REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
[CORAM: GATEMBU, NYAMWEYA & LESIIT JJ.A]

CIVIL APPEAL NO. E004 OF 2020

BETWEEN

NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY……..APPELLANT

VERSUS

KELVIN MUSYOKA (Minor suing through Mother
and Best friend SCHOLASTICA
KHALAYI SHIKANGA)..……...…1ST RESPONDENT
IRENE AKINYI ODHIAMBO…….…….....…2ND RESPONDENT
MILLICENT ACHIENG AWAKA…….…….3RD RESPONDENT
ELIZABETH FRANCISCA MWAILU……...4TH RESPONDENT
ELIAS OCHIENG……..…….5TH RESPONDENT
JACKSON OSEYA……...……...6TH RESPONDENT
HAMISI MWAMERO…….……...7TH RESPONDENT
DANIEL OCHIENG OGOLA…….……....8TH RESPONDENT
MARGARET AKINYI…….…...…….9TH RESPONDENT
CENTER FOR JUSTICE, GOVERNANCE &
ENVIRONMENTAL ACTION (Suing on their own behalf
and on behalf of all the Residents of Owino-Uhuru Village
in Mikindani, Changamwe Area, Mombasa) …….……..…10TH RESPONDENT
THE ATTORNEY GENERAL…..…….……...11TH RESPONDENT
THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT,
WATER AND NATURAL RESOURCES…….…..…...…12TH RESPONDENT
THE CABINET SECRETARY, MINISTRY
OF HEALTH…..……..13TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA……...…14TH RESPONDENT
THE EXPORT PROCESSING
ZONES AUTHORITY…..…15TH RESPONDENT

METAL REFINERY (EPZ) LIMITED……..…16TH RESPONDENT
PENGUIN PAPER AND BOOK COMPANY LTD.....17TH RESPONDENT

CONSOLIDATED WITH
CIVIL APPEAL NO E032 OF 2021

BETWEEN

THE EXPORT PROCESSING ZONES AUTHORITY……..…..APPELLANT

VERSUS

KELVIN MUSYOKA(Minor suing through Mother
and Best friend SCHOLASTICA
KHALAYI SHIKANGA) ..……...…1ST RESPONDENT
IRENE AKINYI ODHIAMBO…….....…2ND RESPONDENT
MILLICENT ACHIENG AWAKA…….3RD RESPONDENT
ELIZABETH FRANCISCA MWAILU……...4TH RESPONDENT
ELIAS OCHIENG……..…….…….5TH RESPONDENT
JACKSON OSEYA……...……...6TH RESPONDENT
HAMISI MWAMERO…….……...7TH RESPONDENT
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THE CABINET SECRETARY, MINISTRY
OF HEALTH…..…….13TH RESPONDENT
NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY……..……..……14TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA……...…15TH RESPONDENT
METAL REFINERY (EPZ) LIMITED……..…16TH RESPONDENT
PENGUIN PAPER AND BOOK COMPANY LTD.....17TH RESPONDENT

(Appeals from the Judgment and decision of Environment and Land Court at Mombasa (A. Omollo J.) delivered on 16th July 2020
in
Mombasa ELC Petition No. 1 of 2016)
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JUDGMENT OF THE COURT

1. The consolidated appeals herein have been filed by National Environment Management Authority (NEMA), the Appellant in Mombasa **Civil Appeal No. E004 of 2020**; and Export Processing Zones Authority (EPZA), the Appellant in **Mombasa Civil Appeal No. E032 of 2020** and who were designated as the 1st Appellant and 2nd Appellant respectively during the consolidation of the appeals. Both appeals arise out of a judgment of the Environment and Land Court at Mombasa delivered on 16th July 2020 in **KM & 9 others vs Attorney General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR**. The suit in the Environment and Land Court was brought by way of a petition dated 20th February 2016 filed by various petitioners, being Kelvin Musyoka, a minor suing through Scholastica Khalayi Shikanga, his mother and Best Friend; Irene Akinyi Odhiambo; Millicent Achieng Awaka; Elizabeth Francisca Mwailu; Elias Ochieng; Jackson Oseya; Hamisi Mwamero; Daniel Ochieng Ogola; and Center for Justice, Governance & Environmental Action, who are the 1st to 10th Respondents in the consolidated appeals.

2. The said suit was instituted by the above-named Respondents on behalf the residents of Owino-Uhuru village situated within Changamwe Division, Mikindani area of Mombasa County. For ease of reference in

this judgment, we shall refer to the 1st to 9th Respondents as the residents of Owino- Uhuru village and the 10th Respondent as CJGEA. The said residents and CJGEA claimed in their petition that Penguin Paper and Book Company Ltd, the owner of a parcel of land being 1707/ SECT/V/MN/MIKIDANI/MOMBASA, which was situated approximately 50 metres from the village, had been issued with a license by the EPZA to operate as an Export Processing Zone (EPZ) Company in violation of the Export Processing Zones Act, which prohibits the licencing of entities engaged in activities that have an adverse effect on the environment. Further, that Penguin Paper and Book Company Ltd in turn leased part of its land to Metal Refinery EPZ Ltd, which was thereupon issued with a trading licence by the Mombasa County Council to construct and operate a factory dealing with toxic lead, contrary to the provisions of the Physical Planning Act.

3. Metal Refinery EPZ Ltd consequently started operating a lead acid batteries recycling factory on the said parcel of land in 2007, by smelting the lead electrodes and lead carbon compounds of used lead batteries at high temperatures for export, and the residents of Owino- Uhuru village averred that the smelting process produced liquid solid waste and gaseous emissions which contained lead particles. The residents further contended that shortly after Metal Refinery EPZ Limited commenced operations, complaints began emerging from the village that the factory was poisoning the environment arising from poor managements of its liquid, solid and gaseous waste. The complaints centered on the fact that

the incidence of diseases, especially respiratory diseases, increased tremendously in the village after the factory began its operation, and that the dust and gases emitted from the factory houses corroded the iron sheet roofs of the houses in the village.

4. The residents and CJGEA thereupon commenced campaigns for the permanent closure of the factory and for the concerned authorities to investigate the environmental degradation wrought by the activities of the factory as well as the negative health impacts suffered. They detailed the complaints made, and the various closures of the said factory by the County Government of Mombasa, only for the factory to be subsequently reopened several times. In particular, that the Municipal Council of Mombasa closed the factory in June 2008 but in July 2008, the factory reopened after it was deemed that Metal Refinery EPZ Ltd had substantially complied with the safety requirements. That on 20th February 2009, the Cabinet Secretary, Ministry of Health closed the factory for not meeting the public health and sanitation standards, and following a complaint made to, and investigations by the Public Complaints Committee (PCC) of the National Environment Management Authority,the PCC made findings that Metal Refinery EPZ Ltd had been discharging effluent to the drainage system which posed significant health risk to those who came into contact with it since it was contaminated with lead, and ordered the closure of the factory. However, that the factory was reopened shortly thereafter, and that after several

intermittent closures and re-openings, was eventually permanently closed in 2014.

5. The adverse effects of lead on the environment and humans was also detailed by the residents and CJGEA in their petition, as well as the regulation of lead production and exposure to lead levels by various international instruments and bodies; including the classification of used lead acid batteries as hazardous waste by the Basel Convention, and the designation of acceptable blood lead levels by the Centre for Disease Control (CDC), the Food and Agriculture Organization (FAO), and World Health Organization (WHO). According to the residents, several studies conducted on the soil, air, water bodies and dust on houses in Owino-Uhuru village by the Government Chemist and other experts from the Ministry of Health revealed high levels of lead contamination that was not safe for human habitation. Additionally, that tests conducted to determine the blood lead levels of the petitioners and residents of the village revealed unacceptably high levels of lead poisoning, and the 1st to 9th Respondents were suffering various illnesses and ailments as result that required immediate medical intervention, which they could not afford. Lastly, that there had been at least 20 cases of death in the village directly attributable to the lead poisoning.

6. The case by the residents of Owino-Uhuru village and CJGEA therefore, was that NEMA, EPZA, the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health, and

the Mombasa County Government were responsible for constitutional infractions in their regulation of Metal Refinery EPZ Ltd and Penguin Paper and Book Company Ltd, and the residents faulted the said authorities for failing to enforce national laws and standards on the environment and human rights. Further, that the said authorities had violated the residents' constitutional rights to a clean and healthy environment, highest attainable standard of health and to clean and safe water by permitting, authorising and licensing the Metal Refinery EPZ Ltd's lead and lead alloys manufacturing plant without reasonable measures to prevent human and environmental harm; by failing to monitor and enforce environmental, health and safety regulations and adequately protect the residents from the effects of excess exposure to lead, and by failing to act upon the complaints made and recommendations on the reparation and minimizing of harm, after being made aware and receiving information of the actual cases of negative effects of exposure to lead from the residents and other institutions.

7. Metal Refinery EPZ and Penguin Paper and Book Company Limited were in this respect also alleged to have been under a duty to cooperate with state organs and other persons to protect and conserve the environment, and that the Metal Refinery EPZ's actions of operating a lead factory without taking any measures to protect the environment and human life, and Penguin Paper and Book Company Limited's action of allowing Metal Refinery EPZ to operate within its premises and conniving to influence its licensing also contributed to the violation of

the right of the residents of Owino-Uhuru village to a clean and healthy environment.

8. Additional violations alleged by the residents and CJGEA was the systematic denial of access to information on the effects of exposure to hazardous materials and activities and how to mitigate the said effects, which violated their right to information, and the failure to undertake comprehensive background check including comprehensive environmental and social impact assessment and provide the residents with an opportunity to meaningful engage in the said processes and participate in development decisions.

9. The residents of Owino-Uhuru village and CJGEA accordingly sought various reliefs as follows:
   (a) declarations that their right to a clean and healthy environment, right to highest attainable standard of health, right to clean and safe water in adequate quantities, right to life and right to information had been violated;
   (b) an order for compensation for the damage to the resident's' health and environment and for loss of life;
   (c) various orders of mandamus against the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health, NEMA, EPZA, the Mombasa County Government, Metal Refinery EPZ Ltd and Penguin Paper and Book Company Ltd, directing them to carry out a comprehensive participatory study to

ascertain the levels of lead in the residents' environment and bodies, to implement the recommendations in the reports by the Ministry of Health's Lead Poisoning Investigation Team dated May 2015 and by the Senate Standing Committee on Health dated 17th March 2015 on the lead exposure to the residents; to develop and implement regulations with regards to lead and lead alloys manufacturing plants and on the licensing, operations and monitoring of entities dealing with hazardous waste; and to develop a National Action Plan towards operationalising the Basel Conventions Technical Guidelines for Environmentally Sound Management of Waste Lead-Acid Batteries.

10. The Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health detailed the efforts they made to address the complaints made by the residents in a replying affidavit sworn on 5th July 2018 by John K. Ndungu, a Public Health Officer in the Ministry of Health. The gist of their response was that after having become aware of the protests by the residents of Owino-Uhuru village, a team from the Ministry of Health which included the said deponent carried out an inspection of the factory operated by Metal Refinary EPZ Ltd on 26th February 2009, which was the basis of the closure order in a letter dated 13th March 2009 and that on 24th April 2009, an environment measurement report was prepared and delivered to the Provincial Director of Public Health Officer indicating the various analyses carried out and the results and passed/ approved by SGS , a private laboratory. That by letters dated 16th

March 2009, 8th April 2009, and 15th April 2009, and 4th June 2009, the management of Metal Refinery EPZ Ltd confirmed steps taken in compliance with directions and recommendation made by the public health team, and further inspections were carried out by the team which revealed that recommendations with regards to waste disposal had not been complied and the closure order remained in force. However, that during the period of closure the Ministry of Health received a letter from NEMA dated 12th May 2010 indicating consideration of reopening of the factory, and that on 10th June 2010, another inspection was made of the factory which ascertained that most of the recommendations had been met. A letter dated 15th June 2010 was subsequently issued authorizing the reopening of the factory with caution of continued compliance with recommendation of the District Public Health Officer-Kilindini.

11. The factory subsequently operated for 11 months and during a routine visit, the Ministry of Health officers discovered that some waste had been disposed along a seasonal riverbed and closed the factory on 17th June 2011 and after removal of the waste, issued a conditional closure lifting order on 2nd September 2011. In August 2014, the deponent was summoned by the Senate Health Committee to shed light on the factory and, and that the Senate Committee consequently made several recommendations including testing of persons living 100 meters from the factory. That the Ministry of Health in Mombasa thereupon carried out water and soil sampling, took blood samples from various age groups of residents for testing, opened a special ward at Port Reitz Hospital to offer

lead treatment and health services to the residents, and physicians were trained on management of lead cases.

12. The County Government of Mombasa, in their replying affidavit sworn on 16th March 2018 by its Attorney, Mtalaki Mwashimba, stated that its role was to issue a single business permit to Metal Refinery EPZ Ltd after it had set up a factory and obtained the approvals of all relevant ministries and departments at national level. That the County Government's officers visited the factory to see whether the plant complied with physical health requirements which included, whether it was well ventilated and had firefighting equipment and fire exits, and the deponent asserted that the County Government of Mombasa was not involved in measuring and determining the toxicity of the lead levels that came into contact with humans. Further, that all the necessary Environmental Impact Assessment Tests were done by NEMA in conjunction with the stakeholders dealing with environmental matters at national level before giving the go ahead for setting up of the plant, and that the County Government of Mombasa played no role in the setting up of the plant and were not to blame for the misfortune that befell the residents of Owino-Uhuru Village.

13. NEMA responded by way of replying affidavit sworn on 15th March 2018 by Zephaniah Ouma, its Deputy Director of Compliance, and detailed the actions it took after Metal Refinery EPZ Ltd submitted an Environment Impact Assessment Project Report on 13th March 2007. The key

interventions in this respect were that NEMA gave a cessation and restoration order to Metal Refinery EPZ Ltd contained in a letter dated 23rd April 2007, after inspection of the site revealed that they were undertaking smelting of scrap lead acid batteries without an Environmental Impact Assessment licence; that it gave a conditional approval to Metal Refinery EPZ Ltd on 16th May 2007 and requested them to confirm in writing that they would comply with the conditions, which the 16th Respondent did on 17th May 2007; that the 1st Appellant then gave Metal Refinery EPZ Ltd authority to carry out trial runs by a letter dated 11th June 2007, and by a letter dated 14th August 2007 lifted the cessation and restoration order of 23rd April 2007 after an inspection found out that the its plant was functioning well, and reinstated the approval of 16th May 2007. The Environment Impact Assessment (EIA) licence was subsequently issued on 5th February 2008.

14. Further, that on 15th June 2009, upon receiving the initial Environmental Audit, NEMA issued an improvement order dated 15th September 2008, and on 12th May 2010, it issued conditions for reopening the factory. A further inspection was done on 30th September 2011 by NEMA and another improvement order issued to Metal Refinery EPZ Ltd on 3rd October 2011, who updated on the steps taken to comply with the improvement orders by a letter dated 24th October 2011. A further inspection carried out by NEMA on 27th November 2013 revealed non-compliance with the earlier improvement notice, which led to a decision to close the factory which was communicated to Metal Refinery EPZ Ltd

on 29th November 2013. On 5th August 2014, NEMA was invited by the Senate Standing Committee to investigate Metal Refinery EPZ Ltd following a petition by the residents. NEMA subsequently wrote letters dated 30th March 2015 and 17th April 2015 addressed to the Director of Medical Services requesting for the epidemiological results in order to take corrective measures, and in May 2015, constituted a task force that initiated a decommissioning strategy and prepared a report dated October 2015. NEMA stated that it forwarded the Task Force Report together with a policy paper on remediation to the Cabinet Secretary, Environment, Water and Natural Resources and the Director of Public Prosecutions for further policy directions and action. NEMA therefore denied that it was negligent in granting the EIA licence, and averred that it undertook all the necessary steps in ensuring that Metal Refinery EPZ Ltd complied with the set procedure and regulations, and acted according to the provisions of the Environment Management and Conservation Act.

15. EPZA on its part opposed the petition in a response sworn on 1st March 2008 by Fanuel Kidenda, its Chief Executive Officer. Its case was that Metal Refinery EPZ Ltd applied for an Export Processing Zone Manufacturing License, which application was provisionally approved in principle vide a letter which had conditions to be fulfilled before they could be issued with an EPZ manufacturing licence, including the submission of a certified copy of an Environmental Impact Assessment License from NEMA, and issuance of an Export Permit and Mineral

Dealers License issued by the Commissioner of Mines and Geology, which were fulfilled. That by a letter dated 12th June 2008, the then Municipal Council of Mombasa shut down Metal Refinery EPZ Ltd's factory under the Public Health Act and that when the closure notice was lifted by a letter dated 4th July 2008, EPZA wrote to Metal Refinery EPZ Ltd highlighting environmental and public health compliance issues to be undertaken before its licence could be renewed. Further, that the Ministry of Public Health and Sanitation Services also gave Metal Refinery EPZ Ltd compliance measures that required to be met as evidenced by various correspondences dated 7th May 2009, 14th July 2009, and 2nd and 14th September 2009.That by a letter dated 23rd December 2009, the Ministry of Public Health and Sanitation Services directed Metal Refinery EPZ Ltd to cease operations, and the said company closed down its manufacturing unit in July 2012, whereupon it was advised by EPZA on the procedure for closure. EPZA denied that it failed to monitor and enforce environmental, health and safety regulations, and averred that it executed its mandate and issued licenses in accordance with the requirements of the Export Processing Zones Act, and also took issue with the credibility of the evidence presented by the residents of Owino Uhuru village.

16. A hearing of the petition was held by the Environment and Land Court (ELC) in which ten witnesses gave oral testimony on behalf of the residents of Owino Uhuru village, six of whom (PW1 to PW6) were residents of the village and two (PW6 and PW7) were also former

employees at Metal Refinery EPZ Ltd's factory. PW1-PW5 testified as to the dark smoke, dust and liquid waste that was discharged to the village by the factory operated by Metal Refinery EPZ Ltd before its closure, and the effects on their houses, health and family members' health. PW1 in this respect informed the Court that the 1st Respondent herein was her grandchild, and had suffered injuries on his leg after stepping on waste discharged from the factory, and after various hospital visits he was tested and found to have lead particles in his blood and put on treatment. Further, that PW1 was also tested and found to have lead particles in her blood, and that since she could not afford the treatment for the 1st Petitioner, she put him in a children's home.

17. PW2 likewise testified that he and two of his children were tested and found to have lead particles in their blood; PW3 testified that her son developed rashes and scars on his legs and upon being tested he was found to have lead poisoning and was put on treatment; PW4 testified that he and other villagers organized demonstration and were arrested, and that he was also tested and found to have lead in his blood; PW5 testified that one of his sons who was born in 2011 started developing rashes on the body and coughing when he was 2½ years old, and after being tested was found to have lead and put on treatment. However, that his son's health did not improve and he passed on 30th September 2016.

18. PW6 stated that he was employed by Metal Refinery EPZ Ltd in 2010 and also resident in Owino-Uhuru village, and that his wife who used to

wash his overalls started becoming ill in 2010, and their two children who were born in 2011 and 2015 died in November 2012 and September 2015 respectively. In addition, that his wife was tested and found to have high lead levels in her blood, and also died in 2015. PW7 detailed the work he was employed to do at Metal Refinery EPZ Ltd in his testimony, and stated that he was also tested and found to have lead in his blood levels, and that some of his co-workers died, while his wife had three miscarriages.

19. The residents and CJGEA also called various experts to testify on their behalf. PW8, who had since retired, testified that in 2014 while he worked as Deputy Government Chemist, he carried out tests on fifty (50) blood samples he received from the Ministry of Health, and on additional blood, water, soil and dust samples collected from Uhuru-Owino residents and village, which were found to contain high levels of lead. He produced his report as an exhibit, which had recommended *inter alia* immediate closure of the metal factory that was the suspected source of the lead. PW9, a medical doctor, also physically examined some residents of the village upon a request from CJGEA, and observed manifestations of lead exposure on their skin and bodies. He however did not undertake any tests on the residents. The last witness who testified on behalf of the residents of Uhuru-Owino village (PW10) was the Executive Director of CJGEA who stated that she was initially employed by Metal Refinery EPZ from January to April 2009, and that her son fell ill, and tests revealed that it was as a result of lead in the blood, which may have been

as result of exposure when he visited the factory. She thereupon resigned from Metal Refinery EPZ and started mobilising the residents of Owino-Uhuru village and to lobby various government institutions to take action against the lead pollution by Metal Refinery EPZ, and formed CJGEA in the process. PW10 detailed the correspondence made and activities undertaken in this regard in her testimony.

20. The Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health called two witnesses, DW1, a Principal Public Health Officer at the Ministry of Health and deponent of their replying affidavit, reiterated the averments he had made in the said affidavit, while referring to various correspondence, and stated that the Ministry did not receive any letters from the residents of Owino-Uhuru village prior to their demonstrations, on the lead poisoning by the Metal Refinery EPZ Ltd's factory, nor any report from NEMA or EPZ on the said lead poisoning, and that the Ministry did not lift its closure order of the factory. DW2 was the then Director of Medical Services, and confirmed that she was part of the team that undertook investigations on the complaints made about the waste from the factory, and prepared the report produced by PW8 that found elevated lead levels in the blood and environmental samples collected from the residents and environs of Owino-Uhuru village.

21. NEMA's witnesses (DW3 and DW4) was its acting deputy director of compliance and enforcement and deponent of NEMA's replying affidavit,

and an environmental officer, and both adopted their respective witness statements. On cross-examination, DW3, while stating that the operations of Metal Refinery EPZ Ltd's factory before the issuance of the EIA licence on 5th February 2009 were illegal, confirmed that there was a letter dated 6th December 2006 which gave the factory permission to operate before the EIA licence, and that no audit of its operations was done between December 2006 and April 2007 when the factory was ordered to stop operations. DW4 on his part confirmed visiting the factory during the EIA exercise and Owino-Uhuru village.

22. The acting County Attorney of Mombasa County testified as DW5, and adopted his witness statement which was similar to the contents of the replying affidavit filed by the County, and reiterated that its role was limited to issuance of a single business permit and was not tasked with measuring lead levels in the environment. While admitting that the County was the successor in title to the Municipal Council of Mombasa and was responsible for planning and zoning issues, the witness stated that it was not proper for the council to authorize the dumping of waste and ought to have closed the factory.

23. Similarly, DW6, a liaison officer at EPZA Mombasa regional office adopted the replying affidavit filed by EPZA as his evidence, and stated that EPZA issued the Metal Refinery EPZ Ltd with a licence after it had been issued with an EIA licence and licence from the Mines and Geology department as required by the law. The last witness to testify was DW7,

an environmental officer from EPZA, who confirmed that he was part of, and secretary of meetings held on 27th April 2009 called by the Public Health department over the closure of Metal Refinery EPZ Ltd's factory, and wrote the minutes that confirmed that most of the corrective measures were undertaken by Metal Refinery EPZ Ltd and that it had complied with the requirements to re-open the factory.

24. After hearing the parties, the Environment and Land Court *(A. Omollo J.)* delivered a judgment on 16th July 2020 allowing the petition by the residents of Owino-Uhuru village and CJGEA, which set out in detail the pleadings, evidence and submissions made by the parties, and made various findings as follows. On the issue of the trial Court's jurisdiction to hear and determine the petition, the learned trial Judge held that the gist of the petition revolved around the violations of the rights of the residents of Owino- Uhuru village towards a clean and healthy environment as provided for in Article 42 of the Constitution, the rights to life in Article 26, and right to the highest attainable standard of health care and sanitation as guaranteed by Article 43; and that by dint of Article 70 of the Constitution and Section 3(3) of the Environmental Management and Coordination Act No. 8 of 1999 the said residents could seek redress in the Environment and Land Court.

25. On the issue of proof of violations of the rights of the residents of Owino-Uhuru village, while noting that seven of the witnesses who testified in support of the petition and injuries and loss suffered were residents of

Owino-Uhuru village, and that the Court had opportunity to observe their injuries, the court in addition considered the report of the Deputy Government Chemist who testified as PW8, a report by the Parliamentary Standing Committee on Health on the Owino-Uhuru Petition, and the evidence of PW9, and was satisfied that the the residents of Owino-Uhuru village and CJGEA demonstrated that there was a threat of violation of their rights under the Constitution and proved the actual violation to their personal life, the environment (soil and dust) where they stayed and the water which they consumed. It was added none of the respondents to the petition gave any reports to contradict the scientific reports produced on record.

26. On the issue of culpability for the violations, it was noted that the source of the pollutant was Metal Refinery EPZ Ltd, and that Metal Refinery EPZ Ltd and Penguin Paper and Book Company Ltd did not contradict the violations levelled against them. The trial Court detailed the violations of law committed by the other Respondents, who it noted were aware of the presence of the residents of Owino-Uhuru village at the time they were licensing the operations of the Metal Refinery EPZ Ltd. Specifically, it was found that the Cabinet Secretary in the Ministry of Environment, Water and Natural Resources issued a license for operations to Metal Refinery EPZ Ltd prior to issue of an EIA licence and without supporting documents and public participation. The Cabinet Secretary in the Ministry of Health was found liable for breaching the rights to life and clean and healthy environment of the residents of

Owino-Uhuru village for failing to take steps to have Metal Refinery EPZ Ltd remove the nuisance and for failing to provide required treatment to the residents of Owino-Uhuru village.

