



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.294 OF 2013

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATION

AND ALLIED WORKERS(KUDHEHIA WORKERS).....PETITIONER

AND

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

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Kenya Union of Domestic, Hotels, Education Institutions and Allied Workers (hereinafter "**KUDHEHIA**") is a trade union representing Kenyan workers working as domestic and hotel workers, workers in educational institutions, in hospitals and allied workers. It claims that over the years, it has been involved in championing for and advocating for the rights of workers in Kenya while working with the Central Organization of Trade Unions (Kenya) in seeking the enforcement and implementation of the Constitution, 2010. That it seeks the protection of its members from unfair practices and laws intended to deprive them of the due process of the law and the larger caucus of Kenyan unionisable employees deprived from their benefits as enabled by various statutes and Collective Bargain Agreements (CBA's).
2. It has filed this Petition on behalf of 7 other Trade Unions representing *inter-alia*, employees of State Corporations alleging that the 1st Respondent, The Salaries and Remuneration Commission (*hereinafter* "**SRC**") has violated the Constitution in enacting The SRC (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (*hereinafter* **SRC Regulations 2013**), gazetted *vide* Gazette Notice No. 2 of 2013. KUDHEHIA also seeks that those Regulations should be declared null and void to the extent of their inconsistency with the Constitution, 2010.

The Petitioner's Case

3. The Petitioner alleges that its members are not public officers as envisioned by **Article 260** of the **Constitution** and **Section 11** of the **Salaries and Remuneration Commission Act No. 10 of 2011** (*hereinafter "the SRC Act"*) and that the SRC has violated the Constitution in classifying, defining and describing such unionisable employees as public officers/and or state officers. That some members of the Petitioner such as specifically employees at Moi Teaching and Referral Hospital, Kenyatta National Hospital, public universities, domestic workers, allied workers, employees in public educational institutions, hotels, workers in Kenya Power and Lighting Company Ltd, do not fall within the category of state officers or public officers as defined under **Article 260** of the **Constitution** as they are neither public officers nor state officers thus it is unconstitutional for the 1st Respondent to describe them as such.
4. Miss Ngesa for the Petitioner further submitted that according to the definition of '**public office**', '**public service**' and '**state organ**' as provided for under **Article 260** of the **Constitution**, the employees of state corporations and parastatals do not fall within the group of employees whose salaries is to be set and/or reviewed by SRC. That the Petitioner members' are not officers in the national government or county government, Commissions or agencies established under the Constitution, and as such the SRC does not have the mandate to interfere with their remuneration. In support of that submission she relied on the case of **National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Ltd & 2 Others (2013) e KLR**; where the Industrial Court defined a '**public officer**'.
5. It was also Miss Ngesa's case that the SRC in enacting The SRC Regulations, 2013 has breached its constitutional mandate contrary to clear provisions of **Article 230** of the **Constitution** and submits that the SRC Regulations 2013 are unlawful as they contravene the parent Act; The **SRC Act**.
6. The Petitioner is also aggrieved by Regulation 18 of the SRC Regulations, 2013 which provides that the SRC shall not negotiate with Trade Unions when determining, reviewing or advising on remuneration and benefits of State or public officers and that public service organizations with unionisable employees shall have to seek advice from the SRC before commencing CBA negotiations with respective trade unions and that if any CBA's are successfully negotiated the SRC will first have to confirm the fiscal sustainability of the negotiated package. It is the Petitioner's case in that regard that the said Regulation violates **Article 41** of the **Constitution** which guarantees workers the right to fair labour practices particularly the right to engage in collective bargaining. That Regulation 18 further violates the provisions of **Articles 36** and **37** of the **Constitution** since the Regulation attempts to curtail and limit the scope of collective bargaining agreements. Reliance is placed on the Canadian case of **Facilities Sub-sector Bargaining Association v British Columbia (2007)** where it was stated that CBAs are recognized as a basic human right.
7. Miss Ngesa's further submission is that the SRC did not ensure public participation before enacting the Regulations 2013 and that by the time the SRC conducted its hearings, the SRC Regulations 2013 had already been enacted. She relies on the following cases on public participation; **Republic v The Chairman, National Transport and Safety Authority & 3 Others, JR Case No. 2 of 2014**, **Robert N. Gakuru & Others v The Governor Kiambu County & 3 Others Petition No. 532 of 2013** and **Matatiele Municipality & 10 Others v President of the Republic of South Africa & 12 Others CCT 73 of 2005**.
8. In the Petition dated 12th June 2013, Petitioner therefore seeks the following orders;

