Disparity in judges’ salaries declared unconstitutional

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At the root of the problem, according to the petition considered by Judge George Odunga – incidentally named Kenya’s jurist of the year for 2019 – lay a decision by the Salaries and Remuneration Commission (SRC) and the Judicial Service Commission (JSC). This decision was to distinguish between high court judges on the basis of whether they were appointed ‘from outside the judiciary’ or were already ‘serving in the judiciary.

According to counsel for Sollo Nzuki, a private individual who launched the petition challenging the judges’ unequal salary system, that in turn meant the two commissions ‘discriminated, differentiated … oppressed and continue to oppress some high court judges’ who were classified as appointed from ‘outside the judiciary’.

Counsel for Nzuki argued that as far as the ‘outsiders’ were concerned, their lower starting salary was ‘oppressive, unjust, unwarranted, ill-advised and discriminatory, hence unconstitutional’. More practically, it meant they could not access certain benefits such as a ‘full mortgage scheme’. This was because with their lower salaries they could not afford the repayments.

Kenyan judges were entitled to equal protection and benefit of the law, and the two commissions were obliged not to discriminate against the judge on any ground. However, the commissions ‘entrenched and perfected a totally unconstitutional narrative’ with the starting salaries of high court judges being determined by whether they were appointed from ‘outside the judiciary’ or from within it. This discrimination in salary operated despite the fact that judges from these two categories were appointed on the same day to do the same work, said Nzuki.

One result was that people appointed from the private sector who sacrificed their lucrative income to serve the Kenyan people on the Bench, were disadvantaged. Further, the commissions’ tweaking of the salary system had resulted in some ‘grave absurdities’. This amounted to an unconstitutional situation which threatened the independence of the judiciary and the due administration of justice.

For its part, the SRC said it was independent and that the judges had not proved that it had breached ‘any of the constitutional principles that guide it’. Similarly, the JSC said the complaint had not been proved and the petition should be dismissed with costs. Anyone who applied to be a judge was ‘well aware of the salaries’ before applying for a post or taking the oath of office. In addition, magistrates who had served in the judiciary for a long time before being appointed as judges could not have their salaries reduced.

Odunga first dismissed the argument that the court should not consider the petition because it infringed the doctrine of separation of powers. Then he said the two commissions were clearly prohibited by the Constitution from unfairly discriminating against anyone.

When someone became a judge, it was through appointment rather than promotion. Those already serving within the judiciary (as magistrates) were eligible for ‘appointment’ as a high court judge if they met the requirements. Since the process involved ‘appointment’, individuals were to be ‘at par’ in relation to their remuneration.

There were no proper grounds ‘to create disparity between those (already) serving in the judiciary and those not (already) serving’. Once appointed, all judges performed similar tasks, regardless of their background.

By failing to ‘harmonise’ judges’ remuneration to avoid a difference between those drawn from private practice and those already in the legal system, the SRC abdicated its constitutional and statutory mandate, he said. Judges’ salaries were closely tied to judicial independence. Thus, their remuneration and other benefits were ‘constitutionally ringfenced’ and could not be varied ‘to the disadvantage’ of a judge.

The SRC’s task was to set salaries so that ‘each tier of the judiciary is remunerated in accordance with its superior rank’. A system where ‘a magistrate’s remuneration is higher than that of a judge of a superior court flies in the face of judicial hierarchy and is unacceptable.

Odunga’s five-point order included a declaration that any disparity in salary between judges appointed on the same day violated the affected judge’s constitutional rights not to be discriminated against. He also declared that appointment as a high court judge was ‘a substantive appointment’ and not a promotion. Thus, all judges were entitled to similar starting salaries and benefits. Any categorisation of judges by the commissions, based on whether they were appointed from outside or from within the judicial system was unconstitutional, he declared.

Finally, he made a declaration compelling the commission to pay any affected judges the same starting salary as had been paid to other judges, ‘whichever is higher’. Any payments of salary or benefits was to be paid ‘promptly’, backdated to the date of their appointment.

The judgment makes interesting reading for a number of reasons. Among these, I was struck by Odunga’s quoting extensively from other jurisdictions (including a number of South African cases). This is an example of the growing trend among African judges to read widely and where relevant to cite from their colleagues in other countries, both on this continent and elsewhere. More negatively, I was surprised that the two commissions had chosen to stick to a road so obviously discriminatory, and that an instinctive understanding of what is demanded by the Constitution and its guaranteed rights has not yet taken root in their thinking. Even if the SRC’s decision was based on a blinkered view of what made financial sense in Kenya, why did the JSC respond so passively?

What surprised me most though, is that the discriminatory system of remuneration lasted as long as it did before being challenged in court. And that when the petition was finally launched, the JSC figured as a respondent, defending the challenged status quo – rather than as the petitioner, acting on behalf of the judiciary to ensure constitutionally-mandated fairness, not to mention protection of judicial independence.