27. NEMA was found not to have fulfilled its mandate as set out in section 58 of the Environment Management and Coordination Act by allowing Metal Refinery EPZ Ltd to operate a factory without an EIA licence, by allowing trial runs by Metal Refinery EPZ Ltd before an EIA licence, by ordering reopening of Metal Refinery EPZ Ltd's factory without confirmation of compliance of the improvement orders it issued, and by not invoking the principle of polluter pays. EPZA was found in violation of the law when it issued Metal Refinery EPZ Ltd with a license without prior submission of an EIA license and premised on letters that were in respect of distinct parcels of land. The court found no role or liability on the part of the Mombasa County Government in failing to comply with environmental laws. Liability was therefore apportioned to NEMA at 40%; Metal Refinery EPZ Ltd at 25%; the Cabinet Secretary in the Ministry of Environment, Water and Natural Resources, the Cabinet Secretary in the Ministry of Health and EPZA at 10% each; and Penguin Paper and Book Company Ltd at 5%.

28. On the issue of compensation, the court while considering the concept of strict liability and section 108 of the Environment Management and Compliance Act as well as Article 70(c) of the Constitution, and as set out in the case of **David M Ndetei vs Orbit Chemical Industries Ltd (2014)**

eKLR found that the 1st to 10th respondents are entitled to compensation in monetary and non-monetary reliefs pleaded in the petition. The trial Court accordingly made the following orders:

a) *Declarations that the Petitioners' rights to a clean and healthy environment; rights to the highest attainable standard of health and right to clean and safe water; and rights to life were violated by the actions and omissions of the Respondents.*

b) *An award of Kshs 1.3 Billion to the Petitioners for personal injury and loss of life payable within ninety (90) days from the date of judgment by NEMA, Metal Refinery EPZ Ltd, the Cabinet Secretary in the Ministry of Environment, Water and Natural Resources, the Cabinet Secretary in the Ministry of Health, EPZA and Penguin Paper and Book Company in accordance with the apportionment of their liability set out in the judgment. In default the Petitioners be at liberty to execute.*

c) *The Respondents were directed to clean-up the soil, water and remove any wastes deposited within the Owino-Uhuru Settlement by the settlement by Metal Refinery EPZ Ltd within 4 months (120 days) from date of the judgment. In default, the sum of Kshs.700,000,000 became due and payable to the CJGEA to coordinate the soil andenvironmental clean-up exercise.*

d) *An order of mandamus against the Attorney General, Cabinet Secretary in the Ministry of Environment, Water and Natural Resources and NEMA directing them to develop and implement*

regulations adopted from best practices with regard to lead and lead alloys manufacturing plants.

e) The costs of the petition be granted to the Petitioners.

29. NEMA, being dissatisfied with the judgment proffered an appeal and filed a Memorandum of Appeal dated 9th October 2020 in which it has raised nine (9) grounds of Appeal challenging the findings by the trial Court on liability and award of compensation and damages. NEMA faulted the findings of liability on the ground that the trial Court misconstrued the interpretation of the principles of strict liability, 'polluter pays', and causation in apportioning liability; and failed to appreciate the Environment Impact Assessment process, the importance of trial runs and the 'precautionary principle' in environmental governance. The quantum of compensation of Kshs 1,300,000,000.00/= and Kshs 700,000,000/= was challenged for having been based on proposals given by the petitioners only, and for the finding that CJGEA, a Non-governmental Organisation, could be paid the Kshs 700,000,000/= to conduct a soil contamination clean up in favour of the public and without any expert input.

30. EPZA was equally dissatisfied with the judgment and raised twenty-three (23) grounds of appeal in its Memorandum of Appeal dated 7th May 2021, in which it faulted the findings of the trial Court in five broad areas. First, the trial Court's jurisdiction to hear and determine the constitutional petition; second, the violations of the law found to have been committed by EPZA and apportioning of liability to EPZA; third the application of

the "Polluter Pays Principle" and lastly, the award of excessive damages of Kshs 1.3 Billion to the 1st to 9th petitioners and persons claiming through them for personal injury and loss of life and of Kshs 700,000,000/= payable to the 10th petitioner for soil / environment clean up exercise without justification and evidence, and ascertainment of affected persons in the representative suit.

31. The two appeals were consolidated and heard during a virtual hearing held on 20th July 2022, Learned counsel ***Mr. Erastus K. Gitonga*** appeared for NEMA, learned counsel ***Mr. Kisaka*** and ***Mr. Masafu*** appeared for EPZA, and learned counsels, ***Mr. Francis Olel, Mr. Charles Onyango*** and ***Mr. Gideon Odongo*** appeared for the 1st to 10th Respondents, while learned counsel ***Mr. Emmanuel Makuto*** and ***Ms. Nimwaka Kiti*** appeared for the 11th to the 13th Respondents. There was no appearance for the County Council of Mombasa. The Parties while highlighting their submissions reiterated their written submissions. NEMA filed two sets of submissions, the first dated 13th October 2021 and truncated submissions dated 21st February 2022. Mr. Gitonga highlighted the said submissions during the hearing. Mr. Masafu and Mr. Kisaka highlighted submissions dated while Mr. Olel and Mr. Onyango highlighted submissions.

32. We need to address the preliminary issue raised by EPZA of the trial Court's jurisdiction to hear the petition filed by the residents and CJGEA at the outset, as it has the potential of disposing of this appeal. Mr. Masafu's submissions on the issue were that the Environment and Land

Court did not have jurisdiction to determine the petition, as the issues raised therein lay in the purview of the National Environment Tribunal. The counsel cited section 126 of the Environment and Management Act, 1999; the decision of Asike-Makhandia JA in the case of **Kibos Distillers Limited & 4 others vs Benson Ambuti Adega & 3 others** [2020] **eKLR** and the Supreme Court decision in the case of **Albert Chaurembo Mumba & 7 others (Sued on their own and on behalf of predecessor and or successor in title in their capacities as Registered Trustees of Kenya Ports Authority Pension Scheme) vs Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other members/ beneficiaries of the Kenya Ports Authority) (2019) e KLR** (hereinafter **"The Albert Chaurembo Mumba Case")** which we will examine later on in this judgment.

33. Mr. Olel, the counsel for the residents, in reply submitted that the provision relied upon by EPZA refers to a situation where there is ongoing pollution and a complaint has been made to NEMA and the petition filed by the residents and CJGEA was not an appeal from a refusal to grant a license, refusal to transfer the same, or imposition of any condition, limitation, revocation, suspension or variation of the same; or the decision of any committee or environmental inspector performing their functions under EMCA within the context of section 129(2) and (3) of EMCA. Further, that Metal Refinery EPZ Ltd closed shop in the year 2014, while the petition was filed in February 2016 seeking several declarations and damages arising from pollution

practices occasioned by the direct and complicit negligence on the part of all respondents in the petition, and it would have been illogical to expect that the petitioners would make their complaint to NEMA about a factory not in operation. Mr. Olel placed reliance on the provisions of Article 162(2)(6) of the Constitution of Kenya 2010 and section 13 of the Environment & Land Court Act No 19 of 2012 as the provisions giving the Environment and Land Court Act jurisdiction to hear and determine all disputes relating to land and environment and address any issue regarding denial, violation or infringement of or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 43 and 70 of the Constitution of Kenya 2010. Reference was made to decision in the case of **John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR** in this regard.

34. The starting point in determining the jurisdiction of any Court or Tribunal, as restated by the Supreme Court of Kenya in **Samuel Kamau Macharia and another vs Kenya Commercial Bank and 2 Others, Application No. 2 of 2011 [2012] eKLR,** is either the Constitution or legislation or both, and a Court or Tribunal can only exercise jurisdiction as conferred by the constitution or other written law. The Supreme Court also emphasised that a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law or divest a tribunal of its jurisdiction vested upon it by Parliament_by judicial craft or innovation.

35. In **The Albert Chaurembo Mumba Case (supra)** the Supreme Court of Kenya further explained the jurisdictional question as follows:

> *"[135] By jurisdiction, it is clearly meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which jurisdiction shall extend, or it may partake both these characteristics. If for example, the jurisdiction of an inferior court depends on the existence of a particular state of facts, the court must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to a nullity. Jurisdiction, therefore, must be acquired before judgment is given."*

36. Section 129 (1) of the Environment Management and Co-ordination Act (EMCA) provides for the matters that may be appealed to the National Environment Tribunal (NET) established by the said Act as follows:

> *(1) Any person who is aggrieved by:*
> *(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder:*
> *(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;*
> *(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder:*
> *(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;*

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder:
may within sixty days after the occurrence of the event against which he is dissatisfied appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

37. Section 129(3) provides for the relief that the Tribunal can grant as follows:

(3) Upon any appeal, the Tribunal may—
(a) confirm, set aside or vary the order or decision in question;
(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
(c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
(d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
(e) if satisfied upon application by any party, review any orders made under paragraph (a).

38. The Supreme Court of Kenya noted in **The Albert Chaurembo Mumba Case** that in order to give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute, In, **Kibos Distillers Limited & 4 others vs Benson Ambuti Adega & 3 others [supra]** this Court (*Asike-Makhandia, Kiage & Odek, JJA)* noted that a court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted, and that the concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body. In addition, that section 129 (3) of EMCA confers power upon the NET to *inter alia* exercise any

power which could have been exercised by NEMA or make such other order as it may deem fit, and is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider various prayers in the petition that was before the trial Court including that of violation of constitutional right to a healthy environment. Further, that it was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court. The Court found that the key dispute in the petition before the trial court was whether the appellants therein were polluting the environment and whether their EIA Licences were lawfully procured, and that the competent organ with original jurisdiction to hear and determine the matter was the NET or the NECC (National Environment Complaints Committee). It was in this context that the Court in that appeal found that the learned trial judge erred in usurping the jurisdiction of the Tribunal and or the NECC.

39. On the other hand, in the instant appeal the claim by the residents and CJGEA in the trial Court exclusively concerned the violation of constitutional rights by the Respondents, arising from the operations of Metal Refinery EPZ Ltd, and for which specific remedies were sought including compensation and judicial review orders (mandamus) against the Respondents. There was no issue or prayer raised by the residents and CJGEA that was within the ambit of section 129(1) of EMCA as was the case in **Kibos Distillers Limited & 4 others vs Benson Ambuti Adega & 3**

others [**supra**]. In addition, the alleged harm and violations arising from the adverse effects of the subject pollution happened outside the timelines provided in section 129(1) of EMCA. Lastly, NET has no powers to grant the remedies that were sought by the residents and CJGEA, and we are reluctant to adopt the interpretation of section 129(3) of EMCA as being an all encompassing provision that empowers NET to grant any relief that may be sought by a party in this appeal, since in our view NET's powers can only be exercised within the context of the objectives and four corners of EMCA, which is the parent Act, and the powers and duties granted to the various agencies created thereunder.

40. It is also our view that section 129(3) of the EMCA cannot be used to arrogate to the NET specific powers given to the Courts under the Constitution, particularly the powers under Article 23(3) which provide for relief that can be granted in a claim for violation of constitutional rights as follows:

> *(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—*
> *(a) a declaration of rights;*
> *(b) an injunction;*
> *(c) a conservatory order;*
> *(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*
> *(e) an order for compensation; and*
> *(f) an order of judicial review.*

41. Section 13 (3) of the Environment and Land Court Act in this respect specifically grants the Environment and Land Court jurisdiction to hear

and determinee applications for redress of a denial, violation, or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. It is notable that Article 70 of the Constitution also provides that if a person alleges that a right to a clean and healthy environment under Article 42 has been, is being or is likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. The Article provides for additional remedies that can be granted by a Court in this respect to include any order or directions it considers appropriate—

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

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

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

42. We therefore find no arrogation of jurisdiction by the Environment and Land Court either by judicial craft or arising from the pleadings before it, as the claim was one of violation of the rights to a clean and healthy environment and the remedies sought were well within its jurisdiction and powers, which powers are not specifically granted to the NET under EMCA.

43. On the outstanding substantive issues arising from the consolidated appeals, we have perused the submissions filed by the parties herein, and note that the findings by the trial Court on the adverse effects of the activities and operations of the factory run by Metal Refinery EPZ Ltd are not contested. In particular, the two Appellants do not contest the observations by the trial Court as follows:

> *"128. The report presented by PW8 was in effect the report by the 1st – 3rd Respondents. Since this witness (PW8) was not declared as a hostile witness, there was no basis laid to doubt his findings. The findings of PW8 which were very detailed is found at pages 182-195 of the petition. All the people whose samples were tested were residents of Owino-Uhuru. Amongst these were Alfred Mullo (PW2), Margaret Akinyi – 9th Petitioner, Elias Ochieng Oseya - 5th Petitioner, Daniel Ochieng Ogola – 8th Petitioner and Elizabeth Francisca – 4th Petitioner.*
> *129. Paragraph 3 of the report (187 – 188 of the petition) gave a summary of Blood lead (Pb) levels results for the 50 residents of Owino-Uhuru and Table 2 gave summary of persons (which included petitioners) with elevated blood lead levels which required one form of intervention or another. The government chemist report also included soil lead levels and their findings. At page 189 of the petition was table 3 which gave the sample points; table 4 was summary of dust levels and also water levels. Foot note to table 4 stated thus;*
> *i. Lead at levels ?40mg/ft2 on floors is a hazard.*
> *ii. Lead levels ?250mg/ft2 on interior windows is a hazard.*
> *iii. There are pockets of dust with high lead levels which is hazardous especially for children in play areas including persons who spend time in enclosed places."*

44. The Court also referred to the *Report of the Standing Committee on Health on the Owino-Uhuru Public Petition* and noted as follows:

"130….The committee held it sittings pursuant to a petition they received from residents of Owino-Uhuru alleging violation of their rights stipulated in Article 42, 43, 69 and 70 of the Constitution. The committee which comprised members of the 11th Parliament stated that they did a fact finding tour in Owino-Uhuru village as well as the 7th Respondent's premises. They also held meetings with various stakeholders such as Mombasa County Health Department officials, Public Complaints Committee and National Environment and Management Authority officials.