“(a) By deciding to promulgate the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 [the] Respondents were in breach of their constitutional obligations under Articles 2(1), 2, 3, 4, and 5, Article 3(1), 10, 19, 20(1), (2)

and (3), 21(10), 22, 23, 33, 36,4(1), (2), (3), (4) and (5), 156, 230, 260(1), (2) and (3) of the Constitution and thus their decision was null and void.

(b) *The Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013, Legal Notice No.2 issued under the hand of the Chair-lady of the Salaries and Remuneration Commission and dated 16th January 2013 is illegal, unlawful, ultra-vires, mala-fides, null and void to the extent of their inconsistency with the Constitution.*

(c) *The descriptions of the employees in the state organisations represented by the petitioners and public Servants or State officers and that they are subject to the setting of their salaries by the Salaries and Remuneration Commission is illegal, null and void and inconsistent with the descriptions as stated in Article 260 the Constitution and Section 2 of the Salaries and Remuneration Commission Act, 2011.*

(d) *That Regulation 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public officers) Regulations, 2013, suggesting that the employees of the State Corporations, wrongly categorised by the Respondents as being subject to the setting of the salaries by the 1st Respondent and that they are not allowed to be consulted on the formation of Collective Bargaining Agreements as allowed by Article 41, is illegal, ultra-vires, null and void to the extent of their inconsistency with the Constitution.”*

The 1st Respondent's Case

9. The 1st Respondent, **SRC** in reply to the Petition filed a Replying Affidavit sworn on 25th July 2013 by Anne Gitau, the Commission's Acting Secretary. It also filed written submissions dated 21st March 2014.
10. In her Affidavit, Anne Gitau aforesaid states that SRC has not at any time taken action that has infringed or threatened to infringe on the constitutional rights and freedoms of the Petitioners and that the said Commission has not unlawfully usurped any powers that it does not have and has always acted within its constitutional and statutory mandates. That under **Section 11** of the **SRC Act**, the 1st Respondent exercises its powers pursuant to the provisions of **Article 230(4)** of the **Constitution** which mandates it to *inter alia* inquire into and advise on the salaries and remuneration to be paid out of public funds. That under **Section 13** of the **SRC Act**, it has powers to execute all its constitutional and statutory functions and under **Section 26** it has powers to make regulations generally for the better carrying into effect any of the provisions of the Act.
11. On the issue of whether the Petitioner's members are state officers or public servants, the SRC claims that State Corporations are entities in the public sector and consequently, their employees fall within the meaning of public officers per the provisions of **Article 232(2)** of the **Constitution**. It therefore submits further that it is mandated to act towards achieving equity in salaries and remuneration in the public sector by coming up with regulations governing the remuneration and benefits of all state and public officers.
12. In regard to the SRC Regulations 2013, it submits that **Section 26** of the **SRC Act** has mandated it to enact regulations for the purposes of carrying into effect the provisions of the Act and that SRC Regulations 2013 are not in violation of the provisions of the Constitution at all.
13. It is also the SRC's position that it has not in any way affected the right of the Petitioner and its members to enter into CBA's with employers and that it has only set out guidelines and ethical principles which must be followed when negotiating such agreements and its role is limited to considering their fiscal sustainability, a mandate conferred on it by the Constitution.

14. The SRC has thus urged the Court to dismiss the Petition with costs for the above reasons.

The 2nd Respondent's Case

15. The 2nd Respondent, The Attorney General in opposing the Petition filed Grounds of Opposition dated 25th July 2013 and which read as follows;

“(1) That the Petition is misconceived and is an abuse of the process of this Honourable Court because Article 230 (4) of the Constitution clearly states that the 1st Respondent herein has the mandate to advise the national and county Governments on the remuneration and benefits of all public officers.

(2) That members and employees of state corporations and or parastatals are public officers within the meaning of Article 260 of the Constitution and it therefore follows that the 1st Respondent has the mandate to advise the national Government on issues of their remuneration and benefits.

(3) That parastatals and or state corporations are creatures of the national Government, ... are fully owned by the Government and responsibilities of the staff lie within the Government and therefore their workers are public officers.

(4) That the 1st Respondent was acting within its constitutional and statutory mandate in promulgating the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public officers) Regulations, 2013.

(5) That the 1st Respondent has the constitutional and statutory jurisdiction to regulate the salaries and remunerations of all persons paid out of public funds as defined under the Public Funds Management Act.

(6) That the implementation of the Salaries and Remuneration Commission (Remuneration and Benefits of State and public Officers) Regulations, 2013 will not in any way interfere with the rights and freedoms of the Petitioners' members and employees of state corporations and or parastatals.”

16. Mr. Obura presented the 2nd Respondent case. He submits that state corporation employees are public officers as defined under **Article 260** of the **Constitution** as well as under the **Public Finance Management Act** which defines public money to include monies raised by any public body and that Parliament has an oversight role over State Corporations generally.

For these reasons, he seeks dismissal of the Petition and regarding a letter dated 11th October 2012 in which the Attorney General had taken a contrary position to the above, he states that his instructions as regards the present Petition are as above and he had nothing to say about the content of that letter.

Issues for determination

17. The Parties herein have made various submissions and arguments in support of their respective cases, and proposed certain issues and questions for determination by this Court. In my view, there are five issues for determination and they are as follows;

(i) *Whether employees of parastatals and state corporations are public officers and or state*

officers.

(ii) *Whether the SRC acted within its constitutional mandate in setting and or reviewing the salaries of employees in parastatals and state corporations.*

(iii) *Whether regulation 18 of the SRC Regulations is constitutional or ultra vires the constitutional mandate donated to SRC.*

(iv) *Whether there was public participation in the enacting of the SRC Regulations.*

(v) *Whether the orders sought should be granted.*

Whether employees of parastatals and state corporations are public officers.

18. The Petitioner claims that its members such as employees at Moi Teaching and Referral Hospital, Kenyatta National Hospital, public universities, public educational institutions, Kenya Power and Lighting Company Ltd, domestic workers and allied workers do not fall within the category of public officers nor state officers as envisaged by the Constitution.

19. The starting point in addressing the above issue would be the definition of public officer under **Article 260** of the **Constitution** which provides that a '**public officer**' is;

“(a) Any state officer; or

(b) any person, other than a state officer who holds a public office”.

20. I am clear in my mind that the members of the Petitioner cannot be state officers and the definition of State officers Under **Article 260** of the **Constitution** bears me out because under that Article, '**state office**' is defined thus;

“State office” means any of the following offices—

(a) President;

(b) Deputy President;

(c) Cabinet Secretary;

(d) Member of Parliament;

(e) Judges and Magistrates;

(f) Member of a commission to which Chapter Fifteen applies;

(g) holder of an independent office to which Chapter Fifteen applies;

(h) Member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;

(i) Attorney-General;

(j) Director of Public Prosecutions;

(k) Secretary to the Cabinet;

(l) Principal Secretary;

(m) Chief of the Kenya Defence Forces;

(n) Commander of a service of the Kenya Defence Forces;

(o) Director-General of the National Intelligence Service;

(p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or

(q) ...”

As can be seen, none of the Petitioners hold the above mentioned offices and I will not belabour that point, and the next question is whether the Petitioner's members hold public office. My answer to that question is in the affirmative and I will say why shortly.

21. Under **Article 260**, of the **Constitution**, a public office refers to;

“an office in the national government, county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament”.

What I gather from the above definition is that the criteria for determining whether one is a public officer is quite clear and requires no more than a literal interpretation. First, the person must hold an office either in the national government, county government or public service; secondly, the remuneration and benefits of that officer must be payable directly from the Consolidated Fund or directly out of money provided by Parliament.

22. None of the Petitioner's members holds an office in the County Government and as to whether they hold an office in the National Government, I will revert to that issue later in this judgment. The second consideration is whether they hold an office in the public service. To answer that question, I will first consider the definition accorded to Public service under **Article 260** of the **Constitution**. This Article defines '**public service**';

“as the collectivity of all individuals, other than state officers, performing a function within a state organ”.

'**State organ**' in turn has the meaning of **“a commission, office, agency or other body established under the Constitution”.**

Following these definitions, whereas the Petitioner's Members are not employees of any body established under the Constitution, it is clear that the provisions of **Article 260** must be read together with the provisions of **Article 232** of the **Constitution** which sets out the values and principles of public service. The reason for that is not idle; it is a rule of Constitution interpretation that the constitution must be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is what has now come to be known as the rule of harmony - See **Tinyefuza v Attorney**

General Constitutional Appeal NO. 1 of 1997 for a discussion on the subject.

23. With that fact in mind, **Article 232(2)** provides thus;

“(2) The values and principles of public service apply to public service in;

(a) All state organs in both levels of government; and

(b) All state corporations”.

24. To my mind, it is clear that the drafters of the Constitution intended that the values and principles of public service should govern not just employees of state organs but also those of state corporations. The reason for that finding is not far fetched. Under **Section 3** of the **State Corporations Act (Cap 446)** the President establishes corporations as body corporates to perform certain specified functions. The State has a controlling stake in state corporations and as such they are public entities performing a public function. They therefore cannot be removed from the ambit of the Constitutional provisions with regard to the values and principles governing public service. Indeed the provisions of the **Public Officer Ethics Act of 2003** confirms that position. **Section 2** defines a public officer to mean;

“an officer, employee or member including unpaid, part time, temporary officer or employee or member of any of the following:-

(a) The Government or any department, service or undertaking of the Government;

(b) The National Assembly or Parliament;

(c) Local Authority;

(d) Any corporation, Council Board, Committee, or other body which has power to act under and for purposes of any written law relating to local Government, or public utility or otherwise to administer funds belonging to, or granted by the government, or money raised to administer funds belonging to, or granted by the Government or money raised by rates, taxes or charges in pursuance of such law; (Emphasis mine)

(e) Co-operative Society established under the Co-operative Societies Act.”

Although the said Act was enacted in 2003, its definition of public officer is largely in line with the criteria elsewhere above mentioned and as defined by **Article 260** as read with **Article 232(2)** aforesaid save for the reference to local governments which no longer exist. That criteria for avoidance of doubt is that the officer serves in the public service and his benefits are derived from funds set aside by Parliament and in the manner operationalised by **Section 2** of the **Public Officer Ethics Act** above.

25. In addition, in his Affidavit in support of the Petition, Albert Njeru at paragraph 3 stated as follows;

“That as allowed by the previous and present Constitutions, the Petitioners are various Trade Unions, representing Kenyan workers working in various state owned organisations”.

At paragraph 23 he clarified that the State owned organisations include some of the institutions from where the Petitioner's members are drawn from. In that regard he stated as follows;

“That we are advised by our advocates on record, which advice we agree to as correct, that our members, the said unionisable employees of inter-alia, The Moi Teaching and Referral Hospital, Kenyatta National Hospital, public universities, Domestic workers, Allied workers, employees in public educational institutions, hotels, workers in Kenya Power and Lightning Company Ltd, KENGEN, NHIF, NSSF, KPA and so many others....”

26. It cannot be denied therefore that in the above context, Moi Teaching and Referral Hospital as well as Kenyatta National Hospital are State Corporations established under **Section 3** of the **State Corporations Act**. Public Universities such as Moi University, University of Nairobi, Egerton University etc are established by Acts of Parliament as public universities. Although these institutions do not receive monies from the Consolidated Fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in **Article 260** regarding funds from Parliament.

27. Further 'Public fund' has the meaning assigned to it by the **Exchequer and Audit Act (Cap 412 Laws of Kenya)**. Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner's members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.

28. I now revert to the issue whether Petitioner Members are employees in the National Government. To my mind State corporations are part of the National Government. ***Black's Law Dictionary, 8th Edition*** defines the term 'government' as being;

“(i) The structure of principles and rules determining how a state or organization is regulated.

(ii) The sovereign power in a Nation or State.

(iii) An organization through which a body of people exercises political authority, the machinery by which sovereign power is expressed”.

Taking the first definition of principles and rules determining how a State is regulated and also the second definition of 'the sovereign power in a nation or State' in the context of this petition, **Article 260** defines the term 'state' as follows;

“When used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.”

29. Further, **Article 1** of the **Constitution** provides as follows;

“1) ...

2) ...

3) Sovereign power under this constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution-

(a) Parliament and the legislative assemblies in the county government,

(b) the national executive and the executive structures in the county government

(c) The judiciary and the independent tribunals”.

30. **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 are 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 and any other finding would be absurd, illogical and impractical given the design and structure of our Constitution. In passing I would like to reiterate my earlier sentiments in **Okiya Omtatah Okoiti and Another v Attorney General and Another Petition No. 446 of 2013** where I stated thus;

“It seems to me that the 1st Petitioner has taken a very narrow meaning of 'government' to mean 'executive' and in fact only 'the national executive' in the traditional 'serikali' meaning. The national executive as structured in the Constitution is quite different from the National Government”.

31. I am also in agreement with the sentiments of Rika J in **National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Ltd where he expressed himself as follows while considering definition of a public officer;**

“From these definitions, a Public Officer executes government functions, not for profit or personal interest. His position is created by the Constitution, Act of Parliament; or of Municipality or other legally constituted bodies. The functions and powers of the Public Officer are defined and executed through the law. The public officer is employed to execute government functions and therefore, remunerated directly from the consolidated fund or money authorized by Parliament”.

32. For all the above reasons, I find and hold that the members of the Petitioners are public servants and subject to all laws governing such persons.

Whether the SRC acted within its constitutional mandate in setting and or reviewing the salaries of employees in parastatals and State Corporations.

33. The Petitioner contends that the 1st Respondent in enacting the SRC Regulations acted in excess of its powers and that the SRC Regulations are null and void for being unconstitutional and for contravening the **SRC Act No. 10 of 2011**. Further, that the SRC did not have powers to enact Regulations that govern the Petitioners' member organisations as they are neither part of the public service nor are they officers.

34. In that regard SRC is a Commission established under **Article 230(1)** of the **Constitution**. Its functions are set out under **Article 230(4)** and are; to set and regularly review the remuneration and benefits of all state officers and advise the national and county Government on the remuneration and benefits of all other public officers. Further, Parliament pursuant to the **Salaries and Remuneration Commission Act No. 10 of 2011** has expounded on the powers and duties of SRC. The preamble to the Act therefore states that it is;

“An Act of Parliament to make further provision as to the functions and powers of the

Salaries and Remuneration Commission, the qualifications and procedures for the appointment of the Chairperson and members of the Commission and for connected purposes”.

In furtherance therefore of the powers conferred by **Article 230(4)** of the **Constitution**, **Section 11** of the **SRC Act** provides for the functions and powers of the Commission as follows, i.e. that it shall;

- “(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 to be paid out of public funds;**
- (c) Advise the national and county Governments on the harmonisation, 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 officer;**
- (g) Make recommendations on the review of pensions payable to holders of public offices; and**
- (h) Perform such other functions as may be provided for by the Constitution or any other written law.”**

35. 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 the SRC has the mandate of setting and regularly review 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. I therefore find that the SRC acted within its constitutional mandate in describing the employees of the state organisations represented by the Petitioners as public servants and they are subject to the mandate of the SRC in relation to setting and reviewing of their salaries.

Whether Regulation 18 of the SRC Regulations is constitutional or ultra vires the constitutional mandate donated to the SRC

36. Having found that the SRC acted within its statutory mandate in enacting the SRC Regulations 2013, I must now consider whether the said Regulations are constitutional or otherwise.

37. **Section 26** of the **SRC Act** allows the Commission to make Regulations, generally for the better carrying into effect of any provisions of the Act. Pursuant to this provision the SRC enacted the SRC Regulations 2013 whose full title reads; **'The Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013.'**

38. The Petitioner is aggrieved by Regulation 2 paragraph 9 and Regulation 18. Regulation 2 states;

“Public Service organisation' means a State organ, a State corporation or national or county Government entity and includes any organisation in the public service established by law.”

39. I have already found that the Petitioner's institutions are institutions in public services for reasons stated elsewhere above. Accordingly, I therefore do not find any conflict between Regulation 2 paragraph 9 of the SRC Regulations and the Constitution.
40. I now turn to consider **Regulation 18**. The Petitioner is aggrieved by **Regulation 18** as it claims that it denies the Petitioner's institutions the chance to negotiate with SRC when determining, reviewing or advising on remuneration and benefits of its members and that the Petitioner's institutions shall have to seek advice from the 1st Respondent before commencing CBA's negotiations.
41. **Regulation 18** states as follows;

“18(1) The Commission shall not negotiate with a trade union when determining, reviewing or advising on remuneration and benefits of state or public officers.

(2) The management of a public service organization with unionisable employees shall seek the advice of the Commission before the commencement of any collective bargaining process with the respective union on the sustainability of the proposal of the union.

(3) Where the collective bargaining process referred to in paragraph (2) is successful the management shall, before signing the agreement confirm the fiscal sustainability of the negotiated package with the Commission.”

42. Under **Section 11(a)** of the **SRC Act**, one of the functions of the SRC is to advise the national and county government on the remuneration and benefits of all other public officers. The issue therefore is whether the SRC must negotiate with the Petitioner on the salary and remuneration of its members before advising on their salary and remuneration"
43. Having reflected on the matter, I think that the petitioner has missed the point regarding the import of Regulation 18. I say so with respect because CBAs are negotiated between employers and trade unions representing employees. While the employers in this case are Institutions within the public service and Government in the context explained elsewhere above, trade unions *per se* are not part of the public service although their members are.

In that context, SRC's role is limited to advising the National Government (including parastatals and State corporations) on the remuneration and benefits of their officers hence the provision in Regulation 18(2) *'that the management of a public service organisation shall seek the advise of'* the SRC before any CBA negotiations are commenced. Conversely, since trade unions have a direct connection with the SRC when the mandate of the later is critically looked at, there is no lawful basis why SRC should negotiate directly with trade unions. It is not the place of SRC to negotiate with non -state and non-public service organs hence the provisions of Regulations 18(1) above.

Regarding Regulation 18(3), whereas trade unions and public service institutions with unionisable employees have a right under **Article 41(5)** of the **Constitution** to enter into a CBA, SRC's role is limited in that case to invoking **Article 230(5)(a)** of the **Constitution** and take into account *'the need to ensure that the total public compensation bill is fiscally sustainable'*. To do so, it must necessarily weigh the total public wage bill against individual CBAs and ensure that the same is fiscally sustainable. To my mind and following **Tinyefuza** (supra), that is the rule of harmonisation and that a right is balanced by the greater public good.

In the end, I see nothing ultra vires or unconstitutional about Regulation 18 aforesaid and on the contrary, it is beneficial to the Petitioner and its members.

Whether there was public participation in the enacting of the SRC Regulations

44. I also recall that the Petitioner attacked the SRC Regulations on the basis that they were passed without public participation as required under the law and that the hearings regarding the effect of the said Regulations were conducted after the Regulations had been enacted.

45. Public participation as a national value is recognized under **Article 10** of the **Constitution**. The **Constitution at Article 94** has vested legislative authority of the people of Kenya in Parliament and **Article 118** has provided for public participation and involvement in the legislative business. The Article provides as follows;

“(1) Parliament shall-

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(2) Parliament may not exclude the public, or any media, from any sittings unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion”.

While the Constitution is clear that Parliament must involve the public in its legislative business, the issue here is whether public participation also applies to the Commission while it is enacting regulations for effecting the provisions of the enabling statute.

46. The SRC Act at **Section 26** has mandated the Commission to enact Regulations and that Section provides as follows;

“The Commission may make regulations generally for the better carrying into effect of any provisions of this Act. ”

47. Pursuant to **Section 26**, the SRC enacted the impugned Regulations and Regulation 3 provides for the objects and purposes of the Regulations as follows;

“The objects and purpose of these Regulations shall be to enable the Commission manage, harmonise and rationalise remuneration and benefits of state and public officers and in particular provide for the procedure for;

(a) submission of remuneration and benefits proposals for State and public officers to the Commission.

(b) reviewing of remuneration and benefits of state and public officers by the Commission;

(c) setting and reviewing of remuneration and benefits for state officers; and

(d) advising on remuneration and benefits for all other public officers”

48. In the case of ***Doctor’s for Life International v The Speaker National Assembly and Others (CCT12/05)[2006] ZACC 11*** the South Africa Constitutional Court explained that the duty to

facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of state and is enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information. The Court observed that;

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.”

As to what forms of public participation in the law-making process are adoptable, Sachs J In ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*** 2006 (2) SA 311 (CC), noted that,

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. ”

49. Closer home, recently Majanja J. in ***Law Society of Kenya v Attorney General Nairobi Petition No. 318 of 2012*** observed as follows;

“[51] In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the Parliamentary Standing Orders that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these Standing Orders provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.”

50. In addition in ***Nairobi Metropolitan PSV Saccos & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013*** I expressed myself as follows in regard to the importance of public participation;

“The Constitution has established a state in which the Constitution is the supreme law and is binding upon the legislature, the executive and all organs of the State. The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement.”

51. Looking at the law as expressed above, it would be expected that just like the Legislature, any other body empowered to make law including County Assemblies and Commissions must engage the public before enactment of the law. In the present case, I am not certain whether the Commission sought public participation before or after the enactment of the SRC Regulations, 2013. although the Petitioner says that it was after the enactment, that fact alone cannot invalidate the Regulations which I have found to be otherwise lawful. If there are other issues that the Petitioner requires the SRC to look at, there is always an opportunity to do so because the Regulations are amenable to periodic amendments with good reason. In any event Ms Ngesa did not render any evidence as to when the hearings were done. I have seen a Report on the public hearings on the proposed Remuneration structure for State officers in Kenya. Nowhere in that Report is it mentioned when the hearings were done so as to determine whether the Regulations were enacted without public participation. That is all there is to say in that regard.
52. While therefore agreeing with the Petitioner that public participation is a principle that must generally be adhered to, I do not think that lack thereof in the present case should cause their invalidation at the instance of the Petitioner.

Whether the Orders sought should be granted

53. At paragraph 8 of this judgment, I reproduced all the Prayers sought in the Petition and in addressing the issues framed for determination, it is obvious that none of the orders sought can be granted and I so find.

Conclusion

54. This Petition raises crucial issues relating to the relationship between trade unions, employers in the public service and the role of the SRC in addressing the emotive questions of salaries and remuneration. SRC ought to understand however that while I will not grant the orders sought, it is obligated to ensure that while exercising its role as adviser to the Government, it does not unduly ignore CBAs painfully crafted by trade unions and employers. It should also not be seen to be siding with employers because they are part of the Government that it advises. It must strike a fine balance, invoke fairness and ensure that employees get the best pay for work done. I digress.
55. As I otherwise see no merit in the Petition, the same is hereby dismissed.
56. As for costs, let each party bear its own costs as the litigation was for the benefit of the wider public.
57. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Nyamodi for 1st Respondent

Miss Muchiri holding brief for Mr. Obura for 2nd Respondent

Miss Ngesa for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE



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