



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 29 OF 2019

IN THE MATTER OF ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 41, 47, 171, 172, 230, 248 AND 259 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

KENYA MAGISTRATES AND JUDGES ASSOCIATION.....PETITIONER

VERSUS

SALARIES AND REMUNERATION COMMISSION.....RESPONDENT

AND

JUDICIAL SERVICE COMMISSION.....INTERESTED PARTY

JUDGMENT

1. The Kenya Magistrates & Judges Association (Association) is an association bringing together Judges of the Superior Courts and Magistrates and Kadhis (*judicial officers*).
2. On 22 January 2019, the Association presented an inelegantly drafted and verbose/repetitive Petition before Court alleging that the *Salaries and Remuneration Commission* (the Commission) had violated several constitutional provisions while setting the remuneration and benefits of *judicial officers*.
3. The Commission filed a replying affidavit sworn by its acting Secretary/Chief Executive Officer in opposition to the Petition on 27 May 2019 while the Judicial Service Commission (Interested Party) filed a replying affidavit sworn by its Secretary on 12 June 2019.
4. Pursuant to Court directions the Association filed its submissions on 2 August 2019 in which it identified 3 Issues for determination (the submissions did not match the subtitles).
5. The Commission filed its submissions on 17 September 2019 and it set some 7 Issues as arising for determination.
6. The Interested Party did not file any submissions.
7. The submissions were highlighted on 7 October 2019 and the Court reserved judgment to today.
8. The Court has considered the Petition, the affidavits on record and the submissions.
9. The Court will adopt the Issues as proposed by the Association albeit with the introduction of subthemes as necessary since the Association's arguments and submissions were spread all over/appeared misplaced.

What are the basic minimum Constitutional and statutory requirements imposed on the Respondent in the exercise of the administrative function of the review of remuneration and benefits of state officers working in the Judiciary?

10. This was really not an issue in dispute though the Association identified it as Issue 1 while the Commission submitted on it as Issues (i)

and (ii), and the Court will, therefore, assume it was meant to set out the legal background to the dispute presented by the Association.

11. It was and is common that the Commission is established pursuant to Article 230 of the Constitution, 2010 and that it is given its primary powers and functions by Article 230(4) & (5), and that the *Salaries and Remuneration Commission Act* has set out in greater detail the said mandate.

12. It is also not in dispute that by dint of Article 41 of the Constitution, every worker has a right to fair labour practices including fair remuneration and reasonable working conditions.

13. Similarly, it was common that in exercising its function of setting the remuneration of state officers, the Commission exercises an administrative function, and therefore amenable to jurisdiction granted under Article 47 of the Constitution and the *Fair Administrative Action Act*.

14. Further, it is also not in dispute that the Commission in exercising the function of setting and reviewing remuneration and benefits must be cognisant of fundamental rights of employees as contemplated by the Employment Act, 2007 and more so in respect to discrimination and other minimum conditions of employment.

Whether the Commission complied with the basic Constitutional and Statutory requirements in setting the remuneration and benefits of judicial officers

15. The Association set out this as Issue (II) and thereunder set out some 12 grounds, which it contended that the Commission failed to consider but was under a constitutional and statutory imperative to consider or be guided with.

16. The Commission discussed this question as Issue (III).

17. The Court has however attempted to isolate the sub-themes recurring in the pleadings and submissions.

Whether the Commission was under obligation to consult with the Association

18. The Association submitted on this theme under the *expanded jurisdiction* ground and it contended that the Commission was under an obligation imposed on it by section 7(2)(a)(v) of the *Fair Administrative Action Act* to give it a reasonable opportunity to make representations before setting the remuneration and benefits for judicial officers.

19. The Association submitted that the failure to consult it violated Article 47(1) of the Constitution and sections 5(c) and 6(2)(f) of the *Fair Administrative Action Act*.

