



**Mohamed v State Corporation Advisory Committee & 2 others; Public Service Commission (Interested Party) (Employment and Labour Relations Petition E079 of 2024) [2025] KEELRC 914 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 914 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E079 OF 2024  
MN NDUMA, J  
MARCH 20, 2025**

**BETWEEN**

**HASHIM D. MOHAMED ..... PETITIONER**

**AND**

**STATE CORPORATION ADVISORY COMMITTEE ..... 1<sup>ST</sup> RESPONDENT**

**KENYA UTALII COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF TOURISM AND WILDLIFE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner was appointed to fill the position of Principal and Chief Executive Officer (CEO), Kenya Utalii College by a letter dated 9/12/2016. This followed a successful interview.
2. The Petitioner alleges that he was initially offered a salary of Kshs. 370,000.00, however, considering that the Petitioner was earning a net salary of USD 7,500.00 and had requested a gross salary of Kshs. 800,000.00, the Council negotiated with the Petitioner and agreed on a gross salary of Kshs. 720,000.00.
3. The Petitioner states that the college, the 2<sup>nd</sup> Respondent herein, issued him with a letter dated 24/1/2017 confirming his terms and conditions of service for the said position with a total remuneration of Kshs. 720,000.00 divided as follows:-

Basic pay Kshs. 600,000.00

Housing Kshs. 80,000.00



Other remunerative allowances Kshs. 40,000.00

Leave allowance – 1/3 of basic Kshs. 200,000.00

Gratuity – 30% of basic pay subject to approval of parent Ministry and approval by SCAC.

4. The chairman of the 2<sup>nd</sup> Respondent wrote to the Cabinet Secretary (CS) of the parent Ministry seeking his intervention with the State Corporations Advisory Committee (SCAC) on behalf of the council, stating that they had under personal emolument, services, budget, funds that could absorb the remuneration following the 2016/2017 budget.
5. The Petitioner states that he assumed the position on 16/1/2017, receiving a gross salary of Kshs. 370,000.00 while awaiting the approval of his negotiated salary by the Ministry of Tourism and SCAC.
6. That the CS, Ministry of Tourism and Wildlife and Chairman of the college by letters dated 19/2/2018 and 2019/2020 wrote to the Public Service Commission (PSC) requesting for intervention and approval of the negotiated salary.
7. That the 1<sup>st</sup> Respondent SCAC declined to approve the salary and the Petitioner has since been receiving a gross monthly salary of Kshs. 370,000.00.
8. That the Petitioner issued notice of intention to sue but same have been ignored. Petitioner avers that the petition is founded on Articles 41(1) and 2(a) (b); Article 35(1)(b), 47 and 230(5)(b) and (c) of the Constitution of Kenya 2010.
9. The Petitioner also relied on section 4(1) of the Access to Information Act, Section 5(5) of the Employment Act, Section 4 and 6 of the Fair Administrative Action Act No. 4 of 2015 and section 12 of the Salaries and Remuneration Commission Act.
10. he Petitioner further invokes Article 23(1) and (3) of the Universal Declaration of Human Rights on the right to just and fair remuneration under favourable condition.
11. Furthermore, Petitioner invokes Article 7 of the International Convention on Economic, Cultural and Social Rights which obliges member states to ensure the right of everyone to the enjoyment of just and favorable conditions of work.
12. The Petitioner under Part E of the petition pleads that failure to pay the negotiated salary of Kshs. 720,000.00 and continuing to pay the Petitioner Kshs. 370,000.00 violates Article 41 of the Constitution and section 5(5) of the Employment Act 2007. He states that he was entitled to the payment on merit. That the Petitioner's right to legitimate expectation has been violated in view of the negotiated package that was promised but not approved to-date.
13. The Petitioner seeks the following reliefs:-
  - a. A declaration that the Respondents violated the Petitioner's fundamental right to fair remuneration.
  - b. A declaration that the Respondents violated the Petitioner's right to reasonable working conditions.
  - c. A declaration that the 1<sup>st</sup> Respondent violated the Petitioner's right to information
  - d. A declaration that the 1<sup>st</sup> Respondent violated the Petitioner's right to fair administrative action.



- e. An order of MANDAMUS be issued compelling the 1<sup>st</sup> Respondent to approve the Petitioner's negotiated gross salary of Kshs. 720,000.00.
- f. An order for specific performance requiring the immediate approval of the Petitioner's negotiated gross salary of Kshs. 720,000.00.
- g. An order requiring the amendment of the Petitioner's employment contract to indicate his negotiated gross salary of Kshs. 720,000.00
- h. An order of compensation for the accumulated unpaid salary of Kshs. 23,727,272 from January 2017.

