



Universities Academic Staff Union (UASU) v University of Nairobi; Cabinet Secretary, Ministry of Education & 3 others (Interested Party) (Petition E069 of 2020) [2024] KEELRC 257 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 257 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E069 OF 2020
NZIOKI WA MAKAU, J
FEBRUARY 13, 2024

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION (UASU) PETITIONER

AND

UNIVERSITY OF NAIROBI RESPONDENT

AND

**CABINET SECRETARY, MINISTRY OF EDUCATION & 3
OTHERS INTERESTED PARTY**

JUDGMENT

1. In the Petition dated 26th October 2020, the Petitioner prays for judgment against the Respondent as follows:
 - a. A Declaration that the Respondent’s recommendations regarding the eligibility or qualifications for an academic member of staff to earn the Clinical Allowances contained in the letter of the Respondent, Deputy Vice-Chancellor (Human Resource and Administration) dated 9th October 2020 under reference UON/CA/2/14/2 is unconstitutional, null and void in relation to Articles 10, 41, 47 and 232 of *the Constitution*, the *Universities Act* No. 42 of 2012 and the *Employment Act* 2017.
 - b. A Declaration that the Respondent has infringed on the Petitioner’s constitutional rights under Articles 10, 41, 47 and 232 of *the Constitution*, 2010.
 - c. An Order restraining the Respondent, its servant or agents from implementing the recommendations regarding the eligibility or qualifications for an academic member of staff to earn the Clinical Allowances contained in the letter of the Respondent, Deputy Vice-



Chancellor (Human Resource and Administration) dated 9th October 2020 under reference UON/CA/2/14/2.

- d. An Order of permanent stay of the recommendation reducing the allowances issued to the Petitioner's members on 9th October 2020 or any other recommendations thereafter reducing Petitioner's members' allowances from July 2020.
 - e. An Order restraining the Respondent, its servant or agents from implementing any reduction in the amount of Clinical Allowances paid and payable to academic members of staff in the College of Health Sciences from July 2020.
 - f. An Order directed to the Respondent to restore the Clinical Allowances to the academic members of staff at the College of Health Sciences and payments of withheld amounts without loss of benefits.
 - g. An Order restraining the Respondent from victimizing, harassing or coercing, intimidating or otherwise dismissing or terminating any of the academic members of staff at the College of Health Sciences as a consequence of the Clinical Allowances dispute and/or industrial actions.
 - h. The Respondent be and is hereby restrained either by themselves or their servants, agents, officers or any other person whomsoever is acting on its behalf from downgrading and slashing, reducing or in any other way diminishing the employees' Clinical Allowances.
 - i. Any other or further order this Honourable Court may deem fit to grant in the circumstances.
 - j. Interest at Court rates on (c) above from the date of filing suit until settlement in full.
 - k. Cost of the suit.
2. The Petition herein concerns the Petitioner's members working with the Respondent at the College of Health Sciences and in respect to payment of Clinical Allowances. The Petitioner, who represents members of University Academic Staff in all public Universities, stated that Salaries and Remuneration Commission (the 2nd Interested Party) approved the payments of the said clinical allowances to the Petitioner's members of academic staff. That KMPDU (3rd Interested Party) then applied for funds from the government towards the clinical allowances, which was approved and sent to the Respondent. The Petitioner further stated that apart from being lecturers, the members of University Academic Staff at the College of Health Sciences are also doctors offering professional medical and clinical services based at the Kenyatta National Hospital (KNH) Campus, and further enjoy dual membership of the Petitioner Union and the 3rd Interested Party.
3. The Petitioner averred that in 2012, the Clinical Allowances paid to the doctors in public service were further enhanced through a Circular Reference No. MSPS/2/2/3A Vol. III dated 12th January 2012 by the Ministry of State for Public Service. That subsequently, the Clinical Allowances for academic staff at College of Health Sciences were adjusted in 2012 vide a Letter Ref. MST/FIN/11/4/VOL.XIII dated 28th August 2012 by the Ministry of Higher Education, Science and Technology and a Letter of PS, Ministry of Finance/Treasury Ref. ES 43/12/01(25) dated 8th October 2012. The Petitioner further averred that the Clinical Allowances for doctors in public hospitals were later enhanced in 2017 and comprised the following: Risk Allowance; Non-practice Allowance; Extraneous Allowance; and Doctors' Allowance (replacing the Emergency Call Allowance). That however, the allowances for academic staff in the Colleges of Health Sciences in the Public Universities were not implemented in 2017 but in 2020. That following extensive discussions between the Ministry of Education, National Treasury and Planning, the SRC, Parliament and Representatives of academic staff of Colleges of Health Sciences in all public universities, the Clinical Allowances were enhanced



through Supplementary Budget II passed by Parliament in May 2020. In addition, the Covid-19 pandemic rescue package was appropriated through the Supplementary Appropriations Bill 2020 and assented to by former President Uhuru Kenyatta as the Supplementary Appropriations Act 2020. The Petitioner noted that in May 2020, the PS Ministry of Education communicated to the Respondent's V.C the Government's allocation for payment of the arrears of enhanced Clinical Allowances dating back to 2017, with an accompanying schedule of those eligible for the payment. Further, additional funds were allocated to the Respondent in July 2020 to sustain payment of the Clinical Allowances.

4. It was the Petitioner's averment that however since July 2020, all academic staff have been paid varying amounts of the Clinical Allowances with a majority getting reduced amounts of the allowances or none at all. That the same has been a unilateral act of the Respondent's V.C who solely determines who to pay and how much to pay without recourse to the constitutional and labour rights of the academic staff or consulting the Petitioner before making such drastic variations of terms of service. The Petitioner asserted that unlike other public universities that convened meetings with their academic staff at their Colleges of Health Sciences to transparently declare the funding received from the Government for payment of the aforementioned arrears. The Petitioner further asserts the Respondent herein excluded the Petitioner from any participation whatsoever and paid the arrears to some academic staff at rates not agreed upon, while omitting others from payment without any explanation. It contended that the same was the reason why the Respondent was the only public university that had not paid doctors/lecturers their clinical allowances. That noteworthy, the Petitioner's members who wrote letters to the Deputy V.C Human Resource and Administration neither received any response from the Respondent nor were paid the unlawfully deducted and unpaid clinical allowances. The Petitioner's stance was that the Respondent had in essence unilaterally abolished Clinical Allowances harmonized with those working in public service and other public universities. That the Respondent acknowledged the non-payment of clinical allowances in various letters such as the V.C's Letter to the Principal, College of Health Sciences referenced UON/CA/2/14 VOL. XVIII/62 dated 25th September 2020.
5. The Petitioner asserted that a dispute was consequently referred for conciliation that was conducted by a Conciliator appointed by the Ministry of Labour and Social Protection and that in a meeting convened on 15th September 2020, parties agreed that: pending allowances be paid with due diligence; a committee be immediately constituted to deal with the definition, concept, implementation and supervision of clinical services; and the process be finalized within one week. That however one week after conciliation, clinical allowances had not been paid most academic staff at the College of Health Sciences and the Respondent had in effect declined to comply with the Conciliation Agreement. The Petitioner averred that after it issued a seven (7) days Strike Notice and its members subsequently withdrew their labour, the Principal of the College of Health Sciences, upon consultation with others, developed a Document titled "Clinical Services – Definition, Concept, Implementation and Supervision". That additionally, the Principal attached a List of Academic Staff eligible for enhancement of Clinical Allowances. That however, on 9th October 2020, the Deputy V.C Human Resource and Administration wrote a letter to staff giving the management's own clarification on who is eligible for clinical services and effectively introduced additional restrictions. That this new and purported attempt to redefine clinical services was malicious and solely meant to disenfranchise and segregate the staff, as an excuse for the Respondent to stop paying staff their duly entitled clinical allowances, leading to denial of benefits as clearly outlined in the Petition.
6. The Petitioner's case was that the Respondent has breached and violated the labour rights of the academic staff at the Respondent's College of Health Sciences, KNH Campus by unilaterally altering their Terms of Service to their disadvantage, through reducing, and in some cases, abolishing their clinical allowances that have always been paid since 2002. That it had a legitimate expectation that the Respondent would contact it before any purported reduction of its members' allowances could



be effected. That the Respondent had thus infringed on the University Academic Staff's right to collective bargaining guaranteed under Article 41(5) of *the Constitution* of Kenya. Moreover, that Article 232(1)(d), (e) and (f) requires the involvement of the people in policy-making, accountability and transparency. The Petitioner averred that it would be discriminating for its members to be subjected to withdrawal of allowances yet all other doctors/lecturers from other universities are getting the same. That it is also illegal for the Respondent to be receiving funds from the 1st Interested Party on account of Clinical Allowances but misapplying the same to other areas. The Petitioner further averred that the Respondent had breached Article 10 by failing to adhere to the values and principles of governance and Article 47 on fair administrative action by unreasonably, unlawfully and unfairly withholding their clinical allowances and unilaterally altering the definition of clinical services. It asserted that the Petitioner's members risk being condemned to earn a salary that does not match their work done and qualifications and lose their employment rights.

7. In a Further Affidavit sworn by Dr. Constantine Wasonga on 15th April 2021, the Petitioner averred that the segregation of its members in terms of entitlement to clinical allowances only happens after the Respondent has used the same members' names to receive capitation from the 1st Interested Party and Treasury. That for instance, Treasury released funds for clinical allowances to the Respondent on 9th December 2020 amounting to Kshs. 931,749,600/- for the financial year January to June 2017, 2018, 2019 and 2020 using names the Petitioner's members. That the Respondent was then allocated Kshs. 299,602,445/- for financial year 2020/2021 for 367 members of the Petitioner entitled to the clinical allowances. That however, the said members have to date not been paid clinical allowances as the Respondent attempts to redefine the terminology "clinical allowances" and exclude the grievants after pocketing their allocation from the National Treasury. That in addition, the Respondent has purported to reduce clinical allowances due to the grievants and that from March 2021, they have been earning less than their entitlements.
8. Dr. Wasonga swore a Second Further Affidavit on 12th January 2023 wherein he averred that most colleagues in medicine, pharmacy and dentistry, some of whom do not have clinical duties, receive the full risk allowance, extraneous allowance, non-practice allowance and emergency call allowance (renamed Doctors' allowance). That from July 2020 to date, affected faculty members have earned different amounts of clinical allowances on a discriminatory manner based on non-specified criteria, in violation of the rallying call by the 2nd Interested Party for 'equal pay for equal work'. He asserted that the Petitioner urges this Court to direct the Respondent to reinstate the grievants to their previous clinical allowances and payment of all unpaid arrears for the periods starting January 2017 to date as per the tables outlined in his Affidavit.
9. Respondent's Case

The Respondent filed a Replying Affidavit sworn by its Acting Director, Internal Audit, Mr. Kenneth N. Gitau on 5th May 2023. Mr. Gitau averred that the clarification the Respondent issued to all its staff on 9th October 2020 with regard to clinical allowances was premised on the various Circulars issued by SRC as well as the Respondent's Terms of Service for Academic for Senior Library and Administrative Staff 2006 (hereinafter "the Respondent's Terms of Service") inter alia as follows;

- a. The Universities Academic Staff Union (UASU) Members eligible for clinical allowances are described in the Terms of Service for Academic, Senior Library and Administrative Staff as "Staff with clinical duties in the School of Medicine, School of Dental Sciences, School of Pharmacy, School of Nursing Sciences, UNITID"



- b. The Salaries and Remuneration Commission circular states that the clinical allowances are to be paid to those deployed in public hospitals/health facilities but not those doing administrative duties.
- c. The University of Nairobi management in compliance with the applicable Terms of Service, relevant CBAs and guidance from the Salaries and Remuneration Commission continues to pay the qualified staff the said clinical allowances. (Emphasis by Respondent)
10. The Respondent's position was that the aforementioned letter of 9th October 2020 did not contain any recommendations and only clarified on the eligibility of inter alia the Respondent's medical teaching staff to clinical allowances. Mr. Gitau further averred that in compliance with the Ruling of this Honourable Court of 5th November 2021 and in fulfilment of its mandate, the Respondent's Directorate of Internal Audit conducted a Payroll Audit to ascertain who amongst the 34 academic members of staff of the Respondent listed in the Petitioner's Further Affidavit is eligible for the Emergency Call Allowance, Extraneous Allowance, Risk Allowance and Non-Practice Allowance. In this regard, he produced a copy of the Audit Report marked KG-7. That from the Circular dated 29th May 2003 by the Ministry of Education, Science and Technology: only Doctors, Dental Officers and Pharmacists were entitled to Non-Practice Allowance (not to be paid to those licenced to engage in private practice), Extraneous Allowance (limited to those providing clinical services) and Medical Risk Allowance; and the paramedical personnel stated as inter alia clinical officers, nurses, technologists, technicians, physiotherapist, radiographers were entitled to only medical risk allowance ranging from Kshs. 2,000/- for pharmaceutical technologists, radiographers, physiotherapists, Kshs. 3,000/- for clinical officers and Kshs. 3,850/- for nursing officers/nurses. Mr. Gitau acknowledged that the SRC reviewed the prevailing position regarding the clinical allowances and approved payment to Doctors (Medical Officers, Pharmacists, Dentists) and all health workers, subject to the criteria provided in SRC Circulars of 14th September 2015, 28th April 2017 and 12th January 2020 and at the rates indicated in the aforesaid Circulars. He fronted that in the case of the Respondent's medical teaching staff, the position of the Government in its Circular of 29th May 2003 varied with the SRC Circulars to the extent that an additional allowance namely "Emergency Call Allowance" was introduced; which as per the SRC Circular of 14th September 2015, is payable to Doctors (Medical Officers, Dentists, Pharmacists) deployed in hospitals and are on call. That the Respondent is consequently bound by the advice of the SRC regarding the academic members of staff eligible to receive the Emergency Call Allowance, Extraneous Allowance, Risk Allowance and Non-Practice Allowance and the applicable rates.
11. It was Mr. Gitau's averment that the referred to Return to Work Formula dated 4th March 2017 between the National Government of Kenya, the County Governments of Kenya and KMPDU is not applicable to the Petition herein because the Petitioner was not party to it and the Respondent has no Recognition Agreement with KMPDU, which is the Union that was party to the Return to Work Formula. He denied the Petitioner's assertion that the Emergency Call Allowance was renamed 'Doctors Allowance', asserting that the renaming was declined in the SRC Advisory dated 20th April 2017 and that the SRC has continued to refer to the allowance as "Emergency Call Allowance" in its aforementioned recent Circulars. Mr. Gitau further averred that the Petitioner has deliberately misinterpreted the advice of the SRC by implying that "all medical teaching staff" are entitled to the clinical allowances irrespective of whether they are deployed in a public hospital and performing clinical duties. Mr. Gitau contended that the allowances cannot be lumped together as the Petitioner has done and that each of them has to be considered on its own merits, as regards when it is payable and the applicable rate.



12. While analysing each of the allowances grounded by the SRC Circulars of 14th September 2015, 28th April 2017 and 12th January 2020, Mr. Gitau firstly noted that from the Audit of the Respondent's Payroll, only one (1) out of the 34 members of staff listed by the Petitioner in its Affidavit falls under the category of Doctor, Dentist or Pharmacist entitled to Emergency Call Allowance. That however, despite the said Dr. Julius M. Otido being a Medical Doctor deployed to KNH, there was no evidence that he performed clinical duties for the period 1st July 2020 to 31st December 2022 and he is accordingly not entitled to Emergency Call Allowance as claimed. For Extraneous Allowance, Mr. Gitau noted that whereas the Petitioner had neither identified the members of staff who are paid the different amounts of the extraneous allowances, nor presented evidence to demonstrate that the alleged members are deployed in a public hospital, the different professions of the staff and their respective Job Grades, the contents of Table 1 in the Circular dated 14th September 2015 evidence that the extraneous allowance is not payable at a standard rate to all medical teaching staff. That in this case, the 34 members listed were deployed in public hospitals and during the period 1st July 2020 to 31st December 2022 were entitled to the extraneous allowance at the rates indicated and drawn from the SRC Circular of 14th September 2015. That the 34 members are entitled to Health Risk Allowance for the period 1st July 2020 to 31st December 2022 as indicated at Table 5 of the Audit Report while only one person – Dr. Julius M. Otido is entitled to the Non-Practising Allowance because he falls under the category of Medical Officers, Dental Officers and Pharmacists. Mr. Gitau further averred that the Petitioner's demand, in the Second Further Affidavit sworn on 12th January 2023 by Dr. Constantine Wasonga, for the arrears belonging to 26 members of staff is untenable because there was no breakdown indicating the arrears in respect of each of the four (4) allowances and the said 26 members of staff have not demonstrated that they met the criteria set out in the SRC Circulars and the Respondent's Terms of Service. Mr. Gitau asserted that the Kshs. 40,143,171/- erroneously paid to 33 out of the 34 members of staff as allowances for the period 1st July 2020 to 31st December 2022 should in fact be refunded as highlighted at Table 4 of the Audit Report.
13. The Respondent averred that the instances that any of the Petitioner's members who are academic staff of the Respondent have had any of the quantum of the clinical allowances reduced or abolished is because the allowances were being paid in error to persons not entitled to them or at erroneous rates on account of having not satisfied the requirements set out in clause 16(c) of the Respondent's Terms of Service and the aforementioned three SRC Circulars. That considering the advice by SRC, it was thus preposterous for the Petitioner to contend that the Respondent should have invited it to discuss any matters together on payment of allowances of its members. Moreover, that compliance with the Respondent's Terms of Service and SRC Circulars with respect to the payment of the four (4) allowances to medical teaching staff does not amount to discrimination of the Respondent's medical teaching staff vis-a-vis the medical teaching staff in the "31 Universities" as alleged by the Petitioner. That in any event, the Petitioner had not adduced evidence to demonstrate the details of the medical teaching staff in the "57 Universities" that are paid the four (4) allowances without complying with the advice of SRC as per the Circulars.
14. In response, the Petitioner filed a Third Further Affidavit sworn by Dr. Constance Wasonga on 17th May 2023. Dr. Wasonga averred that the real purpose of the Audit Report annexed to the Respondent's Replying Affidavit is to justify the illegal and unorthodox intention of the Respondent to redefine what constitutes "clinical services", so that the grievants are removed from their entitlement to the clinical allowances. Furthermore, that the said Audit Report violates the chain of command and supervision of the lecturers as guided by the University Act and the guidelines set out by the University of Nairobi Senate; in that any complaint, conflict or misconduct in the hospital (where duty was allocated) is handled by the Chairman of the Department where the responsible academic staff member



is domiciled. That the Respondent's V.C has formed a culture of creating an extra chain of command and supervisory structure alien to the law and guiding policies and that none of the respective chairs/ heads of departments where all the 34 listed members are domiciled, has raised any complaint in regard to performance of clinical duties. That the 34 out of the 291 persons earmarked for discrimination and harassment actually conduct clinical duties at KNH, Mathari and other County and Sub-County health facilities as confirmed by their respective chairs of departments and duty rotas. He further averred that the assertion in the Audit Report that no clinical teaching and examination is carried out at the facility casts aspersion on the competence of graduates trained by the said faculty. That the said Report is also an expression of belligerent ignorance, disdain and disparaging character since no logbook or tracking of work conducted by the Respondent's academic staff kept by KNH, Mathari and other County health facilities accompanied the Report. Further, Dr. Wasonga averred that the audit done for only 34 out of the 291 enlisted in the HR Document (Exhibit CW 5), all of whom are eligible for payment of the clinical allowance, is selective and discriminatory.

15. It was Dr. Wasonga's further averment that the Circular by Ministry of Education dated 29th May 2003 did not provide for inclusion of pharmacists as being eligible for Non-Practice and Extraneous Allowances as also supported by the Respondent's Terms of Service. That it was erroneous to claim that Lecturers in the School of Pharmacy were included in the said Circular or that Staff Members in the School of Pharmacy were included for the three allowances, when they were not. That at the time of the issuance of the Circular, only two universities, namely the Respondent and Moi University were offering medical education. He asserted that the paramedical personnel captured in Respondent's Affidavit are of no evidential value as they are certificate and diploma holders working in public hospitals and who are not qualified to work in universities as academic members of staff. He averred that whereas the Petitioner does not contest the SRC Circulars, they should be interpreted in line with the Employment Act, which stipulates equal pay for equal work done. Dr. Wasonga noted that the HR Document referred to by the Respondent in fact shows that the Respondent blatantly pays clinical allowances to university staff doing purely administrative duties. That in any case, the academic staff in the Respondent's Departments of Dental, Anatomy & Physiology, Pharmacy are not deployed in any public hospital or health facilities yet the Respondent deliberately pays their full clinical allowances, including to the DVC Academic Affairs who offers no clinical duties. He asserted that remuneration should be based on services provided and not the different Unions that employees belong to. That whereas the Respondent purports to pay 'emergency call allowance' and is named so, its payslips for academic staff refer to the said allowance in the College of Health Sciences as 'doctors allowance'. That by implication, the Respondent is in contempt of the Court Ruling delivered on 7th May 2017 dismissing an application to rename the said allowance. According to the Petitioner, the Respondent ceased payment of clinical allowances in full in January and February of 2021 to the 34 members in their respective departments and the computations provided in Table 4 of the Respondent's Affidavit are thus misleading. That for academic staff in department of nursing, the stoppage was effected in November of 2020 and that as per the Audit Report, it is further contended that academic staff in the Department of Public Health are not listed as being eligible for clinical allowances.
16. The Respondent's reply to the Petitioner's Third Further Affidavit was a Further Affidavit sworn by Mr. Gitau on 8th November 2023. Mr. Gitau denied that both their Replying Affidavit and Audit Report indicate that the 34 grievants are not entitled to clinical allowances, as evidenced from page 15 (Table 5) of the Audit Report. He asserted that preparation of an audit report does not amount to supervision of lecturers and that the impugned Audit Report by the Respondent sought to find out the category of the clinical allowances and applicable rates that each of the 34 grievants is entitled to, based on the criteria set out by SRC. That nowhere in the Audit Report has there been redefinition of clinical services as alleged by the Petitioner, who has thus failed to demonstrate the manner in which clinical



services have been redefined. Mr. Gitau averred that it was clear that the suit herein had been filed on behalf of 34 members of staff listed in the Petitioner's Further Affidavit of 12th January 2023 and not on behalf of all academic staff members at the Respondent's Faculty of Health Sciences. That in any case, not all academic members of staff at the said Faculty are members of the Petitioner Union. Further, that the alleged confirmation of clinical duties via duty rotas is made in ignorance of the position that a duty rota demonstrates assigned work but is not evidence that work was performed as assigned. He challenged the Petitioner to instead tender evidence to demonstrate that the 34 members of staff offer clinical duties as alleged. He noted that contrary to the Petitioner's allegation, the Audit Report had not indicated that no clinical teaching and examination is carried out at the facility, asserting that clinical teaching and rendering clinical duties at the hospitals are not synonymous.

17. The Petition was disposed of by way of written submissions, which parties highlighted in Court as herein below.

18. Petitioner's Written Submissions

The Petitioner submitted that the issues for determination by this Court are:

- a. Whether the Clinical Allowance should be paid to the grievants in accordance with their terms of Service and as per the Ministry of Higher Education's directive which stated that they continue to be paid;
- b. Whether the Respondent is in breach of its obligation to the Petitioner; and
- c. What reliefs are available to the Petitioner's members?

19. It was the Petitioner's submission that in as much as the Respondent is trying to redefine the "Clinical Allowance", it is noteworthy that the Respondent's Terms of Service remain the same and have not been altered and or changed. That the Respondent thus purporting to not pay and/or reduce the said clinical allowance is a breach of duty and unlawful, further because the said Terms of Service were incorporated at paragraph 2 of the individual Letters of Employment. That clause 16(c) of the Terms of Service provides that clinical allowances are payable as indicated in Table V annexed thereto, which provides as follows:

"Clinical Allowances for staff with clinical duties in the school of Medicine, school of Dental Science, School of Pharmacy, School of Nursing Science, University of Nairobi, Institute for Tropical and infectious Diseases (UNITID) and the University Health Service."

20. That the payslips of the Petitioner's members produced in Court show that Clinical Allowances have always been paid until July 2020 when the Respondent opted to stop payment of the same without justification. It was submitted by the Petitioner that this Court has variously held that unilateral alteration or variation of the terms of contract of employment is unlawful, illegal and amounts to unfair labour practice in violation of Article 41 of *the Constitution*. The Petitioner cited the cases of Kenya County Government Workers Union v Wajir County Government & another [2020] eKLR; Maxwel Mivawa & 7 others v Judicial Service Commission [2017] eKLR; and Eunice Njeri Wambugu & 5 others v County Public Service Board, Kirinyaga County [2020] eKLR in support of these arguments.

21. The Petitioner submitted that the Respondent having failed to involve the Petitioner Union, a key stakeholder, for consultations from the very onset, this Court ought to find that the Respondent's actions are untenable, unlawful, a misrepresentation and a discriminative practice contrary to section 4 of the *Employment Act*. Furthermore, that it is illegal for the Respondent to receive funds from the 1st Interested Party on account of the clinical allowances, forwarding the names of the said grievants but misapplying the same to other areas without paying the said grievants. The Petitioner further



submitted that despite parties executing a Conciliation Agreement, the Respondent has refused, neglected and or delayed to remit to the Petitioner its members' withheld allowances and to cease from reducing the staff allowances. That consequently, the Petitioner's members working at the Respondent's College of Health Science have been severally prejudiced and have continuously suffered loss and damages because of the Respondent's breaches. It was the Petitioner's submission that the actions of the Respondent is an affront on their employment contracts and the provisions of the Terms of Service and that the Court of Appeal stated in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. The Petitioner further submitted that its members have a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as espoused under Article 47 of *the Constitution* of Kenya and affirmed by the Court of Appeal in case of Judicial Service Commission of Kenya v Mbalu Mutava & another [2015] eKLR. It was the Petitioner's submission that the Respondent's actions are illegal, unconstitutional, unreasonable and therefore null and void. It thus urged the Court to grant the Orders as sought in the Petition as it is in the interest of justice and fairness that the grievants are reinstated to their previous clinical allowances and payment of all arrears unpaid for the periods starting January 2017 to date.

22. Oral submissions by Petitioner

Counsel for the Petitioner submitted that the Petition relates to payment of clinical allowances, which were paid from 2002 until August 2020 when they were stopped on allegation that they were no longer offering clinical services. He noted that the basis of the payment is per the provisions of clause 16(c) which provides for payment of clinical allowances for doctors who are lecturers. That the money for payment is sourced from Treasury and that through conciliation by MOH, a Return to Work Formula was undertaken for payment of clinical allowance. He further submitted that the purported redefinition of clinical services still covers what the Petitioners offer to the University and referred to Exhibits marked KG-6 and KG-3 annexed in Mr. Gitau's Affidavit as being approvals from the SRC and Ministry of Health allowing payment of the clinical allowances. That however, the Respondent had refused to pay the same stating that only some lecturers with a particular Degree of Medicine are to be paid.

Respondent's Written Submissions

23. The Respondent submitted that pursuant to its duties under Article 230(4) of *the Constitution* of Kenya as read together with section 11 of the SRC Act, the SRC reviewed the entitlement of clinical allowances to doctors and health workers and approved payment of the allowances, subject to fulfilment of the criteria provided in SRC Circulars of 14th September 2015, 28th April 2017 and 12th January 2020. The Respondent cited the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others [2015] eKLR in which the Court of Appeal held that the advice of SRC under Article 230(4)(b) on the remuneration and benefits of all public officers is binding on all persons, state organs and independent commissions. It was the Respondent's submission that considering the Court Ruling delivered on 5th November 2021 that the "Respondent cannot be faulted for failing to pay the disputed clinical allowances to members of the petitioner who do not render clinical services to public health facilities, and without the advice from the SRC", this Court should not deviate from the said finding as doing so would amount to sitting on appeal against the decision of a Judge of concurrent jurisdiction. In support of the foregoing submission, the Respondent relied on the case of Stephen Mwaura Njuguna v Dougals Kamau Ngotho & another [2012] eKLR by the Court of Appeal.



24. The Respondent submitted that a party ought to adduce evidence to substantiate the allegations in its pleadings and that failure to do so renders the allegations mere statements. It relied on the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR where the Court cited with approval the decision in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001* (unreported). The Respondent argued that the Petitioner having indicated that the grievants are the 34 members of staff listed at para 18 of the Petitioner's Further Affidavit sworn on 12th January 2023, there was no basis for the Respondent to produce an Audit Report with details of all its academic members of staff at the Faculty of Health Sciences, including employees not subject to the Petition herein. That contrary to the Petitioner's Submissions that the Respondent owes all the 34 grievants, the only listed persons it owes are Wanjohi Patrick M (Kshs. 130,000/-) and Otido Julius M (Kshs. 2,460,000/-) as indicated at page 13 (Table 4) of the Audit Report. That the other 32 members of staff having been overpaid, they owe the Respondent the sums indicated in Table 4.
25. On the issue of legitimate expectation, the Respondent submitted that the same cannot prevail over express provisions of *the Constitution*, as held by the Court in the case of *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR. That the Respondent is bound the advice of SRC and therefore any payment of the clinical allowances contrary to the advice of SRC would offend *the Constitution*. It further cited the case of *Republic v Communications Authority of Kenya Ex Parte Airtel Networks Kenya Limited* [2017] eKLR in which the High Court cited with approval the decision of *R v Gaming Board of Great Britain, ex parte Kingsley* [1996] COD 178 at 241 where it was stated that the doctrine of legitimate expectation should not be invoked to confer an unmerited or improper benefit. The Respondent yet again referred to the Court Ruling of 5th November 2021 delivered in this case, wherein the Court found that the Respondent has not breached any term of their contract of service or any of their legal rights as employees by stopping the erroneous payment of clinical allowances to staff who do not render clinical services.
26. The Respondent urged the Court to disregard the allegations of discrimination of 34 members of staff as the same was not pleaded in the Petition dated 26th October 2020. In submitting that parties are bound by their pleadings, the Respondent relied on the decisions of the Court of Appeal in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR and the Court in *Hellen Wangari Wangechi v Carumera Muthoni Gathua* [2015] eKLR. It concluded that the Petitioner having also failed to discharge of its evidential burden by laying material before the Court to demonstrate that there are 257 members of staff at the Respondent's Faculty of Health Sciences, and medical teaching staff in 31 Universities who are earning full clinical allowances, the burden cannot shift to the Respondent to prove the contrary.

Oral submissions by Respondent

27. Counsel for the Respondent submitted that the crux of their Replying Affidavit sworn by Mr. Kenneth Gitau on 5th May 2023 is the payment of four (4) allowances (Emergency Call Allowance, Health Risk Allowance, Extraneous Allowance and Non-Practice Allowance) heaped under 10 clinical allowances. Counsel argued that the said allowances are neither all payable at a blanket rate nor to all cadres of academic teaching staff and asserted that the Respondent relies on the Circulars issued by SRC. She noted that whereas Risk Allowance was not part of the 2016 allowances, the Petitioners had, without indicating the basis for the same, asserted that the said allowance was enhanced to Kshs. 80,000/-. That the said amount is drawn from the SRC Circular dated 12th January 2020 which indicated when the allowance is payable and that figure of Kshs. 80,000/- was given in 2017. Counsel for the Respondent further argued that the Petitioner selectively chose the SRC Circular it can rely on and



ignored the contents of other Circulars. It was her stance that the SRC Circulars that came under the 2010 Constitution are binding upon the Respondent and Petitioners and that the Terms of Service of 2006 have to be read in consonance with the 2010 Constitution. That the Respondent being a public institution and given that parts of these funds are drawn from public funds, the same cannot go contrary to directives of SRC. The Respondent relied on their Submissions before Court and the SRC Guidelines.

28. This Petition seeks to litigate on the non-payment of certain allowances to the Respondent's staff who are named as Grievants in the Petition before me. These Grievants numbering 34 are serving in various capacities. From the evidence adduced, it is clear the Salaries and Remuneration Commission did issue circulars which were to be read in tandem with Ministry of Health circulars in respect of the allowances said to be denied the members of the Petitioner. Having had a careful look at the material before me and the law as well as authorities cited, it is imperative to underscore the cardinal principle of equal pay for work of equal value. The allowances that have been delineated in the circulars in question relate to, inter alia, clinical allowances. These in my understanding are payable to qualified staff who are assigned clinical duties and are in direct contact with patients. A clinical allowance in ideal situations cannot be paid to a person manning a desk at the University and totally unconnected to the work of offering clinical services in terms of the Circulars. The court will advert to one circular to drive home the point. The SRC Circular of 14th September 2015 being SRC/028/09/2015 clearly sets out the allowances payable to doctors, dentists, pharmacists, anaesthetists, clinical officers and nurses as well as technologists and technicians, paramedics, drivers deployed in hospitals, mortuary attendants as well as support staff. Risk allowances are payable to nurses, laboratory technologists, mortuary attendants, chemists, physiotherapists, occupational physiotherapists, biomedical engineers/technologists, medical records/information officers, radiographers, radiation protection, community oral officers, entomologists, public health officers/technicians (Job group L-P and G-K), and orthopaedics. This position is replicated in the subsequent circulars as well as the Circulars issued by the Ministry of Health.
29. In the view of the Court, the interpretation of these circulars by the Petitioner is erroneous as it seems to bifurcate the roles played by doctors, dentists and pharmacists from the work done by the supporting cast as named in the foregoing portion. The Respondent has been implementing these circulars as required and the court did not discern any discrimination raising the matter before me to a constitutional threshold. Secondly, only 2 of the Grievants herein have been proved to be owed funds currently, that is, Dr. Julius M. Otido who owed a sum of Kshs. 2,460,000/- and Patrick M. Wanjohi who apparently is owed Kshs. 130,000/- which sums the Respondent is ordered to settle within the next 30 days. The Respondent must continue paying the allowances as and when they fall due and should not allow the build up of arrears.
30. The Respondent is called to note the order issued in respect of the 2 Grievants as per paragraph 29 above. Failure to comply will result in the sums attracting interest penalties of 14% per annum till payment in full commencing 13th March 2024 if any portion of the sums due remains unpaid. The Petitioner is faulted for not moving court in 2017 when the alleged infarctions arose since by failing to articulate the case for the non-payment of allowances when they fell due and were unpaid has led to the untidy situation it finds itself in. There may have been meritorious claims for some of its members but the filing of a Petition instead of a suit compromised the degree of scrutiny each and every Grievant would be entitled to in respect of the claims. The Petitioner did not convince the court that the remedies it seeks for the entire corpus of Grievants is merited and the court therefore dismisses the balance of the Petition herein, albeit with no order as to costs.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

