



**National Environment Management Authority v Wabwoto & 3 others;  
Law Society of Kenya & 2 others (Interested Parties) (Civil Appeal  
E276 of 2020) [2025] KECA 276 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 276 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E276 OF 2020  
WK KORIR, GV ODUNGA & PO KIAGE, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... APPELLANT**

**AND**

**EDWARD K. WABWOTO ..... 1<sup>ST</sup> RESPONDENT**

**ERASTUS GITONGA ..... 2<sup>ND</sup> RESPONDENT**

**CICILIA W. GITHAIGA ..... 3<sup>RD</sup> RESPONDENT**

**JUDITH N. KITHINJI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**SALARIES & REMUNERATION COMMISSION ..... INTERESTED PARTY**

*(Being an Appeal from the Judgment and Order of the Employment and Labour Relations Court, Nairobi (B Ongaya, J.) delivered on 10th April, 2019 in ELRC Cause No. 547 of 2018)*

**JUDGMENT**

1. This appeal arises from a judgement by the Employment and Labour Relations Court, Nairobi in ELRC Cause No. 547 of 2018. The said cause was instituted by the respondents against the appellant on 16<sup>th</sup> April 2018.
2. The respondents claim was: that they were duly qualified advocates of the High Court of Kenya running their own private practice; that they were recruited from the private sector by the appellant



as legal officers on full time basis on permanent and pensionable terms of service; that the appellant, a public body as defined under section 3 of the *Interpretation and General Provisions Act* and Article 259 of *the Constitution* of Kenya, is bound by the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016; that by virtue of Article 259 of *the Constitution* and section 2 of the *Public Officer Ethics Act* the appellants were public officers; and that Public Service Commission Human Resource Policy, 2016, the Public Service circulars of 11<sup>th</sup> June 2010 and 9<sup>th</sup> October 2012 and other prevailing public service practice applicable to the legal professionals in the public service applied to their service in the appellant's establishment; and that the 1<sup>st</sup> to 4<sup>th</sup> respondents also served the appellant as public prosecutors for purposes of cases arising under the Environmental Management and Co-ordination *Act (No.8 of 1999)* having been appointed and duly gazetted by the Director of Public Prosecutions under section 85 of the *Criminal Procedure Code* and the *Office of the Director of Public Prosecutions Act* (ODPP Act) as per gazette notice No. 2181 of 4<sup>th</sup> April 2014 effective from 18<sup>th</sup> March 2014.

3. It was expounded: that by circular No. MSPS.10/145A VOL. VII/40 dated 11<sup>th</sup> June 2010, titled "rationalization and harmonization of the public service legal subsector remuneration", issued by Titus M. Ndambuki, the Permanent Secretary in the Office of the Prime Minister and Ministry of State for Public Service addressed to the Solicitor General the said Permanent Secretary conveyed the information that the Permanent Public Service Remuneration Review Board had agreed to the enhancement of Non-Practice Allowance as follows: SL1 – SL4 Kshs. 15, 000.00 per month; SL5 – SL7 Kshs. 20, 000.00; SL 8 Kshs. 40, 000.00 which rates were applicable from 1<sup>st</sup> July 2010 and necessary action was to be taken; that circular No. MSPS.10/5A VOL.III/(78) dated 9<sup>th</sup> October 2012 was similarly issued by the same Titus M. Ndambuki, addressed to the Solicitor General, the Director of Public Prosecutions, and the Acting Permanent Secretary, Ministry of Justice, National Cohesion and Constitutional Affairs in which it was disclosed that following the recommendation of the Salaries and Remuneration Commission, approval was thereby granted for legal personnel in State Law Office, Office of the Director of Public Prosecutions and Ministry of Justice, National Cohesion and Constitutional Affairs to be paid State Counsel/Prosecutorial Allowance with effect from 1<sup>st</sup> October 2012 at the following rates, SLG1 – SLG 6 Kshs. 30, 000.00; SLG7 – SLG 8 Kshs.40, 000.00; and SLG 9 Kshs.50, 000.00; and that the grading by the appellant is equivalent to State Law grading thus E5 equates to SL7 OR SLG7; E6 equates to SL6 and SLG6; and E7 equates to SL5 or SLG5 and to the civil service grading thus, E5 equates to Job Group P; E6 equates to Job Group N; and E7 equates to Job Group M.
4. The respondents' case was that the appellant acted unlawfully and contrary to the principles of fair labour practices and equality in denying the respondents their lawful entitlements as set out above. They prayed for judgment against the appellant
  - a) A declaration that the appellant's action of not paying the 1st to 5th respondents a non-practice allowance was unlawful, wrongful and unfair.
  - b) A declaration that the appellant's action of not paying the 1st to 5th respondents a prosecutorial allowance was unlawful, wrongful and unfair.
  - c) A declaration that the appellant subjected the respondents to discriminatory and unlawful labour practice by denying them the subject allowances.
  - d) In regard to non-practice allowance the respondents computed their entitlements thus: 1st respondent Kshs. 2,060,000.00; 2nd respondent Kshs. 1,760,000.00; 3rd respondent Kshs. 1,900,000.00; 4th respondent Kshs. 860, 000.00; 5th respondent Kshs. 540, 000.00.



- e. The appellant to pay non practice allowance accruing to the respondents from the date of filing the claim and for the duration of service of the respondents at the rate to be determined by applicable government circulars or otherwise as may be set by a lawful competent authority.
  - f. In regard to prosecutorial allowance the 1<sup>st</sup> to 4<sup>th</sup> respondents prayed that they were entitled thus: the 1<sup>st</sup> respondent Kshs.1, 830, 000.00; the 2<sup>nd</sup> respondent Kshs.1, 470, 000.00; the 3<sup>rd</sup> respondent 1, 470, 000.00; and 4<sup>th</sup> respondent Kshs. 1, 440, 000.00.
  - g. The appellant to pay prosecutorial allowances accruing to the 1<sup>st</sup> to 3<sup>rd</sup> respondents from the date of filing the claim and for the duration of their service. The rate of prosecutorial allowance to be determined by applicable government circulars or otherwise as may be set by a lawful competent authority.
  - h. The above sums to earn interest at court rates.
  - j. Costs of the cause.
  - j. Any other order that the court may deem fit and just to issue.
5. In its defence seeking the dismissal of the respondents' claim, the appellant contended that: there was no dispute that the appellant employed the respondents in its establishment to perform professional legal services on grades as pleaded by the respondents; that the appellant is bound by Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 but, only as far as the regulations are consistent with the respondent's Human Resource Policy and Procedures Manual; that the salaries and benefits of public officers are regulated by the Salaries and Remuneration Commission since the respondents were public officers under Article 259 of *the Constitution*; that the circulars in issue and as referred to by the respondents did not bind the appellant because they were never addressed to the appellant; that the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 did not provide for the allowances claimed by the respondents; that the respondents were not prosecutors employed under the Office of the Director of Public Prosecutions albeit being gazetted by the Director of Public Prosecutions to prosecute offences under the *Environmental Management and Co-ordination Act* No.8 of 1999; that the circular Ref. No. OP.CAB.2/23A of 2011 by Amb. Francis K. Muthaura, Permanent Secretary, Secretary to the Cabinet and Head of the Public Service stopped review of salaries in public service to pave way for the constitutionally and newly established Salaries Remuneration Commission to perform its constitutional mandate in that regard; that the respondents had not sought and obtained the advice of the Public Service Commission about the allowances in issue and their respective claims, thus the suit was premature; that the equivalent of job groups as urged for the respondents was unfounded since job grading is unique to the appellant and cannot be equated to the state law grading; that the appellant had not acted unlawfully and contrary to the principles of fair labour practices as envisaged in Article 41 of *the Constitution*; that the allowances were not due to the respondents as prayed; and that the respondents were seeking to be unjustly enriched yet they had notoriously been practising as legal practitioners outside their duties and functions as the respondent's legal personnel and prosecutors.
6. In reply to the response, the respondents stated: that the appellant's Human Resource Manuals provided for payment of Non-practicing allowance and they were entitled to it; that the legal subsector in the circular of 11<sup>th</sup> June 2010 clearly covered the respondents' employment as it was not exclusive to State Law establishment; that the circular by the Head of Public Service issued in 2011 only operated to put a caveat on review of existing salaries and allowances and not the implementation of the existing ones such as the circular on non-practicing allowance which had been in place since 2009; that the



denial of the non-practice allowance and prosecutorial allowances was discriminatory, malicious and an infringement and violation of their constitutional rights; that it was the obligation of the appellant and not the respondents to seek and obtain the advice of the Public Service Commission and the respondents could not bypass the appellant's management to do so; that the job structure exhibited by the appellant was a mere recommendation and which had never been implemented since the respondents' job groups were as per their exhibited pay slips; that despite request by the respondents the appellant's management and Board deliberately refused the approval of the payment of the allowances; and that the respondents were exclusively offering legal services in the public service as employed by the respondent.

7. After considering the matter, the learned Judge identified that issues for determination as: whether the appellant was bound by the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016, and the two circulars providing for the prosecutorial allowance and the non-practising allowance; whether the respondents were entitled to grading equivalents as urged for them in their computations for the claimed non- practicing and prosecutorial allowances; and whether the denial of the two allowances by the appellant as claimed for by the respondents amounted to discrimination and unfair labour practices.
8. On the issue whether the appellant was bound by the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016, and the two circulars providing for the prosecutorial allowance and the non-practising allowance, the learned Judge found: that pursuant to section 3 of the [Public Service Commission Act](#) No.10 of 2017 the Act applies to all public bodies and persons holding office in the public service subject to Articles 155(3) (a), 158(3), 234(2) (a), 234(3) and 252 (1) of [the Constitution](#) and section 28 of the [Kenya Defence Forces Act](#) No. 25 of 2017; that the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 is binding upon the appellant; that the appellant is not one of the entities excluded from the Commission's constitutional functions and powers; that whereas the appellant is a body corporate as established under the [Environmental Management and Co-ordination Act](#) No.8 of 1999, in exercise of its statutory functions and powers particularly by recruiting, appointing, promoting, disciplining, removing public officers and any other human resource function, it is strictly bound to comply with the law, regulations, and policies as may be in force and as issued or promulgated by the Public Service Commission (the Commission) in the exercise of its constitutional public service functions and powers; that the appellant's exercise of human resource or employment functions and powers as envisaged in section 16 and other provisions of the [Environmental Management and Co-ordination Act](#) No.8 of 1999 must be construed and brought to conformity with the constitutional functions and powers of the Commission as amplified in the provisions of the [Public Service Commission Act](#), 2017; that the appellant and other public bodies or authorities falling under the Commission's constitutional authority are bound to undertake their human resource functions in accordance with the provisions of the [Public Service Commission Act](#), 2017 and the public service regulations and policies as may be put in place by the Commission from time to time; that in so far as the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 was issued by the Commission in exercise of its constitutional public service functions and powers, its provisions were binding upon the appellant and it was misconceived for the appellant to take the position that the Commission's policies and regulations were subject to its Board's human resource decisions; that in undertaking its human resource functions, the appellant's Board must ensure that its decisions are aligned to the general policies and regulations and the general law governing the public service and as per the general public service regulations, policies, decisions and directives as issued by the Commission from time to time; that where in specific cases the appellant may experience difficulties in implementing such



general public service regulations, policies, decisions and directives as may have been issued by the Commission, it is the respondent's obligation to seek and obtain from the Commission such specific variation or clarifications and alterations as may be appropriate; that the appellant is bound accordingly and must at all times align its human resource functions, powers, policies, and decisions to the general public service provisions as provided in *the Constitution*, the *Public Service Commission Act*, 2017 and the regulations and policies issued by the Commission from time to time.

9. The learned Judge further held: that the circular of 11<sup>th</sup> June 2010 on payment of non-practicing allowance to employees in the legal subsector of the public service applied to the appellant because it clearly applied to the entire public service; that the circular dated 9<sup>th</sup> October 2012 applied to prosecutors and since the 1<sup>st</sup> to 4<sup>th</sup> respondents were gazetted as prosecutors, there was no established and lawful reason why the circular could not apply to them; that the circular of 9<sup>th</sup> October, 2012 applied to all lawyers in the public service and for so long as the respondents established that they were in public service with similar professional legal duties, they would be entitled to the allowance even without their being gazetted as prosecutors; that the use of "prosecutorial allowance" was meant to simply designate the allowance and not to have it paid exclusively to those involved in criminal prosecutions; and that the circulars were binding upon the appellant and if the appellant failed to specifically provide for the terms of the circulars in its contracts of service, then the Court had jurisdiction to correct the unjustified omission.
10. It was found: that that the Salaries and Remuneration Commission's role in the matter was already spent since the circular of 11<sup>th</sup> June 2010 on non practicing allowance was issued with approval of the Permanent Public Remuneration Review Board (which was the predecessor of the Salaries and Remuneration Commission) and the circular of 9<sup>th</sup> October 2012 was issued upon recommendation of the Salaries and Remuneration Commission; that in any event, and as relates to the circular of 11<sup>th</sup> June 2010, section 6 of the 6<sup>th</sup> Schedule on Transitional and Consequential Provisions to *the Constitution* of Kenya 2010, the rights conferred upon persons serving in the legal subsector of the public service like the appellant could not have lost the accrued rights under the circular of 11<sup>th</sup> June 2010 and consequential to the coming into operation of *the Constitution* of Kenya, 2010 which established the Salaries and Remuneration Commission and the government's obligations thereunder subsisted and the appellant was bound accordingly; that the appellant's Human Resources and Procedures Manual and clause 8.25 provided that the appellant would pay non- practicing allowance to those who are eligible as per government circulars hence the two circulars were clearly contemplated under that provision and they must apply accordingly; that clause C.23 at page 55 of the Public Service Commission Human Resource Policy, 2016 provided a clear position that the government would determine other allowances from time to time as had been done in the two circulars in issue; and that there was no reason that would prevent the two circulars from being applicable to the respondents' service in the appellant's establishment.
11. It was found by the learned Judge: that since under section 10(1) of the *Employment Act*, 2007, particulars of a written contract of service include job description and remuneration applicable, ranks, grades or job groups, they are clearly part of the job description and applicable remuneration like in the instant case where the allowances were pegged on the grading by the circulars; that the appellant failed to discharge that statutory burden in section 10(7) of the *Employment Act*, 2007 which provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer; that in the absence of any other material before the Court on the equivalency of the grades, the respondents had established that, on a balance of probability, the equivalency of grades as urged by them applied; that under section 16(3) and(4) of



the *Employment Act*, 2007, the court has power to determine and confirm particulars which ought to have been included in the respondents' respective contracts of service hence the appellant could not defeat the respondents' prayers by simply arguing that despite the applicable circulars and allowances, the same cannot be conferred by reason of the appellant's own failure to include the particulars in the individual contracts of service as envisaged in the circulars; and that in any event the circulars were of general application across the public service and the failure by the appellant to specifically include the allowances in the individual contracts did not defeat the respondents' case because the allowances were automatically part of their terms and conditions of service.

12. In addition, the court found: that the function of creating and abolishing offices in the public service such as in the appellant's establishment is constitutionally vested in the Public Service Commission and section 25 of the *Public Service Commission Act*, 2017 clearly required the appellant to move the Commission to establish the levels of grading and designation of the offices the respondents held, if there was any doubt in that regard; that the appellant could not therefore be allowed to turn around and benefit from its own failure or shift to the respondents its clear statutory duty; that the respondents could not be faulted because section 98 of the Public Service Commission Act, 2017 provides that the Commission may, by notice in the gazette assign the job groups referred to in the Act to public officers in public bodies which do not use such job groups for the proper application of the Act to those offices; that in any event, a board paper on the subject had been tabled before the respondent's Board as per endorsement on the exhibited internal memo of 26<sup>th</sup> April 2011 showing that the only reason the Board failed to approve the paper was because the Board considered that the circular by the Head of Public Service stopped review of salaries and allowances until the coming into operation of the Salaries and Remuneration Commission as had been established under *the Constitution* of Kenya, 2010 and that the allowances had equally been affected by that circular; that the judgment be served upon the Public Service Commission to consider issuing the relevant gazette notice under section 98 of the *Public Service Commission Act*, 2017 to harmonize and provide for equivalency of job groups, grades, and ranks applicable in the public bodies under its constitutional and statutory functions and powers, and in view of the serious issues which emerged in the case and to consider issuing the gazette notice not later than 1<sup>st</sup> February 2020.
13. Regarding the issue whether the denial of the two allowances by the appellant as claimed for by the respondents amounted to discrimination and unfair labour practices, it was held: that the respondents failed to establish discrimination on any of the grounds listed in Article 27 of *the Constitution* or section 5 of the *Employment Act*, 2007; that they however established that they have been denied equality of treatment as envisaged in section 5 of the *Employment Act*, 2007 and as per the cited ILO conventions and that the failure to pay them the two allowances amounted to adverse or disadvantageous treatment that was not equal to the other public officers holding similar offices and to whom the two circulars providing for the two allowances applied and had been implemented; that the respondents had established that the appellant subjected them to unequal pay by denial of the two allowances because persons holding similar positions in the public service continued to enjoy the allowances; that based on the case of *Louw v Golden Arrow Bus Services (Pty) Ltd* [1999] ZALC 166, the denial of the two allowances amounted to unequal treatment and therefore unfair discrimination that was founded upon arbitrary or unreasonable grounds; that on the authority of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR in which the case of *Copper Pass Ltd v Lawton* [1977] Q.B 852 was cited, the respondents performed duties of equal value like those public officers referred to in the circulars and that the circulars directly applied to the respondent because the circulars applied to all such officers serving in the legal subsector of the public service; that the appellant failed to show that the circulars had not been intended to apply to the respondents yet the intention in the circulars was that the allowances applied to all in the subsector towards harmonisation of their terms of service; and



that while the appellant urged that it had unique terms of service applicable to the respondents, the appellant did not suggest or show that such terms of service included or provided for the element of the two allowances as had been introduced by the two circulars or the allowances had been taken into account one way or the other.

14. In his disposition the learned Judge: declared the appellant's action of not paying the respondents a non-practice allowance unlawful, wrongful and unfair; declared that the appellant's action of not paying the respondents a prosecutorial allowance unlawful, wrongful and unfair; declared that the appellant subjected the respondents to unequal treatment amounting to discriminatory and unlawful labour practice by denying them the subject allowances; ordered the appellant to pay the 1<sup>st</sup> to 5<sup>th</sup> respondents non-practice allowance in the sums of Kshs.2, 060, 000.00, Kshs. 1, 760, 000.00; Kshs.1, 900, 000.00; Kshs. 860, 000.00; and Kshs. 540, 000.00 respectively; directed the appellant to pay the respondents further non practice allowance accruing from the date of filing the claim and for the duration of service of the respondents at the rate set by applicable government circulars or otherwise as may be set by a lawful competent authority; ordered the appellant to pay to the 1<sup>st</sup> to 4<sup>th</sup> respondents prosecutorial allowance in the sums of Kshs.1, 830, 000.00; Kshs.1, 470, 000.00; Kshs.1, 470, 000.00 and Kshs. 1, 440, 000.00 respectively; ordered the appellant to pay further prosecutorial allowances accruing to the 1<sup>st</sup> to 3<sup>rd</sup> respondents from the date of filing the claim and for the duration of their service at a rate applicable by government circulars or otherwise as may be set by a lawful competent authority; directed that the amounts due to the respondents be paid by the appellant to the respondents not later than 1<sup>st</sup> August 2019 failing which interest at Court rates would apply from the date of the judgment until full payment; directed that a copy of the judgement be served upon the Public Service Commission, within 7 days from the date of the judgment in order for the Commission to consider issuing, not later than 1<sup>st</sup> February, 2020, the relevant gazette notice under section 98 of the Public Service Commission Act, 2017 to harmonize prevailing grading levels and to provide for equivalency of job groups, grades, and ranks applicable in the public service or bodies under its constitutional and statutory functions and powers; and directed the appellant to pay the costs of the suit.
15. When the appeal was called out for hearing on the Court's virtual platform on 22<sup>nd</sup> October 2024, learned counsel, Mr Brian Okech, appeared for the appellant, learned counsel, Mr Geoffrey Mahinda, appeared for the respondents, learned counsel, Mr Mwangi, appeared for the 1<sup>st</sup> interested party, learned counsel, Mr Eredi, appeared for the 2<sup>nd</sup> interested party and learned counsel, Mr Sitienei appeared for the 3<sup>rd</sup> interested party. These parties referred to as "interested parties" should, of course, have been named as respondents in the appeal. Although the appellant, the respondent and the third interested party had filed their submissions which they highlighted, the 1<sup>st</sup> interested party submitted orally in opposition to the appeal, while the 2<sup>nd</sup> interested party made oral submissions supporting the appeal.
16. The appellant has condensed its 11 grounds of appeal into 4 issues, namely: whether the trial court had the jurisdiction to award the respondents the non-practice allowance and prosecutorial allowance as prayed for in the claim; whether the respondents are officers under the Office of the Director of Public Prosecutions (ODPP); whether the trial court had the jurisdiction to equate the job group of the respondents; and whether the appellant discriminated against the respondents.
17. The appellant's submissions as highlighted by Mr Okech were: that the non-practice and prosecutorial allowance claimed by the Respondents was pursuant to various Human Resource Manuals subject to approval through the relevant government circulars which had not been done; that although in the exercise of its mandate pursuant to Article 230(4) and section 11 of the Salaries and Remuneration Act No. 10 of 2011, as espoused in the case of Kenya Union of Domestic Hotels, Education and Allied Workers Union (KUDHEHIA workers) v Salaries and Remuneration Commission & Attorney



General High Court Petition No. 294 of 2013, the Salaries and Remuneration Commission (SRC) has made numerous promises to set out the applicable rates, it is yet to do so; that in establishing the SRC, the drafters of *the Constitution*, 2010 did not envisage the role regarding salaries and remuneration being played by the court hence the SRC should be allowed to exercise its statutory role; that on the authority of this Court's decision in *Narok County Council v Trans Mara County Council* [2000] 1 EA 161 and *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR, the trial court erred in purporting to fix rates of allowance when none had been approved by the relevant statutory authority; that on the authority of the decision in *Union of National Research Institutes Staff of Kenya v Kenya Agricultural and Livestock Research Organization* [2020] eKLR, the Court ought to take into account the fact that the appellant, being a state organ, operates on budgetary allocations hence the allowances sought by the respondents are channelled through budgetary allocations, which if not approved by the SRC, the appellant would not be able to pay; that similarly, the Public Service Commission did not have any approved circular with regard to the non-practice allowance or prosecutorial allowance thus by backdating payment of allowances whose applicable rates were not in place, the trial court usurped the powers of the SRC and based on the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the court had no jurisdiction to do so; that the learned Judge erred in law and fact by holding that the respondents were entitled to prosecutorial allowance pursuant to gazette notices dated 9<sup>th</sup> October 2012 issued by the Office of the Director of Public Prosecutions (ODPP) for its own officers yet the respondents are not officers recognized under the said circular; that the gazette Notice dated 4<sup>th</sup> April 2014, gazetting some of the respondents as prosecutors under the Environment Management and Co-ordination *Act (No. 8 of 1999)* only conferred prosecutorial powers upon the respondents and did not make them officers entitled to allowances reserved for officers of the ODPP since the nature of the work and work load of the officers of the ODPP and respondents are completely different; that the appointment letters of the respondents emanated from the appellant which also paid their salaries and therefore the appointment of a person as a public prosecutor does not make him an officer of the ODPP but merely "confers prosecutorial powers" upon that person hence the trial court misdirected itself in law and fact in finding that the respondents were officers of the ODPP entitled to prosecutorial allowance based on rates awarded to officers of the ODPP without any directions from the SRC; that the learned Judge erred in law and fact by holding that the respondents were entitled to non-practicing allowance and yet the rates were not ascertained as per grades of the respondents and in issuing contradictory orders that the Commission harmonizes the prevailing grade levels and provide for equivalency of job groups, grades and ranks applicable in the public service yet pursuant to Articles 233 and 234 of *the Constitution* and section 98 of the *Public Service Commission Act*, the Commission acts as the human resource for the government; that in ordering that payment be made as prayed by the respondents yet the Job grades entitled to the allowance was yet to be determined, the trial court usurped the mandate of the SRC and the Commission in proceeding to equate the job group for the award of the allowances; that the Human Resource Policy and Procedural Manual for the Public Service Commission 2016 only provides for salary job grading on promotion and is silent on allowances thus, on the authority of the case of *Narok County Council v Trans Mara County Council* (supra) the trial court could not, on its own motion, purport to equate job groups as proposed by the respondents when calculating the non-practice allowance; that since the rate for both the non-practice and prosecutorial allowances was yet to be approved, the finding by the court that the actions of the appellant for not paying the said allowances was discriminatory, unlawful, wrongful and unfair was unfounded and occasioned a miscarriage of justice; and that this Court should take judicial notice that the SRC has since commenced steps to harmonize the allowances payable to state legal offices. We were urged to allow the appeal with costs.



18. Mr Eredi, in his oral submissions stated: that while it was not his contention that the respondents were not entitled to allowances, such allowances can only be set by the appellant's board; that the respondents cannot claim allowances granted to other prosecutors since the respondents were legal officers and not prosecutors; that their prosecutorial powers were only limited to their roles; that while the respondents were public officers, they were not in the mainstream Public Service Commission hence their terms were determined by the appellant's board; that in any case the said allowances had not been determined by the SRC and the appeal ought to be allowed and the judgement set aside.
19. The 3<sup>rd</sup> interested party's submissions, as highlighted by Mr Sitienei, were: that it was not a party to the proceedings before the trial court thus it was not afforded an opportunity to present its case on the matter; that Article 230(4) (b) of *the Constitution* mandates it to advise the national and county governments on remuneration and benefits of all other public officers while the Salaries and Remuneration Commission (SRC) Act, 2011 vests it with additional powers and functions; that by virtue of the appellant being a public body and the respondents being public officers, its mandate as set out under Article 230(4)(b) of *the Constitution* extended to advising the appellant on the respondents' remuneration and benefits including the allowances the subject matter of the suit; that the respondents fell squarely within its mandate by virtue of being public officers in the employ of the appellant; that the payment of remuneration and benefits to the respondents is made out of public funds which can only be made upon receipt of its advice which, pursuant to Article 259(11) of *the Constitution* as interpreted by this Court in Civil Appeal No.196 of 2015 - Teachers Service Commission TSC v Kenya National Union of Teachers (KNUT) and the Supreme Court in Muthuuri & 4 Others v National Police Service Commission & 2 Others (Petition No. 15 (E022) of 2021) [2023] KESC 52(KLR), is mandatory; that based on Black's Law Dictionary, 9<sup>th</sup> Edition, the respondents did not prove that non-payment of prosecutorial and non-practicing allowances by the appellant was unlawful, wrongful and unconstitutional or discriminatory; that on the authority of Civil Appeal No. 22 of 2015 - Mohammed Fugicha v Methodist Church in Kenya (2016) eKLR and Federation of Women Lawyers (FIDA) Kenya & 5 Others v AG & Another (2011) eKLR, differential treatment where there exist an intelligible differentia to warrant such treatment does not amount to discrimination; that on the authority of Mbona v Shepstone & Wylie [2015] ZACC11 and Josphat Koli Nanok & Another vs Ethics & Anti-Corruption Commission [2018] eKLR, allegations of discrimination must be proved the onus of proving it lying on the person alleging and such violation must be real, with real implications on real lives of the people. We were urged to reappraise the facts before us, draw own inferences and find that the respondents did not prove discrimination against them and further that the trial court erred in holding that the respondents had been treated in a discriminatory manner.
20. It was further submitted: that the learned judge erred in failing to consider and find that the 3<sup>rd</sup> interested party was a necessary party in the determination of the issue in controversy before it and that the proceedings and the orders issued directly touched on its mandate which was contrary to Article 50 of *the Constitution* as confirmed in Doa Da Tented Camps & Lodges Limited v Jubilee Insurance Co. of Kenya Ltd [2021] eKLR; that the mandate vested upon it under Article 230(4)(b) of *the Constitution*, is exclusive and can only be interfered with by a court in exceptional circumstances as held by this Court in TSC Case (supra); that on the authority of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and Kenya Youth Parliament & 2 Others v AG & Another, Constitutional Petition No. 101 of 2011 there is need for judicial restraint in matters that have been reserved for other bodies by *the Constitution*; that the Supreme Court in Muthuuri & 4 Others vs National Police Service Commission & 2 Others (Petition No. 15 (E022) of 2021) [2023] KESC 56(KLR) re-emphasized the role and mandate of the 3<sup>rd</sup> interested party in setting and advising on the remuneration and benefits for state and public officers; that it has never advised on the award of non-practicing and prosecutorial allowances to the respondents or the quantum thereof, thus in



awarding the allowances and ordering payment to the respondents, the trial court usurped its mandate; that the judgment if not set aside will have an impact on the total public compensation bill and a ripple effect across the public service in addition to distorting the remuneration and benefits structures in the public service. We were urged to allow the appeal with costs.

21. In opposition, the respondents in their submissions, as highlighted by Mr Mahinda were: that based on the evidence, the trial court found that the appellant was not an entity excluded from the Public Service Commission's constitutional functions and power and was thus bound by the circulars; that the appellant did not tender evidence of any other applicable grading structure thus it is bound by its pleadings and cannot now blame the trial court for considering the grading structure which was uncontroverted; that based on the holdings in *Mellen Mbera v James Theuri Wambugu* [2020] eKLR citing *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* (2014) eKLR parties are bound by their pleadings and on the authority of the case of *Daniel Kibet Mutai & 9 Others v AG* [2019] eKLR uncontroverted evidence is tantamount to an admission; that the trial court was right in finding that the appellant denied the respondents the two allowances that were payable to others in the public service performing similar work or work of equal value; that the trial court was guided and aptly applied the law, in particular Article 27(1) of *the Constitution*, that every person is equal before the law and has the right to equal protection and equal benefit of the law and section 5(1) of the *Employment Act*, as confirmed in *Louw v Golden Arrow Bus Service (Pty) Ltd* [1999] ZALC 166 to promote equality of opportunity in employment so as to eliminate discrimination; that the trial court soundly found that the respondents were advocates employed in the Public Service to preform duties of public Officers, to whom the circulars in issue applied were entitled to the allowances like the other legal practitioners in the public service for whom the circulars have been implemented; that the rate being unascertainable, the same were set out in the public service circulars dated 11<sup>th</sup> June 2010 and 9<sup>th</sup> October 2012 which were payable to job groups equivalent to those held by the respondents; that the appellant neither tendered any contrary tabulations nor offered any other different rate that was applicable and therefore the respondents' claim in this regard was uncontroverted; that the finding of the trial court in order (e) and (g) does not in any way mean that the rate is or was not ascertainable as the court took into consideration the fact that applicable rate and/or circular from the day of filing the claim going forward through the "undetermined tenure" of the respondents service was not to be governed by any new circular and/or authority as may be issued going forward; that the court could not set contractual terms for parties on their relationship going forward noting that nothing barred the appellant from formulating a new policy and/or circular in accordance with the law on the payment of these allowances; that the trial court was right in finding that the respondents were entitled to prosecutorial allowances on the basis of the circular applicable to all prosecutors; that the circular was properly issued by the Permanent Secretary, Ministry of State for Public Service to ODPP as the constitutional office concerned with prosecutions under Article 157 of *the Constitution*; that it is not true that the two allowances were backdated as the court only granted what was pleaded; that the trial court correctly found the circular dated 11<sup>th</sup> June 2010 approved by the Permanent Public Remuneration Review Board (predecessor of the SRC) was issued on the recommendation of the SRC hence it was incorrect to contend that the SRC had not sanctioned the rates applied in payment of the allowance; that since the respondents are not state officers under Article 260 of *the Constitution* but are merely public officers, the holding in the case of *Kudhedhia Workers v SRC & AG* (supra) was distinguishable; that therefore the role of the SRC is not to set and review their salaries abut merely advisory on the remuneration and benefits of public officers; and that the rates were not in dispute as they were clearly outlined in the legal government circulars and policy documents and in any case, if there was a dispute, it was perpetrated by the appellant who refused and/or ignored to find a solution if it considered the policy on allowances problematic. We were urged to find that the appellant failed to demonstrate any error or misdirection on the part of the trial court and to dismiss the appeal with costs.



22. Mr Mwangi for the 1<sup>st</sup> interested party, as already indicated associated himself with the submissions of Mr Mahinda.
23. We have considered the record placed before us as well as the submissions of learned counsel. This being a first appeal, we are cognisant of the principles enunciated in *Selle v Associated Motor Boat Co.* [1968] EA 123. Although the hearing before the High Court proceeded by way of affidavit evidence, this Court’s duty to subject the evidence adduced before the trial court, be it viva voce or by way of affidavit, is not lessened merely because the hearing proceeded on the basis of affidavit evidence. While the usual caution that the Court did not have the benefit of seeing the witnesses testify and gauging their demeanour and credibility, may not apply to such circumstances, the need to analyse and re-assess the evidence on record and reach own conclusions on the issues for determination in the appeal, must always be kept in mind.
24. The first issue that arises from this appeal is whether the appellant was bound by the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016, and the two circulars providing for the prosecutorial allowance and the non-practising allowance being the Public Service circulars of 11<sup>th</sup> June 2010 and 9<sup>th</sup> October 2012. Section 3 of the *Public Service Commission Act* No.10 of 2017 provides that:
- Subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of *the Constitution* and section 28 of the *Kenya Defence Forces Act* (Cap. 199), this Act shall apply to all public bodies and persons holding office in the public service.
25. We did not hear the appellant contend that it is not a public body or that it fell within the exceptions set out above. Therefore, being a public body, the provisions and the directions issued pursuant to the said Act applied to the appellant. As regards the Public Service circulars of 11<sup>th</sup> June 2010 and 9<sup>th</sup> October 2012, it is not contested that the same were issued by the then Permanent Secretary in the Office of the Prime Minister and Ministry of State for Public Service, one Titus M. Ndambuki. His authority to issue the said circulars was not challenged. In the circular dated 11<sup>th</sup> June 2010, addressed to the Solicitor General, it was expressed that:
- “As you are aware, a Consultant has submitted a Report on the Rationalisation and Harmonisation of the Public Service Legal Sub-Sector to the Permanent Public Service Remuneration Review Board.
- Arising from the findings of the Report, the Board has advised that it is not prudent to review salaries for the legal personnel in isolation of other public Service Sub-Sectors as this would create pressure from other professional cadres whose salaries have not been reviewed since 2005.
- The Board has also pointed out that the findings of the Consultant pointed to the fact that the pressure for higher salaries for legal personnel is not necessarily due to inadequacy of the current packages but is highly influenced by the inequalities that have been created in emerging Institutions in the Public Service Sub-Sector due to uncontrolled salary levels that may have been adopted when they were established.
- In the meantime, the Board has agreed only to enhancement of Non-Practice Allowance as follows.”



26. The Permanent Public Service Remuneration Review Board referred to above was the predecessor to the Salaries and Remuneration Commission, the 3<sup>rd</sup> interested party herein. Paragraph 33 of Schedule 6 to *the Constitution* provides that:

An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

27. It is clear from the above circular that the Consultant's Report was submitted to the 3<sup>rd</sup> interested party's predecessor which in turn agreed to the enhancement of non-Practice allowance. The establishment of the 3<sup>rd</sup> interested party did not nullify the actions taken by its predecessor and hence the 3<sup>rd</sup> interested party was clearly bound by the recommendations made by the Permanent Public Service Remuneration Review Board since section 6 of the Sixth Schedule to *the Constitution* provides that:

“Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.”

28. The Public Service circular of 9<sup>th</sup> October 2012, addressed to Director of Public Prosecutions, was to the effect that:

“Following the recommendation of the Salaries and Remuneration Commission, approval is hereby granted for the legal personnel in State Law Office, Office of the Director of Public Prosecutions and Ministry of Justice, National Cohesion and Constitutional Affairs to be paid State Counsel/Prosecutorial Allowance with effect from 1<sup>st</sup> October 2021 at the following rates

....

SLG 1-SLG6 30,000

SLG 7 – SLG 8 40,000

SLG9 50,00

Please note that the allowance is an interim measure while awaiting the result of the Job Evaluation Exercise in the Public Service. You are advised to seek Treasury's concurrence on the resultant expenditure before effecting the payments.

Please take necessary action.”

29. The 3<sup>rd</sup> interested party has not taken issue with the contents of this letter either. Therefore, whereas we agree that it is the mandate of the 3<sup>rd</sup> interest party to advise on the remuneration and benefits of public officers, in this case, it is clear that the 3<sup>rd</sup> interested party either as currently established or through its predecessor, the Permanent Public Service Remuneration Review Board, was aware of and tacitly acknowledged, the review of the allowances in the Public Service Sub-Sector. The 3<sup>rd</sup> interested party having undertaken its role, there was nothing remaining for it to do in the matter and no further consultation was required. If there was no budgetary allocation made for the payment, that was a



matter that the appellant was at liberty to take up before the trial court on how and when the payments would be made. It was not a ground for seeking to deny liability.

30. By Gazette Notice No. 2181 of 4<sup>th</sup> April 2014, Irene Kamunge, Erastus Gitonga, Cecilia Githaiga, Edward Wabwoto, Judith Kithinji and Edwin Ayiro were appointed by the Director of Public Prosecutions as Public Prosecutors for the purposes of cases arising under the Environmental Management and Co-ordination Act with effect from 18<sup>th</sup> March 2014. Although it is submitted that the mere fact that the 1<sup>st</sup> to 4<sup>th</sup> respondents were appointed by the Director of Public Prosecutions did not entitle them to the allowances payable to the officers in the Office of the Director of Public Prosecutions, in this case, the appointments of the 1<sup>st</sup> to 4<sup>th</sup> respondents as public prosecutors, was expressed to be pursuant to the powers conferred upon the Director of Public Prosecutions by section 85(1) of the Criminal Procedure Code which provides that:

The Director of Public Prosecutions, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

31. The appointment of the 1<sup>st</sup> to 4<sup>th</sup> respondents as public prosecutors was therefore not under the Environmental Management and Co-ordination Act. Having been appointed by the Director of Public Prosecutions in the exercise of his statutory mandate, the appellant was not required and had no power to take any other action in the matter by way of its ratification or otherwise and therefore the 2<sup>nd</sup> respondent's submissions that the appellant's board was required to decide on the prosecutorial allowances payable to the 1<sup>st</sup> to 4<sup>th</sup> respondents is incorrect.
32. In our view, having been appointed as public prosecutors, any treatment to the said respondents that was different from other public prosecutors was not justified. We agree with the finding by the learned Judge that the respondents proved that the manner in which the appellant treated them by:

“the failure to pay them the two allowances amounted to adverse or disadvantageous treatment that was not equal to the other public officers holding similar offices as held by the claimants and for whom the two circulars providing for the two allowances applied to and had been implemented accordingly. In particular the claimants have established that the respondent has subjected them to unequal pay by denial of the two allowances because persons holding similar positions in the public service have continued to enjoy the allowances.”

33. It was contended that the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 applied subject to their consistency with the respondent's Human Resource Policy and Procedures Manual. It is our view that since it is the Public Service Commission Act that guides the operations of the appellant, the internal documents generated by the appellant must comply with the documents made by the Commission and where there is inconsistency, the latter must prevail. We therefore agree with the learned Judge's view that:

“Section 16 of the Environmental Management and Co-ordination Act No.8 of 1999 on the staff of the respondent provides thus, ‘The Authority may appoint such officers or other staff of the Authority as are necessary for the proper discharge of its functions under this Act or any other written law, upon such terms and conditions of service as the authority may determine.’ The section was enacted long before the Constitution of Kenya, 2010. Section 7(1) of the 6<sup>th</sup> Schedule on Transitional and Consequential Provisions to the Constitution of Kenya 2010 provides, ‘All law in force immediately before the effective date continues in



force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with *the Constitution*.’ Thus the Court holds that the respondent’s exercise of human resource or employment functions and powers as envisaged in section 16 and other provisions of the Environmental Management and Co-ordination *Act No.8 of 1999* must be construed and brought to conformity with the constitutional functions and powers of the Public Service Commission and as amplified in the provisions of the *Public Service Commission Act, 2017*. The Court further holds that the respondent and other public bodies or authorities falling under the Commission’s constitutional authority are bound to undertake their human resource functions in accordance with the provisions of the *Public Service Commission Act, 2017* and the public service regulations and policies as may be put in place by the Commission from time to time.”

34. According to the appellant, the Public Service Commission Human Resource Policy, 2016 did not provide for the allowances claimed by the respondents. However, clause 8.25 of the appellant’s Human Resources Policies and Procedures Manual, on “Non-Practicing Allowances”, provided that:

The authority shall pay non-practicing allowance to those who are eligible as per the Government circulars.

35. The respondents did place before the learned Judge evidence in support of what they were entitled to. That evidence was not controverted since the appellant did not present before the learned Judge figures different from those availed by the respondents. If the appellant was in possession of figures other than those presented by the respondents it was upon them, pursuant to section 112 of the *Evidence Act*, to adduce evidence to that effect. The issue of how much was payable to the respondents in respect of allowances was a factual issue based on the evidence presented before the trial court. This Court (per Hancox, JA, as he then was), in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, held that:

“The appellate Court only interferes with the trial Court’s findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

36. We have no basis for interfering with the learned Judge’s finding on the amount that the respondents were entitled to as non-practicing allowance. As for prosecutorial allowance the Public Service circular of 9<sup>th</sup> October 2012 clearly set out what was payable. The appellants equated their job groups to similar positions in the public service. The appellants did not tender evidence to the contrary and the learned Judge cannot be faulted for believing the respondents.
37. The appellant faulted the respondents for instituting the proceedings prematurely without obtaining the advice of the Public Service Commission about the allowances in issue and their respective claims. The appellant seems to have shifted its responsibility to the respondents. It was upon the appellant to have sought from the Public Service Commission what the respondents were entitled to. Even after being confronted with the respondents’ claims, the appellant took no action to confirm with the Public Service Commission that fact. It instead adopted an untenable position that the respondents were not entitled to claim the allowances whatsoever. That contention was with due respect misconceived.
38. Upon our own re-evaluation of the evidence and our consideration of the law, we find no merit in this appeal which we hereby dismiss in its entirety with costs to the respondents.



39. Those shall be our orders.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

