Symposium on the Wathome Decision - Beyond Breeder Rights: Reclaiming Seed Sovereignty, Food Justice, and Cultural Autonomy in Kenya

By:

Wambugu Wanjohi

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In late November 2025, the Machakos High Court in Kenya issued an unprecedented judgment that was noteworthy. The judgment was not limited to legal correction; it struck down the key provisions of the Seed and Plant Varieties Act (SPVA). It was a strong assertion of humanity's dignity, culture, and the right to eco-justice. The Court aligned Kenyan law with constitutional values and international human rights obligations by declaring unconstitutional the laws that criminalized the saving, sharing, and sale of farm-saved and Indigenous seeds. The UN human rights experts have recognised this judgement as a landmark for the rights of peasants and food security, and declare it a strong rebuttal against the international trade of seeds through

restrictive IP regimes.

The case Kisilu Musya & Samuel Wathome & 3 Others v. Kenya Plant Health Inspectorate Service & Greenpeace Environmental Kenya NPC put forward a simple but radical proposition: seed sharing among smallholder farmers is not (or should not be) a criminal or illegal act; rather, it is the cornerstone of a better agricultural future. The petitioners, aided by civil society outfits like the Biodiversity and Biosafety Association of Kenya (BIBA) and the Law Society of Kenya (LSK), argued that SPVA's alignment with the UPOV 1991 framework was maliciously premised on the corporation's breeder rights over the constitutional and cultural rights of rural people in consultation with a benefit-sharing arrangement.

Seeds as Culture, Not Commodity

Article 11 of Kenya's 2010 Constitution states that culture is "the cornerstone of the nation" and that the State must "promote all forms of national and cultural expression" (subsection 2 (b)). The State is further mandated to "ensure the promotion of indigenous technologies" (subsection 2(d)). For generations, farming communities across Kenya have developed, conserved, and exchanged Indigenous seed varieties that are well-adapted to local agro-ecological conditions. These seeds are not mere biological materials; they represent a repository of ancestral knowledge and social cohesion. Criminalising their exchange, as the SPVA did through provisions like Section 8(1), which banned the sale of "unindexed" seeds, was, in the Court's words, "to erode the cultural uniqueness of Kenya's Indigenous peoples."

The ruling properly considers seed sovereignty as linked to cultural sovereignty. The legislation renders illegal a practice that feeds more than 80 percent of Kenya's smallholder farmers by forcing farmers to register as a seed merchant (with a prohibitive fee of Ksh 75,000), certify their seeds in a costly laboratory process, and exchange only "indexed" commercial varieties. This did not amount to modernization; this was epistemic violence in the form of delegitimizing Indigenous knowledge systems in favour of a narrow, profit-engendering so-called quality definition by global seed companies.

Dr. Clare O'Grady Walshe indicates in her comparative study of seed laws in Sub-Saharan Africa that the 2012 SPVA amendments in Kenya were among the

most aggressive in Sub-Saharan Africa in copying UPOV 1991 standards, even though Kenya had no binding obligation to do so under international law. Unlike this, Ethiopia's 2013 Seed Proclamation specifically excludes smallholder farmers from the ambit of certification, as farmers play a central role in conserving agro-biodiversity. The adjustment of Kenya's judiciary now brings its policy closer to this rights-based, pluralistic model.

The Right to Food vs. the Right to Profit

A fundamental tenet, enshrined in the ruling of the Court, is that the right to food prevails over property rights. According to articles 43(1)(c) and 21(2) of Kenya's Constitution, "every person has a right to be free from hunger, and to have adequate food of acceptable quality," and obliges the State to legislate to realize this right progressively. Nonetheless, the administration and application of the SPVA caused serious obstacles to food accessibility and production among poor farmers.

The sale of "uncertified" seeds was made a crime under Section 10(4), while the use of seeds harvested by farmers from "protected" variety seeds was restricted under Section 20(1E). This restriction stated that the use of these seeds would only be allowed "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder." In effect, farmers were legally bound to make commercial purchases each year.

The Court has correctly concluded that these provisions limit the right to food unjustifiably. According to UN experts, seed saving and seed sharing are " integral to the identity, resilience and contribution of peasants to national food systems". Laws that prohibit these actions stop a transaction, but also cut off a community's lifeline to food sovereignty. With smallholder farmers producing over 60% of the national food supply, such a disconnect is an outright threat to national food security.

Equity, Discrimination, and the Informal Seed Economy

A further important element of the ruling was its recognition of socio-economic discrimination embedded in the SPVA. The registration and certification regime was not just highly bureaucratic; it was exclusionary by design. The legislation imposed high fees and technical requirements on seed companies, which only

larger agribusinesses can afford. As a result, it established a two-tiered system: one exclusively for corporate seed traders, and one for the majority of rural farmers.

The Court ruled that this, in fact, amounted to an instance of indirect discrimination under Article 27 of the Constitution, which provides for equality and freedom from discrimination among others on social and economic grounds. Essentially, the law was penalizing poverty. A Makueni or Turkana farmer who shared drought-resistant millet seeds with a neighbor could go to prison for two years or face a fine of one million shillings just for doing something necessary for survival.

This consideration of the ruling directly engages with the larger debates on development. The farmers who perform the main activity in agriculture end up marginalized through policies that are framed as modernizing or formalizing. The judgment of the Machakos High Court is a reminder that agricultural development must start from the realities and rights of small producers, and not from the profit margins of transnational seed companies.

A Rights-Based Framework for Seed Governance

The ruling based its judgment on Kenya's international human rights obligations. The Constitution, through Articles 2(5) and (6), provides that international law and ratified treaties form part of the law of Kenya. The above provision line calls out Nairobi in human standards. The Court relied on two significant instruments: the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which upholds farmers' rights to save, use, exchange and sell farm-saved seed, and the 2018 United Nations Declaration on the Rights of Peasants and other People working in Rural Areas (UNDROP), which lays out in Article 19 a "right to seeds".

The UN Working Group on Peasants has explained that this includes the right to not only seeds but also the legal recognition and active support of "peasant-managed seed systems". By classifying informal seed systems as illegal, unscientific, and inferior, Kenya's past seed law failed the test spectacularly. The Court's invalidation of the most oppressive clauses of the SPVA is thus not merely a victory within the domestic legal system; it is a step that allows Kenya to fulfil its international human rights and food sovereignty commitments.

Additionally, the ruling gives credence to the 'green imperialism' which has emerged as a major critique across the world, where seemingly benevolent environmental or agricultural initiatives are taking away community rights through the imposition of green knowledge and property regimes. By affirming Indigenous seed sovereignty, the Court has rejected a model of agricultural development that equates progress with corporate control and endorsed one that embodies local agency, biodiversity, and resilience.

Implications and the Road Ahead

This ruling is not the end of the story; it is a beginning. Parliament now has the constitutional duty to enact new legislation that genuinely protects Indigenous seeds and plant varieties while balancing the legitimate interests of plant breeders. Such a law must avoid the pitfalls of the past by:

• Explicitly exempting smallholder farmers and informal exchanges from commercial certification and registration requirements;

• Establishing a distinct legal category for "farmers' seeds" that recognizes their genetic diversity and cultural value;

• Creating participatory mechanisms for seed governance that include farmers' organizations in decision-making;

• Ensuring that any intellectual property protections for commercial breeders do not undermine the human right to food or the cultural right to seed sharing.

The UN experts have justifiably urged other nations to take inspiration from the courage of the Kenyan judiciary. In Africa and the Global South, similar struggles are underway against seed laws that criminalize tradition in the name of innovation. Kenya's High Court issued a ruling suggesting courts can and must intervene to protect human rights when legislative processes are captured by narrow commercial interests.

All in all, the Machakos High Court judgment goes beyond the technicalities of plant variety protection. That says a lot about who gets to control the most basic building blocks of our food systems – and therefore, our cultures and our futures. Through its ruling that acknowledges seed sharing as a constitutional right rather than a criminal offense, the Court has planted the seeds of a just,

equal, and sovereign food future for Kenya. It is now up to policymakers, civil society, and citizens to nurture this legal harvest into a vibrant reality.

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