liability to both the directors and the company.

Also in *Patrick Mueu Musumba and Another versus DPP*¹⁴⁹ where the applicants were seeking review of bail and or bond terms. Counsel for the applicant argued that it was unfair for the lower court to impose higher bond terms for the 1st Applicant because he was charged in his capacity as the director of his own company by virtue of section 23 of the Penal Code. Counsel further argued that the harsh bond terms that had been previously granted amounted to denial of bail which in itself was against the spirit of Article 49 of the Constitution. He further argued that since the 1st applicant was charged jointly with other accused persons then uniform bond and or bail terms should apply. The prosecution on the other hand argued that in as much as they did not oppose to the application for bond and or bail, they insisted the amount of bail or bond that should be granted by the court should be commensurate to the charges facing the accused persons. According to the prosecution the charges at hand were serious and involved huge sums of money. Therefore the bail that was given by the lower court was sufficient. Justice Ngenye allowed the application made by the applicants and set aside the earlier bond terms of 30Million with 2 surerities of a similar amount and substituted with 10Million with 1 surerity of a similar amount.

As illustrated in the above case-law, whereas there has been instances when section 23 of the penal code has been brought into question, courts seems to have shied away from addressing the question as to whether a company can be solely convicted for criminal acts under the penal code.

Section 19 of the Companies Act deals with the effects of registration of a company. Once a company is registered and incorporated it is at liberty to perform all functions of incorporated entities. These include suing and being sued both in criminal and civil proceedings. The Act also has certain provisions that contemplate criminal liability of

¹⁴⁸ Criminal Appeal 232 of 2012.

¹⁴⁹ Criminal Application 575 of 2018

corporations. For example under sections 210, 798 and 810 of the Company's Act.¹⁵⁰ The DPP is empowered under Sections 210, 798 and 810 to institute criminal proceedings if an inspector's report discloses a commission or omission amounting to an offence.

EMCA also has a provision that anticipate for offences committed by corporations

The Act provides as follows;

When an offence against this Act, is committed by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence.¹⁵¹

By virtue of section 145(1) above, a corporation in Kenya independently be charged as an offender. Also, under this section, a corporation can be prosecuted through its directors or officers who had knowledge of the offence at the time it was being committed.

Currently, the County Government is in charge of waste management in the counties. Under the County Government Act¹⁵² a county government is classified as a corporation.¹⁵³ Under the Act, the County government can be prosecuted for crime. Initially, the current functions done by the county government were done by the local authority. Back then, under the Local Authority Act, a local authority was classified as a corporation and as such could not escape criminal liability. This was demonstrated in the case of *Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council Of Nairobi*¹⁵⁴ where court reiterated that every local authority is a body corporate and pursuant to section 145 of EMCA, the principal officers of a local authority can be held responsible for committing offences under EMCA and that the immunity provided under sec 87 of the Local Government Act does not cover criminal liability. The effect of this decision meant that a local government as a corporation can be prosecuted for crime.

The importance of extending criminal liability to the corporate officials is because one, a corporation is an artificial entity incapable of committing an offence two, a corporation cannot serve a prison term. A prison term can only be served by the corporate officials who

¹⁵⁰Company Act, Act No 17 of 2015,

¹⁵¹ Environmental Management and Coordination Act No. 8 of 1999 Section 145(1)

¹⁵² Act No 17 of 2012

¹⁵³ Ibid, section 6(1)

¹⁵⁴ ELC 53 of 2012(2013) e KLR.

are considered the directing mind and will of the company. Therefore the decisions of these corporate officials are deemed to be the decision of the company.

3.2 Complexity in the Definition of Hazardous Waste

As previously discussed in chapter one, hazardous waste according to the Black's Law Dictionary, has been defined as 'waste which because of its physical, chemical or infectious characteristics may pose substantial or potential harm to human health or the environment'.¹⁵⁵ In Kenya, there are certain statutes, regulations and conventions that also attempt to define hazardous waste.

Under EMCA, section 2 defines hazardous waste as waste classified as such by virtue of section 91 of the Act. In section 91, the Standards and Enforcement Committee in consultation with the lead agencies is to come up with a criteria of classifying hazardous waste based on flammability, persistency toxicity exclusivity just to mention but a few.¹⁵⁶

In the Waste Management Regulations 2006, hazardous waste has been specified and classified under the fourth and fifth schedule respectively.¹⁵⁷ In the fourth schedule of the regulation, hazardous waste has been classified as Y1 – Y45.¹⁵⁸ Where Y1 is wastes generated as a result of human activities Y2 includes clinical waste, Y3 is pharmaceutical waste, Y4 is waste generated from pesticides and Y5 is waste generated from preserving wood. From Y6 to Y45 the classification is done using some chemical terms which can only be understood by scientists. The same is quite complex. The fifth schedule on the other hand, gives characteristics of hazardous waste and the same is listed from H1 –H6.¹⁵⁹ Just like the classification under EMCA, the regulation also classifies hazardous waste based on its combustion ability, toxicity, infectious characteristics to human health, corrosiveness, radioactivity, persistency just to mention but a few.

The Environmental Impact Assessment and Audit Regulations 2003 fails to define hazardous waste. It however defines waste to include "liquid, solid, gaseous, radioactive which if emitted from the environment will likely alter the environment".¹⁶⁰ It is important to note, under regulation 18(1) (i) a developer of a project is supposed to give NEMA an action plan on how they intend to deal with hazardous activities in the cause of carrying

¹⁵⁵ Bryan A Garner, *Black Law Dictionary* (9th Ed2009) 1728.

¹⁵⁶ Supra note 16, Section 91.

¹⁵⁷ The Waste Management Regulations, 2006, Regulation 22.

¹⁵⁸ Ibid, Fourth Schedule.

¹⁵⁹ Ibid, fifth Schedule.

¹⁶⁰ The Environmental Impact Assessment and Audit Regulations, Regulation 2.

out the project.¹⁶¹ It is my considered view that it could have been prudent for the draftsman to attempt to define, categorize or classify hazardous waste.

