



Ethics and Anti-Corruption Commission v Ngeru (Civil Suit E004 of 2023) [2024] KEHC 8585 (KLR) (Civ) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT E004 OF 2023

EN MAINA, J

JULY 4, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ESTHER WANGECHI NGERU DEFENDANT

JUDGMENT

1. The Plaintiff brings this suit for the recovery of a sum of Kshs. 34,095,200 being public funds allegedly misappropriated and/or embezzled from the National Treasury and Planning (hereinafter referred to as “Treasury”) pursuant to its mandate under Section 11(I)(j) of the [Ethics and Anti-Corruption Commission Act](#).

The Parties

2. The Plaintiff is a body corporate established under Article 79 of [the Constitution](#) and Section 3 of the Ethics & Anti-Corruption Commission Act with a mandate to institute and conduct proceedings for the purpose of recovery or protection of public property.
3. The Defendant was at all material times the Deputy Internal Auditor General at the National Treasury.

The Plaintiff’s case

4. The Plaintiff avers that the Defendant fraudulently, illegally and irregularly received an overpayment of allowances as a result of overlapping and use of wrong rates and which allowances did not have the approval of the Salaries and Remuneration Commission (hereinafter “SRC”). The Plaintiff contends that an analysis of the payment vouchers from Treasury Bank statement between February 2020 and



June 2022 established that the Defendant irregularly and fraudulently received allowances amounting to Kshs. 34,095,200 broken down as follows:

- a. Extraneous Allowance Kshs. 15,628,000.00
 - b. Facilitation Allowance Kshs. 14,786,000.00
 - c. Taskforce/Committee Allowance Kshs. 1,551,200.00
 - d. Other Undefined Allowances Kshs. 2,130,000.00
5. On 19th July 2022, the Plaintiff obtained orders preserving a sum of Kshs. 8,550,920.30 in Account Number xxxxxx held at ABSA Bank Kenya PLC belonging to the Defendant.
6. The particulars of fraud and illegality on the Defendant's part are stated to be knowingly receiving allowances for unspecified reasons, for an unspecified number of days, for unknown activities and beyond the approved rates based for her job placement contrary to the guidelines set by the Salaries and Remuneration Commission. The Plaintiff avers that the Defendant received multiple allowances for the same alleged official duties and made false and misleading statements to her principal in relation to the emoluments contrary to Section 41 of the *Anti-Corruption and Economic Crimes Act*, 2003. Further that she wrongfully enriched herself, at the expense of the public, in breach of the provisions of the *Public Officer Ethics Act* and improperly conferred a benefit to herself contrary to Section 46 of the *Anti-Corruption and Economic Crimes Act*, 2003.
7. The Plaintiff contends that the Defendant is personally liable for the loss of Kshs. 34,095,200 and hence prays for judgment against the Defendant as follows: -
8. The Plaintiff prays for the following: -
- a. A declaration that the sum of Kshs. 34,095,200 was fraudulently embezzled from Treasury,
 - b. An order directing the Plaintiff to pay Kshs. 34,095,200 fraudulently embezzled from Treasury,
 - c. In the alternative, an order of forfeiture of the Kshs. 8,550,920.30 held at Absa Bank PLC, Account Number xxxxxx to the Plaintiff in Partial fulfilment of the Judgement sum in (b) above;
 - d. Payment of a sum of Kshs. 25,444,297.70 to the Plaintiff being the balance outstanding upon satisfaction of payer (c) above;
 - e. Cost of the suit;
 - f. Interest on (b), (c) and (d) at Court Rates from the date the cause of action arose until payment in full;
 - g. Any other relief that the Court may deem fit to grant.

The Defendant's case

9. In her written statement of defence dated 21st February 2023 filed herein on 27th February 2023, the Defendant denies the allegation that she fraudulently, illegally and irregularly received public funds and avers that all amounts received as allowances from her employer were legally due to her for official duties undertaken and were sanctioned by the SRC and the Treasury guidelines on allowances; that the Plaintiff's claim for Kshs. 34,095,200/- against her is driven by malice and witch-hunt instigated by third parties at the Treasury; that the Plaintiff's investigations have not only been one sided but the



- Plaintiff has knowingly agreed to be used to settle personal scores between the Defendant and third parties. She denies the particulars of fraud and illegality in toto, and avers that all allowances paid to her were duly sanctioned by her employer; that all assignments leading to the accrual of the allowances were duly executed to completion and the same were assigned by her employer in accordance with her job description. She asserted that all the classes of allowances paid to her were and are still being paid to all staff at the Treasury from the junior to senior most staff in accordance with their job groups.
10. She avers that she was not in any way involved in the approval or awarding of allowances at the Treasury; that at no single moment during her employment at the Treasury has it been brought to her attention that she has been paid multiple allowances for the same job and if the same had been brought to her attention, she would have readily refunded such excess amounts if any.
 11. She further avers that the Plaintiff claims an arbitrary figure of 34,095,200/- without giving specific details on how it arrived at that figure.
 12. The Defendant also denies receiving a demand and/or notice of intention to sue as alleged and contends that this suit is therefore premature and should be dismissed on that ground. She explains that the Plaintiff only served her with a demand on 12th January 2022 without any supporting documentation sufficient for her to respond and proceeded to file this suit within seven days thereafter. She avers that the prayers in the Plaint are untenable and will only amount to engaging this court in an academic exercise. She maintains that the Plaintiff's suit is ambiguous, unclear, wanting in material particulars, is incompetent, misconceived, an abuse of the court process and is inept in both legal substance and form and it should therefore be dismissed with costs.
 13. To prove its claim, the Plaintiff called two witnesses who testified as follows: -
 14. PW1, Jennifer Gitari, a principal officer, Allowance and Benefits at the Salaries and Remuneration Commission (SRC) testified that the commission's mandate includes: -
 - a. To set and regularly review the remuneration and benefits of all state officers; and
 - b. To advise the national and county governments on the remuneration and benefits of all other public officers.
 15. She testified that in regard to this claim the SRC received a letter from the EACC/Plaintiff requesting for documents for approved policies on payment of various allowances to public officers at the National Treasury. The Plaintiff also requested the CEO of the SRC to nominate a competent officer to record a statement in that regard and that the assignment was given to her.
 16. With regard to payment of allowances to public officers she testified that the payment of Special Duty Allowance to public officers was guided by Section C.15 of the Public Service Commission (PSC) Human Resource policies and procedures manual which states: -

“When an officer is called upon to perform duties of a higher post but does not possess the necessary qualifications for appointment to that post, he shall be paid special duty allowance at the rate of fifteen per cent (15%) of the officer's basic salary. The payment of special duty allowance will be subject to recommendation by the Human Resource Management Advisory Committee and approval by the authorized officer.”
 17. That payment of extraneous allowance is guided by various policies and circulars including: -
 - i. The PSC Human Resource Policies and Procedures Manual for the Public Service, 2016 under Section C.13 has guided that “Extraneous allowance shall be paid to officers who are called



upon to undertake extra responsibilities in addition to their normal duties and therefore work over and above the official working hours on a continuous basis. The rates and eligibility for payment shall be determined by the Government from time to time.

