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## ACCESS TO ENVIRONMENTAL JUSTICE IN ZAMBIA: A CRITICAL REVIEW OF THREE SIGNIFICANT CASES

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### 1 Introduction

Understanding how development and human rights protection struggle to share the same space may be difficult to comprehend until environmental rights are the focus. Generally, states' conceptual norm for human rights protection provides cross-sectoral application of the law, which guarantees the protection mechanism. For example, in terms of employees' rights in the workplace, the protection mechanism has the latitude of protecting the employee from exploitation. At the same time, economic law allows the employer to demand maximum but fair productive output from the worker. The above arrangement tends to make the law satisfy the minimum standard of protection for the worker but not at the expense of economic development, which is derived through the profit-driven strategies of the employer. The compatibility of development with environmental rights is determined by how the legal system governing the jurisdiction designs a structure similar to the one presented above.

In the preceding and current chapters, the tension between the cultural development of resource-rich Nigerian communities and the influences introduced by the government through oil corporations is observed to exist on parallel planes. Subsequently, the economic and cultural development elements strive to find bearing under a legal system that should lay the groundwork for the relationship for sustainable development.

In African countries, the attempts between development and protection of the environmental rights of the people experience similar dimensions in states but vary in the level of access to justice. Securing justice in the global and national processes around access to and management of natural resources and other environmental goods is a key theme in the modern-day sustainability discourse. Environmental justice

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has historically and traditionally focused on addressing inequities in the distribution of environmental risks. The central thesis of this chapter is that the term ‘environmental justice’ has evolved beyond a mere focus on the distributive justice element to include the enforceability of procedural and substantive environmental rights. The primary question that this chapter addresses is whether there is tangible evidence to show how procedural and substantive environmental rights are enforced in Zambia. On the strength of carefully selected case law, this chapter argues that the enactment of the Environmental Management Act 12 of 2011, together with other pieces of legislation for environmental protection – enabling the new constitutional order of 2016 – has introduced a new wave of environmental justice in Zambia. It examines the nature of the contested environmental rights in the decided cases before assessing whether the relevant legislative order has enhanced the protection of individual health and the natural and built environment.

There is an increasing demand for courts of law to continually recognise and examine the connection between rising global environmental degradation and the enjoyment of protected environmental rights. What is underlying the rising levels and nature of environmental degradation? Research has shown that many environmental challenges are caused by the development of anthropocentric advancement in one way or another. It is now commonplace to find development projects being met with severe criticism and resistance from environmentalists calling for ‘green’ forms of development that are more ecologically sensitive. How can the need for accelerated development be balanced with the need for both procedural and substantive environmental justice? Taking the case of Zambia, this chapter shows the evolution of environmental justice from its distributive focus to the enforcement of environmental rights. With the enactment of a new, post-2010 environmental law order in Zambia, there has been a significant increase in environmental cases in the courts of law, with a varied nature of contested environmental rights.

This chapter has six sections. Section 1 is the introduction, while section 2 embarks on access to an environmental justice literature review that identifies three focus themes: environmental human rights, equitability in access to natural resources, and judicial interpretation of the interplay between the first two themes. Section 3 explains the basis upon which the three selected cases are evaluated for their access to environmental justice content, while section 4 is the actual case analysis of the three critical environmental justice cases. These cases are:

- (i) *Mopani Copper Mines Plc v Ndumo Miti (suing in his capacity as Administrator of the Estate of the late Geoffrey Elliam Miti) & Victor Namboya Miti (suing in*

his own capacity and as Administrator of the Estate of the late Beatrice Sakala Miti) & The Attorney General (Appeal 154 of 2016) (the *Mopani Copper Mines Sulphur Dioxide* case);

- (ii) *Vincent Ziba v The Attorney General & Mwembeshi Resources Limited* 2014/HP/A.006 (unreported), which later on appeal was cited as *David Ngwenyama v The Attorney General and Mwembeshi Resources Limited* Appeal 1 of 2020 and *The People v The Board of the Zambia Environmental Management Agency Ex. Partes Conservation Advocates Zambia Limited* 2023/HP/0211 (unreported) (hereinafter collectively referred to as the *Lower Zambezi National Park Mining Project* case);
- (iii) *Kasanka Trust Limited v Gulf Adventure Limited* 2021/HP/1280 (unreported) (the *Kasanka National Park* case).

Section 5 examines two important access to environmental justice factors that have not been analysed in the literature review. These are the plights of women in accessing environmental goods and benefits and in environmental sustainability education in relation to the effects of climate change and other environmental challenges. In conclusion, Section 6 summarises the salient access to environmental justice challenges evident in the three focus cases.

## 2 Access to environmental justice: Literature review

The term 'environmental justice', first used in the USA in 1888, referred to the 'unequal, unfair, and unjust distribution of environmental burdens on marginalised communities, especially racialised and low-income communities in the United States'.<sup>1</sup> Environmental justice has since evolved beyond a mere focus on distributive justice to include the enforceability of procedural and substantive environmental rights. The focus presently extends to access to environmental information, participation in decision-making and access to courts, and the fulfilment of human rights such as rights to health and life. In modern parlance, environmental justice focuses more on 'principles of recognition for marginalised local nomadic, indigenous or poor communities' participation in environmental decision-making, minimisation and fair distribution of ecological risks, redress, and compensation for ecological harms'.<sup>2</sup>

Access to justice incorporates all the substantive legal subjects from civil to criminal law: constitutional law, human rights, property law, family

1 RD Bullard & GS Johnson 'Environmental justice: Grassroots activism and its impact on public policy decision making' (2000) 56 *Journal of Social Issues* 555 at 555.

2 F Millner 'Access to environmental justice' (2011) 16 *Deakin Law Review* 190 at 191.

law, and environmental law. The literature review focuses on access to environmental justice to redress environmental inequalities and injustices.

In line with the theme of this chapter, access to environmental justice borrows extensively from the general themes of access to justice, which are founded on substantive and procedural (environmental) rights. In this vein, we echo Ndulo's argument that:

Access to justice is not just a fundamental right in itself; it is also an essential prerequisite for protecting and promoting all other rights, including civil, political, cultural, economic, and social rights. Access to courts can be considered the inexorable pathway to justice. Anything that hinders the free movement of citizens in and out of the justice system has implications for the delivery of legal services, socio-economic development, inclusive prosperity, economic growth, and the welfare of a country's citizens.<sup>3</sup>

According to this argument, this chapter projects access to environmental justice as an alienable right and a prerequisite for the enjoyment of the right to a clean, safe and healthy environment and safeguards other fundamental human rights, such as the rights to health and life. Access to environmental justice must be an expression of free movement in and out of the justice system in a country. Therefore, it is important to understand what barriers exist to realising access to environmental justice and examine applicable remedial policy measures.

The literature shows that environmental human rights, their judicial interpretation and equitability in access to mining and other natural resources are important themes to consider in the discourse on access to environmental justice in Zambia and beyond. Regarding equitability, the plight of women and other vulnerable groups in accessing environmental goods is worth examining because research has established that women and children bear the brunt of global environmental disadvantages compared to men.<sup>4</sup>

3 M Ndulo 'The COVID-19 pandemic, courts, and the justice system' in J Dawuni (ed) *Gender, judging and the courts in Africa* (2021) 278-296.

4 B Agarwal 'The gender and environment debate: Lessons from India' (1992) 18 *Feminist studies* 119; U Bob et al 'Environmental conflicts and women's vulnerability in Africa' (2010) <https://www.accord.org.za/ajcr-issues/environmental-conflicts-and-womens-vulnerability-in-africa/>; R Yavinsky 'Women more vulnerable than men to climate change' *Population Reference Bureau* 26 December 2012 <https://www.prb.org/resources/women-more-vulnerable-than-men-to-climate-change/> (accessed 14 November 2023).

Access to environmental justice is particularly topical in mining countries because of the triad of interfaces between mining activities, environmental pollution, and human rights. This makes the focus on access to environmental justice in Zambia particularly relevant because it is a mining country with practical experiences on how mines and mineral resources hinder access to environmental justice.<sup>5</sup> For instance, two of the three Zambian cases analysed in this chapter<sup>6</sup> hinge on the environmental effects of mining.

From the literature, it is shown that mining activities are responsible for alarming global incidences of environmental degradation and associated violations of human rights: soil and land degradation;<sup>7</sup> desertification and deforestation; water pollution and ecological imbalance; species and biodiversity loss; climate change;<sup>8</sup> and the disappearance of thousands of water sources, including underground water, rivers, streams, lakes, and ponds. Further, the resultant air pollution and depletion of water quality and quantity have a direct negative impact on several human rights – rights to life, a healthy and safe environment, health and liberty, and safety, to mention a few.

In research investigating how Mongolian environmental NGOs employ substantive and procedural environmental and human rights to access environmental justice, it was found that access to environmental information, meaningful public participation in environmental decision-making processes, and access to the courts were particularly significant in achieving environmental justice in Mongolia. The research analysed 24 cases initiated in the courts of law by environmental NGOs and found that the claimants encountered untold challenges in accessing environmental information, participating in decision-making processes, and receiving court remedies.<sup>9</sup>

5 C Mulenga 'Judicial mandate in safeguarding environmental rights from the adverse effects of mining activities in Zambia' (2019) 22 *Potchefstroom Electronic Law Journal* 1.

6 In this chapter, these are referred to as the Lower Zambezi National Park Mining Project and the Mopani Copper Mines Sulphur Dioxide cases.

7 C Mulenga 'Soil governance and the control of mining pollution in Zambia' (2022) 6 *Soil Security* <https://doi.org/10.1016/j.soisec.2022.100039> (accessed 14 November 2023).

8 PG Silveira, MD Venâncio & JRM Leite 'Brumadinho's disaster, mine tailing dams and the environmental licencing in Brazil: Preventing risks to human wellbeing, soils, and the environment' in H Ginzky et al (eds) *International Yearbook of Soil Law and Policy 2019* (2021) 241-259.

9 U Enkhbaatar 'Access to environmental justice: NGO Environmental advocacy on mining-related environmental issues in Mongolia' LLM thesis, Osgoode Hall Law School, York University, Canada, 2020.

Access to court remedies is compromised without procedural rights to environmental information and effective participation. Therefore, it is paramount that procedural rights are available to all to facilitate access to substantive environmental justice. The research undertaken in the mining sector in Mongolia is comparable to the three Zambian cases that will be analysed in this chapter because environmental human rights, judicial interpretation, and equitability are in contention.

## 2.1 Access to justice and environmental human rights

The literature justifies assigning human rights status to the environment on the first premise. According to Bolaji, the nature and extent of damage caused to the environment by human activities justify the need to frame environmental issues under the scope of human rights.<sup>10</sup> Arguably, environmental destruction results in the enjoyment of fundamental human rights, such as the right to life. From another perspective, Bolaji posits that:

[I]f matters such as the right to die (euthanasia), abortion, and same-sex marriage with no universal agreement can be accorded a right protection in some jurisdictions, why should it not be so for environmental issues which have over the years met global recognition and acceptance?<sup>11</sup>

In understanding the definitional inadequacies of the term ‘environmental rights’, Bolaji undertakes a review of the literature and concludes that virtually all writers avoid the problem of defining the scope and content of environmental rights ‘because of the problems of indeterminacy, variability, and relativity that the concept is bound to suffer or encounter’.<sup>12</sup> Although there is a general acceptance of the concept of environmental rights, it remains contested what the ‘qualitative content’ is, and this is ‘left to time determinacy and interpretations as will continue to be provided by the court’. This underscores the urgent need for a ‘green judiciary’ in every jurisdiction to counter the global nature of environmental challenges.

Environmental rights are human rights. According to Friends of the Earth International, environmental rights have been defined as

10 A Bolaji ‘Upholding environmental human rights through judicial interpretation of peaceful enjoyment of property’ (2021) 29 *International Islamic University of Malaysia Law Journal* 249 at 253.

11 Bolaji (n 10) 253; AK Otubu ‘Environmental protection and human rights: An overview of current trends’ *SSRN Electronic Journal* (2010) [https://www.researchgate.net/publication/228184560\\_Environmental\\_Protection\\_and\\_Human\\_Rights\\_An\\_Overview\\_of\\_Current\\_Trends](https://www.researchgate.net/publication/228184560_Environmental_Protection_and_Human_Rights_An_Overview_of_Current_Trends) (accessed 27 November 2021).

12 Bolaji (n 10) 253-256.

access to the unspoiled natural resources that enable survival, including land, shelter, food, water and air and also include more purely ecological rights, including the right for nonhuman living creatures to survive or the right for and enjoy an unspoiled landscape.<sup>13</sup>

This definition of environmental rights includes both environmental and ecological rights. For instance, humankind's accessibility to natural resources must be facilitated as a matter of right while respecting the environmental rights of nonhuman creatures.

The right to water is grounded in international human rights law, the United Nations human rights system, and the African regional human rights system. Although access to water now has this recognition, it remains unenforceable owing to numerous challenges, especially in developing countries.<sup>14</sup> In the case of Zambia, there have been real challenges in enforcing the right to water for local communities in the vicinity of the Konkola Copper Mines (KCM), owned by a large multinational conglomerate.<sup>15</sup> Although the claimants in this case eventually got some court remedies, the actual process of enforcing their environmental rights and access to environmental justice was not without challenges. For instance, the power imbalance between the affected local communities and the defaulting mining conglomerate already shows fundamental inequalities at the core of this chapter.

Still, on water rights and access to environmental justice in Zambia, Mudenda argues that water pollution is one of the significant environmental problems in the mining industry, compounded by an increase in agriculture activities.<sup>16</sup> This is established in research assessing the physical and chemical contamination of the Munkulungwe Stream located on the Copperbelt of Zambia, emanating from the Bwana Mkubwa mine. The subsequent impact on the surrounding community is that water quality downstream was substantially polluted and likely to

13 Friends of the Earth International 'Environmental rights are human rights' (18 June 2003) <https://www.foei.org/what-we-do/environmental-rights-human-rights> (accessed 14 November 2023).

14 O Kaaba 'The challenge of enforcing the right to water: The case of the Vedanta PLC Mining Conglomerate in Zambia' in G Cissé (ed) *Transitioning to clean water and sanitation* (2021) 69.

15 PT Sambo '*Konkola Copper Mines PLC v Nyasulu & 2000 Others Appeal No 1/2012*' (2019) 2 *SAIPAR Case Review* article 4 <https://scholarship.law.cornell.edu/scr/vol2/iss2/4> (accessed 20 December 2021).

16 L Mudenda 'Assessment of water pollution arising from copper mining in Zambia: A case study of the Munkulungwe stream in Ndola, Copperbelt Province' Masters of Philosophy thesis, University of Cape Town, 2017 <http://hdl.handle.net/11427/27984> (accessed 14 November 2023).

affect human health and food security. The research recommends that groundwater surrounding mining tailings dams be monitored in both active and abandoned mines. Further, there must be an improvement in the environmental management of mining-related impacts in Zambia.<sup>17</sup>

This chapter borrows the definition of environmental rights from Friends of the Earth International, where human beings must access the pristine environment for their survival, livelihoods, and good health. Environmental degradation, therefore, violates human rights, especially for the poor, vulnerable, and marginalised who directly depend on natural resources for survival, as shown in the case of access to water for local Zambian communities disadvantaged by large multinational mining conglomerates. Another example is in the tourism sector, where national parks earn countries like Zambia foreign exchange and provide jobs, conserve marshlands, and help regulate climatic conditions critical for human survival.<sup>18</sup>

There are several advantages to linking international human rights law with international environmental law, and three of these are considered. First, human rights provide strong moral grounds for an absolute claim to a particular right. This enables interested and affected parties to tap into the necessary public support without being burdened with highly technical aspects of environmental law. Secondly, an opportunity is created to use well-developed international human rights law remedies to address environmental grievances.<sup>19</sup> Thirdly, a rights-based approach to environmental protection concentrates national and international attention on the plight of the people harmed by environmental degradation. Citizens are thus able to access environmental justice both domestically and internationally.

Building upon these noted advantages, the three Zambian cases analysed in this chapter each have international environmental and conservation dimensions and hinge on respect for environmental rights and access to justice. Each case raises access to environmental justice concerns for their local communities.

17 As above.

18 U Bwalya & J Kapembwa 'Economic benefits, local participation, and conservation ethic in a game management area: Evidence from Mambwe, Zambia' (2020) 13 *Tropical Conservation Science* 2 1940082920971754.15.

19 P Pathak 'Human rights approach to environmental protection' (2014) 7 *International Journal of Sustainable Development* 17.

## **2.2 Judicial interpretation of environmental rights**

The role of the judiciary in environmental enforcement and compliance is critical. It involves the actualisation of the letter and spirit of all laws, into practical outcomes in the community. This section reviews the literature on environmental adjudication and access to environmental justice. The judicial interpretation of environmental rights and interests is the cornerstone of access to environmental justice.

In the case of the Zambian judiciary, environmental adjudication training has been ongoing, with the latest being conducted in 2019. In collaboration with the Zambia Environmental Management Agency (ZEMA) and the United Nations Environment Programme (UNEP), the Judiciary of Zambia held a training of adjudicators on environmental law, at which the then Chief Justice described environmental law as the ‘new human rights’. The then Chief Justice underscored the urgent need to:

Build capacity for adjudicators in order for them to be well vested in environmental laws and be equipped to interpret them correctly; recognising the need to save the environment, as adjudicators by being more proactive in our response to pressing environmental concerns in order to protect the country’s natural resources. I anticipate the benefits of training adjudicators in environmental law as being far-reaching: the production of a cadre of environmental law experts on the bench who keep abreast of sophisticated environmental trends and environmental crimes and be aware that perpetrators will stop at nothing. Civil actions, on the other hand, will often times demand of adjudicators to strike that delicate balance between the economic benefit and public interest.<sup>20</sup>

With these training insights and environmental aspirations by the then head of the judiciary in Zambia, there has been a marked improvement in the adjudication of cases, as evidenced by several cases,<sup>21</sup> three of which are analysed in this chapter. However, it must be stated that without similar undertakings of continuous development in understanding environmental principles by judicial officers and legal practitioners alike, the ends of environmental justice in Zambia cannot be secured. Still, from the Zambian perspective, it has been argued that:

20 Judiciary of Zambia ‘Training of trainers workshop in environmental law’ (2019) <https://judiciaryzambia.com/2019/12/05/two-day-training-of-trainers-workshop-in-environmental-law/> (accessed 14 November 2023).

21 *Moses Lukwanda v Zambia Airforce Projects Limited* (Caz/08/323/2019) [2020] ZMCA 9 (24 February 2020).

The judiciary, therefore, can and must play a leading role in promoting compliance with and the enforcement of environmental regulations. Where a judiciary is well informed of the rapidly expanding boundaries of environmental law, it becomes more sensitive to its role of promoting the rule of law with regard to development that is environmentally friendly.<sup>22</sup>

Moving to the Nigerian perspective, Ibe and Akwa argue that access to environmental justice is almost nonexistent due to many challenges. These include both procedural and substantive access to justice challenges. The procedural legal challenges include the requirement of *locus standi*, lack of access to environmental information, poverty, illiteracy, and ignorance. The substantive legal challenges include the absence of express provision for environmental rights in the Constitution, non-recognition of environmental rights in Nigerian statutes, the conservative attitude of Nigerian courts towards enforcement of environmental rights, non-deterrent criminal provisions for environmental offences, and the high cost of environmental litigation.<sup>23</sup> Violating procedural human rights, including the right to information, peaceful assembly, access to justice, and participation in decision-making, can contribute to environmental harm. For this reason, this chapter is premised on the protection of both procedural and substantive rights for access to environmental justice.

The challenges faced by judiciaries in Africa generally appear to be with respect to identifying the

specific tasks and roles that courts have to perform when it comes to advancing environmental rights, and their overall net contribution to advancing the type of interests that environmental rights seek to promote.<sup>24</sup>

According to the United Nations Environment Programme (UNEP), the role of the judiciary is primarily to promote environmental law at the national level:

The role of the Judiciary is fundamental in the promotion of compliance with and enforcement of international and national environmental law. It aims at promoting judiciary networking, sharing of legal information, and

22 C Mulenga 'Judicial mandate in safeguarding environmental rights from the adverse effects of mining activities in Zambia' (2019).

23 C Ibe & EO Akwa 'Mechanisms for access to environmental justice in Nigeria: Challenges and prospects' (2021) 5 *African Journal of Law and Human Rights* 1.

24 CB Soyapi 'A multijurisdictional assessment of the judiciary's role in advancing environmental protection in Africa' (2020) 12 *Hague Journal on the Rule of Law* 307 <https://doi.org/10.1007/s40803-019-00128-9> (accessed 14 November 2023).

harmonisation of the approach to the implementation of global and regional instruments.<sup>25</sup>

This can be achieved in many ways, such as implementing environmental principles through binding judicial decisions.

### **2.3 Equitability in access to natural resources**

Equitability in access to natural resource sharing presupposes equitable sharing of economic or other benefits obtained from any environmental or naturally occurring resources. The Convention on Biological Diversity, 1992, codifies most of the expectations for fair access to natural resources. These are domesticated in local legislation in Zambia, such as the Mines and Minerals Regulation, Water Resources Management, Wildlife and Environmental Management Forests Acts, and, importantly, the Constitution.

## **3 The basis for analysis of access to environmental justice cases in Zambia post-2011**

This part of the chapter explains the basis upon which access to environmental justice cases will be analysed. The basis for analysing the three selected cases has been derived from the literature review in Section 2, which has shown that the key themes of access to environmental justice rest on understanding the nature of the environmental human rights in contention, equitability in accessing natural resources, and judicial interpretation of all arising interests. This basis for analysis is by no means exhaustive. Other aspects can be used to establish whether decided cases promote access to environmental justice that have not been used in this analysis but are discussed in Section 5 of this chapter.

The selection of the three cases for analysis in this section is based on the following three criteria:

- (i) their significance in terms of the global nature of access to environmental justice and environmental protection;
- (ii) having been considered by any of the superior courts, namely the High Court, Court of Appeal, Constitutional Court and the Supreme Court in Zambia;

25 KJ Markowitz & JJA Gerardu 'The importance of the judiciary in environmental compliance and enforcement' (2012) 29 *Pace Environmental Law Review* 538 <https://digitalcommons.pace.edu/pelr/vol29/iss2/5> (accessed 4 February 2022).

- (iii) decided by the courts in the post-2011 period when the Environmental Management Act, was enacted.

Embedded in the third criterion for analysis is the requirement that the case under analysis should have been decided after the 2016 constitutional amendment took effect in Zambia. According to Kibugi, arguing from the Kenyan perspective, where environmental considerations are given a distinctive level of attention in the Constitution, there is 'greater attention to the effects of growth and development on the natural environment and greater access to environmental justice through legal instruments and judicial reforms'.<sup>26</sup> In the case of Zambia, although the Constitution does not provide the right to a safe, clean and healthy environment or other procedural rights in the Kenyan Constitution, it has provisions for environmental and natural resource protection that give substantive rights.<sup>27</sup>

It is important to mention that over the years, especially since the post-2011 period, there has been a progressive increase in the number of environmental cases heard in the courts in Zambia. This can be attributed to several issues, one of which is increased awareness of environmental issues in the country. It is noteworthy that some of the environmental issues in contention tend to be centred around water rights, ecological interests and loss of livelihoods.<sup>28</sup>

#### 4 Analysis of the three access to environmental justice cases

In this section, we examine three access to environmental justice cases that have been adjudicated in the courts of law post-2011 after the Environmental Management Act, alongside several other enabling pieces of legislation such as the Water Resources Management Act, Fisheries Act, Wildlife Act, Forests Act, and Urban and Regional Planning Act. It is also important to explain that the enactment of the constitutional

26 R Kibugi 'Development and the balancing of interests in Kenya' in M Faure & W du Plessis (eds) *The balancing of interests in environmental law in Africa* (2011) 167-196.

27 Articles 43(1)(c)(d); 151(2)(f); 253-257.

28 Sambo (n 15); PT Sambo '*Vedanta Resources PLC and Konkola Copper Mines PLC v Lungowe & Others* 2019 UKSC 20' (2019) 2 *SAIPAR Case Review* article 5 <https://scholarship.law.cornell.edu/scr/vol2/iss2/5> (accessed 14 November 2023); PT Sambo '*Moses Lukwanda & 9 others v Zambia Airforce Projects Limited and 7 others* CAZ/08/323/2019' (2020) 3 *SAIPAR Case Review* article 11 <https://scholarship.law.cornell.edu/scr/vol3/iss1/11> (accessed 14 November 2023); see also C Mulenga 'Judicial mandate in safeguarding environmental rights from the adverse effects of mining activities in Zambia' (2019) 22 *Potchefstroom Electronic Law Journal* 1 <https://doi.org/10.17159/1727-3781/2019/v22i0a5414> (accessed 14 November 2023).

amendment in 2016 introduced important provisions that have enhanced access to environmental justice in Zambia, notwithstanding the absence of constitutional environmental rights.

#### **4.1 The Mopani Copper Mines sulphur dioxide case**

The *Mopani Copper Mine Sulphur Dioxide* case centres around the mining city of Mufulira, where Mopani Copper Mines Plc was indiscriminately pumping sulphur dioxide into the atmosphere resulting in several lawsuits for a wide range of legal injuries bordering on the right to life and a clean, safe and healthy environment. At the time of the case under discussion, the mine was owned by Carlisa Investments Corporation, a joint venture company comprising Glencore International AG (73.1 per cent), First Quantum Minerals Ltd (16.9 per cent) and ZCCM-IH (10 per cent).<sup>29</sup> As can be seen, the mine was under 90 per cent foreign ownership, bringing to the fore considerations of wanton environmental impunity by multilateral mining conglomerates, which needs stricter laws to control.<sup>30</sup> Again, this case speaks to the need for balancing competing rights and interests in access to natural resources.

The genesis of this case was that the High Court awarded the victim's estate general damages with interest and costs. At the centre of this case was the need to ascertain the obligations and liabilities of entities and persons who discharge or emit toxic substances into the atmosphere. Aggrieved by the determination of the High Court, the mining company appealed to the Supreme Court on the general basis that it was penalised for emitting high volumes of sulphur dioxide from its smelter without establishing the statute or statutory instrument where such limits were imposed.

The Supreme Court supported the finding of the High Court that:

Section 4(1) of the EMA stipulates that '...every person living in Zambia has the right to a clean, safe and healthy environment'. ZEMA is thus enjoined as the regulator to '...do all such things as are necessary to ensure the sustainable management of natural resources and protection of the environment, and the prevention and control of pollution.' ZEMA has power to, among others,

29 'Board Chairmans' speech on ZCCM-IH's acquisition of 90% shares in Mopani Copper Mines' *ZCCM-IH* 20 January 2021 <https://www.zccm-ih.com.zm/2021/01/20/board-chairmans-speech-on-zccm-ihs-acquisition-of-90-shares-in-mopani-copper-mines/> (accessed 20 January 2022).

30 M Charles & P Le Billon 'Corporate accountability and diplomatic liability in overseas extractive projects' (2021) 8 *The Extractive Industries and Society* 467 at 467-476, 468, 472.

carry out investigations into actual or suspected air pollution, and, to sanction or prosecute those who breach environmental standards and guidelines.

The Supreme Court decided that the mining company's argument that it acted within the law could not be sustained. This was because the Zambia Environmental Management Agency, a statutory body with a specific mandate to prevent and control pollution, had prescribed the limits of sulphur dioxide.

Further, the evidence on record irrefutably showed that the mining company was not compliant, with the effect that the victim's death was directly linked to their omission. This position adopted by the Supreme Court sets a standard that the lower courts must follow in determining access to environmental justice cases.

Furthermore, the Supreme Court established that the facts on which the case was founded were quite disturbing. The evidence on record showed that the mining company had been emitting excessive amounts of sulphur dioxide into the ambient air for many years, contrary to the directives of lawful authorities. According to the Supreme Court, what was shocking was that despite these repeated and persistent breaches, which seriously undermined the residents' right to life, the regulator, ZEMA, did not invoke the provisions of the law to punish the mining company. As a statutory body whose stated mandate is to prevent and control pollution and protect the environment, ZEMA failed the community in Mufulira. The indignation expressed by the Supreme Court in this case shows that the right to life is embedded in environmental human rights, the judicial protection of which is a first step towards accessing justice.

Against this backdrop, the Supreme Court found that the victim's estate was entitled to enhanced damages. As was observed by the Indian court in *India Council for Enviro-legal Action v Union of India*, the measure of compensation in such cases 'must be correlated with the magnitude and capacity of the enterprise because such compensation must have a deterrent effect'.<sup>31</sup>

In the final analysis, the Supreme Court held that the global award of K400 000 awarded by the High Court was too modest given the aggravating circumstances of the case, where the entire community was put at risk, more so that the pollution had gone on for a long time and it was within the capacity of the mining company itself to control. Therefore, the Supreme Court set aside the lower court's award of damages, awarding

31 1996 AIR 1446, 1996 SCC (3) 212.

in its place, the amount of K1 000 000 with interest. The award of such a colossal sum of ‘punitive’ damages in an environmental case in Zambia is commendable because it sends a clear message to would-be perpetrators on the need to preserve the environment.

#### **4.2 The Lower Zambezi National Park Mining Project case**

The Lower Zambezi National Park (LZNP) is a protected area for its rich biodiversity, making it an environmentally sensitive location. It is a habitat for over 124 animals, 403 birds, and 54 aquatic species, attracting tourists worldwide.<sup>32</sup> Independent research reveals that the potential environmental impacts of mining in the area are biodiversity loss (wildlife, agro-diversity), loss of landscape and aesthetic degradation, noise pollution, soil contamination, soil erosion, surface water pollution and decreasing water (physico-chemical, biological) quality, groundwater pollution or depletion, large-scale disturbance of hydro and geological systems, reduced ecological and hydrological connectivity, and mine tailing spills, while potential health impacts include occupational disease and accidents.<sup>33</sup>

According to Leigh, the Zambezi basin, mainly watered by the Zambezi River, is one of Africa’s most important basins as a natural asset shared among Angola, Botswana, Tanzania, Namibia, Zambia, Zimbabwe, Malawi, and Mozambique, and the river basin directly supports the livelihoods of over 47 million people.<sup>34</sup> The projected copper mine will

destroy the environment, fragile natural ecosystems and water resources that sustain human livelihoods and the wildlife-based tourism industry as both Zambia and Zimbabwe have national parks on their banks.<sup>35</sup> Rivers and natural ecosystems will also be disturbed by mining, as will forests, wildlife

32 U Petterson et al ‘Environmental impact statement for large scale mining activities under License Number 15547-HQ-LML’ (2012) owned by Mwembeshi Resources Ltd Located in Luangwa District, GeoQuest Limited, Woodlands, Lusaka Zambia.

33 P Steyn ‘Lower Zambezi National Park Mining is “fatally flawed”, says report’, quoted in JT Gathii ‘Saving the Serengeti: Africa’s new international judicial environmentalism’ (2016) 16 *Chicago Journal Of International Law* <https://cjl.uchicago.edu/publication/saving-serengeti-africa’s-new-international-judicial-environmentalism> (accessed 1 March 2022).

34 K Leigh ‘Evaluation report Kangaluwi open pit-mine in the Lower Zambezi National Park’ (2014).

35 R Baipai et al ‘Utilization of the Zambezi River Basin for tourism: Opportunities and challenges’ (2020) 1 *Hospitality & Tourism Review* 11.

and bird species and cultural sites unique to the Lower Zambezi National Park.<sup>36</sup>

Therefore, the case of the LZNP Mining Project case arises from a pristine natural ecosystem located in a remote, ecologically sensitive, protected area. This is the area where the Kangaluwi Mine open-pit copper project is earmarked. The mine site is located within the boundaries of the LZNP. Further, a World Heritage Site comprising the Mana Pools National Park and Sapi and Chewore Safari areas lies directly across the river in Zimbabwe and shares the Zambezi River boundary.<sup>37</sup> The Zambezi River Basin is one of Africa's most important natural resource systems. The Zambezi River is the largest river in the SADC region,<sup>38</sup> with approximately 70 per cent of the Zambian population living within the Zambezi River Basin.<sup>39</sup>

The Zambia Environmental Management Agency (ZEMA), after studying the Environmental Impact Statement (EIS), initially disapproved of the project because the proponents did not disclose clear guidelines on how the adverse environmental effects having the potential to disturb the critical ecosystem were going to be avoided or reduced.<sup>40</sup> The proponents of the mining project then quickly appealed to the Minister responsible for environmental affairs, in line with the law, and the appeal was granted.

This case was initiated as an appeal in the High Court by five environmental NGOs against the decision of the regulator, ZEMA, to allow Mwembeshi Resources Limited to proceed with mining activities in the LZNP. Regrettably, the environmental significance of this case has been watered down by several technical legal shortcomings, which are outlined below and analysed in relation to access to environmental justice.

The High Court granted the environmental activists an injunction to put the execution of Mwembeshi Resources Limited's mining plan on hold because going ahead with the project would undermine the country's environmental laws, which required a detailed environmental impact assessment to be carried out before the commencement of any project.

36 Leigh (n 34).

37 UNESCO 'World Heritage list - Mana Pools National Park, Sapi and Chewore Safari Areas' (1984) <http://whc.unesco.org/en/list/302> (accessed 14 November 2023).

38 O Shela 'Management of shared river basins: The case of the Zambezi River' (2000) *2 Water Policy* 65.

39 P Ashton et al 'An overview of the impact of mining and mineral processing operations on the water resources and water quality in the Zambezi, Limpopo and Olifants catchments in Southern Africa' (2001).

40 Steyn (n 33).

The High Court of Zambia dismissed the injunction and the entire case for failure to prosecute, stating that the mode of instituting the matter at the High Court was improper, as the environmental activists had neglected to file their record of appeal.

Dissatisfied with the High Court's verdict, the environmentalists then appealed to the Court of Appeal on the grounds, *inter alia*, that the High Court erred when it dismissed the matter for want of prosecution and failed to take into account the public interest importance of the case, which ought to have been determined on its merits. The Court of Appeal found that the appellant had exhibited a 'relaxed attitude from 2014 when the appeal was lodged to 2019' and could, therefore, not accept the appellant's arguments on the importance of determining a matter that was highly irregular and not procedurally permissible. This approach did not take account of the substantive environmental protection issues raised.

Although there are numerous decisions cited in the decision of the Court of Appeal to the effect that an inordinate breach of procedural rules can render a case a nullity, the Supreme Court has on numerous occasions frowned upon the practice of ending cases on procedural technicalities, preferring to hear as many cases as possible on their merits. Further, by virtue of the 2016 Constitutional Order, environmental matters are constitutional matters.<sup>41</sup> Article 118(2) provides that in the exercise of judicial authority, the courts shall be guided by several principles. Chief among these is that justice shall be administered without undue regard to procedural technicalities, and the values and principles of this Constitution shall be protected and promoted.

On February 8, 2023, an interested party, Conservation Advocates Zambia Limited, initiated judicial review proceedings in the High Court against the environmental regulator, ZEMA. The gist of these new proceedings is a renewed attempt to halt the highly contentious mining activities in the LZNP. The remedy sought was an Order of Mandamus directed to ZEMA to compel it to perform its statutory duty to review its decision dated May 7, 2023 to allow large-scale mining activities in the LZNP. This case was scheduled for hearing sometime in April 2023 but was overtaken by events when ZEMA communicated its decision that it could not review its own decision. Consequently, the only option left for Conservation Advocates Zambia Limited was to appeal to the Minister of Green Economy and Environment, in line with the provisions of sections 115 and 116 of the Environmental Management Act.

41 See arts 43, 151(2)(f), and 253-257 of the Constitution of Zambia, Act 2 of 2016.

On May 31, 2023, the Minister ordered the mining company to immediately halt all mining-related activities in the LZNP on the basis that the mining company had violated the environmental conditions antecedent to which the initial mining license had been granted in May 2021.<sup>42</sup> Finally, on August 24, 2023, ZEMA, the environmental regulator issued a cancellation of the mining company's license via its Decision Letter. According to the decision letter, the cancellation of the license has been necessitated by the mining company's failure to comply with the conditions, namely:

- (a) Implementation of the LZNP Mining Project in line with the ZEMA approved EIS;
- (b) Submission of detailed design of the Tailings Storage Facility to ZEMA and the Mines Safety Department prior to project implementation;
- (c) Avoid erection of permanent structures in the LZNP without the written approval of the Department of National Parks and Wildlife;
- (d) Employ the Best Available Technology and Best Environmental Practices throughout the project life; and
- (e) Strict adherence to the provisions of the Forests, Water Resources Management and Energy Regulation Act.

It is clear that the mining company has fallen foul of all the environmental conditions upon which the license was based. It is, however, concerning that it has taken over 20 years to give a definitive stance on mining in the LZNP. The present decision by ZEMA does not appear to be the last, given that the mining company is entitled to use the review and appeal process that is available under the Environmental Management Act.

### 4.3 The *Kasanka National Park* case

Kasanka is one of the smallest national parks in Zambia, yet it is also one of the most beautiful, boasting of incredible biological diversity. Some wildlife phenomena stand out as extraordinary events like the Kasanka Bat Migration, which brought global acclaim to the national park.<sup>43</sup> Every October, about 10 million straw-coloured fruit bats descend on Kasanka. The bats fly from all over Africa to roost in the park and are crucial to seed dispersal across Africa, being the most significant mammal migration in

42 C Mfula & F Njini 'Zambia orders halt to work on copper mine in Lower Zambezi park' *Reuters* 31 May 2023 <https://www.reuters.com/world/africa/zambia-orders-halt-work-copper-mine-lower-zambezi-park-2023-05-31/> (accessed 14 November 2023).

43 Kasanka Trust 'Who we are' <https://kasanka.com/who-we-are/> (accessed 14 November 2023).

the world.<sup>44</sup> The straw-coloured fruit bat is listed as near threatened by the International Union for Conservation of Nature (IUCN) Red List, giving them a 'near-threatened' status.<sup>45</sup> This case includes consideration of environmental rights protection, viz rights to property and development. The facts of each of the three cases will now be analysed.

This case was initiated in the Lusaka High Court by three plaintiffs in 2021. It is important to first explain the parties' capacities for this action before analysing the contentious matters it presents. Further, the parties' capacities illuminate cardinal issues related to legal standing and lay the groundwork for appreciating the arising access to environmental justice issues in the case.

The first plaintiff is a wildlife charity that manages Kasanka National Park situated in the Central Province of Zambia. Its main objectives are to 'secure the biological diversity in the national park and stimulate and sustain the local economy'.<sup>46</sup> The second and third plaintiffs represent community forest management groups within the areas adjacent to Kasanka National Park.

The first two of the seven defendants are limited companies with private investment interests that hinge on access to and exploitation of natural resources in the areas surrounding Kasanka National Park. The third and fourth defendants are the Zambia Environmental Management Agency (ZEMA) and the Water Resources Management Agency (WRMA), both statutory bodies. The third defendant, ZEMA, is responsible for 'all such things necessary to ensure the sustainable management of natural resources, the environment's protection, the prevention and control of pollution, and any incidental matters'.<sup>47</sup> WRMA, the fourth defendant, aims to promote and adopt a 'dynamic, gender-sensitive, integrated, interactive, participatory, and multisectoral approach to water resources management and all matters incidental thereto'.<sup>48</sup> The fifth, sixth, and seventh defendants are the responsible local authorities, the Commissioner of Lands and the Attorney General.

44 G Smith 'Why the world's biggest mammal migration is crucial for Africa – Photo essay' *The Guardian* 5 January 2021 <https://www.theguardian.com/environment/2021/jan/05/why-the-worlds-biggest-mammal-migration-is-crucial-for-africa-photo-essay-aoe> (accessed 14 November 2023).

45 R Cooper-Bohannon et al 'Eidolon helvum. *The IUCN Red List Of Threatened Species*' (2020) e.T7084A22028026 <https://dx.doi.org/10.2305/IUCN.UK.2020-2.RLTS.T7084A22028026.en> (accessed 10 February 2022).

46 Kasanka Trust (n 43).

47 Section 7 of the Environmental Management Act 12 of 2011.

48 Section 9 of the Water Resources Management Act 21 of 2011.

### 4.3.1 *Plaintiffs' access to environmental justice claims – injunctive relief*

The central claims, in this case, are yet to be decided at trial and are therefore not under discussion in this chapter. It suffices to say that the Lusaka High Court was beseeched to determine whether an application for an interim injunction decision has since been made.

The plaintiffs raised five substantive arguments supporting their application for the interim injunction. First, the first defendant's ownership, occupation, and use of more than 5 000 hectares of land located in the buffer zone of the Kafinda GMA have resulted in threats to overall environmental wellbeing. Second, the first defendant has significantly encroached into and fenced off parts of Kasanka National Park and introduced species of animals that are not native to the area. The third argument was that the first plaintiffs have cleared off five hectares of riparian water berry trees on both sides of the Luwombwa river, thereby destroying a riverside habitat in the precincts of Kasanka National Park. Fourthly, the second defendant has occupied and obtained leasehold tenure to commence large-scale farming activities in parts of the GMA, in consequence of which 860 hectares of native forest have been cleared; and parts of the local Luwombwa river have been diverted for the second defendant's private interests in violation of the provisions of the Water Resources Management Act. Lastly, the defendants have established private commercial interests that are generally at variance with preserving ecologically and climatically sensitive areas protected by law through the provisions of several pieces of environmental legislation, such as the Environmental Management, Forest, Wildlife, and Water Resources Management Acts, amongst others.

In response to these arguments, the defendants raised three arguments. First, they are *bona fides* title holders in the subject areas and are merely carrying out commercial activities that are legally permissible; secondly, the defendants' premises are more than 7.5 kilometres away from the Kasanka National Park and therefore pose no inherent harm to the biological diversity interests of the national park and surrounding areas; and thirdly, the plaintiffs have no *locus standi* in the matter and were therefore not entitled to the reliefs sought.

By February 1, 2022, the court had evaluated the plaintiffs' and defendants' arguments and found that the issue for consideration was whether the application for an interim injunction was made in line with settled law and practice, viz., whether there is a risk of irreparable harm occurring if the interim injunction is not granted. According to established Zambian precedent, irreparability of harm is limited to whether damages

cannot adequately atone for the injury suffered, and whether what is feared by the applicants is not just 'mere inconvenience?'<sup>49</sup>

Regarding the adequacy of damages, the court found that the defendants 'had commenced and continued to engage in cutting down trees that threatened the ecological balance and biological diversity in the Kafinda Game Management Area'.<sup>50</sup> Further, the court relied on an earlier Court of Appeal judgment<sup>51</sup> to find that 'the plaintiffs do not have to prove that damage is being occasioned to the environment by the defendants' activities'.<sup>52</sup> This position is also in line with the provisions of Section 4(3) of the Environmental Management Act, where a person only needs to show the likelihood of environmental damage arising.

Furthermore, the court was of the considered view that 'the status quo should not be maintained; it is wiser to restrain the ongoing activities rather than risk irreparable damage to the environment'.<sup>53</sup> According to the court, the injunction in the circumstances of this case would have the effect of protecting the environment from any further damage, which could not be atoned for by damages. Accordingly, the court granted the injunction restraining the defendants from any further cutting down of trees, clearing vegetation, further construction works, fencing off, or any further activities or developments on the land and abstraction of water from the Luwombwa River exceeding amounts stated in the water permit.

As of August 2023, however, a search of the court record revealed that the plaintiffs had filed an application dated November 14, 2022, in which the three defendants (contemnors) are cited for contempt of court. According to the summons and affidavit in support, the defendants have generally 'disregarded and disobeyed the court's order of interim injunction issued on February 1, 2025'.<sup>54</sup> This application has been pending a hearing since November 2022 before the same High Court, which had made environmentally sound findings regarding the urgency

49 See *American Cynamid Co v Ethicon Co Limited* (1977) AC 396; *Shell BP Zambia Limited v Conidaris* (1975) ZR 174.

50 *Kasanka Trust Limited v Gulf Adventure Limited* 2021/HP/1280 (unreported) Ruling, at 9.

51 *Moses Lukwanda*.

52 *Kasanka Trust Limited* Ruling, at 9 (n 47) 9.

53 *Kasanka Trust Limited v Gulf Adventure Limited* 2021/HP/1280 (unreported) Ruling, at 10 (n 47) 11.

54 *Kasanka Trust Limited v Gulf Adventure Limited* 2021/HP/1280 (unreported) *Ex Parte* Summons for Leave to Commence Committal Proceedings for Contempt of Court, 1.

of preserving pristine and biologically sensitive parts of the environment earlier in February 2022.<sup>55</sup>

This judicial attitude goes against the spirit of speedy resolution of environmental disputes, which lies at the heart of environmental governance. As argued in Section 2.2 of this chapter, the judiciary is an indispensable ally in global environmental protection. On March 2, 2022, the 5th UN Environment Assembly passed 14 resolutions, three of which prioritised ecosystem restoration, biodiversity protection, resource efficiency, consumption and production patterns, climate mitigation and adaptation.<sup>56</sup> Looking back at the facts of this case, the key issue for resolution is the preservation of biological diversity, which in turn also affects climate mitigation and adaptation. The High Court is accordingly enjoined to prioritise the timely resolution of environmental disputes.

#### 4.3.2 *Arising access to environmental justice arguments*

The plaintiffs' case was founded on restraining the defendants from continuing to cut down trees, cultivate crops, abstract water, conduct construction and other works bordering on access to natural resources in the Kafinda Game Management Area. These claims are supported by Section 4 of the Environmental Management Act. Other considerations in this case include the plight of the vulnerable, such as women and children. Further, it is important to mention that the cutting down of trees and interfering with natural waterways present significant challenges for climate justice. These considerations are discussed in more detail in Section 5 of this chapter.

The other declarations sought by the plaintiffs are that the defendants' developments in the area are a threat to the plaintiffs' and the general public's right to a clean, safe and healthy environment under Section 4 of the Environmental Management Act and directly endanger the ecology and biological diversity of the Kafinda GMA.

55 *Kasanka Trust Limited v Gulf Adventure Limited* 2021/HP/1280 (unreported) Ruling, at 10 (n 47) 11.

56 'UN Environment Assembly concludes with 14 resolutions to curb pollution, protect and restore nature worldwide' UN Environment Programme press release 2 March 2022 <https://www.unep.org/news-and-stories/press-release/un-environment-assembly-concludes-14-resolutions-curb-pollution> (accessed 28 August 2023)

## **5 Other access to environmental justice issues for possible consideration**

Access to justice generally has many facets that are beyond the scope of this chapter. This is also true in relation to access to environmental justice. In this section, two aspects of access to environmental justice are discussed: the plight of women and other vulnerable groups and the interplay of environmental sustainability education and awareness.

### **5.1 The plight of women in accessing environmental goods and benefits**

The plight of women and other vulnerable groups has been especially topical in access to justice. In this chapter, the challenges women face in accessing environmental justice have not explicitly been pointed out, yet this is one key focus area that deserves analysis.

In research examining the main challenges to accessing the justice system, especially among women and other vulnerable groups during the COVID-19 pandemic, Ndulo argues that, unfortunately, the COVID-19 pandemic has just increased longstanding structural inequalities in society and undermined the progress that has been made in reducing both economic and gender inequality. Suffice it to mention that access to environmental justice for women and vulnerable groups is one of the structural inequalities that the COVID-19 pandemic has exacerbated.<sup>57</sup>

In line with understanding access to environmental justice for women, Roberts interrogates engendering access to environmental justice in Nigeria's oil-producing areas and its connection with poverty and the disempowerment of women. The author argues that women already suffer from the fact that access to justice for most Nigerians is as challenging and restrictive as it is discriminatory against women. Consequently, access to environmental justice is an additional burden on women, who are ignored and continue to suffer substantive environmental injustices.<sup>58</sup>

Still, from the Nigerian perspective, Ekhatior uses the example of the natural resource-rich Niger Delta to show that globally, women suffer uniquely from environmental injustices and can only enjoy environmental

57 Ndulo (n 3) 281.

58 FN Roberts 'Engendering access to environmental justice in Nigeria's oil producing areas' (2021) 25 *Law, Democracy and Development* 167.

goods when barriers to environmental justice are eliminated.<sup>59</sup> Consequently, women-led protests are increasingly being viewed as one strategy for improving access to natural resources and environmental justice.

In research using eco-feminist, gender and human rights-climate justice theories to investigate mitigation and adaptation plans in Nigeria, Mali, South Africa, and Rwanda, Hughes finds that women in sub-Saharan Africa bear the brunt of gender and climate injustice.<sup>60</sup> This finding holds true for other countries such as Zambia, as discussed in the three case studies in this chapter, particularly the Kasanka National Park case where access to natural resources and livelihoods by women is severely threatened. According to Hughes, it is critical to first interrogate the pre-existing and entrenched societal gender inequalities before moving on the actual physical and economic impacts of climate change and its effects on women as a vulnerable group.<sup>61</sup> This is important because women have historically been disadvantaged, while environmental challenges and calamities have just exacerbated suffering.

## 5.2 Environmental sustainability education, access to environmental justice and climate change effects

Global climate change discourse has been topical for over a decade, yet there is very little environmental sustainability education around the subject and how it connects to access to justice. Despite projections that the adverse effects of climate change will adversely affect developing countries in the global south, particularly those in Asia and Africa,<sup>62</sup> there is very little awareness of the necessary adaptation and mitigation measures.

The climate in most of Africa is projected to change: temperatures will rise, and the frequency and intensity of extreme events such as droughts and floods will increase. Evidence suggests that these changes will significantly impact the region, although the degree of impact will vary from country to country. The poorest countries, as well as their most

59 E Ekhatior 'Women and access to environmental justice in Nigeria' (2020) <https://ssrn.com/abstract=3719831> (accessed 14 November 2023).

60 KM Hughes 'Climate and gender justice in sub-Saharan Africa: Emerging trends post-Paris 2015' (2021) 38 *Wisconsin International Law Journal* 197.

61 Hughes (n 60) 201.

62 G Kilroy 'A review of the biophysical impacts of climate change in three hotspot regions in Africa and Asia' (2015) 15 *Regional Environmental Change* 771 <https://doi.org/10.1007/s10113-014-0709-6> (accessed 1 February 2022).

vulnerable women and children are expected to be the most affected, as they lack adaptive capacity.<sup>63</sup>

Despite climate change emerging as a domestic political issue in Zambia in 2009, when the UNDP, with the support of the government of Norway, facilitated the establishment of a Climate Change Facilitation Unit (CCFU),<sup>64</sup> there has been little movement towards the creation of a robust environmental education campaign. With the finalisation of a draft of Layman's Bill on Climate Change, it is hoped that there will be innovation around issues emanating from the global climate change challenge, such as enhanced public awareness and sustainability education, to ensure the necessary individual and national responses. In recent times, the effects of climate change,<sup>65</sup> such as Tropical Storm Ana and more recently, a very intense tropical Cyclone Freddy have ravaged Madagascar, Malawi, Mozambique, South Africa, Zambia, and Zimbabwe, leaving a trail of destruction,<sup>66</sup> with multitudes left without access to climate or environmental justice. These eventualities call for urgency in ensuring that citizens understand the link between most human activities that are facilitating climate change and the emergence of drastic climate-induced emergencies.

From the Zambian perspective, Sambo argues that the development of an environmental ethos is anchored on necessary skills, 'ideas, and attitudes towards the environment that are informed by relevant education, awareness, and enforcement of legislation'.<sup>67</sup> According to the author, this process of creating an environmental ethos has been set in motion

63 B Tembo et al 'Economic implications of climate change in Zambia' (2020) <https://sa-tied.wider.unu.edu/article/economic-implications-climate-change-in-zambia> (accessed 4 January 2022).

64 J Pardoe et al 'Evolution of national climate adaptation agendas in Malawi, Tanzania and Zambia: The role of national leadership and international donors' (2020) 20 *Regional Environmental Change* 118 <https://doi.org/10.1007/s10113-020-01693-8> (accessed 14 November 2023).

65 H Ngoma et al 'Impacts of climate change on agriculture and household welfare in Zambia: An economy-wide analysis' (2021) 167 *Climatic Change* 55 doi:10.1007/s10584-021-03168-z (accessed 14 November 2023).

66 T Patel & J Patel 'Briefing paper: Amid increasing weather extremes, awareness of climate change remains low in Mozambique' *Africa Portal* (28 January 2022) <https://www.africaportal.org/publications/amid-increasing-weather-extremes-awareness-climate-change-remains-low-mozambique/>; and MW Kateta 'Cyclone Freddy points to urgent need for climate-smart solutions in Malawi' *The New Humanitarian* 15 March 2023 <https://www.thenewhumanitarian.org/news-feature/2023/03/15/cyclone-freddy-climate-smart-solutions-malawi> (accessed 14 November 2023).

67 PT Sambo 'The Environmental Management Act (2011): A basis for the growth of an environmental ethos and good environmental governance in Zambia?' in P Kameri-Mbote et al *Law | Environment | Africa* (2019) 647-664 at 657.

through the provisions of the Environmental Management Act.<sup>68</sup> In agreement with this view, Milupi et al argue that the aim of environmental education is ‘developing a citizenry conscious and motivated to develop and manage its own environment in a sustainable manner’.<sup>69</sup> In research conducted in some schools in Zambia, the authors argue that pupils must be provided with opportunities to acquire and develop skills for tackling the complexity of environmental issues and conclude that ‘there was no clear-cut policy on environmental education in selected schools’.<sup>70</sup> These views from the literature show that despite the existence of an environmentally enabling constitutional and legal order, there is a need to put measures in place for concerted environmental education and awareness in Zambia.

## 6 Conclusion

This chapter started by drawing attention to the growing need for judiciaries around the world to pronounce themselves on the nexus between rising global environmental degradation and challenges on the one hand and the enjoyment of the right to a safe, clean and healthy environment (together with its associated rights) on the other. The central questions in this chapter hinge on how accelerated development can be balanced with the need for procedural and substantive access to environmental justice and whether this is being pursued in the case of the judiciary in Zambia. This chapter focused on analysing three highly publicised and contentious cases decided by superior courts in Zambia; the Mopani Copper Mines Sulphur Dioxide, Lower Zambezi National Park Mining Project, and Kasanka National Park cases.

From the literature review and analysis of the three decided cases, this chapter has established that ‘greening the Zambian judiciary’ has a firm foundation that urgently requires consolidation. It has been noted that although only three cases have been analysed in this chapter, other cases have been decided by the courts based on their access to environmental justice considerations. The access to environmental justice content of the three cases in this chapter has been analysed based on three themes: environmental rights context, equitability in access to natural resources, and judicial interpretation of the interplay between the first two themes. Although not used in this chapter, the plight of women in

68 Sambo (n 63) 662-663.

69 I Milupi, et al (2022) ‘Mainstreaming Environmental Education in the School and Teacher Education Curriculum in Zambia’ (2022) 2 *International Journal of Social Science and Education Research Studies* 366.

70 Milupi et al (n 69) 377.

accessing environmental goods and benefits, together with the provision of environmental awareness in relation to climate change and other environmental challenges is a critical measure for accessing environmental justice and therefore need to be integrated into decision-making processes.

This chapter has established that in the Mopani Copper Mines Sulphur Dioxide case, the judiciary pronounced itself in unambiguous terms on all three themes, culminating in the award of punitive damages to the estate of the deceased victim. Regrettably, this case was not necessarily initiated based on environmental damage. However, both the High and Supreme Courts expressed indignation at the magnitude of environmental negligence exhibited by the mining company.

In the Lower Zambezi National Park Mining Project case, this chapter has shown that the dismissal of the entire case for want of prosecution is an affront to access to substantive environmental justice. Procedural technicalities should not impede access to (environmental) justice. It is gratifying, however, that other environmentalists and stakeholders have since taken a keen interest in the matter and have taken multi-pronged approaches towards securing the ends of environmental justice.

Lastly, granting an interim injunction restraining developers in the precincts of *Kasanka National Park* has delighted environmentalists and given hope to access environmental justice in the courts of law in Zambia. The High Court ruling succinctly fuses the three themes of access to environmental justice elaborated in this chapter, igniting hope that the Zambian judiciary is alive to the nexus between environmental degradation and the realisation of the right to a safe, clean and healthy environment. It is however concerning that there is a continued delay in accessing environmental justice in the *Kasanka National Park* case, as outlined.

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