



**Muchelule & 5 others v Attorney General; Judicial Service Commission
(Interested Party) (Petition E311 of 2023) [2024] KEHC 12116 (KLR)
(Constitutional and Human Rights) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E311 OF 2023

EC MWITA, J

OCTOBER 8, 2024

BETWEEN

**MR JUSTICE AGGREY MUCHELULE 1ST PETITIONER
MR JUSTICE WELDON KORIR 2ND PETITIONER
MR JUSTICE JOEL NGUGI 3RD PETITIONER
MR JUSTICE GEORGE ODUNGA 4TH PETITIONER
MR JUSTICE EVANS MAKORI 5TH PETITIONER
LADY JUSTICE JUDY OMANGE 6TH PETITIONER**

AND

THE ATTORNEY GENERAL RESPONDENT

AND

THE JUDICIAL SERVICE COMMISSION INTERESTED PARTY

President’s failure to appoint Judges recommended by JSC is a breach of the Judges’ right to fair administrative action

The petitioners were recommended for appointment as Judges of the Court of Appeal on July 22, 2019 by the Court of Appeal. The President did not appoint the persons recommended and did not give written reasons for not doing so. The President later appointed seven of the 11 recommended judges of the Court of Appeal, leaving out the 1st to 4th petitioners. Aggrieved, they filed the instant petition contending their rights were violated. The High Court held that the President violated articles 2, 3, 10, 27, 28, 47 and 166(1)(b) of the Constitution during the period July 22, 2019 and August 13, 2019 to September 13, 2022, in failing or refusing to appoint the petitioners



as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission.

Reported by John Ribia

Constitutional Law – *fundamental rights and freedoms – right to fair administrative action – right to dignity – freedom from discrimination - appointment of judicial officers – role of the Judicial Service Commission vis-à-vis the role of the Environment and Land Court – where JSC recommended Judges for appointment – where the President refused to appoint the Judges – whether the President in failing or refusing to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission violated their rights to fair administrative action - whether the President in failing or refusing to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission violated their right to equal benefit of the law and the full and equal enjoyment of rights - whether the State through the actions of the President casting aspersions without particulars that the reasons why he could not appoint the petitioners was because they were not fit to hold public office violated the petitioners’ right to dignity - Constitution of Kenya, 2010, articles 2, 3, 10, 19, 20, 23(2), 27, 28, 47, 156(6), 162(2)(a), 165(3), and 166(1)(b).*

Constitutional Law – *fundamental rights and freedoms – suit challenging violation of fundamental rights and freedoms – remedies for breaches of fundamental rights and freedoms – damages - what were the conditions under which a court could award damages for constitutional violations - Constitution of Kenya, 2010, articles 2, 3, 10, 19, 20, 23(2), 27, 28, 47, 156(6), 162(2)(a), 165(3), and 166(1)(b).*

Brief facts

On July 22, 2019, the Judicial Service Commission (the JSC), recommended 11 persons among them, the 1st to 4th petitioners, for appointment as Judges of the Court of Appeal. Further, on August 13, 2019 the JSC again recommended 30 persons, among them, the 5th and 6th petitioners, as Judges of the Environment and Land Court (ELC).

The JSC forwarded names of those recommended to the former President (herein referred to as the President) for formal appointment as required by article 166(1)(b) of the Constitution. The President did not appoint the persons recommended and did not give written reasons for not doing so. The President later appointed seven of the 11 recommended for as judges of the Court of Appeal, leaving out the 1st to 4th petitioners. Similarly, those recommended for appointment to the ELC, were appointed except the 5th and 6th petitioners.

The petitioners’ appointment was only gazetted on September 13, 2022 and were sworn on August 14, 2022, after three years’ wait. The petitioners filed the instant petition challenging that delay in appointment as having engendered violation of their rights and fundamental freedoms. They also sought for orders of damages.

Issues

- i. Whether the President in failing or refusing to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission violated their rights to fair administrative action.
- ii. Whether the President in failing or refusing to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission violated their right to equal benefit of the law and the full and equal enjoyment of rights.
- iii. Whether the State through the actions of the President casting aspersions without particulars that the reasons why he could not appoint the petitioners was because they were not fit to hold public office violated the petitioners’ right to dignity.
- iv. What were the conditions under which a court could award damages for constitutional violations?
- v. Whether a suit on the role of the President in appointment of Judges was *res judicata* considering similar suits had been determined before.



- vi. Whether a suit on the role of the President in appointment of Judges was *sub judice* considering a suit on the same subject matter was before the Court of Appeal.

Held

1. Where the court determined that it had no jurisdiction to hear a particular matter, that was the end. It should not take any further step, but down its tools. Jurisdiction of a court must flow from the Constitution, statute or both. Specialized courts of equal status to the High Court derived their jurisdiction from article 162(2)(a) of the Constitution.
2. The jurisdiction of the Employment and Labour Relations Court (ELRC) was to determine disputes that arose out of employer-employee relationship and related matters. The jurisdiction of the High court on the other hand was original, it involved determination of human rights violations and constitutional interpretation.
3. The petitioners argued that the inaction or omission of the President to appoint them as Judges of the Court of Appeal was a violation of their constitutional rights and fundamental freedoms. The issue of the omission to appoint the petitioners was not based on employer-employee relationship, but a challenge about a constitutional violation. That was, the petition alleged that there had been a violation of the Constitution and rights and fundamental freedoms occasioned by presidential inaction. The petition was not against the Judiciary as the employer of the petitioners (as Judges). Rather, it was against the State's failure through the President, to act as required by the Constitution. The issues raised in the petition fell within the jurisdiction of the High Court.
4. *Res judicata* referred to a matter in which there was a final judgment based on merit by a court of competent jurisdiction. Where that was the case, there could not be litigation over the same matter for the same cause of action. To successfully raise *res judicata* as a bar, a party must show that the matter in issue in the previous litigation was also in issue in the instant case; that the parties in the former suit were the same in the new suit, and that the issue was finally adjudicated on merit. *Res judicata* would not permit the same parties to reopen the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but was not brought forward for whatever reason. For the principle of *res judicata* to apply, the parties to the litigation must be the same or litigating through some other parties and the issue must as well be the same.
5. The petitioners were not parties in the previous litigation and had not presented any plea for determination in the litigations therefore, the petition was not *res judicata*.
6. Section 6 of the Civil Procedure Act provided that no court should proceed with the trial of a suit or proceeding in which the matter was also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, or litigating under the same title in the same or any other court having jurisdiction to grant the relief sought. Unlike *res judicata*, for *sub judice* rule to apply, the matter must be pending before another court with jurisdiction to grant the same relief. The matter must be between the same parties and over the same subject matter. The appeals before the Court of Appeal were not between the same parties and indeed not over the same subject matter. The petitioners' case was different from what was before the Court of Appeal and, therefore, was not *sub judice*.
7. Although the Constitution required the President to appoint persons recommended by the JSC as judges, the President did not do so for over 3 years. The Constitution did not give the President an option or discretion when it came to appointing judges. That omission left the petitioners in an awkward position full of anxiety, unsure of what was happening and when they would be appointed.
8. The President failed to appoint the petitioners as judges of the respective courts. The Attorney General (AG) did not file an affidavit to controvert the petitioners' assertions. Additionally, the AG did not give any explanation why the President did not appoint the petitioners, notwithstanding the constitutional text that the President's mandate was limited to appointing judges in accordance with the recommendations of the JSC.



9. The petitioners had a legitimate expectation that they would be appointed as judges of the respective courts when recommended and their names sent to the President. That right (to legitimate expectation) crystallised once their names were forwarded to the President. The President had no right to decline to appoint them as that was a constitutional imperative. The refusal to appoint the petitioners amounted to not only a constitutional violation, but also violation of a crystallised constitutional right.
10. The Presidential inaction or omission also violated the petitioners right to fair administrative action guaranteed by article 47(1) and (2) of the Constitution. Article 47(1) guaranteed every person the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. The President was required to appoint the petitioners within a reasonable time but did not.
11. The delay in appointing the petitioners violated the requirement of expedition and efficiency. The action was not lawful either because the Constitution did not give the President discretion when it came to the appointment of judges following recommendations by the JSC. Article 47(2) of the Constitution required that if a person's right or fundamental freedom had been, or was likely to be adversely affected by an administrative action, the person had the right to be given written reasons for the action. The President did not give any written reasons why he could not appoint the petitioners' despite being recommended by the JSC. That was in violation of article 47(2). Article 47 was intended to bring discipline in administrative actions so that values and principles of the Constitution were infused in matters of public administration.
12. There could be no worse violation than when the President of a democratic country made public statements and innuendos casting aspersions on the suitability of State officers and public officers to serve in positions they had been recommended to, by the body mandated by the Constitution to make such recommendations. It was even more critical and a grave matter in situations where the persons had been recommended for appointment to serve in positions as sensitive as those of judges of superior courts where holders of those offices were expected to be the custodians of the Constitution, justice and the rule of law.
13. The petitioners enjoyed the same right to be appointed as judges of the respective courts once they were recommended. The President could not apply a different standard and appoint a few of those recommended leaving the petitioners. Article 166(1)(b) of the Constitution protected all persons recommended for appointment as judges. They formed one recommendation and had to be appointed as one cohort and not as the President wished.
14. Once the process of nomination of persons to be appointed as judges was complete, the President's mandate was limited to putting in place mechanisms to appoint them. He could not purport to process, vet, approve or disapprove the nominees. The President could not even cherry pick who to appoint and who not to. The Constitution demarcated and assigned power to be exercised only in accordance with the Constitution and not as one wished.
15. The President's refusal, inaction or omission to appoint the petitioners as judges of the Court of Appeal and the ELC was not based on any law and it thus violated the Constitution and the petitioners' rights and fundamental freedoms.
16. Human rights and fundamental freedoms were for enjoyment to the greatest extent possible and not for curtailment. No one was exempt from its dictates and commands of the Bill of Rights. Rights attached to all persons by virtue of their being human and respecting rights was not a favour done by the state or those in authority. They merely follow a constitutional command to obey.
17. Article 23(2) of the Constitution vested on the High Court, the discretion to grant appropriate reliefs to vindicate violations of the rights in the Bill of Rights. The essence of such relief was to ensure that the rights enshrined in the Constitution were protected and enforced.
18. The state would be required to pay damages for making decisions that were plainly unconstitutional, are in bad faith or an abuse of power. The President's action was not only unconstitutional: it was



- also intended to undermine the independence of the judiciary in violation of the national principles of good governance, including the rule of law and human rights.
19. Once a court found that rights and fundamental freedoms had been violated, it had an obligation to grant an appropriate relief. Courts granted compensation in cases of violation of rights and fundamental freedoms as a deterrence against similar violation in the future. Awarding compensation should also send a clear message that there should be no right without a remedy and to remind the state and its agents that rights have value, were for enjoyment and must be respected, enhanced and protected as demanded by the Constitution. Their violation must attract compensation.
 20. In determining whether damages were an appropriate and just remedy, the court had to consider:
 1. whether a constitutional right had been breached;
 2. whether damages would fulfil one or more of the related functions of compensation, (that was; vindicating the right, or deterring future breaches);
 3. whether the state had demonstrated that an alternative remedy existed that would defeat the functional considerations that support an award of damages; and
 4. the appropriate quantum of damages.
 21. The AG had not demonstrated that there was an alternative remedy available to the petitioners that would vindicate violations of their rights other than damages. Damages would be the appropriate remedy since the violations complained of could not be vindicated in any other way.
 22. The petitioners would have been entitled to yearly increment for the three years had they been appointed without delay. However, allowing the yearly increment claim would indeed compensate the petitioners for the period they did not work in the positions they had been recommended for. That aspect should form one of the factors to be taken into account in determining the level of general damages for the violation of their rights and fundamental freedoms.
 23. In a country where people tended to believe whatever the President said to be the truth, the petitioners went through a difficult period given the fact that the 1st to 4th petitioners were still serving as judges of the High Court and the 5th and 6th petitioners as judicial officer and Registrar of the High Court, respectively. They suffered mental and psychological anguish, a serious violation of rights and fundamental freedoms by the person holding the highest office in Kenya.
 24. In 2014, the President declined to appoint judges after they had been recommended by the Judicial Service Commission. Despite that pronouncement, the same President repeated the infraction 5 years later. Further litigation and declarations that the President could not decline to appoint persons recommended by the JSC; that he should appoint the petitioners and that continued delay in appointing them would amount to continued violation of the Constitution, did not dissuade the President from the omission which, in any case, was voided by article 2(4) of the Constitution.
 25. To aggravate the situation, the President appointed some of those recommended leaving the petitioners' position in an indeterminate state causing them more anxiety. The AG as the principle legal advisor to the national government had not argued or demonstrated that the office discharged its mandate under article 156(6) of the Constitution to promote, and uphold the rule of law and defend public interest with regard to the appointment of the petitioners. The President's constitutional transgression had to be frowned upon and discouraged. The AG must also be called out for failing to uphold article 156(6) of the Constitution. The only way to do so, was to award exemplary damages.
 26. The petitioners were discriminated against and suffered differential treatment in violation of article 27 of the Constitution when their colleagues were appointed leaving them without any explanation. That caused the petitioners anxiety, mental and physical anguish. They were considered pariah in the eyes of reasonable members of society which diminished their dignity.
 27. The petitioners' right to fair administrative action was violated contrary to article 47 of the Constitution as no written reasons were given to explain why they could not be appointed. The petitioners not only lost their yearly increment but also pecking order in their respective courts.



Petition allowed.

Orders

- i. *Declaration issued that the President violated articles 2, 3, 10, 27, 28, 47 and 166(1)(b) of the Constitution during the period July 22, 2019 and August 13, 2019 to September 13, 2022, in failing or refusing to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission.*
- ii. *Declaration issued that the State, through the refusal or failure by the President to appoint the petitioners as judges after they were recommended for appointment by the Judicial Service Commission for the period July 22, 2019 and August 13, 2019 to September 13, 2022, violated the petitioners' right to equal benefit of the law and the full and equal enjoyment of rights guaranteed by article 27(1), (2) of the Constitution, the right to dignity and the right to have that dignity respected and protected as guaranteed by article 28 of the Constitution, and the rights guaranteed by article 47 (1) and (2) of the Constitution.*
- iii. *Declaration was issued that the State through the actions of the President casting aspersions without particulars that the reasons why he could not appoint the petitioners was because they were not fit to hold public office violated the petitioners' right to have their dignity respected and protected in terms or article 28 of the Constitution.*
- iv. *An order for compensation was issued awarding each petitioner general damages of Kshs 15,000,000 against the respondent for violation of the petitioners' constitutional rights and fundamental freedoms*
- v. *An order of compensation was issued awarding each petitioner exemplary damages of Kshs. 5,000,000 against the respondent for abuse of state power resulting in the violation of petitioners' constitutional rights and fundamental freedoms.*
- vi. *The petitioners shall have interest on 4 and 5 above at court rates from the date of the judgment until payment in full.*
- vii. *Costs of the petition awarded to the petitioners.*

