A rights-basis for climate compensatory claims in Kenya*

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Abstract

This chapter analyses the Kenyan legal system and argues that a rights-based approach offers possibilities for obtaining compensation against private entities for climate-related losses in Kenya. It identifies four main features that make Kenya's legal system conducive for rights-based climate compensatory claims. Firstly, there exists a specific legislative provision on enforcing climate-related rights coupled with a justiciable environmental rights provision in the Constitution. Secondly, horizontal application of constitutional rights provides the possibility to enforce violation of environmental and climate-related rights against private entities. Thirdly, the liberalised *locus standi* and causation requirements for enforcement of environmental and climate-related rights allow litigants to circumvent the restrictive requirements experienced in private law cases. Finally, the legal system provides for a remedy of compensation for environmental and climate-related rights violation. The Chapter concludes that while the legal system may be conducive for climate compensatory claims, litigants may still face the challenge of proving when and how much compensation is due, considering the conflicting jurisprudence on compensation in environmental rights cases.

1 Introduction

The question of who should be responsible for the costs and damages of climate change is now becoming more important with the rising impacts of climate change. The risks of climate change come with huge costs as properties are damaged and livelihoods lost, and the necessary mitigation and adaptation strategies also attract huge costs.[1] As 'the realization sinks that climate change will cause billions of dol-

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1 For instance, the global cost of climate change in 2010, including private and public property damage, was approximately USD 700 billion and the estimates have dramatically increased since then. The UNEP estimates that the global cost of adapting to climate change impacts is expected to grow to USD 140-300 billion per year by 2030 and USD 280-500 billion per year by 2050. The IPCC on the other hand estimates that the costs of damages from warming of 1.5°C and 2°C in 2100 are USD 54 trillion and USD 69 trillion respectively, relative to 1961-1990. See Michael Byers, Kelsey Franks and Andrew Gage, 'Internalization of climate dam-

lars of harm even if we do everything feasible to cut back on emissions,'[2] momentum is building up on litigation as an avenue for holding responsible agents liable for the costs associated with climate change.

But then again, litigation has so far failed to provide the much-needed reprieve to victims as climate cases seeking compensation around the world have largely been unsuccessful.[3] Parties to a climate damages suit are usually faced with an insurmountable task of convincing the courts that emissions from the defendants have indeed caused damage capable of being redressed. The diffuse nature and transboundary effect of GHG emissions create particular challenges on establishing climate liability in a way that would fulfil the traditional litigation requirements for compensation. The problem is exacerbated by the lack of domestic legislations that recognise the intricacies of climate change. One commentator has pointed out that the 'climate damages litigation landscape would be significantly altered if countries enact legislation changing or clarifying the rules around climate damages liability.'[4]

One country that deserves mention in this breadth is Kenya. It is one of the few countries around the world with a specific legislation providing for enforcement of rights relating to climate change and for compensation of climate victims.[5] The Climate Change Act of 2016[6] and the Constitution[7] provide for the right to sue entities that contribute to climate change without the need to demonstrate loss or injury and

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ages litigation' (2017) 7 Washington Journal of Environmental Law & Policy 264, 266; Daniel Puig et al., 'The adaptation finance gap report' (United Nations Environment Programme (UNEP) 2016) 40; Ove Hoegh-Guldberg et al., 'Impacts of 1.5°C of global warming on natural and human systems' in Valérie Masson-Delmotte et al. (eds), *global warming of 1.5°c: an ipcc special Report on the Impacts of Global Warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018) 264-265.

2 Daniel A Farber, 'Adapting to climate change: Who should pay' (2007) 23 Journal of Land Use & Environmental Law 1, 4.

3 For the purposes of this chapter, successful means a positive outcome of the claim in court rather than the effects of litigation in the broader policy and regulatory landscape. As at the time of writing this Chapter, about 25 climate compensatory cases had been filed against private entities in various jurisdictions around the world, out of which 22 had been filed in the US. In the US, none of the cases have been determined on merits. See Sabin Centre for Climate Change Law, 'Climate change litigation databases' <http://climatecasechart.com/> accessed 15 June 2020.

4 Byers, Franks and Gage (n 1) 269; Andrew Gage et al., 'Taking climate justice into our own hands: A model Climate Compensation Act' (West Coast Environmental Law 2005) <https://static1.squarespace.com/static/565777bfe4b0509ba9e4f31e/t/5666fee5dc5cb481d318cb85/1449590501349/web_version_final.pdf> accessed 20 October 2018.

5 Uganda is another country that recently enacted a climate change legislation with a specific provision on climate change litigation which provides for the relief of compensation. See the (Uganda) National Climate Change Act 2021, Section 26.

6 (Kenyan) Climate Change Act No 11 of 2016.

7 Constitution of Kenya 2010.

allows court to order for compensation of 'climate victims'.[8] The provisions, though not yet tested, address some of the challenges that have stood in the way of climate litigation and open doors for climate compensatory claims in Kenya.

While recognising that there are various avenues for enforcing the Climate Change Act and obtaining compensation,[9] this chapter concentrates on the rights-based approach to climate compensatory claims against private entities in Kenya. It discusses how the Climate Change Act and the Constitution provide a rights basis to seek damages and how this approach addresses the challenges that have clouded climate compensatory claims around the world.

2 The challenge of climate compensatory claims: A global perspective

For the purposes of this article, *climate compensatory claims* refer to a sub-set of climate litigation where plaintiffs sue private entities seeking compensation for damages caused or likely to be caused by climate change and for the costs of preparing for the impacts of climate change. Although there are cases where compensation can be sought against government for its actions or inaction against climate change, the discussion in the chapter is limited to liability of private entities for climate violations. These claims can be filed by either private persons, civil society or even governmental organisations.