## Reply

14. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent filed Replying Affidavit dated 20/11/2024 in which particulars of appointment of the Petitioner as the Principal/CEO of the 2<sup>nd</sup> Respondent is admitted. That same was with effect from 16/1/2017 for a period of 3 years as per the letter dated 9/12/2016. That, however, the Chairman of the 2<sup>nd</sup> Respondent entered into a contract with the Petitioner dated 14/1/2017 in which the Petitioner accepted to work for a period of 5 years.
15. That in 2004 Government issued remuneration structures for Chief Executive Officers for all State Corporations through general guidelines on terms and condition of service for staff and Board members in terms of which the Kenya Utalii College was initially categorized at PC 1 but later re-categorized to PC 2 with remuneration for CEO to be a minimum of Kshs. 150,000.00 and maximum of Kshs. 350,000.00. That any negotiation upon appointment of any CEO had to be within those guidelines. That advisory by the 1<sup>st</sup> Respondent, SCAC was restricted only within such band.
16. That if the remuneration was deemed unsatisfactory and there was need to negotiate beyond the confines of the guidelines, then the Board would be required to seek a review from the Salaries and Remuneration Commission (SRC) as stipulated under Article 230 of *the Constitution* of Kenya 2010 and SRC Act.
17. That the 2<sup>nd</sup> Respondent through the Petitioner submitted a proposal to SRC for consideration dated 3/10/2015. The reviewed salary structure by SRC dated 3/10/2019 is what obtains at the 2<sup>nd</sup> Respondent's place to-date.
18. That with regard to the salary of the Petitioner, SRC vide letter dated 10/5/2021 informed PSC that the only way to determine any review of the CEO's salary was by another job evaluation process otherwise its salary structure of 2019 should prevail.
19. That the contract of employment in this matter was between the Petitioner and the Board/Council of 2<sup>nd</sup> Respondent. That the contract was entered into freely and voluntarily and any other provisional terms that were subject to third party consideration cannot be presumed to be legitimate expectation within the contract.
20. That SRC having pronounced itself on the appeal made by the Petitioner is the only organ mandated to consider any grievance that the Petitioner may have in relation to his present remuneration and not SCAC.
21. The Respondents depose that no constitutional rights of the Petitioner have been violated. This is a contractual matter between the Petitioner and the 2<sup>nd</sup> Respondent entered into freely and voluntarily and the Petitioner is bound by the terms of the contract. That the contract is only subject to salary reviews determined by SRC. That the petition does not disclose any constitutional violation with



reasonable precision as guided by the case of Anarita Karimi Njeru versus The Republic [1976 – 1980] KLR 1272.

22. That no particulars of violation of specific Articles of *the constitution* are disclosed in the petition. That furthermore, success in a constitutional petition is evidence based as was stated in the case of St. Patrick Hill School Ltd versus NHIF [2019] eKLR where the court held:-

“59 ...success in a constitutional petition is evidence based, when no evidence is adduced, the journey comes to a stuttering halt. Mere allegations will not bear any fruit.”

23. That the petition lacks merit and it be dismissed for want of proof.

#### **2<sup>nd</sup> Respondent’s replying affidavit dated 2/9/2024**

24. The 2<sup>nd</sup> Respondent vide the affidavit of Peter Mwinzi Muindi, the Chief Executive Officer of the 2<sup>nd</sup> Respondent deposed that they negotiated with the Petitioner a gross salary of ksh 720,000/= but until the lapse of the Petitioner’s contract in 2022 had not received any communication, feedback and/ or approval of the Petitioner’s proposed gross salary. As such, the Petitioner received a gross salary of ksh. 370,000/= monthly throughout the contractual period. That they never received any letter from 1<sup>st</sup> Respondent dated 29<sup>th</sup> April, 2021 that ‘the personal to self-salary was inadmissible’ and also never received the letter dated 10<sup>th</sup> May 2021 from the SRC.

#### **Further Affidavit**

25. The Petitioner filed further affidavit dated 14/10/2024 in which it traverses the Replying Affidavit of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and that by the 2<sup>nd</sup> Respondent. The Petitioner confirms the contents of the 2<sup>nd</sup> Respondent’s Replying Affidavit in paragraphs 3-12 to be true in so far as it relates to the appointment of the Petitioner as CEO of the 2<sup>nd</sup> Respondent, the negotiated salary, as well as the correspondence between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the Interested Party. The Petitioner reiterates that the negotiated salary was justified as it was in line with the Petitioner’s role, experience and expertise and above all, it was within the 2<sup>nd</sup> Respondent’s budget and had been approved by the College Council.
26. That having earned USD. 7,500 gross salary before the appointment, the Petitioner had legitimate expectation that the impugned salary ought not to have been significantly lower. This was a precondition and an important factor for the Petitioner to accept the position.
27. That the Petitioner’s contract with the 2<sup>nd</sup> Respondent cannot be rewritten since the contract was negotiated and written considering all the prevailing conditions mentioned above.
28. Additionally, the SRC guidelines encourage salaries to be based on the qualification, expertise and experience of an individual along with the financial capacity of the institution. That the College Council negotiated the salary of the Petitioner with due regard to the aforesaid principles as per the role of the CEO/Principal of the 2<sup>nd</sup> Respondent.
29. That the negotiated salary of Kshs. 720,000.00 aligns with the 2004 guidelines for determination of salaries and remuneration of CEOs in State Corporations.
30. That due to the inaction by SCAC, the Petitioner has suffered financial loss, unfair remuneration and an infringement of his dignity amounting to violation of the Petitioner’s constitutional rights under Article 35, 41 and 47 of *the Constitution* of Kenya 2010.



31. That the letter of appointment dated 24/1/2018 was issued to the Petitioner and clause 9 of the same expressly provided that the 2<sup>nd</sup> Respondent's council had agreed to a negotiated basic salary of Kshs. 720,000.00 which would be subject to approval by the parent ministry and by SCAC.
32. That the required approval had been disregarded despite request by the Cabinet Secretary from the Ministry of Tourism by a letter dated 19/2/2018 to the 1<sup>st</sup> Respondent, PSC.
33. That 1<sup>st</sup> Respondent neither approved nor wrote back providing any reasons whatsoever for failing to approve the negotiated salary of Kshs. 720,000.00.
34. That the letter dated 29/4/2021 purportedly rejecting the salary was not received by the Petitioner or the 2<sup>nd</sup> Respondent. That the Petitioner only saw it in court. That the failure to provide reasons violates Article 47 of *the Constitution* read with section 4 and 6 of *Fair Administrative Action Act* and right to access information under Article 35(1)(b) of *the Constitution*.
35. That Petitioner had legitimate expectation that SCAC would act within a reasonable time frame and provide reasons for any adverse decision.
36. That the petition be granted as prayed.

### **Determination**

37. The court has carefully considered pleadings by the parties, the submissions and authorities before court and has delineated the following issues for determination:
  - i. Is the Petitioner caught by the doctrine of avoidance by raising constitutional matters in an employment contract interpretation dispute?
  - ii. If the dispute is deserving of consideration of pertinent constitutional provisions, has it been pleaded with precision and clarity deserving of a constitutional petition?
  - iii. Has the Petitioner proved breach of the contract of employment between the Petitioner and the 2<sup>nd</sup> Respondent.
  - iv. What reliefs, if any, is the Claimant entitled to as against the Respondents jointly and severally.
38. It is clear that resolution of the dispute raised by the Petitioner depends on a proper construction of the letter of appointment dated 9/12/2016 for the position of Principal and Chief Executive Officer of the 2<sup>nd</sup> Respondent made by the Cabinet Secretary of the Ministry of Tourism and Wildlife, 3<sup>rd</sup> Respondent.
39. In the said letter, the CS stated:

“The Council will provide you with the Terms and Conditions of your employment.”
40. The appointment was made in terms of section 25(1) of the *Tourism Act*, for a period of three (3) years and effective 16/1/2017.
41. The said letter is to be construed together with the further letter of appointment of the Petitioner as the CEO/Principal of the 2<sup>nd</sup> Respondent written in furtherance of the reference by the CS in the letter of appointment dated 9/12/2016. The letter by the 2<sup>nd</sup> Respondent spelt out terms and conditions of service to be:
  - i. “5 year period effective 16/1/2017



- ii. Basic salary of Kshs. 600,000.00  
House allowance of Kshs. 80,000.00  
Remuneration allowance Kshs. 40,000.00 subject to the parent Ministry of Tourism and the approval by State Corporations Advisory Committee (SCAC).
- 42. Meanwhile, pending the above approval, you will be paid in accordance with terms applicable to the position: i.e. a basic salary Kshs. 250,000.00 per month, a housing allowance of Kshs. 80,000.00 per month and other remunerative allowances totaling Kshs. 40,000.00. Upon approval of the negotiated salary level, you will be paid the balances arrears.”
- 43. The first issue for determination is whether the contract of employment which was signed by the Chairman, College Council of the 2<sup>nd</sup> Respondent and accepted by the Petitioner on 24/1/2017 is binding with regard to the promise of salary increment and approval under clause 9 thereof and whether breach of the terms of the said contract raise any constitutional issues for determination.
- 44. Firstly, the Petitioner entered into this contract freely and voluntarily but was induced also by a promise by the employer, the 2<sup>nd</sup> Respondent that his salary would be reviewed to Kshs. 720,000.00 from the salary to be paid upon commencement of the contract in the sum of Kshs. 370,000.00 provided there was approval by a 3<sup>rd</sup> party named, SCAC and Ministry of Tourism.
- 45. It is not in dispute that the Ministry approved the promised salary of Kshs. 720,000.00 but SCAC was not in agreement with the raised terms and so did not approve the same on the basis of the terms agreed upon between the Petitioner and the 2<sup>nd</sup> Respondent. Secondly, any review of the terms and conditions of service for the CEO of the 2<sup>nd</sup> Respondent required approval by SRC and SRC declined to give such an approval.
- 46. A plain interpretation of clause 9 of the contract of employment between the Petitioner and the 2<sup>nd</sup> Respondent leads to the inevitable conclusion that the parties entered into a contract of employment which had terms which one of the parties being the employer had no ability to perform because performance of the said clause depended on a party or parties who were not part of the contract.
- 47. A further plain interpretation of the contract shows that SRC, which in fact had the final word in approving the proposed salary of Kshs. 720,000.00 because it was beyond the approved structure, was not named in the said contract as an enabler of the promised raise. The 2<sup>nd</sup> Respondent therefore made an empty or hollow undertaking to the Petitioner in the contract of employment which was not factual, since neither the Ministry of Tourism nor the State Corporation Advisory Committee (SCAC) had lawful mandate to approve the promised salary raise to Kshs. 720,000.00.
- 48. Furthermore, the Petitioner performed his part of the contract by providing services to the 2<sup>nd</sup> Respondent as the CEO/Principal upon acceptance of the remuneration legitimately offered him in the contract in the sum of Kshs. 370,000.00 which the Petitioner continued to earn up to the time of filing the suit. To the extent that the 2<sup>nd</sup> Respondent made promises to the Petitioner which it was incapable of fulfilling and to the extent that the Petitioner accepted the payment without doing any due diligence to ensure that the 2<sup>nd</sup> Respondent was lawfully bound by the promise on the basis that it had legal ability to fulfill the terms without depending on persons or factors beyond its control, clause 9 of the contract could not be binding on these parties in respect of the promised salary raise to Kshs. 720,000.00 as matter that was beyond the ability of both parties.
- 49. The resolution of the dispute hangs on a pure interpretation of contract of employment and needed not be elevated to a constitutional issue.



50. The fact that SRC which is not a party to the contract, is the constitutional organ with the mandate to approve the proposed salary raise did not of itself warrant this matter to be elevated to a constitutional petition.
51. The fact of the matter is simply that the 2<sup>nd</sup> Respondent had no ability to give what it did not have and the Petitioner clearly erred in accepting an offer that was clearly upon simple due diligence outside the ability of the 2<sup>nd</sup> Respondent.
52. The contract of employment between the two parties in as far as the promise of the salary raise goes did not bind either of the parties to the contract.
53. The Petitioner has failed to prove that the 2<sup>nd</sup> Respondent or any of the Respondents in this matter violated constitutional rights protected under Articles 35, 41, 47 and 233 of *the Constitution*.
54. The 2<sup>nd</sup> Respondent or any of the Respondents did not also violate section 5(5) of the *Employment Act*, since no case of discrimination has been proved by the Petitioner.
55. Furthermore, the Petitioner did not prove that he was unfairly made to enter into a contract of employment with the 2<sup>nd</sup> Respondent. The terms of the employment contract were clear on what the 2<sup>nd</sup> Respondent was able to provide and it was up to the Petitioner to ensure that he did not get into an arrangement beyond the ability of the 2<sup>nd</sup> Respondent to his potential loss and detriment.
56. As was stated in Nairobi Civil Appeal No. 452 of 2018, Pamela Obura versus Austin Recovery Agency & Another section 107 and 108 of the *Evidence Act* places the burden of prove on he who alleges.
- “A litigant who fails to discharge the evidential burden in a case carries the risk; he may lose the whole or some part of the case. Furthermore, unlike the legal burden, the evidential burden is not stated, it keeps shifting between the parties throughout the trial.”
57. It is for the above reason that disputes that largely linger on interpretation of a contract of employment and evaluation of the conduct of the parties to the contract ought to be brought in terms of the relevant legislation and not unnecessarily elevated to a constitutional dispute where germane matters become remote and inevitably, may not get the attention they deserve for just and fair resolution of the actual issues in dispute.
58. Accordingly, the petition lack merit in its entirety and is dismissed with no order as to costs.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2025**

**MATHEWS NDUMA**

**JUDGE**

Appearance:

Mr. Ali Ahmed for Petitioner

Ms. Kiunga for 2<sup>nd</sup> Respondent

Mr. Odukenya for 1<sup>st</sup> and 3<sup>rd</sup> Respondent

Mr. Kemboi – Court Assistant

