Matindi v Salaries and Remuneration Commission & another (Petition E317 of 2023) [2026] KEHC 755 (KLR) (Constitutional and Human Rights) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 755 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E317 OF 2023

LN MUGAMBI, J

JANUARY 30, 2026

BETWEEN

ELIUD KARANJA MATINDI ..... PETITIONER

AND

SALARIES AND REMUNERATION COMMISSION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 30th August 2023 is supported by the Petitioner's supporting affidavit of even date and a supplementary affidavit dated 17th May 2024.

2. This Petition assails the 1st Respondent's decision to review the remuneration and benefits payable to state officers in the financial years 2023/2024 and 2024/2025. This review cycle covered the 3rd Remuneration and Benefits Review Cycle. Remuneration and Benefits Review cycles are undertaken by the Respondent every four financial years. This covered the period 2021/2022 -2024/2025.

3. The Petitioner's grievance is that in arriving at this decision, the 1st Respondent did not conduct effective public participation for it did not disclose important information it had relied on to enable the public interrogate the reasons thereof properly, that 1st Respondent backdated the reviewed rates for the State officers to allow them take effect at a date earlier than the actual date of their gazettement which was an irresponsible, imprudent and uneconomic utilization of national resources, that the decision pushes the needs of State Officers ahead of the segments in the population deserving state protection for instance; those named in Articles 53-57 of *the Constitution* and, finally, the 1st Respondent review is not in tandem with the principles it ought to have taken into account as specified

in Article 230 (5) of *the Constitution*. The Petitioner thus alleges violation of various Articles of *the Constitution* which include- Article 2 (2) & (4), 10 (2), 201, 230 (4) & (5) and, 232 (1) & (2).

4. For this reason, the Petitioner brings this Petition against the Respondents seeking the following reliefs:

Declarations

a. The 1st Respondent failed to discharge its constitutional duty to facilitate public participation prior to setting the remuneration and benefits for State officers for financial years 2023/2024 and 2024/2025.

b. The 1st Respondent failed to fulfil its obligations as required by *the Constitution*, including taking into account the principles set out in Articles 10, 201, 230[5], 232[1] and [2], 249[1] and [2] and 258[1], when it increased the remuneration and benefits payable to State officers for financial years 2023/2024 and 2024/2025.

c. The 1st Respondent could not commence the increased remuneration and benefits for State officers for financial years 2023/2024 to 01.07.2023, to a date before the publication of the applicable constitutional instruments in the Kenya Gazette on 09.08.2023.

d. The 1st Respondent failed to uphold its independence when it decided to retain the remuneration and benefits for the President and Deputy President of the Republic at the same level as those notified in the Gazette Notice No. 8792 of 27.07.2022.

e. The 2nd Respondent failed to discharge its constitutional mandate, including promoting, protecting and upholding the rule of law and defending the public interest, in its advice to the 1st Respondent about compliance with *the Constitution* in setting and reviewing the remuneration and benefits payable to State officers for financial years 2023/2024 and 2024/2025.

f. The constitutional instruments notifying the remuneration and benefits payable to State officers for financial years 2023/2024 and 2024/2025 and published as Kenya Gazette Notices No. 10346 to 10352 and dated 09.08.2023, are unconstitutional, null and void.

Orders

5. The Court be pleased to issues orders:

a. Quashing the constitutional instruments notifying the remuneration and benefits payable to State officers for financial years 2023/2024 and 2024/2025 and published as Kenya Gazette Notices No. 10346 to 10352 and dated 09.08.2023.

b. Requiring the Respondents, working with other State organs, to immediately recover any additional remuneration and benefits, over and above those payable immediately before the publication of the impugned instruments, paid to State officers pursuant to the impugned constitutional instrument.

c. Requiring parties in these proceedings to meet own costs.

d. Any other appropriate relief that commends itself to this Court to meet the requirements of *the Constitution*.

Petitioner's Case

6. The Petitioner commences by stating that the 1st Respondent on 30th June 2023, invited the public and various stakeholders to give their views on the proposed remuneration and benefits for State officers for the financial years 2023/2024 and 2024/2025. For the purpose of that exercise, the 1st Respondent provided a table of the proposed remuneration and benefits on its website.

7. The Petitioner questions the 1st Respondent table display with the proposed new rates without disclosing the factors that informed that decision. In view of the insufficiency of the information, the Petitioner states that he wrote to the 1st Respondent requesting for additional information as to how the proposed new rates were arrived especially the matter that the 1st Respondent determined that the proposed increases met the requirements of Article 230(5)(a) of *the Constitution*.

8. The Petitioner notes that this correspondence was also copied to the Commission on Administrative Justice (CAJ). The Petitioner asserts that this information was not provided by the 1st Respondent. However, CAJ responded to him on 7th August 2023 indicating that the information he was seeking in reference to the proposed remuneration and benefits structures for State Officers had been already been divulged by the 1st Respondent in its website.

9. The Petitioner further depones he went ahead wrote to the 1st Respondent opposing the proposed changes on 13/7/2023 in which he pointed out that due to the 1st Respondent's failure to provide enough information to the public as part of its public participation exercise, the proposed increase in the remuneration and benefits would be unlawful. In addition, he indicated that the proposed changes could not lawfully be backdated to commence on a date earlier than the date of notification in the Kenya Gazette. The Petitioner avers that the 1st Respondent acknowledged receipt of his memoranda.

10. On 9th August 2023, through Kenya Gazette Notices No. 10346 to 10352, published as Special Issue Vol. CXXV – No. 177, the 1st Respondent gazetted the increased remuneration and benefits payable to State officers in which for financial year 2023/2024, the rates wereto commence on 1st July 2023 whereas for financial year 2024/2025 on 1st July 2024.

11. The Petitioner faults the 1st Respondent's decision to increase and backdate the new rates of remuneration and benefits for State officers asserting it violates of Articles 2(2) & (4), 10(2), 201, 230(4) and (5) and 232(1) and (2) of *the Constitution*.

12. Furthermore, the Petitioner argues that the 1st Respondent's failed to provide adequate information to the public to enable the members of public to understand how it arrived at the decision to increase the remuneration and benefits for State Officers thereby violating the Articles 10(2), 230(5) and 232(1) of *the Constitution*. Further that the public participation conducted by the 1st Respondent was inadequate and so violated Article 201 of *the Constitution*.

13. The Petitioner took issue with the 1st Respondent for retaining the remuneration and benefits payable to the President and his Deputy in the financial years 2023/2024 and 2024/2025 at the same levels as was notified previously in the Gazette Notice No. 8792 of 27th July 2022. The Petitioner claimed that the 1st Respondent provided no other reason and the reason behind it was because it was acting in compliance with the President's instructions that he and his Deputy did not wish to have their remuneration and benefits increased and thus by so doing, the 1st Respondent yielded its constitutional independence to the direction of the President contrary to Article 249 of *the Constitution*.

14. The Petitioner stated that in a presentation made by a commissioner with the 1st Respondent at the Third National Wage Bill Conference held on 15th to 17th April 2024, the 1st Respondent confirmed

that the current total public compensation bill continues defy the recommended the statutory limitation of 35% of the public wage bill to revenue ratio and that explains why the Third National Wage Bill Conference was themed "Towards 35%" as an aspirational theme. The Petitioner contended that the wage bill to total revenue ratio in financial year 2020/2021 was 54.77%; 47.06% in 2021/2022, and was projected to be 46.64% in 2022/2023.