While there has been considerable attempts by both government and private parties to file climate compensatory claims, to the author's knowledge, none has been successful in actually obtaining the same.[10] In the US for instance, where most of the compensatory suits have been filed, none of them have to date reached trial on merits.[11] Issues such as the political question doctrine, legal standing and displacement by statutes have been major barriers.[12] In Germany, the *Lliuya v RWE AG*[13] case

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8 Climate Change Act Section 23; Constitution of Kenya Article 70.

9 For a discussion of the avenues, see Lydia A Omuko-Jung, 'The evolving locus standi and causation requirements in Kenya: A precautionary turn for climate change litigation?' (2021) 15 Carbon & Climate Law Review 171; Lydia A Omuko-Jung, 'Climate change litigation in Kenya: Possibilities and potentiality' in Francesco Sindico and Makane Moise Mbegue (eds), *Comparative climate change litigation: Beyond the usual suspects*, vol 47 (1st edn, Springer International Publishing 2021).

10 See (n 3) above.

11 Ibid.

12 *City of Oakland v BP PLC* (2018) 325 F Supp 3d 1017 (ND Cal); *City of New York v BP p.l.c* (2018) SDNY 1:18-cv-00182, 325 F Supp 3d 466; *Comer v Murphy Oil USA, Inc* (2007) SD Miss No 07-60756, 2007 WL 6942285; *State of Connecticut et al. v American Electric Power Company, Inc et al.* (2005) SDNY 1:04-cv-05669-LAP, 406 F Supp 2d 265. See also Byers, Franks and Gage (n 1) 272.

13 *Essen Regional Court Case No 2 O 285/15* (unofficial English translation available at the Sabin Centre Climate Change Litigation Database <http://climatecasechart.com/climate-change-litigation/non-us-case/lliuya-v-rwe-ag/> accessed 28 September 2021).

seems to be hopeful since it has moved to the evidentiary stage.[14] The case did, however, have its fair share of challenges, as the court of first instance dismissed the claim for failure to meet the causation requirements and lack of effective redress from court.[15]

Although some of the challenges in these cases are jurisdiction specific,[16] the claimants seem to have similar challenges across board – selecting the proper cause of action, proving legal standing and linking their injuries or losses to the defendants' emissions.[17]

2.1 Causes of action

The question claimants are usually faced with is, what cause of action is suitable? Is it only private law causes of action or can public law causes of action also provide an avenue for claiming compensation? Most, if not all, of climate compensatory claims around the world have been based on private law causes of action in tort (available for common law countries) or in the civil procedure (in Germany). The private law cases have however faced many obstacles, which has led some authors to question their suitability for climate liability.[18]

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14 Ibid. A Peruvian national sued a German Company for its contribution to GHG emissions and sought to have the defendant held liable for the portion of costs of adequate preventative measures to protect the claimant's property against the impacts of climate change. The district court dismissed the claim, and an appeal was lodged. The appellate court has declared the case admissible, and it has now moved to the evidentiary stage to determine the existence of risk to the claimant's property and how the defendant's GHG has contributed to the risk.

15 Ibid. The district court held that it was impossible to identify a linear causal chain from particular source of emissions to a particular damage and that the court could not provide the claimant with an effective redress because his situation would not change even if RWE stopped emitting.

16 For instance, displacement of common law causes of action by statute is quite specific to cases in the US. See *Native Village of Kivalina v ExxonMobil Corp* 696 F3d 849 (9th Cir 2012); *City of Oakland* (n 12); *City of New York* (n 12).

17 Another barrier not addressed here of particular relevance to the US cases is the political question doctrine. The doctrine bars US courts from considering cases that raise political issues that are best addressed by the elective branches. Lower courts in the US have dismissed tort-based climate cases on the ground that they raise non-justiciable climate cases, though the Supreme Court has held that the doctrine does not bar climate related claims. See *American Electric Power Co v Connecticut* 564 US 410 (2011); Byers, Franks and Gage (n 1) 273.

18 Matthew Edwin Miller, 'The right issue, the wrong branch: Arguments against adjudicating climate change nuisance claims' (2010) 109 Michigan Law Review 257; David A Dana, 'The mismatch between public nuisance law and global warming' (2010) 18 Supreme Court Economic Review 9. *Kysar* also argues that tort law seems fundamentally ill-equipped to address the causes and impacts of climate change. See Douglas A Kysar, 'What climate change can do about tort law' (2011) 4 Environmental Law 1, 3-4.

In the US, for instance, common law causes of action have been dismissed because of the displacement doctrine. According to this doctrine, federal common law cannot be applied by US courts when the issue in question is directly regulated by statute.[19] In the climate change context, the courts have held that global warming cases are displaced by the Clean Air Act (CAA) and consequently, federal courts have no subject matter jurisdiction.[20] The problem, however, is that the CAA does not provide for damages as a remedy for harms arising from the very pollution it purports to regulate.[21] This leaves plaintiffs with limited, if any, avenue to seek and recover remedy for damages arising from climate change impacts, since their claims are precluded from federal common law claims by CAA and at the same time cannot recover damages under the statute. This has made it almost impossible for plaintiffs in the US to recover damages for any injury or losses from climate change.[22]

Generally, climate lawsuits based on private law causes of action are considered more difficult to navigate and a public law approach seems like an easier avenue.[23] For instance, if a climate case is based on negligence, the claimant must prove that the defendant owes them a duty of care recognised by law and that the defendant has

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19 Nicole Johnson, '*Native Village of Kivalina v ExxonMobil Corp*: Say goodbye to federal public nuisance claims for greenhouse gas emissions' (2013) 40 Ecology Law Quarterly 557, 560; Mark Belleville and Kennedy Katherine, 'Cool lawsuits: Is climate change litigation dead after Kivalina v ExxonMobil?' (2012) 7 Appalachian Natural Resources Law Journal 51, 58.

20 *Native Village of Kivalina v ExxonMobil Corp.* (n 16) 858.

21 Belleville and Kennedy Katherine (n 19) 97-98; Johnson (n 19) 561.

22 Subsequent decisions have followed this reasoning in dismissing climate compensatory claims. In the *City of Oakland v BP P.L.C.* a federal district court dismissed public nuisance lawsuits brought by Oakland and San Francisco seeking to hold five fossil fuel companies liable for climate change harms on the basis of the displacement doctrine. Although the claimants attempted to differentiate their federal nuisance claims from claims based on GHGs previously found to be displaced by the Clean Air Act, the court held that AEP and Kivalina's displacement rule would apply to the cities' claims even though the claims were based not on the defendants' own greenhouse gas emissions but on their sales of fossil fuels to other parties that will eventually burn the fuels. Again, in July 2018, another federal district court in *City of New York v BP P.L.C* dismissed a suit filed by New York City against fossil fuel companies seeking damages for climate change-related injuries. One of the conclusions made by the court while dismissing the suit was that the CAA displaced all common law claims. See *City of Oakland* (n 12) 10; *City of New York* (n 12) 21-22.

23 Maria L Banda and Scott Fulton, 'Litigating climate change in national courts: Recent trends and developments in global climate law' (2017) 47 Environmental Law Reporter 10121, 10134; K Bouwer, 'Substantial justice?: Transnational torts as climate litigation' (2021) 15 Carbon & Climate Law Review 188, 189-190; Kysar (n 18) Section II. *Bouwer*, for instance, notes that private law duties do not easily accommodate environmental harms and similar problems apply to climate torts. *Kysar* discusses the difficulties in using tort for climate litigation, pointing out that '[a]t each stage of the traditional tort analysis – duty, breach, causation, and harm – the climate change plaintiff finds herself bumping up against doctrines that are premised on a classical liberal world view in which threats such as global climate change simply do not register.'

breached this duty out of which the claimant has suffered loss.[24] Duty of care involves a particular or defined legal obligation 'arising out of a relationship between ascertained defendant(s) and ascertained plaintiff(s).'[25] In climate change, it is difficult to identify the relationship between ascertained defendants and ascertained plaintiffs.[26] Secondly, there is need to demonstrate foreseeability of risk. The question is whether it is reasonably foreseeable that a particular defendant's actions of emitting GHGs in the course of its business would lead to a specific climate related event that would in turn harm the plaintiff.[27] And when does such foreseeability arise?[28] Thirdly, the plaintiff needs to show that the defendant breached the duty of care.[29] To what extent would the defendant's emission be considered to have caused climate change that induced the event that caused the plaintiff's injury? Would the defendant's emissions be sufficient or necessary element for the event that injured the plaintiff?[30] While developments in climate science have made it possible identify the role of anthropogenic global warming to certain events and to quantify the contribution of large emitters,[31] it still remains difficult to prove to the required standards that the plaintiff was injured because of the defendant's influence on the climate.[32] Indeed, looking at climate lawsuits generally, the tort-based ones have not had positive out-

24 For an analysis of elements of negligence, see David G Owen, 'The five elements of negligence' (2007) 35 Hofstra Law Review 1671.

25 Brian J Preston, 'Climate change litigation (Part 1)' (2011) 5 Carbon & Climate Law Review 3, 6; See also James Salzman and David Hunter, 'Negligence in the air: The duty of care in climate change litigation' (2007) 156 University of Pennsylvania Law Review 101, 107; and *Palsgraf v Long Island Railroad* 162 NE 99 (NY 1928) (opinion of Justice Cardozo). *Salzman and Hunter* note that the duty of care is owed to another person or class of persons, and not to the world at large.

26 Climate change is essentially considered a global tort, in that everyone is at risk by global warming in which multiple defendants contribute to. See Salzman and Hunter (n 25) 108; Preston (n 25) 7.

27 Preston (n 25) 7.

28 Ibid.

29 Owen (n 24) 1676.

30 See Preston (n 25) 8 for an analysis of necessary and substantial elements in determining the defendant's liability for the plaintiff's injuries.

31 The recent field of attribution science tries to find out how human-induced climate change contributed to the occurrence of specific extreme weather events while the *Carbon Majors Report* identifies major emitters and quantifies their contribution. See RF Stuart-Smith et al., 'Increased outburst flood hazard from Lake Palcacocha due to human-induced glacier retreat' (2021) 14 Nature Geoscience 85; Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2014) 122 Climatic Change 229.

32 Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9) 172; Sabrina McCormick et al., 'Science in litigation, the third branch of U.S. climate policy' (2017) 357 Science 979; Tobias Pfrommer et al., 'Establishing causation in climate litigation: Admissibility and reliability' (2019) 152 Climatic Change 67, 68.

comes from court[33] and the successful ones have mainly been based on public law doctrines.[34]

And while public law cases are considered easier to navigate and a more straightforward vehicle for climate litigation,[35] they also have their fair share of challenges when used to seek compensation. For instance, some jurisdictions do not allow for horizontal application of constitutional rights[36] which closes the door for rights-based claims against private entities. In other jurisdictions, persons claiming a public right or interest have to show they suffered an injury greater than other members of the public,[37] which makes it challenging to obtain damages for injuries which are diffuse in nature like those arising from climate change. Thus, both private and public law have their fair share of challenges when used to seek compensation for injuries arising from climate change impacts.

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33 It is however important to note that the appellate court in *Lliuya v RWE* has declared the case admissible and moved to the evidentiary stage. It remains to be seen if the plaintiff with prove his case at trial. See (n 14) and Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9) 171.

