



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 547 OF 2018

ERASTUS K. GITONGA.....1ST CLAIMANT
EDWARD K. WABWOTO.....2ND CLAIMANT
CICILIA W. GITHAIGA.....3RD CLAIMANT
JUDITH N. KITHINJI.....4TH CLAIMANT
SIMON NGARA.....5TH CLAIMANT

- VERSUS -

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY...RESPONDENT

- AND -

LAW SOCIETY OF KENYA.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

JUDGMENT

The claimants filed the statement of claim on 16.04.2018 through Gathara Mahinda & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) A declaration that the respondent's action of not paying the 1st to 5th claimants a non-practice allowance is unlawful, wrongful and unfair.
- b) A declaration that the respondent's action of not paying the 1st to 5th claimants a prosecutorial allowance is unlawful, wrongful and unfair.
- c) A declaration that the respondent subjected the claimants to discriminatory and unlawful labour practice by denying them the subject allowances.
- d) In regard to non-practice allowance the claimants are entitled thus 1st claimant Kshs.2, 060, 000.00; 2nd claimant Kshs. 1, 760, 000.00; 3rd claimant Kshs.1, 900, 000.00; 4th claimant Kshs.860, 000.00; and 5th claimant Kshs. 540, 000.00.
- e) The respondent to pay non practice allowance accruing to the claimants from the date of filing this claim and for the duration of service of the claimants. The rate of practice allowance shall be as issued by applicable government circulars or otherwise as may be set by a lawful competent authority.
- f) In regard to prosecutorial allowance the 1st to 4th claimants pray that they are entitled thus the 1st claimant Kshs.1, 830, 000.00; the 2nd claimant Kshs.1, 470, 000.00; the 3rd claimant 1, 470, 000.00; 4th claimant Kshs. 1, 440, 000.00.
- g) The respondent to pay prosecutorial allowances accruing to the 1st to 3rd claimants from the date of filing the claim and for the

duration of their service. The rate of prosecutorial allowance shall be as issued by applicable government circulars or otherwise as may be set by a lawful competent authority.

- h) The above sums to earn interest at court rates.
- i) Costs of the cause to be awarded.
- j) Any other order that the court may deem fit and just to issue.

The claimants are at all material times employed by the respondent as legal officers on full time basis on permanent and pensionable terms of service. The 1st claimant was employed 01.10.2009, the 2nd claimant on 20.12.2010, the 3rd claimant on 02.06.2010, the 4th claimant on 01.08.2013 and she resigned from the respondent's service effective 01.04.2018, and the 5th claimant on 04.01.2016. The respondent is a government agency established as an Authority under section 7 of the Environmental Management and Coordination Act (EMCA) and it operates under the management of a Board of Directors. The respondent is a body corporate with powers to recruit, appoint, discipline, and manage its own employees.

The claimants were each recruited by the respondent from the private sector where they worked as private practitioners. Each claimant is a duly qualified legal practitioner as an advocate of the High Court of Kenya. It is the claimants' case that the respondent is a public body as defined under section 3 of the Interpretation and General Provisions Act and Article 259 of the Constitution of Kenya. Thus the respondent is bound by the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016. The claimants are public officers under Article 259 of the Constitution, section 2 of the Public Officer Ethics Act and are within the meaning of public service in Article 259 of the Constitution. Accordingly the claimants' case is that Public Service Commission Human Resource Policy, 2016, the Public Service circulars of 11.06.2010 and 09.10.2012 and other prevailing public service practice applicable to the legal professionals in the public service apply to their service in the respondent's establishment.

The 1st to 4th claimants are also serving as public prosecutors duly gazetted by the Director of Public Prosecutions under section 85 of the Criminal Procedure Code and the Office of the Director of Public Prosecutions Act (ODPP Act) as per gazette notice No.2181 of 04.04.2014 and effective 18.03.2014. By that notice, the Director of Public Prosecutions appointed the 4 claimants to be Public Prosecutors for purposes of cases arising under the Environmental Management and Co-ordination Act (No.8 of 1999) and the same was in exercise of the powers conferred by section 85 (1) of the Criminal Procedure Code as vested in the Director of Public Prosecutions. The parties are silent but it appears that the gazette notice must have been issued following a request by the respondent to the Director of Public Prosecutions in that regard.

The circular No. MSPS.10/145A VOL. VII/40 dated 11.06.2010 was addressed to the Solicitor General and issued by Titus M. Ndambuki, CBS, Permanent Secretary in the Office of the Prime Minister and Ministry of State for Public Service. The circular was titled thus, rationalization and harmonization of the public service legal subsector remuneration. The circular conveyed that the Permanent Public Service Remuneration Review Board had agreed to the enhancement of Non-Practice Allowance as follows, SL1 – SL4 Kshs. 15, 000.00 per month; SL5 – SL7 Kshs. 20, 000.00; SL 8 Kshs. 40, 000.00. The new rates would be applicable from 1st July, 2010 and necessary action was to be taken.

The circular No. MSPS.10/5A VOL.III/(78) dated 09.10.2012 was addressed to the Solicitor General, the Director of Public Prosecutions, and the Acting Permanent Secretary, Ministry of Justice, National Cohesion and Constitutional Affairs. The circular was issued by Titus M. Ndambuki, CBS Permanent Secretary - Ministry of State for Public Service. The circular conveyed that following the recommendation of the Salaries and Remuneration Commission, approval was thereby granted for legal personnel in State Law Office, Office of the Director of Public Prosecutions and Ministry of Justice, National Cohesion and Constitutional Affairs to be paid State Counsel / Prosecutorial Allowance with effect from 01.10.2012 at the following rates, SLG1 – SLG 6 Kshs. 30, 000.00; SLG7 – SLG 8 Kshs.40, 000.00; SLG 9 Kshs.50, 000.00.

The claimant's case is that the grading by the respondent is equivalent to State Law grading thus E5 to SL7 OR SLG7; E6 to SL6 and SLG6; and E7 to SL5 or SLG5 and to the civil service grading thus, E5 to Job Group P; E6 to Job Group N; and E7 to Job Group M.

The claimants' case is that the respondent has acted unlawfully and contrary to the principles of fair labour practices and equality in denying the claimants their lawful entitlements as prayed for. The claimant's case is that despite their presenting the grievances to the respondent since 2011, the respondent has failed to purge the grievances.

The respondent filed the statement of response on 10.07.2013 through Mwaura & Wachira Advocates.

The respondent prayed that the claimants' suit be dismissed with costs.

The respondent's case is to the following effect:

- a) There is no dispute that the claimant employed the claimants in its establishment to perform professional legal services and grades as pleaded for the claimants.
- b) The respondent is bound by Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 but, only as far as the regulations are consistent with the respondent's Human Resource Policy and Procedures Manual.
- c) The salaries and benefits of public officers are regulated by the Salaries and Remuneration Commission. The claimants are indeed

public officers under Article 259 of the Constitution and the Commission is instrumental in determining the salaries and remuneration applicable to the claimants.

d) The respondent denies that the circulars in issue and as referred to by the claimants bind the respondent because they were never addressed to the respondent.

e) The Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 does not provide for the allowances now claimed for by the claimants.

f) The claimants are not prosecutors employed under the Office of the Director of Public Prosecutions but admittedly, the Director of Public Prosecutions has duly gazetted them to prosecute offences under the Environmental Management and Co-ordination Act No.8 of 1999.

g) The circular Ref. No. OP.CAB.2/23A of 2011 by Amb. Francis K. Muthaura, EGH, Permanent Secretary, Secretary to the Cabinet and Head of the Public Service stopped review of salaries in public service to pave way for the constitutionally and newly established Salaries Remuneration Commission to perform its constitutional mandate in that regard.

h) The claimants have not sought and obtained the advice of the Public Service Commission about the allowances in issue and their respective claims. Thus the suit is premature.

i) The equivalent of job groups as urged for the claimants is unfounded. The job grading is unique to the respondent and cannot be equated to the state law grading.

j) The respondent denies that it has acted unlawfully and contrary to the principles of fair labour practices as envisaged in Article 41 of the Constitution.

k) The allowances are not due to the claimants as prayed for.

l) The claimants are seeking to be unjustly enriched yet they have notoriously been practising as legal practitioners outside their duties and functions as the respondent's legal personnel and prosecutors.

