



**Ocharo v Anti-Female Genital Mutilation Board & another; Salaries and Remuneration Commission & 7 others (Interested Parties) (Petition E013 of 2021) [2022] KEELRC 1542 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1542 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E013 OF 2021**

**J RIKA, J  
MAY 27, 2022**

**BETWEEN**

**MEMBA OCHARO ..... PETITIONER**

**AND**

**ANTI-FEMALE GENITAL MUTILATION BOARD ..... 1<sup>ST</sup> RESPONDENT**

**STATE CORPORATION ADVISORY COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**

**PAUL KILONZO ..... INTERESTED PARTY**

**ZUWEINA SALIM ..... INTERESTED PARTY**

**TITUS CHEMURSOI ..... INTERESTED PARTY**

**MILTON OMONDI ..... INTERESTED PARTY**

**FLORENCE CHEMUTAI ..... INTERESTED PARTY**

**JARED KINGOINA ..... INTERESTED PARTY**

**OSMAN IBRAHIM ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner describes himself at paragraph 1 of the Petition, as a Kenyan Citizen, who is passionate about fairness of governmental organizations, and that at all material times, he was aware that the 1<sup>st</sup> Respondent engaged 22 Public Officers, the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties among them, to operationalize



- the Anti- Female Genital Mutilation Board, following the passage of the [\*Prohibition of Female Genital Mutilation Act\*](#), 2012.
2. The 1<sup>st</sup> Respondent is a Semi-Autonomous Government Agency, tasked with the Administration of the Female Genital Mutilation Act.
  3. The 2<sup>nd</sup> Respondent is an Advisory Body, advising the Government on the administration of State Corporations.
  4. The 1<sup>st</sup> Interested Party is a Constitutional Commission, empowered to regularly set and revise the benefits of State Officers, and to advise National and County Governments on the remuneration and benefits of all other Public Officers.
  5. The dispute revolves around the salaries payable to the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, once they were seconded from the various Ministries, to the newly established 1<sup>st</sup> Respondent.
  6. The Petitioner submits that the 1<sup>st</sup> Interested Party, approved a salary structure for the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, on 6<sup>th</sup> August 2015.
  7. Rather than have adopted the salary structure as approved by the 1<sup>st</sup> Interested Party, the 2<sup>nd</sup> Respondent wrote to the Principal Secretary advising that the 22 seconded Public Officers, including 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, be paid 15% of their substantive basic salary.
  8. It was expected that by 31<sup>st</sup> May 2018, the 1<sup>st</sup> Respondent would have recruited its own staff, and the 22 seconded Public Officers would revert to their respective Ministries.
  9. The 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, through the Petitioner, allege that they were discriminated against. The CEO, the Acting Director Administration among others, were paid in accordance with the salary structure approved by the 1<sup>st</sup> Interested Party. The 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties were paid at the rate recommended by the 2<sup>nd</sup> Respondent- 15% of the basic salary. This was despite the Board having set aside a sum of Kshs. 17 million for staff remuneration.
  10. There were consultations between the Seconded Staff and the Board, where it was recommended that, the seconded Staff are accorded equal treatment with their colleagues. The CEO wrote to the Principal Secretary asking for funds to cater for personnel emoluments. The Principal Secretary wrote to her colleagues in the Treasury asking for funds. The Treasury Principal Secretary advised that it was not feasible to avail the funds, because preparations for Supplementary Budget had already been concluded.
  11. The affected seconded staff, anonymously sought the intervention of the Commission on Administrative Justice. The Commission investigated the matter, and concluded that the seconded staff had been treated in an unlawful, unfair and discriminatory manner. It was recommended that the 1<sup>st</sup> Respondent should reconsider its decision, and pay the affected Employees the difference in their remuneration, based on the Board's approved salary structure for the duration of their deployment.
  12. The 1<sup>st</sup> Respondent was unmoved.
  13. The Petitioner submits that the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties' constitutional rights under various Articles, particularly articles 27 and 41 have been violated. They were treated in a discriminatory manner, denied equality and fair remuneration. The Petitioner invokes section 4 of the [\*Fair Administrative Action Act\*](#), which demands that any administrative action is lawful, reasonable and procedurally fair; and, sections 5 and 17 of the [\*Employment Act\*](#) respectively, outlawing discrimination at the workplace, and requiring Employers to pay their Employees entire salary earned.



14. It is proposed that the court grants the following orders: -
  - I. Declaration that the withholding by the 1<sup>st</sup> Respondent, of the deployed Officers' salaries since 2015, to the date of termination, is unfair and unlawful.
  - II. The Respondents are compelled to pay the withheld salaries.
  - III. Declaration that the Respondents violated the deployed Officers' rights to fair labour practices.
  - IV. Declaration that the Respondents jointly and severally breached the constitutional and statutory rights of the deployed Officers, under articles 27, 41 and 236 of *the Constitution* read together with the *Fair Administrative Action Act*.
  - V. Declaration that variation of the deployed Officers' salaries is unfair and in violation of their fundamental rights.
  - VI. The deployed Officers are paid general damages for breach of contract.
  - VII. Aggravated and exemplary damages.
  - VIII. Any other suitable remedy.
  - IX. Costs be in the cause.
15. Bernadette Loloju, Chief Executive Officer of the 1<sup>st</sup> Respondent, swore an Affidavit responding to the Petition, on July 20, 2021.
16. She explains that the 1<sup>st</sup> Respondent was established in December 2013, following the enactment of the *Prohibition of Female Genital Mutilation Act*, 2011. Sometime in 2014, staff were deployed from various Ministries, to help in setting up of the Board. They continued to be paid salaries by their respective Ministries.
17. In 2018, the 1<sup>st</sup> Respondent wrote to the 2<sup>nd</sup> Respondent, seeking advice on payment of top-up allowance, to be paid to the deployed staff, for the duration of their deployment. The 2<sup>nd</sup> Respondent recommended payment of 15% of the substantive salaries. The 1<sup>st</sup> Respondent Board approved this. Its Human Resource and Accounts Divisions, prepared detailed schedule of payment. Between May 29, 2018 and May 30, 2018, deployed staff received their payments in accordance with the approved schedule. The 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties were among the recipients. It is the position of the 1<sup>st</sup> Respondent therefore, that the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, are not entitled to further payments. The Petition is made in bad faith.
18. It was agreed by the parties that the petition is considered and determined on the strength of the record.
19. The issues, as broadly understood by the court, are whether the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties were treated in a discriminatory way by the 1<sup>st</sup> Respondent; and whether they are entitled to the various remedies sought.

**The Court Finds: -**

20. Thankfully, there is a Determination made by the Commission on Administrative Justice [Office of the Ombudsman] in Inquiry File CAJ / FGM/ O12/ 423/ 2018, on the issues in dispute in this Petition.
21. In *Kenya Vision 2030 Delivery Board v. Commission on Administrative Justice & 2 others* [2021] e-KLR, the Supreme Court held that recommendations of the Commission on Administrative Justice



can only be binding if specifically provided for in law. It was held that the Commission cannot usurp the role of this Court in employment and labour relations matters.

22. This court [E&LRC] however, does not think it should ignore the investigations, findings and recommendations of the Commission on Administrative Justice relating to this dispute. The Court and the Commission are involved in administration of various forms of justice, requiring cooperation and comity. There should be no wastage of public resources by state institutions, in administration of the same justice. The court should not conduct an elaborate and separate trial of facts which have already been established, by another reputable state institution in the justice sector. The main Parties in this Petition appeared before the Commission and presented their positions. The investigations, findings and recommendation of the Commission have not been faulted by any of the Parties. They have not been challenged. The 1<sup>st</sup> Respondent's CEO Bernadette Loloju, said nothing in her Affidavit, on the investigations, findings and recommendations of the Commission on Administrative Justice. Should the dispute be prolonged in the courts, while the findings and recommendations of the Commission remain in place? Should not the Parties have taken these findings and recommendations as a guide for settlement out of court?
23. The highlights in the findings of the Commission include the following: -There was a surprising contrast in the manner in which the 1<sup>st</sup> Respondent dealt with the remuneration of 4 Employees vis-à-vis the complainants [including 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties]. The 1<sup>st</sup> Respondent followed the advice of the 2<sup>nd</sup> Respondent in dealing with the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties and their colleagues, while applying the salary structure approved by the 1<sup>st</sup> Interested Party, in dealing with the 4 Employees. There was no basis for making distinction between the 2 groups of Employees. The 1<sup>st</sup> Respondent's explanation that the 4 Employees were carrying out special functions, was neither here, nor there, as all Employees had been seconded from various Ministries and were assigned substantive duties. The 1<sup>st</sup> Respondent's explanation that it could not implement the salary structure approved by the 1<sup>st</sup> Interested Party, before Human Resource Instruments were in place, was hollow, as the same structure had been implemented with regard to 4 Employees. Even after the Human Resource Instruments were approved, the 1<sup>st</sup> Respondent did not pay the aggrieved staff in accordance with the salary structure approved by the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Respondent was deliberate in paying the 4 Employees in accordance with the 1<sup>st</sup> Interested Party's salary structure, while subjecting the rest to the Advisory from the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent ignored Guidelines on Secondment in the Public Service, by failing to remunerate the aggrieved Employees and formalize secondment. The aggrieved Employees continued to be paid by their respective Ministries, and the 1<sup>st</sup> Respondent only attempted to remunerate the aggrieved Employees, when it was about to recruit its own staff. The 1<sup>st</sup> Respondent acted in an unfair and discriminatory manner in the remuneration of deployed Employees. The 1<sup>st</sup> Respondent acted in an unlawful and unjust manner against the deployed Employees.
24. The Commission therefore recommended that the 1<sup>st</sup> Respondent should reconsider its decision on the payment of its Employees, and pay affected deployed Employees the difference of their remuneration based on the Board's approved salary structure for the duration of their deployment.
25. The court adopts the above findings. It is unfortunate that the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Interested Party took different positions on remuneration of the deployed Officers. The 2<sup>nd</sup> Respondent is mandated under Section 27 [1] [c] of the *State Corporations Act*, where necessary to advise the Government on among other issues, secondment of Public Officers to State Corporations, and the terms and conditions of such secondment. It is however, the constitutional mandate of the 1<sup>st</sup> Interested Party, under article 230 [4] [b] of *the Constitution*, to advise the National and County



Governments, on the remuneration and benefits of all other Public Officers. section 27[1][c] of the State Corporations Act, appears inconsistent, with article 230[4][b] of the Constitution.

26. The salary structure approved by the 1<sup>st</sup> Interested Party should have prevailed over the advice given by the 2<sup>nd</sup> Respondent. The aggrieved Employees were all Public Officers, on secondment from various Ministries. There should have been no advice offered by the 2<sup>nd</sup> Respondent, because it was not necessary. The State Corporations Act only requires such advice is given, where necessary. The 1<sup>st</sup> Interested Party had given its endorsement of the salary structure applicable to the deployed staff, and the 2<sup>nd</sup> Respondent should have deferred to the constitutional mandate of the 1<sup>st</sup> Interested Party.

27. Some of the prayers in the Petition are repeated. The orders made below shall suffice.

**It Is Ordered: -**

- a. The findings of the Commission on Administrative Justice in its Inquiry File FGM/012/423/2018, are adopted as the findings of this Court.
- b. It is declared that the 1<sup>st</sup> respondent violated the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties' constitutional and statutory rights under articles 27, 41 and 236 of the Constitution, section 4 of the Fair Administrative Action Act and Section 5 of the Employment Act.
- c. The 1<sup>st</sup> Respondent shall pay to the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, the difference between the salaries paid in accordance with the 2<sup>nd</sup> Respondent's Advisory, and those that should have been paid in accordance with the salary structure approved by the 1<sup>st</sup> Interested Party over the period of deployment.
- d. The 1<sup>st</sup> Respondent shall pay each of the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, general damages at Kshs. 300,000, for violations of the constitutional and statutory rights identified above.
- e. Costs to the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties, to be paid by the 1<sup>st</sup> Respondent.
- f. Interest allowed at court rates, from the date of Judgment till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.**

**JAMES RIKA**

**JUDGE**

