



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 77 OF 2020

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 35, 41, 48, 50, 165, 230, 248, 253, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015

AND

IN THE MATTER OF: SALARIES AND REMUNERATION COMMISSION (NO. 10 OF 2011)

BETWEEN

KENYA ASSOCIATION OF HEALTH ADMINISTRATORSPETITIONER

V

SALARIES AND REMUNERATION COMMISSION 1ST RESPONDENT

MINISTRY OF HEALTH.....2ND RESPONDENT

MINISTRY OF FINANCE.....3RD RESPONDENT

ATTORNEY GENERAL..... 4TH RESPONDENT

AND

KENYA HEALTH PROFESSIONALS SOCIETY.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS 2ND INTERESTED PARTY

JUDGMENT

1. The Kenya Association of Health Administrators (the Association) instituted these proceedings against the Salaries and Remuneration Commission (the Salaries and Remuneration Commission), the Ministry of Health (Health Ministry), Ministry of Finance (Finance Ministry) and the Honourable Attorney General (the Attorney General)(cumulatively the Respondents) on 14 May 2020 alleging that the decision by the Salaries and Remuneration Commission to omit its members from eligibility to COVID19 medical emergency allowance and benefits was discriminatory, arbitrary, irrational and contravened Articles 10, 27, 28, 47 and 232 of the Constitution as read with section 12 of the Salaries and Remuneration Commission Act.

2. Filed together with the Petition was a motion under a certificate of urgency seeking interim conservatory orders.

3. When the Motion and Petition were placed before this Court sitting as the Duty Court on 14 May 2020, it directed that both be heard together.

4. Consequently, the Court further directed the filing and exchange of responses and submissions with mention set for 29 May 2020 to

confirm compliance.

5. On 29 May 2020, it turned out that some of the parties had not complied and the Court extended the timelines for compliance.

6. The Salaries and Remuneration Commission filed a replying affidavit sworn by its Chief Executive on 3 June 2020 while the Health Ministry, Finance Ministry and the Honourable Attorney General filed Grounds of Opposition on 12 June 2020. The Principal Secretaries, Health and Finance ministries also filed replying affidavits on 3 June 2020.

7. The Council of Governors filed on 12 June 2020 a replying affidavit sworn by its Chief Executive Officer. Its submissions were filed on 20 July 2020.

8. The Association filed its submissions on 12 June 2020 in which it identified two primary Issues

i. Whether the 1st Respondent's exclusion of the Petitioner (sic) as beneficiaries of the COVID 19 medical emergency allowance, risk and extraneous allowance is a discriminatory and unfair exercise of the 1st Respondent's exercise of administrative action.

ii. Whether the Petitioner is deserving of the issuance of the conservatory orders sought.

9. The Salaries and Remuneration Commission filed its submissions on 9 July 2020 in which it identified two Issues as arising for the determination of the Court

i. Whether the 1st Respondent's advice as communicated by its letters 24 January 2020 and 28 April 2020 are discriminatory to the Petitioner's members.

ii. Whether the writs of mandamus and certiorari as sought against the 1st Respondent can issue.

10. The Health and Finance ministries and the Honourable Attorney General filed their submissions on 26 June 2020 in which they addressed the following Issues

i. Payment of the medical emergency allowance and discrimination.

ii. Devolution of health services.

iii. On-going negotiations.

iv. Constitutional issues to be determined by the court.

v. Joinder of parties.

vi. Efficacy of orders sought.

11. The Council of Governors identified 6 issues for determination, viz

i. Whether the Petitioner has the locus standi to negotiate/advocate for the terms and conditions of employment of its members.

ii. Whether the Petitioner's members meet the eligibility criteria for the receipt of the allowances as set out by the 1st Respondent.

iii. Whether the 1st Respondent acted within its mandate in excluding the Petitioner (sic) from the frontline health workers receiving the COVID19 emergency allowance.

iv. Whether the 1st Respondent's letters dated 24th January 2020 and 28th April 2020 is discriminative.

v. Whether the 1st Respondent's letters to the 2nd and 3rd Respondents dated 24th January 2020 and 28th April 2020 violates the Petitioner's right to fair administrative action.

vi. Whether the reliefs sought as against the 1st Respondent should issue.

12. The Court has given due consideration to all the facts and law placed before it and will adopt the Issues as identified by the parties, albeit in a condensed form.

Joinder of parties

13. Citing Order 1 Rules 2 and 3 of the Civil Procedure Rules and *Joseph Njau Kingori v Robert Maina Chege & 3 Ors* (2002) eKLR, the Health and Finance Ministries, and the Honourable Attorney General urged the Court to find that they were not relevant parties to the

Petition as no relief had been sought against them and therefore should be excused from the proceedings.

14. The Court finds the argument disingenuous.

15. It is the Cabinet Secretary, Ministry of Health who under the authority of the Public Health Act declared COVID19 a public health pandemic and it would be casual of it to attempt to steer clear of a disputation relating to health care workers and any benefits promised or accruing to them during the pandemic or litigation alleging discrimination in the eligibility for such benefits.

16. The safeguarding of the public health and safety implicates myriad types of resources including financial and human capital, and in this respect, the Court finds that the Attorney General and Ministry of Finance were necessary parties.

17. The Respondents also objected to competency of the Petition on the ground that health is a devolved function and therefore all the respective County governments and/or county public service boards should have been enjoined to the Petition.

18. It is common that the Council of Governors is a statutory body established under the Intergovernmental Relations Act as a common forum for all the County Governments and that the County Governments under the respective County Public Service Boards employ health workers.

19. The COVID 19 public health pandemic not only concerns the National but the County Governments as well. Both levels of government have a duty to ensure that public interest, safety and health is safeguarded.

20. It is within public information that the County Governments have organised under an entity called the Council of Governors.

21. The Court would hold that the Council of Governors already being a party, it would have been legally superfluous to enjoin all the 47 County Governments to this litigation.

22. The Court finds the objection(s) on joinder without merit.

Petition not identifying Constitutional Issues with precision

23. The Respondents, finding umbrage in *Anarita Karimi Njeru v R* (1979) eKLR, submitted that the Petition had not met the requisite threshold because it had not set out with precision the specific Articles of the Constitution that have been violated and the manner of violation and therefore should be dismissed.

24. The Constitution in Article 22(3)(b) now allows a party alleging a constitutional violation to approach the Court on the basis of informal documentation (epistolary jurisdiction).

25. The Article also contemplates formalities being kept to a minimum.

26. Although the Petition at large appears to be an academic thesis on various provisions on the Bill of Rights, the facts set out leave no doubt to any reasonable person that the Petitioner was alleging that the failure to pay its members (health administrators) the COVID19 medical emergency allowance was discriminatory thus implicating Article 27 of the Constitution.

27. The Court while noting that the Petition could have been better drafted is of the view that the Respondents were aware of the case to meet and were not prejudiced and therefore dismissing the Petition for lack of clarity would not serve the interests of justice.

Prematurity of Petition

28. The Respondents also contended that the Petition was premature because there were on-going negotiations between the key stakeholders (including a society the Petitioner is a member) before the Ministry of Labour by dint of the Labour Relations Act.

29. To demonstrate that there were on-going negotiations, the Respondents produced a copy of a Joint Strike Notice issued under the hand of the Kenya Health Professionals Society on 4 May 2020, a letter from the Kenya Health Professionals Society dated 12 May 2020 accepting to dialogue on the questions in dispute, a letter from the Cabinet Secretary, Ministry of Labour and Social Protection dated 14 May 2020 convening a conciliation meeting and a letter dated 17 May 2020 from the Kenya Health Professionals Society suspending the strike notice.

30. The Principal Secretary, Ministry of Health in paragraph 11 of her replying affidavit deposed that the Association was a member of the Kenya Health Professionals Society, an averment which was not denied (the Association produced documentation confirming its membership of the Society).

31. The Court consequently finds as a fact that the Association being a member of the Kenya Health Professionals Society and which Society is and/or was engaged in negotiations with the Respondents on the issues the subject of this Petition, among other issues, should have been aware and ought to have disclosed that negotiations were ongoing by the time it moved the Court.

32. The Petition was in that regard brought to Court prematurely.

33. Based on the objection on prematurity and failure to exhaust the mechanisms for dispute resolution envisaged under the Labour Relations

Act, under which the Strike Notice was issued, the Court would have dismissed the Petition.

34. However, proceeding on the assumption that the conclusion on prematurity is wrong, the Court will now examine whether the Association has proved to the requisite standard that there was discrimination in excluding its members from the COVID19 medical emergency allowance.

Discrimination

35. The facts leading to the discrimination claim are largely not in dispute.

36. On 14 April 2020, the Kenya Health Professionals Society wrote to the Chairman Council of Governors, Head of Public Service and Chairperson of the Salaries and Remuneration Commission to protest against a statement by the Salaries and Remuneration Commission dated 9 April 2020 warning that the payment of a special allowance to health care workers by Counties was unlawful.

37. In the same letter, the Society urged both the National and County Governments to consider paying all health care workers an allowance to cushion them during the COVID19 pandemic.

38. The letter must have prompted the Council of Governors to act for on 15 April 2020, the Council of Governors made a request to the Salaries and Remuneration Commission to approve the payment of a medical emergency allowances/benefits to *frontline health care workers* under the County Governments as a result of and due to the declaration of COVID19 health pandemic.

39. On 16 April 2020, the President of the Republic directed the Ministries of Health and Public Service to develop a welfare/motivation package to cushion COVID 19 *frontline health care workers*.

40. The Salaries and Remuneration Commission, being a key body in the setting of public service remuneration and benefits met with the Council of Governors on 24 April 2020 and later convened a meeting of stakeholders on 27 April 2020 and 28 April 2020 (Ministries of Health and Public Service, the Public Service Commission and the Council of Governors).

41. At the meeting, it was agreed that COVID19 *frontline health care workers* are those directly involved in fighting COVID19 (those managing patients in health facilities and quarantine facilities, conducting surveillance and contract tracing, those in mortuary services, laboratory diagnosis and those in direct contact with patients) would be eligible for a COVID19 medical emergency allowance (a Technical Committee worked out the eligibility criteria).

42. The Salaries and Remuneration Commission released a schedule of those eligible for the allowance through a Circular dated 28 April 2020 and addressed to the Cabinet Secretary, National Treasury. The National Treasury confirmed availability of funds on 5 May 2020. The Salaries and Remuneration Commission eventually approved and advised on the package on 13 May 2020/14 May 2020.

43. According to the agreed criteria, 16 out of 17 health cadres became eligible. These excluded *health administrators* who are members of the Association, which was registered as a purely professional society under the Societies Act.

44. On 4 May 2020, the Kenya Health Professionals Society (of which the Association is a member) issued a Strike Notice, being aggrieved with the formulation of the COVID19 *frontline health care workers* package. The Strike Notice led to conciliation under the leadership of the Ministry of Labour.

45. The Association then instituted these proceedings alleging discrimination based on the principle of equal remuneration for work of equal value.

46. In asserting discrimination, the Association contended that its members, *health administrators* were recalled from leave in order to deal with the COVID19 pandemic (no evidence placed before the Court); that the members supervised the other cadres eligible for the COVID19 medical emergency allowance and that there had been historical discrimination of its members in the grant of allowances.

48. The continued failure to consider the *health administrators* for the COVID19 emergency health allowance and other extraneous and risk allowances, the Association asserted, was callous, deliberate, unjustifiable, unreasonable, arbitrary, and amounted to discrimination.

48. In the view of the Association, the Respondents in omitting its members from eligibility from the allowances had considered irrelevant considerations thus breaching their rights, an action which amounted to a mutilation of constitutional promises.

49. Urging the Court to find that there was discrimination, the Association asked the Court to consider the decision of the 5 judge bench in *Philip Tunoi & Ar v Judicial Service Commission* (2015) eKLR that

In our understanding of the law, one can only allege discrimination if in the ordinary circumstances he has been afforded some differential treatment or different standards have been applied as against him as opposed to another person of equal status as himself based on any of the grounds stipulated under Article 27 of the Constitution.

50. The Association also drew the attention of the Court to the definition of discrimination in the case of *Peter K. Waweru v Republic* (2006) eKLR where it was stated Discrimination means affording different treatment to different persons attributed wholly or mainly to their respective descriptions. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

51. Further reliance was placed in the Court of Appeal decision in *Justice Kalpal H. Rawal v Judicial Service Commission & 3 Ors* (2016) eKLR.

52. Resisting the discrimination claim, the Respondents asserted that the COVID19 medical emergency allowance is(was) purely for *frontline health care workers* who include the health workers 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.

53. In justifying the eligibility criteria, the Respondents contended that it was arrived at after considering the roles of each cadre of workers in the health sector and guidance on funding from the National Treasury.

54. The allowance it was submitted, was not meant for all health workers in the broad sense but only for those identified as being in the frontline in the fight against COVID19, and that the Association's members do not fall in the set category and the failure to include them in the list did not amount to discrimination in any way as the same is purely a justifiable differential treatment.

55. Further, it was contended by the Respondents that allowances are discretionary benefits given by the employer to employee and do not create any legal obligation for the employer to the employee. The fact that the Associations' members do not fit in the set criteria, it was submitted, does not amount to any unfair discrimination by the Respondents and they cannot claim a right or entitlement of the allowances.

56. And on eligibility, it was submitted that the principles of fiscal sustainability, transparency and fairness as provided in Article 230(5) of the Constitution were considered.

57. On the domestic legal framework, the Respondents cited section 5(4)(b) of the Employment Act, 2007, which provides that

It is not discrimination to – distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. to urge that the right to equality does not prohibit discrimination but only unfair discrimination.

58. Drawing from comparative case law, the Respondents cited the South African case of *Louw v Golden Arrow Bus Services (Pty) Ltd* (1999) ZALC 166, where the Labour Court stated

...it is not an unfair labour practice to pay different wages for equal work or work of equal value. It is, however, an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin. (*my emphasis*)

59. The Court is in agreement with the exposition of what is discrimination in the cases relied on by the parties that *motive or reason for the discrimination* is a factor to consider.

60. In other words, before finding discrimination based on different wage for work of equal value, the Court must consider the context of the alleged discrimination.

61. Considerations is paramount as the context may not be similar to those applicable to sex and race and/or religious discrimination among others.

62. What the Court is confronted with is alleged discrimination on the ground of equal pay for work of equal value or exclusion of an employee from certain benefits or allowances in the workplace.

63. Some of the considerations which a Court dealing with a claim for equal pay discrimination are whether the employees perform the same work or work to which equal value can be attributed, the nature of activities entrusted to the employees, the training requirements for carrying out the work and the working conditions, the professional qualifications/training and categorisation or classification of the jobs.

64. It was incumbent upon the Association to establish through evidence at the first instance that there was a presumption of unequal pay as against the given comparators (the *frontline health care workers*).

65. Besides contending that its members, *hospital administrators* were working within the health sector, the Association did not provide any type of evidence as to the professional qualifications/training of the *hospital administrators*, the nature of the duties or functions performed by the *hospital administrators vis a vis* the *frontline health care workers*, the working conditions (whether the hospital administrators came into direct contact with COVID19 patients/suspects).

66. Equally not demonstrated was the professional qualifications/training, nature of duties or functions of the *frontline health care workers* to enable the Court to determine their appropriateness as comparators.

67. Despite the failure, the Court has keenly considered sections 5(3) and (5) of the Employment Act, 2007.

68. What it demands is equal remuneration for work of equal value. The section however also gives an exception to an employer to consider the inherent requirements of a job. The inherent requirements may include risks and exposure based on safety and health considerations. Assuming that both the *frontline health care workers* and *hospital administrators*' work in the same environment, can it be said that their exposure to infection to COVID19 is inherently the same?

69. The Court does not think so.

70. Even without cogent evidence, the Court notes from the documents on record that those eligible for the COVID19 medical emergency allowance are doctors, dentists, nurses, clinical officers, community health officers, public health officers and the like.

71. These *health care workers* are directly in the line of contracting COVID19 on the basis of the patients they have to face directly in the course of work and not in the back office. The inherent requirements and risks of their duties are not comparable to those of *hospital administrators*.

72. The Court, on the basis of the material placed before it finds that the Association did not prove that the exclusion of its members from eligibility for COVID19 emergency medical allowance was discriminatory or amounted to unfair discrimination.

73. The Court finds that there are/were genuine occupational requirements to justify the decision by the Respondents.

Locus of the Petitioner

74. Before concluding, the Court has some remarks on an issue raised by the Council of Governors, the *locus standi* of the Petitioner, an association registered under the Societies Act to agitate on terms and conditions of employment, for its members.

75. Allowances and benefits in the workplace belong to the realm of terms and conditions of service.

76. Under our legal framework, terms and conditions of employment, where labour is organised is negotiated through and/or agitated under the Labour Relations Act.

77. Under the scheme provided for under the Act, it is the mandate of a trade union to negotiate with the employer.

78. In the case at hand, neither the constitution of the Association or the Kenya Health Professionals Society were disclosed. The main objective of the Association, therefore, remained vague and it was not clear to the Court whether it was within its province to agitate for issues which squarely fall within the province of organised labour/trade unions.

79. Equally not disclosed was whether the members of the Association are unionisable or not, or whether they were already members of the very many trade unions operating with the health sector.

Conclusion and Orders

80. From the foregoing, the Court finds and holds that the Petition was not only premature but was without merit.

81. The Petition is dismissed with no order as to costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 7th day of August 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Omari instructed by Musyoka Mogaka & Co. Advocates

For 1st Respondent Mr. Wahome, Advocate, c/o Salaries and Remuneration Commission

Kenya Health Professionals Society did not participate

For 2nd to 4th Respondents Ms. Mbilo, State Counsel, Office of the Attorney General

For Council of Governors Mr. Lawi Eugene, Advocate, Council of Governors

Court Assistant Judy Maina