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# Assessing Gaps in the Revenue and Royalty Frameworks in the Mining Sector in Kenya

APRIL 8, 2024



# Acknowledgments

The Kenya Human Rights Commission extends its heartfelt gratitude to all its partners and stakeholders for collaborating on this study on Revenue Sharing Mechanisms and Royalty Management in Kenya. Special thanks to Oxfam Kenya for their invaluable support throughout this study. Their commitment to promoting social justice and equitable resource management has been instrumental in shaping this research. We also acknowledge the leadership and expertise of our consultants, Dennis Kyalo and Isaac Wanjiru, who were instrumental in the execution and successful completion of this study.

We sincerely acknowledge government officials at both the national and Kwale County level, communities in Kwale, industry experts, and civil society organisations, especially Haki Madini partners, who generously shared their time, insights, and expertise during the data collection process. Your contributions have fortified the depth and breadth of this study, significantly enriched its quality, and will strengthen revenue-sharing mechanisms in Kenya and beyond.

# Foreword

The Kenya Human Rights Commission is pleased to share the findings of the comprehensive study on Revenue Sharing Mechanisms and Royalty Management in Kenya, focusing on Kwale County. This study critically examines the complexities of administering revenue and mineral royalties in the mining sector, offering practical solutions to address these challenges. Through this research, KHRC aims to contribute meaningfully to discussions on equitable resource management and sustainable development in Kenya.

It is intimated that the most reliable and sustainable sources of domestic resources for governments are taxes and some non-tax instruments, such as royalties and resource rents from mining, as well as license/user fees to access public services.<sup>1</sup> Domestic income can only contribute to enhanced development outcomes when effectively utilised for productive and advantageous public spending. Therefore, governments must prioritise, strengthen, and cultivate the structures governing revenue generation and expenditure. We are confident this report will spark constructive dialogue towards transparent and accountable revenue and royalties management frameworks to benefit Kenyans' current and future generations. We hope this report speaks to every Kenyan, especially host communities in mining areas.

The study employed a robust methodology that included an extensive literature review, in-depth interviews, key informant interviews, and focus group discussions to capture diverse perspectives on revenue sharing and royalty management in Kenya. At the heart of this study are the voices of the community members, government officials, and industry experts who shared their insights and experiences regarding managing mining royalties. By engaging with stakeholders at various levels, the study provides a nuanced review of the existing legal and regulatory frameworks governing revenue management in Kenya's mining sector. It also sheds light on the various elements of distributive justice within the context of resource justice and interlinkage with the progressive enjoyment and realisation of human rights.

In line with our mandate of enhancing human rights-centred governance at all levels, the KHRC has proactively advocated for inclusive, just, transparent and progressive management of the extractives sector. This study aligns with our vision, and we invite you to delve into the analysis of the revenues and royalties' management frameworks to reveal the pathways to an inclusive and progressive mining sector in Kenya.

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<sup>1</sup> Junquera-Varela, R. F, et al. (2017). Strengthening Domestic Resource Mobilization Moving from Theory to Practice in Low- and Middle-Income Countries. The World Bank Group. <https://www.globalfinancingfacility.org/sites/default/files/Strengthening-Domestic-Resource-Mobilization-DRC.pdf>

# Executive summary

## Overview

This report presents findings from a study commissioned by the Kenya Human Rights Commission (KHRC) in February 2024 on Revenue Sharing Mechanisms and Royalty Management in the Mining Sector in Kenya, a case of Kwale County. The findings were drawn from a review of policy documents and discussions with key stakeholders in the mining sector and complemented by in-depth key informant interviews (KIIs) and focus group discussions (FGDs). The findings underscore the mining sector's potential for domestic resource mobilisation and economic and social development through effective mining revenue management and royalty sharing and highlight the opportunities for improvement and benchmarking against international best practices.

## Key legal, regulatory, and institutional gaps and recommendations

The study reveals critical gaps that require interventions for effective governance to ensure communities, counties with mining activities, and the country at large benefit from mining royalties and other benefits.

There are oversight gaps in the Mining Act of 2016 and the Mining (Mineral Royalty Sharing) Regulations of 2023, which do not provide for the oversight of the community share of royalties. Further, there is limited transparency and accountability in Kenya's mining revenue and royalties sharing and use mechanisms. To address the gaps, the recommendations include the need for the national and county governments, national assembly, senate, and civil society organisations (CSOs) to collaborate on harmonising legislation. For example, the proposed Natural Resources (benefit sharing) Bill, 2022, should be harmonised with existing laws, such as the Mining Act of 2016, to avoid contradictions in the revenue sharing framework and ensure the transparent utilisation of mining revenues and royalties. Furthermore, there's a call for the National Treasury and Economic Planning and the Ministry of Mining and Petroleum to develop clear royalty disbursement frameworks and ring-fence the use of royalties. This can be done in consultation with civil societies like Haki Madini and KHRC. Additionally, operationalising mining institutions requires action from the national government, national assembly, and senate while ensuring complementation between various institutions, which involves advocacy from CSOs. Lastly, accountability mechanisms, including reporting, auditing, and oversight on royalties and other benefits allocation and use, require concerted efforts from the government, the parliament, county governments, civil societies, and independent oversight bodies such as the Office of the Auditor General's (OAG) and the Office of the Controller of Budget.

Notably, there is also limited involvement of local communities in decisions around the use of mining benefits, which is to some extent associated with limited disclosure of mining benefits to communities. This calls for CSOs to lead advocacy efforts to ensure local community interests are well represented in the frameworks.

A crucial takeaway from the review of the disbursement mechanism is the need for new regulations to specify the management and utilisation of the 10% mining royalty funds allocated to communities, as the Public Finance Management Act (PFMA) of 2012 primarily addresses the management of public funds at the national and county levels, leaving a gap in governing community royalties. There is a need to expedite the completion of the Natural Resources (benefit sharing) Bill, 2022 and related royalty management regulations that stipulate the utilisation of the National government and County government's share of their mining royalty's revenue. The Mining (Royalty Collection and Management) Regulations, 2023 miss out on important aspects such as transparency in collecting royalties, audit of the processes, oversight, and accountability. Equally, the proposed Mining (Mineral Royalty Sharing) Regulations, 2023, circumvents the issues of transparency and accountability by retaining control of funds in the Ministry of Mining, which beats the purpose of community control of their share of revenue. These are gaps that need to be addressed in the proposed regulations.

## Human rights, transparency, and accountability concerns

The mining sector in Kenya is highly susceptible to unethical practices, including corruption and bribery. This is worsened by cases of porous revenue collection systems and politics because of the high returns associated with the sector. Fair land compensation for individuals and communities displaced by mining

activities ranks as one of the top human rights issues in the sector. This is attributed to poor guidelines on compensation and resettlement of people for mining activities. A case example is in Kwale County, where some people were resettled in a swampy area in Lunga Lunga, with others receiving low prices for their land following displacement to pave the way for the mining of Titanium. This calls for clear guidelines on fair land compensation for individuals and communities displaced by mining activities. There are also concerns about limited transparency among the communities in mining areas on the revenue sharing mechanism, where they do not exactly know how much benefits they are entitled to and how benefits meant for the community are spent or should be spent. There is, therefore, a crucial need to move beyond informing communities and embrace proactive community engagement, participation, and support when receiving and using mining benefits such as royalties. Other elements can include institutionalising and enforcing responsible business conduct among mining companies to ensure they support sustained environmental protection and benefits to communities beyond their mining periods.

## **Lessons from Kwale Community Development Agreement Committees**

The Kwale Community Development Agreement Committees (CDACs) offer lessons that can be adopted in other counties or committees that manage community resources, including royalties. First, CDACs have contributed to the effective development of the areas impacted by mining activities by implementing infrastructure projects such as schools, health facilities, road networks, and economic empowerment programs, improving residents' quality of life. Secondly, the presence of a recruited technical team or secretariat within CDAC offices ensures smooth operation and effective implementation of identified projects, emphasising the importance of skilled personnel in the CDACs. However, challenges such as political interference leading to skewed project prioritisation, high administrative costs, the community's limited voice in mining companies' decisions, the use of mining benefits meant for the community, and the possibility of misuse of funds underscore the need for transparent governance. Further, there is a need for structured regulations to ensure accountability and equitable distribution of benefits among communities while providing for conflict redress mechanisms in case of conflicts between committee members, community, and mining companies. Additionally, addressing capacity gaps among elected members, including setting minimum qualifications for a community representative to be elected, controlling for having politically inclined members, and enhancing transparency and reporting mechanisms, are crucial towards fostering community empowerment and the long-term sustainability of development projects beyond the mining operations.

## **Best practices in mining**

The study also draws some best practices in mining benefits and royalties from various countries such as Australia, Canada, India, the United States, Papua New Guinea, Namibia, South Africa, Tanzania, and Ghana. From Papua New Guinea's consultation mandates to Australia's land councils and Canada's Free Prior Informed Consent (FPIC) principle, community involvement in licensing processes is essential for equitable decision-making in the mining sector. Kenya could adopt such legal frameworks to ensure comprehensive agreements on compensation before granting licenses. Meanwhile, Kenya could also learn from Canada, India, and the United States by enabling county governments to collect royalties directly. This would enhance accountability and prevent evasion from paying royalties by companies. Learning from Australia and Ghana, establishing Foundation Trust Funds could facilitate effective royalty distribution and community investment. Finally, Kenya could learn from Tanzania's Mineral Audit Agency to implement rigorous mineral audits, ensuring accurate royalty payments and revenue transparency.

## **Further research**

Further research can focus on comparing revenues generated from large-scale mining companies and artisanal mining across different counties, examining established processes for royalty collection, reviewing compensation and resettlement frameworks for residents in potential mining areas, and conducting fact-finding research on human rights violations in mining regions.

## Abbreviations and acronyms

ASM	Artisanal and small-scale mining
AWEIK	Association for Women in Energy and Extractives in Kenya
BROP	Budget Review and Outlook Paper
BSA	Benefit-Sharing Agreement
CDA	Community Development Agreement
CDAC	Community Development Agreement Committee
CMK	Cortec Mining Kenya
CRA	Commission on Revenue Allocation
CS	Cabinet Secretary
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
DRM	Domestic Resource Mobilization
EITI	Extractive Industry Transparency Initiative
FATF	Financial Action Task Force
FGD	Focus Group Discussions
GDP	Gross Domestic Product
HUDA	Human Development Agenda
HURIA	Human Rights Agenda
KCM	Kenya Chamber of Mines
KEPSA	Kenya Private Sector Alliance
KER	Kenya Economic Report
KHRC	Kenya Human Rights Commission
KIIs	Key Informant Interviews
KIPPRA	Kenya Institute for Public Policy Research and Analysis
KOGA	Kenya Oil and Gas Association
KRA	Kenya Revenue Authority
MDACs	Ministries, Departments, Agencies and Counties
MNCs	Multinational Corporations
MRA	Mining Regulatory Authority
NMC	National Mining Corporation
NMI	National Mining Institute
PWA	Pacific Wildcat Resources Corps
PFM	Public Finance Management
PFMA	Public Finance Management Act 2012
RMO	Regional Mining Officer
TMAA	Tanzania Mineral Audit Agency

# Contents

Foreword	1
Executive summary	2
List of Figures	6
List of Tables	6
Abbreviations and acronyms	7
1.0 INTRODUCTION	1
1.1 Background: an overview of the mining sector	1
1.2 Research objectives and proposed approach	1
2.0 ANALYSIS APPROACH AND REPORT WRITING METHODOLOGY	3
2.1 Summary of the data collection, analysis approach, and report writing methodology	3
2.2 Data collection	3
2.2.1 Desk review	3
2.2.2 Key informant interviews (KII)	3
2.2.3 Focus group discussions (FGDs)	4
2.2.4 Case studies	4
2.3 Data analysis and report writing	4
3.0 OVERVIEW OF THE MINING SECTOR	4
3.1 The mining sector in Kenya	4
3.2 The mining sector in Kwale	6
3.3 Mining revenue sharing mechanisms and royalty management	7
4.0 CHALLENGES, GAPS, AND OPPORTUNITIES IN THE MINING SECTOR	10
4.1 Objective 1: Review of legal, regulatory, policy, and institutional frameworks governing mining in Kenya	10
4.1.1 Legal, regulatory, and policy frameworks	10
4.1.2 Institutional Frameworks	15
4.1.3 Gaps in the legal, regulatory, policy, and institutional frameworks governing mining in Kenya	18
4.1.4 Mineral Royalties as a key opportunity for accelerating domestic resource mobilization (DRM)	20
4.2 Objective 2: International and regional best practice in revenue sharing and royalty management	21
4.2.1 International best practices in revenue sharing and royalty management	21
4.2.2 Regional best practices in revenue sharing and royalty management	25
4.3 Objective 3: Transparency, accountability, oversight, and human rights issues	27
4.3.1 Accountability and transparency in mining in Kenya	27
4.3.2 Human rights considerations in revenue sharing practices	30
5.0 CONCLUSIONS AND RECOMMENDATIONS	34
5.1 Gaps and recommendations	34
Institutional framework in the mining sector	36
5.2 Summary of proposals for best practices	40
6.0 FURTHER RESEARCH	41
ANNEX 1: LIST STAKEHOLDERS CONSULTED IN THE STUDY	43
ANNEX 2: TOOLS FOR DATA COLLECTION	44
A. Key Informant Tool (KII) for County and National Government Officials and Formal CSOs	44
B. Key Informant Tool (KII) for Mining Companies/Multinationals	47
C. Focus Group Discussion (FGD) Tool for Local Community Representatives:	49

## List of Figures

Figure 1: Benefit sharing with the local communities	8
Figure 2: Current mining revenue collection framework	8
Figure 3: Mining revenue distribution mechanism	10
Figure 4: Mining revenue sharing and the respective disbursement legal framework	14

## List of Tables

Table 1: Kwale County mineral exploration activities by various some companies	7
Table 2: Summary of legal, regulatory and policy framework guiding revenue sharing in Kenya's mining sector	12
Table 3: Summary of institutions that govern the operations in Kenya's mining sector	15
Table 4: List stakeholders consulted in the study	42



# 1.0 INTRODUCTION

## 1.1 Background: an overview of the mining sector

The extraction of mineral resources like coal, petroleum, natural gas, sandstone, metallic resources such as titanium, gemstones, zinc, lead, gold, and copper yields revenue for mining companies, governments, local communities, and creates jobs and infrastructure in mining regions. Conversely, mineral extraction can result in adverse environmental and social impacts for nearby communities, including displacement, loss of livelihoods, environmental degradation, pollution, and health issues.

Mining typically refers to the extraction of valuable minerals or other geological materials from the earth, while “extractives” is a broader term encompassing various activities involved in extracting natural resources, including oil, gas, and minerals. In Kenya, the extractive sector encompasses a broader spectrum, including mining, oil, and gas.<sup>2</sup>

**The governance of the mining sector involves various legal and regulatory frameworks and government decisions** throughout its value chain, including decisions to extract, regulation of extraction activities, revenue arrangements, and fiscal management of revenue resources. Africa is endowed with numerous resources, and countries are tightening their legal, regulatory and policy frameworks to guide the development of the mining sector. African Union Mining Vision (2009) aims to position mining as a central force driving Africa’s socio-economic development. Legal frameworks in many resource-rich countries provide for the development of benefit-sharing agreements (BSAs), which determine how economic value created by mining activities is shared between companies and stakeholder communities. Additionally, some countries, like Ghana, allocate a portion of mining royalties directly to affected communities, regardless of any BSA. In Kenya, the Natural Resources (Benefit Sharing) Bill of 2022 defines royalties as fees paid by entities for the exploitation or exploration of natural resources.

As a result, the Kenya Human Rights Commission (KHRC) commissioned this study to address the need for transparent and progressive management of mining sector revenues and royalties in Kenya. The study was conducted over a period of 20 days between February and March 2024.

## 1.2 Research objectives and proposed approach

The study sought to address the following objectives:

- 1. Objective 1:** Critically assess Kenya’s mining revenue management legal, regulatory, policy and institutional frameworks/models, establish if there is any incoherence and or duplication with the Public Finance Management Act (PFMA) 2012 and advise on their adequacy and effectiveness as fiscal instruments for actualising economic and social benefits for the national government, respective county government and local communities.

**Proposed approach:** A critical review of existing literature complemented by key informants’ interviews (KIs) and focus group discussions (FGDs), identifying strengths, gaps and any incoherence or duplication and providing recommendations for enhancement.

- 2. Objective 2:** Benchmark Kenya’s royalty framework and models, draw comparisons with selected international and regional good practices and test their ability to compensate mineral owners effectively, give back to communities, mitigate conflicts, and stand the test of responsible business.

**Proposed approach:** A critical review of existing literature to benchmark Kenya’s mining benefits and royalty frameworks with practices in other countries, to draw comparisons, and assess their suitability to work in the Kenyan Context.

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2 IHRB. (2016). The “Human Rights in Kenya’s Extractive Sector: Exploring the Terrain 2016” report

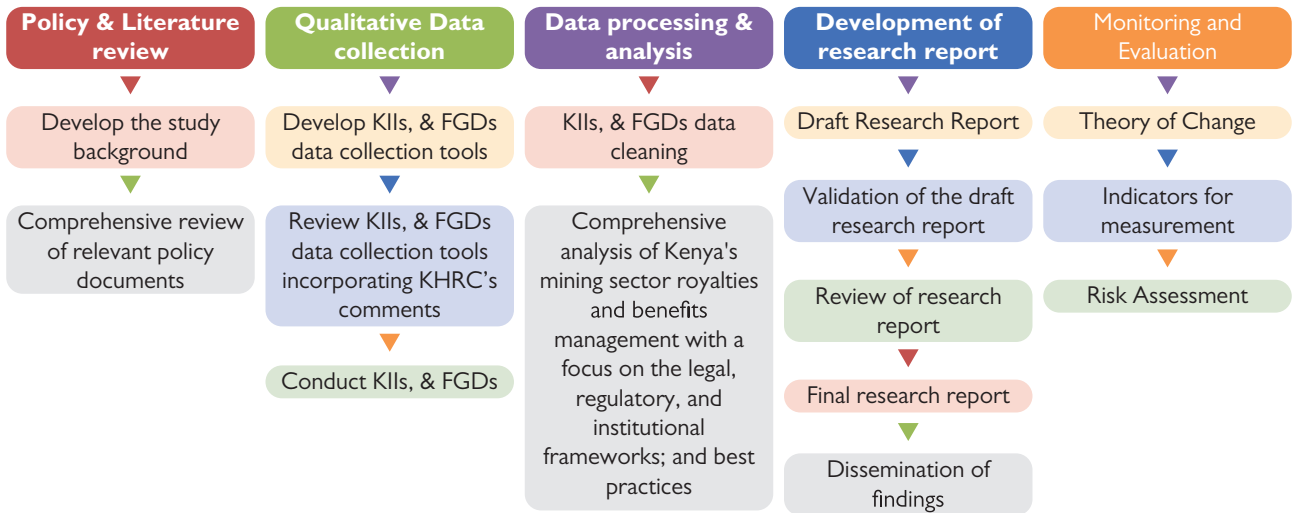
- 3. Objective 3:** Assess the mechanisms for management, reporting and tracking mining practices, benefits, and distribution by the national and county governments, as well as at the community level in view of strengthened transparency, accountability and oversight by communities and interested stakeholders.

**Proposed approach:** Assess current mechanisms and propose enhancements to ensure strengthened transparency, accountability, and community oversight. Explore current approaches in Kwale County.



## 2.0 ANALYSIS APPROACH AND REPORT WRITING METHODOLOGY

### 2.1 Summary of the data collection, analysis approach, and report writing methodology



### 2.2 Data collection

#### 2.2.1 Desk review

A comprehensive review of existing literature, laws, policies, and institutional frameworks related to mining sector revenue management in Kenya was undertaken.

#### 2.2.2 Key informant interviews (KII)

The consultant's team interviewed key stakeholders, including national and county government officials, community representatives, civil society organisations, and industry experts to gather insights and perspectives.

To gain an in-depth understanding, support, and triangulate the findings from the review of relevant existing mining sector revenue management with a focus on the legal, regulatory, and institutional frameworks and models, the consultants' team collected qualitative data through Key Informant Interviews (KII) to the extent possible.

In consultation with members of the Kenya Human Rights Commission (KHRC) technical team, the consultants' team developed appropriate KIIs discussion guides. The guides kept the discussions focused and ensured that the different discussions were conducted in a similarly structured way, ensuring that the data was collected systematically. The guide included a script for the introduction of the study, purpose, and guiding questions. The interviews were conducted via online and in-person meetings.

The consultants' team documented discussions by taking notes, obtaining consent from interviewees beforehand, and recording when necessary. The combined approaches provided a clear understanding of participants' statements and reactions to various discussed issues.

Annex I of this report provides the list of relevant stakeholders who informed the study's primary data.

### 2.2.3 Focus group discussions (FGDs)

To extract pertinent information, the consultant's team conducted two focus group discussions (FGDs), one with 11 participants and the other with 9. These discussions included youth, women, individuals with disabilities, business representatives, members of civil society, and experts in the mining sector.

### 2.2.4 Case studies

The consultants analysed case studies from selected countries, including Australia, Canada, India, the United States, Papua New Guinea, Namibia, South Africa, Tanzania, and Ghana, to benchmark international and regional best practices in mining sector revenue management.

## 2.3 Data analysis and report writing

The consultants analysed data from Key Informant Interviews (KIIs) and Focus Group Discussions (FGDs) using thematic content analysis. This approach identified common themes and key issues raised by participants. Additionally, an in-depth literature review supplemented the primary data to formulate conclusions and recommendations in the report. A PowerPoint presentation summarising key findings and recommendations was also created to complement the main report.



## 3.0 OVERVIEW OF THE MINING SECTOR

### 3.1 The mining sector in Kenya

Kenya is a highly endowed nation with a variety of natural resources and potential deposits of rare minerals. Among the mineral resources found in Kenya are diatomite in Kariandusi, Rift Valley, mineral sand ore in Kwale, fluorspar in Kerio Valley Elgeyo Marakwet, vermiculite and gold in larger Western Parts of Kenya, coal in Kitui, gemstones, limestone, silica sand, manganese, gypsum and iron core, among others.

Since gaining independence, the growth of Kenya's mining sector has been sluggish. This tepid progress, compounded by issues such as a lack of political support and insufficient technical capacity, has hindered its development. The sector relied heavily on the Mining Act of 1940. However, with the inception of Kenya Vision 2030, the mining sector was outlined as the seventh sector that would spur the country's economic growth. The execution of this policy document led to several developments in the sector, notably the revision of the Mining Act in 2012, followed by the enactment of the Mining Act 2016 and the Mining and Mineral Policy 2016. Additionally, various regulations have been instituted to guide mining activities.

Devolution in Kenya has significantly enhanced resource management by granting county governments and local communities the opportunity to engage in decision-making processes and the administration of mining activities within their respective areas. Article 62 of the Kenyan Constitution designates minerals and mineral oils as public land, giving the national government the authority to establish the legal framework for their utilisation while ensuring public participation in resource management.

The Kenyan Constitution's first schedule creates 47 counties, and the fourth schedule delineates the functions of the national and county governments. Regarding mining, the **national government is responsible for protecting natural resources, while county governments implement national policies on specific natural resources.**

**In the last decade, Kenya has witnessed a surge in investments in oil, gas and mining precipitated by the discovery of oil in Turkana in 2012, which spurred the possibility of Kenya becoming an oil producer.**<sup>3</sup> Subsequent discoveries of valuable minerals in Kwale County and significant coal deposits in Kitui County have further propelled the growth trajectory of the Kenyan mining sector. This expansion complements the existing extraction activities, including the mining of industrial minerals, as well as artisanal and small-scale mining (ASM), prevalent in the coastal and western Kenya regions for gemstones and gold, respectively. Kenya boasts abundant resources such as natural gas, petroleum, and minerals like coal and niobium.

Institutions and legal frameworks have been established to regulate the exploitation and revenue sharing of these resources. The Mining Act of 2016 instituted bodies like the National Mining Corporation and Mineral Rights Board, while the Petroleum Act of 2019 established the National Upstream Petroleum Advisory Committee.

The key players in the mining sector comprise the national and county governments, various Ministries, Departments, Agencies and Counties (MDACs), including the Ministry of Energy and Petroleum, Ministry of Mining, Blue Economy & Maritime Affairs, National Treasury and Economic Planning, Ministry of Investments, Trade and Industry, Ministry of Environment, Climate Change and Forestry, Cabinet Extractives Committee (CEC), National Environmental Management Agency, National Mining Corporation, Commission on Revenue Allocation (CRA); Kenya Revenue Authority, Kenya National Bureau of Statistics. Furthermore, parliamentary and senate committees for Mining and Energy, Kenya National Oil Corporation, National Land Commission, regional administrations, multinational companies, local communities, donor organisations, and development partners like the African Development Bank, World Bank, and United

3 Institute for Human Rights and Business. (2016). Human Rights in Kenya's Extractive Sector Exploring the Terrain. [https://www.ihrb.org/uploads/reports/IHRB%2C\\_Executive\\_Summary\\_-\\_Human\\_Rights\\_in\\_Kenyas\\_Extractive\\_Sector\\_-\\_Exploring\\_the\\_Terrain%2C\\_Dec\\_2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C_Executive_Summary_-_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf)

Nations are significant participants. Additionally, non-governmental organisations such as the Kenya Human Rights Commission (KHRC) and Revenue Watch Institute, civil society groups including the Association of Women in Energy and Extractives, academic institutions, Faith-Based Organizations, International Council on Mining and Metals and community-based organisations, along with organised private sector associations such as Kenya Oil and Gas Association (KOGA), Kenya Private Sector Alliance (KEPSA), and Kenya Chamber of Mines (KCM), also play a vital role. Other players are local communities and individuals in artisanal and small-scale mining (ASM) and commercial mining companies such as Base Titanium Limited (which has operations in Kwale County). The list of relevant stakeholders to be interviewed for this study is provided in Annex I of this report.

The extractives sector, including mining, is a vital contributor to Kenya's GDP. Currently, the extractive sector contributes only 1% of Kenya's GDP and less than 3% of export revenue. However, it has the potential to expand significantly, potentially reaching 10% of GDP, thereby enhancing domestic resource mobilisation and fostering economic and social development. Nevertheless, large-scale operations in the sector are dominated by multinational companies, prompting the government to strengthen regulatory frameworks to ensure the country benefits from resource use, especially for non-renewable mineral resources. The Kenya Local Content Bill (2023) aims to ensure local businesses, the government, and communities benefit from natural resources, as anticipated in the Kenya Economic Report (KER) of 2019 published by the Kenya Institute for Public Policy Research and Analysis (KIPPRA). The KER 2019 underscores revenue trends in the mining subsector from 2014 to 2018, showing increased revenues but declining royalties, indicating revenue leakages. The Income Tax Act of 2014 and Tax Procedure Code of 2015 outline revenue sharing in mining, but there is a lack of clear mechanisms for channelling generated revenues to counties and communities for accountability and transparency. Information sharing is vital to address accountability gaps in revenue management.

### **Notable gaps: in Kenya's mining sector**

- As much as Kenya is proposing the Natural Resources (Benefit Sharing) Bill of 2022, it is imperative to explore the pertinent issues that will guide the revenue sharing such as the issues of transparency, legal framework and management of the revenues generated from exploitation of the resources.
- Currently, there is no clear framework for royalty disbursement in Kenya.

## **3.2 The mining sector in Kwale**

Kwale County is among the 47 counties in Kenya. It is primarily categorised as Arid and Semi-Arid Land (ASAL), with an estimated population of 866,820 within an area of 8,267 km<sup>2</sup> based on the 2019 census. The county comprises four sub-counties: Kinango, Matunga, Msambweni, and Lunga Lunga.

The county is endowed with significant massive deposits of already discovered minerals and has other potential minerals for exploitation. These include Titanium (rutile, ilmenite, zircon) found in Nguluku and Shimba Hills; Gemstones in Kuranze; Rare Earth Elements (niobium, phosphates) in Mrima Hills and Samburu; Silica Sands in Waa, Tiwi, and Ramisi; Zinc, Lead, and Copper in Mkang'ombe, Mwache, Dumbule, and Dzitenge; Baryte in Lunga-lunga; Coal in Maji ya Chumvi; Sandstones in Mariakani; Limestone in Shimoni and Waa; Coral rocks along the coastline; and potential offshore oil and gas reserves.<sup>4</sup> Lastly, recent sediments and deposits, such as the Marafa and Magarini formations, are also present along the coastal strip.<sup>5</sup> Presently, Silica Sands and Duruma Slates are the most mined minerals in the communities of Kwale.

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4 Human Rights Agenda (HURIA), 2014, Mining And Environment: An Assessment of Mining Companies' Compliance with Environment, Health and Safety Regulations and Standards in Kwale, Kilifi and Taita Taveta Counties in the Coast Region of Kenya

5 Security Research and Information Center (2018). Natural Resources Governance and Management of Emerging Conflicts Arising from Extractive Industries: A Case Study of Kilifi, Kwale and Turkana Counties. Nairobi, Kenya

**Table 1: Kwale County mineral exploration activities by various some companies**

	<b>Mining Activities</b>	<b>Minerals Location</b>	<b>Exploring Companies</b>
1	Limestone	-Waa	- Kenya Calcium Products Ltd
2	Titanium	-Nguluku	-Base Titanium Limited
		-Maumba	
		-Shimba hills	
3	Niobium	-Mrima Hills	- Pacific Wildcat Resources Corps (PAW)
			-Cortec Mining Kenya (CMK)
4	Silica Sand	Waa, Tiwi and Ramisi	-Milli Glass Limited,
			-Kenya Breweries
			-Glass Limited
			-Eastern Chemicals
5	Gemstones (Small Scale)	Kuranze	Napass Gems Ltd
			-Nadan Mining Co
6	Sapphire, Tourmaline, Amethyst, Topaz,	Kuranze	-Harrison Dodi & Sons
			-Lillian M. Gems
			-Twins Horse Mining Co
			-Napass Gems Ltd

Source: Security Research and Information Center, 2018; Human Rights Agenda (HURIA), 2014.

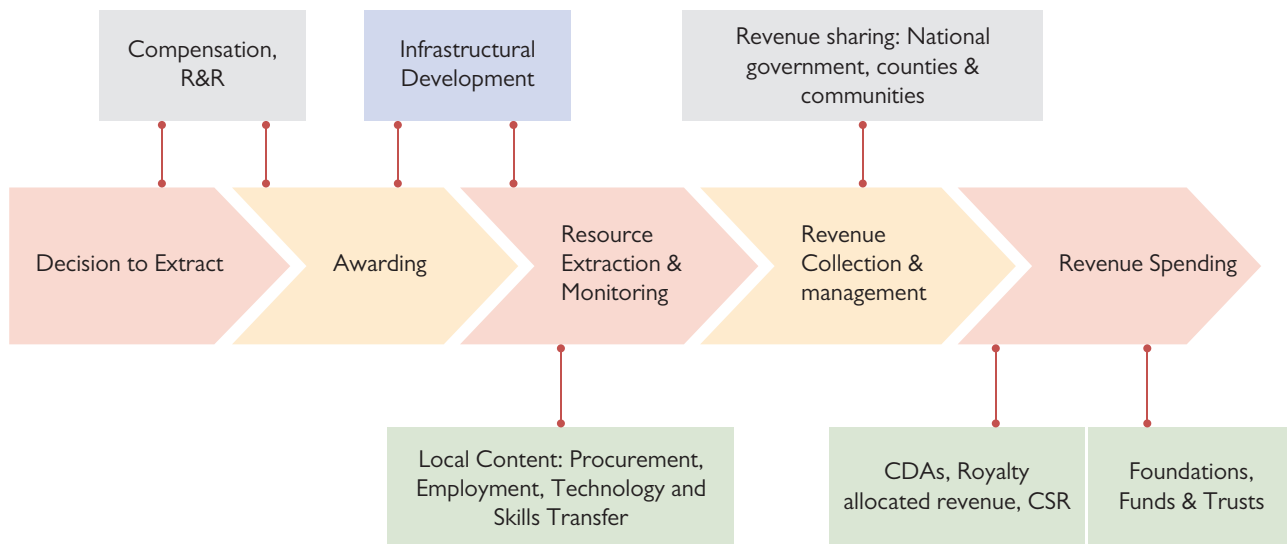
### **Notable gaps and concerns in Kwale’s mining sector**

- There has been consistent opposition to mineral exploitation in the county. Local leaders, organised groups, and communities have expressed concerns regarding environmental impacts, especially perceived high radioactivity.
- There are also issues related to communal or individual land compensation and equitable sharing of benefits among stakeholders.

### **3.3 Mining revenue sharing mechanisms and royalty management**

In various countries, the government has laid down mechanisms to ensure that mining companies share revenues with the local communities across the value chain. The decisions should be made during critical mining stages such as the negotiation phase, awarding of licensing, extraction, revenue collection and spending. The ideal situation is to involve all the stakeholders in all these critical stages. For instance, critical interventions should be in place when deciding to license and award license holders, including transparency, public involvement, competitive bidding, well-defined contracts, social and environmental assessments, and clear guidance on taxation and royalties payment. In addition, mechanisms for benefit sharing across the value chain are important. This could be in the form of compensation to resource the right holders, infrastructural development at initial stages and share of generated revenue. This is illustrated in Figure 1 below:

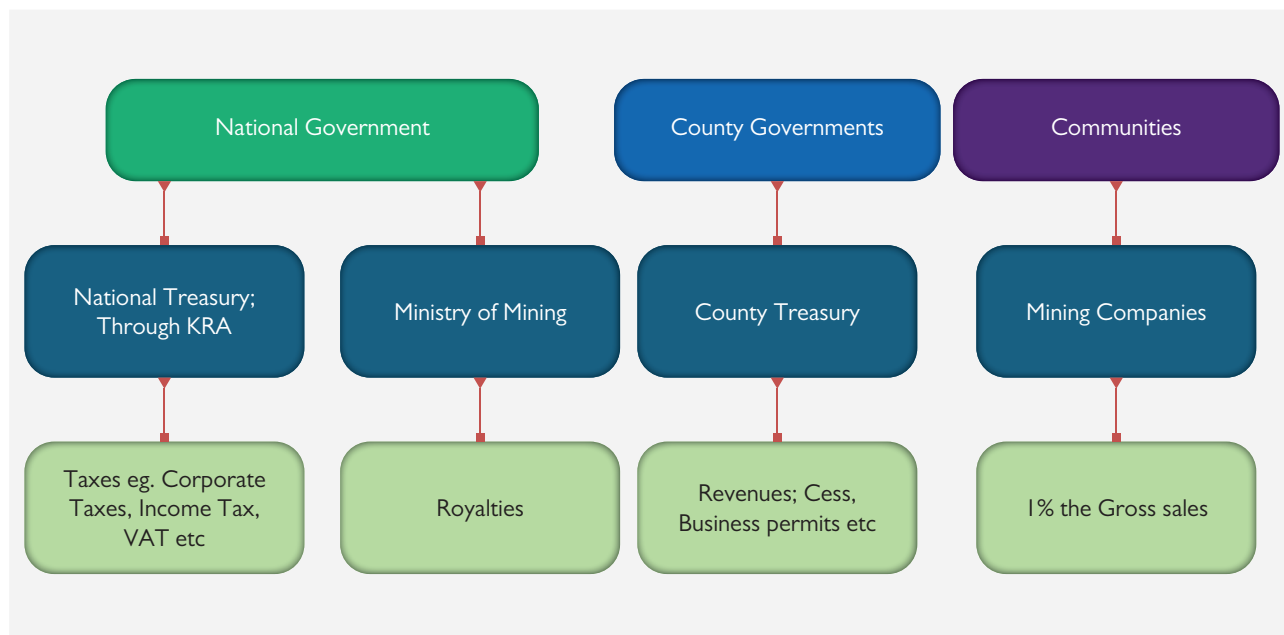
**Figure 1: Benefit sharing with the local communities**Source: Wanjiru I, et al. 2020; NNGI 2010; United nation 2015



Source: Wanjiru I, et al. 2020; NNGI 2010; United nation 2015

Revenue in the mining sector in Kenya is generated in four different ways: national government tax collections and license fees; county governments’ levies through cess and business permits; royalties collected from mining companies; and a 1 % gross sale share that goes directly to the communities through Community Development Agreements. This is effectively illustrated in Figure 2.

**Figure 2: Current mining revenue collection framework**



**Which frameworks in Kenya guide mining revenue sharing?** In Kenya, several legal and policy frameworks prescribe the taxes, fees, and royalties to be paid by mineral rights holders and the modalities of benefit sharing. **Section 117 (2) (k)** of the Mining Act 2016 requires mineral holders to pay royalties, cess (a form of tax charged by county governments on goods when they move across county borders), taxes, and other fiscal requirements.

**How should royalties be paid in Kenya?** **Section 183 (1)** requires the mining entities to pay royalties as per the rates or classes provided by the office of the County Secretary in charge of the Ministry of Mining. The Act under **Section 186 (1)** stipulates that the mining entity should remit the payable royalties



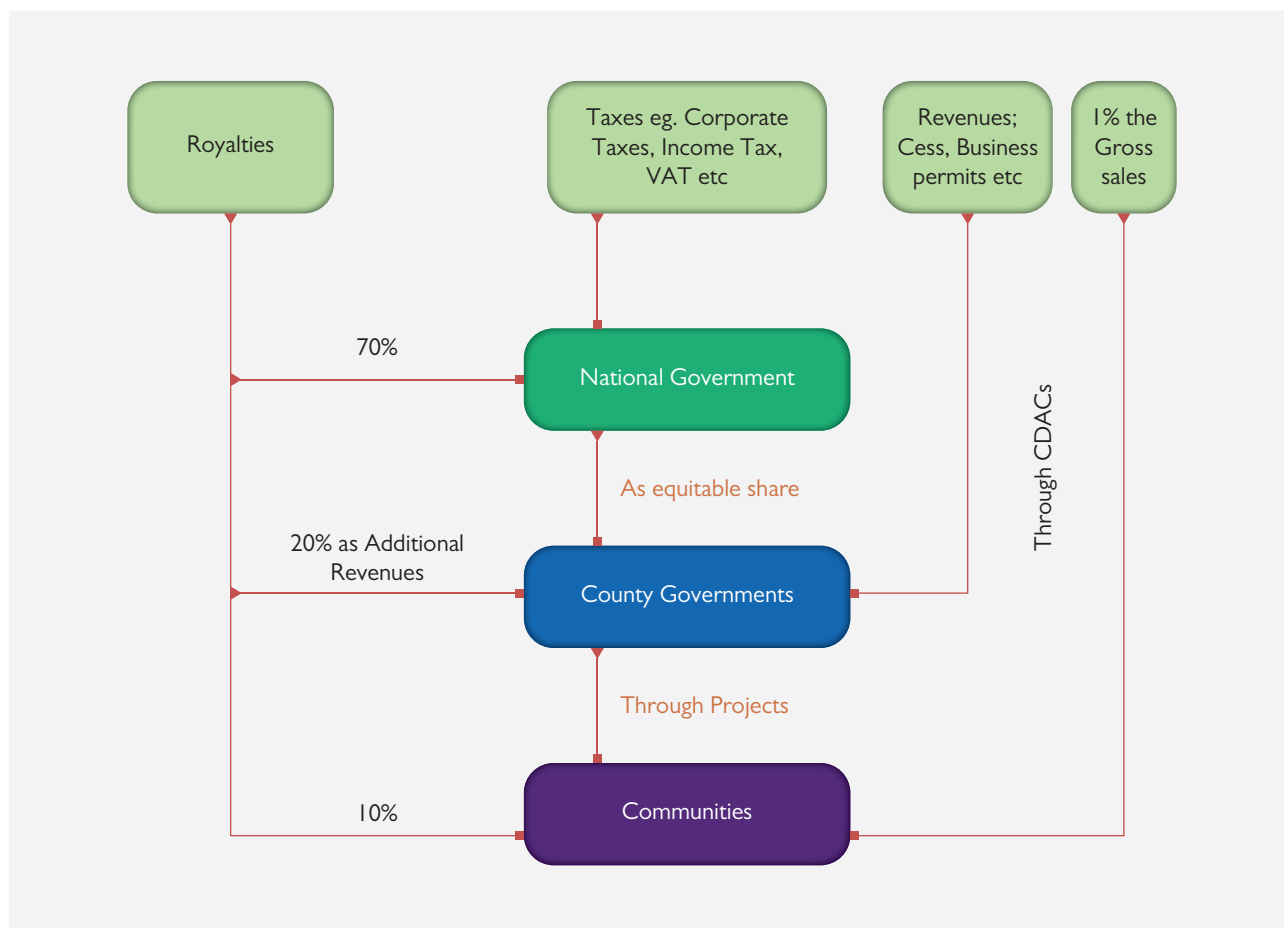
through a designated account for royalties' collection as provided by the State Department responsible for mining. During payment, **Section 186 (2)** of the Mining Act 2016 states that the mineral holder should provide a statement indicating the mineral details, appropriate point of sale, and the dates and amount of royalties paid. By the fifth date of every month, the mining entity is required under the act to provide a royalty liability report, and the responsible State Department will issue a receipt for the same. **Section 183 (5)** provides a modality to distribute the paid royalties. Such royalties shall be distributed as follows:<sup>6&7</sup>

- 70% to the National Government;
- 20% to the County Government; and
- 10% to the community around the mining areas

In the event that the mining entities default in payment, the Mining Royalties Cadastre Office issues a 30-day notice to the entities to pay all the outstanding royalties. If the mining entities fail to pay within the notice period, the Cadastre office records all the outstanding royalties from the mineral holders in a Cadastre register and the Cabinet Secretary is required to suspend their licenses or permits immediately. In case the mineral holders fail to pay for the royalties, the cabinet secretary has the prerogative to revoke their licenses.

The distribution mechanism of mining revenues and benefits is illustrated in Figure 3.

**Figure 3: Mining revenue distribution mechanism**



6 Njau, B (2021). Royalties in the Extractives Sector In Kenya: A Focus On Non-Renewable Resources Framework, Accessed on 25/02/2014 on: <https://www.slideshare.net/TonyLisko/a-paper-on-royalties-in-the-extractives-industry-in-kenya-non-renewable-resources>

7 The National Treasury of Kenya (2022). Proposed framework for sharing of mineral royalties revenue among the national government, county governments and communities. <https://www.treasury.go.ke/wp-content/uploads/2022/05/Framework-for-sharing-of-royalties.pdf>

## 4.0 CHALLENGES, GAPS, AND OPPORTUNITIES IN THE MINING SECTOR

### 4.1 Objective 1: Review of legal, regulatory, policy, and institutional frameworks governing mining in Kenya

This objective aims to critically assess Kenya's mining revenue management legal, policy and institutional frameworks/models, establish if there is any incoherence and or duplication with the Public Finance Management Act (PFMA) 2012 and advise on their adequacy and effectiveness as fiscal instruments for actualising economic and social benefits for the national government, respective county government and local communities.

#### 4.1.1 Legal, regulatory, and policy frameworks

##### 4.1.1.1 Review of the legal, regulatory, and policy frameworks

The Kenya Vision 2030, particularly the Medium-Term Plan 2, sets policy direction on mining. The document envisaged the development and review of legal frameworks and the formation of institutions in the sector; and this led to the development of Mineral Policy 2016, Mining Act 2016, the review of the Energy Bill of 2012, the review of Petroleum (Exploration and Production) Act (Cap 308) and establishment of institutions such as the mining corporation. More importantly, the policy document envisaged the evolution of a single fiscal regime for mining and engagement in the Extractive Industry Transparency Initiative (EITI).

The Mining Act of 2016 offers guidelines to the mining industry on royalties and revenue-sharing mechanisms. On royalties' payment, the Act **requires** a mineral rights holder to pay royalties to the State. The amount of royalties is based on the total value of sales. Additionally, the legislation empowers the Cabinet Secretary to establish the rates of royalties to be paid. According to Section 255(2) of the Act, any regulations established under the laws replaced by this legislation will remain valid as long as they align with the new legislation until the Cabinet Secretary formally revokes them. On August 16, 2013, the Cabinet Secretary for Mining issued the Mining (Prescription of Royalties on Minerals) Regulations of 2013 through Legal Notice No. 187. These regulations set out the royalty rates payable by mineral rights holders for the various mineral commodities.

On revenue distribution, the Mining Act of 2016 section 183(5) specifies that 70% of the royalty revenues will go to the National Government, 20% to the County Government, and 10% to the community where the mining activities occur. Additional Allocation Act guides the disbursement of additional allocations to county governments.

Other relevant laws include the Public Finance Management Act (PFMA) 2012, the Environmental Management and Coordination Act 1999, the Tax Procedures Act 2015, the Land Act 2012, the Public Procurement and Disposal Act, the Finance Act, the Land Registration Act 2012 and the Community Land Act 2016.

##### 4.1.1.2 Public Finance Management Act (PFMA) 2012 and link to mining benefits

The Public Finance Management Act (PFMA) 2012 is the principle legislation and the legal framework that guides the management of public finance at both the national and county government levels in line with the principles of public finance as set out in the Constitution of Kenya. Additionally, the legislation mandates that public officials entrusted with financial management responsibilities are answerable to the public through Parliament and County Assemblies for their stewardship of these funds.

**Kenya’s mining royalty collection and management are not expressly mentioned under the overarching Public Finance Management (PFM) framework, standards, or regulations.** In addition, while the PFM Act 2012 provides structures, institutions, and procedures to ensure prudent fiscal management and management of public funds, it does not incorporate clear structures concerning the management, use, disbursement, and administration of royalties at the national and county levels. Nonetheless, the general principles of prudent management of revenues for public benefit would still apply, including ensuring openness and accountability, ensuring revenues from mining are used prudently and responsibly and ensuring management of revenues from mining is responsible with clear fiscal reporting. The PFM Act offers little guidance on systematically and comprehensively identifying the most effective actions and systems that national and county governments should take to strengthen their PFM systems in relation to revenue derived from natural resources. Though this is a gap within the PFM Act 2012 itself, this can adequately (and perhaps more suitably) be covered in separate regulations specific to Mining.

#### 4.1.1.3 Summary of legal, regulatory and policy framework in Kenya’s mining sector

A summary of the legal, regulatory and policy framework that sets the pace in enhancing resource sharing and royalty management is highlighted below.

**Table 2: Summary of legal, regulatory and policy framework guiding revenue sharing in Kenya’s mining sector**

Legal/ Regulatory/ Policy framework	Highlights on resource sharing and royalties management
Mining and Minerals Policy 2016	<ul style="list-style-type: none"> <li>It covers various aspects of mining activity. It emphasises sustainability and addresses community engagement, environmental concerns, and mining benefits.</li> <li>Among other issues, the policy provides for the development and implementation of a stable, transparent, predictable, and competitive fiscal regime which will provide for the collection of fees, royalties, and rents</li> <li>The Policy envisaged the creation of a Mineral Audit Agency, which would determine the appropriate royalties and taxes to be paid to the Government for the minerals produced. The agency will prevent royalties’ evasion by monitoring and auditing the production and exportation of minerals.</li> </ul>
Mining Act 2016	<ul style="list-style-type: none"> <li>It has fiscal provisions that support equitable distribution of revenues.</li> <li>Allows transparency by requiring publication of mining activities in the public domain.</li> <li>Provides that the Ministry of Mining make publication of production levels and revenue receipts from mining activities.</li> </ul>
The Natural Resources (Benefits Sharing) Bill, 2022	<ul style="list-style-type: none"> <li>Though a draft and subject to change, it provides for the establishment of a benefit-sharing system in utilisation of natural resources between the companies involved, national government, county governments and the community. It also seeks to establish Community Benefit Sharing Committees and Local Benefits Sharing Forum in the interest of enhancing transparency and good governance of mineral revenues.</li> </ul>
The Mining (Community Development Agreement) Regulations, 2017	<ul style="list-style-type: none"> <li>The Community Development Agreement (CDA) is governed by the Mining (Community Development Agreement) Regulations, 2017. The regulations establish the modalities of cooperation and engagement between the community and large-scale mineral rights holders, with the aim of ensuring that community interests are protected, and relevant benefits accrue to the affected community as appropriate.</li> </ul>

<p>Constitution of Kenya (2010)</p>	<ul style="list-style-type: none"> <li>• The Constitution introduces the principles of good governance, which, among other things, considers aspects of inclusivity, transparency and accountability, human dignity, equity, equality, non-discrimination, rule of law, participation of people and social justice.</li> <li>• Article 69 requires the state to ensure sustainable exploitation, utilisation, management and conservation of environmental and natural resources and ensure the equitable sharing of accruing benefits.</li> <li>• Articles 202 (1) and (2) guide the equitable revenue sharing and additional allocation to the counties.</li> <li>• Article 201 highlights the principles of public finance, which include openness and accountability, prudent use of public funds, sharing burdens and benefits from resources and public borrowing between current and future generations, responsible financial management, and clear fiscal reporting.</li> </ul>
<p>The Public Procurement and Disposal Act, 2015 (the PPDA 2015)</p>	<ul style="list-style-type: none"> <li>• This Act provides instructions regarding the acquisition of goods, services, and assets, as well as their disposal. It applies to all governmental bodies and public entities concerning procurement planning, processing, inventory and asset management, asset disposal, and contract management. The Act gives direction on the utilisation of public funds through procurement. This is relevant for the mining sector because disbursed mining revenues benefit communities through procured projects, which need to follow the stipulated guidelines in the aforementioned Act.</li> </ul>

**Figure 4: Mining revenue sharing and the respective disbursement legal framework**

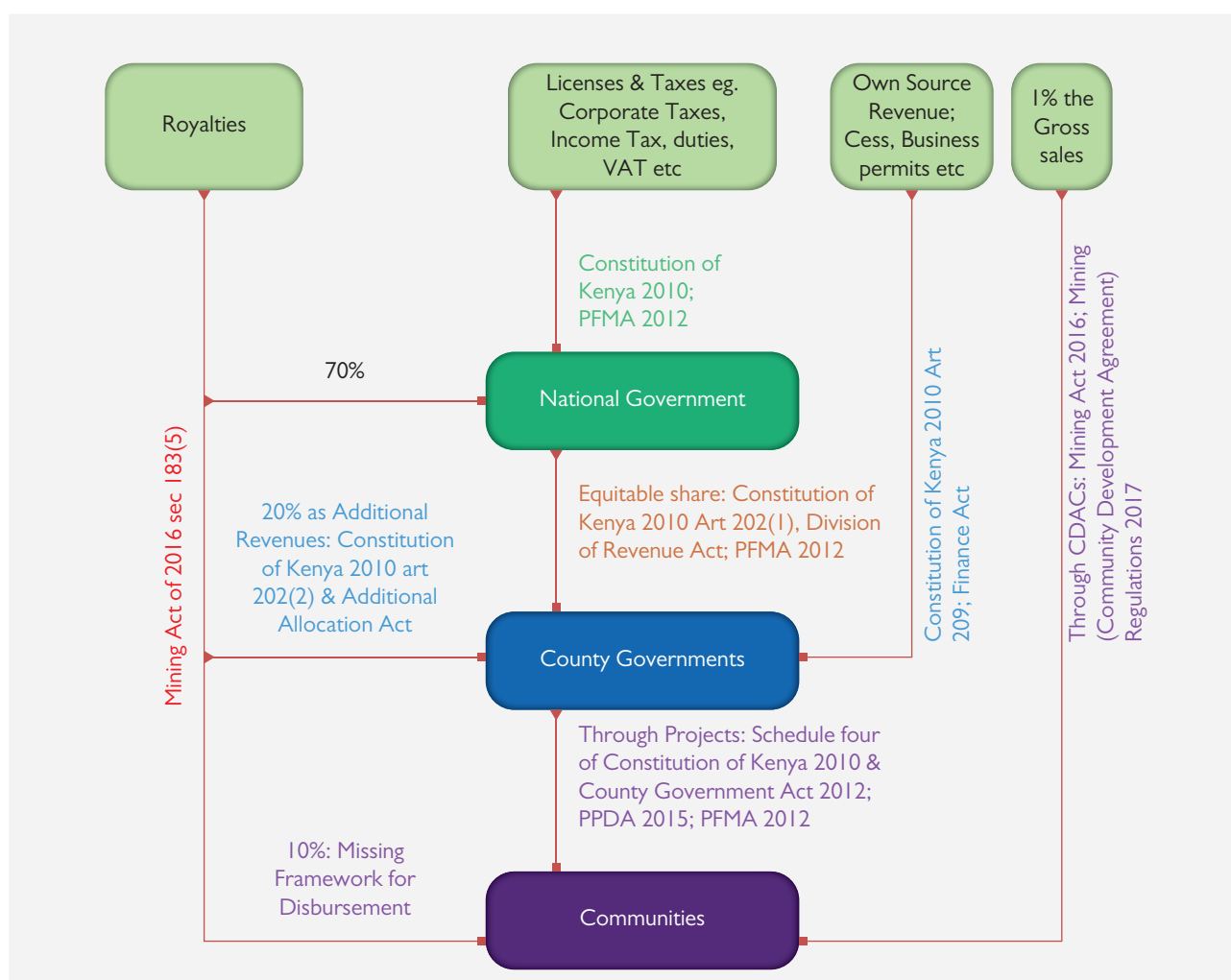


Figure 4 illustrates the revenue sharing mechanism in the mining sector and the respective legal framework providing the revenue disbursement to the respective beneficiaries.

## 4.1.2 Institutional Frameworks

### 4.1.2.1 National Institutional Frameworks

Below is a summary of institutions that govern Kenya's mining sector operations. It also includes the policies or legal frameworks that established them.

**Table 3: Summary of institutions that govern the operations in Kenya's mining sector**

Policy/ legal Framework	Institutions created	Role of the institution
Mining and Minerals Policy 2016	Proposes Mineral Audit Agency	The Mineral Audit Agency determines appropriate royalties for the minerals produced and taxes owed to the Government from mineral production; prevents mineral smuggling and royalty evasion; oversees and inspects minerals produced and exported; audits the capital investments and operational expenses of mining firms; assess and audit produced minerals and those exported; and audit mining companies financial statements; and offer advice on the competitiveness of Kenya's mining sector and fiscal regulations compared to global standards.
Mining Act 2016	Directorate of Mines	Oversee and encourage activities to advance the extraction and utilisation of minerals and mineral resources.
	Directorate of Geological Surveys	Brings together the Government of Kenya's initiatives in gathering and storing geological data associated with prospecting into a centralised national repository.
	Mineral Rights Board	Provides guidance to the Cabinet Secretary regarding the approval, denial, maintenance, renewal, suspension, cancellation, modification, transfer, exchange, bidding, or transfer of Mineral Rights Agreements. Additionally, responsible for regulating the fees associated with various minerals.
	National Mining Corporation	Serves as the investment entity representing the national government regarding minerals.
	Mineral and Metal Commodity Exchange	It is responsible for enhancing security and efficiency in mineral business transactions.
	County Artisanal Mining Committee	Aids the Ministry of Mining in overseeing mining operations within the counties in collaboration with the county office.
Constitution of Kenya 2010	Commission on Revenue Allocation (CRA)	The institution was created under Article 215 of the constitution to strengthen benefit sharing in the spirit of devolution.
Natural Resources (Benefit Sharing) Bill of 2022	Commission on Revenue Allocation (CRA)	The commission is responsible for executing the Natural Resources benefit-sharing mechanisms. It is required to coordinate the development of benefit-sharing agreements between an impacted County and a relevant entity. It will also review and, if necessary, decide the royalties owed by a relevant entity involved in exploiting natural resources.

Community Benefit Sharing Committees	It monitors projects that are parties to benefit-sharing agreements in the county and determines how funds will be allocated to the local communities.
Local Benefits Sharing Forum	Negotiates with the benefit-sharing committee to develop benefit-sharing agreements that will benefit the local committee. It also monitors the projects being carried out by the community.

#### 4.1.2.2 Community level institutional frameworks

Beyond royalties, communities in mining areas benefit from a 1% share of gross sales of mining companies and, to some extent, CSR activities led by mining companies through institutions that are locally based in mining areas known as Community Development Agreement Committee (CDACs).

*Community Development Agreement Committee (CDACs) contribute to the development of the affected areas however, there are concerns about the duplication of projects.* There is evidence that CDACs in Kwale County have facilitated the development of areas impacted by mining activities. This is through the execution of several infrastructure projects such as constructing roads, dispensaries, schools, sinking boreholes and providing economic empowerment programs. The projects have improved residents' quality of life and mitigating mining's negative impacts on communities. However, it was noted that while CDACs and the mining companies' corporate social responsibility (CSR) activities benefit the community and Kwale County at large, there is a need to align them to avoid duplication of projects. One government official highlighted that **"We have found ourselves in situations where a mining company has approved a CDAC project like a school or dispensary, and yet the county had issued a tender for the same and had to cancel. It is important to consult with the County for the sustainability of these projects."** In addition, despite the notable gaps in duplication of projects, most stakeholders in both government and the community in Kwale County highlighted that the government needs to follow up on other mining companies to operationalise CDACs because, at the moment, only Base Titanium seemed to have operational CDACs in Kwale County.

**CDACs work well when they have a recruited technical team/ secretariat to run CDAC Offices:** A dedicated technical team runs CDAC offices. This team, led by a fund manager, has professionals with expertise in project management, finance, and community development. The skilled technical team ensures the effective functioning and operation of the CDAC, oversees the implementation of projects, and tracks the utilisation of funds allocated for community development.

**Political interference:** One of the most glaring concerns and a challenge noted so far is the influence of politicians within CDACs. The influence is either through politicians who are part of the committees or their representatives. It is a lesson that political influence and interference often derail project prioritisation, cause favouritism and negatively impact the equitable distribution of benefits among communities.

**Administrative costs:** High administrative costs from the share of revenues received by CDACs have been identified as a challenge. This indicates the need for efficient financial management and oversight to ensure that a significant portion of funds is directed towards community development projects rather than administrative expenses.

**Selecting committee members with the capacity to represent the community's interests:** The process of selecting representatives for CDACs has been marked by political undertones, influence and capacity issues. It is imperative to ensure that representatives are selected based on merit and genuine community representation rather than political inclination.

**Capacity building:** Most elected members lack the capacity to participate effectively in making decisions in the committee. In some instances, the community member representatives did not have adequate education background to enable them to actively engage in the committee, especially in advising on economically viable and sustainable projects that would yield optimal social benefits. Building the capacity of CDAC members and the wider communities is imperative in enhancing effective participation in decision-making

processes, financial management, and project implementation. Communities must be empowered to engage in revenue-sharing mechanisms and hold stakeholders accountable actively.

**Transparency and reporting:** CDACs face transparency and reporting challenges. Communities often do not access information regarding the utilisation of funds and projects. This includes limited participation in community information public participation forums. Enhancing transparency and instituting robust reporting mechanisms are paramount for building trust and accountability.

**Duplication of projects:** Project duplication between CDACs and county governments has been noted, resulting in inefficiencies and resource wastage. For example, in Kwale County, there were instances of CDACs constructing a school or repairing a road, yet similar projects had been marked for development by the County Government. Coordination and collaboration between CDACs and other development agencies are crucial in avoiding duplication and maximising the projects' impact.

**Long-term sustainability:** CDAC representatives in Kwale highlighted the importance of investing in long-term sustainable projects that outlive the mining operations. This includes infrastructure development, economic empowerment programs, and environmental conservation initiatives that contribute to the overall well-being of communities even after the mining activities cease.

**Possibility of misuse of funds:** There is no oversight in the implementation of projects under the CDACs. This is because despite there being a technical team to implement the projects approved by the CDAC, an external body was not clearly provided with the ability to audit or oversee these projects to ensure prudent use of the public resources. Such insufficient oversight risks mismanagement of community development projects, and there may be a diversion of such projects that benefit individuals within the CDAC or those affiliated with it. There is a need for structured regulations that establish oversight mechanisms for funds managed by CDACs.

### 4.1.3 Gaps in the legal, regulatory, policy, and institutional frameworks governing mining in Kenya

#### 1. A clear framework for royalties' collections and disbursements is inexistent.

Since enacting the Mining Act 2016, the National Treasury has collected Mineral royalties of Ksh 7.5 billion.<sup>8</sup> Although the Act has provided for the distribution in a formula of 70%-20%-10% between the national government, county governments and communities, respectively, there lacks specific regulations to guide the transfers to communities as indicated in the Budget Review and Outlook Paper (BROP) of 2022.

Although the Public Finance Management Act (PFMA) 2012 is clear on the accounting mechanisms to safeguard the public interest, the law does not clearly address the issue of royalties disbursement to the community. In particular, there are no clear procedures or mechanisms to track the royalties sharing from collection to disbursement. The Mining (Royalty Collection and Management) Regulations, 2023, miss out on important aspects such as transparency in collecting royalties, audit of the processes, oversight and accountability. Equally, the proposed Mining (Mineral Royalty Sharing) Regulations, 2023 circumvents the issues of transparency and accountability by retaining control of funds in the Ministry of Mining, which beats the purpose of community control of their share of revenue.

#### 2. There clearly exist institutional gaps in Kenya to effectively coordinate and monitor the activities of various agencies involved in royalties collection.

The Mining and Mineral Policy had proposed the establishment of a Mineral Audit Agency whose mandate would entail ascertaining the accurate royalties and taxes owed to the government from mineral production, prevention of mineral smuggling and royalty evasion; overseeing and inspecting minerals produced and exported, audit the capital investments and operational expenses of mining firms; and offer advice on the competitiveness of Kenya's mining sector and fiscal regulations compared to global standards.

8 Business Daily Africa (2022); AG clears Sh7.5bn mineral royalty sharing plan. Accessed on 26/02/2024 at: <https://www.businessdailyafrica.com/bd/economy/ag-clears-sh7-5bn-mineral-royalty-sharing-plan--4064432>

Nevertheless, this was not established in the Mining Act 2016. This agency would be crucial in ensuring the royalties collection mechanisms are enhanced and effectively audited.

### **3. Weak stakeholder involvement in the process of regulation, royalties collection and disbursement.**

Local communities are inadequately consulted in drafting important regulations governing the royalty schemes, collection, and utilisation. A particular case involves drafting the regulations that would guide the disbursement of 10% royalties to the communities around the mining area. The cabinet secretary responsible for mining formed a committee to draft a Minerals Royalty Committee to draft the mineral royalties regulation. The committee comprised the Council of Governors, the Ministry of Industrialization, the Attorney General's office, the National Treasury, and the Commission on Revenue Allocation (CRA). From the composition, important stakeholders such as the community representatives, Kenya Revenue Authority (KRA), Kenya Chamber of Mines and the Civil Society Organizations (CSOs) were left out.<sup>9</sup> The involvement of government agencies alone in the drafting will lead to skewed regulations that do not adequately address the interests of the entire industry and the community. Further, lack of community involvement led to a situation where most Kwale residents cited they were not engaged in decision-making by Base Titanium in execution of critical development projects, as indicated by the Haki-jamii household survey of 2017.<sup>10</sup>

### **4. Transparency and accountability are challenges in the revenue sharing mechanisms in Kenya.**

Between 2016 and 2023, the mineral royalties were collected without a comprehensive structure for collection and disbursement. The Prescription of Royalties on Minerals) Regulations, 2013 L.N. 187/2013 was sketchy and did not provide ample guidance on collection and disbursement of royalties. The Mining Act 2016 provides a formula for distribution of royalties among the national government, county government and the community. However, it is unclear what broad spending areas the royalties should be used. The proposed regulation on royalty sharing by the national treasury indicates that 70% of royalties will be channelled through the consolidated fund, 30% for the counties will be channelled into the County Mineral Royalties account, after which 20% will be disbursed to the counties, and 10% to the community. However, despite the National Treasury sharing a schedule of disbursement with the controller of the budget, there is no structure to guide the royalties utilisation since the regulations do not specify approval of disbursement against a particular budget. Interestingly, the proposed regulations seem to tighten controls on the 10% for the community share, which the county assembly will adequately monitor. The loophole remains in the capacity of the community development agreement committee to account for the utilisation of their projects. The composition of the members, as set out in the proposed regulations, indicates capacity gaps, which will be a challenge to its implementation. It is unclear who the accounting officers for the community development agreement committees will be and how they will be sourced.<sup>11</sup> Also, there is no clarity on the monitoring and audit modalities. The proposed regulations do not provide for the audit process and timelines for the disbursement of royalties and implementation of the projects.

### **5. Concerns around institutional capacity**

This analysis revealed that there is a challenge to institutional capacity with the collection of royalties. Unlike the Energy Act 2019, where the authority to collect the royalties is vested in the Kenya Revenue Authority (KRA), the Mining Act of 2016 grants the state department responsible for mining the authority to collect royalties. This could be an issue of concern due to the capacity of the state department to administer the collection of royalties effectively, given that the handling of revenues and finances may not be within their mandate.

9 The Standard, 2024. Royalties sharing team formed to unlock Sh7.5b. Accessed on 26/02/2024 at: <https://www.standardmedia.co.ke/business/business/article/2001465479/royalties-sharing-team-formed-to-unlock-sh75b>

10 International Commission of Jurists (ICJ), 2018. Citizen's Access to Information Guide. Accessed on 26/02/2024 at: <https://countytoolkit.devolution.go.ke/sites/default/files/ICJ%20Citizen's%20Access%20to%20Information%20Guide%20for%20Extractives%20Industry.pdf>

11 National Treasury 2024. Proposed Framework For Sharing of Mineral Royalties Revenue Among the National Government, County Governments And Communities. Accessed on 26/02/2024 at: <https://www.treasury.go.ke/wp-content/uploads/2022/05/Framework-For-Sharing-Of-Royalties.pdf>



- 1. Disclosure and access to information relating to mining revenue are challenging.** The Mining Act of 2016 provides that the mining entities and the ministry responsible for mining should avail information to the public for scrutiny. However, it is unclear which agency is responsible for ensuring that information disclosure happens and that the public can access the information. Information on contract agreements, royalty payments, and disbursement needs to be made public and available through accessible channels.
- 2. Oversight concerns in the governance of revenue sharing;** the Mining Act of 2016 and the Mining (Mineral Royalty Sharing) Regulations, 2023, do not provide for the oversight of the community share of royalties. The proposed regulation authorises the accounting officer for the Ministry responsible for mining to authorise community spending from the royalties account, and the regional mining officer (RMO) shall be the secretary of the community royalty management committee. However, the issue of oversight on the utilisation of the funds remains a major concern that could lead to mismanagement of the fund. In addition, community members felt the RMO could be part of the committee but not tasked as the accounting officer of the royalties allocated to the community.

#### 4.1.4 Mineral Royalties as a key opportunity for accelerating domestic resource mobilization (DRM)

It is intimated that the most reliable and sustainable sources of domestic resources for governments are taxes and some non-tax instruments such as royalties and resource rents from mining, as well as license/user fees to access public services.<sup>12</sup> Domestic income can contribute to enhanced development outcomes, but only when effectively utilised for productive and advantageous public spending. Therefore, governments must prioritise, strengthen and cultivate the structures governing revenue generation and expenditure.

A royalty represents the primary non-tax mechanism utilised in the mining sector. While corporate tax pertains to income generated within the country, a royalty refers to the payment made to the resource owner or the factor of production—in this context, land. A royalty can take the form of a per-unit or ad valorem payment, is easily predictable and manageable, and serves as a reliable revenue source for the government. In contrast, income tax revenues are uncertain and can be influenced by transfer pricing, tax strategies, and creative accounting practices. The World Bank has recommended that the royalty rate be moderate, ranging between 3 to 5 per cent for minerals, as excessively high rates may incentivise selective extraction, leaving behind lower-grade minerals.<sup>13</sup> According to a World Bank report, higher royalty rates are more suitable for valuable minerals such as diamonds and platinum.

The royalty rate for oil and gas typically falls within the range of 5–25 per cent, although it commonly oscillates around 10 per cent. Certain high-income countries (HICs) like Norway and the United Kingdom have gradually phased out royalties, while others like South Africa have introduced a profit-based royalty system. In these instances, the royalty rate is contingent upon the company's operational profits. However, this approach has not always yielded satisfactory outcomes for the resource-rich nations. For example, in Ghana, the effective royalty rate is determined based on the profitability of mining activities, calculated by assessing the mine's operating ratio throughout the year. The operating ratio is derived from the operating margin ratio (total revenue minus operational expenses) to total revenue. If the operating ratio is below 30 per cent, the royalty rate is 3 per cent.

Countries allowing regional governments have gained more in royalties and development initiatives spearheaded by the earnings. In Canada and Australia, for instance, there has been enhanced regional growth in areas where mining activities occur. With a properly laid down legal framework that ensures communities are engaged in the negotiation with the mining companies, the revenue share has been utilised effectively. Royalties, therefore, play an important role in domestic resource mobilisation, which spurs growth through community development.

<sup>12</sup> Junquera-Varela. R. F, et al. (2017). Strengthening Domestic Resource Mobilization Moving from Theory to Practice in Low- and Middle-Income Countries. The World Bank Group. <https://www.globalfinancingfacility.org/sites/default/files/Strengthening-Domestic-Resource-Mobilization-DRC.pdf>

<sup>13</sup> Ibid

Because Kenya has not refined its legal frameworks to collect and manage royalties effectively, it is missing out on the effective maximisation of benefits from the mining companies. Apparently, the multinational companies carrying out mining activities end up repatriating much profit, and the country loses out in terms of reaping benefits from mining.

## 4.2 Objective 2: International and regional best practice in revenue sharing and royalty management

The objective entails benchmarking Kenya's royalty framework and models to draw comparisons with selected international and regional good practices and test their ability to compensate mineral owners effectively, give back to communities, mitigate conflicts and stand the test of responsible business. Some of these best practices were drawn from countries such as Australia, Canada, India, the United States, Papua New Guinea, Namibia, South Africa, Tanzania, and Ghana.

### 4.2.1 International best practices in revenue sharing and royalty management

There is no straightforward definition of natural resource revenue sharing, which is usually treated as a subset of natural resource revenue management or fiscal decentralization.<sup>14</sup> There are two main channels through which revenues can be shared. First, sub-national authorities can be granted rights to collect and retain taxes. Property taxes and surface fees are often the main resource-related taxes collected directly by local governments in most unitary countries. The more significant sources of revenue—profits taxes such as corporate income taxes, royalties, withholding taxes, value-added taxes (VAT) and in-kind production—are generally collected by national governments.

With regard to the second channel, resource revenues collected by the national government can be separated from other types of fiscal revenues—for instance, general taxes such as personal income taxes or taxes from the manufacturing sector—and shared with sub-national authorities through special resource-based intergovernmental transfer systems. Almost every country has an intergovernmental transfer system to finance sub-national governments. However, fewer have natural resource-specific intergovernmental transfers that treat natural resource revenues differently from other revenues.

**Natural resource revenue-sharing arrangements cannot be viewed in isolation from the underlying fiscal decentralisation arrangements.** Political decentralisation refers to the transfer of some decision-making powers to locally elected officials. Administrative decentralisation refers to transferring some responsibilities to officials responsible for administering a given region within a country, whether hired by or accountable to a national or local government, such as responsibility for monitoring compliance with environmental regulations. However, fiscal decentralisation refers to the transfer of expenditure responsibilities, revenue-raising powers (e.g. taxation), and the transfer of money from national to subnational authorities, usually to enable subnational governments to meet their responsibilities. Resource revenue sharing can be thought of as a subset of fiscal decentralisation, which is specific to natural resource revenues.

**Mineral-specific taxes like royalties paid to the state or provincial government.** In federal states such as Argentina, Australia, Canada, India, and the United States, taxation is typically shared between national and sub-national governments, with mineral-specific taxes like royalties paid to the state or provincial government. However, the degree of revenue decentralisation varies, with some federal states exhibiting more centralised resource revenue management. For instance, in Iraq and the Russian Federation, resource revenue management is largely centralized at the national levels (Bauer A. et al, 2016)<sup>15</sup>. In some fiscally decentralised states such as Australia, Canada, India and the United Arab Emirates, some of the larger sources of revenue are collected directly by subnational authorities.<sup>16</sup>

14 <https://www.local2030.org/library/221/Natural-Resource-Revenue-Sharing.pdf>

15 Bauer A. et al (2016). Natural Resource Revenue Sharing, Natural Resource Governance Institute (NRGI) and the United Nations Development Programme (UNDP), September 2016

16 <https://www.local2030.org/library/221/Natural-Resource-Revenue-Sharing.pdf>

**Allowing local governments to collect royalties from the mining companies.** In Canada and the United States, the federal government delegates the imposition and collection of royalties to the provincial, territorial, and state governments. In Canada, the authority for royalties primarily lies with the provinces and territories, with royalties being profit-based for all minerals. The Canadian constitution explicitly acknowledges the rights of provinces and territories to manage their non-renewable natural resources, forestry resources, and electrical energy. Tax structures vary, including single-rate, two-tier, and sliding-scale tax rates. Some provinces and territories have commodity-specific mining taxes. These governments have the power to impose mining taxes and royalties, with all provinces and territories with significant mining activities implementing such levies as a form of compensation for the extraction of non-renewable resources owned by them. This taxation is separate from federal and provincial/territorial income taxes.<sup>17</sup>

**Enabling fiscal policies that allow effective resource sharing is very important.** For instance, the Norwegian Petroleum Fund has made a mark in mining by instituting an effective fiscal policy strategy. Norway uses its revenue to yield maximum benefits by making enormous investments that would benefit the citizens. The country has an elaborate institutional framework to guide the utilisation of the revenues generated from oil. All the revenues from oil, the returns on investments and the accumulation of funds and their transfer to finance the budget are only made in financing deficits. Otherwise, they are left to accumulate through effective asset management by the central bank.<sup>18</sup>

**Using foundation trust funds is a practice that could be emulated but with a well-formulated structure.** This benefit-sharing mechanism is often made between the mineral license holders and the local communities where mining occurs. In North America and Australia, customary ownership is recognised, and such FTFs agreements have been made, which largely deal with the disbursement arrangements, compensations, commitment for employment, and governance structures. In some agreements, some funds are allocated for use by future generations, and therefore, such allocations are invested. The Gnaala Karla Booja (GKB), traditional landowners of the Boddington gold mine area in Western Australia, signed a Community Partnership Agreement with the mine operators in 2006. This agreement aims to support GKB People economically through employment opportunities and annual financial assistance since 2009. A trust manages these funds for local business and community projects, overseen by a joint committee of Traditional Owners and mine representatives. The Raglan Agreement, signed in 1995 in Canada, serves as a model for First Nations agreements in mining. Located in the Nunavik Territory, the Raglan mine agreement involves the closest communities (Salluit and Kangiqsujaq), the Makivik Corporation, and the Raglan mine (now owned by Xstrata Nickel). Governed by the Raglan Committee with equal representation from Inuit groups and the company, it includes a profit-sharing provision of 4.5% of operating profit, amounting to nearly C\$17 million in 2007. Funds are managed in a Trust, with distributions to Makivik Corporation (25%), Kangiqsujaq (30%), and Salluit (45%), which then allocate funds to fourteen Nunavik communities based on needs assessment.

**Transparency and adequate compensation:** In Papua New Guinea, legislation such as the Environmental Act of 2000 and Mining Act of 1992 safeguards community interests by requiring mining companies to secure acceptance from landowners and provide adequate negotiated benefits and compensation. The Mine Development Forum (MDF) facilitates collaboration between the government, local communities, and mining companies to ensure all interests are considered in decision-making. The Mineral Development Fund (MDF) ensures adherence to agreements between mining developers and local communities, promoting equitable distribution of benefits. This process involves local communities due to their exposure to potential risks. Mining companies increasingly incorporate Corporate Social Responsibility (CSR) into their operations, driven by the obligation to honour commitments made to local communities and governments. For instance, the Porgera Mine in Enga province exemplifies collaborative efforts between stakeholders to ensure equitable benefit distribution, including royalty sharing, infrastructure development, and employment opportunities for locals.

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17

Ibid

18

Qiao B et al.2008. Fiscal Federalism of Non-Renewable Natural Resources: Principles and Practices of Revenue Sharing and Equalization

The Porgera Joint Venture dedicates a portion of its profits to infrastructure projects, resulting in significant investments in healthcare, education, and infrastructure initiatives in Papua New Guinea.

**Protection of the rights of Indigenous communities:** Under Australian legislation, benefit-sharing agreements must provide for reasonable benefit-sharing arrangements with Indigenous people, including the protection for and valuing of any Indigenous peoples' knowledge.<sup>19</sup> Prior informed consent of the Indigenous owner or native title holder must be obtained for access to genetic resources on Indigenous people's land. A general principle accepted by all Australian Governments is that access and benefit-sharing must ensure the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms. In Australia, the government is strict on applying the Commonwealth Native Title Act, 1993 (NTA). The Act safeguards and acknowledges indigenous land rights, including mining activities. Registered native title claimants or holders have negotiation rights with developers regarding specific operations, such as exploration and mining permits. Aboriginal culture and heritage can persist on non-native title lands, requiring mining companies to secure Aboriginal heritage clearance before commencing operations. Negotiations between mining entities and title holders may grant access to traditional lands in exchange for compensation, which can include training, royalties, employment, or cash payments. Indigenous communities are granted title rights to uphold their traditional laws and customs and maintain their connection to the land. If negotiations between these communities and mining companies reach an impasse within six months, either party can seek a determination from the National Native Title Tribunal to decide whether mining operations can proceed on a specific piece of land. Generally, determinations lean in favour of the indigenous residents and may impose conditions on the mining company. In cases where title rights are impacted by government grants, native title holders can seek compensation through the Commonwealth Court. These legally binding agreements are commonplace in almost all major new mining projects.

**Collaboration between the government and the local community in funding projects:**

In Australia, Argyle Diamonds Ltd established an agreement with the Aboriginal owners of the Argyle diamond mine in Western Australia in 2005. This pact aimed to improve services such as healthcare, education, literacy, sports, youth initiatives, and cultural support. The Aboriginal owners fund these initiatives through a 'Partnership Fund', which receives a portion of royalty payments. Traditional owners can only finance initiatives if the government or the private sector contributes an equal amount. In 2008, the Australian and Western Australian governments matched every dollar committed by traditional owners to a business development program with \$1.5. For every dollar contributed by traditional owners to a teenage girls' development initiative, \$5 was contributed by the government and private groups. This effective collaboration ensures that government, mining companies and communities are invested in the community programs.

Long-term investment: In Australia, mining revenues can enable Aboriginal communities to establish capital funds, offering the prospect of generating future income beyond the mining period in the long run. In 2001, Aboriginal parties in Cape York, Queensland, agreed to allocate over 50 per cent of their earnings to a long-term investment fund. Profits were reinvested for two decades, ensuring the preservation of the capital base with interest available for immediate expenditures. By 2011, the capital fund had reached US \$40 million and was anticipated to yield even greater returns by 2021.

Involvement of the communities in decision-making and giving communities a chance to trade with the mining entities: In Canada, the Canadian Constitution Act of 1982, under section 35, acknowledges existing 'Aboriginal and treaty rights'. Canadian courts have repeatedly affirmed the government's obligation to consult and accommodate indigenous peoples in decisions that may infringe upon their rights, such as recording mineral claims, permitting mineral exploration, or granting mining leases. Additionally, Canada endorses the principle of Free Prior Informed Consent (FPIC), which grants potentially affected communities the right to participate in decision-making processes and the right to refuse consent. Mining companies must provide comprehensive information to communities to ensure they understand the implications of potential mining projects.

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19 <https://www.wipo.int/tk/en/databases/contracts/texts/australiaprovider.html>

Equally, Canadian law protects indigenous property rights, and indigenous land titles are recognised under land claim agreements. Aboriginal communities are granted preferential access to contracts for providing goods and services to mining projects, thereby creating economic opportunities. These communities have succeeded in securing major contracts, initially through joint ventures with non-Aboriginal businesses, and later as independent operators as their business expertise grew.

We can classify countries into three groups based on how they handle resource revenue sharing: (1) countries that allocate natural resource earnings similarly to other types of income for distribution; (2) countries that distinguish natural resource earnings from other income types and distribute them based on their origin; and (3) countries that differentiate natural resource earnings from other income types and distribute them based on specific indicators.

#### 4.2.2 Regional best practices in revenue sharing and royalty management

**Uniform application of ad valorem royalty rates across the countries.** Mineral-rich nations from Africa have indicated a growing trend of streamlining the tax system on royalties to reap maximum value. There seems to be a convergence in how most countries apply uniform rates for royalties among countries. Except for a small number, most African countries use a variable scale to determine mineral royalty rates, which vary based on the type of mineral. For instance, the royalty rate for diamonds in Botswana is 10%. This is similar to the rates in Namibia. Kenya's gold royalties' rate is 12%, which falls within the same range. With such rates, the maximum benefits from selling minerals would accrue.

**Use of gross revenues in determining royalty rates.** In addition, most of these nations utilise gross revenues to determine the rates. Using gross revenue ensures that the state is protected against cost overstatement from mining companies. Nevertheless, countries that use this method risk losing track of the improvements in tax administration to oversee expenses throughout the value chain effectively. This at times weakens the nation's future negotiation with the mineral rights holders when the prices of the commodities change. Only countries that adopt sliding scale royalty rates would realise the benefit of the rates moving in tandem with the new mineral prices to capture the changes in the market dynamics.<sup>20</sup>

**Institutional strengths to effectively coordinate and monitor the activities of various agencies that are involved in royalties' and mining tax collection.** A comparative analysis between Kenya and Tanzania indicates that Tanzania has a body that audits minerals royalties. The country instituted the Tanzania Mineral Audit Agency (TMAA) in 2010, and it is responsible for the enforcement of taxes and royalties. This situation led to doubling the revenue collected between 2011 and 2012. This is like the proposed establishment of a Mining Mineral Audit Agency under Kenya's Mineral Policy. Another successful case is that of Zambia, which instituted a Mining Tax Unit clearly attached to the tax authority. Their mandate is to collect mining revenues, resulting in increased revenue generation.

**The establishment of a mineral development fund and the involvement of the community in the process is an important practice.** Ghana, for instance, has established a mineral development fund that ensures that mining communities reap maximum benefits. The Ghana Revenue Authority collects revenue and deposits 20% of the revenues in this fund. 20% of this fund supports the local economy, initiates alternative projects to support livelihood and, more importantly, remedies the harmful impacts of mining on the local communities. A governing board is in place to manage, allocate and disburse finances from the fund in a mechanism provided by the law. The board institutes a local management committee for every community affected by mining activities, and community leaders are incorporated into that committee. In Mozambique, the law requires that the government engage and consult the communities around the mining areas before exploration and any development. This is contrary to the Kenya government's provision, where the government only seeks mineral holders to enter into community development agreements if a project is proposed to invest over US \$500 million.

20 Economic Commission for Africa, 2016. Optimizing Domestic Revenue Mobilization and Value Addition of Africa's Minerals; Towards Harmonizing Fiscal Regimes in the Mineral Sector. Accessed from: [https://archive.uneca.org/sites/default/files/PublicationFiles/optimization\\_of\\_domestic\\_revenue\\_eng.pdf](https://archive.uneca.org/sites/default/files/PublicationFiles/optimization_of_domestic_revenue_eng.pdf)

The broad-based socio-economic empowerment Charter in South Africa has been pivotal in prompting corporate social investment efforts. Numerous trust funds have been set up to meet social responsibilities during the conversion of 'old order' mining rights. The advantages of these structures include fostering community independence, and the funds have the potential to attract funding from other investors. Consequently, this framework promotes long-term sustainability and facilitates smooth ownership transitions.

Community interest and advancement of the mining sector: Ghana enacted the Mineral Development Fund Act of 2016 to pool resources from the mining sector to benefit the local communities. Ghana's revenue authority deposits twenty per cent of the royalties from mining companies into this fund. The fund aims to boost the local economy, establish alternative livelihood initiatives, and mitigate the adverse impacts of mining on affected communities. From this fund, the governing body ensures that fifty per cent of the funds allocated to the administration of stool lands, twenty per cent is designated for the Mining Community Development Scheme, four per cent to support the Ministry's mining activities, thirteen per cent to enhance mining operations overseen by the mineral commission, eight per cent allocated to supplement the geological survey department's mining efforts and five per cent dedicated to research, training, and initiatives fostering sustainable development through mining.

## 4.3 Objective 3: Transparency, accountability, oversight, and human rights issues

### 4.3.1 Accountability and transparency in mining in Kenya

**Spurred by investor confidence and the recognition that competitive mining can be a critical resource for domestic revenue,** the Government of Kenya incorporated mining into its Vision 2030, the country's long-term development economic blueprint. The Ministry of Energy and Petroleum's Strategic Plan 2013-2017 is focused on facilitating the "provision of clean, sustainable, affordable, competitive, reliable and secure energy services at least cost while protecting the environment." However, despite the aspirations for the economic potential of a developing mining sector, there are also concerns related to the risks of adverse economic, social and environmental impacts of the sector.

**The mining sector in Kenya is highly susceptible to unethical practices, including corruption and bribery.** In numerous resource-rich African nations, the absence of accountability and transparency in revenue management worsens governance inefficiencies and frequently perpetuates cycles of corruption, conflict, and poverty.<sup>21</sup> Mining, especially the regulation of precious metals and stones, is particularly vulnerable to corruption, money laundering and terrorism financing (ML/TF), illicit financial flows and misappropriation of revenues collected.<sup>22</sup> A study by the Financial Action Task Force (FATF) on diamond trading exposed a growing trend whereby diamonds are now being utilised as a vehicle for money laundering. Additionally, precious minerals have been implicated in trade-based money laundering schemes, where they are exploited to conceal illicit funds through price manipulation, fictitious sales invoices, and tax evasion.

**African countries that are endowed with natural resources are often considered to have a 'resource curse'** rife with human rights abuses, endemic corruption, poor socioeconomic development, high poverty and widespread inequality. Africa is endowed with an abundance of these minerals. The Democratic Republic of Congo (DRC), for example, produces over 70% of the world's cobalt. DRC and Zambia together supply 10% of global copper, while Mozambique and South Africa hold significant reserves of graphite, platinum metals, and lithium.<sup>23</sup> However, historically, these resources have only benefitted a few individuals in positions of power and have not led to meaningful economic development in Africa. Several studies have established that there is a correlation between an abundance of natural

21 Obati. G., Owuor, G. Extractive Industries, Natural Resources Management and Sustainable Development: A Review.

22 UNODC. UNODC Trains Law Enforcement Authorities to Tackle Money Laundering and Terrorism Financing in the High-Stakes Precious Metals and Stones Industry. 19 Dec 2023. [Press release]. [https://www.unodc.org/easternafrica/en/Stories/cracking-down-on-global-financial-crime\\_-unodc-trains-law-enforcement-authorities-to-tackle-money-laundering-and-terrorism-financing-in-the-high-stakes-mining-industry.html](https://www.unodc.org/easternafrica/en/Stories/cracking-down-on-global-financial-crime_-unodc-trains-law-enforcement-authorities-to-tackle-money-laundering-and-terrorism-financing-in-the-high-stakes-mining-industry.html)

23 <https://www.un.org/africarenewal/magazine/february-2023/african-countries-urged-prioritize-green-value-chains-minerals>

resources, weaker governance structures, and less regressive democratic practices.<sup>24</sup> This could be attributed to the ease of controlling revenues from mining. The presence of resources within a country also negatively impacts the accountability, independence, and transparency of political institutions.

**Resource-driven development, especially in African countries, leads to nebulous outcomes, particularly for poor and vulnerable communities.** While international financial institutions such as the World Bank insist that resource extraction accelerates economic development, several studies have underscored the adverse impacts of mining on economic development and marginalized communities.<sup>25</sup> Further, resource-backed loans/financing for infrastructure development projects lead to increased public debt and often do not yield optimal returns on investment that boost economic growth or improve the quality of public services due to mismanagement of funds received. As African countries export primary commodities, African governments do not benefit from the value chain of natural resources.

**The politicisation of the mining sector, rampant corruption, Poor Public Finance Management (PFM), porous revenue collection systems, risks of state capture of public institutions, and weak governance in Kenya undermine the capacity of the sector, particularly in domestic resource mobilisation (DRM), socioeconomic development and trickling down of benefits to local communities.** In 2023, Kenya was ranked 126 out of 160 on Transparency International's Corruption Perceptions Index, and 67% of people who participated in the Global Corruption Barometer perceived that corruption had increased in the last year.<sup>26</sup> There is a concern that the deep-rooted nature of corruption and structural challenges in Kenya's governance might hinder the possibility of creating an enabling environment for responsible business practices in mining.<sup>27</sup>

**The 2010 Constitution introduced significant governance reforms, marked by the advent of devolution, which established 47 county governments. These reforms encompassed fiscal decentralisation, increased public participation in public affairs, and underscored the government's commitment to enhance accessibility to public services while mitigating inequality.** Devolution presents both risks and opportunities in the mining sector. While service delivery has moved closer to citizens and county governments, which are empowered to determine their funding priorities based on their local needs, policy development, regulation, and general oversight of the sector remain with the national government.<sup>28</sup> On the other hand, the implementation of policies on natural resources and the environment has been devolved to county governments.<sup>29</sup> This requires effective policy coordination between the national and county governments.

**Corruption in revenue sharing manifests in various forms that deprive governments of contributions to DRM and deny communities the benefits that would accrue.** Field research revealed that in communities where mineral resources are discovered, there's typically an immediate expectation of benefiting from the discovery.<sup>30</sup> However, reality paints a different picture, with benefits only realised after an average of seven to ten years between discovery and revenue generation. Consequently, while local communities may swiftly face negative impacts, such as perceived issues related to land ownership, environmental consequences, the influx of external labour, unequal resource distribution, and displacement, the anticipated positive outcomes like revenue sharing often remain elusive for many years. Tax evasion and illicit financial flows also deprive governments of revenue.

24 Knutsen, C. et al. (2017). Mining and Local Corruption in Africa. *American Journal of Political Science*. Vol. 61, No. 2 (APRIL 2017), pp. 320-334. <https://www.jstor.org/stable/26384734>

25 Idemudia, U. et al. (2022). The extractive industry and human rights in Africa: Lessons from the past and future directions, *Resources Policy*, Volume 78, 2022, 102838, ISSN 0301-4207, <https://doi.org/10.1016/j.resourpol.2022.102838>

26 Transparency International. <https://www.transparency.org/en/countries/kenya>

27 IHRB. (2016). Human Rights in Kenya's Extractive Sector: Exploring the Terrain. [https://www.ihrb.org/uploads/reports/IHRB%2C\\_Executive\\_Summary\\_-\\_Human\\_Rights\\_in\\_Kenyas\\_Extractive\\_Sector\\_-\\_Exploring\\_the\\_Terrain%2C\\_Dec\\_2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C_Executive_Summary_-_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf)

28 Ibid

29 Ibid

30 IHRB. (2016). Human Rights in Kenya's Extractive Sector: Exploring the Terrain. [https://www.ihrb.org/uploads/reports/IHRB%2C\\_Executive\\_Summary\\_-\\_Human\\_Rights\\_in\\_Kenyas\\_Extractive\\_Sector\\_-\\_Exploring\\_the\\_Terrain%2C\\_Dec\\_2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C_Executive_Summary_-_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf)

## Case study

### **Text Box 1: Impacts of lack of transparency in South Africa's mining industry in royalties management**

International mining companies operating in South Africa are required to make significant royalty payments to the government and community entities. Yet, there is a notable lack of transparency regarding how these funds are allocated and utilised.

An investigation revealed that during the 2018 fiscal year, ten publicly listed British companies disclosed payments totalling at least \$1.076 billion (approximately R18.05 billion) to various government bodies between July 2017 and December 2018. These payments, categorised as taxes, royalties, infrastructure improvements, and other mining-related fees, were reportedly made to entities such as Sars, local governments, and community structures. Of these payments, at least \$281 million were designated as royalty payments.

A significant issue identified is the opaque nature of tax royalty collection and distribution among stakeholders. Communities are often deprived of mining royalties due to a lack of transparency in royalties paid to governments. A 2018 study by Corruption Watch highlighted the distortion, inequality, and potential for abuse in the distribution of mining royalties. The research, focused on mining projects in the North West and Limpopo provinces, found a lack of transparency in negotiating and finalising royalty agreements with affected communities. Additionally, there were concerns about the conversion of royalty arrangements, such as the shift from development accounts for beneficiaries to equity sharing with communities. Once companies transfer royalty payments to the state, they relinquish direct control over them, and navigating the revenue-sharing system of community development trusts can present challenges.

Overall, the administration of mining royalties demonstrates a severe lack of transparency in negotiating agreements with affected communities, raising questions about the fair distribution and utilisation of these funds.

Source: <https://m28investigates.com/article/18>

### **4.3.2 Human rights considerations in revenue sharing practices**

**Even though mining is crucial to socio-economic advancement in most African nations, it has fueled instances of human rights violations in several local communities.** A study conducted by Idemudia U. et al. (2022) on mining and human rights in Africa underscored that human rights violations centred around social needs, economic activities, community exclusion from benefit sharing mechanisms, land ownership tussle, unfair compensation mechanisms, cultural heritage and loss of livelihood.<sup>31</sup>

The mining sector is characterized by human rights abuses that leave lasting impacts on the local communities, driven by a confluence of factors.<sup>32</sup> Given that resource extraction in Africa tends to take place in a rural setting, these violations are often tied to land ownership.<sup>33</sup> There are several ways in which resource extraction causes or contributes to the abuse of human rights, including sparking conflicts, land disputes, loss of traditional sources of livelihood, lack of community participation in decision-making, exploitation of local communities, negative health impacts on people, environmental degradation and unfair labour practices. The dynamics of these issues are often interrelated.

31 Idemudia, U. et al. (2022). The extractive industry and human rights in Africa: Lessons from the past and future directions, *Resources Policy*, Volume 78, 2022, 102838, ISSN 0301-4207, <https://doi.org/10.1016/j.resourpol.2022.102838>

32 Wario, H. Mining and extractives / A hopeful mix between governance and gold in Kenya. 13 Dec 2023. *EnactAfrica*. <https://enactafrica.org/enact-observer/a-hopeful-mix-between-governance-and-gold-in-kenya>

33 Idemudia, U. et al. (2022). The extractive industry and human rights in Africa: Lessons from the past and future directions, *Resources Policy*, Volume 78, 2022, 102838, ISSN 0301-4207, <https://doi.org/10.1016/j.resourpol.2022.102838>



Nonetheless, governments must actively work to protect their citizens from exploitative practices and challenge / defend against predatory behaviour by multinational corporations (MNCs). Governments at national and country levels ought to play a stronger role – both in ensuring and supporting community engagement based on meaningful dialogue, and in promoting the overall conditions required for the potential benefits of mining for communities to be recognized and realized.<sup>34</sup>

### **Fair land compensation for individuals and communities displaced by mining activities.**

The mining sector is commonly dominated by MNCs. This disenfranchises local communities (mainly land ownership) where mining activities are established, perpetuating a cycle of inequality and power imbalances between African countries, their communities, and international institutions. Communities are often deprived of their land due to competition between multinational corporations and community members over land use for either mineral extraction or agricultural purposes, in which community members lose access to their land without adequate compensation. Studies have found that conflict often emanates from communities who claim birthright over the ownership of lands, while mining companies claim mineral rights over the ownership of the same.<sup>35</sup> Land is a very emotive issue in Kenya, complicated by a complex land tenure system that convolutes determination of land rights especially concerning community land.<sup>36</sup> In addition, dispossession of community land leads to loss of livelihoods and diminishes the prospects of agricultural-based activities for rural communities. In Kenya, pastoralists have been displaced from their lands to pave way for mining activities with minimal benefits derived from resource extraction. Displaced individuals can face challenges in finding gainful employment in the mining industry due to a lack of relevant skills. MNCs sometimes renege on their promises to employ local communities, further exploiting them. Social conflict arises in mining communities when mining companies and government representatives fail to seek consent or involve residents in decision-making processes related to development, resettlement, or compensation for land loss.

An example is Kitui County, Eastern Kenya, where coal extraction occurs in the Mui Basin. Reports cited that residents claimed that their land was taken without their awareness, and they were excluded from negotiations regarding resettlement or compensation for the land they lost.<sup>37</sup> Further, the destructive nature of mining decimates the surrounding land and reduces its agricultural productivity, displacing traditional sources of livelihood. The dominating and destructive practices of international MNCs are an extension of colonial approaches to resource extraction in Africa.

Insights from stakeholders in Kwale County revealed that there are concerns about people's resettlement for mining activities. Initially, the compensation stood at Ksh. 30,000 per acre, but through negotiation, it was increased to Ksh. 80,000. Most individuals affected were resettled in Bwiti and Lunga Lunga. However, presently, many of them are experiencing significant financial hardship. Notably, some of them lacked title deeds and were essentially squatters, dating back to around 2002. In addition, some areas in Lunga Lunga are swampy, making it unsuitable for farming or most economic activities. This has worsened the economic conditions of those who were resettled there. Several people cited the need to prioritise the Lunga Lunga people when deciding who to allocate the land to when Base Titanium ends operations in addition to the royalties benefits meant for the community. It was suggested that in the future, community leaders, in collaboration with the government, should advocate for mining companies to offer increased compensation that aligns with the value of the minerals that will benefit these companies.

34 [https://www.ihrb.org/uploads/reports/2015-02%2C\\_IHRB\\_Report%2C\\_Security\\_\\_Human\\_Rights\\_in\\_Kenyas\\_Extractive\\_Sector.pdf](https://www.ihrb.org/uploads/reports/2015-02%2C_IHRB_Report%2C_Security__Human_Rights_in_Kenyas_Extractive_Sector.pdf)

35 Idemudia, U. et al. (2022). The extractive industry and human rights in Africa: Lessons from the past and future directions, *Resources Policy*, Volume 78, 2022, 102838, ISSN 0301-4207, <https://doi.org/10.1016/j.resourpol.2022.102838>

36 Land in Kenya is categorized into Public, Private and Community Land under Article 61 of the Constitution

37 OB Igbayiloye & D Bradlow. (2021). An assessment of the regulatory legal and institutional framework of the mining industry in South Africa and Kenya for effective human rights protection: Lessons for other countries. *21 African Human Rights Law Journal* 363-388 <http://dx.doi.org/10.17159/1996-2096/2021/v21n1a16>

**Responsible business conduct by mining companies must be institutionalised and enforced by governments.** Numerous issues, including human rights abuses such as non-compliance with international environmental standards, failure to fulfil community development expectations, disputes over compensations, and the lack of access to remedies in local courts for community members, suggest the need for multinational corporations (MNCs) to embrace and implement corporate social responsibility (CSR) principles and practices in their interactions with local communities. In this context, CSR encompasses the obligation to avoid negative impacts (that is, do no harm) and the duty to actively contribute to community development. As such, in the planning stages of a mining project, addressing social issues such as conflict, community displacement and resettlement, loss of farmland and livelihood, environmental pollution and degradation concerns, and the preservation of ancestral land and culture is imperative.

**Distributive justice is the pathway towards a just mining sector and should form part of the bare minimum standards when undertaking mining activities.** Distributive justice is concerned with ensuring equality in the distribution of goods, benefits, responsibilities, risks and impacts of extraction. It seeks to articulate the benefits and burdens of mining activities that affect communities.<sup>38</sup> Consequently, the unequal distribution of negative impacts and disproportionate burdens revolves around the rights in community land and the overlooked voices of anti-mining groups in stakeholder consultation processes. Within the mining sector, communities anticipate equitable distribution of the benefits of mining or oil ventures. These benefits encompass compensation, royalties, tax contributions, job opportunities, and enhancements to local infrastructure. In Kenya, it was publicly reported that local communities staged protests in Turkana County, where Tullow Oil had commenced oil operations. The protests were reportedly sparked by an influx of foreign workers, irregular procurement practices and a lack of a framework for sharing of proceeds for the community.<sup>39</sup>

**Crucial need to move beyond informing communities and embrace proactive community engagement, participation and support.** This involves providing access to information and conducting consultations, and securing the community's buy-in. A case example is communities in the oil exploration in Turkana County who face a 94 per cent poverty level and 87 percent illiteracy level (with literacy rates for women in particular only reaching a mere 4 percent).<sup>40</sup> Most of the discoveries considered economically viable have been discovered in Turkana which is situated in the remote and arid northwestern region of the country and is marked by a lack of development, frequent droughts, and ongoing inter-ethnic conflicts, attributed to widespread cattle rustling and conflict over resources.<sup>41</sup> Turkana has been prone to conflict and is historically marginalised, but communities have experienced limited support from the national government.<sup>42</sup> Further, tensions surrounding benefit-sharing in relation to mining revenues exist. Therefore, Turkana residents expect oil discoveries to improve their lives significantly. These expectations primarily revolve around employment opportunities with oil companies and their service providers, the provision of goods and services, the generation of revenue for both the County and National governments to fund public services, and corporate social investments.<sup>43</sup> Oil companies must comply with the requirements of Free, Prior and Informed Consent.

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38 Ibid

39 Financial times. <https://www.ft.com/content/682ea95a-3fe1-11e3-a890-00144feabdc0>

40 <https://politicsofpoverty.oxfamamerica.org/will-oil-bring-promise-peril-communities-turkana-kenya/>

41 Nairobi Process. (2015). Security and Human Rights in Kenya's Extractives Sector. [https://www.ihrb.org/uploads/reports/2015-02%2C\\_IHRB\\_Report%2C\\_Security\\_\\_Human\\_Rights\\_in\\_Kenyas\\_Extractive\\_Sector.pdf](https://www.ihrb.org/uploads/reports/2015-02%2C_IHRB_Report%2C_Security__Human_Rights_in_Kenyas_Extractive_Sector.pdf)

42 Oxfam. (2017). Testing Community Consent: Tullow Oil project in Kenya. <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620362/bp-testing-community-consent-tullow-oil-kenya-081117-en.pdf;jsessionid=AA4334D332712FD622DECCB7FEC70830?sequence=1>

43 Nairobi Process. (2015). Security and Human Rights in Kenya's Extractives Sector. [https://www.ihrb.org/uploads/reports/2015-02%2C\\_IHRB\\_Report%2C\\_Security\\_\\_Human\\_Rights\\_in\\_Kenyas\\_Extractive\\_Sector.pdf](https://www.ihrb.org/uploads/reports/2015-02%2C_IHRB_Report%2C_Security__Human_Rights_in_Kenyas_Extractive_Sector.pdf)

**In Kwale County, respondents cast doubt on the transparency of the revenue-sharing mechanism.** Issues raised ranged from decision-making in the mining sector, openness on licensing and signing of contracts, sharing of vital information, enactment of important legal frameworks, disbursement of the community share, utilisation of the revenues generated from mining activities and monitoring of projects. Communities often do not receive adequate information regarding mining activities, benefit-sharing mechanisms, and royalty payments. Some companies conceal vital information, hindering transparency. In addition, limited public participation during licensing processes excludes communities from negotiations for benefits. Proposed regulations and guidelines lack effective community engagement, leading to gaps in understanding and acceptance. There is opaqueness in royalty distribution whereby the communities are often unaware of royalty distribution and how the funds are utilised. Politicians and government representatives dominate royalty committees, leading to transparency and community representation concerns. The communities raised concerns about oversight, where there is a lack of clear structures for overseeing benefit-sharing mechanisms and royalty utilisation. Similarly, independent auditing is limited, with some stakeholders expressing concerns about the reliability of audit processes conducted by mining companies.



## 5.0 CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Gaps and recommendations

Gaps	Recommendation	Responsibility	
Legal and regulatory framework in the mining sector	<p>Harmonisation of legislation</p>	<p>Harmonising the proposed Natural Resources (benefit sharing) Bill, 2022, with existing laws such as the Mining Act of 2016 to avoid contradiction in the revenue sharing framework.</p> <ul style="list-style-type: none"> <li>• KHRC and Haki Madini should speed up advocacy on the finalisation process of the Bill. The institutions will also establish obstacles hindering the process and use the findings to inform fast-tracking the process.</li> </ul>	<p>The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate &amp; Civil Society Organizations (CSOs)</p>
	<p>Utilisation of mining revenues and royalties for mining advancement</p>	<p>The national Government's revenue share from mining activities to be used for the mining industry's advancement, such as the operationalisation of important institutions</p>	<p>The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate &amp; Civil Society Organizations (CSOs)</p>
	<p>Develop a clear royalties disbursement framework</p>	<p>There lacks a clear disbursement framework for the 10% of royalties meant to be shared with the communities. The county royalties' disbursement is pegged on the County Governments Additional Allocations Act 2022 but could be further provided for in a separate PFMA regulation with a clear guideline on the funds' management.</p> <p>Public Finance Management Act (PFMA), 2012 provides for budgeting and management of funds that are allocated to National and County governments. However, there's no provision for managing royalties and other funds allocated to communities through their committees.</p> <ul style="list-style-type: none"> <li>• There is a need to have provisions in the Mining Act of 2016 or fast-track the finalisation of the proposed Mining (Mineral Royalty Sharing) regulation of 2023. This will specify the management and utilisation of the 10% mining royalty funds allocated to communities, as the PFMA primarily addresses the management of public funds at the national and county levels, leaving a gap in governing community royalties.</li> </ul>	<p>The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate &amp; Civil Society Organizations (CSOs)</p>

Gaps	Recommendation	Responsibility
Ring-fence use of royalties' funds	<p>Currently, the 70% and 20% royalties allocated to the National and County governments respectively can be used for any development or recurrent expenditure under both levels of government. It is important to broadly specify areas that the money can be used for. This can be part of the regulations developed on the use of royalties.</p> <p>Further, civil societies need to be proactive in advocacy for the utilisation of the royalties funds.</p>	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate & Civil Society Organizations (CSOs) such as Haki Madini
Land compensation	Communities and Civil societies need to be engaged before the government makes the compensation decision. This is to be done before contracts are awarded to mining companies. Further, discussions on a compensation framework for coherence need to be initiated.	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, Ministry of Lands, Housing and Urban Development, National Assembly, Senate & Civil Society Organizations (CSOs) such as Haki Madini
Institutional framework in the mining sector	Operationalisation of the National Mining Corporation (NMC) and the National Mining Institute (NMI) need to be prioritised. The institutions can facilitate research, education, investments, and skills development in the mining sector.	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, & Senate
	Complementation of institutions to support development initiatives	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate & civil societies.
	Skills and competence in the management of shared mining revenues	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Parliament & Senate, County Government
	Royalty management committee	GOK, Parliament, Senate, & and Civil society like Haki Madini

Gaps		Recommendation	Responsibility
Sustainability of mining benefits and royalties	Long-term planning for royalties to benefit Local communities	Currently, most counties like Kwale with significant mining operations that contribute to royalties do not have long term investment plans for the royalties that will be shared with the communities. There is a need for plans for long-term projects that would benefit communities beyond the companies close.	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, & Senate, Royalty committees, CDACs, & County Governments
	Sustainable management of infrastructure constructed using mining revenues and royalties	Community projects constructed through mining revenue and royalties through committees such as CDACs lack proper maintenance and management when mining companies exit the sites. There is a need for proper handing over of community projects to the respective county governments or the national government to ensure the sustainability and smooth operation of such projects.	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate, CDACs, Royalty committees & County Governments
Transparency	Information sharing	<ul style="list-style-type: none"> <li>Information relating to contract and agreement signing should be made public and on time to enhance transparency.</li> <li>Information on revenue collected and disbursement should be made public, and public views to be collected regarding the reports.</li> <li>The Ministry of Mining and the National Treasury should avail reports regarding companies that have paid royalties and how much the communities will be receiving.</li> <li>KHRC and Haki Madini should agitate for information sharing from the national and county governments, mining companies and the communities in charge of revenue utilisation.</li> <li>KHRC and Haki Madini to lobby for Kenya to join the Extractives Industry Transparency Initiative.</li> </ul>	KHRC, Commission on the administration of justice. Parliament, senate, & GOK
Accountability	Reporting	Accountability for the money utilised from the community's share of revenues and royalties is needed. We need to build the capacity of local communities to understand mining revenues and royalty reports provided by mining companies and the government.	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate, Haki Madini, KNCHR and KHRC

Gaps		Recommendation	Responsibility
	Audit	<ul style="list-style-type: none"> <li>Audit of all public funds going for community projects; revenue from 1% gross sales and royalties need to be audited by the auditor general to enhance accountability.</li> <li>KHRC and Haki Madini should continuously scrutinise and ask questions about audit queries relating to revenue utilisation.</li> </ul>	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Office of the Auditor General (OAG), Parliament, Senate, County governments, Haki Madini, KNCHR and KHRC.
	Oversight	Clear oversight mechanism: Utilisation of revenue from 1% gross sales and royalties needs a clear oversight mechanism to enhance accountability and prevent public fund mismanagement. Currently, there is no body that oversees the utilisation of money by CDACs, which could spill over to the proposed royalty committees.	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, Senate, County government, Haki Madini, KNCHR and KHRC.
	Community engagement	The public participation framework should be enhanced to ensure communities are adequately engaged in all revenue-sharing phases. Civil societies should continuously advocate for community engagement in all phases.	KHRC, Haki Madini, Commission on the administration of justice. Parliament, Senate, & GOK
	A platform for stakeholders to monitor utilisation of shared revenues from mining	A platform is needed for all stakeholders to monitor and assess the utilisation of money from the revenue share at the community and county levels.	Haki Madini, KNCHR, KHRC, National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, and Senate
	Conflict resolution mechanisms	<p>According to the Mining Act of 2016, complaints on mining benefits and royalty sharing need to be directed to the Cabinet Secretary (CS) Ministry of Petroleum and Mining. While this may look good, it is quite bureaucratic given the seniority gap between the mining-affected communities, CDACs and the office of the CS. It was also noted that in the event CDAC had conflicts with other stakeholders, such as the mining companies or the county government, it was not clear who was responsible for dispute resolution.</p> <ul style="list-style-type: none"> <li>Consider establishing a Mining Regulatory Authority (MRA), having a parliamentary mining committee, or a County level oversight framework tasked with overseeing the mining sector instead of the CS</li> </ul>	The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, and Senate

Gaps		Recommendation	Responsibility
Infringement of Human rights	Inclusivity in decision-making	The mining community needs to be engaged in making decisions that will affect them before and after licensing and issuing contracts to the mining companies. KHRC and Haki Madini to spearhead advocacy on inclusivity of the affected communities in decision making.	KHRC, Haki Madini, Commission on the administration of justice. The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, and Senate
	Effective Projects prioritisation	The study indicated that political capture is common during project prioritisation of community revenue shares. The revenue-sharing framework needs to ensure that civil societies are involved in project prioritisation to weed out political influence.	KHRC, Commission on the administration of justice. The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, and Senate
	Equal allocation of projects to the affected communities.	The respective parties/or committees need to ensure that there is equity and equality during project development for money generated from mining activities. Some members of the affected communities have received more projects than others in Kwale County due to their political inclination. <ul style="list-style-type: none"> <li>KHRC and Haki Madini should advocate for equity and equality in project development and execution to ensure people get the right to development in their areas.</li> </ul>	KHRC, Commission on the administration of justice. The National Treasury and Economic Planning, Ministry of Mining and Petroleum, National Assembly, and Senate

## 5.2 Summary of proposals for best practices

Best Practice	Details	Country	Proposal for Kenya
Community involvement during licensing	Section 3 of the Mining Act 1992 provides for consultation with the affected communities before granting large-scale mining leases to mining companies.	Papua New Guinea	Kenya needs to use legal instruments to ensure that mining companies enter into agreements on compensation and other benefits before licences are issued.
	Australia established land councils. The Aboriginal Land Rights Northern Territory Act 1976 sets guidelines for negotiation with the landowners before granting the companies licences. The land councils are consulted before any agreement is sealed with the mining companies.	Australia	
	Canada endorses the principle of Free Prior Informed Consent (FPIC), which grants potentially affected communities the right to participate in decision-making processes and the right to refuse consent.	Canada	



<b>Best Practice</b>	<b>Details</b>	<b>Country</b>	<b>Proposal for Kenya</b>
Royalty collection	Royalties are paid to the state or provincial government.	Canada, India, and the United States	Kenya can consider allowing county governments to collect royalties from mining companies. This would enhance the close monitoring of the companies' activities and prevent royalty payment evasion.
Foundation Trust Funds (FTFs)	The FTFs largely deal with the disbursement arrangements, compensations, commitment for employment, and governance structures. In Australia, a trust manages these funds for local business and community projects, overseen by a joint committee of Traditional Owners and mine representatives.	Australia	Trust funds can be established to distribute royalties effectively to the community and make investments for future generations.
	Ghana's revenue authority deposits twenty per cent of the royalties received from mining companies to this fund. The fund's aim is to boost the local economy, establish alternative livelihood initiatives, and mitigate the adverse impacts of mining on affected communities.	Ghana	
Mineral Audit	Tanzania instituted the Tanzania Mineral Audit Agency (TMAA) in 2010. It is responsible for enforcing taxes and royalties, a situation that led to a doubling of the revenue collected between 2011 and 2012.	Tanzania	There is a need for a body that carries out audits of the minerals mined, follows up on sales and ensures prompt and accurate payment of royalties

## **6.0 FURTHER RESEARCH**

1. Compare revenues generated from large-scale mining companies and artisanal mining across different counties. This includes the established processes for collecting the royalties.
2. Review the compensation and resettlement framework of people living in prospective mining areas.
3. Fact-finding research on human rights violations in mining areas.

# ANNEX 1: LIST STAKEHOLDERS CONSULTED IN THE STUDY

**Table 4: List stakeholders consulted in the study**

<b>Organisation</b>	<b>Department</b>
Kwale Mining Alliance	Operations
Ministry of Interior	Administration
National government department of mining	Administration
	Mining
	Planning
	Compliance
The county government of Kwale	Finance
	Environment and natural resources
Oxfam	Programs
Association for Women in Energy and Extractives in Kenya (AWEIK)	Administration
Msambweni Community Development Agreement Committee (CDAC)	Management
Media	Reporting
Base Titanium	Administration
Haki Madini Coalition	Programs
Haki Jamii	Programs
Ngengenye Human Rights CBO	Programs
Kwale Women Focus Initiative	Administration
Human Development Agenda (HuDA)	Administration
Inter-Religious Council	Administration

## ANNEX 2: TOOLS FOR DATA COLLECTION

**Title: Study on Revenue Sharing Mechanisms and Royalty Management in Kenya**

**KENYA HUMAN RIGHTS COMMISSION (KHRC)**

**Title: Study on Revenue Sharing Mechanisms and Royalty Management in Kenya**

### Tools

#### A. Key Informant Tool (KII) for County and National Government Officials and Formal CSOs

This tool will also guide KIIs

**Date:** \_\_\_\_\_

**Interviewee Information:**

**Name:** \_\_\_\_\_

**Position:** \_\_\_\_\_

**County/ National Government Institution:** \_\_\_\_\_

**Start with greetings and introduction before starting the interview conversation**

I am [Your Name], a consultant representing the Kenya Human Rights Commission (KHRC), a leading Non-Governmental Organisation in Africa dedicated to enhancing human rights-centered governance. Currently, I am undertaking a study on Revenue Sharing Mechanisms and Royalty Management in Kenya. This research aims to analyze the legal, regulatory, and institutional frameworks in the mining, with a focus on assessing their adequacy, effectiveness, and accountability. The study intends to provide valuable insights to support transparent and progressive management of mining revenues, aligning with the African Mining Vision. In addition, the findings will inform KHRC's advocacy work to support equitable and sustainable mining royalties sharing in Kenya.

**In a simple way explain to the interviewee what royalties are**

In Kenya's mining sector, **royalties** are payments made by mining companies to the government in exchange for the permission to access and extract non-renewable minerals from the land. These payments, usually a percentage of the company's income, contribute to national development and are distributed among the national government, county governments, and local communities as specified by the Mining Act of 2016.

**Interviewee Background and Understanding of Royalties and Revenue Sharing in the Mining sector:**

- a. Kindly share with us/ me an overview of your role and responsibilities in the county/national government/ CSO space, particularly in relation to mining, revenue sharing, and royalty management?
- b. What are some of the recent developments that you are aware of in mining revenue sharing and royalty management? What has occasioned these developments? Why are they relevant?
- c. How would you describe the political economy of the mining sector in Kenya? Who are the key players? Why?

### **Current Framework and Policies:**

- d. How would you describe the existing legal, regulatory, institutional frameworks and structures for mining revenue management at the county/national level? *[Explain that this means what policies/regulations does s/he know exist or are being developed, how do they work; what is the role of Counties?]*
- e. In your opinion, are there any gaps or challenges in the current frameworks that hinder effective administration of royalties to the national government, county government, and local communities?
- f. What is your take on the royalties' current ratios as part of an existing legal framework.
- g. What is the nexus/impact of the existing mining revenue management frameworks on Social-economic development?
- h. Is there an aspect of the legal framework that has not been dealt with during the interview that they would like to address.
- i. How would you describe the overall coordination between the national and county government in the mining sector? What have been the gaps and how can they be strengthened?

### **Royalties and Community Development Agreement (CDA) :**

- a. Regarding royalties, can you elaborate on the mechanisms in place for the distribution of royalties between the national government, county government, and local communities? *[Ask for details on percentages that go to each group; what are the trends in disbursement? after how long the revenues are shared; who is in charge; has it happened in the last one year or when was it lastly shared; is there an account and who manages it? Are they audited? Can s/he quote percentages or amounts (total and shared)]*
- b. How is the Community Development Agreement (CDA) implemented in your county (or in this country), and what impact has it had on community development projects? Is the CDA adequate? What is their take on the existing CDA? In the view of KI, what is the take of the mining communities on the implementation of the CDA?
- c. How is the stakeholder/community organization and coordination in the sector?

### **Political goodwill from local politicians and executive (leadership) at both national and county:**

- d. How would you describe the political climate and support or challenges to royalty sharing in the County/ at a national level? Probe for a recommendation.
- e. What is the role of politics in the resource justice conversation within the context of royalties management and CDA? What are the interlinkages?

### **International and Regional Benchmarks:**

- f. Do you know of any efforts to benchmark Kenya's royalty framework against international and regional best practices? If yes, what were the key findings, and how have they influenced policy decisions? Alternatively, do you know of some best practices from other countries that Kenya can adopt in its royalty sharing mechanisms?
- g. In your view, how does Kenya's current royalty framework compare to selected international and regional models in terms of compensating mineral owners, benefiting communities, revenue mobilization, contribution to GDP, and promoting responsible business practices?

### **Mechanisms for Management, Reporting, and Tracking:**

- a. What measures are in place to ensure transparency, accountability, and community oversight in the management of mining revenues? *[Ask for details of community or CSO groups involvement in royalty sharing in his/her jurisdiction that s/he is aware of]*
- b. How are mining revenues collected, reported, and tracked at both the national and county levels? Do mining companies that you are aware of share information on revenues and royalty payments? If so, how and how frequent? If not, they need to share details of concern and a recommendation.
- c. How do you ensure accountability and oversight in the process of revenue and royalties management and sharing in the mining sector in Kenya? (questions to parliamentarians)
- d. To what extent does the revenue sharing from royalties management adhere to Principles and Framework of Public Finance described in chapter 12 of the Constitution.

### **Recommendations and Way Forward:**

- e. Based on your experience and observations, what recommendations would you propose to improve the progressive, inclusive, accountable, transparent, and participatory management of mining revenues in Kenya, especially at the county level?

*Note: Ensure to thank the interviewee for their time and willingness to contribute to the study. Additionally, request any additional relevant information or documents they may be willing to share to supplement the research.*

## B. Key Informant Tool (KII) for Mining Companies/Multinationals

This tool will also guide KIIs

**Date:** \_\_\_\_\_

### Interviewee Information:

**Name:** \_\_\_\_\_

**Position:** \_\_\_\_\_

**Institution:** \_\_\_\_\_

### Start with greetings and introduction before starting the interview conversation

I am [Your Name], a consultant representing the Kenya Human Rights Commission (KHRC), a leading Non-Governmental Organisation in Africa dedicated to enhancing human rights-centered governance. Currently, I am undertaking a study on Revenue Sharing Mechanisms and Royalty Management in Kenya. This research aims to analyze the legal, regulatory, and institutional frameworks in mining, with a focus on assessing their adequacy, effectiveness, and accountability. The study intends to provide valuable insights to support transparent and progressive management of mining revenues, aligning with the African Mining Vision. In addition, the findings will inform KHRC's advocacy work to support equitable and sustainable mining royalties sharing in Kenya.

### In a simple way explain to the interviewee what royalties are

In Kenya's mining sector, **royalties** are payments made by mining companies to the government in exchange for the permission to access and extract non-renewable minerals from the land. These payments, usually a percentage of the company's income, contribute to national development and are distributed among the national government, county governments, and local communities as specified by the Mining Act of 2016.

### Interviewee Background and Understanding of Royalties and Revenue Sharing in the Mining sector:

- a. Kindly share with us an overview of how [Mining Company Name] currently engages in revenue sharing mechanisms and royalty management in Kenya's mining sector?

### Community Development Agreement (CDA) and Royalties:

- a. How does [Mining Company Name] implement the Community Development Agreement (CDA) and handle the distribution of royalties as per the requirements of the Mining Act of 2016?
- b. Are there any specific policies or guidelines that your company adheres to regarding revenue sharing with local communities?
- c. Can you share insights into the company's approach to fulfilling its obligation of X% of the company's income towards community projects through the CDA?
- d. How do you engage with local communities to ensure their involvement in decision-making related to revenue sharing from mining activities?
- e. Can you provide details on any community development projects funded by mining revenues?

### Challenges and Opportunities:

- a. In your experience, what challenges or opportunities does [Mining Company Name] encounter in adhering to the existing legal, regulatory, and institutional frameworks related to revenue sharing and royalty management in Kenya?

**Transparency and Reporting:**

- a. How does [Mining Company Name] ensure transparency in reporting and tracking mining revenues collected and distributed at both the national and county levels? *[What kind of reports or level of information on revenues and royalty/ benefits sharing do you share and with whom; how frequently]*/ What systems/mechanisms are in place to ensure transparency in reporting mining revenues and royalties to national government, county government, and communities?
- b. How do you ensure accountability and oversight in the process of revenue and royalties management and sharing in the mining sector in Kenya?
- c. What measures do you have in place to prevent any potential misuse or mismanagement of mining revenues and royalties allocated to communities?

**Community Engagement:**

- a. To what extent does [Mining Company Name] involve local communities in the decision-making process related to revenue sharing and community development projects?

**Recommendations for Improvement:**

- a. Based on your experience, what recommendations would [Mining Company Name] propose to enhance the progressive, inclusive, accountable, transparent, and participatory management of mining revenues in Kenya?

*Your valuable insights will contribute significantly to our efforts in advocating for transparent and progressive management of mining revenues in Kenya. Thank you for your time and cooperation in this study.*



## C. Focus Group Discussion (FGD) Tool for Local Community Representatives:

**Date:** \_\_\_\_\_

### Interviewee Information:

**Name:** \_\_\_\_\_

**Position:** \_\_\_\_\_

**Name of group and place of meeting:** \_\_\_\_\_

### Start with greetings and introduction before starting the FGD

I am [Your Name], a consultant representing the Kenya Human Rights Commission (KHRC), a leading Non-Governmental Organisation in Africa dedicated to enhancing human rights-centered governance. Currently, I am undertaking a study on Revenue Sharing Mechanisms and Royalty Management in Kenya. This research aims to analyze the legal, regulatory, and institutional frameworks in the mining sector, with a focus on assessing their adequacy, effectiveness, and accountability. The study intends to provide valuable insights to support transparent and progressive management of mining revenues, aligning with the African Mining Vision. In addition, the findings will inform KHRC's advocacy work to support equitable and sustainable mining royalties sharing in Kenya.

### In a simple way explain to the participants what royalties are

In Kenya's mining sector, **royalties** are payments made by mining companies to the government in exchange for the permission to access and extract non-renewable minerals from the land. These payments, usually a percentage of the company's income, contribute to national development and are distributed among the national government, county governments, and local communities as specified by the Mining Act of 2016.

### Community Perceptions and Understanding:

- a. How would you describe the community's understanding of revenue sharing mechanisms and royalty management in the mining sector within Kwale County?
- b. How are royalties and benefits from mining currently managed and distributed within the community?

### Impact on Local Development:

- c. In your opinion, how has the revenue sharing from mining activities, including royalties, contributed to local development projects and community well-being in Kwale County?
- d. Have community development projects or initiatives been funded by royalties or revenue sharing from mining? If so, what are some examples?
- e. What improvements or changes would community members like to see in the management and administration of royalties and revenue sharing for the benefit of the community?
- f. How do community members ensure that funds allocated for development projects actually benefit the community as intended?

### Challenges Faced by the Community:

- g. What challenges or issues have the community faced in accessing and benefiting from the royalties allocated to Kwale County, as outlined in the Community Development Agreement (CDA) and the Mining Act of 2016?

### **Community Involvement in Decision-making:**

- h. How actively are local communities involved in the decision-making processes related to the administration of royalties and the implementation of community projects funded through the CDA? How satisfied are community members with the current system of royalties and revenue sharing in place?

### **Information Accessibility:**

- i. To what extent do community members have access to information concerning the pricing, sales, negotiations, contracts, and parties involved in the extraction and sale of natural resources in Kwale County?
- j. In your view, are there mechanisms in place to ensure transparency and accountability in the administration of royalties and revenue sharing ?

### **Expectations and Recommendations:**

- k. What are the community's expectations from mining companies and the government concerning revenue sharing, and what recommendations would you propose to enhance the transparency and accountability of these processes for the benefit of the local community?
- l. How can the royalties from the mining sector be harnessed to contribute to addressing current economic challenges such as debt crisis and high cost of living?

*Your valuable insights will greatly contribute to our understanding of the local dynamics and help shape recommendations for more inclusive and accountable management of mining revenues in Kenya. Thank you for your participation.*





## Get in touch

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