131. The committee further stated that they reviewed documents presented and the reports of the different institutions charged with protection of the Environment such as Public Complaints Committee (PCC), National Environment and Management Authority, Public Health e.t.c. For instance at page 25 of the report (page 121 of the petition), the PCC stated thus under paragraph 3.8.1.2;

i. The PCC team observed evidence suggestive of air pollution i.e corrosion of corrugated iron sheets on the rooftops of homes of the residents of Owino-Uhuru.

ii. The factory has been discharging effluent through a hole in their boundary wall into a trench that runs through Owino- Uhuru village and into the municipal drainage system. That this effluent posed a significant health risk to human and animal health life; and

iii. Lead dust produced from the factory had had negative impact on the health of workers therein.

132. The Parliamentary Committee in their report made a raft of recommendations inter alia;

a. The immediate cleaning of the environment including detoxifying and restoring the soil.

b. The replanting of destroyed trees.

c. The immediate testing of all the residents of Owino-Uhuru village for lead exposure.

d. The removal of hazardous waste slug the plant has disposed of over the years and continues to dispose of at Mwakirunge Dumpsite.

45. Lastly it is also notable in this regard that the Zero Draft Report dated 15th July 2015 of the *Task Force on Decommissioning Strategy for Metal*

Refinery EPZ Ltd set up by NEMA found sufficient evidence of lead exposure at the factory and among the residents of Owino-Uhuru village in chapter three thereof.

46. It is not disputed that the factory in question was operated by Metal Refinery EPZ Limited on land owned by Penguin Paper and Book Company Ltd. It is also notable that the findings as regards infringement of the rights of the Residents of Owino-Uhuru village were not disputed by NEMA and EPZA. The issues raised in the consolidated appeal largely turn on the legality and propriety of the findings by the trial Court on the liability of NEMA, EPZA and the other state agencies for the adverse effects from the operations of the said factory, and the basis for the quantum of the award of damages and compensation.

47. On the basis and apportionment of liability, Mr. Gitonga for NEMA submitted that the trial Court misconstrued the doctrine of strict liability and the "polluter pays" principle when it found NEMA culpable and apportioned it 40% liability. The counsel, while citing section 107 and 108 of the Evidence Act; the decisions on strict liability in **David M. Ndetei vs Orbit Chemical Industries Limited [2014] eKLR** and **Rylands v. Fletcher (1861-73) ALL ER;** and comparative Indian Supreme Court decisions in **MC Mehta vs Union of India [1987] 1 SCC 395** and **Indian Council for Enviro-Legal Action vs Union of India Supreme Court Of India (1996) 3 SCC 212,** submitted that it is established in law that strict liability is typically imposed absolutely on the owner of the land causing

the pollution for damages caused by escape of substances to a neighbour's land, and that the trial Court therefore erroneously found NEMA liable and apportioned it 40% liability.

48. In addition, that the trial Court, should have found Metal Refinery EPZ Ltd fully culpable and liable for the damages and environmental restoration based on the "polluter pays" principle, and while citing the decision in the case of **Kiema Mutuku vs Kenya Cargo Handling Services Ltd. (1991) 2 KAR 258,** the counsel submitted that there no liability without fault in the legal system in Kenya and that fault has to be pleaded and proved by evidence at the hearing. The counsel also cited Principle 16 of the Rio Declaration on Environment and Development (hereinafter "the Rio Declaration") and the case of **Fishermen & Friends of the Sea vs The Minister of Planning, Housing and the Environment (Trinidad and Tobago) [2017] UKPC 37** and **Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) vs Impressa Construzioni Giuseppe Maltauro SPA & 2 others [2019] eKLR** in support of the position that the costs of pollution control and remediation are borne by the person who cause the pollution, who should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. Therefore, that the trial Court, having found that the residents suffered individually through inhalation and absorption of pollutants from Metal Refineries EPZ Limited should have for purposes of consistency found that Metal Refineries EPZ Limited was the polluter

and therefore ought to have solely met the costs of compensation and environment restoration.

49. The findings by the trial Court on the processes of the issue of the EIA licence were also faulted by the learned counsel for NEMA. In particular, that the learned judge failed to appreciate that the Environment Impact Assessment process is a time bound process, and thus could not have allowed for the back and forth correspondence before a decision to license can be arrived at. Reference was made to section 58 of the EMCA and the decision in the case of **Save Lamu & 5 others vs National Environmental Management Authority & another [2019] eKLR** for the position that the Court is only required to ensure that the statutory steps and processes in the Act are followed, but must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of mitigating factors proposed, and that it is not for the judges to decide what projects are to be authorised but as long as they follow the statutory process, it is for the responsible authorities.

50. In addition, that the trial Court failed to acknowledge that NEMA discharged its mandate and followed procedure by making site visits and issuing statutory instructions and orders upon Metal Refineries EPZ Limited, both before and after licensing, and that NEMA adopted a consultative approach hence the "legion" of correspondence by way of statutory letters that were issued to Metal Refineries EPZ Limited.

Reliance was placed on the decision in the case of **Hosea Kiplagat & 6 others v National Environment and Management Authority (NEMA) & 2 others [2018] eKLR** that NEMA has the capacity and mandate to do an environmental audit and monitoring of the project after it's operational, and it was submitted that the issuance of the Environmental Impact Assessment Licence was not an end of the Environmental Impact Assessment process but rather part of the process, and that learned trial judge was wrong to impute liability on NEMA simply because the Appellant licensed the project. Lastly, that the trial Judge failed to appreciate the importance of trial runs and the 'precautionary principle' in environmental governance; and the counsel submitted that the trial runs directive was issued based on the precautionary principle as formulated in the 1992 Rio Declaration principle 15. It was submitted that Lead smelting was a relatively new industry in the Country and the first to be subjected to the Environmental Impact Assessment Process and that a trial run is a preliminary test of how a new or proposed project would work and is applied in novel areas with a view to inspecting the environmental impacts beforehand where the national environmental agency is not fully possessed with the relevant expertise. In the event of negative impacts then the proponent would be required to mitigate the impacts or discontinue the undertaking.

51. Mr. Kisaka for EPZA on his part submitted that the trial Court failed to appreciate the documents that an investor is required to provide before being allowed to operate under the Export Processing Zones Act,

and in particular that EPZA granted Metal Refinery EPZ Limited an EPZ licence based on a letter dated 12th December 2006 written by NEMA that confirmed that the project could proceed and that the Environmental Impact Assessment (EIA) licence would be issued in due course.

52. Therefore, that under the presumption of regularity, the trial Court ought to have proceeded on the premise that the award of the EPZ licence was properly done and that official duties were properly discharged and all procedures duly followed. According to the counsel, the residents of Owino-Uhuru village and CJGEA were consequently required to provide cogent, clear and uncontroverted evidence to rebut the regular issuance of the EPZ licence. Further, that the learned trial Judge erred in failing to appreciate that section 23 of the Export Processing Zones Act did not require EPZA to receive an Environmental Impact Assessment Licence from Metal Refinery EPZ Limited , but rather was to grant the EPZ license if the proposed business enterprise did not have a deleterious impact on the environment, engage in unlawful activities, impinging on national security or prove to be a health hazard. In this respect, that by a letter dated 26th September 2006 written by NEMA to Metal Refinery EPZ Limited, it was stated that the proposed project was approved with conditions, and directed Metal Refinery EPZ Limited to confirm in writing the conditions shall be complied with prior to the

commencement of the project to enable the Authority to process the Environmental Impact Assessment Licence.

53. Additionally, that Metal Refinery EPZ Limited having undertaken to comply with the conditions imposed by NEMA prior to the commencement of its project by a letter dated 1st November, 2006 and in answer, NEMA, in its letter dated 6th December 2006 having confirmed that the project could proceed and therefore being satisfied that the proposed business would not be deleterious to the environment, the reasonable and available option to EPZA was to grant an EPZ Licence to Metal Refinery EPZ Limited. Further, that EPZA had also received the Mineral Dealers Licence which the Commissioner for Mines and Geology had issued to Metal Refinery EPZ Limited on 22nd November, 2006. Metal Refinery EPZ Limited was found to thereafter have caused pollution, and that the trial Court therefore failed to apply the polluter pays principle as set out in principle number 16 of the Rio Declaration and restated in section 2 of EMCA, and erred in law and fact in relying on **David Ndetei vs Orbit Chemicals Industries Ltd (2014) eKLR** and failing to appreciate that Metal Refinery EPZ Limited , being the polluter, should have been entirely liable for the harm, if any, and not EPZA.

54. The counsel relied on the decision by the India Supreme Court in **Indian Council for Enviro-Legal Action and Others vs Union of India and Others (1986) 2 LRC 258** that the financial costs of preventing or remedying

damage caused by pollution should lie with the undertakings which cause the pollution and that it is not the role of the Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The imposition of liability-on a public body when pollution was caused by a private entity is untenable and illogical and more so where the Appellant discharged its statutory duties accordingly. It was thus counsel's position that Metal Refinery EPZ Ltd should bear the costs of environmental remediation and compensation of the affected parties. In any event, that the EIA License was eventually issued to Metal Refinery EPZ Limited by NEMA on 5th February, 2008, while EPZA issued the EPZA licence on 13th December 2006, and was therefore in error, if at all, for only one year which should have affected EPZA's portion of liability, if any.

55. Ms. Kiti and Mr. Makuto's submissions on liability were along four fronts. Firstly, that the trial judge erred by apportioning more culpability on NEMA, the Ministry of Environment Water and Natural Resources and Ministry of Health cumulatively than on Metal Refinery EPZ Limited and Penguin Paper and Book Company Limited contrary to the laid down principle of "polluter pays" that is elaborated in Principle 16 of the Rio Declaration, sections 2 and 3 of the EMCA and case of **Dobs Entertainment Limited vs National Environment Management Authority [2021] eKLR** that apportions blame on the

polluting entity and on a fault basis Further, that the learned trial judge rightly stated in the judgment that there was sufficient evidence to show that the pain and suffering of the residents was because of lead poisoning from the waste discarded by the metal refinery in their vicinity, and from the evidence adduced in the trial Court, there was no doubt that resultant pollution was stemmed from unsanctioned and illegal actions by Metal Refinery EPZ Limited , which did not have a license to operate as a metal refinery and whose actions were in violation of the license issued to it which only allowed the exporting of metals as a metal dealer and not a metal refinery.

56. Secondly, that the trial Court did not find that the Ministry of Environment, Water and Natural Resources and Ministry of Health were negligent in their duties in protecting the environment nor failed to take action as and when they were called to do so, and that there was sufficient proof that the various administrative actions were commenced to prevent Metal Refinery EPZ Limited from continuing to operate in a manner that polluted the environment. In particular, that the Ministry of Health acted swiftly after it was made aware of the concerns of the villagers with regards to the effects of the factory on their health in conducting investigations, inspections, ordering closure of the factory and providing medical care and treatment to the victims of the pollution as illustrated by the evidence of some of the witnesses for both the residents and the Ministry.

57. Thirdly, that the Ministry of Environment Water and Natural Resources is the parent Ministry of NEMA and based on the distribution of responsibilities, the ministry is in charge of policy formulation and appointments to various institutions dealing with environmental protection, while the roles of day-to-day regulation of environmental issues are granted to the NEMA, which includes issuance of Environmental Impact Assessments (EIA) as provided in the EMCA under section 58. Further, that the Ministry is mandated to provide regulatory framework for the issuance of the EIA and fulfilled the statutory obligations in policy formulation, and there were no policy deficiencies that required it to be held liable nor was it found culpable for failure to provide sufficient policy that led to the pollution. Likewise, that the Ministry of Health discharged its statutory duty having provided the necessary policy framework and made all required appointments to various lead agencies, and could not be held liable should the lead agencies fail to implement policy. In addition, that no direct link was established between a policy gap and actions of the polluter for the Ministry to have been found culpable. Therefore, that the finding of liability on the part of the Ministries without allegations of insufficient policy framework in preventing the pollution goes against the principle of causation, and the decision by the Supreme Court of Kenya in **Kenya Wildlife Service vs Rift Valley Agricultural Contractors Limited [2018] eKLR** was cited for the position that four key elements predominate in establishing a negligence claim - a duty of care, a breach of that duty, causation, and damage.

58. Lastly, that the learned trial Judge erred by stating that liability of the County Government of Mombasa was negligible, yet the environmental discharge was allowed to harm the residents since the said county government had not provided safety measures for disposal of waste, which is a function of county Governments under Schedule 4 part 2 of the Constitution which. Further, that the County Government of Mombasa authorised the reopening of the metal refinery occasioning further harm to the residents of Owino- Uhuru village despite actions by officials of the Ministry of Health to close the metal refinery.

59. Mr. Onyango, the counsel for the residents of Owino-Uhuru village and CJGEA, in response challenged the position that the "polluter pays" principle provides that only the direct polluter, namely Metal Refinery (EPZ) Limited, should have been held liable, and submitted that a reading of section 2 of EMCA reveals that the law does not state categorically that recompense must be paid only by the person who runs the establishment that is responsible directly for pollution, but by a person convicted of such pollution. Therefore, that in cases of pollution, the court must look at the circumstances under which the pollution took place and then proceed to apportion blame based solely on available facts. In addition, that whereas Principle 16 of Rio Declaration promotes the taking into account of the fact that the polluter should, in principle, bear the cost of pollution, this principle does not take away, the ultimate responsibility of a state as a duty bearer under international

human rights laws and standards to ensure human rights for all are respected, protected and fulfilled. That the obligations of States requires them to refrain from interfering with or curtailing the enjoyment of human rights, to protect individuals and groups against human rights abuses and to take positive action to facilitate the enjoyment of basic human rights. Therefore, that NEMA and EPZA, being state organs within Article 21 of the Constitution, had an obligation under Article 69 of the Constitution to take necessary steps to promote environmental rights. The counsel also pointed out that Article 69 of the Constitution is in line with Principle 15 of the Rio Declaration.

60. Coming to the present case, the counsel submitted that the toxic gas, solid waste dust and contaminated water that was dumped on Owino-Uhuru Village emanated from a factory run by the Metal Refineries (EPZ) Limited, but that the NEMA and EPZA, being state organs. are enjoined to observe the national values and principles of governance as set out in article 10 of the Constitution of Kenya 2010 and had a responsibility to apply the provisions of this Constitution in a manner that respects and upholds the right and fundamental freedoms that are set up in the Bill of Rights. The counsel set out the statutory duties of NEMA and EPZA, and pointed out that under section 9(1) of EMCA, the main object and purpose for which NEMA is established is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

Further, that among the NEMA's principal duties under section 58 of EMCA is to ensure that projects that legally require EIA licenses are commenced only after consideration of an EIA report and issue of an EIA license, and that it is in this way that NEMA executes its mandate of protecting the environment and to protect citizens from harmful projects.

61. The counsel submitted that after EIA report was submitted to NEMA on behalf of Metal Refinery (EPZ) Limited on the 13th March 2007 and before the EIA license was issued by NEMA on the 5th February 2008, Metal Refinery (EPZ) Limited had already commenced operations in violation of the provisions of section 58 of EMCA set out above. Further, that despite NEMA being aware of the actions by Metal Refinery (EPZ) Limited of operating illegally without an ElA license, it did not apply the punishment set out at section 138 of EMCA, and instead, rewarded wrong doing by issuing it with an ElA license the following year. In addition, that NEMA proceeded to issue an ElA license to Metal Refinery (EPZ) Limited when the ElA report presented for its consideration did not contain any comments from the immediate neighbours of the premises where it was already carrying out its activities.

62. On the liability of EPZA, the counsel submitted that under section 9 of the Export Processing Zones Act, one of the objectives of the EPZA is the regulation and administration of approved activities within the

Export Processing Zones (EPZ) through, inter alia, the examination and processing of applications for licences by the export processing zone developers, export processing zone operators, and export processing zone enterprises and issue of the relevant licences. Further, that section 23 of the Act provides for licensing of EPZ firms and in particular that a license shall only be issued by EPZA if the proposed enterprise shall not have a deleterious impact on the environment. However, that EPZA, in response to Metal Refinery (EPZ) Limited's application to be issued with an EPZ enterprise license, responded by a letter dated 2th June 2006 setting out conditions upon which the licence could reasonably be issued including requiring the 15"' Respondent to submit a copy of ElA license from NEMA. EPZA then proceeded to issue Metal Refinery (EPZ) Limited with a license on 13'" December 2006 thereby enabling it to begin operations as an EPZ enterprise, yet the said company did not obtain an EIA license until the 5th February 2008.

63. The counsel submitted that EPZA therefore did not follow its own conditions set for issuing an operating license, and in so doing, issued a license to Metal Refinery (EPZ) Limited to operate its factory without knowing or caring to find out about the effects that the activities of the factory would have on the environment or on the health of the community living around the factory in complete abdication of its responsibility as set out in Section 23 of the Act. In addition, that instead of seeking to enforce compliance by Metal Refinery (EPZ) Limited to safety standards that would have prevented the pollution, available

documents showed that EPZA differed with the decisions of other government agencies which closed the factory, by arguing that the factory ought to be opened forthwith to continue with its business.

64. In conclusion the counsel submitted that the picture which emerges is of statutory bodies who failed in their responsibilities to superintend the activities of Metal Refinery (EPZ) Limited, and that even when complaints began to emerge during the initial operations of the company that the operations were harmful to the environment and to the health of those living around it, NEMA and EPZA refused to act to avert further disaster and were thus responsible as enablers of the pollution that was carried out by the Metal Refinery (EPZ) Limited. Therefore, that whereas the actual pollution was committed by the Metal Refinery (EPZ) Limited, the inaction and omission of NEMA and EPZA as duty bearers makes them responsible for violations suffered by the residents of Owino-Uhuru village and that the consequences of that failure to carry out correctly statutory functions must also fall on them under the principle of strict liability established by the decisions in in the **Rylands vs Fletcher (supra) , MC Mehta vs Union of India (supra)** and **David_M Ndetei vs Orbit Chemical Industries Ltd (supra).**

65. The counsel also cited the decision by the European Court of Justice in **Muhammad Kaya vs Turkey, 22535/93** that a positive obligation arises if the authorities knew or ought to have known of the existence of a

real and immediate risk to life from the acts of third parties and failed to take reasonable measures within the scope of their powers, and the decision by the African Commission on Human and People's Rights in **Association of Victims of PEV and lnterights vs Cameroon, 272/03,** where it ruled that state parties shall not only protect rights through appropriate legislation and effective enforcement but by also protecting the citizens from damaging acts that may be perpetrated by private parties.

66. In commencing our determination of the issue of whether there was a legal basis to find NEMA and EPZA liable for the adverse effects of the operations of Metal Refinery EPZ Limited, we need to reiterate that the premise of the petition brought by the residents of Owino-Uhuru village was the violation of their constitutional rights, and the basis for liability in this respect was proof of conduct or acts or omissions on the part of NEMA, EPZA and other state agencies sued that was responsible for, or contributed to the infringement of the resident's rights. The residents in this respect set out the manner in which their rights were violated by NEMA and EPZA, as well as the other state agencies, and also set out the violations by Metal Refinery (EPZ) Limited and Penguin Paper and Book Company Ltd who were private entities. The applicable principles that apply in determining liability in this appeal are therefore both private and public law principles. The private or civil law principles on liability which center on the torts of nuisance and negligence, only determine the liability of the private persons, and of public bodies to a

limited extent with respect to breach of statutory duties. In this respect it is notable that the liability under the principle of **Ryland vs Fletcher (supra)** of Metal Refinery (EPZ) Limited and Penguin Paper and Book Company Ltd as the persons who discharged the waste that polluted the environment and caused adverse effects to the residents, and owner of the land from which such discharge emanated is not contested.

67. NEMA and EPZA have contended that they were allocated and apportioned liability using this rule, and that Metal Refinery (EPZ) Limited and Penguin Paper and Book Company Ltd ought to have been held solely liable or shouldered the greater portion of liability. It is notable that the rule in **Ryland vs Fletcher** remains relevant in environmental regulation, as the standard of care that is imposed in terms of hazardous activities. An example in this regard is Article 4 of the Basel Convention's Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, which applies strict liability for any damage resulting from the movement of hazardous wastes on the entity in operational control, and if two or more persons are liable, liability is joint and several. Our reading and appreciation of the findings by the trial Court leads us to a contrary view. It is also notable that the trial Court considered the principle of strict liability and the decisions thereon in **Rylands vs Fletcher (supra) , MC Mehta vs Union of India (supra)** and **David_M Ndetei vs Orbit Chemical Industries Ltd (supra)** when addressing the issue of compensation and held as follows:

> *" 168. In light of the provisions of Article 70(c) of the Constitution; Section 108 of EMCA and the Case law highlighted hereinabove, I am persuaded to make a finding that the petitioners are entitled to compensation in monetary and non-monetary reliefs as pleaded in the petition which reliefs I had set out at the beginning of this judgment."*

68. The trial Court clearly relied on other provisions of the Constitution and EMCA in allocating liability to NEMA and EPZA. In this respect, it is also notable that the trial Court did not exclusively or solely rely on the "Polluter Pays" principle to establish liability on the part of NEMA and EPZA and other state agencies. In analyzing the submissions made on behalf of the residents and CJGEA the trial Court observed as follows:

> "*72. The Petitioners submitted that the 7th Respondent should ideally be the party to bear the cost of remediation and compensate the Petitioners in accordance with the Polluter Pays principle as per Principle 16 of the Rio Declaration. The said principle does not however take away the responsibilities of the 1st to 6th Respondents as State duty bearers to ensure that international human rights laws and standards are respected protected and fulfilled. The said duties are stipulated in article 21 of the Constitution with those pertaining to environmental rights in article 69(1) (d), (f), and (g). That the provisions of article 69 in line with Principle 15 of the 1992 Rio Declaration on application of the precautionary approach in environmental protection are to the effect that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent actual degradation."*

69. Likewise, on the submissions made on behalf of the Attorney General, and Cabinet Secretaries for the Ministries of Environment and of Health urging the trial court to adopt the polluter pays principle embedded in

the Rio Declaration principle 16 and find that Metal Refinery (EPZ) Limited was solely liable for the pollution, the trial Court observed as follows:.

> *"87…The Rio Declaration passed 27 principles to guide the protection of the environment for the present and future generations. Inter alia, principle 8 and 18 states thus;*
> *Principle 8: To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."*
> *88. This principle imposes upon the State a responsibility to ensure that activities within their jurisdiction to eliminate unsustainable patterns of production and consumption. The inference being that before the 1st to 3rd Respondents can argue that the polluter shall pay, they have a duty to regulate. The duty is explained in principle 13 which provides thus; "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".*

70. We agree with this observations, and in addition, note that the "polluter pays" principle is an economic instrument which initially required a producer of goods or other items to be responsible for the costs of preventing or dealing with any pollution that the process causes. This includes environmental costs as well as direct costs to people or property, and also covers costs incurred in avoiding pollution as well as remedying any damage. However there are difficulties in the application of this principle and its exact scope and extent of payable costs, and identifying the responsible persons or "polluters". Section 2 of EMCA defines the

"polluter-pays principle" to means " *that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law*." Conviction of pollution connotes the application of criminal law and sanctions to private operators as opposed to state agencies, and primary liability appears to be assigned to private actors as the primary polluters under the section.

71. However, the state as an economic operator in the process of regulation and development of economic policies is well recognized, and the state and state agencies also engage in economic activities as operators. Therefore, it is not a hard and fast rule that state and state agencies are exempt from the application of the "polluter pays" principle. It is also instructive that both the Environment and Land Court Act (in section 18(a)) and EMCA (in section 3(5)) in this respect require the Environment and Land Court in exercising the jurisdiction conferred upon it, to be guided by principles of sustainable development including the "polluter pays" principle.

72. These findings notwithstanding, in the present appeal, the law that regulates the state's obligations in relation to the right to a clean and healthy environment and environment protection is public law, and the state's liability occurs when it violates its statutory or constitutional

obligation or duty, (the wrongful act), and a linkage is established between the wrongful act and the damage or injury caused by the environment (the causal link). The Constitution places positive obligations upon the State and state agencies to promote and protect the right to a healthy environment by taking "all necessary measures". State liability may thus derive from an administrative authorisation, an absence of regulation, or from inadequate measures relating to activities of the private actors, which result in harm to the environment. The violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originates from the actions of the State or its organs, but also if it results from lack of effective regulation of private activities. In a translation of the decision of European Court of Human Rights in **Tătar vs Romania (Application no. 67021/01)** published in ***International Litigation and State Liability for Environmental Damages : Recent Evolutions and Perspectives*** by Sandrine Maljean-Dubois in **Jiunn-rong Yeh : Climate Change Liability and Beyond, National Taiwan University Press, 2017** *(accessed from https://shs.hal.science/ halshs-01675506f on 9th June 2023),* the Court stated as follows:

> "***The positive obligation to take all reasonable and adequate measures implies, before anything else, for all States, the duty to develop an administrative and legislative framework for the efficient prevention of environmental damages and human health. When a State has to address complex questions of environmental and economic policy, and especially when it is about dangerous activities, it is necessary, in addition, to reserve a special place for regulations adapted to the specificities of the activity, especially for the risk that could result from it. This obligation must determine the authorisation, implementation, exploitation, security and control of the activity and impose to everyone concerned the adoption of practical measures that***

can guarantee the effective protection of citizens whose lives could be exposed to dangers inherent to the area. It is also necessary to underline that the decision process must include the conduction of appropriate enquiries and studies, to prevent and evaluate in advance the effect of activities that can damage the environment and violate individual rights, and that allow the establishment of a just balance between the different concurrent interests . The importance of public access to the conclusions of these studies as well as information that allows an assessment of the danger it is exposed to makes no doubt Finally, concerned individuals must also be able to stand a claim against any decision, act or omission before courts if they consider that their interests or observations were not sufficiently taken into account in the decision-making process "

73. The Kenyan Constitution in this respect imposes shared obligations and responsibility for environmental protection, management and conservation on both the state actors as well as private actors under Article 69 as follows:

(1) The State shall—
(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
(d) encourage public participation in the management, protection and conservation of the environment;
(e) protect genetic resources and biological diversity;
(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

74. Under Article 260 of the Constitution, the "State" is defined to mean "the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution"; a "state organ" means a commission, office, agency or other body established under the Constitution while a person includes a company, association or other body of persons whether incorporated or unincorporated. It is notable in this respect that both NEMA and EPZA are statutory bodies that are established under Acts made by Parliament pursuant to powers granted by the Constitution, and of relevance in this appeal is that Article 69 specifically requires systems of environmental impact assessment, environmental audit and monitoring of the environment to be established, which has been principally been done under EMCA.

75. Article 69 also embodies the shift that has occurred over the years in the regulation of the environment, from reactive provision of remedies for environmental pollution to more proactive provisions of standards and preventative measures designed to reduce or eliminate the risk of environmental damage. In particular article 69 embodies the principle of sustainable development which attempts to reconcile the conflicting demands of economic development and environmental protection so as to ensure that the benefit of any development outweighs its costs,

including costs to the environment. The diverse and complex nature of the environment, and of the causes and extent of its pollution and degradation requires a broad range of regulatory tools and mechanisms. In this respect, the typical regulatory process involves the establishing the general policies on the environment, setting standards or specific policies in relation to the environmental issue concerned, applying these standards and policies to individual situations, normally through some licensing system, enforcing standards and permissions through administrative and criminal sanctions, providing information about the environment and the regulatory process itself, and using mechanisms to monitor and improve the regulatory system. See in this regard the text on **Environmental Law** by **Bell and McGillivray 7th edition**, at pages. 224 to 227.

76. The questions that we need to answer in this appeal are the legal implications and environmental effects if any, of the actions and conduct or omissions of the NEMA and EPZA during the processes of licensing of Metal Refinery (EPZ) Limited, and adequacy of the monitoring and enforcement of it activities and operations. It is notable that with respect to the regulatory framework, EMCA in this respect provides for the responsible agencies and tools for environmental protection, environmental planning, guidelines on environmental protection of various sectors, integrated environmental impact assessment of plans and projects, environmental audits and monitoring, environmental quality standards and various environmental enforcement measures. NEMA and

EPZA do not dispute that they approved operations by Metal Refinery (EPZ) Limited before the issuance of the EIA licence to it, and in this regard, we will reproduce the sequence of events illustrated by the evidence adduced and as captured by the trial Court as follows:

> *"146 ... According to the 4th Respondent's evidence, an Environment Impact Assessment license was issued in February 2008 pursuant to an Environment Impact Assessment project report submitted on 13th March 2007. The 4th Respondent annexed a letter dated 26th September 2006 (page 70 of Ouma's affidavit) which approved the 7th Respondent's project to be undertaken on L.R No. MN/II/3697, Kilifi District and letter by the 7th Respondent dated 1/6/2006 requesting for change of address on the National Environment Management Authority license and Environment Impact Assessment approval (NEMA/PR/5/1213) to the 8th Respondent's premises.*
> *147. However, on 6/12/2006, the 4th Respondent issued another letter to the 7th Respondent which stated thus, "Further to the approval letter dated 26th September 2006, and your letter of compliance to the conditions of approval sent to us on 24th November, we would like to advice you that the manufacture of lead alloys using scrap metal batteries from the region as raw material can carry on. The EIA license will be given to you in due course. However, do ensure that the conditions set out in the approval letter will be strictly adhered to".*
> *148.The question which arises, was the 4th Respondent approving another project after it already did so on 26/9/2006 for the project in the Kilifi land" Secondly the 6th Respondent stated that it relied on this letter to issue the 7th Respondent with a license. Yet the letter referred to L.R No. MN/III/3697 Kilifi District while the 6th Respondent was stationed in Changamwe Mombasa. As at March 2007, the project on the 8th Respondent's land had not been issued with approval to operate as the 4th Respondent did not provide evidence on its response for the request to transfer the license from Kilifi District to Mombasa."*

77. The learned trial Judge proceeded to observe as follows:

"149. It is interesting to note that while the 4th Respondent was considering the Environment Impact Assessment project report dated 13/3/2007, it went ahead to issue a letter dated 23/4/2007 referenced "Cessation and Restoration Order for the Scrap Battery processing plant, Birikani area off New Holland/CMC Yard Nairobi Road, Mombasa". The letter directed the 7th Respondent to do the following;

a. Cease operations immediately.

b.Initiate an Environmental Impact Assessment (EIA) Study to facilitate in depth evaluation of the potential impacts associated with the project and to materialize harmony with the affected and interested stakeholders.

c.Submit a letter of commitment to the Authority to the effect that you will comply with the above requirements within seven (7) days from the date of receipt of this letter.

d.Call Environmental Inspectors from NEMA to inspect the level of the compliance, which should be to the satisfaction of the Authority on such terms and conditions as may be deemed appropriate and necessary.

150. Within 3 weeks of the cessation and restoration order, the 4th Respondent on 16th May 2007 proceeded to approve the 7th Respondent's project. The 4th Respondent's action in my view amount to assisting the 7th Respondent in breaching the law instead of holding them to account. If the law allowed them to issue a cessation order why issue an Environment Impact Assessment (E.I.A.) license before confirming that their letter of 23/4/2007 had been complied with" To show the contradiction by the 4th Respondent in carrying out its mandate, it issued another letter dated 11th June 2007 stating thus, "This is to inform you that the authority has reviewed your request and hereby grant you permission to carry out trial runs." The letter of 16/5/2007 had in conclusion asked the 7th Respondent to, "Kindly confirm in writing that the condition shall be complied with prior to commencement of the project to enable the authority process the Environment Impact Assessment license." The 7th Respondent gave the commitment vide their letter of 17th May 2007. So was the letter of 17/5/2007 the basis for giving permission for trial runs before a license was issued" Does the law allow for trial runs before an Environment Impact Assessment license is given"

78. Likewise, EPZA does not dispute that it issued the EPZ licence to Metal Refinery (EPZ) Limited before the issuance of the EIA licence. In addition to being subject to the obligations under Article 69 of the Constitution, EPZA was under a specific duty under section 23(c) of the EPZ Act was to ensure that the business entities it licenced under the Act "shall not have a deleterious impact on the environment, or engage in unlawful activities, impinging on national security or may prove to be a health hazard". EPZA in its letter dated 27th June 2006 responding to Metal Refinery EPZ Ltd application for a an EPZ business enterprise licence, required it to "*submit certified copy of Environmental Impact Assessessment License from National Environmental Management. Authority (NEMA) For the project"*. EPZA nevertheless proceeded to issue an EPZ licence without the EIA licence and has urged that it complied with its duty by relying on NEMA's approvals to Metal Refinery EPZ Ltd before issuance of the EIA licence. EPZA therefore not only was in direct violation of Article 69 of the Constitution and section 23 of the EPZ Act, but also assumed the legal risk and responsibility for any shortcomings by NEMA in its processes of issue of the EIA licence to Metal Refinery EPZ Ltd in this regard.

79. Likewise, as also noted by the trial Court, also noted that the Cabinet Secretary Ministry of Environment Water; and Natural Resources issued license No. 78 of 2006 to the Metal Refinery EPZ Ltd valid until 31st December 2006 for operations at Penguin Paper and Book Company EPZ

Limited Godowns despite having noted in its letter dated 13th June 2006 to EPZA advising that *"exports of lead are still allowed for those who have the necessary licenses from our department and NEMA. Further, the export of lead from scrap batteries should be done in accordance with the provisions of the Mining Act. ….*". It is also notable that under section 103 of the mining Act, the Cabinet Secretary is to issue a mining licence where *inter alia "the applicant has obtained an approved environmental impact assessment licence, a social heritage assessment and environmental management plan in respect of the applicant's proposed mining operations*". We need to emphasize that the EIA license was eventually issued by NEMA on 5th February 2008.

80. What then were the legal implications and effects of the approvals and licences given by the various state agencies to Metal Refinery EPZ Ltd to commence operations before the issuance of an EIA licence? Section 58 of the EMCA which deals with application for an Environmental Impact Assessment Licence provides as follows as regards the EIA study and reports:

> ***"(1).Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.***
> ***(2).The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and***

submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority: Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.

(3).The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

(4).The Cabinet Secretary may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.

(5).Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6).The Director-General may, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(6A) The Cabinet Secretary in consultation with the Authority shall make regulations and formulate guidelines for the practice of Integrated Environmental Impact Assessments and Environmental Audits.

(6B) The Cabinet Secretary shall make regulations for the accreditation of experts on environmental impact assessments.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.
(10) A person who knowingly submits a report which contains information that is false or misleading commits an offence and is liable on conviction, to a term of imprisonment of not more than three years, or to a fine of not more than five million shillings, or to both such fine and imprisonment and in addition, his licence shall be revoked."

81. The Second Schedule lists the projects that require submission of an environmental impact assessment study report, which are categorized by low, medium and high risk. Sections 59 -62 of EMCA provide the processes that follow after the Environmental Impact Assessment study, including publication of the report by NEMA in the Kenya Gazette and two local newspapers, comments on Environmental Impact Assessment report by Lead Agencies, setting up of a technical advisory committee to advise it on environmental impact assessment if need be, or a further evaluation or environmental impact assessment study, review or submission of additional information if necessary. After these processes, NEMA may, under section 63, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. It is also notable that Regulation 17 of the Environmental Management and Co-ordination (Waste Management) Regulations, 2006 specifically provides that no person shall engage in any activity likely to generate any hazardous waste

without a valid Environmental Impact Assessment licence issued by Authority under the provisions of the Act.

82. An environmental impact assessment is a key environmental law and regulation mechanism, and its essence is that information about likely environmental impacts of development projects, plans and programs is properly considered before potentially harmful decisions are made. As explained in the text on **Environmental Law** by **Bell and McGillivray** at page 432:

> *"Thus, environmental assessment is both a technique and a process. EIA's and SEA's are inanimate rather than tangible. The key point is that., strictly, the 'assessment' is undertaken by the decision maker on the basis of environmental information with which it is supplied. This information consists, in part, of an 'environmental statement' prepared by the developer, (or more likely, by hired consultants), which details at least the main environmental impacts of the project and any mitigating measures that are proposed to reduce the significance of those impacts... But just as importantly, the environmental information also includes other information supplied by various statutory consultees.. independent third parties, members of the public, and even the decision maker itself. So it is worth stressing that the developer does not produce an environmental assessment (a mistake that even some judges still make); the decision maker carries out the assessment on the basis of environmental information supplied."*

83. It is therefore the responsibility of NEMA to not only ensure compliance with the requirements and processes of an environmental impact assessment, but to also take into account the information thereon when making a decision whether or not to approve and licence a project. The effects of the failure to do so may be development that has unmitigated

damaging effects on nearby properties and human health, as happened in the present appeal. The issues that are required to be identified and addressed in the EIA are specified in the Second Schedule to the Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, namely the ecological considerations including biological diversity, sustainable use and ecosystem maintenance; the social considerations including effect on human health; landscape; land uses; and the effects on water sources in terms of quantity and quality and drainage patterns/drainage systems. In addition, the standards as regards hazardous wastes are provided in the Fourth Schedule of the Environmental Management and Co-ordination (Waste Management) Regulations, 2006 and include control of wastes containing 0.1% or more by weight of lead and wastes in solid and liquid form.