Under the National Sustainable Waste Management Bill, 2018 hazardous waste has been not been defined. However, in the bill waste has been defined as follows;

Any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered and includes all wastes as municipal waste, domestic waste, waste from agriculture, horticulture waste, aqua culture waste, forestry waste, biomedical, hazardous, industrial waste, pesticide and toxic substances, but does not include radioactive waste.¹⁶²

Though the Bill is yet to become law, it could have been important for legislator to attempt to define, categorize and classify hazardous waste. This is because the bill has several provisions that make reference to hazardous waste.

At the international environmental law, The Basel Convention, defines hazardous waste on the basis of its characteristics as per annex 1 or as defined by any domestic legislation or that which has been categorized as hazardous waste by virtue of annex 11.¹⁶³ In Annex 1 hazardous waste falls under the category of controlled waste and has been categorized as Y1-Y45. Y1 is clinical waste, Y2 is pharmaceutical waste, Y3 is pharmaceutical drugs, Y4 is waste from the production of pharmaceuticals and Y5 is waste from the manufacture and production of wood preserving chemicals. From Y7 to Y45 the categorization of hazardous waste, just like in the Waste Management Regulations 2006 is quite complex and it uses scientific terms that can only be understood by scientists. Annex 11 of the Basel Convention, hazardous waste has been classified as a waste that requires special attention. It has been classified as H1 to H13. This classification just like in the Waste Management Regulations 2006 is based on explosivity, flammability, toxicity just to mention but a few. The Bamako Convention also, defines hazardous waste as waste contained in annex 1 and 11 including any waste considered hazardous by domestic legislation.¹⁶⁴ Annex 1 of the

¹⁶¹ Ibid, Regulation 18(1)(i).

¹⁶² National Sustainable Waste Management Bill, 2018 Section 2.

¹⁶³ *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal*, Available at <http://kenyalaw.org/treaties/treaties/84/Basel-Convention-on-the-Control-of-Transboundary-MovementsArticle> last accessed on 31st October, 2018. Article 1.

¹⁶⁴ *Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement of Hazardous Waste within Africa*, available at < https://au.int/sites/default/files/treaties/7774-treaty-0015_-_bamako_convention_on_hazardous_wastes_e.pdf > Article 2 to the Convention, last accessed on 31st October, 2018.

convention, categorizes hazardous waste from Y1-Y45. Y1 is clinical waste, Y2 is pharmaceutical waste, Y3 is pharmaceutical drugs, Y4 wood processing chemicals and Y5 is organic solvents. From Y7 to Y45 the categorization just like in the Waste Management Regulations 2006 and the Basel Convention is quite complex as it uses several scientific terms. Annex 11 on the other hand, gives the characteristics of hazardous components based on explosivity, flammability, toxicity etc.¹⁶⁵

From this discussion, it appears there are some legislations that fail to define hazardous waste but instead make reference to hazardous waste in other provisions. It also appears the classification, categorization and definition of hazardous waste is quite complex. The categorization and classification of this waste can only be understood by scientists. The court may have to call scientists as experts to testify. In addition, corporations may have to employ scientists to advise on some specific chemicals used by them before generation.

In addition, Daniel Mmereki¹⁶⁶ argues in most developing countries, hazardous waste lacks a proper definition. In these countries hazardous waste has been defined based on its radioactivity, toxicity and corrosiveness.¹⁶⁷ According to him, the problem in definition in turn affects the ability of these countries to effectively segregate, handle and dispose the waste.¹⁶⁸

3.3 Prescribed Penalties for Non-Compliance

Criminal law prescribes certain penalties for noncompliance. The penalties can either be in form of fines, imprisonment or non-custodial in nature.

3.3.1 Fines

In Kenya, discharge of hazardous waste is illegal under section 141 EMCA. Any person who discharges hazardous waste and found guilty by the courts, is entitled to payment of a fine that is not less than one million.

Apart from EMCA, the Forest Conservation and management Act, prohibits the dumping of any “solid, liquid, toxic or other wastes” to the forest.¹⁶⁹ It is my considered view that hazardous waste can fall in the category of other wastes by virtue of this section. Any

¹⁶⁵ Ibid, Annex 11

¹⁶⁶ In ‘The Management of Hazardous Waste in Developing Countries’ <www.intechopen.com/books/management-of-hazardous-wastes/the-management-of-hazardous-waste-in-developing-countries> last accessed on 6th December, 2018

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Supra note 9, section 68(8).

person who is found contravening section 68(8) can be liable to payment of fine not exceeding 3million.

The National Sustainable Waste Management Bill, also has a provision for punishing private entities engaged in the unlawful disposal of waste. Section 26 of the Bill provides for a 'fine not less 5% of the corporation's net income registered in the previous tax year, or a fine of Ksh five million, whichever is higher'¹⁷⁰

3.3.2 Imprisonment

Under section 141 of EMCA, any person who unlawfully disposes hazardous waste to the environment is liable to be imprisoned for a term not less than two years. The person to be imprisoned by virtue of section 145(1) EMCA as previously discussed, is the company directors or officers who had knowledge of the offence at the time it was being committed.

Section 68(8) of the Forest Conservation and management Act also provides for a 10 year jail term to any person found disposing hazardous waste in the forest. The Act fails to expressly provide for the company officials who are to be liable. However, it can be assumed it is those officials who at the time the offence was being committed were aware of it.

The National Sustainable Waste Management Bill introduces a new aspect that the previous statutes failed to expressly address. In section 26 of the Bill, if a private entity is found guilty by court for failing to manage waste properly, then the Chief Executive Officer at the time can be imprisoned for a term of four years.

3.3.3 Non-Custodial Sentences

Section 93 of EMCA provides for non-custodial sentences to be imposed on persons who unlawfully discharge hazardous waste to the environment. Under the Act, court can order such persons to

- a) Remove such hazardous waste to from the environment
- b) Pay costs incurred in the process of restoring the environment to its original state.
- c) Pay 3rd parties reparation, restitution or restoration as may be determined by the courts.

¹⁷⁰ Supra Note 27 Section 26.

