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**A CRITICAL ANALYSIS OF LAWS AND JURISPRUDENCE ON
SALARIES AND REMUNERATION OF PUBLIC AND STATE
OFFICERS IN KENYA**

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A CRITICAL ANALYSIS OF LAWS AND JURISPRUDENCE ON SALARIES AND REMUNERATION OF PUBLIC AND STATE OFFICERS IN KENYA

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Abstract

Purpose: This paper aimed at critically analyzing the laws and jurisprudence on salary and remuneration of public and state officers in Kenya.

Methodology: The paper used desk review method. It identified secondary materials related and relevant to study. Particularly, the study journal articles and case laws.

Results: The study found that Salaries and Remuneration Commission, as an independent body under the constitution charged with remuneration of public and state officers has experienced lot of interference from other state agencies. At the same time the commission has in some instance acted ultra vires despite the law providing clearly its mandate.

Unique contribution to theory, practice and policy: To avoid the court battles as a result of interferences, there is need for the commission to have structural engagement with all public agencies and bodies so as to clarify its mandate. Just as the relationship between the national and county governments is based on the principle of consultation and cooperation, the same can be adopted by the commission to ensure effective and efficient service delivery.

Key Words: *Salary, remuneration, interference, ultra vires.*

INTRODUCTION

Salaries and remunerations are key to all economic sustenance for both governments and individuals, and therefore a means of economic and social growth and development of a nation.¹ Remuneration since the beginning of the 19th century has been used to designate the whole contractual benefits to which a private sector worker is entitled as part of his or her employment. High ranking employees would get a number of benefits on top of their salary such as commissions on profits or benefits in kind. These services were therefore considered part of the package the contractual compensation to which such employee would be entitled in the event of unfair termination.

In 20th century, human rights principles developed and included fair labor practices as part of industrial relations.² Thus, remuneration as a key concept in labor relations became part of government policy that aimed at improving public servants wellbeing and their general performance.³ Some scholars have argued that contributions in the form of remuneration are intended to increase employees' commitment to the organization and improve employee performance.

According to Onyekwelu et al remuneration is mainly concerned with the fulfilment an employee gets for a well performed work or task, and which includes any form of payment or reward that contributes to satisfaction.⁴ They argue that the aim of remuneration is to help the organization attract and retain the right human resource.

Traditionally, remuneration has been seen as the total income and in some instance it may comprise a series of different payments set out under a specific rule.⁵ For instance, an organization's total compensation for its employees may include a lump sum and a fee for services, or it may include salary and shared financial risk. Thus, remuneration provides a basic incentive for an employee to do their job effectively and efficiently. It also plays a key role in motivating an employee to perform the assigned duties with the diligence and professionalism required.

Research Problem

Salaries are a key source of income for workers and determine their standard of living. Salary has been defined as a payment for services rendered under some contract or appointment,

¹E Onah, 'Remuneration Policy and Inequalities in Kenya, a Source of Labour Wars: Borrowing from Global Lessons' (2016) 4 1
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=27802810Ahttps://www.academia.edu/download/45658546/Remuneration_Policy_and_Inequality_in_Kenya_a_Sour_of_Labour_Wars.pdf>.

²Olayo Julius Ochieng and Lewis Kinyua Waithaka, 'Evolution of Labour Law in Kenya: Historical and Emerging Issues' (2019) 4 International Journal of Law and Policy 1.

³ibid.

⁴RU Onyekwelu, Ego Dike and US Muogbo, 'Remuneration as a Tool for Increasing Employee Performance in Nigerian' [2020] SSRN Electronic Journal.

⁵Adetoun Ramat Balogun and Oyewumi Oluwatiobi Omotoye, 'Remuneration and Employee Performance in Global Communication Limited, Lagos Nigeria.' (2020) 22 Journal of Business and Management 15.

computed by time and payable at fixed intervals.⁶Salary has an impact on both the employee's performance and productivity. Hence, modern organizations are keen on salary and remuneration. It is suffice to note that for improved performance and increased productivity, there is need for a well-functioning system that can cater for the salaries and remuneration.

Judicial definitions of the terms "*salary*" and "*remuneration*" were also defined in *Jimnah Muchiri v Agricultural Society of Kenya* where it was held that "remuneration" ordinarily means "reward, recompense, pay, wages or salary for service rendered."⁷ The court stated that "salary" or "wages" is the remuneration for a contract of service, and the definition of "salary" or "wages" includes allowances payable to an employee for services rendered because these allowances are part of the remuneration to which an employee is entitled under his contract of employment. It went on to state that "Salary" or "wages" or "pay" means remuneration for service paid or payable in cash or capable of being expressed in terms of money, including allowances.

The court also expressed itself by stating that the word "remuneration" is a word of wide import and it includes allowances to which an employee is entitled under his contract of employment; and those allowances are a part of the contract of employment to which an employee is entitled as a reward for his services.

In line with the above understanding of salaries and remunerations, the main objective of the study was to critically evaluate the laws and jurisprudence on salary and remuneration of public and state officers in Kenya. The first part discussed the meaning prescribed on the terms salaries and remunerations. The second part defined the terms public and state officer. The third part analyzed the legal and institutional framework governing the salaries and remuneration and the post 2010 jurisprudence on the mandate of Salaries and Remuneration Commission (SRC). Finally, the paper concluded with the possible reforms to be undertaken.

Research Methodology

The paper used desk review method. Desk research refers to secondary data or that which can be collected without fieldwork. Desk research is basically involved in collecting data from existing resources hence it is often considered a low cost technique as compared to field research, as the main cost is involved in executive's time, telephone charges and directories. It identified secondary materials related and relevant to study. Particularly, the study journal articles and case laws.

Findings and Discussions

The Meaning assigned to Public and State Officer.

In Kenya, every public and state officer is entitled to a salary and remuneration. According to the constitution of Kenya 2010, a public officer means any State officer; or any person, other than a

⁶ZOE Adams, "Wage", "Salary" and "Remuneration": A Genealogical Exploration of Juridical Terms and Their Significance for the Employer's Power to Make Deductions from Wages'.

⁷*Jimnah Muchiri v Agricultural Society of Kenya*[102].

State Officer, who holds a public office.⁸A public office means an office in the national government, a 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.⁹

A State officer means a person holding a State office.¹⁰A 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) an office established and designated as a State office by national legislation.¹¹

In *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission*, the Petitioner alleged 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 and that the SRC had violated the Constitution in classifying, defining and describing such unionisable employees as public officers/and or state officers.¹²The petitioner alleged that their members are 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 and 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 SRC to describe them as such.

In the matter, Justice Isaac Lenaola stated that corporations are entities comprised in the National Government. He said that entities such as The Kenyatta National Hospital, The Moi Teaching and Referral Hospital, are state corporations within the Ministry of Health, KPLC within the Ministry of Energy and Public universities within the Ministry of Education and Technology. Based on this, he stated that it inevitably 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.

Analysis of the Legal and Institutional Framework Governing the Salaries and Remuneration and the arising Jurisprudence.

⁸The Constitution of Kenya 2010, Article 260.

⁹ibid Article 260.

¹⁰ibid Article 260.

¹¹ibid Article 260.

¹²*Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR.*

The right to fair remuneration is regarded as one of the core elements in labor rights by the International Labor Organization (ILO). Kenya as a member to ILO has grounded its labor laws and policies under this principle. Kenya legal framework is founded on relevant ILO conventions ratified by the country, the country's constitution and domestic labor legislations and policies;

According to ILO, when setting different minimum wages, the principle of equal remuneration for work of equal value should be respected. The Equal Remuneration Convention, 1951 (No. 100) states the principle of equal remuneration for men and women workers for work of equal value.¹³ Paragraph 2(a) of the Equal Remuneration Recommendation, 1951 (No. 90), calls for the application, as rapidly as practicable, of this principle in establishing minimum or other wage rates in industries and services where such rates are determined under public authority.¹⁴ Further, Convention No. 111 is broader in terms of scope and aims to eliminate all discrimination in respect of employment and occupation, whether based on sex, race, colour, religion, political opinion, national extraction or social origin, or any other criterion determined by States parties to the Convention.

Before the 2010 constitution public institutions used to set their salaries and remunerations on their own. In some cases ad hoc committees and commissions used to set salaries and remunerations. As a result of this there was very big vertical and horizontal disparity and inequity in terms of remuneration. The effect of this was that Kenya experience a lot of industrial strikes. There was need for reforms to bring harmony and uniformity in remuneration in the public sector. To this end the framers of the 2010 constitution did not hesitate to propose the establishment of an independent body to address salaries and remuneration in the public sector.

Under article 230 of the constitution of Kenya 2010, the salaries and remuneration commission (SRC) was established.¹⁵ The powers and functions of the Salaries and Remuneration Commission are to set and regularly review the remuneration and benefits of all State officers; and advise the national and county governments on the remuneration and benefits of all other public officers.¹⁶ The Commission's structures, responsibilities and authority are stipulated in the Salaries and Remuneration Commission Act, 2011.

According to the Act, salary and remuneration includes the ordinary, basic or minimum wage or pay and any additional emoluments and benefits whatsoever payable, directly or indirectly, whether in cash or in kind, by an employer to an employee and arising out of the employment of that employee.¹⁷

In performing its functions, Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013 was created. The object and purpose of the Regulations was to enable the Commission manage, harmonize and rationalize remuneration and benefits of State and public officers and in particular provide procedure for; submission of

¹³Equal Remuneration Convention, 1951 (No. 100).

¹⁴Equal Remuneration Recommendation, 1951 (No. 90).

¹⁵The Constitution of Kenya 2010.

¹⁶ibid.

¹⁷Salaries and Remuneration Commission Act, 2011.

remuneration and benefits proposals for State and public officers to the Commission; reviewing of remuneration and benefits of State and public officers by the Commission; setting and reviewing of remuneration and benefits for State officers; and advising on remuneration and benefits for all other public officers.¹⁸

In *County Government of Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party)*, the high court provided the Requirements to be met by the Salaries Remuneration Commission before reviewing remuneration and benefits of state and public officers.¹⁹ This petition was as a result of a published Gazette Notice in March 2013 on the salaries for State officers serving in the National and County Government, the Senate and the National Assembly, Constitutional Commissions and Independent Offices. In July, 2017, SRC issued a press statement in which it announced the reviewed salary structure for the all the State officers for the period 2017-2022. The respondent clarified that the recommended remuneration structure for State officers for the period 2017-2022 was anchored on the job evaluation that was undertaken in the year 2013. Aggrieved by the decision of the SRC the petitioners successfully instituted a petition on the grounds that the impugned decision unlawfully varied, to the disadvantage and detriment of the affected officers, the remuneration and benefits payable to State officers serving in County Assemblies among other grounds.

Justice George Vincent Odunga stated that in order to justify any review of the remuneration and benefits by the SRC, it was necessary that SRC undertake a study on labour market efficiency and dynamics; a survey of the prevailing economic situation; and a comprehensive job evaluation. He stated that these processes were to be undertaken at least one year before the review.

In performing its mandate of determining salaries and allowances for state and public officers in Government, SRC was found to have interfered with the independence of Judicial Service Commission (JSC). In *Judicial Service Commission v Salaries and Remuneration Commission & another*, Justice Enock Chacha Mwita held that the Salaries and Remuneration Commission does not have the mandate to limit the number of remunerable meetings that a constitutional commission can have.²⁰ In this matter SRC wrote a letter to the chair of JSC on December 19, 2013 detailing its determinations on remuneration and benefits of the Petitioner's officers. SRC set the sitting allowances and also limited the number of JSC remunerable meetings to 8 meetings a month, effective from the date of the letter. The honorable judge stated that SRC mandate was limited to setting and reviewing remuneration and benefits for state officers and advising the National and County Governments on the issue of remuneration and benefits of public officers. He further stated that the mandate did not extend to superintending how an independent commission utilized its budgetary allocations.

¹⁸The Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013.

¹⁹*County Government of Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party)* [2018] eKLR.

²⁰*Judicial Service Commission v Salaries and Remuneration Commission & another* [2018] eKLR.

Another instance where the court has found SRC to have acted ultra vires is when it wrote a letter to the Principal Secretary, Ministry of Labour, Social Security and Services which made it mandatory for Collective Bargaining Agreements (CBA) related to public service employees be submitted to the SRC for further advise before they were registered effectively halting the registration of CBAs. The matter was taken to the Employment and Labour Relations court. In *Kenya National Union of Nurses v Chairperson Salaries & Remuneration Commission & 4 others*, the question for determination was what was the role of SRC in advising remuneration of unionisable employees with respect to their Collective Bargaining Agreements (CBA).²¹ The court stated that the Constitution of Kenya, 2010 recognized that intrusion by the Commission into the entire area of public sector collective bargaining would have the effect of eroding the rights and freedoms given by article 41. Hence, the law only allows SRC to come in as an advisor under article 230(4) (b) rather than an active player determining how and when the collective bargaining would open and close.

The court went on to state that SRC had to limit itself to its role as provided for under article 230 of the Constitution of Kenya, 2010 and therefore the letter it wrote directly interfered with Petitioner's right to freely negotiate CBAs as envisaged under article 41(5) of the Constitution and the Labour Relations Act. Based on this the SRC was advised to devise a way in which it would advise the government as envisaged without getting into details of negotiations which was to be freely exercised.

There are other instances where independent bodies have interfered with the SRC mandate. This is evidenced in *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* case, where the court held that the Parliamentary Service Commission's unilateral decision to determine and operationalize a housing allowance for Members of Parliament without consulting Salaries Remuneration Commission was ultra vires and unconstitutional.²² The court stated that the mandate to determine and set a housing or accommodation allowance, was a function exclusively and constitutionally vested in the SRC by article 230 (4) (a) of the Constitution and the Salaries and Remuneration Act. Further, the court also stated that only the SRC was clothed with the requisite power and authority to determine allowances and benefits payable to state officers including Members of Parliament.

Another interference with the mandate of SRC was evidenced in early 2013 where through a Special Issue of the Kenya Gazette, the Salaries and Remuneration Commission published the remuneration of various categories of state officers. The gazette notice specifically dealt with the remuneration of Members of Parliament (the Senate and the National Assembly). The Members of the National Assembly were aggrieved by the terms set for them on their remuneration and benefits by the SRC and they immediately put into place mechanisms for setting aside the decision of the SRC as contained in the notice. This culminated in a resolution by the National Assembly to nullify all the notices contained in the Special Gazette Issue.

²¹*Kenya National Union of Nurses v Chairperson Salaries & Remuneration Commission & 4 others* [2016] eKLR.

²²*Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR.

The court had to intervene to protect the SRC in *Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others*.²³ Justices Isaac Lenaola, Mumbi Ngugi and Weldon Kipyegon Korir held that the SRC was doing its job, exercising its constitutional mandate and function with regard to the remuneration of State Officers, when it issued the Special Issue of the Kenya Gazette on 1st March, 2013. Thus, the court found that in moving to quash the Gazette Notice containing the remuneration and benefits of its members, the National Assembly stepped into the arena reserved for the SRC by the Constitution.

The judges further added that the remuneration and benefits of the members of the then 11th Parliament and any other Parliament coming into existence thereafter could only be determined by the SRC. Therefore, the *National Assembly Remuneration Act* was unconstitutional.

Conclusion and Recommendation.

This study has examined and analyzed salaries and remuneration in Kenya and concluded that salaries and remunerations for public and state officers enjoy both constitutional and legislative backing. The study noted that the courts have stood tall to protect any interference on the functions of SRC from all quarters. At the same time SRC has been ordered not to interfere with the running of independent bodies. Based on the cases of inferences, it is clear that SRC is yet to clearly understand its constitutional duties. On the other hand, other government agencies and organs are yet to understand the same. This paper recommends SRC to have structural engagements with all government bodies and have a clarification on its role and functions. Just as the relationship between the national and county governments is based on the principle of consultation and cooperation, the same can be adopted by the commission to ensure effective and efficient engagement with other agencies.

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