84. NEMA did not provide evidence that the EIA Study report undertaken by Metal Refinery (EPZ) Limited dated 13th March 2007 that was produced in evidence was subjected to technical evaluation in light of the parameters that require to be satisfied in terms of impact, as set out in the Second Schedule to the Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, and confirmation of the relevant standards that required to be met by Metal Refinery EPZ Ltd, including on hazardous waste. The causal link between the approval of the operations of Metal Refinery EPZ limited before completion of the EIA process and the damage suffered as a result of effects of the project is therefore evident, since appropriate anticipatory controls could have

been put in place by NEMA *ex ante* were the hazardous impacts of the project properly identified, including an absolute prohibition of the project. Put differently, the project would never have seen the light of day, and hence no damage would have been resulted.

85. For these reasons, it is our view that the allocation and apportion of liability to NEMA and EPZA for approving the project and its commencement before the full impact of the project were considered and evaluated was near equal in measure to that of the actual perpetrators of the pollution. The main actors in this respect in so far as the cause of the deleterious activities were concerned were NEMA, EPZA and Metal Refinery EPZ Ltd, with the liability of the other agencies and actors being either passive or reactive in relation to the pollution.

86. In addition, once the evidence of the adverse and hazardous effects of the operations of the project became apparent, and given the nature of the wide ranging of the effects on both the ecosystem, human health, water and air quality, NEMA ought to have applied the wide range of enforcement measures at its disposal, including cancellation of the EIA licence, restoration orders and prosecution of the perpetrators of the pollution. We therefore find that NEMA for this reason bears greater responsibility than EPZA and the Ministry of Health for the harmful environmental and health effects of the project. From our analysis as set out in the foregoing, we find it necessary to slightly revise and review the

original allocation and apportion of of liability set out by the trial Court in paragraph 158 of its judgment as follows:

i. *2nd Respondent (The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources)-5%*
ii. *3rd Respondent (The Cabinet Secretary in the Ministry of Health)-5%*
iii. *4th Respondent (NEMA)-30%*
iv. *6th Respondent (EPZA)- 10%*
v. *7th Respondent(Metal Refinery EPZ Ltd) - 40%*
vi. *8th Respondent(Penguin Paper and Book Company Ltd) - 10%*

87. We also feel constrained to comment on the finding by the trial Court that no liability attached to the County Government of Mombasa, on the ground that the evidence adduced did not show any direct role of the County Government in failing to comply with the environmental laws, and that the Physical Planning Act ceased to apply to the EPZ zone once the area was gazetted as such under the EPZ Act. There was no evidence on record that the area, land or building where Metal Refinery EPZ Ltd was operating had been declared an export processing zone, which declaration is required to be done by the relevant Minister by way of a notice in the Gazette under section 15 of the EPZ Act.

88. Secondly, the trial Court found that the issuance of single business permit is not attached to fulfilment of any conditions prior to its being issued, and it is notable that the timeline with respect to the deleterious operations by the Metal Refinery EPZ Ltd was between 2006 and 2014 when its factory was closed. Prior to the new Constitution, the Physical

Planning Act which was then in operation and was repealed by the Physical and Land Use Planning Act in 2019, gave local authorities power under section 29 to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area and to consider and approve all development applications and grant all development permissions, and under section 32, when considering a development application, was have regard to the health, amenities and conveniences of the community generally and to the proper planning and density of development and land use in the area. Under section 116 of the Public Health Act, it is also the duty of every local authority " *to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition*."

89. Lastly, under Article 186 of the Constitution of 2010, the functions and powers of the county Governments are as set out in Part II Fourth Schedule to the Constitution, which include in paragraph 2, county health services including refuse removal, refuse dumps and solid waste disposal, in paragraph 3 control of air pollution, noise pollution, other public nuisances and outdoor advertising, and in paragraph 10, implementation of specific national government policies on natural resources and environmental conservation, including soil and water

conservation. There are therefore clear duties with respect to environmental protection which were imposed on the County Government of Mombasa and its predecessor in this regard. However, since there was no cross appeal on the trial Court's findings on the said County Government's liability by the counsels for the Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health who only raised their concerns their submissions, we shall say no more about the issue.

90. We are also minded to address the two justifications raised by NEMA and EPZA in concluding on the issue of liability. NEMA relied on the precautionary principle as the reason for allowing the operations of Metal Refinery EPZ Ltd before its licensing and trial runs. The precautionary principle is defined in section 2 of EMCA as the "*principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*". We are concerned that NEMA's interpretation of the principle is that it permits the taking of risks in unknown cases, whereas to the contrary, the principle requires caution to be taken even when there is no evidence of harm or risk of harm from a project, and that proof of harm should not be the basis of taking action. The proper application of the principle therefore is that scientific analysis of risks should form the core of environmental rules and decisions, notwithstanding the fact that such analysis may be uncertain. In the alternative, the principle is

also used when there are limits to the extent that science can inform actions, and ultimately rules and decisions have to be made having regard to other considerations such as the public perception of the risk and the potential for harm. It is notable that the EIA processes provide opportunity for such analysis and perceptions to be taken into account.

91. EPZA on the other hand made an economic argument to justify the operations of Metal Refinery (EPZ) Limited, in terms of the contribution thereby to economic development. In this respect there will always be competing values that need to be balanced in environmental regulation, as well as the costs and benefits of compliance, and it is notable in this respect that this is one of the main objectives of an EIA and that Article 69 emphasizes on ecologically sustainable development.

92. On the issue of quantum of damages, Mr. Gitonga for NEMA submitted that the learned trial Judge erred by arriving at the quantum of Kshs 1,300,000,000.00/= and Kshs 700,000,000/= on the basis of proposals given by the residents and CJGEA only and without any expert input especially for the clean-up exercise. Reliance was placed on the Court of Appeal decision in the case of **Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR** for the position that the award of damages for constitutional violations of an individual's right reliefs under public law remedies and the court's discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. Further, that the trial Judge directed public funds of Kshs 700,000,000/-

be channelled to a non-governmental organization to undertake the soil contamination clean-up, when the said exercise inevitably required expertise not reposed in the non-governmental organisation. In addition, that there would be no statutory obligation placed upon the said non-governmental organisation for audit and monitoring of their work, and in the event of default there would no enforceable remedy. Therefore, that the learned judge should have directed that clean up responsibility be squarely on the polluter and in default, a state actor. Lastly, that it was unclear how the Court arrived at the sum of Kshs 700,000,000/-as the appropriate figure for clean-up exercise, and that no scientific or statistical formula was applied by the learned trial Judge in arriving at the dispute quantum. In conclusion, the counsel pointed out that NEMA is a state corporation funded by exchequer, and that the award by the trial Court is so exorbitant and if left to stand, it would cripple it and effectively deny the public of the otherwise statutory functions that it dispensed.

93. Mr. Kisaka while submitting on behalf of EPZA made reference to the cases of **Municipal Council of Eldoret vs Titus Gatitu Njau [2020] eKLR, Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, Kigaragari v Aya (1985) KLR 273, John Kipkemboi & another v Morris Kedolo [2019] eKLR and Board of Trustees Anglican Church of Kenya, Diocese of Mandera v THW (Suing through her father ad guardian ad litem HWG) [2019] eKLR.** and **Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment)** which held

that the quantum of damages to be awarded depends on the nature of right that is proven to have been violated, the extent of the violation and the gravity of the injury caused. The counsel submitted that the award of damages was neither reasonable nor moderate in so far as it was based on the wrong comparison, and made reference to the case of **Mohammed Ali Baadi and others v AG & 11 others [2018] eKLR** as relied on by the trial judge stating that the facts, circumstances and prayers therein were completely different.

94. In addition, that the residents and CJGEA bore the burden of proving the number of people affected, the extent of the damages suffered, the evidence that the damage resulted from the pollution and the cost of treating any condition that they had. Further, that they were under obligation to plead and prove the damages they suffered and any compensation to be made to them was special damages not general damages, because the cost of treating the affected person could be calculated, and the cost of the restoration should have been specifically pleaded and proved. Reliance was in this regard placed on the cases of **Orbit Chemicals Industries vs Professor David M. Ndetei [2021] eKLR** and **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR.** Counsel concluded that the trial Court did not satisfy itself as to the number of residents of the Owino-Uhuru village, there was no evidence to show that the persons were 3,000 in number, no list of persons on whose behalf the residents brought the petition to Court, and that a representative suit could not have been the mechanism for proving

the damages to all the alleged 3,000 persons in the estate of Owino Uhuru nor afford the Court the opportunity to evaluate the extent of the injury of each of the individuals.

95. Therefore, that thee trial Court erred in awarding damages that were not deserved and which were excessive, capricious and arbitrary as no reasons underpinned them; the comparative case applied was not apt in the circumstances thus taking into account irrelevant factors; there was no evidence to confirm the actual number of persons involved; the trial Court did not ascertain the extent of injury suffered by the alleged 3,000 resident before arriving at the award of damages of Kshs 1.3 billion; the award was contrary to public policy in so far as it sought to divert huge sums of public funds to private programmes and finally, the trial Court did not consider the economic and commercial impact of the award. The counsel urged that the trial Court thereby misapprehended the evidence in material respects, and that the damages awarded were manifestly excessive and inordinately high and based on wrong principles, and asked us to interfere with the award.

96. The counsel for the residents of Owino -Uhuru village and CJGEA, Mr. Olel, placed reliance on various decisions including in the cases of **William Musembe & others v Moi Education Centre & others, SC Pet. No 2 of 2018; Edward Akong'o Oyugi & 2 others vs Attorney General [2019] eKLR** for the principles that apply in awarding compensation in constitutional petition, and submitted that from the evidence presented

in court it is clear that the residents did adequately and in a robust manner discharge the burden of proof that indeed they are victims of lead poisoning, in that not only was their health irreversibly affected, but also the environment where they live had been condemned as inhabitable and must be remediated at a great cost to make it safely habitable again. Further, that the damages and/or effects of lead poisoning were amply proved by the witnesses who testified and also scientifically by various reports admitted and laboratory reports which clearly showed there was extensive lead poison not only to persons residing in Owino –Uhuru village but the contamination spread to the soil and water. Further, that the Ministry of Health acknowledged that the treatment of lead poisoning needed a process known as Chelation in their report christened '**An Integrated Plan to Reduce lead Exposure in Owino Uhuru Settlement**' and that the drug to be used in the process, namely oral succimer meso 2,3, dimercaptosucinnic Acid (DMSA) (CDC, 1991) was not available locally and needed to be procured from abroad.

97. The counsel further submitted that the damages awarded in the petition were commensurate and appropriate, and that the appellants herein had misconstrued the basis used in arriving at damages as they wrongly based it on quantum as awarded in tort. The damages awarded was a global figure of Kshs 1,300,000,000/-, and if divided among the roughly 4000 residents amounted to Kshs 325,000/-, and the environmental damage was irreversible and the residents would have to move out of the said village when remediation action was taken; their houses would be

demolished and the top soil be removed, the corrugated iron sheets of their houses were corroded by sulfuric acid and even had holes and could not be reused; the water of Owino –Uhuru was contaminated by lead; nor was it necessary for all the 4,000 persons to produce medical reports to show ill health and lead contamination, since the various government reports confirmed that the entire village was contaminated and thus damages became applicable.

98. Therefore that the Appellants had not shown that the damages awarded were excessive, or that the trial Judge exercised her discretion in a wrong manner, and counsel requested this Court not to interfere with the award by the trial court. In addition, that the Appellants did not address the question of quantum in their submissions in the trial Court or offer an alternate proposal and the trial Judge exercised her discretion in granting an award. The counsel noted that in **Edward Akong'o Oyugi & 2 others vs Attorney General [2019] eKLR,** Mativo J. (as he then was), awarded the Petitioners a global compensation award of Kshs 20,000,000/- for the 1st Petitioners and Kshs 6,000,000/- for the 2nd Petitioner; in **M W K & another vs Attorney General & 3 others [2017] eKLR** Mativo J. (as he then was), awarded the Petitioner a global sum of Kshs 4,000,000/- for infringement of rights; in **Mohamed Ali Baadi & others v Attorney General & 11 others [2018] eKLR,** the Constitutional Court awarded the Petitioners therein a global compensatory award of Kshs 1,760,424,000.00/-, and that in **Hon. Gitobu Imanyara & 2 others v Attorney General, Supreme Court Petition No. 15 of 2017**, the Supreme

Court enhanced an award of damages from Kshs 25 million to Kshs 60 million.

99. Lastly, the counsel submitted that the argument that the residents were under obligation to plead and prove damages suffered and any compensation to be made to them was special damages and not general damages failed to appreciate the effects of the provisions of **Article 70 (3)** that in a case of enforcement of environment protection, it was crystal clear that a party was under no obligation to prove or show any loss or injury. However, that in the present case, the residents went beyond the scope of the provisions of this law and were able to prove actual loss and injury. The counsel urged that the residents had locus to file the petition in the trial Court and that there was an express provision of the constitution and the rules pertaining to the filing of petitions/ public interest litigations, and it was not necessary to use provisions of the Civil Procedure Rules especially order 1 Rule 8 to submit those lists of the those they represented or those who reside at Owino Uhuru village.

100. The circumstances in which this Court will disturb the finding of a trial Judge as to the amount of damages were set out in **Kemfro Africa Limited t/a Meru Express Services (1976) & another vs. Lubia& Anor. (No. 2) [1985] eKLR**, thus; -

> *"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left*

out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

101. The prayers that were sought by the residents of Owino Uhuru village against the Respondents with respect to reparation were two, firstly an order for compensation for the damage to the Petitioners' health and environment, and loss of life; and secondly that a mandamus order be issued against the 2nd , 3rd , 4th , 5th , 6th , 7th and 8th Respondents directing them to within 90 days from the date of the judgment to implement the recommendations in a report prepared by a Lead Poisoning Investigation Team of the 3rd Respondent dated May 2015 and another by the Senate Standing Committee on Health dated the 17th day of March 2015 including adequately cleaning up and remediating contaminated soil in Owino Uhuru Village and offer adequate health services to the residents including the Petitioners and animals affected by exposure to lead from the 7th Respondent's manufacturing plant.

102. The applicable principles with respect to payment of compensation to remedy constitutional violations were stated by the South African Constitutional Court in **Ntanda Zeli Fose vs Minister of Safety and Security, 1996 (2) BCLR 232 (W),** and the Court acknowledged that compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution, as a distinct remedy and additional to remedies in private law for damages. Further, that the comparable common law measures of damages will be a useful guide in

assessing the amount of compensation, which will depend on the facts and circumstances of each case.

103. Compensation is also a recognised remedy for constitutional violations under Articles 23 (3)(e) and 70 (2)(c) of the Constitution, and Article 70(3) specifically provides that, an applicant whose rights to a clean and healthy environment has been violated does not have to demonstrate that any person has incurred loss or suffered injury. Where general damages are sought for personal injury that arises from the violation, the law will grant damages for the losses that presume are the natural and probable consequence of a wrong, and may be given for a loss that is incapable of precise estimation, such as pain and suffering. The relevant principles applicable to award of damages for constitutional violations under the Constitution were also explained by the Privy Council in the case of **Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004**. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:

> *"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.*

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches."

104. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case.

105. The trial Judge's findings on the quantum of damages were as follows:

"170. The petitioners further asked for compensation for general damages as a result of damage to their health, the environment and for loss of life. They have proposed a sum of Kshs.2,000,000,000 for the damage to humans and Kshs. One Billion (Kshs.1,000,000,000) for soil clean up. The 1st – 6th Respondents urged the court to dismiss the prayer for compensation. Not even the 2nd and 4th Respondent proposed that they can undertake to do the soil clean up nor the 3rd respondent propose a module to provide the chelation treatment of some of the ailing petitioners yet it is a mandate imposed on them under statute. The dismissive approach demonstrates a lack of commitment on the part of the Respondents to protect the right to clean and healthy environment as well as the ecosystem. The petitioners cited the LAPSSET and David Ndetei Cases (supra) to support their submission for an award of a total sum of Kshs.3 Billion.

171.In the absence of alternate proposals, this court is persuaded to adopt the proposal given by the petitioners in regard to the sum awardable. I have considered the fact that the comparative Case law cited awarded amounts which is close to the submitted amount. Consequently: in place of Kshs. 2 billion proposed for personal injury and loss of 1 life, I shall award Kshs.1.3 Billion due

and payable to the 1st – 9th petitioners and persons claiming through them. The 2nd, 3rd, 4th, and 6th – 8th Respondents shall pay in accordance with apportionment of their liability in paragraph 158 above the total sum of Kshs.1.3 Billion within a period of 90 days from the date hereof and in default, the petitioners are at liberty to execute. The court further direct the named liable respondents to within 4 months (120 days) from date of this judgment to clean-up the soil, water and remove any wastes deposited within the settlement by the 7th respondent. In default, the sum of Kshs.700,000,000 comes due and payable to the 10th petitioner to coordinate the soil/environmental clean-up exercise."

106. We need to distinguish the decisions in **Orbit Chemicals Industries vs Professor David M. Ndetei [2021] eKLR** and **Mohamed Ali Baadi and others vs Attorney General & 11 others [2018] eKLR** in this respect. **In Orbit Chemicals Industries vs Professor David M. Ndetei [supra] eKLR** the claim was for general damages for loss of use of land and nuisance, while in Mohamed Ali Baadi and others vs Attorney General & 11 others concerned the traditional fishing rights of the fishermen, and in addition, the award was based on a valuation report in which the fishermen, who were organized into beach management units had participated, and the figure awarded of Kshs. 1,760,424,000/- was sourced from the valuation report and therefore largely accepted by the parties as the amount needed to compensate all the fishermen in Lamu County. They two decisions are therefore not comparable with respect to general damages payable as they did not involve awards for personal injury, and in **Mohamed Ali Baadi and others vs Attorney General & 11 others [2018]** the affected fishermen were known and identifiable. We in this respect note that the learned trial Judge awarded the amount of Ksh 1.3 billion as

compensation for the 9 petitioners and persons claiming through them who were not identified. It is notable in this respect that the object of compensation is to remedy a wrong that a person has suffered, and the victim must of necessity be identified for purposes of causation and enforcement of the remedy.

107. As regards the award of restoration, we have three concerns. The first was as noted by the Court of Appeal in **Orbit Chemicals Industries vs Professor David M. Ndetei [supra]** an award for the cost of restoration of the soil is an award as special damages, and in this respect the award of Kshs 700,000,000/= to CJGEA was therefore awarded when it had not been specifically pleaded or proved. The second is that restoration of contaminated land is a fairly technical exercise, as it entails the removal or treatment of the contaminated land, and eventual restoration and reclamation of the land and habitat restoration, which requires scientific methodologies and techniques which were not demonstrated by the residents and CJGEA, to justify the order and award. Lastly, the relevant legal and institutional framework for restoration of contaminated land resides with NEMA under the EMCA, in terms of its functions, powers, structures, and capacity, as opposed to CJGEA. In particular, one of the functions of NEMA under section 9(2)(k) of EMCA is to "*initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur*", whereas under section 25, a National Environment Restoration Fund is created which is vested in, and

administered by NEMA, and whose objective is to be "*a 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*".Lastly, under section 108, NEMA has powers to issue and serve on any person in respect of any matter relating to the management of the environment an environmental restoration order, which may require the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order, an/or pay compensation to other persons whose environment or livelihood has been harmed by the action which is the subject of the order.

108. We are therefore of the view that the trial Court failed to take into account various relevant factors and principles of law in the award of damages, and this is a proper case to interfere with the exercise of the learned trial Judge's discretion. We have in this respect deliberated at length on what the appropriate action should be in the circumstances of this appeal, and have had to undertake further research on this issue, which has regrettably caused some delay in the delivery of this judgment. In this respect it is notable that the nature of environmental harm that was caused by the activities of Metal Refinery EPZ Ltd was two-fold: the harm to the environment in term of the contamination of the soil air and water in the Owino- Uhuru Settlement, which was noted both by the *Report of the Standing Committee on Health on the Owino-Uhuru*

Public Petition dated 17th March 2015 and the *Zero Draft Report* dated 15th July 2015 of the *Task Force on Decommissioning Strategy for Metal Refinery EPZ Ltd*, . Second was the harm to human health, and in particular the high lead levels in the blood of the residents who were tested which also noted in the said reports, as well as the report by the Government Chemist of the e Ministry Health titled *Report on Lead Exposure in Owino -Uhuru Settlement, Mombasa County Kenya* dated April 2015 and the report of the Lead Poisoning Team of the Ministry of Health on *Assessment of Blood levels among Children in Owino Ouru Settlement in Mombasa County Kenya, 2015,* which is dated May 2015. All these reports were produced as evidence by the residents, who in addition also provided evidence and medical reports of the injuries caused to them.

109. It is therefore in the interests of justice that appropriate remedies are granted in this appeal, and in this regard the Supreme Court of Kenya did confirm in **Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)** that Article 23(3) of the Constitution empowers the Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. In addition, Rule 33 of the Court of Appeal Rules of 2022 provide that on any appeal from a decision of a superior court, the Court of Appeal shall have power, so far as its jurisdiction permits—

(a) to confirm, reverse or vary the decision of the superior court

(b) to remit the proceedings to the superior court with such directions as may be appropriate; or

(c) to order a new trial,

and to make any necessary incidental or consequential orders, including orders as to costs.

110. It was evident from the various reports produced in evidence that only a sample of the residents were tested for lead levels in their blood. and we appreciate the difficulties and costs involved in proving causation in injuries caused by environmental pollution, and in particular in proving that all residents of Uhuru village were exposed to and injured by the activities of Metal Refinery EPZ Ltd. This difficulty is compounded by the extent of exposure, both spatially in terms of the period of time the subject factory operated by Metal Refinery EPZ Ltd was functioning and producing hazardous waste, and also geographically, in terms of the areas that were affected. It is however necessary that all possible claimants are identified, ascertained and compensated, both in the interests of justice, but also in the interests of proportionality and costs effectiveness, to ensure that this case is not an open door for free riders and opportunists to make personal gain from the tragedy that befell the residents of Owino-Uhuru village.

111. In conclusion, this appeal therefore partially succeeds only to the extent of our findings on the apportionment of liability, award and quantum of damages, and we accordingly order as follows:

1. **We hereby set aside the following orders granted by the Environment and Land Court at Mombasa on 16th July 2020 in KM & 9 others vs Attorney General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR be and are hereby set aside:**

"(d)THAT the sum of Kshs 1.3 Billion (Kenya Shillings One Billion Three Hundred Million) be and is hereby awarded to the Petitioners for personal injury and loss of life payable within a period of 90 days from the date of judgment and in default, the Petitioners shall be at liberty to execute.

(e) THAT the sum of Kshs 1.3 Billion (Kenya Shillings One Billion Three Hundred Million) shall be payable to the 2nd, 3rd, 4th, 6th, 7th., and 8th Respondents in accordance with the apportionment of liability at paragraph 158 of the judgment as for as follows.

(i) 2nd Respondent -10%

(ii) 3rd Respondent -10%

(iii) 4th Respondent -40%

(iv) 6th Respondent - 10%

(v) 7th Respondent -25%

(vi) 8th Respondent - 5%

(f) That an order be and is hereby issued directing the Respondents to clean up the soil, water and to remove any

wastes deposited within Owino Uhuru Settlement by the 7th respondent within 4 months, (120) days from the date of the judgment herein, and in default the sum of Kshs 700,000,000/= becomes due and payable to the 10th Petitioner to coordinate the soil and environmental cleanup exercise.

(g) That in the event that the monetary award given in terms of prayer (v) of the Petition is not honored, then prayer (vii) of the petition shall lie".

2. We hereby set aside the apportionment of liability by the trial Judge and substitute it with the following apportionment of liability:

(a) The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources -5%

(b) The Cabinet Secretary in the Ministry of Health -5%

(c) NEMA-30%

(d) EPZA- 10%

(e) Metal Refinery EPZ Ltd - 40%

(f) Penguin Paper and Book Company Ltd - 10%

3. We hereby remit the issue of the compensation payable to the Petitioners as prayed in Prayer (e) of the Petition dated 20th February 2016 filed in KM & 9 others vs Attorney General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR for

rehearing before a judge at the Environment and Land Court at Mombasa other than A. Omollo J., including the taking of additional evidence limited to the said issue and assessment of damages payable to the Petitioners, and taking into account the principles set out in this judgment.

4. We hereby order and direct the National Environmental Management Agency, within 12 months from the date of this judgment, and in consultation with all the relevant agencies and private actors and in appropriate exercise of its functions and powers to:
   (a) identify the extent of contamination and pollution caused by the operations of Metal Refinery EPZ Ltd as the Owino-Uhuru Settlement,
   (b) remove any contamination and pollution in the affected areas of Owino-Uhuru Settlement, and
   (c) restore the environment of Owino Uhuru Settlement and its ecosystem;
   (d) periodically report every 3 months to the Environment and Land Court at Mombasa on the progress made in this regard, and for any consequent directions, until the satisfactory completion of the restoration.

5. All the other orders granted by the Environment and Land Court at Mombasa on 16th July 2020 in KM & 9 others vs Attorney

General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR are affirmed and upheld except to the extent modified by the findings in this judgement.

6. **We make no order as to costs of the appeals, since the Appellants have partially succeeded in the consolidated appeals herein.**

112. It is so ordered.

Dated and Delivered at Mombasa this 23rd day of June 2023

S. GATEMBU KAIRU, FCIArb

……
JUDGE OF APPEAL

P. NYAMWEYA

……
JUDGE OF APPEAL

J. LESIIT

……
JUDGE OF APPEAL

I certify that this is a true copy of the original.
Signed
DEPUTY REGISTRAR