In sum, the type of penalty to be imposed is often left to the discretion of the judge or magistrate hearing a case. However, under these specific statutes discussed in this part, the court has the discretion to either fine, imprison, impose non-custodial sentence or impose both sentences.

3.4 The process of Handling Hazardous Waste

Under the Waste Management Regulations 2006, a waste generator has been defined as ‘any person whose activities under his/her discretion produces waste.’¹⁷¹ To prevent the adverse consequences that might be caused by unlawful generation of waste, waste generators are required to comply with certain requirements under the law or else they can be liable for harm. They have to;

a) Segregate Hazardous Waste

Regulation 3 of the Waste Management Regulation 2006, defines segregation as ‘any activity that separates waste materials for processing.’¹⁷² In the Regulation, the waste generators are encouraged to separate the hazardous waste from the nonhazardous and ensure that such waste is disposed in a facility provided by the local authority.

This approach has also been adopted in the National Sustainable Waste Management Bill that is yet to become law. In the Bill section 13(d) encourages the private entities that engage in waste generation to separate hazardous waste from the nonhazardous waste. Once the separation is done, the entities are encouraged to dispose such waste in the disposal facilities provided by the county government. The Bill conforms to the constitution by acknowledging the role played by the county government in waste management.

According to the World Health Organization and Ministry of Health standards, clinical waste is to be separated.¹⁷³ As previously discussed, clinical waste has been classified and categorized as hazardous waste. As a consequence, most hospitals have adopted the color coding technique where for example, the yellow waste bins is used to dispose syringes, the red waste bins is used to dispose bandages, soiled cotton and gloves while the black waste bins is used to dispose non-medical waste such as left over foods, office supplies just to

¹⁷¹ Supra note 22, Regulation 3.

¹⁷² Ibid, Regulation 3.

¹⁷³ At < www.psk.or.ke/public/uploads/file/4666b3f2a9d4b513e961f3199b77c47f.pdf > last accessed on 8th December, 2018.

mention but a few.¹⁷⁴ However, it is only until recently that a hospital like Aga Khan Kisumu started segregating their clinical waste.¹⁷⁵ Non-segregation of hazardous waste by hospitals, if ignored can cause serious consequences to human health and the environment.

b) Collect Hazardous Waste

Waste collection has been defined as ‘collection of waste usually in a truck before disposal.’¹⁷⁶

There are some statutes in Kenya that have provisions for waste collection and recycle.

For example under the Occupational Safety and Health Act, it is the duty of the employer to develop a system of “safe collection of hazardous waste in order to avoid risks to the environment and to the employees.”¹⁷⁷ If a corporation fails to comply with section 83(4) of the Act, then they can be liable for harm done both to the environment and their employees. Corporations therefore has a duty to protect the environment and their employees by developing systems or acquiring systems that ensure waste is collected, recycled and disposed in a safe manner

c) Transport Hazardous Waste

Generators of waste are also encouraged to use licensed transporters who are well trained in handling hazardous waste. Further the transporters are to dispose the waste in designated disposal sites provided by the county government. It should be noted that hazardous waste cannot be disposed in disposal sites, this waste can only be incinerated. Incineration is discussed hereunder

d) Incinerate Hazardous Waste

Under Regulation 26 of the Waste Management Regulations 2006, generators of hazardous waste are required by law to treat hazardous waste through a process called incineration. The incinerators have to comply with the provisions of the third schedule before they can be allowed to operate.

¹⁷⁴ Ibid.

¹⁷⁵ Barack Oduor, Counties aiming to buy Incinerators, Microwaves for Safer Waste Disposal, *Daily Nation* (Nairobi, 7th May 2018) <www.nation.co.ke/news/Counties-to-buy-incinerators-to-ensure-safer-waste-disposal--/1056-4548418-5m94qg/index.html> last accessed on 8th December, 2018.

¹⁷⁶ At <www.collinsdictionary.com/dictionary/english/refuse-collection> last accessed on 6th December, 2018.

¹⁷⁷ Occupational Safety and Health Act, 2007 Section 83(4).

Incineration is the process in which high temperatures are used to reduce the pathogens contained in hazardous waste which if released to the environment can cause detrimental effects to human health and the environment.¹⁷⁸ An incinerator is operated by a skilled individual who is in charge of burning the waste and maintaining the incinerator.¹⁷⁹ Due to the hazardous components found in clinical waste, incineration is the recommended process used to discard this waste.¹⁸⁰ Every health facility is supposed to have an incinerator.¹⁸¹ Those that don't have are supposed to outsource from another hospital that has or employ the services of a private firm. In Kenya, we very few private companies that offer this service. The only well-known company is the Environmental Combustion Consultant Limited.¹⁸² This is because, the cost of procuring an incinerator is quite high. However, despite all this, there are some private hospitals and clinics that do not have incinerators and as such dispose this waste in an open dumpsite while others bury the waste.¹⁸³ This is dangerous since the residents risk being exposed to contaminated syringes which can lead to HIV infection and Hepatitis.¹⁸⁴

e) Adopt Cleaner Production Mechanisms

Regulation 6 of the Waste Management Regulations 2006, encourages waste generators to adopt cleaner production principles. Clean production has been defined as the process of 'reducing environmental impacts from processes, products, and services by using better management strategies, methods, and tools.'¹⁸⁵ To achieve this, the waste generators are encouraged to reuse and recycle waste with the sole aim of conserving the environment.

Similarly section 13(a) of the National Sustainable Waste Management Bill, the private sector is encouraged to adopt cleaner production principles with the aim of protecting the environment. Some of the strategies are conservation of raw materials, reduction of toxic wastes and recycling of waste.

¹⁷⁸At < www.psk.or.ke/public/uploads/file/4666b3f2a9d4b513e961f3199b77c47f.pdf > last accessed on 8th December, 2018.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid

¹⁸² At <www.ecclkenya.com/> last accessed on 8th December, 2018.

¹⁸³ Mercy Kahonda, Residents Court Risks as Hospital Burns Medical Waste in Open Pit, *Daily Nation* (Nairobi 3rd March 2018) < www.standardmedia.co.ke/article/2001271816/residents-court-risks-as-hospital-burns-medical-waste-in-open-pit > last accessed on 8th December, 2018.