The claimants filed on 23.08.2018 the reply to the statement of response and urged as follows:

a) The respondent's Human Resource Manuals provide for payment of Non-practicing allowance and they are entitled as claimed.

b) The legal subsector in the circular of 11.06.2010 clearly covers the claimants' employment as is not exclusive to State Law establishment.

c) The circular by the Head of Public Service issued in 2011 only operated to put a caveat on review of existing salaries and allowances and not implementation of the existing ones. The circular on non-practicing allowance had been in place since 2009.

d) Denial of the non-practice allowance and prosecutorial allowances was discriminatory, malicious and an infringement and violation of their constitutional rights.

e) It was the obligation of the respondent and not the claimants to seek and obtain the advice of the Public Service Commission and the claimant's could not bypass the respondent's management to do so.

f) The job structure exhibited by the respondent was a mere recommendation and which had never been implemented. The claimants' job groups are as per their exhibited pay slips.

g) Despite request by the claimants the respondent's management and Board have deliberately refused the approval of the payment of the allowances.

h) The claimants are exclusively offering legal services in the public service as employed by the respondent.

The interested party, the Law Society of Kenya (LSK), in applying to be enjoined filed the supporting affidavit of its Secretary and Chief Executive Officer one Mercy Wambua and stated as follows:

a) The claimants are active members of the LSK.

b) The membership of LSK comprises advocates both in private and public practice. The claimants are part of the class of advocates who have opted out of private practice to work in public service.

c) By statute the LSK is empowered to represent, protect and assist members of the legal profession in Kenya in matters relating to conditions of practice and welfare per section 4 of the Law Society of Kenya Act No.21 of 2014. The LSK is also mandated to promote and uphold the Constitution and render legal services to the public in general as well as assist the courts in administration of justice.

d) The LSK would therefore participate in the suit by filing submissions to aid the Court in rendering a decision that will be used in all institutions that are in a similar situation with the respondent. The matters raised by the claimants affect other members of the LSK in public service with similar predicaments as the claimants in the instant case.

The application by the interested party to be enjoined as filed on 09.11.2018 through Macharia – Mwangi & Njeru Advocates was allowed by consent of the parties on 03.12.2018. Parties further agreed that the suit be determined on the basis of the pleadings and documents filed for the parties. The parties filed their respective submissions.

The Court has considered the material on record. The Court makes findings on the issues in dispute as follows:

The **1st issue** for determination is whether the respondent was bound by the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016, and the two circulars providing for the prosecutorial allowance and the non-practising allowance. As urged for the claimants, the respondent has admitted that the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 are binding upon the respondent. The only caveat by the respondent is that the application is subject to the decisions by the respondent's Board.

The Public Service Commission is established under Article 233 of the Constitution of Kenya 2010. The Commission's functions and powers are provided for in Article 234 of the Constitution. Article 233 (3) of the Constitution provides that the constitutional functions and powers of the Commission shall not apply to:

- a) State offices;
- b) An office of high commissioner, ambassador, or other diplomatic or consular representative of the Republic;
- c) An office or position subject to the Parliamentary Service Commission; the Judicial Service Commission; the Teachers Service Commission; the National Police Service Commission; or an office in the service of a county government, except as contemplated in clause (2) (i) – on hearing and determining appeals in respect of county governments' public service.

The Court holds that the respondent is not one of the entities excluded from the Commission's constitutional functions and powers. The Court further holds that whereas the respondent is a body corporate as established under the Environmental Management and Co-ordination Act No.8 of 1999, in exercise of its statutory functions and powers particularly by recruiting, appointing, promoting, disciplining, removing public officers and any other human resource function, it is strictly bound to comply with the law, regulations, and policies as may be in force and as issued or promulgated by the Commission in the exercise of its constitutional public service functions and powers.

Section 16 of the Environmental Management and Co-ordination Act No.8 of 1999 on the staff of the respondent provides thus, “ **The Authority may appoint such officers or other staff of the Authority as are necessary for the proper discharge of its functions under this Act or any other written law, upon such terms and conditions of service as the authority may determine.**” The section was enacted long before the Constitution of Kenya, 2010. Section 7(1) of the 6th Schedule on Transitional and Consequential Provisions to the Constitution of Kenya 2010 provides, “**All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.**” Thus the Court holds that the respondent's exercise of human resource or employment functions and powers as envisaged in section 16 and other provisions of the Environmental Management and Co-ordination Act No.8 of 1999 must be construed and brought to conformity with the constitutional functions and powers of the Public Service Commission and as amplified in the provisions of the Public Service Commission Act, 2017. The Court further holds that the respondent and other public bodies or authorities falling under the Commission's constitutional authority are bound to undertake their human resource functions in accordance with the provisions of the Public Service Commission Act, 2017 and the public service regulations and policies as may be put in place by the Commission from time to time.

