



**National Gender & Equality Commission & another v Judicial Service Commission
& another; Lenaola (Interested Party) (Petition 446 & 456 of 2016 (Consolidated))
[2017] KEHC 8343 (KLR) (Constitutional and Human Rights) (12 May 2017) (Judgment)**

National Gender & Equality Commission & another v Judicial Service Commission & 2 others [2017] eKLR

Neutral citation: [2017] KEHC 8343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 446 & 456 OF 2016 (CONSOLIDATED)**

EC MWITA, J

MAY 12, 2017

BETWEEN

NATIONAL GENDER & EQUALITY COMMISSION 1ST PETITIONER

ADRIAN KAMOTHO NJENGA 2ND PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

HON. JUSTICE ISAAC LENAOLA INTERESTED PARTY

The appointment of 5 male judges of the Supreme Court out of a total of 7 judges was not a breach of the two-thirds gender principle

The petition related to the two-third gender principle in the Supreme Court. The court held that the appointment of 5 male judges of the Supreme Court out of a total of 7 judges was not a breach of the two-thirds gender principle.

Reported by Beryl A Ikamari

Constitutional Law - judiciary - appointments of judges to the Supreme Court - criteria for appointment of judges to the Supreme Court - competence and gender equality - whether it was necessary for at least 3 out of the 7 judges of the Supreme Court to be female - Constitution of Kenya 2010, articles 172 & 27.

Constitutional Law - fundamental rights and freedoms - right to equality and freedom from discrimination - two-thirds gender rule - whether it was necessary for at least 3 out of the 7 judges of the Supreme Court to be female - Constitution of Kenya 2010, articles 172 & 27; National Gender and Equality Commission Act, No 15 of 2011, section 8.



Statutes - National Gender and Equality Commission Act - mandate of the National Gender and Equality Commission - whether the National Gender and Equality Commission had the mandate to render advice on gender and equality issues and whether the advice was binding - National Gender and Equality Commission Act, No 15 of 2011, section 8.

Brief facts

In June 2016, the retirements of the Chief Justice, Deputy Chief Justice, and a Judge of the Supreme Court caused vacancies at the Supreme Court. The Judicial Service Commission initiated a recruitment process to fill the vacancies. That process culminated in the recommendation of the appointment of Hon. Mr. Justice Maraga, Hon Lady Justice Mwilu, and Hon Mr. Justice Lenaola, to the positions of Chief Justice, Deputy Chief Justice and Judge of Supreme Court respectively.

On the basis that under the two-third gender principle, a woman should have been appointed for the post filled by Hon Mr. Lenaola, (the interested party) petitions were filed in court.

Issues

- i. Whether the appointment of a person of the male gender as a judge of the Supreme Court making the number of male judges of the Supreme Court 5 out of 7 judges, was a breach of the two-third gender principle as recognized in the Constitution.
- ii. Whether the advice of the National Gender and Equality Commission was binding on the Judicial Service Commission.
- iii. Whether the instant petition was *res judicata* given the existence of a prior petition in which the same issue was determined.

Relevant provisions of the Law

Constitution of Kenya 2010,

Article 27(8);

...the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Constitution of Kenya, 2010

Article 172;

172. (1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—

- (a) recommend to the President persons for appointment as judges;
 - (b) review and make recommendations on the conditions of service of—
 - (i) judges and judicial officers, other than their remuneration; and
 - (ii) the staff of the Judiciary;
 - (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
 - (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and
 - (e) advise the national government on improving the efficiency of the administration of justice.
- (2) In the performance of its functions, the Commission shall be guided by the following—
- (a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and
 - (b) the promotion of gender equality.

National Gender and Equality Commission Act, No 15 of 2011,

Section 8;



The functions of the Commission shall be to—

- (a) promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
- (b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;...

Held

1. The functions of the Judicial Service Commission under article 172(1) of the Constitution included the recommendation of persons for appointment as judges. In the performance of its duties, article 172(2) of the Constitution required the Judicial Service Commission to undertake a competitive and transparent process of appointment of judicial officers and other staff of the judiciary and promote gender equality.
2. Part V of the Judicial Service Act provided the criteria for evaluating qualifications of individual applicants and that criteria included professional competence, communication skills, integrity, fairness and good judgment. Regulation 14 of the First Schedule to the Judicial Service Commission Act required the Commission to nominate the most qualified applicants, taking into account gender, regional, ethnic and other diversities of the people of Kenya. Therefore the Commission was required to consider competence first before it considered gender.
3. The Commission was under an obligation to first consider competence and also consider not only gender parity but also other considerations stated in the Constitution and the Judicial Service Commission Act, without necessarily compromising merit.
4. The right to equality and freedom from discrimination was recognized in article 27 of the Constitution. Article 27(3) provided that women and men had a right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. The right to equality included affirmative measures designed to address any disadvantages suffered by individuals or groups because of past discrimination. Article 27(8) of the Constitution provided for the two-thirds gender principle and stated that not more than two-thirds of the elective or appointive bodies should be of the same gender.
5. The Constitution was clear in stating that one gender would not occupy more than two-thirds of elective or appointive positions in a body. For the petitioners to succeed, they had an obligation to show that the number of male judges in the Supreme Court were more than two thirds that of women.
6. The Supreme Court had seven members two were female and five were male. Two-thirds of seven would give 71.42 percent or 4.66 men, while one-third of seven would give 28.57 percent or 2.33 female. There were no decimal points to human beings and taking the figures to the nearest whole numbers, 4.66 would round off to 5 men, while 2.33 would round off to 2 women.
7. The Constitution used fractions and not percentages. For the petitioners to succeed, there was need for them to show a direct and clear breach of the Constitution and statute with regard to the two-thirds gender principle in making recommendations for appointment at the Supreme Court.
8. It was difficult to fault the Judicial Service Commission for recommending the interested party for appointment to the Supreme Court. It would have been ideal to recommend a woman for appointment but an ideal situation was not the same as a clear breach of the Constitution or the law on the two-thirds gender principle.
9. The interested party's appointment to the Supreme Court was not a breach of the two-thirds gender principle. Therefore, the composition of the Supreme Court was not unconstitutional.
10. The National Gender and Equality Commission, via a letter dated July 15, 2016, rendered advice to the Judicial Service Commission. In their advice, the National Gender and Equality Commission stated that in order to comply with the two-third gender principle, at least two (2) of the three (3) advertised positions had to be filled by persons of the female gender.



11. Under section 8 of the National Gender and Equality Commission Act, No 15 of 2011, one of the functions of the 1st petitioner was to promote gender equality and freedom from discrimination and to monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all National and County policies, laws and administrative regulations in all public and private institutions. The Constitution gave the 1st petitioner the mandate to promote gender parity but it did not give it the mandate to render advice. The word 'advise' only appeared in the National Gender and Equality Commission Act where the Act provided that the 1st petitioner was to advise on the integration of the principal of equality.
12. The Judicial Service Commission could consider the National Gender and Equality Commission's advice while conducting interviews and recommending persons for appointment but it was not under an obligation to comply with the advice. The advice of the National Gender and Equality Commission was not binding on the Judicial Service Commission.
13. The doctrine of *res judicata* referred to the rule that where there had been a final judgment or decree on merit by a court of competent jurisdiction on the rights of parties or those litigating on their behalf, a similar issue could not be raised again in court. In principle a party had to litigate once and litigation over the same subject matter had to end once the matter had been finally determined.
14. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR was also a challenge claiming that at least 2 out of the 5 judges of the Supreme Court had to be female in order to meet the two-thirds gender principle. The issue in that petition was similar to the issue in the instant petition. However, the parties in the two cases were different and therefore the instant petition was not *res judicata*.

Petition dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. These Consolidated Petitions once again bring to the fore the question of gender inequality in appointive positions more particularly women representation in the Supreme Court. The facts of this petition are straight forward. In June 2016 three Vacancies occurred in the Supreme Court, following the retirements of the Chief Justice, Deputy Chief Justice, and a judge of the Supreme Court.
2. The 1st respondent, the Judicial Service Commission, initiated the process of filling those positions by advertising the vacancies and inviting applications from qualified and interested persons. The 1st respondent received 13 applications for the position of Chief Justice, 16 for the position of Deputy Chief Justice, and 21 for that of Judge of the Supreme Court. Interviews were conducted and the 1ST respondent recommended the appointment of Hon. Mr. Justice Maraga, Hon Lady Justice Mwilu, and Hon Mr. Justice Lenaola, to the positions of Chief Justice, Deputy Chief Justice and Judge of Supreme Court respectively.
3. Those recommendations triggered the present petitions, mainly targeted at the recommendation of Hon Mr. Lenaola's appointment, on grounds that a lady should have been recommended for appointment instead, hence that recommendation did not comply with the two-third gender principle.
4. Petition number 446, therefore, sought the following reliefs.