Citations

Cases

Kenya

1. *Attorney General v Adrian Kamotho Njenga & others* Civil Appeal No 286 of 2020 - (Explained)
2. *Attorney General v Kituo Cha Sheria & 7 others* Civil Appeal 108 of 2014; [2017] KECA 773 (KLR) - (Explained)
3. *Attorney-General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae)* Petitions 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Explained)
4. *Attorney-General & another v Katiba Institute & 7 others* Civil Application E365 & E368 of 2021 (Consolidated); [2021] KECA 166 (KLR) - (Explained)
5. *Benjamin v Chief Justice of the Republic of Kenya (CJ) & another; Judicial Service Commission (JSC) & 13 others (Interested Parties)* Constitutional Petition E196 of 2021; [2022] KEHC 10072 (KLR) - (Explained)
6. *Daniel Musinga t/a Musinga & Co Advocates v National Nation Newspapers Ltd* Civil Case 102 of 2000; [2005] KEHC 3185 (KLR) - (Explained)
7. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)
8. *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
9. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
10. *Kariuki, Peter M v Attorney General* Civil Appeal 79 of 2012; [2014] KECA 713 (KLR) - (Explained)



11. *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)* Petition 206 of 2020; [2021] KEHC 442 (KLR) - (Explained)
12. *Kipyator, Nicholas Kiprono Biwott v Clays Limited & 5 others* Civil Cases 1067 & 1068 of 1999; [2000] KEHC 537 (KLR) - (Explained)
13. *Law Society of Kenya v Attorney General, & Judicial Service Commission, Kenya Magistrates and Judges Association* Constitutional Petition 313 of 2014; [2016] KEHC 5096 (KLR) - (Explained)
14. *Macharia & another v Director of Public Prosecutions & 11 others* Petition 9 (E011) of 2022; [2022] KESC 61 (KLR) - (Explained)
15. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
16. *Muya, Martin Mati v Judicial Service Commission & another* Petition 154 of 2019; [2019] KEELRC 722 (KLR) - (Explained)
17. *Ndumba, Godfrey Julius Mbogori & another v Nairobi City County* Civil Appeal 55 of 2012; [2018] KECA 702 (KLR) - (Explained)
18. *Nganga, Eunice v Higher Education Loans Board & 2 others* Constitutional Petition 91 of 2019; [2021] KEELRC 733 (KLR) - (Explained)
19. *Ngonga, Samson Onyango v Public Service Commission & 5 others* Petition 459 of 2011; [2013] KEHC 5466 (KLR) - (Explained)
20. *Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* Petition 369 of 2019; [2020] KEHC 9228 (KLR) - (Explained)
21. *Njuguna, James Davies v James Chacha (Sued as Chairman Parklands Sports Club, Onesmus Gitbinji (Sued as Secretary Parklands Sports Club, John Nguri (Sued as Treasurer Parklands Sports Club & Parklands Sports Club* Civil Case 198 of 2012; [2013] KEHC 1886 (KLR) - (Explained)
22. *Omtatah, Okiyah Okoiti & another v Attorney General & 6 others* Petition 593 of 2013; [2014] KEHC 8157 (KLR) - (Explained)
23. *Orengo, James v Attorney General & another* Civil Suit 207 of 2002; [2007] KEHC 2937 (KLR) - (Explained)
24. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
25. *Seven Seas Technologies Limited v Eric Chege* Miscellaneous Application 29 of 2013; [2014] KEELRC 588 (KLR) - (Explained)
26. *State Law v Katiba Institute and Hon. Chief Justice & President of the Supreme Court & 5 others* Civil Appeal No E088 of 2022 - (Explained)

Uganda

Tinyefuze v Attorney General of Uganda (Constitutional Petition No 1 of 1996); [1997] UGCC 3 - (Explained)

South Africa

Fose v Minister of safety and Security (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997) - (Explained)

United Kingdom

Henderson v Henderson [1843] 67 ER 313 - (Explained)

Canada

1. *Attorney General of Canada v Power* 2024 SCC 26 - (Explained)
2. *Mackeigan v Hickman* [1989] 2 SCR 796 - (Explained)
3. *Mackin v New Brunswick (Minister of Finance); Rice v. New Brunswick* 2002 SCC 13; [2002] 1 SCR 405 - (Explained)

Jamaica

Fuller v A-G of Jamaica Civil Appeal 91/1995 - (Explained)



Texts

Pilkington, ML., (Ed) (1984), *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms* 62 Canadian Bar Review 517

Statutes

Kenya

1. Civil Procedure Act (cap 21) sections 6, 7- (Interpreted)
2. Constitution of Kenya articles 2, 3, 10, 19, 20, 23(2); 27; 28; 47(1); 47(2); 156(6); 162(2)(a); 165(3); 166(1)(b)- (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) sections 4 12- (Interpreted)

Advocates

None mentioned

JUDGMENT

Background

1. On July 22, 2019, the Judicial Service Commission (the JSC), recommended 11 persons among them, the 1st to 4th petitioners, for appointment as Judges of the Court of Appeal. Further, on August 13, 2019 the JSC again recommended 30 persons, among them, the 5th and 6th petitioners, as Judges of the Environment and Land Court (ELC).
2. The JSC forwarded names of those recommended to the former President (herein referred to as the President) for formal appointment as required by article 166(1)(b) of the *Constitution*. The President did not appoint the persons recommended and did not give written reasons for not doing so. The president latter appointed seven of the 11 recommended for as judges of the Court of Appeal, leaving out the 1st to 4th petitioners. Similarly, those recommended for appointment to the ELC, were appointed except the 5th and 6th petitioners.
3. The petitioners' appointment was only gazetted on September 13, 2022 and were sworn on August 14, 2022, after three years' wait. The petitioners have now filed this petition challenging that constitutional violation as having engendered violation of their rights and fundamental freedoms.

The Petitioners' Case

4. The petitioners' case is premised on the depositions in the supporting affidavit sworn on their behalf by the 1st petitioner and their written submissions. The petitioners state that although they were recommended for appointment and their names forwarded to the President on 22nd July and August 13, 2019 respectively, they were not appointed and no written reasons were given for the President's refusal to appoint them for three years.
5. The petitioners assert that despite public interest litigation in *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR, where the court held that the President had no power to decline to appoint them, and that further delay in appointing them was a continued violation of the *Constitution*, they were not appointed.
6. The petitioners again make reference to the decisions in *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)* [2021] eKLR and *Benjamin v Chief Justice of the Republic of Kenya (CJ) & another; Judicial Service Commission (JSC) & 13 others (Interested Parties)* [2022] KEHC 10072 (KLR) which they say, were also ignored.



