



Ocharo v Anti-Female Genital Mutilation Board & another; Salaries and Remuneration Commission & 7 others (Interested Parties) (Petition E013 of 2021) [2022] KEELRC 1542 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1542 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E013 OF 2021**

**J RIKA, J
MAY 27, 2022**

BETWEEN

MEMBA OCHARO PETITIONER

AND

ANTI-FEMALE GENITAL MUTILATION BOARD 1ST RESPONDENT

STATE CORPORATION ADVISORY COMMITTEE 2ND RESPONDENT

AND

SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY

PAUL KILONZO INTERESTED PARTY

ZUWEINA SALIM INTERESTED PARTY

TITUS CHEMURSOI INTERESTED PARTY

MILTON OMONDI INTERESTED PARTY

FLORENCE CHEMUTAI INTERESTED PARTY

JARED KINGOINA INTERESTED PARTY

OSMAN IBRAHIM INTERESTED PARTY

JUDGMENT

1. The Petitioner describes himself at paragraph 1 of the Petition, as a Kenyan Citizen, who is passionate about fairness of governmental organizations, and that at all material times, he was aware that the 1st Respondent engaged 22 Public Officers, the 2nd to 9th Interested Parties among them, to operationalize



- the Anti- Female Genital Mutilation Board, following the passage of the [Prohibition of Female Genital Mutilation Act](#), 2012.
2. The 1st Respondent is a Semi-Autonomous Government Agency, tasked with the Administration of the Female Genital Mutilation Act.
 3. The 2nd Respondent is an Advisory Body, advising the Government on the administration of State Corporations.
 4. The 1st Interested Party is a Constitutional Commission, empowered to regularly set and revise the benefits of State Officers, and to advise National and County Governments on the remuneration and benefits of all other Public Officers.
 5. The dispute revolves around the salaries payable to the 2nd to 9th Interested Parties, once they were seconded from the various Ministries, to the newly established 1st Respondent.
 6. The Petitioner submits that the 1st Interested Party, approved a salary structure for the 2nd to 9th Interested Parties, on 6th August 2015.
 7. Rather than have adopted the salary structure as approved by the 1st Interested Party, the 2nd Respondent wrote to the Principal Secretary advising that the 22 seconded Public Officers, including 2nd to 9th Interested Parties, be paid 15% of their substantive basic salary.
 8. It was expected that by 31st May 2018, the 1st Respondent would have recruited its own staff, and the 22 seconded Public Officers would revert to their respective Ministries.
 9. The 2nd to 9th Interested Parties, through the Petitioner, allege that they were discriminated against. The CEO, the Acting Director Administration among others, were paid in accordance with the salary structure approved by the 1st Interested Party. The 2nd to 9th Interested Parties were paid at the rate recommended by the 2nd Respondent- 15% of the basic salary. This was despite the Board having set aside a sum of Kshs. 17 million for staff remuneration.
 10. There were consultations between the Seconded Staff and the Board, where it was recommended that, the seconded Staff are accorded equal treatment with their colleagues. The CEO wrote to the Principal Secretary asking for funds to cater for personnel emoluments. The Principal Secretary wrote to her colleagues in the Treasury asking for funds. The Treasury Principal Secretary advised that it was not feasible to avail the funds, because preparations for Supplementary Budget had already been concluded.
 11. The affected seconded staff, anonymously sought the intervention of the Commission on Administrative Justice. The Commission investigated the matter, and concluded that the seconded staff had been treated in an unlawful, unfair and discriminatory manner. It was recommended that the 1st Respondent should reconsider its decision, and pay the affected Employees the difference in their remuneration, based on the Board's approved salary structure for the duration of their deployment.
 12. The 1st Respondent was unmoved.
 13. The Petitioner submits that the 2nd to 9th Interested Parties' constitutional rights under various Articles, particularly articles 27 and 41 have been violated. They were treated in a discriminatory manner, denied equality and fair remuneration. The Petitioner invokes section 4 of the [Fair Administrative Action Act](#), which demands that any administrative action is lawful, reasonable and procedurally fair; and, sections 5 and 17 of the [Employment Act](#) respectively, outlawing discrimination at the workplace, and requiring Employers to pay their Employees entire salary earned.



