



*Approved
for Tabling
8/28/2022 D/smt
8/3/2022*


REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT- SECOND SESSION

THE NATIONAL ASSEMBLY

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF DRAFT SALARIES AND
REMUNERATION COMMISSION (REMUNERATION AND BENEFITS
OF STATE AND OTHER PUBLIC OFFICERS), REGULATIONS 2022.

MARCH, 2023

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 08 MAR 2023	DAY: WEDNESDAY
TABLED BY:	CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION Hon. Samuel Chepkong'o
CLERK-AT-THE-TABLE:	Christine Ndintu

The Directorate of Audit, Appropriations & Other Select Committees
The National Assembly,
Parliament Buildings,
NAIROBI.

TABLE OF CONTENTS

TABLE OF CONTENTS	3
ABBREVIATIONS	5
CHAIRPERSON'S FOREWORD	6
1.0 PREFACE	7
1.1 <i>Establishment and Mandate of the Committee</i>	7
1.2 <i>Committee Membership</i>	8
1.3 <i>Committee Secretariat</i>	9
2.0 CONSIDERATION OF THE DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS, 2022	10
2.1 <i>Introduction</i>	10
2.2 <i>Objects and Purpose of the Regulations</i>	10
2.3 <i>Legislative Context and Policy Background</i>	10
2.4 <i>Overview of the Regulations</i>	11
2.5 <i>Scrutiny of the Instrument</i>	12
2.6 <i>Submissions from Stakeholders Engagement</i>	13
2.6.1 <i>Public Service Commission</i>	14
2.6.2 <i>Parliamentary Service Commission</i>	15
2.6.3 <i>Judicial Service Commission (JSC)</i>	16
2.6.4 <i>Teachers Service Commission</i>	16
3.0 COMMITTEE OBSERVATIONS	17
3.1 <i>Statutory Timelines</i>	17
3.2 <i>Consultations/Public Participation</i>	17
3.3 <i>Regulatory Impact Statement</i>	17
4.0 COMMITTEE RECOMMENDATION	18
ANNEXURES 1	19

ABBREVIATIONS

JSC	Judicial Service Commission
PSC	Public Service Commission
SI	Statutory Instrument
SO	Standing Order
SRC	Salaries and Remuneration Commission
TSC	Teachers Service Commission

CHAIRPERSON'S FOREWORD

The Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulations, 2022 were forwarded by the Salaries and Remuneration Commission (SRC) to the Clerk of the National Assembly *vide* a letter **Ref SRC/ADM/18(58)** dated 6th June 2022. The Draft Regulations were subsequently tabled before the House on 7th June 2022 and referred to the Committee on Delegated Legislation for consideration

Section 26(2) of the Salaries and Remuneration Commission Act (*No. 10 of 2011*) provides that the power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly.

The purpose of the Draft Regulations is to provide for the procedure for:

- (i) setting and reviewing remuneration and benefits for State Officers,
- (ii) advising on remuneration and benefits for other public officers, and
- (iii) reviewing remuneration and benefits of other public officers.

In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held a meeting with the Salaries and Remuneration Commission on 22nd November, 2022.

The Committee also held meetings with the Teachers Service Commission, the Parliamentary Service Commission, the Public Service Commission, and the Judicial Service Commission on 24th February, 2023.

The Committee noted with concern that contrary to the requirements for public participation set out in Articles 10 and 118 of the Constitution, sections 5, 5A, 13(a) and the Schedule to the Statutory Instruments Act (*No. 23 of 2013*) read together with Standing Order 210 that requires the Regulation-Making Authority (RMA) to conduct public participation and sufficient consultation with the stakeholders and persons likely to be affected by the regulations, the public participation was not sufficiently conducted with those likely to be affected by the Draft Regulations.

Having considered the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022 in line with the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Statutory Instruments Act (*No 23 of 2013*), the Salaries and Remuneration Commission Act (*No.10 of 2011*), **the Committee resolved to recommend to the House NOT to approve the publication of the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022** for failing to conduct public participation as required by the Constitution and Statutory Instruments Act and contravening the provisions of the Constitution and the Salaries and Remuneration Commission Act, 2011.

In conclusion, I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 210 (4), it is my pleasure and duty to present to the House the Committee's **Report on its Consideration of the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulations, 2022.**

Hon Samuel Kiprono Chepkonga, CBS, M.P.

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the Courts;
 - f) gives retrospective effect to any of the provisions in respect to which the Constitution or the Act does not expressly give any such power;
 - g) involves expenditure from the Consolidated Fund or other public revenues;
 - h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
 - q) accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises of:

Hon. Chepkonga Kiprono Samuel CBS, M.P
Chairperson
UDA

Ainabkoi Constituency

Hon. Githinji, Robert Gichumi M.P
Vice Chairperson
UDA

Gichugu Constituency

Hon. Mbui, Robert, CBS, M.P
WDM-Kenya

Kathiani Constituency

Hon. Dekow Barrow Mohamed, M.P.
UDA

Garissa Township Constituency

Hon. Julius Lekakeny Ole Sunkuli , EGH,
EBS, M.P.
KANU

Kilgoris Constituency

Hon. Odoyo, Jared Okello M.P
ODM

Nyando Constituency

Hon. Mwirigi, John Paul, M.P
UDA

Igembe South Constituency

Hon. Chepkorir, Linet M.P
UDA

Bomet County

Hon. Munyoro, Joseph Kamau M.P
UDA

Kigumo Constituency

Hon. Kipkoech, Gideon Kimaiyo M.P
UDA

Keiyo South Constituency

Hon. Ruku, Geoffrey Kariuki Kiringa M.P
DP

Mbeere North Constituency

Hon. Komingoi, Kibet Kirui M.P

UDA

Bureti Constituency

Hon. Chebor, Paul M.P
UDA

Rongai Constituency

Hon. Lenguris, Pauline M.P
UDA

Samburu County

Hon. Onchoke Mamwacha Charles M.P.
UPA

Bonchari Constituency

Hon. Yakub, Adow Kuno, M.P.
UPIA

Bura Constituency

Hon. Kamene, Joyce M.P.
WDM-Kenya

Machakos County

Hon. Mwale, Nicholas S. Tindi, M.P.
ODM

Butere Constituency

Hon. Mnyazi, Amina Laura M.P.
ODM

Malindi Constituency

Hon. Abdullahi, Bashir Sheikh, M.P.
UDM

Mandera North Constituency

Hon. Mugabe, Innocent Maino, M.P.
ODM

Likuyani Constituency

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -
 1. Ms. Esther Nginyo Clerk Assistant I
 2. Mr. Wilson Dima Dima Principal Legal Counsel
 3. Ms. Winny Otieno Clerk Assistant III
 4. Mr. Brian Langwech Clerk Assistant III
 5. Mr. Jacknorine Buleemi Clerk Assistant III
 6. Mr Josephat Motonu Senior Fiscal Analyst
 7. Mrs. Sheila Chebotibin Serjeant-At-Arms
 8. Mr. Charles Ayari Audio Officer
 9. Mr. Daniel Ominde Reseach Officer III

2.0 CONSIDERATION OF THE DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS, 2022

2.1 Introduction

5. The Salaries and Remuneration Commission made the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulations, 2022 in exercise of the powers conferred by section 26 of the Salaries and Remuneration Commission Act, 2011.
6. Section 26(1) of the Salaries and Remunerations Commission Act, 2011 empowers the Salaries and Remunerations Commission (SRC) to make Regulations for better carrying into effect of any provisions of the Act. Further, section 26(2) provides that the power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly.
7. The Draft Regulations were submitted to the Clerk of the National Assembly on 6th June 2022 and laid before the House on 7th June, 2022.

2.2 Objects and Purpose of the Regulations

8. The Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulations, 2022 provides for the following:
 - a) the timeline, procedure, requirements and considerations to be used in the review of remuneration and benefits as well as the communication and implementation of the reviewed remuneration and benefits;
 - b) the setting and review of pension for other public officers by the Salaries and Remuneration Commission;
 - c) the purpose, procedure, information required and conditions under which a job evaluation will be undertaken as well as the review of the evaluation results in the event of dissatisfaction by a public body;
 - d) the procedure and conditions for setting and developing salary structures for State officers and advising on salary structures for other public officers;
 - e) the procedure and factors to consider in coming up with financial rewards or other incentive schemes; and
 - f) the duration, benefits accruing and procedure of coming up with collective bargaining agreements.

2.3 Legislative Context and Policy Background

9. Article 230(4) of the Constitution mandates the Salaries and Remuneration Commission to set and regularly review the remuneration and benefits of all State Officers and advice the National and County Governments on the remuneration and benefits of all other Public Officers.
10. In discharging its mandate, Article 230(5) of the Constitution and section 12(1) of the Salaries and Remuneration Commission Act, 2011 requires the Salaries and Remuneration Commission to ensure:
 - a) that the total public compensation bill is fiscally sustainable;
 - b) that public services are able to attract and retain skills required to execute their functions;

- c) productivity and performance; and
 - d) transparency and fairness.
11. In addition to the functions outlined in Article 130(4) of the Constitution, section 11 of the Salaries and Remuneration Commission mandates the Salaries and Remuneration Commission 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 offices;
 - 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; and
 - h) perform such other functions as may be provided for by the Constitution or any other written law.
12. Section 26(1) of the Salaries and Remuneration Act empowers the Salaries and Remuneration Commission to make regulations generally for the better carrying into effect of any provisions of the Act. However, the power to make Regulations in section 26 of the Act can only be exercised only after a draft of the proposed Regulations has been approved by the National Assembly.

2.4 Overview of the Regulations

13. **Part I** of the Regulations provides for the citation and interpretation of the various terms used in the Regulations. This part also provides the objectives of the Regulations including to facilitate the discharge of Salaries and Remuneration Commission's mandate and to provide for the procedure of setting and reviewing remuneration and benefits for State officers; of advising on remuneration and benefits for other public officers and of keeping under review all matters relating to salaries and remuneration of other public officers.
14. **Part II** of the Regulations provides for the following:
- a) The timeline, procedure, requirements and considerations to be used in the review of remuneration and benefits as well as the communication and implementation of the reviewed remuneration and benefits. Pension- the Draft Regulations provide for the setting and review of pension for other public officers.
 - b) Job evaluation-The Draft Regulations provide the purpose, procedure, information required and conditions under which a job evaluation will be undertaken as well as the review of the evaluation results in the event of dissatisfaction by a public body.
 - c) Salary structures-The Draft Regulations provide the procedure and conditions for setting and developing salary structures for State officers and advising on salary structure for other public officers.

- d) Rewards and incentives- The Draft Regulations provide the procedure and factors to consider in coming up with financial rewards or other incentive schemes.
 - e) Collective bargaining agreements-The Draft Regulations provide the duration, benefits accruing and procedure of coming up with collective bargaining agreements.
15. **Part III** provides the obligations placed on public bodies; powers of the Salaries and Remuneration Commission such as to request for the relevant information, monitor and evaluate the reviewed remuneration and benefits and the Salaries and Remuneration Commission's obligation to conduct stakeholder consultation and to sensitize public bodies on the implementation of the reviewed remuneration and benefits.

2.5 Scrutiny of the Instrument

16. Pursuant to section 16 of the Statutory Instruments Act, 2013, the Committee invited the Regulation making Authority (The Salaries and Remuneration Commission) to a pre-publication scrutiny meeting on Friday, 3rd June, 2021 to consider the Draft Regulations and the following recommendations were made by the Committee during the plenary –
- a) the Salaries and Remuneration Commission to clearly set out its salaries and remuneration mandate with respect to State and other Public officers;
 - b) the Salaries and Remuneration Commission to clarify the purpose of conducting Job Evaluation and resultant job evaluation grading structures; and
 - c) the Salaries and Remuneration Commission to incorporate equitable share of revenue to counties as a factor for consideration in advising County governments on remuneration and benefits for other public officers.
17. Subsequently, Secretary/CEO of the Salaries and Remuneration Commission forwarded a letter **Ref. SRC/ADM/18 (58)** dated 6th June, 2022 addressed to the Clerk of the National Assembly forwarding the Revised Draft Regulations for consideration and approval by the National Assembly. The letter indicated that the Commission had made the requisite amendments to the Draft Regulations by deleting clause 31 as per the Committee's guidance.
18. The Committee on Delegated Legislation at its 25th sitting held on 7th June, 2022 at Continental House, Parliament Buildings considered the Draft Regulations. The meeting was attended by the Salaries and Remuneration Commission, Judicial Service Commission, Public Service Commission and Teachers Service Commission.
19. At this meeting, the Public Service Commission indicated that it had informed the Salaries and Remuneration Commission that the Draft Regulations contravened the Constitution and exceeded the constitutional and statutory functions of the Salaries and Remuneration Commission. The Public Service Commission also informed the Committee that its comments had not been taken into consideration in the Draft Regulations and that the Salaries and Remuneration Commission had not convened a stakeholders' validation forum on the Draft Regulations.
20. The Teachers Service Commission informed the Committee that Regulation 6 and 21 of the Draft Regulations contravened the Constitution and encroached on its constitutional mandate. It further indicated that its input had not been incorporated in the Draft Regulations.

21. The Judicial Service Commission conveyed its objection to the draft Regulation. JSC submitted that the Draft Regulations were unconstitutional and in excess of powers bestowed upon the Salaries and Remuneration Commission. It also indicated that the Regulations violated the independence of the Judiciary and its functions under the Constitution.
22. In response to the comments by Judicial Service Commission, Public Service Commission and Teachers Service Commission at the meeting, the Salaries and Remuneration Commission submitted that it had taken into consideration the proposals of the three Constitutional Commissions before submitting the Draft Regulations to Parliament. However, it had not conducted a stakeholder validation workshop on the Draft Regulations nor had it engaged the other Constitutional Commissions on their input on the Draft Regulations.
23. In this regard, the Committee resolved that the Salaries and Remuneration Commission should engage the other Constitutional Commissions on the Draft Regulations before submitting them to Parliament for approval.
24. The Committee on Delegated Legislation in the 13th Parliament held a meeting with the SRC on 22nd November, 2022 to brief it on the Draft Regulations during which it observed as follows:
 - i. the SRC had engaged the Committee on Delegated Legislation in the 12th Parliament on the Draft Regulations, however, the Commission was advised to comprehensively engage all the relevant stakeholders as concerns had been raised by some stakeholders whose views had not been addressed in the Draft Regulations;
 - ii. during the preparation of the Regulations, SRC had engaged and received comments from 52 stakeholders, whose matrix was annexed to the Draft Regulations presented to the Committee;
 - iii. the SRC Act, 2011 has not defined the term ‘benefits’, however, it has been defined in the Employment Act, 2007.;
 - iv. whereas the role of SRC on Benefits and Rewards regulating in accordance with Article 230(4)(a) of the Constitution, concerns were raised as to whether the Benefits and reward setting aspect was beyond their mandate. It was however, clarified that the role of SRC on this matter was advisory, as they give the benefits range whereas the employers have discretion over the benefits administration; and
 - v. Regulation 26 was giving the Commission more powers over and above what is envisaged in the Constitution.

2.6 Submissions from Stakeholders Engagement

25. The Committee also invited the Parliamentary Service Commission, Public Service Commission, Teachers’ Service Commission and Judicial Service Commission for a stakeholders’ engagement on Friday, 24th February, 2023 to deliberate on the Draft Regulations. It however, emerged during the stakeholder engagement that the SRC had not engaged the Commissions as directed by the Committee as was constituted in the 12th Parliament during the meeting that was held on 7th June, 2022.

2.6.1 Public Service Commission

26. the definition of the term “benefits” in the regulations are ultra vires for encompassing non-financial compensation which exceeds the mandate of the Salaries and Remuneration Commission under Article 230(4) of the Constitution;
27. the definition of the term “state body” gives SRC the power to deal directly with Ministries, Departments, Agencies, State Corporations and Universities all of which fall within the mandate of the Public Service Commission;
28. Regulation 3(b) (iii) is unconstitutional to the extent that it confers SRC the sweeping mandate to keep under review all matters relating to salaries and remuneration for other public officers contrary to Article 230(4) of the Constitution;
29. Regulation 4 exceeds the powers and functions of SRC as provided for in Article 230(4) of the Constitution and section 11 of the Salaries and remuneration Commission Act, 2011;
30. Regulation 4(4) is unconstitutional to the extent that it empowers SRC to undertake the review taking into account the applicable national budgeting and planning cycles;
31. Regulation 5 is unconstitutional and ultra vires to the extent that it gives SRC power to deal directly with public bodies to the exclusion of service commissions responsible for reviewing of terms and conditions, and are therefore capable of dealing with the requests and recommendations of SRC;
32. Regulation 6 is inconsistent with the Constitution, the Pensions Act, the Retirement Benefits Act, the Public Service Superannuation Scheme Act, and section 11(g) of the SRC Act for vesting pension and retirement benefits to the SRC, including setting the formula for pensions payable to public officers;
33. Regulation 7(1) (g) and (j) are unconstitutional and ultra vires to the extent that they vest job and performance evaluation on SRC and not the employer;
34. Regulation 8(b), empowering SRC to advise and determine the time frame for implementation of the advice is tantamount to making the advice binding contrary to the finding of the Supreme Court in *Kenya Vision 2030 Delivery Board and the Commission on Administrative Justice & 2 Others SC Petition No 42 of 2019*;
35. Regulation 9(16) are unconstitutional and ultra vires to the extent that they empower the SRC to undertake job evaluation instead of the relevant service commission;
36. Regulation 19(2) is unconstitutional to the extent that it provides that salary structures for other public officers may only be reviewed on the advice of the SRC;
37. Regulation 21(2) is contrary to Article 249 of the Constitution and should be deleted to the extent that it seeks to unlawfully usurp the mandate of public service employers by irregularly granting the SRC the mandate to advise on internal managerial prerogatives of public employers;

38. Regulation 21(2) goes beyond the powers of the Commission to the extent that it mandates public service institutions to seek prior advice of the SRC before awarding its public officers any reward for productivity and performance;
39. Regulation 23(3) is ultra vires to the extent that it prescribes the period of collective bargaining agreement;
40. Regulation 24(1) derogates from the powers of the public service employers to the extent that it requires public service institutions to seek prior advice of SRC before commencement of collective bargaining negotiations;
41. Regulation 26(2), (3) and (4) are ultra vires for going beyond the powers of the SRC to advise;
42. Regulation 28(1), (2) and (3) are contrary to the established procedure of litigation before the judiciary;
43. the Draft Regulations do not provide for a guide on when a service commission responsible for public officers may seek for advice from SRC, the attendant procedure and documents;
44. PSC further noted that clause 4 of the said Regulations does not provide for annual increments for State Officers.
45. Additionally, PSC noted that contrary to Article 41(5) of the Constitution, which states that, *Every trade union, employers' organizations and employer has the right to engage in collective bargaining* the, SRC has invited itself to the CBA negotiations, clear the negotiated agreement, and monitor the implementation of the advice it has given through the Regulations which is outside its mandate.

2.6.2 Parliamentary Service Commission.

46. The Parliamentary Service Commission noted that the SRC has in the past, overstepped its mandate of setting remuneration and benefits of State Officers, for instance, in the Gazette Notice dated 27th July, 2022 in which SRC purported to review and set remuneration for the Members of the 13th Parliament before it was even constituted.
47. The Commission further noted that, unlike other State Officers in the same scale as the Members of Parliament, SRC does not provide for graduated salaries for Members of Parliament, with annual increments factored in to compensate for inflation and the rising cost of living.
48. The Commission further submitted that SRC has also arrogated upon itself the powers to regulate facilitation allowances like claim for mileage reimbursable and per diems contrary to Article 230(4) of the Constitution which limits the powers of SRC to setting and regularly reviewing remuneration and benefits. It submitted that regulation of facilitation allowances by the SRC interferes with the responsibility of the Parliamentary Service Commission to provide facilitation to members of the Parliament to undertake their constitutional mandate.

49. The Parliamentary Service Commission further submitted that, whereas the SRC is vested with the powers to set remuneration and benefits for State Officers, its role is merely advisory when it comes to other public officers. The Commission submitted that it is a regulatory overstep for the SRC to set salaries and other benefits for parliamentary staff who are employees of the Parliamentary Service Commission.
50. The Parliamentary Service Commission further submitted that employers of public officers are not required to obtain the approval of SRC when setting the salaries and benefits of public officers, and therefore, the Draft Regulations are ultra vires to the extent that they seek to make it mandatory for the public bodies to comply with the advice it provides with regard to the remuneration and benefits of public officers.

2.6.3 Judicial Service Commission (JSC)

51. JSC noted that the Regulations contravenes Article 172(1) (b) of the Constitution that gives the JSC exclusive powers to review and make recommendations on the conditions of service for judges and judicial officers other than their remuneration, and to review and make recommendations on the remuneration and conditions of service for the staff of the Judiciary.
52. It further submitted that the Draft Regulations contravene Article 249(2) of the Constitution which provides that the Commissions and independent offices are subject only to the Constitution, the law and are independent and not subject to direction or control by any person or authority.

2.6.4 Teachers Service Commission

53. TSC highlighted that the definition of the term “benefits” in the Draft Regulations is ultra vires for encompassing non-financial compensation which exceeds the mandate of SRC under Article 230(4) of the Constitution;
54. They also noted that Regulation 3(b) (iii) is unconstitutional and should be deleted as it confers the SRC the sweeping mandate to keep under review all matters relating to salaries and remuneration for other public officers contrary to Article 230(4) of the Constitution;
55. In addition, Regulation 6 is inconsistent with the Constitution, the Pensions Act, the Retirement Benefits Act, the Public Service Superannuation Scheme Act, and section 11(g) of the SRC Act for vesting pension and retirement benefits to the SRC, including setting the formula for pensions payable to public officers;
56. Further, Regulation 21(2) is contrary to Article 249 of the Constitution and should be deleted to the extent that it seeks to unlawfully usurp the mandate of public service employers by irregularly granting the SRC the mandate to advise on internal managerial prerogatives of public employers.
57. TSC also noted that they were never invited by the SRC for public participation on the said Regulations. They submitted that they were only invited for public participation on the Guidelines but not the Regulations.

3.0 COMMITTEE OBSERVATIONS

58. Having examined the Draft Regulations against the Constitution, the interpretation and General Provisions Act (*Cap 2*) the Statutory Instruments Act (*No. 23 of 2013*) and the Salaries and Remuneration Commission Act (*No. 10 of 2011*), the Committee observed THAT—

3.1 Statutory Timelines

59. Unlike Regulations made under other Statutes, section 26(2) of the Salaries and Remuneration Commission Act, (*No. 10 of 2011*) requires that the Regulations made by the Commission under the Act (*due to their very nature*) **MUST** be laid before the National Assembly and approved by the House before they are published in the *gazette*.

60. The Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022 were properly laid before the House in Draft form as contemplated under section 26(2) of the Salaries and Remuneration Commission Act, 2011.

3.2 Consultations/Public Participation

61. Articles 10 and 118 of the Constitution and section 5 of the Statutory Instruments Act require that the regulation-making authority conducts public participation and sufficient consultation with the stakeholders and persons likely to be affected by the regulations.

62. The Salaries and Remuneration Commission indicated in the Explanatory memorandum submitted along with the Regulations that extensive consultations were conducted while preparing the Draft Regulations, with key stakeholders whose input was taken into account before finalization of the Draft Regulations. The Salaries and Remuneration Commission attached a schedule of a report and public participation feedback on the Draft SRC (Remuneration and Benefits of State and other Public Officers) Regulation, 2022.

63. The Salaries and Remuneration Commission via a letter to the Clerk of the National Assembly Ref. No. SRC/TS/12 dated 1st November, 2022 indicated that the Draft Regulations were subjected to Public Participation between 28th February and 4th March, 2022 and 10th March 2022. This was done through sensitization sessions and involved Ministries, Departments and Agencies, State offices, County governments, the Council of Governors, Law Society of Kenya, Association of Professional Societies in East Africa, Kenya Law Reform Commission, Central Organization of Trade Unions among other Stakeholders.


64. However, the TSC, Parliamentary Service Commission, PSC and JSC indicated during the stakeholders meeting held on 24th February, 2023 that they were not engaged in public participation and consultation by SRC in regard to the Draft Regulations as directed by the Committee on Delegated Legislation of the 12th Parliament during its 25th Sitting on 7th June, 2022.

3.3 Regulatory Impact Statement

65. The Draft Regulations do not require a Regulatory Impact Assessment within the meaning of sections 6, 7 and 8 of the Statutory Instruments Act, as they do not impose costs on any community or part of the community.

4.0 COMMITTEE RECOMMENDATION

66. Having considered the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022 in line with the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Statutory Instruments Act (*No 23 of 2013*), the Salaries and Remuneration Commission Act (*No.10 of 2011*), the Committee resolved to recommend to the House **NOT** to approve the publication of the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022, for failing to conduct public participation as required by the Constitution and Statutory Instruments Act and contravening the provisions of the Constitution and the Salaries and Remuneration Commission Act, 2011.

Signed..........

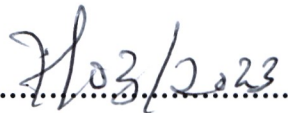
THE NATIONAL ASSEMBLY
PAPERS LAID

DATE: 08 MAR 2023

DAY: WEDNESDAY

TABLED BY: CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION
Hon-Samuel Chepkong's

CLERK-AT THE-TABLE: Christine Ndritu

Date..........

HON. CHEPKONGA KIPRONO SAMUEL CBS, M.P
CHAIRPERSON

ANNEXURES 1

- 1. Adoption list**
- 2. Minutes**
- 3. Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022**
- 4. Salaries and Remuneration Commission (Act No. 10 of 2011)**
- 5. Correspondences**
- 6. Memoranda on the Draft Regulations by:**
 - a) Teacher Service Commission;**
 - b) Parliamentary Service Commission;**
 - c) Public Service Commission; and**
 - d) Judicial service Commission.**
- 7. Petition No. 42 of 2019 Between Kenya Vision 2030 Delivery Board and the Commission on Administrative Justice.**


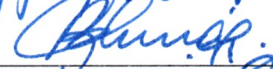
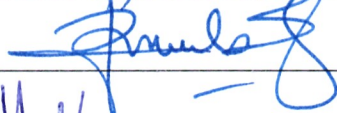
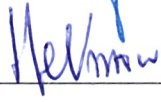
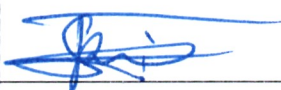
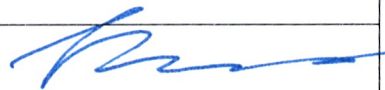
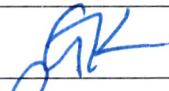

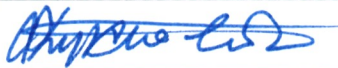
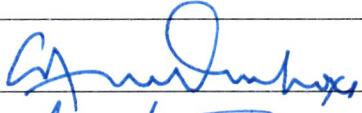
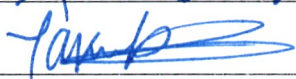
ANNEXURES 2

- 8. SRC Correspondences and Views from Stakeholders during their Public Participation process**

COMMITTEE ON DELEGATED LEGISLATION ADOPTION LIST

DATE: 02/03/2023 VENUE: SMALL DINING ROOM STARTING TIME: 10:00 AM
MAIN PARLIAMENT BUILDINGS. ENDING TIME: 12:00 NOON

AGENDA: ADOPTION OF THE REPORT ON DRAFT SALARIES & REMUNERATION
COMMISSION (REMUNERATIONS & BENEFITS OF PUBLIC OFFICERS) REGULATIONS
2022.

	NAME	SIGNATURE
1.	The Hon. Chepkonga Kiprono Samuel, CBS, M.P, Chairperson	
2.	The Hon. Githinji, Robert Gichumi, M.P. Vice-Chairperson	
3.	The Hon. Mbui, Robert, M.P.	
4.	The Hon. DeKow Barrow Mohamed, M.P.	
5.	The Hon. Sunkuli Julius Lekakeny, MP	
6.	The Hon. Abdullahi Bashir Sheikh, M.P.	
7.	The Hon. Mwirigi, John Paul, M.P.	
8.	The Hon. Kamene, Joyce, M.P.	
9.	The Hon. Mwale, Nicholas S. Tindi, M.P.	
10.	The Hon. Odoyo, Jared Okello, M.P.	
11.	The Hon. Chepkorir, Linet, M.P.	
12.	The Hon. Munyoro, Joseph Kamau, M.P.	
13.	The Hon. Kipkoech, Gideon Kimaiyo, M.P.	
14.	The Hon. Ruku, Geoffrey Kariuki Kiringa, M.P.	
15.	The Hon. Komingoi, Kibet Kirui, M.P.	
16.	The Hon. Chebor, Paul, M.P.	
17.	The Hon. Lenguris, Pauline, M.P.	
18.	The Hon. Mamwacha Onchoke Charles, M.P.	
19.	The Hon. Yakub, Adow Kuno, M.P.	

20.	The Hon. Mnyazi, Amina Laura, M.P.	
21.	The Hon. Mugabe, Innocent Maino, M.P.	

MINUTES OF THE 11th SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON THURSDAY, 2nd MARCH, 2023, IN THE SMALL DINING ROOM, MAIN PARLIAMENT BUILDING AT 10:00 AM.

PRESENT

1. The Hon Samuel Kiprono Chepkonga, CBS, M.P. Chairperson
2. The Hon. Robert Gichimu Githinji, M.P. Vice Chairperson
3. The Hon. Robert Mbui, CBS, M.P
4. The Hon. John Paul Mwirigi, M.P.
5. The Hon. Jared Okello Odoyo M.P
6. The Hon. Dekow Barrow Mohamed, M.P.
7. The Hon. Ruku Geoffrey Kariuki Kiringa, M.P.
8. The Hon. Paul Chebor, M.P.
9. The Hon. Onchoke Charles Mamwacha. M.P
10. The Hon. Abdullahi Bashir Sheikh, M.P.
11. The Hon. Gideon Kimaiyo Kipkoech, M.P.
12. The Hon. Pauline Lenguris, M.P.
13. The Hon. Adow Kuno Yakub, M.P.

APOLOGIES

1. The Hon. Julius Lekakeny Ole Sunkuli, EGH, EBS MP
2. The Hon. Joyce Kamene, M.P.
3. The Hon. Nicholas S. Tindi Mwale, M.P.
4. The Hon. Kibet Kirui Kimingoi, M.P.
5. The Hon. Joseph Kamau Munyoro, M.P.
6. The Hon. Linet Chepkorir M.P.
7. The Hon. Innocent Maino Mugabe, M.P.
8. The Hon. Laura Amina Mnyazi, M.P.

IN ATTENDANCE

SECRETARIAT

- | | | |
|----------------------------|---|------------------------------|
| 1. Ms. Esther Nginyo | - | Clerk Assistant I |
| 2. Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 3. Mr. Brian Langwech | - | Clerk Assistant III |
| 4. Ms. Winny Otieno | - | Clerk Assistant III |
| 5. Mr. Jacknorine Buleemi | - | Clerk Assistant III |
| 6. Ms. Faith Jully | - | Public Communication Officer |
| 7. Ms. Fiona W. Githunguri | - | Legal Counsel II |
| 8. Mr. Manuel Leparachao | - | Serjeant-At-Arms. |
| 9. Mr. Charles Ayari | - | Audio Officer |

AGENDA

1. Prayers
2. Preliminaries
3. Adoption of the Agenda
4. Confirmation of minutes
5. Matters arising
6. **Briefing on:**
 - i. The Crops (Miraa) Regulations, 2022 (Legal Notice 101/2022)
 - ii. Public Finance Management (National Peace Support Operations Fund) Regulations, 2022. Legal Notice No.219 of 2022
 - iii. The Merchant Shipping (Training and Certification) (Amendment) Regulation, 2022.
 - iv. Legal Aid (General) Regulations, 2022 (Legal Notice 87/2022)
7. **Consideration and Adoption** of the Report on Draft salaries and Remuneration commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022.
8. Any Other Business; and
9. Adjournment

MIN. DAA&OSC/CDL/070/2023

PRELIMINARIES

The Chairperson called the Meeting to order at 10:15 a.m. after which prayers were said. He then welcomed all present to the meeting.

MIN. DAA&OSC/CDL/071/2023

ADOPTION OF THE AGENDA

The Members adopted the agenda of the meeting as was proposed by Hon. Abdullahi Bashir M.P and seconded by Hon. Jared Okello Odoyo M.P.

MIN. DAA&OSC/CDL/072/2023

CONFIRMATION OF MINUTES

Minutes of the 7th Sitting held on Thursday, 23rd February, 2023, were confirmed as true records of the deliberations as proposed by the Hon. Robert Gichimu Githinji, M.P. and seconded by the Hon. Ruku Geoffrey Kariuki Kiringa, M.P.

Minutes of the 8th Sitting held on Friday, 24th February, 2023 were confirmed as true records of the deliberations as proposed by the Hon. John Paul Mwirigi, M.P. and seconded by Hon. Pauline Lenguris, M.P.

Minutes of the 9th Sitting held on Tuesday, 24th February, 2023 were confirmed as true records of the deliberations as proposed by the Hon. Ruku Geoffrey Kariuki Kiringa, M.P and seconded by Hon. Pauline Lenguris, M.P

Minutes of the 10th Sitting held on Tuesday, 28th February, 2023 were confirmed as true records of the deliberations as proposed by the Hon. Robert Mbui, CBS, M.P and seconded by Hon. Robert Gichimu Githinji, M.P.

MIN. DAA&OSC/CDL/073/2023 MATTERS ARISING

Under Minutes of the 9th Sitting held on Friday, 24th February, 2023, the Hon. Pauline Lenguris, M.P. was recorded as absent with apology whereas she was present during the said meeting. The Committee also noted the need to have a schedule of summaries of meetings held every month to enable Members to have records of the Sittings attended.

**MIN. DAA&OSC/CDL/074/2023 THE CROPS (MIRAA) REGULATIONS, 2022
(LEGAL NOTICE 101/2022)**

The Principal Secretary, State Department for Crop Development was not available to brief the Committee on the Crops (Miraa) Regulations, 2023. The matter was deferred to 14th March, 2023.

**MIN. DAA&OSC/CDL/075/2023 PUBLIC FINANCE MANAGEMENT
(NATIONAL PEACE SUPPORT OPERATIONS
FUND) REGULATIONS, 2022. LEGAL
NOTICE NO.219 OF 2022**

Mr. Wilson Dima Dima, Principal Legal Counsel briefed the Committee on the Public Finance Management (National Peace Support Operations Fund) Regulations, 2022 as follows, that;

1. The Legal Notice No. 219 of 2022, Public Finance Management (National Peace Support Operations Fund) Regulations, 2022 (“the Regulations”) is made pursuant to powers conferred on the Cabinet Secretary for National Treasury and Economic Planning as per section 24(4) of the Public Finance Management Act, (*No. 18 of 2012*) hence, is a statutory instrument within the meaning of section 2 of the Statutory Instruments Act (*No 23 of 2013*).
2. The Legal Notice was published in the Gazette on 14th of December, 2022, and received by the Clerk of National Assembly on 22nd December, 2022 (when the House was on recess) and was tabled before the House on the 14th of February, 2023, being within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act. It provides for the following Regulations;
3. **Regulation 1 and 2** are preliminary provisions which includes the citation and interpretation of the various terminologies used in the text of the provisions of the Regulations.
4. **Regulations 3 and 4** provide for the establishment of the National Peace Support Operations Fund as well as the source of the capital of the fund, being a sum of seven billion shillings as appropriated by National Assembly.
5. **Regulation 5** provides for the object and purpose of the Fund to support the participation in Peace Support Operations (PSO) by the Kenya Defence Forces, the National Police Service or any other organization in accordance with Article 240(8)(a) of the Constitution.

6. **Regulation 6** provides for sources of the funds to include, money appropriated by the National Assembly for purposes of the fund, monies received as reimbursement from PSO for the Government provision of Contingent Owned Equipment, assets and services excluding personnel reimbursement, grants, donations, bequests or other gifts made to the Fund, as well as any other sources approved by the Cabinet Secretary.
7. **Regulation 7** provides for payments made out of the Fund, **Regulation 8** provides for retention of receipts of earnings or accruals to the fund while **Regulation 9** provides for release of funds and **Regulation 10** provides for management of the Fund.
8. **Regulation 11** provides for functions of the Defence Council, which includes dealing with matters of approvals of annual estimates of revenue and expenditure of the Fund.
9. **Regulation 12** provides for the Administrator of the Fund being, the Principal Secretary in the Ministry responsible for matters relating to defence, whose functions include to supervise and control the administration of the Fund, operate and maintain bank accounts in the manner as may be prescribed by the National Treasury among others.
10. **Regulation 13** provides for the secretariat known as the National Peace Support Operations Secretariat (NPSO) constituted in consultation with the Defence Council.
11. **Regulation 14** provides for accounts of the Fund stating that a bank account is to be opened and maintained at the Central Bank of Kenya, in line with section 28 of the Act and administered upon by the Administrator.
12. **Regulation 15** provides that the Administrator should ensure that the accounts are not overdrawn.
13. **Regulation 16** provides for advances from the Cabinet Secretary to the National Treasury, with approval of the National Assembly where the Fund together with the surplus from the previous year is insufficient to meet the actual or estimated liabilities of the Fund.
14. **Regulation 17** provides for investment of the Funds by the Defence Council with the consent of the Cabinet Secretary to the National Treasury to invest surplus from the Fund into Government securities.
15. **Regulation 18** provides for review of the Fund by the Cabinet Secretary at the lapse of ten years from its commencement, to review its performance in achieving the objectives for which it was formed.
16. **Regulation 19** provides for preparation of annual estimates of revenue and expenditure of the Fund for the year by the Administrator.
17. **Regulation 20** provides for preparation of quarterly financial and non-financial reports as prescribed by the Public Sector Accounting Standards Board for approval and submission to the National Treasury.
18. **Regulation 21** provides for accounts and audit, where the Administrator of the Fund shall cause to be kept proper books and records of account of the income, expenditure, assets, equipment and properties of the Fund, for auditing as per the Public Audit Act, 2015.

19. **Regulation 22**, provides for administration of expenses, that the Fund shall not exceed three per centum of the approved budget of each financial year.
20. **Regulation 23**, provides for offences and penalties, where a person who misappropriates any funds or assets from the Fund, shall be liable upon conviction to imprisonment for a term not exceeding five years or to a fine not exceeding two million shillings or to both.
21. **Regulation 24**, provides for effects of winding up of the Fund including payment of the remaining amount in the Fund to the National Exchequer account for the credit of the national government and **Regulation 25** provides for the revocation of the Legal Notice No. 151 of 2022 on Public Finance Management (National Peace Support Operations Fund) Regulations, 2022.

MIN. DAA&OSC/CDL/076/2023

**THE MERCHANT SHIPPING (TRAINING
AND CERTIFICATION) (AMENDMENT)
REGULATIONS, 2023**

Mr. Wilson Dima Dima, Principal Legal Counsel briefed the Committee on the Merchant Shipping (Training and Certification) (Amendment) Regulations, 2023 as follows, that;

1. The Merchant Shipping (Training and Certification) (Amendment) Regulations, 2022 are made by the Cabinet Secretary for Mining, Blue Economy and Maritime Affairs in exercise of the powers conferred upon him by section 450 of the Merchant Shipping Act, 2009.
2. The Regulations were published in the Gazette as Legal Notice No. 1 of 2023 on 20th January 2023 and received on 1st February 2023 by the Clerk of the National Assembly. The Regulations were thereafter laid on the table of the House on 14th February 2023 being the first sitting day since publication hence within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act. The House resumed its sittings on 14th February 2023 after a long recess.
3. The Regulations seek to amend the Merchant Shipping (Training and Certification) Regulations, 2016.
4. **Regulation 2** provides new definitions for inclusion in the proper alphabetical sequence in the Principal Regulations namely radio duties, passenger ship, Code for implementation, IGF Code, Polar Code and polar waters. Some of these definitions are necessary for adoption of additions and amendments made to the International Convention for the Safety of Life at Sea, 1974 (SOLAS), that Kenya is a party and has been declared to be a convention applicable to Kenya under the Merchant Shipping Act, 2009.
5. **Regulation 3** proposes to revise paragraph (1) of Regulation 15 of the Principal Regulations and to insert a new paragraph that sets out additional requirements for a master or an officer serving on ships operating in polar waters.
6. **Regulation 4** introduces a new regulation (24A) on the role of the Kenya Maritime Authority in coordinating the conduct of periodic audits with the relevant entities.
7. **Regulation 5** seeks to revise the wrong reference of Regulation 54 in Regulation 44 of the Principal Regulations for accurate referencing within the Principal Regulations.

8. **Regulation 6** deletes and substitutes the current Regulation 50 of the Principal Regulations which in effect deletes the requirement that seafarers must undergo the trainings required in Regulation 51 to 54 of the Principal Regulations.
9. **Regulation 7** deletes and substitutes the current Regulation 51 of the Principal Regulations to clarify and broaden the scope of crowd management training to include certain areas of safety and emergency familiarization.
10. **Regulation 8** introduces a new division (D) setting out the certification requirements for personnel on ships subject to the IGF Code (The International Code of safety for ships using gases or other low-flashpoint fuels). This ensures alignment to the amendments and additions made to the International Convention for the Safety of Life at Sea, 1974 (SOLAS) in line with the Merchant Shipping (Application of Safety Convention, 1974) Order, 2004 which declares that the Safety Convention (1974) including the protocols and amendments thereto, is applicable to Kenya under the Merchant Shipping Act.
11. **Regulation 9** deletes and substitutes the current Regulation 52 of the Principal Regulations to clarify and broaden the scope of safety training to include the safety of the ship, property, the people on board as well as the protection of the marine environment.
12. **Regulation 10** deletes and substitutes the current Regulation 53 of the Principal Regulations for alignment with the certification and training requirements under the IGF Code for personnel working onboard ships.
13. **Regulation 11** introduces a new division (E) setting out the certification requirements for personnel on ships operating in polar waters. **Regulation 12** then deletes and substitutes the current Regulation 54 of the Principal Regulations to provide the scope and application of the new division (E).
14. **Regulation 13** deletes and substitutes the current Regulation 55 of the Principal Regulations for alignment with the certification and training requirements under the Polar Code for personnel working onboard ships.
15. **Regulation 14** deletes and substitutes the Form of the Certificate of Approval set out in the Fourth Schedule of the Principal Regulations.

MIN. DAA&OSC/CDL/077/202

**LEGAL AID (GENERAL) REGULATIONS,
2022 (LEGAL NOTICE 87/2022)**

The Committee satisfied itself that Legal Aid (General) Regulations, 2022 were in accordance with the Constitution, the Statutory the Statutory Instruments Act (No 23 of 2013) and the Legal Aid Act (No. 6 of 2016) under which they are made. The Committee therefore **Approved** the Legal Aid (General) Regulations, 2022 (Legal Notice No. 87/2022) as published as was proposed by Hon. Robert Mbui, CBS, M.P. and seconded by Hon. John Paul Mwirigi, M.P.

MIN. DAA&OSC/CDL/078/2023

**CONSIDERATION AND ADOPTION OF THE
REPORT ON DRAFT SALARIES AND
REMUNERATION COMMISSION
(REMUNERATION AND BENEFITS OF
STATE AND PUBLIC OFFICERS)
REGULATIONS, 2022**

The Committee considered and adopted the Report on the Draft salaries and Remuneration commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022 as was proposed by Hon. Robert Mbui, CBS, M.P. and seconded by Hon. Robert Gichimu Githinji, M.P., with the following recommendation to the House, that:

“ Having considered the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulation, 2022 in line with the Constitution, the Interpretations and General Provisions Act (Cap 2), the Statutory Instruments Act (No 23 of 2013), the Salaries and Remuneration Commission Act (No.10 of 2011), the Committee resolved to recommend to the House to adopt the report recommending to the House NOT to approve the publication of the Draft Regulations for failing to conduct public participation as required by the Constitution and Statutory Instruments Act and contravening the provisions of the Constitution and the Salaries and Remuneration Commission Act, 2011”.