¹⁸⁴ Ibid.

¹⁸⁵At < <http://bcbu.oulu.fi/CleanerProduction.pdf> > last accessed on 8th December, 2018.

3.5 Institutions dealing with unlawful disposal of waste by corporations

There are several institutions created by the law that are tasked with the responsibility of dealing with corporate offenders who emit hazardous waste unlawfully. These institutions are;

3.5.1 National Environment Management Authority

The National Environment Management Authority is established under EMCA.¹⁸⁶ It is a body corporate capable of being sued.¹⁸⁷ The Authority is tasked with several responsibilities that are aimed at protecting the environment. Related to management of hazardous waste, the Authority is tasked with the responsibility of publishing guidelines on environmental management.¹⁸⁸ As a consequence The Waste Management Regulations 2006 and The Environmental Impact Assessment and Audit Regulations 2003 discussed above have all been published due to the efforts of NEMA.

3.5.2 National Environment Trust Fund (NETFUND)

This is a body established under EMCA. Under the act, the fund is tasked with the responsibility of facilitating research aimed at the management of the environment.¹⁸⁹ It is governed by Board of Trustees who is appointed by the Cabinet Secretary in charge of environment. The Board of Trustees is mandated to formulate policies, oversight of Fund's assets and undertake any objective stipulated within the organization. The fund has does constant research on reuse and recycle of waste.

3.5.3 National Environment Restoration Fund

This is a body established under the provisions EMCA. The main function of the fund is to act "as supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require the Authority to intervene towards the control or mitigation of environmental degradation."¹⁹⁰ Unlawful disposal of hazardous waste has detrimental effects on the environment. Restoring the environment to its original state requires serious intervention. A times the intervention can be costly. The restoration fund performs an important function in trying to restore the environment to its original state.

3.5.4 National Environment Council (NEC)

¹⁸⁶ Supra note 16, Section. 7

¹⁸⁷ Ibid section 7(2)(a)

¹⁸⁸ Ibid Section 9(2)(n).

¹⁸⁹ Ibid Section 24(4).

¹⁹⁰ Ibid, Section 25(3)

NEC is established under section 4 (1) of EMCA. One of the functions of the council is to 'promote cooperation among the public departments, local authorities, private sector, non-governmental organs and such other organizations engaged in environmental protection programmes.'¹⁹¹ Cooperation is key in achieving environmental protection especially when dealing with corporate offenders

3.5.5 National Environmental Complaints Committee (NECC)

This is established under section 31 of EMCA.¹⁹² Its main role is to investigate allegations or complaints that arise due to environmental conflicts such as environmental degradation.¹⁹³ It makes investigation and offers recommendations to the problems to the National Environmental Council.

3.5.6 National Environment Tribunal (NET)

This is established by section 125 of EMCA. Its principle function is to receive, hear and determine appeals arising from decisions of NEMA on issuance and revocation of licenses.¹⁹⁴ Section 129 (3) of the EMCA empowers the Tribunal to set aside, confirm or vary the decisions of NEMA for example where an Environmental Impact License was erroneously denied. It also advises NEMA on complex matters such as pollution.¹⁹⁵

3.5.7 The Pharmacy and Poisons Board.

This institution is established under the Pharmacy and Poisons Act.¹⁹⁶ Under the Act, one of the functions of the board is to regulate the practice in trade in drugs and poisons.¹⁹⁷ The category of drugs listed as poisonous is found in the last schedule of the Act. Pharmaceutical drugs fall under the category of hazardous waste. If left unregulated an overdose of a drug can be fatal. Apart from the Pharmacy and Poisons Act, the board also derives its authority from the Use of Poisonous Substances Act¹⁹⁸ and the Dangerous Drugs Act.¹⁹⁹

¹⁹¹ Ibid, Section 5 (c)

¹⁹² Ibid, note 21.

¹⁹³ Ibid note 21, s. 32.

¹⁹⁴ Ibid, s 129.

¹⁹⁵ Ibid, s 132.

¹⁹⁶ Cap 244 Laws of Kenya.

¹⁹⁷ Ibid, section 26

¹⁹⁸ Cap 247 Laws of Kenya

¹⁹⁹ Cap 245 Laws of Kenya.

3.5.8 The Pest Control Products Board.

This institution is established under section 5 of the Pest Control Products Act.²⁰⁰ Under the Act, the board regulates and accesses pest products.²⁰¹ As previously discussed, pesticides are classified and categorized as hazardous waste because of the toxic components it has which if left unregulated can cause detrimental effects to the environment and human health.

3.5.9 National Police service

The institution is established under the National Police Service Act.²⁰² Under the act, one of the functions of the Kenya Police is to enforce the laws of Kenya. To do this, the police have the responsibility of investigating crimes. Corporate environmental offences require police investigations. Investigations range from documentary analysis, interviewing witnesses, expert analysis, video recording and many more. Once investigations are complete, the police are to forward their finding to the Office of the Director of Public Prosecution. The prosecutors in turn are to analyze the evidence presented and make a decision on whether to charge a corporate offender or not.

3.5.10 Office of the Director of Public Prosecutions

This institution is established under Article 157 of the Constitution. The Institution also derives its authority under the Office of the Director of Prosecution Act.²⁰³ It is the principal body charged with the mandate of instituting or discontinuing a criminal charge against an accused person. In carrying out its functions, the prosecutors work closely with the police and the judiciary. It is the duty of the prosecutor to prove a criminal charge against a corporate offender beyond reasonable doubt to sustain a conviction. If they fail to do so, an accused person can be acquitted.

3.5.11 The Magistrate Courts

The Constitution under Article 169 established the Magistrate Court as a subordinate court.

The court is also established under the Magistrate Court Act²⁰⁴. Under the Act, a magistrate court has jurisdiction to determine proceedings that are criminal in nature brought under the Criminal Procedure Code and by virtue of any written law.

²⁰⁰ Act No 6 of 2009

²⁰¹ Ibid, section 6

²⁰² Act No 11A of 2011.

²⁰³ Act No 2 of 2013

²⁰⁴ Act No 26 of 2015

The decisions made by a magistrate court can be appealed through the Environment and Land Court. This is because the court has appellate jurisdiction to hear and determine appeals relating to environmental protection.²⁰⁵

3.5.12 County Government

Part 2 of the fourth Schedule in the Constitution expressly provides that the County Governments shall be responsible for waste management in the counties.²⁰⁶ This therefore calls on all the 47 counties to establish legal and institutional framework on waste management. As a consequence the County Government Act²⁰⁷ was introduced to give effect to Chapter 11 of the Constitution (on devolved government). Under the act, one of the functions of the County Government is to provide for service delivery in the county. One of the ways in which the county government provides service delivery is through recycling of waste. Previously, waste management was a function of the local government. The local authority got its powers under repealed Local Government Act, Cap 265, and Laws of Kenya.²⁰⁸ The County governments should enact subsidiary legislation that complement those provided under the framework legislation of EMCA.

As illustrated by the discussion, the institutions set up under EMCA do not have the mandate to investigate or prosecute offenders for the offences created by the Act. This therefore leaves all the burden of investigation with the intention of prosecution to the police and the Office of the Director of Public Prosecutions. The NET which is a quasi-judicial body lacks jurisdiction in criminal matters. Therefore where a criminal offence touching on hazardous waste is reported, it is presented before the Magistrate's Courts which has its own challenges in the disposal of such cases as discussed in the next chapter.

The legal and institutional framework seem to lay more emphasis on the individual culpability of natural persons rather than corporations which the law already recognizes as being persons and should therefore be prosecuted in the event they are deemed responsible for commission of a criminal offence.

²⁰⁵ Section 13(4) Environment and Land Court Act 12 A

²⁰⁶ Constitution, Fourth Schedule

²⁰⁷ Act No 17 of 2012

²⁰⁸ For example Section 160 of the Repealed Local Government Act which provided as follows :-

160. Every municipal council and, except in regard to matters contained in paragraphs (a) and (h), every town council and every urban council shall have power—

(a) to establish and maintain sanitary services for the removal and destruction of, or otherwise dealing with, all kinds of refuse and effluent and, where any such service is established, to compel the use of such service by persons to whom the service is available

3.6 Conclusion

Vision 2030 was launched in the year 2008 by the former president Mwai Kibaki.²⁰⁹ Its main objective is to ‘transform Kenya into a newly industrialized middle income country by the year 2030.’²¹⁰ Before it was adopted, it involved various stake holder deliberations and consultations.²¹¹ To achieve the vision, it was agreed to divide the vision into three pillars. These are the social, economic and political pillar. Under the social pillar, the vision seeks to ensure every Kenyan lives in a clean, secure and sustainable environment. To achieve this, the government aims to ensure that there is a proper waste management system in place. A proper waste management system can only be achieved if the issues addressed in this chapter are dealt with. As discussed, Kenya has a very comprehensive legal and institutional framework on hazardous waste. Despite having all these laws, the researcher did not come across any case law where a corporation has been prosecuted for unlawful disposal of hazardous waste. This however, does not mean the problem does not exist. As previously discussed in chapter one, the residents of Owino Uhuru Slum in Mombasa County recently experienced the effects of unlawful disposal of waste. The effects of lead poisoning led to serious health concerns to the residents. As a consequence, the residents opted to institute a civil suit against all the concerned parties including the corporation which was involved. To date, no criminal suit has been brought against these institutions. The issues brought out from the analysis of these laws are pertinent and need to be addressed.

²⁰⁹ At < <https://vision2030.go.ke/> > last accessed on 8th December, 2018.

²¹⁰ Ibid.

²¹¹ Ibid.

CHAPTER FOUR

PROCESS OF PROSECUTING CORPORATIONS FOR UNLAWFUL DISPOSAL OF HAZARDOUS WASTE IN KENYA

4.0 Introduction

As discussed in chapter two a person is not criminally liable for an offence unless it is 'established through evidence that he committed the offence or he omitted to act voluntarily with a blameworthy mind'.²¹² The guilty mind is called *mensrea* while the act is *actus reus*.²¹³ During trial, prosecution need to prove both the *mensrea* and the *actus reus* in order to get a conviction. However, as previously discussed in chapter two, environmental offences fall under strict liability offences. In strict liability offences, the prosecution do not have to prove *mensrea*, prove of *actus reus* is sufficient to warrant a conviction.

Also as discussed in chapter three, Kenya has a very comprehensive legal and institutional framework on hazardous waste. The laws and the institutions in place are adequate to deal with corporate offenders. However, as previously pointed out, there is no corporation in Kenya which has been prosecuted for unlawful disposal of hazardous waste. Further, after analysis of the several laws in chapter 3, the issues discussed must be addressed to ensure corporate offenders are made liable for their actions. This chapter seeks to discuss some of the challenges that exist in the process of prosecuting corporate offenders for unlawful disposal of waste.

4.1 Investigations

The process of initiating a criminal charge begins when a complainant reports a criminal offence against a suspect at the nearest police station. At the police station, he or she will be given an OB Number and thereafter the police will record their statement. At this point, the complainant is to furnish the police with all the evidence they have to support the charge against the suspect. The police will examine the evidence and call witnesses to also record their statements. If the evidence is sufficient, they will proceed and arrest the suspect. However, before effecting arrest, the police might face the following challenges;

First, to prove an offence against a corporate offender for unlawful disposal of waste, requires good investigative skills. However, the police lack the requisite training to

²¹² William Musyoka, *Criminal Law*, (Law Africa Publishing K Ltd) 27.

²¹³ Ibid

effectively investigate most of the cases they handle this in turn leads to cases that are poorly investigated which often leads to acquittals by the courts.²¹⁴

Second, based on the categorization and classification of hazardous waste as discussed in the previous chapter, the police may have to call scientists to testify in court as prosecution witnesses. The availability and cost implication involved in procuring the services of a scientist might be a challenge.

Third, the Constitution, under the rights of an arrested person provide that an accused person has to be brought before court within twenty four hours of arrest.²¹⁵ This constitutional provision affects the ability of the police to effectively investigate most of the cases. Most offenders are brought to court to beat the 24 hour rule which in turn affects the quality of investigations.

Finally, corporations enjoy huge financial muscle. The police on the other hand are poorly compensated. As a consequence, they can be easily compromised.

In addition to the above, the police are to work closely with the Office of the Director of Public Prosecutions. One of the functions that a public prosecutor has is to assist the police in investigations.²¹⁶ A prosecutor can also recommend to the police on how to carry out a particular investigation. However, public prosecutors face the following challenges;

First, poor pay. For example the salary scale of a prosecution counsel, ranges from Kshs 35910 to 45888 p.m.²¹⁷ with this kind of salary, prosecutors are likely to be compromised by corporate offenders who have an economic advantage over them.

Second, it is only recently that the Director of Public Prosecutions, Mr. Haji, established a Prosecutors Training Institute to offer prosecutorial training to the public prosecutors.²¹⁸ Most public prosecutors lack the necessary trial advocacy skills to effectively investigate offences against corporate offenders.

²¹⁴ Kelvin Mogeni. Criminal Justice Reforms: Issues and Options for Kenya <<https://icj-kenya.org/news/latest-news/184-criminal-justice-reforms-issues-and-options-for-kenya>> last accessed on 6th December, 2018.

²¹⁵ Constitution, Article 49(1)(f).

²¹⁶ At <www.odpp.go.ke/wp-content/uploads/2018/09/Role-profile-ODPP-job-advert.pdf> last accessed on 9th December, 2018.

²¹⁷ Ibid.

²¹⁸ At <www.odpp.go.ke/the-odpp-to-establish-a-prosecutors-training-institute-pti/> last accessed on 6th December, 2018.

Finally, most public prosecutors have moved to other government institutions.²¹⁹ The main reason being poor pay.²²⁰ As a consequence, some courts have been left with very few prosecutors with huge workload.²²¹ This affects the capacity of the available prosecutors to effectively advise and make recommendations to police on investigations.

4.2 Arrest and Physical Appearance of Accused Person to take Plea

Section 207 of the Criminal Procedure Code provides that an accused person must plead to the charges.²²² There is no provision under the Criminal Procedure Code that provides on how plea is to be taken if the accused is a corporation. This is because a corporation is considered an artificial entity incapable of pleading to the charge. For a corporation to plead to the charge, the trial magistrate has to satisfy itself that the company represented has authority of the company to plead to the charge. This was demonstrated in the case of

*Manager, Nanak Crankshaft Ltd vs. Republic, through City Council of Nairobi*²²³

In this case counsel for the applicant raised an issue in court on whether the company as a corporate entity could be charged with a criminal offence. In this case the applicant was charged in his capacity as the manager of the company and had been called to take plea on behalf of Nanak Crankshaft Ltd. The charge sheet had indicated Nanak Crankshaft Ltd as the accused person. According to him, the charge sheet was defective and it ought not to have been registered in addition, the sentence passed in the lower court was erroneous because the trial magistrate did not take time to find out whether the applicant had authority of the company to plead to the charges. The respondent on the other hand argued that the charge sheet was proper since section 165 of the Public Health Act allowed either the manager or the company secretary to plead to the charges on behalf of a company. According to respondents, corporations being artificial entities are incapable of physically being present in court to plead to the charge. Justice Ojwang acquitted the applicant of the charges. According to the judge the trial court ought to have satisfied itself before taking plea that the manager was the person authorized to take plea on behalf of the company. The learned judge argued that since there is no provision in the Criminal Procedure Code that

²¹⁹ Irene Wairimu, Prosecutor Shortage hits Nakuru Courts, *Star Newspaper* (Nairobi, 11th September, 2018) <www.the-star.co.ke/news/2013/09/11/prosecutor-shortage-hits-nakuru-courts_c829128> last accessed on 6th December, 2018.

²²⁰ Ibid.

²²¹ Ibid.

²²² The Section provides as follows Accused to be called upon to plead

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

²²³ High Court, Criminal Revision Case 763 of 2007.

shows how a corporation is to plead to the charge, the courts should rely on section 33 of the UK Criminal Justice Act.

A corporation official can easily frustrate the criminal process by refusing to bring documentation that gives them authority to take plea. Also, from the decision it appears some magistrates are not well informed on the provision of section 33 of the UK Criminal Justice System.

4.3 Standard of Proof.

The general rule in criminal law is that a person is innocent until proven guilty. The burden therefore falls on the prosecution to prove beyond reasonable doubt that it is the accused person who committed the offence. In *Woolmington verses DPP*²²⁴ the House of Lords held that it is not for the defendant to prove his innocence. He is entitled to the benefit of any doubt in relation to his guilt. In Kenya, the rule has been reaffirmed in several case laws. For example in *Phillip Muiruri Ndaruga vs Republic*²²⁵ where Justice Mativo while making reference to Justice Brennan in the case on *Re Winship* stated that a criminal charge against an accused person must be proved beyond reasonable doubt. This is because it an accused person might lose his freedom and a times he or she might be stigmatized by the society in which he lives in. Therefore, where there is any slight doubt created in the mind of the court on whether an accused person committed an offence, then it will lead to an acquittal.

It is my considered view that proving cases beyond reasonable doubt against corporations for unlawful disposal of hazardous waste might be difficult because a times the prosecution may have to call scientists to testify as prosecution witnesses. Finding a scientific expert might be difficult. Furthermore, the cost implication in procuring their services might be high. Furthermore, scientific evidence can be challenged in court. Critiques have argued that science is constantly evolving and a times even the scientists themselves have failed to agree on a particular scientific issue.²²⁶ The inconsistency in science can lead to acquittals by the court.

A times the prosecution may require a director of the offending company to appear as a witness. This may come with its own fair of challenges as was demonstrated in

²²⁴ (1935) HL

²²⁵ Criminal Appeal No 76 of 2012.

²²⁶ Rosalind Malcom, *A Guide to Environmental Law* (1994) 6-17.