- ii. Circular Ref. No. DPM/38/1/1A dated 10th April 2008 (copy attached) advised on payment of the allowance to all officers in job group T in the civil service at a rate of KES 60,000 p.m. for extraneous allowance.
 - iii. Circular Ref. No. MSPS.2/1A Vol. XXXVI (111) dated 14th April 2009 and Circular Ref. No. MSPS.MSPS 2/1A Vol. XXXV (118) dated 13th November 2008, (copies attached) guided on the rates of the allowance for Secretarial Personnel, Drivers and Support Staff attached to various offices.
 - iv. The SRC vide letter Ref. No. SRC/TS/AG/3/37 Vol. IX dated 22nd April, 2021 (copy attached) advised the National Treasury on payment of extraneous allowance to officers involved in the budget making process. The SRC through the said letter in reference advised the National Treasury that the Salaries and Remuneration Commission during its 339th meeting held on 7th April 2021 deliberated on their request and observed that the request was inconsistent with the framework of the taskforce allowance as provided by the SRC.
18. She emphasized that by a circular dated 22nd April 2021 sent to the National Treasury through a letter Ref. No. SRC/TS/AG/3/37 Vol IX the SRC advised the CS Treasury on the payment of extraneous allowances to officers involved in the budget making process; that the SRC had deliberated upon a request made to it by the Treasury and had reached a decision that the request was inconsistent with framework of the taskforce allowance provided by the SRC and hence the compensation for the tasks concerning the budget making process was better made under the framework of extraneous allowance. It was her evidence that the SRC gave advise that the National Treasury staff involved in the budget making process, who worked long hours on a continuous basis and who may have extra responsibilities were effective 1st August 2020 to be paid as follows: -

Monthly extraneous allowance to TNT Staff

Job Group	Extraneous Allowance Kshs. per month
U	75,000.00
T	60,000.00
S	50,000.00
P, Q, R	40,000.00
M & N	30,000.00
K & L	20,000.00
G & H & J	15,000.00
F & Below	10,000.00



19. In court she explained that the recommended extraneous allowances were to be paid monthly through the pay slip as opposed to the request by the Treasury to pay per task as proposed in the letter by the CS Treasury.
20. She further testified that task forces were to be consisted by an Authorized or Accounting officer and the members thereof appointed in writing and given clear terms of reference and duration of assignment with well-defined out puts and further no office was to be appointed to more than once task force at any given time. This was as per a letter dated 2nd August 2013 from the Ministry of Devolution and Planning. She contended that on 16th December 2015 the SRC gave guidance on payment of task force allowances – that such allowances could only be paid upon advice by the SRC and that in so stating the SRC took cognizance of the letter dated 16th April 2014 from the Ministry of Devolution and planning. She contended that the SRC declined the request by Treasury to pay Task Force allowance to its staff who were involved in the budget making process. She also contended that any payment of allowances without approval of the SRC is illegal.
21. In regard to entertainment and meal allowances it was her evidence that the eligibility criteria was in clause 12 and 17 of the PSC manual but that the payment was outside of the eligibility outside of the criteria then the SRC would step in to advise. She explained that prior to the SRC advisory/circular dated 22nd April 2021 task force allowance could be paid but effective 1st August 2020 the same was to be replaced by an extraneous allowance. She conceded that by the time the circular advisory was given people had already received the task force allowance. Further that non implementation of the SRC advisory is taken as non-compliance.
22. In cross examination she clarified that the advisory regarding the extraneous allowance was only in regard to the officers involved in the budget making process and not any other and also that officers in Job Group 5 were not eligible for entertainment allowance unless advised by the SRC.
23. PW2 Shadrack Mwenda testified that he was a member of the team that was formed to institute investigations following a report received on 20th May 2022 by the EACC, where he is working as an investigator. He stated that investigations revealed that the Defendant was a public officer who had risen through the ranks at the National Treasury to the to the position of Deputy Internal Auditor General, Job Group S, effective 23rd May 2018. Her net pay was Kshs. 188,023.65. He stated that on 5th July 2022, the Plaintiff applied for and obtained a warrant to investigate the Defendant's account xxxxxx held at Absa Bank Kenya; that the Bank Supplied the EACC with bank records which upon analysis revealed that between 1st January 2020 and 30th June 2022, the Defendant received a total of Kshs.54,404,791.30 in form of allowances and imprests; that an analysis of the payment vouchers which EACC received from Treasury revealed that the Defendant illegally received Kshs. 34,095,200 in extraneous, facilitation, taskforce and other undefined allowances in that the extraneous allowances were paid outside the payroll while some did not have a duration (start and end date) for the period it was being paid. He stated that the investigation covered 913 days indicating payment of all days of the year as well as double payment for most days. He explained that the SRC had in its advisory declined payment of extra compensation of Treasury staff who took part in the National budget preparation between August 2020 and June 2021 and had instead recommended that the compensation was to be made through an extraneous allowance. He explained that extraneous allowances are paid to officers who take on extra duties above their normal duties and work beyond working hours on a continuous basis.
24. PW2 further testified that the Defendant received facilitation allowance for various tasks undertaken, including preparing and arranging vouchers in accounts, working on account reconciliation, and appraising of records in accounting; that the Defendant received facilitation allowance of Kshs.



- 14,786,000 of which Kshs. 10,691,000 had no start and end date, and that Kshs. 4,095,000 was paid for 925 days in a 913-day period (2.5 years) which indicated overlapping of days and payments. He contended that the facilitation allowance is not defined in the Government Policy Documents and Circulars and that the payment lacked objectivity as it had not been approved by the SRC. He further testified that the Defendant received taskforce allowances of Kshs. 1,551,200 contrary to the Government Policy and guidelines by the SRC. Further, the activities described in the payment vouchers were routine tasks routinely undertaken by the Defendant in the ordinary course of her duties thus the taskforce allowances were paid without justification or approval by the SRC and that she was also paid taskforce allowances without appointment to any taskforce.
25. He further testified that as per the Circular Ref Number SRC/ADM/CIR/1/13(122) dated 16th April 2014 from the SRC and the Circular from the Ministry of Devolution Ref No. MSPS.2/1A VOL. XLVIII (119) dated 2nd August 2013, guidelines to streamline the management of taskforces in the public service provided as follows: -
- a. A taskforce would be constituted by the Authorized/ Accounting Officer.
 - b. Members would be individually appointed in writing, with clear terms of reference and duration of assignment, with well-defined outputs.
 - c. Members of a taskforce would be a maximum of fifteen (15) with not more than two (2) supporting staff.
 - d. An officer was not to be appointed to more than one taskforce at the same time.
 - e. Taskforce assignment to be completed within a maximum period of twenty (20) days, with extension only with prior authority of the Head, Directorate of Public Service Management, giving justification for extension and expected period in excess.
 - f. Token compensation to be paid after completion of assignment, at fixed rates per day, which have been tabulated.
 - g. The taskforce is only set up by the Authorized Officer if he is convinced that the assignment can only be completed through a taskforce; he personally approves the taskforce allowance; mid-year returns on taskforce expenditure made with a copy to the Principal Secretary in the Treasury.
 - h. The authorized officer is also tasked to ensure that overtime and retreat allowances are not paid alongside the taskforce allowance.
26. For the Defendant, DW1, Willys Odhiambo Okwacha, testified that he was the Assistant Internal Auditor General at the Treasury at the material time. He testified that his role in this case included reviewing payment vouchers to determine whether they were genuinely processed and supported by genuine documents and to confirm whether the amounts alleged to have been paid to the Defendant were correctly enumerated by the Plaintiff whereupon he prepared a report dated 13th September 2023. He stated that he also conducted an analysis of the payments to confirm whether the payment vouchers were approved by authorized officers and whether the payment rates were correct. In his opinion based on the analysis, the payments made to the Defendant were legal.
27. He testified that extraneous allowances were paid for work done outside the course of normal duties and is paid as per assignment, not monthly. He testified that the system could overlap assignments as the auditors at Treasury could do different tasks concurrently. Payment was based on completion and



- delivery of assignment and payments for a certain period could be made in another period hence the overlap.
28. It was his testimony that the process for payments made to the Defendant complied with the provisions of the *Public Finance Management Act* and that he had come to the conclusion that there was no fraud. He opined that the Defendant did not approve any of the payments and that no documents had been altered to her advantage.
 29. He testified that an officer could not appoint herself to a taskforce; that such appointment was done by the Authorized or Accounting Officer. He explained that the Defendant was not the AIE (Authority to Incur Expenditure) holder in any of the documents and added that the payments were made to all the officers listed in the schedule, yet only the Defendant was sued, a thing which concerned him.
 30. In Cross examination, DW1 testified that the letter dated 20th November 2020 was authored by Ukur Yattani the then Cabinet Secretary, National Treasury. The letter was addressed to SRC concerning the allowances for the officers working on the budget 2020/2021 and supplementary budget 2021/2022. He testified that SRC is mandated to merely give advice on allowances but does not approve the payment thereof.
 31. Referring to the letter dated 22nd April 2021 from the SRC to the Cabinet Secretary National Treasury, PW2 stated that SRC recommended that extraneous allowances be paid and assigned a sum of Kshs. 50,000 for Job Group S. He stated that the circular was also backdated to 1st August 2020. He clarified that the period of interest is between February 2020 to June 2022 and the extraneous allowance claimed is Kshs. 15,628,000. He conceded that at the rate of Kshs. 50,000 a month for that period, about Kshs. 1 million would have been payable to the Defendant. He also conceded that the letter from the SRC did not refer to a specific assignment but related to all the officers working on the budget preparation and at all times.
 32. He testified that although the PSC manual did not provide for a facilitation allowance however, he was aware of facilitative and remunerative allowances. He explained that a meal allowance is facilitative. He further explained that extraneous allowance can be facilitative if one is being merely facilitated and remunerative if it is paid through the pay slip.
 33. In regard to Clause C.23 of the PSC manual, he testified that it provides for other allowances which would usually be authorized by the Accounting Officer who has absolute discretion to determine what type of allowance is to be paid to employees; that, facilitation allowance can be part of the other allowances and this explains the extra Kshs. 14 million paid to the Defendant. He was not aware of a document which refers to a facilitation allowance but the allowances were paid like honoraria. He further testified that the generating document for the allowances is a memo and the mere approval by the accounting officer made the payments regular and lawful.
 34. In re-examination, DW1 explained that the SRC Circular dated 22nd April 2021 applied to a specific activity, namely budget making and it could not be implemented post facto as the officers had already been paid. He explained that the money paid to the Defendant in 2020 included assignments done prior to that year, and hence they constituted pending bills but that the vouchers and memos indicated the activity and period for the payment. He contended that there was clear definition of what was being paid in the memo.
 35. DW2, Esther Wangechi Ngeru, (the Defendant) testified that she joined the National Treasury as an Examiner officer III on 3rd April 1986 and gradually rose through the ranks to the position of the Deputy Internal Auditor General with effect from 23rd May 2018 until March 2023 when she retired. Cumulatively she worked with the National Treasury for 36 years. She stated that on/or about July



- 2022, she was served with a Court Order allowing the EACC to freeze her account No. xxxxxx at ABSA Bank purportedly for embezzlement of public funds.
36. In relation regard to the claim she testified that she was duly appointed to the committees by the appointing authority and that she executed the tasks assigned and hence was entitled to the allowances. She contended that she had no authority whatsoever to appoint herself into any taskforce or committee as evidenced by the various supporting documents. That the two allowances were legally earned by undertaking various activities as assigned to her by her superiors and in which such activities warranted payment of the allowances.
 37. She stated that she never received payments for work that was not undertaken. She asserted that the allowances were paid to many other officers as evidenced by the payment vouchers produced by the plaintiff and the question as to why she was the only one sued begs an answer.
 38. She contended that she knows for a fact that this suit is instigated by malice; that when the Plaintiff instituted investigations into this matter, the Principal Secretary, National Treasury established an ad hoc committee to investigate the allegations levelled against four employees of the National Treasury including herself and that the committee undertook investigations and compiled a report. She stated that in that report, the Committee in which the Plaintiff's own witness Kenneth Odhiambo was a member, came to the conclusion that all the allowances paid to her were legally approved and followed due process and as such she could not be deemed culpable. She testified that the allowances were dully sanctioned by her employer and were payable to all staff at the National Treasury and that they were set and approved by a different department all together where she had no say at all.
 39. She asserted that all the money in her account was legally earned; that the account also received her salary and daily subsistence allowance which the Plaintiff is not challenging.
 40. In cross-examination, she conceded that she was not entitled to an entertainment allowance and contended that approval of the same would not have made it legal. She testified that she was involved in the entire budget making process and was among the officers referred to in the SRC Circular as being entitled to an extraneous allowance. She confirmed that the SRC recommended a rate of Kshs. 50,000 a month. She averred that she does not dispute that she received the Kshs. 34 million claimed by the Plaintiff. She stated that being an auditor she too would recommend refund of irregularly paid allowances and that had any excesses been brought to her attention she would have refunded the same. She however maintained that all the allowances paid were due to her and that she was entitled to them and as such this case ought to be dismissed with costs.

Submissions

41. Learned Counsel for the parties summed up their cases by way of written submissions.
42. Mr. Wambugu, Counsel for the Plaintiff submitted that as per the testimony of Jennifer Gitari - PW1, any appointment to a taskforce has to be made upon advise of the SRC; that extraneous allowance paid without approval of SRC is illegal; and that National Treasury, officers involved in the budget making process ought to have been paid extraneous allowance, as guided by PSC Human Resource Manual and the SRC advisory. Counsel stated that Shadrack Mwenda (PW2), an investigator with the Plaintiff had testified that as per the advice given by SRC and his computation, the Defendant ought to have received Kshs. 1,500,000 as extraneous allowance for the period under investigation, which amount ought to have been paid monthly through the pay slip as her Job Group (S) entitled her to that allowance at the rate of Kshs. 50,000 per month. Counsel stated that PW2 explained that "facilitation allowance" is not provided for in any government circular. Further, that according to circulars, an officer was allowed only 20 days' facilitation allowance in a month with approval; that it



was explained that in a month, the Defendant was not entitled to be paid that allowance for more than twenty (20) days. As for the “undefined allowances”, Counsel stated that the payment vouchers did not have a start or end date as would determine if the activities were within the guidelines provided by the SRC. Counsel submitted that this suit concerns advice given by the SRC, which advice was ignored. Counsel argued that the advice given by the SRC on payment of allowances to public officers is binding. Counsel placed reliance on the case of *Salaries and Remuneration Commission vs. National Hospital Insurance Fund, Management Board & Others (Civil Appeal No. 156 of 2016)* [2024] KECA 419 (KLR) (26 April 2024) (Judgment) and in urging this court to order the Defendant to refund the allowances wrongly paid to her Counsel placed reliance on the case of *Salaries and Remuneration Commission & Another vs. Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR (paragraph 240).

43. Counsel asserted that the Defendant conceded that according to the advice of the SRC, she was part of the officers involved in the budget making process and hence in effect conceding that any amounts that she received outside what was recommended by SRC was irregular and unlawful. Accordingly, Counsel argued that this proves an element of fraud and illegality as pleaded in paragraph 8 (c) of the plaint and he urged this court to find her personally liable for this amount in line with the holding in the case of *Parliamentary Service Commission & Others (supra)*.

44. Counsel further urged the court to consider the nature of the PSC Human Resource Manual, which was described by the Court Applicant in the case of *Alfred Odongo Amombo v Lake Victoria North Water Services Board & Another* [2018] eKLR, cited with approval in *Godwin Barasa Barechi v Kenya Trade Network Agency* [2020] eKLR where the Court of Appeal stated as follows:

“The directives by public service commission in their circulars are to supplement gaps in all public service bodies’ human resource and procedure manuals.”

45. Counsel stated that the Defendant admitted that the PSC manual did not provide for “facilitation allowance” thus, a description if any.

46. On the issue of costs Counsel submitted that Section 27 of the *Civil Procedure Act* provides that costs follow the event and hence the costs of this case should be awarded to the Plaintiff.

47. Mr. Ngara, Learned Counsel for the Defendant, submitted that the Plaintiff’s case is highly hinged on various circulars by the SRC in relation to payment of allowances. He referred to PW1’s testimony that the SRC’s advisory was binding and as such it was mandatory that government bodies comply with such advisory. He submitted that SRC’s advisory is not binding and as such SRC’s circulars in the public sector cannot be used as a yardstick to determine alleged irregular or fraudulent payment of an allowance. He relied on Article 230 (4) of *the Constitution* which provides for the powers of the Salaries and Remuneration Commission and the case of *Advisory Opinion Reference No. 2 Of 2014, Matter of the National Land Commission* [2015] eKLR, to argue that the SRC’s advisory is not binding; that the advisory must be read together with Article 234 (2) (g) of *the Constitution* which establishes the Public Service Commission and its mandate. Counsel contended that the drafters of *the Constitution* appreciated the need for separation of powers between SRC and the Public Service Commission in enacting the two provisions. Counsel also relied on *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* [2021] eKLR, where the Supreme Court stated: -

“.....it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in *the Constitution* or in law. Neither *the Constitution* nor the CAJA states that CAJ’s recommendations are binding. Consequently,



the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations. . . "We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this court and other superior courts. As such we are of the opinion that the following guiding principles ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

Guiding Principles on the recommendations from Commission to public bodies:

Any power to make a recommendation ought to be specifically provided for in *the Constitution* or in law; Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed; A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in *the Constitution* or in law; The manner in which a recommendation is to be implemented by a Public entity is discretionary; Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority; Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary;

We need to note at this juncture that Commissions are supposed to act as watchdogs and co-operate and work with government arms. It is the duty of Parliament to implement reports from commissions pursuant to article 254(1) of *the Constitution* and section 8 of the CAJA. Commissions therefore cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of Parliament, which is the organ vested with the mandate to enforce implementation. For avoidance of doubt, a public office or body or state organ to whom a recommendation is made need not appeal against such a recommendation for it not to be binding on it."

48. Counsel for the Defendant submitted that all allowances paid to the Defendant were within the law and that even without the circulars from the SRC being binding on the National Treasury, the same were complied with. Counsel argued that the Defendant was a public officer and as such she was subject to the Human Resource Policies and Procedure Manual for the Public Service which provides for payment of various allowances to public officers. Counsel asserted that according to the evidence adduced by the Plaintiff, the allowances in contention were the extraneous allowance, the Taskforce/Committee Allowance and Facilitation Allowance.
49. For the Taskforce/Committee Allowance, Counsel referred the court to the Circular dated 2nd August 2013 which provides guidance on the appointment of Taskforce Members and payment of their allowances. Counsel stated that the circular provides for the members to be appointed and the manner in which the task force is instituted and for what purpose. Counsel averred that the circular is categorical and leaves the discretion of constituting a Taskforce to the Accounting Officer; that the only rider is that officers above Job Group "T" were not eligible for the task force allowance. Referring to the Defendant's Letter of Appointment dated 20th June 2018 Counsel stated being in Job Group "S" which is below "T" the Defendant was eligible for payment of Taskforce/Committee allowance at the rate of Kshs. 4,000/-.
50. Counsel for the Defendant also referred to the Circular from SRC dated 16th April 2014 which guides on payment rates for Taskforce Allowance and Committees appointed by government reiterating the rates in the aforementioned circular. He contended that during cross-examination PW1 confirmed that prior to the 22nd April 2021 SRC advisory to the National Treasury, SRC had allowed Treasury to pay the Taskforce allowance; that PW1 also confirmed that by the time SRC gave the advice, the allowance had already been paid and as such the Taskforce/Committee allowances paid to the Defendant up to



22nd April 2021 could not be deemed illegal firstly as it had been approved by SRC and secondly because backdating of the circular to August 2020 came too late in the day.

51. On whether the Defendant was appointed to the Taskforce Committees, Counsel submitted that the Defendant had produced appointment letters to that effect, as well as a Memo dated 5th October 2020 from the Principal Secretary, National Treasury.
52. Counsel referred this Court to the Memo dated 2nd September 2020 approved by the Principal Secretary and appointing the Defendant to the Audit Committee for the financial year 2020/2021. He submitted that the memo has the terms of reference and is accompanied by the the list of appointed members with the Defendant included.
53. He also referred to the Memo dated 31st July 2019 appointing Audit Committee members for the financial year 2019/2020, by the Principal Secretary on 2nd August 2019. The Defendant's name on the appointment appears on the list of appointees.
54. He pointed out the letter dated 6th August 2018 which appointed the Defendant to the Steering Committee for consultancy works. He submitted that the letter has the stipulated terms of reference for the members and refers to a timeline per the consultancy.
55. Counsel for the Defendant asserted that the Defendant was legally and formally appointed to the various Taskforce's and Committees by her Principal in accordance with SRC Circulars.
56. On whether the Defendant was paid rates in line with the SRC recommendations, Counsel for the Defendant referred to a voucher for payment of Taskforce allowance of the Audit Committee for the financial year 2017/2018, the memo requesting for the payment and a schedule of payment. He pointed out that the Defendant appears at item no. 10 of that schedule and the total number of days paid are 25 for three periods at a rate of Kshs. 4,000/- as provided in the SRC Circulars.
57. Counsel further referred to the Memo dated 4th June 2021 requesting for payment of Taskforce allowance for the development of the Disaster Management Fund Regulations, 2020 with attached schedule of members. He pointed out the Defendant's name with her rate being Kshs. 4,000/- for 30 days. He thus submitted that a perusal of all Taskforce/Committee allowances paid to the Defendant were at the rate of Kshs. 4,000/- per day where she was a member and Kshs. 5,000/- per day where she was the Chair as advised by the SRC.
58. On the question of whether the National Treasury sought the Advisory of SRC before the payment of allowances, Counsel for the Defendant submitted that such advisory was not necessary. He referred the court to a letter dated 20th November 2020 from the Cabinet Secretary, National Treasury & Planning where the Cabinet Secretary refers to a letter dated 22nd April 2020 seeking approval for the compensation of officers involved in budget preparation for the year 2019/2020 and submitted that it is only logical that the Cabinet Secretary would not have been referring to requests for approvals which were never made to SRC.
59. He further pointed out to a response to this letter by the SRC, done six months after on 22nd April 2021, long after the Taskforce allowances payment had been made for the financial year 2020/21. Additionally, he referred the court to a letter dated 19th June 2020 from the SRC to the National Treasury and submitted that the Plaintiff's allegation that approvals were not sought from SRC must also fail.
60. On the issue of extraneous allowances, Counsel submitted that PW1 and PW2 did not tender any evidence on any guideline or circular that explicitly required such an allowance to be paid within the payroll. Counsel submitted that the extraneous allowances paid to the Defendant were actually paid



for assignments undertaken through committees. He referred this court to page 137 of the Plaintiff's Bundle where SRC notes as follows: -

“As you are aware, the Public Service adopts a sector wide approach in undertaking assignments of National importance, which may require inter-sectoral or inter-ministerial consultations. Such tasks require technical knowledge and skills to ensure achievement of results. It is against this background that members are compensated for the increased workload and responsibilities during the assignment.”

61. Counsel contended that from the above statement, it was clear in SRC's mind that indeed Taskforces and Committees were paid per assignment and not on a monthly basis within the payroll as alleged. He submitted that the position was further corroborated by DW1's evidence that extraneous allowance was paid outside the normal work done and was paid per assignment not per month.
62. Counsel further submitted that PW2 relied on the circular dated 22nd April 2021 from SRC which was addressing the request by the Cabinet Secretary, National Treasury dated 20th November 2020 for payment of Taskforce Allowance to National Treasury staff involved in supplementary budget making for the financial year 2021/2022 and that the SRC advised the National Treasury to pay staff involved in the process an extraneous allowance as opposed to the Taskforce allowance. The rates provided therein were only to apply to people who were involved in that particular exercise. Had the Defendant been paid for the exercise, she would have been entitled to a sum of Kshs. 50,000/- per month. Counsel submitted that the Defendant was never at any point paid the extraneous allowance of Kshs. 50,000/- as she was already being paid other extraneous allowances. Counsel stated that the Plaintiff did not point out any single payment of extraneous allowance paid to the Defendant in relation to that particular exercise and as such the claim that she was supposed to be paid Kshs. 50,000/- per month as extraneous fails.
63. Referring to Clause C.13 of the Public Service Human Resources Policies and Procedure Manual Counsel argued that the manual provided for an extraneous allowance payable to officers called upon to undertake extra responsibilities in addition to normal duties but did not provide that the allowance shall be a one off payment per month. Counsel averred that the Plaintiff did not produce any pay slips from the National Treasury showing that the Defendant was the only one who was paid extraneous allowance outside of the pay slip.
64. Counsel submitted that the Plaintiff did not also call any witness from the National Treasury to shed light on this issue. He thus submitted that the only allowances payable to the Defendant monthly were those captured in her pay slip and in her letter of appointment. To support this argument Counsel relied on Section 20 of the [Employment Act](#).
65. Counsel contended that the above provision, the pay slip of an employee should have the gross amount of wages and further include statutory deductions guided by the above authorities, that the Defendant's pay slip had her basic pay, House Allowance and Commuter Allowance per her contract of Appointment, which particulars formed her gross salary as provided by Section 20 of the [Employment Act](#). Counsel submitted that the allowances that were mandatory to be paid within the payroll were those that formed part of her contract of employment and it was not mandatory extraneous allowance be paid within the payroll. He contended that the Plaintiff's assertion that payment of extraneous allowance outside the payroll is irregular must also fail.
66. On the issue of Facilitation Allowance, Counsel submitted that the manual provided for allowances other than those in the manual and a facilitation allowance would be one that would fall under such a category. Counsel stated that a good example is non- Practicing Allowance for State Counsels and



Judicial officers. He submitted that the mere fact that an allowance does not appear in a manual or a circular from SRC does not make it illegal. He contended that most allowances in the public service are sector specific and are paid based on the nature of work undertaken by such a sector and the National Treasury is no exception. He took issue with PW2's evidence where upon being asked if he inquired from the National Treasury the purpose or nature of the Facilitation Allowance, he responded in the negative despite alleging he undertook investigations in the matter.

67. On whether allowances paid to the Defendant overlapped, Counsel for the Defendant submitted that PW2 did not point out any single activity paid twice to the Defendant. Counsel submitted that the allegation that there was overlapping was based on an assumption that the period of investigation had a total of 913 days and the Defendant had been paid allowances for a total of 1782. Counsel submitted that the said assumption and calculation by PW2 was erroneous and failed to take into account the period when the actual assignments took place and the time when such payments were made. Counsel stated that the Defendant adduced evidence that some of the activities paid for during the period of investigation had actually taken place in the years 2018 and 2019 due to unavailability of funds; unusual for government agencies to process several payments vouchers at once upon release of budgetary allocations.
68. Counsel stated that the position was buttressed by the August 2022 Report of the Ad hoc Committee formed to investigate the Alleged Embezzlement by Treasury officials where paragraph 3 (iii) the committee notes that overlaps in payment of allowances could be attributed to the long time it took to pay imprests.
69. On the allegations of fraud and illegality on the part of the Defendant, Counsel submitted that based on the definition of fraud in the Oxford English Dictionary and the Black's Law Dictionary Revised Fourth Edition those made against the Defendant cannot hold.
70. Counsel also placed reliance on the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR where the court stated: -

“Fraud is essentially a common law tort of deceit and its essentials are:-

false representation of an existing fact;with the intention that the other party should act upon it;the other party did act on it; andthe party suffered damage.

71. Counsel stated that the Plaintiff was required to prove that the Defendant made a false presentation to her employer with the intention of having the employer act on it and that based on the representation her employer acted the representation to his detriment.
72. Counsel also relied on Section 107 of the *Evidence Act* Cap 80 to argue that the burden to prove the particulars of fraud itemized in the Plaintiff fell on the Plaintiff. He also relied on the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR.
73. Counsel contended that the Plaintiff threw a voluminous bundle of documents to the Court and the Defendant to go on a fishing expedition for themselves for whatever it was alleging. He contended that PW2 stated an amount of Kshs. 10,691,000/- as forming part of payments without a specified duration and Kshs. 4,095,000/- as payments done within 925 days in 2.5 years which had 913 days yet the Plaintiff's pleadings and filed documents do not specifically point out any documents evidencing allowances paid with unspecified purpose, number of days, activities or daily rate. He pointed the court to pages 486, 751, 799, 820, 622 and 635 of the Plaintiff's bundle of documents and stated that out of the six documents referred to by PW2, only one was from the Defendant's department. He stated that all the impugned documents went through the requisite approval stages in which the Defendant was



not a part of. Counsel argued that PW1 did not adduce any evidence that the work undertaken by the Defendant was routine, but that the Defendant adduced evidence to prove that the assignments given and paid for were not within her work plan.

74. Counsel submitted that the Plaintiff's witnesses did not adduce any evidence that would prove fraud on the part of the Defendant.
75. On the question of whether the money in the Defendant's account amounts to proceeds of crime, Counsel for the Defendant submitted that the allegations against the Defendant were investigated by the ad hoc committee established for that purpose and which confirmed that all the payments were legally paid. Further, that according to DW1, it was evident that some amounts that were paid into that account by the Treasury were no allowances; that some were salaries and other allowances other than the impugned ones. Counsel submitted that the Defendant has proved beyond a balance of probability that the amounts in her account were legally earned and as such the same cannot be deemed to be proceeds of crime.
76. He relied on the finding in the case of Central Bank of Kenya Vs Giro Commercial Bank Limited and Three Others [2019] eKLR and the case of William Kabogo Gitau Vs George Thuo and 2 Others [2010] eKLR.

The Issues for determination

- i. Whether the Recommendations of the Salaries and Remuneration Commission (SRC) are binding on public bodies.
- ii. Whether the allowances paid to the Defendants conformed to Article 230 (b) of *the Constitution*: were those allowances payable and whether the amount claimed was indeed paid to the Defendant.

Analysis and Determination

Issue No. (i) - Whether the Recommendations of the Salaries and Remuneration Commission (SRC) are binding on Public Bodies.

77. Article 230 of *the Constitution* of Kenya 2010 establishes the Salaries and Remuneration Commission (the SRC) and sets out its powers and functions under Sub-Article 4 as being to:-
 - a. set and regularly review the remuneration and benefits of all State officers; and
 - b. advise the national and county governments on the remuneration and benefits of all other public officers.
78. The Defendant was working at the State Department of the National Treasury and planning. For all intents and purposes therefore she was a public officer and her remuneration and benefits fell within the ambit of Article 230(4) (b) of *the Constitution*. It is my finding that being a public officer and not a state officer and much as the functions of her office fell within the public service commission hence the SRC did not have power to set her remuneration and benefits as that function belonged to the PSC, her employer could only do so upon the advice of the SRC. In other words, before setting the remuneration and benefits of public officers the PSC had to seek the advice of the SRC and once given that advice would be binding.



79. That is in accordance of Article 259 (11) of *the Constitution* makes it mandatory that where *the constitution* requires a person to act on the advice of another person then that person must act only upon that advise. The sub-article states: -

“(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”

80. It would appear to me therefore that the National Treasury could only pay such allowances as were advised by the SRC. In other words, the advice of the SRC was binding upon the National Treasury. This was also the finding of the Court of Appeal in the case of *Teachers Service Commission v Kenya Union of Teachers (KNUT) & 3 others* where the court stated: -

“The advice of the SRC under *the Constitution* is binding on the national and county governments and any power or function exercised without that advice is invalid.”

81. Similarly, in the case of *Salaries and Remuneration Commission v National Hospital Insurance Fund Management Board & 2 others (Civil Appeal 156 of 2016)* [2024] KECA 419 (KLR) (26 April 2024) (Judgment) the Court of Appeal stated: -

60. Guided by the Supreme Court of Kenya decision in the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011 at paragraph 93 and persuaded by conclusions by Lenaola, J. in *Kenya National Commission on Human Rights -v- Attorney & Another* (supra) we come to the conclusion and finding that the advice given by SRC was binding. The advice is binding because to hold otherwise would render the functions of SRC under Article 230 (5) idle. It would render SRC ineffective and irrelevant; it will introduce a discretionary concept of pick and choose in Kenya’s governance structure. An interpretation that renders a constitutional Article idle and an Independent Commission ineffective does not pass the threshold of constitutionality. SRC is a constitutional organ and the learned trial Judge therefore erred in interpreting *the Constitution* in a manner that renders SRC’s singular and exclusive mandate in Article 230 (5) (a) ineffective.

61. In the circumstances, we find that the trial court misapprehended the doctrine of separation of functions which is keystone in Kenya’s governance structure. In holding that SRC has a non-binding advisory role in the determination of remuneration and benefits of public officers, the trial court disregarded the central and exclusive juridical competence of SRC in the determination of fiscal sustainability of the total public compensation bill as per article 230 (5) (a) of *the Constitution*.

62. We are fortified in this finding because a Constitution does not contain mere advice; it does not contain provisions that would not have a binding force and obligation of law; everything in *the Constitution* must have the force and binding obligation of law; nothing can be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in the company of other binding articles. A Constitution cannot contain mere advice, incapable of being enforced and whose violation is attendant with no legal consequences. Unless expressly stated, the 2010 Constitution does not contain articles or provisions that are without force of law and whose binding nature is discretionary. Except as otherwise stated in *the*



Constitution, Article 259(11) removes all discretionary power and by so doing, the Constitution contains binding provisions.

63. The seeking of advice does not violate the principle that Independent Commissions are not subject to direction or control by any person or authority. The binding advice given by SRC is mutually complementing the role of all state organs and Independent Commissions in ensuring sustainable development as a constitutional value embodied in article 10(1)(d) of the Constitution. The advice given by SRC is binding as the advice is not merely an opinion, it is advice that has a constitutional underpinning. The advice is binding as it emanates from a constitutional organ with exclusive constitutional mandate to determine fiscal sustainability of the total public compensation bill. Further, the advice is binding as the principle of effectiveness require that all provisions of the Constitution must be given effect. SRC advice is not advice in personam, it is advice in rem as it limits and determines remuneration rights and entitlements of public officers. Being an advice in rem, SRC's advice binds all persons, state organs and independent commissions."
82. Counsel for the Defendant placed reliance on the case of Kenya Vision 2030 Delivery Board v Commission of Administrative Justice & 2 others [2021] eKLR where the Supreme Court, Njoki Ndungu SCJ, held that the recommendation of the commission on administrative Justice was not binding. In my view that case is distinguishable from the instant case both in the facts and the law. Firstly that case did not concern the remuneration and benefits of employees and secondly unlike in the present case there the SRC is clothed with power under Constitution to give advice the CAJ does not have similar power and it would not thus come under the ambit of Article 259(11) of the Constitution.
83. The upshot is that the first issue is answered in the affirmative.
- Issue No. (ii) – Whether the allowances paid to the Defendants conformed to Article 230 (b) of the Constitution: were those allowances payable and whether the amount claimed was indeed paid to the Defendant.
84. The Plaintiff takes issue with four categories of allowances that were paid to the Defendant: "Extraneous Allowance" of Kshs.15,628,000.00, "Facilitation Allowance" of Kshs. 14,786,000.00, "Taskforce/Committee Allowance" of Kshs. 1,551,200.00 and other "Undefined Allowances" of Kshs. 2,130,000.00.
85. The Plaintiff's case is that whereas the extraneous allowance was payable it was supposed to be paid at the rate of Kshs.50,000/= per month but not as per an assignment, that the Plaintiff was paid per assignment contrary to the advice of the SRC which, as I have already found was binding. The Plaintiff also contends that the facilitation and the taskforce allowances ere not payable as they were not provided for in the PSC manual; that the extraneous allowance was sufficient to compensate the Defendant for whatever work she did over and above her normal duties. It is the Plaintiff's case that the said duties were in any event within her scope as an internal auditor and hence did not require an extra allowance. The Plaintiff contends that the advice of the SRC had to be obtained before appointment to any task force and that the officers involved in the budget making process were to be paid an extraneous allowance. The Plaintiff also averred that there was overlapping of payment; that the Defendant received allowances covering a period of 1787 days yet there were 913 days. The Plaintiff tendered vouchers which prove that the Defendant was paid under the various heads of allowances including those that were undefined.
86. On her part, the Defendant while conceding that she was indeed paid allowances in the sum of Kshs.15,628,000/- and that she was also aware that the SRC had recommended an extraneous



allowance of only Kshs.50,000/- She however contended that the SRC advise came long after she had been paid. On the overlap DW1 testified that the same came about as a result of allowances for a previous period being paid on a subsequent date and it was not therefore not in excess. DW1 referred this court to a memo dated 12th May 2020 to explain for instance that the allowance for work done in Bomet County in February 2019 was only paid on 8th June 2020.

87. For the extraneous allowance it is my finding as stated elsewhere in this judgment that, the same was payable only as advised by the SRC; and once the advice was given it was binding. It is obvious from the evidence adduced by the Defendant that prior to the SRC's advice in regard to payment of allowances was not sought even though the SRC was in existence even then. My finding that payment of allowances without consultation of the SRC was unlawful. The allowances paid to the Defendant prior to the SRC's letter dated 22nd April 2021 are recoverable from the Defendant being unlawfully paid and also for being in excess of the sum of Kshs. 50,000/- per month which she should have been paid for those tasks.
88. The Defendant concedes that the payment of extraneous allowances covered her involvement in the budget making process between August 2020 and June 2021. Both months inclusive, the months worked were eleven, entitling her to extraneous allowance of Kshs. 550,000 in year 2021 for the budget making process.
89. The Payment vouchers presented by the Plaintiff refer to allowances for 72 days earned for the Bomet and Njoro verification, though no start and end date are provided. At most, the 72 days would spread to three months, which would have earned the Defendant Kshs. 150,000/- yet the Defendant earned Kshs. 700,000 for the Bomet County Investigations and the budget making process. I therefore find that the Defendant was paid excessive extraneous allowances to the tune of Kshs. 14, 928, 000 which sum is recoverable from her.
90. As regards facilitation allowance, the Defendant conceded that she received a sum of Kshs. 14,786,000 under that head. DW1 testified that facilitation allowance was for various tasks undertaken, including preparing and arranging vouchers in accounts, working on account reconciliation, and appraising of records in accounting all of which the Plaintiff claimed were within the Defendant's regular tasks. DW1 admitted that facilitation allowance is not provided for in the Government policy documents and circulars or manual but that the allowances were paid like honoraria. Counsel for the Defendant submitted that the manual provided for other allowances apart from the ones that were listed in the manual and facilitation. He took issue with PW2's evidence of not inquiring from Treasury how the facilitation allowance came about. My finding is that given that facilitation allowance is not provided for in any regulation, policy or instruction, and the advice of the SRC having not been sought to pay such an allowance for activities which were in any event clearly within the definition of the Defendant's regular work, I find that it was wrongfully paid and the sum claimed of Kshs.14,789,000 is recoverable.
91. As for the Taskforce/Committee Allowance of Kshs. 1,551,200 the Plaintiff claims that no Taskforce allowance was payable to the Defendant as SRC had advised that officers in Job Group S were to be paid an extraneous allowance as opposed to a Taskforce allowance. The Plaintiff referred to the letter to Treasury dated 22nd April 2021, where SRC advised that that compensation for the Taskforce be made under extraneous allowances and declined the request for payment of Taskforce allowance to the Treasury Staff involved in the Annual Budget preparation, effective 1st August 2020. The Plaintiff further argued that the activities described in the payment vouchers were routine tasks undertaken by the Defendant in the ordinary course of her duties that the taskforce allowances were paid without justification or approval by the SRC. The Plaintiff claimed that there was no evidence of the Defendant's appointment to the taskforces in compliance to the Circular from SRC, Ref



Number SRC/ADM/CIR/1/13(122) dated 16th April 2014 and the Circular from the Ministry of Devolution Ref No. MSPS.2/1A VOL. XLVIII (119) dated 2nd August 2013 which provided guidelines to streamline management of taskforces in the public service. PW2 testified that officers in Job Group ‘T’ and above were not eligible for a taskforce allowance as their remuneration package factors in extraneous assignments that they are required to perform in their normal course of duty.

92. The Defendant submitted that she had no authority whatsoever to appoint herself into any taskforce or committee: that she was appointed by her superiors. DW1 testified that Job Group “S” which is below “T” made the Defendant eligible for payment of Taskforce/Committee allowance at the rate of Kshs. 4,000/- for a member as per the Circular from the SRC dated 16th April 2014. DW1 also testified that under the 22nd April 2021 Circular the SRC allowed the Treasury to pay the Defendant a taskforce allowance. Counsel for the Defendant submitted that that all Taskforce/Committee allowances paid to the Defendant up to 22nd April 2021 could not be deemed illegal having been approved by SRC and the backdating of the circular to August 2020 came too late in the day.
93. My finding is that the Treasury ought to have awaited the advice from the SRC before paying the allowances. The effect of the circular dated 22nd April 2021 was that the allowance for the officers working on the budget making process for the year 2020/2021 and the supplementary budgets for the year 2021/2022 and the medium term budget was to be paid by way of a monthly extraneous allowance but not per hence ruling out its payment in the form of a task force allowance. While the explanation given in regard to overlapping is plausible it is not lawful that the Defendant received allowances beyond the recommendation of the SRC that members of tasks undertaken were routine and hence not sitting and facilitation. The Defendant received allowances for tasks such as bank reconciliation, ICT invoicing tracking and so on. Clearly these allowances had not met the approval of the SRC and were not payable. That the Ad hoc Committee established by the Treasury to inquire into the allocation levelled against the Defendant found in her favour, does not alter the above finding as clearly that committee did not consider that the allowances could only be paid upon the advice of the SRC and at the rate so advised. The analysis by DW1 did also not take that aspect of the Plaintiff’s claim into account but was only concerned with whether the figures were correct.
94. For the task force allowance, whereas this was indeed payable under the SRC circular dated 16th December 2015 which relied heavily on the Ministry of Devolution circular dated 2nd August 2013, one could only receive such allowance if properly appointed to such task force, to wit, in writing by an Authorized/Accounting officer and if they met the criteria set out in the SRC circular. The taskforce allowance was also limited to a maximum period of 20 days but the schedules obtained from the Treasury by the EACC show that the Defendant was paid sometimes even for 30 and 60 days contrary to the SRC circular. The payments did not therefore meet the terms formulated in the SRC circular dated 15th December 2015 and were therefore unlawful hence the task force allowances to the tune of Kshs.1,551,200/- is refundable.
95. Similarly, no allowance which is not defined in the PSC manual and subsequently approved by the SRC is payable. The sum of Kshs. 2,130,000/- paid under that head was therefore unlawfully paid and the Defendant is liable to refund the same.
96. It is to be noted that the allowances are refundable despite that the Defendant may not have acted fraudulently in receiving the same. They are also refundable despite that other officers received the same yet they have not been sued in this case. The point is that they were wrongfully, irregularly and unlawfully paid to the detriment of and loss to the National Treasury, a public body, and hence they must be recovered from the Defendant. The duty to make such recovery falls upon the EACC/Plaintiff



pursuant to its mandate under Section 11(1) of the Ethics & Anti-Corruption Commission Act. The Plaintiff has proved its claim against the Defendant on a balance of probabilities.

97. Accordingly, judgment is entered in favour of the Plaintiff against the Defendant for: -

- a. A sum of Kshs. 34,095,200/-
- b. That the sum of Kshs. 8,550,920.30 preserved in the Defendant's Account No. xxxxxxx at Absa Bank shall be utilized towards realizing the sum found due and hence judgment is entered for the Plaintiff against the Defendant for a sum of Kshs.25,444,297.70.
- c. Costs of the suit.
- d. Interest at court rates as prayed in the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF JULY 2024.

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E.N. MAINA

JUDGE

