



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 136 OF 2016

COUNTY SECRETARY OF UASIN GISHU & OTHERS....CLAIMANT

VERSUS

SALARIES & REMUNERATION COMMISSION.....RESPONDENT

AND

COUNCIL OF GOVERNORS.....INTERESTED PARTY

JUDGEMENT

1. By a petition dated 10th November, 2016 the petitioners sought orders among others that:

- a. A declaration that the Petitioners' constitutional right to a fair trial as guaranteed by Articles 25 (c) and 50 (1) & (2) (d) of the Constitution has been violated by the Respondent.
- b. A declaration that the Petitioners' constitutional right to equality and freedom from discrimination as guaranteed by Article 27 (1), (2), & (5) of the constitution has been violated by the Respondent;
- c. A declaration that the Petitioners' constitutional right to fair Labour Relations as guaranteed by Article 41 (1), [2] (b) of the constitution has been violated by the Respondent.
- d. A declaration that the Petitioners' constitutional right to fair administrative action as guaranteed by Article 47(1) & (2) of the Constitution has been violated by 1st to 7th Respondents.
- e. A declaration that the Petitioners be compensated a total sum of one million Kenya shillings (Kshs. 1,000,000.00) each or any other amount that the court deems sufficient and/or appropriate by the Respondents for violating the Petitioners' constitutional rights;
- f. A permanent injunction do and is hereby issued restraining the Respondent, its representatives, employees, servants and/or agents or anybody working under or for it from releasing, circulating or in any way publishing final job evaluation results report on the counties.

2. The facts upon which the petition was based was stated by the petitioners as follows:

- Section 15 of the sixth schedule of the constitution obligated the parliament to enact a law which makes provision for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under article 185.
- Pursuant to this provision, parliament enacted the Transition to Devolved Government Act which established the Transition Authority under Section 4 thereof.
- The functions of the Transition Authority were provided for under section 7 thereof which included, amongst other functions to make recommendations for the effective management of assets of the national and county governments and to advise on the effective and efficient rationalization and deployment of the human resource to either level of government
- Pursuant to its mandates, the Transition Authority undertook a job description and specifications for selected county officers and

proposed their remunerations to which it proposed a scale of Kshs. 152,060 to 302,980 per month, house allowance of Kshs. 70,000 and commuter allowance of Kshs. 24,000 per month for a County Secretary, a remuneration equivalent to a public officer in Job Group T.

- Indeed counties advertised for positions of county secretaries under Job Group T.
- Applicants applied for these jobs on understanding that they were to be retained[^] under the terms of Job Group T if they were successful.
- Indeed the successful applicants signed contracts with the counties on Job Group T as terms of engagement.
- The Permanent Secretary in the ministry of state for public service way back on 10th April, 2007 issued a secular on harmonization of allowances applicable to job group T to which he directed that officers in Job Group T shall be entitled to Kshs. 65,000 Entertainment Allowance, Kshs. 60,000 Extraneous Allowance and Kshs. 15,000 Domestic Allowance.
- In a letter/circular dated 29th July, 2013 to governors, the Respondent ignored the advice given by the Transition Authority for remuneration of County Secretaries and purported to advise that the County Secretaries be paid Kshs. 135,000 to Kshs. 180,000 as basic salary, Kshs. 70,000 as House Allowance and Kshs. 20,000 to Kshs. 50,000 as other allowances.
- In another unilateral letter/circular dated 31st July, 2014 to all the county secretaries copied to chairpersons and secretaries to County Public Service Boards, the Respondent purported to review further the salaries of the county secretaries and consolidated their salaries to range between consolidated gross figure of Kshs. 225,000 to Kshs. 300,000 wherein the basic salary is expressed to be 60% of the monthly remuneration package while 40% of the same is consolidated allowances. It is noteworthy that County Secretaries are Public Officers as opposed to State Officers to be paid a consolidated amount.
- Members of the same Job Group in the public service however earn a salary of between Kshs. 396,600 to Kshs. 547,540.
- In a letter dated 29th August, 2016 to the Chief Executive Officer of Respondent, the applicants through their secretary requested the Respondent to harmonize their salaries with other public servants as obligated under part III of the Human Resource Policies and Procedure Manual for public service.
- In a shocking letter dated 23rd September, 2016 to the applicants, the respondent asserted that the applicants are in Job Group S as opposed to Job Group T. the basis was a letter/ circular dated 18th December, 2014 where the Respondent purported to re-designate the County Secretaries in Civil Service Job Group "S" equivalent.
- The functions of the respondent in respect of public servants is provided for under article 230 (4) (b) and section 7 of the Salaries and Remuneration Act as "advise the national and county governments on the remuneration and benefits of all other public officers".
- The role of the respondent is thus only advisory, and thus lacks the power to re-designate the job group of a public servant. The said purported re-designation of the County Secretaries from job group T to job group S is thus manifestly illegal.
- Article 236 (b) of the constitution further protects Public Officers from demotion in rank without due process of the law. The actions of the respondent also violate the applicants' right to fair labour relations protected under article 41 (1) (2) (a) & (b).
- Even if the Respondent had the powers to re-designate the job groups of a public servants, it would be catastrophic if the County Secretaries were to be reduced to the Job Group S which is the same Job Group as Chief Officers. It is like the Head of Public Service being in the same Job Group as Permanent Secretaries. It would totally break the chain of command and create anarchy in the Counties as there would be no head to lead from the top. This would paralyze the operations of the Counties.

3. The respondent filed a replying affidavit in opposition to the petition through Anne Gitau and stated in the main that:

- I am the Commission Secretary to the Respondent herein and well versed with the facts of this case. I have been authorized by the Respondent to swear this Affidavit on its behalf and therefore competent to swear this affidavit.
- The Respondent is a Constitutional Commission established by Article 230 of the Constitution whose mandate is to set and regularly review the remuneration and benefits of all state officers and to advise the national and county governments on the remuneration and benefits of all other public officers.
- In addition, Section 11 of the Salaries and Remuneration Act, 2011 provides for additional functions of the 1st Respondent to include;
 - a. Inquire into and determine the salaries and remuneration to be paid out of public funds to State officers and other public officers;
 - b. Keep under review all matters relating to the salaries and remuneration of public officers;
 - c. Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction

and retention of requisite skills in the public sector;

d. Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;

e. Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;

f. Make recommendations on matters relating to the salary and remuneration of a particular State or public officer;

· In performing the above functions, the Respondent must be guided by the principles set out in Article 230(5) of the Constitution, including:

a. the need to ensure that total public compensation bill is fiscally sustainable,

b. the need to ensure public services attract and retain the skills required to execute their functions and

c. transparency and fairness.

· While the defunct Transitional Authority (TA) was established to facilitate a smooth transition to devolved governance, its mandate was subject to the advice of the Respondent on remuneration and benefits for offices in the county governments.

· The Respondent released a Circular Ref. No. SRC/TS/CGOVT/3/16 on 'Remuneration and Benefit of Public Servants Serving in the County Government' dated 29th July, 2013, whose effective date was 1st May 2013. The Circular adopted a new grading structure after the job evaluation had been conducted for the Applicants/ Petitioners.

· The Circular did not give job groups to the positions advised on, including that of County Secretary, the Applicant/ Petitioner herein. The County grading structure is not the same as that of the Central Government. State Officers also have a distinct structure from the Central Government.

· From this, it is clear that the Applicants/Petitioners have been treated the same way as state officers in terms of grading structure. Therefore, they have not been discriminated against.

· The Respondent undertook a review of allowances in the public service and identified disparities in some allowances. The Respondent then advised the government on the harmonization of the allowances including some for the position County Secretary.

· Following this communication on the allowances payable there was a lot of back and forth communication between the applicant and respondent on exactly where they lay in terms of the allowances payable to them.

· To avoid confusion and lengthy individual correspondence which the Applicants/ Petitioners members were engaging in with the Respondent, assigned them an equivalent job group as that in the Central Government for the purposes of paying certain allowances.

· The Respondent has not designated positions in terms of job groups while providing advice save that for the purposes of payment of the following allowances: Hardship Allowance and Subsistence Allowance for foreign and domestic travel. Indeed the Applicant /Petitioners are being paid House allowance of Kshs. 70, 000 and not the Kshs. 60,000 they would be paid at 'S' or the Ksh. 80,000 they would be paid at ' T'.

· The Respondent in the Corrigendum on the Circular for Review of Allowances in the Public Service dated 18th December 2014 gave equivalent grades for state officers and other designated public officers, to be used while paying the concerned officers the allowances as enumerated hereinabove.

· The position of County Secretary was established after the promulgation of the Kenya Constitution 2010, which vests the Respondent with the exclusive mandate of advising on remuneration and benefits for the position.

The circular from the former Ministry of State of Public Service Ref. No. DPM/38/1/1A on 'Harmonization of Allowances Applicable to Job Group T' dated 10th April 2007 does not apply to the position of County Secretary, which at the time of issuing the circular was not in existence. The Respondent has never designated the position of County Secretary in Job Group 'T' but only gave a grading structure.

· The Respondent in discharge of its mandate advised on the remuneration and benefits for the position of County Secretary by Circular Ref. No. SRC/TS/CGOVT/3/16 dated 29th July, 2013.

· The Respondent's advice superseded all other salary structures in existence or advice given prior to the circular pursuant to Article 259 (11) of the Constitution of Kenya 2010.

· The Respondent has not classified any position in the counties in job groups or designated County Secretaries to any job group. The circular Ref. No. SRC/ADM/CIR/1/13/ Vol. III (127) dated 18th December, 2014 titled 'Corrigendum on the Circular for the

Review of Allowances in the Public Sector only compared County Secretaries to Civil Service Job Group 'S' for purposes of implementing the advice on allowances as communicated vide its Circular Ref. No. SRC/ADM/CIR/1/13/Vol.III (126) dated 10th December, 2014.

- The Respondent deliberated on the issues raised by the Applicants in their letter dated 29th August, 2016 requesting the Respondent to harmonize their allowances with those of public officers in Job Group 'T' in the National Government and responded appropriately vide its letter Ref. No. SRC/TS/CG/BA/3/61 dated 23rd September 2016.

- The Respondent did not re-designate the position of County Secretary, but only compared the position to one in the Civil Service for purposes of payment of specified allowances. This does not amount to a demotion as alleged the Applicants/Respondents or a reduction in their remuneration and benefits. Indeed the Applicant/ Petitioner is seeking Promotion an increase in remuneration and benefits through the backdoor.

- The mandate of the Respondent is limited to advising on remuneration and benefits for the public officers. Recruitment is purely the responsibility of the County Public Service Board, and the Respondent did not compel any Board as alleged to advertise or recruit persons to the position of County Secretary at any job group. All the County Public Service Boards need to do is to comply with the Respondent's advice on the remuneration and benefits for the position.

- Further, any allegations that the Respondent has interfered with the Applicant's chain of command is totally baseless. The applicant/ Petitioner has the responsibility of placing its Officers in whichever grade it chooses to and if they have graded themselves below those they command , it is there responsibility.

- The Respondent has undertaken Job Evaluation in the Public Service including County Governments. The exercise involved the evaluation of 40,298 jobs in 228 institutions. Stakeholder involvement was key from the onset to ensure that every stakeholder understood the process and played their role. Data Collection for the assignment took six (6) months. Thereafter the evaluation process began. The job evaluation process involved the following nine steps:

- a. Stakeholder Sensitization
- b. Training of Job Analysis Teams (JATs);
- c. Administration of Job Analysis Questionnaires (JAQs);
- d. Validation of the JAQs;
- e. Development of Job Descriptions;
- f. Validation of Job Descriptions Manuals;
- g. Job Evaluation;
- h. Development of a Grading Structure
- i. Salary Survey and Development of a Salary structure

- Sensitization workshops were held for senior management in every institution. Training was undertaken for all those who were involved in the Job Evaluation exercise especially the Job Analysts, who coordinated the exercise in their respective institutions.

- Job holders in the Public Service participated by completing job analysis questionnaires that were used to develop job descriptions for the various positions. The job descriptions were compiled into job description manuals and validated by the respective institutions. These job description manuals formed the primary data that was used to evaluate each job.

- Job Evaluation was undertaken in all the 47 Counties by a consultant, PricewaterhouseCoopers. The County Secretaries participated in the Job Evaluation by filling Job Analysis Questionnaires for their positions, validated the questionnaires from which Job Descriptions for their position was developed. There was an interactive and participatory process in the finalization of the job description manuals in the counties after which the job description manuals were signed off for use in the job evaluation.

- The respondent in undertaking the job evaluation exercise did so within the law and with the full participation of the stakeholders and in doing so giving fulfillment to the spirit and the will of the people of Kenya to have sustainable development through equitable distribution of resources.

4. In support of the petition, Professor Tom Ojienda for the petitioner submitted that the guiding principles of the respondent as prescribed by the Salaries and Remuneration Commission Act under section 12 (2) recommended that the respondent takes into account the recommendation of previous commission's such as Transitional Authority (TA) to enquire into the matter of remuneration in public service. According to Counsel, the respondent in its circular dated 29th July, 2013 to governors ignored the advice by Transitional Authority for remuneration of County Secretaries and purported to advise that the County Secretaries be paid Kshs 135,000/= to Kshs 180,000/= as basic salary Kshs 70,000 as house allowance and Kshs 20,000/= to 50,000/= as other allowances.

5. The respondent further ignored the benefits attributable to members of Job Group T as advised in circular dated 10th April, 2007. The respondent also reviewed the salaries of the County Secretaries and consolidated their salaries to range between Kshs 225,000/= to Kshs 300,000/= wherein the salary was expressed to be 60% of the monthly remuneration package while 40% of the same was consolidated as allowances. Mr Ojienda further submitted that by a circular dated 18th December, 2014 the respondent ignored the advice of Transitional Authority and unilaterally and arbitrarily re-designated the petitioners to job group S.
6. Counsel further contended that the petitioners were public officers and therefore the role of the respondent in respect of remuneration was restricted to advisory as provided for under article 230 (4) (b) of the Constitution and Section 11 of the SRC Act. According to counsel, the respondent thus lacked the power to re-designate the job group of a public servant. Mr Ojienda further contended that the respondent lacked power in law to reformulate grading structures more so if the effect of such reformulation would be to reduce the benefits that the petitioners were entitled to under Job Group T.
7. The petitioners further submitted that as public servants, article 236(b) protected them from demotion in rank without due process of the law. The actions by the respondent further amounted to violation of the petitioners right to fair labour relations protected under article 41(1) (2) (a) and (b) of the constitution. Mr Ojienda further submitted that the process which led to the impugned re-designation of new job structures were arbitrary, non-participatory, opaque and did not follow due procedure.
8. In a letter dated 1st November, 2016 to all County Secretaries copied to chair persons and secretaries of County Public Service Boards, the respondent invited the petitioners to a meeting scheduled for 8th November, 2016 for presentation of the preliminary Job evaluation results to the counties by the respondent. The respondent expected contribution of the petitioners before the release of the final job evaluation on 11th November, 2016. The petitioners were never supplied with preliminary job evaluation results before 8th November, 2016 for them to study, understand and formulate recommendations of any. The respondent further refused to supply the preliminary job evaluation results or even read to the petitioners sections that affected them on 8th November, 2016 when they turned up for the meeting.
9. Concerning the contention that the petition was premature, counsel submitted that the assertion was misplaced since the respondent could not deliberately breach rules of procedure and violate the constitution in the process just because there would be another level of engagement according to counsel would be fruits from a poisonous tree and could never cure past irregularities.
10. The respondent on its part submitted that it ensured the petitioner enjoyed fair remuneration. According to the respondent, Annexure AG1 clearly demonstrated that an initial request was received from the Transitional Authority and the respondent in exercise of its constitutional mandated advised on initial remuneration and benefit structure for the petitioners. The petitioners were not in office at the time but exhaustive consultations were held between the respondents and representatives of the County Government. There were no job groups designated to the petitioners.
11. In getting the results, the petitioners were consulted every step of the way. Thereafter a comprehensive study on allowances was carried out to ensure harmony and standardization. A countrywide job evaluation was then launched by the president of Kenya and the process was concluded and results released in November, 2016. According to Counsel for the respondent, the job evaluation report which the petitioners sought to stop had been arrived at after an objection and inclusive process. It contained an appeal process for any one dissatisfied with the results. According to Wafula the respondent fulfilled the legal and statutory requirement for fair administrative action. If a party disagreed with the results of an administrative action this did not make the action unfair.
12. Mr Wafula further submitted that there was no designation, resignation or demotion of the petitioners from Job Group T to S. However even if such designation, re-designation or demotion took place this did not amount to a violation of fundamental rights or freedoms under article 47(2). According to Counsel, the petitioners had been treated in an acceptable manner and that there was no re-designation whatsoever. Mere reference was made to an equivalent grade for purposes of ease of application of rate of allowances and cogent reasons were given every time for the respondent's actions. On discrimination, Counsel submitted that the petitioners had not shown that they had been treated differently and that it would not be appropriate for the petitioners to be treated in a special manner from all other state or public officers.
13. The Transition Authority (TA) as was established under section 4 of the Transition to Devolved Government Act had as some of its objects to provide legal and institutional framework for coordinated transition to the devolved system of government while ensuring continuing delivery of services to citizens, provide for policy and operational mechanism during the transition period for audit, verification and transfer to national and county government of assets, liabilities, human resources, pension and other staff benefits of employees of the government and local authorities.
14. The Salaries and Remuneration Commission (SRC), the respondent herein is created under article 230 of the Constitution. Its main mandate under sub article (4) include setting and regularly reviewing the remuneration and benefits of all state officers and advise the national and county government on the remuneration and benefits of all other public officers. Both institutions that is the TA and SRC were created by the constitution to perform distinct functions within their mandate. Any matter concerning salaries, remuneration and benefits of state and public officers in National and County Governments is therefore within the exclusive mandate of the SRC.
15. The advice of SRC thereon is binding on both national and County Government functionaries. This was so held in the case of TSC Vs KNUST & 3 Others Civil Appeal No 196 of 2015 as per Odek JA. It was therefore erroneous on the part of the counsel for the petitioners to submit that the respondent wrongfully and or unlawfully ignored the advice of TA on the remuneration of County Secretaries.
16. The SRC by its letter dated 29th July, 2013 responding to a letter from TA dated 18th April, 2013 and 12th July, 2013 on remuneration and benefits for staff serving in the County Government informed TA that it deliberated on the package and held consultative meetings with stakeholders on the subject and approved among others that a County Secretary be paid a basic salary of Kshs 135,000/=, a house allowance of Kshs 70,000/= and other allowance of Kshs 20,000/= totaling to a remuneration package of Kshs 225,000/=. The SRC did not attach any public service equivalent job group to the remuneration package recommended to the TA.
17. The petitioners contended that pursuant to its mandate the TA undertook a job description and specification for selected county officers and purposed their remuneration at a scale of Kshs 152,060 to 302,980 per month, house allowance of Kshs 70,000/= and commuter

allowance of Kshs 24,000/= which remuneration was equivalent to a public officer in job group T. the petitioners however did not exhibit any evidence of any such undertaking by the TA and in any event as stated before herein, issues concerning salaries, remuneration and benefits of public officers are within the exclusive mandate of SRC such that if there was any such undertaking by the TA, it was subject to the binding advise of SRC which it gave vide its letter dated 29th July, 2013.

18. In the petition, the petitioners have sought among others a declaration that their constitutional right to fair trial as guaranteed under article 25 (c) and 50 (1) and (2) (d) have been violated and further that their right to equality and freedom from discrimination guaranteed under article 27 (1) (2) and 5 of the constitution have been violated.

19. Article 25 (c) of the constitution read together with article 50 (1) and (2) (d) concern due process in the event that a citizen is undergo some form of trial or adjudication of a dispute he or she may have before a Court of Law or Tribunal. These articles are not in strict sense applicable to internal consultative and administrative processes for policy formulation. The dispute before the court concerned remuneration and benefits. The petitioners were of the view that they were entitled to remuneration as recommended by the TA on one hand. While on the other hand, the respondent were of the view that the matter of setting salaries, remuneration and benefits for public officers was within their exclusive mandate and the advice given binding. The dispute cannot therefore qualify as an article 25 or 50 dispute.

20. On the issue of discrimination under 27, the petitioners did not sufficiently demonstrate how the act by SRC in setting their salaries and remuneration in accordance with its mandate under the constitution, discriminated against them. Furhter whereas the petitioners claim that they were assigned to Job Group T and later downgraded to Job Group S by the respondent they did not produce any evidence assigning them to Job Group T what they considered as assignment to Job Group T was a mere reference point for ease of harmonization and payment of allowances and did not itself constitute conferment on the alleged Job Group.

21. This court and the courts of equal status including the High Court as well as the Court of Appeal and the Supreme Court has held severally that in order to qualify as a constitutional dispute, the petitioner must identify the article of the constitution violated or threatened with violation and in what way it has been or threatened with violation.

22. It is not enough to bandy articles of the constitution and claim they have been violated without poignantly demonstrating in what manner they have or have been threatened with violation.

23. In conclusion, the court has reviewed and considered the petition herein and for reasons above stated find the same devoid of any constitutional issue to warrant the orders sought. The same is hereby dismissed with costs.

24. It is so ordered.

Dated at Nairobi this 14th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 14th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-for the Claimant

and

.....for the Respondent.

Abuodha J. N

Judge