MIN.DAA&OSC/CDL/079/2023 ANY OTHER BUSINESS.

There was no any other business deliberated under this Agenda .


MIN. DAA&OSC/CDL/080/2023 ADJOURNMENT.

There being no other business, the meeting was adjourned at Twenty-Five Minutes past Eleven O'clock. The next meeting will be held on Tuesday, 7th March, 2023 at Ten O'clock.

SIGNED:

**THE HON. SAMUEL CHEPKONGA, CBS. M.P.
CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION**

DATE: 7th March 2023

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 08 MAR 2023	
DAY: WEDNESDAY	
TABLED BY:	CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION Hon. Samuel Chepkonga
CLERK AT THE TABLE:	Christine Ndilitu

MINUTES OF THE 9th SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON THURSDAY 24th FEBRUARY, 2023, AT VICTORIA CONFERENCE, HOLIDAY INN, KIAMBU COUNTY AT 02:00 PM.

PRESENT

1. The Hon Samuel Kiprono Chepkonga, CBS, M.P. Chairperson
2. The Hon. Robert Gichimu Githinji, M.P. Vice Chairperson
3. The Ho. Robert Mbui, CBS, M.P
4. The Hon. Lekakeny Julius Ole Sunkuli , EGH, EBS, M.P
5. The Hon. Samuel Gonzi Rai, M.P.
6. The Hon. Jared Okello Odoyo, M.P
7. The Hon. John Paul Mwirigi, M.P.
8. The Hon. Charles Onchoke Mamwacha, M.P
9. The Hon. Joseph Kamau Munyoro, M.P.
10. The Hon. Laura Amina Mnyazi, M.P.
11. The Hon. Kibet Kirui Kimingoi, M.P.
12. The Hon. Paul Chebor, M.P.
13. The Hon. Ruku Geoffrey Kariuki Kiringa, M.P.
14. The Hon. Yakub Adow, M.P.
15. The Hon. Joyce Kamene, M.P.
16. The Hon. Linet Chepkorir, M.P.
17. The Hon. Pauline Lenguris, M.P.

APOLOGIES

1. The Hon. Nicholas S. Tindi Mwale, M.P
2. The Hon. Innocent Maino Mugabe, M.P.
3. The Hon. Abdullahi Bashir Sheikh, M.P.
4. The Hon. Gideon Kipkoech Kimaiyo, M.P.

IN ATTENDANCE

THE NATIONAL ASSEMBLY.

- | | | |
|---------------------------|---|------------------------------|
| 1. Ms. Esther Nginyo | - | Clerk Assistant I |
| 2. Ms. Winny Otieno | - | Clerk Assistant III |
| 3. Mr. Jacknorine Buleemi | - | Clerk Assistant III |
| 4. Mr. Dima Dima | - | Principal Legal Counsel I |
| 5. Mr. Daniel Ominde | - | Research Officer |
| 6. Mr. Manuel Leparchao | - | Sergeant-At-Arms. |
| 7. Mr. Charles Ayari | - | Audio Officer |
| 8. Ms. Faith Jully | - | Public Communication Officer |

PARLIAMENTARY SERVICE COMMISSION

1. Ms. Eunice Gichangi - Deputy Clerk, Senate
2. Mr. Anthony Njoroge - Director, Litigation and Compliance

PUBLIC SERVICE COMMISSION

1. Dr. Simon K.A Rotich - CEO, Public Service Commission
2. Ms. Jacqueline Manani - Director Legal Services PSC

JUDICIAL SERVICE COMMISSION

1. Mr. Paul Ndemo - Deputy Registrar, Judicial Service Commission
2. Mr. Isaac Wamae - Deputy Registrar, Judicial Service Commission
3. Mr. Diana M.N - Legal Counsel, Judicial Service Commission.

AGENDA

1. Prayers;
2. Preliminaries;
3. Adoption of the Agenda;
4. Deliberations on; **Draft salaries and Remuneration commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022. By;**
 - i. **Parliamentary Service Commission**
 - ii. **Public Service Commission**
 - iii. **Judicial Service Commission**
7. Any Other Business; and
8. Adjournment.

MIN. DAA&OSC/CDL/056/2023

PRELIMINARIES

The Chairperson called the Meeting to order at 02:30 p.m. after which prayers were said. He then welcomed all present to the meeting.

MIN. DAA&OSC/CDL/057/2023

ADOPTION OF THE AGENDA

The Members adopted the agenda of the meeting as was proposed by The Hon. Kibet Kirui Kimingoi, M.P. and seconded by Hon. Samuel Gonzi Rai, M.P.

MIN. DAA&OSC/CDL/058/2023

DELIBERATIONS ON THE DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND PUBLIC OFFICERS), REGULATION, 2022. BY THE PARLIAMENTARY SERVICE COMMISSION.

Ms. Eunice Gichangi, Deputy Clerk Parliamentary Service Commission briefed the Committee on the issues identified in the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022 as follows:

1. The Parliamentary Service Commission noted that the SRC has in the past, overstepped its mandate of setting remuneration and benefits of State Officers, for instance, in the

Gazette Notice dated 27th July, 2022 in which SRC purported to review and set remuneration for the Members of the 13th Parliament before it was even constituted.

2. The Commission further noted that unlike other State Officers in the same scale as the Members of Parliament, SRC does not provide for graduated salaries for Members of Parliament, with annual increments factored in to compensate for inflation and the rising cost of living.
3. The Commission further submitted that SRC has also vested upon itself the powers to regulate facilitation allowances like claim for mileage reimbursable and per diems contrary to Article 230(4) of the Constitution which limits the powers of SRC to setting and regularly reviewing remuneration and benefits. she submitted that regulation of facilitation allowances by the SRC interferes with the responsibility of the Parliamentary Service Commission to provide facilitation to members of the Parliament to undertake their constitutional mandate.
4. The Parliamentary Service Commission further submitted that, whereas the SRC is vested with the powers to set remuneration and benefits for State Officers, its role is advisory when it comes to other public officers. The Commission submitted it is a regulatory overstep for the SRC to set salaries and other benefits for parliamentary staff who are employees of the Parliamentary Service Commission. In particular, the Commission highlighted the following provisions:
 - (a) clause 8 to the extent that it indicates the effective date of implementation of the SRC recommendations;
 - (b) clause 10(1) (a) and 11(2) (a) to the extent that it stipulates that public bodies must have a job evaluation conducted by the SRC;
 - (c) clause 19(2) to the extent that it provides that salary structures for other public officers may only be reviewed on the advice of the SRC;
 - (d) clause 21(2) to the extent that it mandates public service institutions to seek prior advice of the SRC before awarding its public officers any reward for productivity and performance;
 - (e) clause 23(3) is ultra vires to the extent that it prescribes the period of collective bargaining agreement;
 - (f) clause 24(1) derogates from the powers of the public service employers to the extent that it requires public service institutions to seek prior advice of SRC before commencement of collective bargaining negotiations;
 - (g) clauses 26(2), (3) and (4) are ultra vires for going beyond the powers of the SRC to advise;

(h) clauses 28(1), (2) and (3) of are contrary to the established procedure of litigation before the judiciary.

5. The Parliamentary Service Commission further submitted that employers of public officers are not required to obtain the approval of SRC when setting the salaries and benefits of public officers, and therefore, the Draft Regulations are ultra vires to the extent that they seek to make it mandatory for the public bodies to comply with the advice it provides with regard to the remuneration and benefits of public officers.
6. The Commission further submitted that clause 4(2) of the Draft Regulations is unconstitutional to the extent that it empowers the SRC to undertake the review taking into account the applicable national budgeting and planning cycles. The Commission submitted that section 11(e) of the SRC Act limits the role of the SRC to review, and that the allocation of funds to implement the review is a preserve of the Parliament.
7. The Parliamentary Service Commission further noted that the SRC did not engage them in public participation in regard to the said Regulations.

MIN. DAA&OSC/CDL/059/2023

**DELIBERATIONS ON THE DRAFT
SALARIES AND REMUNERATION
COMMISSION (REMUNERATION AND
BENEFITS OF STATE AND PUBLIC
OFFICERS), REGULATION, 2022. BY
THE PUBLIC SERVICE COMMISSION**

Dr. Simon K. Rotich, CEO Public Service Commission submitted the following issues to the Committee in regards to the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022

1. The Commission noted that SRC did not engage the PSC on the Regulations as directed by the Committee in June, 2022.
2. The Commission generally observed the tendency of the SRC to dissect the PSC and deal directly with the Ministries, Departments and Agencies, including State Corporations and Public Universities without involving the PSC which the responsible Commission for the said institutions.
3. PSC also noted that SRC has traditionally rendered its advice on its own motion, without providing for the procedure for the employer itself to seek advice. PSC recommended that there should be provisions on procedure and mode through which a service commission can seek advice from SRC.
4. PSC also flagged out the attempts by the Regulations to make advice provided by the SRC binding contrary to the provisions of Article 230(4) limiting the roles of the Commission to advisory.

5. Further, the Commission noted that contrary to Article 41(5) of the Constitution, which clearly the parties to the negotiation of a collective bargaining agreement (CBA), SRC has invited itself to the CBA negotiations, clear the negotiated agreement, and monitor the implementation of the advice it has given through the Regulations.

6. PSC also recommended separate provisions dealing with the two distinct functions of the SRC, with the First Part dealing with the SRC's mandate of reviewing and setting the remuneration and benefits for State Officers and the Second Part dealing with the SRC's function of advising the national and county governments on the remuneration and benefits of other public officers. It noted that the two functions cannot be mixed up because they present distinct functions for SRC.

7. PSC further noted that clause 4 of the said Regulations does not provide for annual increments for State Officers.

MIN. DAA&OSC/CDL/060/2023

DELIBERATIONS ON THE DRAFT
SALARIES AND REMUNERATION
COMMISSION (REMUNERATION AND
BENEFITS OF STATE AND PUBLIC
OFFICERS), REGULATION, 2022. BY
THE JUDICIAL SERVICE
COMMISSION

Mr. Paul Ndemo, Deputy Register Judicial Service Commission submitted the following anomalies to the Committee in regards to the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022.

1. In their Written Submissions, JSC noted that SRC did not take into account their objection raised vide the JSC letter dated 19th May, 2022.

2. He further noted that the Regulations contravenes Article 172(1) (b) of the Constitution that gives the JSC exclusive powers to review and make recommendations on the conditions of service for judges and judicial officers other than their remuneration, and to review and make recommendations on the remuneration and conditions of service for the staff of the Judiciary.

3. The Draft Regulations also contravene Article 249(2) of the Constitution which provides that the Commissions and independent offices are subject only to the Constitution, the law and are independent and not subject to direction or control by any person or authority.

4. The Commission also noted that SRC did not engage them on Public Participation on the Draft Regulations.

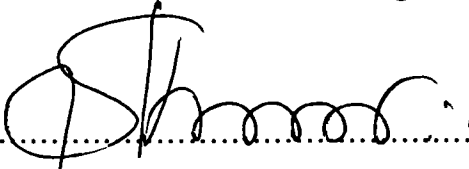
MIN. DAA&OSC/CDL/061/2023 ANY OTHER BUSINESS

There was no any other business under this agenda item.

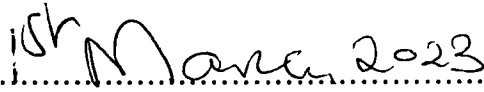
MIN. DAA&OSC/CDL/062/2023

ADJOURNMENT

There being no other business, the meeting was adjourned at Fifteen Minutes past Five O'clock.

SIGNED:.....

THE HON. SAMUEL CHEPKONGA, CBS. M.P.
CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION

DATE:.....

MINUTES OF THE 5TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON TUESDAY 22ND NOVEMBER, 2022, HILTON GARDEN INN, MACHAKOS COUNTY AT 8:30 AM.

PRESENT

1. The Hon Samuel Kiprono Chepkonga, CBS, M.P. Chairperson
2. The Hon. Robert Gichimu Githinji, M.P. Vice Chairperson
3. The Hon. Robert Mbui, M.P
4. The Hon. Samuel Gonzi Rai, M.P
5. The Hon. Sunkuli Julius Lekakeny, MP
6. The Hon. Jared Okello Odoyo M.P
7. The Hon. John Paul Mwirigi, M.P.
8. The Hon. Ruku Geoffrey Kariuki Kiringa, M.P.
9. The Hon. Gideon Kimaiyo Kipkoech, M.P.
10. The Hon. Innocent Maino Mugabe, M.P.
11. The Hon. Paul Chebor, M.P.
12. The Hon. Pauline Lenguris, M.P.
13. The Hon. Kibet Kirui Kimingoi, M.P.
14. The Hon. Adow Kuno Yakub, M.P.
15. The Hon. Joseph Kamau Munyoro, M.P.

APOLOGIES

1. The Hon. Mamwancha Onchoke Charles, M.P.
2. The Hon. Nicholas S. Tindi Mwale, M.P.
3. The Hon. Laura Amina Mnyazi, M.P.
4. The Hon. Linet Chepkorir M.P.
5. The Hon. Abdullahi Bashir Sheikh, M.P.
6. The Hon. Kamene Joyce, M.P.

IN ATTENDANCE

THE NATIONAL ASSEMBLY.

- | | | |
|---------------------------|---|-------------------------|
| 1. Ms. Esther Nginyo | - | Clerk Assistant I |
| 2. Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 3. Mr. Brian Langwech | - | Clerk Assistant III |
| 4. Ms. Winny Otieno | - | Clerk Assistant III |
| 5. Mr. Jacknorine Buleemi | - | Clerk Assistant III |
| 6. Mr. Josephat Motonu | - | Senior Fiscal Analyst |
| 7. Mrs. Sheila Chebotibin | - | Serjeant-At-Arms. |
| 8. Charles Ayari | - | Audio Officer |

SALARIES AND REMUNERATION COMMISSION

- | | | |
|-------------------------|---|------------------------|
| 1) Mrs. Lyn Mengich | - | Commission Chairperson |
| 2) Ms. Nelly P. Ashubwe | - | Commissioner |
| 3) Mr. John Monyoncho | - | Commissioner |
| 4) Ms. Margaret Sawe | - | Commissioner |

- | | | |
|----------------------------|---|--------------------------|
| 5) Mr. Abdiwahab Abdi | - | Commissioner |
| 6) Dr. Mumbwa Munyao (PHD) | | Commissioner |
| 7) Ms. Anne R. Gitau | - | Commission Secretary/CEO |
| 8) Mr. James Sitienei | - | Head of Legal |

AGENDA

1. Prayers;
2. Preliminaries;
3. Adoption of the Agenda;
4. Confirmation of previous minutes;
5. Matters arising;
6. **Briefing on Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) regulations, 2022**
7. Any Other Business; and
8. Adjournment.

MIN. DAA&OSC/CDL/026/2022

PRELIMINARIES

The Chairperson called the Meeting to order at 9:10 a.m. after which prayers were said. The Chairperson then welcomed all present followed by a round of introduction.

MIN. DAA&OSC/CDL/027/2022

ADOPTION OF THE AGENDA

The Members adopted the agenda of the meeting as was proposed by Hon. Julius Sunkuli, M.P and seconded by Hon. Kipkoech Gideon Kimaiyo, M.P.

MIN. DAA&OSC/CDL/028/2022

CONFIRMATION OF PREVIOUS MINUTES.

Confirmation of the minutes of the previous sitting was deferred to the next sitting.

MIN. DAA&OSC/CDL/029/2022

BRIEFING ON DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND PUBLIC OFFICERS) REGULATIONS, 2022

Mr. James Sitienei, Head of Legal, Salaries and Remuneration Commission (SRC) briefed the Committee on the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State Officers) Regulations, 2022 as follows, that:

1. In discharging its mandate, SRC is guided by the principles set out in Article 230(5) of the Constitution and Section 12(1) of the SRC Act, 2011. The principles are—
 - (a) the need to ensure that the total public compensation bill is fiscally sustainable;
 - (b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;
 - (c) the need to recognise productivity and performance;
 - (d) transparency and fairness; and
 - (e) equal remuneration to persons for work of equal value.

2. Members were briefed that SRC invited written submissions from stakeholders and the public, vide newspaper advertisements in the Daily Nation and Standard newspapers, which ran on 22nd February, 2022. SRC received submissions from stakeholders and the public in the form of memoranda and views which were all considered.
3. Further, SRC engaged a wide range of stakeholders through sensitisation meetings held between 28th February and 4th March, and on 10th March, 2022.
4. All the stakeholders consulted supported the draft regulations and made comments and proposals, some of which were incorporated into the draft. SRC has prepared a comprehensive report of stakeholders' feedback on the draft regulations.
5. Under regulation 3, the objects and purpose of the Draft SRC (Remuneration and Benefits of State and other public officers) Regulations, 2022 is to further facilitate the discharge of the mandate of the Commission.
6. The draft regulations provide the procedure to—
 - (a) set and review remuneration and benefits for State officers;
 - (b) advise on remuneration and benefits for other public officers; and
 - (c) Keep under review all matters relating to salaries and remuneration of other public officers.
7. Section 11 (e) of the SRC Act mandates SRC to determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation. Pursuant to this provision, Regulation 2 of the draft regulations defines the term 'review cycle' as follows: *'The period after which, remuneration, allowances and benefits for State and other public officers are reviewed for budgeting and planning purposes.'*
8. Regulation 4 provides that SRC shall:
 - a. review and set remuneration and benefits for State officers every four years.
 - b. review and advise on remuneration and benefits for other public officers every four years.
9. Under Regulation 6, members were briefed that, Pension is an employment benefit and as such, SRC is mandate under Article 230 (4) (a) and (b) of the Constitution, to set and regularly review in respect of State officers, and advise with respect to other public officers. The Regulations provide—
 - i. that the Commission shall set the pension or gratuity due to a State officer; and
 - ii. in consultation with relevant stakeholders, advise on the pension or gratuity due to other public officers taking into account the applicable laws.
10. Factors to be considered by SRC in setting, reviewing and advising on remuneration and benefits. – Regulation 7 – include:
 - a) the principles set out under Article 230(5) of the Constitution, section 12 of the SRC Act and other applicable laws;
 - b) the economic performance of the country;
 - c) the capacity of a public body to afford the cost of proposed remuneration and benefits;
 - d) the ability of a public body to sustain payment of remuneration and benefits;
 - e) the outcome of comparative surveys on the labour markets and trends in remuneration;
 - f) comparative analysis between remuneration and benefits for similar jobs within institutions in the same sector to ensure equity and competitiveness;
 - g) job evaluation results as undertaken by the Commission;
 - h) cost of living;
 - i) existing collective bargaining agreements;

- j) achievement of performance and productivity targets;
 - k) government policies and guidelines;
 - l) the equitable share of revenue to county governments; and
 - m) any other relevant factor in determination of remuneration or benefits.
11. Regulation 10 is on job evaluation. SRC shall undertake job evaluation where:
- a) jobs in public bodies have not been evaluated by the Commission;
 - b) a public body is established;
 - c) a public office is established;
 - d) a new job is established arising from—
 - i. change in the institutional mandate of a public body; or
 - ii. change in the institutional structure of a public body.
 - e) a change arises in the job content of a role in a public body.
12. The SRC's obligations during job evaluation under Regulation 11 (1) includes,
- a) before undertaking a job evaluation sensitise public bodies on the job evaluation;
 - b) use an analytical, point-factor based job evaluation system that evaluates jobs using compensable factors determined by the Commission;
 - c) engage the respective public bodies on job evaluation results; and
 - d) communicate the job evaluation results to the respective public bodies, in writing.
13. Review of job evaluation results under Regulation 13 entails:
- a) Job evaluation results may be reviewed by SRC where new material information or significant changes in the job content have been submitted to the Commission.
 - b) A public body, State officer or other public officer dissatisfied with job evaluation results may request SRC to review the results.
 - c) A request for review of job evaluation results should set out the grounds for review and include supporting documents.
14. Regulation 14 Job evaluation results shall remain valid until the job is re-evaluated by the Commission.
15. On Salary structures under (Regulation 16):
- a) The Commission shall use job evaluation results to develop salary structures for State officers and advise the national and county governments on the salary structures for other public officers.
 - b) Salary structures set, reviewed or advised by SRC shall remain valid until reviewed by SRC.
16. On Performance and productivity under (Regulation 21), a public body shall seek the advice of the Commission on proposed financial rewards or cash awards before establishing a financial reward or cash award scheme.
17. The procedure for collective negotiation under (Regulation 24) propose that.
- a) A public body shall seek the advice of SRC on the remuneration and benefits items payable out of public funds before the commencement of collective bargaining negotiation.

- b) SRC shall, thereafter provide the public body with advice on the remunerative and benefits items payable. A public body shall undertake negotiation within SRC's advice.
 - c) Upon conclusion of the collective bargaining negotiation, the public body shall request SRC for clearance of the draft collective agreement to facilitate its registration at the Employment and Labour Relations Court.
18. The Regulations seek to facilitate the achievement of fiscally sustainable, transparent and fair, and harmonized pay in the public service by:
- a) aligning the cycle of determination and review of salaries and remuneration for State and other public officers to the national budgeting and planning cycles;
 - b) setting out the principles and factors to be considered during setting, review and advise on remuneration and benefits for State and other public officers;
 - c) setting out procedures for conduct of job evaluation for purposes of determining the comparable and relative worth of jobs;
 - d) setting out the factors to be considered in rewarding productivity and performance in the public service; and
 - e) setting out the procedure for obtaining the advice of SRC on the remunerative and benefit items payable out of public funds in collective bargaining negotiation.
19. Members deliberated on the Regulations and observed the following, that:
- i. The SRC had engaged the Committee on Delegated Legislation in the 12th Parliament on the Draft Regulations, however, the Commission was advised to comprehensively engage all the relevant stakeholders as concerns had been raised by some stakeholders whose views had not been addressed in the Draft Regulations;
 - ii. During the preparation of the Regulations, SRC had engaged and received comments from 52 stakeholders, whose matrix was annexed to the Draft Regulations presented to the Committee.
 - iii. The SRC Act, 2011 has not defined the term 'benefits', however, it has been defined in the Employment Act, 2007.
 - iv. Whereas the role of SRC on Benefits and Rewards regulating in accordance with Article 230(4)(a) of the Constitution, concerns were raised as to whether the Benefits and reward setting aspect was beyond their mandate. It was however, clarified that the role of SRC on this matter was advisory role, as they give the benefits range whereas the employers have discretion of over the benefits administration.
 - v. Regulation 26 was giving the Commission more powers over and above what is envisaged in the Constitution.
 - vi. Concerns were raised regarding some of the regulations, gazette notices within the purview of SRC that had not been tabled in Parliament them and contravenes section 11 of the Statutory Instruments Act but are already in force. SRC was requested to provide the Committee with a response on this matter within 7 days of this meeting.
 - vii. The Committee further requested that SRC submits the amended Draft Regulations and within 14 days from the date of this meeting.