- i. A declaration that men and women are critical to equal opportunities under Articles 27(3) and 232(1) (i) to serve as judges of the Supreme Court of Kenya.
 - ii. A declaration that the Supreme Court established under Article 163 of the constitution is an appointive body within the meaning of Article 27(8) of the constitution and a state organ under Article 232 (1).
 - iii. A declaration that the failure by the 1st respondent to put in place legislative policy and other measures for the implementation as the one third, two third principle in gender representation in all appointive bodies that they hold is unconstitutional.
 - iv. A declaration that the recommendation for appointment or appointment of two (2) persons of the male gender and one (1) of the female gender by the first respondent in violation of the one-third, two-thirds principle (sic) the 1st respondent in violation of the one-third two-thirds principle in representation of men and women at the Supreme Court is unconstitutional null and void.
 - v. A declaration that the failure of the 1st respondent to implement the representation of women to the seven member Supreme Court towards nearly half or 3-4 is unconstitutional.
 - vi. As order of judicial review in the nature of certiorari to remove into this Honorable Court for purposes of quashing and or nullifying the decision of the JSC to nominate the interested party, a man for appointment as the last and seventh member of the Supreme Court of Kenya.
 - vii. An order of prohibition restraining the 1st respondent from forwarding and the 2nd respondent from appointing the interested party or any other man to the remaining spot in the Supreme Court in its current composition.
 - viii. A structural interdict requiring the 1st and 2nd respondents to put in place legislative policy and other measures of the implementation of the one-third, two-thirds gender equity principle in all appointive positions held by the respondents including at the supreme court.
 - ix. Any other order that the Honorable (sic) may deem to be fit and just to ensure that the constitutional provisions are protected and enforced.
5. On the other hand, Petition No 456 of 2016 which was consolidated with petition 446, sought the following orders:-
- i. A declaration that the current composition of the Supreme Court of Kenya is in violation of Articles 10, 27 and 172(2) (b) of the Constitution of Kenya be and is hereby issued.
 - ii. A declaration be and is hereby issued that the constitutional and statutory breaches render the entire of the supreme court of Kenya untenable as currently constituted and therefore constitutionally in valid.
 - iii. An order striking down the Supreme Court of Kenya for being unconstitutional and pave the way for the re-constitution of the Supreme Court of Kenya in strict compliance with the constitution be and is hereby issued.
 - iv. An order of mandamus directing the respondent to comply with the constitutional gender requirement and ensure that at least three(3) of the seven (7) judges recommended for appointment to the Supreme Court of Kenya are of the opposite gender be and is hereby issued.
 - v. Costs of or incidental to the petition be provided for.



- vi. This Honorable court be at liberty to grant any further orders/relief that may be just and expedient.
6. The 1st respondent opposed the petitions through a replying affidavit sworn on 20th December 2016 and filed in court on 22nd December, 2016, while the 2nd respondent filed grounds of opposition dated 24th January 2017 and filed in court on 25th March, 2017. The 1st respondent stated that the process of appointing Judges is competitive and transparent, and that the 1st respondent followed both the Constitution and Judicial Service Act in undertaking the exercise.
7. The 2nd respondent on his part stated that the petitions are an abuse of the court process, that the issue has been adequately addressed by the court in the case of Federation of Women Lawyers of Kenya (FIDA) & 5 Others v Attorney General & Another [2011] eKLR, and that the Court is bound by the decision of the Supreme Court in respect to the gender principle raised in the petitions.
8. The 2nd respondent reiterated the 1st respondent's position that the law on the appointment of judges was followed and held the view that the petitions were not well founded.

Petitioners' submissions

9. Mr. Mbithi, learned counsel for the 1st petitioner, urged the Court to grant petition particularly Prayers a - f, h and I, submitting that the petition was about equal opportunities for both men and women in the Supreme Court, and were contesting the decision of the 1st respondent to nominate more men to the Supreme Court without complying with the gender equality principle.
10. According to Mr. Mbithi, the 1st respondent ignored advice, from the 1st petitioner through its letter dated 15th July 2016 on how to fill the vacancies in the Supreme Court, necessitating the petition. Learned counsel contended that the 1st respondent did not require legislation to implement the two third gender principle since it was undertaking an appointive exercise. Counsel relied on the decision in Marilyn Muthoni Kamuru & 2 Others vs Attorney General & another [2016] eKLR to support his submission that appointive positions do not require a legislation for compliance.
11. Learned counsel maintained that the 1st petitioner's advice to the 1st respondent was binding and submitted that there was need to move to a 50-50 male – female representation in all positions and cited the Convention on the Elimination of all Forms of Discrimination Against Women, 1981 (CEDAW), Maputo protocol and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as supportive of this view. Counsel submitted, therefore, that the 1st respondent violated Article 27(6) which promotes gender affirmative action in recommending the appointment of a man as Judge of the Supreme Court. Counsel was also of the view that the 1st respondent similarly violated Articles 232, 172 of the constitution and section 10(2) (b) of Judicial Service Act on the two third gender principle.

Second Petitioner's Submissions

12. The 2nd petitioner agreed with the 1st petitioner and added that the Supreme Court as presently constituted is unconstitutional for failure to meet the two third gender principle threshold. The 2nd petitioner argued that Article 172 (2) (b) of the constitution and section 10 of the Public Service Act obligate the 1st respondent to promote gender equality. The 2nd petitioner referred to the decision in the case of Independent Policing Oversight Authority & Another v Attorney General & others [2014] eKLR and Attorney General & 2 others v Independent Policing Oversight Authority & Another [2015] eKLR for the submission that we have a young constitution whose constitutional principles must be applied. He submitted that the Supreme Court should lead by example in complying with the



two-third gender principle because of its heavy mandate of interpreting and enforcing the constitution, and therefore, showing that it was abiding by the constitution would be the best way for the country.

First Respondent's Submissions

13. Mr. Issa, who appeared together with Miss. Lipwop for the 1st respondent, opposed the petitions and submitted that the 1st petitioner has no constitutional mandate to offer a binding advisory opinion to the 1st respondent on the issue of the two third gender principle, although such advisory opinion could be noted, and was indeed noted. As a creature under Article 59(1), counsel submitted, the 1st petitioner's mandate is to promote gender equality, but not to render binding advisory opinions to other Independent Commissions. Learned counsel drew a distinction between the 1st petitioner and the Salaries and Remuneration Commission which has constitutional mandate under Article 230 (4) (b) to offer advice to the national and county governments and, by extension, to other Commissions and Independent Offices on salaries and benefits for public officers. In Counsel's view, therefore, the 1st petitioner was taking up the role of the High Court of interpreting the constitution.
14. Mr. Issa further argued that the petitioners were taking a narrow interpretation of Article 27 of the Constitution on gender equality. According to counsel, in order to successfully raise the question of equality within the Judiciary, one has to look at appointments in the Judiciary since the promulgation of the constitution in order to determine whether the question of two-third gender principle has been complied with in the institution, rather than look at only one superior court.
15. Counsel contended that the mandate of the 1st respondent is given by Article 172(2), and it has to recommend persons for appointment on the basis of competitive and transparent processes as well as promote gender equality. Counsel argued that there was no evidence of discrimination against one gender in the impugned recommendations since the judiciary is one institution as opposed to a single superior court. Learned counsel maintained that the law requires that an applicant who performed best from among both men and women be recommended for appointment to join the judiciary, hence the best were recommended for appointment to the Supreme Court. He, therefore, submitted that the Supreme Court is properly constituted, and in his view, the petitions have no legal basis.

Second Respondent's Submissions

16. The 2nd respondent relied on their written submissions through which it was argued that the issue before court was determined in the case of Federation of Women Lawyers Kenya (FIDA-(k)) & 5 Others V Attorney General and Another [2011]eKLR to the effect that rights under Article 27 are to be realized progressively. The 2nd respondent also agreed with the 1st respondent that appointment of judges is governed by Article 166(2) of the constitution and the Judicial Service Act, and that apart from basic constitutional requirements, there are other requirements under the Judicial Service Act, in that one should have competence, good legal judgment, integrity and communication skills, among others.
17. The 2nd respondent was of the view, that the issue raised by the petitioners had been dealt with in the FIDA case, hence they were estopped from re-litigating that same issue through the present petitions. The 2nd respondent further contended that the two third gender principle that formed the core of the petitions will be progressively realized and cited the Supreme Court Opinion in The Matter of Gender representation in the National Assembly and the Senate [2012]eKLR, Federation of Women Lawyers (FIDA-(K)) (supra), and John Ouru Nyagah & 3 Others v County Government of Nyamira & 2 others[2015]eKLR to support this submission.



18. It was the 2nd petitioners further contention, that courts should exercise caution in interfering with decisions of bodies where such bodies have complied with the law, and referred to the case of Fredrick Majimbo and Another v The Principal Kianda School, Secondary Section Petition No 281 of 2012 to support this submission. The 2nd respondent's contention, therefore, was that the petitioners had not demonstrated that the 1st respondent failed to comply with both the constitution and statute, and urged the court to follow precedents where the same issue had been dealt with including the Supreme Court Advisory opinion in the gender representation case.
19. The 2nd respondent relied on the case of Republic v Business Premises Rent Tribunal Exparte Albert Kigera Karume [2015]eKLR and Rift Valley Sports Club v Patrick James Ocholla [2005]eKLR to emphasis on the importance of stare' decisis which he urged the court to follow in determining this matter. Finally the 2nd respondent submitted that the court cannot grant structural interdicts as prayed by the petitioners and referred to the case of Kenya Airports Authority v Mutu Bell Welfare Society & 2 Others [2016] eKLR to support the submission that such an order would require reporting to the court on the progress made towards achieving the two-third gender principal.

Analysis and Determination

20. I have considered the petitions, responses thereto, submissions by counsel, and authorities cited. From the pleadings and submissions, the following issues arise for determination, namely;
 - i) Whether the nomination of the interested party (Hon. Mr. Justice Lenaola) for appointment to the Supreme Court violated the two-third gender principle as envisaged by Article 27(6) and(8)of the constitution, and was therefore unconstitutional;
 - ii) Whether the Supreme Court as presently constituted is unconstitutional
 - iii) Whether the advisory opinion by the 1st petitioner to the 1st respondent was binding;
 - iv) Whether the petitions are res judicata.

I. Whether the nomination of the interested party Hon. Mr. Justice Lenaola for appointment to the Supreme Court violated the two-third gender principle as envisaged by Articles 27(6) and (8) of the constitution, and was therefore unconstitutional;

21. The petitions challenged the 1st respondent's decision to recommend two men and only one woman for appointment to the Supreme Court to fill three vacancies that had arisen in that court following the retirement of Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court. Those vacancies were advertised and applications received from persons who wished to be considered for appointment.
22. For the position of Chief Justice only 2 out of 13 applicants were women. In the case of Deputy Chief Justice, there were only two male out of 16 applicants, while in the case of Judge of the Supreme Court, there were 10 women out of 21 applicants. After interviews, Hon. Mr. Justice David Maraga, Hon. Lady Justice Philomena Mwilu and Hon. Mr. Justice Isaac Lenaola were recommended for appointment as Chief Justice, Deputy Chief Justice and Judge of the Supreme Court respectively. It was the recommendation of Hon Mr. Justice Lenaola that really prompted these petitions. The gravamen of the petitions is that there should have been another female judge recommended for appointment to the Supreme Court instead of Hon. Mr. Justice Lenaola.
23. The law governing appointment of judges to Superior Courts is the Constitution and the Judicial Service Act, 2015. The organ responsible for conducting interviews and recommending persons for appointment to the superior courts is the 1st respondent, the JSC, established under Article 172(1)



of the Constitution. Functions of JSC are provided for under Article 172(2), one of which is to recommend persons for appointment as judges. And in the performance of its duties under Article 172(2), JSC is to undertake a competitive and transparent process of appointment of judicial officers and other staff of the judiciary and promotion of gender equality.

24. Part V of the judicial Service Act provides for the procedure for appointing judges. Section 30 provides that-

- “ 1). For the purposes of transparent recruitment of judges, the commission shall constitute a selection Panel consisting of at least five members.
- 2). The function of this selection panel shall be to short list persons for nomination by the commission in accordance with the first schedule.
- 3). The provisions of this section shall apply to the appointment of the of Chief justice, and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.
- 4). Members of the selection panel shall elect a Chairperson from amongst their number.
- 5) Subject to the provisions of the First Schedule, the selection panel may determine its own procedure” .(Emphasis)

25. The First Schedule to the Act provides for the procedure to be followed in selecting applicants to be recommended for appointment as judges. That procedure applies to judges of all Superior Courts. Part V further provides for the criteria for evaluating qualifications of individual applicants which includes among others; professional competence, communication skills, integrity, fairness and good judgment. Regulation 14 of the First schedule requires that the Commission nominates the most qualified applicants,taking into account gender, regional, ethnic and other diversities of the people of Kenya. The commission is, therefore, required to take into account competence first even as it considers gender.

26. The impugned appointment related to judges of the Supreme Court. Article 166(3) of the Constitution provides for the appointment of the Chief Justice, Deputy Chief Justice and Judges of the Supreme Court and their qualifications. These are basic constitutional requirements which are augmented by the requirements provided for in the JSC Act. Even where the applicants meet basic constitutional requirements, the 1st respondent, in making recommendations for appointment of a judge, has to consider competence as the first criteria before considering the other criteria including gender.

27. The foundation and policy considerations behind this requirement must be that the judiciary, under the transformative constitution, should have judges who meet the threshold set both by the constitution (including chapter six) and the Judicial Service Act. That is, the Judiciary should not only have competent but also men and women of integrity appointed through an open competitive and transparent process which meets the values and principles of the constitution.

28. The Petitioners’ main complaint is that in recommending the interested party for appointment to the Supreme Court, the 1st respondent violated Article 27 of the constitution on the two third gender principle. I have perused both the constitution and the law relating to appointment of Judges of superior courts. The first criteria for such appointment is first and foremost competence, before considering any other requirements. The petitioners have not accused the 1st respondent that it did not



- follow the constitution and the law in conducting the interviews. They have not even suggested that the lady applicants performed better than the person who was eventually recommended for appointment.
29. The 1st respondent followed the constitution and the law in advertising, conducting interviews and subsequently recommending the successful applicants for appointment. The 1st respondent was under a legal obligation first to consider competence in recommending names of persons for appointment to the Supreme Court, and at the same time bearing in mind not only gender parity but also other considerations stated in the Constitution and the Act, without necessarily compromising merit.
 30. The Supreme Court has seven members, and as presently constituted, five members of the court are of male gender while two are of the female gender. Prior to recommending the appointment of the Deputy Chief Justice, and the interested party to the position of Deputy Chief Justice and Judge of the Supreme Court respectively, there was only one female Judge in the Supreme Court and six male Judges following the appointment of the Chief Justice. The petitioners have argued that the position of the other Judge of Supreme Court, apart from that of the Deputy Chief Justice should have gone to a female judge to make the number of female Judges 3, thus meet the two- third gender principle.
 31. The two-third gender principle is an important element of human rights in our Constitution, and there has been substantial litigation on this subject. Article 27(3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 27 (6) further provides that to give full effect to the realization of the rights guaranteed under the Article, the state was to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Article 27 (8) states that in addition to the measures contemplated in clause 6, the state was to take legislative and other measures to implement the principle that not more than two-thirds of the elective or appointive bodies should be of the same gender. Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women has similar provisions to Article 27 on the equality between women and men. It provides that Women and men are equal before the law and shall have the right to equal protection and benefit of the law and that states should take appropriate measures to ensure effective access by women to judicial and legal services including legal aid.
 32. The constitution is clear that one gender should not occupy more than two- thirds of elective or appointive positions in a body. For the petitioners to succeed, they had an obligation to show that the number of male Judges in the Supreme Court were more than two thirds that of women. The Supreme Court has seven members, two of whom are female while five are male. The petitioners have therefore argued that this composition is against the two-third gender principle. In their view, there should have been three (3) female members and four (4) male members to make the composition two-thirds gender compliant.
 33. The petitioners have used percentages to argue that female members in the Supreme Court are less than 33.3 percent, which is unconstitutional. Taking the numbers as they are, two-thirds of seven would give 71.42 percent or 4.66 men, while one- third of seven would give 28.57 percent or 2.33 female. There is no decimal point in human beings, and taking the figures to the nearest whole numbers, 4.66 would round off to 5 men, while 2.33 would round off to 2 women. The Constitution does not use percentages but fractions, and for the petitioners to succeed, they were to show that there was indeed a direct and clear breach of the Constitution and statute with regard to the two-third gender principle while making the recommendation for appointment.



34. In the in the Federation of Women Lawyers Kenya (FIDA-K) & Others v Attorney General & Another (supra), the court considered the same issue of gender in the appointment of women Judges to the Supreme Court and observed;

“We reckon that judicial appointments should be based on merits, non-discrimination and they must reflect the diversity of our people but in this case we have no evidence that JSC in exercise of its functions under Article 172 as read together with the JSC Act failed to comply with Article 27. We think that the JSC conducted the shortlisting, the interviews and the recommendations of the five Supreme Court Judges in accordance with the provisions of Part V of the JSC Act, 2011, Section 30 of the said Act and all the relevant provisions of the constitution.”(emphasis)

35. The Court went on to state that persons to be appointed to judicial office should be persons who have experience, and that judicial appointment is not meant for everybody but for those who have attained certain foundation in legal training. The court observed;

“...judicial appointments should be based on the concept of equal opportunity, non-discrimination and above all must reflect the diversity of the people of Kenya taking into consideration the values, beliefs and experience brought about by an individual appointed for a particular position...We think that the role and powers of the JSC have been clearly defined by the JSC Act and by the constitution. Generally, it can be assumed that any person who meets the criteria and standards set has a legitimate expectation to be recommended for appointment. Those who finish in ne top group of the candidates counting judicial traits, academic promise, ethnic and geographical diversity and gender consideration are entitled to be recommended for appointment. It would be unfair, unjust and unconstitutional to exclude persons who come within the threshold set by Article 27 and Article 172, and the JSC Act for appointment.” (emphasis)

36. In the Supreme Court advisory opinion in The gender representation in the National Assembly and Senate [2011] eKLR, the supreme court dealt with the issue of the two-thirds gender principle in the representation in parliament and stated that the principle would be progressively realized, and hoped that a legislation would be in place by 27 August 2015, which was not to be. Other efforts including the case of Centre for Rights Education and Awareness & 2 Others V Attorney General & another [2015] eKLR where again the court had found that there was failure to enact the legislation and gave the Attorney General timelines within which to prepare a Bill for the National Assembly to enact the legislation, have not yielded any fruitful result.

37. In the case of Federation of Women Lawyers of Kenya (FIDA-K) & 5 others v Attorney General (supra), the court followed the supreme court edict and stated;-

“To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two-thirds principle is concerned is unrealistic and unreasonable. The issue in dispute remains an abstract principle which can only be achieved through enabling legislation by parliament”.

38. With the contemplated legislation, perhaps there would have been clarity on the number of women and men in both legislative and appointive bodies to ease the difficulty posed in determining the issue of gender parity like in the case of the Supreme Court. Article 27(6), and (8) gives an avenue to bridge the gender disparity gap given the fact that it may not necessarily be through legislation alone that the two-thirds gender principle could be realized, especially in appointive positions. Article 27(6) provides



that other measures including affirmative action programmes and policies may be designed and taken to redress any disadvantage suffered by individuals and groups because of past discrimination; while Article 27(8) puts it even more clearly, that in addition to the measures, contemplated in clause (6), the state shall take legislative and other measures to implement the principle that not more than two-thirds the members of elective or appointive bodies shall be of the same gender”.

39. The constitution therefore leaves a leeway to achieve gender parity even in the absence of legislation both in legislative and appointive bodies. It is even easier to achieve the two-thirds gender equity in appointive positions since all that is required are policies and affirmative action based on good will. On this I agree with Onguto J’s observation in the case of Marilyn Muthoni Kamuru & 2 Others vs. Attorney General & another (supra) where the learned Judge stated ;

“ Article 27 (8) imposes upon the state the obligation to redress gender disadvantage by enacting laws that may be needed and also undertaking other measures including affirmative action that would ensure women are needed to redress any inequality that may manifest. Article 27 (8) enjoins the state to be pro-active and that may be achieved not just through legislation, but through appointments as the Article itself dictates.”(emphasis)

40. The 1st respondent was involved in an appointive exercise, and from the words of the constitution, it did not require legislation to implement the two-thirds gender principle in appointive positions. All it required was action to facilitate compliance with the principle. Any claim that the recommendation for appointment failed to comply with the gender principle, would have to be looked at from the perspective of whether these were appointive positions. The answer to the first question therefore has to be looked at from this perspective.
41. Article 232 of the Constitution provides for values and principles of Public Service and in particular that fair competition and merit is the basis of appointments and promotions in the public service before considering other criteria including that of gender. From the facts of this petition, the constitution and the JSC Act, and the decision in Federation of Women Lawyers (FIDA- K) (supra), it is difficult to fault the 1st respondent for recommending the interested party for appointment to the Supreme Court making the number of men 5. It would have been ideal to recommend a woman for appointment, but that is not to say an ideal situation is the same as a clear breach of the Constitution or the law on the two-thirds gender. Even if one applied a mathematical formula to the question at hand, the result would invariably have been the same, that two-thirds is 5 while one-third is 2. The number of judges being uneven, the figure can only be approximate and not exact. The 1st respondent cannot be blamed for that.
42. I am therefore, unable to hold that the 1st respondent breached either the Constitution or the JSC Act in recommending the interested party for appointment to the Supreme Court. His nomination did not also breach the two-thirds gender principle as contemplated by the Constitution.

Whether the Supreme Court as presently constituted is unconstitutional

43. Having determined that there was nothing unconstitutional in the recommendation made for appointment of Judges to the Supreme Court, the second issue on the constitutionality of the composition of the Supreme Court does not arise for determination and must, therefore, fall by the wayside.



Whether the advisory opinion by the 1st petitioner to the 1st respondent was binding;

44. The 1st petitioner also complained that its advice to the 1st respondent on the recommendation for appointment of Judges to fill the vacancies was ignored, although counsel submitted, the 1st respondent was bound by such advice. The 1st petitioner had conveyed its views by letter dated 15th July 2016, which stated in part;-

‘.... in order to comply with the two third gender principle, it follows that at least two (2) of the three (3) advertised positions must be filled by persons of the female gender. This would translate to 42.85% in favor of the female gender, in a worst case scenario well within the two-thirds gender principle which requires that neither gender should fall below one third. No position is a preserve of one gender and neither is there a lesser gender, both are equal and should be accorded equal opportunities. In fact Kenya being a member of the African Union (AU) the parity principle should be 50-50 percent in favor of either gender....’

45. 1st petitioner, a constitutional commission established under Article 59(1) of the Constitution, exercises functions provided for under Article 59(2) to among others promote respect for human rights and develop a culture of human rights, promote gender equality and equity generally and to coordinate and facilitate gender main streaming in national development. Under Section 8 of the National Gender And Equality Commission Act, No 15 of 2011, one of the functions of the 1st petitioner is to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution, and, to monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all National and County policies, laws and administrative regulations in all public and private institutions.

46. I have perused the Constitution and the Act. The Constitution gives the 1st petitioner mandate to promote gender parity. The Constitution does not, however, give it mandate to advise. The word “advise” only appears in the Act, where the Act provides that 1st petitioner should advise on the integration of the principal of equality. The 1st respondent is also an Independent Constitutional Commission with its specific constitutional mandate. The 1st petitioner’s mandate to advise as given by the Act, can be contrasted with that of the Salaries and Remuneration Commission, which has been given mandate by the Constitution under Article 230 4(b) to advise the National and County governments on remuneration and benefits of public officers. That mandate was confirmed by the Court of Appeal in the case of Teachers Service Commission(TSC) v Kenya National Union of Teachers(KNUT) & 3 Others[2015] eKLR where the court held that the advice of SRC under Article 230 (4)(b) on the remuneration and benefits of all public officers is binding on National and County governments.

47. The 1st respondent could take into account the 1st petitioner’s advice while conducting interviews and recommending persons for appointment, but was not under obligation to abide by such advice. I, therefore, hold that the advice by the 1st petitioner was not binding on the 1st respondent. This is because the 1st petitioner’s mandate to facilitate and give advice on how to integrate gender parity is not a mandate provided by the Constitution but by statute, and for that reason the advice could not bind the 1st respondent, a constitutional commission.

Whether these Petitions are res judicata.

48. The 2nd respondent submitted that the petitions are res judicata, arguing that a similar petition had been heard and determined over the same issues. According to the counsel, the same issue was raised in the case of Federation of Women Lawyers Kenya (FIDA-K) (supra) and determined. The petitioners



on their part argued that the principle of res judicata does not apply to constitutional petitions. Res judicata is a principle of law which seeks to ensure that there is conclusiveness in litigation. Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya) provides;

“No Court shall try any suit or issue in which the matter directly or 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.”

49. The doctrine of res judicata refers to the rule that where there has been a final judgment or decree on merit by a court of competent jurisdiction on the rights of parties or those litigating on their behalf, a similar issue may not be raised again in court. The elements of res judicata are therefore, that;
- a) There is a former judgment or order which was final;
 - b) The judgment or order was on merit;
 - c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action.

(See *Uhuru Highway Developers Limited v Central Bank of Kenya & Others* [1999] eKLR).

50. This principle has now been accepted that a party ought to litigate only once and that litigation over the same subject matter must come to an end once it has been finally determined.
51. The Court of Appeal addressed the rationale of this doctrine in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR thus;

“The rationale behind res judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resource and timely termination of cases. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law...In a nutshell, res judicata being a principle of law, may be raised as a valid defense. It is a doctrine of general application and it matters not whether the proceedings are constitutional in nature. The general consensus therefore remains that res judicata being a general principle of law that relates to jurisdiction of the court, may be raised as a defense to a constitutional claim...”

52. Similarly, in the case of *Edward Akongo Oyugi & 2 Others v Attorney General* [2016] eKLR, the court stated;

“The law is now relatively clear that for a plea of res judicata to succeed, the respondent must establish four critical factors; first, that the parties must be the same or parties under whom they claim or litigate; secondly, the matter must be directly and substantially in issue in both suits; thirdly, the matter must have been conclusively decided in the previous suit and finally, there must be shown a concurrence of jurisdiction.”



53. And in the case of *Edwin Thuo v Attorney General & Another* Petition No 212 of 2013, the court gave a warning on the possibility of parties re-inventing cases by changing characters in the cases in order to defeat the doctrine of *res judicata*, and stated:-
- “The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”
54. The former petition that was determined was that of *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another* [2011] eKLR. Just like the present petition, that petition challenged appointment of Judges to the Supreme Court alleging non-compliance with the two-thirds gender principle in those appointments.
55. In particular, the 1st respondent herein (JSC) who was also a respondent in that petition, had earlier recommended one man and one woman for appointment as Chief Justice and Deputy Chief Justice respectively. It was the turn to recommend other persons for appointment as Judges of the Supreme Court so that the Supreme Court could be fully constituted.
56. Among the persons recommended for appointment was one woman while 4 were men which would make 5 men and 2 women in that court, triggering that petition. The petitioners argued that the recommendation was in violation of the two-thirds gender principle. In their view, of the five judges recommended, two should have been women and three men which would have made the number of women 3 and that of men 4. The petition was however disallowed, and the courts findings have been referred to in this judgment.
57. The respondents have therefore maintained that the present petition is *res judicata*. Firstly as a matter of fact, that petition was about appointment of Judges to the Supreme Court, which is the same issue before this court. Secondly, it also sought to declare that the recommendation for appointment of Judges to the Supreme Court violated the two-thirds gender principle and Article 27 of the Constitution, which again is the same issue before this court. Thirdly, the petition was against the 1st respondent, who is the main respondent herein, and the impugned decision in both the former and current petitions was made by the same respondent.
58. The petitioners in the former petition are not the same as those in the current petition to make this petition fall within the requirements of *res judicata*. For that reason only, this petition is not *res judicata*.
59. Having given due consideration to the petition, the ultimate conclusion is that it is without merit. Consequently it is hereby dismissed. Regarding costs, the order I make is that each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2017.

E C MWITA

JUDGE