*Clay City Developers and Another verses DPP and another*²²⁷ where the applicants had been charged with the offence of conspiracy to defraud. The applicants were seeking orders of certiorari with effect to stop the DPP from summoning the other directors as witnesses against Clay City Developers Limited. According to them by summoning the other directors to testify on behalf of the company, it amounted to having an accused person testifying against another. In dismissing the Notice of Motion Application, Justice Odunga stated that the applicant had not cited any provision in law which provides that a director of a company is not a competent witness in a criminal proceeding against the company. According to the learned judge, a corporation is distinct from the directors charged and it was not illegal to call the other directors as witnesses. The judge acknowledged that the director who had been charged was not charged in his personal capacity but was charged in his capacity as the director of the company.

4.4 Penalties

As previously discussed, the penalties available to corporate offenders under the provisions of EMCA,²²⁸ Forest Conservation and Management Act,²²⁹ National Sustainable Waste Management Bill, range from fines, imprisonment, and imposition of non-custodial sentences such as reparation, restoration and restitution.

The penalties imposed under these pieces of legislation are punitive enough to ensure compliance. However, a problem can exist in the following ways;

First, Sentencing is normally left to the discretion of the judge or magistrate hearing the case. Imprisonment is one of the mandatory sentence provided for under our law. It is not possible for a court of law to imprison a corporation if found guilty.²³⁰ A corporation is an artificial entity, incapable of serving a prison term.²³¹

Second, discretion can be abused. It can be contrary to the expectations of the litigants and as a result undermine the concept of justice.²³² For example, a magistrate can decide to exercise his or her discretion by imposing a fine that does not make economic sense. For

²²⁷ Misc Application No 6 of 2013

²²⁸ Act No 8 of 1999.

²²⁹ Act No 34 of 2016.

²³⁰ At < http://www.supremecourtcases.com/index2.php?option=com_content&itemid=65&do_pdf=1&id=6646 Company?s Liability where Imprisonment is Mandatory Part of sentence > last accessed on 6th October, 2018.

²³¹ Ibid.

²³² Pravin Bowry, Can Discretion affect the Delivery of Justice , *Standard Digital* (Nairobi, 5th August, 2015) < www.standardmedia.co.ke/article/2000171652/can-discretion-affect-delivery-of-justice > last accessed on 6th December, 2018.

example under, the Forest Conservation and management Act, any person who is found contravening section 68(8) can be liable to payment of fine not exceeding 3million. The court can decide to impose a fine of Ksh 100,000 by virtue of this section.

Third, with the nature of the non-custodial sentences imposed under the provisions of EMCA, there effect is as follows;

Restitution: aims at compensating the victim for the harm done.²³³

Restoration: aims at returning the environment to its original state.²³⁴

Reparation: seeks to reestablish the situation that existed before the harm was done.²³⁵

However, the cost of cleaning the environment and restoring it to its original state is not economically viable. ²³⁶It involves huge amount of costs. Furthermore, the cost of the cleanup might lead to more negative than positive effects to the environment.²³⁷

Finally, the credibility of the judiciary has been affected by corruption. Recently, transparency international released a report on corruption in Kenya. ²³⁸In the report most institutions in the public sector are ranked as corrupt. ²³⁹According to the report, most state officers engage in corruption due to the lack of transparency and accountability.²⁴⁰ In the report, key government institutions such as the Judiciary, the Police, Local Authorities and state corporations have been listed as being corrupt. These institutions are mandated to offer services to the citizens.²⁴¹ Corruption affects the ability of these institutions to carry out their functions. The perception of the public is ‘why hire a lawyer when you can get a judge’. ²⁴²As a consequence, corruption has led to increased backlog of cases, missing files and illegal acquittals.

In addition, Kenyan courts have convicted companies for criminal offence without clear rules as to how this criminal liability is imposed. The principles used to convict natural persons seem to be the ones applied in dealing with corporates. As a consequence of the

²³³ At <<https://legal-dictionary.thefreedictionary.com/restitution> > last accessed on 6th December, 2018.

²³⁴ At <www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml > last accessed on 8th December, 2018.

²³⁵ Ibid.

²³⁶ Phillipe Sands, Principles of International Environmental Law (Cambridge University Press 2012) 105

²³⁷ Ibid.

²³⁸ At< <https://tikenya.org/wp-content/uploads/2018/06/adili111.pdf> > last accessed on 6th December, 2018.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Anthony Gitonga, There is Corruption in the Judiciary says the Chief Justice David Maraga, *Standard Digital* (Nairobi 21st October, 2016) <www.standardmedia.co.ke/article/2000220603/there-is-corruption-in-the-judiciary-says-chief-justice-david-maraga > last accessed on 7th December, 2018.

failure to distinguish between individuals and corporates, similar sentences are imposed on individuals as well as corporates.

For instance in the case of *Paper House of Kenya Ltd vs Republic*²⁴³, the accused company being the owner/occupant of a plot of land where nuisance emanated, was charged with failing to comply with a notice issued under the Public Health Act . The company was convicted of the offence and fined a sum of Kshs 886,500 and in default to serve one year imprisonment. On appeal the conviction and sentence was upheld. It was not however stated in the judgment who was to be imprisoned in the event the company failed to pay the fine.

Similarly in *Wonderloaf Bakery Ltd vs Republic*²⁴⁴, the appellant company had been convicted by the City Court for failing to comply with a notice under the Public Health Act and had been sentenced to pay a fine of Ksh 522,000. Whereas the company appeared before the court through it's director, it was the company that was ultimately convicted

4.5 Incapacity

In February 2015, NEMA released a report on National Solid Waste Management.²⁴⁵ The main objective that the different stakeholders had when coming up with the report was the tackling waste management in Kenya.²⁴⁶ The reports identifies challenges of waste management in Kenya. The report identified that Kenya lacks technological capacity to effectively incinerate waste.²⁴⁷In addition, Daniel Mmereki²⁴⁸ in discussing the challenges faced by developing countries in dealing with hazardous waste also argues that most developing countries lack the requisite technologies that are effective enough to promote effective handling of hazardous waste.²⁴⁹ As a consequence, waste generators end up disposing hazardous waste in an unlawful manner.

Secondly, due to the toxic components found in hazardous waste, its handling requires caution.²⁵⁰Experts must be employed to advise on the toxicity of some hazardous

²⁴³ (2006) Kenya Law Reports.

²⁴⁴ (2007)eKLR

²⁴⁵At

<www.nema.go.ke/images/Docs/Media%20centre/Publication/National%20Solid%20Waste%20Management%20Strategy%20.pdf> last accessed on 6th December, 2018.

²⁴⁶ Ibid.

²⁴⁷ Ibid,

²⁴⁸ In 'The Management of Hazardous Waste in Developing Countries' <www.intechopen.com/books/management-of-hazardous-wastes/the-management-of-hazardous-waste-in-developing-countries> last accessed on 6th December, 2018

²⁴⁹Ibid.

²⁵⁰ Ibid

components before it is handled, transported and generated. Most developing countries lack the necessary expertise to do this.

Thirdly, according to a report done by Leah Oyake ²⁵¹ 'Awareness on Environmentally Sound Solid Waste Management by Communities and Municipalities in Kenya' lack of training by the key personnel who mane incineration facilities affects the ability to effectively handle, collect and segregate the waste

4.6 Conclusion.

In order to enjoy the right to a clean and healthy environment, corporate offenders who unlawfully dispose hazardous waste must be punished. To achieve this the challenges addressed in this chapter must be addressed. Addressing the challenges might not be easy given the resource constraints that Kenya as a developing country is facing. To effectively deal with the challenges, it requires collaboration between different agencies concerned and adoption of the recommendations in the preceding chapter.

²⁵¹ In 'Awareness on Environmentally Sound Solid Waste Management by Communities and Municipalities in Kenya' <www.ke.undp.org/content/dam/kenya/docs/energy_and_environment/Awareness%20on%20environmentally%20Sound%20Solid%20Waste%20Management_.pdf >

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.0 Conclusion.

The environment is unique and must be protected for the sake of the current and future generations. Activities such as unlawful disposal of hazardous waste, threaten the uniqueness of the environment. Corporations being one of the lead causes of unlawful disposal of hazardous waste must be liable for their actions. Liability is effective if these corporations are prosecuted for unlawful disposal of waste. Criminal remedies unlike civil law remedies are effective because criminal law is deterrent in nature.

As discussed, Kenya has a comprehensive legal and institutional framework on hazardous waste. Being a common law country, we have adequate laws and the institutions to deal with corporate offenders. It is my opinion, we do not need more laws or institutions. We need to effectively address the challenges discussed in imputing liability on corporations. To achieve this, I recommend the following;

5.1 Recommendations

First, the public needs to be aware that protection of the environment is a collective responsibility between the government and its citizens. To achieve this, the government should; encourage public participation in environmental decisions that directly affect the public and sensitize the public on the availability of both civil and criminal remedies to aggrieved parties who intend to sue corporate offenders.

Second, the enforcement agencies need to be provided with enough resources to effectively carry out their functions. This can be done by the treasury, during budgetary allocations

Third, According to the report released by NEMA on National Solid Waste Management,²⁵² the following measures need to be adopted in order to effectively deal with hazardous waste in Kenya

- a) Waste generators are encouraged to minimize waste by adopting measures that will reduce waste. The generators are further encouraged to adopt cleaner production technologies.

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At www.nema.go.ke/images/Docs/Media%20centre/Publication/National%20Solid%20Waste%20Management%20Strategy%20.pdf > last accessed on 6th December, 2018

- b) It is recommended that the county government should endeavor to ensure waste is segregated at source. This can be achieved through; creating awareness on the importance of waste segregation to the members of the public who directly deal with this waste and putting up stiff measures to the institutions that fail to dispose hazardous waste in a proper manner.
- c) The waste generators should be encouraged to adopt waste treatment technologies such as reuse and recycle of waste and waste incineration (which is the controlled burning of solids, liquids and gaseous waste) according to the report, waste incineration is important in the management of hazardous waste.

Fourth, judicial officers, through the Judiciary Training Institute, and the prosecutors through the Prosecutors Training Institute should continuously be trained in order to enhance their skills and competencies. Corporate environmental offences are considered sophisticated offences, proving them in court can be difficult.

Fifth, on sentencing, judicial officers should use the penalties prescribed under different legislations. However, in sentencing they should impose stiff penalties because the process of restoring the environment to original state is expensive and a times impossible.

Sixth, the National Sustainable Waste Management Bill needs to be enacted into law. As discussed, the bill has very good provisions on hazardous waste management in Kenya.

Seventh, collaboration between the government agencies must be encouraged. It is through collaboration that measures can be taken on how to effectively protect the environment from the effects of hazardous waste.

Eighth, the Ethics and Anti-Corruption Commission needs to intensify its efforts in fighting corruption within the public sector. The commission should aim at ceasing illegally acquired assets and returning the proceeds to the government. The proceeds can in turn be used to establish recycling and waste treatment facilities in the counties.

Ninth, at the international level, state parties should be encouraged to consult, report, share information and cooperate with each other. This can be achieved through lobbying at the international forum on the importance of protecting the environment from hazardous waste.

Tenth, the Kenyan government needs to collaborate with international investors who are interested in advising the country on how best to; reuse and recycle waste, dispose

hazardous waste in a safe manner, train on the components of hazardous waste and fund on incinerators.

Eleventh the county government need to periodically report to the national government on the waste management strategies they have put in place including some of the challenges experienced in trying to come up with the strategies.

Twelfth, the government needs to encourage research and innovation at our higher institutions of learning. This can be achieved through offering scholarships to the needy students and cross border learning. It is only through research and innovations that techniques for reuse and recycling of waste can be discovered.

Thirteenth, the National Council for Law Reporting, should be on the lookout for judicial precedence where a corporation in Kenya has been prosecuted for unlawful disposal of hazardous waste.

Finally, the government needs to encourage corporations to adopt cleaner production mechanisms. To achieve this, the government can offer tax incentives to the corporations that adopt technologies which encourage reuse and recycle of waste.

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