



**County Public Service Boards National Consultative Forum &
47 others v Salaries and Remuneration Commission (Petition
E029 of 2023) [2024] KEELRC 1279 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1279 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E029 OF 2023

B ONGAYA, J

MAY 24, 2024

**IN THE MATTER OF ARTICLES 10, 22, 23, 27, 42, 47, 230 (4), 232, 234, 235, 251, 259, 260
– MEANING OF STATE OFFICE (G) AND (Q), OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTIONS 57, 58, (5) (A) (B),
59, 59A OF THE COUNTY GOVERNMENTS ACT**

**IN THE MATTER OF SECTION 11 OF THE SALARIES AND REMUNERATION
COMMISSION ACT, 2011 AS READ TOGETHER WITH REGULATION
14 OF THE SALARIES AND REMUNERATION (REMUNERATION AND
BENEFITS OF STATE AND PUBLIC OFFICERS) REGULATIONS, 2013**

**IN THE MATTER OF THE VIOLATION OR THREATENED VIOLATION OF
ARTICLES 3, 10, 20(1), 27(1) & (2), 41, 47, 230(4) AND (5), 232, 251, 259, 260
(MEANING OF STATE OFFICE (G) & (Q) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

**COUNTY PUBLIC SERVICE BOARDS NATIONAL CONSULTATIVE
FORUM 1ST PETITIONER**

MOMBASA COUNTY PUBLIC SERVICE BOARD 2ND PETITIONER

KILIFI COUNTY PUBLIC SERVICE BOARD 3RD PETITIONER

LAMU COUNTY PUBLIC SERVICE BOARD 4TH PETITIONER

TAITA TAVETA COUNTY PUBLIC SERVICE BOARD 5TH PETITIONER

GARISSA COUNTY PUBLIC SERVICE BOARD 6TH PETITIONER

WAJIR COUNTY PUBLIC SERVICE BOARD 7TH PETITIONER

ISILOLO COUNTY PUBLIC SERVICE BOARD 8TH PETITIONER



MERU COUNTY PUBLIC SERVICE BOARD	9 TH PETITIONER
EMBU COUNTY PUBLIC SERVICE BOARD	10 TH PETITIONER
MAKUENI COUNTY PUBLIC SERVICE BOARD	11 TH PETITIONER
NYANDARUA COUNTY PUBLIC SERVICE BOARD	12 TH PETITIONER
TURKANA COUNTY PUBLIC SERVICE BOARD	13 TH PETITIONER
WEST POKOT COUNTY PUBLIC SERVICE BOARD	14 TH PETITIONER
SAMBURU COUNTY PUBLIC SERVICE BOARD	15 TH PETITIONER
TRANS NZOIA COUNTY PUBLIC SERVICE BOARD	16 TH PETITIONER
BARINGO COUNTY PUBLIC SERVICE BOARD	17 TH PETITIONER
BUNGOMA COUNTY PUBLIC SERVICE BOARD	18 TH PETITIONER
SIAYA COUNTY PUBLIC SERVICE BOARD	19 TH PETITIONER
KISUMU COUNTY PUBLIC SERVICE BOARD	20 TH PETITIONER
KISII COUNTY PUBLIC SERVICE BOARD	21 ST PETITIONER
NAIROBI COUNTY PUBLIC SERVICE BOARD	22 ND PETITIONER
KWALE COUNTY PUBLIC SERVICE BOARD	23 RD PETITIONER
MANDERA COUNTY PUBLIC SERVICE BOARD	24 TH PETITIONER
THARAKA NITHI COUNTY PUBLIC SERVICE BOARD	25 TH PETITIONER
KITUI COUNTY PUBLIC SERVICE BOARD	26 TH PETITIONER
KIRINYAGA COUNTY PUBLIC SERVICE BOARD	27 TH PETITIONER
TANA RIVER COUNTY PUBLIC SERVICE BOARD	28 TH PETITIONER
MARSABIT COUNTY PUBLIC SERVICE BOARD	29 TH PETITIONER
MACHAKOS COUNTY PUBLIC SERVICE BOARD	30 TH PETITIONER
NYERI COUNTY PUBLIC SERVICE BOARD	31 ST PETITIONER
MURANG'A COUNTY PUBLIC SERVICE BOARD	32 ND PETITIONER
KIAMBU COUNTY PUBLIC SERVICE BOARD	33 RD PETITIONER
UASIN NGISHU COUNTY PUBLIC SERVICE BOARD	34 TH PETITIONER
ELGEYO/MARAKWET COUNTY PUBLIC SERVICE BOARD	35 TH PETITIONER
NANDI COUNTY PUBLIC SERVICE BOARD	36 TH PETITIONER
LAIKIPIA COUNTY PUBLIC SERVICE BOARD	37 TH PETITIONER
NAKURU COUNTY PUBLIC SERVICE BOARD	38 TH PETITIONER
NAROK COUNTY PUBLIC SERVICE BOARD	39 TH PETITIONER



KAJIADO COUNTY PUBLIC SERVICE BOARD 40TH PETITIONER
KERICHO COUNTY PUBLIC SERVICE BOARD 41ST PETITIONER
BOMET COUNTY PUBLIC SERVICE BOARD 42ND PETITIONER
VIHIGA COUNTY PUBLIC SERVICE BOARD 43RD PETITIONER
BUSIA COUNTY PUBLIC SERVICE BOARD 44TH PETITIONER
NYAMIRA COUNTY PUBLIC SERVICE BOARD 45TH PETITIONER
MIGORI COUNTY PUBLIC SERVICE BOARD 46TH PETITIONER
HOMABAY COUNTY PUBLIC SERVICE BOARD 47TH PETITIONER
KAKAMEGA COUNTY PUBLIC SERVICE BOARD 48TH PETITIONER

AND

SALARIES AND REMUNERATION COMMISSION RESPONDENT

JUDGMENT

1. The petitioners filed the petition dated 02.02.2023 through Ngwele & Company Advocates. The 1st petitioner is the County Public Service Boards Consultative Forum which is a society registered under the Societies Act. Its principal objective is to provide a forum for consultation among the County Public Service Boards of the various county governments and consideration of matters of common interest to County Public Service Boards. The 1st petitioner has filed the petition for the 47 County Public Service Boards also named as the 2nd to 48th petitioners. The Boards are established per section 57 of the County Governments Act, 2012 as body corporates with perpetual succession. The Boards are, amongst other functions and powers, tasked with establishing and abolishing offices in the county public service and making recommendations to the Salaries and Remuneration Commission, the respondent, on the remuneration, pensions and gratuities for county public service employees.
2. The petitioners filed the amended petition dated 08.09.2023. The petitioner prayed for the following reliefs:
 - (a) A declaration be and is hereby issued that the Respondent's circular dated 8th December 2017 is unconstitutional, null and void.
 - (b) A declaration be and is hereby issued that members of the County Public Service Boards are state officers within the meaning of Article 260 of the Constitution.
 - (c) A declaration be and is hereby issued that the salaries and benefits of members of the County Public Service Boards should be comparable to those of the members of the Public Service Commission.
 - e) An order of mandamus is hereby issued compelling the Respondent to engage with and consider the Memoranda of the County Public Service Boards before reviewing the remuneration and benefits for officers in the service of the county executive.
 - (ea) A declaration be and is hereby issued, that the County Public Service Boards have both the Constitutional and statutory mandate to originate proposals for salaries and benefits of



Members of the County Public Service Boards and of all other Public Officers serving in the County Public Service, they therefore have a legal obligation to make recommendations to the SRC and that the SRC's Constitutional and Statutory mandate and duty is limited only on advising the CPSB's on the submitted proposals/memoranda and recommendations from the CPSB's to the SRC.

- (eb) A declaration be and is hereby issued, that the SRC cannot Suo moto, set and advise on the Salaries and Benefits of the Members of the County Public Service Boards and/or of all other public Officers serving in the County Public Service without considering and advising on the Memorandum of Recommendations on the salaries and Benefits submitted to the Respondent by the County Public Service Boards pursuant to section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution.
- (ec) A declaration be and is hereby issued that the document dated 28th April 2023 issued by the SRC in reaction to the on the Memoranda of the County Public Service Boards containing the recommendations on the salaries and benefits of the Members of the County Public Service Boards submitted to the Respondent on 30th March 2023 pursuant to the provisions of section 59 (1)(j) of the County Governments Act does not constitute and/or is not, advise within the meaning of Article 234(b) of the Constitution.
- (ed) A declaration be and is hereby issued that the SRC having failed to and/or refused to advise on the Memorandum of Recommendations including the Report of the Consultant submitted to it by the 1st Petitioner on behalf of all the Petitioners under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, the same be final and that the petitioners be deemed to have discharged their obligations under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, accordingly the Members of the County Public Service Boards are entitled to the following grading structures, namely, Chairperson Grade F2; Vice Chairperson Grade F1; Member Grade F1; and, Secretary/CEO Grade Fh1.
- (ee) A declaration be and is hereby issued that the SRC having failed to and/or refused to advise on the Memorandum of Recommendations including the Report of the Consultant submitted to it by the 1st petitioner on behalf of all the Petitioners under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, the same be final and that the petitioners be deemed to have discharged their obligations under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, accordingly the Members of the County Public Service Boards are entitled to the salary structure as set out in the Memorandum of Recommendations.
- (eb) An order be and is hereby issued that the new grading and salary structure for Members of County Public Service Board shall be effective from the date of appointment of the respective members of the Boards.
- (h) The costs of and incidental to these proceedings.
- (i) Interest on (h) above at court rates with effect from the date of filing the Petition herein until the date of full and final settlement. (j) Such other, further, additional, incidental, alternative and/or appropriate relief(s) or remedies as the Honourable Court may deem just and expedient.



3. The amended petition was based upon the supporting affidavits on record and the annexed further supporting affidavit of Samson Kibii, the Secretary General of the 1st respondent sworn on 08.09.2023 and the exhibits thereto.
4. The petitioners' case is stated and urged as follows:
 - a. The respondent is an independent constitutional commission established under Article 230(1) of the Constitution of Kenya. The respondent's key constitutional mandate under Article 230(4) of the Constitution is: (a) setting and regularly reviewing the remuneration and benefits of all state officers; and (b) advising the national and county government on remuneration and benefits of all other public officers.
 - b. The petitioners urge that the respondent has acted unconstitutionally, unreasonably, and illegally in the following respects:
 - i. By usurping the mandate of the County Public Service Boards by purporting to set the remuneration and benefits of officers in the county public service contrary to Article 230(4) of the Constitution.
 - ii. Despite numerous memoranda and objections from the petitioners and their proxies, failing to properly differentiate between state officers at the county level from the other public officers in the county public service.
 - iii. Discrimination against members of the County Public Services and contrary to Article 27 (1) & (5) of the Constitution by purporting to lump them together for remuneration purposes with other officers of the county public service even though the, the members are state officers; and, by offering them lower and inferior remuneration packages in comparison to members of Public Service Commission even though the County Public Service Boards and the Public Service Commission perform similar functions albeit at different levels of the government. The petitioners rely on the stated particulars of disparities in the remuneration and benefits package between the members of the Boards and the Commission.
 - c. Subjecting members of the Boards to unfair labour practices including placing them in lower job groups in comparison to their subordinates in the county public service structure and in violation of Article 41 of the Constitution.
 - d. The petition is filed per standing conferred under Articles 22 and 258 of the Constitution and pursuant to the preamble to the Constitution that all people of Kenya aspire for a government based on the essential values of equality, human rights, freedom, democracy, social justice, and, the rule of law. Further, Article 259 provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, human rights, and fundamental freedoms in the Bill of Rights; permits development of the law; and, contributes to good governance. The petitioners also state that Article 50 (1) of the Constitution provides for the petitioners' right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before the Honourable Court.
5. The petitioners urge the following facts in support of the amended petition:
 - a. On 08.12.2017, the respondent issued a circular purporting to advise per Article 230(4) of the Constitution, on the remuneration and benefits for members of the County Public Service Board for the period 2018 to 2023. The petitioners' case is that the said 2017 circular was illegal



and unconstitutional because it issued on the erroneous premises that members of the Boards are public officers in the service of the County Executive, whereas, they are in fact state officers, and by offering the members of the Boards remuneration and benefits inferior to those of the members of the Public Service Commission.

- b. By letter dated 03.06.2020 the Governor, Baringo County addressed the respondent that the secretary and Chief Executive Officer (CEO) of the County Public Service Board was very low and out of step with the workload of the CEO. The letter urged for the review of the salaries, allowances, and privileges of the members of the County Public Service Board to mirror those of the members of the Public Service Commission. The letter requested for upwards review of the salaries and benefits of the Board Secretary and CEO so as to attract, retain and motivate skilled professionals to the position.
- c. On 06.08.2020, the respondent issued a circular communicating that it had developed Guidelines on Conducting Job Evaluation for the 2021/2022 to 2024/2025 Remuneration Cycle for public sector. The petitioner's case is that the respondent developed the guidelines without involving the petitioners at all.
- d. On 14.08.2020 the respondent sent a request for written submissions on Draft Remuneration Guidelines for Public Sector.
- e. On 21.08.2020, the 17th Petitioner, Baringo County Public Service Board, issued a written submission to the respondent conveying its views on the respondent's Draft Remuneration Guidelines, 2020 The 17th respondent stated and urged as follows:
 - i. Reminded the respondent to consider factors such as skill and professional equity; and, equal pay for work of equal value or equal work, in reviewing remunerations and benefits of state and other public officers.
 - ii. Some guidelines invoked for the respondent in guiding job evaluation did not adhere to the principle of equal pay for equal work.
 - iii. The respondent urged to note that members of the County Public Service Board and those of the Public Service Commission not only held the same qualifications and experience but also performed the same functions.
 - iv. Recommended that members of the County Public Service Board be offered remuneration and benefits package mirroring those of members of the Public Service Commission.
 - v. Decried the wide pay disparities between the job grades in the county and national governments.
 - vi. Proposed that the respondent collaborates with County Public Service Boards in delegating part of its public sector remuneration review to the County Public Service Boards.
- f. On 17.06.2021 the respondent issued a circular informing amongst others, the Boards, that the respondent would not review the basic salary structures, allowances and benefits in the public sector in the financial year 2021/22 – 2022/23; and, the respondent would review the situation after two fiscal years and based on the status of the economy, issue a guidance on the way forward for the remaining period of the third remuneration and benefits review cycle.



- g. On 21.06.2021, the Secretaries of the 47 County Public Service Boards submitted a Joint Memorandum to the respondent complaining against the underpayment and mis-grading of the position of Secretary to the Board. The respondent acknowledged receipt of the memorandum by letter dated 28.06.2021. By letter dated 06.07.2021 the respondent advised the interim secretary of the Association of Certified Secretaries of Kenya to channel through the County Public Service Boards the Memoranda on mis-grading and underpayment of the Secretaries to the County Public Service Boards. On 21.07.2021 the Association of Professional Societies of East Africa (APSEA) issued a memorandum to the respondent on Grading and Remuneration of the Secretary to County Public Service Board urging fair and equal treatment in terms of job-grading and remuneration noting they performed the same functions as the Secretary of the Public Service Commission; faulted the respondent for grading the Secretary at level of a Director yet the Board exercised disciplinary control over officers in the county public service; and, the County Public Service Boards were independent commissions equal in stature to the Public Service Commission. By letter dated 28.07.2021 the respondent acknowledged receipt of both memoranda and promised to respond.
- h. On 22.12.2021 the 17th petitioner, Baringo County Public Service Board on behalf of all the Boards issued a memorandum faulting the respondent for failing to heed the recommendations in the advisory opinion dated 21.08.2020 that members of the Boards were state officers; paying members of the Boards at least 3 to 4 times lower than their peers in the public sector; and, failing to engage the Boards during the Job evaluation process. The respondent was requested to give the Boards an opportunity to offer guidance and input on the job evaluation process; suspend the communication and implementation of the proposed benefits and remuneration for state offices pending engagement of the Boards; address the pay disparities between equivalent job grades in the county and national governments as required under the Allowances and Benefits Policy for Public Service; and address wide pay disparities between the members of the Board and the members of the Commission.
- i. On 06.12.2021 the respondent issued the Elgeyo Marakwet County Public Service Board with a report on job evaluation grading results for 2021/22 – 2024/2025.
- j. On 30.12.2021, the 1st petitioner addressed to the respondent a memorandum on the respondent's proposed remuneration and benefits for state officers for financial years 2021/2022 to 2024/2025. The 1st petitioner urged that the respondent had omitted County Public Service Boards from the remuneration proposals of state officers while members of the Boards were state officers; County Secretaries and Chief Officers in the county executive had been offered a higher remuneration and benefits package than the members of the County Public Service Boards who were tasked with staffing and overseeing the performance of public officers in the county service; the members of the Boards and the members of the Public Service Commission performed similar jobs but the Board members had been offered inferior remuneration and benefits package contrary to Articles 10 and 232 of the Constitution; and, the need for the respondent to review the remuneration proposal to harmonize salaries of state officers at both national and county levels to enhance equity and fairness. On 31.12.2021, the Nyamira and Siaya County Public Service Boards issued their respective memorandum raising the same issues.
- k. The respondent by Gazette Notice No. 8794-dated 27.07.2022 published in Vol. CXXIV No. 145, the Chairperson of the respondent notified that the respondent had reviewed the remuneration and benefits for state officers in the executive of the County Governments. The



gazette excluded members of the County Public Service Boards from the list of state officers in the service of the executive arm of county government.

- l. By Gazette Notice No. 8796 dated 27.07.2022 published in Vol. CXXIV No. 145 the respondent's chairperson notified the public that the respondent had reviewed the remuneration and benefits for state officers in the full time constitutional commissions and independent offices. The remuneration and benefits of members of Public Service Commission were included but not for the members of the County Public Service Boards.
- m. Despite the memoranda alluded to the respondent has unilaterally purported to set the remuneration, pensions and gratuities for county public service employees without consulting the County Public Service Boards; making any recommendations to the County Public Service Boards; and considering the recommendations of the County Public Service Boards.
- n. After filing of the petition, the Court directed parties to consider compromise. The petitioners' case is that their view was that the members of County Public Service Boards are state officers while the respondent's view was that they were "other public officers". the petitioners state that it was agreed that the petitioners present their memorandum on recommendation of salaries and benefits payable to members of the County Public Service Boards as envisaged in section 59(1) (1) of the County Governments Act. The memorandum was to be accompanied with the following documents:
 - i. A set of new harmonised job description for the four roles of Chairperson; Vice Chairperson; Members; and, Secretary or CEO of the Boards.
 - ii. A memorandum of key issues (compensable factors) affecting the remuneration and benefits of the office holders in the Boards.
 - iii. A proposal of benchmarked remuneration and benefits.
 - iv. The compiled document containing the 47 letters of delegated authority from the 47 Boards to the 1st respondent.
- o. The petitioners' case is that it was agreed that the foregoing documents be submitted by 30.03.2023 after which the respondent would re-evaluate the Job Descriptions and issue a revised Job Evaluation results for members of the Boards within two weeks thereafter being by 14.03.2013.
- p. On 23.03.2023, the petitioners engaged a Human Resource Firm known as Workforce Productivity Centre (WPC) so as to undertake a scientific job evaluation of the job description developed by the petitioners. On 30.03.2023 the petitioners submitted to the respondent their formal; recommendations on salaries and benefits payable to members as chairperson, vice chairperson, member and secretary and CEO of the Board.
- q. On 17.04.2023 the 1st petitioner and the respondent held a follow up meeting and the respondent shared a document titled "Report on Job Evaluation, Grading Results and Proposed Remuneration and Benefits for the County Public Service Board for 2021/ 22 – 2024/25 Remuneration Review Cycle". The petitioners say the document replicated the respondent's position of December 2021 instead of advising on the contents contained in the petitioners' memorandum and related documents as submitted to the respondent by the 1st respondent. At the meeting, the petitioners state that it was clear that the respondent had made no effort to re-evaluate the new, harmonised and revised job descriptions in the Boards and that the respondent maintained its pre-meditated position. The respondent failed to explain



how it had arrived at the token changes proposed in their report. The respondent promised to make an advisory opinion by 20.04.2023 and 10 days allowed for the 1st respondent to respond in writing so that the respondent would issue an advisory by 30.04.2023.

- r. On 28.04.2023 the respondent wrote to the forum to release the purported Job Evaluation results through a report titled “Report on Job Evaluation Grading Results and Proposed Remuneration and Benefits for the County Public Service Board for the 2021/22 – 2024/25 Remuneration Review Cycle” dated April 2023. With respect to that report the respondents urge as follows:
- i. The respondent advised the petitioners that the respondent evaluates public service jobs using analytical and point factor-based Job Evaluation (JE) systems, which evaluate jobs using compensable factors. Compensable factors provide a basis for judging a job's value and in turn its compensation.
 - ii. The respondent further stated in its report that compensable factors are the characteristics of the job that enable pursuit of the organization's strategy and achievement of its objectives and that they are intrinsic in a job and in their absence the job cannot be performed adequately.
 - iii. The respondent further disclosed in its JE Grading Results Report that the respondent adopted ten (10) compensable factors for the third remuneration review cycle.
 - iv. The respondent further advised in its report that a job evaluation system has broad factors that consist of: A preliminary factor which assesses aspects of a job and determines the initial banding of the job; Input factors which assess factors such as qualifications, knowledge & skills, experience and training; Process factors which assess accountability, problem solving, responsibility among others and Output factors which measures influence and impact of a role.
 - v. The respondent further acknowledged that the County Public Service Boards submitted job descriptions for four roles; Chairperson CPSB, Vice Chairperson, Member and Secretary/CEO to CPSB for re-evaluation as agreed in the meeting of 23rd April 2023.
 - vi. The respondent stated in its report that job descriptions were then subjected to the point-factor JE system, which systematically rated each position based on the job evaluation compensable factors. It further stated that the points or scores derived therefor were then 26 assigned for each of the factors present in the job and summed up to determine its relative worth.
 - vii. The respondent went further in its report to intrastate the “ JE Banding System and Remeasure Score Ranges” which were used as a basis for assigning JE grades to jobs within the different skill levels of the CPSBs.
 - viii. The respondent advised the petitioners that it did re-evaluate the four (4) roles Chairperson, Vice Chairperson, Member and Secretary or CEO of County Public Service Board have been evaluated based on the revised Job Descriptions submitted which placed the Chairperson of the CPSBs at Grade E2 and the Members on E1 of their evaluation system without answering the basic questions as to whether the Boards should be Banded and Grade E in the first place and why.



- ix. The respondent acknowledged in its report that the CPSBs had submitted job descriptions which have been revised and improved from one review cycle to another and that it provided clarity and understanding on the roles of the CPSB.
- x. However, the respondent made an admission in its observations that though the respective roles were clearly articulated capturing elaborately what is provided in the CGA, 2012 on functions of the Board Section 59(1), Powers of the Board as provided in Section 59(4) and the reporting modalities of the Board to the County Assembly as provided in section 59(5) of the County Governments Act (CGA), other relevant provisions as provided in the CGA 2012 and other related statutes, “These elements though improved and enhanced in the revised JDs were considered in the previous (2021) evaluation that resulted to the upgrading of the roles of Chairperson from E1 to E2, Vice Chairperson and Members from D5 to E1 and Secretary/CEO to the Board from D4 to E1”.
- xi. In the same report, the respondent acknowledged that in the revised JDs, the input factors which are knowledge and training (Academic qualifications, Professional qualification, Training, and Work experience) were not re-evaluated, purportedly because they did not change since 2021, as this is provided in the statutory instruments, consequently, by their own admission, “there was no change in the scoring of these factors for the respective roles” despite the fact that the petitioners sought to demonstrate extensive review of these requirements that were not adequately captured by statute.
- xii. The Respondent further acknowledged that the revised Job Descriptions (JDs) had additional elements that had not been properly articulated in the previous submissions and this has had a positive impact on the scoring of the process and in the revised JDs under the working conditions, the risk aspects of the roles were clearly spelt out and those risks that are inherent to the job had been considered during re-evaluation of the roles.
- xiii. The respondent further acknowledged that the risks that emanate from external factors (Transport, entertainment etc.) to be considered under facilitative elements while output compensable factors such as complexity, responsibility, accountability, management, interaction, decision making, problem solving, influence and impact of the roles were also well articulated and that subsequently this had a positive impact in the scoring of some of the compensable factors, leading to an upward shift in scores.
- xiv. The respondent made another contradictory statement that “however the shifts were not significant enough to lead to a change of grade as they are within the same band of the respective grades;” yet the respondent failed to disclose that it made a fundamental error of making the wrong choice of banding in the first place because the Board is a top decision making organ in the County Government and cannot be placed in any Job Group Band “E” and instead must rank among the top decision-makers in the county government because it is responsible for making policy decisions like all top Executives who are placed in Band “F” which the Respondent avoided from the beginning.
- s. In view of the Report’s contradictions, the 1st petitioner for other petitioners asked the respondent to demonstrate fairness and transparency in line with one of the four main principles of JE as stated in Article 230(5). The petitioners’ case is that, however, the respondent failed to explain how they arrived at the Banding decision and how the



compensable factors in the stated JE system used by the respondent was used to derive the points that were provided by the respondent as the JE grading results and hence the inevitable conclusion that the respondent may have grossly misinterpreted the application of the JE process and or deliberately failed to conduct the Job Re-evaluation as promised and hence ended with wrong and grossly unfair JE Grading Results. In absence of an explanation by the respondent, the petitioners rejected the results of JE as not factual and for failing the fairness and transparency test as contemplated in Article 230(5) (b) of the Constitution. The petitioners referred the JE grading results to its contracted JE expert, Work Productivity Centre (WPC) to review the same and with instructions to conduct an in-depth JE process. On 29.05.2023 the WPC requested for further information to bridge the information gap and the 1st petitioner requested the respondent to provide the information by the letter dated 31.05.2023 but which remains not replied to by the respondent. The petitioners requested for the information by the notice to produce dated 09.06.2023 but the respondent failed to answer the same. The petitioners then requested their expert to submit the final report on the alternative and scientific JE process that was submitted to the petitioners by letter dated 26.06.2023. The report observed that the respondent's JE report was wrong upon the following basis:

- i. There are internal inconsistencies in job grading and salaries within the County Governments by the SRC. For instance, the positions of members of the CPSBs are graded lower (job grade E2 and E1) compared to the positions of County Secretary and County Attorney (job grade E3 and E2 respectively) while Chief Officers are at job grade E1, the same job grade as that of the Vice Chairperson and other members of the CPSBs, yet these positions are offices in the County Public Service where CPSBs are employers.
- ii. The CPSBs are policy-making entities while County Secretary, Chief Officers and County Attorney are majorly implementers and have operations roles.
- iii. There are inconsistencies in job grading of the CPSBs' members compared to similar jobs in comparator institutions (external relativities) such as the Public Service Commission. The gap in job grades and remuneration of jobs with similar or closely related scope of mandate should not be wide as evidenced by the current grading and salary structure of Public Service Commission (PSC) and CPSBs.

6. The petitioners' case is that the experts further established as follows:

- a. Wrong Banding for CPSB jobs: Table 2 in the said report (page 8 of 20) titled: "JE Banding System and Remeasure Score Ranges" provides a breakdown of bands/skill level, JE grade and score ranges. While the report confirms that SRC used ReMeasure job evaluation system to evaluate jobs in CPSBs, it is notable that, job evaluators using ReMeasure system of JE are required to use a preliminary factor to assess aspects of a job and determine the initial banding of the job. The determination of the initial band of a job is based on the Paterson Plan as illustrated in Table 1 of the report
- b. Based on Paterson guidelines, the correct band for CPSB jobs is Band F. Therefore, SRC erred by selecting Band E in its past Job evaluations of the Roles in the CPSBs
- c. Selection of a wrong band has implications on scoring and eventual job grade. Firstly, it limits the range of applicable answers for subsequent questions to the guideline band. Secondly, it determines the weighting of the factors. Therefore, the resultant job grades produced by SRC for roles in CPSBs does not reflect the true relative value and worth of these jobs.



- d. Inconsistency in job grading of jobs in the County Public Service: the petitioner's expert did get an opportunity to review SRC letter Ref. No. SRC/TS/246 VOLI (35) dated 5th June 2023 addressed to the CEO, Council of Governors regarding job evaluation grading, attendant remuneration, and benefits structure for County Secretary and Head of County Public Service. In the aforesaid letter, the SRC has graded the County Secretary position at job grade E3. Despite the fact that this is job established in the county public service and hence a job subject to the oversight and disciplinary control of the CPSBs (as per section 59(1)(c) of the CGA .The role is graded higher than the members of CPSB roles even though scope of the mandate of CPSBs is broader and higher than the role of County Secretary. It should be noted further that the County Secretary in his or her capacity as the head of County Public Service may only exercise powers delegated by the Board and therefore the fact that the functions of the County Secretary are delegated by the CPSBs as per section 86 of the CGA , 2012 is adequately evidence of the inconsistency grading by SRC.
 - e. The Chief Officers have been placed at the same job grade (E1), which is the same or similar job grade to the Grade that SRC has placed the Board Members of the CPSBs save for the position of the Chairperson.
 - f. This inconsistency implies that there are internal inconsistencies in the application of job evaluation principles and guidelines by SRC, which are attributable to gaps in the job evaluation system used by SRC, and the lack of understanding of the mandate and functions and powers of the CPSBs or gaps in the technical capability of job evaluators. Petitioners' exhibit "JN-6" was a copy of the SRC letter Ref. No. SRC/TS/246 VOLI (35) dated 5th June 2023.
7. The petitioner's expert report showed that the current gross salaries of all CPSB positions were well below the market average remuneration as follows:
- a) The analysis carried out by WPC reveals that generally, gross salaries of members of the CPSB are placed between the 25th and 50th percentile and this is even worse for the Secretary/CEO whose gross salary is -4% below 25th percentile.
 - b) Assuming that the correct market position is at the 90th percentile, the Chairperson's salary is below the 90th percentile by -103% (Ksh. 325,551.80) while salary for Vice-Chairperson and Members' salary is below the 90th percentile by -126%; (Ksh.294,175).
 - c) The Secretary's salary is -199%; (420,900) below the 90th percentile.
 - d) The salary analysis results portray a grievous disparity, which negates the principles of fairness.
8. The petitioners' expert interim report submitted to the respondent on 30.03.2023 recommended as follows:
- a. All CPSB jobs should be banded at Band "F" based on the Paterson job evaluation system.
 - ii. The CPSBs are top policy-making organs of the County Government being charged with wide ranging functions as listed in section 59 of the (CGA 2012) in which decisions made at that level impact the entire institution of the County Government, that is, the County and hence it rank as a top County Organ which provide an overall direction in the establishment and abolishing of county public service offices, acquisition, development, and utilization of county human resources among other functions and powers of CPSBs. The expert report recommended pay structure in the CPSB positions for 2023/2024 and 2024/2025 with benefits as particularised in paragraph 54S (a), (b) and (c) of the amended petition.



9. The petitioners have pleaded and urged as follows:
- a. The respondent has over the last review cycles of setting and reviewing of remuneration and benefits for public sector employees (both state officers and other public officers) including county public officers or officers serving in the county public service generally, consistently overstepped its mandate and usurped the role of the petitioners by setting and recommending salaries and benefits of public officers serving in county public service contrary to the requirements under Articles 230(4) (b) requiring the respondent to render an advisory to the recommending authority being the respective county public service boards.
 - b. In the case of making recommendations on the salaries and benefits for the staff in the County Public Service, the recommending authority is the County Public Service Boards per section 59(1) (f) of the County Governments Act and the 47 County Public Service Boards have in writing delegated to the 1st respondent to make recommendations to the respondent pursuant to section 59(1) (j) of the Act.
 - c. The respondent has taken the view that the chairperson, vice chairperson, members and secretary of the petitioners are categorised as other public officers unless otherwise advised by the Hon. Attorney General or found by the Court that they are state officers. Accordingly, the petitioners urge that in view that the respondent holds that they are not state officers, the boards' respective chairperson, vice chairperson, members and secretary are outside the respondent's scope of mandate to set and regularly review the salaries and benefits of state officers pursuant to the provisions of Article 230(4) (a). It is therefore the respondent's view that the members of the Boards should recommend their own salaries and benefits besides proposing and recommending the salaries of staff in county public service and per section 59(1) (j) and thereafter seeking an advisory from the respondent per Article 230(4) (a) of the Constitution.
 - d. The petitioners engaged the respondent between July 2021 and February 2023 and there was no amicable resolution of issues. Thus, the instant petition was filed. Subsequently they engaged their expert. The petitioners' case is that per section 59(1) (g) of the County Governments Act and Article 234(4)(b) of the Constitution, it is the Boards that have the constitutional and statutory mandate to originate proposals for salaries and benefits of other public officers serving in the county public service and the Boards are required by law to make recommendations to the respondent and the respondent's constitutional and statutory mandate and duty is limited only on advising the petitioners on the submitted proposals or memoranda and recommendations from the boards to the respondent.
 - e. Further, the respondent cannot suo moto proceed to set and advise on salaries and benefits of the members of the Boards and other public officers in the county public service without considering and advising on the memorandum of recommendations on the salaries and benefits delivered to the respondent and including the report by the petitioners' consultant submitted to the respondent by the 1st petitioner on behalf of the other petitioners. Thus, the respondent should not be allowed to continue with the previous conduct of setting salaries of the Board chairperson, vice chairperson, member and secretary as well as other public officers in the county public service without receiving recommendations from the Boards per section 59(1) (g) of the County Governments Act as read with Article 234(4) (b) of the Constitution.
 - f. The petitioners' case if the respondent fails to advice on the recommendations by the petitioners like in the instant case on the recommendations made by the petitioners' consultant the Court should proceed to pronounce and declare the same as final. The petitioners in urging



their case relied upon the supporting affidavit of Samson Kibii and James Ondieki Nyamosi dated 30.06.2023 as well as the further affidavits by Samson Kibii and James Ondieki Nyamosi dated 05.02.2024.

10. The respondent filed the replying affidavit of Dr. Hillary Patroba sworn on 17.11.2023 and filed through James Sitienei Advocate. The respondent also relied upon the earlier filed replying affidavit of Anne R. Gitau, MBS sworn on 21.09.2023 and filed on 06.10.2023. It was urged and stated for the respondent as follows:
- a. The respondent is established under Article 230 of the Constitution. Its powers and functions per Article 230(4) of the Constitution are: (a) to set and regularly review the remuneration and benefits of all state officers; and, (b) to advise the national and county governments on remuneration and benefits of all other public officers. Article 230(5) of the Constitution and section 12 of the Salaries and Remuneration Commission Act requires the respondent to take into account the following principles in the discharge of its powers and functions, namely:
 - i. the need to ensure that the total public compensation bill is fiscally sustainable;
 - ii. the need to ensure that the public services are able to attract and retain the skills required to execute their functions;
 - iii. the need to recognise productivity and performance;
 - iv. transparency and fairness; and,
 - v. equal pay for work of equal value.
 - b. Section 11(d) and (e) of the Salaries and Remuneration Commission Act confers upon the respondent the mandate to: (a) conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices; and, (b) determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation. Under the provisions, the respondent has set a four year cycle of salaries and remuneration review in the public service.
 - c. To perform its work, the respondent undertakes job evaluation defined as a systematic process of determining the relative worth of different jobs within an organisation and across organisations aimed at establishing a fair, equitable, and consistent grading structure for all employees. Job evaluation systematically examines the content and requirements of jobs to determine their relative worth. The worth is then used to establish fair and equitable remuneration structures within the organisation. Job evaluation determines worthiness of a job based on requirements and responsibilities. On the other hand, compensation determination involves advising on actual salary levels and benefits. Thus job evaluation and compensation determination are separate and distinct processes.
 - d. The respondent uses analytical and point factor based job evaluation systems to assess the relative worth of jobs in the public service. The system evaluates jobs based on customised compensable factors for the public service, which constitute the characteristics of a job. The system has different skill level comprising of strategic skill level (Band F and E) Tactical skill level (Band D) and basic skill level (Band A) which determine the initial banding of the job. Points or scores are then assigned to each compensable factor based on the job's requirements. The total points or scores for a job determine its relative worth, which is then used to assign its relative worth. The relative worth of a job is achieved by using the same standardised compensable



factors and the same standardised weightings assigned to the factors by the job evaluation system for all jobs in the public service.

- e. One of point factor based job evaluation system is known as REMeasure and which the respondent customised and standardized to reflect the uniqueness of roles in the public service and to ensure fairness and transparency of the relative worth of jobs in the public service. Thereafter the Paterson Philosophy of job evaluation grading was used as a correlation matrix for job grading structures across job evaluation systems used by the respondent. For purpose of job evaluation in the public service, the respondent has adopted 10 compensable factors classified into input factors, process factors and output factors. They are as follows
 - i. In put factors – job knowledge(job knowledge and skills, academic and professional qualifications experience;
 - ii. Process factors – accountability;
 - iii. decision making;
 - iv. responsibility;
 - v. problem solving;
 - vi. management skills;
 - vii. interpersonal skills;
 - viii. independent judgment;
 - ix. working conditions
 - x. output factors – impact or influence.
- f. The factors must be applied without modification towards determining relative worthiness of jobs in the public service.
- g. To determine relative worthiness of a job, the respondent takes into account both the internal and external relativities of jobs within the national and county governments. Internal relativities involve assessing and comparing the value of different jobs within the same organisation or governmental structure it looks at the relationships and hierarchies among various positions within the county governments or national government institutions. External relativities involves comparison of a job to similar roles outside the specific organisation or national and county governments’ structure. It looks at relationships and hierarchies among various positions across the county governments or national government institutions.
- h. At paragraph 20 of the replying affidavit of Dr. Hillary Patroba, it is stated thus, “20. That following job evaluation, the respondent advises the national and county governments on remuneration structures that are fair and equitable.”
 - i. The respondent issues periodic administrative guidelines on job evaluation to the public service. In 2020 it issued the Guidelines on Conducting Job Evaluation for the 2021/22 – 2024/25 Remuneration Review Cycle for public sector as issued on 06.08.2020. The guidelines had a 10 step procedure thus:
 - i. Mobilization and sensitization where stakeholder institutional policy makers are sensitized on the purpose and benefits of job evaluation.



- ii. Institutional engagement meeting. The sensitization of institutional leaders at the meeting is the start of actual job evaluation.
 - iii. Determination of jobs requiring evaluation where each institution forms a Job Description Analysis Committee (JDAC). The description of each job is done and signed by the institutional authorised officer for delivery to the respondent.
 - iv. Development and review of job descriptions lead by JDAC and involving institutional heads of departments (HoDs) to reflect duties, tasks, responsibilities, and specifications of a job. Institutional Head of Human Resource receives the job descriptions from the HoDs for confirmation and submission to JDAC.
 - v. Validation and sign off Job Description Manual where the JDAC conforms the job descriptions to respondent's specifications and the Job Description Manual is signed off by the institutional head of human resource and authorised or accounting officer.
 - vi. The respondent, based on the Job Description Manuals, undertakes Job evaluation and grading. The jobs are subjected to respondent's job compensable factors.
 - vii. Job evaluation results feedback workshops where the respondent shares the preliminary job evaluation report with institutions to help finalise the grading structure.
 - viii. Release of job evaluation results where job evaluation results are used to design a job grading structure reflecting classification of jobs by indicating job grade for every job in the institution.
 - ix. Feedback where institutions provide feedback on implementation of the job evaluation results.
 - x. Reviews and closure whereby institutions are allowed to request for reviews or appeals through the authorised officer.
- j. The respondent per Article 230(4) (b) of the Constitution advised county governments on the remuneration and benefits for members of county public service boards who are all public officers. The first remuneration cycle was for 2013 – 2017 and the advisory was by the letter SRC/TS/CGOVT/3/61 dated 13.06.2013. The second remuneration cycle was for financial years 2017 – 2021 and the respondent reviewed and advised the county governments on the remuneration and benefits of members of the boards by letter SRC/TS/CGOVT/3/61 Vol. IV (49) dated 08.12.2017. The advisory took into account the principles in Article 230(5) of the Constitution and section 12 of the Salaries and Remuneration Commission Act. The respondent also undertook job evaluation to determine the relative worth of the position of chairperson, member, and secretary to the board relative to other positions in the county government.
- k. The Public Service Commission is an Independent Constitutional Commission established under Article 233 of the Constitution and its powers and functions are set out in Articles 234, 155(3) (a) and 158 (2), (3) and (4) of the Constitution as well as statutory roles in various statutes. Within the constitutional and statutory provisions, the Commission has functions and powers over the public service of both the national and county governments. The petitioners' statutory functions and roles are over the public service in the respective county. Thus, the Commission and the boards are substantially different in scope of mandate.



The respondent's case is that the petitioners are therefore misleading or misconceived in invoking the Commission as a comparator.

- i. At the start of the third cycle remuneration review, the county and national governments submitted to the respondent job descriptions for the jobs to be evaluated. The job descriptions included those for members of the county public service boards. In the 2nd review cycle of 2017 the chairperson of the board was graded E1, Vice chairperson and member as D5, and, secretary as D4. In the 3rd remuneration cycle of 2021, the chairperson was graded E2; vice chairperson, member and secretary as E1. On 01.03.2023, the Court encouraged parties to seek compromise of the issues in dispute in the instant petition. Parties met and the petitioners submitted revised job descriptions. The respondent undertook job evaluation and returned the same grading thus the chairperson was graded E2; vice chairperson, member and secretary as E1. On 01.03.2023. From the resubmitted job descriptions, the shift was not significant as to result in a change in the job grading as had earlier been communicated. After agreed engagements between the petitioners and the respondent, on 20.04.2023 the respondent communicated to the petitioners the Job Evaluation Grading for the roles in the county public service boards and proposed remuneration and benefits under the 3rd remuneration review cycle for formal feedback. By the letter dated 12.05.2023 the petitioners rejected the same. By letter dated 10.11.2023 ref. no. SRC/TS/29(94) to all Secretaries, County Public Service Boards, the respondent advised on the remuneration and benefits for members of the Boards, the petitioners, for the 3rd remuneration and benefits review cycle. The respondent's case is that the review was transparent and fair and carried out per the respondent's guidelines on conducting job evaluation for the 2021/22 – 2024/25 remuneration review cycle for the public sector issued to the public service on 06.08.2020. The grading for roles in the County Public Service Boards was aligned to the entire county job evaluation grading structure as follows:
 - i. Governor F2.
 - ii. Deputy Governor E5.
 - iii. Speaker of County Assembly E4.
 - iv. County Executive Committee Member E3.
 - v. County Attorney E3.
 - vi. County Secretary E3.
 - vii. Chairperson County Public Service Board E2.
 - viii. Vice Chairperson or Member County Public Service Board E1.
 - ix. Secretary / CEO, County Public Service Board E1.
 - x. Chief Officer E1.
 - xi. Clerk of County Assembly E1
 - xii. County Solicitor D5.
 - xiii. Member of County Assembly D4
- m. With respect to the job evaluation undertaken by petitioners' consultant the respondent observes that it has not taken into account internal relativities and is therefore not aligned to the county government job evaluation grading structure where the jobs are domiciled (like



proposing the chairperson to be at F2 and vice chairperson or member at F1 whereas the Governor is at F2 and Deputy Governor at E5 as per prevailing grading); the consultant's grading fails to take into account external relativities and is not therefore aligned to the entire public service (for example by proposing chairperson and member at F2 and F1 respectively while the chairperson and vice chairperson of the Public Service Commission are graded at F1 and E5 respectively. Further, the compensable factors adopted for petitioners are not aligned to those adopted by the respondent. The respondent states that the petitioners' proposal does not consider the principles set out in Article 230(5) of the Constitution and section 11 of the Salaries and Remuneration Commission Act

- n. The members of the boards are not state officers and only Parliament by legislation can designate state officers per Article 260 of the Constitution. Per Article 230(4) (a) the respondent as read with Article 260, the respondent sets the remuneration and benefits of state officers. Members of the boards are public officers and in that, regard the respondent advises county governments on remuneration and benefits per Article 230(4) (b) of the Constitution. The respondent therefore acted constitutionally and lawfully in advising on the county governments on the remuneration and benefits for members of county public service boards.
 - o. At paragraph 67 of the affidavit of Dr. Hillary Patroba it is stated, "67. That despite the respondent involving county public service boards on the job evaluation process, not a single county public service board has ever made any recommendations on the remuneration and benefits for public officers to the respondent as required under section 59(1) (j) of the County Governments Act."
 - p. The respondent's case is that under Article 230(4) (b) of the Constitution the respondent advises the national and county governments on remuneration and benefits of all other public officers and under section 11(b) of the Salaries and Remuneration Commission Act it keeps under review all matters relating to the salaries and remuneration of public officers. The respondent states that it has overarching mandate to advice on the remuneration and benefits for all public officers and can act on its own motion suo moto or upon a request to advise on the salaries and remuneration of public officers. That Article 230(4) (b) of the Constitution and section 11(b) of the Salaries and Remuneration Commission Act does not expressly limit the respondent's authority to invoking its jurisdiction only upon request for advice.
 - q. The petitioners have not pleaded with precision the constitutional provisions allegedly violated as was held in *Anarita Karimi Njeru –Versus- The Republic (1976-1980) KLR 1272*.
11. James Ondieki Nyamosi in his further affidavit sworn on 05.02.2024 has urged and stated as follows:
- a. He is a certified human resource practitioner registration no. 6578 of the Institute of Human Resource Management an Associate Partner and head of workforce and strategy advisory services at the Workforce Productivity Centre (WPC) which is a registered human resource firm with extensive experience in undertaking Job Evaluations. He has over 17 years of experience. He was consulted by the petitioners to undertake job evaluation for the petitioners with respect to the board positions of chairperson, vice chairperson, member and secretary of the county public service board.
 - b. The respondent is misleading in stating that a job evaluation is about relative worth of a job across organisations as for his part, job evaluation relates the relative worth of a job within an organisation. Inded the respondent in its own Guidelines on conducting job evaluation for 2021/22 to 2024/25 cycle defines job evaluation as a process by which the relative worth of



jobs in an organisation is systematically and objectively assessed per page 3 paragraph 7 of the Guideline. That is the definition widely adopted by experts in job evaluation and as per Michael Armstrong (2005), job evaluation is a systematic process for defining the relative worth or size of jobs within an organisation to establish internal relativities and to provide the basis for designing an equitable grade and pay structure.

- c. Job evaluation and compensation determination are separate and distinct as urged for the respondent but they are interdependent. The International Labour Organisation (ILO) Equal Remuneration Convention, 1951 (No. 100) requires organisations to use an objective job evaluation mechanism to assess the relative worth of jobs (job evaluation) and design salary or pay structure (remuneration and benefits structure) that is compliant with the principle of equal pay for work of equal value. An equitable and defensible pay structure cannot be achieved unless a structured and systematic process is used to assess job values and relativities. Job evaluation is a crucial process that determines grading of jobs in the public sector and eventually the actual salary levels and benefits (remuneration structure). In undertaking a salary survey to establish the market position and rate for jobs, job grades are used as one of the criteria for position matching to benchmark similar jobs. The salary and remuneration packages such as salary ranges of state and public officers are based on their respective job grades which is a resultant of a job evaluation process. A salary structure follows a grading structure. Errors committed in job grading have a huge impact on the resultant pay structure.
- d. It is misleading for the respondent to state that it used customised compensable factors for job evaluation in public service. By its own annual report for 2017/18 financial year, at page 12 the three consulted firms used three different job evaluation tools thus PricewaterhouseCoopers used REMeasure for constitutional commissions, independent offices and teaching service as well as county government; Earnest and Young used Role Value Index (RVI) for Civil Service; and Delotte and Touche used T.A.S.K (Tuned Assessment Skills and Knowledge) for service and regulatory state corporations; and, commercial and strategic stae corporations. Each evaluation system has system specific customised compensable factors as set out in table 3 of the further affidavit and the factors differ from system to the other. The respondent has provided no evidence to show that the compensable factors in the systems were customised for Kenya's public service. Each system has own specific guidelines on how to determine initial banding of a job. The respondent failed to interpret each system as expected and opted to rely on Paterson system to correlate job evaluation results from the three cited systems of job evaluation while REMeasure Banding is the only one based on Paterson's band hierarchy.
- e. The respondent alleges to have allocated points to jobs through factor rating methodology with critical scientific parameters such as standardised compensable factors and standardised weights in a defened job evaluation scheme or plan but the respondent has failed to exhibit a breakdown of scores of each compensable factors for each of the positions in the County Public Service Boards for the past three remuneration review cycles as requested in the notice to produce No.1 and No. 2 dated 09.06.2023 and 29.01.2024. Further no factor scheme plan or weighting grid against which scoring could have been made by the respondent has been exhibited or produced as demanded or requested for. The respondent has failed to produce distribution of factors weights across bands or levels per its alleged customised and standardised REMeasure. The respondent offers no evidence to show results based on the customised and standardised REMeasure tool it says it applied.
- f. While alleging the customised and standardised REMeasure was applied across the public service in the third remuneration review cycle 2021/22 -2024/25, the assertion is misleading



because the respondent further asserts that Paterson philosophy of job evaluation was thereafter used as a correlation matrix for job grading structures across job evaluation systems used by the respondent. It is asserted for petitioners that correlation of job evaluation results is only necessary when more than one job evaluation system is used to evaluate jobs.

- g. In the respondent's Guidelines on conducting job evaluation for 2021/22 – 2024/25 remuneration review cycle for public sector, the respondent noted thus, "...Whilst the Commission envisages that most jobs may not have significantly changed, it will undertake evaluation of new jobs and jobs identified by institutions to have significantly changed as will be justified using the criteria outlined in the guidelines...." Even if the respondent conducted the evaluation across the public sector using the REMeasure tool, it is urged that the respondent has failed to show how the previous job evaluation results for the three tools used of TASK, REMeasure and Role Value Index may have been translated into the 3rd cycle remuneration review results.
 - h. The score ranges of the purported customised and standardised REMeasure system is a replica of those in the authentic REMeasure system currently owned by Remchannel, a subsidiary of Old Mutual. In absence of differentials, then the alleged customization and standardization is not established at all.
 - i. The compensable factors in the respondent's guidelines for 3rd remuneration review cycle are significantly different from those in paragraph 15 of the replying affidavit of Dr. Hillary Patroba. That inconsistency is unacceptable as fair and transparent process.
 - j. The alleged customized and standardized REMeasure has not been shown to have been developed in consultation or participation of key stakeholders like the petitioners and its scientific development and consistency has not been explained by the respondent. In scientific terms it did not explain or provide for factor weighing scheme or grid; factor correlation or conversion tables; and attached job evaluation manual. There is no exhibited process the respondent adopted to identify, select, standardize, validate, and ratify the compensable factors and petitioners were not involved in the customization and standardization process. The respondent has invoked an amorphous and indefensible job evaluation system.
 - k. Best practice in job evaluation process requires a job evaluation panel or committee incorporating representatives of all stakeholders. The respondent never involved the petitioners' representatives in the actual rating and grading of jobs and the failure violated Article 230(4) (b).
 - l. The petitioners thus employed the consultant to undertake own salary survey and whose procedural steps are set out in the further affidavit. The Job Evaluation panellists consisted selected members of the petitioners, lead consultant and two support consultants. The consultant used the widely accepted Paterson job evaluation system as being objective.
12. The hearing proceeded and the makers of the affidavits were examined and cross-examined. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
13. To answer the 1st issue the Court returns that as submitted for the respondent, the offices of chairperson, the vice chairperson, member and secretary of a county public service board are not state offices and therefore holders of those positions do not constitute state officers. Article 260 of the Constitution defines "state office" to mean the following offices:(a) President;(b) Deputy President;(c) Cabinet Secretary;(d) Member of Parliament;(e) Judges and Magistrates;(f) member of a commission



to which Chapter Fifteen applies;(g) holder of an independent office to which Chapter Fifteen applies;(h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;(i) Attorney-General;(j) Director of Public Prosecutions;(k) Secretary to the Cabinet;(l) Principal Secretary;(m) Chief of the Kenya Defence Forces;(n) commander of a service of the Kenya Defence Forces;(o) Director-General of the National Intelligence Service;(p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or (q) an office established and designated as a State office by national legislation;

The Article defines "State officer" means a person holding a State office. The County Governments Act or other national legislation has not been shown to designate the offices of chairperson, vice chairperson, member, and secretary of the county public service board as state offices and the holders of the four offices are therefore not state officers within the constitutional definition. The Article provides thus, "public officer" means : (a) any State officer; or (b) any person, other than a State Officer, who holds a public office; "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; and, "public service" means the collectivity of all individuals, other than State officers, performing a function within a State organ. The Article provides thus, "State organ" means, a commission, office, agency or other body established under the Constitution. It therefore appears to the Court that in absence of national legislation designating offices of chairperson, vice chairperson, member, and secretary of the county public service board as state offices, the members of the petitioners are therefore public officers. The constitutional definitions appear to pass all state officers for public officers but not being part of public service.

14. The 2nd issue for determination is to spell out the constitutional and statutory mandate of the respondent and in relation to the mandate of the petitioners. Article 230(1) establishes the respondent. The composition of the respondent is provided for in Article 230(2) as consisting of the following persons appointed by the President:
- a. a chairperson;
 - b. one person each nominated by the following bodies from amongst persons who are not members or employees of those bodies:
 - i. the Parliamentary Service Commission;
 - ii. the Public Service Commission;
 - iii. the Judicial Service Commission;
 - iv. the Teachers Service Commission;
 - v. the National Police Service Commission;
 - vi. the Defence Council; and
 - vii. the Senate, on behalf of the county governments;
 - c. one person each nominated by:
 - i. an umbrella body representing trade unions;
 - ii. an umbrella body representing employers; and



- iii. a joint forum of professional bodies as provided by legislation;
- d. one person each nominated by:
 - i. the Cabinet Secretary responsible for finance; and
 - ii. the Attorney General; and,
- e. one person who has experience in the management of human resources in the public service, nominated by the Cabinet Secretary responsible for public service.

Article 230(3) states that the Commissioners under clause (1) (d) and (e) shall have no vote.

15. Article 230(4) of the Constitution provides that the powers and functions of the respondent shall be 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.
16. Article 230(5) of the Constitution provides that in performing its functions, the Commission shall take the following principles into account:
 - 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 recognise productivity and performance; and
 - d. transparency and fairness.
17. Section 3 of the Salaries and Remuneration Commission Act provides that in addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to— (a) acquire, hold, charge and dispose of movable and immovable property; and (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.
18. Section 11 of the Salaries and Remuneration Commission Act provides that In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall:
 - (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 offices;
 - (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.
19. Section 12 of the Salaries and Remuneration Commission Act on the Commission's guiding principles states as follows:
1. In addition to the principles set under Article 230(5) of the Constitution, the Commission shall also be guided by the principle of equal remuneration to persons for work of equal value.
 2. Without prejudice to subsection (1), the Commission shall take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service.
20. With respect to the powers and functions of the county public service board, section 59 (1) of the County Governments Act provides that the powers and functions of the board, shall be, on behalf of the county government, to:
- (a) establish and abolish offices in the county public service;
 - (b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
 - (c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under the Act;
 - (d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
 - (e) promote in the county public service the values and principles referred to in Articles 10 and 232;
 - (f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;
 - (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;
 - (h) advise the county government on human resource management and development;
 - (i) advise county government on implementation and monitoring of the national performance management system in counties;
 - (j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.

The Court considers that the function in section 59(1) (a), (g) and (j) have a direct bearing on the functions of remuneration and benefits.

21. With respect to a chairperson, vice chairperson, member, secretary, and other public officers being county public service employees, the Court finds that they are all public officers falling within the respondent's constitutional mandate in Article 230 (4) (b) of advising the national and county governments on the remuneration and benefits of all other public officers.
22. To answer the 3rd issue, the Court returns that in undertaking its powers and functions under Article 230 (5) (a) and (b), the respondent is bound by the constitutional and statutory guiding principles



earlier cited in this judgment as well as the relevant provisions of the Constitution and legislation. The respondent is one of the chapter 15 constitutional and independent offices as listed at Article 248 (2) (h). In particular, Article 249(2) provides that the respondent is subject only to the Constitution and the law; and, is independent and not subject to direction or control by any person or authority. In that regard, the respondent being subject to law, its role to advise the national and county governments on the remuneration and benefits of all other public officers is chained by Constitutional and statutory provisions. Such statutory provisions include the powers and functions vested in the county public service boards under section 59(1) (a), (g) and (j) of the County Governments Act. In that respect, the Court specifically returns that the mandate of the county public service board chains the respondent's exercise of its advisory constitutional roles in the following respects:

- a. The county public service board establishes and abolishes offices in the county public service within its mandate. The Court holds that the board's exercise of the power to establish and abolish offices overrides the respondent's exercise of advising the national and county governments on the remuneration and benefits of all other public officers. Indeed, in absence of existence of a public office, then the advisory role becomes moribund. Thus, the respondent is misconceived in asserting that it can act suo moto without a deliberate action on the part of the boards making the respondent's advisory role to accrue. The Court returns that the advisory in that regard is indeed about public offices duly established by the boards. Thus section 60 of the County Governments Act on criteria the boards (the petitioners) are to apply in establishing county public offices have an elaborate provisions including the financial prudence the boards must consider and which in the opinion of the Court, would be lost out and rendered irrelevant, if the respondent would offer an advisory suo moto without taking into account the board's statutory functions and decisions in that regard. Thus, section 60(1) of the Act provides that a board may establish an office in the county public service if it is satisfied that: (a) the establishment of the public office shall serve public interest in line with the core functions of the county government; (b) there exists no other public office in the county public service discharging or capable of discharging the duties for which the county is requested to establish another office; (c) upon the establishment of the office, the office shall be vacant to be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures; (d) the establishment of the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the county public service or occasion unfair competition for staff among county public bodies; (e) the establishment of the office shall not confer unfair advantage to a group of or individual serving public officers; (f) the county government entity has prudently utilized offices previously provided in its establishment; and (g) funding for the office to be established is duly provided for. Section 60(2) of the Act provides that in determining the provision of funding under subsection (1) (g), the County Public Service Board shall take due regard to the need to limit the component of personnel emoluments to a level that does not adversely affect other budgetary provisions in the recurrent vote. Section 60(4) provides that in deciding whether to establish a public office, the County Public Service Board shall take into account: (a) the overall workload in the county public service concerned; and (b) the suitability of that department but not any other to be the domicile of the public office to be established. In the opinion of the Court, the function and power of the county public service board to establish public offices in the county public service and the attendant applicable factors or criteria provide a direct complimentary role to the constitutional advisory role of the respondent.
- b. To amplify the role of the county public service board as a necessary initiator of the respondent igniting its advisory role on remuneration and benefits of other public officers,



section 59 (1) (g) vests in the board the function and power to facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties. Human resource planning or workforce planning as it is also known, entails understanding the requirements of an organisation in terms of numbers and kinds of individuals needed to efficiently or optimally achieve organisational targets. It is the process of carefully and scientifically preparing a strategy to ensure the right people are available at the right time, in the right place, and at the right cost for the organisation. The importance or usefulness of human resource planning include increasing productivity, implementing managerial activities, motivating employees, avoiding manpower shortage and excess, evaluating demand and supply of resources, increasing quality of hire, and, growing a competitive advantage. (<https://www.keka.com/human-resource-planning#:~:text=Meaning%20of%20Human%20Resource%20Planning,best%20resources%20of%20a%20company>).

The boards' function and power to undertake human resource planning appears to the Court to be an integral precondition to the respondent's successful undertaking of the advisory role on remuneration and benefits for the other public officers. It is through the petitioners undertaking human resource planning that will justify the special needs of every county public service. Conceivably, it will be impossible for the respondent to offer informed advisory on the remuneration and benefits for public officers, so to say, suo moto without due and relevant information about the human resource plans of the individual county governments.

- c. Further, section 59 (1) (j) is categorical that the county public service board has the power and function to make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees. The Court considers that the recommendations would flow from the human resource planning undertaken by each petitioner. It appears to the Court that respondent in its regulatory framework of undertaking the function of advising the national and county governments on the remuneration and benefits of other public officers in the county public services must have a provision that triggers its undertaking of the function, and which is, receiving the recommendations from the county public service board in issue.
23. In finding that the respondent cannot act suo moto and undertake an advisory to the national and county governments on remuneration and benefits for other public officers, the Court has considered provisions of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations published as Legal Notice No. 2 of 2013. Section 26 of the Salaries and Remuneration Commission Act empowers the Commission to make regulations thus, "(1) The Commission may make regulations generally for the better carrying into effect of any provisions of this Act. (2) The power to make Regulations shall be exercised only after a draft of the proposed Regulations has been approved by the National Assembly."
24. Regulation 3 of the regulations provides that the object and purpose of the Regulations shall be to enable the Commission manage, harmonise and rationalise remuneration and benefits of State and public officers and in particular provide procedure for:
- a. submission of remuneration and benefits proposals for State and public officers to the Commission;
 - b. reviewing of remuneration and benefits of State and public officers by the Commission;
 - c. setting and reviewing of remuneration and benefits for State officers; and
 - d. advising on remuneration and benefits for all other public officers.



Regulation 3(a) is clear that proposals have to be submitted. The Court considers that for county public services, the proposals would entail recommendations by the respective public service board envisaged in section 59(1)(j) of the County Governments Act. Having found that the chairperson, vice chairperson, members and secretary of county public service board are not designated as state officers holding state office, the recommendations would include as relates to those four offices as well as the other public officers in county public services.

25. Regulation 4 provides thus “(1) The Commission shall undertake a review of remuneration and benefits of State and public officers every four years and, (2) a review under paragraph (1) shall be conducted at the same time across the public sector.” Regulation 6 provides thus “(1) Despite regulation 4, the Commission shall undertake special reviews to: (a) ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service; or (b) compensate for increased cost of living. (2) A special review under paragraph (1) shall not interrupt or replace the four year review cycle, but its results shall inform the review.” It appears to the Court that the special review must as well be informed by the human resource planning or workforce planning and which by law is a function vested in the county public service board. The Court holds that the respondent cannot undertake the four year cycle review of remuneration and benefits or a special review towards advising the national and county governments on the remuneration and benefits for other public officers without specifically responding to proposals or recommendations of the county public service board or such other employer in the public service. Thus, Regulation 7 thereof states that nothing under the regulations may be construed as precluding a State or public office from making an application, in writing, to the Commission seeking guidance or advice on the remuneration and benefits accruing to its officers. The respondent therefore does not and cannot lawfully initiate and continue a reviewing and setting the remuneration and benefits of state officers; or, advising the national and county governments on the remuneration and benefits of other public officers, without there being a proposal or recommendation as envisaged in the law from the concerned public sector employer or an individual state or public officer. The Court holds that in undertaking its constitutional mandate as conferred under Article 230 (4) (a) and (b), the respondent is acting upon the needs of the service by state officers and the rest of the public services. It acts upon specific requests consistent with needs of the national and county governments. The human resource needs reside with the national and county governments and the respondent cannot conceivably and mysteriously contemplate, initiate and continue the same. The needs, in the opinion of the Court, reside and emanate from the relevant authority in the county or national government to be acted upon by the respondent in discharge of its constitutional and statutory mandate,
26. To answer the 4th issue for determination, the Court returns that in undertaking its functions and powers as conferred per Article 230 (4) (a) and (b) the respondent cannot act suo moto without responding to proposed or communicated needs of the national and county governments as submitted to it by way of proposals or recommendations. In other words, the respondent does not serve its own created real or perceived needs, but, it is established and exists to address requests presented to it by relevant authorities in the national and county governments towards exercising and discharging its constitutional and statutory powers and functions.
27. To answer the 5th issue, the methodology adopted by the respondent in exercising and discharging its constitutional and statutory powers and functions must be such that it satisfies the imposed guiding constitutional and statutory principles as well as relevant constitutional and statutory provisions. The Court has already cited the imposed guiding principles in Article 230(5) and section 12 of the Salaries and Remuneration Commission Act. The Regulations made under the Act alludes to :



- a. submission of remuneration and benefits proposals for State and public officers to the Commission;
 - b. reviewing of remuneration and benefits of State and public officers by the Commission;
 - c. setting and reviewing of remuneration and benefits for State officers; and
 - d. advising on remuneration and benefits for all other public officers.
28. Regulation 5 on the study to precede reviews provides as follows:
- (1) The Commission shall, at least one year before the review, cause the following to be conducted:
 - (a) a study on labour market efficiency and dynamics;
 - (b) a survey of the prevailing economic situation; and
 - (c) a comprehensive job evaluation.
 - (2) The Commission shall prepare a report on the findings under paragraph (1) and the report shall form the basis for review.
 - (3) The review shall be communicated to the Cabinet Secretary responsible for matters relating to finance, the Judicial Service Commission, the Parliamentary Service Commission and the national and county governments for inclusion in the subsequent budgetary estimates.
 - (4) Subject to the budgetary allocations approved by Parliament, a review may be implemented in phases across the public sector.
 - (5) Despite paragraph (4), an approved review shall vest in full in respect of State or public officers retiring from a public service organization before full implementation.
29. Regulation 5 does vest in the respondent the role of “causing” :a study on labour market efficiency and dynamics; (b) a survey of the prevailing economic situation; and (c) a comprehensive job evaluation. The hotly contested issue in the instant petition is what authority should actually undertake these steps and what are the systematic procedures and scientific methodologies or tools to be applicable. A hot issue has arisen whether, like in undertaking job evaluation, what tool should be applied of those tools that are available such as the cited REMeasure; TASK, customised and standardized REMeasure, Paterson Banding system and others. The Court was informed there would be many others. Another contested issue was whether the respondent can unilaterally determine such applicable procedures and tools and whether different tools and methodologies can be invoked. In the Court’s opinion, such are matters that should have been provided and clarified in the regulations. The regulations in place were issued in 2013 shortly after the promulgation of the Constitution of Kenya 2010. The Court considers that time is ripe for the regulations to be reconsidered and reissued by the respondent taking into account all the stakeholder concerns and providing for the step-by-step procedure, process, and tools that satisfy the constitutional and statutory principles to be taken into account in exercising and discharging the respondent’s functions. While making that finding for exploitation of the unlimited space for more just delivery of mandate by the respondent and for improvement, it is clear that the process of delivery of mandate by the respondent must be transparent and fair and must meet all the other imposed guiding principles. The constitutional Bill of Rights must as well be upheld in the discharge of the respondent’s mandate. In that regard, the Court holds that stakeholder participatory process must be adopted in formulation of the applicable regulations; the determination of the methodologies and tools for both job evaluation and determining remuneration structure; the roles



of each involved player; and a provision on review or appeal processes. An improvement of the respondent's regulations would need to consider these matters.

30. The Court considers that the participatory process in delivery of the respondents' mandate is a mandatory constitutional prescription. First, Article 249(2) declares that the respondent is subject to the Constitution and legislation. Second, Article 41(1) of the Constitution provides that every worker has the right to fair labour remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Third, Article 41(5) provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining. Article 41 (4) every employer has the right to form and join an employer's organisation; and to participate in the activities and programmes of an employers' organisation. The mandate of the respondent is at the core of the provisions of Article 41 on the right to fair labour practices. The delivery of the respondent's mandate should uphold the Article 41 rights of workers and employers in the public and state services. It appears to the Court that the constitutional imperative will not be achieved through non-participatory processes in delivery of the mandate. The mandate as vested and conferred in the respondent cannot be said to be designed or executed inconsistent with the right to fair labour processes. It is undisputable that the decisions to be made by the respondent in delivery of its mandate must be consistent with the right to fair administrative action in Article 47 of the Constitution. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
31. Section 57 of the Labour Relations Act implements the constitutional right to collective bargaining provided for in Article 41(5) of the Constitution. The said section 57 provides as follows:
- (1) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement. The Labour Relations Act, 2007 51
 - (2) For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.
 - (3) All the information disclosed by an employer as specified in subsection (2) is confidential and shall not be disclosed by any person to a person who is not engaged in the negotiations.
 - (4) An employer is not required to disclose information that : (a) is legally privileged; (b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or an order of any court; (c) if disclosed, may cause substantial harm to the employer or employee; or (d) is private personal information relating to an employee, unless an employee consents to the disclosure of that information.
 - (5) If there is a dispute about what information is required to be disclosed in accordance with the provisions of this section, any party to the dispute may, in writing, refer the dispute to the Minister for conciliation.
 - (6) If a dispute remains unresolved, after it has been referred to the Minister under subsection (5), any party to the dispute may refer the dispute to the Industrial Court under a certificate of urgency.
 - (7) In any dispute about an alleged breach of confidentiality, the Industrial Court may order that the right to disclosure of information be withdrawn for a period specified by the court.



- (8) No person shall disclose any confidential information disclosed under this section to a person who is not a party to those negotiations.

The Court considers that unionisable public officers and their respective employers in the public service or sector should enjoy the right to collective bargaining and that protection and safeguards should be incorporated and upheld in the delivery of the respondent's mandate.

32. With respect to terms and conditions of service in the public sector where there is no collective bargaining, section 61 of the Labour Relations Act provides as follows:

- (1) The Minister may, after consultations with the Board, make regulations establishing machinery for determining terms and conditions of employment for any category of employees in the public sector.
- (2) The terms and conditions of employment determined under subsection (1) shall have the same effect as a collective agreement registered under this Part and may be enforced as if it were a collective agreement.
- (3) The Minister may – (a) determine different terms and conditions for different categories of employees; or (b) not exercise the powers under this section in respect of a category of employees who are represented by a trade union that is entitled to be recognised in terms of this Part.

While the section was enacted prior to the Constitution of Kenya 2010 and constitutional provision of the respondent's mandate, the section suggests existence of a machinery to determine remuneration and benefits for public officers outside the collective bargaining system. The persuasion is that a process that influences or determines remuneration and benefits of public officers and state officers is a participatory process, respects fair bargain and involves open negotiations between employers and employees and is based on disclosure of relevant information.

33. The ILO C100 - Equal Remuneration Convention, 1951 (No. 100) Article 1 provides thus, "For the purpose of this Convention : (a) the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment; and (b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex."

34. Article 2 of ILO C100 states thus, "1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. 2. This principle may be applied by means of: (a) national laws or regulations; (b) legally established or recognised machinery for wage determination; (c) collective agreements between employers and workers; or (d) a combination of these various means."

35. Article 3 of ILO C100 provides as follows:

- "1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.
2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or,



where such rates are determined by collective agreements, by the parties thereto.

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.”

36. The Court considers that ILOC100 provides there shall be methods in operation for determining rates of remuneration (what parties called compensation determination); and, differential remuneration to workers shall be based on objective appraisal of jobs on the basis of the work to be performed (what parties called job evaluation and which is referred to in the statutory regulations quoted earlier in this judgment). The determination of the methods for determining remuneration and an objective appraisal of jobs is determinable by collective bargaining or by legislation, a legally recognised machinery for wage determination; or a combination of the three. Kenya has ratified ILO C100 and Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. C100 being law in Kenya therefore spells out how to arrive at the methods for determining remuneration and an objective appraisal of jobs. Article 10 of the Constitution on national values and principles of governance prescribes for participation of people; equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalised, good governance, transparency and accountability; and sustainable development. Article 232 (1) provides for values and principles of public service amongst them efficient, effective and economic use of resources; involvement of the people in the process of policy making; accountability for administrative acts; and transparency and provision to the public of timely, accurate information. The Court considers that the cited values and principles together with the provisions of the ILO C100, the respondent is clearly guided on determination of the methods of job evaluation and determination of compensation in exercise of its constitutional mandate.

37. The 6th issue for determination is on remedies. The Court returns as follows:

- a. The petitioners prayed for a declaration that the Respondent’s circular dated 8th December 2017 is unconstitutional, null and void. It is the petitioners’ submission that the circular was issued without recommendation by the petitioners in exercise of their statutory function under section 59 (1)(j) of the County Governments Act. It is further submitted that the same issued without consideration of the petitioner’s proposals to the respondent per regulations already cited earlier in the judgment. The petitioners’ submissions are found valid. However, the respondent has raised a valid bar to granting of the declaration. It is submitted that the circular has been fully implemented and the matter rested. The petitioners do not dispute that position. The circular having been fully implemented and even some of the members of the petitioners may have left service, the declaration when issued will be superfluous or in returning a nullity as prayed, thereby create a cumbersome implementation of the ensuing parties’ respective positions or obligations. For instant, if the declaration is issued, is the effect that all payments made under the circular would be a nullity and therefore recoverable from the persons who may have been paid? The has considered that it should not issue in vanity. The bar to grant the declaration is upheld and prayer declined.
- b. The petitioners prayed for a declaration that members of the County Public Service Boards are state officers within the meaning of Article 260 of the Constitution. The Court has already found that they are not state officers and the submission made for the respondent upheld in that regard.



- c. The petitioners prayed for a declaration that the salaries and benefits of members of the County Public Service Boards should be comparable to those of the members of the Public Service Commission. It is established that the commissioners and the members of the petitioners are not comparable in the sense that the commissioners are state officers while the members of the petitioners are not. It should also be obvious that the submissions made for the respondent that there are clear functional and power differentials are correct. The county public service boards serve individual counties while the mandate of the Commission spreads to across the national and county governments. The Court returns that the constitutional design of the respondent mandate with respect to state officers on the one hand and on the other, other public officers makes the two categories clearly distinct.
- d. The petitioners prayed for an order of mandamus compelling the Respondent to engage with and consider the Memoranda of the County Public Service Boards before reviewing the remuneration and benefits for public officers in the service of the county executive. The Court has found that indeed the respondent by its regulations must consider proposals by way of recommendations from the county public service board prior to making a period as well as special, ad-hoc remuneration, or compensation review. The petitioners have as well established that despite their presentation of recommendations as was done in the court-encouraged compromise in the instant petition, the respondent appears not to have scientifically responded to their memorandum. It is also established that in the previous two remuneration cycles the respondent appears not to have considered the petitioners' recommendations or proposals in that regard. It is submitted for the respondent that the petitioners failed to make the recommendations. However, the Court finds that the respondent appears to have instituted a unilateral method for job evaluation and determination of compensation. Further, the respondent has not shown a step-by-step process under which the petitioners should have made the recommendations or proposals. The Court returns that in that respect the petitioners have established neglect or failure by the respondent to perform the statutory duty to invite and consider the petitioners' recommendations or proposals in that regard. The Court has found that the making of the relevant regulatory provisions was vested in the respondent but which failed to sufficiently provide for the same. Conditions for grant of the judicial review order of mandamus have been satisfied. The order will issue accordingly.
- e. The petitioners prayed for a declaration that the County Public Service Boards have both the Constitutional and statutory mandate to originate proposals for salaries and benefits of Members of the County Public Service Boards and of all other Public Officers serving in the County Public Service, they therefore have a legal obligation to make recommendations to the SRC and that the SRC's Constitutional and Statutory mandate and duty is limited only on advising the CPSB's on the submitted proposals/memoranda and recommendations from the CPSB's to the SRC. The Court has already made the finding as such and the declaration will issue accordingly. While making that finding the Court has found that the respondent cannot move suo moto and make advisories in that regard without being moved by the county public service board. The Court also considers that the County Governments Act and the binding nature of statutory duty for the county public service board to make the recommendations prior to the respondent exercising the advisory power and function flows from Article 235 of the Constitution which provides that a county government is responsible within a framework of uniform and standards prescribed by an Act of Parliament for: (a) establishing and abolishing offices in its public service; (b) appointing persons to hold or act in those offices, and confirming appointments; and (c) exercising disciplinary control over and removing persons holding or acting in those offices. The Court has earlier in the judgment



shown how the boards' statutory roles to establish and abolish offices; undertake human resource or workforce planning, and budget for personnel emoluments have a direct bearing on the statutory duty to make recommendations to the respondent about job evaluation and determination of compensation towards facilitating and complimenting the respondent's constitutional and statutory mandate of advising national and county governments on the remuneration and benefits of other public officers. The declaration will issue accordingly.

- f. The petitioners prayed for a declaration that the SRC cannot suo moto, set and advise on the Salaries and Benefits of the Members of the County Public Service Boards and/or of all other public Officers serving in the County Public Service without considering and advising on the Memorandum of Recommendations on the salaries and Benefits submitted to the Respondent by the County Public Service Boards pursuant to section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution. The Court has found as much and the declaration will issue.
- g. The petitioners prayed for a declaration that the document dated 28th April 2023 issued by the SRC in reaction to the on the Memoranda of the County Public Service Boards containing the recommendations on the salaries and benefits of the Members of the County Public Service Boards submitted to the Respondent on 30th March 2023 pursuant to the provisions of section 59 (1)(j) of the County Governments Act does not constitute and/or is not, advise within the meaning of Article 234(b) of the Constitution. The Court finds that the declaration will issue on account that the method of undertaking job evaluation and the method of determining compensation and the differentials in the compensation did not amount to an objective job appraisal or meet the criteria of determining compensation as envisaged in ILO C100 and the constitutional guiding principle of transparency and fairness. The declaration will issue.
- h. The petitioners prayed for a declaration that the SRC having failed to and/or refused to advise on the Memorandum of Recommendations including the Report of the Consultant submitted to it by the 1st Petitioner on behalf of all the Petitioners under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, the same be final and that the petitioners be deemed to have discharged their obligations under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, accordingly the Members of the County Public Service Boards are entitled to the following grading structures, namely, Chairperson Grade F2; Vice Chairperson Grade F1; Member Grade F1; and, Secretary/CEO Grade Fh1. The Court has found that the petitioners' recommendations proceeded on upon a misconception that the members of the petitioners were directly comparable to the Commissioners of Public Service Commission who in fact and law are State officers. The Court has also considered that it has not been shown that the petitioners' recommendations were undertaken and arrived at upon a method of determining compensation as set out in legislation, a legal machinery for determining compensation, or collective bargaining envisaged or a combination of such methods as envisaged in ILO C100. The constitutional provision is that the respondent advises on the remuneration of the chairperson, vice chairperson, member and secretary of the county public service consequential to the recommendations of the respondent. If the respondent fails to advise taking into account the recommendations, then the legitimate relief would be an order such of mandamus to compel the respondent to undertake the advisory taking into account the petitioners' recommendations. It would be undermining the Constitution in adopting the recommendations free from the respondent's advisory. The declaration will be declined.



- i. The petitioners prayed for a declaration that the SRC having failed to and/or refused to advise on the Memorandum of Recommendations including the Report of the Consultant submitted to it by the 1st petitioner on behalf of all the Petitioners under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, the same be final and that the petitioners be deemed to have discharged their obligations under section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution, accordingly the Members of the County Public Service Boards are entitled to the salary structure as set out in the Memorandum of Recommendations. The Court has already found that such a declaration would not pass the constitutional test and it is declined.
- j. The petitioners prayed for order that the new grading and salary structure for Members of County Public Service Board shall be effective from the date of appointment of the respective members of the Boards. The order appears flowing from the foregoing two prayers and which the Court has declined. In the circumstances, the instant prayer for a declaration is found unjustified. The related prayer of interest on the award will similarly fail.
- k. The petitioners prayed for such other, further, additional, incidental, alternative and/or appropriate relief(s) or remedies, as the Honourable Court may deem just and expedient. The Court has found that the respondent's current regulations fail to sufficiently provide for participatory process of determining the methods for objective job appraisals (job evaluation) and determination of fair and transparent compensation including step-by-step stakeholder involvement within ascertainable and predetermined timelines for each step. It is also true in line with the respondent's submissions that the county public service boards, except for their members in the instant dispute, they have failed to discharge their statutory mandate to make appropriate recommendations to the respondent with respect to other public officers in county public services. To that extent a declaration will issue that the respondent, a year prior to the next every four years' remuneration review cycle for public and state officers shall issue sufficient regulations providing for participatory process of determining the methods for objective job appraisals (job evaluation) and determination of fair and transparent compensation including step-by-step stakeholder involvement within ascertainable and predetermined timelines for each step and upholding guiding principles and values as found in this judgment. A further declaration will issue that the petitioners, a year prior to the next every four years' remuneration review cycle for public and state officers, shall issue guiding instruments for undertaking the power and function to make recommendations to the respondent including the related functions and powers as found in this judgment.
- l. The parties are all public entities. The Court has also considered the nature of the dispute, which has arisen out of the failures of both the petitioners and respondents to institute effective measures of undertaking their respective powers and functions as found in this judgment. Accordingly, there will be no orders on costs

38. In conclusion, the petition as amended herein is hereby determined with orders:

1. The judicial review order of mandamus hereby issued compelling the Respondent to engage with and consider the Memoranda of the County Public Service Boards before reviewing the remuneration and benefits for public officers in the public service of the county executive.
2. The declaration hereby issued that the document dated 28th April 2023 issued by the SRC in reaction to the Memoranda of the County Public Service Boards containing the recommendations on the salaries and benefits of the Members of the County Public Service Boards submitted to the Respondent on 30th March 2023 pursuant to the provisions of



section 59 (1)(j) of the County Governments Act does not constitute and/or is not, advise within the meaning of Article 234(b) of the Constitution.

3. The declaration hereby issued that that the SRC cannot suo moto, set and advise on the Salaries and Benefits of the Members of the County Public Service Boards, and, of all other public officers serving in the County Public Service without considering and advising on the Memorandum of Recommendations on the salaries and Benefits submitted to the Respondent by the County Public Service Boards pursuant to section 59(1)(g) of the County Government Act as read together with Article 234(4)(b) of the Constitution.
4. The declaration hereby issued that the document dated 28th April 2023 issued by the SRC in reaction to the Memoranda of the County Public Service Boards containing the recommendations on the salaries and benefits of the Members of the County Public Service Boards submitted to the Respondent on 30th March 2023 pursuant to the provisions of section 59 (1)(j) of the County Governments Act does not constitute and/or is not, advise within the meaning of Article 234(b) of the Constitution.
5. The declaration hereby issued that, the respondent, a year prior to the next every four years' remuneration review cycle for public and state officers shall issue sufficient regulations providing for participatory process of determining the methods for objective job appraisals (job evaluation) and determination of fair and transparent compensation including step-by-step stakeholder involvement within ascertainable and predetermined timelines for each step, and, upholding the guiding principles and values as found in this judgment.
6. The declaration hereby issued that the petitioners, a year prior to the next every four years' remuneration review cycle for public and state officers, shall issue-guiding instruments for undertaking the power and function to make recommendations to the respondent including the related functions and powers as found in this judgment.
7. No orders on costs of the petition.

Signed, dated and delivered by video-link and in court at Nairobi this Friday 24th May 2024.

BYRAM ONGAYA**

PRINCIPAL JUDGE**

