REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER E033 OF 2022

UNION OF NATIONAL RESEARCH AND ALLIED
INSTITUTES STAFF OF KENYA (UNRISK)..CLAIMANT

-VERSUS-

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI)...RESPONDENT

SALARIES AND REMUNERATION COMMISSION (SRC)...........................INTERESTED PARTY

Coram

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide a statement of claim dated the 18th of January 2022, the Claimant sued the Respondent and sought the following Orders:-

a) This honourable court finds and declare that since the respondent lawfully needs the interested party's advice for the purpose of Section 57(2) of the labour relations act, 2007, the interested party's failure and/or refusal to advise the respondent for four (4) years from January 2018, threatens the respondent's employees' constitutional right to fair labour practice, to fair remuneration, and to reasonable working conditions.

b) This honourable court be pleased to order that all items agreed upon at conciliation and after conciliation meetings, be and are hereby amicably settled and be in the 2017-2021 Collective Bargaining Agreement (CBA) as agreed.

c) This Honourable Court be pleased to utilise the services of CPMU of the Ministry of Labour to analyse the five (5) remaining items: Extraneous Allowance; Emergency Call Allowance; Non Practice Allowance; Health Risk Allowance; and Health Workers Service Allowance as submitted to Court by the Claimant and the Respondent, then report to Court within sixty (60) days.

d) The Interested Party be and is hereby at liberty to submit to Court her supposed advice to the Respondent over the five (5) items.

e) This Honourable Court be pleased to order that, this suit being an economic dispute, save for the different dates already agreed for different CBA items, the whole reviewed CBA cover four (4)years from 1st July 2017 up to 30th June 2021, both dates inclusive.

f) This being an economic dispute suit, this Honourable Court be pleased to order any benefit it deems just to award.

g) The Claimant's reasonable costs hereof be pronounced by the Court against the Respondent and the Interested Party.

2. The Claimant, in support of the claim, filed their verifying affidavit, sworn by Zachariah Chacha on 21st January 2022, and a bundle of documents.

3. The Respondent entered appearance through the law firm of CFL Advocates and filed a statement of response dated 4th October 2022. In support of their response, the Respondent filed a witness statement of BEN SIFUNA dated 17th December 2024.

4. On their part, the Interested Party entered appearance through Murakaru Wahome Advocate and filed a statement of defence dated 16th December 2024.

Hearing and evidence

5. On the 27th February 2025 the parties agreed to proceed by way of documentation and written submissions.

The Claimant's case in summary

6. The Claimant's case is for review of certain clauses in the amended Collective Bargaining Agreement (CBA) between it and the Respondent, which they have been unable to agree on. The CBA under review is CBA RCA No. 225 of 2014 which expired on 30th June 2017. Following failure to agree on the amendments, the Claimant reported the dispute to the Cabinet Secretary for Labour via a letter dated 18th July 2017, which culminated in a series of conciliation meetings. Unfortunately, the dispute was not resolved through conciliation and the conciliator prepared a Report/Certificate of Unresolved Dispute dated 20th August 2021 highlighting the disputed items as: Extraneous Allowance; Medical Risk Allowance; Emergency Call Allowance; Non-Practice Allowance; Leave Allowance; Commuter Allowance; House Allowance and Health Risk Allowance.

7. The Claimant states that they subsequently attended a number of meetings with the Respondent to discuss the above set out items, causing the disputed items to be reduced to: Extraneous Allowance; Emergency Call Allowance; Non-Practice Allowance; Health Risk Allowance; and Health Workers Service Allowance.

8. The Claimant sets out the items in the draft CBA for 1st July 2017 to 30th June 2021 as follows:

a) Article 30: Extraneous Allowance

Per the Consent Order in Cause No. 1315 of 2013 entered into on 15th February 2019 it was consented that: (a) All KEMRI staff in job groups KMR.12 to KMR.I or the equivalent, "shall qualify for Extraneous Allowance"; (b) All Research Scientists "shall earn the same amount of Extraneous Allowance payable to medical doctors".

b) Article 57: Emergency Call Allowance

Per the Consent Order in Cause No. 1315 of 2013 it was consented that:

"This allowance shall be paid to all research scientists, clinical officers and any other staff cadre that may be assigned emergency service(s)."

c) Per Order 4 of the Consent Order in Cause No. 1315 of 2013 it was consented that:

"The effective date to implement both extraneous allowance and emergency call allowance is 1st July 2019, ipso facto, the Claimant so prays."

d) Article 52: Non Practice Allowance

There shall be a non-practice allowance payable to medical doctors, dentists, pharmacists, vets, advocates and any other occupation as may be defined from time to time by the management in consultation with the union, including but not limited to:-

Employees in the following professions and who are professionally registered wilh their professional bodies to become entitled to the above allowance:-

i. Human Resource Managers (Administrators)
ii. Supplies/Procurement
iii. Legal Officers
iv. Accountants
v. Security Officers

e) Article 58: Health Risk Allowance

KEMRI staff shall qualify for Health Risk Allowance as follows:

i. Medical doctors, dentist, pharmacists and veterinary doctors – Kshs.20,000/- monthly.

ii. All other KEMRI employees:

KMR.12 and above	Kshs. 20,000/- monthly
KMR. 7 to 11	Kshs. 15,000/- monthly
KMR. 1 to 6	Kshs. 10,000/- monthly.

f) Article 29: Health Workers Service Allowance

KEMRI staff shall qualify for Health Workers Service Allowance(s) as stipulated in Government Circular(s) as may eb issued from time to time.

9. It is averred by the Claimant that despite acknowledging receipt through their letter dated 24th January 2018 of the cause of action of this suit contained in the Claimant's letter dated 15th December 2017, the Interested Party has failed to advise the Respondent over the draft CBA in line with Section 57 (2) of the Labour Relations Act 2007, or to give the Respondent written reasons for failure to advise the Respondent over the same. The Interested Party has failed to comply with the foregoing in spite of being provided with relevant information by the

Respondent, and issuing a Circular Ref No. SRC/ADM/CIR/1/13 (118) dated 21st March 2014 where the Interested Party clarified that "All Collective Bargaining Agreements that cover the period 1st July 2013 onwards must be negotiated within the framework of the Commission Guidelines".

10. It is the Claimant's position through their conduct, the Interested Party has violated Articles 47 (1) and (2), and 230 (4) (a) of the Constitution, and Section 11 of the Salaries and Remuneration Commission Act No. 10 of 2011. The Claimant further states that the Interested Party has frustrated the Claimant's attempt to effectively negotiate the remaining five (5) items with the Respondent, and their failure/refusal to exercise their authority over this dispute has prejudiced the Claimant's members and potential members and contravened their Constitutional right to fair labour practices, fair remuneration and reasonable working conditions under Articles 41 (1) and (2), and Section 20 (1) and (4) of the Employment and Labour Relations Act.

11. The Claimant urges the Court to engage the economic division of the Ministry of Labour (CPMU) and give it timeframes to assist in this dispute, with the Interested Party being at liberty to submit to Court her supposed advice to the Respondent.

Respondents' case in brief

12. The Respondent challenges the jurisdiction of the court to hear and determine this matter on the premise of Section 6 of the Civil Procedure Act 2010 for the reason that a similar suit exists, namely Nairobi ELRC Case No. 1545 of 2018 Edward Githinji & 131 Others vs KEMRI &

Others which was filed by the Respondent’s employees who the Claimant herein purports to eb acting on behalf. The suit raises similar issues and seeks similar reliefs.

13. They explain that the Interested Party's functions do not comprise of merely advising the Respondent, but include: a) Inquiring into and advising on the salaries and remuneration to be paid out of public funds; b) Keeping under review all matters relating to the salaries and remuneration of Public Officers; c) Advising 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) Conducting comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of Public Officers; e) Determining the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation; f) Making recommendations on matters relating to the salary and remuneration of a particular State or Public Officer; g) Making recommendations on the review of pensions payable to holders of Public Offices; and h) Performing such other functions as may be provided by the Constitution or any other written laws.

14. The Respondent clarifies that it lacks any capacity on its own motion to propose, negotiate or enter into a Collective Bargaining Agreement to provide for payment of allowances to the Claimant's members or any other unionisable staff of the Respondent. They state that terms of service of the Respondent’s employees related to payment of allowances are subject to the approval of the parent Ministry, being the Ministry of Health, the National Treasury, the Office of the Attorney General, and the Salaries and Remuneration Commission. As such, without an approval from them, the Respondent is not in a position to propose or negotiate payment of allowances to the Claimant's member or any other unionisable staff of the Respondent.

15. It is averred that the Respondent being a Statutory Corporation, pursuant to Section 5 of the State Corporations Act, is required to exercise its mandate subject to the consent of the parent Ministry, the Ministry of Health and subject to further limitations and conditions imposed by the National Treasury. In addition to the foregoing, payment of allowances to the Claimant's members and other unionisable staff of the Respondent, being a public expenditure, pursuant to sections 10 and 11 of the State Corporations Act, the Respondent is not at liberty to incur public expenditure without the approval of the parent ministry and the National Treasury.

16. The Respondent argues that the Claimant's action of selectively suing the Respondent will result in this court issuing orders in vain, as the Respondent cannot be compelled to pay allowances without the approvals from the necessary stakeholders as identified by the Respondent.

17. It is the Respondent's case that the terms of service of the Respondent's employees are further governed by the Respondent's Human Resource Manual and Policy Manual, now revised to include the terms of service in the CBA 2013-2017. The purported settlement or agreement on any allowances with the Claimant is denied.

Interested Party's case in brief

18. The Interested Party avers that it is an independent Commission established under Article 230 of the Constitution with the mandate to: set and regularly review the remuneration and benefits of all State Officers; and advise the national and county governments on the remuneration and benefits of all other public officers. Section 11 of the SRC Act confers the Interested Party with

additional powers and functions including the mandate to inquire into and advise on the salaries and remuneration to be paid out of public funds.

19. In the exercise of its powers and functions, the Interested Party is required under Article 230 (5) of the Constitution and Section 12 of the SRC Act, to take the following principles into account: the need to ensure that the total public compensation bill is fiscally sustainable; the need to ensure that the public services are able to attract and retain the skills required to execute their functions; the need to recognise productivity and performance; transparency and fairness; and equal pay to persons for work of equal value.

20. In the discharge of its powers and functions under Article 230 of the Constitution and Section 11 of the SRC Act, the Interested Party has issued various circulars which provide guidelines on determination and review of remuneration and benefits in the public service with respect to collective bargaining negotiations. These guidelines are specifically designed to govern collective bargaining negotiations in the public service, by establishing: clear procedures for seeking the Interested Party's advice; specific requirements as to the information or documents to be provided by a public body; the factors to be taken into consideration when advising on collective bargaining agreements; and timelines on collective negotiations.

21. With regard to the instant dispute, it is the Interested Party’s case that vide letter Ref. KEMRI/CONF/5/66/TY dated 15th December 2017, the Respondent duly sought the Interested Party's advice on the collective bargaining agreement between the Respondent and Claimant for the period covering the financial years 2017/2018 to 2020/2021. The request for advice as submitted by the Respondent did not adhere to the existing guidelines on collective bargaining

negotiations in the public service as the Respondent did not submit the following documentation or information: i. Copy of the current CBA being implemented for the unionized employees; ii. The Respondent's counter offer and justification for each recommendation on the financial items in the proposed CBA based on affordability, fairness and parity of treatment; iii.The existing salary structure for non-unionized staff indicating the date of the last review and numbers in post by grade; iv. The Respondent's Audited Financial Statements for the last three financial years; and v. Evidence of budgetary allocation from either internally generated funds or allocation by the National Treasury for implementation of the same as evidence of affordability and sustainability of the recommendations if approved.

22. In view of the failure to the adhere to the existing guidelines on collective bargaining negotiations, the Interested Party, vide letter Ref. SRC/TS/KEMRI/3/17/7 (13) duly requested the Respondent to provide the additional information following which the Interested Party would advise on the matter. The Respondent has failed to provide the requested information and/or documents, to enable the Interested Party provide informed advice on the draft CBA between the Claimant and Respondent.

DETERMINATION

23. The court upon perusal of the pleadings and documents placed before it by the parties, discerned the issues for determination to be-

a. Whether all the items agreed upon in the conciliation and after the conciliation meeting should be included in the 2017-2021 CBA.

b. Whether the Court should order and utilize the CPMU of the Ministry of Labour to analyze the final remaining items

Whether all the items agreed upon conciliation and after the conciliation meeting should be included in the 2017-2021 CBA

The claimant's submissions

24. When this dispute was reported at the Ministry of Labour, the Claimant had submitted a list of issues as contained in the CBA which attached and on "UNRISK 4". The conciliator from the Ministry of Labour and Social Protection by his letter dated 20th August 2021 addressed to the Respondent stated that after a series of meetings the parties had agreed to 47 items in the CBA leaving out eight items which remained unresolved. After the conciliation the Responder and the Claimant met and agreed on three (3) more issues leaving five (5) outstanding issues which have beenpresented to this Honourable Court for determination. The said issues include:- 1. Extraneous Allowance - Article 30 ,Emergency Call Allowance - Article 57 , Non Practice Allowance - Article 52 , Health Risk Allowance - Article 58 and Health Workers Service Allowance - Article 29. The Claimant and the Respondent having agreed on the other items, then nothing stops the parties from signing the CBA as the other items which are contested awaits the Court's determination. From the responses filed by the Respondent and the Interested Party there is serious objection were the Court to order that the agreed items in the CBA for the years 2017 to 2021 be signed and registered as the other contested items are litigated.

The Respondent's submissions

25. Whether the court may award the allowances sought by the Claimant Union- The jurisdiction of the Court to determine CBA negotiation disputes is provided for under Section 73(1) of the LRA which provides as follows: - "If a trade dispute is not resolved after conciliation, a party

to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.” In Kenya Tea Growers Association versus Kenya Plantation & Agricultural Workers Union [2018] eKLR (‘The Kenya Tea Case’) the Court held that the jurisdiction of the ELRC to determine trade disputes between parties included the power to determine disagreement with respect to the terms of the CBA. The Court held as follows:- “Under Part IX when a trade dispute is not resolved through conciliation Section 73(1) of the LRA stipulates that such a dispute may be referred to the ELRC by either of the parties. The role played by the ELRC in that instance is clearly indicated by the title of Part IX which reads ‘Adjudication of disputes. The Black's Law Dictionary 9th Edition defines adjudication as:-“The legal process of resolving a dispute; the process of judicially deciding a case.” It follows therefore that the ELRC at this stage is tasked with the responsibility of determining the trade dispute between the parties which in our view, includes the disagreement with regard to the terms of the CBA or what the parties refer to as the economic dispute between them.” In determining the trade dispute between the parties, the Court is not bound by the minimum working conditions under the Employment Act. In the Kenya Teas Case above, the Court was of the view that when determining a trade dispute, the Court can exercise power under Section 26(2) of the Employment Act to issue more favourable terms than those provided for under the Employment Act. The Court held as follows;- Section 26(2) of the Employment Act provides that- “Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.” We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum

terms and conditions of employment set out by the Employment Act and Wages Order but also empowers the ELRC to issue such favourable terms. The advice from the salaries and remuneration commission is mandatory prior to the Court reviewing any allowances to the members of the Claimant union. The SRC is established as an independent commission with powers and functions set out in Article 230(4) of the Constitution which are"(a) to set and regularly review the remuneration and benefits of all state officers; and (b) To advise the national and county governments on the remuneration and benefits of all public officers." In Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR ('TSC Case') the Court was of the opinion that a determination of the increase in wages and allowances must be made with the advice of the SRC. The Court held as follows:- "I hereby restate that the advice given by SRC under Article 230 (4) (b) of the Constitution is binding; that the national value of sustainable development embodied in Article 10 (2) (d) and the constitutional criterion of fiscal sustainability of the total public compensation bill as stipulated in Article 230 (5) (a) of the Constitution are part of the mandatory criteria that must be taken into account in the determination of remuneration and benefits in the public service. The principles of public finance stipulated in Article 201 (c) and (d) of the Constitution are mandatory criteria of relevance in the determination of remuneration in the public service. Remuneration in the public service should not be determined at a level that threatens the sustainability of the national economy to the prejudice of the present and future generations." In the premises, it would amount to usurpation of the constitutional role of the Interested Party if the court were to entertain the prayers sought which effectively seek to invite the court into awarding the allowances or utilizing the services of the CPMU to perform a function constitutionally reserved for the interested party. In terms of prayer (b) of the Claim, the Respondent has vehemently denied that it has settled any terms relating to the payment of

allowances after the conciliation meetings. In the premises, there is no concurrence on an agreement for payment of any allowances. The Claimant has not produced any proof of the alleged agreement between the parties on any of the allowances. In terms of prayer (c), we are of the considered view that the Court cannot utilize the services of The Central Planning and Monitoring Unit (CPMU) under the Ministry of Labor to determine the dispute on the allowances without the input of the SRC. The CPMU was established under the Ministry of Labor to assist the industrial court (now Employment and Labor Relations Court) with policy review and research on the economic aspects of such disputes. In the TSC case, the Court held that the ELRC does not have jurisdiction over its own motion to award allowances which constitute a public expenditure, as such action would constitute a usurpation of the role of the SRC. The Court held as follows:- "I find therefore that it is only the relevant constitutional institutions particularly SRC which have the exclusive jurisdiction to deal with an increment of basic salary and allowances for public officers. The labour court in awarding teachers a basic salary increase of 50% - 60% and allowances, a task for which it had no institutional competence to handle, made a fundamental jurisdictional error by usurping the role of SRC and other actors, and the award having been made without jurisdiction, is a nullity and liable to be set aside on that ground alone. In summary, I find that the labour court had no jurisdiction to award the teachers a basic salary increment and allowances as it could not derive such jurisdiction from the consent order or from the Labour Relations Act or from the Constitution."

9. In the circumstances, the Court cannot proceed to award the allowances sought by the Claimant using the services of the CPMU without the input of the SRC. Further, the nature of collective bargaining requires the process to be voluntary and collaborative. In the TSC case the court held as follows;-the very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the

union…If the labour court fixes basic salary and allowances to be incorporated in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law."

The Interested party's submissions

26. Whether the interested party's advice in the subject cba was mandatory -It is not in dispute, that the Respondent herein is a public body. As was held by the Court in Kenya Chemical Workers Union v Agro Chemicals & Food Company Limited & another (Cause E004 of 2023) [2023] KEELRC 1674 (KLR) (13 July 2023) (Judgment), the content of bargaining in the public service is limited premised on the fact that terms and conditions of service in the public sector are governed by policies and codes of regulation that have statutory underpinning. In this case, therefore, the Respondent's extent of collective bargaining is fundamentally limited and constrained by its statutory nature and operational framework. As a State corporation established under statute and operating within the broader public service framework, the Respondent cannot engage in unfettered collective bargaining negotiations that disregard established regulatory mechanisms and oversight requirements. Consequently, the Respondent cannot proceed with collective bargaining negotiations or conclude agreements on remunerative items without adhering to the established regulatory framework, including obtaining the Interested Party's advice as constitutionally mandated. Any attempt to bypass these requirements would exceed the Respondent's legal capacity and compromise the integrity of the collective bargaining process in the public service context. The Court in the Agro-chemicals case further held that collective bargaining process where employees in the public sector are involved, ceases to be a bipartite and becomes instead, a tripartite process due to the mandatory and binding nature of the advisory by the Interested Party. Other than for reasons of

fiscal sustainability, the advisory by the SRC ensures uniformity in wages across the public service. The mandatory and binding nature of the Interested party's advice as pronounced by the Court of Appeal in the TSC -vs- KNUT case was subsequently affirmed and upheld by the Supreme Court in Muthuuri & 4 others v National Police Service Commission & 2 others (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR) (Civ). The Supreme Court held as follows: We wish to emphasize that in the decision of Teachers Service Commission (supra) which the appellants rely on, the Court of Appeal (Githinji, Koome (as she then was), Mwilu (as she then was), Azangalala & Odek, JJ.A.) was unanimous that no valid salary and/or benefit of a state or public officer, shall ensue from a process that ignores the role of SRC. The court held that the advice by SRC under Article 230(4)(b) of the Constitution is binding and that SRC has a role to play in collective bargaining agreements on matters relating to remuneration and benefits of public officers, including teachers. Emphasis added. In this case, therefore, the Respondent was under obligation comply with the following constitutional and regulatory frameworks prior to commencing negotiations with the Claimant on the 2017/2018 – 2020/2021 CBA: i. Article 230(4) as read together with Article 259 (11) of the Constitution which mandates that the Interested Party shall advise the national and county governments on the remuneration and benefits of all public officers. This constitutional provision creates a mandatory oversight mechanism that cannot be bypassed or ignored in collective bargaining processes involving public bodies such as the Respondent. ii. The Interested Party's Circular Ref. No. SRC/ADM/CIR/1/13 Vol. iv 28 dated 14th October 2019 which establishes binding guidelines requiring public bodies to seek prior advice on remuneration and benefits items before commencing negotiations. It is pertinent to note that while the Respondent did seek the Interested Party's advice vide letter Ref. KEMRI/CONF/5/66/TY dated 15th December, 2017, the Respondent fundamentally failed to adhere to the established procedural requirements for

obtaining such advice. As detailed in the Interested Party's response, the Respondent's submission was deficient and non-compliant with the existing guidelines on collective bargaining negotiations in the public service. Specifically, the Respondent failed to provide the following critical documentation and information as required under the Interested Party's Circular Ref. No. SRC/ADM/CIR/1/13 Vol. iv 28: 7 i. Copy of the current CBA being implemented for the unionized employees, which is essential for comparative analysis and ensuring continuity; ii. The Respondent's counter offer and justification for each recommendation on the financial items in the proposed CBA based on affordability, fairness and parity of treatment; iii. The existing salary structure for non-unionized staff indicating the date of the last review and numbers in post by grade, necessary for maintaining internal equity; iv. The Respondent's Audited Financial Statements for the last three financial years, critical for assessing financial capacity and sustainability; and v. Evidence of budgetary allocation from either internally generated funds or allocation by the National Treasury for implementation of the proposals, demonstrating affordability and sustainability of the recommendations if approved. The Interested Party, acting diligently and in accordance with established procedures, vide letter Ref. SRC/TS/KEMRI/3/17/7 (13) dated 24th January, 2018, formally requested the Respondent to provide the additional information, following which the Interested Party would be in a position to provide informed advice on the matter. Despite this clear procedural guidance and the lapse of over six years since the initial request, the Respondent has persistently failed to provide the requisite information and documentation necessary to enable the Interested Party to render informed and comprehensive advice on the proposed collective bargaining agreement. This failure demonstrates a fundamental breach of the Respondent's procedural obligations under the established regulatory framework. The Respondent having failed to comply with these constitutional and statutory requirements, and having proceeded

with negotiations without the mandatory prior advice from the Interested Party, any purported collective bargaining 8 agreement or negotiated benefits would lack legal validity and constitutional foundation.

Decision

27. It is not in dispute that the claimant union holds a valid recognition agreement with the respondent. The parties had a Collective Bargaining Agreement for the period 1st July 2013 to 30 June 2017. Since then, the claimant 's attempts to conclude a Collective Bargaining Agreement for the period 1st July 2017 to 30th June 2021 has hit a dead end. The parties attempted conciliation which was unsuccessful and a certificate of unresolved dispute was issued on 8 items of the draft CBA. The claimant stated thereafter the parties discussed and only 5 items remain outstanding. The respondent denied they agreed on any allowance after the conciliation and states it lacks capacity on its own to conclude the CBA and would need approval of the parent ministry, Ministry of Health, the office of the Attorney General , the national treasury, and the interested party.

28. The court gave the parties ample time to settle the dispute out of court. The recognition agreement between the parties gives right to the union to negotiate a CBA as stated in section 57 of the Labour Relations Act –'*57 (1)An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.''* In the instant case, the parties have already signed one CBA, which ended June 30th, 2017. The issue is the 2017 to 2021 CBA. The court finds the only real impediment of conclusion of the CBA is the lack of advisory by the interested parties which the superior courts held as

mandatory. The Court of Appeal in the TSC -vs- KNUT case was subsequently affirmed and upheld by the Supreme Court in Muthuuri & 4 others v National Police Service Commission & 2 others (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR) (Civ). The Supreme Court held as follows: '*We wish to emphasize that in the decision of Teachers Service Commission (supra) which the appellants rely on, the Court of Appeal (Githinji, Koome (as she then was), Mwilu (as she then was), Azangalala & Odek, JJ.A.) was unanimous that no valid salary and/or benefit of a state or public officer, shall ensue from a process that ignores the role of SRC. The court held that the advice by SRC under Article 230(4)(b) of the Constitution is binding and that SRC has a role to play in collective bargaining agreements on matters relating to remuneration and benefits of public officers, including teachers*.'' Emphasis added. The Claimant states they have only 5 items not agreed on, while the respondent states they are 8. There was no evidence of the agreement post the certificate of non-settlement of dispute by the conciliator, and the CBA being an agreement of the parties, the court finds the status is as at the time of the certificate of non-settlement of dispute. The court finds the 8 items under paragraph 4 of the claim are still outstanding.

29. The constitutional mandate of the interested party under the article 230(4) of the Constitution of Kenya to wit- '4) 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.'' It is obvious that the interested party is a mandatory participant in conclusion of a CBA where public money is involved and as held by the Court of Appeal and Supreme Court in decisions cited above.

30. The court arrested the issuance of judgment as the parties had indicated the interested party was to issue the advisory. This was not to be. The interested party submitted as follows- In this case, therefore, the Respondent was under obligation comply with the following constitutional and regulatory frameworks prior to commencing negotiations with the Claimant on the 2017/2018 – 2020/2021 CBA: i. Article 230(4) as read together with Article 259 (11) of the Constitution which mandates that the Interested Party shall advise the national and county governments on the remuneration and benefits of all public officers. This constitutional provision creates a mandatory oversight mechanism that cannot be bypassed or ignored in collective bargaining processes involving public bodies such as the Respondent. ii. The Interested Party's Circular Ref. No. SRC/ADM/CIR/1/13 Vol. iv 28 dated 14th October 2019 which establishes binding guidelines requiring public bodies to seek prior advice on remuneration and benefits items before commencing negotiations. 22.It is pertinent to note that while the Respondent did seek the Interested Party's advice vide letter Ref. KEMRI/CONF/5/66/TY dated 15th December, 2017, the Respondent fundamentally failed to adhere to the established procedural requirements for obtaining such advice. As detailed in the Interested Party's response, the Respondent's submission was deficient and non-compliant with the existing guidelines on collective bargaining negotiations in the public service. Specifically, the Respondent failed to provide the following critical documentation and information as required under the Interested Party's Circular Ref. No. SRC/ADM/CIR/1/13 Vol. iv 28: 7 i. Copy of the current CBA being implemented for the unionized employees, which is essential for comparative analysis and ensuring continuity; ii. The Respondent's counter offer and justification for each recommendation on the financial items in the proposed CBA based on affordability, fairness and parity of treatment; iii. The existing salary structure for non-

unionized staff indicating the date of the last review and numbers in post by grade, necessary for maintaining internal equity; iv. The Respondent's Audited Financial Statements for the last three financial years, critical for assessing financial capacity and sustainability; and v. Evidence of budgetary allocation from either internally generated funds or allocation by the National Treasury for implementation of the proposals, demonstrating affordability and sustainability of the recommendations if approved. The Interested Party, acting diligently and in accordance with established procedures, vide letter Ref. SRC/TS/KEMRI/3/17/7 (13) dated 24th January, 2018, formally requested the Respondent to provide the additional information, following which the Interested Party would be in a position to provide informed advice on the matter. Despite this clear procedural guidance and the lapse of over six years since the initial request, the Respondent has persistently failed to provide the requisite information and documentation necessary to enable the Interested Party to render informed and comprehensive advice on the proposed collective bargaining agreement. This failure demonstrates a fundamental breach of the Respondent's procedural obligations under the established regulatory framework. The Respondent having failed to comply with these constitutional and statutory requirements, and having proceeded with negotiations without the mandatory prior advice from the Interested Party, any purported collective bargaining 8 agreement or negotiated benefits would lack legal validity and constitutional foundation.'' The Court of appeal in TSC V Knut as upheld by the supreme court Muthuuri & 4 others v National Police Service Commission & 2 others (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR) (Civ). The Supreme Court held as follows:We wish to emphasize that in the decision of Teachers Service Commission (supra) which the appellants rely on, the Court of Appeal (Githinji, Koome (as she then was), Mwilu (as she then was), Azangalala & Odek, JJ.A.) was unanimous that no valid salary and/or benefit of a state or public officer, shall ensue from a process that ignores the role of SRC. The court

held that the advice by SRC under Article 230(4)(b) of the Constitution is binding and that SRC has a role to play in collective bargaining agreements on matters relating to remuneration and benefits of public officers, including teachers. It is thus apparent that the advisory of the interested party is mandatory and that no other agency can usurp its powers including the CPMU.

31. The interested party has explained to the court the reason why it was unable to issue the advice on the CBA to the respondent and specifically in response to the fact that the Respondent failed to provide the following critical documentation and information as required under the Interested Party's Circular Ref. No. SRC/ADM/CIR/1/13 Vol. iv 28: 7 –

i. Copy of the current CBA being implemented for the unionized employees, which is essential for comparative analysis and ensuring continuity;
ii. The Respondent's counter offer and justification for each recommendation on the financial items in the proposed CBA based on affordability, fairness and parity of treatment;
iii. The existing salary structure for non-unionized staff indicating the date of the last review and numbers in post by grade, necessary for maintaining internal equity;
iv. The Respondent's Audited Financial Statements for the last three financial years, critical for assessing financial capacity and sustainability; and
v. Evidence of budgetary allocation from either internally generated funds or allocation by the National Treasury for implementation of the proposals, demonstrating affordability and sustainability of the recommendations if approved.

32. The court, in the circumstances, finds no fault on the interested party but the respondent for the delay in conclusion of the CBA.

Whether the claimant is entitled to relief sought

33. The court lacks the power to order the registration of the CBA on agreed issues without the consent of the interested party, as that is unconstitutional(Article 230(4), as held by the superior courts (TSCV KNUT and Muthuuri case above).

34. The delayed registration of CBA since June 2017 amounts to unfair labour practice under Article 41(5) of the constitution which provides –'*(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.'* The failure by the respondent to comply with the requirements of the interested party so as to be issued with advice on the CBA amounts to a violation of Article 41(5) of the Constitution as the parties have a valid registration agreement. The court cannot leave the claimant without a remedy having found there is the constitutional violation. The court makes the following orders to enforce the right-

a. The respondent in 30 days to provide the interested party with the following documents stated in paragraph 9 of the statement of defence by the interested party –

i. Copy of the current CBA being implemented for the unionized employees, which is essential for comparative analysis and ensuring continuity;

ii. The Respondent's counter offer and justification for each recommendation on the financial items in the proposed CBA based on affordability, fairness and parity of treatment;

iii. The existing salary structure for non-unionized staff indicating the date of the last review and numbers in post by grade, necessary for maintaining internal equity;

iv. The Respondent's Audited Financial Statements for the last three financial years, critical for assessing financial capacity and sustainability; and

v. Evidence of budgetary allocation from either internally generated funds or allocation by the National Treasury for implementation of the proposals, demonstrating affordability and sustainability of the recommendations if approved.

b. The interested party is to issue the advice on the proposals in the draft CBA within 30 days of receipt of the documents as per paragraph 9 of their response and outlined above.

c. The parties to proceed and conclude and sign the CBA within 30 days of receipt of the advice of the interested party.

35. Each party to bear its own costs in the claim in the spirit of promoting harmonious industrial relations.

36. It is so ordered.

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DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY,2026.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Kimani h/b Nyabena

Respondent: Wesonga

Interested party – Muthomi h/b Murakaru