7. The petitioners state that except the foregoing public interest litigations, there has never been previous litigation between them and the respondent, suing in their personal capacities over the same issues or seeking similar reliefs.
8. The petitioners assert that the refusal to appoint them, cause them public humiliation because of insinuations from the President and other public officials taking a cue from the president, that they were collectively un fit to hold office of judge of the respective courts. This injured their dignity. They also suffered great humiliation and anxiety, physical and mental anguish given the uncertainty over their appointment.
9. According to the petitioners, following the recommendation by JSC for their appointment, they begun preparations to transit to their new offices in view of the pending appointment which was not, however, to be, in violation of the Constitution and their rights and fundamental freedoms.
10. The petitioners argue that several violations were committed against them, namely; violation of their right to fair administrative action and dignity; mental and psychological suffering and anguish; damage to reputation; loss of yearly increments in emoluments directly linked to period of service; loss of pecking order in the respective courts and discriminatory treatment when the President appointed their cohorts and swore them into office on April 4, 2021 leaving them in a predicament.
11. According to the petitioners, they lost yearly increment; for judges of the Court of Appeal, Kshs 33,349 and Kshs. 31,232 for the ELC judges amounting to Kshs 400,188 and 374,784 respectively, in the first year. The amount doubled in the second year and would triple in the third year.
12. in this respect, the 1st to 4th petitioners aver that they suffered loss as follows:
 - a. September 2019 to September 2020.....4008,188
 - b. September 2020 to September 2021.....800,376
 - c. September 2021 to September 2022.....1, 200,564
 - d. September 2022 to July 2023.....1,534,054

Total Kshs. 3,935,182
13. The 4th and 5th petitioners assert that they suffered loss as follows:
 - a. September 2019 to September 2020.....374, 784
 - b. September 2020 to September 2021.....749,568
 - c. September 2021 to July 2022.....1,200,564
 - d. September 2022 to July 2023.....1,436,352

Total Kshs. 3,685 056
14. The petitioners maintain that the President’s inactions and omissions violated articles 2(2), 3, 10, 27, 28, 47 of the Constitution for failing to uphold the Constitution, abide by national values and violated the petitioners’ right to equal benefit of the law and full and equal enjoyment of rights. The omission also infringed on their right to dignity, fair administrative action and legitimate expectation.
15. The petitioners further assert that the President made unsubstantiated claims and cast aspersions that they were unfit to hold public office creating a state of uncertainty which adversely interfered with their work in the offices they held then and were preparing to move to the new offices. In that regard, the



- petitioners argue, the President undertook an unlawful administrative action by failing to give written reasons on the claims.
16. As a result of the foregoing, the petitioners state, they have suffered loss and damage and claim damages. The petitioners rely on the decision in *Attorney-General & 2 others v Ndiu & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR))
 17. The petitioners maintain that the petition is neither *res judicata* nor *sub judice*. They rely on the decisions in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2021] eKLR and *Okiya Omtatah Okiiti & another v Attorney General & 6 others* [2014] eKLR for the argument that the respondent does not claim that they (petitioners) were parties in the previous petitions - *Adrian Kamotho Njenga v Attorney General, Judicial Service Commission & 2 others (Interested Parties)* (*supra*); Civil Appeal No 286 of 2020, *Attorney General v Adrian Kamotho & others; Katiba Institute v President of Kenya & 2 others, Judicial Service Commission (Interested Parties)* (*supra*) and Civil Appeal No E088 of 2022, *State Law v Katiba Institute and Hon Chief Justice & President of the Supreme Court & 5 others*).
 18. The petitioner further maintain that they did not take part in the *Magare case* where they merely named as interested parties. There is also no evidence that they were aware of that petition and participated in those proceedings. As interested parties in the petition, they argue, they were subordinate parties who could not seek substantive reliefs from the court. This court cannot deny them audience on that basis. They rely on the decision in *Macharia & another v Director of Public Prosecutions & 11 others* [2022] KESC 61 (KLR).
 19. The petitioners urge that the previous petitions were filed before their appointment as judges, while this petition seeks remedies for constitutional violations following the President's actions or omissions from July 22, 2019 and August 13, 2019 to September 13, 2022. They also seek reliefs that were not sought in the previous litigation.
 20. The petitioners further urge the court to note that they have not prayed for salaries for the period they were not appointed. Their claim is that they be placed at the remuneration level they would have been had they been appointed as required by the *Constitution*.
 21. Regarding jurisdiction, the petitioners argue that violation of the right to dignity is a constitutional question seeking a constitutional remedy, thus, falling within the jurisdiction of this court more so, when defamatory claims are made to the detriment of their right to dignity. It is the petitioners' position, that the state and the Presidency, in particular, is liable for the violations committed against them.
 22. Regarding special damages, the petitioners assert that they lost yearly increments due to the President's failure to appoint them. They urge the court to award them Kshs 3,935,182 each for the 1st -4th petitioners and Kshs 3, 685, 056 each for the 5th and 6th petitioners.
 23. On the general and exemplary damages, the petitioners propose Kshs 25,000,000 each in general damages and Kshs 10,000,000 each in exemplary damages. They rely on *Eunice Nganga v Higher Education Loans Board & 2 others* [2021] eKLR and *James Orengo v Attorney General & another* [2007] eKLR respectively. They further rely on the decisions in *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others* [2000] eKLR and *Daniel Musinga t/a Musinga & Co Advocates v National Nation Newspapers Ltd* [2005] eKLR.
 24. The petitioners urge this court to allow their petition as follows:



- i. An order compelling the respondent, on behalf of the government to make a public admission published in such manner as shall be prescribed by this honourable court that no evidence was ever presented before the Judicial Service Commission or any other body that merited their disqualification as Judges of the Court of Appeal, and, the Environment and Labour Court respectively hence no reason existed to deny them their appointments.
- ii. A public apology or pronouncement from the Office of the President clearing the petitioners' names of the allegations of unfitness to hold office.
- iii. A declaration that for the period running from July 22, 2019 and August 13, 2019- September 13, 2022, the President of the Republic of Kenya violated articles 2, 3, 10, 27, 28, 47 and 166(1) (b) of the Constitution in failing, refusing and neglecting to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they were recommended for such appointment by the Judicial Service Commission.
- iv. A declaration that the State, through the refusal, failure or neglect by the President of the Republic of Kenya to appoint the petitioners as judges after they were recommended for appointment by the Judicial Service Commission for the period running from July 22, 2019 and August 13, 2019- September 13, 2021 namely, the right to equal benefit of the law and the full and equal enjoyment of rights as guaranteed by article 27(1) & (2) of the Constitution of Kenya, the right to inherent dignity and the right to have that dignity respected and protected as guaranteed by article 28 of the Constitution of Kenya, and the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by article 47(1) of the Constitution as well as the right to written reasons for administrative action that is likely to adversely affect the rights or fundamental freedoms.
- v. A declaration that the State through the actions of the President of casting aspersions without particulars that the reasons why he could not appoint the petitioner was because they were not fit to hold public office violated the rights of the petitioners to have their dignity respected and protected in terms of article 28 of the Constitution of Kenya, 2010.
- vi. An order for special damages for loss of yearly increments in emoluments amount Kshs 3,935,182 for the 1st to 4th petitioners each and Kshs 3, 685,056 for the 5th and 6th petitioners each.
- vii. An order for elevation of the remuneration of the petitioners to the level it ought to be had they been appointed within 14 days of the recommendation of their appointment was made to the president.
- viii. An order for compensation by way of general damages against the respondent for the violation of the petitioners' rights and constitutional protections specified in prayers (C), (D), and (E) above and in particular general damages for:
 - a. Violation of the petitioners' rights to fair administrative action;
 - b. Violation of the petitioners' right to dignity
 - c. Mental and psychological anguish and suffering
 - d. Damage to reputation
 - e. Loss of status/ pecking order in the judiciary



- f. Discriminatory treatment when the president appointed 34 judges who were sworn in office on 4/6/21 leaving out the 6 of them when there was no reason and when he had no power in law to do so.
- ix. An order of compensation by way of exemplary damages against the respondent for abuse of state power resulting in the violation of petitioners' rights and constitutional protections specified in prayers (C), (D), (E) and (F) above.
- x. Costs of the petition.
- xi. Interest of (E), (F) and (G) above at court's rate from the date of judgment till payment in full.

