



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 6 OF 2019 CONSOLIDATED WITH JUDICIAL REVIEW APPLICATIONS Nos. 10 AND 12 BOTH OF 2019**

**REPUBLIC**

**VERSUS**

**KENYA COPYRIGHT BOARD .....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**SALARIES AND REMUNERATION COMMISSION.....3RD RESPONDENT**

**-EX-PARTE-**

**MESHACK V. OTIENO.....1ST APPLICANT**

**SONYKING K. KIMATHI.....2ND APPLICANT**

**EMILY K. KIOKO.....3RD APPLICANT**

**EPHRAIM GIKANDI NDIRITU.....4TH APPLICANT**

**ABDI MOHAMED ABIKAR.....5TH APPLICANT**

(Before Hon. Justice Byram Ongaya on Friday, 6th December, 2019)

**JUDGMENT**

The applicants are employed by the 1st respondent. The 1st respondent is a state corporation established under section 3 of the Copyright Act, Cap 130 of the Laws of Kenya. The 3rd respondent is an independent constitutional commission established under Article 230 of the Constitution of Kenya 2010. Thus the applicants are public officers and the 1st respondent is a public body as defined in the Constitution.

The applicants have exhibited their respective payslips showing that each is paid risk allowance and extraneous allowance at all material time. The 1st respondent has issued an internal memorandum Ref. No. KECOBO/2A/330/2018/VII/(25) dated 29.08.2018 addressed to, amongst others, the applicants. The internal memorandum conveys that following advice from the 3rd respondent ref. No. SRC/TS/CBT/3/3 VOL.V (99) dated 27.07.2018, payment of responsibility, extraneous and risk allowances were suspended with immediate effect. The reason for suspension was that the payment of the allowances had been subject of audit queries in the recent past. The 3rd respondent had therefore advised as follows:

- a) Payment of responsibility and risk allowances ceases with immediate effect.
- b) Extraneous allowance payable to copyright inspectors ceases with immediate effect.
- c) Payment of non-practice allowance is made in accordance with the relevant public service circular applicable at the time.
- d) No allowances shall be paid as a ratio or percent of the basic pay and in case of such payments having been made, including extraneous allowance, the same should cease with immediate effect.

The internal memorandum signed by Edward Sigei, the 1st respondent’s Executive Director, concluded as follows:

**“At the time of the initial review by SRC, the Board had sought a review of the decision that discontinued the payment of allowances and thereafter relied on Board of Director Approval.**

**In view of the above, the Board will be making a fresh request to the Commission once fully constituted bearing in mind that such compensations ought to have been factored in the job evaluation exercise.**

**The HRM office shall issue pay change advice (PCA) to all affected officers as applicable.”**

The applicants opposed the suspension by their internal memorandum dated 17.09.2018 upon the following grounds:

- a) The letter by the 3rd respondent suspending the allowances and the auditors’ management letter clearly stating their queries had not been attached on the Executive Director’s internal memorandum of 29.08.2018.
- b) The copyright inspectors’ function is both extraneous and risky in nature. It entails waking up at 4.00am to arrive at the police station, collect prisoners on time, register and escort them to court before 7am and normally the investigation, arresting and compiling of case files goes beyond normal working hours sometimes up to 11pm. Thus it was unfair to deny the officers extraneous and risk allowance.
- c) The audit queries had not been communicated to the affected officers so that they could make their representations. The 1st respondent’s human resource policy at clause 15.1.2 was clear that any correspondence that affects an employee of the organisation shall be accorded every party involved an opportunity to make representation of their case through the Head of Department but such communication was never received as contemplated.
- d) The Copyright Inspectors had been beaten and injured on numerous occasions such as at Muthurwa, Nyamakima, Mukuru kwa Njenga and had to invoke forceful means of protecting themselves and many had been falsely accused in the course of duty.in conducting raids they had lost personal documents and effects. Some of them carried guns while on duty and which was an inherent risk and the weapon also attracted thugs constituting a risk to the inspectors.
- e) The enforcement officers had also been tasked to protect the board in responding to emergency situations or attacks at the front office or as assigned.
- f) Article 41 (2) (a) of the Constitution provides for the right to fair remuneration and Article 41(1) provides that every person has a right to fair labour practices.
- g) Public Service Human Resource Policies and Procedures Manual of May 2016 provides at C.I(3) that public officers shall not over commit their salary beyond the two-third (2/3) of their basic salaries and the heads of Human Resource Units to ensure compliance. Annex c.13 provides that extraneous allowance shall be paid to officers who are called upon to undertake extra responsibilities in addition to their normal duties and therefore work over and above the official working hours in a continuous basis. The rates and eligibility to payment shall be determined by the Government from time to time.
- h) The 1st respondent’s Human Resources Policy and Procedures Manual, December 2016 at clause 4.10 provides that extraneous allowance shall be paid to officers who are called upon to undertake extra responsibilities in addition to their normal duties and therefore work over and above the official working hours (8.00am to 5.00pm) in a continuous basis. The rates and eligibility to payment shall be determined by the Government from time to time.

The memo concluded that the suspension would affect the officers adversely in service delivery and the affected officers would find it difficult to meet financial ends in the prevailing hard economic times. They requested that the suspension be reconsidered by the Board and the management bearing in mind that it was an advisory and not a directive by the 3rd respondent.

By the internal memorandum dated 12.09.2018 addressed to the Head of Department, Enforcement the respondent acknowledged receipt of the internal memos of 12.09.2018 and 17.09.2018 and indicated that the Executive Director’s Office was paying due attention to the appeals and the outcome would be communicated in due cause. There was no positive response resolving the matter and the applicants have moved the Court.

The applicants have filed their respective applications through Wambo Muyala & Company Advocates. The last of the applications was filed on 29.05.2019 and the first on 15.05.2019. The applications are by notice of motion under order 53 rule 3(1) of the Civil Procedure Rules, Rules 2 and 3 of the Employment and Labour Relations Court (Procedure) Rules, Section 7 of the Fair Administrative Action Act, 2015 and all enabling powers and provisions. The applicants filed their respective verifying affidavits, exhibits and prescribed statements of facts and relief. The prayers are for:

- a) An order of certiorari to bring into the Honourable Court and quash the 1st respondent’s decision to suspend the ex-parte applicants’ risk and extraneous allowances as embodied in the memo dated 29.08.2018 or otherwise.
- b) An order of mandamus compelling the 1st respondent to pay the ex-parte applicants’ accrued as well as future risk and extraneous allowances in accordance with their terms of service.
- c) An order of prohibition restraining the 1st respondent from withdrawing the applicants’ risk and extraneous allowances by dint of the memo dated 29.08.2018 and otherwise negatively interfering with their terms of service.

d) An order of prohibition restraining the 3rd respondent from advising the 1st respondent to withdraw the applicants' risk and extraneous allowances and otherwise negatively interfering with their terms of service.

e) Costs to be awarded to the ex-parte applicants.

The applicants' applications are based upon the following grounds:

a) By the memo dated 29.08.2018 the 1st respondent has unilaterally withdrawn or suspended payment of the due benefits including the risk and extraneous allowances.

b) The said memo is contrary to the applicants' terms and conditions of service.

c) The memo was implemented without according the applicants due process.

d) The withdrawal of the allowances has occasioned the applicants undue hardship.

e) The applicant's right to fair administrative action per Article 47 has been violated in the manner the memo was imposed.

f) Unless the Court intervenes the applicants will suffer irreparable harm.

g) It is fair and just to grant the orders prayed for.

The 1st respondent responded to the applicants' judicial review applications by filing in Application No.6 of 2019 a notice of motion seeking to enjoin the 3rd respondent. The notice of motion was filed on 11.04.2019 through George Nyakweba Advocate, Chief Legal Counsel for the 1st respondent. The 1st respondent's case was that the impugned memo was issued in line with the constitutional advisory by the 3rd respondent. The 1st respondent's application was supported by the annexed affidavit of Ketty Arucy, Senior Human Resource Officer for the 1st respondent. The 1st respondent's application was allowed and the 1st respondent's grounds in response to the application are as follows:

a) In July 2013 the 3rd respondent approved a new salary structure for the 1st respondent's employees. The new structure provided for House Allowance, Non-practising Allowance and Commuter Allowance only.

b) The 1st respondent's Board Chairman appealed to the 3rd respondent concerning the omission of some allowances since some officers of the 1st respondent were engaged in rather extraneous and risky activities. The 1st respondent informally told the 1st respondent to await the completion of the on-going public service job evaluation process. Thus the Executive Director elected to maintain the payment of the omitted allowances awaiting the job evaluation outcome.

c) The job evaluation report was received in July 2017 but had not addressed the omitted allowances.

d) The Office of the Auditor-General audited the 1st respondent's for 2016/2017 and observed that the 1st respondent's resolutions with regard to the affected allowances were un-procedurally implemented without the required approval. The auditors demanded for approval by SCAC or SRC for payment of the risk, extraneous and responsibility allowance. The 1st respondent's Executive Director acted by the letter of 03.07.2018 seeking formal guidance from the 3rd respondent.

e) The 3rd respondent replied that the payment of the said risk, responsibility, and extraneous allowances be stopped forthwith. Thus the Executive Director issued the impugned internal memorandum dated 29.08.2018 stopping the payment of the allowances forthwith.

f) On 08.10.2018 the 1st respondent appealed against the 3rd respondent's directive. The 3rd respondent asked the 1st respondent to submit a fresh request with justification for each allowance for consideration by the newly constituted 3rd respondent.

g) The Public Service Commission issued the letter dated 12.09 2018 stating that the said allowances be stopped.

h) The 1st respondent has set up a task-force to speed up the resolution of the quagmire.

i) The 3rd respondent has the mandate to set and regularly review the remuneration and benefits of all state officers as well as to advise the national and county governments on the remuneration and benefits of all other public officers. The applicants are public officers. The 1st respondent was therefore in order to seek the 3rd respondent's advisory.

The 3rd respondent opposed the applications by filing on 15.07.2019 the replying affidavit of Anne R. Gitau, the Commission Secretary and Chief Executive Officer. The affidavit was filed through Rosalie Wafula Advocate. The 3rd respondent's case is as follows:

a) The functions and powers of the 3rd respondent under Article 230(4) of the Constitution are 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.

b) The Constitution provides that in undertaking its functions the 3rd respondent shall take into account the principles of need to ensure that the total public compensation bill is fiscally sustainable; the need to ensure that the public services are able to attract and

retain the skills required to execute their functions; the need to recognize productivity and performance; and transparency and fairness.

c) Section 11 of the Salaries and Remuneration Commission Act vests in the 3rd respondent further functions listed therein. The function includes, inter alia, to advise on the salaries and remuneration to be paid out of public funds; and to keep under review all matters relating to the salaries and remuneration of public officers.

d) Under Article 259(11) of the Constitution, the advice by the 3rd respondent is mandatory except to the extent that the Constitution provides otherwise.

e) The 3rd respondent reviewed salaries and allowances payable to staff of the 1st respondent based on the 1st respondent's representations in 2012. The 3rd respondent noted that although the extraneous allowance was approved in 2011 prior to constitution of the 3rd respondent the payment, of the allowance was to police inspectors in the 1st respondent's service and the positions no longer existed in the 1st respondent's establishment. The information on responsibility, risk and extraneous allowances was not part of the 1st respondent's representation submitted in 2012.

f) On 08.10.2018 the 1st respondent wrote to the 3rd respondent admitting that its Board approved in January 2013 the payment of extraneous allowance and responsibility allowance without approval or advice of the 3rd respondent. The 3rd respondent has written the letter dated 23.07.2018 observing that the 1st respondent paid the three allowances (risk, responsibility and extraneous allowances) in circumstances whereby the 3rd respondent being fully constituted, its advice was not requested for and obtained. The Commission invited the 3rd respondent for a consultative meeting on the matter scheduled for 26.07.2018 at the 3rd respondent's Boardroom.

The Court has considered the material on record including the final submissions filed for the parties. The Court makes findings as follows.

**First**, the evidence is that the extraneous allowances were introduced and paid pursuant to the decision of the 1st respondent's Board sometimes in 2013 and at a time that the 3rd respondent was in place. The Court finds that in absence of the advisory by the 3rd respondent in discharge of its constitutional and statutory mandate, the extraneous allowance could not continue to be paid and the decision by the 3rd respondent was consistent with its constitutional and statutory mandate as urged for the 3rd respondent. Further as submitted for the 1st and 2nd respondents by learned Litigation Counsel Odukenya Wycliffe for the Attorney General, it was not clear when risk allowance was introduced and no decision by the 1st respondent's Board or the 3rd respondent has been exhibited in that regard. The Court finds that it is contrary to public interest for the Court to aid an illegality. For want of the 3rd respondent's advisory, the contractual term, if any, to pay the applicants risk and extraneous allowance is found illegal and therefore not enforceable as it would be null and void.

**Second**, the Court has considered the applicants' concerns that their rights under Articles 41 and 47 of the Constitution were violated in the manner the risk and extraneous allowances were suspended. It is true that their contracts of service would have been breached in view of the vested benefits to earn the two allowances but for the illegality of the purported contractual term to pay the two allowances. The Court has found that the contractual term to pay the two allowances was illegal. In such circumstances the applicants' allegation for violation of the constitutional rights will collapse as founded upon an illegal contractual term.

**Third**, the Court finds that the payment of the two allowances was suspended rather than abolished. The Court has considered the material on record and it is clear that the 3rd respondent has issued a clear direction towards the resolution of the matter within its constitutional and statutory mandate. The Court considers that the applicants' remedy lies squarely within the 3rd respondent's constitutional and statutory powers and functions and which the 1st respondent has already invoked by appealing against the 3rd respondent's directive suspending the payment of the allowances.

**Fourth**, the Court has considered the submissions for the applicants filed by Howard & Nick Advocates that the claimant's legitimate expectation to meet their already committed financial obligations is defeated by the suspension of the payment of the risk and extraneous allowance. The Court finds that there cannot be a legitimate expectation founded upon an illegal contractual term of service. Further it is that the allowances are suspended pending the 3rd respondent's advisory in the matter once the 1st respondent complies by providing the required information. The 3rd respondent's letter dated 22.10.2018 advises that a fresh request with justifications for each of the allowances for consideration by the 3rd respondent be submitted by the 1st respondent. The 1st respondent has been properly guided and the applicants are equally bound accordingly.

**Fifth**, the Court considers that in view of the findings made earlier in this judgment, the applicants have not established a justification for grant of the remedies as prayed for. The Court has considered the applicants' innocence to the extent that they did not influence the grant of the questionable risk and extraneous allowances to themselves and returns that each party shall bear own costs of the proceedings.

In conclusion, the judicial review applications filed herein for the applicants are hereby dismissed with orders that each party to bear own costs of the applications.

**Signed, dated and delivered in court at Nairobi this Friday, 6th December, 2019.**

**BYRAM ONGAYA**

**JUDGE**