34 Examples of the successful cases include *Leghari v Pakistan* which was a rights-based litigation against government's inaction and delay in implementing the National Climate Change Policy and Framework; *Gbemre v Shell* where the court found that a Nigerian legislation permitting gas flaring violated the claimant's rights to life and dignity; and *Netherlands v Urgenda* in which the Supreme Court upheld the Court of Appeals decision that the State's policy on GHG emission reduction was not in compliance with Articles 2 and 8 ECHR which requires it to take suitable measures to protect the residents of the Netherlands from dangerous climate change. See *Leghari v Federation of Pakistan* WP No 25501/2015 (Lahore High Ct Green Bench 2015); *Gbemre v Shell Petroleum Dev Co Nigeria Ltd & Others* No FHC/B/CS/53/05 (Fed High Ct 14 Nov 2005) (Nigeria); *State of the Netherlands v Urgenda Foundation* (2019) ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands).

35 Banda and Fulton (n 23) 10134.

36 In the US for instance, human rights provisions under the Constitution have no direct application between private actors. Private actors are not bound by constitutional rights except when they are endowed with powers or functions that are governmental in nature, that is, when they are acting as a state or when they conduct a state action. The Canadian Supreme Court has also held that the Charter rights do not bind private persons. Germany on the other hand has a different approach – a private person may not bring direct constitutional action against another but parties to a private litigation may raise basic rights to support their positions through the general clauses and concepts of private law. See *Evans v Newton* 382 US 296, 299 (1966); *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* (1986) J 2 S,c'R, 573,9 B,c'LR (2d) 273 595; Danwood Mzikenge Chirwa, 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 Law, Democracy & Development 21, 22-31.

37 See for instance *T-330/18 - Armando Carvalho and Others v The European Parliament and the Council* (2019) ECLI:EU:T:2019:324 at (54), the court held that the plaintiffs need to show that they are affected by the contested matter in a peculiar manner or by reason of circumstances in which they are differentiated from all other persons.

2.2 Legal standing

The classical standing in claims for damages grants only persons who have suffered or are likely to suffer as a result of the challenged conduct the right to seek actionable remedy.[38] In the US for example, the plaintiff has to demonstrate that (i) they have suffered an injury in fact; (ii) that is fairly traceable to the defendant's conduct; and (iii) is capable of being redressed by the court.[39] It is quite a challenge to navigate this classical standing requirement in climate cases. Whereas courts generally acknowledge injuries suffered by the plaintiffs, they have generally rejected the plaintiffs' assertions on causation.[40] This is compounded by the fact that for some courts, it is insufficient for the plaintiff to demonstrate that the defendants' emissions *contributed* to the injuries suffered.[41]

The other issue with standing is that some courts have determined that only government entities, and not private citizens, have a standing to assert global warming claims. In *Massachusetts* and *Connecticut,* the Supreme Court found that the plaintiffs have standing by granting them 'special solitude' due to their sovereign states.[42] While the cases were not compensatory claims, they have influenced claims for damages, such as the *Comer v Murphy* where the court held that the plaintiffs lacked standing because, *inter alia*, all of them were private citizens who had no sovereign status.[43]

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38 *Gouriet v Union of Postal Office Workers* (1977) AC 43 500; Brian Sang, 'Tending towards greater eco-protection in Kenya: Public interest environmental litigation and its prospects within the new constitutional order' (2013) 57 Journal of African Law 29, 31.

39 United States Constitution Section III; *Lujan v Defenders of Wildlife* 504 US 555 (1992) 560-561.

40 In *Comer v Murphy*, while the court acknowledged that those who suffered property damage and physical injuries from Hurricane Katrina did have such a particularised injury for standing purposes, the court found that the Plaintiffs had failed to establish a causal connection between the defendants' emissions to the specific damage they suffered during Hurricane Katrina. Similarly, in *Kivalina v Exxonmobil* the court held that the village lacked constitutional standing because its injuries were not fairly traceable to the defendants' emissions. See *Comer v Murphy Oil USA* (2009) 585 F3d 855 (5th Cir) 23; *Native Village of Kivalina v Exxonmobil Corp* 663 F Supp 2d 863 (ND Cal2009) 877-880.

41 *Comer II* (n 40) 21-22; *Native Village of Kivalina v Exxonmobil Corp* (n 40) 880-882. An exception is *Lliuya v RWE AG* (n 13) where the appellate court has accepted that partial contribution can still be a basis for liability.

42 *Massachusetts v Environmental Protection Agency* 549 US 497 (2007) 518-520; *AEP v Connecticut* (n 15) 420.

43 *Comer II* (n 40) 22.

2.3 Causation and liability

To be able to recover damages, plaintiffs must establish a causal relationship between their injury and the defendants' actions. Causation in this case is different from the 'fairly traceable' requirement for standing, but rather (at least in the US) they have to establish factual and proximate causation.[44] While the courts in the US are yet to deal with this issue in climate compensatory cases since none has so far reached merits, it is considered one of the most significant barriers to overcome in climate compensatory claims.[45] For factual causation, one needs to show that the defendant's action more likely than not caused the injury,[46] which is often established through the 'but for' test, in which case the defendant's action needs to be a necessary element.[47] Under civil law jurisdiction, particularly Germany and Austria, the plaintiff has to prove that there is a high probability that the defendant's conduct caused the harm.[48] In the climate change context, extreme events are subject to natural fluctuations in frequency and severity making it difficult to attribute the event that caused an injury to human intervention,[49] let alone emissions from particular defendants. Even if the plaintiff were able to establish the link, the emissions from a single or a group of defendants cannot be singled out to have caused climate change.[50] In a mix of emissions in the atmosphere from a multitude of emitters, a single defendant's emissions is sometimes considered just a 'drop in the ocean.'[51]

In *Lliuya v RWE,* the district court dismissed the claim for lack of causal link, noting that the defendant's emissions were so insignificant in light of the millions and

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44 Kysar (n 18); *Restatement of the Law (Third) of Torts: Liability for physical and emotional harm* (The American Law Institute 2012).

45 Kysar (n 18) 29; Byers, Franks and Gage (n 1) 278-279; Preston (n 25) 8.

46 *Wheat v Sofamor, SNC* 46 F Supp 2d 1351(ND Ga 1999) 1357; Byers, Franks and Gage (n 1) 279.

47 Byers, Franks and Gage (n 1) 280; Richard W Wright, 'Causation, responsibility, risk, probability, naked statistics, and proof: Pruning the bramble bush by clarifying the concepts' (1988) 73 Iowa Law Review 1001, 1019.

48 Martin Spitzer and Bernhard Burtscher, 'Liability for climate change: Cases, challenges and concepts' (2017) 2017 Journal of European Tort Law 166.

49 Ibid 167; Kysar (n 18) 31.

50 *Native Village of Kivalina v Exxonmobil Corp* (n 40). The court held that considering that GHGs rapidly mix in the atmosphere and inevitably merge, GHGs cannot be traced to any particular source, let alone the defendant. See also Byers, Franks and Gage (n 1) 280-281.

51 In *Lliuya v RWE AG* (n 13), the district court noted that the emissions 'by the defendant are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted… Even the emissions of the defendant, as a major greenhouse gas emitter, are not so significant in the light of the millions and billions of emitters worldwide.' See also Jacqueline Peel, 'Issues in climate change litigation' (2011) 5 Climate Law Review 15, 16; Lydia Akinyi Omuko, 'Applying the precautionary principle to address the "proof problem" in climate change litigation' (2016) 21 Tilburg Law Review 52, 57.

billions of emitters worldwide.[52] Consequently, even if the defendant's emissions were undone, the plaintiff's harm would have still occurred. Furthermore, it stressed that the chain of causation in climate change complex, multipolar and even scientifically disputed.[53]

3 Climate compensatory claims in Kenya: A rights-based approach

The above discussion has briefly pointed out the challenges claimants around the world face in trying to obtain compensation for climate damages, ranging from the classical causation and *locus standi* to the issue of the right cause of action. Particularly, private law-based claims seem to be more challenging to navigate when the traditional legal requirements are applied to climate cases. Consequently, this chapter considers the rights-based approach as a more promising avenue for claiming compensation within the Kenyan legal system, considering how public law has evolved in the country especially as relates to enforcing environmental rights.[54]

The main legal provision for enforcement of rights relating to climate change is Section 23 Climate Change Act. It provides that

> a person may, *pursuant to Article 70 of the Constitution*, apply to the Environment and Land Court (ELC) alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change. [Emphasis added][55]

Article 70 of the Constitution on the other hand allows any person who alleges that a right to clean and healthy environment protected under Article 42 of the Constitution[56] has been, is being or is likely to be infringed or threatened to apply a court for redress. The direct reference to the Constitution places climate related violations at the same level as constitutional rights violations so that the enforcement proceedings under the constitution are also available for climate litigation.[57] Thus, the inclusion of the right to clean and healthy environment in the Bill of Rights coupled with the enforcement provision in the Climate Change Act provide a basis for a rights-based approach to climate-compensatory claims in Kenya.

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52 *Lliuya v RWE AG* (n 13). See the unofficial English translation of the district court's decision at the Sabin Centre Climate Change Litigation Database <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision-1.pdf> accessed 28 September 2021.

53 Ibid.

54 For a discussion of the evolution, see Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9).

55 Climate Change Act Section 23(1).

56 Article 42 of the Constitution provides that every person has a right to clean and healthy environment, including the right to have the environment protected for the benefit of present and future generations.

57 Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9) 181.

3.1 Horizontal application of constitutional rights

One significant aspect is the possibility to enforce the Bill of Rights against private entities. The obligation to uphold the Constitution and the rights therein is placed not only on the state but also on private entities.[58] The Constitution provides that the Bill of Rights (which includes the right to clean and healthy environment) binds all state organs and *all persons.*[59] Article 260 defines *person* under the Constitution to include 'a company, association or other body of persons whether incorporated or unincorporated.'[60] Consequently, the Bill of Rights binds companies, associations and other private entities and the courts have indeed confirmed that the Constitution allows for the enforcement of Bill of Rights against private entities.[61] In fact, the courts consider the issue of whether the constitutional rights can be applied horizontally to be beyond peradventure and completely settled, but rather the real issue is to what extent the Bill of Rights should apply to private relationships.[62]

On the extent of applicability of Bill of Rights to private relationships, the courts are reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question.[63] Thus, if a matter can be decided on the basis of existing legislation or an alternative remedy without invoking the constitutional provisions as the foundation of the suit, then such alternative course of action should be adopted instead.[64] While it may be argued that the Climate Change Act (or even the environmental legislation)[65] provide a remedy, the

58 Constitution of Kenya Article 3(1). The provision mandates every person to respect, uphold and defend the Constitution. See also Omuko-Jung, 'Climate change litigation in Kenya: Possibilities and potentiality' (n 9).

59 Constitution of Kenya Article 20(1).

60 Ibid Article 260.

61 *Rose Wangui Mambo and 2 Others v Limuru Country Club and 17 Others* Pet 160 of 2013 (High Court at Nairobi) (2014) eKLR (69). The Court noted that to hold that private entities are insulated from the constitutional duty to respect and uphold fundamental rights would strip individual Kenyans of the very constitutional protection that the Constitution of Kenya 2010 meant jealously to guard and leave them exposed and vulnerable in private dealings. See also *B A & another v Standard Group Limited & 2 Others* Civil Appeal No 224 of 2012 (Court of Appeal at Nairobi) (2016) eKLR (34); *Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & Another* Civil Appeal No 296 of 2014 (Court of Appeal at Nairobi) (2017) eKLR 6.

62 *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Pet 65 of 2010 (High Court at Nairobi) (2013) eKLR (59); *Isaac Ngugi v Nairobi Hospital & 3 others* Pet 407 of 2012 (High Court at Nairobi) (2013) eKLR (22); *Baobab v Duncan* (n 61) 7-8.

63 *Ngugi v Nairobi Hospital* (n 62) para 23; *Baobab v Duncan* (n 61) 8.