Attorney General's Case

- 25. The Attorney General (the AG) has opposed this petition through grounds of opposition and written submissions. The AG contends that the petitioners have not demonstrated how their rights and fundamental freedoms were violated.
- 26. It is the AG's position, that refusal to appoint the petitioners was canvassed in *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others* (*supra*) whose decision is on appeal in Civil Appeal No 286 of 2020 *Attorney General v Adrian Kamotho Njenga & Others*.
- 27. The AG again argues that the issue was litigated in *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others* (*supra*) which was stayed and is on appeal in Civil Appeal No E088 of 2022, *State Law v Katiba Institute and Hon. Chief Justice & President of the Supreme Court & 5 others*. Further litigation was conducted in *Benjamin Magare Gikenyi v Chief Justice of the Republic of Kenya & another; Judicial Service Commission & 13 others Interested parties* (Constitutional Petition E196 of 2021) [2022] KEHC 10072 (KLR) (Constitutional and Human Rights) (25 July 2022) (Judgment).
- 28. According to the AG, the petitioners were actively involved and participated in the *Magare* case as interested parties where the issue of compensation and damages was found to be unmerited. That decision has not been vacated, making this petition *res judicata*. The AG further takes the view, that the other issues, including the alleged discrimination, are *sub judice*, as they were canvassed in the earlier petitions and are the subject of the appeals.
- 29. Regarding the reliefs sought, including back dated salaries and annual salary increment, the AG argues that it would be a violation of the principle of equal pay for equal work done. The petitioners did not discharge their duties as judges of the Court of Appeal and ELC respectively, for the period between July 22, 2019 and August 13, 2019 to September 13, 2022. They cannot claim compensation.
- 30. On jurisdiction, the AG argues that the awards the petitioners seek arise from employer-employee relationship which falls within the jurisdiction of the Employment and Labour Relations Court (ELRC). This is because prior the petitioners' appointment to new positions, they had served as judges and judicial officers leading to existence of employer-employee relationship between themselves and the State. The AG relies on the decision in *Martin Muya v Judicial Service Commission & another* [2019] eKLR to support this position. The AG maintains, therefore, that this court has no jurisdiction to determine an issue arising from employer-employee relationship. The AG cites the decisions in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1; *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR; *Samson Onyango Ngonga v Public Service Commission & 5 others* [2013] eKLR and *Davies Njuguna v James Chacha (Sued as Chairman Parklands Sports Club & 3 others* [2013] eKLR, that this is a matter for the ELRC thus, this court ought to down its tools.



31. On whether the matter can be transferred to the ELRC, the AG argues that where a court lacks jurisdiction, it cannot transfer the case to the court with jurisdiction for hearing and determination. The AG relies on *James Davies Njuguna Case* (*supra*).
32. AG maintains that the claim for compensation for damage to reputation violates the principle of constitutional avoidance. The AG further argues that since the amount sought as special, general damages and exemplary damages arise from an employer-employee relationship, the award can only be made by the ELRC.

Interested Party Response

33. The JSC, the interested party, did not file response or submissions to this petition.

Determination

34. Upon considering the arguments by parties, I have distilled the following issues for determination, namely; whether this court has jurisdiction to hear this petition; whether the petition is *res judicata*; whether petitioners' rights and fundamental freedoms were violated and whether they are entitled to damages.

Jurisdiction

35. The AG has argued that this court has no jurisdiction to hear and determine this petition. According to the AG, the issues in the petition arise out of employer-employee relationship. For that reason, the petition falls within the jurisdiction of the ELRC. The petitioners hold a different view, contending that the petition concerns constitutional violations thus, falls within the jurisdiction of this court.
36. Whether a court has jurisdiction to hear a matter or not, is a threshold question to be determined based on the facts of the matter before court. This is because jurisdiction is the power or authority given to a court to hear and determine a dispute presented before it. In that regard, when jurisdiction of the court is challenge, the court has to carefully consider and determine the fundamental question of its jurisdiction over the matter.
37. Where the court determines that it has no jurisdiction to hear a particular matter, that is the end. It should not take any further step, but down its tools. (See *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR).
38. Speaking on jurisdiction of a court in *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court stated:

[68] A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... without jurisdiction, the court cannot entertain any proceedings...Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.
39. *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* (*supra*), the Supreme Court observed:

[30] The *Lillian 'S'* case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate



to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

40. It follows that jurisdiction of a court must flow from the Constitution, statute or both. The court should only exercise jurisdiction as conferred on it by the Constitution or the law. It must not act where there is no jurisdiction.
41. Article 162(2)(a) required Parliament to establish courts with equal status to the High Court to hear and determine disputes relating to Employment and Labour Relations (ELRC) and Environment and Land Court (ELC). Parliament enacted the Employment and Labour Relations Court Act No 20 of 2011, establishing the ELRC (s 4). Section 12 of the Act, provides for the jurisdiction of the ELRC. That court has exclusive, original and appellate jurisdiction to determine all disputes referred to it in accordance with article 162(2) of the Constitution, the provisions of the Act, and any other written law that extends jurisdiction to that court.
42. According to section 12 of the Act, jurisdiction of the ELRC is on disputes relating to, or arising out of employment between an employer and an employee; an employer and a trade union; an employers' organisation and a trade union's organisation; between trade unions; between employer organisations; an employers' organisation and a trade union; a trade union an employer's organisation or a federation and a member thereof; concerning registration and election of trade union officials; and disputes relating to the registration and enforcement of collective agreements.
43. Article 162(2)(a) of the Constitution read with section 12 of the ELRC Act, are clear that the core jurisdiction of the ELRC is to determine disputes that arise out of employer-employee relationship and related matters.
44. The jurisdiction of this court, on the other hand, is donated by article 165(3) of the Constitution to, among others, (b) determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) any question respecting the interpretation of the Constitution, including the determination of— (i) the question whether any law is inconsistent with or in contravention of the Constitution; "(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution."
45. Article 165(3) thus, authorises this court to decide all matters other than those reserved for other courts as contemplated in article 162(2) and restricted by article 165(5) and (6). In that regard, therefore, the sweep of the constitutional authorisation given to this court should not be easily give up. This court has wide jurisdiction to hear and determine a variety matters brought before it. The question whether this court has jurisdiction to hear and determine the petition must, therefore, be viewed through the prism of article 165(3)(b)(d).
46. The petitioners argue that the inaction or omission of the President to appoint them was a violation of their constitutional rights and fundamental freedoms. The issue of the omission to appoint the petitioners is not based on employer-employee relationship, but a challenge to constitutional violation. That is, the petition questions violation of the Constitution and rights and fundamental freedoms occasioned by the presidential inaction. The petition is not against the Judiciary as the employer of the petitioners (as Judges). Rather, it is against the State's failure through the President, to act as required by the Constitution. I, therefore, find and hold that the issues raised in this petition fall within the jurisdiction of this court.



47. Having disposed of the jurisdictional question, the next issue is whether the petition is *res judicata*.

Res judicata

48. The AG again argues that the petition is *res judicata*. According to the AG, the omission or refusal to appoint the petitioners was canvassed in *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others* (*supra*) whose decision is on appeal in Civil Appeal No 286 of 2020 *Attorney General v Adrian Kamotho Njenga & others*; another decision in *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others* (*supra*) was stayed by the court of Appeal through *Attorney-General & another v Katiba Institute & 7 others* [2021] KECA 166 (KLR). the AG argues that there was another matter namely; *Benjamin Magare Gikenyi v Chief Justice of the Republic of Kenya & another; Judicial Service Commission & 13 others (Interested parties)* (*supra*).
49. The AG contends that the petitioners were actively involved and participated in the *Magare* case as interested parties where the issue of compensation and damages was declined as unmerited. In the view of the AG, that decision having not been vacated, makes this petition *res judicata*.
50. The AG further argues that the other issues, including the alleged discrimination, are *sub judice*, as they were canvassed in the other petitions and are the subject of appeals. The AG takes the position that because of the pending appeals, this petition is *sub judice*.
51. The petitioners maintain that this petition is not *res judicata*. They argue that they did not take part in the previous petitions, including the *Magare* case, but were merely named as interested parties. They were not also served and never participated in those proceedings.
52. Res judicata as a principle used in civil litigation means a matter that has already been determined by a court of competent jurisdiction. That is, *res judicata* refers to a matter in which there is a final judgment based on merit by a court of competent jurisdiction. Where that is the case, there cannot be litigation over the same matter for the same cause of action.
53. Section 7 of the *Civil Procedure Act* provides:
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
54. To successfully raise *res judicata* as a bar, a party must show that the matter in issue in the previous litigation is also in issue in the present case; that the parties in the former suit are the same in the new suit, and that the issue was finally adjudicated on merit. That is; the ruling, judgment, or decision was made after all the proper procedures of the trial. The court must have decided the case on the merit and determined parties' rights and obligations in that matter. For that reason, *res judicata* is first, a question of fact and once established, it becomes a point of law.
55. In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2021] eKLR, the Supreme Court stated:
- [54] The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would



ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

56. The Supreme Court cited the decision of Wigram v C in *Henderson v Henderson* (1843) 67 ER 313, on the subject, thus:

[57] [W]here a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

57. The position emerging from the above decisions, is that *res judicata* will not permit the same parties to reopen the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but was not brought forward for whatever reason. For the principle of *res judicata* to apply, the parties to the litigation must be the same or litigating through some other parties and the issue must as well be the same.

58. I have perused the decisions in the cases the AG relies on to argue that the petition is *res judicata*. In *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others* (*supra*), the petitioners were not parties to that petition. The issues in that petition were on whether the President was constitutionally bound to appoint persons recommended by the JSC as judges. The issues that were in that petition are not similar to those in the present petition. In *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others* (*supra*), the parties were different and so were the issues.

59. Regarding *Benjamin Magare Gikenyi v Chief Justice of the Republic of Kenya & another; Judicial Service Commission & 13 others (Interested Parties)* (*supra*), the petitioners before this court were merely named as interested parties and not substantive parties. The prayers before that court were not presented by the petitioners herein. There is no evidence that the petitioners were served and participated in that case. The AG has not shown that the petitioners took part in that petition and that the petition conclusively determined the issues in this petition.

60. The petitioners herein not having been parties in the previous litigation and having not presented any plea for determination in those litigations, this petition is not *res judicata*.

61. On whether the petition is *sub judice*, again the answer must be in the negative. Section 6 of the *Civil procedure Act* provides that no court should proceed with the trial of a suit or proceeding in which the matter is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, or litigating under the same title in the same or any other court having jurisdiction to grant the relief sought.

62. First, unlike *res judicata*, for *sub judice* rule to apply, the matter must be pending before another court with jurisdiction to grant the same relief. The matter must be between the same parties and over the same subject matter. The appeals before the Court of Appeal are not between the same parties and



indeed not over the same subject matter. The petitioners' case is different from what is before the Court of Appeal and, therefore, is not *sub judice*.

Violation of rights and Fundamental Freedoms

63. The core issue in this petition is whether the petitioners' rights and fundamental freedoms were violated. Put differently, were there constitutional violations?
64. The petitioners' case is that the JSC having recommended them for appointment as judges of the respective courts and forwarded their names to the President on July 22, 2019 and August 13, 2019, respectively, the President failed to appoint them as required of him by the Constitution. This, the petitioners argue, was a constitutional violation whose effect infringed on their rights and fundamental freedoms.
65. The AG did not dispute the fact that the President failed to appoint the petitioners as required by the Constitution. The AG did file a replying affidavit to controvert the petitioner's claim of constitutional violation and infringement of their rights. The AG did not even proffer any justification for the President's failure to appoint the petitioners.
66. The 1st to 4th petitioners were judges of the High Court having been appointed in 2011 while the 5th and 6th petitioners were judicial officers. The 1st to 4th petitioners were among the successful applicants recommended for appointment as judges of appeal. The 5th and 6th petitioners were among the successful applicants recommended for appointment as judge of the ELC. Names of those recommended for appointment to the Court of Appeal were forwarded to the President on July 22, 2019. Those recommended for appointment as ELC judges were forwarded to the President on August 13, 2019. The names were forwarded in accordance with article 166(1)(b) of the Constitution. Article 166(1) provides that the President shall appoint—
 - “(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.”
67. Although the Constitution requires the President to appoint persons recommended by the JSC as judges, the President did not do so for over 3 years. the Constitution does not give the President an option or discretion when it comes to appointing judges. This omission left the petitioners in an awkward position full of anxiety, unsure of what was happening and when they would be appointed.
68. The petitioners assert, which is not controverted, that they suffered public humiliation because the President issued public statements insinuating that they were collectively unfit to hold the office of judge of the respective courts they had been recommended for. This was so, notwithstanding the fact that they had gone through rigorous open interview processes and were subjected to public participation and scrutiny before being recommended. Further, they were still performing their duties as judges, judicial officer and Registrar of the High Court, respectively. They had not received any complaint regarding their suitability to serve in the positions they were holding or those recommended for.
69. Indeed, there is no denial that the President failed to appoint the petitioners as judges of the respective courts. As already pointed out, the AG did not file an affidavit to controvert the petitioners' assertions. The AG did not also give any explanation why the President did not appoint the petitioners, notwithstanding the constitutional text that the President's mandate is limited to appointing judges in accordance with the recommendations of the JSC.



70. The petitioners had a legitimate expectation that they would be appointed as judges of the respective courts when recommended and their names sent to the President. This right (to legitimate expectation) crystallised once their names were forwarded to the President. The President had no right to decline to appoint them as this is a constitutional imperative. The refusal to appoint the petitioners amounted to not only a constitutional violation, but also violation of a crystallised constitutional Right.
71. The Presidential inaction or omission also violated the petitioners right to fair administrative action guaranteed by article 47(1) and (2) of the *Constitution*. Article 47(1) guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The President was required to appoint the petitioners within a reasonable time but did not.
72. The delay in appointing the petitioners violated the requirement of expedition and efficiency. The action was not lawful either because the *Constitution* does not give the President discretion when it comes to the appointment of judges following recommendations by the JSC.
73. Further, article 47(2) requires that if a person's right or fundamental freedom has been, or is likely to be adversely affected by an administrative action, the person has the right to be given written reasons for the action. The President did not give any written reasons why he could not appoint the petitioners despite being recommended by the JSC. This was in violation of article 47(2).
74. Article 47 must not be in vain. It is intended to bring discipline in administrative actions so that values and principles of the *Constitution* are infused in matters of public administration. (See *Judicial Service Commission v Mbalu Mutava Musyimi* [2015] eKLR)
75. The petitioners again argue that the President and other public official made public statements to the effect that they (petitioners) were unsuitable to be appointed as judges of those courts. The AG did not deny this assertion leaving it uncontroverted.
76. There can be no worse violation than when the President of a democratic country makes public statements and innuendos casting aspersions on the suitability of State officers and public officers to serve in positions they have been recommended to, by the body mandated by the *Constitution* to make such recommendations. It is even more critical and a grave matter in situations where the persons have been recommended for appointment to serve in positions as sensitive as those of judges of superior courts where holders of those offices are expected to be the custodians of the *Constitution*, justice and the rule of law.
77. To aggravate the situation, the petitioners argue, the President appointed some of their colleagues with whom the petitioners had been recommended, leaving the petitioners' position in limbo. This, no doubt, created disparity and was a discriminatory treatment in violation of article 27(1) of the *Constitution* on the equality before the law and the right to equal protection and equal benefit of the law. The petitioners had to endure negative speculation on why they were not appointed injuring their dignity.
78. The petitioners enjoyed the same right to be appointed as judges of the respective courts once they were recommended. The President could not apply a different standard and appoint a few of those recommended leaving the petitioners. Article 166(1)(b) protects all persons recommended for appointment as judges. They form one recommendation and have to be appointed as one cohort and not as the President wishes.
79. This position was made clear in *Law Society of Kenya v Attorney General & 2 others* (Petition No 313 of 2014); [2016] eKLR, where the court held that once the process of nomination of persons to be appointed as judges is complete, the President's mandate is limited to putting in place mechanisms to



appoint them. He cannot purport to process, vet, approve or disapprove the nominees. The President cannot even cherry pick who to appoint and who not to. In other words, the Constitution demarcates and assigns power to be exercised only in accordance with the Constitution and not as one wishes and caprice.

80. In the circumstances, I find and hold, that the President’s refusal, inaction or omission to appoint the petitioners as judges of the Court of Appeal and the ELC was not base on any law thus, violated constitution and the petitioners’ rights and fundamental freedoms.

Damages

81. The final issue is whether the petitioners are entitled to damages and, if so, what is the quantum.
82. The petitioners have come to this court seeking redress for constitutional violations and violation of their rights and fundamental freedoms enshrined in the Bill of Rights. They have demonstrated that the President violated the Constitution and their rights and fundamental freedoms despite the President having sworn to protect, uphold and defend the Constitution and laws of the Republic.
83. Article 19 of the Constitution is plain that the Bill of rights is an integral part of our democratic state and the framework for social, economic and cultural policies. The article is also clear that the purpose of recognizing and protecting human rights and fundamental freedoms is to, among others, preserve the dignity of the individual. Article 19 further affirms that human rights belong to each individual and are not granted by the state. They are only subject to the limitations contemplated by the Constitution.
84. It must be appreciated that human rights and fundamental freedoms are for enjoyment to the greatest extent possible and not for curtailment. In this respect, the Court of Appeal stated in Attorney General v Kituo Cha Sheria & 7 others [2017] eKLR, that
- “rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State.”
85. The court emphasized that under article 20, the Bill of Rights applies to all law and binds all state organs and all persons so that no one is exempt from its dictates and commands. This is so, because rights attach to all persons by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.
86. Article 23(2) vests on this court, the discretion to grant appropriate reliefs to vindicate violations of the rights in the Bill of Rights. The essence of such relief must be to ensure that the rights enshrined in the Constitution are protected and enforced. (Fose v Minister of safety and Security [1997] (3) SA 786 (CC)).
87. In Attorney General of Canada v Power, 2024 SCC 26, the issue was whether the state is liable to pay damages for enacting unconstitutional legislation. The Supreme Court of Canada agreed, stating that the state may be required to pay damages for making unconstitutional legislation if it is clearly unconstitutional, or was in bad faith or an abuse of power.
88. By parity of reasoning, the state will be required to pay damages for making decisions that are plainly unconstitutional, are in bad faith or an abuse of power. (See also Mackin v New Brunswick (Minister of Finance); Rice v. New Brunswick 2002 SCC 13; [2002] 1 SCR 405.)



89. The President’s action was not only unconstitutional: It was also intended to undermine the independence of the judiciary in violation of the national principles of good governance, including the rule of law and human rights.
90. The petitioners have not only demonstrated violation of the Constitution, they have also proved violation of their rights and fundamental freedoms. Once a court finds that rights and fundamental freedoms have been violated, it has an obligation to grant an appropriate relief as required by article 23(3) of the Constitution. In cases of violation of the Constitution and fundamental freedoms, the court must consider whether an award of damages as compensation towards that violation is the appropriate remedy.
91. This is because, as the Constitutional Court of Uganda stated in Tinyefuze v Attorney General of Uganda (Constitutional Petition No 1 of 1996) [1997] UGCC 3,
“if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.”
92. This is also supported by the Supreme Court of Canada’s position in Mackeigan v Hickman [1989] SCR 796, that courts are the protectors of the Constitution and the fundamental values embedded therein, namely; the rule of law, fundamental justice and preservation of the democratic process.
93. In Attorney General of Canada v Power (*supra*), Wagner, CJ stated:
As for s 24(1), (equivalent to our article 23) it provides a personal remedy in the sense that it is specific to the violation of the applicant’s rights; it is a unique public law remedy against the state that should not be assimilated to the principles of private law remedies. An award of damages as a s 24(1) remedy against the state for exceeding its legal powers has long been recognized as an important requirement of the rule of law.
94. Courts grant compensation in cases of violation of rights and fundamental freedoms as a deterrence against similar violation in the future. This was recognized by ML Pilkington in an article titled “Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms” [1984] 62 Canadian Bar Review 517, thus:
[T]he purpose of awarding damages in constitutional matters should not be limited to simple compensation, but such an award ought, in proper cases, to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.
95. Awarding compensation should also send a clear message that there should be no right without a remedy and to remind the state and its agents that rights have value, are for enjoyment and must be respected, enhanced and protected as demanded by the Constitution. Their violation will, and must, attract compensation.
96. In determining whether damages are an appropriate and just remedy, the court has to consider (1) whether a constitutional right has been breached; whether damages would fulfil one or more of the related functions of compensation, (that is; vindicating the right, or deterring future breaches); (3) whether the state has demonstrated that alternative remedy exists that would defeat the functional considerations that support an award of damages and (4) the appropriate quantum of damages. (See Attorney General v Power).



97. In this case, the AG has not demonstrated that there is an alternative remedy available to the petitioners that would vindicate violations of their rights other than damages. It is my view, that damages will, in this case, be the appropriate remedy since the violations complained of cannot be vindicated in any other way.

Quantum

98. The petitioners have sought special damage, general damages and exemplary damages. Regarding special damages, they urge the court to award the yearly increment they would have been entitled to for the three years had they been appointed immediately. The 1st to 4th petitioners urge for Kshs 3,935,182 each while the 5th and 6th petitioners seek Kshs 3,685 056 each. The AG argues that this would amount to paying the petitioners for work not done, although much of the AG's argument is that this is a matter for the ELRC.

99. Special damages are a form of economic damages that are special or specific to the individual victim. They relate to the specific costs or expenses a person has been put through due to the respondent's unlawful acts or breaches. Special damages are thus, intended to return the party to the economic position he would have been, save for the violations.

100. There is no denial that the petitioners would have been entitled to yearly increment for the three years had they been appointed without delay. However, allowing this claim would indeed compensate the petitioners for the period they did not work in the positions they had been recommended for. I take the view, that this aspect should form one of the factors to be taken into account in determining the level of general damages for the violation of their rights and fundamental freedoms.

General Damages

101. The petitioners have sought general damages of Kshs 25,000,000 each and Kshs. 10,000,000 each as exemplary damage. The rely on *Eunice Nganga v Higher Education Loans Board & 2 others* [2021] eKLR; *James Orengo v Attorney General & another* [2007] eKLR; *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others* [2000] eKLR and *Daniel Musinga t/a Musinga & Co. Advocates v National Nation Newspapers Ltd* [2005] eKLR. The AG has not made any proposal either on general damages or exemplary damages.

102. The recommendation for appointment of the 1st to 4th petitioners was made on July 22, 2019. That of the 5th and 6th petitioners was made on August 13, 2019. The petitioners were not appointed until September 13, 2022 having waited for a period of three years. Between the dates of recommendation and appointment, they endured anxiety, humiliating statements made by none other than the President to the effect that they were not fit for appointment to the respective courts recommended for.

103. In a country where people tend to believe whatever the President says to be the truth, the petitioners went through a difficult period given the fact that the 1st to 4th petitioners were still serving as judges of the High Court and the 5th and 6th petitioners as judicial officer and Registrar of the High Court, respectively.

104. The refusal to appoint the petitioners, coupled with the statements alluded to, weighed down on the petitioners, put their reputation on the line and injured their dignity. They suffered mental and psychological anguish, a serious violation of rights and fundamental freedoms by the person holding the highest office in the country.



105. When considering the level of damages to award, the position adumbrated by Patterson JA in *Fuller v A-G of Jamaica* (Civil Appeal 91/1995, unreported) is helpful. He stated:

Where an award of monetary compensation is appropriate, the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized.

106. In *Eunice Nganga v Higher Education Loans Board & 2 others* [2021] eKLR, the court awarded of Kshs.10 million damages for infringement of fundamental rights and freedom. In *Peter M Kariuki v Attorney General* [2014] eKLR, the Court of Appeal awarded Kshs 15,000,000 general damages for violation of constitutional rights.
107. Taking these awards into account, the nature of violations by the holder of the highest office in the land and considering the level of inflation, an award of Kshs 15,000,000 general damages for each petitioner, is fair and reasonable.

Exemplary damages

108. The petitioners further seek exemplary damages of Ksh 10,000,000 each. Exemplary Damages are punitive in scope intended to punish an outrageous conduct (*Godfrey Ndumba Mbogo & another v Nairobi City County* [2018] eKLR.) To allow this claim, the court considers the respondents' conduct to determine if the award is justified.
109. In this case, the President is the head of state who swears to respect, uphold and defend the *Constitution* and laws of the Republic. He is the symbol of unity and the embodiment of the national values and principles of good governance, including the rule of law and human rights. When the President disrespects the *Constitution* and the law, and undermines the mandate of constitutional organs of state, his actions encourage the citizenry to do likewise, leading to destruction of institutions, governance and the rule of law in the country.
110. In 2014, the President declined to appoint judges after they had been recommended by the JSC. That infraction was challenged in court through *Law Society of Kenya v Attorney General & 2 others* (*supra*). The court pronounced itself that the President has no authority or power to decline to appoint persons recommended by the JSC as judges.
111. Despite that pronouncement, the same President repeated the infraction 5 years later. Further litigations and declarations that the President could not decline to appoint persons recommended by the JSC; that he should appoint the petitioners and that continued delay in appointing them would amount to continued violation of the *Constitution*, did not dissuade the President from the omission which, in any case, was voided by article 2(4) of the *Constitution*.
112. To aggravate the situation, the President appointed some of those recommended leaving the petitioners' position in an indeterminate state causing them more anxiety. The AG as the principle legal advisor to the national government has not argued or demonstrated that the office discharged its mandate under article 156(6) to promote, and uphold the rule of law and defend public interest with regard to the appointment of the petitioners.
113. There can be no greater public interest than defending the *Constitution* and upholding the rule of law and human rights, as founding values in article 10 of the *Constitution*. The President's constitutional



transgression has to be frowned upon and discouraged. The AG must also be called out for failing to uphold article 156(6) of the Constitution. The only way to do so, is to award exemplary damages.

114. Taking into account what the petitioners went through during the three years' wait; the discrimination they endured when their colleagues were appointed; the lost pecking order and salary increase, I consider an award of Kshs 5,000,000 exemplary damages for each petitioner reasonable in the circumstances of this case.

Conclusion

115. Having considered the pleadings and arguments by parties, the decisions relied on, the Constitution and the law, I come to the following conclusions;
116. First, the President violated the Constitution and the petitioners' rights and fundamental freedoms. The 1st to 4th petitioners were serving Judges. They were recommended for appointment to the Court of Appeal but were not appointed. They were kept waiting for three years. The 5th and 6th petitioners were judicial officer and Registrar of the High Court, respectively. They were recommended for appointment to the ELC, but were not appointed for three years, a violation of their legitimate expectation. The petitioners were humiliated, ridiculed and held in contempt following unsubstantiated claims and innuendoes that they were not fit for appointment, despite rigorous interview processes they had gone through.
117. Second; the petitioners were discriminated against and suffered differential treatment in violation of article 27 of the Constitution when their colleagues were appointed leaving them without any explanation. This caused the petitioners anxiety, mental and physical anguish. They were considered pariah in the eyes of reasonable members of society which diminished their dignity.
118. Third; the petitioners' right to fair administrative action was violated contrary to article 47 as no written reasons were given why they could not be appointed. The petitioners not only lost yearly increment but also pecking order in their respective courts.

Disposal

119. Based on the above conclusions, I make the following declarations and orders;
1. A declaration is hereby issued that the President violated articles 2, 3, 10, 27, 28, 47 and 166(1) (b) of the Constitution during the period July 22, 2019 and August 13, 2019 to September 13, 2022, in failing or refusing to appoint the petitioners as judges of the Court of Appeal and the Environment and Land Court after they had been recommended for appointment by the Judicial Service Commission.
 2. A declaration is hereby issued that the State, through the refusal or failure by the President to appoint the petitioners as judges after they were recommended for appointment by the Judicial Service Commission for the period July 22, 2019 and August 13, 2019 to September 13, 2022, violated the petitioners' right to equal benefit of the law and the full and equal enjoyment of rights guaranteed by article 27(1), (2) of the Constitution, the right to dignity and the right to have that dignity respected and protected as guaranteed by article 28 of the Constitution, and the rights guaranteed by article 47(1) and (2) of the Constitution.
 3. A declaration is hereby issued that the State through the actions of the President casting aspersions without particulars that the reasons why he could not appoint the petitioners was because they were not fit to hold public office violated the petitioners' right to have their dignity respected and protected in terms or article 28 of the Constitution.



4. An order for compensation is hereby issued awarding each petitioner general damages of Kshs 15,000,000 against the respondent for violation of the petitioners' constitutional rights and fundamental freedoms
5. An order of compensation is hereby issued awarding each petitioner exemplary damages of Kshs 5,000,000 against the respondent for abuse of state power resulting in the violation of petitioners' constitutional rights and fundamental freedoms.
6. The petitioners shall have interest on 4 and 5 above at court rates from the date of this judgment until payment in full
7. Costs of the petition to the petitioners

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2024

E C MWITA

JUDGE