15. He asserts that while the 1st Respondent keeps talking about having a public wage bill that is fiscally sustainable but has failed to talk the talk and walk the walk in the setting of the remuneration and benefits for State officers which the 1st Respondent intends to increase by 19% over the four-year review cycle. The Petitioner points out that this is the highest increase across the whole public sector where public compensation bill for the national government has by now surpassed the recommended ratio thus breaching Article 230(5)(a) of *the Constitution*.

1st Respondent's Case

16. In reply, the 1st Respondent through its Director – Remuneration Services, Dr. Hillary Patroba filed its replying affidavit sworn on 17th November 2023. He reiterated the 1st Respondent's mandate as provided for under Article 230 of *the Constitution* as well as the principles set out under Section 12 of the *Salaries and Remuneration Commission Act*, 2011 (SRC Act).

17. He explained that by dint of Section 11 (e) of the SRC Act, the 1st Respondent set out a 4-year remuneration and benefits review cycle. He notes that the first cycle covered the 2013/2014 - 2016/2017 financial years while the second cycle covered the 2017 /2018 - 2020/2021 financial years and finally the third cycle that covers 2021/2022- 2024/2025 financial years.

18. He depones that the 1st Respondent set the state officers remuneration and benefits in 2013 under the first cycle. However, their payremained the same during the second cycle as there wasno upward review of the remuneration and benefits for state officers under the second cycle.

19. He depones that prior to setting the remuneration and benefits for state officers under the third cycle a number of measures were undertaken.

20. First, the 1st Respondent evaluated all State Officer jobs so as to determine their relative worth. This worth was then used to establish the job grading structures so as ensure fair and equitable remuneration and benefits.

21. Second, the 1st Respondent undertook international comparative surveys on the labour markets and trends in remuneration for state officers' jobs so as to establish how other similarly placed economies, with similar structures of government, remunerate their equivalent of State officers.

22. Third, the 1st Respondent undertook a survey of the economic performance of the Country which had been affected by the COVID-19 pandemic.

23. Furthermore, the 1st Respondent sought the National Treasury's advice vide a letter dated 21st May 2021. Particularly, the 1st Respondent sought guidance on: the economy's ability to afford and fiscally sustain pay reviews during the third cycle, allocation of Ksh. 6.8 billion for the financial year 2021/22 for review of remuneration and benefits for public officers serving in the national government and affordability and fiscal sustainability of phasing out the balance of Ksh. 68.5 Billion in the financial year 2022/23 to 2024/25 for review of remuneration and benefits for all public officers.

24. In its response dated 31st May 2021, the National Treasury informed the 1st Respondent that due to the effect of the COVID-19 pandemic on the performance of the economy and given that the economic

recovery was expected to be slow, the upward review of the remuneration and benefits in the public service ought to be postponed for at least two fiscal years or until the economy had fully recovered.

25. He states that the 1st Respondent noting the National Treasury's advice issued a Circular dated 17th June 2021 informing that: there would be no review of the basic salary structures in financial years 2021/2022 and 2022/2023, there would be no additional funding provided for implementation of the job evaluation results and a review of the same would be done after two fiscal years as guided by the status of the economy. For this reason, there was no upward review in the third cycle.

26. He depones after the end of the two fiscal years, the 1st Respondent wrote to the National Treasury through a letter dated 31st August, 2022 requesting Ksh.90.1 billion for implementation of the review of remuneration and benefits for state officers and all other public officers. This was to be implemented in four-equal-phases between financial years 2023/2024 – 2026/2027.

27. The National Treasury in its response dated 3rd October 2022 gave the green light and approved Ksh.22.6 billion for the financial year 2023/2024. In a subsequent letter dated 6th July 2023, the National Treasury reviewed the amount to Ksh.21.7 billlion.

28. It is deponed that the proposed remuneration and benefits for all state officer and public officers for financial years 2023/2024 and 2024/2025 were guided by: the job evaluation grading structure, outcome of comparative surveys on the labour markets and trends in remuneration, confirmation of affordability and provision of funding by the National Treasury and the principles set out under Article 230 (5) of *the Constitution* and Section 12 of the SRC Act.

29. He depones that in view of this and in compliance with Articles 10, 201 and 230(5) of *the Constitution*, the 1st Respondent invited the public and stakeholders on 30th June 2023, to submit views on the proposed remuneration and benefits for State officers.

30. He points out that the publication contained all the relevant information required to enable the public and stakeholders submit their views.

31. Thereafter, the revised remuneration and benefits for all State Officers were published in the Kenya Gazette under the third review cycle.

32. He asserts that contrary to the Petitioner's assertions, the implementation of the remuneration and benefits structures was done in compliance with *the Constitution* and the law and was not subject to anyone's direction or control.

33. He stresses that the Petition is not merited and thus should be dismissed with costs.

2nd Respondent's Case

34. The 2nd Respondent opposed the Petition in the Grounds of Opposition dated 26th May 2024 on the basis that:

    i. The Petitioner herein has not demonstrated before the Court how the 2nd Respondent has violated any constitutional provisions.

    ii. The *Access to Information Act*, 2016 under Section 6 provides for the limitation of the right of access to information, which include a scenario where the information sought, is likely to involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made.

iii. Information relating to salary increment of civil servants would amount to a violation of their right to privacy.

iv. There is no requirement in law for a public body to provide a rationale for its decision. The 1st Respondent, as established in *the Constitution*, and operationalized by statute, has the constitutional mandate to review and set the salaries and benefits of state and public officers.

v. The question of public participation has been extensively litigated upon. The parameters set is for the proposed policy or legislation to be presented to the public, and opportunity given for the members of the public to ventilate on the same.

vi. It is not in dispute that the information was availed to the public and views invited from the members of the public in line with the requirements for public participation.

vii. The instant Petition is based on a misunderstanding of the letter and the spirit of the law on access to information and by extension, public participation.

viii. The question of retrospective application of the law has been widely litigated upon. Despite the general rule that retrospective application of the law is prohibited, the Courts have provided for the exception as in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd &2 Others, SCK APP. No. 2 of 2011 (2012) eKLR where it was held that:

> "[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsburys Laws of England, 4th Edition Vol.44 at page 570). A retroactive law is not unconstitutional unless it:
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> (i) is in the nature of a bill of attainder;
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> (ii) impairs the obligation under contracts;
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> (iii) divests vested rights; or
>
> (iv) is constitutionally forbidden."

ix. The instant scenario allows for the gazette notices to be applied from a date earlier that the date of the actual gazettement.

x. From the above, it is clear that the Petition is premised on a clear misapplication of the law by the Petitioner.

Petitioners' Submissions

35. The Petitioner filed submissions dated 10th July 2024 in support of his Petition.

36. On public participation, the Petitioner submitted that the 1st Respondent is required to undertake this exercise as envisaged under Article 10(2) (a) and 201 of *the Constitution* in line with its mandate under Article 230(4)(a) of *the Constitution*. Reliance was placed in British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties)[Petition No. 5 of 2017] where the Supreme Court guided as follows:

> " Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of *the Constitution* and is binding on all State

organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the Sovereignty of the People "that permeates *the Constitution* and in accordance with Article 1(4) of *the Constitution* is exercised at both national and county levels"... Since the promulgation of *the Constitution* 2010, the question of the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts. The High Court in this matter appraised itself of the various decisions on the same, which appraisal the Court of Appeal readily endorsed. In the Matter of the National Land Commission, the Supreme Court placed the principle of public participation at the core of the concept of checks and balances in governance in the execution of their functions by the various arms of government, when we stated:

> "[308] The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in Article 10 of *the Constitution*: in particular, the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability. It is to be noted that, the very essence of checks-and-balances touches on the principles of public participation, inclusiveness, integrity, accountability and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity, transparency, good governance and accountability..."

37. The Petitioner submitted that the 1st Respondent bears the burden of proving under Section 107 of the *Evidence Act*, that it complied with *the Constitution*, including its duty to facilitate public participation, when it set the impugned remunerations and benefits. According to him, the 1st Respondent failed to subject its proposals to any form public participation. He added that the 1st Respondent had not provided any evidence to demonstrate that it carried out any public participation before it published the impugned constitutional instruments. Equally, he argued that no evidence was adduced to show that it invited the public to give their views. Likewise, that no report was issued on the outcome of any submissions received from the public or any information on what impact, representations from the public had on its final decision. In his summation, the 1st Respondent indeed failed to demonstrate that it actually facilitated public participation rendering its impugned instruments unconstitutional, null and void, ab initio.

38. Moreover, he stressed that whereas the powers donated to the 1st Respondent under Article 230(4)(a) are exercisable without the direction or control of any person or authority, they must still be exercised in accordance with *the Constitution*. Reliance was placed in Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party) (Petition E242 of 2022) [2022] KEHC 11630 (KLR) where it was held that:

> " Regardless of the nature of the impugned Rules and the fact that the power to make them flows directly from *the Constitution*, the letter and spirit of *the Constitution* must be upheld in the process of enactment....the rules cannot make provisions which are in conflict with the national values and principles of governance or run contra the Bill of Rights or even usurp the powers of other constitutional entities.The emphasis here is that the any rules made by any entity must be in conformity with *the Constitution*."

39. On whether the 1st Respondent complied with Article 230(5) of *the Constitution* in setting the impugned remuneration and benefits for state officers, the Petitioner submitted that it did not. The Petitioner reiterating the contents of his affidavit noted that the 1st Respondent had in fact admitted that the current public compensation bill is unconstitutional as it breaches the maximum target set by Section 15(2) (b), *Public Finance Management Act* and Regulation 26(1)(a) of the Public Finance Management (National Government) Regulations, 2015.Essentially, this means fewer resources are available to fund public services.

40. The Petitioner added that the 1st Respondent also included, in the increase, previously-unannounced additions, without offering any justification for the same. The Petitioner emphasized that the 1st Respondent has a duty to abide by *the Constitution*, including when fulfilling its functions.

41. On compliance with Article 249(2) of *the Constitution*, the Petitioner submitted that the 1st Respondent had also violated this provision by surrendering its independence to the control of the President. He asserted that the 1st Respondent had not provided any rational explanation why, those of the President and the Deputy President were, over the period covered, retained at the level set in the Kenya Gazette Notice No. 8792 of 27th July 2022.

42. To buttress this issue, reliance was placed in the Matter of Interim Independent Electoral Commission [2011] eKLR where it was held that:

> " It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under *the Constitution*, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in *the Constitution* as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. *The Constitution* established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

43. On the retrospective application of the impugned instruments, the Petitioner submitted that the 1st Respondent cannot cause the impugned constitutional instruments to commence on a date before they were published in the Kenya Gazette. In his view, there is no provision in *the Constitution* that allows back-dating of constitutional instruments to a date before the decision was made and so the same is offensive to Article 10(2) and 201 of *the Constitution*.

44. Reliance was placed in Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others [2014] eKLR where it was held that:

> " The Kenya Gazette is the official bulletin of the Government of Kenya. It announces to all and sundry the decisions of the Government. The only formal way the SRC could have conveyed its decision on the remuneration and benefits of state officers was through the Kenya Gazette.

85. The position and place of the Kenya Gazette in the affairs of this nation was addressed by the Court of Appeal in the case of Ali Hassan Joho & Another v. Suleiman Said Shahbal & 2 Others Court of Appeal Civil Appeal No 12 of 2013 thus:-

> [24.] The Kenya Gazette is an official newspaper of the government in which official matters including official notices are published. The Gazette has evidentiary character. Section 68 of the *interpretation and General Provisions Act* provides:- "The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government Printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice."
>
> Section 85 of the *Evidence Act* has identical provision..... The elections are matters of great public importance and the requirement that the result of elections be declared or published in the Gazette does not derogate from the intendment of section 76(1)(a). The requirement of Gazettement is required, among other things, to give the declared results a seal of certainty finality, and legality."

45. The Petitioner further argued that by stating, in July 2022, that any changes in the remuneration and benefits payable to State officers for Financial Years 2023/2024 and 2024/2025 would be notified on or before 1st July 2023, the 1st Respondent created a legitimate expectation that it would comply with *the Constitution*. As such, failure to do this and instead, setting those remuneration and benefits on 9th August 2023 and then backdating them to 1st July 2023, the 1st Respondent was a violation of the principles of transparency, accountability and good governance as set out in Constitution.

46. Reliance was placed in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where it was held that:

> " An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation..."

47. To this end, the Petitioner urged the Court to issue orders, in the form of a structural interdict as an appropriate relief to remedy the violation of *the Constitution* as was recognized by the Supreme Court in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)[2021] eKLR.

1st Respondent's Submissions

48. The 1st Respondent through its Counsel, James Sitienei filed submissions dated 20th November 2024 and underscored the issues for discussion as: whether the 1st Respondent undertook adequate public participation prior to setting the impugned remuneration and benefits for State officers, whether the 1st Respondent complied with the constitutional and statutory principles in setting the remuneration and benefits, whether remuneration and benefits structures are constitutional instruments and whether

implementation thereof can be back dated and whether the 1st Respondent acted contrary to Article 249 (2) of *the Constitution*.

49. On the first issue, Counsel noted that this principle was appreciated by the Court in William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others (2020) eKLR as follows:

> " According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms."

50. Like dependence was placed in Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR and Kaps Parking Limited & another v County Government of Nairobi & another [2021] eKLR.

51. Counsel submitted that the 1st Respondent had demonstrated in its Replying Affidavit that it had complied with the dictates of Articles 10, 201 and 230 (5) of *the Constitution*. Mainly, it was stated that the 1st Respondent issued a publication on 30th June, 2023 inviting all stakeholders and the public to submit views on the proposed remuneration and benefits for State officers and issued the relevant information for guidance on its website. Counsel noted that this fact was affirmed by the CAJ in its correspondence.

52. Accordingly, Counsel submitted that it is clear that the 1st Respondent met the set threshold for public participation in that it provided reasonable access to the information required by the public, provided the details of the proposed remuneration and benefits for State officers, informed the public of what is expected and set out the manner in which and timelines when the views should be submitted.

53. Turning to the second issue, Counsel submitted that the 1st Respondent set the remunerations and benefits pursuant to Article 230 (4) (a) of *the Constitution* and in strict compliance with the law and principles that guide the discharge of its mandate. Furthermore, Counsel submitted that the 1st Respondent possesses comprehensive expertise in determining remuneration and benefits structures for state officers.

54. Counsel stressed that the Petitioner seeks orders to quash the salary structures set by the 1st Respondent on unproven allegations. Considering this, Counsel asserted that the 1st Respondent's decision should be upheld unless it can be shown that it acted contrary to the law.

55. Reliance was placed in JNN (a minor VS Naisula Holding Ltd T/A N School (2018) eKLR where it was held that:

> " It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the Wednesbury principles of illegality, irrationality and impropriety if the decision can get over the first test it may withstand the other turn tests unless it is shocking, unreasonable, perverse or improper.
>
> The test of unreasonableness is not applied in a vacuum but in the context of life's realities. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to those

formulated by education institutions or professional bodies, possessing the expertise and experience of actual day to day working of the institutions."

56. Counsel as well argued that making of this decision is a polycentric decision that involves a multiplicity of financial and policy considerations, and consultations with relevant stakeholders including the National Treasury. For this reason, Counsel urged that it was best left to the 1st Respondent. The Court was implored to exercise restraint in that regard. Reliance was placed in Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others, Civil Appeal No. 290 of 2012 where it was held that:

> " It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that: "[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."

57. Counsel on the third issue submitted that the Petitioner's interpretation of the set remuneration and benefits structures was flawed since as deponed in the 1st Respondent's affidavit, implementation of the remuneration and benefits structures was planned and funded to commence on 1st July, 2023, which is the beginning of the government's financial year and structures are always aligned to the government financial year. For this reason, Counsel submitted that the 1st Respondent had acted within the law.

58. Furthermore, Counsel relying in Okiya Omtatah Okoiti & 3 Others -vs- Attorney General & 5 Others (2014) eKLR submitted that publication of the remuneration and benefits structures for State Officers in the Gazette is one of the means through which the 1st Respondent communicates the set remuneration and benefits structures.

59. Finally, Counsel submitted that as demonstrated in the 1st Respondent's response, it set the remuneration and benefits in line with the principles set out under Article 230(5) of *the Constitution* and Section 12 of the SRC Act.

60. Correspondingly, Counsel submitted that the Petitioner had not discharged his burden of proof yet had made unsubstantiated claims on the independence of the 1st Respondent in setting the impugned remuneration and benefits structures, in particular with regard to the President and Deputy President.

61. To buttress this point reliance was placed in Joseph Koli Nanok and another Vs Ethics and Anti-corruption Commission (2018) eKLR where it was held that:

> " Moreover, I think it trivializes *the constitution*, its values and principles when empty allegation of infringement is made. A petitioner who cites a violation of *the constitution* must by cogent evidence relate alleged breaches with real concrete and direct loss, damage or injury arising out of the violation it does not help to allege violation drop conceptual abstract and

interpretation to fit some artifice text book arguments in the decision by the Respondent its decision should not be set aside."

62. In view of the foregoing, Counsel submitted that the Petitioner was not entitled to the relief sought and so urged the Court to decline his invitation to interfere with the 1st Respondent's mandate.

2nd Respondent's Submissions

63. The 2nd Respondent through its Counsel, Mwise Robi filed submissions dated 5th June 2025.

64. Counsel on whether the Petitioner's right to access information was violated, submitted that this right can be limited under Section 6 of the *Access to information Act*. That is where, the information sought is likely to involve unjustified invasion of the privacy of an individual other than the applicant or the person on whose behalf an application has been made.

65. Counsel further submitted that there is no requirement in law for a public body to provide a rationale for its decision and more so, the 1st Respondent under Article 230 of *the Constitution* and the SRC Act, has the unfettered mandate to review and set the salaries and benefits of state and public officers.

66. On public participation, Counsel relied in Mui Coal Basin Local Community & 15 Others(supra) where the Court held as follows:

> "Public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account."

67. Counsel stressed in light of this that the requirement of public participation is for the proposed policy or legislation to be presented to the public and an opportunity be given to the public to give their views. Counsel added that ordinarily a decision by a public body such as the 1st Respondent is reached by consultations between the various officers in the organizations which in turn allow the body to make a well-informed decision which is then subjected to public participation. Counsel noted that issuance of the requisite information by the 1st Respondent was also been affirmed by the CAJ.

68. According to Counsel, the Petition is based on a misunderstanding of the letter and the spirit of the law on access to information and public participation and so their alleged violation is incorrect.

69. On the backdating of the remunerations and benefits, Counsel submitted that generally retrospective application of the law is it is prohibited however, the interpretation of the Courts indicates a departure from the general rule. Reliance was placed in Samuel Kamau Macharia (supra) where it was held that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears this was the intention of the legislature. Consequently, Counsel submitted that the gazette notices can be applied retrospectively as the same is allowed under the law.

Analysis and Determination

70. Taking into consideration the issues raised herein, it is my humble opinion that the issues that arise for determination are as follows:

    i. Whether the 1st Respondent's decision on the review of the remuneration and benefits payable to state officers for financial years 2023/2024 and 2024/2025 failed to comply with the principle of public participation by not disclosing sufficient information to the public to enable a well-versed public participation.

    ii. Whether the 1st Respondent's decision to backdate the review of the remuneration and benefits payable to state officers to a date earlier than the date of gazettement was unlawful and unconstitutional.

    iii. Whether the Respondents have persistently violated the constitutional, statutory and regulatory principle that require public compensation to be fiscally sustainable.

    iv. Whether the Petitioner is entitled to the reliefs sought.

71. This Petition assails the manner the 1st Respondent undertook one of its constitutional mandates, that is reviewing the terms of remuneration and benefits of state officers asserting that it did not meet the Constitutional and statutory threshold. It thus becomes necessary to explicate the mandate of the 1st Respondent before venturing into discussing the alleged fundamental lapses that the Petitioner identifies as invalidating the exercise that the 1st Respondent conducted.

72. The 1st Respondent is established under Article 230(1) of *the Constitution* and its specific mandate provided for under 230 (4) as follows:

> The powers and functions of the Salaries and Remuneration Commission shall be 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.

73. The 1st Respondent's function is further elaborated under Section 11 of the SRC Act as follows:

> In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall—
>
> a. inquire into and advise on the salaries and remuneration to be paid out of public funds;
>
> b. keep under review all matters relating to the salaries and remuneration of public officers;
>
> c. advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;
>
> d. conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;
>
> e. determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;

f. make recommendations on matters relating to the salary and remuneration of a particular State or public officer;

g. make recommendations on the review of pensions payable to holders of public offices; and

h. perform such other functions as may be provided for by *the Constitution* or any other written law.

74. Its powers are set out under Section 13 as follows:

1. The Commission shall have all powers generally necessary for the execution of its functions under *the Constitution* and this Act, and without prejudice to the generality of the foregoing, the Commission shall have powers to—

a. gather, by any means appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities;

b. interview any individual, group or members of organizations or institutions and, at the Commission's discretion, conduct such interviews;

c. hold inquiries for the purposes of performing its functions under this Act;

d. take any measures it considers necessary to ensure that in the harmonization of salaries and remuneration, equity and fairness is achieved in the public sector.

2. In the performance of its functions, the Commission—

a. may inform itself in such manner as it thinks fit;

b. may receive written or oral statements from any person, governmental or non-governmental agency; and

c. shall not be bound by the strict rules of evidence.

75. The 1st Respondent in fulfilling its mandate is to be guided by the principles set out under Article 230(5) as follows:

a. the need to ensure that the total public compensation bill is fiscally sustainable;

b. the need to ensure that the public services are able to attract and retain the skills required to execute their functions;

c. the need to recognize productivity and performance; and

d. transparency and fairness.

76. Section 12 of the SRC Act on this point adds as follows:

1. In addition to the principles set under Article 230(5) of *the Constitution*, the Commission shall also be guided by the principle of equal remuneration to persons for work of equal value.

2. Without prejudice to subsection (1), the Commission shall take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service.

77. Having set out the mandate, I now turn to the discussion of the specific issues that the instant Petition raises.

> Whether the 1st Respondent's decision on the review of the remuneration and benefits payable to state officers for financial years 2023/2024 and 2024/2025 failed to comply with the principle of public participation by not disclosing sufficient information to the public to enable a well-versed public participation.

78. The Petitioner alleged that in making the decision to review the remuneration and benefits of State officers that were to apply in the 3rd Remuneration and Benefits Review cycle and set to paid in financial years 2023/2024 and 2024/2025; the 1st Respondent did not avail adequate information to enable the public to fully understand and participate hence the public participation that was conducted did not meet the requisite threshold of public participation. That even after he sought this information from the 1st Respondent, it was not provided prompting him to write to Commission on Administrative Justice which however wrote back telling him the information was already available in the 1st Respondent's website.

79. The 1st Respondent refuted this allegation and asserted that it complied with the Constitutional dictates on public participation. It stated that on 30th June, 2023, it published a notice inviting all stakeholders and the public to submit views on the proposed remuneration and benefits for State officers for financial year 2023/2024 and 2024/2025. It also stated that the publication contained all relevant information to enable the public and stakeholders to submit their views on the matter. That it is only after the completion of public participation the 1st Respondent set and published the remuneration and benefits for all State officers for the fiscal years 2023/2024 and 2024/2025.

80. The principle of public participation is a constitutional dictate particularly under Article 10 (2) (a) of *the Constitution*. *The Constitution* decrees that this principle be satisfied whenever State organs, State officers, public officers and all persons whenever they apply or interpret *the Constitution*; enact, apply or interpret any law, or make or implement public policy decisions. That requirement is to ensure that the people are meaningfully involved whenever key decision-processes affecting them are about to be made so that they can make their contributions for consideration by the decision makers. Public Participation thus signifies direct democracy or direct sovereignty of the people working hand in hand with representative democracy.

81. The Supreme Court underscored the importance of this principle in the case of British American Tobacco case Kenya, Plc v Cabinet Secretary for the Ministry of Health & 5 others (2019) eKLR and also took the opportunity to highlight the key ingredients of an effective public participation. It stated thus:

> " 85. Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of *the Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the Sovereignty of the People "that permeates *the Constitution* and in accordance with Article 1(4) of *the Constitution* is exercised at both national and county levels" ...

"96... It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

"Guiding Principles for public participation

i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.

ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

iv. Public participation is not an abstract notion; it must be purposive and meaningful.

v. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

82. In South Africa the Court in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) held as follows:

> " The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which *the Constitution* envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect... There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."

83. The issue of public participation according to this Petition concomitantly ties with the right of access to information. This is because Petitioner's alleges that the failure by the 1st Respondent to provide adequate details on how it arrived at the decision to propose the review of the rates of remuneration and benefits for State officers compromised the ability of the Petitioner to appreciate how the 1st Respondent had satisfied itself that those proposals met the requirements set out in Article 230 (5) (a) of *the Constitution* on fiscal sustainability given the on-going economic hardships being experienced by Kenyans.

84. For this reason, the Petitioner wrote to the 1st respondent on 4th July, 2023 seeking for the information and copied the letter to the Commission on Administrative Justice. The 1st Respondent did not respond to the letter but the Commission on Administrative Justice (CAJ) responded to him informing him the information he was seeking was already available in the 1st Respondent's public website.

85. Article 35 of *the Constitution* provides:

a. Every citizen has the right of access to—

1. information held by the State; and

2. information held by another person and required for the exercise or protection of any right or fundamental freedom.

b. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

c. The State shall publish and publicise any important information affecting the nation.

86. The enjoyment of this right however is given effect by the provisions of *Access to information Act*. Section 7 inter-alia requires that the Party seeking the information write to the State organ or body holding the information and where the request is not acted upon, Section 14 provides the procedure to be followed. It is to lodge a complaint with the Commission on Administration of Justice (CAJ) as the Petitioner did. The powers that CAJ may exercise are specified in Section 23 and include:

a. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;

b. question any person in respect of any subject matter under investigation before the Commission; and

c. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

2. The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—

a. the release of any information withheld unlawfully;

b. a recommendation for the payment of compensation; or

c. any other lawful remedy or redress.

3. A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.

4. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.

5. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

87. The Petitioner states he sought for the information from the 1st Respondent's. He never received a response from the 1st Respondent but CAJ responded to him indicating the information he wanted was readily available in the 1st Respondent's website. It means CAJ's assessment of his complaint was that it was unwarranted. In its letter of 7th August, 2023, it wrote to the Petitioner thus:

> "the Commission has reviewed the Salaries and Remuneration Commission website https:src.go.kepublic participation/ and noted that the requested information has been provided. Further, find enclosed copy of the document for your information and records."

88. CAJ thus evaluated and determined the Petitioner's complaint about not being provided with sufficient information and was satisfied that the complaint lacked merits. This Court cannot thus reopen that issue since it not an appeal against the decision of the CAJ as envisaged by Section 23(3) of the Act. The Petitioner is before this Court not by way of appeal against the decision of CAJ but to relitigate the same factual issue that he was not provided sufficient information by the 1st Respondent to properly inform his views on public participation. information that (CAJ found was readily available in the 1st Respondent website and even sent him a copy).

89. In my view, the primary issue the right of access to information and CAJ dealt with that finding that the information was actually available in the website of the 1st Respondent all along. The Petitioner did not challenge this decision of CAJ. The Petitioner is thus precluded from raising the same complaint of inadequacy of information unless by way of appeal against the decision of CAJ.

90. On whether public participation was undertaken and if it was adequate, it is a fact that there was public participation. A notice of the same was published on 30/6/2023 inviting memoranda to be submitted to the Secretary/CEO not later than 13th July, 2023. The Petitioner in fact participated by submitting his views on 13/7/2023 via email. He opposed the new rates of remuneration and benefits for the State Officers on grounds inter-alia of that it was fiscally unsustainable, that it was unlawful to backdate the increase on a date earlier than when the changes were actually gazetted, that the proposed changes were in violation of Articles 10 (2), 201 and 232 of *the Constitution* hence the proposed increase ought to have been scrapped as was done in the financial year 2022/2023.

91. It is apparent that none of the Petitioner's views found favour with the 1st Respondent but that in itself does not mean it was because there was inadequate public participation. As was held by the Supreme Court in Cabinet Secretary for National Treasury and Planning & 4 others v Okoiti & 52 others (2024) KESC 63 (KLR);

> "... when Parliament receives thousands of views during public participation, it may consider clustering them into themes to address the concerns raised by the people. Therefore, there is no justification for imposing an additional burden on Parliament to respond directly to each individual involved in the public participation process.
>
> 159. We therefore hold that there is no sufficient basis to invalidate a public participation exercise on the grounds that Parliament did not provide reasons to every individual participant on how their proposals, suggestions, and input was treated..."

92. I find no merit in the Petitioner's claim that 1st Respondent's decision on the review of the remuneration and benefits payable to state officers for financial years 2023/2024 and 2024/2025 did not comply with the principle of public participation.

Whether the 1st Respondent's decision to backdate the review of the remuneration and benefits payable to state officers to a date earlier than the date of gazettement was unlawful and unconstitutional.

93. The Court in Joseph Maburu alias Ayub v Republic [2019] KEHC 1172 (KLR) on the meaning of the principle of refractive application offered insight as follows:

> " The doctrine of retroactive application of the law is defined in Black's Law Dictionary, 7th Edition, as:
>
> A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. The retroactive law is not unconstitutional unless it 1) is in the nature of an ex post facto law or a bill of attainder, 2) impairs the obligation of contracts, 3) divests vested rights, or 4) is constitutionally forbidden...Also termed retrospective law.
>
> 7. In the case of Khaemba Patrick Wanyonyi vs. Teachers Service Commission [2013] eKLR, Gikonyo J. had this to say on the origins of this doctrine:
>
> The concept of retroactive or retrospective law developed over time in the 1700s to cure the grave injustices occasioned by what was called the bill of attainder (1300-1600) on a person (attainder) who had been sentenced to death or declared an outlaw. Literally, all civil rights of the attainder were extinguished whether past, present and future, and could not perform any of the legal functions." that he performed before the attainder."

94. The Supreme Court in Macharia (supra) in view of this guided as follows on application of this issue:

> " 59. Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. Black's Law Dictionary (12th Edition) to which we have been referred, defines retrospective law as:
>
> "A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring , or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."
>
> 60. Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of *the Constitution*. That article provides that:
>
> "Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law".

61. As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570).A retroactive law is not unconstitutional unless it:

i. is in the nature of a bill of attainder;

ii. impairs the obligation under contracts;

iii. divests vested rights; or

iii. is constitutionally forbidden."

95. *The Constitution* specifically prohibits retroactive application of criminal law under the right to fair hearing in 50 (2) (n) and 50 (2) (p) by stating that an accused has the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law; and, to the benefit of the least severe of the punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.

96. However, for non-criminal legislation, *the Constitution* does not automatically forbid the enactment of retroactive law or policy but I believe such legislation in my view should meet the threshold set out under Article 24; meaning that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

97. Applying the reasoning to the issue before this Court, I thus believe that backdating of the remuneration and benefits is not mechanically unlawful unless shown be outside the parameters set out in Article 24 of *the Constitution*.

98. The question thus becomes, was the decision irrational and unjustifiable given the circumstances of this case?

99. According to the 1st Respondent, the purpose of revising and increasing the rates was among others informed by the need to cushion the officers from inflation through effecting the cost-of-living adjustment (COLA). Annexure HP 2 of the 1st Respondent's replying affidavit reads:

> The SRC, while setting and advising on remuneration and benefits payable in public service is guided by constitutional principles set out in in Article 230 (5) of *the Constitution* and Section 12 of the SRC Act... In addition, within the context of the above principles, the SRC considers the following factors:
>
> a. ...
>
> b) cost of living adjustment (COLA): This is the periodic increase in wages of salaries to cushion against the loss in purchasing power of money due to inflation. The SRC considers consumer price index (CPT) to cushion for COLA.

100. Further, the 1st Respondent indicated that the rates were also justified by the results of an evaluation the 1st Respondent had conducted to ensure that the State officers earned fair and equitable renumeration based on economic performance and comparative surveys in the labour market.

101. Furthermore, Treasury had already budgeted for and confirmed pre-allocation of the funds to cater for the proposed 3rd Cycle review increases in its letter of 31/10/22 to begin from financial year 2023/2024. The backdating was thus meant to cover for the period of prolonged delay in implementation in the period prior to the gazettement of the revised rates.

102. The reason for the backdating has been sufficiently explained; it was not done impulsively but was founded on sound reason. The 1st Respondent justified the revised rates based on its own evaluation. It was meant to ensure that state officers received fair, equitable remuneration and this was justified by economic performance and comparable market surveys that the 1st Respondent had undertaken. There was no rebuttal evidence offered by the Petitioner to counter this assertion or demonstrate otherwise. Further, the backdating of pay was not unreasonable or irresponsible as alleged by the Petitioner. The 1st Respondent explained rationale behind it was to ensure that State officers were shielded from effects pay-inflation that had already taken place during the delayed period on implementation and that was already covered by a full budgetary allocation.

103. The Petitioner's argument thus fails for two main reasons: first, backdating salary and remuneration review is not inherently unconstitutional or unlawful provided that there is proper justification and for this, the 1st Respondent has provided a clear and reasonable justification in respect of review and backdating; which is to ensure equitable, market comparative and fiscally sustainable pay for State officers, hence that decision was neither impulsive nor arbitrary as contended by the Petitioner. This Court is thus not satisfied that the decision should be quashed.

> Whether the 1st Respondent has persistently violated the constitutional, statutory and regulatory principle that requires public compensation to be fiscally sustainable.

104. The Petitioner alleged that the 1st Respondent has under its watch allowed a situation where the public wage bill to national revenue ratio is unlawful for defying the statutory set maximum of 35% thus constraining fiscal sustainability which contravenes Article 230 (5) (a) of *the Constitution*. He explained that the 1st Respondent fully aware of the sad state of affairs as can be discerned from the presentations made by its Commissioners during the Third National Wage Bill Conference held from 15th -17th April, 2023 at Bomas of Kenya.

105. I have carefully read the two presentations that the Petitioner referred to and exhibited. These presentations were made by the Chairperson of the 1st Respondent Mrs. Lyn Mengich while the other is by a commissioner of the 1st Respondent – Mr. John K. Monyoncho. The presentations or the said workshop was not contested by the 1st Respondent.

106. The two Senior Officers of the 1st Respondent do in fact acknowledge that the 35% limit of public wage to revenue ratio is being disregarded. However, my understanding of the two presentations which I read painstakingly lay bare fact of escalation of public wage bill and acknowledge that wage bill poses a great fiscal risk to the nation. The 1st Respondent admits that alone, it cannot confront the matter and thus appeals for stakeholder support to arrest this worrying trend as SRC (1st Respondent) cannot singlehandedly undertake this phenomenal responsibility.

107. At this juncture, it is also important to take note of the fact that under the *Public Finance Management Act*, the power of enforcing fiscal discipline under the Act is vested on the National Treasury at the

National Government level and in the County Treasury at the County Government level. SRC is thus is correct in seeking the wider stakeholder support in confronting this matter.

108. Before I proceed further, it is necessary that I set out the relevant legal provisions on fiscal responsibility in regard to wage bill to revenue ratio and where the primary responsibility for ensuring fiscal sustainability falls under the Statute. The relevant law is the *Public Finance Management Act*, Cap 412A. It specifies who bears responsibility over fiscal sustainability. It states:

> Section 15 (2): In managing the national government's public finances, the National Treasury shall enforce the following fiscal responsibility principles—
>
> b)) the national government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the national government revenue as prescribed by regulations;

109. This section thus takes us to the Public Finance (National Government) Regulations Legal Notice Number 34 of 2015.

110. Under the heading, 'Fiscal Strategy and Macro-Economic Framework' we have Regulation 26 (1) (a) & (b) which states:

> Part III – Fiscal Strategy And Macro-economic Framework
>
> 26. Fiscal responsibility principles
>
> (1) In addition to the fiscal responsibility principles set out in section 15 of the Act, the following fiscal responsibility principles shall apply in the management of public finances—
>
> a. national government's expenditure on the compensation of employees (including benefits and allowances) shall not exceed 35 percent of the national government's equitable share of the revenue raised nationally plus other revenues generated by the national government pursuant to Article 209 (4) of *the Constitution*;
>
> b. for the avoidance of doubt, the revenue referred to in paragraph (a) shall not include revenues that accrue from extractive natural resources, including oil and coal;

111. For the County Governments, the relevant regulations are the *Public Finance Management Act*, The Public Finance Management (County Governments) Regulations Legal Notice Number 35 of 2015.

112. The specific regulation is Regulation 25, which falls under 'county Fiscal Strategy.'

> 25. Fiscal responsibility principles
>
> (1) In addition to the fiscal responsibility principles set out in section 107 of the Act, the following fiscal responsibility principles shall apply in the management of public finances—
>
> (a)) the County Executive Committee Member with the approval of the County Assembly shall set a limit on the county government's expenditure on wages and benefits for its public officers pursuant to section 107(2) of the Act;
>
> (b) the limit set under paragraph (a) above, shall not exceed thirty five (35) percent of the county government's total revenue;

(c) for the avoidance of doubt, the revenue referred to in paragraph (b) shall not include revenues that accrue from extractive natural resources including as oil and coal;

113. The 1st Respondent brazenly acknowledges that these provisions are being honoured in breach than in compliance. Coming from a Constitutional Commission that is charged with the mandate to control remuneration under Article 230 of *the Constitution*, this is worrying. Neither the National or County Treasury or even Parliament or County Assemblies that pass the budgets have been given any discretion to overlook these legal provisions meaning in proposing and passing such budgetary allocations, they are inherently unlawful for exceeding the set legal limits contained in mandatory statutory prescriptions.

114. It means that the National and County Treasuries propose budgets that are against the law and the National Assembly and County Assemblies pass them knowingly, as these statutory limits are not observed. It portrays them as being above the law. This undermines the rule of law principle under the national values and principles of governance under Article 10 (2) (a) and also Article 232 (b) which demands efficient, effective and economic use of resources. As a result of this indiscretion the country continues to witness suppressed economic growth where the national revenue is increasingly being applied to meet ever-growing public wage bill instead of channeling the resources to improve the collective well-being and the development of the nation.

115. From the statistics gathered in the two presentations of the 1st Respondent which the Petitioner relied on, it appears that some slow progress is being realized from said efforts being spearheaded by the 1st Respondent since the last three years where some minor reduction of public compensation bill to national revenue ratio has been recorded. For instance, in the financial 2020/2021, the wage bill to national revenue was at 54.77% ; in year 2021/2023 it went down to 47.06% and the projection was that in 2022/2023 it will drop down to 46.64%. Still, that is nowhere close to the statutory set limit of 35%.

116. The requirement that public wage bill to revenue ratio should be 35% is not a target but a legal command that is being violated with impunity by the National Treasury, County Treasury, Parliament and the County Assemblies which have orchestrated this blatant disregard of the applicable law yet this is a government whose foundation is the founded on *the Constitution* and must be governed in accordance with the law. Article 2 (1) of *the Constitution* makes it clear that *the Constitution* is the supreme law of the Republic and binds all persons, all State organs at both levels of government. That means both the national and county governments are equally bound by the national values and principles of governance under Article 10 (2) (a) which incorporates the principle of rule of law, equity, social justice and sustainable development among others.

117. There is no equity in a nation whose population is over 50 million but half of its total revenue is gobbled up by only just over a million public and state officers in remuneration and allowances. This state of affairs is fiscally unsustainable and totally indefensible. It is a direct violation of Article 10 (2) (d) on 'sustainable development' (part of our national values and principles of governance) as such excessive consumption does not guarantee intergenerational equity, that is, as we meet our present needs, we must also ensure our future generations will be able to meet theirs as well.

118. Further, spending half of total revenue raised on remuneration and allowances to sustain a tiny fraction of the population in public employment is a breach of the principles of public finance as Article 201 (iii) of *the Constitution* requires that "Expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas while Article 201 (d) requires that "public money shall be used in a prudent and responsible way."

119. The application of public revenue should prioritize the development of the nation and collective wellbeing of its people in order to realize rights under Article 43 such as- health, education, housing, food, clean water and social security for the public in general. When half of the revenue is consumed in wages and allowances for public officers and state officers, the ability to fulfil those constitutional obligations suffer and so is the capacity of the State to meet the needs of the marginalised and other vulnerable groups in the society as required by articles 20 (5) (b) and 21 (3) of *the Constitution*. I agree with petitioner's contention in this regard.

120. While it the right of State Officers and Public officers to receive fair compensation for the service they render, it must also be appreciated that the foundation of public service is integrity, sacrifice, accountability, and commitment to the collective wellbeing, such that the welfare of the public takes centre stage and not the vice-versa. That does not mean that public servants should be under-compensated or should earn less that what is equitable pay based on the market trends, but the emphasis is, that the pay must be balanced so that their wages are fiscally sustainable and not impair the ability of the State to meet its key obligations for the collective good of the entire population.

121. This Court would be failing in its constitutional mandate if it were to brush aside the petitioner's concerns regarding the high wage bill to revenue ratio that is prevailing in clear violation of the defined legal threshold. This is a fundamental legal issue that has constitutional implication as demonstrated. The articles of *the Constitution*, I have alluded to are not mere slogans but constitutional commands that the State and its organs namely: the National Treasury, County Treasuries, Parliament and County Assembles have violated. Article 2 (1) binds all persons and all State organs at both levels of Government. *The Constitution* makes it obligatory to ensure that there is fiscal sustainability in order to promote sustainable development. Further, it requires that expenditure be used in a manner that ensures equitable development of the country. This Court would be shirking its constitutional responsibility if it evades the question of fiscal discipline in public expenditure, which this Petition raises.

122. Going by the evidential material that the Petitioner presented, which the Respondent has not contested, there is an acknowledgement made by the 1st Respondent's representatives in presentations made at the Third National Wage Bill Conference held on 15th – 17th April, 2024, that the public wage bill to Revenue ratio is way beyond the legal threshold of 35% and this continues to be the case.

123. This Petition thus succeeds only on this issue, that is, there is continuing violation of the public wage bill to revenue ratio which is an infringement of fiscal principles enshrined in *the Constitution* as well as the statutory and regulatory limits.

124. This therefore takes me to the next issue, that is, what would be the most appropriate remedy to grant in the circumstances of this case?

Whether the Petitioner is entitled to any relief.

125. Article 23 (3) specifies the reliefs the Court may grant in a Constitutional Petition. Its introductory sentence states:

> "in any proceedings brought under Article 22, a court may grant an appropriate relief, including"

126. The use of the word 'appropriate relief and including' means the list is not exhaustive, hence in deserving cases, the Court is not be restricted to the list provided for in *the Constitution*. It can suitably fashion reliefs that best suit the circumstances of each case.

127. In L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) [2022] KEHC 17132 (KLR) the Court affirmed this approach by holding thus:

> " 244. As is the case in constitutional petitions, there are arrays of available remedies. what a court endeavors to do upon confirming of any infringement is to grant an appropriate remedy. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief..."

128. In the circumstances in this case, I am of the view that there is need to consider appropriate remedies to address the continuing violations of fiscal sustainability in which half of national revenue is spent on the remuneration and allowances for public sector employees with the result that hampers the ability of the State to provide for the well-being of the population at large, including provision of social economic rights under Article 43, undertaking infrastructural development in the country or catering for the needs of the marginalised and vulnerable groups as argued by the petitioner.

129. This Court believes that a structural interdict order would be the most appropriate remedy to facilitate strategic and effective interventions to address the issue.

130. In South Africa, the Constitutional Court in Black Sash Trust v Minister of Social Development and Others (Freedom Under Law N) (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017) when faced with situation that required the State to take certain steps to facilitate the enjoyment by the population of the benefit of social assistance, the Court in coming up with a structural interdict order explained as follows while borrowing from the following words of Mogoeng CJ in Mhlope:

> " It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted . . ."

131. The Supreme Court in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) acknowledged that structural interdict can rightly issue under Article 23. The Court explained:

> " 121. We are however, in agreement with the submissions of the appellant and amicus curiae, to the effect that article 23(3) of *the Constitution* empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the functus-officio doctrine retains its validity, even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case-by-case basis. To subject article 23 of *the Constitution* to the limitations of order 21 of the Civil Procedure Rules, would stifle the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.

Where a court of law issues an order, whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.

122. Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions."

132. The 1st Respondent concedes there has been non-compliance with the statutory and regulatory requirement of the public wage-bill- to revenue ratio. This is an express contravention of the law and an infringement of rule of law principle which *the Constitution* demands under Article 10 (2) (a) of *the Constitution* as well as other constitutional principles touching on fiscal sustainability that this judgment has discussed in the foregoing. The Salaries and Remuneration Commission has a duty to ensure that public wage remains within the realistic fiscal limits while Parliament, County Assemblies and, the National Treasury, County Treasuries are equally are bound by the Statute and Regulations thereunder to ensure wage bill to revenue ratio is enforced legally within the set limits.

133. Despite the clear violation, this Court foresees practical difficulties if it were to propose or order an instant solution given the grave social-political implications of this matter. Phased policy and legislative interventions to systematically bring down the public wage bill to revenue ratio to the required legally authorized levels would have minimal socio-legal disruptive consequences in the public sector. Structural interdicts will give sufficient latitude and time to the authorities concerned to address this lingering problem within realistic timeframes. In Republic v Council of Legal Education; Commission for University Education (Interested Party) (Miscellaneous Civil Application 16 of 2016) [2016] KEHC 7535 (KLR) (4 April 2016) (Judgment) the Court underscored the utility of structural interdict by stating thus:

"144. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. In the first instance the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Secondly, the court mandates government compliance with constitutional responsibilities. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a

> solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders... After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court."

134. Given the projections contained in from the presentations that were made at the Third National Wage Bill Conference which was held on 15th- 17th April, 2024; that the Petitioner relied upon as evidence and which the Respondents did not dispute, I am of the humble view that a period of four and half years, is sufficient timeframe to achieve the legally defined threshold of public wage bill to revenue fiscal ratio.

135. The orders that commend themselves for issuance in this Petition thus are as follows:

a. A declaration is hereby issued that the continued defiance by the national government and county governments to maintain fiscal control of the total public compensation bill within the statutory and regulatory ceiling of public wage-bill to revenue ratio violates the principles of public finance under Article 201, Article 201(d), the national values and principles of governance under Article 10(2) of *the Constitution*, Section 15 (2) (b) of the *Public Finance Management Act*, Cap 412A as read with Regulation 26 (1) (a) & b of the Public Finance (National Government) Regulations -Legal Notice 34 of 2015 and Regulation 25 (1) (a) & (b) of The Public Finance Management (County Governments) Regulations -Legal Notice Number 35 of 2015.

b. A declaration is hereby issued that the national government and the county governments continued violation of the constitutional, statutory and regulatory fiscal principles that has resulted in expenditure of nearly half of national revenue on payment of remuneration and allowances for public sector employees has undermined the progressive realization of socio-economic rights under Article 43 of *the Constitution*, the protection of the rights of the vulnerable, the marginalized groups and communities thereby violating Articles 20(5), 21(3) and Articles 53-57 of *the Constitution*.

c. A declaration is hereby issued that pursuant to Article 230 (5) (a) of *the Constitution* that empowers the Salaries and Remuneration Commission (SRC-1st Respondent) to ensure the public compensation bill remains fiscally sustainable and affordable while counterbalancing these requirements with principles of equity and productivity, it is declared that all public sector employers- whether national or county governments, state corporations, independent commissions, and public universities, must seek and obtain the advice of the 1st Respondent on

remuneration, benefits or allowances, including collective bargaining agreements, instrument or any action that has an effect of increasing the public compensation bill.

d. A declaration is hereby issued that where the Salaries and Remuneration Commission (the Respondent) declines or advises against any such implementation on grounds of fiscal unsustainability or for any other reason relevant to its mandate under Article 234 of *the Constitution*, such implementation must await a further renegotiation with the 1st Respondent for the resolution of the matter and, in the event of a dispute, a determination by the Court.

e. For the next four and a half years, the 1st Respondent (SRC) shall file an affidavit in this Court on 30th June of each year, commencing 30th June, 2026 and ending on the 30th June 2030 (but if 30th June of any year happens to fall on a weekend or a public holiday, the filing be done on the next working day). The affidavit shall detail: time-bound strategies it has developed and is implementing to achieve a 35% public wage bill to revenue ratio; collaborative measures being jointly implemented in conjunction with other stakeholders; advisories and/or directives issued to curb abuse in payment of allowances to State and public officers, percentages of reduction of wage to revenue ratio and savings being made per every year arising from the strategies and interventions it has put in place and implemented.

f. A declaration is hereby issued, that any national government or county government budget that exceeds the prescribed public wage bill to revenue ratio under the *Public Finance Management Act* and Regulations is unconstitutional, null and void.

Notwithstanding (f) above, the declaration of nullity and invalidity of the offending budgets shall not take effect until 1st July, 2030. This suspension avails an opportunity to the national and county governments, in conjunction with the 1st Respondent, a reasonable transition period to implement progressive fiscal measures to facilitate full compliance with the constitutional principles and statutory wage bill ceilings.

g. The Court may, either on its own motion or upon application of any party, make further orders as may be necessary to achieve the wage bill to revenue ratio or otherwise in the interests of justice.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY, 2026.

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L N MUGAMBI

JUDGE