



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 3 OF 2015

THE TEACHERS SERVICE

COMMISSION..... PETITIONER

VERSUS

THE KENYA NATIONAL UNION

OF TEACHERS(KNUT).....1ST RESPONDENT

THE KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS(KUPPET).....2ND RESPONDENT

SALARIES AND REMUNERATION

COMMISSION (SRC) 1ST INTERESTED PARTY

THE HON. THE ATTORNEY

GENERAL 2ND INTERESTED PARTY

**AND IN THE ECONOMIC DISPUTE BETWEEN KENYA NATIONAL UNION OF
TEACHERS (KNUT) AND THE KENYA UNION OF POST PRIMARY EDUCATION**

(KUPPET) CLAIMANTS

VERSUS

TEACHERS SERVICE COMMISSIONRESPONDENT

JUDGMENT

Background

1. Petition No 3 was filed together with a Notice of Motion Application dated 7th January 2015 by the Teachers Service Commission (TSC) seeking orders in terms of prayers 1, 2 and 5 of the Notice of Motion against Kenya National Union of Teachers (KNUT), 1st Respondent and The Kenya Union of Post primary Education Teachers (KUPPET), 2nd Respondent with Salaries and Remuneration

Commission (SRC) as an Interested Party.

2. The purpose of the Orders sought was to;

- i. Certify the Application urgent, heard ex-parte and it's service be dispensed with in the first instance owing to its urgency.
- ii. Issue a prohibitory injunction to the officials and members of the Respondents restraining them from continuing with the strike commenced on 5th January, 2015 pending the hearing and determination of the Application interpartes.
- iii. That the Petitioner be granted leave to serve the Petition and any orders or directions by way of press advertisements in a paper that has a nationwide circulation.

3. It is important at this point to note that a national wide strike called by the Respondents had completely paralyzed primary, Secondary and Tertiary Colleges Education all over the country and its end was not in sight.

4. Upon hearing the Counsel for the Applicant Mr Anyuor, exparte and having realized the magnitude of the matter the Court granted the Application in terms of prayers 1 and 5 certified the matter urgent and directed that the Application and the Petition be served on the Respondents and the Interested Party and the matter be mentioned the following day on the 9th January, 2015 for directions and or further orders. The Applicant provided to the Court a list of the Executive Officers of KNUT and KUPPET and the Court directed that they appear in Court on 9th January, 2015 at 10.30 a.m.

5. Advocates for the parties appeared on 9th January, 2015 and it was reported that the officials of the Respondent were not available. Senior officials of the Applicant had however availed themselves in Court.

6. Upon hearing Counsel for the parties the Court made the following order:

“The Court notes the willingness of the parties to engage in a constructive engagement in terms of Section 15 of the Industrial Court Act 2011, and the Court directs that the officials of the two Unions named in the order of the Court of 8th January, 2015 and the officers of Teachers Service Commission in Court today appear before me in chambers at 10:30 a.m. on 14th January, 2015 for that purpose”.

Section 15 proceedings

Section 15 of the Employment and Labour Relations Court Act (ELRCA) provides:

*“15(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the Parties, any other appropriate means of dispute resolution, conciliation, mediation and traditional dispute resolution mechanisms in accordance with **Article 159(2)(c)** of the Constitution.”*

7. The record of the proceedings speak for itself. Senior Counsel Paul Muite led the process for the Unions. M/s Stella Munyi for the Hon Attorney General; and Mr Sitima for SRC. The Cabinet Secretary Labour Mr Kazungu Kambi made opening statements followed by the Chairperson of TSC M/s Maria Nzomo. Mr Sossion for KNUT spoke at length followed by Mr Misoi for KUPPET.

8. The Commissioner for Labour Sammy Nyabena made very valuable contribution followed by the Chief Executive Officer (CEO), TSC Mr Olongoiboni. SRC Counsel Mr. Sitienei concluded the direct participation by the parties.

9. A guided dialogue ensued with a view to broker a truce and get the children back to the schools. It is important to note that the dialogue was at the highest level with the Chairlady and the CEO of TSC on the one hand and the Secretary Generals of the Unions on the other hand. The input by the Cabinet Secretary

for Labour and the SRC Counsel was also invaluable.

10. Counsels, Paul Muite for the Unions, Mr Sitima, Mr Jaoko, Ms J Guserwa, Mr Mariaria, Mrs Stella Munyi, all played crucial roles in the proceedings that took about eight (8) hours to conclude under the guidance of the Court.

11. The Court recorded the following consent orders as dictated to by Mr Paul Muite and Mr Sitima the Counsel for the parties;

- i. That the parties have agreed to have the Economic dispute adjudicated by the Court.
- ii. The KNUT and KUPPET will file their memorandum and serve by 19th January, 2015.
- iii. The Employer (TSC) to file their memorandum and serve on or before the 26th January, 2015.
- iv. The Central Planning and Monitoring Unit (CPMU) and SRC to file their reports within 10 days from 26th January, 2015.
- v. Meanwhile the Unions ie KNUT and KUPPET call off the teachers strike commenced on 5th January, 2015 forthwith.
- vi. For the avoidance of doubt, all teachers resume teaching by Monday the 19th January, 2015.
- vii. TSC undertake not to victimize any teacher/Union officials/Unions who may have participated in the strike including payment of salaries.

12. As it came to pass the celebrated truce led to a national wide resumption of schooling effective 19th January, 2015 and the ceasefire has held to date.

Effect of the consent on Petition No. 3 and the Application dated 7th January, 2015

13. The Consent entered into by the parties and recorded as an order of the Court on 14th January 2015 was conceived in extra ordinary circumstance in a day of high drama that kept the nation in bated breath. The consent, may not have been elegantly crafted but in the Court's view its import and effect on the pending Petition and interlocutory application was manifestly clear as follows;

- i. On the consideration of calling off the national wide teachers strike by the two Unions, and upon the undertaking by the TSC not to victimize the teachers, officials of the Unions and the Unions that had participated in the strike;
 - a. The Petition was compromised and replaced by the Economic dispute.
 - b. The Unions (KNUT and KUPPET) became the Claimants in the Economic dispute and the TSC being the employer, became the Respondent.
 - c. SRC remained an interested party in the Economic dispute.

14. Neither of the parties was averse to the same Court hearing the Economic dispute and as the proceedings will show, Counsel for the parties thanked the Court profusely for the role it had played in brokering a solution and undertook to respect and participate in the prosecution of the Economic dispute to its conclusion.

15. Upon realization of the industrial peace following the consent, Counsel for the TSC entertained the thought of reviving the Petition and even filed an Application dated 22nd January, 2015 and filed on 23rd January, 2015 seeking to set aside the consent entered into on 14th January, 15.

16. Upon hearing the parties the Court made the following orders:-

Upon reading the Application by the Applicant/Petitioner (TSC) dated 22nd January, 2015 and filed on 23rd January, 2015. And having heard Counsel for the Applicant/Petitioner and the Counsel for the Respondents, the Court makes the following orders:-

1. That the Parties fully abide by/honour the consent orders entered into on 14th January, 2015 pursuant to conciliation proceedings conducted under the auspices of the Court in terms of Section 15 of the Industrial Court Act and Article 159 of the constitution of Kenya 2010.
2. That all the issues raised in the Application dated 22nd January 2015 be addressed by the parties and determined by the Court during the hearing of the Economic dispute filed pursuant to the consent orders of 14th January, 2015.
3. That the Respondent file their response to the issues raised in the Application on or before 28th January, 2015.
4. SRC file its report on or before the 9th February, 2015.
5. CPMU to analyze, prepare and file their report on or before 23rd February, 2015.

17. The effect of this order was to further accommodate TSC to safeguard the fragile process and allow the Respondents to respond to any new matter raised. The Court also enlarged the time in which the reports by SRC and CPMU were to be filed.

18. Meanwhile the Hon. The Attorney General sought to be enjoined as an interested party in the proceedings and the Application was granted. This admission took into consideration the interest of the Cabinet Secretary in Charge of Labour who had also sought to be enjoined in the suit. The Application by the Cabinet Secretary was rendered superfluous by joinder of The Attorney General to represent national government in the matter.

Determination of the Petition

19. Having considered all the papers filed before Court and submissions by the Parties, the Court is of the considered view that the consent by the Parties dated 14th January, 2015 compromised the Petition.

20. In arriving at this decision the Court is persuaded by the authority in the case of **Mrs Charity Kemana Vs East African Building Society [2004] eKLR** in which the parties were challenging the validity of a consent appointing an Arbitrator and the Court held that the grounds to review a consent judgement should be such grounds as would justify the setting aside of a contract. The Court relied on the case of **Flora N. Wasike Vs Destimo Wamboko (1982-88) 1KAR 625**.

21. The Court set out grounds upon which a consent Judgment could be reviewed or set aside to include:

- i. the consent having been obtained by fraud or collusion or by an agreement contrary to the policy of the Court.
- ii. the consent having been given without sufficient material facts or in misapprehension or in ignorance of material facts; or
- iii. generally for a reason which would enable the Court to set aside the agreement.

22. None of the above grounds were available to the Petitioner/Applicant. The facts and circumstances under which the consent was arrived at were well documented in open Court. The parties fully participated in the process that culminated in the consent order and undertook fully to abide by the terms of the consent. The Application to set aside the consent and open up the Petition was merely an after thought the Applicant having fully benefited from the consent order which brought to an end a national wide strike of its employees. The Applicant was in law and fact *estopped* from reneging on the consent it had fully participated in crafting and having enjoyed the fruits of the consent order.

23. The issues for determination by the Court are as follows:

- i. Whether KNUT and KUPPET (The Unions) are entitled to conclude a CBA with TSC determining the terms and conditions of Employment of all the unionisable teachers in the country.
- ii. If the answer to (i) above is in the affirmative what is the role of SRC in the negotiations and conclusion of the CBA.

- iii. Are the teachers entitled to a basic salary increment in the CBA as prayed or at all?
- iv. Are the teachers entitled to a review of any allowances as prayed?
- v. If the answer to (iii) above is in the affirmative, what is the effective date of the CBA?

Issue i

24. Article 41 (5) of The Constitution of Kenya 2010 provides;

“Every trade Union, employers’ organization and employer has the right to engage in collective bargaining.”

25. The Labour Relations Act No. 14 of 2007 part VII titled *“Recognition of Trade Unions and Collective Agreements”* regulates Recognition of Unions by employers of unionisable employees and collective bargaining of terms and conditions of employment of unionisable employees including conclusion of collective Agreements.

26. It is common cause that TSC has Recognition Agreements with KNUT and KUPPET. The two Unions represent different constituencies but in the present matter, the two lodged a joint memorandum of claim dated 19th January 2015 with all supporting documents annexed thereto on the same date.

27. The Recognition Agreement between KNUT and TSC is dated 16th May 1968. The Recognition Agreement between KUPPET and TSC is dated 2nd June 2010. Both are marked Annex ‘1’ to the Memorandum of Claim.

28. A Recognition Agreement is entered into for the purpose of collective bargaining. The Recognition Agreement records the terms upon which the employer recognizes the Unions. These matters are provided for under section 54 of the Labour Relations Act No 14 of 2007 (RLA).

KNUT and TSC

29. In respect of KNUT and TSC, though the Agreement entered into in 1968 is skeletal, it provides;

“..... the Commission and the union hereby make this Agreement with respect to the Recognition of the union by the Commission and to the negotiating procedure to be allowed dealing with claims and grievances put forward by the union in virtue of such Recognition and declare as follows:-

30. The document then sets out the negotiating procedure of collective claims as follows:-

*“collective claims means any claim for the alteration of the Terms and Conditions of service and shall be referred by the Secretary General of the Union to the Teachers Service Commission Committee established under **Section 13 (1)** of the Act”*

31. Though the copy of Agreement submitted by KNUT is not signed by the parties the matter of Recognition was not placed in dispute by TSC in its lengthy Memorandum of Response dated 28th January, 2015 and signed by Gabriel K. Lengoiboni, CBS, EBS and Chief Executive of TSC. It was filed on the same date.

KUPPET and TSC

32. The Recognition Agreement between KUPPET and TSC was concluded in the year 2010 and so is more comprehensive than that between KNUT and TSC. It defines terms and conditions of service to be negotiated by the parties and under item 4.0 titled GUARANTEE, The Agreement provides for;

“All negotiations concerning Terms and Conditions shall be carried out between the commission and the union provided that all negotiations concerning remuneration payable to teachers shall be negotiated by

the Teachers Service Remuneration Committee as established under section 13 (1) of the Teachers Service Commission Act, Cap 212 Laws of Kenya”.

33. The Agreement also defines collective claim to mean any claim for the alteration of the terms and conditions of service which may affect all unionisable employees or any group of unionisable employees.

34. The Recognition Agreement was signed on 2nd June, 2010. TSC has not placed the matter of Recognition of KUPPET in dispute in the Memorandum of Response aforesaid.

Collective grievances

35. Under Clause 17 of the Agreement between KNUT and TSC and under Clause 8.0 of the Agreement between KUPPET and TSC is provided that in the event of failure to reach a settlement of a collective grievance which include failure to reach settlement on a collective claim regarding terms and conditions of service either party may refer the dispute to the Minister for Labour in accordance with the provisions of the Labour Relations Act 2007 which superceded Trade Disputes Act No 15 of 1965 which was in place when the KNUT Agreement was concluded.

36. In terms of **Section 57 (1)** of RLA,

“an employer, group of employers or an employer’s organization that has recognized a trade union in accordance with the provisions of this part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the Recognition agreement” (emphasis mine)

37. The provision is couched in mandatory terms and does not give an employer any discretion to conclude or not to conclude a CBA with the union. TSC is accordingly bound under Article 41 (5) of The constitution of Kenya 2010 to enter into collective bargaining with KNUT and KUPPET and is further bound by section 57 (1) of the Labour Relations Act No 14 of 2007 to conclude a collective agreement with KNUT and KUPPET setting out terms and conditions of service for all unionisable employees (read teachers) in terms of the Recognition Agreements referred to above. The Court so finds.

Issue ii

38. What is the role of Salaries and Remuneration Commission (SRC) in the Collective Bargaining and conclusion of a Collective Agreement between TSC with KNUT and TSC with KUPPET?

39. In terms of **Article 41 (5)** of The Constitution of Kenya 2010 as read with **Section 57 (1)** of the Labour Relations Act No 14 of 2014, no other party other than the employer and the recognized Union has any role in the conclusion of a Collective Agreement setting out terms and conditions of service for all Unionsable employees covered by the Recognition Agreement.

40. SRC is established under **Article 230 (1)** of The Constitution of Kenya 2010 and the powers and functions of SRC are set out under **Clause 230 (4)** as follows:-

“The powers and functions of the Salaries and Remuneration Commission shall be 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 and benefits of all other public officers”*

41. **Sub Article 230 (5)** sets out the guiding principles under which SRC is to operate which include:-

- 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 recognize productivity and performance and;
- d. Transparency and fairness

42. SRC is an interested party in this matter and has filed a report on 19th February, 2015 in terms of the consent recorded by the parties on 14th January, 2015.

43. SRC sets out its mandate in the report under **Article 230** of the Constitution and **Section 11** of the Salaries and Remuneration Act 2012. The Commission pursuant to **Section 26** of the Act published, The Salaries and Remuneration Commission. (Remuneration of State and Public officers) guidelines 2013. Regulation (3) thereof provides for the objects and purpose of the Regulations which are to enable the commission manage, harmonize and rationalize remuneration and benefits of State and public officers.

44. Section 37 (3) of the Teachers Service Commission Act, 2012 provides that the registered teachers recruited by the Commission under **Article 237 (2) (b)** of the Constitution shall serve under such terms and conditions of service as the committee under **Section 13 (5)** of the Act in consultation with the Salaries and Remuneration Commission may determine (see the emphasis).

45. It was submitted for SRC that **Article 259(11)** of The Constitution provides that;

*“ If a function or power conferred on a person under this constitution is exercisable by the person only on the **advice** or recommendation, with approval or consent of, or on consultation with, another person, the function may be performed or the power exercised **only on that advice**, recommendation, with that approval or consent or after that consultation, except to the extent that this constitution provides otherwise”, emphasis mine.*

and therefore, this provision of the constitution renders the advise given by SRC to TSC binding.”

46. Rival submissions were strongly made by Senior Counsel Muite for the KNUT and Ms Guserwa for KUPPET as follows;

47. The Constitution of Kenya 2010 established the TSC as an Independent Commission under **Article 237** and the TSC Act was thereafter enActed in 2012. The TSC Act at Section 13 made provisions for the establishment of committee for the better carrying out by TSC of its functions pursuant to which the Consultative Committee of Terms and Conditions of Service of Teachers Employed by TSC was formed.

48. That under **Article 237(2)** of the constitution, the functions of TSC include;

“(b) to recruit and employ registered teacher”. This provision made it clear that TSC was the sole employer of teachers.”

49. Therefore SRC had no role whatsoever in the negotiations and determined of the basic salary for teachers. It follows that for the purpose of collective bargaining, TSC is the employer of the Unionsable teachers and it has the sole mandate to bargain with the recognized Unions.

50. Therefore TSC only needed to budget for the salaries of the teachers and seek budgetary approval from the Treasury and once its annual budget is approved by parliament that was the end of the matter.

51. That SRC needed to advise the Treasury as part of the National Government on the remuneration and benefits of teachers being part of public officers and the Treasury would in turn approve the appropriate budget allocation for the remuneration and benefits of teachers. That SRC had no business intervening in collective bargaining between TSC and the Unions. TSC was on the other hand obliged by the TSC Act to consult SRC and then make its informed proposals to the Unions during collective bargaining.

52. That TSC could not therefore make an offer of salary increment during negotiations with the Unions and later on purport to withdraw the offer before it had been considered by the Unions only on the basis that SRC had commanded it to withdraw the offer.

53. On this, the Court was referred to **Advisory opinion No 2 of 2012 by the Supreme Court in the matter of Principle of Gender Representation in the National Assembly and the Senate and in the matter of the Attorney General (on behalf of the Government) as the Applicant, [2012] eKLR where the Supreme Court stated;**

“We would state that the Supreme Court as a custodian of the integrity of the constitution as the country’s charter of governance is inclined to interpret the same holistically, taking into account its declared principles and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution”.

54. In this light the Court was urged to uphold the independence of TSC as an employer while discharging its constitutional and statutory mandate of negotiating and determining the terms and conditions of its employees.

55. The Court was also referred to the **Industrial Court of Kenya at Nairobi Petition 31 of 2013 between Kenya Medical Research Institute Vs The Hon. Attorney General and 3 Others** in which Nderi Nduma , Mumbi Ngugi and G. V. Odunga JJ., cited with approval a decision of the Uganda Court of Appeal sitting as a Constitutional Court in which it held that the principles of constitutional interpretation are;

- i. That the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible in its context should be given according to the ordinary meaning of the words used
- ii. That the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (the harmony principle)
- iii. That all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument
- iv. That a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefits of the rights guaranteed
- v. That in determining constitutionality, both the purpose and the effect are relevant and;
- vi. That **Article 126 (1)** of the Constitution enjoins Courts to exercise judicial power in conformity with the law and with the values, norms and aspirations of the people. See **Besigye and Others Vs the Attorney General (2008) EA 37 and foundation for Human Rights Initiatives Vs Attorney General HCCP No 20 of 2006 (CCU) (2006) EA 120.**

56. The widest construction of **Article 230(4) (b)** in the context of **Articles 41 (5) 237 (1) (b), 249(2) (b) , 259 (11)** has led this Court to the conclusion that;

- i. Both SRC and TSC are Independent Commissions protected under Article 249 of the Constitution and are not subject to direction or control of any person or authority but subject only to the Constitution and the law.
- ii. That in terms of **Article 237(1)(b)**, TSC is the employer of the teachers and it has both constitutional and statutory mandate to negotiate and determine remuneration and benefits of all unionisable teachers in terms of **Article 41(5)** as read with **Section 57** of the RLA.
- iii. That TSC is part of the national government and is bound to consult SRC in terms of **Article 230(4)** as read with **Article 259(11)** of the Constitution in the process of negotiating with the Unions the remuneration and benefits of teachers but **TSC is not bound by the advice given to it by SRC in the final determination of the remuneration and benefits of the teachers which ought to be an outcome of the collective bargaining process.** This position is supported by **Section 13 (5)** of the Teachers Service Commission Act, 2012 which mandates the Remuneration and Benefits Negotiations Committee to consult SRC in the process of negotiations.
- iv. In light of the foregoing, SRC advised TSC to await undertaking of a job evaluation exercise of all public officers in the public service before considering any basic salary increment to its employees. Following this advice, TSC considered itself bound by the advice by SRC and

promptly withdrew the basic salary increase offer tabled at the negotiations with the Unions of between 50% – 60% over a period of four years.

57. This essentially led to the collapse of the collective negotiations and the issuance of strike notices by KNUT and KUPPET leading to the teachers national wide strike that commenced on 5th January, 2015.

58. Looking at Clause 2 of the Recognition Agreement between TSC and KNUT and clause 4.1 of the Recognition Agreement between TSC and KUPPET both of which provide;

“ All negotiations concerning terms and conditions shall be carried out between the Commission and the Unions provided that all negotiations concerning remuneration payable to teachers shall be negotiated by the Teachers Service Remuneration Committee as established under section 13 (1) of the Teachers Service Commission Act Cap 212 Laws of Kenya ”

TSC was not bound to await a job evaluation exercise as per the advice of SRC.

59. The term job evaluation is a term of art and is defined as follows;

“job evaluation is an assessment of the relative work of various jobs on the basis of a consistent set of job and personal factors, such as qualifications and skills required. The objective of the job evaluation is to determine which jobs should get more pay than others. Several methods such as job ranking, job grading and facts or comparison are employed in job evaluation. Job evaluation is a basis for wage and salary negotiations”. Per google engine.

60. Whereas it is generally accepted, that the conduct of a job evaluation exercise is the prerogative of the employer, it is now a well established practice, supported by Court decisions that the exercise must be done in consultation with the employees and where the employees are unionised, the exercise must be done in consultation with the union.

61. This is a mandate that belongs to the employer and not a third party. TSC cannot abdicate its constitutional and statutory obligation in terms of **Article 237(2)**;

(b) *to recruit and employ registered teachers*

(c) *to assign teachers employed by the Commission for service in any public school or institution;*

(d) *to promote and transfer teachers;*

(f) *to terminate the employment of teachers;*

Furthermore in terms of Article 237(3); *“The Commission shall-*

a. review the standards of education and training of persons entering the teaching;

b. review the demand for and the supply for teachers; and

c. advise the National Government on matters relating to the teaching profession.”

62. These are matters closely related to the job evaluation exercise which in the Court’s view fall squarely within the purview and constitutional mandate of TSC.

63. No evidence has been tendered by TSC that it had considered even mildly the necessity of a job evaluation exercise to precede the negotiations and conclusion of a CBA. TSC only felt bound by the last minute advice by the SRC and withdrew the offer it had already shared with the Unions. Regrettably, this Action of withdrawal of the offer fanned the emotions, rhetoric, and acrimony that culminated in the national wide strike on 5th January, 2015.

64. It is the Courts considered view that TSC is not bound by the advice by SRC on the matter and only TSC has the Constitutional and Statutory mandate to conduct a job evaluation exercise of the teachers. SRC has an advisory role on both the determination of basic salary and benefits payable to teachers including the conduct of a job, evaluation exercise. The Court so finds.

Issue iii

65. Are the teachers entitled to a basic salary increment in the CBA as prayed or at all?

The Claimant Unions and the Respondent TSC have placed competing facts for and against the Claim for a basic salary increment. The 1st Interested Party SRC and the 2nd Interested Party, The Hon. The Attorney General have filed Reports and written submissions in opposition to the grant of a salary raise as demanded by the Claimants or at all.

Facts of the Claim for Basic Salary Increment

66. The Unions have submitted in the Joint Memorandum of Claim filed on 19th January 2015 that; teachers in Kenya can hardly survive from month to month, as the cost of living far outstrips teachers' pay.

67. Prior to 1997, teachers' pay was negotiated and agreed between the Union and the Teachers Service Remuneration Committee (TSRC) and any increments agreed upon would ordinarily be implemented in three (3) years cycle.

68. Periodically, there was establishment of Public Service Salary Review Commissions which include the Ndegwa Commission - 1970 / 71; the Waruhiu Commission – 1979/80; the Ramtu Commission – 1995 and the Mbithi Commission – 1990/91, set up to review salaries of public officers.

69. In 1997, due to a disagreement on terms and conditions of service teachers under the auspices of KNUT, (KUPPET was not in existence), went on strike which was called off when an agreement was eventually reached between KNUT and TSC. The agreement was reduced into writing and gazetted under Legal Notice No. 534 of 1997 annexed to the Memorandum of Claim and marked '2'. The Legal Notice was to be implemented in a span of five (5) years.

70. This did not materialize because TSC implemented the 1st phase in July 1997 and made no other increment until 2002, when KNUT again called its members to a national strike.

71. The Legal Notice No. 534 of 1997, was unilaterally revoked by the then Minister for Labour by way of Legal Notice No. 162 of 2002, prompting KNUT to go to Court to seek its restoration in High Court Misc. Civil Application No. 1143 of 2002. Legal Notice No. 162 of 2002 marked '3' was withdrawn following the Court Action.

72. Subsequent negotiations between KNUT and TSC led to an agreement on 3rd December 2002 wherein the schedule of payments under Legal Notice No. 534 of 1997 were spread out over a ten (10) year cycle.

73. On May 2003, an agreement was reached to reschedule the basic pay increments under Legal Notice No. 534 of 1997 from ten (10) years to five (5) years.

74. In April 2008 KNUT, engaged TSC in demands over basic pay, allowances and other benefits without success, leading to a National wide strike by teachers in January 2009. The strike was eventually called off after TSC agreed to an increase of teachers salaries. The 2009 increments were implemented over a three (3) year cycle ending in 2012.

75. Legal Notice No. 534 of 1997 was revoked for a second time vide Legal Notice No. 16 of 2003 without Union participation. The Unions knew about this in 2012. Legal Notice No. 16 of 2003 is

attached to the Memorandum of Claim and marked '4'.

76. The Constitution of Kenya 2010, was now in place and the Teachers Service Commission Act, 2012 was enacted. *Section 13*, thereof provided for the establishment of Committees for the better carrying out by TSC of its functions pursuant to which the Consultative Committee of Terms and Conditions of Service of Teachers employed by TSC was formed.

77. On 4th July 2012, SRC issued a circular titled "*Determination and Review of Remuneration in the Public Service.*" In the circular SRC provided the following Guidelines to the Public Sector;

- i. *The Public Service adopts a four (4) year review cycle applicable to all Public Service Organizations with effect from 1st July 2013;*
- ii. *All Public Service Organizations to immediately commence their remuneration analysis, Collective Bargaining Negotiations and make proposals to the Commission for analysis, verification and advice and such submissions be made not later than 31st December 2012.*
- iii. *Public service Organizations to take into account the provisions of the attached Guidelines as they work on the proposals. The Commission will respond to the respective organizations by the 1st March 2013.*
- iv. *All the current Collective Bargaining Agreements expire on 30th June, 2013 to allow room for new Collective Bargaining Agreements with four (4) year review cycle.*
- v. *In compliance with **Section 13** of the Salaries and Remuneration Commission Act, 2011, all Public service Organizations should submit annual remuneration and benefits data by December 2012, regardless of whether they are seeking review.*

The letter and the attached Guidelines are marked '5'.

78. In October 2012, KNUT and KUPPET presented their Memorandum to the Consultative Committee setting out their demands on basic salaries allowances and other benefits.

79. The negotiations commenced on 18th October 2012 between the two Unions and TSC.

80. The attached SRC Guidelines are very instructive on this matter and in particular Clause 6 provides;

"organizations seeking advice on Collective Bargaining Agreements should include the following information in addition to those provided above;

- i. *a copy of the demands from the Unions;*
- ii. *The management's recommendations to the Commission on each of the items proposed for negotiations for the Commission's advice;*
- iii. *The existing remuneration structure being implemented for the management staff; and*
- iv. *Prior to making **Counter-offer**, Public Service Organizations **should obtain the advice of SRC.**"*

Clause 8 reads:

81. *"Please note that once the Commission has given its advice, any appeal on the same will only be considered after six (6) months. **This however, does not apply to CBA's.** Clarification on implementation of the advice will however, be provided as need arise."*

82. The negotiations did not yield consensus and a dispute was referred to the Ministry of Labour, Social Security and Services in February 2013. The letters and minutes of the attempted conciliation are attached and marked '7'. Conciliation was conducted by Mr. J. N. Makaa who on 21st March 2012, issued a certificate of unresolved dispute and a national strike was called in June 2013.

83. The Industrial Court (as it then was known) declared the strike illegal and issued injunctive orders restraining both Unions from participating in the strike and directing parties to return to the negotiating table.

84. The negotiations resulted in Return-to-work Formulas being signed and filed in Court by the Unions. KNUT'S Return-to-work Formula included a component setting out agreed rates on commuter, responsibility, special school, and readers allowance and a **condition to negotiate and register a Collective Bargaining Agreement – (CBA) within ninety (90) days.**

85. In addition, KUPPET signed an agreement with TSC on 11th July 2013 and filed in Court on 17th July 2013, setting out agreed terms relating to commuter, responsibility, special school, and readers allowance. The Return-to-Work Formula Agreements are attached to the Memorandum of Claim and jointly marked '8'.

86. It is important at this point to note that paragraph II, Clause 2, 3 and 4 of the Return-to-Work Formula between TSC and KNUT which Agreement was made an order of the Court commanded the parties to commence collective bargaining negotiations within seven (7) days from 19th July 2013, when the agreement was registered as order of the Court based on the Memorandum of demands submitted to TSC by KNUT and the negotiations were to be concluded within ninety (90) days.

87. Similarly under the Return-to-Work Formula signed between TSC and KUPPET which was registered as an order of the Court on 19th July 2013 the parties undertook to negotiate the demands under **Section 13(5)** of the Teachers Service Commission Act No. 12 of 2012 as soon as possible based on the demands already submitted to the TSC. This particular Agreement did not provide the timelines. In addition KUPPET and TSC on 11th July 2013, signed a further Agreement which was also registered as an order of the Court on 17th July 2013 in which various allowances were awarded to the teachers and under Clause 8. It was agreed;

- a. increase in basic salary;
- b. Increase in house allowance;
- c. Annual leave allowance;
- d. Responsibility allowance for school administrators in job Group L and above;
- e. Any other demands would be negotiated under the auspices of the Remuneration Committee.

88. TSC and the Unions between 2012 and 2014 convened **twenty six (26)** sessions without being able to conclude a CBA as per the consent orders of the Court.

89. Up until 17th April 2014, TSC had not made a counter-offer on the basic salary demand by the Unions. It was agreed at a meeting held on 17th April 2014, that TSC would table its offer on 24th April 2014. The meeting did not take place.

90. On 25th April 2015, the CEO, TSC wrote to the Unions stating that TSC would propose an appropriate date for the Consultative Meeting as it was still studying the Unions' proposals. KUPPET reported a Trade dispute by a letter dated 30th July 2014 but this was only restricted to the issue on leave allowance and responsibility allowance. On 8th August 2014, KUPPET requested for a letter of disagreement from the Minister in view of a stalemate in concluding negotiations as per the consent order dated 11th July 2013. On 29th August 2014, the Minister wrote back declining to issue a certificate of unresolved dispute.

91. On 25th August 2014, KNUT wrote to TSC demanding holding of a consultative meeting within twenty one (21) days from the date of the letter to conclude negotiations in terms of the consent order of the Court. The letter is marked "11".

92. A consultative meeting was held on 9th September 2014, in which TSC tabled a response to the

Unions' demands as contained in their respective Memoranda. The document was titled '*working document*' which set out proposals for the enhancement of teachers' remuneration including an **increment on basic salary of between 50% to 60%. The document is attached hereto and marked '12'**.

93. The Unions requested for time to consult on the Counter-offer by the TSC and the request was granted.

94. It is important to point out the salient features in the document as follows;

- i. TSC acknowledged receipt of Memorandum, of Demands presented by KNUT and KUPPET;
- ii. TSC noted that it had analysed the demands and made the following observations;
 - a. The Unions demands had not taken into account the current Economic growth with a GDP growth of 4.3% p.a. as at 2011. The GDP growth was projected to be at 5.6% in 2012.
 - b. The current wage bill for teachers is 119 Billion p.a. a growth of 300% as demanded by KNUT/KUPPET would increase the wage bill to 360 Billion p.a. on basic salary alone. The demand of 50% house allowance would add an additional 180 Billion plus 10% of commuter allowance would add another 36 billion p.a. while medical allowance would require additional 72 Billion p.a.

95. Total budget as per the Unions' demands would be 725 billion against a Revenue base of 900 billion KRA.

96. TSC noted that the demands were not feasibly sustainable. That a survey by KIPRA had rated the public wage bill in

Kenya at 11.7% which is too high to GDP growth of 4.3 per cent in 2011.

97. TSC also noted that, the Commission had never taken a job Evaluation Exercise on teaching service since it was established.

98. In proposing increase in basic salary, allowances and other benefits, TSC noted;

“The working percentage increase in salary is meant to bridge the existing disparity between the highest paid and the lowest paid teacher as per Appendix I”.

99. The TSC then proceeded to make a comprehensive response on the demands by the Unions on 13 items as set out at page 119 of the Memorandum of Claim as follows;

1.	Pay increase	A pay increase between 50 – 60% was approved.
2.	Elongation to job Group S & T	It was agreed the Commission considers elongation to job Group 'J'.
3.	House Allowance	An increase in House Allowance was proposed to be by 50% regionally.
5.	Commuter Allowance	It was agreed that the commuter rates be harmonized with the Civil service.
6.	Leave Allowance	Approved payment of leave Allowance at the rates applicable to Civil

		servants
7.	Entertainment Allowance	To apply to similar grades in Civil Service.
8.	Education Allowance	Allowance is only paid to diplomats engaged in foreign service.
9.	Accommodation Allowance	To be paid at the rates, applicable to Civil servants.
10.	Disturbance Allowance	To continue being paid at the rate of one month's salary if transfer is initiated by TSC.
11.	Danger / Hazard / Risk Allowance	To continue being handled under Work Injury Benefit Act.
12.	Hardship Allowance Areas	The designated hardship allowance areas be as per the recent Government list published by DPM.
13.	Responsibility Allowance	It was agreed that the status quo be maintained.

