



**Nyakuri & 206 others v Board of Trustees National Social Security Fund (NSSF)
(Petition E128 of 2023) [2024] KEELRC 797 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 797 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E128 OF 2023**

**B ONGAYA, J
APRIL 8, 2024**

BETWEEN

GEORGE OKELO NYAKURI 1ST PETITIONER

GEORGE MWANDEMBO & 205 OTHERS 2ND PETITIONER

AND

**THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND
(NSSF) RESPONDENT**

JUDGMENT

1. The petitioners are at all material times employees of the respondent serving in former grades 5 and 6 and presently spread across the new grades MG5, MG6, MG7 and MG8 and some of them have since retired. The respondent is a public service employer established under the *National Social Security Fund Act, 2013* and the petitioners are therefore public officers. They filed the petition on June 30, 2023 through Were & Oonge Advocates. The petitioners prayed for orders as follows:
 - a. A declaration that the disparities in salary and allowance reviews and increments between the respondent's employees in Grades 5 and 6 and their counterparts in Grades 7 and 8 is discriminatory and therefore illegal.
 - b. An order compelling the respondent to pay petitioners all the unpaid COLA as was approved by the board in its 155 meeting in October 2011 and in arrears from 2011.
 - c. An order compelling the respondent to pay the petitioners the unpaid appraisal rewards as approved by the board in its meeting in October 2011 and in arrears from November 2011 to date.



- d. An order compelling the respondent to pay the petitioners the unpaid leave, acting and transfer allowances in arrears from November 2011 to date as was approved by the board in its 115th meeting in October 2011.
 - e. An order compelling the respondent to pay the petitioners the pension contributions underpayments in arrears and the accrued interest from November 2011 to date.
 - f. A declaration that the consolidated salaries are unlawful and a further order compelling the respondent to make the components of the salary itemised and identifiable.
 - g. An order compelling the respondent to place all G6 employees at MG 6 and at their current notch levels as was in the old structure, to move to respective notch in the new structure to maintain the seniority with effect to 01.03.2023 as was done with the G2 –G5 into MG2 – MG5 respectively.
 - h. An order compelling the respondent to publicise to all members of staff the approved PSC HR instruments tools and the job evaluation implementation matrix that was approved by the board meeting held on 08.03.2023.
 - i. A permanent injunction restraining the respondent from engaging in any repeated acts of discrimination against the petitioners in any manner.
 - j. Costs of the petition be awarded to the petitioners.
 - k. Any other relief the Honourable Court may deem fit to grant.
2. The petition was based upon the attached supporting affidavit George Okelo Nyakuri and the supplementary affidavit of George Okello Nyakuri sworn on November 16, 2023. The petitioners' case is as follows:
- a. The petitioners are serving or served the respondent in job grades G5 and G6 and they are not unionisable staff. Their unionisable counterparts are in grades G7 and G8.
 - b. In 2010 the respondent commissioned a major job evaluation and skills mapping exercise undertaken by Price Waterhouse Coopers (PWC) culminating in the PWC Report which was adopted and approved by the respondent in August 2011 being exhibit GON 2.
 - c. At the 155th meeting held on 11.10.2011 the respondent's board of trustees resolved that the PWC Report would be implemented in exactly same nature and context. Thus, the new organisation structure and salary were implemented effective November 1, 2011 based on implementation matrix prepared by Deloitte & Touche Consulting Limited as duly adopted and approved by the respondent.
 - d. The implementation of the report was discriminatory to them as members of G5 and G6 out the petitioners' case. Prior to the 2011 job evaluation, the management salary reviews were done every time the CBA was implemented for unionisable staff. On 06.01.2012, the management trustee circular ref. no. SF/EST/1/25 Vol.V/(116) the management staff salaries including for G5 and G6 were consolidated with 60% of the consolidated salary defined as the basic salary. By circular ref no. SF/EST/1/179 Vol. 1/76 of 21.02.2017 the basic salary was revised to 65% of the consolidated salary with 35% remainder not being itemised. That was contrary to the unionisable staff salary structure who were in G7 & 8 whose salary was itemised as basic pay, house allowance, and transport allowance. In 2012 the petitioners being in G5 & 6 were given two full notches salary increment backdated to 01.07.2012 and that was



the only salary increment since 2012 as opposed to unionisable employees who have received salary increase of 7% on basic salary; 5% on house allowance and commuter allowance every year since 2011 consistently per their CBA cycles. On cost of living adjustment (COLA) which is provided for in clause 3.6.1 of respondent's human resource manual per recommendation of PWC Report at 8.3.4, only four COLA were paid between 2011 and 2022. The salary structures were never opened per PWC Report and COLA has not been paid to some of the petitioners because they have attained upper limit in the salary structure. The petitioners in G5 & G6 have never been paid per performance appraisal on every July as provided in the 2011 Manual, except once in 2011. However, the unionisable staff in G7 & G8 have been getting 2% salary increase on basic salary and every year because of performance appraisal. No complaints have been raised about G5 & G8 performance. The G7 & G8 unionisable staff have, by reason of their CBA, continued to enjoy consistent annual salary increase; leave allowance; staff loans entitlements; transfer allowance; salary advances and contributions to staff pension scheme; staff loan entitlements and at a better rate compared to staff in G5 & G6.

- e. On 12.03.2023 the respondent unveiled a new job evaluation exercise by circular SF/EST/1/25 Vol.VI/(113) which was promised as a solution to the previous G5 & G6 grievances. However, staff in G5 & G6 continued to suffer the discrimination as follows:
 - i. All management staff were moved horizontally whereby G2, G3, G4 and G5 migrated to MG2; MG3; MG4 and MG5 respectively while for G6 were subjected to 3 conditions criteria per circular SF/EST/1/25 VOL. VI/(113) of 17.03.2023 requiring master's degree plus professional qualification and 15 years of service, or, bachelor's degree plus professional qualifications and 20 years of service. The criteria is in contract to the competence matrix approved by the Public Service Commission and which stipulated bachelor's degree; minimum KCSE C+ or its equivalent; at least six years work experience; performance qualifications; membership to a professional body where applicable; proficiency in computer applications; fulfil chapter six of the *Constitution*; or, Diploma; 12 years minimum working experience; supervisory course certificate; proficiency in computer applications; and, fulfil chapter 6 of the *Constitution*. The consequence was that criteria set to convert to G6 to MG6 were discriminately higher which was the entry grade to the respondent's management cadre and requirements set were to high applicable only to senior management positions in the public service generally. Thus, G6 staff were downgraded to new grades MG7 and MG 8 in a discriminate manner.
 - ii. The salary conversion to the new salary structure was implemented arbitrarily and not based on known approval documents on criteria.
 - iii. Long serving employees on the grade were not recognised and rewarded accordingly.
 - iv. The implementation of the 2023 job evaluation did not cure the injustices of 2011 restructuring and upon implementation on 17.03.2023, more salary discrepancies emerged and dissatisfaction amongst the petitioners.
- f. The petitioners were not privy or notified about the Public Service Commission HR Instruments that the respondent's board approved and the attached implementation matrix. The implementation was imposed without due information.
- g. The respondent's HR Manual at clause 4.10 provides that the respondent shall meet the cost of annual subscription to professional bodies for its employees but the same has been implemented discriminately.



3. The respondent opposed the petition by filing the replying affidavit of Carolyn Okul, the Human Resource Manager of the respondent. The replying affidavit was sworn on 21.09.2023 and filed through Okoth & Kiplangat Advocates. The respondent's case is as follows:
- a. The petitioners are public officers who allege that the respondent has discriminated them as their employer. They seek to enforce a 2011 and 2014 Human Resource Instruments and implementation the PWC Report of 2010.
 - b. The Court (Dr. Gakeri J) in *Consumer Federation of Kenya (COFEK) suing through its officials Stephen Mutoro, Ephraim Kanake and Henry Ocieng v National Social Security Fund Board of Trustees & Another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party)* [2022] eKLR held that the human resource instruments and recommendations that were implemented without the approval of the Public Service Commission were contraventions of the *Constitution* of Kenya 2010. The petitioners' claims based on instruments declared unconstitutional cannot be enforced by the Court.
 - c. Prior to 2011 the respondent had 14 employees' grades. In 2010 the mentioned PWC Report ensued. It reported on a job evaluation whose proposals were to be individually approved by the respondent and the government prior to adoption and implementation. By the cited decision by Dr Gakeri J the recommendations were not adopted as was required and expected. In particular the recommendations that were not adopted as required but in the PWC Report included on Cost of Living Adjustment (COLA); salary increment based on performance appraisals; updating the range minimum and maximum for each grade after every two years.
 - d. One of the recommendations by PWC Report that the respondent implemented was a reduction of grades from 14 to 8. Grades 1 to 6 were in the respondent's management and therefore not unionisable. Unionisable staff were in grades G7 & 8.
 - e. In 2014, the respondent retired the 2011 HR Manual and implemented a new one on 14.04.2014. since 2011 the petitioners had not raised grievances about implementation of PWC Report. There had been a clear internal complaints procedure both in the 2011 and 2014 HR Manuals. The same was never invoked.
 - f. The respondent adopted and implemented recommendations in PWC Report including on COLA and performance based bonuses system which were implemented effective 01.07.2017. Prior to 01.07.2017, no employee from all the 8 grades received COLA or performance based remuneration tied to corporate and individual performance. All adopted recommendations were implemented uniformly in management cadre job groups G1 to G6.
 - g. In 2017, the respondent procured KPMG to carry out another organisational structure. The respondent approved the KPMG recommendations but it was not implemented because of an advisory by the Head of Public Service dated 11.03.2020 that the recommendations be forwarded to State Corporations Advisory Committee (SCAC) for approval. SCAC approved the implementation but as at that point the Court had on 13.04.2022 directed that the recommendations including the HR instruments must be approved by the Public Service Commission per its constitutional mandate and prior to the implementation. The Court found that it was unconstitutional for the respondent to prepare and implement the instruments without approval and input of the Public Service Commission. That was in *Consumer Federation of Kenya (COFEK) suing through its officials Stephen Mutoro, Ephraim Kanake and Henry Ocieng v National Social Security Fund Board of Trustees & Another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party)* [2022] eKLR.



The impact of the decision was that the HR instruments and the PWC Reports which were implemented without the input of the Public Service Commission are unconstitutional. After the decision the respondent forwarded the instruments to the Commission which on September 12, 2022 issued the directives on the new structure. The directive is exhibited as CO11 on the replying affidavit and it was as follows:

- i. The number of employees be limited to a maximum of 1, 405.
 - ii. Increase the grades from 8 to 12.
 - iii. Each grade to have an indicative minimum requirement for appointments.
 - iv. Each grade to have the maximum number of employees it can hold and specifically, the new grade MG6 (Grade 6) to hold a maximum of 162 employees only.
- h. On 06.03.2023, the respondent implemented the instruments adhering to the Commission's directive. The implementation included mapping the existing employees into their new grades and staff were given a period within which to appeal against the respondent's decision in event of dissatisfaction. 331 employees, as urged for the petitioners, lodged their complaints or appeals with the respondent's HR Department per the HR instruments. They were considered and most of them were resolved. The petitioners did not invoke the complaints or appeal procedures and the petition is premature.
4. Final submissions were filed for the parties including the petitioners' supplementary submissions. The Court has considered the material on record and the parties' respective positions. The Court returns as follows.
 5. To answer the 1st issue, the Court returns that the petitioners cannot have valid and legitimate claims based on PCW Report and ensuing HR instruments or such other HR instruments that had not been approved by the Public Service Commission in exercise of its constitutional mandate. The respondent's submissions in that regard are upheld and the findings in *Consumer Federation of Kenya (COFEK) suing through its officials Stephen Mutoro, Ephraim Kanake and Henry Ochieng v National Social Security Fund Board of Trustees & Another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party)* [2022] eKLR will prevail. The claims and prayers based on the unconstitutional instruments and as enumerated for the petitioners must collapse as unjustified.
 6. To answer the 2nd issue, the petitioners cannot establish a case for discrimination under articles 27 and 41 of the *Constitution* as read with section 5 of the *Employment Act*, 2007 by alleging that they were discriminately treated as compared to the unionisable staff. The Court considers that the petitioners are bound by their respective contracts of service and being in management and not unionisable, the terms and conditions of service in the CBA never became incorporated in their individual contracts of service. Further, the petitioners have not rebutted the respondent's case that with respect to the management cadres G1 to G6 any recommendations in the PWC Report implemented, albeit unconstitutionally so, were uniformly implemented with respect to all management cadre staff at all grades. Thus, the petitioners have as well failed to establish discrimination in that regard.
 7. The petitioners pray that the respondent is ordered to deliver to them the Public Service Commission communication on approval of the HR instruments and attached matrix on implementation. The respondent has already delivered the Commission's communication in that regard by way of exhibit CO 11 on the replying affidavit. To answer the 3rd issue, the Court returns that it would be superfluous to grant a prayer the respondent has already satisfied as found.



8. To answer the 4th issue, the Court considers that the petitioners in G6 who say have not converted to MG 6 as per instruments approved by the Commission are entitled to their individual grievances being considered internally by the respondent and failing satisfaction, an appeal may be made to the Commission or appropriate legal proceedings may be filed in Court. The Court considers that the petitioners have not shown that they have exhausted the prevailing internal or appellate grievance procedures. To that extent, it appears that the individually aggrieved petitioners ought to take appropriate steps in that regard.
9. To answer the 5th issue, the respondent is entitled to confer a consolidated salary under section 31 of the Employment Act only where the consolidated pay includes reasonable provision for housing. The section does not provide for a consolidated pay beyond inclusion of reasonable provision for housing. Where the consolidated pay has a definite provision for housing then the employer must show as much in the itemised statement of payment or pay slip. The respondent shall therefore henceforth, starting payment at the end of May 2024, provide the petitioners an itemised pay statement or payslip as contemplated in section 20 of the Employment Act, 2017. The section provides as follows:
- (1) An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.
 - (2) The statement specified in subsection (1) shall contain particulars of—
 - (a) the gross amount of the wages or salary of the employee;
 - (b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and
 - (c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment. (3) This section shall not apply to a casual employee or an employee engaged on piece rate or task rate terms or for any period not exceeding six months.
 - (4) The Minister may exclude any category of employees or employees employed in any sector from the application of this section.
10. In view of the findings, the petitioners' case will fail as unjustified or not established at all save as relates to pay statement. The Court has considered the historical background to the case, that parties are still in employment relationship, the margins of success, and, each will bear own costs.

In conclusion, the petition is hereby determined with orders:

1. The declaration that the respondent shall henceforth, starting salary payment at the end of May 2024, deliver to the petitioners an itemised pay statement or payslip as contemplated in section 20 of the Employment Act, 2017.
2. Each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

