Cultural Heritage Impact Assessment in Kenya

Wycliffe Oloo and Ibrahim Busolo Namunaba

Introduction
Like many other countries in Africa, Kenya is experiencing rapid industrialization and increasing population density with unprecedented pressure on both natural and cultural resources. With each and every development the environment is impacted either positively or negatively and more often than not, cultural heritage resources are never spared the impact. Hence the need to ensure the environment is safeguarded for not only the benefit of all humanity but also for the sustainability of the ecosystem. Cultural Heritage Impact Assessment (CHIA) has been used effectively as a tool for assessing potential impacts on cultural heritage resources. CHIA refers to the ‘potential impacts, negative and positive on the full range of cultural resources of an area, which may result from proposed development or works or environmental trends; and the design of measures to mitigate impacts which are unacceptable and maximize those which are beneficial’ (Rogers 2008).

This paper looks at legislations that cover Cultural Heritage Impact Assessment in Kenya, citing examples of project implementation before and after the enactment of environmental impact assessment laws. Nonetheless it is important to note that even before the enactment of the legislation, environmental impact assessments that strived to address cultural heritage aspects were still being conducted in Kenya.

Legislation
The Environmental Impact Assessment (EIA) process in Kenya is coordinated by the National Environmental Management Authority (NEMA), established under the Environmental Management Coordination Act - EMCA - (No. 8 of 1999). Under the Act, EIA is defined as a ‘systematic analysis of projects,
policies, plans or programmes to determine their potential environmental impacts’ and ‘the significance of such impacts and to propose measures to mitigate the negative ones’ (EMCA 2001). However this Act focuses mainly on environmental or natural issues, rarely touching on cultural heritage. Where cultural heritage is mentioned it is seldom given the seriousness that it deserves. Conversely, cultural heritage matters are mainly covered by the National Museums and Heritage Act of 2006 that mandates the National Museums of Kenya (NMK) to conduct Impact Assessments on areas of cultural heritage interest prior to development taking place.

The objective and purpose of NEMA is ‘to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of government in implementation of all policies relating to the environment’ (Section 9 of EMCA 1999). In essence NEMA plays a supervisory role in any EIA in Kenya. To effectively achieve this NEMA is ultimately responsible for issuing, verifying or cancelling environmental impact assessment licenses. NEMA is responsible for coordinating all public and private sector players who have a role in the implementation of EIA Guidelines. Finally, NEMA oversees implementation of EIA guidelines at Provincial and District levels through both Provincial and District Environmental Committees respectively (EMCA 1999). Despite this, cultural heritage managers are not represented in such regional committees.

For Cultural Heritage Impact Assessment, various sections in the National Museums and Heritage Act 2006 (NMHA) which repealed the Antiquities and Monuments Act 1984 (Cap 215) and National Museums Act 1983 (Cap 216) address issues relating to the protection of heritage. The Act provides for the establishment, control, management and development of national museums in addition to ‘the identification, protection, conservation and transmission of the cultural and natural heritage of Kenya’. Section 35(1) of NMHA provides for exploration licences, control of access to protected areas and compensation to owners of land in protected areas. It states ‘...where private land .....the rights of the owner or occupier are disturbed in any way, or damage to the land, or to crops, buildings......the Government shall on demand pay to the owner or occupier such compensation as is found and reasonable.......’ In principal, this implies that in case of any project development, heritage specialists have access to any land notwithstanding the ownership status, and document any natural or cultural features that exist within that specific piece of land and suggest probable mitigation including compensation for any damages.
It is noteworthy that NMHA tries to embrace EMCA by clearly stating under section 77 that it amends Section 38 of the Environmental Management and Co-ordination Act by inserting in (j) ... "The national environment action plan shall... prioritize areas of environmental research and outline methods of using such research findings". This section did not exist in the previous Antiquities and Monuments Act (Cap 215) and National Museums (Cap 216).

NMHA further emphasizes the role of NMK in carrying out impact assessments. In Section 5,(1)(n) the Act states in part '...The National Museums may -subject to the provisions of the Environmental Management and Coordination Act, conduct Environmental Impact Assessments' on sites earmarked for development projects and whose implementation threatens the survival of heritage resources. In essence, every parcel of land has potential for heritage interest unless proved otherwise through a professional study. The NMHA also gives the National Museums the powers to put in place sound policies for managing such heritage sites, monuments or materials. Hence the Act empowers NMK to take into account and record all monuments and protected areas declared or deemed to have been declared by the Minister under section 25 of the Act.

**EIA Process**

The EIA process in Kenya provides decision makers with the information necessary to determine whether or not a project should be implemented. The process also involves community consultation and public participation. The project approval process involves decision-making at various levels with the necessary authorization only given once all EIA requirements have been fulfilled and accepted by NEMA and the relevant lead agencies. NEMA makes decisions at various stages whether to issue a license without conditions, with conditions or reject a project proposal completely. If the NEMA is unable to resolve any complaint regarding compliance with EIA requirements the proposal becomes subject to a review by the Environment Tribunal. EMCA even has provisions to bring proceedings in a court of law where necessary for judicial review. EIA findings are accessible to the public upon request; nonetheless certain sections of the same EMCA gives provision to make certain parts of the report confidential.

A big plus for EMCA is the availability of EIA guidelines clearly stating the EIA steps & requirements for EIA implementation and list of Thirty four institutions including the National Museums of Kenya that are allowed to
carry out EIA in Kenya in accordance with EMCA third schedule sections ((37) (1) (d) and 70 (2)).

Apart from the two Acts, EMCA and NHMA, another significant source of mandate for the protection of cultural heritage in Kenya is derived from the United Nations Educational, Scientific and Cultural (UNESCO) Convention, (usually referred to as the World Heritage Convention of 1972) concerning the protection of the World Cultural and Natural Heritage. The convention confers obligations on State Parties to protect sites inscribed on the World Heritage List which in Kenya’s case are Lamu Old Town, The Mijikenda Kayas, Lake Turkana and Central Island and Mt. Kenya National Park.

The national commitment to protect cultural and natural heritage is contained in Articles 4, 5, 6 and 7 of the Convention. Thus Kenya should make efforts to identify, protect, conserve, present and transmit her heritage to the future. The convention compels countries to effectively protect their heritage. This now brings us to the question: do projects in Kenya embrace impact studies on cultural heritage in their EIA?

Most projects rarely conduct EIA with the exception being those projects funded by both bilateral and multilateral international donor agencies or projects conducted by major quasi-government (parastatal) agencies such as the Kenya Pipeline Authority, Kenya Power and Lighting Company or Kenya Generation Company (KenGen). Moreover in such instances cultural experts are normally brought on board only in the review process or in the event where the developer stumbles on heritage resources. Generally, NEMA neither forwards EIA reports to the NMK to provide input nor is NMK represented in the review committees.

Nonetheless Cultural Heritage Impact Assessment is usually conducted in most multi-sector projects in which the NMK is involved. For instance during the construction of the Loiyangalani Desert Museum in Marsabit District in Northern Kenya, an Environmental Impact Assessment was conducted. Even though the Museum was commissioned in June 2008, the Environmental Impact Assessment is yet to be made public to date. The NMK was also involved in conducting CHIA during the construction of the Koitalel Samoei
Mausoleum, for Koitalel Samoei\(^2\), a National Hero, in Nandi South District in the year 2006.

For the case of the Koitalel Samoei Mausoleum, which is located on a site that the Nandi community believes Koitalel was interred, a CHIA was incorporated in the planning and budgeting stage. Though archaeological excavations at the proposed mausoleum site did not yield substantial findings, the excavations however, enabled the community to open up and request the NMK to carry out more archaeological research in other localities associated with Koitalel Samoei and which the community believe to be of historical significance. Consequently archaeological excavations were carried out at both Kaptumo Fort and Kipture Fort areas of Nandi South District that are currently farms and occupied by the Divisional Administration offices respectively.

The only archaeologically visible marks in both areas are the depressions that were once deep trenches that surrounded the forts. Nonetheless the archaeological excavations at the sites led to the discovery of a number of material remains that included gun barrels, bullet slugs and a ceramic vase, indicating that military fortresses may have existed in the two sites in the beginning of 20\(^{th}\) century. This is an example of CHIA practice that not only leads to more research but also to creation of trust and acceptance with members of a community as the result of engaging the community at the earliest time possible.

In the Coast Province, the NMK has conducted CHIAs for three major projects. One was the expansion of NMK premises at Fort Jesus meant to host the Directorate of Research Institute for Swahili Studies in Eastern Africa (RISSEA) (Busolo 2008a). The second was the Optical Fibre cable project at Fort Jesus Museum. In the latter case, CHIA was conducted in the inter-tidal zone and seabed of the channel to mitigate the impact on both terrestrial and marine cultural resources. Of particular interest was the impact of the projects on the military landscape of Fort Jesus monument and the shipwrecks on the seabed of the channel leading to the old port of Mombasa (Busolo 2008b). A number of cultural materials were excavated and stored for posterity. Fossil shells were also recovered and have been helpful in the reconstruction of the palaeo-marine environment of the island of Mombasa. Following seabed

\(^2\) Koitalel Samoei Barbarani arap Turugat was a freedom fighter from the Nandi Community who was killed by the British in October 1905 for resisting their invasion into Nandi ancestral land. Kenya recognizes him as one of its National Heroes.
surveys, NMK now has a revised map of shipwreck sites in the channel and has recommended alternative routes for the optical cable.

Figure 1: Test Archaeological excavation at Koitalel Mausoleum Site

Figure 2: Ceramic Vase excavated at Kaptumo Fort
Figure 3: Map of Kenya showing location of Loiyangalani Desert Museum, Koitalel site and Sondu Miriu.
Other developments subjected to CHIA included the proposed Children’s Park project at Mama Ngina Heritage Site. This project was subsequently stopped due to adverse impact of the heritage at the site. Through a CHIA it was established that the site was a cemetery of an ancient Tuaca settlement, one of the earliest occupations on the Island of Mombasa.

In Lamu, NMK has spearheaded an assessment of the impact of human settlements and development on the sand dunes and has since advised developers and government agencies to safeguard the fresh water aquifers. The Lamu sand dunes are scientifically proven to be a source of fresh water for Lamu and its surroundings (NMK 2009).

Figure 4 : Children’s Park at Mama Ngina Heritage site, Mombasa.
Figure 5: The Children’s Park project at Mama Ngina Heritage site was halted after CHIA found the site was a cemetery of an ancient Tuaca settlement.

Figure 6: Settlement in the sand dunes in Lamu. The National Museums of Kenya has conducted CHIA and advised public and private developers to protect freshwater aquifers and respect the government’s 60 meter high water mark requirement.
Besides, many non-NMK projects have been subjected to the CHIA albeit at a slow pace. The case of the Sondu Miriu hydropower project in Nyanza province is a good example. The project consists of a run-of-the-river power plant of 60 MW capacities that utilizes water of the Sondu River and is envisaged to produce an average annual generation of 330 GWh (Africa Water Network 1999). The Project does not have a major dam and associated reservoir but relies on the flow of the river with only a small storage capacity at the intake. Some water is diverted to the power station via the intake tunnel while the rest is left to flow approximately 13 km downstream into the original course.

Given the magnitude of the project, the law requires an EIA to be carried out before such a project commences. Accordingly an EIA was carried out in 1991, followed by a Socioeconomic Impact Assessment in 1993 by the Nippon Koei Company Limited of Japan and RPS International of Kenya, following the request of the Kenya Power Company (KPC, now known as KenGen). The results were included in an EIA summary completed in September 1993.

An Archaeological Impact Assessment within the area designated for destruction by the building of the 60MW hydroelectric power plant along the Sondu-Miriu River was also carried out in 1999 by a team of NMK archaeologists. During the excavation at the plant, a site rich in pottery, lithics and faunal remains was discovered (Onjala et.al. 1999). In February 2000 a preliminary test excavation was carried out to determine the degree of preservation and the depth of the cultural deposits. These test excavations documented a rich Holocene cultural sequence with clear stratification (Onjala et.al. 1999). The findings were exceptionally well preserved, including vast amounts of ceramics, worked stone, iron implements, beads and faunal remains as well as the earliest domesticated banana dating to 4th millennium BC (Leijju et al 2006).

It should be noted that this CHIA research focused mainly on the area that would be directly destroyed by the hydroelectricity power plant. The emphasis was never on the surrounding environments and the cultural landscape. Thus the impact and mitigation for the change in the river course was never addressed. The National Environment Management Authority (NEMA) assessed the EIA, audit and monitoring reports as stipulated in the EMCA (part vii). NEMA then approved the project in 2004, eleven years after the submission of the EIA report. The project was given the green light but on condition that an annual environmental audit is carried out (CDM, 2007). The delay in the approval of the EIA for the project was probably due to lack of an
existing implementation machinery since EMCA was enacted in 1999 and NEMA was created thereafter in the year 2000 before being fully operational in 2004.

**Impact of Project on Heritage**

Upon commencement of the project, the Sondu Miriu Community, through a number of NGO’s such as Africa Water Network, Climate Network Africa and Sondu Miriu River Advocacy Group raised objections concerning the implementation of the project, through letters to KenGen and the Parliamentary Energy Committee. Their grievances among others that touched on heritage included,

1. **The fact that the project was not environmentally friendly.** They argued that...*the project should be environmentally sustainable* and that *...major natural resources like forests and water should not be put at risk because they are important sources of livelihood for the affected.* (Otieno. 2001)

The community argued that indiscriminate destruction of large tracts of forestland and pasture to give way for roads, tunnels, staff quarters, offices, will lead to the disappearance of many water springs and streams. The deteriorating health conditions associated with the project such as the prevalence of respiratory, water–bone and water related diseases became common. No hospitals were built as promised in the project document. Instead a clinic constructed at the site was meant for project staff members only since community members were always turned away from the clinic.

2. **The fact that cultural heritage sites were in danger...** *That the project should not violate the affected communities' cultural beliefs and heritage* (Odera, 2001).

The community cited the destruction of cultural shrines as an example. They argued that the magnificent Wang’ Odino falls was being obliterated due to the drying up of the river after the diversion of the river upstream. According to the community, the falls is the harbinger of good and bad omen. It is the home of prosperity or death. So fearful is the community of the wrath of the falls that only a few selected adults are allowed to venture deep into the forest and the belly of the precarious Odino hills to visit the falls. Every time the roaring falls are disturbed, according to the community, “the gods of Odino
react with thunder and lightning, consuming those it finds on its path" (Odera 2001).

To keep the local community at ease, the project managers assured the community that Odino falls will not be disturbed because there will be some "little" water left to flow over the falls. Borrowing experience from other dam projects, critics of the project believed the river will dry up completely because of the prevailing drought situation (Africa Water Network, 2001) Thus, the community which attaches a lot of cultural values and beliefs to the breathtaking falls felt that the project did not address adequately mitigation strategies for Odino falls heritage site. Other grievances ranged from the secretive manner in which the project was implemented, land compensation issues, corruption and nepotism among others.

Following the pressure from various advocacy groups and the community, the Japanese government eventually suspended funding to the controversial hydroelectric power project in June 2001, while it was still in the first phase of construction, citing “environmental disruption and corruption” (Wanjiru, 2001). Thereafter Japan had to organize a total of six fact-finding missions to assess the situation before proceeding with the project.

In order to address issues raised by the community members, a Technical Committee was formed in 2000. The Technical Committee comprised of thirty one members encompassing major stakeholders with voting rights including the affected community members, elected leaders, professionals of relevant disciplines, representatives of locally based Civil Society organizations, Governmental institutions responsible for development coordination in the region, and KenGen (CDM, 2007).

**National Data on Environmental Impact Assessments**

The national data presented here is for the period between 2002 and 2007 and includes figures for both EIAs and CHIAs combined. The year 2002 marked the implementation of EMCA (1999). NEMA itself was created one year after the enactment of EMCA and took approximately four years to put in place its administrative structure including recruitment of qualified personnel with orientation in environmental science, environmental management and policy formulation.
<table>
<thead>
<tr>
<th>YEAR</th>
<th>Number of EIA reports (includes CHIAs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 2002</td>
<td>10</td>
</tr>
<tr>
<td>Year 2003</td>
<td>48</td>
</tr>
<tr>
<td>Year 2004</td>
<td>95</td>
</tr>
<tr>
<td>Year 2005</td>
<td>725</td>
</tr>
<tr>
<td>Year 2006</td>
<td>345</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>1445</strong></td>
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</table>

Table 1: Yearly comparison of Environment Impact Assessment reports 2002-2006

The data in table 1 above shows a general trend of increasing number of EIAs conducted during the period between 2002 and 2006. This is an indicator of growing awareness and sensitization of the public on the importance of EIAs prior to commencement of development projects. The drop in the number of EIA reports in 2006 may be attributed to the electioneering phobia that characterized the country. The political agenda during 2006/2007 focused on the tenuous land issues and many investors were not ready to develop their property, and rather chose to suspend development plans. It may also be explained by the high rate of inflation that that affected the cost of materials and fuel at this period. From Table 2, Nairobi region had the highest number of EIA reports (896) processed with North Eastern region recording the lowest at 15 reports only.

<table>
<thead>
<tr>
<th>REGION</th>
<th>NUMBER OF EIA REPORTS (INCLUDES CHIAs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Kenya</td>
<td>28</td>
</tr>
<tr>
<td>Rift Valley</td>
<td>217</td>
</tr>
<tr>
<td>North Eastern</td>
<td>15</td>
</tr>
<tr>
<td>Eastern</td>
<td>101</td>
</tr>
<tr>
<td>Central</td>
<td>87</td>
</tr>
<tr>
<td>Coast</td>
<td>58</td>
</tr>
<tr>
<td>Nyanza</td>
<td>43</td>
</tr>
<tr>
<td>Nairobi</td>
<td>896</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,445</strong></td>
</tr>
</tbody>
</table>

Table 2: Regional distribution of EIA reports for the period between 2002 and 2007.
(Source NEMA 2007)
This is explained by the fact that Nairobi region is relatively more sophisticated and sensitive to environmental issues than other regions. Most establishments in Nairobi already underscore the need for EIAs. The population around the Metropolis of Nairobi is relatively educated in environmental issues and the majority of the people are most likely to notice development projects that are adverse to their environment. The number of reports from the coast region does not demonstrate the magnitude of development projects that take place there. This is alarming, given that this is a rapidly developing tourism development zone with numerous remains of Swahili cities. Its ranking at the fifth position, with only 58 reports against the national level of 1445 reports, implies vulnerable resources are much more at risk of being destroyed in this region as many projects are not subjected to EIAs. The same would apply for the Western and Nyanza regions with 2% and 3% respectively.

Table 3 below on the other hand, shows that the highest number of EIA reports was received from projects in human settlements and infrastructure, reflecting increasing population density in the areas of concern. Besides, the need for increased supply of housing, public infrastructure such as roads, sewage, water systems and industrial development and expansion has superseded efforts for preservation of heritage resources. It also appears that there were minimal developments in other sectors which recorded less than 100 EIA reports.

This may be as a result of some developers not complying with the legal requirement for EIA. It is also possible that not all EIA reports were submitted for review as inter-agency communication is sometimes lacking. The tourism and heritage sector is one of the main focal points of development in the coast region yet it posted only 43 EIA reports out of a total national figure of 1445. Transport, Communication and Agriculture each posted 29 EIA reports, which is quite low compared with the large public works on roads and heightened agricultural activities in the Rift Valley and Western regions of the country. The general trend indicated by the foregoing data shows a steady appreciation of EIAs as a tool for the management of resources in Kenya. More input is however required to increase awareness among the developers and the general public. It is also necessary for an integrated approach towards resource utilization to mitigate adverse impacts and enhance positive benefits from development projects.
<table>
<thead>
<tr>
<th>Sector</th>
<th>Number of EIA Reports</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human settlement and information</td>
<td>737</td>
<td>51</td>
</tr>
<tr>
<td>Commerce and Industry</td>
<td>260</td>
<td>18</td>
</tr>
<tr>
<td>Water Resource</td>
<td>231</td>
<td>16</td>
</tr>
<tr>
<td>Tourism and Heritage</td>
<td>43</td>
<td>3</td>
</tr>
<tr>
<td>Energy</td>
<td>10</td>
<td>7</td>
</tr>
<tr>
<td>Transport and communication</td>
<td>29</td>
<td>2</td>
</tr>
<tr>
<td>Agriculture</td>
<td>29</td>
<td>2</td>
</tr>
<tr>
<td>Others</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1445</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Table 3: Sectoral distribution of EIA reports between 2002 and 2007

**Conclusion**

It is important to note that even though in Kenya there is no legislation that deals with CHIA specifically, the EMCA and NMHA try to regulate project impacts on heritage. However, there are a number of shortfalls in both Acts that to some extent compromise their effectiveness. For instance cultural heritage is not mentioned or addressed in the EIA guidelines. The Act confines the definition of the environment to the natural and biophysical environments only - air, land, fauna, flora and water (EMCA, 1999). NEMA is not obliged by law to give EIA reports to the NMK to provide input on cultural heritage. The NMK is thus obliged, like any other institution or individual, to seek for such reports from NEMA. It would be better if a modality is put in place that will make it mandatory for NEMA to forward reports touching on Cultural Heritage to the NMK for review purposes given that NMK is mandated by NMHA section (d) to research and advice on Cultural heritage matters. Alternatively NMK should be represented in EIA review committees.
Even though EIA guidelines exist, there is no clear guideline on the minimum requirements for public participation. Inclusion of the community members at the earliest stage of a project development will eventually lead to avoidance of future stand offs like the case of Sondu-Miriu. Therefore there is need to create awareness among the public on a project, for it to be accepted by the local community like in the case of Koitalale Samoei Mausoleum. Moreover, results of CHIA often end up with significant results like the case of Sondu-Miriu, Wadh Lang’o site where one of the earliest domesticated bananas was discovered.

It is the mandate of the National Museums of Kenya as stipulated in NMA section (d) to ‘promote cultural resources in the context of social and economic development’ by sensitizing the public on the importance of cultural heritage impact assessment. In the long run potential impacts to heritage will be assessed and mitigation strategies proposed. For effective preservation and conservation of heritage in Kenya more needs to be done in terms of the legal framework to make sure that various legislations that deal with heritage matters are not in conflict but in harmony with programmes, projects or national policies.

The challenge to balance between development and conservation of heritage remains a major concern for heritage managers especially as the general public does not appreciate the role of heritage in national development. In most cases people have sold artefact products and destroyed monuments without knowing that these are part of the heritage they need to preserve and protect. They view heritage as static and irrelevant in terms of economic livelihoods. For this reason the NMK has set a precedence to make heritage sites economically relevant and beneficial to the host communities. This way it is expected that the local communities will see reason to preserve monuments in their vicinity and use CHIA as prerequisites for better management of resources.

There is need to sensitize lead agencies to appreciate inter-agency cooperation as a means towards better management of heritage besides other vulnerable resources. This will enhance exchange of information between them especially those agencies whose role involve land and/or affect the survival of heritage resources. Enormous resources are required for awareness campaigns to educate the public on the need for CHIA prior to development initiatives. It is noteworthy that NEMA is playing a notable role in registering EIA consultants as well as forwarding some reports to NMK for review. However, a lot more
has to be done in checking the standards of the EIA consulting agencies. The trend experienced so far indicates a significant appreciation of EIAs and many agencies are going to follow the guidelines for development.

References


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