20. In the view of the Association, the process whereby its President forwarded its views to the Interested Party for onward transmission to the Commission was not sufficient to meet the constitutional and statutory threshold, and the Court was asked to adopt the test set out in the case of *R v Public Procurement Administrative Review Board & 2 Ors* (2019) eKLR.

21. The Association also asserted that it should have been granted direct audience to make oral presentations to the Commission.

22. It was thus submitted that the alleged representation by the Interested Party as averred by the Commission did not meet the Constitutional and Statutory threshold and hence the entire process of review of the remuneration and benefits of judicial officers was not procedurally fair.

23. In rebutting the assertions and submissions that the Association was not afforded an opportunity to make representations, the Commission asserted that a *Memorandum* from the Association dated 20 April 2017 was presented to it by the Interested Party after which lengthy consultations were held with it (Interested Party) as implementer (the Commission filed copies of correspondences to show the consultations).

24. The Commission submitted that it was not necessary that the Association be granted personal or direct audience and in this regard, it was urged that the written representations made by the Association through the Interested Party met the standards of fair administrative action for a hearing. For this submission, the Respondent cited *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

25. In the normal scheme of employment relationships, it is the employer and the employee who negotiate and agree on terms and conditions of service.

26. A reading of the functions and powers of the Commission does not suggest that it stands in an employer/employee relationship with the state officers whose remuneration and benefits it is mandated to set and review.

27. The Commission herein is established pursuant to the provisions of Article 230 of the Constitution. Its powers and functions have been set out in Article 230(4) and section 12 of the *Salaries and Remuneration Commission Act*.

28. The functions include setting and regularly reviewing the remuneration and benefits of all state officers, which include judicial officers.

29. However, due to the nature of the judicial function, and with a view to facilitating and promoting the independence of the judiciary, the *Judicial Service Commission* has been established by dint of Article 172 of the Constitution.

30. One of the core of the functions of the *Judicial Service Commission* in the promotion and facilitation of the independence of the judiciary under Article 172(1)(b) of the Constitution is the review and making recommendations to the Commission on the conditions and terms of service for judges and judicial officers.
31. The conditions of service which include remuneration and benefits of the judges and judicial officers, in the view of the Court, constitute a fulcrum of the independence function of the *Interested Party*.
32. Although the *Interested Party* is not strictly the employer of judges and judicial officers, it has the first obligation to look into their terms and conditions of service under the current legal framework.
33. In the circumstances and in consideration of the Constitutional design, in the view of the Court, it is the *Interested Party* which is obligated under the function to promote and facilitate the independence of the judiciary and to review the terms and conditions of service, to directly and meaningfully engage with the judges and judicial officers before it reviews and makes recommendations to the Commission.
34. For, the *Interested Party* as the shield for judicial independence serves to protect judges and judicial officers from a situation where they would be actively agitating for their remuneration and other terms of service in breach of the Code of Conduct.
35. In the case at hand, it is admitted that the Association made written representations to the Commission through the *Interested Party* on 20 April 2017.
36. The judges of the High Court and Courts of Equal Status sent a Memoranda to the Commission in April 2017 at the invitation of the Commission.
37. To the Court, that was tandem with the general constitutional architecture on the participation of persons likely to be affected by an administrative decision in terms of Articles 41 and 47 of the Constitution as read with the provisions of the *Fair Administrative Action Act*.
38. It was also in line with the discretion given to the Commission by section 13 of the *Salaries and Remuneration Commission Act* to hold interviews or consultations with such persons or organisations it may feel necessary.

Commission's breach of duty to give reasons

39. A running theme in the Association's papers was the contention that the Commission failed to provide reasons as to why and how it arrived at the review of the remuneration and benefits paid to judicial officers.
40. Article 47(2) of the Constitution has placed an obligation on a person performing an administrative function to give reasons for administrative action if a person's right or fundamental freedom is likely to be adversely affected. Section 6(2) of the *Fair Administrative Action Act* has amplified the Constitutional obligation.
41. It was asserted that the Commission was required by section 6 of the *Fair Administrative Action Act* to give the reasons for setting the remuneration and benefits.
42. The Commission in addressing the allegation that it failed to give reasons it considered in setting the remuneration of the judicial officers contended that the reasons were given and it produced several correspondences dated 30 March 2017, 18 August 2017, 6 October 2017, 20 November 2017, 14 December 2018, 13 December 2018, 30 April 2019 (and culminating in a letter dated 17 May 2019 after the filing of these proceedings) exchanged with the *Interested Party*.
43. The Association countered that the Respondent's letter dated 17 May 2019 did not comply with the requirement to furnish reasons as it is a general letter with general averments and was served beyond the 30-day limit imposed by Section 6(3) of the *Fair Administrative Action Act*.
44. The Association sought umbrage in *JNN (a minor), MNM, suing as next friend v Naisula Holdings Limited t/a N School* (2018) eKLR where the Court noted that the obligation under Article 47(2) is that reasons must be given and a person against whom an administrative decision is taken is entitled to the same being supplied within one month failure of which, a rebuttable presumption arises that the decision was not conducted in good faith (section 6(4) of the *Fair Administrative Action Act*).
45. The Association also cited *Republic v Public Procurement Administrative Review Board & 2 others, ex-parte Pelt Security Services Limited* (2018) eKLR.
46. The correspondences placed before the Court clearly show the factors the Commission considered in setting the remuneration for judicial officers.
47. This particular ground of challenge, therefore, has baffled the Court for there is nothing placed on record that the Association at any particular time wrote to the Commission seeking reasons.
48. If the Association sought for reasons from the Commission, there was no demonstration that such reasons were requested for and that the Commission failed to provide the same within 30 days.
49. All that is on record is that the Association sought for information from the *Interested Party* through a letter dated 15 October 2018, and

it appears that the information was provided. The records provided included a communication from the Commission setting out the reasons it had considered in setting the remuneration for judicial officers.

50. The Court finds that the Association did not prove it sought for reasons and that the Commission failed to provide reasons as prescribed in law.

Whether the Commission failed to review/set remuneration and benefits within prescribed cycles

51. This was ground 10 in the Association's submissions.

52. The Association also alleged the Commission had failed to review the remuneration and benefits payable to its members within the prescribed 4-year cycles.

53. In the view of the Court, this allegation had no factual basis or merit as there was ample evidence available even to the Association that there was a setting of remuneration and benefits in December 2014 and that the next cycle of the review was concluded around 13 December 2018

Whether the Commission failed to consider material considerations in setting the remuneration and benefits of judicial officers

54. The question whether the Commission failed to consider relevant factors in setting the remuneration and benefits of judicial officers formed the crux of the Petition and these were outlined in Issue (II) as grounds 1, 2, 3, 4, 5, 8 and 9 in the submissions.

55. The Association's challenge on these grounds appears to have been grounded on the contentions that supervening factors arose after 2013 review cycle and that the Commission had failed to take into consideration these relevant and material factors.

56. In brief, the factors which had emerged and which the Association contended that the Commission did not consider were the *expanded jurisdiction of judicial officers brought about by the Magistrates Court Act, 2015 the Elections Act and the Law of Succession Act* (among other Statutes) increased the pecuniary jurisdiction of judicial officers as well as granted jurisdiction over employment, labour, environmental and land disputes.

57. Apart from the *expanded jurisdiction*, the Association asserted that judicial officers had an increased workload during the review cycle and used private time to draft decisions.

58. The Commission in resisting the allegations that it did not consider the relevant factors took the position that it carried out a job evaluation exercise using the *Paterson Job Grading System* and that it considered *input factors* (qualifications, knowledge, skills, experience and training); *process factors* (problem solving and communication) and *output factors* (financial impact and influence of decisions), and that the results from the evaluation were used in setting the remuneration for judicial officers.

59. It was also asserted that the fact that judicial officers were full-time state officers was considered and that after considering all the factors, the remuneration of the judicial officers was set comparatively higher than those of state officers in the other organs of government.

60. The Commission submitted that it has the necessary expertise in matters of remuneration and benefits, and in that the absence of proof of unconstitutionality (illegality, procedural impropriety and irrationality), its decision setting the remuneration and benefits for the judicial officers ought not to be disturbed.

61. There are many job grading systems and this Court is aware of other grading systems including *Peromnes* Job grading system and *Castellion* system.

62. The Commission indicated that it opted to use the *Paterson* system without disclosing any other details or what fact-specific factors it considered and/or what weight was given to the factors which were considered.

63. The Association did not bother to interrogate the elements involved in the *Paterson* system to flesh out, if at all the different weights assigned to each factor it contended were not considered.

64. The factors the Association accused the Commission of not considering would appear to fall generally within the array of *input, process and output factors* under the *Paterson* system.

65. However, on the state of the pleadings, the Court is unable to determine whether the factors the Association were contending were not considered were considered or not considered and/or what weight(s) were given to the factors.

66. The Court has the word of the Association against that of the Commission.

67. To unravel the puzzle, it is the Court's view that more disclosure and or interrogation through *viva voce* evidence would have been germane, or experts should have been called.

Security (allowance)

68. The question of security/risk allowance broadly fell under the factors allegedly not considered by the Commission but because the Commission disowned that this fell under its mandate, the Court will address this issue separately.

69. The Association contended that judicial officers by the nature of their duties performed sensitive and risky duties but were denied security or a risk allowance in lieu thereof despite the nature of duties.

70. The Commission did not deny that security for judicial officers was a valid concern.

71. How to address the security concerns were the point of departure between the Association and the Commission.

72. The Association called for the provision of security or a security/risk allowance. The Commission washed its hands off, contending that security was within the jurisdiction of the Inspector General of Police.

73. Although no figures were presented before the Court, it may not be easy to provide police protection to all judicial officers, as it has been said that the Police are stretched.

74. However, that should not mean that the judicial officers cannot be facilitated to secure private security. An allowance can comfortably cover that.

75. By throwing the gauntlet to the Inspector General of Police, and not considering the other reasonable options, the Court finds that the Commission did not consider a relevant *process factor*.

Discrimination

Transport

76. On the question of transport, the Commission contended that fiscal sustainability could not allow for the provision of official transport to all judicial officers unless one was undertaking official duties and that there was in place a car loan facility on a reduced interest rate.

77. The Secretary of the Interested Party deposed in her affidavit that the Commission had not proclaimed itself on the question of office transport for judicial officers.

78. It is in the public knowledge that state officers in the legislative arm have access to car grants and are also entitled to mileage. There are also other public officers whose contracts provide for transport allowance or a commuter allowance.

79. If transport allowance was part of the remuneration paid to judicial officers, the Commission did not disclose as much.

80. No plausible reason was tendered to this Court to demonstrate why it was justifiable to treat judicial officers who have not been provided with official transport differently.

81. The Court finds that there has been discrimination by the Commission.

Non-practice allowance

82. The Association further alleged discrimination in that there was no review of non-practicing allowance to bring to par with state counsels and prosecutors.

83. To demonstrate that there was discrimination in respect of non-practice allowance, the Association asserted that whereas State Counsel and Prosecutors were earning non-practising allowances ranging from Kshs. 30,000/- to Kshs. 50,000/-, for judicial officers, it was set at Kshs. 10,000/-.

84. The Commission in response indicated that the non-practice allowance was under review.

85. The Association did not contest the Commission's assertion that a review of non-practice allowance alongside other allowances within the public sector was on-going.

86. However, it is also a fact that State Counsels and prosecutors are getting were marginally higher non-practice allowance compared to judicial officers.

87. The Commission did not explain when and how the discrepancy arose. There was no indication when the review of this allowance would be completed.

88. The Court is constrained to find discrimination.

Discrimination and Irrationality

89. The Association further challenged the decision of the Commission to band together judicial officers and *members of county assemblies* whom it contended had lower academic qualifications and who at the same time were entitled to sitting allowances.

90. The Commission on the other hand contended and urged that academic qualifications were only one of the factors to be considered and that it had also considered the statutory roles placed upon *members of county assemblies*. It was also contended that the nature of work for the *members of county assemblies* involved plenary and committee sessions and therefore sitting allowances were justified.

91. It is in the public domain that the nature of the work of *members of county assemblies* requires both plenary and committee sessions, and therefore consideration of such factors would not be discriminatory or irrational as against judicial officers.

Executive's higher remuneration

92. The Association did not prove that members of the Executive branch were paid more than its members for work of equal value.

Capping allowances at 40% of basic pay

93. The Association challenged the failure by the Commission to itemise the allowances enjoyed by judicial officers unlike in the other sectors of the public service as irrational, and a violation of Articles 27, 41, 47 and 230(5) of the Constitution.

94. It was also contended that the capping of allowances at 40% of basic pay was arbitrary.

95. The Respondent's justification was that the capping/formula was for purposes of computing gratuity and/or pension.

96. Sections 10, 11, 13, 16, 20 and 31 of the Employment Act, 2007 contemplates an itemised pay statement. In not setting out, if at all, specifics and how much of the judicial officers' and indeed all state officers remuneration comprises of allowances, the Commission has been disregarding both the text and spirit of the employment law.

97. It would not be out of context to surmise therefore that in this respect the Commission has been opaque and not transparent. Transparency is one of the national values in this country.

98. On the question of the 40% cap on allowances, the Court is of the view that by itself is not arbitrary. The arbitrariness is in the failure to identify the individual allowances.

99. The Commission should relook its position on the question of itemising allowances so that employers and employees in the public sector are in the know.

100. Probably, itemising the allowances may have resolved the gravamen of the Association's case as to what factors the Commission considered in setting the remuneration and benefits of state officers.

Conclusion and Orders

101. The Association sought about 16 generously worded substantive orders. An order should be precise and clear.

102. The Commission submitted that the Association did not pursue all channels open to it as there is a review mechanism established by the Commission which they did not request for.

103. It also contended that the Association had not shown any adverse effects from its actions and submitted that whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular way, say compelling the Commission to pay a particular amount unless that amount has been ascertained and reference was made to the Court of Appeal decision in *R v Kenya National Examination Council Ex-parte Gathengi & others, Civil Appeal No. 266 of 1996*.

104. It further contended that review having been carried out, an order of mandamus cannot quash that which has already been done.

105. An order of *mandamus* can be issued to compel the performance of a duty.

106. The Court has considered the submissions, finds and holds that the Association has made out a case for grant of the following orders

(a) A declaration that the failure of the Respondent to make provision for security allowance for magistrates and Kadhis was discriminatory and unfair.

(b) A declaration that the failure by the Respondent to make provision for transport allowance for Magistrates and Kadhis was discriminatory and unfair.

(c) A declaration that the failure by the Respondent to review the non-practice allowance payable to judicial officers was discriminatory.

(d) A declaration that the failure by the Respondent to itemise the allowances paid to judicial officers and other state officers is

unlawful.

(d) An order of mandamus to compel the Respondent to review the remuneration of judicial officers in light of this judgment be concluded within 6 months.

107. The other reliefs are declined.

108. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 22nd day of November 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Otieno instructed by Ongoya & Wambola Advocates

For Respondent Mr. Sitienei/Ms. Wafula instructed by Rosalie W. Wafula Advocate

For Interested Party Mr. Wamaasa instructed by Isaac J.M. Wamaasa Advocate

Court Assistant Lindsey