100. At page 120, TSC set out the additional budgetary requirements as per the counter offer to be a minimum of Kshs. 52,272,629,472 and a maximum of Kshs.106,492,101,074 in respect of basic salary increment. Upon adding the proposed increments in house allowance and leave allowance country wide, the Grand total were a minimum of Kshs.52,272,629,472 and a maximum of Kshs.117,980,948,378.

101. Appendix I at page 12.1 contains the proposal for basic salary by TSC spread over job designations P1 to Chief Principal which is the equivalent of job Group G to R.

102. Proposal for house allowance are confirmed in Appendix 2 on page 122 & 123.

103. Proposal for leave allowance are on Appendix 3 on page 124.

104. The Unions reverted with a Joint Counter Proposal scaling down the basic salary demand from a high of 300% to between 100% and 150%. The Joint Counter Proposal Memoranda is attached and marked 'B'.

105. This was in the spirit of give and take in the continuing Collective Bargaining. There was no agreement in subsequent meetings and by letters dated 7th August 2014 and 13th October 2014, KUPPET requested the Cabinet Secretary Labour for a certificate of unresolved inspite. The letters are marked '14'. The last Consultative Meeting was held on 17th November 2014.

106. The Annual Delegates Conference (ADC) for KNUT was set for 7th – 10th December 2014 while that of KUPPET was scheduled for 5th December 2014. The Unions requested a Consultative Meeting be held before the scheduled ADCs. It was agreed to schedule a meeting on 3rd December 2014, when TSC promised to table an offer to enable the Unions present reports to their respective Delegates conferences.

107. The meeting of 3rd December 2014 was abruptly cancelled by TSC by a letter dated 29th November 2014. The Unions respective delegates passed resolutions calling the strike Action commencing from the beginning of the 2015 academic term. The relevant strike notices were issued.

108. The outlined facts have been accepted by the Court as representative of the chronology of events that led to the filing of this suit. There are minor differences on the narrative told by the protagonists in

this matter which are immaterial in the determination of this suit.

109. The most significant difference on the narrative regards the document titled ‘working document’, which TSC while admitting that it had tabled it at the Consultative meeting held on 9th September 2014 between TSC and the two Unions, TSC denies that, the document comprised a counter offer to the demands of the Unions. TSC maintains that, it was merely a working document for the purpose of obtaining advice from SRC.

110. TSC submitted that once the proposal on basic salary increment of between 50 – 60% was submitted to SRC, SRC advised against the grant of the salary increment until job evaluation exercise in the entire public service was done. TSC stated that it had no budgetary allocation for the proposed salary increase. The Court however notes that TSC did not produce a letter directed to the National Treasury seeking a budgetary allocation based on the proposed basic salary increment.

Submissions by the Claimants on Basic Salary

111. The Claimant Unions submit under paragraph 3 of the memorandum of Claim that Basic Salary is the most important component of remuneration and it is the single indicator of one’s earning capacity at a given time in that job groups are categorized based on basic salary, qualification of loans and mortgages is dependent on it, and it is applied in calculation of pension and terminal benefits. Allowances are also paid as a percentage of one’s basic salary. It was therefore important that the basic salary was regularly reviewed and raised yet the last negotiated basic pay was enjoyed by teachers in 1997 pursuant to Legal Notice No. 534 of 1997. The same was implemented over a span of ten (10 years), ending in 2007. However, there has been arbitrary non-negotiated increments in the name of harmonization of teachers’ salaries with those of Civil Servants.

112. That a bare minimum requirement on any salary increment is that it should sufficiently cushion the worker against the prevailing rate of inflation. That inflation indices show that the average annual inflation rates over the past five (5) years have ranged from a high of 16.5% to a low of 4.4.%. The Unions attached CBK Inflation Index marked ‘15’.

113. The Unions rely on the working document by TSC to affirm this submission, Annexure ‘12’.

114. The Unions further submitted that teachers were poorly remunerated as compared to Civil Servants relying on various circulars.

115. That the introduction of free primary education in 2003 and free secondary education in 2008, has seen an exponential increase in the number of students in schools in Kenya. The teachers have therefore suffered an increased work burden without a corresponding increment in pay.

116. That the internationally accepted teacher-student ratio is 1:25 while that in Kenya, is 1:50 (with some teachers teaching as many as 90 students per class). Consequently there is an acute shortage of teachers in Kenya.

117. The Counsel for the Unions submitted that teachers should not be punished with low remuneration simply because they are many. That this should not be a key consideration in determining remuneration of teachers.

118. That teachers are trained professionals and the foundation on which all other professionals is built.

119. The Counsel urged the Court to award the teachers a basic salary that befits their status and contribution to the national economy and social fabric.

Teachers Service Commission Memorandum of Response

120. As stated earlier in this judgment, most matters outlined here before regarding the chronology of

events are not in dispute and the Court will not regurgitate the same.

121. The Court notes the introductory paragraphs in part I of the TSC memorandum of Response paragraph 1 to 10 in which is set out the chronology of events as largely representative of what Actually happened except for some material, deliberate misrepresentations under paragraph 9 thereof.

122. In paragraph 9 it is stated that the Court ‘decreed’ to subject the matter to the Alternative Dispute Resolution (ADR) mechanism. Nothing could be further from the truth as the record of proceedings will clearly show. A consent by the parties was recorded by this Court.

123. The Court has already made a finding in this judgment on the matter and will say no more about it.

124. Under Part II of the Memorandum by TSC, paragraphs 11 – 15 are in harmony with the averments by the Unions and therefore not in dispute.

125. Between 29th January 2009 up to July 2012, TSC harmonized the salaries of teachers with those of Civil Servants. The payments were phased at 40 % from 2010 / 2011 and 20% for 2011 / 2012. TSC submits the harmonization was a result of an agreement between TSC, Ministry of Education, Treasury and KNUT. The Unions however state that this harmonization process was done arbitrarily and without any consultations with the Unions.

126. The bottom line however is that the teachers salaries were reviewed accordingly and the amounts were fully paid by July 2012. Allowances remained the same till 30th June 2009.

127. TSC submits that inspite of the improved basic salaries to the teachers, they went on strike in 2013 demanding harmonization of teachers allowances with those of other public officers. The national wide strike culminated in the two Return-to Work Formulas referred to earlier which became orders of the Court.

128. TSC admits in paragraph 21 that the parties agreed to conclude the negotiations of CBA within 90 days.

129. TSC made a response to the allegations that it caused the undue delay in commencing and concluding the negotiations and states that it was necessary to develop the Rules of the Remuneration Committee and Code of Regulations for teachers which was an integral part of the CBA. The parties agreed to jointly develop the two documents hence the delay in Actual negotiations.

130. Other delays were caused by the need to comply with **Articles 230(4)** and **259(II)** of the Constitution by seeking advice from the Salaries and Remuneration Commission with a view to substantively respond to the demands of the Unions.

131. On 17th April 2014, TSC presented its responses to the Consultative Committee but the Unions resolved not to consider the same in the absence of an offer on basic salary component.

132. By July 2014, all issues previously agreed between the TSC and Unions had been fully implemented.

133. TSC submits that it is regrettable that the parties have not been able to package the Return-to-Work Formula into a CBA due to the Unions’ insistence to agree on an enhancement of basic salary first.

134. TSC states that negotiations were on-going when the Unions called for another strike in December 2012. TSC submits that a total of thirty eight (38) demands had been agreed upon. A summary of the demands is annexed as Appendix ‘4’.

135. TSC’s Response to the Demand for enhancement of Basic salary is covered under paragraphs 30 to 52 of the Memorandum of Response. The salary review reflected in Table A and B are not in dispute.

136. Part II focuses on the salary demands by the Unions and the Response by the TSC which facts are also not in dispute.

137. TSC supports the view that the teachers should await a job evaluation exercise to be conducted by SRC to determine the relative worth of the various job / services performed by public officers and productivity levels including teachers in public institutions.

138. TSC states that it has sought technical guidance from the National Treasury on the demands submitted by the teachers and has received a guidance that the proposed requests on Basic salary cannot be approved due to the Economic situation obtaining in the country at the moment.

139. That the Government has after necessary evaluations by SRC approved an increase on allowances to all Civil Servants including teachers which totals Kshs.9.3 billion shillings on teachers only. The Government has made necessary budgetary allocations to ensure that the approved offer is implemented without fail.

140. TSC submits therefore, the teachers should be patient and await the proposed job evaluation and thereafter resume negotiations on Basic salary. Annexed are two letters from Treasury and SRC confirming this position.

141. The letter from Cabinet Secretary Henry Rotich, is dated 24th October 2014 in which he states interalia;

- i. The basic salaries for the teachers have been harmonized with those of the Civil Service. Reviews will be undertaken across the board in the context of the advice from the Salaries and Remuneration Commission (SRC), which will take into account principles of equity, fairness, productivity and fiscal sustainability of the Public service Wage Bill as outlined in the Constitution.

In addition, we are in the process of implementing the Budget and there are no additional resources to accommodate any salary adjustments. Therefore consideration of any reviews should be undertaken in the context of the medium term budgeting cycle to ensure fiscal sustainability of the wage bill.

- ii. With regard to leave allowance TSC to subject any proposals to the ongoing FY 2015 /16 MTEF.
- iii. All other allowances to be reviewed based on SRC advice in their letter dated 23rd September 2014.

142. This is the position taken by TSC in **Part V** of the Memorandum of Response. The Court notes that the Cabinet Secretary Treasury wrote the letter upon considering the demands by the Unions without the Counter-offer by the TSC.

House Allowance

143. On house allowance demand, the conclusion by TSC is that the Government has in line with the current cost of housing in the various regions of the country and pursuant to the provisions of **Article 230(4)** of the Constitution, approved new house allowance rates for all Public Servants including teachers as shown in Table D. The new rates will be implemented with effect from 1st July 2015.

Responsibility Allowance

144. This was increased by 100% with effect from 1st July 2013 and the same may only be reviewed after undertaking job evaluation so that employees are compensated based on the worth of the job.

Leave Allowance

145. Presently teachers do not enjoy leave allowance, however in the spirit of equality and to motivate teachers, Government has offered to commence payment of leave allowance to teachers with effect from 1st July 2015. The rates applicable are at par with those of other public officers as per Table F. The same is applicable with effect from 1st July 2013.

Hardship Allowance

146. Currently TSC pays hardship allowance at the rate of 30% of minimum basic salary per grade in terms of Legal Notice No. 534 of 1997 to teachers working in gazetted hardship areas. These rates have been reviewed with effect from 1st July 2015 as shown in Table G.

Hazard Allowance

147. This is covered under The Work Injury Benefits Act (WIBA 2007) and Government makes no award.

Disturbance Allowance

148. Transfer and Disturbance Allowance has always been paid in terms of Legal Notice No. 534 of 1997 by TSC at the rate of one month salary to teachers transferred at the instance of TSC outside their home district. The Union demanded that the allowance be payable upon transfer within the same District. TSC has declined this proposal in view of the recent delineation of boundaries which has made distances between districts very minimal and hence teachers hardly change their residences.