In so far as the Public Service Code of Conduct (2006) as currently revised and known as the Public Service Commission Human Resource Policy, 2016 was issued by the Commission in exercise of its constitutional public service functions and powers, its provisions were binding upon the respondent and it was misconceived for the respondent to take the position that the Commission's policies and regulations were subject to its Board's human resource decisions. The Court holds that in undertaking its human resource functions, the respondent's Board must ensure that its decisions are aligned to the general policies and regulations and the general law governing the public service and as per the general public service regulations, policies, decisions and directives as issued by the Commission from time to time. The Court holds that where in specific cases the respondent may experience difficulties in implementing such general public service regulations, policies, decisions and directives as may have been issued by the Commission, it is the respondent's obligation to seek and obtain from the Commission such specific variation or clarifications and alterations as may be appropriate.

The Court has specifically considered the provisions of the Public Service Commission Act No.10 of 2017 and returns that under section 3 of the Act, the Act applies to all public bodies and persons holding office in the public service and subject to Articles 155(3) (a), 158(3), 234(2) (a), 234(3) and 252 (1) of the Constitution and subject to section 28 of the Kenya Defence Forces Act No. 25 of 2017. Thus the Court returns that the respondent is bound accordingly and it must at all times align its human resource functions, powers, policies, and decisions to the general public service provisions as provided for in the Constitution, the Public Service Commission Act, 2017 and the regulations and policies issued by the Commission from time to time.

Turning to the circulars, it was submitted for the respondent that the Salaries and Remuneration Commission established under Article 230 of the Constitution of Kenya, and as per Article 230(4) (b) advises the national and county governments on the remuneration and benefits of all other public officers. It was submitted that the circulars having not been addressed to the respondent directly, they were therefore not binding. For the claimants it was submitted that the circular of 11.06.2010 on payment of non-practising allowance to employees in the legal subsector of the public service applied because the respondent was clearly (and it was undisputed) a public body under Article 259 of the Constitution. Further the respondent's Human Resources and Procedures Manual at clause 8.25 provides that the respondent shall pay non-practising allowance to those who are eligible as per government circulars. It was submitted for the claimants that the Court follows the

holding in Hezekiah Oira T/A Oira Advocates –Versus- Kenya Broadcasting Corporation [2015]eKLR, where Aburili J held that public officers are paid a non practicing allowance to cover what they would have earned had they been in active practice, which allowance, if the advocate was not paid, nothing prevented him from claiming. It was also submitted for the claimants that as was held by the Supreme Court of India in State of M.P & Ors –Versus-yogendra Shivastava Civil Appeal No. 3156 of 2007 that if appointment letters provided for payment of non practicing allowance which was not in consonance with the rules, then the Court could correct or set aside the anomaly.

As for the circular dated 09.10.2012 the claimants submitted that it applied for 1st to 4th claimants who had been gazetted as prosecutors.

The Court has considered the submissions and returns that the circular of 11.06.2010 on payment of non-practicing allowance to employees in the legal subsector of the public service applied to the claimants' service because it clearly applied to the entire public service. As for the circular dated 09.10.2012 it states that it applies to prosecutors and the 1st to 4th claimants were gazetted as prosecutors and there is no established and lawful reason why the circular would not apply. The Court considers that the circular of 09.10.2012 appears to apply to all lawyers in the public service and for so long as the claimants established that they were in public service with similar professional legal duties, it is the Court's opinion that they would be entitled to the allowance even without their being gazetted as prosecutors. The Court has carefully revisited the circular and the wide ranging categories of the officers it applies to and returns that use of "**prosecutorial allowance**" was meant to simply designate the allowance and not to have it paid exclusively to those involved in criminal prosecutions. The Court finds that the circulars were binding upon the respondent and if the respondent failed to specifically provide for the terms of the circulars in the claimants' contracts of service, then as per the holding by the Indian Supreme Court in the cited case, the Court had jurisdiction to correct the unjustified omission.

