



REPUBLIC OF KENYA



Parliamentary Service Commission & 4 others v Salaries and Remuneration Commission & 7 others (Civil Appeal E017 of 2021) [2025] KECA 275 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 275 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E017 OF 2021
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
FEBRUARY 21, 2025**

BETWEEN

**PARLIAMENTARY SERVICE COMMISSION 1ST APPELLANT
THE CLERK OF THE SENATE 2ND APPELLANT
THE CLERK OF THE NATIONAL ASSEMBLY 3RD APPELLANT
PARLIAMENT 4TH APPELLANT
MEMBERS OF PARLIAMENT 5TH APPELLANT**

AND

**SALARIES AND REMUNERATION COMMISSION 1ST RESPONDENT
OKIYA OMTATAH OKOITI 2ND RESPONDENT
THE CONTROLLER OF BUDGET 3RD RESPONDENT
THE CABINET SECRETARY NATIONAL TREASURY 4TH RESPONDENT
THE HON. ATTORNEY GENERAL 5TH RESPONDENT
TRANSPARENCY INTERNATIONAL KENYA 6TH RESPONDENT
KATIBA INSTITUTE 7TH RESPONDENT
LAW SOCIETY OF KENYA 8TH RESPONDENT**

(Being an appeal from the Judgment of the High Court Constitutional and Human Rights Division (Nyamweya, Korir & Mativo JJ.) dated 10th December 2020 in Petition No. 208 of 2019 Consolidated with Petition Nos. 185 of 2019 and 339 of 2019.)



JUDGMENT

1. This appeal arises from the judgment of the High Court [Nyamweya, Korir & Mativo, JJ. (as they were then)] dated 10th December 2020 in Constitutional and Human Rights Division, Petition Nos. 208 of 2019 consolidated with Petition Nos. 185 of 2019 and 339 of 2019 .
2. The Salaries and Remuneration Commission (herein after ‘SRC’) and Okiya Omtata Okoiti, the 1st and 2nd respondents respectively were the petitioners in Petition Nos. 208 of 2019 and 185 of 2019 respectively whereas Parliamentary Service Commission the 1st appellant, (hereinafter ‘PSC’) was the petitioner in Petition No. 339 of 2019.
3. At the time of consolidation of the Petitions, The Controller of Budget, The Cabinet Secretary, National Treasury and The Hon. Attorney General, the 3rd, 4th and 5th respondents respectively who were enjoined as interested parties in Petition No. 208 of 2019 were made the respondents. In addition, the Members of Parliament (MPs), initially sued individually as respondents in Petition No. 185 of 2019 were designated interested parties. Other parties designated as interested parties in the suit included; Transparency International- Kenya, (a not-for-profit organization with the aim of developing a transparent and corruption-free society through good governance and social justice initiatives); Katiba Institute, (a non-profit company limited by guarantee under the *Companies Act* whose objective is to improve and implement the understanding of the *Constitution*); and the Law Society of Kenya, (a statutory corporate established under section 3 of the *Law Society of Kenya Act*).
4. The common strand that cut across the three Petitions related to a decision by the Parliamentary Service Commission (PSC) to set, approve and pay house allowances to the Members of Parliament (MPs). As the High Court noted the point of departure was that whereas the petitioners in Petition Nos. 208 of 2019 and 185 of 2019 (SRC and Omtata respectively) sought to have the decision by the PSC annulled and/or invalidated, the petitioner in Petition No.339 of 2019 (PSC) sought the enforcement of the said decision.
5. In Petition No. 208 of 2019 it was contended that on 31st January 2019, PSC wrote to it (SRC) requesting amongst other things the approval of house allowance to be paid to each MP at the rate Kshs.250,000/= per month to enable MPs pay rent in houses within Nairobi in locations befitting their stature.
6. The reasons given for that request were firstly, that the decision of SRC to confer a housing benefit to Governors and Deputy Governors discriminates against MPs. Secondly, that section 31 of the *Employment Act* 2007 requires an employer to provide an employee with reasonable housing accommodation at or near the place of employment or to pay to the employee sufficient sums to cover rent to enable the employee to obtain reasonable accommodation. Thirdly, that in other jurisdictions, MPs are paid allowances to enable them hire a hotel room or lease a house near where Parliament is located. Lastly, PSC had budgeted for Kshs.250,000/= per month as house allowance in the budget of 2018/2019 financial year.
7. SRC filed its suit when PSC went ahead and obtained the funds and paid the house allowances to the MPs backdated to October 2018 without its approval as required by Article 230(4) (a) of the *Constitution*, and also in disregard of the advice by the National Treasury. Therefore, the payment was ex facie illegal and unconstitutional. It was stated that PSC’s decision had resulted in the loss of public funds in excess of Kshs.99,500,000/= per month, and Kshs.1,194 billion annually, hence, the said decision was a perverse exercise of State power that set a dangerous precedent in the



management of public funds. In addition, that it greatly undermined the binding national values and principles of governance in the Constitution, the constitutional powers of SRC in Article 230 (4)(a) of the Constitution. Moreover, it provided a basis for high salary agitation in the public sector and a consequential breach of the principles in Article 230(5) of the Constitution.

8. As a result, SRC prayed for several declarations and orders which we summarize as follows:
 - a. A declaration that the decision of the respondents to set, approve and pay MPs a house allowance outside the constitutional structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC disregarded the constitutional mandate of the SRC and that PSC acted outside the prescribed constitutional powers contained in Article 127 (6) of the Constitution, and unconstitutionally performed the functions that are exclusively vested in the SRC by Article 230 (4) and (5) of the Constitution; violated the provisions of Article 259(11) of the Constitution that provides that the power of PSC to pay MPs allowance in the circumstances of this case must be exercised only after the setting by or with the approval of SRC, and have exercised State power contrary to the provisions of Article 259(11) as read with Article 230(4) of the Constitution;
 - b. An order of certiorari be issued to quash the decision of PSC pay to MPs a house allowance outside the constitutional structure of remuneration and benefits of all State Officers in Parliament;
 - c. An order of permanent injunction be issued to restrain the respondents, their agents and persons acting under the authority of the respondents from setting, approving and paying any benefit or house allowance to MPs outside the constitutional structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC;
 - d. An order of permanent injunction be issued to restrain the Controller of Budget, its agent and persons acting under its authority from approving payment of nay benefit or house allowances of MPs outside the constitutional structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and in disregard to the constitutional mandate of SRC as required by Articles 230(4) (a) of the Constitution;
 - e. An order be issued directing the Clerk of the Senate and the Clerk of the National Assembly to recover from salaries and allowances paid to MPs any allowance paid pursuant to the illegal and unconstitutional decision of the PSC to pay MPs house allowance outside the constitutional structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and in disregard to the constitutional mandate of SRC as required by Article 230 (4) (a) of the Constitution; and,
 - f. Alternatively, an order be issued directing the 3rd to 12th respondents to personally pay to the consolidated fund all house allowances paid to MPs pursuant to the illegal and unconstitutional decision of the PSC to pay MPs house allowance outside the constitutional structure of remuneration and benefits of all State Officers in Parliament.
9. In Petition No. 185 of 2019 Mr. Okiya Omtatah raised the same arguments as those advanced by the SRC and reiterated that all monies already paid to the MPs as house allowances should immediately be recovered with interest. He thus prayed for
 - i. A declaration that the SRC is the only State organ empowered to determine the salaries and remuneration of all State Officers and, as a consequence, MPs have no capacity under the Constitution to determine their salaries and allowances; a declaration that the decision by the PSC to pay MPs house allowances is unconstitutional and, therefore, invalid, null and void



ab initio; a declaration that the MPs are not entitled to house allowances; an order compelling the PSC, the Cabinet Secretary National Treasury, the Controller of Budget and the Hon. Attorney General to recover all the money paid to MPs as house allowance; and an order compelling the PSC/Parliament to pay the costs of this suit.

10. In Petition No. 339 of 2019 filed by the PSC, it was contended that on 1st and 8th March 2013, SRC published the remuneration and benefits for State Officers serving in Parliament, the Executive, Constitutional Commissions and Independent Offices, and in the County Government. That in the new remuneration structure, the remuneration of the MPs was reduced from Kshs.851,000/= to Kshs.532,500/=, a reduction of 37.4%. Further, that the allowances payable to MPs was made subject to taxation unlike in the previous regime under the *National Assembly Remuneration Act*, Chapter 5 of the Laws of Kenya where allowances were tax free. Therefore, they were entirely dissatisfied with it. In addition, that despite a series of consultations held between itself and SRC, a number of issues remained unresolved and in particular, the issues pertaining to SRC reviewing and setting “service and facilities” falling within PSC’s mandate under Article 127(6) of the *Constitution*.
11. The PSC also stated that on 7th July 2017, the SRC issued a press statement and also published in Gazette Notice No. 6517 a remuneration and benefit structure for State Officers in the Executive, Parliament (Senate and the National Assembly), County Governments and full-time constitutional commissions in which it abolished car grant of a maximum of Kshs.5,000,000/= once in a parliamentary term, a benefit that was previously enjoyed by the MPs; sitting allowance for plenary sessions and reduced the sitting allowance that may be paid for committee meetings to a maximum of 16 meeting per month; ex-gratia assistance to MPs and their families which was stated to be contrary to best practice where an employer assists an employee who has exceeded their medical cover entitlement; reduced the maximum mortgage entitlement for MPs from Kshs.35 million to 20 million without effecting a similar reduction to the maximum mortgage entitlement for other State Officers such as Judges and Cabinet Secretaries; and reduced the number of children that could be covered by the medical cover from 5 to 4 without providing any reasons.
12. PSC was aggrieved by the decision of SRC and filed Judicial Review proceedings against SRC in JR Misc. Application No. 686 of 2019; *The PSC v. SRC, AG & 3 Others (Interested Parties)* in which Odunga, J. (as he then was) quashed the Gazette Notice No. 6517 and held that the impugned Gazette Notice was tainted with procedural impropriety. However, that the Court declined to make a pronouncement on the mandate of PSC and SRC regarding the expression ‘service and facilities’ as provided for under Article 127 of the *Constitution* for reason that the Court was approached to only exercise its judicial review jurisdiction and not interpretation of the *Constitution*.
13. The PSC averred that the interpretation of the expression ‘service and facilities’ regarding its mandate under Article 127(6) *vis-à-vis* the SRC’s mandate under Article 230 was still live and that the High Court was the proper forum to determine the issue. In addition, that despite the outcome of the JR proceedings, SRC had remained adamant that the provision of medical care and/or cover, medical *ex-gratia* payment, the various allowances and a housing facility to MPs were benefits falling within its mandate, and were not ‘service and facilities’ which fell within the PSC’s mandate.
14. Further, the PSC confirmed that the SRC, by a letter dated 14th May 2019 had purported to direct the Clerk of the Senate and Secretary of the PSC and Clerk of the National Assembly, in their respective roles as Accounting Officers of the Senate and the PSC, and the National Assembly, respectively, to desist from making any payments of ‘House Allowance’ to facilitate MPs in carrying out their constitutional mandates as set out under Articles 94, 95 and 96 of the *Constitution* and contrary to PSC’s mandate under Article 127(6) (a) and (e) of the *Constitution of Kenya*. It was argued that the



said letter was made without jurisdiction and was, for all intents and purposes unlawful since it was anchored on a gazette notice which had been quashed by the Court.

15. Consequently, the PSC prayed for *inter alia* - the following orders:
- a. An order of Mandamus be issued compelling the SRC to provide MPs with housing allowances for their housing in their respective constituencies.
 - b. A declaration be issued that the mandate and role of the PSC under Article 127 of the Constitution extends to provision of services and facilities to ensure the efficient and effective functioning of Parliament.
 - c. A declaration be issued that the services and facilities that the PSC is mandated to provide to MPs under Article 127 of the Constitution as read together with section 2 of the Parliamentary Service Act, No. 10 of 2000, are services to ensure the efficient and effective functioning of Parliament as well as to ensure the wellbeing of MPs and staff of Parliament and are not remuneration.
 - d. A declaration be issued that the mandate and role of the SRC under Article 230(4)(a) of the Constitution is only limited to setting and reviewing the remuneration and benefits of State Officers serving in the PSC and Parliament, and not to determine the number of remunerable meetings that the PSC, and/or any committees of Parliament may hold in the exercise of their respective mandates.
 - e. A declaration be issued that the decision of SRC to cap the remunerable meetings for committees of Parliament to not more than 16 meetings in a month interferes with the constitutional mandate of Parliament and therefore is in contravention of Articles 93(2) and 94(1) of the Constitution.
 - f. A declaration be issued that the SRC has no mandate to direct the PSC's Clerk of Parliament, whilst exercising their respective roles as Accounting Officers of the PSC and/or the Senate and the National Assembly, from paying 'facilitative allowances' to MPs.
 - g. An order of Certiorari to be issued, to remove to this Honorable Court and to quash, the SRC's letter dated 14th May 2019 directing the PSC's Clerks of Parliament to refrain from paying 'facilitative allowances' to MPs.
 - h. An order of Certiorari be issued to remove to this Honorable Court and to quash Gazette Notice No. 2886 of 1st March 2013.
 - i. A declaration that pending a new job evaluation that takes into account the provisions of Chapter Seven and Eight of the Constitution, MP shall be entitled to receive the remuneration and benefits that they were receiving prior to publication of Gazette notice No. 2886 of 1st March 2013.
 - j. An order of prohibition (or alternatively by injunction or otherwise) be issued to prohibit the SRC from in any way interfering with the work and constitutional independence of the PSC and Parliament."
16. The High Court delivered its judgement dated 10th December 2020. It was the court's finding among others, that the payment made to MPs was a remunerative allowance and not a provision of a service and facility within the meaning of Article 127 (6) (a). That the mandate to determine and set housing or accommodation allowance was a function constitutionally vested in the SRC by virtue of Article 230 (4) (a) and the Salaries and Remuneration Commission Act. Hence, PSC's decision was found to



be *ultra vires* its constitutional mandate and to offend the principle of legality which requires that decisions by public bodies must have their source at the law. Therefore, SRC did not in any manner interfere with the constitutional independence and functions of Parliament and PSC. That whereas Gazette Notice No. 2886 of 1st March 2013 was to cease applying from 8th August 2017, being the effective date of Gazette Notice No. 6517 of 7th July 2017, the quashing of the said Gazette Notice meant that the Gazette Notice 2886 of 1st March 2013 would continue to apply until a new Gazette Notice is promulgated by the SRC pursuant to Article 230(4). That having found that PSC acted *ultra vires* in paying the MPs the accounting officers were under an obligation to recover the paid monies. On the alleged issue that MPs are discriminated, the court found that PSC had not demonstrated unfair discrimination. That SRC provided an objective and a rational justification as to why a certain category of State Officers are entitled to and are given a housing benefit.

17. Further, the court found that the 3rd to 12th respondents enjoy immunity for action performed in good faith in the performance of their duties. That Mr. Omtatah and SRC did not endeavor to establish bad faith on the respondents' part hence the suit against them offended Article 250(9) of the Constitution, and hence was unsustainable. On joining the MPs, the court found that the same was correct as the MPs were the beneficiaries of the impugned payments set and facilitated by the PSC and would therefore be affected directly by the decision of the court on the said payments, particularly if it has adverse effect.
18. Accordingly, the Court issued the following orders.
 1. That the prayers sought in Petition No.339 of 2019 by PSC are hereby declined, and the said Petition is hereby dismissed with no order as to cost.
 2. That Petition No. 208 of 2019 and Petition No. 185 of 2019 filed by SRC and Mr. Omtatah respectively are found to be merited to the extent of the following orders:-
 - a. That a Declaration be and is hereby granted that the setting and approval of the payment of an accommodation or house allowance to MPs is a function that is exclusively vested in the SRC by Article 230 (4) and (5) of the Constitution.
 - b. That a declaration be and is hereby granted that the decision of the PSC to set, and approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all State Officers in parliament that is set and communicated by the SRC, and without the approval of the SRC is in violation of Article 230(4) and (5) of the Constitution.
 - c. That a declaration be and is hereby granted that the decision of the PSC to set, and approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and without the approval of the SRC the functions that are exclusively vested to the SRC is *ultra vires* the prescribed constitutional powers of PSC contained in Article 127(6) of the Constitution.
 - d. That a declaration be and is hereby granted that the decision of the PSC to set, approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and without the approval of the SRC is in violation of the provisions of Article 259(11) of the Constitution that required the prior approval of SRC.



- e. That a declaration be and is hereby granted that the decision of the PSC to set, approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and without the approval of the SRC was an exercise of state authority not authorized by the Constitution and in violation of the provisions of Article 2(2) of the Constitution.
 - f. That a declaration be and is hereby granted that the decision of the PSC to set, approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and without the approval of the SRC the functions that are exclusively vested to the SRC was in violation of the provisions of Article 73(1) of the Constitution which provides that any State authority assigned to a State officer is a public trust that ought to be exercised in a manner that is consistent with the purposes and objects of the Constitution.
 - g. That a declaration be and is hereby granted that the decision of the PSC to set, approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the SRC and without the approval of the SRC the functions that are exclusively vested to the SRC was in violation of the binding national values and principles of governance prescribed in Article 10 of the Constitution on the rule of law, transparency and accountability.
 - h. That an order of certiorari be and is hereby issued to quash the decision the PSC to set and approve the payment of an accommodation or house allowance to MPs contrary to the structure and benefits of all State officers in Parliament that is set and communicated by the SRC, and without the approval of the SRC in disregard of Article 230 (4) (a) of the Constitution.
 - i. That an order of mandamus be and is hereby issued directing the Clerk of the Senate and the Clerk of the National Assembly to, within a period of twelve calendar months from the date of this order, recover in full from the salaries and allowances of each MP the entire amount of monies paid as accommodation and/or house allowance to the MPs contrary to the structure of remuneration and benefits of all State officers in Parliament that is set and communicated by the SRC, and without the approval of the SRC.
3. That each party shall bear their respective costs of the two Petitions.”
19. Aggrieved and dissatisfied by the decision of the High Court, the appellants filed this appeal. In their memorandum of appeal dated 14th January 2020, the appellants fault the learned Judges on fifteen (15) grounds that the appellants’ counsel in his written submissions summarized to five grounds which we adopt thus:
- i. The superior court misconstrued the doctrine of *lex specialis derogat generali* with regards to Article 127 (6) and Article 230 (4) of the Constitution;
 - ii. The PSC has a legal mandate to offer facilitative house accommodation to members of parliament;
 - iii. The SRC interfered with the mandate of Parliament and the PSC;



- iv. SRC has failed to set a house allowance and this amounts to discrimination; and,
 - v. The superior court wrongly applied Article 116 (3) of the Constitution to the PSC.
20. The appellants thus pray for orders that:
- i. The judgment dated 10th December 2020 delivered in Constitutional and Human Right Division, Petition No. 208 of 2019 (Consolidated with Petition Nos. 185 of 2019 and 339 of 2019 (Salaries and Remuneration Commission & Another –v- Parliamentary Services Commission & Others)) by Hon Justices Nyamweya J. Korir J. and Mativo J. be and is hereby set aside;
 - ii. the appeal herein be allowed; the judgment dated 10th December 2020 delivered in Constitutional and Human Right Division, Petition No. 208 of 2019 (Consolidated with Petition Nos. 185 of 2019 and 339 of 2019 (Salaries and Remuneration Commission & Another –v- Parliamentary Services Commission & Others)) by Hon Justices Nyamweya J. Korir J. and Mativo J. be substituted with an order dismissing Petitions 208 of 2019 and 185 of 2019;
 - iii. judgment dated 10th December 2020 delivered in Constitutional and Human Right Division, Petition No. 208 of 2019 (Consolidated with Petition Nos. 185 of 2019 and 339 of 2019 (Salaries and Remuneration Commission & Another –v- Parliamentary Services Commission & Others)) by Hon Justices Nyamweya J. Korir J. and Mativo J. dismissing Petition No. 339 of 2019 be substituted with an order allowing Petition No. 339 of 2019 Parliamentary Services Commission –v- Salaries and Remuneration Commission & Others; and,
 - iv. Costs of this appeal be borne by the respondents.

Hearing of the appeal and the Submissions of parties.

21. We heard the appeal on the on 26th January 2024. Present for the appellants was Senior Counsel Prof. Tom Ojienda, while learned counsel Mr. Wanyama was present for the 1st respondent, Mr. Omtatah, the 2nd respondent was present in person, and learned counsel Mr. Ochiel was present for the 7th respondent. The rest of the respondents were not represented despite service of the hearing notice. The appellants and the 1st respondent filed their written submissions dated 16th August 2021 and 13th September 2023 respectively. The 2nd respondent and Mr. Ochiel for the 7th respondent made oral submissions.
22. Highlighting the appellants’ submissions, Prof. Ojienda (hereinafter SC) submitted that some of the grounds in the appeals had been compromised because subsequent to the decision of the High Court, two things had happened. First, that the PSC engaged the SRC on house allowance of MPs and salary review through a Gazette Notice XXB No. 177 of 9th August 2023. Second, that there was compliance with the High Court order and all sums directed to be recovered from MPs recovered within the timeline set by the Court. Therefore, the same is settled.
23. SC urged that only two issues were left for the determination of this Court as:
- a. Whether the High Court correctly interpreted Article 127(6) (a) and Article 230(4) (a) of the Constitution.
 - b. Whether the SRC acted *ultra vires* its constitutional mandate and statutory mandate in capping the number of remunerable sitting that the MPs and PSC could hold.



24. Senior Counsel submitted that the pending two issues called for this Court to, first, address the question of the interpretation of Articles 127 (6) (a) and (e) and Article 230(4)(a) of the Constitution; second, determine whether the High Court erred in the interpretation of the role of PSC under Article 127 (6) (a) and (e) to merely limit or confine the PSC to providing physical amenities and office equipment.
25. On the interpretation of Article 230(4) (a) of the Constitution, SC submitted that the superior court misinterpreted the doctrine of *lex specialis* derogate general by holding that Article 230(4) (a) of the Constitution was the specific provision and the Article 127 the general provision. That the High Court misconstrued Article 127 to be the general provision and Article 230(4) (a) to be the specific provision. SC urged the Court to be guided by a purposeful interpretation that would ensure a holistic interpretation of the Constitution. Reliance was placed in the Supreme Court decision in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others [2014] eKLR.
26. SC further submitted that an interpretation that allows SRC to go right to the table of PSC not only to set allowances but to prescribe how those allowances are paid is a bad interpretation. That PSC must be given space as contemplated by Article 127 (6) to determine the details and to pay allowances. That the role of SRC must stop at simply prescribing those allowances, not at monitoring, or at limiting, or at determining how often or in what respect those allowances should be paid.
27. Secondly, on the issue of parliamentary sitting, SC submitted that SRC can only prescribe the allowance payable to MPs on sittings and that its role ends there. That it cannot prescribe the number of sittings that MPs should undertake. SC argued that to do so, is to undermine the independence of Parliament as an institution. In addition, SC added that just as in the case of the Judicial Service Commission for instance, the SRC cannot prescribe how many times it sits. SC relied on the case of In the Matter of the Speaker of the Senate & Another [2013] eKLR where the Supreme Court held that a Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. That the court cannot supervise the workings of parliament. SC also quoted the case of Okiya Omtatah Okoiti & Another v. Nairobi City County Assembly & 5 Others [202] eKLR.
28. SC emphasized that this court must define the parameters of independence of commissions. That the court must defend institutions and find that the PSC is not only mandated to provide physical facilities and offices for parliamentary staff and Parliament, but also pay necessary allowances to facilitate the work or to facilitate the functioning of Parliament as an institution. That SRC's role must remain as setting those allowances and stopping there. He thus urged this court to set aside the decision of the High Court in so far as it limits the functioning and role of PSC.
29. Mr. Wanyama for SRC on his part reiterated the 1st respondent's written submissions on the areas in contention. He submitted that the appellants seem to base their argument on the doctrine of parliamentary sovereignty where Parliament can sit and decide on issues willy nilly without regard to the Constitution and the applicable laws and therefore they presume under that doctrine that an institution like the PSC is above the law, above the provisions of the Constitution, and can make decisions which are out rightly undermining the very basic purpose and intention of the Constitution.
30. Mr. Wanyama submitted that the constitutional dispensation that we have now is based on the doctrine of constitutional supremacy and whatever the Constitution prescribes is what is supreme, and that in this case, the provision of Article 230 of the Constitution is not in vain.
31. It was argued that Kenya does not have public coffers that are bottomless and therefore, because of that, the SRC has been set by the people of Kenya; that SRC's objective in Article 230(4) is express, clear and unequivocal; that its powers is to set and review the remuneration and benefits of all State



- officers, who include MPs, and that it acted within its constitutional and statutory mandate when it set the salaries and allowances payable to MPs; and that PSC did not have power to set allowances and salaries. He urged that as a policy there is need to ensure that the salaries and benefits payable to State officers are fiscally sustainable to the public offices. Counsel urged that the housing allowance set and approved by the appellants was not valid as the appellants did not seek SRC advice. He urged that the giving of advice on remuneration and allowances was one of the reasons the SRC was created, and that it was mandatory for the advice to be sought and obtained prior to taking any action that required its input and the advice binding as prescribed under Article 259 (11) of the *Constitution*.
32. It was submitted that SRC operates from the context of a certain policy objective in public interest. Therefore, SRC is definitely coordinating with other commissions including the PSC, the Judicial Service Commissions, and the Public Service Commission on the question of remuneration.
33. Mr. Wanyama cited the case of *In the Matter of Interim Independent Electoral Commission* [2011] eKLR and submitted that the meaning of independence of an institution was spelt out in that case. He argued that independence in this authority does not accord to the appellants, a carte blanche to act or conduct themselves on whim of their independence by design configured to the diffusion of the mandate and performance of their functions as prescribed by the *Constitution*. Further, independence does not mean detachment, isolation or disengagement but the PSC has an obligation in the context of coordination and liaising with the other public agencies such as the SRC to ensure that it does not undermine the tenets in Article 10 which is not coincidental, but binding to all persons.
34. Mr. Wanyama urged this court to reject that limb of the appeal because if allowed, it will encourage impunity by institutional commissions and in this case, it will undermine the objectives of having SRC as an organ to set the benefits and salaries of State officers in the first place.
35. On the issue that SRC is controlling the number of parliamentary sittings, Mr. Wanyama submitted that SRC in coordination with PSC and within the context of the wage bill which has been prescribed, can actually determine the number of sittings for purposes of payment of allowances and that does not in any way undermine the independence of PSC but will be helping PSC to set sittings and payment of allowances within the confines which has been set by SRC.
36. Mr. Omtatah on his part confirmed that he has not filed his written submissions but fully associates himself with the submissions of the 1st respondent. He submitted that according to Article 230(4) (a) of the *Constitution* SRC may not limit the number of sittings appellants could hold, however, it can determine the number of those sittings that were payable. Further, that SRC cannot determine remuneration without determining activities.
37. Mr. Omtatah argues that remuneration and benefits are attached to an individual and emphasized that SRC is empowered to determine whatever monies is attached to individuals such as their remuneration which is the totality of what they earn; salaries, wages, allowances etc. On the other hand, that what does not attach to an individual MP is determined by the PSC. He further argues that under Article 127 (6)(a) there is nothing attaching to individuals that PSC was acting on so it cannot be said that the SRC's mandate is ousted by Article 127 (6)(a) of the *Constitution*.
38. On the issue of controlled sittings, Mr. Omtatah responded that what the SRC was trying to solve is issuing a blank cheque to an institution as that could undermine the mandate of the SRC to control the wage bill. In addition, he noted that the control does not necessarily impact on autonomy of PSC since the PSC is expected to work with the SRC. It was argued that if at all the appellants require more sittings and the monies allocated is inadequate, then there is always room to seek review of what has been given.



39. Lastly Mr. Omtatah argued that the budget is a limit to what can be done by the PSC and so to request that the appellants be given a blank cheque will not be viable because even when they make that budget, they will not be able to foresee any emergency that might arise. Mr. Omtatah submitted that the setting of sittings is done scientifically and so the PSC is not denied its autonomy. Otherwise, then it would not be required to make a budget to be approved by Parliament.
40. Mr. Ochiel on his part did not file written submissions but made reference to the [Constitution of Kenya Review Commission Report](#) (CKRC) which he referred to as ‘a constitutional lawyer’s bible’. He began by stating that what SRC caps is not the number of sittings but the number of payable sittings, and that there is a constitutional rationale to that. He argued that MPs are well paid and when SRC allows additional allowances then the allowances do not exceed the basic pay. That allowing the allowances to exceed the basic pay would defeat the purpose of Article 230 of the [Constitution](#) and SRC’s role, and that that can open room for mischief.
41. Referring to page 223 of the [CKRC Report](#), Mr. Ochiel stated that Kenyans specifically called for a SRC that would set working conditions- the salaries, benefits and working conditions of members of parliament and heeding that call, the Commission recommended the creation of SRC. Counsel urged that when SRC sets the allowances, the payable allowances, and the number of sittings for which allowances are payable, it is acting consistently with its constitutional mandate under Article 234 and 235 of the [Constitution](#). He thus urged this court to dismiss the appeal.
42. In rejoinder, SC argued that [CKRC Report](#) speaks of the establishment of independent commissions to deal with institutions and therefore the setting of sittings cannot be taken away from the PSC by the SRC.
43. Lastly, SC urged this Court to find merit in the need to interpret Article 127 and give meaning to it as the most specific provision as opposed to Art 230 of the [Constitution](#), and further outline the specific facilities and forms of facilitation envisaged under Article 127 as well as the role of the PSC thereunder.

Analysis and Disposition

44. We have carefully considered the instant appeal together with the rival submissions both oral and written and the authorities relied upon by the parties.
45. This being the first appellate Court we are required to analyze, evaluate, assess, weigh, interrogate and scrutinize the pleadings, the arguments of parties, cases relied upon and the law and arrive at our own independent conclusion; the case having been heard through submissions. See *Selle v. Associated Motor Boat Company Limited* [1968] EA 123.
46. We are also mindful that we should not interfere with the trial court’s finding unless we are satisfied that the learned Judges demonstrably acted on wrong principles. See *JSM v. ENB* [2015] eKLR.
47. We note from the submissions of Prof. Ojienda, SC that some of the grounds in the appeals have been compromised, according to him, because subsequent to the decision of the High Court, two things happened. Firstly, the PSC engaged the SRC on house allowance of MPs and on salary review culminating with Gazette Notice Vol. CXXV—No. 177 of 9th August 2023. Secondly, there was compliance with the High Court order directing that all sums paid to the MPs as house allowances be recovered from them within the timeline set by the High Court. He urged that only two issues remained for the determination of this Court; that is:
1. Whether the High Court correctly interpreted Article 127 (6)(a) and Article 230 (4)(a) of the [Constitution](#).



2. Whether the SRC acted *ultra vires* its constitutional mandate and statutory mandate in capping the number of remunerable sitting that the MPs and PSC could hold.
48. We start by setting out the two provisions. Article 127 establishes PSC and in sub-article 6 (a) provides thus:-
- “(6) The Commission is responsible for-
- (a) providing services and facilities to ensure the efficient and effective functioning of Parliament;...”
49. Article 230 (4) on SRC provides:-
- “(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 government on the remuneration and benefits of all other public officers.”
50. SC argued that the High Court misinterpreted the two provisions of the Constitution and reached a wrong finding that Article 127 (6) (a) is a general provision and Article 230(4)(a) a specific provision. On the other hand, Mr. Wanyama argued that the High Court was correct in its interpretation and finds no fault in its findings, the same position taken by Mr. Omtatah and Ochiel that the functions of the two commissions are clearly set out in the Constitution.
51. Perhaps it will be better to trace the foundation of the arguments. The superior court observed the arguments of the appellant (PSC) and the SRC (Petitioner in case before them) on the interpretation of Articles 127(6) (a) and 230 (4) thus:
- “174. The PSC’s argument is that the words “services and facilities” in Article 127 (6) (a) should be construed to mean that it is mandated to provide MPs with a housing benefit so as to facilitate them to effectively perform their constitutional mandate.
175. On the other hand, the Petitioners’ argument is essentially founded on Article 230(4) (a) which provides that the powers and functions of the SRC shall be to-
- (a) set and regularly review remuneration and benefits for all State Officers; and,
- (b) advise the national and county government on the remuneration and benefits of all public officers.
176. SRC’s position is that a house allowance is a cash benefit paid through the payroll while a housing benefit is the physical building/house provided for by the Government using taxpayers’ funds to house a State Officer. The SRC argued that the PSC is creating a new term known as accommodation facilitation which term is not provided under any law and the act by the PSC



of formulating and setting the said allowance is in blatant breach of Article 230 (4).”

52. The superior court then considered definitions of the terms allowance, services and facilities after which it delivered itself thus:

“195. From the above definitions, it is clear that an allowance is a payment of money to an employee or officer to meet work related expenses. A house allowance is a specific allowance payable as part of an employee’s remuneration to cater for the housing costs. Therefore, whether it is named as accommodation allowance, a house allowance or a facilitative allowance, the cross-cutting and relevant feature for our purposes is that the payment made in the instant case was meant to cater for the MPs accommodation during the performance of their official duties.

196. On the other hand, the words services and facilities refer to the amenities, offices and equipment which are necessary for the MPs to perform their duties. This construction finds support in the statutory provisions which implement Article 127 of the *Constitution*. Section 18 of the *Parliamentary Service Act*, [103] details the manner of provision of services and facilities to Parliament by PSC as follows: -

18.

(1) The Commission shall, to the extent of its constitutional mandate, be responsible for fulfilment of the provisions under Article 127(6) (a) and (d) of the *Constitution* and in particular shall formulate policies, regulations, strategies and put in place mechanisms for the provision of such services and facilities as necessary for the effective functioning of Parliament and the well-being of Members and the staff of the Commission.

(2) The Commission shall adopt comprehensive strategic plans that ensure the realization of Article 127(6)(b) and (d) of the *Constitution*.

196. The distinction between allowances on one hand and services and facilities on the other, is made even clearer by the provisions of sections 19 and 20 of the Act which demonstrates the services and facilities envisaged under Article 127(6) (a) to assist the MPs in the performance of their duties are physical and logistical in nature, and not in the nature of payment of funds.”

53. The first issue for determination is concerned with who, between the SRC and the PSC should determine and set house allowance payable to MPs. PSC has decried the SRC’s interference with their perceived mandate to set and determine payment of the allowance, urging that it was payable as accommodation allowance to facilitate the MPs as they worked away from their constituencies. The appellants went as far as to claim that the allowance was paid to Governors, their Deputies and others and therefore it was discriminatory not to similarly pay the MPs. The appellants have sought an interpretation of the two Articles of the *Constitution*; 127 (6) and 230 (5) urging that PSC must be



given space as contemplated by Article 127 (6) to determine the details and to pay allowances. That the role of SRC must stop at simply prescribing those allowances, not at monitoring, or at limiting, or at determining how often or in what respect those allowances should be paid.

54. The appellants stated that they engaged the SRC on the house allowance and salary review of MPs resulting to Gazette Notice XXB No. 177 of 9th August 2023. The gazette notice provided as follows:

Remuneration and Benefits for State Officers in the Senate and National Assembly

In Exercise of the mandate of the Salaries and Remuneration Commission (SRC), as provided under Article 230 (4) (a) of the *Constitution of Kenya*, 2010, SRC has reviewed and set the remuneration and benefits for State Officers in the Senate and National Assembly under the Third Remuneration and Benefits Review Cycle that covers Financial Years (FY) 2021/2022-2024/2025..

In setting the remuneration and benefits herein, SRC took into account the principles set out in Article 230(5) of the *Constitution* and Section 12 of *SRC Act*, 2011. Consequently, SRC has reviewed and set the remuneration and benefits for implementation in two phases in FY 2023/2024 – 2024/2025 as follows:

1. Monthly Remuneration structure for State Officers in the Senate and National Assembly

Table 1: Monthly remuneration structure for State Officers in the Senate and National Assembly to be implemented in financial year 2023/2024, with effect from 1st July, 2023.

State Officer Basic Salary House Allowance Commuter Allowance Salary Market Adjustment Gross Salary.” [Emphasis added]

55. The above gazette notice is clear that SRC reviewed and set the remuneration and benefits of MPs to be implemented over a two year period. What that in turn means is that the PSC did, in essence admitted the mandate and role of the SRC as set out under Article 230 of the *Constitution* and the relevant statute, and submitted to the same. The PSC thus admitted that the SRC had the mandate to set and review salaries and remuneration of MPs salaries. Having done so, the appellants cannot purport to re-open their appeal by raising issues it has already admitted in total contradiction of its grounds of appeal and issues for determination.

56. There are Notes to the gazette notice that make it clear that the monthly remuneration of the MPs is fixed unless reviewed by the SRC. It makes it clear that the PSC is bound by the decision of the SRC. It provides thus:

“Notes:

- a. The monthly remuneration is fixed for the term of office of a Member of Parliament, unless reviewed and set by SRC.
 - a.
 - b. ..
 - c. The basic salary is as set herein.
 - d. ...”



57. The appellants in their own confession before us admitted that the judgment of the superior court has been fully complied with and all payments made to MPs under the ‘accommodation/facilitation/house allowance’ fully deducted from the MPs salary. That action settles the finality of the compromise reached by the parties leaving no room to challenge the issue of house allowance. There is therefore left nothing for us to determine in that regard.

Whether the SRC acted ultra vires its constitutional mandate and statutory mandate in capping the number of remunerable sittings that the MPs and PSC could hold.

58. The appellants decried the capping of the number of sittings of House committees by the SRC. SC submitted that SRC can only prescribe the allowance payable to MPs on sittings and that its role ends there. That it cannot prescribe a number of sittings that MPs should undertake. SC argued that to do so, is to undermine the independence of Parliament as an institution. In addition, SC added that just as in the case of the Judicial Service Commission for instance, the SRC cannot prescribe how many times it sits.

59. We are of the view that the appellants’ fate was sealed when it engaged the SRC and compromised remuneration and salaries. The appellants submitted to the mandate of the SRC and has abided its directions and supervisory role over it. It cannot re-open the issues of the number of sitting allowances remunerable before us in this appeal. The gazette notice that resulted from the compromise afore stated is itself clear that the SRC has not capped the number of times committees can sit. It has capped the maximum allowances members can earn each month as house committee sitting allowance. Which means while the number of committee meetings members can attend are not capped, they cannot earn more in sitting allowances than prescribed by the SRC. The gazette prescribed as follows:

2. Benefits for State Officers in the Senate and National Assembly

- a. Committee Sitting Allowance State Officers in the Senate and National Assembly who serve in Committees shall be paid committee Sitting Allowance, as follows:
 - i. Chairperson: Ksh.15,000 per sitting up to a maximum of Ksh.240,000 per month.
 - ii. Vice-Chairperson: Ksh.12,000 per sitting up to a maximum of Ksh.192,000 per month.
 - iii. Member: Ksh.7,500 per sitting up to a maximum of Ksh.120,000 per month.

60. We are of the view that this appeal is moot as it meets all the characteristics of a moot matter. The *Black’s Law Dictionary*, Ninth Edition, defines a moot case as:

“A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.”

61. J.N. Mulwa, J. in the case of *Natural World Mombasa Safaris Ltd v. Karuri* (Civil Appeal E045 of 2022) [2022] KEHC 9979 (KLR) (Civ) (7 July 2022 cited this Court’s decision in *Okiya Omtatah Okioti & 2 others v. Attorney General & 4 others* [2020], while citing the case of *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) v. County Government of Nairobi* [2019] eKLR where Mativo, J, [as he then was] stated that:

A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises



when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact”.

16. And that:

No court of law will knowingly act in vain ... a Suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

62. We are of the view that in this appeal a controversy no longer exists. That through the compromise reached by the key parties in this appeal, the appeal has been placed beyond the reach of the law, depriving it of practical significance. As there is no longer any controversy between the parties, the appeal has been rendered purely academic.

63. Having come to the conclusion we have of this appeal, we find that the only order that commends itself to us is to dismiss this appeal, which we hereby do. We order that the appellants shall bear the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

