



**Council of County Governors v Salaries and Remuneration Commission; Kenya
Human Rights Commission & another (Interested Parties) (Petition E272 of 2022)
[2024] KEHC 9248 (KLR) (Constitutional and Human Rights) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E272 OF 2022

LN MUGAMBI, J

JULY 25, 2024

BETWEEN

COUNCIL OF COUNTY GOVERNORS PETITIONER

AND

SALARIES AND REMUNERATION COMMISSION RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

NATIONAL TAXPAYERS ASSOCIATION INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 3rd June 2022 is supported by the Petitioner’s affidavit even date sworn by Mary Mwiti. It is further supported by the deponent’s supplementary affidavits sworn on the 4th August 2022 and 3rd November 2023 respectively.
2. The substance of this Petition is the alleged failure by the Respondent to set and make recommendations for the provision of a defined benefit pension scheme for retiring Governors and their Deputies at the County level similar to one enjoyed by State Officers at the National Government level.
3. The Petition seeks the following reliefs against the Respondent:
 - i. A declaration do issue that the Respondent’s action in failure to provide for County Governors with a defined benefit pension scheme similar to the one enjoyed by state officers at the



National Government is discriminatory, unfair, unjustifiably selective and in contravention of Article 27 of *the Constitution*.

- ii. An order of mandamus do issue to the Respondent compelling it to make provisions for pension benefits for retiring County Governors and to provide for a pension to the office holders of County Governors.
- iii. Such further and other reliefs be granted to the Petitioner as this Court deems fit.
- iv. Costs of the Petition.

Petitioner's Case

4. The Petitioner avers that *the Constitution* under Article 43(1) (e) provides that 'every person has a right to social security'. Despite the requirement, there is no universal scheme of social security for state officers at the County level similar to the one that the State Officers in the National Government have, that is, a pension with defined benefits upon retirement.
5. The Petitioner depones that Article 151(3) of *the Constitution* provides for protection of the retirement benefits for the former Presidents and Deputy Presidents from any variation that may be detrimental to the interests of the beneficiaries during their lifetime. For the President, the benefit has been realized through the *Presidential Retirement Benefits Act*, 2003. For the Deputy President, the *Retirement Benefits (Deputy President and Designated State Officers) Act*, 2015 covers former Prime Ministers, Chief Justices, Deputy Chief justices and Speakers of Parliament. None of them is required to contribute since it is a defined pension scheme fully funded and guaranteed by the State.
6. In contrast, Governors and their Deputies have neither pension nor legislation that provides for payment of pension to them. Instead, they are paid a gratuity at the end of the term. The Petitioners contend that the differentiation is discriminatory and breeds inequity and unfairness.
7. The Petitioner complained that efforts to have the Respondent provide a comparable defined pension scheme for the Governors and Deputy Governors have been unsuccessful.
8. That in an advisory by the Attorney General dated 18th July 2019 to the National Treasury, the Attorney General advised that the National Treasury Pensions Department is the designated administrator of pensions for public officers in the National Government only. That in view of the division of revenue between the two levels of governments, County governments should designate their own administrator for their pension scheme. Nonetheless, the Respondent has not allowed the Petitioner to set up a defined pension scheme.
9. The Petitioner asserted that the review of Public Service Retirement Benefits Scheme in 2010 has no bearing on the Petitioner's members as they are not employees within the meaning of that circular which only affected permanent and pensionable employees. The circular was also issued prior to the enactment of the *County Governments Act*.
10. Accordingly, the Petitioner is aggrieved by actions of the Respondent and contends that they are in violation of Articles 27(5), 43(1) (e), 47 and 73 of *the Constitution*.

Respondent's Case

11. The Respondent, through the Chief Executive Officer and Commission Secretary, Anne R. Gitau filed the replying affidavit sworn on 13th July 2022.