14. It is proposed that the court grants the following orders: -
- I. Declaration that the withholding by the 1st Respondent, of the deployed Officers' salaries since 2015, to the date of termination, is unfair and unlawful.
 - II. The Respondents are compelled to pay the withheld salaries.
 - III. Declaration that the Respondents violated the deployed Officers' rights to fair labour practices.
 - IV. Declaration that the Respondents jointly and severally breached the constitutional and statutory rights of the deployed Officers, under articles 27, 41 and 236 of *the Constitution* read together with the *Fair Administrative Action Act*.
 - V. Declaration that variation of the deployed Officers' salaries is unfair and in violation of their fundamental rights.
 - VI. The deployed Officers are paid general damages for breach of contract.
 - VII. Aggravated and exemplary damages.
 - VIII. Any other suitable remedy.
 - IX. Costs be in the cause.
15. Bernadette Loloju, Chief Executive Officer of the 1st Respondent, swore an Affidavit responding to the Petition, on July 20, 2021.
16. She explains that the 1st Respondent was established in December 2013, following the enactment of the *Prohibition of Female Genital Mutilation Act*, 2011. Sometime in 2014, staff were deployed from various Ministries, to help in setting up of the Board. They continued to be paid salaries by their respective Ministries.
17. In 2018, the 1st Respondent wrote to the 2nd Respondent, seeking advice on payment of top-up allowance, to be paid to the deployed staff, for the duration of their deployment. The 2nd Respondent recommended payment of 15% of the substantive salaries. The 1st Respondent Board approved this. Its Human Resource and Accounts Divisions, prepared detailed schedule of payment. Between May 29, 2018 and May 30, 2018, deployed staff received their payments in accordance with the approved schedule. The 2nd to 9th Interested Parties were among the recipients. It is the position of the 1st Respondent therefore, that the 2nd to 9th Interested Parties, are not entitled to further payments. The Petition is made in bad faith.
18. It was agreed by the parties that the petition is considered and determined on the strength of the record.
19. The issues, as broadly understood by the court, are whether the 2nd to 9th Interested Parties were treated in a discriminatory way by the 1st Respondent; and whether they are entitled to the various remedies sought.

The Court Finds: -

20. Thankfully, there is a Determination made by the Commission on Administrative Justice [Office of the Ombudsman] in Inquiry File CAJ / FGM/ O12/ 423/ 2018, on the issues in dispute in this Petition.
21. In *Kenya Vision 2030 Delivery Board v. Commission on Administrative Justice & 2 others* [2021] e-KLR, the Supreme Court held that recommendations of the Commission on Administrative Justice



can only be binding if specifically provided for in law. It was held that the Commission cannot usurp the role of this Court in employment and labour relations matters.

