

Concourt reins in President over judge appointments

For the second time in the short history of Kenya's 2010 Constitution, the courts have had to intervene in a major dispute between the President and the Judicial Service Commission over their respective powers. This time, the battle concerned President Uhuru Kenyatta's failure to appoint a number of judges whose names were given to him by the JSC in mid-2019.

The big question was whether the President has a merely ceremonial role in the appointments, or whether he is entitled to reject or even 'reconsider' people recommended by the JSC. This particular dispute goes back to the JSC hearings last year when the commission recommended a number of individuals for appointment to the Court of Appeal, the Environment and Land Court, and the Employment and Labour Relations Court.

In response to presidential inaction since then, attorney Adrian Njenga brought court action against the Attorney-General as representing government, with the JSC, the Chief Justice and President of the Supreme Court, as well as Kenya's law society, all involved as 'interested parties'. Njenga says the President has shown 'a discernible historical pattern of delay' in appointing those recommended by the JSC, and called this 'a conspiracy to sabotage and frustrate the judiciary in executing its constitutional mandate'.

Kenyatta's delay in making these appointments has become a 'recurrent subject of public concern', he said. It also affected the continuing case backlog in Kenya's courts, not to mention that the delays affected the 'career progression' of those whose appointments have still not been confirmed.

The JSC, via its secretary Anne Amadi, explained the procedure adopted that culminated in the list of names sent to the President. She also said the JSC had received a letter from the National Intelligence Service (NIS), noting concerns about the suitability of 'some of the persons shortlisted for interviews'. No further details were, however, offered about these concerns. The JSC gave the NIS extra time to respond with further information, but the NIS declined to say anything more, other than that its initial letter 'discharged its obligation'.

As to transparency, all the interviews with shortlisted candidates were conducted publicly, broadcast on all TV stations and livestreamed. There was a 'rigorous' vetting process including consideration of the character, integrity and professional qualifications of the candidates. Having done all this, the JSC had fully 'discharged its constitutional mandate' and the names of the successful candidates were sent to the President for appointment.

The 'interested parties', including the JSC and the Chief Justice, said there was no provision in the Constitution for the President to reject anyone recommended by the JSC for appointment. The law society added that there had been a widely consultative approach and that the President and members of the public had adequate opportunity to raise any reservations during the interview process. In addition, the President had representatives on the JSC and could have raised any issues through those representatives. However, at this stage, the role of the President was now 'ceremonial' in relation to the list of those recommended for judicial appointment.

The Attorney General, however, initially questioned the jurisdiction of the court to hear the matter at all – an issue considered and rejected by the court in its judgment. The AG also argued that the President, as head of state and of government, had ‘exclusive authority’ to appoint judges in Kenya, ‘on behalf of the citizenry in accordance with recommendations from the (JSC).’

The President was not refusing to perform his duties about appointing judges, said the AG, but was ‘merely taking steps to ensure he does so in accordance with the purposes and objects (of) the Constitution, and in a manner that brings honour to the nation, dignity to the office of the judges and promotes public confidence in the integrity of the office’.

No mere ‘ceremonial’ actor, the President had to consider the JSC list taking into account ‘good governance, public participation, integrity, transparency, accountability and sustainable development’. He also had to ensure that provision was made in the national budget for the salaries of the new judges as well as for their pensions. The President had received ‘adverse reports’ about some of those on the JSC list and it would be ‘irresponsible’ for him to appoint anyone about whose integrity serious questions had been raised.

In its decision, the Constitutional Court said the main reason for the President’s delay appeared to be the comments of the NIS. However, the Constitution gave the JSC a mandate to ensure judicial independence, manage discipline and initiate any judicial removal process.

No other official or official body had direction or control over it. No power was given to the President by the Constitution to ‘comment on or review’ the JSC’s decision. He was not even given power to decline to appoint anyone on the list for the superior courts.

The JSC had carried out its mandate correctly, in an open and transparent manner. If the NIS or anyone else had questions about a candidate, they could have been dealt with during the process.

As to the suggestion that the NIS did not respond to the JSC request for further details since it could not disclose ‘classified information’, the court said it had difficulty in understanding how allegations of a lack of integrity by some applicants could be called ‘classified’ information that would compromise national security.

The JSC’s independence was not a matter of conjecture or speculation. ‘It is a constitutional imperative that cannot be interfered with by any person, organ or authority.’

It was true that the Constitution did not stipulate how long the President could take before formally appointing the judges named by the JSC. But, according to the court, appointment should be virtually immediate since the President played no role in the process apart from formal appointment. A ‘reasonable’ delay between receiving the JSC’s list and making announcing formal appointments would be a fortnight, said the court.

The judges thus found that the delay in appointment was ‘unreasonable and therefore unconstitutional’. They declared that the President was constitutionally bound to appoint those listed by the JSC; that his failure to do so

'violates the Constitution and the Judicial Service Act'; and that his continued delay was a violation of a number of sections of the Constitution. Furthermore, costs were awarded against the Attorney-General.

[Judgment](#)

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