



Kenya County Government Workers Union v Salaries and Remuneration Commission & 4 others (Cause E564 of 2023) [2024] KEELRC 2843 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2843 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E564 OF 2023
SC RUTTO, J
NOVEMBER 15, 2024**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT

AND

SALARIES AND REMUNERATION COMMISSION 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

GOVERNOR COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

**COUNTY SECRETARY COUNTY GOVERNMENT OF NAIROBI 4TH
RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD COUNTY GOVERNMENT OF
NAIROBI 5TH RESPONDENT**

JUDGMENT

1. The instant suit revolves around the advisory mandate of the Salaries and Remuneration Commission (SRC), the 1st Respondent herein under Article 230 (4) (b) of the *Constitution*, vis a vis the right to engage in collective bargaining by employers and trade unions as guaranteed under Article 41(5) of the *Constitution*.
2. The Claimant avers that they engaged in negotiations with the 2nd Respondent with respect to a Collective Bargaining Agreement (CBA) between the two parties. It is averred that on 26th October 2021, the 2nd Respondent vide the 4th Respondent wrote to the 1st Respondent for further parameters and guidelines in relation to collective bargaining negotiations.
3. That on 8th April 2022, the 1st Respondent wrote to the 2nd, 3rd and 4th Respondent and gave two options (option 1 and option 2) to the Claimant and the 2nd Respondent concerning the CBA.



4. According to the Claimant, the proposals issued by the 1st Respondent under option 1 were unlawful, illegal in so far as their implementation is concerned. The Claimant contends that the basic salary proposed is less than the minimum wage under the Regulation of Wages (General) (Amendment) Order, 2022. The Claimant further contends that various allowances currently payable to the defunct employees that had been negotiated in the 2012-2014 CBA were not payable to the employees devolved from the National Government. That there was therefore need for harmonization of salaries of the Claimant's members who were carrying out the same work but had different salaries and allowances.
5. With respect to option 2, the Claimant avers that the proposal was unlawful and illegal and cannot be implemented as it failed to take into account the rising costs of living, inflation, SRC gazetted adjustment of salaries for state officers and Regulation of Wages (General) Amendment) Order, 2022.
6. The Claimant avers that in a letter dated 8th August 2022, the 2nd, 3rd, 4th and 5th Respondents highlighted the above issues and the fact that some of the Claimant's members had been earning the same salary for the last 10 years. In the same letter, the justification of items with financial implication was attached.
7. The Claimant further avers that on 9th December 2022, the 2nd, 3rd, 4th and 5th Respondents wrote to the 1st Respondent enclosing a budget to implement the proposed CBA together with a demonstration on additional revenue to support its implementation.
8. The 1st Respondent rendered a further advisory vide a letter dated 19th April 2023. The Claimant has once again termed the said advisory unlawful and illegal in that it sought to alter the remuneration structure of the Claimant's members by proposing that they forfeit all previous benefits that had accrued and were due and owing to them. In the Claimant's view, the said advisory was discriminatory against certain cadres of its members.
9. It is the Claimant's case that the CBA with the 2nd Respondent was negotiated in accordance with Article 230(4) of the Constitution and Rule 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of States and Public Officers) Regulations, 2013.
10. It is the Claimant's contention that they have been unable to register the CBA on account of the 1st Respondent acting ultra vires by illegally and unlawfully attempting to halt and/or scuttle the negotiations between the Claimant and the 2nd Respondent.
11. Against this background the Claimant seeks the following reliefs:
 - a. An interpretation of Article 230(4) of the Constitution together with Rule 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 on negotiations with trade unions, relating to the purview of advisories issued by the 1st Respondent, the dichotomy between setting and reviewing salaries, as well as offering advice to County and National Governments in relation/as concerning to this suit.
 - b. A declaration do issue that the negotiations and collective bargaining processes between the Claimant and the 2nd, 3rd, 4th as well as the 5th Respondents' were in accordance with the parameters set out by the 1st Respondent as well as Rule 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 on negotiations with trade unions, in so far as the sustainability of the proposals in the Collective Bargaining Agreement that is to be executed is concerned.
 - c. An order do issue compelling the 1st Respondent to issue the 2nd Respondent with a clearance letter to enable the 2nd Respondent and Claimant to execute, register and/or implement the



Collective Bargaining Agreement negotiated and deliberated between the Claimant and the 2nd Respondent.

- d. A declaration do issue that the Respondents' actions have violated the Claimant's members' rights to fair labour practices under Article 27,26,41,47 and 48 of the Constitution of Kenya.
 - e. A declaration do issue that the 1st Respondent's advise is illegal and unlawful in so far as it makes proposals contrary to minimum wages provided for pursuant to Legal Notice No.125 Regulation of Wages (General)(Amendment) Order 2022.
 - f. A declaration do issue that the 1st Respondent's advise is illegal and unlawful in so far as it makes proposals contrary to Section 26 of the Employment Act which recognizes minimum terms of employment to include terms negotiated by a union in a Collective Bargaining Agreement.
 - g. A declaration do issue that the 1st Respondent's advise is illegal and unlawful in so far as it makes proposals contrary to section 60(d) of the County Governments Act, wherein county governments are mandated to always ensure that their job grading and remuneration to public officers such as the Claimant's members ought to be done in a manner that does not disadvantage any office.
 - h. A declaration do issue that the 1st Respondent's advise is illegal and unlawful in so far as it makes proposals contrary to 138 of the County Governments Act, which outlines that the Claimant's members' terms of service including remuneration, allowances and pension or other benefits shall not be altered to the Claimant's members' disadvantage.
 - i. Costs of this Claim.
 - j. Any other relief that this Honourable court may deem just to grant.
12. Opposing the Memorandum of Claim, the 1st Respondent avers that there are three cadres of employees working for county governments including the 2nd Respondent. The first cadre of employees are employees who worked for the central government before the advent of devolution and who were subsequently seconded/transferred to the respective county governments. The second cadre is made up of employees previously working under the defunct local authorities who were subsequently absorbed by the respective county governments while the third cadre consists of employees who were directly recruited by the county governments through the county public service boards after the advent of devolution.
13. The 1st Respondent further avers that the remuneration and benefits structure for the cadre of employees absorbed from the defunct local authorities is different from the remuneration and benefits structure as advised by the 1st Respondent with regard to public officers devolved from the national government or directly recruited by the county public service boards.
14. According to the 1st Respondent, the public officers absorbed from the defunct local authorities earn much higher basic salaries and allowances compared to their counterparts who were seconded from the national government or directly recruited by the county public service boards.
15. The 1st Respondent further avers that it has taken measures aimed at progressively harmonizing the remuneration and benefits structures for the various cadres of public officers in the county governments with the primary objective being to adhere to the principle of ensuring parity in pay for work of equal value.
16. That pursuant to its mandate, on 8th August 2022, the 1st Respondent advised the 2nd Respondent on parameters for negotiation on the CBA between itself and the Claimant under the 3rd remuneration



- and benefits review cycle. That on 19th April 2023, it issued a further advisory to the 2nd Respondent on further parameters for negotiation.
17. According to the 1st Respondent, its advice on parameters for negotiations considered several crucial factors including financial feasibility, fiscal sustainability, comparability, adherence to the current government policies and guidelines, the total gross pay for the three cadres and the need to progressively harmonize the remuneration and benefits structure for the three cadres of county staff with the principles of equity and fairness.
 18. The 1st Respondent further denies that the 2nd, 3rd, 4th and 5th Respondents have complied with its advice on parameters for negotiations as communicated on 8th and 19th April 2022 (sic).
 19. In light of the foregoing, the 1st Respondent has asked the Court to dismiss the Claimant's claim with costs.
 20. The 2nd and 3rd Respondents filed a joint Memorandum of Defence in which they aver that in a bid to try and formulate a budget in order to implement the CBA, it factored in the SRC gazetted adjustment of salaries of state officers, inflation, rising cost of living and; Regulation of Wages (General) (Amendment) Order 2022 which provides for the minimum wage in Kenya.
 21. The 2nd and 3rd Respondents further aver that the CBA was negotiated and concluded in accordance with Article 230(4) of the Constitution as read with Rule 18 of the Salaries and Remuneration Commission Regulations, 2013.
 22. That it does not have the power to issue a clearance certificate upon conclusion of the negotiations of the CBA and that such power is only vested upon the 1st Respondent.
 23. According to the 2nd and 3rd Respondents, the Claimant's claim against them is without basis in fact and/or in law. Consequently, they have termed the claim false, misleading, misadvised and an abuse of the court process. As such, they have asked the Court to dismiss the Claimant's Claim with costs.
 24. The 4th and 5th Respondents responded to the Memorandum of Claim through the Replying Affidavit sworn on 14th November 2023 by Jairus Musumba who has described himself as the County Secretary and Head of County Public Service, County Government of Nairobi. Mr. Musumba avers that the 2nd, 3rd, 4th and 5th Respondents have always expressed their willingness to implement the CBA since it has made all necessary budgetary allocations. That further, they have contacted the 1st Respondent in accordance with the law as far as the CBA in question is concerned. In his view, there is no compelling reason or justification why the CBA failed to be registered or executed.
 25. The Claimant filed a Reply to the 1st Respondent's Statement of Defence in which it avers that the 1st Respondent's advice is to seek to maintain the status quo which is prejudicial to its members employed by the 2nd Respondent. That further, the CBA sought to cure the discriminatory status quo against certain cadres of employees. The Claimant maintains that the CBA was intended to harmonize the remuneration of its members across all the cadres.
 26. The Claimant further avers that the two options given by the 1st Respondent were on a take it or leave it basis without any consideration given to the parameters in which the parties had negotiated. In the Claimant's view, the 1st Respondent has not played an advisory role in the intended registration of the CBA but has instead played a dictative role.
 27. To this end, the Claimant asked the Court to strike out the 1st Respondent's Response and enter Judgment as prayed in the Memorandum of Claim.



28. The suit was canvassed by way of oral evidence and production of exhibits.

Claimant's Case

29. The Claimant called oral evidence through Mr. Roba Duba, its National General Secretary who testified as CW1. At the outset, Mr. Roba sought to adopt his witness statement to constitute his evidence in chief. He further produced all the documents filed on behalf of the Claimant as exhibits before Court.
30. It was his evidence that the 2nd, 3rd, 4th and 5th Respondents in formulating their budget proposal in support of the proposed CBA factored the rising cost of living; Inflation; SRC gazetted adjustment of salaries for state officers; and Gazetted minimum wage increase of May 2022.
31. That further, the 2nd, 3rd, 4th and 5th Respondents relied on economic surveys from the Kenya National Bureau of Statistics and the Consumer Price Index.
32. He further averred that the 2nd, 3rd, 4th and 5th Respondents have not only sought advice but have also complied with the advice of the 1st Respondent. That additionally, the 2nd, 3rd, 4th and 5th Respondents confirmed to the 1st Respondent their fiscal sustainability on the CBA.
33. In Mr. Roba's view, there is no compelling reason given by the 1st Respondent for failure to have the CBA registered between the Claimant and the 2nd Respondent. That as a result, there is an impending industrial action threat that may paralyze the activities of the 2nd Respondent and the residents and people working in Nairobi County.
34. He further averred that some of the Claimant's members are engaged in essential services and any industrial action by such members will have dire consequences on the 2nd Respondent's operations.
35. According to Mr. Roba, the actions of the 1st Respondent in failing to issue the clearance letter which would entail registration of the CBA was unlawful, discriminatory and illegal.
36. That as a result of the blatant and outright discrimination on the part of the 1st Respondent against the Claimant's members, they have been negatively affected psychologically wherein their plight and rights as enshrined under Article 41 of the Constitution have blatantly been infringed upon.
37. According to Mr. Roba, the 1st Respondent only involves itself in a third-party capacity with its role being limited to reviewing the request for collective bargaining negotiations tendered before it, issuing a clearance letter preceding the registration of a CBA and finally providing the parameters that will guide the negotiations.
38. He contends that any other actions outside these would be considered ultra vires and the same is apparent in the present case wherein the 1st Respondent injected itself into the negotiations between the Claimant and the Respondents by restricting negotiations and labour relations between parties.
39. He averred that the 1st Respondent interfered with the negotiations by limiting the avenues available to the negotiating parties and limiting the same to either 'accept the terms' or 'decline the terms'. In his view, the 1st Respondent exceeded its mandate by skewing the negotiations to the detriment of the Claimant's members.
40. It was Mr. Roba's further contention that the actions of the 1st Respondent are contrary to Article 41 of the Constitution on fair labour practices and Section 26 of the Employment Act.
41. He further averred that the 1st Respondent is acting ultra vires and purporting to usurp the powers and functions of unions such as the Claimant by unilaterally varying salaries downwards without



any consultations whatsoever and ignoring and failing to consider the considerations of the 2nd Respondent. In his view, the actions of the 1st Respondent are not founded on any law or piece of legislation.

1st Respondent's Case

42. The 1st Respondent called oral evidence through its Director, Remuneration Services, Dr. Hillary Patroba who testified as RW1. Equally, Dr. Patroba started by adopting his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed on behalf of the 1st Respondent as exhibits before Court.
43. Dr. Patroba stated that the institutionalization of SRC as the only body constitutionally mandated to advise the national and county governments on remuneration and benefits of public officers, was intended to, among other things, entrench the principles of public finance and fiscal responsibility so as to ensure that the public wage bill is fiscally affordable and sustainable.
44. That the cadre of public officers previously working under the defunct Local Authorities had their remuneration and benefits determined through a negotiated CBA executed between the Association of Local Government Employers and the Kenya Local Government Workers Union and Local Authorities on 12th October 2012 and registered by the Industrial Court under the reference RCA no. 21 of 2013.
45. That the cadre of public officers directly recruited by the county public service boards or seconded from the national government have a similar remuneration and benefits structure as advised by the 1st Respondent after taking into account the principles set out under Article 230 (5) of the Constitution and after having carried out job evaluation.
46. Dr. Patroba further stated that the 1st Respondent's advice was to either adopt the remuneration and benefits structure as advised to county governments vide circular Ref SRC/TS/JE/CG/3/33/6/VOL.III (30) dated 8th July 2020 or retain the remuneration and benefits structure as negotiated and registered in RCA no. 21 of 2013. That this advice was premised on the fact that certain categories of employees specifically, health workers absorbed from the defunct local authorities stood to benefit from the said remuneration and benefits structure. That further, the other cadres of the defunct local authorities stand to benefit by adopting the remuneration and benefits structure contained in the 1st Respondent's circular of 8th July 2020.
47. Dr. Patroba further averred that the 1st Respondent's advice to retain the remuneration and benefits structure as negotiated in RCA no. 21 of 2013 was premised on the fact that the remuneration and benefits structures for certain cadres contained were higher compared to the obtaining structures for equivalent job grades for public officers devolved from the national government or directly recruited by county public service boards.
48. With respect to the advisory of 19th April 2023, Dr. Patroba averred that the 1st Respondent advised the 2nd Respondent on the following parameters for negotiation:
 - i. an employee absorbed by the county government from the defunct local authorities may voluntarily opt to be placed on the remuneration structure applicable to the employees absorbed from the national government and those recruited by the county government. An employee who opts to adopt the remuneration structure under reference shall do so voluntarily and in so doing forfeit all remuneration and benefits obtaining in the defunct local authority;



- ii. an employee absorbed by the county government from the defunct local authority who opts to retain the remuneration structure of the defunct local authorities shall retain their current rates of: Basic Salary; House allowance; Commuter Allowance; Extraneous Allowance; Risk Allowance; and Non-practice Allowance. Further, Nursing Service Allowance and Health Workers Allowance are not payable to an employee absorbed by the county government from the defunct local authority; and
 - iii. other remunerative items: to be paid as advised by the Commission vide letter Ref. No. SRC/TS/29/30 (8) dated 8th April, 2022.
49. According to Dr. Patroba, the option to adopt the remuneration and benefits structure as advised to county governments vide circular ref SRC/TS/JE/CG/3/33/6/VOL.III (30) dated 8th July 2020 is elective and offers flexibility to workers who stand to benefit from it.
 50. That on 10th August, 2023 the 1st Respondent further issued Circular Ref no. SRC/TS/29 (81) which is its advice to county governments on the remuneration and benefits for public officers in the County Government Executive under the 3rd Remuneration and Benefits Review Cycle. The remuneration structures advised therein shall be implemented with effect from 1st July 2023 in two phases of financial years 2023/2024 and 2024/2025. This Circular supersedes the Circular dated 8th July 2020 hence an employee absorbed by the county government from the defunct local authorities who voluntarily opts to be placed on the remuneration structure applicable to the employees absorbed from the national government and those recruited by the county government shall have their remuneration and benefits as per Circular Ref no. SRC/TS/29 (81) of 10th August, 2023.
 51. That the 1st Respondent's advice on parameters for negotiation considered several crucial factors, including the financial feasibility, fiscal sustainability, comparability, adherence to current government policies and guidelines, the total gross pay for the three cadres, and the need to progressively harmonize the remuneration and benefits structures for the three cadres of county staff in line with the principles of equity and fairness.
 52. Dr. Patroba contended that the 2nd, 3rd, 4th and 5th Respondents have not complied with the 1st Respondent's advice on parameters for negotiation as communicated on 8th and 19th April, 2022 (sic).
 53. He further averred that implementing the subject agreement as sought by the Claimant would trigger widespread and significant hikes in the Government's wage bill for all 47 county governments. This is because the proposed terms must be applied uniformly, following the principle of equal pay for equal work. The resulting cost increase would be dramatic, with compounding compensation rises across all county governments.
 54. It was his view that the Claimant's position ignores the massive uniform spending hikes the collective agreement would necessitate. The multiplying impact across county governments could skyrocket financial liabilities beyond sustainable levels. The consistent application mechanism essentially fuels an uncontrolled expansion of the national wage bill with exponential consequences.
 55. That further, the Claimant's collective agreement disregards fiscal stability and poses a serious threat to it. The unavoidable universal adoption of the agreement creates a self-perpetuating cycle of runaway wage hikes that endanger the country's financial sustainability.
 56. The 2nd, 3rd, 4th and 5th Respondents elected not to call oral evidence. To this end, they sought to rely on their respective responses to the Memorandum of claim.



Submissions

57. On the Claimant's part, it was submitted that it has always been ready and willing to conclude a CBA that would in turn benefit its members. That to the contrary, the 1st Respondent has been hell-bent on attempting to delay the same. According to the Claimant, the law is express that collective bargaining is not between the union and the SRC, but only between the union and the employer. It was the Claimant's further submission that SRC's role is strictly limited to advising the County Government. In the same vein, the Claimant contended that SRC's role is only advisory and that advice must be issued within the confines of the law as well as in accordance with what the primary parties have agreed upon.
58. The Claimant further submitted that SRC acted ultra vires and played a dictative role as opposed to an advisory role in the collective bargaining process. According to the Claimant, the 1st Respondent failed to abide by its timelines and parameters as provided by the law and at the end issued two separate directives which were unlawful, illegal and unenforceable by the Claimant as well as the 2nd, 3rd, 4th and 5th Respondents. In support of these submissions, the Claimant placed reliance on the case of Kenya Vision 20230 Delivery Board vs Commission on Administrative Justice & 2 others (Petition 42 of 2019) [2021] KESC 35 (KLR) (24 March 2021) (Judgment).
59. Further reliance was placed on a number of authorities including National Union of Water & Sewerage Employees vs Mathira Water and Sanitation Company Limited & 2 Others [2013] KEELRC 283 (KLR), Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT) & 3 others (2015) eKLR and Sollo Nzuki vs Salaries and Remuneration Commission, Judicial Service Commission & Attorney General [2019] KEHC 1511 (KLR).
60. The Claimant further submitted that the 1st Respondent was acting ultra-vires in so far as its role is contrary to Article 230 of the Constitution by purporting to have proposals contrary to legal Notice No. 125 Regulation of Wages (General) (Amendment) Order 2022, Section 26 of the Employment Act and Section 60(d) of the County Governments Act. The Claimant further contended that the 1st Respondent irrationally varied its members' terms of employment against an existing CBA.
61. On its part, the 1st Respondent submitted that its advice issued on 8th and 19th April 2022 (sic) was binding on the County Government of Nairobi and that it was legally obligated to comply with and negotiate with the Claimant within the parameters of SRC's advice of 8th and 19th April 2022 (sic). To this end, reference was made to the cases of Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT) & 3 others (2015) eKLR and Civil Appeal No. 156 of 2016: SRC vs NHIF & others.
62. It was further submitted by the 1st Respondent that in the event of a stalemate in negotiations arising from its advice, the Revised Guidelines on Collective Bargaining in the Public Service require a public body to revert to the 1st Respondent with recommendations on rates it proposes for review. That in this case, the onus fell on the County Government of Nairobi to revert to the 1st Respondent on any challenges it experienced in negotiating with the Claimant within the parameters advised by the 1st Respondent.
63. The 1st Respondent further submitted that the CBA between the Claimant and the County Government of Nairobi was not negotiated within its advice on the remuneration and benefits for the cadre made up of employees previously working under the defunct local authorities. In the 1st Respondent's view, the negotiated rates, as set out in the CBA are not a reflection of its advice as contained in its 2020 Circular or the rates as collectively negotiated in the 2012 CBA.



64. The 1st Respondent further submitted that it is crucial to note that the 2022 wage guidelines do not invalidate or vitiate the entirety of the 1st Respondent's circular of 2020. The wage guidelines merely substituted the basic minimum rates of remuneration as advised by the 1st Respondent with the new minimum wage rates prescribed in the 2022 Wage Order.
65. That the 2nd Respondent was obligated to comply with the 1st Respondent's circular of 2020, while simultaneously incorporating the updated basic minimum wage rates specified in the 2022 wage guidelines, as mandated by Section 48(1) (b) of the [Labour Institutions Act](#).
66. That the 1st Respondent's approach in treating the cadre of staff devolved from the national government or employed directly by county public service boards differently is neither arbitrary nor without justification. Rather, it is a deliberate and well-reasoned strategy aimed at progressively harmonizing the remuneration and benefits for all three cadres within the applicable fiscal realities and constraints faced by the government.
67. On the part of the 2nd and 3rd Respondents, it was submitted that the 2nd Respondent with the guidance of the 4th and 5th Respondent considered all the advisories and guidelines issued by the 1st Respondent in negotiating the CBA with the Claimant. That it is clear that the 2nd and 3rd Respondents concluded the negotiations of the CBA as was required of them and discharged their roles in accordance with the law. That additionally, they implemented the 1st Respondent's advisory and in so doing included the lawful and legal justifications as was required of them.
68. The 4th and 5th Respondents submitted that they have not stood in the way of the implementation of the proposed CBA but have instead taken all the necessary actions to ensure its conclusion.
69. That whereas the 4th and 5th Respondents herein considered all the advisories and guidelines issued by the 1st Respondent herein in guiding the 2nd Respondent's negotiation of the CBA with the Claimant, the 4th and 5th Respondents were under a duty to ensure that the CBA negotiation process did not rigidly follow the 1st Respondent's advisory without considering other relevant factors overlooked by the 1st Respondent herein.
70. The salaries of employees in the different cadres of employment with the county would have their salaries harmonized in a manner that ensures there are minimal or no disparities in pay across the county workforce. The 1st Respondent had not taken these factors into account in its advisory dated 8th April 2022 and hence this informs the reason why the 4th and 5th Respondent in the letter dated 8th August 2022 gave various justifications for considering these factors in the CBA negotiation process.
71. The 4th and 5th Respondents further submitted that to implement the 1st Respondent's advisories as is without factoring in all the relevant factors would have been contrary to the provisions of Section 138 (1) (a) of the [County Governments Act](#).
72. That whereas the advice of the 1st Respondent to the rest of the Respondents herein including has now been held to be binding in nature, any such advisory from the 1st Respondent which is contrary to the [Constitution](#) or statutory provision is not binding.
73. That since the 1st Respondent's role in the CBA negotiation process or salary review for public officers is merely advisory pursuant to Article 230(4)(b) of the [Constitution](#), it was lawful and proper for the 4th and 5th Respondents herein to recommend modifications to the 1st Respondent's advisory of 8th April 2022 to accommodate the circumstances prevailing at the time.



Analysis and Determination

74. Flowing from the pleadings on record, the evidentiary material placed before me, as well as the rival submissions, the Court has isolated the following issues for determination: -
- a. Whether the advisories rendered by the Salaries and Remuneration Commission to the 2nd Respondent are consistent with its constitutional and statutory mandate;
 - b. Whether the reliefs sought by the Claimant lie in law;

Whether the advisories rendered by the Salaries and Remuneration Commission to the 2nd Respondent are consistent with its constitutional and statutory mandate

75. It is unequivocal that the Salaries and Remuneration Commission (SRC) has a central role to play in the determination of the remuneration and benefits payable to all public officers, appointed to serve in the national and county governments.
76. This is a constitutional imperative under Article 230 (4) (b) of the *Constitution* which mandates the SRC to advise the national and county governments on the remuneration and benefits of all other public officers.
77. It is common ground that the members of the Claimant herein are public officers serving in the County Government of Nairobi, the 2nd Respondent herein. Therefore, it goes without saying that the SRC has a major role to play in the collective bargaining negotiations between the Claimant Union and the 2nd Respondent.
78. The Claimant herein avers that on 26th October 2021, the 2nd Respondent through the 4th Respondent requested further parameters and guidelines in relation to collective bargaining negotiations as those issued on 14th October 2019 had been overtaken by time.
79. The record bears that on 8th April 2022, the 1st Respondent wrote to the 2nd Respondent and gave two options with respect to the CBA negotiations.
80. Under Option 1, the 1st Respondent advised the 2nd Respondent to adapt the job evaluation as advised in the circular SRC.TS/JE/CG/3/33/6/VOL.III (3) dated 8th July 2020 for equivalent job grades. With respect to allowances, the 1st Respondent advised that all employees from the defunct Nairobi City Local Government adopt all other allowances applicable to the staff devolved from the National Government at the rates obtaining for similar cadres and equivalent job grades.
81. Under Option 2, the 1st Respondent advised the 2nd Respondent to retain the current rates with respect to basic salary and all payable allowances.
82. Fundamentally, the advice to the 2nd Respondent was to either adopt the remuneration and benefits structure as advised to county governments vide the circular dated 8th July 2020 or retain the remuneration and benefits structure as negotiated and registered in the existing CBA being RCA No. 21 of 2013.
83. In its subsequent advisory of 19th April 2023, SRC advised the 2nd Respondent that an employee absorbed by the County Government from the defunct Local Authorities may voluntarily opt to be placed on the remuneration structure applicable to the employees absorbed from the National Government and where such employee opts to do so, they forfeit all remuneration and benefits obtaining in the defunct Local Authority.



84. That further, an employee absorbed by the County Government from the defunct Local Authorities who opts to retain the remuneration structure of the defunct Local Authorities shall retain their current rates of basic salary and all allowances but shall not be entitled to Nursing Service Allowance and Health Workers Allowance.
85. It is the foregoing advisories that have triggered the instant dispute.
86. One of the issues raised by the Claimant is that Option 1 of the advisory dated 8th April 2022, was unlawful and illegal as the proposed remuneration was below the minimum wage stipulated under Regulation of Wages (General) (Amendment) Order, 2022.
87. It should be appreciated that at the time of issuing the said advice, the aforementioned Wage Order had not been gazetted hence the relevant Wage Order at the time was [Legal Notice No. 2 of 2018](#). To that end, it is not accurate for the Claimant to state that the said advisory was unlawful and contrary to the Regulation of Wages (General) (Amendment) Order, 2022.
88. The Claimant has further contended that the 1st Respondent abandoned its advisory role and opted to wear two more hats; that of the trade union and that of the employer.
89. Revisiting the two advisories by the SRC, it is evident that the parameters given to the 2nd Respondent constituted options which the Claimant and the 2nd Respondent were to elect and incorporate into the CBA.
90. It is my considered view that by giving the parties two options to elect, SRC was essentially limiting the avenues for negotiations between the Claimant and the 2nd Respondent. Differently expressed, the SRC did not give the Claimant and the 2nd Respondent latitude to undertake further negotiations. As crafted, the “advisories” did not constitute “advice” as envisaged under Article 230(4) (b) of the [Constitution](#) and Section 11 of the SRC Act.
91. If I may say, by issuing the advisories in the manner it did, the SRC had stifled further negotiations between the parties as they only had two options to elect from. There was no further room for negotiations.
92. In view of the foregoing, I cannot help but question what the Claimant and the 2nd Respondent were required to further negotiate on, whilst the SRC had already given them options which was to either adopt the remuneration and benefits structure as advised to county governments vide the circular dated 8th July 2020 or retain the remuneration and benefits structure as negotiated and registered in the existing CBA being RCA No. 21 of 2013.
93. The right to engage in collective bargaining is guaranteed under Article 41(5) of the [Constitution](#) of Kenya. Therefore, in as much as the SRC is mandated under Article 230(4) (b) of the [Constitution](#), to advise on the remuneration and benefits of public officers, such advice should be rendered in a manner that does not destroy the right of the trade union and the employer to engage in collective bargaining.
94. As was rightly held in the case of Union of Water & Sewage Employees vs Mathira Water & Sanitation Company Limited and others (2013) eKLR, the [Constitution](#) did not intend that SRC takes over the collective bargaining role with respect to unionisable employees in the public sector, from employees and employers’ organizations.
95. I further agree with the finding by the learned Judge that the [Constitution](#) did not intend that the right to collectively bargain, and the freedom to associate, are shackled through the creation of a Constitutional Commission.



96. It is for the foregoing reason that the Constitution limited the role of SRC in the collective bargaining process in the public sector to “advisory on remuneration” rather than “setting remuneration”.
97. I reiterate the sentiments of the learned Judge in the case of Union of Water & Sewage Employees vs Mathira Water & Sanitation Company Limited and others (supra) that the role of the SRC should be limited to advising the Government and its Agencies in the collective bargaining process as opposed to defining and running the process.
98. To put it succinctly, the advice by SRC should not negate or override the constitutional right of the employers and trade unions to engage in collective bargaining.
99. In this case, the advisories issued by the SRC had the effect of “setting” or “defining” the remuneration and benefits payable to the employees of the 2nd Respondent who are public officers and in so doing, the SRC acted beyond its constitutional mandate which is limited to “rendering advice” as opposed to “setting”.
100. It is this Court’s view that in this case, SRC ought to have advised the 2nd Respondent on the parameters within which to undertake the collective bargaining negotiations with the Claimant and allow the parties reasonable leeway to negotiate.
101. The Claimant has further averred that the advice by SRC failed to take into account the rising cost of living, inflation and SRC’s gazetted adjustment of salaries for state officers.
102. In its defense, the SRC stated that its advice considered crucial factors including financial feasibility, fiscal sustainability, comparability, adherence to current government policies and guidelines, the total gross pay for the three cadres and the need to progressively harmonise the remuneration and benefits structures for the three cadres of county staff in line with the principles of equity and fairness.
103. According to the Claimant, some of its members had been earning the same salary for the last 10 years without any salary review. Notably this position was not refuted by the SRC.
104. In discharging its mandate, the SRC is guided by the principles set out under Article 230(5) of the Constitution and Section 12 of the SRC Act, which requires that the said Commission takes into account fiscal sustainability, the need to attract and retain the skills in the public service, the need to recognise productivity and performance and transparency and fairness.
105. It is in the public domain that over the last 10 years, the SRC has proposed salary reviews for both state and public officers. It follows that over that period, some members of the Claimant Union have not benefitted from these salary reviews.
106. It is also common knowledge that over this period of time, there has been a rise in inflation and the cost of living. In support of its case, the Claimant relied on the 2023 Economy Survey by the Kenya National Bureau of Statistics. This document which I consider persuasive, demonstrates that there was an increase in the consumer price index from 6.1% in 2021 to 7.7% in 2022. This was attributed to the high cost of food, and non-alcoholic beverages, transport and housing, water, electricity, gas and other fuels.
107. It is also worth noting that pursuant to the SRC Revised Guidelines on Collective Bargaining in the Public Service, one of the factors to be considered in providing the parameters for negotiations is the cost of living adjustment.



108. In light of the foregoing, it is this Court's view that it was not reasonably fair for the SRC to propose that the Claimant's members retain the remuneration and benefits under the existing CBA being RCA No. 12 of 2013. By so doing, the SRC had disregarded the cost of living adjustment.
109. Further, it is notable that despite advising the 2nd Respondent that the employees retain the existing remuneration and benefits, SRC has a review cycle of four years. As such one wonders why the SRC would advise that the said employees retain the existing salary for four more years without review.
110. In addition, the SRC did not mention the productivity of the 2nd Respondent's employees whereas this is one of the factors it ought to consider in advising on salary review.
111. To this end, it is apparent that in issuing the advisories, the SRC did not take into account all the factors stipulated under the Constitution, the SRC Act and its Revised Guidelines on Collective Bargaining in the Public Service.
112. In so finding, the Court appreciates the argument by SRC that it is taking measures to progressively harmonize the remuneration and benefits structures for the three cadres of county staff.
113. Be that as it may, such measures need to be balanced against the right to fair remuneration enshrined under Article 41(2)(a) of the Constitution and should not in any way disadvantage any of the employees in the three cadres of the county staff. In this regard, the remuneration and benefits of the 2nd Respondent's employees should be reviewed progressively for all three cadres of employees so as to attain an equilibrium.
114. In light of the foregoing analysis, the Court finds merit in the Claimant's claim and holds that the advisories by the SRC as contained in the letters dated 8th April 2022 and 19th April 2023 are not consistent with its mandate under Article 230(4) (b) of the Constitution and Article 41(5) of the Constitution hence unlawful.

Orders

115. To this end, the Claimant's Claim succeeds in the following manner:
- a. An order is hereby issued declaring the advisories by the 1st Respondent (SRC) as contained in the letters dated 8th April 2022 and 19th April 2023, unlawful in so far as the SRC overstepped its mandate under Article 230(4) (b) of the Constitution and violated the Claimant's and the 2nd Respondent's right to engage in collective bargaining as guaranteed under Article 41(5) of the Constitution.
 - b. The 2nd Respondent is hereby ordered to resubmit the CBA negotiated with the Claimant for consideration by the SRC within 7 days from the date of this Judgment.
 - c. Within 30 days upon submission of the CBA, the SRC is to render its advice as envisaged under Article 230(4) (b) of the Constitution taking into account the guiding principles under Article 230(5) of the Constitution, Section 12 of the Salaries and Remuneration Commission Act and its Revised Guidelines on Collective Bargaining in the Public Service.
 - d. In default of the SRC complying with order (c) above, the Claimant and the 2nd Respondent shall be at liberty to present the CBA to Court for registration.
 - e. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2024.



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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Oketch

For the 1st Respondent Mr. Murakuru

For the 2nd and 3rd Respondent Ms. Ang'ielia instructed by Mr. Oketch

For the 4th and 5th Respondent Mr. Odinga

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