It was submitted for the respondent that the Salaries and Remuneration Commission had to specifically write to the respondent for the two allowances to apply. The Court finds that the Salaries and Remuneration Commission's role in the matter was already spent. The Court notes that the circular of 11.06.2010 on non practicing allowance was issued with approval of the Permanent Public Remuneration Review Board (which was the predecessor of the Salaries and Remuneration Commission) and the circular of 09.10.2012 was issued upon recommendation of the Salaries and Remuneration Commission. In any event, and as relates to the circular of 11.06.2010, section 6 of the 6th Schedule on Transitional and Consequential Provisions to the Constitution of Kenya 2010 provides, "**6. Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.**" Accordingly, the rights conferred upon persons serving in the legal subsector of the public service like the claimants cannot have lost the accrued rights under the circular of 11.06.2010 and consequential to the coming into operation of the Constitution of Kenya, 2010 which established the Salaries and Remuneration Commission - so that the Court returns that the government's obligations thereunder subsisted and the respondent was bound accordingly.

Further the Court has considered the respondent's Human Resources and Procedures Manual and clause 8.25 provides that the respondent shall pay non-practicing allowance to those who are eligible as per government circulars. The Court returns that the two circulars are clearly contemplated under that provision and they must apply accordingly.

The Court further returns that clause C.23 at page 55 of the Public Service Commission Human Resource Policy, 2016 states, "**The Government may pay other allowances to different categories of public officers in various circumstances. Such allowances shall be determined and communicated from time to time.**" The Court finds that the provision provides a clear position that the government will determine other allowances from time to time and as had been done in the two circulars in issue. Thus the Court finds that there is nothing in deficiency that the respondent has established to make the two circulars not applicable to the claimants' service in the respondent's establishment.

The 2nd issue for determination is whether the claimants are entitled to grading equivalents as urged for them in their computations for the claimed non -practicing and prosecutorial allowances. The respondents say that their job groups are unique and cannot be equivalent to the SL and SLG ranking or grading as claimed. The claimants urge that the equivalency applies.

Under section 10(1) of the Employment Act, 2007 particulars of a written contract of service include job description and remuneration applicable. The Court finds that ranks, grades or job groups are clearly part of the job description and applicable remuneration like in the instant case where the allowances were pegged on the grading by the circulars. Section 10 (7) of the Employment Act, 2007 provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. The Court returns that the respondent has failed to discharge that statutory burden to disprove the equivalency of the job groups or ranks as urged for the claimants. The Court has found that the allowances as claimed applied and the respondent failed to include the equivalency of its grading structure to be in consonance with the grading in the circulars so as to confer the claimants the two allowances in issue. The Court returns that in absence of any other material before the Court on the equivalency of the grades, the claimants' have established that on a balance of probability, the equivalency of grades as urged for them applied.

While making that finding the Court has taken into account its jurisdiction or powers under section 16 (3) and(4) of the Employment Act, 2007 to determine and confirm particulars which ought to have been included in the claimants' respective contracts of service and the respondent cannot defeat the claimants' prayers by simply urging that despite the applicable circulars and allowances, the same cannot be conferred by reason of the respondent's own failure to include the particulars in the individual contracts of service as envisaged in the circulars. The Court considers that in any event the circulars were of general application across the public service and the failure by the respondent to specifically include the allowances in the individual contracts did not defeat the claimants' case because the allowances were automatically part of their terms and conditions of service.

Further, the Court has considered that the function of creating and abolishing offices in the public service such as in the respondent's establishment is constitutionally vested in the Public Service Commission and section 25 of the Public Service Commission Act, 2017 clearly required the respondent to move the Commission towards establishing the levels of grading and designation of the offices the claimants held, if there was any doubt in that regard. The Court returns that the respondent failed to move the Commission accordingly even after the

claimants reported their grievances per the correspondence on record and the demand letter. The respondent cannot therefore be allowed to turn around and benefit from its own failure or shift to the claimants its clear statutory duty to move the Commission in that regard.

The Court cannot fault the claimants because in section 98 of the Public Service Commission Act, 2017 it is provided that the Commission may, by notice in the gazette assign the job groups referred to in the Act to public officers in public bodies which do not use such job groups for the proper application of the Act to those offices. The issue had arisen as per the correspondence the claimants had addressed to the respondent but the respondent had failed to act and to move the Commission if it was in any doubt on the grading and grading equivalency issue. In any event the Court has considered that a board paper on the subject had been tabled to the respondent's Board as per endorsement on the exhibited internal memo of 26.04.2011. The endorsement shows that the only reason the Board failed to approve the paper was because the Board considered that the circular by the Head of Public Service stopped review of salaries and allowances until the coming into operation of the Salaries and Remuneration Commission as had been established under the Constitution of Kenya, 2010 and that the allowances had equally been affected by that circular. Thus the Court returns that the Board, on a balance of probability, had no issue about the equivalency of the grading and the claimants are entitled as prayed for.

Accordingly, the Court returns that the claimants are entitled to the equivalency in grading with further directions by the Court that this judgment shall be served upon the Public Service Commission towards the Commission's consideration of issuing the relevant gazette notice under section 98 of the Public Service Commission Act, 2017 to harmonize and provide for equivalency of job groups, grades, and ranks applicable in the public bodies under its constitutional and statutory functions and powers, and in view of the serious issues which have emerged in the present case to consider issuing the gazette notice not later than 01.02.2020.

The **3rd issue** for determination is whether the denial of the two allowances by the respondent as claimed for by the claimants amounted to discrimination and unfair labour practices.

The evidence is that the claimants are duly qualified advocates of the High Court of Kenya. They are duly employed to perform legal services in the public service. Their service is regulated by the general public service laws, regulations and policies and more specifically as provided for in the Constitution, the Public Service Commission Act, 2017, the regulations and policies issued by the Public Service Commission and as implemented by the respondent and its Board in accordance with the respondent's enabling statute, the Environmental Management and Co-ordination Act No.8 of 1999.

As submitted for the interested party, every person has the right to fair labour practices as per Article 41 (1) of the Constitution. Article 41 (2) enumerates the rights of every worker which include inter alia the right to fair remuneration. Further as submitted for the interested party, Article 27 (1) and (2) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law; and equality includes the full and equal enjoyment of all rights and fundamental freedoms. Articles 27(4) and (5) prohibit discrimination by the state or by any person. It was further submitted that section 5 (2) and (3) of the Employment Act, 2007 provides, **“(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee.... (5) An employer shall pay his employee equal remuneration for work of equal value.”**

Further the interested party submitted that clause B. 22 (1) of the Public Service Commission Human Resource Policy, 2016 provides for non discrimination in employment and that the Government shall promote equality of opportunity in employment and will not discriminate directly or indirectly against an employee on any grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Clause A.2 thereof lists the values of public service as per Article 232 of the Constitution and which bind public bodies like the respondent.

The interested party submitted that International Labour Organisation (ILO) conventions as ratified by Kenya apply by reason of Article 2(6) of the Constitution which provides that any treaty or convention ratified by Kenya forms part of the law of Kenya. Thus Kenya ratified on 07.05.2001 the ILO Equal Remuneration Convention, 1951 (No.100) and Article 2 provides thus, **“Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”** Further the ILO Discrimination (Employment and Occupation) Convention, 1958 (No.111) Article 2 provides, **“Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”**

The interested party submitted that the Court should enforce the well settled policy on equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

The Court returns that the claimants have not established discrimination on any of the grounds listed in Article 27 of the Constitution or section 5 of the Employment Act, 2007. However, the claimants have established that they have been denied equality of treatment as envisaged in section 5 of the Employment Act, 2007 and as per the cited ILO conventions. They have established that the failure to pay them the two allowances amounted to adverse or disadvantageous treatment that was not equal to the other public officers holding similar offices as held by the claimants and for whom the two circulars providing for the two allowances applied to and had been implemented accordingly. In particular the claimants have established that the respondent has subjected them to unequal pay by denial of the two allowances because persons holding similar positions in the public service have continued to enjoy the allowances. The Court finds accordingly.

The Court follows Louw –Versus- Golden Arrow Bus Services (Pty) Ltd [1999] ZALC 166 thus, **“The principle “equal work should receive equal pay” in its true form may be extended to analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed, e.g. the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination. In other words it is not an unfair labour practice to pay different wages for equal work or for 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.” The Court returns that the respondent denied the claimants the two allowances that were payable to others in public service performing similar work or work of equal value as was performed by the claimants. Further the Court holds that the denial of the two allowances amounted to unequal treatment and therefore unfair discrimination that was founded upon arbitrary or unreasonable grounds namely, that the circular by the Head of Public Service had the effect of denying the already existing allowances and, as submitted in Court, that the circulars had not been directly addressed to the respondent.

The Court further follows **OI Pejeta Ranching Limited –Versus- David Wanjau Muhoro [2017]eKLR** where Rika J quoted with approval **Copper Pass Ltd –Versus- Lawton [1977] Q.B 852** thus, “Once it is determined that work is of a broadly similar nature it shall be regarded as like work unless the differences are plainly of a level which the industrial tribunal in its experience would expect to find reflected in the terms and conditions of employment.”

In the instant case the Court returns that the claimants are clearly advocates employed in the public service to perform the duties by public officers whom the circulars in issue applied to and they are entitled to the allowances like the other legal practitioners in the public service for whom the circulars have been implemented. The Court finds that the claimants performed duties of equal value like those public officers referred to in the circulars and further finds that the circulars directly applied to the claimants because the circulars applied to all such officers serving in the legal subsector of the public service. The respondent failed to show that the circulars had not been intended to apply to the claimants and the Court finds that the intention in the circulars was that the allowances applied to all in the subsector towards harmonisation of their terms of service. The Court further returns that while the respondent urged that it had unique terms of service applicable to the claimants, the respondent did not suggest or show that such terms of service included or provided for the element of the two allowances as had been introduced by the two circulars or the allowances had been taken into account one way or the other. Thus it was not the respondent’s case, for example, that it had paid the claimants a consolidated salary that included the two allowances. The claimants will therefore succeed in their respective claims.

The Court commends the parties including the interested party for the useful submissions made towards the ends of justice and the effectual determination of the matters in dispute.

The Court has considered the government budgetary cycle which applies to the respondent and finds that the amount due to the claimants will be paid by the respondent not later than 01.08.2019 failing, interest at Court rates will apply until full payment.

In conclusion judgment is hereby entered for the claimants against the respondent for:

- a) The declaration that the respondent’s action of not paying the 1st to 5th claimants a non-practice allowance is unlawful, wrongful and unfair.
- b) The declaration that the respondent’s action of not paying the 1st to 5th claimants a prosecutorial allowance is unlawful, wrongful and unfair.
- c) The declaration that the respondent subjected the claimants to unequal treatment amounting to discriminatory and unlawful labour practice by denying them the subject allowances.
- d) In regard to non-practice allowance the respondent to pay the claimants thus 1st claimant **Kshs.2, 060, 000.00**; 2nd claimant **Kshs. 1, 760, 000.00**; 3rd claimant **Kshs.1, 900, 000.00**; 4th claimant **Kshs.860, 000.00**; and 5th claimant **Kshs. 540, 000.00**.
- e) The respondent to pay non practice allowance accruing to the claimants from the date of filing this claim and for the duration of service of the claimants. The rate of practice allowance shall be as issued by applicable government circulars or otherwise as may be set by a lawful competent authority.
- f) In regard to prosecutorial allowance the respondent to pay the 1st to 4th claimants thus the 1st claimant **Kshs.1, 830, 000.00**; the 2nd claimant **Kshs.1, 470, 000.00**; the 3rd claimant **Kshs.1, 470, 000.00**; and 4th claimant **Kshs. 1, 440, 000.00**.
- g) The respondent to pay prosecutorial allowances accruing to the 1st to 3rd claimants from the date of filing the claim and for the duration of their service. The rate of prosecutorial allowance shall be as issued by applicable government circulars or otherwise as may be set by a lawful competent authority.
- h) The amount already due to the claimants will be paid by the respondent to the claimants not later than 01.08.2019 failing, interest at Court rates will apply thereon from the date of this judgment until full payment.
- i) The claimants shall serve this judgment upon the Public Service Commission, within 7 days from the date of this judgment, towards the Commission’s consideration of issuing the relevant gazette notice under section 98 of the Public Service Commission Act, 2017 to harmonize prevailing grading levels and to provide for equivalency of job groups, grades, and ranks applicable in the public service or bodies under its constitutional and statutory functions and powers - and in view of the serious issues which have emerged in the present case, the Commission to consider publishing the gazette notice not later than 01.02.2020.
- j) The respondent to pay the claimants’ costs of the suit.

Signed, dated and delivered in court at Nairobi this Wednesday 10th April, 2019.

BYRAM ONGAYA

JUDGE