



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 52 OF 2015

**IN THE MATTER OF ARTICLES 2, 3(1), 22(1), 23, 27, 165 AND 258 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE
AND PROCEDURE RULES, 2012**

AND

**IN THE MATTER OF THE ENFORCEMENT AND INTERPRETATION OF THE
CONSTITUTION**

AND

IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION ACT, 2013

BETWEEN

UNION OF KENYA CIVIL SERVANTS (UKCS).....PETITIONER

AND

SALARIES AND REMUNERATION COMMISSION.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. This Petition is brought by Union of Kenya Civil Servants, a trade union registered under Kenyan law to cover the interests of civil servants employed by the Government of Kenya. The 1st Respondent is a Commission established under Article 230 of the Constitution of Kenya with the following mandate:

- a. set and regularly review the remuneration and benefits of all State Officers; and

- b. advise the national and county governments on the remuneration and benefits of all other public officers.
2. The 2nd Respondent is the Attorney General of the Republic of Kenya and is sued in his capacity as the Principal Legal Advisor to the Government.

The Petition

3. The Petitioner alleges that the rights of its members have been violated. Specifically, the Petitioner states that the 1st Respondent has continuously acted beyond its mandate as provided for under Article 230 of the Constitution and Section 11 of the Salaries and Remuneration Commission Act.
4. The Petitioner further states that it has a Recognition Agreement with the Government of Kenya and is the only properly constituted trade union competent to represent the interests of all unionisable civil servants in the country.
5. On 24th March 2014, the Petitioner wrote to the Secretary of the 1st Respondent putting forth its proposals on the management of the public wage bill. By a circular referenced SRC/ADM/CIR/1/13 Vol. III (126) and dated December 2014, the 1st Respondent revised the following allowances payable to public servants:
 - a. Hardship allowance
 - b. House allowance
 - c. Daily subsistence allowance (local travel)
 - d. Daily subsistence allowance (foreign travel)
6. In the said circular, the Chairperson of the 1st Respondent directed senior officers of various Government Departments to ensure compliance.
7. By another circular referenced SRC/ADM/CIR/1/13/ Vol. III (128) and dated 17th December 2014, the 1st Respondent set the loan and mortgage benefits for public officers.
8. On 31st December 2014, the 1st Respondent invited the Petitioner for a validation workshop on the draft Public Sector Remuneration and Benefits Policy. In response, the Petitioner wrote to the 1st Respondent on 27th January 2015 raising concerns with the draft Policy. The Petitioner asked that the draft be withdrawn to allow development of an alternative document under the leadership of the Ministry of Labour, Social Security and Services which was the line Ministry in charge of employment matters.
9. In spite of the concerns raised by the Petitioner, the 1st Respondent went ahead to publish the Public Sector Remuneration and Benefits Policy Framework (June 2015) and the Public Sector Remuneration and Benefits Policy (June 2015) with a proposed commencement date of 1st July 2015.
10. It is the Petitioner's case that the 1st Respondent violated the Constitution and the Salaries and Remuneration Commission Act by:
 - a. Failing to facilitate public participation as envisaged by Article 10 of the Constitution;
 - b. Acting *ultra vires* its mandate which is limited to inquiring and advising the National and County Governments on salaries and benefits for public officers;
 - c. Failing to take into account the proposals of stakeholders including the Petitioner.

11. The Petitioner seeks the following prayers:

- a. A conservatory order restraining the 1st Respondent from implementing the contents of circular dated 19th November 2014 referenced SRC/TS/TA/3/10(86);
- b. A conservatory order restraining the 1st Respondent from implementing the contents of circulars referenced SRC/ADM/CIR/1/13 Vol. III(126) and SRC/ADM/CIR/1/13 Vol. III(128) dated 10th December 2014 and 17th December 2014 respectively;
- c. A conservatory order restraining the 1st Respondent from implementing the contents of the Public Sector Remuneration and Benefits Policy Framework (2015) and the Public Sector Remuneration and Benefits Policy (June 2015);
- d. A declaration that the three circulars being SRC/TS/TA/3/10(86) dated 19th November 2014, SRC/ADM/CIR/1/13 Vol. III(126) dated 10th December 2014 and SRC/ADM/CIR/1/13 Vol. III(128) dated 17th December 2014 as well as Public Sector Remuneration and Benefits Policy Framework (2015) and the Public Sector Remuneration and Benefits Policy (June 2015) are null and void as they are an affront to the basic structures of the Constitution as set out by Articles 3 and 230;
 - e. A declaration that the three circulars being SRC/TS/TA/3/10(86) dated 19th November 2014, SRC/ADM/CIR/1/13 Vol. III(126) dated 10th December 2014 and SRC/ADM/CIR/1/13 Vol. III(128) dated 17th December 2014 as well as Public Sector Remuneration and Benefits Policy Framework (2015) and the Public Sector Remuneration and Benefits Policy (June 2015) are null and void as they contravene Article 230 of the Constitution and Section 11 of the Salaries and Remuneration Commission Act;
- f. A declaration that the contents of the three circulars being SRC/TS/TA/3/10(86) dated 19th November 2014, SRC/ADM/CIR/1/13 Vol. III(126) dated 10th December 2014 and SRC/ADM/CIR/1/13 Vol. III(128) dated 17th December 2014 as well as Public Sector Remuneration and Benefits Policy Framework (2015) and the Public Sector Remuneration and Benefits Policy (June 2015) are null and void as they are *ultra vires* the powers or authority of the 1st Respondent as conferred upon it under Article 230 of the Constitution and Section 11 of the Salaries and Remuneration Commission Act;
- g. An order of certiorari to quash the directives by the 1st Respondent vide three circulars being SRC/TS/TA/3/10(86) dated 19th November 2014, SRC/ADM/CIR/1/13 Vol. III(126) dated 10th December 2014 and SRC/ADM/CIR/1/13 Vol. III(128) dated 17th December 2014 as well as Public Sector Remuneration and Benefits Policy Framework (2015) and the Public Sector Remuneration and Benefits Policy (June 2015) dated 17th December 2014;
- h. An order of prohibition prohibiting the 1st Respondent from seeking implementation of the directives issued vide three circulars being SRC/TS/TA/3/10(86) dated 19th November 2014, SRC/ADM/CIR/1/13 Vol. III(126) dated 10th December 2014 and SRC/ADM/CIR/1/13 Vol. III(128) dated 17th December 2014 as well as Public Sector Remuneration and Benefits Policy Framework (2015) and the Public Sector Remuneration and Benefits Policy (June 2015) dated 17th December 2014;
- i. Costs of the Petition.

The Respondents' Case

12. The 1st Respondent's response is contained in a replying affidavit sworn by its Secretary, Anne Gitau on 11th December 2015. She deposes that in discharging its mandate under Article 230 of the Constitution and Section 11 of the Salaries and Remuneration Commission Act, 2012 the Respondent is guided by the principles set out under Article 230(5) of the Constitution including;

- a. *the need to ensure that the total public compensation bill is fiscally sustainable,*
- b. *the need to ensure that the public services are able to attract and retain the skills required to execute their functions;*
- c. *the need to recognise productivity and performance; and*
- d. *transparency and fairness.*

13. Pursuant to Article 230, the 1st Respondent issued a circular dated 19th November 2014 setting the leave allowance for County Executive Committee members and advising on the leave allowance for other public officers in the County Governments.

14. Pursuant to Section 11(b) of the Salaries and Remuneration Commission Act, the 1st Respondent issued a circular dated 10th December 2014 on review of all allowances in the public service.

15. The 1st Respondent issued another circular dated 17th December 2014 on car loan and mortgage for state officers and public officers.

16. Gitau further depones that the process that led to the development of the Public Sector Remuneration and Benefits Policy Framework and the Public Sector Remuneration and Benefits Policy was initiated by the National Government in March 2013. She states that the process had been consultative with wide public participation.

17. Due to an increasing wage bill, H.E the President of the Republic of Kenya launched the national dialogue on the wage bill in March 2015. The 1st Respondent facilitated the dialogue all over the country and in every county where different stakeholders and the public were consulted. In the course of these engagements it emerged that one of the reasons for the growth in the public wage bill was lack of a National Remuneration and Benefits Policy. A recommendation was therefore made for development of a framework with principles for setting remuneration and benefits in the public sector.

18. Following the outcome and recommendations of the aforesaid dialogue, the 1st Respondent commenced coordination of the process of developing a draft Public Sector Remuneration and Benefits Policy Framework. The 1st Respondent states that it organised meetings with various stakeholders, including the Petitioner with a view to getting input into the final policy. The views thus gathered had been taken into account in the preparation of the Public Sector Remuneration and Benefits Policy.

19. The 2nd Respondent filed grounds of opposition on 16th December 2015 stating that the 1st Respondent had acted within its mandate under Article 230 of the Constitution and Sections 11 and 13 of the Salaries and Remuneration Commission Act.

Findings and Determination

20. The issues for determination in this Petition are as follows:

- a. Whether the 1st Respondent overstepped its mandate under the Constitution and the law;
- b. Whether the 1st Respondent facilitated public participation as required by the Constitution;
- c. Whether the Petitioner is entitled to the remedies sought.

The Role and Mandate of the 1st Respondent

21. In its Petition, the Petitioner questions the power of the 1st Respondent to issue the following circulars:

- a. Circular dated 19th November 2014 which set the leave allowance for County Executive Committee members and advised on the leave allowance for other public officers serving in the county governments;
- b. Circular dated 17th December 2014 which set the car loan and mortgage benefits for state officers and advised on the car loan and mortgage benefits for public officers;
- c. Circular dated 10th December 2014 which sought to review allowances payable in the public service.

22. The Petitioner also questions the power of the 1st Respondent to guide the development of the Public Sector Remuneration and Benefits Policy Framework and the Public Sector Remuneration and Benefits Policy.

23. Article 230(4) of the Constitution sets out the role and mandate of the 1st Respondent as to-

- a. *set and regularly review the remuneration and benefits of all state officers; and*
- b. *advise the national and county governments on the remuneration of all other public officers.*

24. While the role of the 1st Respondent under (a) above appears to be clear, its role under (b) has drawn some controversy. It is the 1st Respondent's case that its advice under Article 230(4)(b) is binding.

25. Both the Petitioner and the 1st Respondent made reference to the decision of the Court of Appeal in ***Teachers Service Commission v Kenya National Union of Teachers [2015] eKLR*** where it was held that the advice of the Salaries and Remuneration Commission under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any exercise of power that ignores this advice is invalid. Under the principle of *stare decisis*, this Court is bound by this decision which I fully agree with.

26. The Court was further referred to Section 11 of the Salaries and Remuneration Commission Act which amplifies the role of the 1st Respondent as follows:

- a. *Inquire into and determine the salaries and remuneration to be paid out of public funds to state officers and other public officers;*
- b. *Keep under review all matters relating to the salaries and remuneration of public officers;*
- c. *Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;*
- d. *Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;*
- e. *Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;*
- f. *Make recommendations on matters relating to the salary and remuneration of a particular state or public officer.*

27. By the time of making its final submissions, the Petitioner appears to have changed its position on the import of the advice of the 1st Respondent under Article 230(4)(b). This was a well advised shift of position. It is my view that in establishing the Salaries and Remuneration Commission under the 2010 Constitution, Kenyans wanted to cure two related mischiefs; first, an unchecked wage bill and second, glaring wage disparities within the public sector.

28. I do not think the wishes of Kenyans could be achieved with the Salaries and Remuneration Commission only dealing with the salaries and benefits for state officers while those of other public officers are dealt with elsewhere. To this extent I agree with the holding by **Rika J** in **National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 Others [2013] eKLR** that the mandate of the Salaries and Remuneration Commission under Article 230(4)(b) must extend to cover all manner of public servants, including employees of state corporations.

Public Participation

29. I now turn to the issue of public participation. The Petitioner complains that there was no adequate public participation in the development of the Remuneration and Benefits Policy Framework and the Public Sector Remuneration and Benefits Policy. The Court was referred to Articles 10 and 201 of the constitution where public participation is stated as a basic principle in the legislative and policy functions of Government

30. Addressing the issue of public participation in **Robert N. Gakuru & Others v Governor of Kiambu County & 3 Others [2014] eKLR** **Odunga J** stated as follows:

“.....public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates.”

31. The 1st Respondent produced a list of persons who attended stakeholders fora on the Remuneration and Benefits Policy Framework and the Public Sector Remuneration and Benefits Policy. The Petitioner takes issue with the persons listed as having attended these fora stating that a large number of them were members of staff of the 1st Respondent with the rest being drawn from Commissions of the National Government, County Public Service Boards and a handful of different union officials. The Petitioner states that the general public ought to have been directly involved and adds that the stakeholder engagements ought to have been preceded by public capacity building in order to achieve meaningful public participation.

32. I agree that public participation ought to be real and credible. It is my view however that in determining whether public participation has been duly facilitated the Court will consider what is reasonable and feasible in the circumstances of each particular case.

33. In the South African case of **Doctors for Life International v Speaker of the National Assembly & Others (CCCT2/05 [2006] (12) BCLR 1399 (CC); 2006(6)SA 416 Ngcobo J** held that facilitation of public involvement connotes taking steps towards ensuring that the public participate in the legislative process.

34. I am persuaded by the holding by **Sachs J** in **Marefong Demarcation Forum & Others v President of the Republic of South Africa & Others (CCT 41/07) [2008]ZACC 10;2008(5) SA 171(CC);2008(10)BCLR 968(CC)** that *“being involved does not mean that one's view must necessarily prevail.”*

35. Closer home a 5-Judge Bench of the High Court in **Coalition for Reforms and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR** held that it would be impracticable to expect that the view of every Kenyan will be considered in the legislative process. This position would apply in the formulation of policy as well. The architecture of the Constitution of Kenya, 2010 leans heavily on strong institutions which must be given space to

operate and deliver on their respective mandates.

36.The 1st Respondent availed to the Court several documents including; the Report on the Public Sector Wage Bill Dialogue and the Report of the Stakeholder Consultative Meetings. A consideration of these documents reveal that in developing the Public Sector Remuneration and Benefits Policy Framework and the Public Sector Remuneration and Benefits Policy, the 1st Respondent involved stakeholders at the national and county levels as well as target stakeholders covering both levels.

37.This Court is therefore satisfied that in discharging its mandate, the 1st Respondent met the constitutional threshold for public participation. The result is that the Petitioner's Petition fails and is dismissed.

38.As this a public interest petition I direct that each party will bear its own costs.

39.Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF JULY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Onsare for the Petitioner

Miss Omugo for the 1st Respondent

Miss Chege for 2nd Respondent