Accommodation and Night out Allowance

149. This Allowance has always been paid as per Legal Notice No. 534 of 1997 and has always been at par with those of other public officers. Government has on its own motion approved an increase on the rates payable to both teachers and other public officers with effect from 9th December 2014 as per Table H. TSC submits that the Unions' demands are unmerited and have been overtaken by events.

Entertainment Allowance

150. TSC makes no offer on this demand since any allowance paid should be aimed at facilitating an employee to perform their work. The demand by the Union is not justified in view of TSC.

Mileage Claims

151. Mileage claims are paid to all public officers on rates approved by Government from time to time. In terms of the Code of Regulations for Teachers, teachers travelling to designated hardship areas are paid an extra mileage allowance. TSC submits that the Unions demand is not justified.

Advance for motor vehicle purchase

152. TSC submits that the Government has with effect from 1st January 2015, increased the amount to be advanced as car loan facility to its officers including teachers payable at a minimum interest rate of 3%. A Government circular to that effect is marked Appendix '15'.

Medical Allowances

153. Teachers since the effect of Legal Notice No. 534 of 1997, earned medical allowance at rates determined by the Government from time to time. The Government has now approved a Medical Policy Cover for all teachers. The process of identifying a suitable provider is ongoing. Inevitably, the monthly medical allowances currently paid to individual teachers will cease and instead TSC shall pay a premium to the identified service provider. TSC submits that the Unions are aware of this fact and therefore the

demand for 400% increase on medical allowance has no basis.

Township Allowance

154. No public officer earns this allowance as it is not provided in the current Government payment framework. The cost of living in towns is mitigated by provision of house allowance which allowance varies from town to town. The demand by the Unions is therefore unjustified.

Other Demands

Elongation of Grades

155. TSC submits that this demand by the Unions is premature since TSC is in the process of reviewing schemes of service and grading structure. This matter should therefore await that exercise.

Study Leave

156. TSC submits that the Unions demand has no basis, since in line with the Code of Regulations for Teachers, TSC has a study leave policy in terms of which teachers wishing to pursue further studies are granted study leave either with or without pay.

Mortgage Facility

157. The Government has approved a mortgage facility to all public servants including teachers at low interest rate of 3% with effect from 1st January, 2015. The Government circular on mortgage facility is appendix '15'

158. It is TSC's submission therefore that all the demands set out by the Unions in their memoranda referred to earlier in this judgement and as set out in their memorandum of claim have been comprehensively addressed as stated herein above through the Code of Regulations for teachers.

159. Other demands including employment of ECD teachers, Adult Education Teachers are outside the legal mandate of TSC and are subject to other legislative framework.

160. The Draft Code of Regulations is annexed and marked '16'.

CPMU: TREASURY AND SRC REPORTS

161. The Central Planning and Monitoring Unit (CPMU) situated at the Ministry of Labour, Social Security and Services was in terms of the Consent order dated 14th January, 2015 directed by the Court to file a Report to guide the Court in the adjudication of the Economic dispute. The Employment and Labour Relations Court (then The Industrial Court) has relied on the input of this unit in resolution of Economic disputes since its inception in 1964 as may be seen from exhibit 'wk1' filed by the Unions, a letter dated 9th August, 2012 written by the then Chief Registrar of the Judiciary to the Principal Secretary Ministry of Labour. Upon transition of the ELRC from the Ministry of Labour to the Judiciary, CPMU was also supposed to transit to the Judiciary. However, the Chief Registrar wrote as follows;

“the Judiciary has no objection to the officers from the Central Planning and Monitoring Unit of the Ministry of Labour carrying out analysis of Collective Bargaining Agreements and investigating and reporting on Economic trade disputes during the transition period until such time the Judiciary recruits officers to perform these functions”.

162. It is clear from the above that this unit is an appendage of the Employment and Labour Relations Court without which the Court would have difficulties in resolution of Economic disputes.

- 163.** CPMU filed two different reports. The 1st one was filed on 23rd February, 2015 under a covering letter signed by Amb. J. Bisal Chepsongol, for Principal Secretary Ministry of Labour Social Security and Services.
- 164.** An Application was brought by Cabinet Secretary, Labour, Social Security and Services dated 13th May 2015 seeking *interalia* for the Cabinet Secretary to be joined in the suit and to seek leave of the Court to replace the CPMU Report filed on 20th February, 2015 with another report by CPMU on the basis that the TSC had ascertained that the data relating to the monthly basic wage for teachers for the period between 1997 to 2013 as captured by CPMU in its report was gravely erroneous, inaccurate and therefore misleading.
- 165.** In particular, the data contained in paragraph 1.20 under Table 9 of the Report by CPMU was erroneous and was not in consonance with the data submitted by TSC vide its letter of 9th February, 2015.
- 166.** Furthermore the calculation of the mid salary for 1997 and 2013 as set out in the 1st CPMU Report at Table 9 and the subsequent average change in percentage was grossly inaccurate and did not reflect the true salary earned by the teachers in both 1997 and 2013.
- 167.** That the figures used were extremely low to an extent that any conclusion derived from the same could not reflect the true position of the average change in income of teachers between the period under review and therefore CPMU has reached an erroneous, irregular and misleading finding that the net entitlement of the teachers in view of the rise in consumer price index (CPI) for the period in question is 128%.
- 168.** That the primary documents showing the correct monthly basic salary of teachers in the period 1997 to 2013 were duly annexed to the TSC memorandum from page 84 to 312.
- 169.** That TSC correctly indicated under Table A at page 12 of its memorandum the teachers' salary for the period 2003 -2007 and at Table B page 14 for the period 2009 – 2013.
- 170.** Grounds of objection to the Application were filed on behalf of the Unions on 20th March, 2015 in that the Application was frivolous and made in bad faith intended to impose a freshly doctored and manipulated Report whose source was doubtful, unknown and intended to influence the mind and decision of the Court. That there seemed to be a well planned collusion between TSC, SRC and AG's office to defeat the Economic claim by the Unions.
- 171.** Before this Application was heard and determined, The Hon. The Attorney General filed a Notice of Motion Application dated 24th March, 2015 on a Certificate of Urgency seeking *interalia* to be granted leave to replace the 1st CPMU Report with another Report dated 24th February, 2015 and the Court to adopt the Report as the Actual Report from the CPMU.
- 172.** The Application was supported by an Affidavit of Stella Munyi, Chief State Counsel in the office of the Attorney General.
- 173.** In view of this Application the initial Application by Cabinet Secretary Labour was abandoned and this Application was heard. The Unions relied on the grounds earlier filed to oppose the Application.
- 174.** The Court admitted the second (2nd) CPMU Report but did not expurge the 1st Report from the record for the reasons that other than replacing the data of the teacher's basic salaries for the period 1997 and 2013, the 2nd Report had also other material differences which the Court deemed necessary to consider alongside the 1st Report in making its final decision.
- 175.** Parties were granted opportunity to file Replying Affidavit and/or further submissions in view of

the admission of the 2nd Report hence the filing of the Replying Affidavit by TSC sworn by Josephine Maundu, Director In charge of Human Resource and Development on 15th April, 2015 in which she indicates the material differences in the two Reports by CPMU.

176. The Court further allowed parties to call witness if they deemed it necessary. In this regard SRC called RW1, John Kennedy Munyochu Maina an Economist employed by SRC as Acting Director, In charge of Research, Compliance, Policy and Planning. He was a holder of a Degree in Statistics, Economics and Finance from University of Puna India; Bachelor of Economics, University of Nairobi; MBA in Finance, University of Nairobi; and undertaking PHD studies in Global Business at the University of Nairobi. RW1 testified on the mandate and duties of SRC. He had perused the documents from all the parties in this matter and had undertaken an analysis of the demands by the union and gave a macro view. RW1 had come to the conclusion that if the demands by the Unions were acceded to, over 70% of the government revenue would be used to pay salaries in the Public Sector. This is because current salaries of teachers were harmonized with those of other civil servants. Therefore any increments to teachers would also apply to all civil servants.

177. RW1 stated considerations that apply in salary review include changes in consumer price index (CPI) and productivity. RW1 added that one may also undertake job evaluation that can give the Actual value of jobs being undertaken.

178. That job evaluation had not been undertaken and SRC intended to use that information to get the current value of jobs. The exercise was to be undertaken by SRC and Public Service Commission (PSC). The process would be completed in eight months from April, 2015. However, the implementation process will be agreed upon thereafter. SRC therefore recommends as it had already done, that TSC awaits the completion of job evaluation. That the current basic salary remains the same because it is already inflation adjusted. This is because the inflation growth is lower than what the teachers are currently earning.

179. Thirdly, SRC had already undertaken a study on allowances and made recommendations to harmonize them within the public service. Job evaluation will therefore ensure equal pay for work of equal value. It was therefore prudent that teachers await completion of that exercise.

180. RW1 stated he was familiar with the 1st and 2nd CPMU Reports. The object in both Reports is the same. CPMU endeavours to determine whether the teachers are being compensated appropriately. CPMU has analyzed the information received to see whether that is reality. In the 1st Report CPMU has the starting point as 1997 and 2013 as their ending point per table 9 on page 8 which reads “*Average Monthly Wage*”. The figures, however, do not reflect the average wage but the starting point of the grade. This is confirmed by the data presented by TSC on page 14 of the TSC’s submissions which give the minimum and maximum salary for each grade.

181. These figures are also those which appertained before the harmonization of teachers’ salaries. Therefore the data is wrong leading to wrong analysis. The rest of the Report reflects an analysis of the demands by the Unions.

182. RW1 stated that the method of analysis is the same in both Reports but due to the difference in primary data (Basic monthly Salaries), the two Reports reflect two different positions. The 1st Report suggests that the teachers have been under compensated especially in basic salary while the 2nd Report suggests the basic monthly salary has increased faster than the consumer price index (CPI).

183. RW1 stated that his expert advice was that because of data discrepancy there are two different results and the 2nd Report represents the correct picture.

184. RW1 stated further that the general method of analysis is the same though he was not familiar with the process of analysis used by CPMU. Under cross examination by Senior Counsel Mr Paul Muite for the Unions, RW1 said the 1st Report used 1997 -2013 as the timeline whereas in the 2nd Report, they used

2009 – 2013 as the time line. He said that the time line did not impAct the results of the analysis because the analysis is based on minimum and maximum wages and not average as table B on wages shows.

185. RW1 admitted that in the 2nd Report, data relating to CPI for 1997 - 2009 is omitted. RW1 accepted that CPI is an important factors in salary evaluation among other factors. RW1 said that SRC had not carried out evaluation of the impAct of salaries and allowances paid to members of Parliament and Senate but SRC had done a job evaluation of the national Assembly and salaries for Judges. RW1 further said the country had 270,000 teachers. That the current impAct of public service salary is 11% of the GDP and 58% of revenue collected. RW1 admitted that the last time TSC and Unions negotiated a salary increase was in 1997 and same was paid in installments over 10 years.

186. RW1 also agreed teachers are entitled to negotiate with TSC their salaries. RW1 insisted that the 2nd CPMU Report was the preferred report.

187. Under cross examination by Ms Guserwa, RW1 identified other omissions in the 2nd Report and agreed that the 2nd Report was much shorter. The source of the data in both Reports was TSC.

188. On the offer made by TSC to the Union, RW1 said that SRC advised against the 50-60% increment because there was no rationale for the proposal. RW1 was not aware if a rationale was provided and if a budget was attached to the proposal by TSC. RW1 had no information from the National Treasury on the affordability of 50 – 60 % when SRC advised against its implementation.

189. RW1 said he recognized the mandate of the Unions to conduct collective bargaining with the employer. RW1 was unable to show any evidence that the Unions were involved in the harmonization exercise. He said currently there were no negotiated terms of service including basic salary for teachers. RW1 however, insisted that the teachers should await the job evaluation exercise.

190. Mr Jaoko and Mr Mbaluto also cross examined the witness.

191. RW1 said that in the 2nd Report paragraph 1.18 shows average CPI changes between 2009 – 2013 as 39.2 % whereas the average teacher's salary for the period increased by 54.6%. RW1 said It was clear that the average salary increase for teachers over the period 2009 – 2013 was above the CPI average by 15.2%. This means the teachers have been compensated over and above the inflationary trends.

192. RW1 explained that CPI analysis uses a base year and in this case was 2009. That base is 100 plus or minus and the results should be the same whether one used 1997 as the base or 2009. If the data is correct, the results would be the same he concluded.

193. RW2 was Mr Charles Nyauki Obuki called by the Hon The Attorney General on behalf of the Government. RW2 was a Senior Economist in the Ministry of Labour. He was a holder of a B.A. Economics from University of Nairobi. An M.A from University of Nairobi. An M.A in Economic Policy management from University of Sukupa in Japan and a Masters of commerce from University of Otago in New Zealand. RW2 has served the Central Planning and Monitoring Unit since 1992 undertaking Economic analysis, policy development and review; monitoring and evaluation; co-ordination of performance contrActing; doing research; co-ordination of implementation of budget; analysis of Economic disputes; and analysis of Collective Bargaining Agreements among others.

194. RW2 stated he was in Court to assist in the resolution of the Economic dispute. He was aware of the Court's request for a CPMU Report. He received the Court order dated 14th January, 2015 and another dated 27th January, 2015 directing CPMU to analyse and prepare a report on or before 23rd February, 2015. The 2nd order had extended the time.

195. RW2 explained the procedure in preparation of the CPMU Reports. Duties are assigned by the Chief Economist to whom the orders of the Court are directed. The officers assigned the task peruse the Court file to familiarize themselves with the dispute. 2ndly the officers arrange meetings with the parties

to get their views. 3rdly the officers prepare a detailed questionnaire to the employer. Once the questionnaire is filled and returned the officers embark on tabulation of data and prepare a report. The report is then filed with the Court with copies to the relevant parties. The officer responsible must sign the Report before filing it in Court.

196. RW2 stated that CPMU attends to Economic disputes in the private and in the public sector. The present one involved public sector. Officers are at times called to Court to clarify their Reports. The main source of information is the pleadings; employer, questionnaire and other relevant information such as Economic survey circulars. In public disputes CPMU consults relevant government arms.

197. RW2 stated the 1st CPMU Report was filed on 20th February 2015. That he had participated in the analysis and preparation of the Report. RW2 told the Court that the 1st Report was not signed and it was therefore an advance draft copy. That it was hurriedly filed on a Friday to comply with the timeline set by the Court which was on or before 23rd February, 2015. It was therefore filed before receiving the relevant approvals and other arms of government had not been consulted.

198. RW2 and members of his team did the relevant consultations thereafter. In the process the officers noticed some errors and the team decided to correct the Report. The error was in table 9 on page 8. The figures below the year 2013 are incorrect and were replaced in the 2nd Report. CPMU also consulted with the National Treasury before the 2nd Report was duly signed and filed on 24th February, 2015. The difference in two reports arise from the incorrect figures in terms of conclusion. Therefore the conclusion in paragraph 3.7 in the 1st Report is incorrect as it was based on incorrect figures in table 9. This conclusion is therefore invalid.

199. *Section 1.20* on page 8 is also invalid as it derives from table 9. *Section 1.21* is also incorrect and invalid as it derives from table 9. *Section 2.1.8* table 12 on page 13 the last column is also incorrect and so is *Section 2.1.9* on page 14. The CPMU team comprised of the Chief Economist, Deputy Chief Economist, Senior Economist; RW1, Economist, Senior Statistician, Statistical Officer and Statistical Assistant.

200. RW2 said that in the 2nd Report they changed the details in table 9 and the team arrived at different conclusions which are the correct and valid ones. RW1 said data was received from TSC and some of the reports submitted by the TSC were inaccurate but TSC later revised the Questionnaire and sent the revised one. This was the source of the incorrect data initially. The correct details are found in table 8 in the 2nd Report. The figures under the year 2013 are different from those in table 9 in the 1st Report. It follows that the percentage changes are different in the two Reports. In the 1st Report the average change between 1997 to 2013 is 152% whereas in the 2nd Report, the percentage difference between 2009 and 2013 is 54.64%. Over the same period, CPI had changed by 39.52%.

201. Comparing the two figures of CPI change and wage increase on average the basic wage increase is above the CPI change by 15.12% (54.64 – 39.52). RW2 explained why the base year in the 1st Report was 1997 whereas in the 2nd Report the base year is 2009 as follows:

202. Treasury has provided guidelines for the period for considering CPI changes when reviewing wages. In this case, most recent date for the revision of wages as provided in the Treasury guideline is the reference point. RW2 acknowledged that teachers' salaries were reviewed in 1997 and 2009, the most recent date of revision is therefore 2009. In 2009 teacher's salaries were harmonized with those of civil servants.

203. The two Reports are therefore different but the 2nd Report provides the current and valid position. RW2 urged the Court to rely on the 2nd Report therefore. Under cross examination by Mr Paul Muite for the Unions RW2 insisted that it was the CPMU team which first discovered the error in the 1st Report but not the TSC. CPMU then requested for additional data from TSC via a telephone conversation between Mr Benson Ogwayo an officer of CPMU and an officer of TSC who RW2 did not know.

204. RW2 stated this took place on 12th February, 2015 before they had completed the first report. This was a contradiction of his earlier evidence.

205. RW1 stated that the analysis on page 13 table 12 in the 1st Report on cost implication of wage demand and CPI was omitted in the 2nd Report. This was because in the 2nd Report, CPI was lower than the average salary increase which was not the case in the 1st Report which was based on erroneous data.

206. RW2 was at pains to explain why in the 2nd Report they had left out comparison of teachers and Secretarial staff wage increments. This analysis was found in table 29 in the 1st Report but was omitted on page 24 in the 2nd Report. Mr Muite referred RW2 to paragraph 3.2 and 3.4 in the 1st Report which was missing in the 2nd Report. RW1 was asked to read paragraph 3.5 on page 29 which showed allocation to the Secretarial staff of TSC increased by 94.2% over a period of 6 years but the statement was missing in the 2nd Report. RW1 could not give a plausible explanation on this matter.

207. Paragraph 3.6 on page 29 in the 1st Report read that allocation to Secretariat staff of TSC increased by 79.53% in 2013 alone to improve the remuneration of TSC Secretariat staff in line with similar Commission staff. Again RW2 was at pains to explain why this information was deleted in the 2nd Report.

208. RW2 was unable to explain the reason why a Clerical officer in the TSC Secretariat earns more than a P1 teacher who undergoes two (2) year professional training in a Teacher Training College. RW2 told the Court that this was news to him. He was learning this in Court.

209. It was put to him by Mr Muite that a Clerical officer undergoes six (6) months in-house training in Government but he retorted that Clerical officers are trained for life and vary from grade to grade. RW2 said that CPMU took into account the offer made by TSC during negotiations of 50-60% from the submissions by the parties.

210. When asked if he was aware from the report by the Auditor General that 33% of Government budget is lost through corruption, RW2 told the Court, that the answer by the Counsel was as good as his. RW2 however admitted that the finding by the Auditor General has some substance. RW2 was pressed by Madam Guserwa to show where the 1st Report shows or reads it was an advance draft, but was unable to do so. RW2 insisted it was a draft because it was not signed. He was however, reminded that the forwarding letter was signed by a Senior Officer of the Ministry of Labour.

211. RW2 was also hardpressed to explain why the 2nd Report was signed by the Cabinet Secretary Kazungu Kambi instead of being signed by the Chief Economist to whom the Court order was directed. It was put to him that CPMU planned to mutilate the 1st Report under external pressure but answered in the negative. RW2 could also not show what new instructions they had received from TSC between 20th January, 2015 and 24th January 2015 when they changed the contents of the 1st Report and replaced it with the 2nd Report.

212. RW3 was Dr Geoffrey Mwau, Economic Secretary in Charge of Budget, Fiscal and Economic Affairs of National Treasury. He told the Court that he advised Government on all Economic policy matters especially the budget. He also seats in the various Boards of parastatals. He has a PHD in Economics specializing in macro Economic policy. RW3 also has two (2) Masters degree from University of Nairobi and University of Mcgil Canada respectively. He has worked as a Senior Advisor to the Board of the World Bank; and in various positions at the United Nations Economic Commission for Africa (UNECA) and International Monetary fund (IMF). He was also a lecturer at the Economics Department of the University of Nairobi.

213. RW3 took the Court through a Report filed by the Treasury on 20th February, 2015 annexed to the

Response by the Attorney General. The Officer gave an overview of the current Economic situation and outlook, budget provision as well as sustainability of wage bill in relation to the Budget and this case. RW3 told the Court that the source of his information was the Budget policy statement 2015, Economic surveys, submissions from TSC and SRC and various circulars issued by the National Treasury.

214. RW3 stated that the Kenya Economy has been resilient inspite of drought and insecurity in 2014. Economic growth was projected at 5.3% and it became exactly that. The country performed within the inflation target set by CBK at 5% \pm 2.5% in 2014. The balance of payment was maintained at 5 billion dollars which is 4.5 months of import cover. On the fiscal situation RW3 said the deficit remained at sustainable level. It was high in 2014 at 8% of GDP and the debt position has remained at less than 45% of GDP.

215. RW3 added that this position was consistent with macro Economic stability. He added that growth in 2015 is projected at 6.9% higher than 2014, mainly due to infrastructural investment going on including Standard Gauge Railway (SGR), Roads, LAPSET and various projects in the Energy sector. Inflation in 2015 is projected to remain between 5% \pm 2.5% and deficit at 7% of GDP. That 2015 – 2016 budget projected revenue of 1.3 trillion against expenditure of 1.9 trillion with external financing and domestic borrowing to cover the deficit of 480 billion.

216. On growth of salaries and allowances in the public sectors, RW3 stated that the current public wage bill stands at 303 billion for national government and 568 billion for other public sector which stands at 10% of GDP which is very high. That standard average for good performing economies is between 5 -7 %. That in order to become a middle income country by 2030 this needs to be controlled.

217. RW3 emphasized that the key measure to contain deficit to avoid macro economic imbalance is to ensure the budget remains within limits of fiscal responsibility. It is therefore important to keep the wage bill below 35% of revenue. It is now at 52% which is not sustainable. To bring the ratio down we need to bring down the wage bill; contain debt level below 45% and Tax rate to remain stable and predictable to encourage investments.

Demands by Teachers

218. RW3 said demands before this Court if upheld would be devastating to the national economy. That the demanded wage increase is between 73% to 237% which translates to 808 billion additional revenue. The consequence of this would make other sectors to shut down. RW3 stated the country would need to borrow heavily leading to high Labour costs and tax people about four (4) times higher. The economy would become uncompetitive, unstable and could even collapse. RW3 emphasized that all of us would be losers including the teachers. These consequences would be immediate and would impAct capital markets. Exchange rates would go up and there would be capital outflow. RW3 concluded that the national economy would not sustain this situation.