64 *Baobab v Duncan* (n 61) 8.

65 Environmental Management and Coordination Act, 8 of 1999 (EMCA).

legislation itself makes a direct reference to the Constitution,[66] providing a reason to invoke constitutional rights as a basis for a climate suit against private entities.

Additionally, where a claim raises more than one causes of action, and one is based on violation of constitutional rights, then a claimant can still file a petition for enforcement of fundamental rights.[67] This means that a climate related claim, even if it raises other causes of action, could still be filed as a constitutional claim against private entities for violation of the right to clean and healthy environment. The fact that Section 23 of Climate Change Act particularly recognises that the application is pursuant to Article 70 of the Constitution strengthens this argument. Enforcement of environmental rights against private entities is further reinforced by Article 69(2) of the Constitution which particularly mandates *every person* to cooperate with the State to protect and conserve the environment.[68]

3.2 Locus Standi

The *locus standi* requirement in public environmental cases (and particularly climate cases) is so relaxed in Kenya to the extent that a person does not need to demonstrate any personal interest or injury.[69] The inclusion of the right to clean and healthy environment in the Bill of Rights grants every person the right to institute court proceedings for the enforcement of the right.[70] One does not need to be specifically or directly affected by the violation – a person or an association can institute proceedings on behalf of another person or even acting in the public interest.[71] This is augmented by Article 70 of the Constitution which grants any person the right to apply to court for redress for a violation or threat violation of the right to clean and healthy environ-

66 Climate Change Act Section 23(1) provides that an application under the provision is made pursuant to Article 70 of the Constitution.

67 *Baobab v Duncan* (n 61) 9. The case raised two causes of action, one for violation of fundamental rights and the other for defamation. Appellants raised an objection that the Respondent should have filed a civil claim for defamation as opposed to a constitutional petition. Both the High Court and Court of Appeal dismissed this argument holding that the conflation of both causes of action into one petition does not preclude the constitutional court from hearing it.

68 Constitution of Kenya Article 69(2).

69 For a discussion of standing requirements in Kenya, see Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9).

70 Ibid Article 22(1) and 258(1). See also Omuko-Jung, 'Climate change litigation in Kenya: Possibilities and potentiality' (n 9).

71 Constitution of Kenya Article 22(2) and 258(2). In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 (Court of Appeal at Nairobi) (2013) eKLR (28), the court held that the stringent *locus standi* requirements requiring some special interest by a private citizen to enforce public rights have been buried in the annals of history. The Supreme Court agreed with the court of appeal finding *on locus standi*. See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Supreme Court Civil Appn No 29 of 2014 (2014) eKLR (78).

ment.[72] For enforcing environmental rights, the claimant does not have to demonstrate that they or any other person has incurred loss or suffered injury.[73] This relaxed *locus standi* requirement is further cemented by the Climate Change Act which allows any person to apply to the ELC for enforcement of climate related rights and does away with the requirement to demonstrate any injury or loss.[74] This is a closely guarded principle by Kenyan courts that any attempt to challenge a petitioner's standing in environmental rights cases is never successful. A case in point is[75] *Joseph Leboo & 2 others v Director Kenya Forest Services & another*[76] which involved management of forests. The court pointed out that in environmental matters, *locus standi* as known and applied under the common law is not applicable.[77] Consequently, any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment.[78] Thus, claimants seeking compensation through human-rights approach are unlikely to face any challenge in showing they have *locus standi* to institute such a suit.

3.3 Proof of violations

To succeed under a constitutional claim, the claimant need to not only state the violations but also demonstrate the manner in which they have been violated.[79] For purposes of environmental rights, the claimant is required to show how the defendants' activities are causing emissions which are affecting the quality of the environment, which from a review of case law does not seem to be problematic.[80] A clean and healthy environment would be one that is devoid of dirt or anything harmful which

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72 Constitution of Kenya Article 70(1).

73 Ibid Article 70(3). A provision similar to this exists in *Section 3 of EMCA* which provides for enforcement of environmental rights by a person on his behalf or on behalf of a group or class of persons, members of an association or in the public interest and that such a person shall have the capacity to bring an action notwithstanding that such they cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury.

74 Climate Change Act Section 23.

75 See, for instance, *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others* Pet 13 of 2015 (ELC at Nakuru) (2016) eKLR; *Joseph Leboo & 2 others v Director Kenya Forest Services & Another* ELC Case No 273 of 2013 (ELA at Eldoret) (2013) eKLR. For a comprehensive analysis of case law on *locus standi* in Kenya, see Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9).

76 ELC Case No 273 of 2013 (ELA at Eldoret) (2013) eKLR.

77 Ibid para 25.

78 Ibid para 28.

79 *Peter Michobo Muiru v Barclays Bank of Kenya Ltd & Another* Pet 254 of 2015 (High Court at Nairobi) (2016) eKLR (8), quoting *Anarita Karimi Njeru v Republic*, Nairobi HC Misc. Criminal Application 4 of 1979.

80 See Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9) 179; Omuko-Jung, 'Climate change litigation in Kenya: Possibilities and potentiality' (n 9).

may interfere with the physical or mental well-being of persons.[81] Some of the factors that are deleterious to the environment as can be discerned from Part VIII of Environmental Management and Coordination Act (EMCA) include effluents, emissions, waste, and noxious smells among others.[82] The courts have for instance found that the right to clean and healthy environment was threatened by a poorly damaged dumpsite due to air pollution and contamination of aquifer[83] or by a base communication transmitter which could impact the environment through electromagnetic waves.[84] Looking at jurisprudence and the EMCA definition, there is no reason why GHG emissions would not be considered as impacting on the quality of the environment and thus a threat to environmental rights. Furthermore, the impact of GHGs on the environment and ultimately to the wellbeing of humans is scientifically documented, which further supports the contention.[85]

One of the things the Climate Change Act and the Constitution have done away with is the need to show injury to succeed in enforcing rights relating to climate change,[86] which also does away with the requirement of linking injuries to emissions from specific entities. The courts are quite lenient on proof of causation and even on evidence in matters relating to violation of the right to clean and healthy environment. For instance, in the case of a poorly managed dumpsite, the judge noted that,

> The bigger danger is however in what the eyes cannot not see; the possible contamination of the aquifer underneath and of Lake Naivasha; the health risk to humans posed by pollution of the air and the soil; and also, the risk to the health of animals which ingest waste dumped at the site. Even without tangible evidence, this is a case that speaks for itself, *a res ipsa loquitor* situation. The dumpsite is clearly an environmental hazard.[87]

On the basis of this, the judge found that the operation of the waste dumpsite was a violation of the right to clean and healthy environment not only of the petitioners but of the residents of the region and all persons in Kenya.[88] It was not necessary for the

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81 *Adrian Kamotho Njenga v Council of Governors & 3 Others* ELC Pet 37 of 2017 (ELC at Nairobi) (2020) eKLR (22).

82 EMCA pt VIII.

83 *African Centre for Rights and Governance (ACRAG) & 3 Others v Municipal Council of Naivasha* Pet 50 of 2017 (ELC at Nakuru) (2017) eKLR.

84 *Ken Kasing'a v Daniel Kiplagat Kirui & 5 Others* Pet 50 of 2013 (ELC at Nakuru) (2015) eKLR.

85 See for example IPCC, *Global Warming of 1.5°C: An IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018); John H Knox, 'Linking human rights and climate change at the United Nations' (2009) 33 Harvard Law Review 477; John H Knox and Ramin Pejan (eds), *The human right to a healthy environment* (1st edn, Cambridge University Press 2018); Stephen Humphreys (ed), *Human rights and climate change* (Cambridge University Press 2009).

86 Climate Change Act Section 23(3); Constitution of Kenya Article 70(3). In both provisions, an applicant does not have to demonstrate that a person has incurred loss or suffered injury.

87 *ACRAG* (n 83) para 32.

88 Ibid para 33.

petitioners to provide evidence showing specific impacts of the dumpsite or that people have been injured as a result of the dumpsite.

In another case, the ELC found that the petitioner's right to clean and heathy environment had been violated by the erection of a telecommunication base transmitter station in the adjacent land.[89] While there was no scientific evidence presented on the likely impacts of the masts on the environment, the court was of the view that telecommunication base transmitter stations have potential to cause harm to the environment and to people as they 'may have a negative visual impact on the environment and propensity to harm, through emissions of electromagnetic waves.' Considering the precautionary approach courts take, it seems that even in climate cases, it may not be necessary to show that the emissions from respondents' activities have actually caused or likely to cause specific impacts that cause harm, but what would rather be important is to show that indeed the respondents' activities emit GHG emissions and the effects of GHG emissions on the quality of environment.[90] Consequently, there is no need for linking emissions to specific climate impacts which cause harm as required in many jurisdictions.

A violation of the right to clean and healthy environment could also arise where the defendant fails to comply with statutory or regulatory duties required of them.[91] The courts have taken the view that where a procedure or a requirement for the protection of the environment is not complied with, then an assumption is drawn that the project is one that threatens or violates the right to clean environment.[92] There is no need to show that the non-compliance has actually caused certain harm, but the mere non-compliance is sufficient. Further, Section 23 of the Climate Change Act provides for 'compensation to a victim of a violation relating to climate change duties.'[93] This provision envisages some statutory or regulatory climate change duties being imposed on both private and public bodies. Currently, the Environmental Management and Coordination (Air Quality) Regulations[94] prohibits owners or occupiers of facilities from causing emission of air pollutants in excess of the prescribed limits.[95] They are also required to install air pollution control technologies to mitigate GHGs and to monitor the emissions.[96]

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89 *Ken Kasinga* (n 84) para 74.
90 For a discussion of the precautionary approach taken by courts in Kenya and the likely impacts on climate change litigation, see Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9).
91 Ibid 184.
92 *Ken Kasinga* (n 84) para 73; *Moffat Kamau* (n 75) paras 90-91 and 95.
93 Climate Change Act Section 23(2)(c).
94 Legal Notice No 34 of 2014 (Air Quality Regulations).
95 Ibid reg 14(1)(b) and 15. The Second Schedule includes GHGs as priority air pollutants subject to the regulations.
96 Ibid reg 16.

Additionally, under Section 16 of Climate Change Act, climate change obligations may be imposed on private entities by the Climate Change Council,[97] including the obligation to report on their emissions and performances.[98] Entities may soon be required to report on their emissions and develop emission reduction plans and show improvement in the next reporting period. The Council may even set emission reduction limits for entities[99] as currently done under the Air Quality Regulations.[100] Non-compliance with emission limits would thus form a basis for a violation of environmental rights as well as a suit under Section 23 of Climate Change Act. This would also be the case where for instance the companies fail to develop emission reduction plans as per the regulations or do not show improvement from previous reporting periods.

3.4 Award of compensation

Where the defendants' actions are found to violate the petitioners' (or any other persons') right to clean and healthy environment, a remedy of compensation can be awarded by the court. The Climate Change Act and the Constitution both provide for the remedy of compensation to a victim of violations, with the former providing specifically for violation of climate change duties and the latter for violation of the right to clean and healthy environment.[101] In both cases, the petitioner does not need to demonstrate that anyone has incurred a loss or suffered injury.[102] An interpretation of these two provisions mean that where a court recognises that a person's right has been violated, they can order for compensation even where no tangible loss or injury can be shown. Kenyan courts have not been shy in granting this remedy for violation of the right to clean and healthy environment despite the petitioners not proving injuries.[103]

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97 The Climate Change Council is a body established under Section 5 of the Climate Change Act and mandated with climate policy coordination and oversight in the country. See Climate Change Act Sections 5 and 6.

98 Ibid Section 16. As at the time of writing this Chapter, the Climate Change Council had not been set up and consequently, such regulations required by the Climate Change Act had not been enacted.

99 One of the functions of the Council is to set targets for regulation of GHG emissions. The National Environmental Management Authority (NEMA) is designated to monitor compliance by entities of climate change obligations and to regulate and enforce compliance with GHG emissions levels set by Council. The information and reports on entities performance may be accessed by any person upon request to the Council or Climate Change Directorate. See ibid 6(h), 17 and 24.

100 Air Quality Regulations reg 16 and Third Schedule.

101 Constitution of Kenya Article 70(2)(c); Climate Change Act Section 23(2)(c).

102 Constitution of Kenya Article 70(3); Climate Change Act Section 23(3).

103 See, for instance, *Ken Kasinga* (n 84).

This grants a leeway to claim for general damages which may usually be awarded to a plaintiff who has suffered no ascertainable damage.[104] This was the case in *Ken Kasing'a* where the court granted the petitioner general damages in recognition that his rights were duly infringed despite the petitioner not showing any specific injury as a result of the violation.[105] Similarly, in *Michael Kibui*,[106] the court granted the petitioners compensation for breach of their right to clean and healthy environment. The court reached a conclusion that the petitioners had suffered damage that required compensation by the Respondent's breach of their right to a clean and healthy environment by causing water, air and noise pollution and excessive vibrations, without any evidence of any injury as a result of the breach.[107] It therefore seems that for compensatory claim based on the constitutional rights, there is no need to show any injury or loss suffered from respondent's emissions or from global warming generally – once the violation is recognised, the court can grant damages. The petitioner may however be required to make submissions on the nature and quantum of such damages.[108]

The problem, however, is that there are no clear rules or guidelines on compensation for violation of environmental rights and this is usually a matter of judicial discretion. There is a lack of a clear jurisprudence on when and how much compensation is due for environmental rights violations. Conflicting jurisprudence can, for instance, be seen in the two cases – *Ken Kasinga* and *Moffat Kamau*. In the former, the Petitioner was awarded damages despite no proof of loss or injury from the violation, simply in recognition that his right to clean and healthy environment had been infringed.[109] In the latter, the court did not grant damages because the Petitioners had not shown any loss suffered as a result of the violation.[110] Some courts also require the petitioners to make specific submissions on the nature and quantum of such compensation, failure to which compensation is denied,[111] while others use their discretion to determine the quantum of damages.[112] Finally, there is also no clear jurispru-

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104 *National Land Commission v Estate of Sisiwa Arap Malakwen & Another* ELC Case No 112 of 2016 (ELC at Eldoret) (2017) eKLR 12.

105 *Ken Kasinga* (n 84) para 85.

106 *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA & 2 others* Pet 1 of 2012 (ELC at Eldoret) (2019) eKLR.

107 Ibid para 63.

108 *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* Pet 53 of 2012 (ELA at Nakuru) (2018) eKLR (79). The court declined to grant compensation because no submissions were made on the nature and quantum of such compensation. This finding is however different from other cases such as *Ken Kasinga* (n 84) where compensation was granted despite no submissions being made on the quantum.

109 *Ken Kasinga* (n 84) para 85.

110 *Moffat Kamau* (n 75) para 102.

111 *Martin Osano* (n 108) para 79.

112 *Ken Kasinga* (n 84) para 76; *Michael Kibui* (n 106) para 63.

dence on what the courts take into account when assessing the quantum of damages. The courts have been awarding varying amounts without explaining how the quantum is reached or what factors are considered in determining the quantum.[113] Considering this jurisprudence, a claimant in climate compensatory suit may still need to provide evidence of injury or loss from climate related violations and enumerate the extent of injury arising from such violations.

4 Conclusion

Climate lawsuits based on public law are generally considered easier to navigate compared to private lawsuits. This route is, however, not explored by litigants in climate compensatory claims, as such suits in various jurisdictions have largely been based on private law. The private law avenue on the other hand seems to have so far failed litigants in obtaining compensation for climate violations. This chapter has shown that climate suits based on the right to a clean and healthy environment supported by Section 23 of the Climate Change Act offers possibilities of obtaining damages in Kenya.

One of the strengths of the Kenyan legal system is the liberalisation of the legal standing requirement as relates to enforcement of environmental rights, which allows any person to institute a suit against private entities for enforcement of rights relating to climate change without the need to show injury. Regarding causation, the fact that the petitioners do not have to demonstrate that a person has been injured and the precautionary approach taken by courts does away with the need to show how the defendant's emissions contributed to occurrence of an event that injured or is likely to injure the plaintiff. What is necessary for recognition of the violation is that the defendants' activities are impacting on the quality of the environment or alternatively, that the defendant has breached statutory requirements as relates to the environment or climate change duties. Once this is recognised, there is a possibility of the victim being awarded damages in recognition of the violation. Again here, there is no need to show any losses or injuries. However, considering the ambiguity on when and how much compensation is due, it may be useful to provide evidence of injuries or losses arising from climate change and, as far as possible, enumerate the extent of those injuries and the likely contribution of the defendant's activities.

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113 For instance, in *Ken Kasinga* (n 84) para 76, the court awarded Kshs. 10,000 (equivalent to about 100USD) while in *Michael Kibui* (n 106) paras 63 & 66, the court ordered the respondent to pay each petitioner Kshs. 30,000 (about 300USD). In the latter case, which was filed by 3 petitioners on their behalf and on behalf of inhabitants of a village, it is unclear whether the compensation for 'each petitioner' meant also the inhabitants on whose behalf the suit was filed or only the 3 petitioners. For further analysis, see Omuko-Jung, 'The evolving *locus standi* and causation requirements in Kenya' (n 9) 186.

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