22. This court [E&LRC] however, does not think it should ignore the investigations, findings and recommendations of the Commission on Administrative Justice relating to this dispute. The Court and the Commission are involved in administration of various forms of justice, requiring cooperation and comity. There should be no wastage of public resources by state institutions, in administration of the same justice. The court should not conduct an elaborate and separate trial of facts which have already been established, by another reputable state institution in the justice sector. The main Parties in this Petition appeared before the Commission and presented their positions. The investigations, findings and recommendation of the Commission have not been faulted by any of the Parties. They have not been challenged. The 1st Respondent's CEO Bernadette Loloju, said nothing in her Affidavit, on the investigations, findings and recommendations of the Commission on Administrative Justice. Should the dispute be prolonged in the courts, while the findings and recommendations of the Commission remain in place? Should not the Parties have taken these findings and recommendations as a guide for settlement out of court?
23. The highlights in the findings of the Commission include the following: -There was a surprising contrast in the manner in which the 1st Respondent dealt with the remuneration of 4 Employees vis-à-vis the complainants [including 2nd to 9th Interested Parties]. The 1st Respondent followed the advice of the 2nd Respondent in dealing with the 2nd to 9th Interested Parties and their colleagues, while applying the salary structure approved by the 1st Interested Party, in dealing with the 4 Employees. There was no basis for making distinction between the 2 groups of Employees. The 1st Respondent's explanation that the 4 Employees were carrying out special functions, was neither here, nor there, as all Employees had been seconded from various Ministries and were assigned substantive duties. The 1st Respondent's explanation that it could not implement the salary structure approved by the 1st Interested Party, before Human Resource Instruments were in place, was hollow, as the same structure had been implemented with regard to 4 Employees. Even after the Human Resource Instruments were approved, the 1st Respondent did not pay the aggrieved staff in accordance with the salary structure approved by the 1st Interested Party. The 1st Respondent was deliberate in paying the 4 Employees in accordance with the 1st Interested Party's salary structure, while subjecting the rest to the Advisory from the 2nd Respondent. The 1st Respondent ignored Guidelines on Secondment in the Public Service, by failing to remunerate the aggrieved Employees and formalize secondment. The aggrieved Employees continued to be paid by their respective Ministries, and the 1st Respondent only attempted to remunerate the aggrieved Employees, when it was about to recruit its own staff. The 1st Respondent acted in an unfair and discriminatory manner in the remuneration of deployed Employees. The 1st Respondent acted in an unlawful and unjust manner against the deployed Employees.
24. The Commission therefore recommended that the 1st Respondent should reconsider its decision on the payment of its Employees, and pay affected deployed Employees the difference of their remuneration based on the Board's approved salary structure for the duration of their deployment.
25. The court adopts the above findings. It is unfortunate that the 2nd Respondent and the 1st Interested Party took different positions on remuneration of the deployed Officers. The 2nd Respondent is mandated under Section 27 [1] [c] of the *State Corporations Act*, where necessary to advise the Government on among other issues, secondment of Public Officers to State Corporations, and the terms and conditions of such secondment. It is however, the constitutional mandate of the 1st Interested Party, under article 230 [4] [b] of *the Constitution*, to advise the National and County



Governments, on the remuneration and benefits of all other Public Officers. section 27[1][c] of the State Corporations Act, appears inconsistent, with article 230[4][b] of the Constitution.

26. The salary structure approved by the 1st Interested Party should have prevailed over the advice given by the 2nd Respondent. The aggrieved Employees were all Public Officers, on secondment from various Ministries. There should have been no advice offered by the 2nd Respondent, because it was not necessary. The State Corporations Act only requires such advice is given, where necessary. The 1st Interested Party had given its endorsement of the salary structure applicable to the deployed staff, and the 2nd Respondent should have deferred to the constitutional mandate of the 1st Interested Party.
27. Some of the prayers in the Petition are repeated. The orders made below shall suffice.

It Is Ordered: -

- a. The findings of the Commission on Administrative Justice in its Inquiry File FGM/012/423/2018, are adopted as the findings of this Court.
- b. It is declared that the 1st respondent violated the 2nd to 9th Interested Parties' constitutional and statutory rights under articles 27, 41 and 236 of the Constitution, section 4 of the Fair Administrative Action Act and Section 5 of the Employment Act.
- c. The 1st Respondent shall pay to the 2nd to 9th Interested Parties, the difference between the salaries paid in accordance with the 2nd Respondent's Advisory, and those that should have been paid in accordance with the salary structure approved by the 1st Interested Party over the period of deployment.
- d. The 1st Respondent shall pay each of the 2nd to 9th Interested Parties, general damages at Kshs. 300,000, for violations of the constitutional and statutory rights identified above.
- e. Costs to the 2nd to 9th Interested Parties, to be paid by the 1st Respondent.
- f. Interest allowed at court rates, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

