



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.....PETITIONER

VERSUS

CABINET SECRETARY,

MINISTRY OF HEALTH & 6 OTHERS.....RESPONDENTS

AND

CENTRAL ORGANISATION OF TRADE UNIONS

(COTU) & ANOTHER.....INTERESTED PARTIES

JUDGMENT

1. The Petitioners filed the Petition dated 4th August 2020 seeking a myriad of declaratory orders in favour of private security workers, in the wake of the global pandemic that is Covid-19. The Petition is filed under Article 27 of the Constitution of Kenya with the purpose of enforcing the right to non-discrimination and the Petitioners also cite Articles 2, 3, 10 and 28 of the Constitution in support of their Petition. The Petitioners aver that whereas guards have been gazetted as essential services providers, they have been excluded from getting all the allowances set aside for those helping the Government fight Covid-19. The Petitioners aver that they have unreasonably and arbitrarily been denied their entitlement of the emergency allowance yet they are tasked with checking temperatures for those gaining entry into every institution. They assert that they lack the basic commodities for protection due to structural discrimination and which leaves them and their families more vulnerable to Covid-19 infection and death with structural discrimination in this context referring to ways in which policies are used to advantage those in power, while disadvantaging powerless workers. They further aver that as the Covid-19 pandemic continues, Security Guards are still reporting to their job sites and risking their personal health and that overlooking them will soon harm the public health and economy. The Petitioners aver that the pandemic has spurred an enormous demand for security officers, expanding their job description to include temperature checks, grocery store, crowd control and at times even required to remove bodies from hospitals. The Petitioners aver that training guards has been a challenge and the Respondents in collaboration with employers' and workers' organization must thus look into their critical needs which include: raising awareness on safe work practices; free provision of personal protective equipment i.e. soap for hand washing, access to public health services, and alternative livelihood. The National Secretary General of the 1st Petitioner, Mr. Isaac Andabwa, swore an affidavit in support of the Petition. He swore on behalf of the 1st Petitioner and also on behalf of the 2nd to 45th Petitioners. He avers that the Petitioners suggest targeted legal and policy measures that should be immediately addressed to protect vulnerable workers' needs during this pandemic.

2. In response to the Petition, the 1st Respondent filed a Replying Affidavit sworn on 2nd October 2020 by the Permanent Secretary, Ministry of Health Ms. Susan Mochache. She avers that under Section 15 of the Health Act, the Ministry of Health is 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. She deponed that in recognition of the need to develop a package to cushion frontline health workers, the Salaries & Remuneration Commission convened a meeting on 27th and 28th April 2020 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 i.e. 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. She further avers that the eligibility criteria, categorization of eligible cadres and rates of allowance was arrived at after considering the roles of each cadre of workers in the health sector in the fight against Covid-19 and guidance on funding by the National Treasury and Planning. She deponed that based on the eligibility criteria, the Petitioners do not fall in the category of frontline health workers and hence not eligible for payment of the Covid-19 Emergency Allowance and that the award and payment of any allowance

must be based on availability of funds, consider potential ripple effect arising therefrom and the cost implications. She asserts that the Petition is frivolous as it discloses no justifiable cause to warrant intervention by this Honourable Court against the 1st Respondent. Further, the Petition being generally argumentative disentitles the Petitioners from the relief sought and should thus be dismissed with costs to the 1st Respondent.

3. The Petitioners submit that the Constitution of Kenya and other Regional and International instruments recognise the right to good health. The Petitioners submit that Article 43(1)(a) of the Constitution provides that to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. The Petitioners submit that Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for recognition of the right for everyone to the enjoyment of the highest attainable standard of physical and mental health. The Petitioners submit that Article 16 of the African Charter on Human and People's Rights (The Banjul Charter) states that: **"Every individual shall have the right to enjoy the best attainable state of physical and mental health"** and further obligates State parties to take the necessary measures to protect the health of their people and to ensure they receive medical attention when they are sick. The Petitioners submit that their dignity needs to be respected and protected as provided for under Article 28 of the Constitution. The Petitioners submit that the Court in the case of **JOO (also known as JM) v Attorney General & 6 Others [2018] eKLR** relied on the South African case of **S v Makwanyane & Another (CCT3/94)(1995) ZACC 3** where the South African Constitutional Court observed that the right to dignity is an acknowledgement that human beings are entitled to be treated as worthy of respect and concern and is therefore the foundation of many other rights specifically entrenched in the Constitution. The Petitioners submit that this Honourable Court is empowered by Article 23(3) of the Constitution to grant various remedies including a declaration of rights and an order for compensation, where there is denial, violation and infringement of the rights of an individual. The Petitioners submit that their rights to dignity and proper health care were infringed and that the pandemic being a national disaster, the Respondents ought to have engaged and facilitated them, without exposing them to the eminent danger. They submit that this Court should thus grant the orders sought and award damages to the Petitioners since they have demonstrated that their rights have indeed been violated and infringed.

4. The 1st to 4th Respondents submit that the term 'essential service' is defined under Section 81 of the Labour Relations Act of 2007 to be a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population. The 1st to 4th Respondents submit that the 4th Schedule of the Act further lists the essential service providers and which list can be amended by the Cabinet Secretary after consultation with the Board as under Section 81(2) of the Act. The 1st to 4th Respondents' submit that subsection (5) provides that a collective agreement may provide for any service to be deemed to be an essential service. It is their submission that until the provided procedures are followed and the list of essential services subsequently amended, the law does recognize private security guards as essential service providers. The 1st to 4th Respondents submit that they acted within the scope of their mandate and did not transgress their constitutional limits or statutory powers and that therefore the Petitioners are not entitled to the reliefs sought. To this end they rely on the case of **Asif Hameed & Others vs State of Jammu & Kashmir & Others (1989) AIR SRC (3) 19** where the Supreme Court of India observed as follows:

"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."

The 1st to 4th Respondents thus urge the denial of the orders and declarations sought by the Petitioner.

5. The fundamental question that falls for determination is whether the Petitioners rights have been infringed upon by virtue of the exclusion from the receipt of the emergency funds for frontline workers. The Cabinet Secretary for Health through the Permanent Secretary in the Ministry of Health asserts that the Petitioners are not frontline workers qualified to receive the allowances as they do not provide an essential service. The term 'essential service' is defined under Section 81 of the Labour Relations Act of 2007 to be **a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population**. Whereas the Petitioners are at the frontline of the fight against the Covid-19 pandemic by screening people wishing to access the various premises countrywide, they are not essential service providers. The Ministry of Health is responsible per Section 15 of the Health Act for the development of health policies, laws and administrative procedures and programmes in consultation with County Governments, health sector stakeholders and the general public, for the progressive realization of the highest attainable standards of health including the right to emergency treatment. The Court is alive to the salutary provisions of Article 16 of the African Charter on Human and People's Rights (The Banjul Charter) which makes provision that: **"Every individual shall have the right to enjoy the best attainable state of physical and mental health"**. The Banjul Charter additionally obligates State Parties to take the necessary measures to protect the health of their people and to ensure they receive medical attention when they are sick. There is additional protection provided under Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides for recognition of the right for everyone to the enjoyment of the highest attainable standard of physical and mental health. The Petitioners like every citizen or resident/visitor to the Republic of Kenya is entitled to the highest standards of medical care in keeping with the obligations of Kenya as far as health of its citizens is concerned. Whereas the Petitioners are at the frontline of the fight against the Covid-19 pandemic by screening people wishing to access the various premises countrywide, they are not essential service providers and as such, the exclusion of the Petitioners and the thousands of Security officers manning many establishments and providing security to people and property are not entitled to the allowance. The Petition is dismissed however, considering the litigation is by public spirited individuals who are seeking the enforcement of a right under the Constitution and given the critical role they play alongside other actors in the security sector I will not make any order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE