



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**

**PETITION NO. 122 OF 2020**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION & 44 OTHERS....PETITIONERS**

**VERSUS**

**THE CABINET SECRETARY MINISTRY OF HEALTH & 6 OTHERS.....RESPONDENTS**

**RULING**

1. The Petitioners/Applicants seek through the Notice of Motion application dated 4<sup>th</sup> August 2020 for orders that:

i. Spent

ii. The Petition herein be heard and determined on priority basis.

iii. Pending the hearing and determination of this Petition, a mandatory injunction does issue to compel the 4<sup>th</sup> and 5<sup>th</sup> Respondents members to conduct trainings, prepare information charts and regularly circulate safety/health information to its employees with respect to COVID-19 and to provide health and safety materials at the work place such as protective equipment, sanitizers, gloves and masks for use by employees at no costs.

iv. Pending the hearing and determination of the Petition, the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents in partnership with the Director of Occupational Health and Safety be ordered to provide adequate training, sensitization on Staying Safe Wellness programs and to support the security guards with skill-training through a multi-stakeholder partnership to ensure responsive health action amidst the pandemic.

v. Pending the hearing and determination of the Petition, the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> Respondents be directed to dialogue with the Petitioners on the measures being undertaken to mitigate the COVID-19 effects which have an impact on their terms and conditions of employment, and thereafter be directed to submit a report to this Honourable court.

vi. Pending the hearing and determination of this Application *inter partes*, the Respondents, its agents and or servants be and are hereby restrained from terminating, suspending, victimising, harassing, coercing and/or discriminating and/or taking any adverse actions against the 2<sup>nd</sup> to 45<sup>th</sup> Petitioners.

vii. Pending the hearing and determination of this application the 5<sup>th</sup> and 6<sup>th</sup> Respondents be directed to ensure that their members do comply with the set minimum wages under the guidance of the 7<sup>th</sup> Respondent and interested parties to afford protection of all workers in the private security industry, taking into account the economic factors.

viii. The cost of this application be borne by the Respondents.

2. The Application is premised on the grounds that the private security industry received a last minute go-ahead on 26<sup>th</sup> March 2020 to continue operating essential services. That the security sector is three times the size of Police Officers and thus a major driver of employment across the counties. That the security guards are expected to assist in community and Government efforts of combating the COVID-19 pandemic and that the longer the pandemic continues, the clearer it is that Security Guards do not have the rights and protection they need and deserve. That as per the interim guidelines on Management of COVID-19, the 1<sup>st</sup> Respondent is required to provide PPE to staff according to risk categories and further recommended to provide surgical masks, gloves and gown for the non-health care staff like the security personnel. That during this period, businesses are legally required to pay workers for work done and must continue to meet the contractual obligations and pay the new minimum wage and that any changes in contracted rate or working hours must first be discussed and agreed with the employees and or their union. That the Respondents have not met the terms of the memorandum of understanding between

the tripartite social partners of the Ministry of Labour, COTU and FKE on Government intervention, safety and health at the work place and training of guards on COVID-19 as pleaded in the application. That the Government is yet to implement fiscal and monetary stimulus measures aimed at stabilizing livelihoods and incomes as well as safeguarding business continuity. Further, most security firms under the 6<sup>th</sup> Respondent association have not adhered to the minimum wage levels retained under Legal Notice 2, on Regulation of Wages (General) (Amendment) Order, 2018.

3. That security guards have not been accorded their basic rights to safety standards, additional compensation and access to affordable health care and the Petitioners believe that the Respondents' action is unconstitutional and violates the right to equality and freedom from discrimination under Article 27 of the Constitution, 2010. That lack of these protections is due to structural discrimination which has disproportionately disadvantaged low wage workers and left them and their families more vulnerable to the COVID-19 infection and death. That the 2<sup>nd</sup> Interested party asserts that it is the obligation of the employer to ensure the safety of their staff in terms of undertaking a proper risk assessment and implementing the necessary measures. The National Secretary General of the 1<sup>st</sup> Petitioner, Isaac Andabwa, swore an affidavit in support of the Motion averring that security workers all over the country have been given additional roles as health workers without prior training and which calls upon the Respondents to consider the security workers when planning for allowances.

4. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 2<sup>nd</sup> October 2020 by the Permanent Secretary, Ministry of Health, Susan Mochache. She avers that the Ministry of Health is statutorily responsible for development of health policies, laws and administrative procedures and programmes in consultation with County Governments, health sector stakeholders and the public, for the progressive realization of the highest attainable standards of health including the right to emergency treatment. That the Salaries and Remuneration Commission thus convened a meeting on 27<sup>th</sup> and 28<sup>th</sup> April 2020 in recognition of the need to develop a package to cushion frontline health workers and agreed that the staff eligible for payment of the allowance would only be the frontline health workers directly involved in fighting the COVID-19 pandemic. That the said Frontline Health Workers for COVID-19 would include those managing patients in health facilities; managing quarantine centres; conducting surveillance and contact tracing; managing mortuary services; undertaking lab diagnosis; and or directly in contact with the COVID-19 patients for example through cleaning of the wards and providing meals. That based on the eligibility criteria, the Petitioners do not fall in the category of frontline health workers and are hence not eligible for payment of the COVID-19 Emergency Allowance. That in view of the foregoing, the Application herein lacks merit and should be dismissed with costs to the 1<sup>st</sup> Respondent.

5. The application was to be disposed of by way of submissions and the 1<sup>st</sup> to 4<sup>th</sup> Respondents submitted that the term 'essential service' is defined under Section 81 of the Labour Relations Act, 2007 to mean a service the interruption of which endangers the life of a person or health of the population. That the 4<sup>th</sup> Schedule of the Act lists the essential service providers to be:

- i. Water supply services
- ii. Hospital services
- iii. Fire Services of the Government/ Public institutions
- iv. Air Traffic Control and Civil Aviation Telecommunication services
- v. Posts Authority and Local Government Authorities
- vi. Ferry Services

6. That this list is tenable to amendment under Section 81(2) of the Labour Relations Act and that subsection (5) further provides that a collective agreement may provide that any service may be deemed to be an essential service. That until the provided procedures set under the Act are amended, the law does not recognize private security guards as essential service providers.

7. The 1<sup>st</sup> – 4<sup>th</sup> Respondents submit that pursuant to Section 36 of the Public Health Act, the Minister of health must put measures whenever any part of Kenya appears to be threatened by any formidable, endemic or infectious disease and which was adhered to through the meeting called by the Salaries Remuneration Commission. They further submit that the award and payment of any allowance must be based on availability of funds and take into account potential ripple effect arising therefrom and its cost implications. That most low-wage workers and not just the Petitioners have been adversely affected by the pandemic and that there was no form of discrimination in the award and payment of allowances as the most eligible were considered. It was submitted that the 1<sup>st</sup> – 4<sup>th</sup> Respondents acted within the scope of their mandate and did not transgress their constitutional limits or statutory powers and that the matter does not therefore call for this Honourable Court's intervention. They rely on the case of **Asif Hameed & Others v State of Jammu & Kashmir & Others (1989) AIR SRC (3)19** where the Supreme Court of India observed that:

“The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of Legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers. These matters need to be adequately addressed albeit by the appropriate organs, being the Executive and Legislature in the first instance and only by the courts in the event of specific transgression that require specific and appropriate judicial redress.”

8. The security guards we all encounter each day represented by the Petitioners are significantly at risk granted the ravages of the global pandemic that is Covid-19. They do not appear on the list of essential service providers but in my considered view ought to be so included as they are critical in security of installations, premises such as offices, factories, courts and residences. They are the ones at the front end of the attack by Covid-19 because they encounter and interact with people of all walks of life. They deal with doctors, nurses, fire fighters, coxswains, pilots, air traffic controllers, secretaries, farmers, teachers, drivers and every imaginable profession yet they are not included in

the list of essential service providers. This is wrong. Does this therefore mean they are entitled to the COVID-19 Emergency Allowance? In my considered view, despite the fact that these Petitioners and their members play a very critical role and ought to be included in the list of essential service providers much the same way lawyers were included, they do not qualify for the COVID-19 Emergency Allowance. This allowance is for those frontline health workers directly involved in fighting the COVID-19 pandemic and of necessity includes those managing patients in health care facilities, those managing quarantine centres, those conducting surveillance and contact tracing, those managing mortuary services, those undertaking lab diagnosis and/or directly in contact with the COVID-19 patients for example through cleaning of the wards and providing meals etc. The Petitioners and their members therefore are not entitled to this allowance. The other limb of the application was the provision of PPE. In the present circumstances, it would be cumbersome to lump the Government with an additional expense because as the COVID-19 mishandling of donations of PPE has shown, as well as the rampant misuse of resources, we cannot trust the Government to do right always as far as this disease is concerned. Corruption is playing its part and even if I ordered the Government to provide PPEs to Security Guards it would most probably not be done or would be an avenue for someone to get rich quick at the expense of the people of Kenya. While I have considerable sympathy for the Security Guards who are represented by the Petitioners it seems like the rest of us we are quite on our own given what transpired last year regarding donations of PPE to the Government. In the premises I will decline to grant any interim relief in respect of the prayers by the Petitioners and will give directions on the disposal of the Petition hereafter. Application dismissed but each party to bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2021**

**NZIOKI WA MAKAU**

**JUDGE**