MIN. DAA&OSC/CDL/030/2022

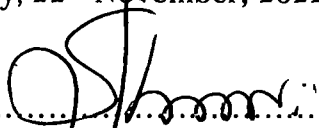
ANY OTHER BUSINESS

There was no business under this agenda item

MIN. DAA&OSC/CDL/031/2022

ADJOURNMENT

There being no other business, the meeting was adjourned at 12:40 p.m. The next meeting will be held on Tuesday, 22nd November, 2022 at Two O'clock.

SIGNED: 

THE HON. SAMUEL CHEPKONGA, MBS, M.P.
CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION

DATE: 22th November 2022

MINUTES OF THE 25TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON TUESDAY 7TH JUNE, 2022 AT 10.30 AM IN THE COMMITTEE ROOM ON 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS.

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. The Hon. Muriuki Njagagua, M.P. - Vice-Chairperson (*Virtual Attendance*)
3. The Hon. Waihenya Ndirangu, M.P.
4. The Hon. George Murugara, M.P.
5. The Hon. (Dr.) Wilberforce Oundo, M.P.
6. The Hon. Daniel Maanzo, M.P.
7. The Hon. Abdi Tepo, M.P.
8. The Hon. Edith Nyenze, M.P.
9. The Hon. Nicholas Tindi Mwale, M.P. *Virtual Attendance*
10. The Hon. Ronald Tonui, M.P. *Virtual Attendance*
11. The Hon. Jennifer Shamalla, M.P. *Virtual Attendance*
12. The Hon. Sammy Seroney, M.P. *Virtual Attendance*

ABSENT WITH APOLOGY

1. The Hon. Patrick Mariru, M.P.
2. The Hon. Robert Mbui, M.P.
3. The Hon. Alice Wahome, M.P.
4. The Hon. Cecily Mbarire, MGH, M.P.
5. The Hon. Timothy Wanyonyi, M.P.
6. The Hon. Munene Wambugu, M.P.
7. The Hon. Robert Gichimu, M.P.
8. The Hon. Martha Wangari, M.P.
9. The Hon. Gideon Mulyungi, M.P.
10. The Hon. William Cheptumo, M.P.

IN-ATTENDANCE

NATIONAL ASSEMBLY SECRETARIAT

1. Mr. Jimale Mohamed - Clerk Assistant II
2. Ms. Ruth M. Gakuya - Clerk Assistant II
3. Ms. Lynette Otieno - Legal Counsel
4. Mr. Charles Ayari - Superintendent of Electronics (Audio)

THE JUDICIAL SERVICE COMMISSION

1. Ms. Munyingi Diana M.N - Advocate, JSC

THE PUBLIC SERVICE COMMISSION

1. Mr. Anthony Muchiri(Amb) - Chairperson

- | | | | | |
|--------------------------|---|-----------------------------|------------------|---|
| 2. Ms. Jacqueline Manani | - | Director Legal Services | Ms. Joan Machayo | - |
| | | Director, HRM & Development | | |
| 3. Ms. Jackeline Manani | - | Director, Legal Services | | |
| 4. Ms. Adhiambo Evelyn | - | Principal HRM Officer | | |

THE SALARIES AND REMUNERATION COMMISSION

- | | | | | |
|-------------------------|---|-------------------------|--|--|
| 1. Mrs. Lyn C. Mengich | - | Chairperson | | |
| 2. Mrs. Anne R. Gitau | - | Chief Executive officer | | |
| 3. Mr. John K. Monyomho | - | Member | | |
| 4. Ms. Sophie Moturi | - | Commissioner | | |
| 5. Mr. James Sitienei | - | Head of Legal | | |

THE TEACHERS SERVICE COMMISSION

- | | | | | |
|------------------------|---|-------------------------|--|--|
| 1. Mr. Jamleck Muturi | - | Chairperson | | |
| 2. Mrs. Nancy Macharia | - | Chief Executive Officer | | |
| 3. Ms. Flora Manyasa | - | Legal Counsel | | |
| 4. Ms. Edwick Musongi | - | Legal Counsel | | |
| 5. Mr. Paul Njuguna | - | PA to CEO | | |
| 6. Dr. Julius O. Olayo | - | HRM and Development | | |

MIN.NO./NA/CDL/2022/130 PRAYER AND PRELIMINARIES

The Chairperson called the meeting to order at 11.00 am with the Prayer and thereafter invited all present to introduce themselves.

MIN.NO./NA/CDL/2022/131 ADOPTION OF THE AGENDA

The agenda was unanimously adopted having been proposed by the Hon. Abdi Tepo, M.P and Seconded by the Hon. Daniel Maanzo, M.P.

MIN.NO./NA/CDL/2022/132 CONFIRMATION OF MINUTES

Minutes of the 24th sitting held on Thursday 2nd June 2022 at 11.00 am were confirmed as a true record of the proceedings having been proposed by the Hon. Edith Nyenze, M.P. and seconded by the Hon. Tindi Mwale, M.P.

MIN.NO./NA/CDL/2022/133 MATTERS ARISING

No matters arose.

MIN.NO./NA/CDL/2022/134 JOINT MEETING WITH THE PUBLIC SERVICE COMMISSION (PSC), THE JUDICIAL SERVICE COMMISSION (JSC), THE TEACHERS SERVICE COMMISSION (TSC), AND THE SALARIES AND REMUNERATION COMMISSION (SRC) ON THE DRAFT SRC (REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS, 2022

Submissions from the Public Service Commission (PSC)

The meeting was informed that following a request for written submissions on the draft regulations by the Salaries Remuneration Commission on 23rd February 2022, the Public Service Commission had submitted a written memorandum on the regulations. However, the Comments from the Commission had not been taken into consideration by the SRC in the draft Regulations submitted to Parliament nor did the SRC convene a stakeholder's validation forum on the draft regulations as presented.

The PSC had raised concerns about the following provisions in the draft regulations - Regulation 2, regulation 3 (b) (iii), regulation 6, regulations 7 (1) (g), regulation 7 (1)(h) and 2, regulation 8 (b), regulations 9 to 16, Regulation 19 (2), Regulation 24(4) & (5) and regulation 29, and had proposed various amendments on the basis that the proposals as contained in the regulations contravened the constitution and exceeded the constitutional and statutory functions of the SRC.

Submissions from the Teachers Service Commission (TSC)

The meeting was informed that the TSC had submitted a written memorandum to the SRC on the regulations. However, the comments from the Commission had not been taken into consideration by the SRC in the draft regulations submitted to Parliament.

TSC had raised concerns about the following provisions in the draft regulations - Regulation 6 and Regulation 21 and proposed the deletion of the regulations on the basis that the proposals as contained in the regulations contravened the constitution, encroached on the constitutional mandate of the TSC and exceeded the constitutional and statutory functions of the SRC.

Submissions from the Judicial Service Commission (JSC)

The meeting was informed that the JSC had raised objections on the draft regulations vide a letter to the SRC dated 19th May 2022. However, the objections raised had not been taken into consideration by the SRC in the draft regulations submitted to Parliament.

The JSC had objected to the draft regulations on the basis that the regulations contravened Articles 172 (1) (b), 249 (2), 160, and 230(4) of the constitution. Further, the regulations were against the finding of the supreme court in the case of Council of Governors and 47 others v the Attorney General and 3 others(2020) eKLR.

The JSC was objecting to the proposed regulations as they were unconstitutional and in excess of powers bestowed upon the SRC (Article 230 (4)(b) and violated the independence of the Judiciary(Article 160 and the functions of the Judicial Service Commission(Articles 172 (1) (b) and 249 (2).

Submissions from the Salaries and Remuneration Commission (SRC)

The meeting was informed that following the request for written memoranda on the draft regulations, the JSC, PSC and TSC had submitted their written memoranda to the Commission.

The Commission had considered and taken into consideration the proposals before submitting the draft Regulations to Parliament. The commission had however not conducted a stakeholder validation workshop on the draft regulations nor had it engaged the other constitutional commissions on their proposed amendments to the draft regulations.

Way Forward

The committee directed that the Salaries and Remuneration Commission to conduct a validation workshop for Public Service Commission, Teachers Service Commission and the Judicial Service Commission and all other Commissions and independent offices to harmonize the concerns raised on the draft regulations before submitting them to Parliament for approval.

MIN.NO./NA/CDL/2022/135 CONSIDERATION OF THE PUBLIC SERVICE COMMISSION (COUNTY APPEALS PROCEDURES) REGULATIONS, 2022

The committee having scrutinized the Regulations in line with the Constitution, the Interpretations and General Provisions Act(Cap 2) the Statutory Instruments Act 2013, and the Public Service Commission Act, 2017, resolved **to approve** them having been proposed by the Hon. Abdi Tepo and Seconded by the Hon. Tindi Mwale, M.P

MIN.NO./NA/CDL/2022/136 CONSIDERATION OF THE SCRAP METAL (THE SCRAP METAL DEALERS) RULES, 2022 (LEGAL NOTICE NO. 84 OF 2022)

The Committee was informed that –

- (i) The Regulations were published in the Gazette as *LN No. 84 of 2022* on 5th May 2022 submitted and were laid on the table of the House on 31st May 2022 being the ninth sitting day since publication hence out of the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act.
- (ii) The Rules seek to regulate the dealings in scrap metal and provide for licensing of scrap metal dealers as a condition for lifting the moratorium on dealings in scrap metals issued on 20th January, 2022.
- (iii) The Rules seek to regulate the dealings in scrap metal and provide for licensing of scrap metal dealers as a condition for lifting the moratorium on dealings in scrap metals issued on 20th January 2022.

The Committee was further informed that -

PART I of the Rules provide for the preliminary provisions including the citation, interpretation of terms in the context within which they are used in the Rules, object and purpose of the Rules and application of the Rules.

PART II of the Rules provides for the nomination of members to the Scrap Metal Council and qualification for appointment as Chairperson and Council members.

PART III of the Rules deals with requirements to carry on business as a scrap metal dealer and application for licence to carry on business. The Part provides for the form of a licence and issues that the Council should consider when issuing a licence. It provides for remedies to dealers when the Council rejects their application for a licence, terms for a licence, variations and revocation of licences.

The part further provides for duties of a licensed dealer including the verification of suppliers' identity, requirement to keep proper records of receipt of scrap metal, and requirement to keep records for disposals of scrap metal. It also provides for the inspection of licensed dealerships, issuance of closure orders and appeals to such orders.

PART IV of the Rules deals with miscellaneous matters including registration of licensed dealers as business member organizations, restrictions in export of scrap metal and creating awareness on scrap metal dealings.

The **SCHEDULE** provides for the fee payable under the Rules.

Committee Observations

The Committee made the following Observations –

Statutory Timelines – Section 11 of the SI Act

1. The Rules were tabled in Parliament outside the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act (*No. 23 of 2013*). The Rules were published in the Gazette as *LN No. 84 of 2022* on 5th May 2022 and were laid on the table of the House on 31st May 2022 **being the ninth sitting day since publication hence out of the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act.**
2. Section 11(4) of the Act stipulates that *if a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.* Accordingly, the Rules ceased to effect on the 24th of May, 2022 by operation of law.
3. Part II of the Rules contain provisions on the Council including nomination and qualification for appointment as the Chairperson and Council members, which is *ultra vires* Part II of the Scrap Metals Act which properly deals with matters relating to the Council hence contrary to section 13(a) of the Statutory Instruments Act (*No. 23 of 2013*).
4. The explanatory memorandum submitted indicates that the Ministry for Industrialization subjected the Rules to public participation and sought for comments from various stakeholders but fails to give evidence of the consultation and its outcomes. contrary to section Article 10 and 118 of the Constitution read together with section 5A of the of the Act, there was no demonstration at all of public participation in the process of making the Regulations.
5. The regulatory making authority failed to submit the Regulatory Impact Statement as required under Section 6 of the Statutory Instruments Act 2013. The Rules make provisions for

dealings in scrap metal, whose implementation may impose environmental and economic implications on the society. The Regulatory Impact Statement is to enable Parliament and stakeholders to be informed of the environmental, social and economic implications of the implementation of the proposed regulation. Contrary to section 6, 7, 8 and 9 of the Act, there was no Regulatory Impact Assessment conducted and consequently no Regulatory Impact Statement notified in the Kenya Gazette and two newspapers of wide circulation nor was the same submitted to Parliament.

Committee Resolution

Having examined the Scrap Metal Rules, 2022 against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Scrap Metal Act, 2015, and the Statutory Instruments Act (No. 23 of 2013), and resolved to recommend to the House **to annul** the Regulations in entirety having been proposed by the Hon. Edith Nyenze and Seconded by the Hon. Abdi Tepo, M.P, due to lack of conformity with the Scrap Metal Act, 2015, and the Statutory Instruments Act, 2013, **for non-conformity with the Constitution, the Scrap Metals Act (No. 1 of 2015) and the Statutory Instruments Act (No. 23 of 2013).**

MIN.NO. /NA/CDL/2022/ 138

ANY OTHER BUSINESS

No any other matter arose.

MIN.NO. /NA/CDL/2022/ 139

ADJOURNMENT

The meeting was adjourned at 12.48 p.m. The next sitting will be held on notice.

Signed.....

Date.....

**HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)**



THE NATIONAL ASSEMBLY	
DATE: 07 JUN 2022	TUESDAY
TABLED BY: lom	
CLERK OF THE TABLE: omr	

LEGAL NOTICE NO.

**THE SALARIES AND REMUNERATION COMMISSION
(REMUNERATION AND BENEFITS OF STATE AND OTHER
PUBLIC OFFICERS) REGULATIONS, 2022**

ARRANGEMENT OF REGULATIONS

Regulation

PART I—PRELIMINARY PROVISIONS

- 1— Short title.
- 2— Interpretation.
- 3— Object of the Regulations.

**PART II—SETTING, REVIEWING AND ADVISING ON
REMUNERATION AND BENEFITS OF STATE AND OTHER
PUBLIC OFFICERS**

- 4— Review cycle.
- 5— Requirements and procedure for submission of relevant information.
- 6— Pension.
- 7— Considerations during setting, review and advice on remuneration and benefits.
- 8— Communication and effective date of advice.
- 9— Job evaluation.
- 10—Conduct of job evaluation.
- 11—Procedure for undertaking job evaluation.
- 12—Information to be submitted by a public body for job evaluation.
- 13—Review of job evaluation results.

- 14—Validity of job evaluation results.
- 15—Request for clarification.
- 16—Application of Job Evaluation results.
- 17—Procedure for developing salary structures.
- 18—Information for setting and review, and advice on salary structures.
- 19—Validity of, and advice on, salary structures.
- 20—Guidance on implementation of salary structures.
- 21—Recognising productivity and performance and award of incentives.
- 22—Factors to be considered in recognising productivity and performance.
- 23—Collective bargaining negotiation.
- 24—Procedure for collective bargaining negotiation.

PART III— MISCELLANEOUS PROVISIONS

- 25—Submission of request for setting, review and advice.
- 26—Review of advice on remuneration and benefits.
- 27—Request for information.
- 28—Disputes relating to remuneration and benefits.
- 29—Monitoring and evaluation.
- 30—Stakeholder consultations.

THE SALARIES AND REMUNERATION COMMISSION ACT, 2011
(No. 10 of 2011)

IN EXERCISE of the powers conferred by section 26 of the Salaries and Remuneration Commission Act, 2011, the Salaries and Remuneration Commission makes the following Regulations—

**THE SALARIES AND REMUNERATION COMMISSION
(REMUNERATION AND BENEFITS OF STATE AND
OTHER PUBLIC OFFICERS) REGULATIONS, 2022**

PART I—PRELIMINARY PROVISIONS

Short title. 1. These Regulations may be cited as the Salaries and Remuneration Commission (Remuneration and Benefits of State and other Public Officers) Regulations, 2022.

Interpretation. 2. In these Regulations, unless the context otherwise requires—

“benefit” means any financial or non-financial compensation or allowance that is provided to a State or other public officer which is over and above the basic or consolidated salary and arising out of the employment of the State or other public officer;

“Commission” means the Salaries and Remuneration Commission established by Article 230 of the Constitution;

“job description” means a standardized documentation of the duties, responsibilities, reporting relationships, critical performance areas and working conditions, and the minimum qualifications, experience, skills and competences required to perform a job;

“job description manual” means a document containing approved job descriptions;

“job evaluation” means a systematic and objective process of determining the worth of a job in relation to other jobs;

“performance” means a measure of the extent of attainment of set objectives of a public body’s goals in an effective and efficient manner;

“productivity” means a measure of efficiency with which inputs are translated into outputs;

Cap. 2 “public body” has the same meaning assigned to it under section 3 of the Interpretation and General Provisions Act;

“public officer” has the meaning assigned to it under Article 260 of the Constitution;

“public service” has the meaning assigned to it under Article 260 of the Constitution;

“review cycle ” means the period after which salaries and remuneration for State and other public officers are reviewed for budgeting and planning purposes;

“reward” means an incentive awarded in recognition of an achievement of performance and productivity;

“State officer” has the meaning assigned to it under Article 260 of the Constitution;

No. 14 of 2007 “trade union” has the meaning assigned to it under section 2 of the Labour Relations Act, 2007; and

Object of the Regulations.

3.(1) The objective of these Regulations is to—

(a) To facilitate the discharge of the mandate of the Commission;

(b) provide for the procedure to—

- (i) set and review remuneration and benefits for State officers;
- (ii) advise on remuneration and benefits for other public officers; and
- (iii) keep under review all matters relating to salaries and remuneration of other public officers.

**PART II—SETTING, REVIEWING AND ADVISING ON
REMUNERATION AND BENEFITS OF STATE AND
OTHER PUBLIC OFFICERS**

Review cycle.

4.(1) The Commission shall review and set remuneration and benefits for State officers every four years.

(2) The Commission shall review and advise on remuneration and benefits for other public officers every four years.

(3) The Commission shall when undertaking a review under paragraphs (1) and (2), evaluate remuneration and benefits of State and other public officers with a view to institute change, if necessary.

(4) The Commission shall undertake the review taking into account the applicable national budgeting and planning cycles.

(5) Despite paragraphs (1) and (2), the Commission may undertake a special review of the remuneration and benefits of State and other public officers to address emerging circumstances and conditions.

Requirements and procedure for submission of relevant information.

5.(1) Whenever a review is due, the Commission shall request for relevant information, from public bodies, on remuneration and benefits for their respective State and other public officers.

(2) The public bodies shall submit the relevant information requested for under paragraph (1)—

- (a) in writing; and
- (b) in such format and within such timelines as may be specified by the Commission.

Pension.

6.(1) Pursuant to Article 230(4)(a) of the Constitution, the Commission shall set the pension or gratuity due to a State officer.

(2) The Commission shall, in consultation with relevant stakeholders—

- (a) advise on the pension or gratuity due to other public officers taking into account the applicable laws; and
- (b) undertake periodic reviews and make recommendations on pensions payable to eligible persons.

Considerations during setting, review and advise on remuneration and benefits.

7.(1) The Commission shall, in setting, reviewing and advising on remuneration and benefits, where applicable, consider any or a combination of the following principles and factors—

- (a) the principles set out under Article 230(5) of the Constitution, section 12 of the Act and other applicable laws;
- (b) the economic performance of the country;
- (c) the capacity of a public body to afford the cost of proposed remuneration and benefits;
- (d) the ability of a public body to sustain payment of remuneration and benefits;
- (e) the outcome of comparative surveys on the labour

markets and trends in remuneration;

- (f) comparative analysis between remuneration and benefits for similar jobs within institutions in the same sector to ensure equity and competitiveness;
- (g) job evaluation results as undertaken by the Commission;
- (h) cost of living;
- (i) existing collective bargaining agreements;
- (j) achievement of performance and productivity targets;
- (k) government policies and guidelines;
- (l) the equitable share of revenue to county governments; and
- (m) any other relevant factor in determination of remuneration or benefits.

(2) In this regulation “cost of living ” means the cost of purchasing goods and services as measured by the changes in the Consumer Price Index as provided by the Kenya National Bureau of Statistics from time to time.

Communication
and effective
date of advice.

8. The Commission shall communicate the—

- (a) set and reviewed remuneration and benefits for State officers indicating the effective date of implementation; and
- (b) advice on remuneration and benefits for other public officers indicating the effective date of implementation.

Job evaluation.

9. The Commission shall undertake job evaluation covering

jobs in public bodies in order to—

- (a) determine comparable and relative worth of jobs in public bodies;
- (b) determine equal pay for work of equal value; and
- (c) ensure fairness and transparency in pay.

Conduct of job evaluation.

10.(1) The Commission shall undertake job evaluation where—

- (a) jobs in a public body have not been evaluated by the Commission;
- (b) a public body is established;
- (c) a public office is established;
- (d) a new job is established arising from—
 - (i) a change in the mandate of a public body; or
 - (ii) a change in the institutional structure of a public body; and
- (e) a change arises in the job content of a role in a public body.

(2) A public body that meets the requirements for job evaluation as set out under paragraph 1 may submit the required information when requested by the Commission during a scheduled job evaluation or when the public body seeks for advice of the Commission on remuneration and benefits.

Procedure for undertaking job

11.(1) The Commission shall—

evaluation.

- (a) before undertaking a job evaluation sensitise public bodies on the job evaluation;
 - (b) use an analytical, point-factor based job evaluation system that evaluates jobs using compensable factors determined by the Commission;
 - (c) engage the respective public bodies on job evaluation results; and
 - (d) communicate the job evaluation results to the respective public bodies, in writing.
- (2) A public body shall—
- (a) ensure all the jobs in the public body are evaluated by the Commission;
 - (b) establish a committee responsible for job analysis and development of job descriptions;
 - (c) ensure members of the Committee responsible for job analysis and development of job descriptions in the public body are trained on matters relating to job evaluation;
 - (d) assess, identify and determine the jobs to be evaluated by the Commission;
 - (e) develop complete, accurate, approved and authenticated job description manuals;
 - (f) provide feedback on the job evaluation results when communicated by the Commission; and

(g) submit a request for review of the job evaluation results if dissatisfied with the job evaluation results as prescribed by the Commission.

(3) A public body shall align the job description referred to in paragraph (2)(e) to the provisions of the relevant law, where applicable, and the approved human resource instruments.

(4) The Commission shall, where a job description for a State officer or other public officer is not submitted and where applicable, use the information provided in the relevant law to evaluate the job.

(5) Where a job description for a public officer is not submitted, the results of the previous job evaluation shall apply.

(6) Where a public body does not provide feedback on job evaluation results, the Commission shall proceed to conclude the job evaluation.

(7) In this regulation “compensable factor” means a job attribute used to provide a basis for determining the worth of a job in relation to other jobs.

Information to be submitted by a public body for job evaluation.

12.(1) A public body that meets the requirements for job evaluation as set out under regulation 10 shall submit to the Commission information relating to jobs within the public body for the purposes of job evaluation.

(2) The information to be provided in paragraph (1) shall include—

(a) the approved institutional structure;

(b) the approved staff establishment;

- (c) the approved career progression guidelines or schemes of service;
- (d) a list of jobs in the public body indicating current grades or levels;
- (e) the complete, accurate, approved and signed-off job description manual presented in a format as prescribed by the Commission; and
- (f) any other information that may be relevant for the job evaluation.

Review of job
evaluation
results.

13.(1) A public body, State officer or other public officer dissatisfied with job evaluation results may, within forty days from the date of communication of the job evaluation results, request for the review of the results in accordance with this regulation.

(2) A public body that is dissatisfied with the job evaluation results shall submit to the Commission a request for the review of the job evaluation results, in writing, set out the grounds for review and attach supporting documents.

(3) A State or other public officer is dissatisfied with the job evaluation results, may upon communication of the job evaluation results—

- (a) submit their grounds for review to the public body; and
- (b) the public body shall, if satisfied that the grounds have merit, submit to the Commission a request for review, the grounds for review and supporting documents.

(4) Where the Commission requests, in writing, for additional information relating to a request for a review of job evaluation

results, a public body shall provide the information within twenty days from the date of receipt of the request.

(5) Where the Commission does not receive additional information relating to a request for the review of job evaluation results within the stipulated time, the Commission may—

- (a) extend the time for submission of the required information; or
- (b) make any other determination as the Commission may considers fit.

(6) The Commission may review job evaluation results where new material information or significant changes in the job content are submitted to the Commission.

(7) The Commission shall review job evaluation results within fifty-five working days from the date of receipt of all the required documents in support of a request for review.

(8) Nothing in this regulation shall preclude any public body, State officer or other public officer from engaging the Commission further on job evaluation results.

Validity of job evaluation results.

14. Job evaluation results shall remain valid until the job is re-evaluated by the Commission.

Request for clarification.

15. A public body may request for clarification from the Commission on job evaluation results and the implementation of job evaluation results.

Application of Job Evaluation results.

16. The Commission shall use job evaluation results, among other factors set out in regulation 7, to—

- (a) set and review remuneration and benefits for a State officer; and
- (b) advise on the remuneration and benefits for other public officers.

Procedure for developing salary structures.

17.(1) The Commission shall—

- (a) develop and set salary structures for State officers; and
- (b) advise on the salary structures for other public officers.

(2) The Commission, shall, before developing and setting salary structures for State officers or advising on salary structures under paragraph—

- (a) conduct comparative surveys on labour markets and trends in remuneration to determine the relativity of remuneration of public service in relation to the market trends; and
- (b) subject the outcome of the comparative surveys on labour markets and trends in remuneration to the principles and factors set out in regulation 7.

Information for setting and review, and advise on salary structures.

18.(1) A public body shall upon request by the Commission provide such information on remuneration and benefits as may be required by the Commission to enable the Commission set and review salary structures for State officers; and advise on salary structures for other public officers.

(2) The Commission may, notwithstanding failure by a public body to submit the required information in accordance with paragraph (1),—

- (a) set salary structures for State officers; and

(b) advise on the salary structures for other public officers.

Validity of, and advice on, salary structures.

19.(1) The salary structures set for State officers shall remain in place until reviewed by the Commission.

(2) The salary structures for other public officers may only be reviewed on the advice of the Commission.

Guidance on implementation of salary structures.

20. A public body may request for guidance from the Commission on implementation of—

(a) the set and reviewed salary structures for State officers;
or

(b) the advice on its salary structures for other public officers.

Recognising productivity and performance and award of incentives.

21.(1) A public body may establish a financial reward and cash award scheme based on productivity and performance management frameworks or incentive schemes established by the public body in accordance with existing laws, regulations, government policies and guidelines.

(2) A public body shall seek the advice of the Commission on proposed financial rewards or cash awards before establishing a financial reward or cash award scheme.

Factors to be considered in recognising productivity and performance.

22. The Commission shall, in advising on productivity and performance, be guided by the following factors—

(a) achievement of productivity and performance targets;

(b) the capacity of a public body to afford the cost of proposed reward;

(c) the ability of a public body to sustain payment of the reward; and

(d) government policies and guidelines.

Collective bargaining negotiation.

23.(1) The Commission shall, pursuant to section 11 of the Act, advise public bodies on the remunerative and benefit items payable out of public funds in collective bargaining negotiation.

(2) Collective bargaining negotiation between a public body and a trade union shall cover a four-year cycle.

Procedure for collective bargaining negotiation.

24.(1) A public body with a recognition agreement with a trade union shall seek the advice of the Commission on remuneration and benefits items payable out of public funds before the commencement of collective bargaining negotiation.

(2) A public body shall provide the following information required for provision of advice on collective bargaining negotiation—

(a) any trade union proposals and management recommendations;

(b) the public body's financial performance;

(c) the budget allocation;

(d) the approved salary structure and staff establishment; and

(e) any other information that may be required by the Commission.

(3) The Commission shall, upon receipt of a request for advice, provide the public body with advice on the

remunerative and benefits items payable out of public funds for purposes of collective bargaining negotiation, taking into account the principles and factors set out in regulation 7.

(4) A public body shall undertake negotiation based on the advice of the Commission.

(5) Upon conclusion of collective bargaining negotiation, the public body shall request the Commission for clearance of the draft collective bargaining agreement to facilitate its registration at the Employment and Labour Relations Court.

PART III—MISCELLANEOUS PROVISIONS

Submission of request for setting, review and advice.

25. The Commission may, at any time, upon the request of a public body, in writing,—

- (a) set and review the remuneration and benefits of the State officers serving in the public body; or
- (b) advise on the remuneration and benefits of the other public officers serving in the public body.

Review of advice on remuneration and benefits.

26.(1) The advice of the Commission, in relation to the remuneration and benefits of all other public officers shall only be reviewed by the Commission.

(2) A public body shall seek for the review of the advice of the Commission in writing.

(3) The Commission may review its advice upon receipt of new material information or justification not previously placed before it provided that such review shall take into account the principles and factors set out in regulation 7.

(4) The advice of the Commission once reviewed supersedes any prior advice.

Request for information.

27.(1) Pursuant to section 13(1)(a) of the Act, the Commission may, request a public body to provide such information as may be relevant.

(2) A public body shall, upon receipt of the request in paragraph (1), provide the information to the Commission in the manner specified by the Commission in the request.

Disputes relating to remuneration and benefits.

28.(1) The Commission shall encourage the use of alternative dispute resolution mechanisms in any disputes relating to remuneration or benefits for State and other public officers.

(2) A public body shall notify the Commission of any dispute relating to remuneration or benefits for its State or other public officers.

(3) A public body shall, where the Commission is not a party to a dispute, notify the Commission of any court proceedings relating to the remuneration and benefits of its State or other public officers within fourteen days of commencement of the suit or service of pleadings.

Monitoring and evaluation.

29.(1) The Commission may monitor and evaluate the implementation of its set remuneration and benefits for State officers or advice on remuneration and benefits for other public officers to—

(a) assess effectiveness in the implementation of the set or reviewed remuneration and benefits of State officers and advice on remuneration and benefits for other public officers.

(b) identify challenges in the implementation of paragraph (a) above; and

(c) in liaison with public bodies, identify remedies, where

appropriate, for continuous improvement.

(2) The Commission shall sensitize public bodies on implementation of the—

(a) set and reviewed remuneration and benefits for State officers; and

(b) advice on remuneration and benefits for other public officers.

Stakeholder
consultation.

30. The Commission shall in the course of discharging its mandate undertake consultations with its stakeholders.

Made on the, 2022

LYN CHEROP MENGICH,
Chairperson,
Salaries and Remuneration Commission.



THE REPUBLIC OF KENYA

LAWS OF KENYA

SALARIES AND REMUNERATION COMMISSION ACT

NO. 10 OF 2011

Revised Edition 2018 [2011]

Published by the National Council for Law Reporting
with the Authority of the Attorney-General

www.kenyalaw.org

NO. 10 OF 2011**SALARIES AND REMUNERATION COMMISSION ACT****ARRANGEMENT OF SECTIONS****PART I – PRELIMINARY***Section*

1. Short title.
2. Interpretation.

PART II – COMPOSITION AND ADMINISTRATION

3. Powers of the Commission as a body corporate.
4. Appointment of chairperson and members.
5. Qualification for appointment of chairperson and members.
6. Nomination of members.
7. Procedure for nominations.
8. Oath of office.
9. Vacancy in office of chairperson or member.
10. Filling of vacancy.
11. Functions of the Commission.
12. Guiding principles for the Commission.
13. Powers of the Commission.
14. Committees of the Commission.
15. Procedures of the Commission.
16. Appointment of secretary of the Commission.
17. Removal of secretary.
18. Secondment of staff.
19. The common seal of the Commission.

PART III – FINANCIAL PROVISIONS

20. Funds of the Commission.
21. Financial year.
22. Annual estimates.
23. Accounts and Audit.

PART IV – MISCELLANEOUS PROVISIONS

24. Report of the Commission.
25. Offences.
26. Regulations.
27. Code of conduct.
28. Transitional and savings.

SCHEDULE

FIRST SCHEDULE —

OATH/AFFIRMATION OF THE OFFICE OF
CHAIRPERSON/A MEMBER/SECRETARY

SECOND SCHEDULE —

CONDUCT OF BUSINESS AND AFFAIRS OF
THE COMMISSION

NO. 10 OF 2011

SALARIES AND REMUNERATION COMMISSION ACT

[Date of assent: 27th July, 2011.]

[Date of commencement: 29th July, 2011.]

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

[Act No. 10 of 2011, Act No. 57 of 2012, Act No. 4 of 2018.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Salaries and Remuneration Commission Act.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to finance;

“**chairperson**” means the chairperson of the Commission appointed under the Constitution, in accordance with the procedure set out in section 4;

“**Commission**” means the Salaries and Remuneration Commission established by Article 230 of the Constitution;

“**public officer**” means a person holding a public office as defined in the Constitution;

“**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;

“**secretary**” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution, in accordance with the procedure set out in section 16;

“**State officer**” has the meaning assigned thereto in the Constitution.

(2) Despite subsection (1), until after the first general elections under the Constitution, references in this Act to the expression “**Cabinet Secretary**” shall be construed to mean “**Minister**”.

PART II – COMPOSITION AND ADMINISTRATION

3. Powers of the Commission as a body corporate

In addition to the powers of the Commission under article 253 of the Constitution, the Commission shall have the power to—

- (a) acquire, hold, charge and dispose of movable and immovable property; and

- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

4. Appointment of chairperson and members

(1) The chairperson and other members of the Commission shall be appointed in accordance with the provisions of Article 230 of the Constitution and this Act.

(2) The member of the Commission under Article 230 (2)(c)(iii) of the Constitution shall be nominated by a joint forum of professional bodies represented by the Association of Professional Societies of East Africa.

(3) The chairperson and members other than those appointed under Article 230 (2)(d) shall serve on a full time basis for a non-renewable term of six years.

[Act No. 4 of 2018, Sch.]

5. Qualification for appointment of chairperson and members

(1) A person shall be qualified for appointment as the chairperson if such person—

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to either—
 - (i) public management;
 - (ii) finance and administration;
 - (iii) human resource management;
 - (iv) economics; or
 - (v) labour laws;
- (c) has knowledge of labour market trends in Kenya as relates to income in the public and private sector;
- (d) meets the requirements of Chapter Six of the Constitution; and
- (e) has had a distinguished career in their respective fields.

(2) A person shall be qualified for appointment as a member if the person—

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in either—
 - (i) finance and administration;
 - (ii) public management;
 - (iii) economics;
 - (iv) human resource management; or
 - (v) labour laws;
- (c) meets the requirements of Chapter Six of the Constitution; and
- (d) has had a distinguished career in their respective fields.

(3) A person shall not be qualified for appointment as the chairperson or a member if the person—

- (a) is a member of Parliament or County Assembly;
- (b) is a member of a governing body of a political party;
- (c) is a member of a local authority;

- (d) is an undischarged bankrupt; or
- (e) has been removed from office for contravening the provisions of the Constitution or any other law.

6. Nomination of members

(1) Every nominating body under Article 230(2)(b) and (c) of the Constitution shall nominate its representative to the Commission in a competitive and transparent manner in accordance with section 7.

(2) A person shall not be qualified for nomination under Article 230 (2)(d) or (e) of the Constitution unless such person holds the qualifications specified in section 5(2).

7. Procedure for nominations

(1) Within fourteen days of the commencement of this Act, or of the occurrence of a vacancy in the Commission relating to the members under Article 230(2)(b) and (c) of the Constitution, the relevant nominating body shall, by advertisement in at least two local daily newspapers of national circulation, invite applications from persons who qualify for nomination under the Constitution and this Act for nomination as a member of the Commission.

(2) The relevant nominating body shall consider the applications received under subsection (1) to determine their compliance with the provisions of the Constitution and this Act, interview the applicants and forward the names of two persons so qualified, who shall be of opposite gender, to the Cabinet Secretary for onward transmission to the President.

(3) *Deleted by Act No. 4 of 2018, Sch.*

(4) *Deleted by Act No. 4 of 2018, Sch.*

(5) *Deleted by Act No. 4 of 2018, Sch.*

(6) *Deleted by Act No. 4 of 2018, Sch.*

(7) *Deleted by Act No. 4 of 2018, Sch.*

(8) *Deleted by Act No. 4 of 2018, Sch.*

(9) *Deleted by Act No. 4 of 2018, Sch.*

(10) The President shall, within seven days receipt of the names forwarded under subsection (2) nominate the members of the Commission from each category and forward the names of the nominees, together with the name of his nominee for Chairperson of the Commission, to the National Assembly.

(11) The National Assembly shall, within fourteen days of the day it next sits after receipt of the names of the nominees under subsection (9), consider all nominations and may approve or reject any nomination.

(12) Where the National Assembly approves the nominees, the Speaker shall forward the names of the approved nominees to the President for appointment.

(13) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the *Gazette*, appoint the chairperson and members approved by the National Assembly.

(14) Where the National Assembly rejects any nomination, the Speaker shall communicate the decision to the President to submit fresh nominations.

(15) In appointing members under this section, the President shall observe the principle of gender equity, regional and ethnic balance and equal opportunities for persons with disabilities and shall ensure that at least one-third of the members are of either gender.

[Act No. 4 of 2018, Sch.]

8. Oath of office

The chairperson, members and secretary shall each make and subscribe before the Chief Justice to the oath or affirmation set out in the First Schedule.

9. Vacancy in office of chairperson or member

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

- (a) dies;
- (b) by notice in writing addressed to the President resigns from office;
- (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the *Gazette* within fourteen days.

10. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 9, the appointment procedure provided for under the Constitution and this Act, shall apply.

(2) A member appointed under subsection (1) shall serve for a term of six years but shall not be eligible for reappointment.

11. Functions of the Commission

In addition to the powers and functions of the Commission under Article 230 (4), the Commission 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 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 offices;
- (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; and
- (h) perform such other functions as may be provided for by the Constitution or any other written law.

12. Guiding principles for the Commission

(1) In addition to the principles set under Article 230(5) of the Constitution, the Commission shall also be guided by the principle of equal remuneration to persons for work of equal value.

(2) Without prejudice to subsection (1), the Commission shall take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service.

13. Powers of the Commission

(1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution and this Act, and without prejudice to the generality of the foregoing, the Commission shall have powers to—

- (a) gather, by any means appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities;
- (b) interview any individual, group or members of organizations or institutions and, at the Commission's discretion, conduct such interviews;
- (c) hold inquiries for the purposes of performing its functions under this Act;
- (d) take any measures it considers necessary to ensure that in the harmonization of salaries and remuneration, equity and fairness is achieved in the public sector.

(2) In the performance of its functions, the Commission—

- (a) may inform itself in such manner as it thinks fit;
- (b) may receive written or oral statements from any person, governmental or non-governmental agency; and
- (c) shall not be bound by the strict rules of evidence.

14. Committees of the Commission

(1) The Commission may, from time to time, establish committees for the effective discharge of its functions.

(2) The Commission may co-opt into the membership of the committees established under subsection (1) persons whose knowledge and skills are considered necessary for the functions of the Commission.

15. Procedures of the Commission

(1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.

(2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

(3) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

16. Appointment of secretary of the Commission

(1) The appointment of the secretary to the Commission under Article 250(12) of the Constitution shall be through a competitive recruitment process and the prior approval of the National Assembly.

(2) A person shall be qualified for appointment under subsection (1) if such person—

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has at least ten years' experience in human resource management, financial management or public management; and
- (d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

(3) As the chief executive officer, the secretary shall be responsible to the Commission for—

- (a) the implementation of functions of the Commission;
- (b) the formation and development of an efficient administration; and
- (c) the organization, control and management of staff.

17. Removal of secretary

(1) The secretary may be removed from office by the Commission, in accordance with the terms and conditions of service, for—

- (a) inability to perform the functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct or misbehaviour;
- (c) incompetence or negligence of duty; or
- (d) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given an opportunity to defend himself or herself against any allegations against him or her.

18. Secondment of staff

(1) In addition to the staff appointed by the Commission under Article 252(1) (c) of the Constitution, the Government may, upon the request by the Commission, second to the Commission such number of public officers as may be necessary for the purposes of the Commission.

(2) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

19. The common seal of the Commission

(1) The common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

PART III – FINANCIAL PROVISIONS

20. Funds of the Commission

- (1) The funds of the Commission shall consist of—
- (a) monies provided by Parliament for the purposes of the Commission;
 - (b) such monies or assets as may accrue to the Commission in the course of the exercise of its powers or the performance of its functions under this Act; and
 - (c) all monies from any other source provided or donated or lent to the Commission.

(2) The receipts, earnings or accruals of the Commission and the balances at the close of each financial year shall not be paid into the Consolidated Fund but shall be retained for purposes of this Act.

21. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in every year.

22. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and in particular, shall provide for the—

- (a) payment of remuneration in respect of the members of the Commission;
- (b) payment of salaries and remuneration in respect of staff of the Commission;
- (c) payment of pensions, gratuities and other charges in respect of benefits which are payable out of the funds of the Commission;
- (d) maintenance of the buildings and grounds of the Commission;
- (e) funding of training, research and development of activities of the Commission; and
- (f) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in the National Assembly.

23. Accounts and Audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor General the accounts of the Commission in respect of that year together with—

- (a) a statement of the income and expenditure of the Commission during that year; and
- (b) statement of the assets and liabilities of the Commission on the last day of that financial year.

(3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act, 2003 (No. 12 of 2003).

PART IV – MISCELLANEOUS PROVISIONS

24. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain—

- (a) the financial statements of the Commission;
- (b) a description of the activities of the Commission;
- (c) such other statistical information as the Commission considers appropriate relating to the Commission's functions; and
- (d) any other information relating to its functions that the Commission considers necessary.

25. Offences

A person who—

- (a) without justification or lawful excuse, obstructs or hinders, or assaults or threatens a member or staff of the Commission acting under this Act;
- (b) submits false or misleading information; or
- (c) misrepresents to or knowingly misleads a member or staff of the Commission acting under this Act,

commits an offence and is liable to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding five years, or to both.

26. Regulations

(1) The Commission may make regulations generally for the better carrying into effect of any provisions of this Act.

(2) The power to make Regulations shall be exercised only after a draft of the proposed Regulations has been approved by the National Assembly.

[Act No. 57 of 2012, s. 59.]

27. Code of conduct

The Commission shall develop a code of conduct for its members and staff.

28. Transitional and savings

Every person who immediately before the commencement of this Act was an employee of the Government attached to the former Permanent Public Service Remuneration Review Board shall, upon the commencement of this Act be given an option to serve in the Commission and if not appointed by the Commission, be redeployed in the Public Service.

FIRST SCHEDULE

[Section 8.]

OATH/AFFIRMATION OF THE OFFICE OF
CHAIRPERSON/A MEMBER/SECRETARY

I having been appointed (the Chairperson to/member of/Secretary to) the Salaries and Remuneration Commission under the Salaries and Remuneration Commission Act, 2011, do swear/solemnly affirm that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my knowledge and ability, perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD)

Sworn/Declared by the said

Before me this day of

Chief Justice.

SECOND SCHEDULE

[Section 15.]

CONDUCT OF BUSINESS AND AFFAIRS OF THE COMMISSION

1. Meetings

(1) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(2) Meetings shall be convened by the secretary in consultation with the chairperson and shall be held at such times and such places as the chairperson shall determine.

(3) Unless three quarters of the members otherwise agree, at least seven days' notice of a meeting shall be given to every member.

(4) The chairperson shall preside over all meetings and in the absence of the chairperson, by a person elected by the Commission at the meeting for that purpose.

2. Conflict of interest

(1) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and in which matter that person or that person's spouse is directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes subparagraph (1) commits an offence and shall be liable, upon conviction to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding seven years, or to both.

(4) No member or staff of the Commission shall transact any business or trade with the Commission.

3. Quorum

The quorum of the meeting shall not be less than half of the appointed members with voting rights under Article 230 of the Constitution.

4. Voting

A decision of the Commission shall be by a majority of the members present and voting and, in the case of an equality of votes, the person presiding at the meeting shall have a second or casting vote.

5. Minutes

Minutes of all meetings shall be kept and entered in records kept for that purpose.





Salaries & Remuneration Commission

Rewarding productivity

RECEIVED
06 JUN 2022
CLERK'S OFFICE
THE NATIONAL ASSEMBLY
DATE: 07 JUN 2022
6th June, 2022

Merdy

DDHSP
per Mr. Sialai
J. Sialai
8/6/22

Ham
mon

2) How, take this for regulations, response to Commission request 6/6/22

Ref: SRC/ADM/18 (58)

Michael R. Sialai, EBS
Clerk National Assembly
P.O Box 41842 00100
NAIROBI

Dear Mr. Sialai,

RE: CONSIDERATION AND APPROVAL OF THE DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS, 2022.

The Salaries and Remuneration Commission (SRC) is established under Article 230 of the Constitution of Kenya and mandated to set and regularly review the remuneration and benefits for State officers, and to advise the national and county governments on the remuneration and benefits for other public officers.

In addition, the Salaries and Remuneration Commission Act, 2011 vests additional powers and functions on SRC. Section 26 of the SRC Act, 2011 mandates the Commission to make regulations generally for the better carrying into effect of the provisions of the Act.

The Commission has pursuant to Section 26 SRC Act developed the Draft Salaries and Remuneration (Remuneration and Benefits of State and Other Public Officers Regulations), 2022. The draft regulations were subjected to public participation and the views of the stakeholders and general public were taken into account and where appropriate incorporated into the draft.

A republication meeting between the Parliamentary Committee on Delegated Legislation and SRC was held on 3rd June, 2022 when SRC presented the draft regulations to the

Committee. The Committee considered the draft regulations and guided on the change to be made to the draft.

SRC has in line with the Committee's guidance made the requisite amendment to the draft regulations by deleting clause 31.

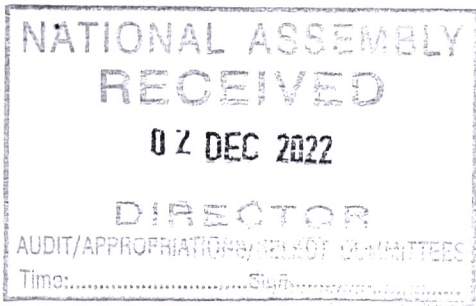
Please find attached hereto the Revised Draft Salaries and Remuneration (Remuneration and Benefits of State and Other Public Officers Regulations), 2022, for consideration and approval by the National Assembly.

The Commission appreciates the continued support of the National Assembly in the discharge of its mandate and looks forward to your prompt action.

Yours



Mrs. Anne R. Gitau, MBS
COMMISSION SECRETARY/CEO



Salaries & Remuneration Commission
Rewarding productivity

A.A. OSC
Please bring the Draft before the Delegated Legislation Committee
24/11/22

Ref. No: SRC/TS/12

24th November 2022

Mr. Samuel Njoroge
Clerk of the National Assembly
Parliament Buildings
P O Box 41842 – 00100
NAIROBI

② Esther Ngunjiri
For consideration by the committee
24/11/22

Dear Mr. Njoroge,

DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS, 2022

Reference is made to your letter Ref. No. NA/DAA&OSC/CDL/2022/(002) inviting the Salaries and Remuneration Commission (SRC) and SRC's letter Ref. No. SRC/TS/12 dated 21st November 2022 on the above matter.

During the meeting with the Committee on Delegated Legislation on 22nd November 2022, SRC presented the Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulations, 2022 to the Committee and received comments thereon.

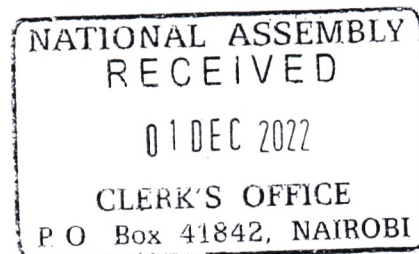
In the course of the meeting, the Committee asked whether SRC had either made, developed or issued any statutory instrument, as defined under Section 2 of the Statutory Instruments Act, that requires to be tabled before the National Assembly for approval in line with Section 11 of the said Act.

In response to the inquiry made, SRC confirms that save for the **Draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Other Public Officers) Regulations, 2022** which have already been tabled before the National Assembly for pre-publication scrutiny and approval, SRC has not made, developed or issued any other Statutory Instrument.

The Commission appreciates your cooperation and support as we discharge our respective mandates.

Yours sincerely,

MRS. ANNE R. GITAU, MBS
COMMISSION SECRETARY/CEO



TEACHERS SERVICE COMMISSION



MEMORANDUM
ON THE DRAFT SRC (REMUNERATION AND BENEFITS OF
STATE AND OTHER PUBLIC OFFICERS)
REGULATIONS 2022

By

THE TEACHERS SERVICE COMMISSION

24TH FEBRUARY, 2023

TSC MEMORANDUM ON THE DRAFT SRC (REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS) REGULATIONS 2022

1. INTRODUCTION

- 1.1 The Teachers Service Commission (the Commission) is established under **Article 237 (1)** of the Constitution as a constitutional Commission with primary functions being to: - register trained teachers; recruit and employ registered teachers; assign teachers for service in any public school or institution; promote and transfer teachers; exercise disciplinary control over teachers; and terminate the employment of teachers engaged in public service.
- 1.2 The Commission is further mandated Under **Article 237 (3)** of the Constitution to: - review the standards of education and training of persons entering the teaching service; review the national demand for, and the supply of teachers; and advise the National Government on matters relating to the teaching profession.
- 1.3 On the other hand, section **11** of the Teachers Service Commission Act requires the Commission to: -
- 1.3.1 Formulate policies to achieve its mandate;
 - 1.3.2 Provide strategic leadership and direction;
 - 1.3.3 Prescribe teaching standards and ensure compliance;
 - 1.3.4 Manage the Teachers' payroll;
 - 1.3.5 Facilitate career progression & professional development;
 - 1.3.6 Monitor the Conduct and Performance of teachers; and
 - 1.3.7 Do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers.

- 1.4 TSC is a Constitutional body bestowed with the specific mandate to undertake teacher management functions. Under Article 250 of the Constitution, membership of the Commission is constituted to facilitate the discharge of the mandate. Article 249(2) (b) of the Constitution clothes the Commission with independent status hence, it is not subject to direction or control by any person or authority.
- 1.5 Further, the Commission is the single largest employer in the public sector in this Country. By implication, the proposed Regulations on remunerations and benefits of state and other public officers will have ramifications on their interests and the legal framework for the management of teaching service in this country.
- 1.6 The Commission has evaluated the proposed Regulations against the background of its potential impact on public service, specifically teaching service and hereby presents its views on the same for your consideration.

2. GENERAL VIEW ON THE PROPOSED REGULATIONS

2.1 Definitions

'**Benefits**' – the word has been used to include both financial and non-financial compensation. We are of the view that to the extent the definition and/or interpretation thereof encompasses non-financial compensation; it is ultra vires as it exceeds the mandate of SRC under **Article 230 (4)** of the Constitution.

2.2 Regulation 3 (b) (iii) postulates that SRC has the objective to : "keep under review all matters relating to salaries and remuneration for other public officers"

It is our view that this objective falls outside the mandate of SRC as set out under **Article 230 (4)** of the Constitution.

- 2.3 SRC's mandate is restricted by the Constitution to advise the National and County Government on the remuneration and benefits of public officers. The Regulations cannot grant a new substantive mandate to keep under review **all matters** relating to salaries and remuneration for other public officers.
- 2.4 In addition, the Constitution vests the function of managing public officers to various public bodies in the public sector. In the case of the TSC, aside from the power to hire and manage teachers, section 18 of the TSC Act provides for a Secretariat staff to support the work of the Commission. Consequently, having such a general clause in the proposed Regulations is not only *ultra vires* the Constitution but will be a usurpation of the role of employers in the public service.

Pension Management in Kenya

- 2.5 Pension regime in Kenya is regulated by the Constitution and statute law that includes the Pensions Act, the Retirement Benefits Act, and the Public Service Superannuation Scheme Act. These legislations provide statutory guidelines on the entire pension regime in public service.
- 2.6 Further, the statutory framework and attendant Regulations vests the mandate for the management of retirement benefits with different institutions in the public service including, the National Treasury, the Retirement Benefits Authority and other public employers.
- 2.7 A plain reading of **Regulation 6** of the proposed Regulations indicates that it seeks to upset the above substantive statutory framework through the "back door" i.e. subsidiary legislation. As a cardinal principle of a law, which we have amplified herein-above, Regulations cannot amend a substantive statutory provision.

For instance, the Regulations propose that SRC shall set and advice on the pension or gratuity payable to state officer and public officers. This contradicts the provision of the first schedule of the **Pensions Act** that provides a statutory formula for calculating pension emoluments in public service.

- 2.8 Under Section 11(g) of the SRC Act, the Commission has the mandate to **make recommendations on the review of pensions payable to holders of public offices**. The proposed Regulations now seek to extend this mandate beyond the provisions of the Parent Act, i.e. SRC Act to include **the "setting and reviewing pensions payable to eligible persons."**
- 2.9 It is the TSC's view that this will create a glaring inconsistency that will not stand the test of time and/or meet the legal threshold for law making. The Regulation (s) as drafted and presented to the public contradicts the spirit and tenor of the Pensions Act, the Retirement Benefits Act, and the Public Service Superannuation Scheme Act.
- 2.10 Accordingly, to the extent that the proposed Regulations encroach on matters already sufficiently and substantially provided by the mentioned statutes, the same fails the *ultra vires* test.
- 2.11 We reiterate that there are statutory legislations in place that create, define and regulate the right to pension. The proposed Regulations will render these statutory instruments impotent and circumvent the powers and roles of bodies under the Pension Act, Retirement Benefits Act, and Public Service Superannuation Scheme Act. In this regard, it is our view that the proposed Regulations should be designed to ensure SRC operates within the confines of the Constitution and relevant statute law.

Managerial prerogative of an employer

- 2.12 Generally, employers have the mandate to recruit, supervise, appraise, and reward employees based on achievements and productivity instruments developed by the employer.
- 2.13 Accordingly, the TSC pursuant to **Section 11(f)** of the TSC Act has in place the Performance, Recognition, Rewards and Sanctions Policy for its employees. This policy framework complements the Performance Contract and Performance Appraisal tools that measure employee productivity, and consequently give rewards or sanctions where appropriate.
- 2.14 In the same spirit, the Public Service Commission has in place the Performance Rewards and Sanctions Policy Framework for the Public Service. This framework establishes performance management system for rewarding exemplary performance, and where necessary, administering sanctions for poor performance, with a view to enhance productivity in the Public Service.
- 2.15 Against this background, we note that, **Regulation 21** (2) seeks to irregularly grant SRC the mandate to advice on internal policies or guidelines related to rewards and productivity.
- 2.16 Accordingly, we propose that **Regulation 21** be deleted to the extent that it seeks to unlawfully usurp the mandate of Public Service employers contrary to **Article 249** of the Constitution.

Our view is further buttressed by the fact that issues of reward and productivity are managerial, often emanating from the administrative prerogative that vests exclusively with an employer. While we appreciate the mandate of SRC under the law, TSC being a Constitutional Commission with operational independence cannot be directed by "any other person" or "authority" save as provided in law.

CONCLUSION

For avoidance of doubt, we confirm that as Institution, we have had a perfect and very cordial working relationship with SRC. While we appreciate the mandate of SRC, we are of the view that the Regulations should be prepared in a manner that will not diminish or encroach on the mandate of the employers in the public sector.

-----**END**-----

REPUBLIC OF KENYA



Telegraphic Address
'Bunge', Nairobi
Telephone 2848000
Fax: 2243694
E-mail: cSenate@parliament.go.ke

Parliamentary Service Commission
Parliament Buildings
P. O. Box 41842 -00100
NAIROBI, Kenya

PARLIAMENT
CLERK OF THE SENATE/ SECRETARY TO THE PARLIAMENTARY SERVICE COMMISSION

OUR REF: DLC/ADM/1/52/WT

24th February, 2023

Mr. Samuel Njoroge,
Clerk of the National Assembly,
Parliament Buildings,
P.O Box 41842-00100,
NAIROBI.

Dear Clerk,

MEETING WITH THE NATIONAL ASSEMBLY COMMITTEE ON DELEGATED LEGISLATION ON THE DRAFT SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND PUBLIC OFFICERS) REGULATION, 2022.

Please refer to your letter Ref:NA/DAA&OSC/CDL/2023/(001) dated 16th February 2023 inviting the Parliamentary Service Commission for a meeting with the National Assembly Committee on Delegated Legislation to deliberate on the draft Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2022.

The Parliamentary Service Commission hereby confirms that it shall attend the meeting. In the meantime, the Parliamentary Service Commission would like to present to the Committee on Delegated Legislation the following memorandum of its views on the draft Regulations:

MANDATE OF THE SALARIES AND REMUNERATION COMMISSION

Members of Parliament

1. Article 230 of the Constitution of Kenya, 2010 establishes the Salaries and Remuneration Commission (SRC). Articles 230(4) & (5) 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.*

(5) *In performing its functions, the Commission shall take the following principles into account—*

- (a) *the need to ensure that the total public compensation bill is fiscally sustainable;*
- (b) *the need to ensure that the public services are able to attract and retain the skills required to execute their functions;*
- (c) *the need to recognise productivity and performance; and*
- (d) *transparency and fairness.*

Parliamentary Service Commission's mandate

2. The Parliamentary Service Commission is established by Article 127 of the Constitution which states as follows at Article 127(6):

- (6) *The Commission is responsible for—*
 - (a) *providing services and facilities to ensure the efficient and effective functioning of Parliament;*
 - (b) *constituting offices in the parliamentary service, and appointing and supervising office holders;*
 - (c) *preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;*
 - (d) *undertaking, singly or jointly with other relevant organisations, programmes to promote the ideals of parliamentary democracy; and*
 - (e) *performing other functions—*
 - (i) *necessary for the well-being of the members and staff of Parliament; or*
 - (ii) *prescribed by national legislation.*

3. The draft Regulations define “benefit” as “means any financial or non-financial compensation or allowance that is provided to a State or other public officer which is over and above the basic or consolidated salary and arising out of employment of the State or other public officer.”

SRC is over-stepping its mandate and veering into the facilitative role of the Parliamentary Service Commission

4. The Salaries and Remuneration has in past over-stepped its mandate of setting the remuneration and benefits of State Officers.

5. In particular, in the Gazette Notice dated 27th July 2022 in which the SRC reviewed and set the remuneration for Members of the 13th Parliament, the Salaries and Remuneration Commission purported to set the mileage claim for Members of Parliament.
6. A claim for mileage is a reimbursement for costs incurred in the provision of transport for official purposes. This is a facility provided to Members of Parliament by the Parliamentary Service Commission under Article 127(6) of the Constitution and not a benefit.
7. It is *ultra vires* or beyond the powers of the Salaries and Remuneration Commission under Article 230 (4) (a) of the Constitution to purport to set facilitative allowances for State Officers as its powers are limited to setting and regularly reviewing remuneration and benefits.
8. Article 230 (4) (a) must be read together with Article 127 (6) of the Constitution, with each provision sustaining the other to achieve the aspirations of the people of Kenya as set out in the Preamble to the Constitution.
9. The Salaries and Remuneration Commission should therefore not interfere with the responsibility of the Parliamentary Service Commission to provide facilitation to Members of Parliament to undertake their constitutional responsibilities. These responsibilities entail travelling to and from Parliament to their respective constituencies/counties.

SRC is over-stepping its mandate and veering into the employment role of State Organs with respect to public officers and in particular that of the Parliamentary Service Commission with respect to parliamentary staff

10. The Constitution of Kenya makes a distinction between the mandate of the Salaries and Remuneration Commission with respect to State Officers and with respect to Public Officers.
11. It is important for the Salaries and Remuneration Commission to properly recognize the distinction between its constitutional power to set remuneration and benefits for State Officers and its power to advise on the remuneration and benefits for other public officers. During the Constitution making process, the Committee of Experts on Constitutional Review in their final report dated 11th October, 2010 stated as follows with regard to the Salaries and Remuneration Commission at paragraph 7.5.5.4:

7.5.5.4 *The Salaries and Remuneration Commission*

The functions of the Salaries and Remuneration Commission were revised in the RHDC. Its power to set the remuneration of MPs, members of the executive, including the president, members of commissions and other independent offices and other senior office holders was retained but its power to set the remuneration of other public officers was removed. This is because setting salaries in the public service is a matter closely linked to government policy and subject to collective bargaining. It is therefore not appropriately taken out of the hands of the executive (and unions) and given to an independent body. Instead, under the RHDC the Commission was to make recommendations on all other salaries etc in the public service. The Commission was covered by the provisions of Chapter 16 of that draft and so is independent. A rigorous process must be followed to remove members of the Commission.

The composition of the Commission was also revised to ensure that each sector affected by its decisions can nominate members to serve on it. In addition, three additional members of the Commission were to supply professional advice and do not vote (these are persons designated by the Attorney-General's office, by the Cabinet Secretary responsible for finance and by the Cabinet Secretary responsible for human resources).

The Salaries and Remuneration Commission protects constitutional democracy in two important ways. First, following practice in many modern democracies, it ensures that people do not set their own salaries – thus although MPs must pass the budget, they do not set their own salaries. Secondly, it protects the remuneration of members of the institutions that are intended to guard the Constitution and oversee the executive and Parliament. So, for instance, Parliament or the executive cannot intimidate judges by threatening to lower their salaries – the salaries are set and protected by the Commission.

12. In summary, State Officers do not have a direct employer who is responsible for their supervision and therefore well placed to set their remuneration. The SRC therefore comes in to set the remuneration for State Officers. On the other hand, public officers have a direct employer responsible for their supervision, reward and discipline and therefore the employer of respective public officers is vested with the responsibility of setting the remuneration for the public officers.

13. The role of the Salaries and Remuneration Commission with regard to public officers is therefore restricted to an advisory role. It follows that in so far as the remuneration and benefits of public officers are concerned, the Salaries and Remuneration Commission's role is limited to an advisory role. Employers of public officers are not required to obtain the approval of the Salaries and Remuneration Commission when setting the salaries and benefits of public officers.
14. The draft Regulations by SRC seek to make it mandatory for public bodies to comply with the advice it provides with regards to the remuneration and benefits of public officers.
15. The Supreme Court has occasion to deal with the matter of advice by constitutional commissions in Petition No. 42 Of 2019 between Kenya Vision 2030 Delivery Board and The Commission on Administrative Justice and 2 Others where the Supreme Court held as follows:

We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this court and other superior courts. As such we are of the opinion that the following guiding principles ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

Guiding Principles on the recommendations from Commission to public bodies:

- (a) *Any power to make a recommendation ought to be specifically provided for in the Constitution or in law;*
- (b) *Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;*
- (c) *A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law;*
- (d) *The manner in which a recommendation is to be implemented by a Public entity is discretionary;*
- (e) *Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority*

- (f) *Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary.*

16. Section 10 of the Parliamentary Service Act, 2000 (*now repealed*) provided as follows:

10. *Parliamentary scheme of service*

The Commission shall prescribe a scheme of service setting out the terms and conditions for the appointment of the officers and other staff of the Service which shall provide for—

- (a) *the appointment and confirmation of appointment of officers and other staff;*
- (b) *promotions, resignations and termination of appointments;*
- (c) *the scales of salaries and allowances; and*
- (d) *the designation and grades of officers and other staff.*

17. The succeeding Act, the Parliamentary Service Act, 2019 at section 11(1) provides that-

In addition to the functions set out in Article 127(6) of the Constitution, the Commission shall – determine and review the terms and conditions of service of the persons holding or acting in the offices of the Service.

18. The Salaries and Remuneration Commission has recently sought to review and advise on the abolition of various allowances payable in the public service and sought to enforce implementation of the same by setting the effective dates for compliance.

19. As set out above, the Salaries and Remuneration Commission may advise but it is the prerogative of the specific public entities that employ the public officers to set the remuneration and benefits of the public officers in its employment.

Comments on specific clauses in the draft Regulations

20. **Clause 4(1)** provides that the SRC shall review and set remuneration and benefits for State Officers every four years.

21. In the last review, carried out by SRC in 2022, the Parliamentary Service Commission observed that-

- (i) SRC had placed Members of Parliament as well as Court of Appeal judges in the same Job Grade at category F1.

- (ii) Unlike Court of Appeal judges whose salaries were graduated, salaries for Members of Parliament were static.

22. However, salaries for Court of Appeal Judges and indeed all other public officers are graduated with annual increments factored in to compensate for inflation and the rising cost of living. This is therefore discriminatory and unfair treatment to Members of Parliament.

23. Taking into account the fact that the review contemplated at clause 4 is to be undertaken every four years, SRC needs to make provision for an annual increment in salary for Members of Parliament.

24. **Clause 4(4)** provides that the Salaries and Remuneration Commission shall undertake the review taking into account the applicable national budgeting and planning cycles. This is contrary to section 11(e) of the Principal Act which provides for the Commission to simply undertake the review. It is thereafter the responsibility of Parliament to determine whether to allocate funds for implementation of the review. It is Parliament's role to make the budget as well as plan for the country's medium-term expenditure framework. The Commission should therefore work closely with Parliament and the National Treasury with undertaking reviews of remuneration and benefits.

25. The following clauses in the draft Regulations usurp the independence of other Constitutional Commissions to handle staff matters:

- (i) **Clause 8** provides that the Salaries and Remuneration Commission shall advise on the remuneration and benefits for public officers **indicating the effective date of implementation** thereby implying that the Salaries and Remuneration Commission has power to direct public bodies on when to implement changes in remuneration for their officers.
- (ii) **Clause 10 (1) (a)** and **Clause 11 (2) (a)** which require that all public bodies must have a job evaluation conducted by the Salaries and Remuneration Commission.
- (iii) **Clause 19 (2)** provides that the salary structures for other public officers may only be reviewed on the advice of the Commission.

26. These proposals infringe on the powers and responsibilities of employers of public officers to undertake their own job evaluations for employees. In particular, the Parliamentary Service Commission, the Judicial Service Commission and the

Public Service Commission have the power to undertake job evaluation for public officers who are employees of these Commissions.

27. The Salaries and Remuneration Commission has no powers to redefine contractual relations between an employer and employee.
28. **Clause 19(2)** is *ultra vires* the powers of the Salaries and Remuneration Commission as set out in the Constitution and the Salaries and Remuneration Commission Act which is to advise on the remuneration and benefits of other public officers. The Commission cannot compel a public service institution to maintain the salary structure of its public officers as advised by the Commission.
29. **Clause 21(2)** provides that a public service institution shall seek the prior advice of Commission before awarding its public officers a reward for productivity and performance. Again, this derogates from the power of employer public service institutions and goes beyond the powers of the Commission to advice.
30. By purporting to set and regularly review the allowances and benefits paid in the public service generally and in particular the Parliamentary Service the Salaries and Remuneration Commission has overstepped its constitutional mandate and contravened the Constitution and Parliamentary Service Act.
31. That it is unfair labour practise to alter to their detriment the allowances and benefits of an employee midway through their employment. Such an action would also be in breach of the contract between the employees and the employer.
32. The Parliamentary Service Commission notes the need for Constitutional Commissions and Independent Offices to work together in a collaborative, mutual manner while respecting each other's mandate. Article 259(11) of the Constitution should be read together with Article 249(2) of the Constitution which provides:
 - (2) *The commissions and the holders of independent offices—*
 - (a) *are subject only to this Constitution and the law; and*
 - (b) *are independent and not subject to direction or control by any person or authority.*
33. A Policy across the entire public sector should take the wide and varied mandates, the unique human resource needs and different environments of all the organizations that comprise the public sector into account.

34. The nomenclature of allowances is unique to institutions and it would not be prudent to merge, rename and restructure allowances and benefits.
35. **Clause 23(2)** is *ultra vires* the powers of the Commission by prescribing the period of collective bargaining agreements. The Commission may advise on the period of a collective bargaining agreement but may not subscribe the period of the agreements.
36. **Clause 24 (1)** provides that a public service institution with a recognition agreement with a trade union shall seek the prior advice on the Commission before commencement of collective bargaining negotiation. This derogates from the power of employer public service institutions and goes beyond the powers of the Commission to advise.
37. **Clauses 26(2),(3) & (4)** are similarly *ultra vires* to the powers of the Commission and derogate from the power of employer public service institutions and goes beyond the powers of the Commission to advise.
38. **Clauses 28 (1), (2) and (3)** are *ultra vires* to the powers of the Commission with regard to advise to employer public service institutions as well as the established procedure of litigation before the judiciary.

RECOMMENDATIONS

The Parliamentary Service Commission therefore recommends, that in exercise of its oversight authority under Article 95(5)(b) of the Constitution and its powers under the Statutory Instruments Act, the National Assembly directs the Salaries and Remuneration as follows:

1. That the Salaries and Remuneration Commission should operate strictly within its mandate under Article 230(4)(a)&(b) and-
 - (a) Only set the remuneration and benefits for State Officers and cease attempting to dictate matters of a facilitative nature such as reimbursement of expenses incurred by State and Public Officers in the carrying out of their duties;
 - (b) Advise on the remuneration and benefits of all other public officers without attempting to set the same by insisting that its advise is binding or setting deadlines for implementation.
 - (c) Cease attempting to abolish various allowances in the public service.

2. That in operationalizing clause 4(1), the Salaries and Remuneration Commission treats all State Officers in the same job grade equally and in particular makes provision for an annual increment in salary for Members of Parliament.
3. That the Salaries and Remuneration Commission do delete or revise the following offending clauses in the draft Regulations:
 - (a) Clause 4(4)
 - (b) Clause 8
 - (c) Clause 10(1)(a)
 - (d) Clause 11(2)(a)
 - (e) Clause 19(2)
 - (f) Clause 21(2)
 - (g) Clause 23(2)
 - (h) Clause 24(1)
 - (i) Clause 26(2),(3) & (4)
 - (j) Clause 28(1), (2) & (3)

The above matters are humbly submitted for the consideration of the National Assembly Committee on Delegated Legislation.

Yours *faithfully,*

for: *EF*

**J. M. NYEGENYE, CBS,
CLERK OF THE SENATE/SECRETARY,
PARLIAMENTARY SERVICE COMMISSION.**

cc: **Rt. Hon. (Sen) Moses M. Wetang'ula, EGH, MP,
Speaker of the National Assembly/Chairman,
Parliamentary Service Commission,
Parliament Buildings,
NAIROBI.**



**MEMORANDUM OF THE PUBLIC SERVICE COMMISSION
ON THE PROPOSED SALARIES AND REMUNERATION COMMISSION
(REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC
OFFICERS) REGULATIONS, 2022**

Introduction

The Commission has reviewed the proposed Regulations and has observed that there are areas which need to be reviewed. It should be noted that the Public Service Commission (PSC) had presented its views on the Regulations sometime last year and had also appeared before this Committee, as previously constituted, sometime last year in which the Commission raised several issues, most of which have unfortunately been disregarded by SRC.

Constitutional and Legal Mandate

Article 234(2)(d) of the Constitution mandates the Public Service Commission (PSC) to investigate monitor and evaluate personnel practices in the public service. Section 59 of the Public Service Commission Act, 2017 defines personnel practices to include remuneration and other conditions of service. Further under Article 234 (2)(g) the Commission has power to review and make recommendations to the national government on conditions of service for public officers under its purview.

In a clear breach of PSC's constitutional and legislative mandate, SRC deals directly with Ministries, Departments and Agencies, including State Corporations and Public Universities without involving the Public Service Commission which is the responsible Commission for the said institutions. The PSC notes that the draft Regulations are seeking to legislate this unconstitutional and unlawful conduct of SRC.

The PSC, being the responsible Commission for the Ministries, Departments, Agencies, State Corporations and Public Universities is the one responsible for

staff establishment and organization structures for the said institutions. The PSC therefore has a bird's eye view on all the institutions and would therefore be able to determine any disparities in terms, remuneration and benefits in the institutions and be able, as the responsible Commission, to regularize any disparities while considering advice from the SRC on remuneration and benefits for the said institutions.

Allowing SRC, through these Regulations, to deal directly with the institutions that fall within the mandate of PSC, would create distortion in the terms of service therefore negating the principle of parity of treatment.

The Constitution also establishes other service commissions which are responsible for reviewing conditions of service for officers under them. These include: the Parliamentary Service Commission; the Judicial Service Commission; the Teachers Service Commission; The National Police Service Commission; and the County Public Service Boards. The Regulations do not recognize these institutions at all.

In reviewing conditions of service, the Public Service Commission and other service commissions may find it necessary to review remuneration and benefits. The Regulations as crafted are scanty on the procedure to be followed or documents to be attached. There should be provisions on when a service commission can seek advice from SRC, how it shall seek the said advice and what documents to be submitted alongside the request.

It is also observed that the Regulations seek to make advice provided by the Salaries and Remuneration Commission binding yet the wording in the Constitution, as interpreted by the **Supreme Court Pet. No. 42 of 2019** limits its role to advise. This is in recognition of the fact that under Article 41(5) of the Constitution employees have a right to enter into collective bargaining agreements. The parties to the negotiation of a CBA are defined, they are a trade union, employers' organization and the employer.

Whereas it is proper for service commissions to seek for advice from SRC as they engage in the negotiations, SRC is exceeding its mandate by attempting to give itself power to clear the negotiated agreement and even to monitor implementation of the advice it has given.

It would be useful to have separate provisions dealing with the two distinct functions of SRC. The Regulations should have two parts. The first part should

exclusively deal with SRC's mandate of reviewing and setting the Remuneration and Benefits for State Officers for which SRC has absolute powers and the second part should provide for SRC's function of advising the national and county governments on the remuneration and benefits of other public officers. These two functions cannot be mixed up because they present different and distinct functions for SRC. Bundling both powers together in the entire Regulations creates a distortion of SRC's functions and causes the overreach by SRC as the distinction is lost.

Apart from the general views expressed herein, the Commission presents the attached detailed matrix containing the Commission's specific views on the Regulations.

**PROPOSED AMENDMENTS TO THE SALARIES AND REMUNERATION
COMMISSION
(REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC
OFFICERS) REGULATIONS, 2022**

No.	CLAUSE	ISSUE	PROPOSED AMENDMENT
PART I—PRELIMINARY PROVISIONS			
PART II- SETTING, REVIEWING AND ADVISING ON REMUNERATION AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS			
1.	2	<p>The definition of Public body a term which has been used in the entire draft regulations gives SRC power to deal directly with Ministries, Departments, Agencies, State Corporations and Public Universities all of which fall within the mandate of the Public Service Commission.</p> <p>SRC should deal with the responsible Service Commissions which are:</p> <ul style="list-style-type: none"> (a) Public Service Commission (b) Parliamentary Service Commission (c) Judicial Service Commission (d) National Police Service Commission (e) Teachers Service Commission (f) County Public Service Board (g) County Assembly Service Board <p>SRC may also deal directly with Constitutional Commissions and Independent offices for their staff</p> <p>Dealing directly with</p>	<p>The definition should be as follows:-</p> <p>“public body” means</p> <ul style="list-style-type: none"> (a) Public Service Commission (b) Parliamentary Service Commission (c) Judicial Service Commission (d) National Police Service Commission (e) Teachers Service Commission (f) County Public Service Board (g) County Assembly Service Board (h) Constitutional Commission and Independent Office

No.	CLAUSE	ISSUE	PROPOSED AMENDMENT
		institutions that fall under the mandate of PSC is an encroachment on the mandate of the PSC	
2.	4	The entire clause exceeds the powers and functions of SRC as provided in Article 230(4) of the Constitution and Section 11 of the SRC Act.	<p>4(1) should read as follows</p> <p>4. (1) The Commission shall review and set the remuneration and benefits State Officers' every four years;</p> <p>(2) The Commission shall keep under review and advise on other public officers' remuneration every four years; and</p> <p>(3) The Commission shall when undertaking a review under paragraphs (1) and (2) evaluate the remuneration and benefits of state and other public officers with a view to institute change if necessary (delete sub regulation 3 a review encompasses evaluation)-</p>
3.	5	<p>The clause exceeds the powers and functions of SRC as provided in Article 230(4) of the Constitution and Section 11 of the SRC Act.</p> <p>It gives SRC power to deal directly with Public bodies to the exclusion of service commissions who are responsible for review of terms and conditions and are therefore able to determine how to deal with requests and SRC recommendations.</p>	<p>5(1) Whenever a review is due, the Commission shall call for relevant information from public service institutions, on remuneration and benefits for their respective State officers. other public officers. (delete)</p> <p>For public officers SRC should wait for requests from the service commissions or the employer.</p>
4.		The regulations do not provide for a guide on when a service commission, responsible for public officers may seek for advice, the	<p>Introduce a clause 5(3) as follows</p> <p>Where a Service Commission has reviewed conditions of service for public officers under its jurisdiction, and it is established</p>

No.	CLAUSE	ISSUE	PROPOSED AMENDMENT
		procedure and required documents	that there is need to review salaries and remuneration, the service commission shall request SRC to advice on the proposed salaries and remuneration.
5.	7(1) (g) and (j)	<p>The clause exceeds the powers and functions of SRC as provided in Article 230(4) of the Constitution and Section 11 of the SRC Act.</p> <p>Job evaluation and performance evaluation are responsibilities of the employer, not SRC</p>	<p>(6) The Commission shall, in undertaking a review or keeping under review all matters relating to the salaries and remuneration of public officers in accordance with these Regulations, consider —</p> <ul style="list-style-type: none"> (a) the principles set out under Article 230 (5) of the Constitution, Section 12 of the Act and other legal provisions; (b) the economic performance of the country; (c) the capacity of the public body to afford the cost of the proposed remuneration and cost; (d) the ability of the public body to sustain payment of remuneration and benefits (e) the outcome of comparative surveys on the labour markets and trends in remuneration; (f) comparative analysis between remuneration benefits for similar jobs within institutions in the same sector to ensure equity and competitiveness (g) cost of living (h) job evaluation results <i>as undertaken by the relevant service commission</i> (i) <i>cost of living;</i>

No.	CLAUSE	ISSUE	PROPOSED AMENDMENT
			<p>(j) <i>existing collective bargaining agreements</i></p> <p>(k) <i>achievement of performance and productivity targets. Performance evaluation results.</i></p> <p>Introduce in the interpretation of terms a definition for a service commission to include:</p> <ul style="list-style-type: none"> a) Public Service Commission; b) Parliamentary Service Commission; c) Judicial Service Commission; d) National Police Service Commission; e) Teachers Service Commission; f) County Public Service Board; g) County Assembly Service Board; and h) Constitutional Commission and Independent Office.
6.	8(b)	<p>Under Clause (b) SRC seeks to be the one to advise and at the same time determine the date of implementation.</p> <p>This would make the advice binding, contrary to the finding in Supreme Court in Pet. No. 42 of 2019.</p> <p>Once SRC give advice, the implementation date should be left to the employer</p>	Clause 8(b) should be deleted
7.	9 to 13	<p>Job evaluation is the work of the employer not SRC. The employer should first undertake job evaluation then seek advice on remuneration or review of remuneration from SRC</p>	<p>Clause 9 should be amended to read:</p> <p>9 A service Commission shall, prior to seeking advice from SRC on review of salaries and remuneration attach a job evaluation report to the request.</p>

No.	CLAUSE	ISSUE	PROPOSED AMENDMENT
		<p>The responsibility to conduct a job evaluation should be placed on the service commission.</p> <p>The clauses exceed the constitutional and statutory powers and functions of SRC, specifically Article 230(4)(b) of the Constitution which has been interpreted by the Supreme Court in Petition No. 42 of 2019.</p>	<p>Clauses 10 to 13 should be deleted.</p> <p>The service commissions shall develop own procedures for conducting the job evaluation.</p>
8.	14-16	These clauses are redundant since job evaluation should be undertaken by the service commissions	Delete clauses 14 to 16
9.	17	<p>The marginal note is on the procedure for developing salary structures but the said procedure is not provided.</p> <p>Regulation 17(2) is a duplication of 7(1)</p>	<p>Either delete 17 (1) (a) or provide the procedure for developing a salary structure for state officers</p> <p>Regulation 17(1)(b) should read</p> <p>Advise on broad parameters to be used by public institutions to develop salary structures.</p> <p>Regulation 17(2) should be merged with regulation 7</p>
10.	18	<p>It is assumed in the draft regulations that it is only SRC who can give advice on its own motion.</p> <p>Consequently, the regulations do not guide on how service commissions should go about seeking advice on the review of their salary structures.</p>	The regulations should provide a procedure or requirements that service commissions should comply with in seeking advice on review of salary structure
11.	19(2)	The clause exceeds the constitutional and statutory mandate of SRC, the wording gives it super powers over the	Delete 19(2)

No.	CLAUSE	ISSUE	PROPOSED AMENDMENT
		<p>employers.</p> <p>An employer should be able to review the salary structures for the employees. For PSC this is provided for under Section 53 of the PSC Act, 2017 which prescribes the parameters to be considered.</p>	
12.	23	<p>The clause encroaches on the Public Service Commission powers and functions in Article 234(2)(e) of the Constitution as read with Section 62 of the Public Service Commission Act.</p>	<p>Clause 23 should be deleted in its entirety.</p>
13.	24(5)	<p>Collective bargaining is recognized under Article 41(5) of the constitution. The negotiation is between the employer and the relevant trade union.</p> <p>It is for this reason that the drafters of the Constitution limited SRCs role , with regard to public officers to only advise on parameters , which the employer should consider in the negotiations.</p> <p>Once SRC has provided the parameters it becomes functus officio.</p> <p>The regulation SRC powers on implementation of the advice which is responsibility of the employer. This provision creates unnecessary bureaucracy in collective bargaining.</p>	<p>Clause 24(5). Should be deleted</p>

PART III— MISCELLANEOUS PROVISIONS

14.	28(2) & (3)	The clause is superfluous as the procedures for dispute resolution in court is provided for in various rules of procedure for different courts.	Clause 28(2) & (3) should be deleted.
15.	29	The role of SRC with regard to public officers, as interpreted by the Supreme Court in Petition no 42 of 2019 is to advice. There is no Constitutional or Legislative function or power to monitor and evaluate the advice.	

A.M.

**A.M. MUCHIRI, (AMB)
CHAIRPERSON**

24th FEBRUARY 2023.

Telephone: NAIROBI. 2729188
Email: jsc@jsc.go.ke
When replying please quote:



REPUBLIC OF KENYA

JUDICIAL SERVICE COMMISSION
INSURANCE PLAZA
FOURTH FLOOR
TANA RD
P. O. BOX 40045-00100
NAIROBI

Ref. No. JSC 8

6th June 2022

Mr. Michael Sitali, EBS
Clerk of the National Assembly
National Assembly
Parliament Building
NAIROBI.

Dear Michael

**WRITTEN SUBMISSION ON THE DRAFT SRC (REMUNERATION
AND BENEFITS OF STATE AND OTHER PUBLIC OFFICERS)
REGULATIONS, 2022**

Reference is made to the above quoted Draft Regulations as presented before the House by the Salaries and Remuneration Commission (SRC).

The Commission wishes to express its concerns that the Salaries and Remuneration Commission has forwarded the above quoted Draft Regulations to the House for enactment without taking into consideration the objection raised vide the Judicial Service Commission letter dated 19th May 2022.

The Judicial Service Commission wishes to reiterate that:

1. The draft regulations contravene Article 172 (1) (b) of the Constitution that gives the Judicial Service Commission exclusive powers to review and make recommendations on the conditions of service for Judges and Judicial Officers other than their remuneration; and to review and make recommendations on the remuneration and conditions of service for the staff of the Judiciary.
2. The draft regulations contravene Article 249 (2) of the Constitution which provides that commissions and holders of independent offices are subject only to the Constitution, the law and are independent and not subject to direction or control by any person or authority.
3. The draft regulations contravene Article 160 of the Constitution which provides that in exercise of its Judicial Authority, the Judiciary shall be subject only to the Constitution and the law

and shall not be subject to the control or direction of any person or authority.

4. The draft regulations contravene Article 230(4) of the Constitution that gives the Salaries and Remuneration Commission (SRC) powers to: '(a) set and regularly review the remuneration and benefits of State Officers; and (b) advise the National and County Governments on the remuneration and benefits of all other public Officers.'
5. The draft regulations go against the finding of the Supreme Court in the case of Council of Governors and 47 others v the Attorney General and 3 others [2020] eKLR in which the Court held as follows: '.....it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon the National Assembly or the Senate.' The Court further held 'To hold otherwise would elevate the commission above Parliament in the legislative Chain.....'
The same position obtains as regards Salaries and Remuneration Commission; it cannot purport to impose its recommendations and advise nor to superintend the Judicial Service Commission.


The purpose of this letter is therefore, to express the Judicial Service Commission's objection to the proposed regulations as they are unconstitutional and in excess of the powers bestowed upon the Salaries and Remuneration Commission (Article 230(4)(b) and violates the Independence of the Judiciary (Article 160) and the functions of the Judicial Service Commission (Articles 172(1)(b) and 249(2)).

Attached, please find a copy of the Judgement in Machakos Constitutional Petition No. 18 of 2018 between Sollo Nzuki and SRC and Others.



Amos A. Amadi, CBS
SECRETARY
JUDICIAL SERVICE COMMISSION.

Encl.

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 08 MAR 2023	
DAY: WEDNESDAY	
TABLED BY:	CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION Hon. Samuel Chepkong'o
CLERK-AT THE TABLE:	Christine Ndiritu

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; Ag. CJ & Ag. P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 42 OF 2019

—BETWEEN—

KENYA VISION 2030 DELIVERY BOARD.....APPELLANT

—AND—

**THE COMMISSION ON
ADMINISTRATIVE JUSTICE.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT
ENG. JUDAH ABEKAH.....3RD RESPONDENT**

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi
(Nambuye, Kiage & Murgor) in Civil Appeal No. 141 of 2015 delivered on
27th September 2019)*

JUDGMENT OF THE COURT

A. BACKGROUND

[1] This Petition of Appeal is dated 6th November 2019 and was filed on 7th November 2019. The Appellant has challenged the entire Judgment and orders of the Court of Appeal (*Nambuye, Kiage & Murgor*) at Nairobi in Civil Appeal No. 141 of 2015 delivered on 27th September 2019.

[2] This matter can be traced to the publication of Kenya Gazette Notice No. 1386 of 17th February 2009 which established the Kenya Vision 2030 Delivery Board (“**the Board**”) to, *inter alia*, make policies, provide advice and overall leadership, oversight, guidance and policy direction in the implementation of the Vision 2030. As part of meeting its objectives, the Board placed an advertisement in the daily newspapers for the position of Director (*Enablers and Macro*) within its establishment. The 3rd Respondent secured a three-year contract of employment for this position with the Board, effective 23rd March 2009. Clause 6 of the contract provided for renewal of the contract six months to expiry, but subject to approval by the Board. Six months to the expiry of his contract, the 3rd Respondent wrote to the Board requesting for a renewal of his contract. His request was rejected on the grounds that his performance was below par, and the contract was subsequently terminated through a decision dated 23rd March 2012.

[3] Aggrieved by the Board’s decision, the 3rd Respondent appealed to the Minister for Planning and National Development and Vision 2030 (“**the Minister**”). The Minister renewed the 3rd Respondent’s contract for a period of one year, but the Board declined to allow him back to work. As a result, the 3rd Respondent sought the intervention of the 1st Respondent, the Commission on Administrative Justice (**CAJ**).

[4] After investigating the matter, CAJ in a report dated 10th October 2013 concluded, *inter alia*, that the Board had “*impugned Articles 47 and 59 of the Constitution and Sections 2 and 8(a), (b) and (d) of the Commission of Administrative Justice Act on fair administrative action.*” Consequently, the CAJ made recommendations to the Board to: *pay the 3rd Respondent an equivalent of twelve months salary and allowances in compensation for the one year period of the reviewed contract; facilitate the 3rd Respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him.* The Board declined to implement CAJ’s recommendations

prompting the 3rd Respondent to file JR Case No. 223 of 2014, *Republic vs. Kenya Vision 2030 Delivery Board & another Ex-parte Eng. Judah Abekah*.

[5] At the High Court, the 3rd Respondent sought *an order of mandamus to compel the Board to comply with the recommendations of CAJ, compensation, and costs*. The High Court identified three issues for determination as follows: *Did CAJ have jurisdiction to determine the matter which had given rise to these proceedings? Can the decisions of CAJ be enforced by issuance of an order of mandamus? and Who should bear the costs of the proceedings?*

[6] On 26th February 2015, the High Court (*W. Korir, J*), found that although CAJ had the powers to investigate the 3rd Respondent's claim, it could not compel the manner in which such recommendations, findings or reports could be implemented. In the Learned Judge's opinion, in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Ultimately, the learned Judge found that CAJ does not have coercive powers over the institutions that it investigates. The Court found that where an organization refuses to implement the recommendations of CAJ, the only action the Commission can take is to make a report to the National Assembly. Thereafter, the National Assembly can take appropriate action pursuant to Section 44(4) of the Commission on Administration of Justice Act (**CAJA**). With regard to costs, the Court ordered each party to bear their own costs on the ground that even though the 3rd Respondent's application had failed, it was not frivolous.

[7] The Judge concluded that since the Commission cannot compel a state agency to implement its recommendations, it follows that a court cannot compel a government agency to implement such recommendations through an order of mandamus. Further that the only exception where a court can compel a public agency to implement a recommendation is where "*there is gross abuse of discretion, manifest injustice or palpable excess of authority*" equivalent to

denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy.” The trial court concluded that the 3rd Respondent had not invoked that exception to warrant issuance an order of mandamus.

[8] Aggrieved by the decision of the High Court, CAJ filed Civil Appeal No. 141 of 2015, *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others*. The 3rd Respondent also filed a cross-appeal. The Learned Judges of Appeal (*Nambuye, Kiage & Murgor*) framed four issues for determination as follows: *whether CAJ had the mandate to intervene in the 3rd Respondent’s complaint; whether the Board is a public entity; whether the CAJ’s request to the Board to implement its recommendations in favour of the 3rd Respondent fell within the realm of performance of a public duty; and whether in the circumstances of the appeal, the Judge exercised his discretion judiciously when he dismissed the JR proceedings.*

[9] On 27th September 2019, the Court of Appeal allowed both the appeal and the cross-appeal. The Appellate Court granted the 3rd Respondent’s prayer for mandamus as was sought in the Judicial Review Application; declared that the 3rd Respondent’s right to fair administrative action was infringed and awarded him KES 700,000/= as compensation with interest from the date of Judgment of the High Court. The costs of appeal and cross-appeal were also awarded. In doing so, the Learned Judges of Appeal agreed with the trial Judge’s finding only to the extent that CAJ had the powers to investigate the 3rd Respondent’s claim and make recommendations.

[10] The Court disagreed with the High Court’s finding to the effect that the only remedy available to a beneficiary of CAJ’s recommendations is limited *to reporting of such findings to the National Assembly*. The Court found nothing in Article 254 of the Constitution to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law. It also found that the complaint raised by the 3rd Respondent fell within the

definition of administrative action as defined in Section 2 of the CAJA as it related to the Board's failure to accede to the Minister's renewal of the 3rd Respondent's contract, and the failure to accede to CAJ's request to convert the Minister's renewal of the said contract for one year to twelve (12) months' salary compensation together with other attendant remedies. The Court emphasized that the Board's actions fell within the realm of public law and were therefore amenable to Judicial Review proceedings contrary to the findings of the Judge in the impugned decision.

[11] Consequently, the Court found that the 3rd Respondent had demonstrated gross abuse of discretion, and that the Board was bound to implement the recommendations of CAJ.

[12] Aggrieved by the finding of the Court of Appeal, the Board filed this appeal as of right pursuant to Article 163(4)(a) of the Constitution. The Board raises three grounds of appeal summarized as follows:

- a. *The Appellate Court incorrectly concluded that the recommendations of CAJ have the force of law and are binding to public bodies;*
- b. *The Learned Judges erred in law in holding that the fact that the Board did not challenge the action of the Minister in extending the 3rd Respondent's contract or CAJ's recommendations, then the CAJ's recommendations are binding on it; and*
- c. *The learned Judges erred by assessing damages in favour of the 3rd Respondent when the High Court did not make any assessment of damages.*

B. PARTIES SUBMISSIONS

(a) The Appellant

[13] The Board submits that the Court of Appeal solely relied on Article 254(1) of the Constitution and overlooked Section 42(4) of the CAJA. In that context, the Board submits that Article 254(1) of the Constitution was not relevant to the matter before the Court as it relates to the general obligation of independent commissions to submit a report to the National Assembly at the end of each financial year. The Board contends that, pursuant to Section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of CAJ, is for CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. Relying on the authority of *Samson Chembe Vuko vs. Nelson Kilumo & others* [2016] eKLR, the Board maintains that CAJ ought to have followed the procedure in the CAJA instead of seeking an order of mandamus.

[14] Learned Counsel for the Board further submits that in view of Section 43(3) of the CAJA, CAJ's recommendations are not outrightly binding and that an order of mandamus will not issue where there is discretion on the public body to act or not to act. Furthermore, that there is no provision in the Constitution or in the CAJA that gives CAJ powers to enforce its decisions and recommendations as if they were a Court order. In support of this argument, the Board cites the cases of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others* [2013] eKLR, *R(Bradley) vs Secretary of State for Work and Pensions* [2008] EWCA Civ 36(Pages 51 to 110) and *Justus Kariuki Mate & another vs Martin Nyaga Wambora & another* [2017] eKLR (pages 111 to 131). Learned Counsel also relied in the authority of *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)*, and SC Reference 3 of 2019; [2020] eKLR (*Re Council of Governors*).

[15] The Board furthermore submits that the recommendations of CAJ are not binding and that public bodies have no obligation to implement them and takes issue with CAJ's recommendations to compensate the 3rd Respondent despite the

Minister communicating to him that the extension of his contract had been declined. In that regard, the Board submits that the Court of Appeal converted what was a normal Judicial Review Application into a Constitutional petition.

[16] It is also the Board's submission that the 3rd Respondent could not overlook or sidestep the laid down dispute resolution institutions such as the Courts and go directly to CAJ for a determination of their grievance. Citing Sections 8 and 30 of the CAJA, Article 159(1) of the Constitution, the cases of *Sentiba Gordon & 2 others vs Inspector of Government* (Civil Appeal No. 06 of 2008) [2010] UGSC 30 and In *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Board urges that if the dispute between the parties was whether the 3rd Respondent was entitled to the renewal of his employment, then the same ought to have been filed before the Employment and Labour Relations Court.

[17] Lastly, the Board faults the Court of Appeal for proceeding to assess damages on its own motion instead of referring the matter back to the High Court for assessment of damages. The Board closes its submission by praying that the appeal be allowed with costs.

(b) *The Attorney General*

[18] We note that the Attorney General did not file its written submissions. However, Ms. Chilaka, appearing in person for the Attorney General on the date of the hearing, did associate herself with the submissions of the Board to the extent that CAJ's recommendations are not binding and therefore have no force of law.

(c) *The 1st Respondent*

[19] In response, CAJ argues that it can make recommendations to a public body concerned in an alleged violation and that those recommendations are binding by

virtue of Articles 19, 249(1), 22(1) &(2) and 59(2),(4), (5)(b), (h),(i) & (j) of the Constitution. CAJ maintains that in Article 59(2)(e) and (j) of the Constitution, it does have the mandate to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated, report on complaints investigated under paragraphs (h) and (i) and take remedial action. CAJ also submits that, under Section 8(d) of the CAJA, it has an obligation to report to the National Assembly bi-annually on the complaints investigated under paragraphs (a)and (b) and the remedial action taken thereon.

[20] In that regard, CAJ argues that there are several ways through which it can achieve its mandate including recommendations, advisory opinions and proposals. Relying on the cases of *SABC vs. DA* (393/2015([2015] ZASCA 156, *Economic Freedom Fighters vs. Speaker of the National Assembly and Others; Democratic Alliance vs Speaker of the National Assembly and Others* [2016] ZACC 11, and *Black's Law Dictionary*, CAJ contends that it is empowered by the Constitution and the Act to make decisions that are compelling or binding on the public officers or bodies which are concerned in violations. It states that its action was equivalent to a remedial action and not a recommendation.

[21] In response to the Board's submissions that the order of mandamus could not issue, CAJ submits that the Board had a public duty to comply with its decision and failure to do so entitled the 3rd Respondent to an order of mandamus sought.

[22] CAJ contends that it had jurisdiction to handle the 3rd Respondent's complaint for renewal of his contract and that the process featured unfairness and irregularities which amounted to a breach of Article 47 of the Constitution on the right to fair administrative action. CAJ maintains that it was created to compliment the court system and that Chapter 4 of the Constitution does not set a hierarchy of jurisdiction of the Courts *vis a vis* its mandate in dealing with

complaints on violation of human rights. Consequently, CAJ prays that this Court upholds the Court of Appeal's decision.

(d) The 3rd Respondent

[23] In opposing the appeal, the 3rd Respondent, while citing Articles 59, 159(4), 249(1) (2), 252, 22(1) & (2) of the Constitution and Section 8 of the CAJA submits that CAJ 's recommendations have a binding character unless challenged by a legal process and are duly set aside or varied.

[24] The 3rd Respondent therefore submits that the Board and other public bodies have an obligation to implement the recommendations of CAJ unless challenged by a legal process and duly set aside or varied.

[25] The 3rd Respondent urges that CAJ is a part of constitutional dispute resolution mechanisms which are complementary to the court process. Further that the centrality of courts remains unchallenged considering that enforcement of recommendations of CAJ require judicial intervention.

[26] Concerning the Court of Appeal's mandate to assess damages in favour of a party on appeal when the High Court did not do so, the 3rd Respondent while citing Section 3(2) of the Appellate Jurisdiction Act, Rule 31 of the Court of Appeal Rules, and the case of *Selle & another vs. Associated Motorboat Company & others* [1968] EA 123, submits that the Court of Appeal did not err in assessing damages.

C. ISSUES FOR DETERMINATION

[27] From the above submissions, the following issues crystalize for determination:

- i. *Whether the recommendations of CAJ are binding on public bodies and if public bodies have an obligation to implement CAJ's recommendations?*

ii. *Whether the Court of Appeal had jurisdiction to award damages?*

iii. *If the answer to (i) is in the affirmative, what are the appropriate reliefs?*

(i) *Whether the recommendations of CAJ are binding on public bodies?*

[28] CAJ is established under Section 3 of the CAJA as a successor to the Public Complaints Standing Committee. The CAJA is an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission Justice pursuant to Article 59(4) of the Constitution. Regarding the powers of CAJ, Section 5 of the CAJA specifically provides as follows:

“In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to—

(a) acquire, hold, charge and dispose of movable and immovable property; and

(b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.”

Section 5 implies that the powers conferred upon CAJ are in addition to the power of commissions in Article 253 of the Constitution. Article 253 of the Constitution makes provision for incorporation of Commissions, whilst Article 254 of the Constitution makes provision for reporting by the same.

[29] All constitutional Commissions and independent offices have an obligation under Article 254(1) of the Constitution, **“as soon as practicable, after the end of each financial year to submit a report to the President and to Parliament”**. These reports may be limited to a particular issue. From the foregoing provisions, it is evident to us that the CAJA was to give effect to Article

59(4) of the Constitution. CAJ is also bound by the provisions of Article 254(1) of the Constitution. We therefore find fault in the Court of Appeal's conclusion that the reporting that is anticipated to be done by CAJ to Parliament, is separate or different from the reporting of its investigative report undertaken in discharge of its mandate in any given year. [30] Further, the CAJA is clear on the functions of the CAJ in the following terms:

“[8]. The functions of the Commission shall be to—

(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;

(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;**
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;**
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;**
- (i) publish periodic reports on the status of administrative justice in Kenya;**
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;**
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;**
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and**
- (m) perform such other functions as may be prescribed by the Constitution and any other written law.**

[31] From the foregoing provisions, it is not contested that CAJ is mandated to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public

sector. We therefore agree with both superior courts' finding that CAJ was mandated to entertain and make recommendations with regard to the 3rd Respondent's complaint.

[32] Under Section 29 of the CAJA, once it has investigated a complaint arising from the carrying out of an administrative action of a public officer or any other public body, CAJ is under mandatory obligation to resolve the matter before it by conciliation, mediation or negotiation. If the matter cannot be resolved, and it determines that the administrative action was carried out unjustly or unreasonably, the CAJ shall make such **recommendations as it deems fit**.

[33] Section 41 of the CAJA also provides for action to be taken by CAJ following an inquiry in the following terms:

“The Commission may, upon inquiry into a complaint under this Act take any of the following steps—

(a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;

(b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;

(c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;

(d) provide a copy of the inquiry report to all interested parties; and

(e) submit summonses as it deems necessary in fulfilment of its mandate. “

[34] Furthermore, under Section 44 of the CAJA, where CAJ concludes that the person or State Organ or public office or organization being investigated is guilty of misconduct, it has an obligation to report the matter to the appropriate authority.

[35] The bone of contention, then, is whether these recommendations are binding on such public bodies.

[36] In *the Matter of the National Land Commission*, Advisory Opinion Reference 2 of 2014; [2015] eKLR, in her concurring opinion, *Ndungu, SCJ*, defined the words ‘**recommend**’, advise, research, investigate, encourage, assess, monitor and oversight’ to mean **actions that provide a facilitative role rather than a primary one**. In her opinion, the context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented. In her opinion, a body with oversight function, and a body that implements the recommendations of the former, are different, and their roles do not overlap. For this reason, there is need for clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted.

[37] Also, in *Re Council of Governors*, this Court defined a recommendation as follows:

“[52] In our considered opinion, the term “recommendation” is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally speaking, a recommendation is a

suggestion or proposal, for a certain cause of action. Such proposal does not ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning, nature and effect, depending on the context in which they are deployed.”

[38] On the binding nature of the recommendations by the Commission on Revenue Allocation, this Court found as follows:

“[60] Taking all these into account, it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. To hold otherwise, would elevate the Commission above Parliament in the legislative chain. We therefore agree with both the Speaker of the National Assembly and the Law Society in their submissions to the effect that, it could not have been the intention of the makers of the Constitution to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation.” [emphasis added]

[39] Similarly, in *Re Council of Governors*, this Court was persuaded by the High Court decision *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others*, HC Constitutional Petition No. 368 of 2014; [2015] eKLR, where Lenaola, J (*as he then was*) found that the recommendations addressed to all the 47 County Assemblies and County

Executives, by the Commission on Revenue Allocation were not binding to the Senate but for good order, reasons for a deviation must be given.

[40] From the foregoing Constitutional provisions, the statutory provisions and authorities highlighted, it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in the Constitution or in law. Neither the Constitution nor the CAJA states that CAJ's recommendations are binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations. Towards that end, we find and affirm that the CAJ's recommendations to inter alia: *pay the 3rd Respondent an equivalent of twelve months salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3rd Respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him*, were not binding upon the Board. We therefore fault the appellate court's conclusion that CAJ's recommendations were binding on the Board.

[41] We agree with the Board's submission and the High Court's finding that under Section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of the CAJ, is for the CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. CAJ ought to have explored the options set out in Section 41 of CAJA. Ultimately, we agree with the trial Court's finding that not even a Court of law can dictate the manner in which a recommendation should be implemented. The only exception, as pointed by the trial Court, is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the aggrieved party is entitled, and there is no other plain, speedy and accurate remedy." It is our finding that the circumstances of the appellant's case do not fit the said exception.

[42] Even where such exceptional circumstances are pleaded, who then bears the burden of proving abuse of discretion? It is our opinion that where a party is so aggrieved by the exercise of discretion or lack of it thereof, by a public officer or institution, it is for that party to prove that their case fits within the four corners of the exception set above. In the instant appeal, we agree with the trial Court that the 3rd Respondent did not discharge this burden of proof. Mere allegation that the Board declined to comply with the CAJ's recommendation is not enough to prove gross abuse of discretion, manifest injustice or palpable excess authority.

[43] We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this Court and other Superior Courts. As such we are of the opinion that the following *guiding principles* ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

Guiding Principles on the recommendations from Commission to public bodies:

- a. *Any power to make a recommendation ought to be specifically provided for in the Constitution or in law;*
- b. *Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;*
- c. *A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law;*
- d. *The manner in which a recommendation is to be implemented by a Public entity is discretionary;*
- e. *Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority*

f. Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary;

[44] We need to note at this juncture that Commissions are supposed to act as watchdogs and co-operate and work with government arms. It is the duty of Parliament to implement reports from commissions pursuant to Article 254(1) of the Constitution and Section 8 of the CAJA. Commissions therefore cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of Parliament, which is the organ vested with the mandate to enforce implementation. For avoidance of doubt, a public office or body or state organ to whom a recommendation is made need not appeal against such a recommendation for it not to be binding on it.

(ii) Whether the Court of Appeal had jurisdiction to award damages?

[45] The Court of Appeal allowed the 3rd Respondent payment of twelve (12) months' salary as compensation in lieu of the one-year renewal of contract which the Board declined to accept; access to the office to collect personal effects, and an apology. Over and above that, the Court of Appeal awarded the 3rd Respondent a sum of Kshs. 700,000.00 upon its finding that his right to fair administrative action had been infringed by the Board.

[46] The Board submits that CAJ did not have the mandate to award any relief to the 3rd respondent as it had declined to renew his contract, a decision communicated to him by the Minister. The Board faults the Court of Appeal for converting what was a normal Judicial Review Application into a constitutional

petition and proceeding to award damages instead of referring the matter back to the High Court. The Board also urges that the dispute between the parties was *whether the 3rd Respondent was entitled to the renewal of his employment* and that the same ought to have been taken to the Employment and Labour Relations Court. On the contrary, CAJ and the 3rd Respondent submit that CAJ had the mandate to make the compensation and that the Appellate Court rightly to awarded damages and compensation where none was made by the trial Court.

[47] Having found above that CAJ's recommendations did not bind the Board, it is our ultimate finding that there was no basis for the Court of Appeal to award compensation to the 3rd Respondent. Although CAJ has the requisite mandate to award compensation under Section 8(c) of the CAJA, (*which Section requires it to report to the National Assembly bi-annually on the complaints investigated and the remedial action taken thereon*), it is our finding that Section 8 of the Act cannot be read in isolation. It has to be read together with Section 41 which provides for action taken by CAJ after an inquiry. Section 41 provides as follows:

“The Commission may, upon inquiry into a complaint under this Act take any of the following steps—

- a. where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- b. recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- c. recommend to the complainant and to the relevant governmental agency or other body concerned in the

- alleged violation, other appropriate methods of settling the complaint or to obtain relief;
- d. provide a copy of the inquiry report to all interested parties; and**
- e. submit summonses as it deems necessary in fulfilment of its mandate.”**

[48] In view of this, it is our finding that having concluded its investigation or inquiry on the 3rd Respondent’s claim, CAJ ought to either have **referred the matter to the relevant authority (which in our opinion includes the National Assembly); or recommended to the 3rd Respondent a course of other judicial redress; or recommend to the complainant appropriate methods of settling the complaint or to obtain relief; provide a copy of the inquiry report to all interested parties (in our opinion including the National Assembly) ; or submit summonses as it deems fit to fulfill its mandate.**

[49] Therefore, it is our finding that the because the dispute between the 3rd Respondent and the Board was an employer-employee dispute, CAJ ought to have recommended to the 3rd Respondent the appropriate method of settling the dispute. In our opinion, one of the methods would have been seeking redress at the Employment and Labour Relations Court (ELRC) which is established to hear and determine disputes relating to employment and labour relations and for connected purposes. The ELRC has the power make appropriate remedies for the 3rd Respondent pursuant to Article 162(2) and 165(5) of the Constitution and Section 12(3) of the Employment and Labour Relations Act including interim preservation orders; prohibitory order; an order of specific performance; a declaratory order; an award of compensation; an award of damages; an order of reinstatement among other.

[50] CAJ cannot usurp the role of the ELRC over employment disputes and award compensation. CAJ, under Section 8(g) of the CAJA, can only recommend

compensation or other appropriate remedies against a person or bodies to which the Act applies. Having found elsewhere in this Judgement that recommendations can only be binding where specifically provided for, we conclude that CAJ lacks the requisite jurisdiction to award compensation in the circumstances. In other words, even if CAJ recommends compensation after concluding its inquiry, there is an additional step or action to be taken by the entity or person to whom the recommendation has been made. That entity or person may or not implement the same depending on the manner on how they choose to exercise their discretion, unless otherwise provided for in the law. Consequently, we set aside the reliefs awarded by the Court of Appeal.

[51] On costs, this Court has previously settled the law on this issue, stating that costs follow the event in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] and that a court has the discretion in awarding costs in its decision. This remains the law. In the instant case, we award costs of this Appeal to the Board.

[52] Consequently, we allow the appeal.

D. ORDERS

[53] Ultimately, upon our finding above, the final orders are that:

1. *The Petition of Appeal dated 6th November 2019 and filed on 7th November 2019 be and is hereby allowed.*
2. *The Judgment of the Court of Appeal sitting at Nairobi, dated 27th September 2019 is hereby quashed and set aside.*

3. *For the avoidance of doubt, the Judgment of the High Court delivered on 26th February 2015, be and is hereby upheld.*
4. *Costs of this Appeal to abide the appeal.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 24th Day of March, 2021.

.....
P. M. MWILU
Ag. CHIEF JUSTICE & Ag. PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA