



**Mwau v Attorney General (Petition 541 of 2013) [2015] KEHC 6979 (KLR)
(Constitutional and Human Rights) (15 January 2015) (Judgment)**

John Harun Mwau v Attorney General [2015] eKLR

Neutral citation: [2015] KEHC 6979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 541 OF 2013
I LENAOLA, J
JANUARY 15, 2015**

BETWEEN

HON. JOHN HARUN MWAU PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

The Court cannot interfere with the process of Conferment of National Honors and Awards.

Reported by Andrew Halonyere

Constitutional Law - National Honours and Awards - conferment of National Honours and Awards - allegation of discrimination against conferment of National Honours and Awards - discretion of the President to confer National Honours and Awards - whether the High Court could interfere with the President's discretionary powers to confer National Honours and Awards - Constitution of Kenya 2010, article 132 (4) (c); National Honours Guidebook 2004; National Honours Act, 2013

Brief facts

The petitioner brought a petition before the High Court claiming *inter-alia* that certain persons (unnamed), including himself, who were eligible to be conferred with National honours, medals and awards between 2008 and 2012 were discriminatorily denied the same, which resulted in unequal treatment and violation of their rights.

The petitioner further claimed that the National Honours Guidebook 2004 established elaborate structures on the eligibility for conferment of the honours and awards and the Guide Book remained the sole source of Government policy in that regard. He submitted that the differentiation accorded amongst Judges, Members of Parliament and Assistant Ministers was unfounded as it had no legitimate purpose other than spite and it created unequal treatment and as such was discriminatory, unfair administrative action and unconstitutional.



The Attorney General (respondent) opposed the petition on the ground that National Honours were a prerogative of the President under the National Honours Guide Book 2004 Guidelines, arguing that the Court would be overstepping its mandate if it granted the declarations sought by the petitioner.

Issues

- i. Whether the petitioner and some Judges, Magistrates, Assistant Ministers and Members of Parliament, among others, who were allegedly eligible to be conferred with medals, National honours and awards between 2008 and 2012 had been denied that right.
- ii. Whether the act of allegedly denying the Government officers the awards and honours amounted to unequal treatment and discrimination.
- iii. To what extent was the process of conferment of National Honours or Awards open to public participation?

Relevant provisions of the Law

Constitution of Kenya 2010

Article 132(4)(c)

Provides as follows;

(4) The President may —

(c) confer honours in the name of the people and the Republic;

Held

1. There was no guarantee or automatic conferment of Honours or Awards to an individual and there was no such thing as class conferment of Honours to individuals in a particular class, profession or office department.
2. Conferment of Honours in Kenya was not automatic or compulsory but was at the discretion of the President, much as it was the preserve of the Monarch in the United Kingdom, and was given to an individual as a way of recognizing that individual's performance and service to the Nation. In the eligibility criteria contained in the Guide Book, there was no provision that an accession to the office of Judge, Member of Parliament or Assistant Minister etc was an automatic qualification for the conferment of any National Honour or award.
3. It was not within the power of the High Court to decide whether or not conferment of Honours and awards was right or wrong or to give its opinion on such matters. It was so because no Kenyan citizen had a legitimate expectation of receiving an Honour since the conferment of such an Honour lay entirely within the discretion of the conferring body, in the instant case, the President, and was based on the distinguished service offered by that citizen.
4. The receipt of an Honour lay entirely within the discretion of the conferring body. The conferral of the Honour was a discretionary favour. It engaged no liberty, no property, no economic interests. It enjoyed no procedural protection. It did not have a sufficient legal component to warrant the Court's intervention. Instead, it involved moral and political considerations which was not within the province of the courts to assess. In other words, the discretion to confer or refuse to confer an Honour was the kind of discretion that was not to be reviewed by the Court.
5. The best example of discretion was judicial discretion. The exercise of discretion by a judge was hardly challengeable unless it was exercised injudiciously. Even higher courts seldom overturned exercise of discretion by subordinate courts. In the same breathe, the High Court or any other Court could not order a President, present or past, to exercise his discretion to confer National Honours in a particular way or to certain officers in certain offices. To do so would be akin to taking away discretion that was reposed only in the President. Such an action would be wholly irregular.
6. The Guide Book which the petitioner had relied upon in seeking the conferment of Honours and Awards between 2008 and 2012 provided for the procedure to be followed in recommending conferment of an award or Honours to an individual. In that regard, there was no evidence before the Court that the said procedure was ever followed and in particular, whether the persons whose rights had allegedly accrued ever applied to the relevant Committee to be awarded such Honours and that the application had been denied. The High Court



could not therefore sit as the Committee on Administration of Honours and grant such Honours and Awards as urged by the petitioner.

7. Mere differentiation based on a criteria leading to legitimate exercise of discretion could not be said to be discriminatory. There was no evidence of unfair administrative action against the Petitioner and all the others that he claimed to represent.

8. The criteria for conferment of National Honours prior to the enactment of the Constitution 2010 and the National Honours Act, 2013 was hardly in the public domain. The President prior to 2010 had sole discretion to confer and annul National Honours. The process was open to public participation but the President's discretion had not been taken away.

Petition dismissed.

Citations

East Africa

1. *Attorney General v Tinyefuza* Constitutional Appeal No 1 of 1997 - (Explained)
2. *Karanja, Samuel Murimi & 2 others v Republic* Criminal Application No 412 of 2003 - (Applied)
3. *Kenya Medical Research Institute (KEMRI) v Attorney General & 3 others* Petition No 31 of 2013 - (Explained)
4. *Kituo Cha Sheria v Attorney General* Petition No 19 of 2013 - (Applied)
5. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] 3 KLR 199 - (Applied)
6. *Matende, Samson v Republic* Criminal Appeal No 141 of 2009 - (Applied)
7. *Mutonga, Samuel & 8 others v Colgate Palmolive (East Africa) Ltd* Civil Suit No 399 of 2007 - (Applied)
8. *Mwita, Julius Chacha v Kenya Airways Ltd & another* Petition No 257 of 2013 - (Applied)
9. *Ombati, Patrick Nyakondu v Credit Bank Ltd* Cause No 105 of 2013 - (Applied)
10. *United States International University (USIU) v Attorney General* Petition No 170 of 2012 - (Applied)
11. *Ruchu, Muragu & another v Registrar Industrial Court & 10 others* Petition No 20 of 2012 - (Applied)

South Africa

1. *Harksen v Lane* No 1998 (1) (SA) 300; [1997] ZACC 12; 1997(11) BCLR 1489 - (Applied)
2. *Minister of Health and others v Treatment Action Campaign and others* (2002) 5 LRC 216; [2002] ZACC 15; 2002 (5) SA 721 - (Followed)
3. *Prinsloo v Van Der Linde* [1997] (3) SA 1012 ZACC 5- (Explained)

Canada

1. *Black v Chretien* (2001) 54 OR (3d) 215, 199 DLR (4th) 228 - (Applied)
2. *Withler v Canada (Attorney General)* (2011) SCC 12; [2011] 1 SCR 396 - (Mentioned)

New Zealand

David McAllistar v Solicitor General of New Zealand [2013] NZHC 2217; [2013] 3 NZLR 708 - (Applied)

Singapore

1. *Eng Foong Ho & Others vs Attorney General* (2009) 2 SLR 542 - (Mentioned)
2. *Ong Ab Chuan v Public Prosecutor* (1980-1981) SLR 58 - (Mentioned)

United Kingdom

- Home Affairs Department ex parte Gangadeen v Secretary of State* [1993]
3. LRC 270-(Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 132(2)(4)(c); 134(4)(c)(e); 162(1)(2); 165(4) -(Interpreted)



JUDGMENT

Introduction.

1. The Petitioner, John Harun Mwau, has described himself as a distinguished Kenyan citizen who has served the public in various capacities and was at one time the Member of Parliament for Kilome Constituency and an Assistant Minister in the Government. He has filed the Petition dated 30th October 2013 claiming inter-alia that certain persons (unnamed), including himself, who were eligible to be conferred with National honours, medals and awards between 2008 and 2012 were discriminatorily denied the same which fact resulted in unequal treatment and their accrued rights were thereby violated.
2. It is specifically that right to National honours and awards that had allegedly accrued by December 2012 and before coming into force of the *National Honours Act*, 2013, that the Petitioner seeks to have recognized, declared and enforced. In his Petition therefore, he has sought the following orders;
 - “(a) A declaration as to what amounts to unfair administrative action.
 - (b) A declaration as to what amounts to a discriminatory practice by a State officer, public officer or a public body.
 - (c) A declaration that a person occupying the office of the President between December 2008 and 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (CGH)
 - (d) A declaration that a person occupying the office of the Vice President, Speaker of the National Assembly, Cabinet Minister, Head of Public Service and Secretary to the Cabinet, Chief Justice between December 2008 to 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the Second Class Honour of the Elder of the Order of the Golden Heart (EGH).
 - (e) A declaration that a person occupying the office of the Deputy Speaker of the National Assembly, Assistant Minister, Lieutenant General and/or Service Commander and Commissioner of Police between December 2008 and 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the Third Class Honour of the Moran of the Order of the Golden Heart (MGH).
 - (f) A declaration that a person occupying the office of a judge, Member of Parliament, and Major Generals of the Armed Forces, between December 2008 and 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Burning Spear (CBS).
 - (g) A declaration that the decision and/or action of conferring National awards and honours, that is to say, the First Class Honour of the Chief of the Order of the Burning Spear (CBS) to only three judges while excluding all other



persons holding the office of a judge between December 2008 and 2012, was discriminatory to the other judges.

- (h) A declaration that the decision and/or action of conferring National Awards and honours to only a few Cabinet Ministers, a few Assistant Ministers and a few Members of Parliament, excluding all other Assistant Ministers and/or Members of Parliament holding office between December 2008 and 2012, was discriminatory to the Assistant Ministers and Members of Parliament.
- (i) By virtue of Article 162 of the *Constitution*, a Declaration that Judges of the High Court, of the Land and Environment Court and of the Industrial Court are of concurrent jurisdiction.
- (j) A declaration whether, by virtue of Article 162(2) of the *Constitution*, the Land and Environment Court and the Industrial Court are High Courts in their own right.
- (k) A declaration whether persons of the same cadre entitled to certain rights and privileges can be accorded differential treatment arbitrarily.
- (l) A declaration whether persons of similar qualifications, status and/or holding equal office can be discriminated against arbitrarily.
- (m) An order that all other judges including Industrial Court and the Environmental and Land Court Judges who held office between December, 2008 and 2012 were entitled to and be conferred with the National Honour and award of the First Class Honour of the Chief of the Order of the Burning Spear (CBS) as of right forthwith.
- (n) An order that all persons who held the position of Assistant Ministers between December, 2008 and 2012, were entitled to and be conferred with the National Honour and award of the Third Class Honour of the Moran of the Order of the Golden Heart (MGH) as of right forthwith.
- (o) An order that all persons who were Members of Parliament between 2008 and 2012 are entitled to and be conferred with the National Honour and award of the First Class Honour of the Chief of the Order of the Burning Spear (CBS) as of right forthwith.
- (p) An order that all persons who were holding the office of a Chief/Principal Magistrate between December 2008 and 2012, be conferred with the National Honour and award of the Second Class Honour of the Elder of the order of the Burning Spear (EBS) as of right, forthwith.
- (q) An order that all persons who were holding the office of a Magistrate between December 2008 and 2012, be conferred with the National Honour and award of the Third Class Honour of the Moran of the order of the Burning Spear (MBS) as of right, forthwith.
- (r) An order for any other or further relief that this Honourable Court may deem just and appropriate in the circumstances.
- (s) An order that the Respondent bears the costs of this Petition.”



The Petitioner's Case

3. The Petitioner's case is contained in his Petition, Affidavit sworn in support of the Petition dated 8th November 2013 and the Petitioner's further Affidavit sworn on 19th June 2014 as well as his undated written submissions filed in Court on 27th June 2014.
4. Mr. Mwangi presented the Petitioner's case and submitted that some individual Judges, Magistrates, Assistant Ministers and Members of Parliament etc, including the Petitioner, who were eligible and whose rights to be conferred with medals, honours and awards had accrued, have been denied that right. That the act of denying those individuals the said accrued rights and conversely to award the same to others in similar situations, amounts to unequal treatment, is unfair, discriminative and was done in bad faith and in violation of the *Constitution*.
5. That the Guidelines and Policy in the Guidebook 2004 for awarding honours, orders, medals and awards categorizes and differentiates the eligibility for individuals to receive the said honours, orders, medals, and awards in three distinct categories namely; those who are ascending to the stated office in the guidebook; those who have performed actions or achievements in scientific fields, loyalty or heroism, sacrifice, bravery, patriotism or leadership and foreign Heads of States and other foreigners. He thus claimed that if these categories were strictly followed, there would be no discrimination at all.
6. It was also his contention that certain office bearers such as the President, Deputy/Vice President, Chief Justice, Speaker of the National Assembly, Head of Public Service and Secretary to the Cabinet, Chief of General Staff, Cabinet Secretaries, the Attorney General, Deputy Speaker of the National Assembly, Assistant Ministers, Lieutenant Generals, Clerk to the National Assembly, Inspector General of the National Police Service, Members of Parliament, Judges of the High Court and Senior Deputy Commissioners of Police are eligible for the awards, honours and medals as of right. It was his claim in that regard that the person who became the President after the 2003 General Elections was awarded the award of Chief of the Golden Heart of Kenya (CGH) and that the persons who became Vice President, Speaker of the National Assembly, Chief Justice, Head of Public Service and Secretary to the Cabinet, Chief of General Staff, the Attorney General, Cabinet Ministers and Deputy Speaker of the National Assembly were between 2008 and 2012 conferred with the honour and award of the Moran of the Golden Heart of Kenya while Lieutenant Generals in the Defence Forces, Clerk of the National Assembly, Commissioner of Police (and later Inspector General of Police) and all Assistant Ministers were conferred with the honour and award of the Moran of the Golden Heart of Kenya. Further, that between 2008 and 2013, only Lady Justice Joyce Aluoch, Justice Dr. Smokin Wanjala, Justice Prof. Ojwang Jackton Boma, Lady Justice Njoki Ndungu, Justice Mohammed Ibrahim and Justice Philip Tunoi were awarded the Order of the Chief of the Burning Spear in 2013. That between the period of 2008 and 2013, only five Judges have therefore been awarded the First Class honour and award of the Order of the Burning Spear (CBS) and that all other Judges have been left out. He also stated that between 2008 and 2013, only one ordinary Member of Parliament, Hon. Adan Keynan, was awarded the honour of the First Class Order of the Elder of the Burning Spear and all others were left out.
7. He further claimed that the National Honours Guidebook 2004 established elaborate structures on the eligibility for conferment of the honours and awards and the GuideBook remains the sole source of Government policy in that regard. He submitted that the differentiation accorded amongst Judges, Members of Parliament and Assistant Ministers is unfounded as it has no legitimate purpose other than spite and creates unequal treatment and as such is discriminatory, an unfair administrative action and is unconstitutional.



8. He also contended that with the enactment of the *National Honours Act*, 2013, the awards and honours issued subsequently ought to be conferred under that Act but those to whom a right had accrued between 2008 and December 2012 are eligible and are entitled to be conferred with the respective awards and honours. That failure to do so amounts to unequal treatment and is discriminatory and unconstitutional.
9. It was his additional submission that the Guidelines are binding on the issuing authority, being the State, and must be applied without variation. On that point he relied on the case of *Home Affairs Department ex parte Gangadeen v Secretary of State* (1993) 3 LRC 270 UK where it was held that the Home Secretary was bound to strictly apply existing policy guidelines and where the authority had power to exercise discretion, that discretion had to be exercised rationally. Further, that in interpreting the law, the *Constitution* and Statutes, the Court must be guided by the principle of harmonization as was expounded by the Ugandan Supreme Court in the case of *Attorney General v Tinyefuza* (2002) EA
10. He submitted that currently, the conferment of National honours is an executive function of the President as provided for under Article 132(2) (c) of the *Constitution* as read together with Article 134(4) (e) and before the enactment of the *National Honours Act*, the process was conducted under the Guidelines 2004. Therefore, regarding the accrued right of those who held office as between 2008 and 2012, he claimed that the *Constitution* 2010 and the *National Honours Act* of 2013 cannot be applied retrospectively to affect those rights or take away any accrued right. He relied on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd* Application No 2 of 2012, *Kituo Cha Sheria & others v Attorney General* Constitutional Petition No 19 of 2013 and *Samuel Murimi Karanja & 2 others v Republic* Criminal Application No 412 of 2003 all which held that the *Constitution* 2010 does not apply retrospectively.
11. On discrimination, it was his case that some individuals in one class have been preferred and were conferred with the Honours and Awards specified in the Guidelines while others in the same class have been left out which action amounts to discrimination. That the President in exercising his powers under Article 132(2) (c) must act in accordance with the *Constitution* and in that regard, reliance was placed on the case of *Minister of Health and others v Treatment Action Campaign and others* (2002) 5 LRC 216, 248. That there are no reasons advanced for failure to gazette all Judges etc with the National honours and therefore the discrimination meted against them is unfair, unreasonable and unlawful as it is not intended to achieve any objective other than inculcating the feeling that some judges, for example, are more important than others. He referred the Court to various decisions from various jurisdictions on the definition of discrimination such as the *Withler v Attorney General* (2011) SCC 12 (2011) 1 scr 396, *EngFoong Ho & others v Attorney General* (2009) 2 SLR 542, *Ong ab Chuan v PP* (1980-1981) SLR 58 and *David McAlistar v Attorney General of New Zealand*.
12. Lastly, it was the Petitioner's submission that a Judge in the Environment and Land Court (ELC), the Industrial Court (IC) and the High Court are at par according to the hierarchy of Courts in Kenya and as such the judges in the ELC and in the IC should be treated equally without any distinction or preference to any other Judges. He referred to the case of *Patrick Kariuki v Delmonte (K) Ltd* (2013) eKLR, *Patrick Nyakomu Ombati v Credit Bank Ltd* (2013) eKLR, *Samson Matende v Republic* (2013) eKLR, *United States International University (USIU) v Attorney General* Petition No 170 of 2012, *Julius Chacha Mwita v Kenya Airways Ltd & another* (2013) eKLR, *Dr. Muragu Ruchu & another v Registrar Industrial Court & 10 others* (2013) eKLR and *Samuel Mutanga & others v Colgate Palmolive (East Africa)* (2013) eKLR all which espouse the position that the ELC and IC have the same status as the High Court.
13. For the above reasons he urged the Court to grant the prayers sought in the Petition.



The Respondent's Case

14. The Respondent, the Attorney General, opposed the Petition through his Grounds of Opposition dated 10th December 2013 which read as follows;

- “(1) That National Honours were a prerogative of the President under the 2004 Guidelines. Accordingly, this Court will be overstepping its mandate if it grants the Declarations sought by the Petitioner.
- (2) That the National Honours are a sole discretion of the President under the *National Honours Act*, 2013 and Article 134(4)(c) of the *Constitution*.
- (3) That both the 2004 Guidelines and the *National Honours Act*, 2013 established stringent and elaborate structures for the nomination of persons to be honoured and awarded which guidelines cannot be by-passed or substituted by a judgment of this Court.
- (4) Further, that one element that runs through the Guidelines and the Act is merit and individual qualities, actions or achievements of heroism, sacrifice, bravery, patriotism or leadership for the defence, benefit or betterment of the Country or a County. The two documents do not make provision for mass beneficiaries for the Awards and Honours.
- (5) That the act of identifying persons from various sectors for purposes of being awarded with various National Honours, involves differentiating individuals based on their services and this does not amount to discrimination.
- (6) That the Petition as filed herein does not raise any Constitutional question for this Court's determination, and to that extent the Petition is an abuse of the Court process.”

15. Mr. Moimbo presented the Attorney General's case and it was his submission that Article 132(4) of the *Constitution* as read with Section 4 of the *National Honours Act* and the GuideBook2004, are clear that issuance of awards and honours is a function of the President at his discretion and such discretion is beyond review by this Court and granting the orders sought would be tantamount to the Judiciary interfering with the legitimate exercise of discretion by the President. On that point, he relied on the case of *Black v Chiritien* (2001) 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A).

16. On the applicability of the GuideBook 2004, Mr. Moimbo submitted that awards are based on merit and individual qualities, actions or achievements of heroism, sacrifice, bravery, patriotism or leadership for the defence, benefit or betterment of the Country and that the GuideBook does not make provision for mass beneficiaries for the awards and honours but is presently strictly guided by Section 4 of the *National Honours Act*, 2013. That in any event, the Guidebook does not have any statutory underpinning and it cannot therefore be the basis of a cause of action in a Constitutional Petition. Further, that the act of awarding/honouring some individuals and leaving others is not an act of discrimination but an act of differentiation based on individual capabilities. On that point, he relied on the case of *Harksen v Lane* No 1998(1) (SA) 300 (CC) where the Court identified two elements for determining whether an act is discriminatory or not;

- i. Whether the challenged law or conduct differentiates people or categorizes people and whether the differentiation bears a rational connection to a legitimate government purpose.



- ii. Whether the differentiation amounts to unfair discrimination.
17. It was therefore Mr. Moimbo's submission that a law or conduct that differentiates between groups of people will be valid as long as it does not deny equal protection or benefit of the law and that a law would be discriminatory if the differentiation it creates does not have a legitimate purpose and if there is no rational connection between the differentiation and the purpose. In that regard he further relied on the case of *Prinsloo v Van Der Linde* (1997) (3) SA 1012 (CC) where it was held that for discrimination to exist, there must be established no rational relationship between the differentiation in question and the Government purpose which is proffered to validate it. Further, and in that context, the alleged discrimination in awarding honours and awards is indeed not discrimination but is in fact differentiation and that differentiation is rational because it has been calculated to reward exemplary conduct.
18. Mr. Moimbo thus urged the Court to dismiss the Petition and in the event that the Court would be inclined to allow the Petition, to do so only with regard to those who were in office between 2008 and the 27th August 2010 (the latter being the date when the *Constitution* 2010 was promulgated).

Determination

19. From the submissions above, I am of the view that there is only one issue for determination in this Petition, i.e whether the Petitioner and some (unnamed) Judges, Magistrates, Assistant Ministers and Members of Parliament, among others, who were allegedly eligible to be conferred with medals, National honours and awards between 2008 and 2012 have been denied that right. As a corollary to that issue, I must also determine whether the act of allegedly denying those individuals the awards and honours amounts to unequal treatment and discrimination. The issue of parity of Judges in the High Court, Environment and Land Court as well as the Industrial Court will be determined as a side issue.
20. It was the Petitioner's contention in the above regard that the Guidelines and Policies in the 2004 Guidebook for awarding orders, National honours, medals and awards differentiates eligibility for such an award in three categories; firstly, those who have ascended to the stated offices in the Guidebook; secondly, those who have performed actions or achievements in scientific fields, loyalty or heroism, sacrifice, bravery, patriotism or leadership and lastly, foreign Heads of States and other foreigners.
21. While the above position can hardly be disputed, I understood his Petition to be limited to the enforcement of an alleged accrued right to be awarded the Honours and awards to Judges, Magistrates, Members of Parliament, Assistant Ministers and other Senior officials in the Public Service and who were in office between 2008 and 2012 by virtue of their ascension to the office of Judge, Member of Parliament etc, respectively. On his part, the Attorney General claimed that under the provisions of Article 132(4) of the *Constitution* as read with Section 4 of the *National Honours Act* and the 2004 GuideBook, the issuance of awards and honours is a function of the President and at his discretion and such discretion is beyond review by this court. This is therefore where I shall begin.
22. It is not in doubt that Article 132(4) (c) of the *Constitution* has granted the President powers to confer National honours, awards and orders. For avoidance of doubt the Article states; "the President may confer Honours in the name of the People and the Republic". So as to give effect to this provision, the National Assembly enacted the *National Honours Act* No 11 of 2013. The Preamble to that Act provides that it is; "An Act of Parliament to give effect to and establish procedures and mechanisms for conferring of national honours by the President under Article 132 (4) (c) of the *Constitution* and for connected purposes." Section 3 (1) of that Act then operationalizes the provisions of Article 132(4) (c) of the *Constitution* and has provided that the President may confer National honours in the name of the People and the Republic on an individual or a body, unit, association of persons or a



corporation. Under Section 3(3) of the Act, such honours are conferred by the President upon taking into account the recommendations of the National and County Governments Advisory Committee, the Parliamentary Honours Advisory Committee and the Judiciary Honours Advisory Committee. Section 4 has then established the persons on whom National honours may be conferred. This Section states that;

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- (1) A person shall merit the conferment of a national honour if the person is -
 - a. a person who exhibited or exhibits exemplary qualities, actions or achievements of heroism, sacrifice, bravery, patriotism or leadership for the defence, benefit or betterment of the country or a county;
 - b. a person who has made an exemplary contribution to the country or a county in the economic, social, scientific, academic, public administration, governance, sports, journalism, business, security or other fields;
 - c. a State officer or public officer who has made an exemplary contribution to the betterment of the national or county governments, the executive, the judiciary, the legislature, an independent commission or an independent office;
 - d. a person who has otherwise brought honour, glory or pride to the Republic.”

Section 8(1) of that Act has then set out the functions of the Advisory Committees as follows;

“8.

- (1) An Advisory Committee established under sections 5, 6 and 7 shall —
 - a. receive and consider representations from any person, body, unit, association of persons or corporation recommending a person for the conferment of a national honour under this Act;
 - b. recommend to the President, on its motion or on representation under paragraph (a), persons, bodies, units, associations of persons or corporations



that may be considered for conferment of a national honour under section 3;

- c. advise the President on the suitability or otherwise of a person, body, unit, association of persons or corporation that is proposed for conferment of a national honour under section 3;
 - d. propose to the President the types, classes or categories of national honours that should be conferred;
 - e. advise the President on the classes or categories of persons, bodies, units, associations of persons or corporations on whom national honours should be conferred.”
23. Under Section 8(2) of the Act, if the Advisory Committee proposes the conferment of a national honour on a person, body, unit, association of persons or corporation, it shall prior to forwarding its proposal to the President, publish its proposal in at least two daily newspapers of national circulation, inviting the public to present to the Committee any views or objections to the conferment and the Committee shall take into account the views or objection prior to making its proposal to the President.
24. That is the law today regarding the power of the President to confer National honours in the name of the People and the Republic as provided for under Article 132(4)(c). That law is clear, straightforward and is unambiguous and requires no more than the literal interpretation as to the procedure to be invoked before the President exercises his discretion to award National honours. However, the contention before me is with regard to the process and procedure existing before the enactment of the *National Honours Act* in 2013. The Petitioner has in that regard claimed that certain persons who assumed office between 2008 and 2013 are entitled to be conferred with National honours as a matter of right. What was the law then and can that contention be sustained?
25. Before the enactment of the *National Honours Act*, National honours were conferred in accordance with the procedure and process contained in the Guide to Awards of Orders, Decorations and Medals, 2004, a document prepared by the National Secretariat on Honours and Awards in the Office of the President. In that Guide Book, a person could be nominated for an award or National honour by any other person (an agent) while a Ministerial/Departmental Committee would nominate members of the uniformed Service and public servants. As for the criteria for nomination, it provided that;
- “ all titles or honours are awarded on merit. Persons who are honoured by the President must therefore be men and women of proven integrity whose role in and contribution to the country and society in general have been adjudged exemplary, profound, pre-eminent and inspiring or people who have excelled in service to the society and to the country in social, political, economic or scientific spheres through displays of exceptional brilliance, courage, commitment and valour in their abilities, such that the award is seen to be a very special, coveted distinction”

In the Guidebook there were seventeen titles of honours and medals given in order of precedence.



26. From the Guidebook and of relevance to the Petition, the Order of the Golden Heart of Kenya had three categories viz. the first class; Chief of the Order of the Golden Heart of Kenya (CGH) is awarded to the Head of State only. The Second Class, Elder of the Golden Heart of Kenya (EGH) is awarded to the Vice-President, Speaker of the National Assembly, Cabinet Ministers, Head of Public Service and Secretary to the Cabinet, Chief of the General Staff, Attorney General and Chief Justice. The Third Class; Moran of the Order of the Golden Heart of Kenya is awarded to those who have rendered distinguished service to the Republic of Kenya and includes, The Deputy Speaker of the National Assembly, Assistant Ministers, Lieutenant-Generals and Service Commanders, Permanent Secretaries, Clerk to the National Assembly, Ambassadors, Commissioner of Police, Chancellors of National Universities, Public Service Commission Chairman, Controller and Auditor General.
27. The Order of the Burning Spear also has three classes viz. the First Class; The Chief of the Burning Spear (CBS) is awarded to Members of Parliament, Major Generals, Senior Deputy Commissioner of Police, Judges of the High Court, Chief Executives of public universities, Commandants of General Service Unit and the Administration Police, Director of the National Youth Service, Commissioner of Prisons, University professors and distinguished scientists. The Second Class, Elder of the Order of the Burning Spear (EBS) is awarded to Brigadiers, Provincial Commissioners, Senior Deputy Secretaries, Deputy Commissioners of Police, Deputy Directors of the National Youth Service and their equivalent in other disciplined services, university professors, distinguished scientists and chief executives of State corporations. The Third Class, Moran of the Order of the Burning Spear (MBS) is awarded to other public figures not included in the First or Second Classes of the Order and officers of the ranks of Colonel, Lieutenant Colonel, Senior Assistant Commissioner of Police or their equivalent in other disciplined services, magistrates and any other prominent civilian person who has contributed to National development.
28. The Guide Book had also set out the criteria applicable in the administration of Honours and awards as follows;

“

“(a) National Committee on Honours and Awards

The National Committee on Honours and Awards advises the President in respect of persons upon whom titles of honour may be conferred and generally in respect of the President’s functions regarding Honours and Awards.

(b) The Secretariat

The National Committee on Honours and Awards has a Secretariat whose functions are as follows;-

To receive nominations, edit the citations to ensure that they conform to the eligibility rules and submit the edited lists to the National Committee. To prepare and publish Honours Lists and Warrant Journals. To prepare certificates of Honour. To organize investiture ceremonies for the award of Honours. To prepare the Rolls of Honour. To organize for the purchase and have the custody of the necessary insignia. To ensure the proper maintenance of all other related records and act as an archive for the national Honours. To replace lost and worn-out insignia. To liaise with the Ministry of Foreign Affairs and International Corporation for conferment of national titles to foreigners and vice versa. To liaise with Ministries/Departments, Branches and Agencies of the Government having related duties, aims or objectives. To educate the



persons honoured on the use of the insignia, how and when it should be worn. Any other matter related or referred to the Secretariat by the National committee.

(c) District Honours and Awards Committees

District committees are based in each District and other functions include; To facilitate identification of eligible persons for Honours and Awards at grassroots level. Nominate five (5) persons and forward their names to the National Secretariat through the Permanent Secretary, Provincial Administration.

Membership of these Committees will include prominent personalities representing farmers, religious organisations, teaching fraternity, civil society, community leaders and District Commissioner. The District Commissioner shall in turn nominate one Senior District Officer to be an ex-officio member and a Secretary to the Committee. The Committees shall elect their own Chairman.

The District Committees shall comprise five (5) members in small size districts, seven (7) in medium size districts and nine (9) in large districts.

(d) The Honours List

The names of persons upon whom the President confers membership of any of the honours are listed in the Honours List which is published in the Kenya Gazette.

It is competent for the President to Annul the award of any title of Honour and to restore it after such annulment and such annulment or restoration is published in the Kenya Gazette.

(e) The Warrant Journal

The citations of all the persons upon whom the President has conferred titles of honour are published in the Warrant Journal.”

29. I have reproduced the above provisions of the Guide Book verbatim for the obvious reasons to be seen shortly and looking at the guidelines again and applying the same to the Petitioner’s case, I opine as follows;

30. Firstly, it is clear that there was and there is no guarantee or automatic conferment of honours or awards to an individual and there is no such thing as class conferment of honours to individuals in a particular class, profession or office department. That is why in the Canadian Case of *Black v Chretien* (*supra*) the Court stated as follows regarding the power of the Crown to grant Honours;

“Unquestionably, the granting of honours is the prerogative of the Crown. The Monarch is the ‘fountain, parent and distributor of honours, dignitaries, privileges and franchises’.common sense dictates that at a minimum, the honours prerogative includes the power to grant or refuse to grant an honour to a Canadian Citizen.”

I agree with the above reasoning and to my mind, conferment of honours in Kenya is not automatic or compulsory but is at the discretion of the President, much as it is the preserve of the Monarch in the United Kingdom, and is given to an individual as a way of recognizing that individual’s performance and service to the Nation. In fact in the eligibility criteria contained in the Guide Book, I have not seen any provision where it is provided that an accession to the office of Judge, Member of Parliament or



Assistant Minister etc is an automatic qualification for the conferment of any National Honour or award.

31. Secondly, it is not within the power of this Court to decide whether or not conferment of Honours and awards is right or wrong and it is not for this Court to give its opinion on such matters. I say so because no Kenyan citizen has a legitimate expectation of receiving an Honour because the conferment of such an honour lies entirely within the discretion of the conferring body and in this case, the President, based on the distinguished service offered by that citizen. And while at face value there would seem to be merit in that expectation, the law and practice as I understand it would lead me to a different conclusion. In that regard the Court in *Blacks v Chretien* (*supra*) stated;

“The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the Honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the Court’s intervention. Instead, it involves ‘moral and political considerations’ which it is not within the province of the courts to assess. In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the Court.”

I am in agreement with the above finding and I dare add that the best example of discretion is judicial discretion. It has been said time and time again that the exercise of discretion by a judge is hardly challengeable unless it was exercised injudiciously. Even higher Courts seldom overturn exercise of discretion by Subordinate Courts. In the same breathe, I do not see how this or any other Court can order a President, present or past, to exercise his discretion to confer National honours in a particular way or to certain officers in certain offices. To do so would be akin to taking away discretion that is reposed only in the President. Such an action would be wholly irregular. Once I have found that the action of the President is discretionary and beyond review by this Court, that is enough to dispose of the Petition before me.

But before I do so, I should dispose of other issues arising from the Petition and Submissions thereto. In that regard, I note that the Guide Book which the Petitioner has relied upon in seeking the conferment of honours and awards between 2008 and 2012 has provided for the procedure to be followed in recommending conferment of an award or honours to an individual. In that regard, I do not have any evidence before me that the said procedure was ever followed and in particular whether the persons whose rights have allegedly accrued ever applied to the relevant Committee to be awarded such Honours and that the application had been denied. This Court cannot now sit as the Committee on Administration of Honours and grant such Honours and Awards as urged by the Petitioner. In any event, the persons who from subject this Petition are unnamed. How is the Court to determine, if at all it had the powers to do so (and I have said that it does not), that their right to be conferred with such Honours had accrued?

32. Having addressed my mind as above, it follows that the Petitioner’s argument on this aspect of the Petition must fail. That being so, it also follows that his argument that those judges, Members of Parliament and Assistant Ministers etc who assumed office prior to and between 2008 and 2012 had any accrued right to be conferred with the National honours must also fail. That being my finding, they cannot be said to have been discriminated against because whereas all the authorities cited by the Petitioner are relevant to the general subject of discrimination under the *Repealed Constitution* as well as the *Constitution* 2010, they are of no relevance to the issues raised in the present Petition. I have seen no authority that would point me to a finding that exercise of discretion in favour of one person based on a set criteria amounts to discrimination against a person in a certain class of persons to whom



- the “favoured” one belongs. As I have previously stated, I cannot fathom how for example exercise of discretion by a Judge in favour of one party can be said to be discriminatory of the other party. Mere differentiation based on a criteria leading to legitimate exercise of discretion cannot therefore be said to be discriminatory and that is all to say on the question of discrimination-see *Harsken v Lane* (*supra*)
33. As to what amounts to unfair administrative action, the context in which a declaration in that regard was sought is completely unclear to me and I will not delve into that issue at all. In any event, based on my findings above, it is obvious that I have found no evidence of unfair administrative action against the Petitioner and all the others that he claims to represent.
34. Before I give my last orders in this Petition, I recall that submissions were also made as regards the status of the Industrial Court, the Environment and Land Court as well as the High Court and certain declarations were sought in that regard and specifically, whether Judges in those Courts are of the same status. I do not intend to spend time on that issue because I am aware that it was the subject of *KEMRI v AG and others*, Industrial Court Petition No 31 of 2013.
35. The Court in that case addressed its mind to the question whether the Chief Justice could, under Article 165(4) of the *Constitution*, empanel a bench of Judges from both the High Court and the Industrial Court. The learned Judges (Nduma, Ngugi and Odunga, JJ) held that both Courts had the same status (that of the High Court) and therefore the Chief Justice was “free to appoint any Judge of the High Court or a Judge of the Court with the status of the High Court” to hear and determine any matter
36. The reasoning of the learned Judges was therefore that all Judges serving in those Courts were of the same status. That being the finding of the Court and which I agree with, I do not think that this Court can say anything more on the subject. Even if I had decided to say anything where is the dispute as regards that issue in this Petition? I must restate the oft quoted statement that this Court deals with real controversies and not hypothetical or academic issues and the issue above is certainly a hypothetical one because Judges in the three Courts by dint of Article 162(1) and (2) of the *Constitution* are certainly of the same status and I see no dispute therein that requires determination That is all to say in that regard.
37. Lastly, an argument was made as regards the jurisdiction of the Industrial Court and Environment and Land Court to deal with interpretation of the *Constitution* and enforcement of fundamental rights and freedoms. Again, I do not know in what context the Petitioner raised this issue in the Petition before me. Where is the dispute in that regard? I see none but having so said, I am aware that the High Court has expressed its mind on that issue in the case of *United States International University v Attorney General* (*supra*). In that case as regards the place of labour and employment matters in the *Constitution*, the Court expressed itself as follows;

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the *Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court”



The Court went on to say that;

“Article 19 provides that the Bill of Rights is an integral part of the framework of Kenya’s democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour rights protected under Article 41 is reiterated in the *Employment Act*, 2007 and *Labour Relations Act*, 2007 does not create a separate wall of jurisdiction for the High Court and the Industrial Court as contended by Mr. Obura. The reiteration of these rights is merely a consequence of Article 19 and recognition of their universality and indivisibility in application in all spheres of labour and employment law.”

And as to the place of and necessity of the Industrial Court, the Court stated thus;

“The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters in its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the *Constitution* or enforce fundamental rights, its decisions even where declaratory in nature, will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).”

The Court then concluded as below;

“In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba v Minister of Safety and Security* (supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the *Constitution* and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the *Constitution* within a matter before it. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 is a court with the status of the High Court and is competent to interpret the *Constitution* and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.”

38. I agree with the learned judge and I adopt his findings as if they were mine in answering the last issue above. I will say no more.



Disposition

39. This Petition raised an important issue and which has been the subject of quiet debate in Kenya. The criteria for conferment of National honours prior to the enactment of the Constitution 2010 and the National Honours Act, 2013 was hardly in the public domain. I have held that the President prior to 2010 had sole discretion to confer and annul National honours. The process is now open to public participation but the President's discretion has not been taken away. I repeat that Article 132(4) (c) provides as follows;

- “(1) ...
(2) ...
(3) ...
(4) The President may—
a. ...
b. ...
(c) confer honours in the name of the people and the Republic;”

Neither the above Article nor the Act have obligated the President to confer National honours to specific individuals at specific times such as Judges or Members of Parliament etc serving between 2008 and 2012. This was also the finding made by Korir J. in a Ruling made in Mary Kavuri Matuku, Constitutional Petition No 602 of 2014 and I agree with the Learned Judge's position in that regard and to hold otherwise would be unreasonable and absurd. What would be the purpose of National honours if they are given without due regard to merit and a set criteria?

40. In the end, therefore and having determined all the issues raised in the Petition and without saying more, it is obvious that the Petition before me lacks merit and is hereby dismissed.

41. As to costs, the Petitioner had sought an order that the Respondent should bear the Costs of this Petition. The Attorney General on his part did not make any submission on the issue of costs nor at the very least pursue an order for the same. That being the case, the best order in the circumstances would be one that necessitates that each party should bear its own costs.

42. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF JANUARY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Mwangi and Mr. Ngatia for Petitioner

Mr. Moimbo for Respondent

Order

Judgment duly delivered.



ISAAC LENAOLA

JUDGE

Further order

Certified copies of Proceedings and the Judgment to be supplied to Parties.

ISAAC LENAOLA

JUDGE

