



Nkosi & another v Salaries and Remuneration Commission & 5 others (Petition E076 of 2024) [2024] KEELRC 2840 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2840 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E076 OF 2024**

B ONGAYA, J

NOVEMBER 15, 2024

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 10(2) (B) (C), 19, 27, 28, 41, 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS AND IN THE MATTER OF THE SALARIES AND REMUNERATION
COMMISSION, A CONSTITUTIONAL COMMISSION ESTABLISHED PURSUANT
TO ARTICLES 230 & 253 OF THE CONSTITUTION OF KENYA AND IN THE
MATTER OF PUBLIC SERVICE REMUNERATION AND BENEFIT POLICY
GUIDELINES 2022, SECTION 3.2.2 AND IN THE MATTER OF SECTIONS 3 & 26
OF SALARIES AND REMUNERATION COMMISSION (REMUNEARTION AND
BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS 2022**

BETWEEN

**GWARAGWARA NKOSI 1ST PETITIONER
KHADIJA ALI 2ND PETITIONER**

AND

**SALARIES AND REMUNERATION COMMISSION 1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT
TRANSITIONAL COMMITTEE ON SOCIAL HEALTH AUTHORITY 3RD
RESPONDENT
NATIONAL HEALTH INSURANCE FUND 4TH RESPONDENT
MINISTRY OF HEALTH 5TH RESPONDENT
SOCIAL HEALTH AUTHORITY 6TH RESPONDENT**



((Before Hon. Justice Byram Ongaya on Friday 15th November, 2024))

JUDGMENT

1. The petitioners who are NHIF management staff, filed the petition dated 16.05.2024 through Bonventure & Associate Advocates, praying for the following orders:
 - a. That an Order of injunction do issue stopping the transition from National Health Insurance Fund (NHIF) to Social Health Authority (SHA) pending the hearing and determination of the petition and the grievances of the NHIF Management staff Grade HF13 to HF8 herein.
 - b. That an Order of injunction do issue stopping the Transition Committee either by themselves, their agents, servants and/or employees from submitting their report to the President of the Republic of Kenya, Ministry of Health, SHA Board and NHIF Board pending hearing and determination of the petition.
 - c. That an Order do issue compelling Salaries and Remuneration Commission (SRC), either by themselves, their agents, servants and/or employees to produce the recommendation of the NHIF Board of increasing salaries of the entire NHIF Management staff HF-8 to HF-13 who are the unionized management staff.
 - d. That an Order do issue compelling the SRC, either by themselves, their agents, servants and/or employees to produce under Article 35 of *the Constitution*, their communication with National Treasury on the implementation of the Collective Bargaining Agreement.
 - e. That a declaratory Order do issue to the effect that by raising the salary of unionized NHIF employees without raising that of the management team of NHIF, the 1st to 5th respondents either by themselves, their agents, servants and/or employees have jointly and severally violated the affected NHIF management team's rights not to be discriminated against as guaranteed by Article 27 of *the Constitution* of Kenya, 2010 and is a further violation of their rights as guaranteed by Articles 41(2) of *the Constitution*.
 - f. That an Order of mandamus do issue compelling the 1st respondents either by themselves, their agents, servants and/or employees to review the petitioners' salary by percentages similar to those awarded to the unionized staff members when they negotiated CBA 2013/2017, 2017/21 and 2021/23 (whichever is higher), and, that the said amount(s) plus benefits be backdated to the time when the salary disparity took place and paid promptly.
 - g. That a declaratory Order do issue that the 1st, 2nd, 3rd, 4th, 5th and 6th respondents either by themselves, their agents, servants and/or employees have jointly and severally acted in a manner that is inconsistent and or in total violation of *the Constitution* and in particular, it has breached Articles 2(4), 10(2) (b) (c), 19, 27, 28, 41, 47, 23(5) (b) (c) & (d), 249(2) (a), 160 and 172 (1) (b) of *the Constitution*.
 - h. That a declaratory Order do issue to the effect that the discriminatory actions by the respondents either by themselves, their agents, servants and/or employees of perpetuating salary discrepancies based on employment status, are inconsistent with the core national values and principles of governance enumerated in Article 10 of *the Constitution*.
 - i. That cost of this petition be provided for by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents.



- j. That this Honourable Court be pleased to grant any other relief and orders it may deem fit and just to grant.
2. The petition is supported by the affidavit of the 1st petitioner who averred as follows:
- i. The NHIF structure includes individuals on contract, such as HF14 and HF15, who hold positions of CEOs and Directors, while the remaining staff (HF13 to HF8) are currently on permanent and pensionable terms of service.
 - ii. In 2016, the World Bank facilitated reforms leading to a severance agreement within NHIF and resulting in early retirement on voluntary terms. Thereafter in 2017, unionized employees (HF1 to HF17) successfully negotiated for a salary increment. The trend continued in 2021 when another salary increment was negotiated by the unionized employees. During the said negotiations, the management staff in HF8 - HF13 (not unionized) were overlooked hence creating a significant disparity between their salaries and that of unionized employees. The act is discriminatory against the rights of management staff.
 - iii. Since 2020, NHIF management staff have been under consideration for a salary review following the implementation of two CBAs that only favoured the unionized staff. The CBAs for 2017-2021 and 2021-2023 awarded unionized staff significant salary increments of 38% and 15% respectively, whereas the management staff received only 16% increase. The disproportionate increase led to a considerable gap between salaries of unionized and management staff, amounting to approximately Kshs. 30,000/- above the salaries of management staff at certain levels, notably HF8 and HF9.
 - iv. The management staff have made all the necessary internal and external steps to address the issues with the relevant department to no success. The staff are depressed especially because of NHIF's transition to SHA, which they have intentionally been excluded despite their experience in management.
 - v. On 26.09.2023, the management staff wrote a letter to the NHIF's CEO requesting for salary harmonization, payment of arrears and expressing their grievances on failure by NHIF Board to award them the same salary increases as unionized employees. They further prayed for harmonization of their allowances and arrears. The issue also formed part of the agenda of the NHIF Board committee meetings. The petitioners' Advocate further addressed the chairperson of the 3rd respondent herein, SHA, COTU and SRC on the harmonization of their salaries.
 - vi. On 25.04.2024, the chair of the 3rd respondent invited representatives of the management staff for a mediation meeting scheduled for 26.04.2024 to address their grievances. However, there has been no positive outcome from concerned parties despite all the above engagements.
 - vii. The management staff continue to face discrimination as their dignity and livelihoods have been severely impacted by the unjustifiable disparity in pay as majority of the unionized staff earn more, even as junior employees earn more than the supervisors in the management team do. Unless the respondents' actions are restrained and the petitioners' issues addressed, the rights of the NHIF management staff will continue to be infringed.
3. The petitioners' case was as follows:



- a. The respondents have failed to uphold their constitutional obligations as outlined in Articles 2(1) (2) and 21 of *the Constitution*, particularly by allowing for discriminatory practices in salary determination and failing to rectify the resulting disparities.
 - b. The discriminatory actions of the respondent are inconsistent with the national values and principles of governance enumerated in Article 10 of *the Constitution*, that is, integrity, transparency, accountability and non-discrimination.
 - c. The discriminatory treatment suffered by the management staff constitutes an infringement of their rights guaranteed under Article 19, including the rights to fair labour practices, and equal protection and benefit of the law.
 - d. The discriminatory salary disparities between management staff and unionized staff with an unjustifiable gap of up to approximately Kshs. 30,000/- is a violation of Article 27 of *the Constitution*.
 - e. The respondents have failed to treat the affected petitioners with dignity and respect as guaranteed under Article 28 of *the Constitution*.
 - f. The 2nd respondent has particularly failed, refused and or neglected to advise the 1st, 3rd, 4th, 5th and 6th respondent to perform their functions in accordance with their respective constitutional mandates. The actions and omissions of the 2nd respondent are therefore an abdication of its constitutional mandate and a ground for this Court to intervene so as to defend and uphold *the Constitution*.
4. The 1st respondent filed the replying affidavit of Anne R. Gitau sworn on 09.10.2024 through Ruth Bikambo, Advocate. SRC's case was as follows:
- i. The Commission is established and derives its mandate under Articles 230(4) (5) and 259(11) *the Constitution*.
 - ii. Pursuant to section 11(e) of the SRC Act, 2011, the SRC sets a four-year cycle for review of remuneration in the public service as follows;
 - a. 1st cycle - 2013/2014 - 2016/2017
 - b. 2nd cycle - 2017/2018 - 2020/2021
 - c. 3rd cycle - 2021/2022 - 2024/2025
 - iii. During the first review cycle, the trade union representing NHIF workers (KUCFAW), initiated negotiations with NHIF on the proposed review in the CBA. While the negotiations were ongoing, NHIF filed a petition (ELRC Milimani Cause No. 40 of 2015), which was heard and determined to wit that the NHIF staff under the KUCFAW did not fall under the constitutional mandate of SRC. Subsequently, the Commission filed an appeal at the Court of Appeal (Civil Appeal No. 156 of 2016).
 - iv. Pending hearing and determination of Civil Appeal No. 156 of 2016, SRC's mandate with respect to review of the remuneration and benefit of NHIF staff is limited to the findings of the Court in ELRC Milimani Cause No. 40 of 2015.
 - v. During the second review cycle, NHIF submitted two (2) different requests for review of the remuneration structure for its management staff and a proposal for review of its unionisable staff through the proposed CBA. SRC received the letters on 20.07.2018 and thereafter, NHIF



submitted additional information on the requests. The Commission issued separate advice to the said requests vide its letters dated 19.11.2018 and 21.01.2019 on the parameters for negotiation. However, KUCFAW's response was that the said advice had been issued late as the negotiations between the employer and the union had already been concluded.

- vi. Additionally, during the second remuneration review cycle, SRC conducted job evaluation for NHIF and based on the results, it advised NHIF, in the letter dated 20.11.2017 to retain its remuneration structure.
 - vii. In the third review cycle, SRC vide its letter dated 20.08.2020 requested NHIF to submit the requisite documents for job evaluation. Unfortunately, NHIF failed to submit the said documents making it impossible for the Commission to undertake job evaluation. However, in April 2021, NHIF wrote to SRC seeking advisory on the financial items proposed for review in the CBA. One of the emerging issues in the proposed CBA was that the CBA cycle was covering a three-year cycle, starting from July 2021 to June 2023, contrary to the guidelines advised by SRC on parameters for negotiation of CBA within the public sector – requiring all CBAs to cover a four-year cycle. There has been no feedback to date on the issue of such compliance as advised by SRC.
 - viii. Considering the foregoing evidence that the Commission has always advised NHIF on the parameters for negotiation of CBAs, the allegations made as against the SRC in the petition herein are untrue and without basis. If at all the disparity in remuneration structure exists as alleged, which is denied, the same can only be attributed to the 4th respondent for its failure to comply with the advice of SRC as and when issued.
 - ix. Furthermore, it was impossible for SRC to enforce any compliance on its advice as there was a binding judgment excluding unionisable staff from NHIF from the Commission's constitutional and statutory mandate. The 4th respondent therefore never submitted any of its proposed reviews in the CBAs to the Commission for clearance before their registration in court.
 - x. The Honourable Court should thus dismiss the petition herein with cost as filed against the 1st respondent as it does not disclose any cause of action as against the 1st respondent.
5. The 3rd, 4th and 6th respondents filed their replying affidavits through learned Senior State Counsel Ms. Beatrice Akuno for the Attorney General, who entered appearance for the 2nd to 6th respondents.
 6. The 3rd respondent filed the replying affidavit of Jason Kapkirwok sworn on 07.06.2024. It was urged that the 3rd respondent had indeed severally met, consulted and engaged the petitioners (the representatives of management staff) on the issues raised herein. Following the Court's directions, the 3rd respondent received the written petitioners' grievances which it was reviewing before making its recommendations to the relevant authorities. It was stated that should the Court grant the prayers sought in the petition, the NHIF staff will suffer great prejudice on account of apparent delay. In addition, the people of Kenya will suffer financial burden in accessing health-care services if the implementation of the benefit package under the new health insurance scheme is delayed.
 7. The 4th respondent filed the replying affidavit of Elijah G. Wachira sworn on 10.06.2024. NHIF's case was that:
 - i. The Board of Management took initiative to have management staff remuneration reviewed every CBA cycle. Subsequently, the NHIF Board and Human Resource and Governance Committee advised that a salary survey be undertaken on peer organization and a paper



resubmitted to the Committee. However, Social Health [Insurance Act](#), 2023 was enacted while the survey was being carried out and following winding up of the Fund, the process was halted.

- ii. The petitioners did not follow the laid procedure for handling internal grievances or request for audience as provided by policy before filing the petition herein.
 - iii. The NHIF Board has handed over the HR matters to SHA in accordance with clause 3 of the First Schedule of the Social Health [Insurance Act](#), 2023, and therefore has no mandate to review or handle any requests or matters.
 - iv. It is in the interest of justice that the petition is dismissed in its entirety with costs.
 - v. This matter ought to have been filed as an ordinary claim as it does not raise any constitutional issues.
8. The 6th respondent filed the replying affidavit of Elijah Wachira sworn on 14.06.2024. SHA's case was that:
- i. As per the transitional provisions with regard to NHIF Staff, the Authority shall give priority to the said staff in the recruitment of its staff, based on the approved staff establishment of the Authority.
 - ii. The staff establishment of the Authority will require approval by the Public Service Commission and advice of salaries by the SRC. Therefore, the Authority's role on the harmonization of salaries of NHIF management staff is not feasible. This is so because the Authority's mandate is to recruit its staff based with priority given to NHIF staff including the management staff.
 - iii. Salaries under the defunct NHIF may be different from that offered by SHA based on the advice given by SRC as the Authority's mandate is different and wider from that of NHIF.
 - iv. The Authority has not refused to harmonize the management staff's salaries but is rather constrained to operate within the provisions of the existing law.
 - v. The petition should thus be dismissed with costs to the respondents for the ends of justice.
9. The petitioners then filed three further affidavits sworn by the 1st petitioner on 19.10.2024 and 24.06.2024 and, by the 2nd petitioner on 21.06.2024, in response to the 1st, 3rd, and 4th and 6th respondents respectively. The petitioners aver as follows:
- a. The report submitted by the Transition Committee does not contain the recommendations and is meant to mislead the Court.
 - b. It is clear from the reports filed in Court that the respondents do not intend to pay the management staff their salaries and dues, legally owing to them. Notably, the SRC never filed any report.
 - c. The delay in negotiation ought not to affect the benefits and dues of the management staff as the same is rooted in their constitutional rights. The said staff should be paid retrospectively equivalent of what the unionized counterparts were being paid.
 - d. The SRC has not demonstrated to this Court the cycle for the management staff salary reviews. The Commission has also not proved that any negotiation was initiated with NHIF on CBA. Since it is clear the SRC is skewed towards union salaries as opposed to management salaries,



it cannot absolve itself from blame. The SRC should have enforced compliance with its advice and is therefore liable for the salary disparities due to oversights or negligence.

- e. The petitioners request for further demand for compensation for contract violation and damages by the employer. Furthermore, from the Board Paper (marked GKN-3), the petitioners seek a total increment of Kshs. 2,461,138,584/= for financial year 2021/23 as per the conducted review.
 - f. The petitioners' constitutional rights continue to be violated based on limited mandate and time to winding up of NHIF while there is still time to resolve the issues.
10. Parties filed their respective written submissions. The Court has considered the material on record together with the submission filed for the petitioners; the 1st respondent; and, the 2nd to 6th respondents. The Court returns as follows.
11. The 1st issue is whether the respondents have discriminated the petitioners. The petitioners' case is that they have been discriminated against Article 27 of *the Constitution* and section 5 of the Act because the salaries for the unionisable staff have been reviewed over the years per the CBAs concluded while their remuneration has not been reviewed and increased concomitantly. The Court has considered the petitioners' case and returns that the petitioners have failed to establish discrimination as was alleged. That conclusion by the Court is based upon the following further findings by the Court:
- a. As urged by the petitioners and the 1st respondent, there are no pleaded and established particulars of discrimination. The petitioners and the respondents agree that the petitioners are in management and the staff whose salaries were reviewed over the years were unionisable. The petitioners and the union members obviously belong to different classes or categories. While the managers and the union members are both, by the two categories, employees of the same employer, the law, contracts, policies and practices applicable to the determination of their salaries or remuneration are distinct and separate. By that inherent distinction, the alleged discrimination will collapse because of want of a valid comparator.
 - b. Nothing by pleading and evidence has been shown to exist that would establish the alleged discrimination as against any of the respondents. The 1st respondent has shown that the NHIF Board filed Cause ELRC No. 40 of 2015 at Milimani, Nairobi where it was held the staff of NHIF were not subject to 1st respondent's constitutional and statutory powers in determination of remuneration for NHIF staff. By that finding the 1st respondent has shown it could not act as claimed for the petitioners until the Court of Appeal determined the 1st respondent's appeal in Salaries and Remuneration Commission –Versus- NHIF Management Board and 2 Others, Civil Appeal No.156 of 2016 [2024]KEGA 419 and holding that the constitutional and statutory mandate of the 1st respondent applied to employees of the NHIF Management Board. In view of the Court decision that had a bearing on exercise of the 1st respondent's powers and functions over the petitioner's remuneration, it cannot be found that the 1st respondent engaged in inaction and thereby discriminated the petitioners. As for the 4th respondent, it appears that it took action, albeit within the Court's intervening judgment already referred to by the 1st respondent, and thereafter, the transition came. In that respect, the 4th respondent cannot be said to have acted discriminately against the petitioners. The other respondents have not been shown to have discriminated the petitioners at all. The Attorney General is said to have failed to advise the 1st respondent but it is now obvious to the Court that disputes were in Courts and then, it is not said that the petitioners specifically asked the Honourable Attorney General to render advice and the request was declined,



rejected, neglected, or disregarded. As for 6th respondent, it was not in culpable or said to have discriminated the petitioners at all material times. The role of the 5th respondent with respect to the alleged discrimination was not pleaded and then proved by the petitioners.

- c. The petitioners urge and submit that the role of the 3rd respondent was to determine the liabilities and assets of the 4th respondent during the transition in the establishment of the 6th respondent. It is not shown how the 3rd respondent discriminated the petitioners. The petitioners' grievance appears to be that the 3rd respondent ought to have stated in its reports the amounts owing to the petitioners by reason of what the petitioners call lack of harmonisation of their remuneration with that of the unionisable employees. However, the petitioner's own case and evidence is that the harmonisation had not been agreed upon and then crystallised as computed increased remuneration figures for each petitioner. Thus, it cannot be that the 3rd respondent could validly be held culpable for failure to include in its reports specific enhanced payments for petitioners that at all material times had not been agreed upon and then become due for implementation.
12. The 2nd issue for determination is whether the remedies should issue. The Court returns that with a finding of no discrimination established, the petition must largely collapse. The petitioners have not made specific submissions to justify award of each of the reliefs as prayed for. For reliefs about production or provision of information, the particulars are not specifically pleaded and it is not shown that a request was made and declined. The generalised reliefs for provision of information are found speculative. The Court further returns that no evidence and submissions have been made to show how the respondents jointly or severally may have contravened the provisions of *the constitution* or the Bill of Rights enumerated in prayer (f). The petitioners as well made no submissions to justify the grant of the injunctions as prayed for. The Court has considered that all parties are either public officers or bodies and each will bear own costs of the proceedings.

In conclusion the petition is hereby dismissed with orders each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