219. RW3 vouched for the harmonization of public servants salaries and allowances under the auspices of SRC. RW3 told the Court 19 billion has been allocated to the entire public sector to harmonise allowances. As an expert, RW3 told the Court that were the demands of the teachers to be met the consequences would be dire.

220. That it is important to safeguard the macro economic stability and put more resources in development to have a bigger cake to share once the economy grows.

221. RW3 concluded that Growth projection remains at 7% and if this is sustained, it would be possible to review the teachers' salaries within a couple of years.

222. RW3 was cross examined by all Counsel. His testimony was fairly consistent in all material respects. He confirmed that the allowances that have been approved for the teachers will be paid as scheduled by 1st July 2015. RW3 said Government is well aware of the growth in the number of school going children following the introduction of the free Primary and Secondary education and therefore the

need to employ more teachers. That Government has continued to provide resources in this respect. RW3 said the Government is aware that due to escalation in the cost of living, provision needed to be made for teachers and other public servants to cushion them. RW3 told the Court that in this regard, Government provides 4% increase in budgetary allocation to cater for salary increase for all sectors annually.

223. RW3 was asked if a demand of 73% - 237% by the teachers was not sustainable what percentage increase would be sustainable, but RW3 did not answer the question directly. He however said given the 52% wage bill we have now the country can't go so far. He concluded that what is sustainable is what the budget can provide and anything more is not sustainable.

224. Pressed further on what salary increase he proposed for the teachers RW3 said that advice from SRC should be awaited upon evaluation of jobs and harmonization. RW3 however agreed remuneration is negotiated between employers and employees, RW3 admitted that Treasury is represented in the Remuneration Negotiations Committee established under **Section 13(5)** of the TSC Act.

225. RW3 noted that SRC advised TSC to seek approval of Treasury on the proposal by TSC to increase the teachers' salaries by 50 – 60% over four years. RW3 however said Treasury did not budget for the proposed increase and instead provided a budget for increase of allowances. Pressured to admit TSC did its homework before proposing 50-60 salary increase to teachers,, RW3 said he would not own the analysis by TSC since in the year 2012/2013 and 2014, the average inflation stood at 5%.

226. He was reminded, Treasury was represented when the Remuneration Committee made the analysis and the offer. RW3 admitted Treasury was represented in the TSC Committee but refused to own the proposal and the analysis.

227. RW3 was asked why there was no budget allocation of 5-7% in line with the inflationary trend and Economic growth. RW3 said there was no money to spend. He insisted that government made 4% provision for salary increment for all public servants to cushion employees against inflation. RW3 admitted salaries for the military are reviewed every four (4) years.

228. RW3 was non-committal when asked if the teachers alone should carry the cross because of their large numbers. RW3 was equally non-committal when asked if he was aware 30% of Government revenue was lost through corruption. RW3 said they have closed many loopholes and continue to do so.

229. **RW3 was asked if he was genuine, why not put the 4% annual provision for inflation as an offer in the CBA negotiations. RW3 said it is not considered as part of wage review but a cover for the wage drift. RW3 said the Unions had the duty to negotiate the CBA. RW3 denied teachers' salaries were not a priority when reminded that teachers are tax payers and need to get their due from Ceasar.**

Final determination on the demand for basic salary Review and increase in allowances

230. The starting point is **Section 57(1)** of the Labour Relations Act, which mandates every employer who has recognized a union to conclude a collective agreement setting out terms and conditions of service for all Unionsable employees covered by the Recognition Agreement. The provisions of **Article 41(5)** of the Constitution of Kenya 2010 made it a constitutional right for every trade union and every employer to engage in collective bargaining.

231. It is not in dispute that since 1997 TSC has not negotiated basic salary increase with the Unions with whom it has signed Recognition Agreements.

232. The latest effort to negotiate and conclude collective agreements between TSC and KNUT on one hand and between TSC and KUPPET on the other hand became a clopper hence the commencement of a national wide strike and this suit.

233. This strike was preceded by four (4) other national wide teachers strikes between 1997 to date.

234. The effect these national strikes have on the welfare of school going children, the teachers, parents, members of the public and the national economy is immense and cannot be underestimated.

235. As was stated by Hon. Justice Saeed R. Cocker the President of the Industrial Court (as he then was) in his book **The Kenya Industrial Court, Origin, development and practice at pg. 66.**

“One of the important functions of the Industrial Court is to ensure that the Government policy as laid down in the Guidelines for the determination of wage awards is strictly complied with by the trade Unions and the employer in the country.”

236. In this regard, the law under section 60(1) of the LRA, 2007 provides;

“Every collective agreement shall be submitted to the Industrial Court for registration within fourteen days from its conclusion.”

237. And under sub-Section (6) it is provided:

“The Industrial Court shall not register a collective agreement that:

- a. conflicts with this Act or any other law; or*
- b. Does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.”*

238. In this case, the Court will also have regard to the guidelines issued by SRC referred to earlier in this judgment.

239. In particular, SRC guided TSC and the Unions vide the circular dated 21st March 2014, titled *“Determination and Review of Remuneration in The Public Service”* referred to earlier in this judgment. In particular SRC noted that;

- i. The Public Service adopts a four (4) year review cycle applicable to all public service organizations with effect from 1st July 2013.*
- ii. All public organizations to submit their proposals by 31st December 2012;*
- iii. All the Current Collective Bargaining Agreements expire on 30th June 2013 to allow room for new Collective Bargaining Agreements with a four year review cycle.*

240. It is common cause that TSC complied with these guidelines and submitted a detailed proposal to SRC with justification for a basic salary review of between 50 – 60 % to be implemented in a four (4) year cycle.

241. It is also not in dispute that the document also contained proposals with regard to allowances and benefits. It is not in dispute a good number of proposals made by TSC on allowances and benefits were approved upon advice by SRC by the National Treasury and are due for implementation with effect from 1st July 2015 under the umbrella of *‘harmonization.’*

242. TSC has made a good attempt to repudiate the proposal it tabled at the negotiations meeting held on 9th September 2014 between TSC and the Unions convened in terms of **Section 13(5)** of the TSC Act, under which is established the Remuneration Negotiations Committee of the Commission.

243. The evidence before Court points to the contrary that indeed TSC made an offer to the Unions of a basic salary increase of between 50 – 60% for a period of four (4) years.

244. It is also evident that the Unions made a counter proposal of between 100 – 150% increase.

Thereafter the negotiations collapsed leading to the strike and this suit.

245. This is the Economic dispute before Court today. The Court has in the light of the evidence before it to determine if the teachers deserve a basic salary increase within the aforesaid parameters by the parties.

246. In this respect, the Court is highly indebted to CPMU for the two Reports the unit submitted to the Court for guidance. The Court is also indebted to the National Treasury for the very informative Report, they tabled.

247. The evidence by RW1, RW2 and RW3 was indeed revealing and has given the Court very clear light on which way to take.

248. Counsel for the parties made very helpful submissions for and against the merits of making a basic salary increase to the teachers.

249. TSC, SRC and the Hon. The Attorney General have maintained that the Government cannot afford to make any basic salary award to the teachers at this point in time. These parties have maintained that, there is no budgetary provision for such an award; the teachers salaries have been harmonized with those of other Civil Servants by 2013 and that upon implementation of the proposed allowances, and benefits by 1st July 2015, these too will have been harmonized with those of other Civil Servants. That all the Civil Servants will thereafter await a job evaluation exercise to be completed in eight (8) months with effect from April 2015.

250. That in any event as clearly demonstrated in the 2nd CPMU report, which in their view represents the correct status of the teachers, the teachers basic salary was increased between 2009 and 2013 at a rate higher than the CPI Index, and therefore the increase has been above the inflationary rates and therefore there is no justification for the demanded increase.

251. The Unions on the other hand have painted a very gleam picture of the remuneration paid to the teachers and have vouched for the statistics and analysis depicted in the 1st CPMU Report which in their view shows;

- a. That the last negotiated salary increase to the teachers was in 1997.
- b. That arbitrary increments were made in the name of harmonization between 1997 and 2013.
- c. That the average salary change for the teachers during the period has been way below the CPI index and therefore have not been compensated for the rise in consumer prices for the period;
- d. That because of their large numbers, the teachers have been victimized by their employer by stating that the Government cannot afford any increase in the teachers basic salary because the money required for that purpose is astronomical and will undermine the national economy.
- e. That the so called harmonization which has occurred between 2009 and 2013 overlooks the fact that the teachers have for a long time earned far less salaries than the rest of the Civil Servants and is only negotiated salary increments that can fairly compensate them for that historical injustice.
- f. That the conditions of teaching have changed for worse since the introduction of free primary and secondary education leading to teachers handling very large classes averaging 50 students and in some cases of upto 90 students and therefore teachers required fair compensation for the enlarged work that they do today.

252. The Court has very carefully considered and analysed the evidence before it and the submissions by the parties and has come to the following conclusions of fact:

(i) the last basic salary increase for the teachers (whether negotiated or not) was in 2009 and therefore 2009 is the correct year of reference for purposes of CPI analysis.

(ii) table 7 at page 7 in the 2nd CPMU Report reflects the correct Consumer Price Index (CPI) at 100.00, in February 2009 and at 139.52, in June 2013 giving a percentage increase of 39.52% during

the period.

(iii) Table 8 in the 2nd CPMU Report shows the correct average monthly basic wage for teachers in 2009 and 2013 and the associated percentage increase over the period. On average, the monthly basic wage increased by 54.6% over the same period;

(iv) Tables 7 and 8 correctly show that the rise in the CPI for the period 2009 to 2013 is 39.52% whereas the average teachers monthly wage increased by 54.64% over the same period. Therefore the figures correctly show that on average, basic wage increase was above the rise in CPI by 15.2%.

(v) However what table 8 also shows in the Court's view is that the average teacher's monthly wage increase for the lower cadre of teachers was below the CPI for the period as follows;

P1	-	30.96%	=	-8.56%
ATS IV	-	33.17%	=	-6.35%
ATS III	-	31.05%	=	-8.42%

(vi) For the Grades ATS II; ATS I and PR3 the salary increase was above the CPI for the period as follows;

ATS II	-	48.47	=	+8.95
ATS I	-	48.02	=	+9.1
PR3	-	4.62	=	+8.42

(vii) Whereas for the highest teachers grades PR2, PR1; SP and CP the average salary increase was above the CPI for the period as follows;

PR2	-	55.05	=	+15.53%
PR1	-	81.68	=	+42.16%
SP	-	81.06	=	+41.54%
CP	-	88.34	=	+48.82%

253. It is the Court's considered view that there is a very big disparity between the average salary increase for the lowest cadre of teachers (P1) at minus -8.95% and that of the highest cadre of teachers (CP) at plus +48.82% for the period under review. The Court therefore concludes that there is dire need to harmonise the salaries of teachers within the different cadre.

254. Indeed, in the proposal and analysis tabled by TSC to the Negotiations Committee and subsequently to SRC, the main justification for the basic salary increase of between 50 – 60% for a period of four (4) years was "*The working percentage increase in salary is meant to bridge the existing disparity between the lowest and the highest paid teacher.*" (see page 3 of the proposal marked *App.'12'* at page 117 of the Memorandum of Claim).

(viii) The Court also finds that CPMU, omitted valuable information in the 2nd Report which was initially contained in the 1st CPMU Report. The Court finds that RW2 was during cross examination by Counsel for the Unions unable to justify the admitted omissions in the 2nd Report.

255. In particular, the information contained under **Part III titled CPMU's observations** on page 29 –

30 of the 1st Report was material to the determination of this suit and the Court will consider the same as follows.

256. CPMU indicated at paragraph 3.4 at page 30 in the 1st Report that without harmonization, allocation and expenditure on teachers increased by an average of 11.3% and 11.6% per annum respectively. The allocation to TSC has been increased by these rates to cater for the normal changing dynamics such as new recruitments, promotions and natural attrition.

257. At paragraph 3.5, CPMU noted expenditure towards TSC Secretariat increased from Kshs.1.7 billion in 2009 to Kshs.3.3 billion in 2014 representing an increase of 94.2% over the six (6) years period. This is attributed under paragraph 3.6 to significant improvement in terms and conditions of TSC Secretariat Staff. The conditions of TSC Secretariat Staff have further been improved vide SRC Circular Ref. No. SRC/TS/TSC/3/35/2 Vol.III(20) of 17th December 2014. TSC and SRC argue that terms and conditions of service for the TSC Secretariat Staff being an independent Constitutional Commission, ought to be in line with those of other Commissions.

258. These are indeed significant revelations which go further to show the disparity in revenue allocations to the TSC Secretariat *vis a vis* the revenue allocation to the teachers. The result has been very big disparity between teachers in the lower grades *vis a vis* teachers in higher grades and big disparities in the terms and conditions of Secretarial Staff *vis a vis* the teachers in general.

259. It is the Court's considered view that the core business of TSC is to provide quality education to all children in Kenya and this can only be provided by the teaching staff under correct supervision. It is arguable therefore that the core staff of TSC are the teachers and should therefore be given the highest priority in revenue allocation and improvement of their terms and conditions of service.

260. The evidence by RW1, RW2, RW3 and the Reports by CPMU and the Treasury gave invaluable information for consideration by the Court in weighting the issues in this matter. This evidence has already been summarized and I will not regurgitate it here.

261. The salient points in the evidence by RW3 is the need to ensure fiscal sustainability by keeping the public wage bill to less than 7% to the GDP. This currently stands at 10%.

(ii) To keep ratio of wages to revenue at no more than 35%. The current ratio is at 52%.

(iii) To keep gross public debt ratio to GDP below 45%. The current ratio stands at 42%.

262. RW3, the Economic Secretary, concluded that meeting the demands by the teachers at all will lead to increased taxation or borrowing to meet the increased recurrent expenditure. RW3 therefore cautioned against any increase in public salaries without considering the principles outlined in the constitution and in particular fiscal sustainability.

263. State Counsel Stella Munyi, in her very able submissions referred the Court to the matter of **The Interim Independent Electoral Commission, Constitutional Application [2011]eKLR** in the following terms;

“the effect of the constitution's detailed provision for the rule of law in process of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context is that the totality of governance powers is shared out among different organs of government and these organs play mutually counter veiling roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.”

264. Counsel therefore urged the Court to let TSC and SRC perform their constitutional and statutory mandates of determining the terms and conditions of teachers and refrain from interfering in any way in that mandate.

265. Counsel further referred the Court to the decision in the **matter of the principles of Gender Representation in the National Assembly and the senate, Sup. Ct. Appl. No. 2 of 2012 [para.83], (supra)**, where the Supreme Court held:

“we would state that the Supreme Court, as a custodian of the integrity of the Constitution as the Country’s Charter of governance, is inclined to interpret the same holistically taking into account its declared principles and to ensure that other organs bearing the primary responsibility for effecting operations that crystalize enforceable rights are enabled to discharge their obligations, as a basis for sustaining the design and purpose of this Constitution.”

266. This Court is indeed bound by this rendition of law by the highest Court of the land.

267. In this respect, the Court refers to **HCC at Nairobi Constitutional and Human Rights Division, Petition No. 294 of 2013 between KUDHEIHA and SRC** where Isaac Lenaola, J. held;

“Article 248 of the Constitution then creates Commissions and Independent Offices. Taking all the above definitions of the Government and the State, it is difficult not to appreciate that State Corporations are entities comprised in the National Government. For instance The Kenyatta National Hospital, The Moi Teaching and Referral Hospital are State Corporations within the Ministry of Health, KPLC within the Ministry of Energy, The Public Universities within the Ministry of Education and Technology. That being so, it automatically follows that their employees are public servants.”

268. This reasoning is in consonance with my earlier finding in this judgment that teachers are public officers employed by TSC which is part of the National Government.

269. The learned Judge further found:

*“Looking at the provisions of **Article 230** of the Constitution as well as the provisions of **Section 11** of the SRC Act, it is clear that SRC has the mandate of setting and regularly reviewing the remuneration and benefits of all State officers and **advising** the National and County Government on the remuneration and benefits of all other public officers.”*

270. The Court therefore reiterates that the TSC has the mandate to set and review the remuneration of teachers upon advise by SRC. The Court further restates that TSC is not bound by the advise of SRC in setting and reviewing remuneration of teachers. A plain and holistic interpretation of **Articles 230(4)** as read with **Article 259(11)** of the Constitution supports this finding by the Court. TSC needs only prepare a budget for allocation of funds by the National Treasury and approval by the National Assembly. However TSC must take into consideration the advice by SRC without necessarily being bound by it.

271. Acting otherwise would be contrary to the Constitutional order restated by the Supreme Court in its advisory opinion.

272. The Employment and Labour Relations Court has since its establishment in 1964, adjudicated upon Economic disputes between Employers and Unions and made basic salary and other monetary awards.

273. In this regard, Justice Saeed R. Cocker in his book referred to earlier at page 77 stated;

“The level of Economic benefits enjoyed by workers can never be static, and the Court determines their level from time to time taking into consideration all the Economic factors plus social and to some extent political considerations.”

274. The learned Judge also stated at page 71 as follows;

“It is an impossible task to lay down the criteria that are used in Industrial Court adjudications. Apart from the traditional concepts, there are always very strong social and political forces at play which have to be accorded due respect when the questions of determining the wage and salary levels and other fringe

benefits for the work force in the country are being considered the principle Economic criteria that have emerged historically and which are commonly used in all cases are;

The basic needs of the workers on the family budget (the basket of goods); movements in the cost of living; wage comparisons i.e. wages paid in other industries and places; money i.e. the financial position of the employer and the ability or inability to pay; productivity increase, if any i.e. the workers efforts in productivity of an enterprise. The effect of a wage award on employment situation in the country and on the price of products of the undertaking, that is its effect upon consumer purchasing power and employmentThe Court's main concern has been in the first place, to ensure that the workers' standard of living does not go down. This is done by restoring the loss of purchasing power that the workers may have suffered during the previous collective Agreements. When this is done the workers' standard of living is maintained but wherever and whenever it is possible, the Court considers it necessary that the workers real income should also increase so that their standard of living may see some improvement. This is done by granting the workers some percentage of wage increase over and above the compensation for increase in the cost of living."

275. In Cause No. 89 of 1966 between Kenya Union of Commercial Food and Allied Workers and Twentieth Century Fox Organisation (East Africa) the Court made the following observations:

"The Court has to consider various factors before a wage increase is granted. An increase in the cost of living is only one of such factors. One of the other important factors which cannot be overlooked is that the worker should be able to get something more than the compensation for the loss of money value, in order to move towards the ultimate objective of enjoying a higher standard of living. But this can be granted only if under competitive conditions an industry can be shown to be capable of paying a full living wage. This has further got to be consistent with the growth of economy in the country and its development plan."

276. The Court fully embraces the wisdom of the Learned Judge.

277. RW3, The Economic Secretary told the Court that Government has consistently budgeted for a 4% basic salary increase for all public officers including teachers to cater for the loss of money value, also referred to as inflation increase.

278. It is common cause that the last negotiated salary increase to the teachers was in the year 1997. This salary award was however implemented in a period of ten (10) years. Even though the Court has already found the year of reference for analysis of CP1 is 2009, being the last date teachers received an arbitrary award of salary from Government, it is clear from the totality of evidence before Court that the average salaries increase for the teachers between 1997 – 2009 was way below that of the Civil Servants hence the harmonization that took place between 2009 to 2013.

This observation is important in view of the evidence by RW3, The Economic Secretary, that Government budgeted for an automatic 4% salary increase cushion against inflation. This 4% increase was not automatically paid to the teachers for the period 1997 to 2013.

The Court notes that a 4% automatic inflation cushion spread between 1997 – 2009 would have translated to a 64% cumulative salary increase to the teachers for the period had it been implemented.

279. In addition, CPMU has in the 2nd Report demonstrated that the lower grades of teachers have earned a basic salary average below the average CPI index for the period 2009 to 2013 by a margin of 8.56% for P1 grade, 6.35% for ATSIIV and 8.42% for ATS III.

280. Furthermore, the disparity in the average basic salary increase between a P1 teacher and a teacher in CP level is 57.38% for the period 2009 to 2013.

281. This is the situation TSC rightly wanted to address in the proposal tabled in the negotiations on 9th September 2014. Accordingly, the Court has upon careful consideration of the evidence

before it found as follows;

(a) A basic salary to the teachers of between 50 – 60% for four (4) years meets the wage review criteria set out herein before in this judgment and the Court awards the teachers accordingly. This Award in reality translates to an annual award of between 12.5% - 15%.

(b) In line with the circular issued by SRC dated 4th July 2012, the Collective Bargaining Agreement containing the 50 – 60% basic wage increase is effective from 1st July 2013 and the same will expire on 30th June 2017.

(c) The allowances increases already awarded to the teachers by TSC with effect from 1st July 2015, which includes;

- i. House allowance
- ii. Leave allowance
- iii. Hardship allowance
- iv. Advance for motor vehicle purchase; and
- v. Mortgage facility; are hereby confirmed as awarded by the Court and the items to be reflected in the Collective Bargaining Agreement for the period 1st July 2013 to 30th June 2017.

(d) All other allowances and benefits in the Memoranda of the parties including;

- a. Responsibility allowance
- b. Hazard allowance
- c. Disturbance allowance
- d. Accommodation and night out allowance
- e. Mileage claims
- f. Study leave
- g. Sabbatical leave;

and any other allowances and benefits that the parties may wish to be reflected in the Collective Bargaining Agreement as negotiable items are to be reflected in the Collective Agreement for the period 1st July 2013 to 30th June 2017 in their current status. e) The term of the CBA to be reflected in the ultimate Clause of the CBA document to be from 1st July 2013 to 30th June, 2017.

- f. The CBA, duly signed by the parties to be registered with the Court in terms of **Section 60(1)** of the Labour Relations Act, 2007 within thirty (30) days from the date of this judgment.
- g. For the avoidance of doubt, this judgment takes effect immediately notwithstanding any delay in preparation of the CBA document and its registration with the Court.

282. Here is to hope, this Judgment will bring to an end the era of arbitrary remuneration awards to the teachers. The Court desires, that the era of acrimony and regular national wide strikes by the teachers will be replaced by an era of guided collective bargaining in a four (4) year cycle. If this scenario come to pass, the pain felt today, by Government implementing this award would be repaid many fold by the peace and harmony to be experienced in the Education Sector. The annual anxiety by the teachers, children and their parents will equally come to an end. Good Labour Relations, translating into national peace and harmony is a trophy worth investing in today.

Dated and Delivered at Nairobi this 30th day of June, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE