



## Peter Waweru v. Republic of Kenya

Miscellaneous Civil Application 118 Of 2004; (2007) AHRLR 149 (KeHC 2006)

**Country:** Kenya

**Region:** Africa

**Year:** 2006

**Court:** High Court at Nairobi

**Health Topics:** Environmental health, Water, sanitation and hygiene

**Human Rights:** Freedom from discrimination, Right to a clean environment, Right to life, Right to water and sanitation

### Facts

About one hundred residents of the Kiserian township were approved to construct residential-cum-commercial buildings by county officials, including health officials. A public health officer investigated reports of "indiscriminate discharge of offensive smelling waste matters within the trading centre flowing out of various premises into open channels along the road to the environment and to the Kiserian River" [Para. 7] and found that most plot owners had connected underground drainage pipes to their septic tanks, causing the leakage of toxic water. The health official gave notices to stop discharge, and after they were ignored his office issued statutory notices requiring the residents to stop the discharge of waste water into the open drain.

At the expiry of the notice a public health officer instituted criminal proceedings against certain non-compliant plot owners, charged with (1) discharging raw sewage into a public water source and the environment and (2) failure to comply with the statutory notice from the public health authority. According to the relevant provisions of the Public Health Act, if a person on whom a notice to remove a nuisance has been served failed to comply with its provisions, the relevant health officer could make a complaint to the magistrate who could then issue a summons requiring such person's appearance. However, the applicants were charged directly instead of being served with a summons to appear before the magistrate.

The applicants alleged that, under the Kenyan Constitution, their fundamental rights had been violated by being criminally charged directly. The lower court granted the application to bring the constitutional reference to the High Court.

### Decision and Reasoning

The Court found that the required notice was not properly given and thus due process was not adhered to. It therefore quashed the charges against applicants.

The Court determined that the charges were discriminatory based on local connection. Considering that only 23 people were charged out of much larger group, the Court determined that the selection was unreasonable and without objective standards.

It noted with concern that the "area earmarked for construction of sewage treatment works is said to have been acquired for private use." [Para 18] and issued an order of mandamus to compel the government agencies responsible to perform their relevant waste management duties.

The Court then outlined the required framework for environmentally sustainable development. It rejected the applicants' arguments that they could not comply with the health requirements concerning the waste water as such compliance would be cost-prohibitive, noting that the cost of sustainable development must be borne by the developer and that the applicants had not considered environmentally friendly alternatives. The Court also rejected the argument that environmental charges might be untimely considering how old the properties were, stating that "nuisance can by its very nature have a silent continuing effect" [Para 20] which can take some time to discover.

The Court noted that, under the Kenyan Constitution, all persons were entitled to the right to life, which encompassed the right to a clean environment. It then discussed each of the four principles it considered directly relevant to such guarantee: sustainable development, precautionary principle, polluter pays, and public trust. The Court held that government was obliged to approve only sustainable development, to apply

the polluter pays principle and to consider issues of intragenerational equity.

## Decision Excerpts

“The people’s right to a clean environment is raw sewage or waste water does threaten the lives of the use the water downstream wherever they are located along the river and it further poses a serious threat to the water table in terms of pollution.” [24]

“In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment.” [26](1)

“The government through the relevant ministries is under the law under an obligation to approve sustainable development and nothing more, which is development that meets the needs of the present generation without compromising the ability of future generations to meet their needs. To this end no further development in the township should be undertaken without satisfying all the environmental and health requirements.” [43]

“At this time and age no development is valid which cannot answer the requirements of sustainable development. As and when a plan of action is put in place as recommended it will be quite apparent to the policy makers and implementers that the Kiserian township time-bomb brings into play nearly all the major principles known to the world today – from the Stockholm Declaration to Rio and more recently in Johannesburg as indicated above. Indeed the act of balancing the rights of the Kiserian town developers with those of their brethren living along downstream Kiserian River does involve the application of the principle intragenerational equity or environmental justice. Intragenerational equity involves equality within the present generation, such that each member has an equal right to access the earth’s natural and cultural resources. In our view this includes the balancing of the economic rights of the town dwellers with the rights of the downstream dwellers to use unpolluted water. If the balance is achieved the chances of achieving inter-generational equity shall have been enhanced.” [47]

“Although E Brown Weiss has aptly described the challenge perhaps it is important for our generation not to ask for a sign before joining in this great fight for environmental justice. The reason for this is that this generation can never have the excuse of lacking in inspiration. It will be recalled that it is our generation that wholly depended on river water for home consumption and for livestock, water pipes and taps were invented in our lifetime but had not reached us. Our rivers had quality water that sustained all generations. Then came the tapped water with the cleansing power of chlorine – finally the water pipes and taps reached some of us – they still have not reached many and the majority of our brothers and sisters. It is our generation again which now says that you take tap water at your own risk – to be on the safe side take bottled water yet it is a fact only a chosen few have access to this new invention! What went wrong before our own eyes! In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.” [50]

Copyright © 2015 www.GlobalHealthRights.org