



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CONSTITUTIONAL PETITION NO 5 OF 2018

IN THE MATTER OF: ARTICLES 1, 2, 3 (1), 10, 19, 20, 21, 22, 23 (1) & (3), 47, 50, 157 (11), 165 (3) (B) AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 11, 12, 13, 20 AND 21 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES, 2013

IN THE MATTER OF: SECTIONS 9, 12, 15, 18, 19, 57, 58 AND 68 (2), (3) OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT CAP 347 LAWS OF KENYA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 2,3, 10 (1), (2) (C), 27 (1), (2), 28 AND 258 (1) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

WILLICE OMONDI WERE.....1ST PETITIONER

LYNETTE JEPCHIRCHIR CHERUIYOT.....2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS2ND RESPONDENT

ATTORNEY GENERAL..... 3RD RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITYINTERESTED PARTY

JUDGMENT

Background

1. The Petitioners are both employees of the National Environment Management Agency (NEMA), and are based in its Nakuru offices. The 1st Petitioner is employed by NEMA as the Principal Environment Officer in Nakuru County, and the 2nd Petitioner is an Environment Officer. NEMA is established under the **Environmental Management and Co-ordination Act, Cap 387 (EMCA)**. The EMCA is a statute enacted by Parliament with the stated purpose to:

“...provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto”.

2. On 9th May, 2018, Milmet Dam – also known as Solai Dam – in Nakuru County collapsed claiming 48 lives, and leading to disastrous losses. Farms and villages were washed away in the on-rush of the water’s break, and hundreds of people were caught up in the consequent muddy sludge. Kenyans woke up to the shocking news of the collapse of the dam splashed in all news media.

3. In the days following the catastrophe, there were scant effective actions taken by public agencies to remedy the situation. This had the unfortunate effect of attracting great public anger, outrage and debate. The petitioners, being employees in one of the public agencies in the eye of the storm, had thus become aware that following the disaster they had been targeted for arrest, which prompted their petition.

4. The petitioners filed this petition on 6th July, 2018, in Nakuru under certificate of urgency. They were apprehensive that, if arrested, their rights to equal enjoyment of the law, to human dignity, and the right not to be deprived of freedom arbitrarily or without just cause, were likely to be interfered with. They were, however, arrested and indicted with others in Naivasha in **Chief Magistrate’s Criminal Case No 977 of 2018, R v Perry Mansukh Kasangara & Others**. They are charged with forty-eight counts of manslaughter, one count of neglect of official duty and one count of failing to prepare an environmental impact assessment report.

5. Following their indictment, the original orders sought under the certificate of urgency were overtaken by events. The file was transferred to Naivasha, after it was brought to the attention of the court in Nakuru that a case of similar consequence in relation to criminal trials instituted for prosecutions connected to the collapsed dam, was in progress in Naivasha. It was therefore deemed apt for consistency that both matters should proceed under one judge.

6. The 1st Respondent, the Directorate of Public Prosecutions, is established under Article 157 of the Constitution of Kenya 2010. The 2nd Respondent is the Director of Criminal Investigations, an office created under Section 28 of the National Police Service Act, Cap 84 Laws of Kenya with the function to undertake investigations on serious crimes within Kenya. The third respondent is the AG who is the legal adviser to the government.

7. The Interested Party, NEMA, is the authority established by Parliament under the Environmental Management and Co-ordination Act No 8 of 1999(as amended), with the object to:

“exercise supervision and general 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” (see section 9).

8. At the hearing, it was agreed that the matter proceed to full hearing on the merits of the petition. The AG was not represented in this matter. The petition is opposed and NEMA filed submissions as an interested party

9. Mr Aim appeared for the petitioners, Mr Muteti and Mr Owiti for the 1st and 2nd respondents, whilst Mr Gitonga appeared for the interested party.

The Parties’ Cases

The Petitioners

10. The Petitioners allege that there are several infringements or threatened violations of their rights. For their full effect, it is apt that the alleged violations as set out in the petition are restated here:

“(i) That the Petitioners right to equal protection of the law and equal benefit of the law will be violated in that :

a. The Petitioners were carrying out their delegated functions directly under authority granted to them by the Director General of NEMA and as such the Respondent should have charged the authority itself and not individual officers.

b. That other officials and/or officers of NEMA are usually protected from personal liability from their actions or omissions by the operation of Section 18 of the EMCA Act and as such they should enjoy the same status.

ii) The Petitioners right to human dignity as protected under Article 28 of the Constitution of Kenya 2010 stand violated by the decision of the Respondents to arrest and charge them as follows;

a. The petitioners will be immediately interdicted by the Authority because of the said charges and thus will not receive their salaries.

b. The Petitioners will have a criminal record which will hamper their carrier progression and/or deny them an opportunity for employment thus denying them an opportunity to leave a dignified life.

iii) The Petitioners rights to freedom and security of their person has been infringed by the Respondents as herein;

a. The Respondents have taken actions which have the effect of denying the petitioners there freedom without a just cause by having them arrested, because of conducting their duties as officers of NEMA and this is despite the fact that the law protects them from any form of action when carrying out their duties.

b. That also the actions of the Respondents in issuing out warrants of arrest against the Petitioners are arbitrary in the

sense that at no time were the Petitioners under investigations by the respondents for any wrong doing and the offences they have been charged with in the prevailing circumstances cannot be termed as cognizable offences.

iv) The Petitioners also had the legitimate expectation that the law protects them from any personal liability when carrying out the functions and powers as delegated to them by the Director General of the Authority as per Section 12 of the EMCA Act.”

11. Accordingly, the petitioners seek the following orders from the court:

“a) A declaration that the actions of the Respondents to charge the Petitioners herein is with the offences of manslaughter and neglect by public official is unconstitutional and in contravention of Articles 27(1) and 28 of the Constitution.

b) A declaration that the actions of the Respondents to charge the Petitioners herein are unconstitutional and ultravires the provisions of Section 18 of the Environmental Management and Coordination Act.

c) An order of certiorari to be issued against the Respondents quashing/setting aside the decision of the Respondents to arrest and charge and/or prosecute the Petitioners.

d) An order of prohibition to be issued against the Respondents from charging and/or arresting the petitioners herein in relation to the collapse and the Solai Dam.

e) Costs of this petition “

12. The petitioners assert that they were deployed to carry out NEMA’s mandate within the County as the only officers deployed there by NEMA. That after Solai Dam breached its embankment, the second respondents opened investigations into the incident, and requested the first petitioner for an audit report of the dam and for an officer to record a statement with the second respondent in Nakuru; that the petitioners stated that they were not aware of existence of the dam; that their mandates were limited to receiving audited reports and checking on compliance with the Act; that at no time had they been informed that they were under investigation: that in line with **section 9** of the **EMCA Act** the petitioners believe that they were exercising powers delegated to them by the Director-General of NEMA

13. The petitioners further contend that the decision to recommend their arrest and prosecution is illegal and ultra vires **Section 18 EMCA** which protects them from personal liability in exercising their mandate; that they had a legitimate expectation that they could never be held personally liable for any actions when carrying out their mandate: that the events leading to the Solai Dam tragedy are eventualities not at all contemplated in the EMCA Act; and that their rights to freedom and security of the person have been infringed by the respondents.

14. It is alleged that their rights under **articles 27(1),(2), 28 and 29 (a)** of the **Constitution** have been violated by dint of the arrest and charging of the petitioners.

The Interested Party

15. NEMA filed a replying affidavit through its Director General Prof. Geoffrey Wakhungu. In essence he opposes the continuance of the criminal trial on the grounds that NEMA works with lead agencies by co-ordinating and supervising their activities, but not performing the activities committed to the lead agencies by statute.

16. He further deposed that after the accident occurred, NEMA did conduct an audit and the outcome thereof was the subject of a suit in Nakuru ELC Petition No 8 of 2018, which is pending hearing. Such proceedings, he avers, are likely to be prejudiced by the proceedings in Naivasha Criminal Case Number 977 of 2018.

17. The Director-General also avers that the petitioners were requested to record statements by the second respondent without caution; that NEMA has an internal human resource mechanism for disciplining its officers who are suspected of negligence; that NEMA’s statutory obligation to require an environmental impact assessment is limited prospective projects; and that section 18 of EMCA grants protection to its officers from personal liability for anything done in execution of the powers or duties of the institution, and the law does not envisage any situation where NEMA, its agents or employees would be held accountable for acts or omissions that are not within its core mandate, duties or obligations.

18. Finally, the deponent advised that the actions of the respondents are not only unlawful, but likely to dampen staff morale and instil fear in them for performing their duties in good faith.

The Respondents’

19. The 1st and 2nd Respondents response was filed through a replying affidavit sworn by Inspector Joseah Maritim. He asserts that the petitioners were obligated under **sections 2, 117(2) and (3), and section 4 of Schedule 2** of the **EMCA Act**, to carry out periodic audits and inspections of all environmental projects including dams, rivers and other resources.

20. He deposed that: the petitioners were aware of Solai Dam within their jurisdiction as its owners had applied for environmental assessment licences for Patel Coffee Estate Limited’s Greenhouses for the years 2016 and 2017; that the estate had also submitted an Environmental Audit for the farm for 2017; that despite issuing licences in respect of the Greenhouses, the petitioners failed to carry out a single inspection or audit; that it was due to the reckless and negligent carrying out of their duties that the weaknesses in the Solai Dam remained undiscovered until the tragedy occurred.

21. Finally, Inspector Maritim asserted that it is in the public interest that the criminal trials should move forward to their logical conclusion to allow the victims of the tragedy to access justice, and that the petitioners would in any event not lose their jobs unless convictions were entered after conclusion of the trial.

Parties' Submissions

The Petitioners

22. For the Petitioners, Counsel submitted that substantially the charges against the petitioners related their rights since **Section 18 of EMCA** gives them absolute immunity from any kind of action whilst conducting their official duties.

23. They therefore seek the court's interpretation of that provision against **Article 157(11)** of the **Constitution** vesting the DDP with prosecutorial powers given that the charges against them state:

“On diverse dates between the year 2007 and 9th May, 2018 being Employees of NEMA in public service wilfully neglected to perform your duty which you were dutifully bound to perform under the EMCA Act.”

24. **Article 157(11)** provides as follows:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”

25. The petitioners also submitted on the strength of **R v DPP Exparte Shamilla Kiptoo & 5 Others [2016] eKLR** that the DPP's actions were irrational and unreasonable since the petitioners had no statutory duty to perform in respect of the collapsed dam. In that case the court quoting **De Smith's Judicial Review** stated:

“A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin consulted an astrologer or where the decision simply fails to add up-which in other words is an error of reasoning which robs the decision of logic.....”

The Judge (Odunga J) went on to state:

“In my view the decision to charge the applicants with offences allegedly committed against the society in light of the material placed before me does not add up...Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction...”

26. The petitioners further submit that the DPP's discretion under the current prosecutorial regime must not be exercised with a view to achieving extraneous goals other than those legally recognised under the law and the ODPP Act. In the **Shamilla case**, the court and gives guidance on eight situations in which the court can intervene to stop a prosecution which include:

“The court can only intervene in the following situations: 1) where there is an abuse of discretion 2) where the decision-maker exercises discretion for an improper purpose, 3) where the decision-maker is in breach of the duty to act fairly, 4) where the decision-maker has failed to exercise statutory discretion reasonably, 5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power 6) where the decision-maker fetters the discretion given, 7) where the decision-maker fails to exercise discretion, 8) where the decision-maker is irrational and unreasonable”

27. It was submitted that this irrationality is seen in the fact that whilst the charges relate to diverse dates from 2007 to 2018, these are periods when they were not then in office. This amounts to a violation of their rights in that they have been stripped of their dignity by having their fingerprints taken by the police, cannot enjoy their full salaries, cannot get certificates of good conduct, and their right to movement has been stymied ever since they were charged.

28. In addition, the petitioners submitted that they had to make statements with the police which were not under caution, and it is from those statements that they were charged with neglect of duty. They had provided in their supplementary affidavit an annexure “WOL 2” which shows the policy on the organisation of Government. In it is the **“Practice Manual for Small Dams, Pans and other Water Conservation Structures in Kenya”**. It shows that the policy of the Ministry of Water and Irrigation in respect of water storage structures is that construction and structural aspects of dams are a preserve of the Water Resources Authority and that NEMA only assesses the impact on the environment.

29. The petitioners pray that their proposed trial is stopped.

The Interested Party

30. The interested party has essentially a two prongs in its submissions. First, it challenged the DPP's actions on the ground that NEMA's officers, employees and agents had absolute immunity and protection from personal liability when doing their work, if done bona fides. Such protection arises under **section 18 EMCA Act**. The second prong is to question what neglect of duty the petitioners have committed.

31. Further, there was the question whether the petitioners were subjected to self-incrimination by the fact of having to record statements without caution with the police. On this point it was obvious to the court that the question is one of admissibility of evidence which is an issue for the lower court.

32. Orally, Mr Gitonga for the interested party stated that NEMA was never aware of the existence of the Solai Dam, and that NEMA had no role in respect of such constructions. Counsel admitted, however, that under **section 117 EMCA**, there are provisions for appointment of Environmental Officers gazetted by the Director General of NEMA, with the role of monitoring the pattern of use of environmental resources and other sector specific environmental inspectorates, and conducting environmental audits.

The Respondents

33. Mr Muteti and Mr Owiti made submissions on behalf of the Respondents. Counsel adopted the written submissions and emphasised their response as set out in their replying affidavit.

34. It is submitted that the belief by the petitioners that they have a blanket immunity under **section 18 EMCA** is unfounded because the section demands that their actions are bona fides. In this case, the petitioners omissions as exhibited in the charges and evidence and are a clear manifestation of lack of good faith in the exercise of their duties. According to counsel, this removes them from the protection of the said immunity provision.

35. The respondents deny any malice in the decision to charge the petitioners among others; that the decision was taken in good faith and in the public interest; and that the petitioners have not established any transgression by the respondents from the threshold set by **Article 157(11)** requiring the DPP to exercise his powers in the public interest, in the interests of the administration of justice and with due regard to the need to prevent and avoid abuse of the legal process.

Issues for Determination

36. The following are the issues I consider to be central to the determination of this petition:

- a) Whether the petitioners are immune from liability by virtue of section 18 of the Environmental Management and Coordination Act (EMCA)?
- b) Whether the 1st Respondent's decision to charge the Petitioners was unconstitutional.

Analysis and Determination

Section 18 EMCA

37. **Section 18** of the EMCA which was the key ground for the applicant's submission that the DPP had no powers to arrest the petitioners reads as follows:

“No matter or thing done by a member of the Authority or any officer, employee or agent of the authority shall, if the matter or thing is done bona fide for executing the functions, powers and duties of the Authority, render the member, officer, employee or agent or any person acting on his directions personally liable to any action, claim or demand whatsoever.” (Emphasis supplied)

38. It is clear from a plain reading of section 18 that it discloses two limitations or conditions for grant of immunity. The first, and more obvious one, is that immunity is granted only on the condition that the matter or thing alleged to be done can be shown to have done *“bona fide for executing the functions, powers and duties of the Authority”*. In this case, however, the petitioners do not suggest that there is anything they have done. On the contrary they deny that NEMA was under obligation to do anything in the circumstances of this case. So the reliance on Section 18 can only be an alternative argument.

39. Secondly, if there was anything the petitioners did in fact do, they must show it to have been done *bona fide*, that is, in good faith. In the circumstances presented, they cannot satisfy this condition because they deny there was any obligation placed upon them to do anything, and therefore they did nothing.

40. In submissions, Mr Muteti cited the case of **Aharub Ebrahim Khatiri v Nelson Marwa & DPP Civil Appeal No 31 of 2017, Mombasa**. There, the Court of Appeal dealt with a situation where the name of Nelson Marwa, a public official, had been struck out in a defamation suit, but the appellant sought to have him reinstated in order to create a nexus with the AG as the officer who would be eventually responsible for damages should the claim succeed. The Court recognised that there is a “thin line” that separates the juristic person who is the link to a claim and the person ultimately liable. Thus, the Court held that whilst Marwa was immune pursuant to **section 15(1)** of the **Government Proceedings Act** for actions done when discharging his official functions, nevertheless:

“the nature of the claim and the issue of whether the actions were carried out in good faith all require the participation of the 1st Defendant (Marwa). In his absence we entertain considerable doubt as to whether the appellant would be able to proceed

with the claim against the AG and DPP”.

41. From the foregoing, there can be no doubt that even in situations where a public official has justifiably claimed immunity; such claim of immunity must undergo the “good faith” test to determine whether the official’s actions are indeed within the parameters of good faith pursuant to which immunity would apply.

42. Thirdly, **section 18 EMCA** clearly grants immunity for matters or things done by an officer. It is silent concerning acts or things which an officer, employee or agent of the Authority fails or neglects to do. It is an open question and doubtful proposition whether, where there has been failure, refusal or neglect to do something required to be done, the immunity available under **section 18** could also be invoked.

43. In my view, the wording of the immunity provision is purposely intended to avoid a situation where an officer gets away with not doing what he is required to do. It is on account of that wording that there is the **Penal Code** offence in **section 128** of “*Neglect of official duty*”. What a public officer is obligated to do, he **“Every person employed in the public service who wilfully neglects to perform any duty which he is bound either by common law or by any written law to perform, provided that the discharge of the duty is not attended with greater danger than a man of ordinary courage might be expected to face, is guilty of a misdemeanour”**

In my view, the law granting immunity is intended to be complementary to that which provides for liability for failure to do what one is obligated to do.

44. In the circumstances of this case, therefore, I am not satisfied that the Petitioners have an entirely and absolute immunity from prosecution because, as shown above, there are a number of limitations to which the immunity provision is subjected.

45. Having dealt with the section 18 EMCA complaint, I now address the next issue.

Whether the DPP was constitutionally justified in arresting and prosecuting the Petitioners

46. On unconstitutionality of the DPP’s actions, the petitioners’ complaints, by and large, were that their right to equal enjoyment of the protection of the law; their rights to human dignity; and their rights not to be deprived of freedom without just cause were abrogated or threatened. Paragraph 16 of their written submissions roundly summarises these alleged threats as follows:

“16)...the decision by the respondents to charge the petitioners herein with the alleged offenses is irrational as the charges just don’t add up. To this end it is also evident that the acts of the respondents are evidently arbitrary and they have already infringed on the rights of the Petitioners as hereunder;

1. The acts of the Respondents have infringed on the rights of the Petitioners to equal protection and equal benefit of the law. This is so because the Petitioners are the only ones who have been charged from NEMA despite the Provisions of Section 18 of EMCA and the fact that they have been charged on duties/powers that are only exercised by the Director General.

2. Their right to human dignity has already been infringed firstly, by the petitioners being interdicted because of the arbitrary charges brought against them by the Respondents meaning they cannot earn their full salaries. Secondly the charges brought against them mean that they now have a criminal record and they cannot enjoy all their rights and privileges as the same will be curtailed by the criminal records i.e they cannot obtain a certificate of good conduct from the 2nd Respondent.

3. Their right of freedom and security has been infringed by the arbitrary acts of the respondents to arrest them as they are now out on bail bond terms from the charges that have been hereby demonstrated to be irrational and unreasonable.”

47. Both parties cited several authorities for consideration by the court. Any failure of the court to refer to all such cases in this analysis is not out of disrespect, or want of analysis. The court has considered all authorities and has summarised the positions it deemed relevant.

48. As earlier noted, the **Shamilla** case was particularly emphasised by the petitioners as tending to show situations when the court can intervene as against the allegedly irrational decisions of the DPP.

49. The courts have identified a string of situations in which the court can intervene as against actions of the DPP. In **Kuria & 3 Others v Attorney General [2001] 2 KLR 69**, the court stated as follows:

“A criminal prosecution which is commenced in the absence of proper factual foundation of basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”

50. The alleged absence of a proper factual foundation based on alleged duties imposed on the petitioners, is precisely the complaint the petitioners have raised. In **Peter Ngunjiri Maina v DPP & 2 Others [2017]eKLR**, Prof Ngugi, J, aptly summarised eight scenarios where the duty and authority of the court in reviewing the exercise of the discretion of the executive is warranted relative to the unfettered discretion of the DPP. Rephrasing Odunga, J, in **R v DPP & 2 Others Exparte Nomoni Saisi [2016] eKLR**, he stated:

“It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the court may interfere. The court can only intervene in the following situations:

- a) *Where there is an abuse of discretion;*
- b) *Where the decision-maker exercises discretion for an improper purpose;*
- c) *Whether decision-maker is in breach of the duty to act fairly;*
- d) *Whether decision-maker has failed to exercise statutory discretion reasonably;*
- e) *Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*
- f) *Where the decision-maker fetters the discretion given;*
- g) *Where the decision-maker fails to exercise discretion;*
- h) *Where the decision-maker is irrational and unreasonable.”*

51. It is upon these criteria that the actions of the DPP in the present case must be tested.

52. After the Solai Dam accident, the petitioners were questioned by the police as would be expected when an accident has led to deaths on a large scale. The petitioners’ case, according to their petition, is that they were NEMA employees carrying out the NEMA mandate within the sub-county in which the dam lies; that the Directorate of Criminal Investigations (DCI) wrote a letter to NEMA through the 1st petitioner; that the letter indicated that the DCI was conducting investigations seeking to know the circumstances which led to the accident; that DCI asked for an Audit Report of the dam; that the petitioners answered the questions; and that they were subsequently charged; with other public officers.

53. I have perused the EMCA Act. The objects of NEMA are stated in **section 9(2) EMCA**, some of which are to:

“(a) co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations.....

.....

d) examine land use patterns to determine their impact on the quality and quantity of natural resources;

.....

j) identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under the Act;

k) initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur;

l) monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given” (emphasis supplied)

54. There is no doubt that the role expected to be played by NEMA, and thereby by its officers within the counties in respect of the environment involves monitoring, co-ordinating, initiating and evolving procedures for safeguards for preventing accidents, assessing activities being carried out by lead agencies, and so on. These responsibilities are not disconnected from the need to ensure a measure of safety of dams.

55. In their affidavits, both of the petitioners stated that the lead agencies which were supposed to have knowledge of the existence of Solai Dam were the Nakuru County Government and the Water Resources Management Authority (WRA) pursuant to the provisions of the Water Act. It is true, for example, that under the **Water Act** it is for the WRA to: regulate the management and use of water resources (section 12); to monitor compliance by water users with conditions of permits(section 13(2)(c)); to ensure that applications for permits shall be the subject of public consultation and environmental impact assessment where appropriate (section 40(4)); to ensure that **“every permit holder shall maintain and retain his or her works in a good and proper and workman-like manner to the satisfaction of the Authority (WRA)”** pursuant to Paragraph 7 of the Second Schedule, Water Act.

56. The processes for public consultation under the Water Act are provided for under **section 139**, and include advertisement on radio and in national circulation press, issuance of notices, invitation of written comments and so on. Thus for a county environment officer to claim that he or she did not know of the existence of a dam within their jurisdiction would be stretching credibility too far. This is particularly so when account is taken of the fact that all existing rights under the Water Act, 2002, under the Water Ordinance 1929, and grants issued before 1st July, 1935 by or on behalf of government under the Crown Lands Ordinance 1902, were deemed to be rights conferred by a permit under the Water Act 2016, pursuant to **Section 157 Water Act, 2016**.

57. It is also to be noted that under **section 12 EMCA**, NEMA has general oversight powers over the WRA as it is mandated to **“direct any lead agency within such time as it may determine, to perform any of the duties imposed on the lead agency by or under the Act”**.

58. A “lead agency” is defined under **section 2 EMCA** as including any Government ministry, department, parastatal, state corporation, or local authority, in which any law vests functions of control or management of or any element of the environment or natural resources. So that, in fact NEMA is entitled to require state agencies duly defined as lead agencies to perform any duties required to be performed under the Environment and Management Act.

59. I agree with the petitioners that under **section 58 of EMCA** environmental impact assessments are required to be done in respect of prospective projects sought to be undertaken by proponents of a project. Given that Solai Dam was existing works, an environmental impact assessment may not be the requisite report or mode of assessing the place and effect of the dam.

60. However, under **section 68 EMCA**, NEMA **“or its designated agents shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect of the environment”**. This role is required to be done by environmental inspectors appointed by the Director General of NEMA by gazette notice pursuant to section 117 EMCA. An inspectors role includes: to monitor the activities of other sector specific environmental inspectorates, to conduct environmental audits, and under **Section 117(3)**: to carry out periodic inspections of all establishments and undertakings within their respective jurisdictional limits which , inter alia, store any substances that are likely to have any significant impact on the environment (**sub-section 3(d)**); to order immediate closure of any manufacturing plant or other establishment or undertaking which pollutes or is likely to pollute the environment (**sub-section 3(f)**); to issue improvement notices to operators of any undertaking or establishment to cease any activities deleterious to the environment (**sub-section 3(g)**);

61. Under **Section 69** NEMA is required, in consultation with lead agencies to monitor: all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts; or the operation of any project or activity with a view of determining its immediate and long term effects on the environment. Further **Section 69 (1A)** makes it mandatory for every lead agency to establish an environmental unit to implement the provisions of the EMCA Act. It is this environmental unit that is the link between NEMA and any such lead agencies including the Water Resources Authority for implementation of the provisions of the relevant legislations.

62. In their Supplementary affidavit filed on 25th July, 2018, the petitioners annexed a document described as *“Organisation of the Government of the Republic of Kenya”* setting out how the government ministries and agencies are organised. To it is attached a document entitled **“Practice Manual for Small Dams, Pans and Other Water Conservation Structures in Kenya” (Practice Manual)**. The Practice manual is published by the State Department for Water, Ministry of Water and Irrigation, 2015.

63. The **Practice Manual** has the following information:

“Paragraph 3.4.6 Role of WRMA and other Regulators:

WRMA is the regulator for water resources which includes regulating water storage structures and water allocations. In this regard, WRMA is responsible for ensuring public safety and therefore has to review dam designs and construction activities to ensure they meet accept acceptable standards and are compliant with regulations. The permit application and inspection process provides WRMA with the information it needs to authorise and permit the structure and water use.

.....Other government regulators (e.g. NEMA) have the responsibility to ensure that the project is compliant with their respective legislations....

Paragraph 3.6 Dam Safety Planning

The impoundment of water particularly by a dam forms a hazard so due consideration is required to the nature of the hazard, the risk of harm and/ or damage, and mitigation measures that can be undertaken to minimise the risks.

The Emergency Action Plan (EAP) is a useful tool which helps to identify preventive measures which can reduce the scale of harm and damage in the event of dam failure. The preparation of an EAP is now considered good practice for small dams that fall into a medium or high hazard class. The EAP should be developed by the dam owner /operator in collaboration with other relevant parties...” (emphasis supplied)

64. The petitioners assert that the WRA oversees all the aspects enumerated in the **Practice Manual**, which is a policy document, including the Emergency Action Plan. They state that NEMA has no role in respect of that policy document. However, the **Practice Manual** at **paragraph 3.4.6** also clearly stipulates that NEMA is one of the other government regulators with responsibility to ensure the project is compliant with their respective legislations.

65. Given all the foregoing highlighted roles and obligations placed on NEMA, it is clear that they extend to its officers in the counties and regions where they have jurisdiction. I am therefore not persuaded that the investigations by the 2nd respondents leading to the questioning of the petitioners, and subsequent arrests for alleged neglect of duty amounted to an abrogation of their rights. Indeed, what I am persuaded about is that the petitioners’ role is deeply intertwined with that of other agencies involved in ensuring that operations such as Solai Dam operate safely and within the many statutorily established parameters.

66. Throughout their petition and the Chamber Summons application, the petitioners assert and confirm that they were “deployed to carry out the mandate of the Authority within Nakuru County”, that they were to oversee the Authority’s activities in the whole of Nakuru County. They therefore bring themselves squarely into the ambit of the persons responsible for NEMA’s functions within the area where Solai Dam is

located.

Disposition

67. It is clear from all the foregoing analysis, particularly given the wide scope of the mandate and responsibilities imposed by statute on NEMA, that its monitoring, supervisory and enforcement roles cannot easily be wished away in the circumstances of this case. Indeed, given the tragic developments that occurred and the substantial impact on the public, and the resulting deaths, the role of NEMA and the petitioners actually came into sharper focus.

68. In light thereof, this court is not inclined to find that the actions of the Respondents in charging the petitioners are unconstitutional or contrary to statute nor irrational given the scope of statutory responsibilities with which NEMA, and by extension the Petitioners, are mandated to perform.

69. The court also hereby declines to issue an order of certiorari to quash or set aside the respondents decision to charge and prosecute the petitioners.

70. In the result, the Petition fails and is hereby dismissed with costs.

71. Orders Accordingly.

Dated and Delivered at Naivasha this 3rd Day of September, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Wairegi holding brief for Airu for the Petitioners
2. Owiti for the Respondent
3. No Representation for the Interested Party

Court Clerk – Quinter Ogutu