



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
KENYA AT NAIROBI

JUDGMENT

CAUSE NO. E345 OF 2024

KENYA NATIONAL UNION OF NURSES (KNUN)

VERSUS

MINISTRY OF HEALTH & 3 OTHERS

HON. STELLA RUTTO

JUDGE

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E345 OF 2024

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

MINISTRY OF HEALTH.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

COUNCIL OF GOVERNORS.....1ST INTERESTED PARTY

THE NATIONAL TREASURY.....2ND INTERESTED PARTY

JUDGMENT

1. The Claimant has described itself as a trade union duly registered pursuant to the provisions of the Labour Relations Act, whose mandate is to create and sustain good employment and labour relations between nurses, other health workers and their employers.
2. It is the Claimant's case that on or about June 2020, at the height of the COVID-19 pandemic, the 1st Respondent, through the 2nd Respondent, facilitated the recruitment of the Universal Health Coverage (UHC) nurses through a

centralized advertisement. According to the Claimant, approximately 2500 nurses were placed on a three-year contract.

3. The Claimant further avers that its members who were engaged under the UHC programme were posted to serve at levels three and four hospitals across the country, with the programme objective being to strengthen health service delivery to citizens following the expansion of health facilities. The Claimant further states that the 2nd Respondent offered these nurses a consolidated salary package of Kshs 50,000/- for Diploma holders and Kshs 40,000/- for certificate holders.
4. The Claimant contends that the nurses at entry level under permanent and pensionable terms earn Kshs 80,000/- for certificate holders and Kshs 100,000/- to Kshs 120,000/- for Diploma holders.
5. It is the Claimant's view that this disparity in the terms of service between health workers serving under the UHC programme and those serving under permanent and pensionable terms amounts to discrimination. The Claimant further contends that the UHC nurses are subject to discriminatory terms with no allowances, such as nursing service allowance, commuter allowance, hardship allowance, health risk allowance, leave allowance, and uniform allowances.

6. It is the Claimant's further contention that the UHC nurses have for a long time suffered unfair remuneration as their remuneration has not followed the principle of "*equal pay for equal work*" contrary to the provisions of Section 5(3) of the Employment Act.
7. The Claimant has further averred that the Respondents have overlooked their own general policies, guidelines, regulations and rules governing appointment, terms, and remuneration of all public officers, inclusive of the Claimant's members.
8. It is the Claimant's assertion that in the recruitment drive of the Claimant's members, the 2nd Respondent did not factor in the existence of the requirement for appointments as per the respective approved schemes of service.
9. The Claimant has further contended that the 2nd Respondent ignored the mandate of the Salaries and Remuneration Commission (SRC) in which it issued advice and circulars on remuneration and benefits of public officers.
10. The Claimant has further averred that on 3rd August, 2021, the 2nd Respondent issued a circular under the reference: "*Review of Employment on Contract Terms at Entry Level*" with the intent to harmonise terms of service for public officers at entry level.

11. According to the Claimant, the 2nd Respondent, on its face, directed “*that employees appointed at Certificate, Diploma and Graduate entry levels on contract terms from May 2019 to date have their terms of service translated to permanent and pensionable terms with effect from their respective date of appointment.*” To date, the Claimant’s members’ contracts have not been converted as per the above circular, a clear indication of outright discrimination.
12. That the Claimant’s members expected that upon the expiry of the contracts, they would be considered for absorption into permanent and pensionable terms.
13. The Claimant avers that it has persistently engaged the concerned ministries on several occasions with a view to settling the matter, but all efforts have not borne any fruit.
14. It is against this background that the Claimant prays for the following reliefs;
- i. THAT a declaration be issued that the Respondents violated the Claimant’s members’ right to fair labour practices by denying Claimant members equal benefit and protections for the enjoyment of their fundamental rights and freedoms.*
 - ii. THAT a declaration be issued that the Respondents violated the Principle of Equal Pay for Equal Work by offering inferior terms and*

conditions under the Local Term Agreement for all Claimant's members.

- iii. THAT a declaration be issued that all the Local Term Agreements between the Respondent and Claimant's members are unconstitutional as they violate the basic principle of labour practices.*
- iv. THAT an order be issued against the Respondents to align the terms of service under the Local Term Agreement to commensurate permanent and pensionable terms, including all the benefits and allowances attached thereto.*
- v. THAT an order be issued for the conversion of all the 2500 Nurses under the Universal Health Coverage contracts into Permanent and Pensionable terms.*
- vi. THAT an order be issued for payment of the underpaid salaries and allowances in arrears computed as the difference between the amount which ought to have been paid as per SRC circulars and the amount actually paid.*
- vii. THAT an order be issued for Joint Computation of the amount due to the UHC nurses on account of underpayment as sought under*

prayer vi above and the report be filed in Court within 30 days of the Judgement for final orders on the same.

viii. THAT an order be issued for payment of gratuity to all the UHC Nurses computed at 31% of entry level salaries as approved by SRC in respective Job Groups.

ix. THAT an order be issued for damages for discrimination and mental anguish against the respondents at court's rate.

x. THAT the Respondents be condemned to bear the costs of the suit.

15.The 1st Respondent countered the Claim through its Response dated 13th September 2024.

16.The 1st Respondent avers that the UHC programme began in 2018 as a pilot programme in four Counties, namely Kisumu, Isiolo, Machakos and Nyeri. These Counties were selected as pilot sites based on the prevalence of unique health needs among their populations. However, the uptake was slow, achieving only 26% in terms of utilization of funds to recruit health care workers for the programme.

17.Consequently, a directive was issued by the President that the management of personal emoluments in regard to UHC be centrally managed at the National

Government level, that is, the 1st Respondent. In order to actualize the rollout of UHC across all the counties, a request for authorization to recruit healthcare workers was made to the 2nd Respondent.

18. The 2nd Respondent approved the request and consequently various positions were advertised on 3rd May, 2020.

19. Vide a letter dated 4th December, 2020, the 2nd Respondent approved engagement of the UHC employees on a consolidated salary and on a three (3) year contract. The consolidated salary was Kshs 50,000/- for Diploma holders and Kshs 40,000/- for certificate holders.

20. The 1st Respondent further avers that the 2nd Respondent's circular dated 3rd August, 2021, did not allow for translation of terms of service for employees who are not in the Ministry Establishment and are employed on a short-term special programme. According to the 1st Respondent, it was not able to translate the terms of service of the UHC staff from contract to Permanent and Pensionable despite receiving numerous requests to do so.

21. The 1st Respondent further avers that in 2023, the 2nd Respondent vide their letter dated 17th May, 2023, granted approval for renewal of appointment on contract in respect of 8,571 staff for a further period of one (1) year with effect from the

dates their contracts ended, pending finalization of modalities for their absorption into permanent terms of employment. Following the extension, the respective County Public Service Boards renewed the contracts and forwarded the same to the National Government for purposes of payment.

22. According to the 1st Respondent, the 2nd Respondent granted approval for renewal of the contracts for a further period of two (2) years on the current terms, based on the lack of additional funding that would have been required to transition the UHC staff into permanent and pensionable terms, and advised that consultations on the modalities for absorption of the health workers for the UHC programme to the permanent and pensionable establishments should continue with a view to finalizing the exercise before the end of the contracts.

23. It is the 1st Respondent's position that the Court should dismiss the Claim with costs.

24. In its Response to the Statement of Claim, the 2nd Respondent denies that the UHC nurses were offered inferior terms as compared to the nurses serving under permanent and pensionable terms. According to the 2nd Respondent, this was a pilot programme by the government to determine its viability and the terms of

service for employees could not therefore have been the same as those serving in offices already established.

25. It is the 2nd Respondent's assertion that the pilot programme was run jointly by the national and county governments with the national government deploying the required personnel to the facilities run by county governments.

26. That since the 2nd Respondent is responsible for the appointment of public officers in the executive arm of the national government, it was requested by the Ministry of Health to recruit the nurses who were subsequently deployed to the county governments.

27. That the successful candidates were appointed on three-year contracts and the remuneration was known to them.

28. The 2nd Respondent further avers that it received information that the Summit, in a meeting held on 12th February 2023, resolved that the contracts for the UHC nurses be extended for another three years, and on this basis, the 1st Respondent requested for a renewal of the said contracts. However, the contracts were only renewed for one year as it was expected that the different county governments would translate the terms of service for the UHC nurses from contract to permanent and pensionable.

29. The 2nd Respondent avers that to date, it is not aware of any consensus that is binding to both levels of government on the translation of the terms of the UHC workers under contract.

30. According to the 2nd Respondent, it is not legally possible for it to approve the absorption of the UHC nurses by the county governments. In its view, any such purported approval will be ignored by the county governments with no legal consequences as it has no power to direct county governments.

31. In light of the foregoing, the 2nd Respondent has asked the Court to dismiss the Claim with costs.

32. In its Response to the Statement of Claim, the 1st Interested Party has contended that it is not an employer of the Claimant's members.

33. The 1st interested party contends that the Claimant's members were engaged to perform a function that is within the constitutional purview of the county governments.

34. The 1st Interested Party further avers that cognizant that health service is a devolved function, individual county governments, through their respective

public service boards, undertook the recruitment of nurses and posted them in different levels three and four hospitals in their respective counties.

35.It is the 1st Interested Party's assertion that the Claimant's members engaged under the UHC programme were appointed on a three-year contract which was to automatically expire by effluxion of time in May 2023.

36.According to the 1st Interested Party, it was a term at the inception of the programme that the Claimant's members be supervised and managed by the respective county governments but their payroll be managed by the 1st Respondent, subject to statutory deductions a fact that did not sit well with the 1st Interested Party as this offends the functional and institutional integrity of county governments.

37.That on the basis of Article 6(2) of the Constitution, the Intergovernmental Relations Act established the National and County Government Co-coordinating Summit as the apex body for intergovernmental relations. The Summit comprises the President, or in the absence of the President, the Deputy President and the Governors of the 47 counties.

38.That aware that the contracts of the UHC staff were coming to an end, the Summit convened on 12th February 2023 to discuss the issues pertaining to the Claimant's

members engaged under the Ministry of Health. The Summit resolved that all contracts of the UHC nurses be extended for another three years under the same terms and conditions. The 1st Interested Party conveyed the resolution of the summit to the 1st Respondent and the 2nd Interested Party, urging them to extend the contracts of the Claimant's members for another three years under the same terms and conditions and to allocate an adequate budget for the same.

39. The renewed contracts were to lapse starting the end of April to October 2024 and in light of this, the 1st Interested Party vide a letter dated 2nd May 2024, invited the 1st and 2nd Respondents to a consultative meeting to ensure there would be no disruption of service in the health facilities in the counties once the UHC staff contracts came to an end.

40. Further, the 1st Interested Party was invited to submit on a petition that raised concerns about the terms and conditions for the staff employed under the UHC programme. In response, the 1st Interested Party vide a letter dated 12th May 2023 submitted to the Senate Standing Committee on Labour and Social Welfare, recommending the following:

- i. *The Ministry of Health extends the contracts of the UHC staff to avoid the disruption of service delivery;*

- ii. *The National Government provides conditional grants to county governments for extension of contracts at the market rate salaries for staff managing the program; and*
- iii. *The management of the UHC staff payroll be transferred to county governments.*

41. The 1st Interested Party further avers without prejudice that the Claimant's members were not subjected to discrimination. Its contention is that at the time the Claimant's members were appointed, they knew and fully appreciated the terms and remuneration attached to the contract.

42. That the Claimant's members' employment terms, as set out in their respective contracts, were guided by specific offers which they voluntarily agreed to. Therefore, it shall be quite amiss for them to compare their respective contracts with those of their counterparts under permanent and pensionable terms which are separate and distinct engagements.

43. The 1st Interested Party further avers that the Claimant's members benefited and continue to acquire the benefits provided under their contracts, which include *inter alia*, the respective salaries and other contractual benefits. Consequently,

the parties are bound by the terms mutually agreed upon and cannot claim inferior terms or violation of the principle of equal pay for equal work done.

44. That further, the absorption of the Claimant's members can only be achieved by the County Public Service Boards and upon taking into account various considerations. Specifically, absorption of members of the Claimant on a permanent basis is only tenable once corresponding funds are transferred from the National Government to Counties.

45. The 1st Interested Party avers that counties are cognizant of the essential role that the nurses employed under the UHC programme play in promoting healthcare services in county facilities and have progressively employed the said staff within their staffing establishments whenever vacancies arise.

46. On the basis of the foregoing, the 1st Interested Party has asked the Court to dismiss the Claim with costs.

47. The 2nd Interested Party countered the Claim through its Response dated 13th September 2024.

48. The 2nd Interested Party avers that the 1st Interested Party, in a communication to the State Department for Public Health & Professional Standards under the 1st

Respondent, conveyed the resolution of the Summit held on 12th February, 2023, to extend the contracts of the UHC staff for another three years under the same terms and conditions.

49. The 2nd Interested Party was copied in this letter and on 22nd April, 2024, it wrote to the 1st Interested Party, indicating that it was not aware of the request by the Ministry to the Public Service Commission to have the UHC staff absorbed by the respective County Governments. Nevertheless, the 2nd Interested Party took note of the Summit resolution and requested that the County Governments (through the 1st Interested Party), the Ministry and the Public Service Commission enter into a consultative framework to progress and resolve the UHC staff matter.

50. Further, the 2nd Interested Party advised that they initiate the necessary engagements and take into consideration the availability of resources within the budgetary provisions of the 1st Respondent and respective County Governments.

51. The 2nd Interested Party has further averred that it received a copy of a letter dated 2nd May, 2024, from the 1st Interested Party addressed to the State Department for Public Health & Professional Standards and the 2nd Respondent, inviting the two entities to attend a consultative meeting to deliberate on the issues.

52. The letter also indicated that the 2nd Respondent had renewed the UHC contracts for a period of one year, which would lapse from the start of April to October 2024. According to the 2nd Interested Party, it was neither directly addressed in the correspondence nor formally requested to take specific action on the UHC matter.

53. In anticipation of such action, the 2nd Interested Party, vide a letter dated 9th May, 2024, requested the 1st Interested Party to apprise it of the outcome of the scheduled meeting. According to the 2nd Interested Party, it was not aware of an Intergovernmental Agreement signed between the 1st Respondent and County governments on the management of UHC staff contracts and the guidelines for transition upon expiry of the employees' contracts.

54. That further, the 2nd Respondent did not communicate to the 2nd Interested Party any decision made to absorb the UHC staff through the respective County Public Service Boards, as would be the case.

55. On account of the foregoing, the 2nd Interested Party has asked the Court to dismiss the claim with costs.

56.The matter proceeded for hearing on 13th March 2025 and 1st April 2025, during which all parties except the 2nd Respondent and the 1st Interested Party called oral evidence.

Claimant's Case

57.The Claimant called oral evidence through **Lynne Wanjiru Kihara** and **Alex Boit Kibuchi** who testified as CW1 and CW2, respectively. Ms. Kihara who was the first to go, identified herself as a qualified and registered nurse and a member of the Claimant Union. She started by adopting her witness statement as well as the list and bundle of documents filed by the Claimant to constitute her evidence in chief.

58.Ms. Kihara averred that she is currently working at Murang'a County Referral Hospital under the UHC programme.

59.That she was employed under the UHC programme in May 2020 and since then, she has been receiving a salary that is half the amount paid to nurses in permanent and pensionable positions, with no benefits attached to her employment.

60.Ms. Kihara averred that she is aware that the SRC has issued circulars on various benefits for healthcare workers. However, despite performing the same work and working under the same conditions as her colleagues who are on permanent and

pensionable terms, she has never benefited from these allowances or other benefits.

61. According to Ms. Kihara, her colleagues serving on permanent terms enjoy all the associated benefits, creating a significant disparity between them.

62. She further averred that over the past five years, she has remained in the same position with no opportunities for career progression. Some of her colleagues in permanent and pensionable positions have had the opportunity to further their education, specialize, and get promoted to higher job groups, while she has been stagnating in the same role.

63. It was Ms. Kihara's testimony that the lack of career advancement, unequal pay, and the absence of benefits have left her demoralized.

64. That further, these conditions have caused her and many of her colleagues to regret pursuing their passion for healthcare, as they feel undervalued and discriminated against.

65. Ms. Kihara stated that it was disheartening to be treated differently simply because they are under contract, despite offering the same services and commitment to their patients.

66. She is therefore demanding equal pay for equal work, with all the benefits that permanent and pensionable healthcare workers receive, alignment of their terms to match those of permanent and pensionable positions and compensation for the discrimination they have endured due to the unequal terms of employment as well as payment of gratuity for the work done under the first contract, as per the terms of employment.

67. Mr. Boit who testified as CW2, identified himself as a qualified nurse and a member of the Claimant Union. Equally, he adopted his witness statement to constitute his evidence in chief.

68. It is worth noting that the evidence of CW2 was, to a great extent, similar to that of CW1.

69. Mr. Boit averred that he is currently working at Ndaragwa Health Center as an Enrolled Community Health Nurse under the UHC programme.

70. It was his testimony that he was recruited into the UHC programme in May 2020 and offered a consolidated salary of Kshs 40,000/-. His employment came without any allowances, job group or opportunities for career progression.

1st Respondent's Case

71. The 1st Respondent called oral evidence through **Rober Tonui** who testified as RW1. Mr. Tonui identified himself as the Director, Human Resources in the 1st Respondent Ministry. Equally, he adopted his witness statement as well as the list and bundle of documents filed on behalf of the 1st Respondent to constitute his evidence in chief.

72. It was Mr. Tonui's testimony that recruitment of the health workers for the UHC programme was conducted in phases with the first phase targeting 5,415 and 4308 in Phase two for County Governments, while 195 were targeted for the National Referral health facilities. That the number of UHC staff decreased from the initial 9918 to 8571 due to natural attrition and the fact that some counties absorbed them into their establishment.

73. According to Mr. Tonui, the rationale behind having a consolidated salary for the UHC staff was to allow counties to recruit more health care workers. That further, the consolidated salary was meant to harmonize their salaries with the already existing salaries of county employees.

74. Mr. Tonui further stated that a Multi-Agency Task-force on transition of UHC staff, drawn from the National Treasury, Public Service Commission, Ministry

of Health and the Council of Governors, met and noted that it was no longer tenable to have the UHC staff continue serving on the present terms. The Task Force, however, noted that the cost of translating the UHC staff to permanent terms amounts to Kshs. 7,747,802,365 out of which only Kshs. 4,238,452,404 is available in the National Government budget.

75. The multi-Agency Taskforce thus recommended as follows:

- i. *The 2nd Respondent be requested to approve absorption of the UHC staff into permanent terms of employment by the respective County Public Service Boards;*
- ii. *That the Diploma and Certificate UHC staff be placed at the entry grade of J/G 'H'/'CSG'12' and J/G 'G'/'CSG'13' respectively;*
- iii. *The 2nd Interested Party makes provision to bridge the gap in financing the transition of KES 3,509,349,961 to cover the full cost of placing UHC staff at J/G 'H'/'CSG' 12 and J/G 'G'/'CSG' 13 for Diploma and Certificate holders respectively, given that only KES 4,238,452,404 is available in the National Government budget for the Financial Year 2024/25; and*
- iv. *The 2nd Respondent to consider specified options with respect to payment of service gratuity.*

76. According to Mr. Tonui, the 1st Respondent wrote to the 2nd Respondent vide a letter dated 2nd April, 2024 forwarding the Taskforce's recommendations and requesting for approval of absorption of the UHC staff into permanent terms by respective County Public Service Boards at the expiry of the current one year contracts and to determine the mode of treating the period served under contract by UHC staff with respect to payment of Service Gratuity.

77. In its response dated 3rd May, 2024, the 2nd Respondent noted its readiness to renew/extend the contracts by two years as per the resolution of the communique of the Summit on 12th February, 2023 and the decision of the Joint Committees on Health of the Senate and National Assembly of 2nd May, 2024. The 2nd Respondent, however, noted that the 1st Respondent needed to confirm the availability of funding so as to facilitate the determination of the same.

78. Pursuant to this directive, the 1st Respondent vide a letter dated 7th May, 2024, sought additional funding amounting to Kshs. 3,509,349,961 so as to cater for the placement of 8,442 UHC staff at J/G'H/CSG 12 and J/G'G'/CSG.

79. The 2nd Interested Party vide its letter dated 16th May, 2024, noted that although the 1st Respondent required Kshs 7,747,802,365 annually to cater for

remuneration of the UHC Staff, it (1st Respondent) had only been considered for Kshs 4,060,296,868 in the FY 2024/25 Annual Estimates.

80. Therefore, the 2nd Interested Party noted that it would not be able to provide the requested additional funding considering that the FY 2024/25 Annual Estimates were prepared in the context of a tight fiscal framework and the same had been submitted to Parliament for appropriation, and thus advised the 1st Respondent to request the 2nd Respondent to consider extending the contracts for UHC staff on the current terms.

81. The 2nd Respondent therefore granted approval for renewal of the contracts for a further period of two years on the current terms, based on the lack of additional funding that would have been required to transition the UHC staff into permanent and pensionable terms and advised that consultations on the modalities for absorption of the health workers for the UHC programme to the permanent and pensionable establishments should continue with a view to finalizing the exercise before the end of the contracts.

2nd Interested Party's Case

82. The 2nd Interested Party called oral evidence through **Samuel Kiptorus**. Mr. Kiptorus identified himself as the Director, Inter-Governmental Fiscal Affairs

Department at the 2nd Interested Party. Similarly, he adopted his witness statement and the list and bundle of documents filed on behalf of the 2nd Interested Party to constitute his evidence in chief.

83.Mr. Kiptorus testified that on 22nd April, 2024, the 2nd Interested Party wrote to the 1st Interested Party, indicating that it was not aware of the request by the 1st Respondent to the 2nd Respondent to have the UHC staff absorbed by the respective County Governments.

84.Nevertheless, it took note of the Summit resolution and requested that the County Governments (through the 1st Interested Party) and the 1st and 2nd Respondents herein enter into a consultative framework to progress and resolve the UHC staff matter. Further, the 2nd Interested Party advised that they initiate the necessary engagements and take into consideration the availability of resources within the budgetary provisions of the 1st Respondent and respective County Governments.

85.It was Mr. Kiptorus's view that in order to sustain the gains made in the UHC policy intervention, the 1st Respondent may consider providing additional allocation of revenues to County Governments either in the form of conditional or unconditional grants pursuant to Article 202(2) of the Constitution.

86. He further opined that the 1st Respondent and the County governments, through a consultative approach, ought to agree on the respective mandate and obligations regarding absorption of the UHC staff, and that these mandates and obligations should be expressed in executed Intergovernmental Partnership Agreements.

87. This is the context within which the 2nd Interested Party based its advisory dated 22nd April 2024, requesting the 1st Respondent to work with County governments and the 2nd Respondent to resolve the impasse within the prevailing budget constraints and through a structured legal framework to accommodate the formalities in respect of intergovernmental relations and public finance statutory requirements.

88. In Mr. Kiptorus' view, the suit is premature and has not considered the complexities of addressing the issues at hand and must therefore be dismissed with costs.

Submissions

89. The Claimant urged the Court to look beyond the label on a contract to determine the "real" or "effective" employer. In this regard, it urged the Court to look at the source of funding for the UHC Nurses' remuneration and who budgets for it.

90. The Claimant further submitted that the 2nd Respondent advert was not a county-level recruitment; rather, it was a national-level recruitment exercise, managed and funded by the Respondent's operational oversight.

91. It was further submitted by the Claimant that under the constitutional architecture, the 2nd Respondent is the exclusive body empowered to recruit, appoint, and remunerate national government employees, including UHC nurses, whose roles were funded from the national budget. That the 1st Respondent, in turn, identifies service needs and conveys them to the 2nd Respondent for implementation. Therefore, any contract arising from the 1st Respondent requisition must, by constitutional mandate, be administered through the 2nd Respondent not the County Public Service Boards.

92. On this issue, it was the Claimant's position that the 2nd Respondent in collaboration with the 1st Respondent, must be recognized as the true and sole employer of the UHC nurses.

93. Referencing the cases of **Wycliffe Lisalitsa v The Chief Executive Officer, Kenyatta National Hospital and 5 others, ELRC cause number 1566 of 2012** and **Jane Achieng and Another v University of Nairobi, ELRC Cause**

number 2144 of 2012, the Claimant submitted that it has established discrimination based on pay differentiation.

94. The Claimant further urged the Court to find that the Respondents' actions and omissions amounted to unlawful discrimination and unfair labour practices. In support of this position, reliance was placed on the case of **Peter Wambugu Kariuki and 16 others v Kenya Agricultural Research Institute, Petition 2 of 2013**.

95. Citing the cases of **Oindi Zaippeline & 39 Others v Karatina University & another [2015] eKLR** and **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others, Petition No. 14 of 2**, the Claimant further submitted that its members acquired an enforceable expectation of absorption into permanent and pensionable terms. To this end, the Claimant argued that the Respondents breached the nurses' legitimate expectations, compounding the unlawful discrimination and unfair labour practices.

96. The 1st Respondent and 2nd Interested Party filed joint written submissions. Opposing the Claim, the 1st Respondent and 2nd Interested Party submitted that the Claimant has not made out *prima facie* case of discrimination. In support of this position, the 1st Respondent and 2nd Interested Party sought to rely on the case of **GMV v Bank of Africa Kenya Limited [2013] KEELRC 162 (KLR)**.

The two parties proceeded to argue that, beyond issuing a blanket statement claiming discrimination, the Claimant's members have not met the criteria set out in the GMV case in that they have not shown that they are members of a protected class or that the reason for the alleged discrimination is due to that membership.

97. To this end, the 1st Respondent and 2nd Interested Party submitted that having failed to establish discrimination, the Claimant cannot therefore be seen to imply that unfair labour practices were occasioned to them or advance the notion that there was a breach of the principle of equal pay for equal work or work of equal value.

98. Referencing the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)**, the 1st Respondent and 2nd Interested Party further submitted that the disputed pay arises out of a contract entered into willingly and with full knowledge of all the terms by the Claimant. According to the 1st Respondent and 2nd Interested Party, if the Claimant's members were not satisfied with the terms of the contract, nothing would have been easier than walking away from it.

99. It was further submitted by the 1st Respondent and 2nd Interested Party that there was no express, clear and unambiguous promise given by the Respondents to the Claimant to warrant legitimate expectation, and consequently rendering the

Claimant undeserving of having a legitimate expectation to be onboarded to permanent and pensionable terms. To buttress these arguments, reliance was placed on the cases of **Munyekenye v Innovations for Poverty Action 120241 KEELRC 1615 (KLR)** and **Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007] KEHC 3680 (KLR)**.

100. On its part, the 2nd Respondent submitted that there has never been an employer-employee relationship between the Claimant's members and the Respondents. According to the 2nd Respondent, neither the advertisement of vacancies nor the payment of salaries creates an employer-employee relationship. It was the 2nd Respondent's view that the Court cannot infer an employer-employee relationship when there is a written contract stating who the employer is.

101. The 2nd Respondent further argued that the Respondents are not party to employment contracts which the Claimant seeks to enforce and consequently, the issue of privity of contract arises. In support of this argument, the 2nd Respondent placed reliance on the case of **Aineah Likuyani Njirah v Aga Khan Health Services (2013) eKLR**.

102. The 2nd Respondent stated in further submission that the circular dated 3rd August 2021, and any other circulars it issues for the service under it, do not

apply to the county government public service or any other public sector excluded from its mandate.

103. According to the 2nd Respondent, the Respondents did not create a legitimate expectation as they are competent decision makers with respect to county government employees.

104. It was further submitted by the 2nd Respondent that the Claimant's members having consented to their terms of employment cannot now turn and plead the Court to vary their terms of contract.

105. Citing the case of **China Wu Yi Limited & another v Irene Leah Musau (2022) eKLR**, the 2nd Respondent further posited that it was the Claimant's responsibility to establish the sum of underpayment through pleadings and evidence. That they cannot shift this responsibility to the Respondents. According to the 2nd Respondent, the Claimant is seeking to shift the burden of proof placed on it to the Respondents by asking for an order of computation.

106. On its part, the 1st Interested Party posited that although the UHC programme was well intentioned, the recruitment process was constitutionally flawed from inception as it circumvented the constitutional framework of transfer of functions

and cooperation in the functions and exercise of powers between national and county governments as assigned in the fourth schedule of the Constitution.

107. According to the 1st Interested Party, no intergovernmental agreement was executed between the county governments and the national government as required under Article 187 (1) of the Constitution and Section 26 of the Intergovernmental Relations Act to indicate that the county governments had transferred or delegated their health functions and powers to the national government.

108. It was the 1st Interested Party's view that the current crisis has been occasioned by the 2nd Respondent acting outside its constitutional mandate to advertise and recruit members of the Claimant under the UHC programme.

109. Placing reliance on the case of **Obware Georgiadis Ochieng & 61 others v Kenya Wildlife Service, Cause No.796 of 2013**, the 1st Interested Party submitted that the Claimant's employment terms were guided by specific offers which the Claimant's members voluntarily agreed to and therefore, it is quite amiss for them to allege that the disparity in terms of service between the health workers serving under the UHC programme and those under permanent and pensionable amounts to acts of discrimination. To this end, the 1st Interested Party

urged the Court to find that the Claimant's members have failed to establish that they were discriminated as alleged.

110. According to the 1st Interested Party, the Claimant's plea to have the fixed contracts converted to permanent and pensionable terms will be tantamount to the court rewriting the contracts that the Claimant's members voluntarily agreed to. To augment this position, the case of **Pius Langat v Co-operative Bank of Kenya Ltd, Civil Appeal No. 48 of 2015** was referenced.

111. The 1st Interested Party maintained that the Claimant's members voluntarily agreed to the fixed-term contracts of employment, and unless such contracts were obtained through fraud, misrepresentation, or through illegal means, the Court should enforce the terms governing such fixed-term contracts of employment.

Analysis and Determination

112. Flowing from the pleadings by the parties herein, the evidentiary material on record as well as the rival submissions, the following issues arise for determination by the Court:

- i. **Who is the employer of the staff under the Universal Health Coverage programme?**
- ii. **Whether the Claimant's members have been subjected to pay discrimination;**

iii. Whether the Claimant is entitled to the reliefs sought.

Who is the employer of the staff under the Universal Health Coverage programme?

113. The parties herein have taken diametrically opposite positions over this issue.

Whereas the Claimant avers that the 2nd Respondent, acting at the request of the 1st Respondent, is the employer of the Universal Health Coverage (UHC) staff, the 2nd Respondent maintains that it has never had an employment relationship with the Claimant's members. In the 2nd Respondent's view, advertisement of vacancies and payment of salaries cannot infer an employer-employee relationship.

114. The issue under determination cannot be answered without some background as to how the UHC staff came to be engaged.

115. From the evidence on record, the Government of Kenya launched the UHC programme in 2018, on a pilot basis in four Counties (Kisumu, Isiolo, Machakos and Nyeri) based on the prevalence of unique health needs among their populations.

116. According to the 1st Respondent, the uptake was slow, achieving only 26% in terms of utilization of funds to recruit health care workers for the programme hence a directive was issued by the former President of the Republic of Kenya to the effect that the management of personal emoluments in regard to UHC be centrally managed at the National Government level, specifically, the 1st Respondent.

117. Consequently, vide a letter dated 20th February 2020, the 1st Respondent sought authorization from the 2nd Respondent to recruit professional healthcare workers to accelerate the implementation of the UHC. Following the approval by the 2nd Respondent, the healthcare workers were recruited in two phases.

118. The record bears that it is the 1st Respondent that determined the remuneration payable to the recruited staff, being a consolidated salary of Kshs 50,000/- for Diploma holders and Kshs 40,000/- for Certificate holders.

119. It is apparent from the foregoing that the process leading up to the recruitment of the healthcare workers was outside the constitutional framework. Here is why. The Fourth Schedule of the Constitution of Kenya, which outlines the distribution of functions and powers between the national and county governments, is explicit that county governments are responsible for county health services.

120. Under Article 187 of the Constitution, it is clear that functions and powers may be transferred between different levels of government. In this regard, Section 26 of the Intergovernmental Relations Act provides for the manner of transfer or delegation of powers, functions, or competencies between different levels of government. To this end, Section 26, aforementioned, outlines the process and requirements for such transfers. Worthy to note is that any transfer or delegation of powers, functions, or competencies must be formalized through a written Agreement.

121. In the present case, there is no evidence of the existence of the Agreement contemplated under Section 26 of the Intergovernmental Relations Act. The 1st Interested Party herein confirmed as much.

122. Pursuant to Article 235 of the Constitution, each county government is given the responsibility of establishing and abolishing offices in its public service, appointing persons to hold or act in those offices, and confirming appointments and exercising disciplinary control over and removing persons holding or acting in those offices.

123. The aforementioned functions are exercised through the County Public Service Boards being corporate bodies established in each county under Section

57 of the County Governments Act. The functions of the County Public Service Boards are to be found in Section 59 of the County Governments Act, which mandates each Board, on behalf of its respective government, to perform certain functions, including but not limited to establishing and abolishing offices in the county public service.

124. It is apparent that following recruitment of the healthcare workers under the UHC programme, they were deployed to the 47 counties, where they were issued contracts of employment by the respective County Public Service Boards.

125. Despite the contracts of employment being issued by the County Public Service Boards, the remuneration of the healthcare workers under the UHC programme was centralized, with the 1st Respondent being responsible for the payment of salaries of the said staff. Indeed, CW1 and CW2 confirmed in their respective testimonies in Court that to date, they receive their salaries from the 1st Respondent.

126. Further to the foregoing, the correspondence on record bears that it is the 1st Respondent that is in control of the terms of service of the healthcare workers under the UHC programme. Indeed, it is the 1st Respondent that has always sought approval from the 2nd Respondent for the renewal of the contracts of the UHC workers and in turn, asked the County Public Service Boards through the

1st Interested Party to extend the contracts of employment of the UHC staff. As a matter of fact, it is clear that from the onset, the County Public Service Boards have not had a say as to whether the contracts of the UHC staff would be renewed or not.

127. The Court (Rika J) in the case **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & another** [2012] KEELRC 4 (KLR) while observing that definitions of an “*employer*” and “*employee*” under the Employment Act are based on the traditional employment relationships, reckoned that labour law must always respond to the changes in the organizational relationships. To this end, the learned Judge looked beyond the statutory definitions and formulated three tests in evaluating who the employer and the employee are. These tests are: Four-fold test, Economic reality test, and Multi-factor test.

128. The Four-Fold Test looks at the right to hire and fire the employee; who pays the salaries and the wages; who retains the power of dismissal and power to impose disciplinary sanctions; and who controls the employee with respect to the means and methods by which the work is to be accomplished. The Economic Reality Test looks at the economic dependence of the employee, while the Multi-Factor Test combines aspects of the first two Tests: it considers the power of

control of the employee with regard to the means and methods of work, and the underlying economic realities of the activity or relationship.

129. Applying the above test to the case herein, this Court is of the view that the evidence on record supports the position that the healthcare workers under the UHC programme are employees of the 1st Respondent. Why do I say so?

130. It is the 1st Respondent that conceptualized the recruitment of the UHC healthcare workers and proceeded to determine the remuneration payable to them. Further, the 1st Respondent is the entity responsible for the remuneration of the said healthcare workers. Therefore, the economic dependence of the healthcare workers under the UHC programme rests with the 1st Respondent.

131. Further to the foregoing, the 1st Respondent has continued to retain control over the continued employment of the said healthcare workers. In this case and as stated herein, it is the 1st Respondent that has always sought approval from the 2nd Respondent for the renewal of the contract of the UHC healthcare workers, and upon grant of such approval, has advised the County Public Service Boards through the 1st Interested Party to extend the contracts of employment of the healthcare workers for a prescribed period of time.

132. For the foregoing reasons, I find no difficulty in concluding that at all material times, the health care workers under the UHC programme are employees of the National Government, specifically, the 1st Respondent.

Whether the Claimant's members have been subjected to pay discrimination

133. The crux of the Claimant's case is that the healthcare workers under the UHC programme have, for a long time, suffered unfair remuneration as their remuneration has not followed the principle of "*equal pay for equal work*".

134. It is common cause that upon recruitment, the healthcare workers under the UHC programme were paid consolidated salaries of Kshs 50,000/- and Kshs 40,000/-, depending on their professional qualifications, with the categorization being either diploma or certificate qualification.

135. It is also not in dispute that the consolidated salaries fall below the remuneration levels of the same category of staff serving under permanent and pensionable terms of service. According to the Claimant, the nursing staff under the UHC programme do not earn the allowances payable to their counterparts serving on permanent and pensionable terms of service. These allowances are the

nursing service allowance, commuter allowance, hardship allowance, health risk allowance, leave allowance, and uniform allowance.

136. To buttress this position, the Claimant exhibited a copy of a registered Collective Bargaining Agreement (CBA) it has with the Ministry of Health, the 1st Respondent herein. As per the said CBA, the nursing staff earn nursing service allowance, commuter allowance, hardship allowance, leave allowance, uniform allowance, and health risk allowance. It is not in dispute that the nurses under the UHC programme do not earn any of these allowances.

137. Further exhibited was a copy of a contract of an employee serving on permanent and pensionable terms in the capacity of Enrolled Nurse III. As per the said contract of employment, the said employee is entitled to house allowance, commuter allowance, extraneous allowance, health service allowance, health risk allowance, leave allowance, and uniform allowance over and above his basic salary. Evidently, the contracts of employment of CW1 and CW2 do not bear these allowances. In this regard, the pay slips of CW1 and CW2 contain only one item, which is described as “special salary” and which is far below the gross remuneration of the employees serving on permanent and pensionable terms.

138. It is therefore apparent that there is a pay disparity between the Claimant's members employed under the UHC programme and their counterparts engaged on permanent and pensionable terms of service. Can it then be said that the Claimant's members have been subjected to pay discrimination?

139. Pay discrimination refers to the unfair treatment of employees with respect to remuneration on the basis of characteristics unrelated to their job performance or qualifications. These characteristics may include gender, race, ethnicity, disability, religion etc.

140. One of the key features in determining pay discrimination is unequal pay for work of equal value, in which case employees in the same category performing similar work are not paid equal remuneration. The determining factor in such a case is that the employees are similarly situated and performing the same kind of work.

141. It should also be appreciated that a number of factors, for instance, experience/seniority, skills, or qualifications, may justify pay disparity.

142. In the present case, the singular defence advanced by the Respondents in justifying the pay disparity between the staff under the UHC programme and those serving on permanent and pensionable terms is that the Claimant's

members voluntarily agreed to their contractual terms and cannot now ask the Court to rewrite the same.

143. **Article 41(2)(a) of the Constitution** guarantees every worker the right to fair remuneration. The key elements of fair remuneration are non-discrimination in remuneration and equal pay for work of equal value. These elements, which are intertwined, have been embodied in the Constitution, the Employment Act 2007 and other key international instruments.

144. With respect to non-discrimination, Article 27 of the Constitution guarantees every person equality and freedom from discrimination. Specifically, Article 27(5) provides as follows:

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

145. Similarly, **Section 5(3) of the Employment Act, 2007** prohibits direct or indirect discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status; in respect of recruitment, training,

promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

146. And further, **Section 5(5) of the Employment Act** mandates employers to pay their employees equal remuneration for work of equal value.

147. Under the **International Labour Organization (ILO) framework, Convention No. 100 (Equal Remuneration Convention)** advocates for equality of pay for work of equal value.

148. In addition, **Article 23 of the Universal Declaration of Human Rights** outlaws discrimination in pay for similar work performed by different individuals.

149. As stated herein, the Respondents have not provided any justification for the pay disparity between the staff under the UHC programme and those serving under permanent and pensionable terms.

150. Worthy to note is that under **Section 5(7) of the Employment Act**, the burden is on the employer to prove that discrimination did not take place. The said provision is couched as follows: -

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

151. This provision was amplified by the Supreme Court in the case of **Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR)** as follows: -

“The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds....According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed.”

152. What can be drawn from the foregoing is that in legal proceedings related to alleged discrimination under Section 5 of the Employment Act, an employer bears the legal burden of proving that discrimination did not occur. As such, the employer is enjoined to demonstrate that any alleged discriminatory action or inaction was not based on protected grounds such as race, sex, religion, disability etc. Where the employer fails to justify the differential treatment, then there exists discrimination against such an employee.

153. As no valid reasons were advanced by the Respondents for the disparity in pay between the staff under the UHC programme and their counterparts serving on permanent and pensionable terms, it is evident that the Claimant's members have been subjected to pay discrimination.

154. I must also say that the Respondents' argument that the UHC staff are bound by the terms of contract they signed does not hold. Here is why. Pursuant to **Section 5(2) of the Employment Act**, an employer is enjoined to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

155. Therefore, in as much as the Claimant's members may have accepted contractual terms that were less favourable compared to those of the staff serving under permanent and pensionable terms of service, there was a statutory duty on the part of the Respondents to ensure fairness in remuneration across the board and to strive to eliminate any discriminatory policy or practice in the workplace.

156. Further and in terms of **Section 5(5) of the Employment Act**, it was improper for the Respondents to base the remuneration of the staff herein on their terms of engagement (i.e fixed-term contract *vis a vis* permanent and pensionable terms of service). The remuneration ought to be equal for the staff in the same category performing the same work, despite their terms of engagement. Indeed, the Respondents herein have not suggested or indicated that the work performed by the staff under the UHC programme is not of the same value as that performed by staff on permanent and pensionable terms.

157. All things considered, the Court finds that the Respondents have subjected the Claimant's members to pay discrimination as they have failed to demonstrate non-discriminatory reasons and justify the pay disparity between the staff serving under the UHC programme and those serving on permanent and pensionable terms of service.

158. To this end, the Respondents are in breach of Articles 41(2) (a) and 27(5) of the Constitution, Section 5 (3) and 5 (5) of the Employment Act, as well as ILO Convention No. 100 and Article 23 of the Universal Declaration of Human Rights.

Reliefs?

159. The Claimant has sought an order for joint computation of the amount due to the nurses under the UHC programme on account of underpayment. On this issue, the Court agrees with the 2nd Respondent that this is a specific claim hence the onus was on the Claimant to compute the underpayment and prove the same in Court to the required standard. Be that as it may, the Claimant failed to satisfy its evidential burden hence, this relief is declined.

160. The claim for payment of gratuity succeeds as there is no evidence that the same was paid to the Claimant's members upon completion of their initial respective contracts.

Orders

161. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimant in the following manner: -

(a) A declaration that the Respondents are in breach of the Claimant's members' right to fair remuneration contrary to Article 41(2) (a) of the Constitution as read with Section 5(5) of the Employment Act, ILO Convention No. 100 and Article 23 of the Universal Declaration of Human Rights.

(b) A declaration that the Respondents are in breach of the Claimant's members' right to equality and freedom from discrimination as guaranteed under Article 27 (5) of the Constitution and Section 5 (3) of the Employment Act by paying the staff under the UHC programme less remuneration compared to their counterparts engaged under permanent and pensionable terms of service.

(c) The Respondents are hereby directed to harmonize and align the terms of service of staff engaged under the UHC programme to be commensurate with those applicable to the staff in the same category engaged under permanent and pensionable terms.

(d) The Respondents are hereby directed to pay gratuity to the Claimant's members serving under the UHC programme at the rate of 31% of their respective salaries.

(e) Each party to bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of September 2025.

..........

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant	Mr. Kirui
For the 1 st Respondent & 2 nd Interested Party	Ms. Mochoge
For the 2 nd Respondent	No appearance
For the 2 nd Interested Party	Mr. Lawi
Court assistant	Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the

Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE