



Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others (Civil Appeal 156 of 2016) [2024] KECA 419 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 419 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 156 OF 2016
MSA MAKHANDIA, J MOHAMMED & S OLE KANTAI, JJA
APRIL 26, 2024**

BETWEEN

SALARIES AND REMUNERATION COMMISSION APPELLANT

AND

NATIONAL HOSPITAL INSURANCE FUND, MANAGEMENT BOARD 1ST RESPONDENT

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nairobi, (N. Abuodha, J.) delivered on 18th March 2016 In Petition No. 40 of 2015)

Scope of the mandate of the Salaries and Remuneration Commission (SRC) in determining the remunerations and benefits of public officers

Reported by Robai Nasike

Constitutional Law – commissions and independent offices – Salaries and Remuneration Commission (SRC) – functions and mandate of the SRC – advisory role of the SRC concerning remunerations and benefits of public officers – whether employees of a State corporation were public officers, hence their remuneration and benefits falling under the purview of the SRC – whether the SRC ought to be consulted during the negotiation of a collective bargaining agreement involving public officers – whether the advice issued by the SRC concerning the benefits and remuneration of public officers was binding – Constitution of Kenya, article 230; Salaries and Remuneration Commission Act (cap 412D), section 11.

Labour Law – collective bargaining agreements – negotiation of collective bargaining agreements for public officers – parties involved in the negotiation of collective bargaining agreements of public officers – Salaries and Remuneration Commission (SRC) – whether the SRC ought to be consulted during the negotiation of a collective bargaining agreement involving public officers – whether the advice issued by the SRC concerning the benefits and



remuneration of public officers was binding – Constitution of Kenya, article 230; Salaries and Remuneration Commission Act (cap 42D), section 11.

Brief facts

The appeal originated from Petition No.40 of 2015 filed by the National Hospital Insurance Fund, Board of Management (the 1st respondent), in the Employment and Labour Relations Court (ELRC). In the petition, the trial court made declarations: that the petitioner as constituted under the Act did not fall under the mandate of the 2nd respondent; that the Salaries and Remuneration Commission Act and Salaries Remuneration Commission Regulations 2012 in so far as they purported to confer on the 2nd respondent jurisdiction to set or restrict remuneration and benefits for public officers other than state officers was inconsistent with the Constitution hence null and void to that extent; the insistence by the 2nd respondent that its advice to the petitioner was binding was counter to the principle of collective bargaining as envisaged under ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98) and by virtue of article 2 (6) of the Constitution, unconstitutional; that the petitioner be at liberty to conclude the Collective Bargaining Agreement reached in July 2013 with the 1st respondent.

The appellant being aggrieved by that judgment and decree, instituted the instant appeal raised 8 grounds of appeal which were compressed into the following three grounds: whether the 1st respondent as statutorily constituted fell under the mandate of the appellant, whether the Salaries and Remuneration Commission Act (SRC Act) and Salaries Remuneration Regulations 2012 violated the Constitution and Labour Relations Act; and whether the advice given by the appellant under articles 230(4) of the Constitution was binding.

Issues

- i. Whether employees of a State corporation were public officers, hence their remuneration and benefits fell under the purview of the SRC.
- ii. Whether the SRC ought to be consulted during the negotiation of a collective bargaining agreement involving public officers.
- iii. Whether the advice issued by the SRC concerning the benefits and remuneration of public officers was binding.

Held

1. Officers and persons serving/working in State corporations were public officers within the meaning of article 260 of the Constitution which gave an explicit definition of public service as; the collectivity of all individuals, other than State officers, performing a function within a State organ. The 1st respondent was a body corporate established under an Act of Parliament as a State corporation within the meaning of that Act, and therefore subject to the Constitution.
2. All State corporations had national outreach by nature and design, and fell squarely under the auspices of the National Government. That also meant that the 1st respondent was also a public service institution that was in existence under the Constitution and its officials and employees would be considered public officers under it. State corporations were agencies of the Government.
3. State corporations, including the 1st respondent, collectively fell within the Government of the Republic of Kenya, and as captured under the definition of “public service”, under article 260 of the Constitution. Hence, the 1st respondent could not separate itself from the public sector. In addition, the remuneration of officers in State corporations such as the 1st respondent was payable either from money provided by Parliament through the annual national budget or funds retained by the State corporation under the provisions of article 206(1)(b) which empowered State organs to retain money that they received for purposes of defraying expenses as empowered by an Act of Parliament.



4. The SRC had the mandate of setting and regularly reviewing the remuneration and benefits of all State officers according to the provisions of article 230 of the Constitution as well as the provisions of section 11 of the Salaries and Remuneration Commission Act. The legal opinion issued by the 3rd respondent (Attorney General) did not translate into legislation giving effect/force to the provisions of article 234 of the Constitution and as such could not supersede the constitutional mandate of the SRC in matters to do with remuneration of the 1st respondent's employees. The trial court erred in holding that the 1st respondent's employees were not public officers and hence not under the mandate of the appellant. Employees of the 1st respondent were public officers under article 260 of the Constitution. Their remuneration and benefits were subject to the jurisdiction of the SRC under article 230(4)(b) of the Constitution and section 11 of the Salaries and Remuneration Commission Act.
5. The SRC had a role in the negotiation of a collective bargaining agreement (CBA) for the 1st respondent. The Constitution provided that the SRC's role was to advise the National Government on the remuneration and benefits of other public officers. There was room for the 2nd respondent, which was a union to negotiate with the 1st respondent as an employer. The terms and conditions of employees of the 1st respondent that were negotiated with the 2nd respondent could only be completed after consultation with SRC as provided for under the law. The 1st respondent was supposed to seek advice from SRC before tabling the proposals to the 2nd respondent. SRC's advice was fundamental in the conclusion of a CBA which dealt with the terms and conditions of public officers.
6. Article 230(1) of the Constitution established the SRC whose functions regarding public officers were set out under article 230(4). The functions of the SRC are further expounded in section 11 of the Salaries and Remuneration Commission Act. The Constitution obligated the SRC to take into account principles set out under article 230(5) when exercising its mandate and functions. No valid salary or benefit of a State or public officer, as appropriate, would ensue from a process that ignored the roles of SRC as provided by the Constitution and enabling statute, the Salaries and Remuneration Commission Act.
7. The giving of advice on remuneration was one of the reasons the SRC was created by the Constitution. The role of SRC was not cosmetic; it was mandatory. It was not only mandatory; it was to be sought and obtained before taking any action that required that advice. That advice was binding as per the requirements of article 259(11) of the Constitution. The trial court found that SRC's advice did not bind the 1st respondent in matters of salary and CBA. With that finding the trial court cast out SRC's constitutional duty to manage Kenya's compensation bill to keep it fiscally sustainable, a constitutional prerequisite of article 230(5).
8. Article 249(2) of the Constitution gave independence to each commission when it provided that the commissions and the holders of independent offices were subject only to the Constitution and the law; and were independent and not subject to the direction or control by any person or authority. The carrying out by SRC of its constitutional mandate of advising on salary, benefits and national compensation bill sustainability was not and could not be construed to be exercising superiority over a union such as the 2nd respondent.
9. Provisions of a CBA concerned terms and conditions of service and involved money issues in addition to performance of duty, evaluation and of necessary competences. SRC had to be involved in its advisory role in negotiations on the conclusion of a CBA involving public officers. The manner and style of how that was to be done was not primary. What was of paramount importance was that SRC's advice had to be sought, and once obtained, it was binding. The prior advice of SRC had to be sought before the 1st respondent could make an offer on basic salary to the 2nd respondent. That advice from SRC bound the 1st respondent.
10. The advice given by SRC was binding because to hold otherwise would render the functions of SRC under article 230(5) idle. It would render SRC ineffective and irrelevant; it would introduce



a discretionary concept of pick and choose in Kenya's governance structure. An interpretation that rendered a constitutional article idle and an independent commission ineffective did not pass the threshold of constitutionality. SRC was a constitutional organ and the trial court erred in interpreting the Constitution in a manner that rendered SRC's singular and exclusive mandate in article 230(5) (a) of the Constitution ineffective.

11. The trial court misapprehended the doctrine of separation of functions which was keystone in Kenya's governance structure. In holding that SRC had a non-binding advisory role in the determination of remuneration and benefits of public officers, the trial court disregarded the central and exclusive juridical competence of SRC in the determination of fiscal sustainability of the total public compensation bill as per article 230(5)(a) of the Constitution.
12. A constitution did not contain mere advice; it did not contain provisions that would not have a binding force and obligation of law; everything in the Constitution must have the force and binding obligation of law; nothing could be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in the company of other binding articles. A constitution could not contain mere advice, incapable of being enforced and whose violation was attendant with no legal consequences. Unless expressly stated, the Constitution did not contain articles or provisions that were without force of law and whose binding nature was discretionary. Except as otherwise stated in the Constitution, article 259(11) removed all discretionary power and by so doing, the Constitution contained binding provisions.
13. The seeking of advice did not violate the principle that independent commissions were not subject to direction or control by any person or authority. The binding advice given by SRC was mutually complementing the role of all State organs and independent commissions in ensuring sustainable development as a constitutional value embodied in article 10(1)(d) of the Constitution. The advice given by SRC was binding as the advice was not merely an opinion, it was advice that had a constitutional underpinning. The advice was binding as it emanated from a constitutional organ with the exclusive constitutional mandate to determine the fiscal sustainability of the total public compensation bill. Further, the advice was binding as the principle of effectiveness required that all provisions of the Constitution must be given effect. SRC advice was not advice *in personam*, it was advice *in rem* as it limited and determined remuneration rights and entitlements of public officers. Being an advice *in rem*, SRC's advice bound all persons, State organs and independent commissions.
14. The Constitution set out the principles that SRC had to take into account before advising on the salaries of public officers. It was only SRC that had the mandate under the Constitution to ensure that the total public compensation bill was fiscally sustainable. The advice was guided by set principles. No other commission was given that mandate; it was only SRC. By advising the 1st respondent on the remuneration of its employees, SRC did not interfere with the functional and operational independence of the 1st respondent. The trial court erred when it held that the advice by SRC to the 1st respondent was not binding. By parity of reasoning, a court could not usurp the role or functions of a constitutional body unless that body had been found to have failed to carry out its functions.

Appeal allowed.

Orders

- i. *Judgment of the Employment and Labour Relations Court dated March 18, 2016, delivered in Petition No. 40 of 2015, its consequential orders and decree ensuing therefrom were set aside in entirety.*
- ii. *Each part to bear own costs of the appeal.*

Citations

Cases

Kenya



1. *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR) - (Mentioned)
2. *Chemilil Sugar Company Limited & 2 others v Kenya Union of Sugar Plantation and Allied Workers* Cause Cause1882 of 2014; [2014] KEELRC 99 (KLR) - (Mentioned)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Followed)
4. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Followed)
5. *In the Matter of the Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Followed)
6. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* Advisory Opinion Reference 1 of 2017; [2020] KESC 54 (KLR) - (Explained)
7. *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudbehia Workers) v Salaries and Remuneration Commission* Petition 294 of 2013; [2014] KEHC 8148 (KLR) - (Followed)
8. *Mogaka, Rodgers Mogusu v George Onyango Oloo & 2 others* Petition 96 of 2014; [2015] KEHC 7639 (KLR) - (Explained)
9. *National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others; Attorney General & another (Interested Parties)* Cause 1664 of 2012; [2013] KEIC 4 (KLR) - (Followed)
10. *Outa v Jared Odoyo Okello & 4 others* Petition 10 of 2014; [2014] KESC 20 (KLR) - (Explained)
11. *Shaban, Mohamud Hassan & 2 others v Shaban Mohamud Hassan & 3 others* Civil Appeal 281 of 2012; [2013] KECA 496 (KLR) - (Mentioned)
12. *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others* Petition 3 of 2015; [2015] KEELRC 863 (KLR) - (Followed)

United States

South Dakota v North Carolina 192 US 286 (1904) - (Followed)

Regional Court

1. *Peters v Sunday Post Limited* [1958] EA 424 - (Explained)
2. *Selle & another v Associated Motor Boat Company Limited & 2 others* [1968] EA 123 - (Followed)

Texts

Stevenson, A., (Ed) (1989), *Oxford English Dictionary* Oxford: Oxford University Press 2nd Edn Vol 12, p 778

Statutes

Kenya

1. Co-Operative Societies Act (cap 490) In general - (Cited)
2. Constitution of Kenya articles 2(6); 10; 41(5); 59; 230; 230(4)(5); 232; 234; 249(2); 259(1)(11); 260 - (Interpreted)
3. Constitution of Kenya (Repealed) In general - (Cited)
4. Court of Appeal Rules, 2010 (cap 9 sub leg) rule 31(1) - (Interpreted)
5. Exchequer and Audit Act (cap 412) In general - (Cited)
6. Labour Relations Act (cap 233) In general - (Cited)
7. National Health Insurance Fund (repealed) (cap 255) section 3 - (Interpreted)
8. Presidential Retirement Benefit (Amendment) Act (cap 197A) In general - (Cited)
9. Public Officer Ethics Act (cap 185 B) section 2 - (Interpreted)
10. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2012 (cap 412D sub leg) In general - (Cited)



11. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (cap 412D sub leg) rule 18 - (Interpreted)
12. Salaries and Remuneration Commission Act (cap 412D) section 11; 26 - (Interpreted)
13. State Corporations Act (cap 446) section 3 - (Interpreted)
14. Teachers Service Commission Act (cap 212) section 37(3) - (Interpreted)

Instruments

1. International Labour Organization Convention 98 on Right to Organise and Collective Bargaining Convention, 1949

Advocates

Mr. Barasa h/b for Mr. Nyamodi for the appellant

JUDGMENT

Background

1. This appeal originates from Petition No.40 of 2015 filed by the National Hospital Insurance Fund, Board of Management (the 1st respondent), in the Employment and Labour Relations Court (ELRC).
2. In the amended petition dated May 18, 2015 the 1st respondent sued Kenya Union of Commercial and Allied Workers (the 2nd respondent), Salaries and Remuneration Commission, (SRC) (the appellant) and enjoined the Attorney General (the 3rd respondent) as an interested party. The amended Petition *inter alia* sought for various declarations to wit; a declaration that the strike notice issued by the 2nd respondent on April 27, 2015 was unlawful; an order restraining the 2nd respondent from calling or proceeding with a strike in the circumstances; a determination by the ELRC on whether the 1st respondent falls under the mandate, province and statutory supervision of the appellant under the Salaries and Remuneration Commission Act, No. 10 of 2011 (SRC Act); a declaration that the 1st respondent as constituted under the SRC Act does not fall under the mandate of the appellant; a declaration that the Salaries and Remuneration Regulations of 2012 offend the intent and object of the Labour Relations Act; and a declaration that the 1st respondent is at liberty to conclude the Collective Bargaining Agreement (CBA) reached in July, 2013 with the 2nd respondent.
3. The petition was supported by the affidavit of Ms. Millicent Mwangi, the 1st respondent's General Manager in charge of Human Resource and Administration sworn on May 15, 2015.
4. The 2nd respondent through Mr. Boniface Kavuvi in charge of Human Resource and Administration filed a replying affidavit dated May 22, 2015, while the appellant through Nicholas Pkech Siwatom, the Director, Remuneration Analysis filed a replying affidavit dated June 24, 2016.
5. At the hearing of the petition parties relied on their written submissions with limited oral highlighting in Court in support of their respective positions. Upon considering the petition the evidence adduced and the submissions, the learned Judge (Abuodha, J.) delivered a judgment on March 18, 2016 in which he ordered as follows:

“A declaration that the petitioner as constituted under the Act does not fall under the mandate of the 2nd respondent; A declaration that the Salaries and Remuneration Commission Act and Salaries Remuneration Commission egulations 2012 in so far as they purport to confer on 2nd respondent jurisdiction to set or restrict remuneration and benefits for public officers other than state officers are inconsistent with the Constitution hence null and void to that extent; The insistence by the 2nd respondent that its advice to the



petitioner is binding is counter to the principle of collective bargaining as envisaged under ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No 98) and by virtue of article 2(6) of the Constitution, unconstitutional; A declaration that the Petitioner be at liberty to conclude the Collective Bargaining Agreement reached in July, 2013 with the 1st respondent and there will be no order as to costs.”

6. On June 27, 2016, the Deputy Registrar of the ELRC duly issued a decree in accordance with the judgment of the ELRC. The appellant being aggrieved by that judgment and decree filed a memorandum of appeal raising 8 grounds, which in its written submissions were compressed into 3 issues as follows:

- a. Whether the 1st respondent as statutorily constituted falls under the mandate of the appellant (Grounds 1,2 & 3);
- b. Whether the Salaries and Remuneration Commission Act and Salaries Remuneration Regulations 2012 offend the Constitution and Labour Relations Act (Ground7);
- c. Whether the advise given by the appellant under articles 230(4) of the Constitution is binding (Ground 4,5 & 6)

7. The appellant’s written submissions dated September 16, 2019 were duly highlighted by learned counsel, Mr Barasa holding brief for Mr Nyamodi.

On the question whether the 1st respondent as statutorily constituted falls under the mandate of the SRC, counsel submitted that the SRC is a constitutional body established under articles 230(4) and (5) of the Constitution, 2010 and that in performing its functions the appellant must take into account the principles set out in articles 230(4) of the Constitution, which inter-alia include ensuring that the total public wage bill is fiscally sustainable.

8. Counsel submitted that Parliament enacted the SRC Act which provides for its functions and powers. That section 11 of the Act provides for the functions of the SRC as well as the principles to be applied in the discharge of its functions. Counsel submitted that a plain reading of the Constitution and the Act shows that the SRC is the constitutional and statutory body with the mandate to set and regularly review the remuneration and benefits of all state officers as well as advise the National and County Governments on the remuneration and benefits of all other public officers.

9. Further, counsel asserted that article 260 of the Constitution as well as section 2 of the Public Officers Ethics Act of 2003 defines who a public officer is. Reliance was placed on the decision of National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Ltd [2013] eKLR on the holding of who is a public officer. Counsel also submitted that by dint of section 3 of the NHIF Act the 1st respondent’s major source of financing is statutory fees from the member contributions which in essence is a public fund within the meaning given in the Exchequer and Audit Act. Reliance was placed on Kenya National Union of Water and Sewerage Employees vs Mathira Water and Sanitation Company Ltd (*supra*). In conclusion, counsel submitted that the 1st respondent discharges a public function, and it is within the public service category and therefore its employees fall within the meaning of public office and public officers. Reliance was placed on the authority of Union of Domestic, Hotels, Education and Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission [2014] eKLR.

10. Counsel further submitted that since the employees or staff of the 1st respondent are public officers, any collective bargaining agreement concerning their compensation should be made subject to the mandate



of the SRC in accordance with rule 18 of the [Salaries and Remuneration Commission \(Remuneration and Benefits of State and Public Officers\) Regulations 2013](#).

11. In further submissions, counsel asserted that the collective bargaining process between the 1st and 2nd respondents as established by the law falls well within the mandate of the SRC, specifically on the issue of the remuneration and benefits to be granted under the collective bargaining agreement. It was thus asserted that the declaration by the learned Judge that the 1st respondent as constituted does not fall under the mandate of the SRC with respect to the negotiation and determination of the salary of the employees or staff of the 1st respondent in the form of a CBA cannot fly in the face of the stated Constitutional and statutory provisions.
12. On the 2nd issue as to whether the [SRC Act](#) and the [Salaries Remuneration Regulations 2012](#) offend the [Constitution](#) and [Labour Relations Act](#), it was submitted that section 26 of the [SRC Act](#) allows the SRC to enact regulations for better carrying out of the provisions of the [Act](#) and that the SRC pursuant to the Section enacted the [Salaries and Remuneration Commission \(Remuneration and Benefits of State and Public Officers\) Regulations, 2013](#).
13. Counsel submitted that the Constitution must be interpreted in a manner that promotes its purposes, values and principles. The case of [Council of County Governors v Attorney General & another](#) [2017] eKLR was relied on. It was submitted that the SRC was created to consolidate decision making with regard to remuneration of public officers and that it was not true and it cannot be that the object and purpose of the [SRC Act](#) and the [Regulations](#) thereto was to create the 1st respondent to interfere with the collective bargaining or other processes it carries out under the auspices of article 41(5) of the [Constitution](#) and the [Labour Relations Act, 2012](#) or any other written law.
14. As to whether the advice given by the SRC under article 230(4) is binding, it was submitted that pursuant to article 259(11) the advice of the SRC to the 1st respondent regarding the latter's employees' and/or staff remuneration and benefits is binding, not only on the 1st respondent but on any person, who determines the remuneration and benefits of public officers.
15. Counsel further submitted that the 1st respondent was bound to take into account the SRC's advice pursuant to article 230(4) and 259(1) of the [Constitution](#) and that the trial judge erred and disregarded the [Constitution](#) when he made the finding that the SRC had no legal basis or constitutional ground to assert that its advice on remuneration of public officers to the National and County Governments is binding. It was further submitted that the SRC exercises its mandate by giving advice which binds the concerned parties and they are required by law to mandatorily seek the advice of the SRC before their decisions can be implemented. The decision of this court in [Teachers Service Commission v Kenya National Union of Teachers & 3 others](#) [2015] eKLR was relied on for the proposition.
16. Counsel further submitted that the CBA reached in July 2013 is null and void to the extent that it does not give effect to the appellant's mandate as envisioned in article 230 of the [Constitution](#) as read together with section 11 of the [SRC Act](#). Counsel asserted that it is trite that the courts should not usurp or interfere with the mandate of Constitutional bodies unless and until such a body violates the [Constitution](#). Counsel relied on this court's decision in [Shaban Mohamud Hassan & 2 others v Shaban Mohamud Hassan & 3 others](#) [2013] eKLR in support of the assertion.

Counsel submitted that by ordering the CBA to be concluded without the advice of the appellant the learned Judge usurped, downplayed and sought to interfere with the constitutional mandate of the appellant and that there was no claim before the court that the advice that the appellant offered was irrational or unreasonable and thereby violated the [Constitution](#).



17. In conclusion, counsel submitted that if the CBA reached in July 2013 is concluded without the input of the appellant contrary to legal requirements then the danger lies on its fiscal sustainability that would greatly impact on the already high public wage bill contrary to public policy, principles of public finance and good governance which principles this court as well as other state organs, state officers and public officers are bound to uphold by dint of article 10 of the Constitution.
18. In support of the appeal, learned counsel for the 3rd respondent submitted that whereas the 1st respondent's members are not employees of any body established under the Constitution, it is clear that the provisions of article 260 must be read together with the provisions of article 232 of the Constitution which sets out the values and principles of public service.

Counsel submitted that the reason for that is not idle, it is a rule of constitutional interpretation that the Constitution must be read as an integrated whole and no one particular provision destroying the other but sustaining the other.

19. Counsel further submitted that under article 232(2) of the Constitution, it is clear that the drafters of the Constitution intended that the values and principles of public service should govern not just employees of state organs but also those of State Corporations. Counsel asserted that under section 3 of the State Corporations Act the President establishes corporations as body corporates to perform certain specified functions. Further, that the State has a controlling stake in state corporations and as such they are public entities performing public functions. Further, that the provisions of the Public Officer Ethics Act of 2003 confirm that position.

Counsel relied on the decision of National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Ltd (*supra*) on the definition of a public officer.

20. In further submissions, counsel emphasized that a state corporation is essentially an institution in the public service and its staff are public officers and the SRC has mandate over it. Further, that NHIF is a public office under the National Government and the larger public service and it operates on public funds provided for by Parliament. Counsel submitted that the SRC under the Constitution has the mandate to advise on remuneration and benefits of its staff and as such NHIF is bound by the SRC Act and Regulations 2012.
21. Counsel further submitted that under regulations 18(1), (2) and (3), CBA's are negotiated between employers and employees or Trade Unions of employees and there is no legal basis for the SRC to negotiate directly with unions as they are not State or public service organs. In further submissions it was asserted that the Constitution mandates the SRC to advice on remuneration of public officers and that such advice is compulsory. Further, that the 1st respondent failed to demonstrate how the SRC Rules and particularly rule 18 offended the Constitution and Labour Relations Act. Counsel further submitted that rule 18 of the SRC Regulations do not offend the intent and object of the Labour Relations Act and that the rules have no negative effect on harmonious labour relations. Further, that in finding that the rules are in order, the 3rd respondent urges this court to be persuaded by the decision in Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudbeiha Workers) v Salaries and Remuneration Commission [2014] eKLR.
22. The case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others (*supra*) was relied on in reference to article 259(11) and article 230(4) (b) of the Constitution, section 11 of SRC Act and 37(3) of the TSC Act. Counsel submitted that the Constitution sets out the principles that SRC has to take into account before giving advice on the salaries of public officers and that it is only SRC that has the mandate under the Constitution to ensure that the total public wage bill is fiscally sustainable. Counsel further submitted that the learned Judge erred in his conclusion that the



advice by the SRC was not binding and also for disregarding the report of the SRC who have the sole statutory mandate of ensuring fiscal sustainability of the State and public officers wage bill. Counsel relied on the decision of *South Dakota v North Carolina* 192 US 268 [1940] LED as cited in the case of *Centre for Rights Education and Awareness & another v John Harun Mwau & others* [2012] eKLR on the rule of construction of constitutional provisions.

23. In opposing the appeal, the 1st respondent submitted that the mandate of the SRC is exercisable only in respect of state and public officers holding state office or in the public service with their salaries and remuneration payable directly from the Consolidated Fund or from money provided by Parliament. Counsel asserted that the 1st respondent is neither established under the *Constitution* nor are its employees' public officers or holding state offices within the meaning of article 260 of the *Constitution*.

Counsel submitted that the issue of State Corporations like the 1st respondent herein fall within the mandate of the SRC was considered by the 3rd respondent through a legal opinion dated December 17, 2012 to the Government.

24. Counsel submitted that from the said legal opinion, the 3rd respondent took the position that state corporations were not established under the *Constitution* and therefore were not state organs under the mandate of the constitutional definition of the terms state and public officer or service. Further, that the position taken by the 3rd respondent in its legal opinion as to the appellant's mandate represents the proper interpretation of the law. The High court cases of *Chemilil Sugar Company Limited & 2 others v Kenya Union of Sugar Plantation and Allied Workers* [2014] eKLR and *National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others* [2013] eKLR were cited for the proposition that the SRC extends only to cover state and public officers.
25. In opposing the appeal, the 2nd respondent submitted that a CBA in question was effective from July 1, 2013 to June 30, 2017 and it had been fully executed, registered and implemented and is a matter behind the parties. Counsel submitted that the 1st and 2nd respondents have negotiated the next CBA for the period July 1, 2017 to June 30, 2021 now pending signatures, registration and implementation. Counsel further submitted that there is no pending cause of action for which the 1st and 2nd respondents can be enjoined or restrained from undertaking.

Determination

26. We have considered the appeal and the submissions. Our mandate on a first appeal as set out in rule 31(1) of the *Court of Appeal Rules* requires us to re-appraise the evidence and to draw our own conclusions. In *Peters vs. Sunday Post Limited* [1958] EA 424, the predecessor of this court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

27. This court is therefore required, as was also stated by the court in *Selle and Another v Associated Motor Boat Company Limited & 2 others* [1968] EA 123 to “reconsider the evidence, evaluate it itself and draw its own conclusion”. With that in mind, we discern, the issues for determination to be: whether the 1st respondent as statutorily constituted falls under the mandate of the SRC; whether the ELRC usurped,



downplayed and interfered with the appellant's constitutional mandate, and whether the advice given by the SRC under articles 230(4) of the Constitution was binding.

28. On the first issue, we note that the issue has been litigated and re-litigated severally. The starting point would be to determine whether positions held by State Corporation's employees such as the 1st respondent are in the public service subject to regulation by the SRC. Fundamentally, the Constitutional threshold is article 260 of the Constitution which defines "public officer" as follows:

"Public officer means –(a) any State Officer; or (b) any person, other than a State Officer, who holds a public office."

29. "Public Office" means an office in the National Government, a County Government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament". On the other hand, public service is defined as follows:

"Public service means the collectivity of all individuals, other than State officers, performing a function within a State organ".

30. The collectivity of public service and being a public officer are all interlinked into public service the only exception is state officers performing a function within a State Organ. All other persons serving the people of Kenya are in the public service. This is the constitutional definition. This collectivity in public service is further given meaning pursuant to section 2 of the Public Officer Ethics Act that defines a public officer as follows:

"Public officer means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following-a)the Government or any department, service or undertaking of the Government, the National Assembly or the Parliamentary Service, a local authority, any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law)a co-operative society established under the Co-operative Societies Act."

31. The courts in addressing the issue of whether employees of State Corporations are public officers within the meaning of article 260 of the Constitution have affirmed the same and given emphasis to the fact of service to the Kenyan public as a collective. The ELRC (James Rika, J) in National Union of Water & Sewerage Employees v Mathira Water And Sanitation Company Limited & 2 others (*supra*) held that:

"The employees of Mathira Water and Sanitation Company may therefore be viewed as public servants, as they are working for an agent and instrumentality of a Public Authority. They are public servants, though not in the traditional public service, controlled directly by Government Ministries. Their employer is a private company, rendering public service. The Water Bill proposes that the water agents may conduct their functions through a public-private partnership. Persons drawn in as partners of the water agents will themselves be new forms of employers, and their employees would not easily fit in the public servant-private employee dichotomy."



32. The ELRC (James Rika, J) in the same *case* held as follows:-

“In the view of the court, employees of the water companies are vaguely public servants, going by the definition given by *Oxford Dictionary* at paragraph 25 above. The characterization is a matter of qualitative judgement, rather than quantitative measurement. The employees fall within the advisory function of the Salaries and Remuneration Commission created under article 230(4)(b).”

33. The *Oxford English Dictionary*, Second Edition [1989] Vol 12, p 778 which is referred to defines public services in the following terms:

“In general, and in most senses, the opposite of private. The varieties are numerous, and pass into each other by many intermediate shades of meaning. The exact shade depends on the substantive qualified, and in some expressions, more than one sense is vaguely present; in others the usage is traditional and it is difficult to determine in what sense precisely, the thing in question was originally called public...”

34. See also the persuasive decision in *Rogers Mogaka Mogusu v George Onyango Oloo & 2 others* [2015] eKLR where the High Court Lenaola, J held that:

“If LBDA receives funds from the Parliament of Kenya and its Chairman gets paid from such funds, can it properly be said that he is not a public officer? I think not and the law as expressed above bears me out. It also follows that the Circular dated July 4, 2013 by the Registrar of Political Parties has captured the law well and ought to be implemented otherwise perceived partisan, non-impartial officials of political parties will also play important roles in public entities, a situation that cannot be proper in our new and settling constitutional dispensation. It is my finding therefore that as Chairman of LBDA, the 1st respondent is a public officer and it is untenable that he

35. In the Supreme Court of Kenya, in the concurring opinion of Njoki Ndungu, SCJ in *Frederick Otienu Outa v Jared Odoyo Okello & 4 others* [2014] eKLR the learned Judge held in part as follows:

“It is my understanding, therefore, that the definition of ‘public officer’ cannot be strictly confined to the singular definition clause in article 260; there are other Constitutional stipulations, and statutory and common law provisions that speak to the definitions, values, principles, and the institutional framework of public service that must apply. This therefore calls for the *Constitution* to be read in a holistic manner when it comes to the interpretation of any one clause.”

36. Njoki Ndung’u, SCJ continued as follows:

“Thus, in arriving at the true meaning of ‘public officer’ under the *Constitution*, then, and in line with the provisions of article 259, one must then fully examine the different concepts carried therein. In the instant matter, four key questions in determining whether any person is a public officer, within the meaning of the *Constitution*, will apply:

- a. Is the person concerned in an office in the national government, the county government or the public service?



- b. Does that person receive remuneration or benefits payable by the Consolidated fund or directly by moneys provided by Parliament?
- c. Does that person perform a function within a state organ or a state corporation?
- d. Was the person holding public office under the terms of the former Constitution?

If one or more of those questions were answered in the affirmative, then the person concerned would rightly be considered within the proper meaning of the term ‘public officer’.”

37. The High Court, Lenaola, J. in *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission* [2014] eKLR held that:

“What I gather from the above definition is that the criteria for determining whether one is a public officer is quite clear and requires no more than a literal interpretation. First, the person must hold an office either in the national government, county government or public service; secondly, the remuneration and benefits of that officer must be payable directly from the Consolidated Fund or directly out of money provided by Parliament.”

38. It is our view that the convergence is that officers and persons serving/working in state corporations are public officers within the meaning of article 260 of the Constitution. Therefore, article 260 of the Constitution gives an explicit definition of public service, as; the collectivity of all individuals, other than State officers, performing a function within a state organ. The 1st respondent is a body corporate established under an Act of Parliament as a State corporation within the meaning of that Act, and therefore subject to the Constitution.
39. All State Corporations have national outreach by nature and design, and fall squarely under the auspices of the National Government. This also means that the 1st respondent is also a public service institution that is in existence under the Constitution and its officials and employees would be considered public officers under it. It is obvious that State Corporations are agencies of the Government and from our understanding, there are four sectors in our Country upon which all organizations, institutions, enterprises and businesses may fall. These are the private sector, the public sector which includes ministries, State-owned Corporations, enterprises, businesses, industries, organizations, Non-Governmental Organizations (NGOs) and Community-Based Organizations (CBOs). State Corporations, including the 1st respondent, collectively fall within the Government of the Republic of Kenya, and as captured under the definition of “public service” under article 260 of the Constitution this means the 1st respondent cannot separate itself from the public sector.
40. Further, it is clear that the remuneration of officers in State Corporations such as the 1st respondent is payable either from money provided by Parliament through the annual national budget or funds retained by the State Corporation pursuant to the provisions of article 206(1)(b) which empowers State organs to retain money that they receive for purposes of defraying expenses as empowered by an Act of Parliament. In *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhebia*



Workers) vs. Salaries and Remuneration Commission (*supra*) the High Court Lenaola, J held that State Corporations such as the 1st respondent,

“that any other finding would be absurd, illogical and impractical given the design and structure of our Constitution”. We agree fully with that holding.

41. We are cognizant that article 230 of the *Constitution* establishes the SRC and its powers and functions are provided for under article 230(4) as follows: set and regularly review the remuneration and benefits of all State officers; and advise the National and County Governments on the remuneration and benefits of all other public officers.
42. In performing the above functions, SRC is commanded under article 230(5) of the *Constitution* to consider four key principles. The principles are: the need to ensure that the total public compensation bill is fiscally sustainable; the need to ensure that the public services are able to attract and retain the skills required to execute their functions; the need to recognize productivity and performance; and transparency and fairness.
43. The functions of SRC are further provided for in the *SRC Act*, which is an Act of Parliament to make further provision as to the functions and powers of the SRC, the qualifications and procedures for the appointment of the chairperson and members of the SRC, and for connected purposes.
44. Under section 11 of the *Act*, the SRC is conferred with additional functions to those set out under article 230(4) of the *Constitution*. They are; inquire into and advise on the salaries and remuneration to be paid out of public funds; keep under review all matters relating to the salaries and remuneration of public officers; the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector; conduct comparative surveys in the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices; determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation; make recommendations on matters relating to the salary and remuneration of a particular State or public officer [Emphasis provided]; make recommendations on the review of pensions payable to holders of public offices; and perform such other functions as may be provided for by the *Constitution* or any other written law.
45. According to counsel for the 3rd respondent, the SRC erred when it involved itself in issues relating to salaries involving employees of the 1st respondent who according to them are not public officers. It referred to the High Court cases of *Chemilil Sugar Company Limited & 2 others v Kenya Union of Sugar Plantation and Allied Workers* [2014] eKLR and *National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others* (*supra*) where the High Court (James Rika, J) held that the SRC extends only to cover State and public officers.
46. We take cognizance of the legal opinion issued by the 3rd respondent dated December 17, 2012. With respect, the advisory/legal opinion does not translate into legislation giving effect/force to the provisions of article 234 of the *Constitution* and as such cannot supersede the constitutional mandate of the SRC in matters to do with remuneration of the 1st respondent’s employees. The mandate and role of the SRC as set out in the *Constitution* and the law was succinctly set out in the persuasive decision of Lenaola, J in *Kenya National Commission on Human Rights (KNHCR) v Attorney General & Another* [2015] eKLR. In that case *KNHCR*, a Constitutional Commission established under Article 59 of the *Constitution* filed a Constitutional Petition seeking a declaration that the *Presidential Retirement Benefit (Amendment) Act* No 9 of 2013 contravened the provisions of among others:- article 234(a)



of the Constitution. The issue was that when Parliament enacted the said Act, it failed to involve SRC thereby usurping their mandate. Lenaola, J held that:

“Looking at the provisions of article 230 of the Constitution as well as the provisions of section 11 of the SRC Act, it is clear that the SRC has the mandate of setting and regularly reviewing the remuneration and benefits of all state officers.”

47. We fully agree with the above position on the mandate of the SRC and we reject the proposition by the 2nd respondent that the trial court was right in its holding that the 1st respondent’s employees are not public officers and hence not under the mandate of the appellant.
48. The trial court in our view erred in holding as such, and we find that employees of the 1st respondent are public officers under article 260 of the Constitution. It follows, therefore, that their remuneration and benefits are subject to the jurisdiction of the SRC under article 230(4)(b) of the Constitution and section 11 of the SRC Act.
49. On the second issue, it is clear that the SRC has a role in the negotiation of a CBA for the 1st respondent. It is imperative to closely look at the Constitution which provides that the SRC’s role is to advise the National Government on the remuneration and benefits of other public officers. In this case there is room for the 2nd respondent, which is a union to negotiate with the 1st respondent as an employer. In our view the terms and conditions of employees of the 1st respondent that are negotiated with the 2nd respondent can only be completed after consultation with SRC as provided for under the aforesaid law. The 1st respondent was supposed to seek advice of SRC before tabling the proposals to the 2nd respondent. SRC’s advice is fundamental in the conclusion of a CBA which deals with terms and conditions of public officers.
50. The crux of this appeal turns on the role of the SRC in determining salaries and wage-related issues of state and public officers. It is for that reason that we now proceed to make our determination on SRC’s role. On this the trial court in the impugned judgment found as follows:

“31. I have perused the correspondence exchanged between the petitioner and Salaries and Remuneration Commission and it would seem that the petitioner was strait-jacketed in its negotiations with the 1st respondent’s, its role reduced to merely communicating what Salaries and Remuneration Commission had decided. That could not by any means be considered as negotiations. It would therefore not be far from the truth to say the regulations offend the spirit of collective bargaining hence offend ILO Convention No. 98 and the Constitution.

32. As observed earlier the mandate of the Salaries and Remuneration Commission over public officers employed or appointed to national or county government is advisory. A person with an advisory role cannot insist that the advice given must be taken without modification even when circumstances permit such modification.

38. As observed earlier in this judgment, the mandate of the 2nd respondent as clearly provided under article 230(4) of the Constitution is to set and regularly review the remuneration and benefits of all state officers and advise the national and county governments on remuneration and benefits of all other public officers. In other words, the 2nd respondent is only mandated to set the salaries and remuneration of state officers but when it comes to other public officers, the 2nd respondent’s role is advisory. It is therefore in excess of its jurisdiction to purport to fix or set salaries for public officers.



39. If it be the practice that the advice given by the 2nd respondent to national and county government is taken without any modification, it will remain as such-a practice without more. The 2nd respondent has no legal or Constitutional ground to insist that its advice over remuneration of public officers to national or country government must be observed to the latter.

40. This conclusion may be unsettling to the 2nd respondent but unfortunately it is the interpretation yielded from the plain reading of article 230(4) of the Constitution. If it was the intention of the framers of the Constitution that the 2nd respondent be given the mandate to set and regularly review salaries and benefits of public officers other than state officers as well, then such intention was omitted when finalizing article 230(4). If that be the case, only an amendment to article 230(4) can remedy the situation. Until that is done, no amount of operational creativity can confer such jurisdiction on the 2nd respondent.----.”

51. Was the trial judge right in his finding? To answer this question, let us start at the beginning, to wit, the creation and the mandate of the SRC by the 2010 Constitution.

Article 230(1) Constitution, provides as follows:

“There is established the Salaries and Remuneration Commission.”

Article 230(4) Constitution outlines the functions of SRC as regards public officers of whom teachers are as per article 260 of the Constitution when it states;

“The powers and functions of the Salaries and Remuneration Commission shall be to –

- a. set and regularly review the remuneration and benefits of state officers; and
- b. advise the national and county governments on the remuneration and benefits of all other public officers [Emphasis supplied].

52. On its part section 11 of SRC Act sets out the SRC’s functions as:

- (a) inquire into and advise on the salaries and remuneration to be paid out of public funds;
- b. keep under review all matters relating to the salaries and remuneration of public officers;
- c. advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector
- d. conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public officers;
- e. determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
- f. make recommendations on matters relating to the salary and remuneration of a particular State or public officer;
- g. make recommendations on the review of pensions payable to holders of public offices; and
- h. perform such other functions as may be provided for by the Constitution or any other written law.”



53. Those functions in the enabling statute flow from the Constitution at article 230(4) which enumerates the powers and functions of SRC as being to:
- a. set and regularly review the remuneration and benefits of all state officers; and
 - b. advise the national and county governments on the remuneration and benefits of all other public officers.
54. In the discharge of its mandate the Constitution obliges the SRC to mandatorily take into account principles as set out under article 230(5) of:
- a. the need to ensure that the total public compensation bill is fiscally sustainable;
 - b. the need to ensure that the public services are able to attract and retain the skills required to execute their functions;
 - c. the need to recognize productivity and performances; and
 - d. transparency and fairness.
55. No valid salary and/or benefit of a state or public officer, as appropriate, shall ensue from a process that ignores the roles of SRC as we have reproduced them above. The learned trial Judge, as shown in paragraph 32 of his judgment quoted above, was categorical that SRC’s input is only mandated to set the salaries and remuneration of State Officers but when it comes to other public officers, its role is advisory.
56. It is clear that the Collective Bargaining process was peripheral and the learned Judge was clear in his mind that any advice SRC gave could be taken or declined as the same was not binding on the SRC. The giving of advice on remuneration was one of the reasons the SRC was created by the Constitution, 2010. The role of SRC is not cosmetic; it is mandatory. It is not only mandatory, it is to be sought and obtained prior to taking any action that requires that advice. And that advice is binding as per the requirements of article 259(11) of the Constitution when it provides as hereunder:
- “(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.” [Emphasis supplied].
57. The learned trial Judge found that SRC’s advice did not bind the 1st respondent in matters salary and CBA. With that finding the trial judge cast out SRC’s constitutional duty to manage the Country’s compensation bill to keep it fiscally sustainable, a constitutional prerequisite of article 230(5).
58. Article 249(2) of the Constitution gives independence to each Commission when it provides:
- “249 (2) The Commissions and the holders of independent offices –
- a. are subject only to this Constitution and the law; and
 - b. are independent and not subject to the direction or control by any person or authority.”



59. From the above we find that the carrying out by SRC of its constitutional mandate of advising on salary, benefits and national compensation bill sustainability is not and cannot be construed to be exercising superiority over a Union such as the 2nd respondent. Provisions of a CBA concern terms and conditions of service and involve money issues in addition to performance of duty, evaluation thereof and of necessary competences. Having seen, under article 230 of the Constitution what the functions of SRC are, there can be no doubt that SRC has to be involved in its advisory role in negotiations on the conclusion of a CBA involving public officers. The manner and style of how that is to be done is not primary.

what is of paramount importance is that SRC's advice has to be sought, and once obtained, it is binding. In conclusion, we are satisfied that the prior advice of SRC had to be sought before the 1st respondent could make an offer on basic salary to the 2nd respondent. That advice from SRC binds the 1st respondent.

60. Guided by the Supreme Court of Kenya decision in the Matter of Advisory Opinion of the court, Constitutional Application No 2 of 2011 at paragraph 93 and persuaded by conclusions by Lenaola, J in Kenya National Commission on Human Rights v Attorney & another (*supra*) we come to the conclusion and finding that the advice given by SRC was binding. The advice is binding because to hold otherwise would render the functions of SRC under article 230(5) idle. It would render SRC ineffective and irrelevant; it will introduce a discretionary concept of pick and choose in Kenya's governance structure. An interpretation that renders a constitutional article idle and an Independent Commission ineffective does not pass the threshold of constitutionality.

SRC is a constitutional organ and the learned trial Judge therefore erred in interpreting the Constitution in a manner that renders SRC's singular and exclusive mandate in article 230(5)(a) ineffective.

61. In the circumstances, we find that the trial court misapprehended the doctrine of separation of functions which is keystone in Kenya's governance structure. In holding that SRC has a non-binding advisory role in the determination of remuneration and benefits of public officers, the trial court disregarded the central and exclusive juridical competence of SRC in the determination of fiscal sustainability of the total public compensation bill as per article 230(5)(a) of the Constitution.

62. We are fortified in this finding because a Constitution does not contain mere advice; it does not contain provisions that would not have a binding force and obligation of law; everything in the Constitution must have the force and binding obligation of law; nothing can be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in the company of other binding articles. A Constitution cannot contain mere advice, incapable of being enforced and whose violation is attendant with no legal consequences. Unless expressly stated, the 2010 Constitution does not contain articles or provisions that are without force of law and whose binding nature is discretionary. Except as otherwise stated in the Constitution, article 259(11) removes all discretionary power and by so doing, the Constitution contains binding provisions.

63. The seeking of advice does not violate the principle that Independent Commissions are not subject to direction or control by any person or authority. The binding advice given by SRC is mutually complementing the role of all state organs and Independent Commissions in ensuring sustainable development as a constitutional value embodied in article 10(1)(d) of the Constitution. The advice given by SRC is binding as the advice is not merely an opinion, it is advice that has a constitutional underpinning. The advice is binding as it emanates from a constitutional organ with exclusive constitutional mandate to determine fiscal sustainability of the total public compensation bill. Further, the advice is binding as the principle of effectiveness require that all provisions of the Constitution must be given effect. SRC advice is not advice in personam, it is advice in rem as it limits and determines



remuneration rights and entitlements of public officers. Being an advice in rem, SRC's advice binds all persons, state organs and independent commissions.

64. This court in *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* (*supra*) had the occasion to discuss the role of SRC in collective bargaining in the public sector in the following terms:

Githinji, JA held thus:

[35] I have had the advantage of reading the judgments of the other members of the court. There are unanimous findings as follows.

(5) The majority of the members of the court have made the following findings:

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

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

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

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

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

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

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

In the same judgment, Azangalala, JA held thus:

[225] With regard to SRC's role in concluding a CBA, my simple answer is that SRC influences CBA negotiations through its mandatory advice to TSC on remuneration and benefits payable to teachers. It may be recalled that the unions' stance on the matter was that they could not conclude a CBA without agreement on basic salary component. Yet TSC cannot lawfully negotiate and agree on the basic salary for teachers without approval of SRC whose advice binds it. So, whereas SRC is not a direct negotiator with the unions on conclusion of a CBA, it influences the negotiations through its constitutional and statutory



mandate when advising TSC on remuneration and benefits payable to teachers. In practical terms, it means that before making any offer to the unions with respect to the remuneration and benefits payable to teachers, TSC must seek SRC's advice on the same.

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

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

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

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

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

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

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

“[169] Therefore, “independence” is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.”

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

“A literal reading of article 230(4)(b) of the *Constitution* shows that SRC is not one of the envisaged external forces against whom the shield of independence can be waved. The



Constitution vides article 230(4)(b) and (5) has integrated SRC in the determination of all matters relating to remuneration and benefits of public officers. The practical consequence is that SRC has an integrated, over-arching centripetal force in the determination of remuneration and benefits payable to public officers which includes teachers... Using company law analogy, the advice given by SRC is like a floating charge hovering all over public service and when it descends, it attaches, crystallizes and binds anything and everything that it lands upon. I believe that the drafters of the Constitution never intended SRC to be a toothless bulldog that barks, barks and barks again without biting – SRC has teeth and can bite, must bite and shall bite. SRC is the forum for determining fiscal sustainability of the remuneration and benefits of all public officers. One ignores SRC at his/her own peril.”

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

68. We find that the learned judge erred when he held that the advice by SRC to the 1st respondent was not binding. This court in Shaban Mobamud Hassan & 3 others [2013] eKLR stated as follows:

“We add that the courts in discharging their judicial function must always bear in mind the supremacy of the Constitution and to respect the manner it has distributed functions to various state organs and independent bodies. The function of the High court is to see that lawful authority vested in these organs and bodies is not abused by unfair treatment. They cannot step outside the bounds of authority prescribed to them by the Constitution or statute because the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all other legislation. But as Lord Brightman warned in the often-cited case of *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 at 1173:

“If the court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty of itself usurping power.”

69. By parity of reasoning, we find that a court cannot usurp the role or functions of a constitutional body unless that body has been found to have failed to carry out its functions.

70. The upshot is that this appeal has merit and we allow it. We hereby set aside in entirety the judgment of the ELRC dated March 18, 2016 delivered in Petition No 40 of 2015. We also set aside in entirety all consequential orders and decree ensuing therefrom.

71. This being a public interest litigation matter, the order that commends itself to us is that each party will bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

ASIKE-MAKHANDIA



.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

