



**Union of National Research Institutes of Kenya (UNRISK) v Kenya Forestry
Research Institute (KEFRI) (Employment and Labour Relations Cause
1685 of 2014) [2024] KEELRC 1861 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1861 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1685 OF 2014**

**AN MWAURE, J
JULY 12, 2024**

BETWEEN

**UNION OF NATIONAL RESEARCH INSTITUTES OF KENYA
(UNRISK) CLAIMANT**

AND

KENYA FORESTRY RESEARCH INSTITUTE (KEFRI) RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed an Amended Statement of Claim dated 26th January 2015.

Claimant’s Case

2. The Claimant avers that it has a valid Recognition Agreement with the Respondent duly signed on 22/06/2012 pursuant to Cause No. 78 of 2001.
3. The Claimant avers that it forwarded the Respondent a Collective Bargaining Agreement (CBA) on 05/05/2014 and proposed that the deliberations commence on 23/05/2014. However, vide a letter dated 27/05/2014, the Respondent responded that it is unable to negotiate and sign a CBA with the Claimant.
4. It is the Claimant’s case that it was left with no other option but to report a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Security Services pursuant to Section 62 of the [Labour Relations Act](#).
5. The Claimant avers that the Cabinet Secretary through the Chief Industrial Relations Officer accepted the report on 16/06/2014 and appointed a conciliator who subsequently called three meetings.



6. The Claimant says that the Respondent failed to attend the last meeting without any justifiable cause, prompting the conciliator to issue a certificate under Section 69 of the [Labour Relations Act](#) to enable the parties proceed to this Court for final determination of the matter.
7. It is the Claimant's case that the Respondent refused to negotiate the entire CBA proposal which consisted of over 20 core items.

The Central Planning and Project Monitoring Department ('CPPMD') Report

8. Vide a court order dated 9th May 2023, the Court made the following orders:
 1. That the Court has listened to the proposal of the parties and refers the matter to the Ministry of Labour (CPMU) for analysis and report back to court on 3/7/2023.
 2. That the Claimant is to advise SRC of these directives as well as file the partial agreement in court by the next mention date.
9. Pursuant to the aforementioned orders, the CPPMU consulted the parties separately regarding the issues in dispute which were summarised into three: - general wages increments; basic minimum salaries; and commuter allowance. And subsequently, the CPPMD filed its report dated 18th October 2023 in this Court on 20th November 2023.
10. CPPMD tabled the following observations before this Court:
 - i. The Claimant's demand for wage increase translated to an increase of the Respondent's wage bill of Kshs 658.9 million for unionisable employees. The Consumer Price Index (CPI) adjustment will translate to an increase of Kshs 279.8 million on the Respondent's wage bill;
 - ii. The Claimant union feels its members have been adversely affected by the erosion in purchasing power due to increased cost of living. This is despite other research institutions having benefitted from the implementation of the JE results in the 2nd Review Cycle.
 - iii. During CPPMD's consultations with the parties, it was observed that the Respondent missed out on the implementation of the 2nd Review Cycle due to inconsistencies in its JE results that were corrected in the 3rd cycle that is yet to be approved by SRC. The Respondent's appraisal of employees was held in abeyance to the 3rd Cycle.
 - iv. The Respondent is tied by limited funding because it is a government funded research institution that relies on the exchequer to undertake developmental and operational activities.
 - v. The Respondent's financial position cannot sustain additional increase on wage bill unless there is an increase in allocation by the National Treasury. The Respondent's job evaluation (JE) results for the 2nd cycle closed in 2020 was held in abeyance by SRC for consideration in the 3rd JE Review Cycle in the public sector.

Claimant's Submissions

11. The Claimant submitted that CPPMD report is just like any expert report which only acts as persuasion to the court as such it is not conclusive. The court is not mandated to abide by it and it can choose to ignore and depart from it.
12. It is the Claimant's submission that vide a letter dated 31/05/2019, the National Treasury directed SRC to increase salaries by allocating funds. SRC failed to release funds to the Respondents but



released the same to KEMRI, KALRO, KMFRI, NCRC and KIPPRA. This action amounts to discrimination.

13. The Claimant submitted that the Respondent is not to blame as SRC has refused to give it authorization to utilise 41.58 million allocated for staff compensation. This money is available and the Claimant pleads with the court to direct SRC to give the authorization letter for the Respondent to implement the job evaluation and make the funds available.
14. The Claimant submitted that to cushion the parties against economic hardship and increase productivity, its members' salaries be increased at the rate of 20% for the 1st year and 10% for the 2nd, 3rd and 4th years.
15. It is the Claimant's submission that the CPPMD report fails short as it assessed the cost of living based on 01/07/2014 to 30/06/2018, whereas, the parties agreed the CBA commence from 01/07/2018 to 30/06/2022. Therefore, the consumer index used was wrong and lower, the Court should increase the same.
16. The Claimant submitted that the majority of its members being the Respondent's employees live outside their place of employment and require facilitation to and from work. The prices of transport have increased due to inflation and the CPPMD report did not pronounce itself on this matter.

Respondent's Submissions

17. It is the Respondent's submission that it is not the duty of this Court to set out the remuneration and benefits of state officers including the claimant's members. To do that will amount to interfering with the mandate of SRC under *the Constitution* and SRC Act as held in *Okiya Omtatab Okoiti & 3 Others vs. Attorney General & 5 Others* [2014] eKLR.
18. The Respondent submits that the Court cannot arrogate itself mandate and purport to increase commuter allowance and basic salary as SRC has determined the remuneration advising the same be retained at the current rates.
19. It is the Respondent's submission that Article 230(4) of *the Constitution* is clear that it is SRC's mandate to set and regularly review the remuneration and benefits of all state officers in the national and county governments and state corporations. Unless that provision is amended, the Respondent must abide by SRC's decision as long as the same is made in accordance with *the Constitution* and the relevant statutory provisions.

Analysis and Determination

20. Having considered the pleadings, affidavits and submissions, the main issues for the Court's determination is whether the Court has jurisdiction to grant the orders sought by the Claimant.
21. The Respondent submitted that it is not the duty of the Court to set out the remuneration and benefits of state officers including the claimant's members; as this amounts to interfering with the mandate of SRC under *the Constitution* and SRC Act.
22. This court relies on the Court of Appeal 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) which held:

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.

23. This Court in *Teachers Service Commission (TSC) vs. Kenya Union of Teachers (KNUT) & 3 Others (supra)* had the occasion to discuss the role of SRC in collective bargaining in the public sector in the following terms where:

Githinji, JA held thus:

I have had the advantage of reading the judgments of the other members of the Court. There are unanimous findings as follows.

The majority of the members of the Court have made the following findings:

- i. That SRC also has a role to play in job evaluation of public officers including teachers.

In the same judgment, Koome, JA (as she then was) held thus:

The Constitution provides that SRC's role is to advise the national government on the remuneration and benefits of other public officers. In this case there is room for Unions to negotiate with their employer. In my view the terms and conditions of teachers that are negotiated with Unions and TSC can only be completed after consultation with SRC as provided under the aforesaid law. TSC was supposed to seek advice of SRC before tabling the proposals to the Unions.

In the same judgment, Mwilu, JA (as she then was) held thus:

No valid salary and/or benefit of a state or public officer, as appropriate, shall ensue from a process that ignores the roles of SRC as I have reproduced them above. And the trial judge ignored them, save for mentioning them in his judgment, in passing so to say. The trial judge, as shown in paragraph 62 above, was categorical that SRC's input in the determination of teachers' salaries, benefits and even in the Collective Bargaining process was peripheral.....

24. Provisions of a CBA concern terms and conditions of service and involve money issues in addition to performance of duty, evaluation thereof and of necessary competences. Having seen, under Article 230 of *the Constitution* what the functions of SRC are, there can be no doubt that SRC has to be involved in its advisory role in negotiations on the conclusion of a CBA involving public officers. The manner and style of how that is to be done is not primary, what is of paramount importance, to my mind, is that SRC's advice has to be sought, and once obtained, it is binding.

In conclusion therefore I find and hold that the prior advice of SRC had to be sought before TSC could make an offer on basic salary to the Unions. That advice from SRC binds TSC.



25. In the same judgment, Azangalala, JA held thus:

With regard to SRC's role in concluding a CBA, my simple answer is that SRC influences CBA negotiations through its mandatory advice to TSC on remuneration and benefits payable to teachers. It may be recalled that the unions' stance on the matter was that they could not conclude a CBA without agreement on basic salary component. Yet TSC cannot lawfully negotiate and agree on the basic salary for teachers without approval of SRC whose advice binds it. So, whereas SRC is not a direct negotiator with the unions on conclusion of a CBA, it influences the negotiations through its constitutional and statutory mandate when advising TSC on remuneration and benefits payable to teachers. In practical terms, it means that before making any offer to the unions with respect to the remuneration and benefits payable to teachers, TSC must seek SRC's advice on the same.

26 The trial Judge, therefore, erred when it held that SRC has absolutely no role whatsoever in the negotiations and determination of basic salary for teachers which holding, in my view, directly followed his earlier finding that SRC's advice to TSC is not binding. I reiterate that SRC, indeed, has a role in the conclusion of a CBA for if its approval of any offer is withheld, TSC would not negotiate the basic salary and benefits component in the CBA.

27 Under Article 230 (4) (b) of *the Constitution*, SRC has the constitutional function to advise the national government on the remuneration and benefits of all public officers. Under Section 37 (3) of the *TSC Act*, TSC has a statutory obligation to consult SRC before determining the terms and conditions of service for teachers. Is the advice given by SRC binding on TSC which is an independent commission that is not subject to direction or control by any person or authority pursuant to Article 249 (2) (b) of *the Constitution*?

28 Article 249 (2) (a) of *the Constitution* stipulates that all Independent Commissions are subject to *the Constitution* and the law. Article 230 (4) (b) is a constitutional procedural and substantive limitation on the powers of TSC in matters relating to determining of remuneration and benefits of public officers.

The limitation is that prior advice from SRC should be obtained. Expressed differently, Article 230 (4) (b) tells TSC that it cannot determine remuneration and benefits of teachers without seeking prior advice from SRC. The constitutional procedural requirement to seek prior SRC advice is reinforced by Article 259 (11) of *the Constitution*.....

29 Article 259 (11) raise two interpretation issues: is the request for advice from SRC that is mandatory and binding or is the advice given by SRC that is binding or are both mandatory and binding? Seeking SRC's advice is a constitutional procedural step; the content of the advice given is substantive as it affects the remuneration rights and entitlements of public officers. Article 230 (4) (b) of *the Constitution* must be analyzed from both the procedural and substantive aspects. The issue is whether both the procedural and substantive aspects of SRC's advice are binding.

Pursuant to Article 230 (4) (b), it is a constitutional mandatory procedure for TSC to seek SRC advice on matters relating to remuneration and benefits of teachers.

30 The Supreme Court in *Communications Commission of Kenya & 5 others -v- Royal Media Services Limited & 5 others*, Petition Nos. 14, 14A, 14B and 14C of 2014 at paragraph 169 stated as follows:

[169] Therefore, "independence" is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or



any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.”

31 As stated by this Court (Odek, JA.) in *Teachers Service Commission v Kenya National Union of Teachers & 3 Others* (supra):

A literal reading of Article 230 (4) (b) of *the Constitution* shows that SRC is not one of the envisaged external forces against whom the shield of independence can be waved. *The Constitution* vides Article 230 (4) (b) and (5) has integrated SRC in the determination of all matters relating to remuneration and benefits of public officers. The practical consequence is that SRC has an integrated, over-arching centripetal force in the determination of remuneration and benefits payable to public officers which includes teachers... Using company law analogy, the advice given by SRC is like a floating charge hovering all over public service and when it descends, it attaches, crystallizes and binds anything and everything that it lands upon. I believe that the drafters of *the Constitution* never intended SRC to be a toothless bulldog that barks, barks and barks again without biting – SRC has teeth and can bite, must bite and shall bite. SRC is the forum for determining fiscal sustainability of the remuneration and benefits of all public officers. One ignores SRC at his/her own peril.”

The Constitution sets out the principles that SRC has to take into account before giving advice on the salaries of public officers. It is also necessary to state that it is only SRC that has the mandate under *the Constitution* to ensure that the total public compensation bill is fiscally sustainable. The advice is guided by set principles; no other Commission is given that mandate; it is only SRC. We agree with counsel for the appellant that the learned Judge erred in his conclusion that the advice by SRC was not binding as the sole statutory mandate of SRC is ensuring fiscal sustainability of state and public officers wage bill. By advising the 1st respondent on the remuneration of its employees, SRC did not interfere with the functional and operational independence of the 1st respondent.”

32 As per the CPPMDF report dated 18th October 2023 the conclusion that the respondent’s financial position cannot sustain to:

From Tale 3, the respondent’s financial position cannot sustain additional increase on wage bill unless there is an increase in the allocation by the National Treasury. The respondent’s JE Results for the 2nd cycle closed in 2020 was held in abeyance by the salaries and remuneration commission for consideration in the 3rd JE Review cycle in the public sector.

33 Against this background the court cannot pronounce itself on the core issue raised without the report of SRC as provided in article 230(4) of *the Constitution* of Kenya 2010.

34 The Court will therefore not grant the prayers sought by the claimant without the input of SRC which will hopefully be handled by the said SRC for the entire public service in the next cycle. Under the circumstances the application by the petitioner fails.

35 The court orders each party to meet their costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE



ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