12. She depones that in view of Article 230 (4) (a) of *the Constitution* the Respondent is mandated to set remuneration and benefits of State Officers and this also includes pension or gratuity.
13. Gratuity, the Respondent explained is a gratuitous payment for services rendered and paid at the end of a contract, resignation, retirement or death of the employee. Pension on the other hand can be a defined contribution scheme (DC) or a defined benefit scheme (DB) and is payable by way of periodical payments. It does not include gratuity.
14. The Respondent deponed that in 2010, the National Treasury carried out a review of all public service retirement benefits schemes and the outcome was issuance by the National Treasury, the National Treasury Circular No.18 of 2010 specifying the conditions to be observed by all public service retirement benefit schemes as from 1st January 2011 in order to ensure fiscal sustainability. As a result, this review saw all Defined Benefit schemes convert to Defined Contributory schemes.
15. The Respondent stated that during the 1st Remuneration and Benefits Review Cycle, it set the retirement benefits for State Officers in the County Government and published them in the Gazette Notice No.2888 dated 28th February, 2013. The Respondent set a service gratuity at the rate of 31% of annual basic pay for every year served for State Officers at the County level.
16. It is stated that this was also retained in the 2nd Remuneration and Benefits Review Cycle vide Gazette Notice No.6518 dated 7th July 2017. This notice was however quashed by the High Court in a judgment delivered in County Government of Kakamega & 2 others vs Salaries and Remuneration Commission; County Government of Mombasa (Interested Party) (2018) eKLR thus reverting to the preceding Gazette Notice.
17. The Respondent divulged that the Petitioner initially submitted its request for pension for the governors and other state officers serving in County Government at a consultative meeting with the Respondent on 20th January 2020. Upon deliberating on the matter, the Respondent in a meeting held on 22nd January 2020 and actioned vide a letter Ref. No: SRC/TS/COG/3/61/48 VOL II (83), approved the policy guidelines for setting up a direct contributory pension scheme for state officers at the County level including the governors and deputy governors.
18. As a result of these guidelines, there is now in existence two types of retirement benefits at the county level. One, a contributory pension scheme established by the County Government and second, gratuity. The Respondent thus maintained that it has discharged its mandate that was guided by the principles set out under Section 12 of the *Salaries and Remuneration Commission Act* (SRC Act).
19. The Respondent stated that the decision to issue these Guidelines was informed by a number of considerations. Firstly, that the proposed pension and other non-pension benefits for governors and deputy governors will not fiscally affordable. The Respondent provided a detailed budgetary implication which was tabularized in its replying affidavit. Second, that other than the President and the designated officers set out in the *Retirement Benefits (Deputy President and Designated State Officers) Act*, all other state officers in the country either receive gratuity payment or a in a defined contribution pension (DC) or both. If Respondent accepts the Petitioner's proposal of the direct benefit scheme, it will bring about distortion of the existing retirement benefits structures for other State Officers and will result in disparity between the governors and deputy governors on one part and other state officers on the other. This will have a ripple effect on all state officers at both levels of government.



20. The Respondent asserted that it has discretion exercisable within the confines of its mandate in making decisions hence an order of mandamus in the manner that seeks to have the Court a particular benefit scheme be accorded to the Petitioner will be an interference of that mandate.
21. The Respondent contends that the Petition lacks merit and is an abuse of Court process.

Interested Parties Case

22. The Interested Parties filed their replying affidavit through the 1st Interested Party's Director, Davis Malombe sworn on 19th September 2023.
23. It is asserted that owing to the financial crisis in the Country, public funds ought to be utilized for the benefit of citizens. As such, it deposed that this Court should not overlook the Petitioner's grossly high salaries as against this Country's economic situation.
24. It is also noted that the Nation public debt is at now the highest since independence. Equally, the Interested Party stated that public wage bill consumes the uppermost of the government expenditure thus leaving only small fraction for the critical development projects. The Interested Parties thus contended that the orders sought by the Petitioner will negatively affect the economy.
25. The Interested parties aver that governors and deputy governors who are paid a salary of Ksh.924,000/= and Ksh.621,250/= respectively, are entitled to 31% of their basic salary as gratuity payment which cumulatively totals to more than Ksh.900,000,000/-. In light of these factors, the Interested Parties urged the Court to adopt a purposive approach in interpreting *the Constitution* in this matter by prioritizing the welfare of Kenyans.

Petitioner's Submissions

26. The Petitioner through Counsel Eugene N. Lawi filed submissions dated 14th February 2024 in support of the Petitioner's case. The issues identified for determination were, whether the exclusion of state officers at the County Government from pension benefits whereas state officers at the National level are entitled to the same amounts to discrimination and whether the failure to make provisions for Governors' pension benefits amounts to violation of Article 43(1)(e) of *the Constitution*.
27. On the first issue, Counsel answered in the affirmative. This is because compared to state officers at the national level, governors and deputy governors only receive gratuity at the end of their tenure. Counsel argued that the payment of gratuity does not guarantee the Petitioner a life-time security pension. Counsel as well submitted that there is no justification for the differentiation between state officers at the two levels of government.
28. Reliance was placed in *Council of Governors v Salaries & Remuneration Commission (Constitutional Petition 328 of 2016)* where it was held that:

"...there is no doubt that deputy governors have been left out in regards to housing benefits. No reasonable and acceptable reason has been given to justify this differential treatment. Housing allowance is a benefit a state officer is entitled to where the state as an employer does not provide a house to the officer. They are entitled to remuneration and benefits which should include housing allowance." "...I have no reason to doubt that there can be no more unreasonable, unjustifiable and unfair differential treatment deputy governors have been subjected to than this, a classic case of unfair discrimination that article 27(5) of *the constitution* prohibits."



29. On this premise, Counsel argued that the Respondent had failed its constitutional mandate under Article 230 (4) (a) of *the Constitution* since it has not set up a defined benefits scheme for the governors and their deputies. In support reliance was placed in In the Matter of Interim Independent Electoral Commission, Constitutional Application No.2 of 2011 where the Supreme Court stressed that:

“...*The Constitution* established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation...these Commissions or independent offices must, however, operate within the terms of *the Constitution* and the law: the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in *the Constitution* and the law.”

30. Turning to the second issue, Counsel submitted that the Respondent's failure to set recommendations for the provision of pension benefits for governors infringe their right to social security as guaranteed under Article 43(1) (e) of *the Constitution*. It was noted that *the Constitution* is clear under Article 24 that any limitation to this right must be justifiable in an open and democratic society. According to Counsel, the omission to address pension benefits for governors disregards the welfare and dignity of retired officials who have dedicated their service to the public.

31. To buttress this point reliance was placed in *Katiba Institute & another v Attorney General & another, Constitutional Petition No. 209 of 2016* where it was held that:

“We have to make it clear that constitutional rights cannot be limited by whims. As was stated by the Court of Appeal in Attorney General vs. Kituo Cha Sheria & 7 Others (supra) the Bill of Rights in Kenya's constitutional framework is not a minor, peripheral or alien thing removed from the definition, essence and character of the nation. It is integral to the country's democratic state and is the framework of all policies touching on the populace and the foundation on which the nation state is built.”

Respondent's Submissions

32. On 15th February 2024, James Sitienei Advocate filed submissions on behalf of the Respondent and identified the issues for determination as, whether the Respondent discriminated against governors and deputy governors, whether the Respondent in setting retirement benefits for governors and deputy governors violated Article 43(1) of *the Constitution*, whether setting a lifetime pension is fiscally sustainable and equitable under Article 10, 201 and 230 (5) of *the Constitution* and whether an order of mandamus can issue to the Respondent to discharge its mandate in a particular manner.

33. Counsel on the first issue submitted that not every distinction or differentiation in treatment amounts to discrimination. Reliance was placed on the Black's Law Dictionary 10th Edition definition that ‘discrimination is the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship and Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured’.

34. It was argued thus in view of this that it was the burden of the Petitioner to prove that governors and deputy governors had been discriminated against. According to Counsel the Petitioner failed to



discharge this burden. Reliance was placed in Joseph Koli Nanok and another vs Ethics and Anti-corruption Commission (2018) eKLR where it was held that:

“Moreover, I think it trivializes *the constitution*, its values and principles when empty allegation of infringement and made. A petitioner who cites a violation of *the constitution* must by cogent evidence relate alleged breaches with real concrete and direct loss, damage or injury arising out of the violation it does not help to allege violation drop conceptual abstract and interpretation to fit some artifice textbook arguments in the decision by the Respondent its decision should not be set aside.”

35. In Counsel’s view, while governors and deputy governors are state officers just like the president, deputy president and judges, it does not mean each state officer must be treated in the same way with regard to retirement benefits. This is owing to inter alia the peculiarities of the positions and constitutional principles that guide determination of such benefits. In this regard reliance was placed in Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR where it was held that:

“Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”

“...at the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation, (Nelson Andayi Havi v Law Society of Kenya & 3 Others- (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality. (National Coalition for Gay and Lesbian Equality v Minister for Justice-).”

36. The Respondent equally relied on the case of: Catherine Kanana Ringera and another Vs Fredrick Konya Internal Affairs Unit and 4 others (2017) eKLR.
37. On the second issue, Counsel submitted that Article 43 is about ‘progressive realization’ and its realization is dependent on the country’s fiscal sustainability to meet its economic obligations. Consequently, Counsel argued upon review of the implication of the proposed defined pension benefit proposed by the Petitioner’s members, Respondent considered that it was not affordable and thus set retirement benefits for governors and deputy Governors that was fiscally sustainable which was gratuity payment with the option of joining a contributory pension scheme hence has thus not violated Article 43 (1) (e) of *the Constitution*.
38. Reliance was placed In the Matter of the Principle of Gender Representation in the National Assembly and the Senate; SC Advisory Opinion No 2 of 2012, [2012] eKLR where the Supreme Court held that:

“We believe, that the expression “progressive realization” is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal-a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.”



39. The Respondent maintained that allowing the defined benefit pension for governors and their deputies will be disproportionately burdensome to the successor governments and generations that have to bear the burden of underwriting the cost of a lifetime benefit when the option of gratuity, which if managed well can provide adequate social security.
40. Lastly, Counsel submitted that the Petitioner seeks to have Court prescribe to the Respondent the type of retirement benefit it should set for the governors and deputy governors. This is opposed as first, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refused to perform the same as held by the Court of Appeal in *Kenya National Examinations Council vs. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. In this case, the Respondent discharged its mandate as enunciated in its replying affidavit.
41. Secondly, it was noted that where a statute imposes a duty its leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid. As such the Court cannot command the Respondent to perform its mandate in a specific way. Moreover, it is noted due to the complexities of determination of salaries and benefits, the same ought to be handled by the experts as held by the Court of Appeal in *TSC v KNUT & 3 Others* [2015] eKLR.
42. Further reliance was placed in *JNN (a minor VS Naisula Holding Ltd T/A N School)* (2018) eKLR where it was stated that:

“It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the *Wednesbury* principles of illegality, irrationality and impropriety if the decision can get over the first test it may not be questioned by the courts. In other words among the *Wednesbury* principles of illegality, irrationality and impropriety if the decision can get over the first test it may withstand the other turn tests unless it is shocking, unreasonable, perverse or improper.

The test of unreasonableness is not applied in a vacuum but in the context of life’s realities. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to those formulated by education institutions or professional bodies, possessing the expertise and experience of actual day to day working of the institutions.”

43. The case of *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others, Civil Appeal No. 290 of 2012* was also cited in support of the foregoing stand.

Interested Parties Submissions

44. Limo and Njoroge Advocates filed submissions for these parties on 19th February 2024. They sought to discuss the burden of a lifetime pension on taxpayers and the turnover rate of governors and their employability after leaving office.



45. Counsel faulted the allegation of discrimination by the Petitioner by relying on the case of Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR where the court held as follows:

“...Consequently, it is always necessary to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

Decided cases suggest that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but it prohibits unfair discrimination. The question that often arises is what makes the discrimination unfair. To prove unfair discrimination, it is incumbent upon the person making the allegations to plead the facts allegedly constituting discrimination and also must prove the discrimination to the required standard.”

46. Counsel submitted that the Respondent had offered an objective and rational justification for the differentiated pension for the governors and deputy governors as detailed in the Respondent’s affidavit. On this premise, it was argued that governors and deputy governors enjoy retirement benefits in the form of gratuity, and thus the claim for pension benefits is untenable as the same would greatly burden the taxpayers.

47. On the first issue, Counsel submitted that funding for pension schemes comes from government revenues, which primarily consist of taxes collected from Kenyans. This should be used to provide for social amenities such as health, education, clean water and proper sanitation among others. As such, approving the Petitioner’s proposal would have a ripple effect on the amount left to cater for these important social amenities, thus exposing the taxpayers to violation of their rights as enshrined in *the Constitution*. This cost is considered to be a heavy burden on the taxpayers and equally fiscally unsustainable in light of the tough economic times and the public debt.

48. Counsel on the second issue submitted that the turnover rate of governors would have immense implications to the financial burden placed on taxpayers in form of benefits due to them. For instance, Counsel noted that in the 2022 elections, the turnover rate of governors was approximately 70%. In such a situation therefore, each turnover in governorship would add to the pool of individuals eligible for lifetime pension benefits hence exacerbating the strain on public finances.

49. Considering this, it was argued that it is untenable to grant the governors and their deputies lifetime pensions. On the other hand, it was noted that these persons are either re-elected in other political posts or serve in other capacities in public offices once they leave office.

Analysis and Determination

50. Arising from the pleadings and submissions of the Parties, the Court finds the following to be the issues for determination:

1. Whether the failure to provide a defined pension scheme for state officers at the County level (Governors and their Deputies) similar to the one provided for State Officers in the National Government level, notably retired Presidents, the retired Deputy President, Former Prime Ministers, Vice Presidents, Speakers of National Assembly and the Senate and former Chief Justices and Deputy Chief Justices) is discriminatory to Governors and their Deputies.



2. Whether the failure to provide pension scheme for governors and their deputies violates Article 43 (1) (e) of *the Constitution*.
3. Whether an order of mandamus should issue compelling the Respondent to provide for pension benefits for governors and deputy governors.

Whether the failure to provide a defined pension scheme for state officers at the County level (Governors and their Deputies) similar to the one provided for State Officers in the National Government level, notably retired Presidents, the retired Deputy President, Former Prime Ministers, Vice Presidents, Speakers of National Assembly and the Senate and former Chief Justices and Deputy Chief Justices) is discriminatory to Governors and their Deputies.

51. This Petitioner challenges the manner in which the Respondent has carried out its mandate under Article 230(4) of *the Constitution* with reference to retirement benefits for governors and deputy governors as discriminatory. This issue thus requires the Court to interpret *the Constitution*.
52. This Court's jurisdiction to interpret *the constitution* is contained in Article 165 of *the Constitution*. Sub-Article 3(d) provides:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of:

- i. the question whether any law is inconsistent with or in contravention of this Constitution;
- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- iv. a question relating to conflict of laws under Article 191;

53. In A.O.O & 6 Others vs. Attorney General & Another [2017] eKLR the Court asserted this constitutional mandate that is entrusted upon it as follows:

“... Article 165 (3) (d) (i) & (ii) of *the Constitution* vests power to the High Court to hear any question respecting the interpretation of *the Constitution* including ...The judiciary has a special role in our system with respect to constitutional interpretation...”

54. *The Constitution* has provided a set of principles that must guide its interpretation under Article 259 which states thus:

1. This Constitution shall be interpreted in a manner that—
 - a. promotes its purposes, values and principles;
 - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. permits the development of the law; and



- d. contributes to good governance.
2. If there is a conflict between different language versions of this Constitution, the English language version prevails.
- Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.
55. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR elaborating the guiding principles on constitutional interpretation held:

“

“(137) ...This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, this Court [paragraph 26] had thus remarked:

“...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result” [emphasis supplied].

(138) In *Speaker of the Senate & Another v. Attorney-General & 4 Others, Sup. Ct. Advisory Opinion No. 2 of 2013*; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

“The Supreme Court of Kenya, in the exercise of the powers vested in it by *the Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret *the Constitution*. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on *the Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of *the Constitution* has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.”



56. Similarly, the Court of Appeal in *Centre Human Rights and Awareness v John Harun Mwau & 6 Others* (2012) eKLR observed as follows:

“*The Constitution* should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms and permits the development of the law and contributes to good governance...that the spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion....that *the Constitution* must be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism...that the entire Constitution has to be read as an integral whole and no one particular provisions destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (harmonization principle).”

57. Further, the Court of Appeal in *Dr. Thuo Mathenge & Another v Nderitu Gachagua & 2 Others* [2013] eKLR held that:

“...the spirit and tenor of *the Constitution* which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation.”

58. The Court must therefore take into account these principles as it embarks on resolving the current controversy between the Petitioner and the Respondent.

59. The Petitioner asserted that President, through the *Presidential Retirement Benefits Act*, 2003 and the Deputy President, through the *Retirement Benefits (Deputy President and Designated State Officers) Act*, 2015 which covers former Prime Ministers, Chief Justices, Deputy Chief justices and Speakers of Parliament enjoy a defined pension scheme fully funded and guaranteed by the State while Governors and their Deputies neither have pension nor legislation that provides for payment of pension to them. Instead, they are paid a gratuity at the end of the term. The Petitioners contended that this differentiation is discriminatory and breeds inequity and unfairness.

The Respondent disputed that it has discriminated against the Governors and their Deputies and argued the fact that they are state officers does not mean that they must be treated in a like manner as the President, the Deputy President or the State officers the Petitioner named who are entitled to a defined benefit scheme since there are peculiarities in the positions and other constitutional principles have to take into account in determination of such benefits. The respondent also asserted that contrary to the claim that the governors and deputy governors do not have retirement benefit scheme, it approved through a letter dated 22nd January, 2020- SRC/TS/COG/3/61/48 VOL II (83) the policy for establishment of direct contributory scheme of state officers at county level and this includes Governors and their Deputies over and above the payment of gratuity that is normally paid at the end of the term.

60. The right to equality and freedom from discrimination is provided for under Article 27 of *the Constitution* which states:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.



- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
 - (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
 - (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
 - (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
61. Freedom from discrimination is also protected by International and regional instruments which are apply in Kenya by dint of Article 2(5) and (6) of *the Constitution* of Kenya. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that:
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
62. Further, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:
- The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
63. Additionally, Article 2 and 3 of the African Charter on Human and Peoples' Rights states that:
- Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.
- Every individual shall be equal before the law, every individual shall be entitled to equal protection of the law.
64. Courts have rendered themselves on what discrimination is in various judicial decisions. In Federation Of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR the Court stated:
- “...At this stage, it is important to ask ourselves, ‘what is equality and what is freedom from discrimination?’ The two terms have been largely defined under Article 27(1) and (2). We



have also tried to state a general perspective of what the two words mean... in the case of Jacques Charl Hoffmann Constitution Court of South Africa it was held;

“At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in the society, must be accorded equal dignity... the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society differ in many respects such as age, ability, education, height size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since *the constitution* can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid. This is in our view what has been accepted in judiciaries as the doctrine of classification which is an integral part of the equal protection clauses in almost all written constitution in the world...”

65. Further, in the case of State of Kerala and another vs N. M. Thomas and Others Civil Appeal No.1160 of 1974 the Court opined as follows:

“This equality of opportunity need not be confused with absolute equality....The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.

The principle of equality does not mean that every law must have universal application for all persons who are not be nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”

66. When determining whether discrimination is present in a matter, the Supreme Court in *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) guided as follows:

“

“(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical*



Research Institute & 3 others [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

“ [49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

(48) Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination.”

67. The Court went on further to observe that:

“ [50] In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”



68. The question thus becomes, has the petitioner proved discrimination in the manner the Respondent has handled the question of pension benefits to the Governors and Deputy Governors? Firstly, it is important to appreciate that the mandate to consider all relevant circumstances in order to structure appropriate benefits that conform with the principles set out in *the Constitution* is vested on the SRC. In so doing, SRC can make distinctions among various categories as long as those distinctions are not shown to be arbitrary or based on discriminatory grounds specified in *the Constitution* or any other unjustifiable ground.
69. In the present case, the Petitioner alleges that that the President and the Deputy President as well as other designated State Officers enjoy a defined benefit pension funded exclusively by the State yet governors and their deputies are only paid a gratuity at the end of their term with no life-long benefits. SRC, which was supported by the interested Party argued that there are peculiarities in the categories of the state officers which distinguishes these two categories of the state officers that have to be taken into account including other constitutional principles. It also pointed out and demonstrated that to grant the type of pension demanded by the petitioner as opposed to the current gratuity payment given the turn-over of governors and their deputies every electoral cycle will not be fiscally sustainable.
70. To succeed in in proving discrimination, a necessary starting point is for the Petitioner to demonstrate the similarity in the two categories of state officers. That may take the form scope of work, tasks, effort and responsibility. The Petitioner did not offer any evidence in that regard. The only comparison the Petitioner attempted to make was the five-year election cycle. Even from a basic a constitutional viewpoint, it is obvious that the two sets of state officers serve under two distinct levels of Government, national and county level, and the Fourth Schedule of *the Constitution*, has delineated different functions that are to be performed by State Officers in each level. In terms of peculiarity of roles, the nature and scope of their constitutional responsibilities is a distinguishing factor. It is also a constitutional requirement for the Respondent to consider the principle of fiscal sustainability, a factor that the Respondent stated it took into account given the high turn-over of governors every five years. Clearly, although Governors and their Deputies are also State officers, there is differentiation in the categories which SRC was justified to take into account in setting their retirement scheme. SRC's exercise of discretion in arriving at the benefits applicable to different categories of State officers in which it gave the governors and their deputies the gratuity option with a rider that they could join a direct benefit contributory scheme has not been effectively challenged by the Petitioner. The Petitioner has not demonstrated that the present terms available to the governors and their deputies were arrived at arbitrarily. SRC has shown that different factors, peculiarities in the positions and application of constitutional principles such as fiscal sustainability were considered in setting the existing terms of Governors and their Deputies. The claim for discrimination fails in the circumstances.

Whether the failure to provide pension scheme for Governors and their Deputies violates Article 43 (1) (e) of *the Constitution*.

71. The Petitioner maintained that the failure to provide Governors and their Deputies with pension is a violation of Article 43 (1) (e) of *the Constitution*. The Respondent refuted this allegation and insisted that it had not failed to provide the Governors and their Deputies with retirement benefits. That in fact, it had provided for payment of gratuity at the end of their term and apart from that, it had also approved a policy for establishment of direct contributory scheme for officers at the County level.
72. Article 43 (1) provides:

- (1) Every person has the right:



(e) to social security

73. The above constitutional provision must however be read together with Article 20 (5) which states that in applying any right under Article 43; if the State claims it does not have resources to implement the right, a Court or tribunal or other authority shall be guided by the principles set out in Article 20 (5) (a, b & c) which includes the requirement that the Court may not interfere with a decision of a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. Further, Article 21 (2) provides that the State shall take legislative, policy and other measures, including setting standards, to achieve the progressive realization of rights guaranteed under Article 43. That makes the realization of Article 43 a work in progress right.
74. It is on SRC that *the Constitution* has bestowed an all-embracing mandate to consider the implications on the fiscal sustainability of benefits to State Officers under Article 230 (5) (a) which requires SRC to ensure that the total public compensation is fiscally sustainable. This should be read alongside Article 201 (c) which underscores one of the key principles in public finance that the burdens and benefits of the use of public resources shall be shared equitably between present and future generations. In this Petition, SRC illustrated attendant huge financial implication of introducing a defined benefit scheme to governors and deputy governors having regard to the high turn-over every five-year election cycle and stated that it would be greatly overburden current and future generations in a Country struggling to meet most basic needs for the benefit of the general public. That even with all these constraints, SRC has provided for payment of gratuity benefit equal 31% of basic salary for every year served in addition to approving a policy for the contributory benefit scheme for state officers at the County level.
75. Accordingly, the claim that the Respondent has failed to provide a retirement benefit for the Governors and their Deputies thereby violating Article 43 (1) (e) is not tenable in view of the payment of gratuity equivalent to 31% total basic pay for every year served at the end of each term and the additional option that exists of joining a direct contributory benefit scheme for governors and the deputies. I thus find that the Respondent has not violated Article 43 (1) (e) of *the Constitution*.

Whether an order of mandamus should issue compelling the Respondent to provide for pension benefits for governors and deputy governors.

76. The Court has already found that contrary to the allegations made by the petitioner, SRC has already set out retirement benefits in form of gratuity payment and approved the policy for the establishment of direct contributory scheme for state officers at the County level who include the Governors. What the Petitioner however is keen to extract from this Court is an order compelling SRC to provide defined a benefit pension scheme. *The Constitution* has vested the SRC with the mandate to make such a determination and not the Courts.

Article 230 (4) of *the Constitution* provides as follows:

- (4) 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.

77. Further, Section 11 of Salaries and Remuneration Commission provides it is the SRC's mandate to:
- a. Inquire into and advise on the salaries and remuneration to be paid out of public funds.
 - b. Keep under review all matters relating to the salaries and remuneration of public officers.



- c. Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.
 - d. Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public officers.
 - e. Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.
 - f. Make recommendations on matters relating to the salary and remuneration of a particular State or public officer.
 - g. Make recommendations on the review of pensions payable to holders of public offices.
 - h. Perform such other functions as may be provided for by *the Constitution* or any other written law.
78. Affirming the Respondent’s mandate in *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR, the Court of Appeal held as follows:

“229... In *Kenya National Commission on Human Rights -v- AG & Another*, Petition No. 132 of 2013; 2015 eKLR, the High Court in a persuasive authority considered the legal consequences of failure to seek advice from SRC. In this case, Parliament had enacted the Presidential Retirement Benefits (Amendment) Act providing for pension and benefits for retired Presidents Hon. Mwai Kibaki and Hon. D.T arap Moi. The High Court (Lenaola, J.) stated that the law mandates that the input of SRC is to be sought as it is the body mandated to review salaries and remuneration; that SRC’s advice ought to have been obtained BEFORE Parliament embarked on its legislative mandate; that by failing to seek recommendation from SRC prior to legislation, Parliament violated the Constitutional Provisions of Articles 10 and Article 230 (4) (a) and (b) and by so doing Parliament usurped the role of SRC; that Section 11 of the SRC Act was violated and the fact that SRC was not consulted was unconstitutional...The binding advice given by SRC is mutually complementing the role of all state organs and Independent Commissions in ensuring sustainable development as a constitutional value embodied in Article 10 (1) (d) of *the Constitution*. The advice given by SRC is binding because the advice is not merely an opinion that is given by a friend, it is advice that has a constitutional underpinning; it is binding because it emanates from a constitutional organ with exclusive constitutional mandate to determine fiscal sustainability of the total public compensation bill; it is binding because the principle of effectiveness require that all provisions of *the constitution* must be given effect. SRC advice is not an advice in personam, it is an advice in rem as it limits and determines remuneration rights and entitlements of public officers. Being an advice in rem, SRC advice binds all persons, state organs and independent commissions...”

79. In the same way, in *Kenya Tea Growers Association & 97 others v Attorney General & 8 others; Central Organization of Trade Unions (COTU) & another (Interested Parties)* (Petition 38, 34, 35, 49 & 50 of 2014 (Consolidated)) [2022] KEELRC 4124 (KLR) (19 September 2022) (Judgment) the Court held that:

“139. The SRC mandate is codified under article 230(4) (a) of *the Constitution* read together with section 11 of the *Salaries and Remuneration Commission Act...*



140. The SRC is the independent constitutional commission mandated to set and regularly review the remuneration and benefits of all State officers and to advise the national and county governments on the remuneration and benefits of all other public officers. It is to set and regularly review the remuneration and benefits of all State Officers. This position has received judicial backing in various court decisions including Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others. The mandate to set and determine remuneration including allowances payable out of public funds to state officers, public officers and holders of public officer, is a function constitutionally vested in the SRC by Article 230 (4) (a) and the SRC Act. SRC is, hence, expected to discharge its mandate in setting and reviewing the remuneration and benefits drawn from public funds and to advise the national and county governments on the remuneration and benefits of public officers by strictly taking into account the principles in Article 230(5) of *the Constitution* and as contained in the SRC Act.”

80. These judicial precedents firmly fortify the significant and exclusive role of SRC in structuring the benefits of different state and public officers with a binding determination. That responsibility is exclusively vested on SRC and subject to ensuring that it abides by the principles set out in Article 234 (5) of *the Constitution* and Section 12 of the SRC Act. In addition, SRC is certainly bound by Article 20 (1) on the Bill of Rights and Article 10 among other constitutional principles. This means that as long as SRC operates within the defined Constitutional and the statutory boundaries, it has a discretion to exercise in structuring the benefits within those boundaries. The Court can only intervene if it is demonstrated there has been abuse of discretion in exercise of that mandate by SRC. Courts will therefore not accept the invitation to interfere and substitute their own opinions for of another constitutional organ or body unless it is demonstrably irrational. Courts, like all other organs are subject to *the Constitution* and work within the limits defined by *the Constitution*. The author of the book, The Juris 48 Compendium, No. 1 Vol. 1A; Constitutional Law, Mr. Felix Okiri, after reviewing a number of cases, succinctly sums up the principles that guide the operations of constitutional organs in a democracy as follows:

”[63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

- a. Each arm of government has an obligation to recognize the independence of other arms of Government
- b. Each arm of Government is under a duty to refrain from directing another organ on how to exercise its mandate
- c. The Courts of law are the proper Judge of compliance with constitutional edict, for all public agencies, but this attended with duty of objectivity and specificity in, in the exercise of judgment
- d. For the functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite circumstances, upon appreciating the prevailing circumstances, and the objective needs and public interest attending each case



- e. The performance of the respective functions, every arm of Government is subject to the law'

81. This Court cannot accept an invitation to compel the Respondent to provide governors and their deputies specifically with a defined benefit scheme that the Petitioner is pushing for. That is will be usurping the Respondent's constitutional and statutory mandate. This Court's intervention can only be called upon if there is illegality or omission to undertake a constitutional mandate by the Respondent of which the Petitioner has failed to demonstrate in this petition.

82. The controversy generated by this petition is between two public bodies hence the petition is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 25TH DAY OF JULY, 2024.

.....

L N MUGAMBI
JUDGE

