REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 435 OF 2010

KENYA UNION OF DOMESTIC,

HOTELS, EDUCATIONAL INSTITUTIONS,

HOSPITALS AND ALLIED WORKERS.....CLAIMANT

-VERSUS-

NAARO HIGH SCHOOL .....RESPONDENT

Mr. Samson Kioko for Claimant

Mr. Mapesa for Respondent

JUDGMENT

The grievant was employed by the Respondent as a watchman on 1st February 1988 in Job Group A with a starting salary of Ksh. 725 per month.

He worked continuously for the Respondent until the 17th July 2008, when the Board of Governors of Naaro High School dismissed him summarily for coming to work drunk and gross insubordination.

He was suspended from duty without pay on 22nd May 2008, pending the investigation and conduct of disciplinary hearing.

At the time of termination he was earning a gross salary of Ksh. 7,830/= comprising of a basic pay of Ksh. 6,130/= and house allowance of Ksh. 1,700.

In his statement of claim and viva voce evidence before Court, the Grievant denies that he reported to work drunk but admits that he refused to write an apology to the head teacher when he was requested to do so because he had not gone to work drunk.

He told the Court that he was not given a hearing by the Board prior to the dismissal nor was the alleged misconduct proved.

He therefore states that the dismissal was unlawful and unfair taking all the circumstances of the case into account.

He claims the following relief from the Court:

i. Payment of 3 months salary in lieu of notice in terms of Clause 6(a)(iii) of the CBA between the Ministry of Education and KUDHEIHA Union in the sum of Ksh. 23,490/= (7,830 x 33).

ii. Service gratuity for the 20 years served, calculated in terms of Clause 31 of the CBA at the rate of one month's salary for each completed year of service in the sum of Kshs. 156,600.

iii. Payment in lieu of outstanding leave days in the year 2007 and 2008 calculated at 21 days salary per year in the sum of Ksh. 10,962.

iv. Payment of 27 days under suspension in the sum of Kshs. 7,042/=

v. Payment of 1 day off per week for 36 months from July, 2006 to 30th June 2008 in the sum of Ksh. 40,716/=.

vi. Issuance of Certificate of service; and
vii. Payment of maximum compensation of 12 months salary for the unlawful and unfair dismissal in the sum of Kshs. 93,960/=.

The letter of appointment dated 1st February, 1988 is attached to the claim as Appendix one and it stipulates that *"the appointment is subject to the terms of any agreement between the Ministry of Education, Science and Technology and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers for the time being in force, on the terms and conditions of service of persons employed by Boards of Governors established under the education (Board of Governors) Order or any other Order, establishing any other Board of Governing body of any institution established under the Education Act."*

In terms of the CBA in place between the Ministry of Education and KUDHEIHA at the time the Grievant was appointed,

a. Interdiction vide *Clause 8(b)* was to be on not less than half basic salary;
b. Normal termination of an employee who had completed five years continuous service or more was upon three months notice or payment in lieu thereof; and
c. *Clause 31* provided for payment of service gratuity calculated at one month's current salary for each completed year of service.

The Grievant states that he had served the Respondent diligently for 20 years and it was unlawful and unfair to summarily dismiss him without payment of any terminal benefits even if, (which is denied) he had committed an offence of coming to work under the influence of alcohol.

That his failure to apologise was in order because he could not admit that which he had not done and therefore his refusal does not constitute insubordination.

The Respondent filed a memorandum of Defence on 29th June 2010.

The Respondent admits that the grievant was employed by the Respondent and his employment was lawfully terminated and his dues were paid.

The Respondent states that the Grievant had various records of misconduct which included being noted to be habitually absent from duty by a letter dated 28/7/1992; suspension from duty around March and July 1996 for alleged incitement and buying cigarettes for students; and on 23rd November 2006, when robbers gained entry to the school, while the Grievant was on duty.

On 24th October 2007 the Grievant received a letter warning him of absenteeism and lateness

without specifying dates when this happened.

On 2nd January 2008, he again received a second warning letter for coming late on 20th January 2008 by reporting at 7.17 p.m. He was alleged to have been drunk.

On 11th May 2008, he was given a notice to show cause for reporting to work one hour late and was alleged to have been drunk.

On 22nd May 2008, he received a letter of suspension for alleged gross insubordination for failing to respond to the notice to show cause dated 11th May 2008.

By a letter dated 1st July 2008, the Respondent invited the Grievant to appear before the Board of Governors on 16 July 2008 at 12.30 p.m. where he was "to be given an opportunity to mitigate over the cases before you." The Grievant denies ever receiving this notice as he was at the time under suspension.

The Board sat on the 16th July 2008 and deliberated on the Grievant's case in his absence. The Board noted that the Grievant had failed to attend the Board meeting though he had been invited, which he denies.

The Board summarily dismissed the Grievant and a decision was taken to replace him with immediate effect.

In Court, the Claimant denied coming late habitually and also denied coming to work drunk.

He said that the new Principal was persistently harassing him and wanted to dismiss him. He denied that he was insubordinate to the Principal.

The Claimant said that he worked from 6 p.m. to 6 a.m. in the morning and reported on time as he was a neighbour to the school. He was not granted leave in 2007 and 2008 though he was entitled to 21 days, was not paid for 27 days during suspension and did not receive off days for 30 months.

The new Principal is the one who changed his terms of service otherwise previously he had taken leave and off days.

The Respondent called Mr. Daniel Kariuki Chege who has been the Principal of the Respondent school since January 2013. He therefore did not find the Grievant at the school and only relied on the record he found.

He told the Court that going by the letter produced in Court and the minutes of the Board, the Grievant was lawfully and fairly dismissed.

That he had 1st and 2nd warning and then was given a notice to show cause but did not respond nor attend the hearing.

The witness told the Court that the school had not signed a recognition agreement with KUDHEIHA and the CBA between the Ministry of Education and KUDHEIHA ceased to have general application in 1993 pursuant to legal Notice No. 263.

The Respondent therefore submits that the terms in that CBA are not applicable to the Claimant.

That the Grievant was dismissed in compliance with the *Provisions of the Employment Act, 2007* and is therefore not owed any of the claimed amounts.

The witness was at pains to explain why the minutes of the Board were signed two years after the alleged meeting which dismissed the Grievant's case.

With respect to leave days, the Respondent produced a letter dated 30/11/2007 indicating that the Grievant was granted 42 days leave with effect from 3rd December 2007 until 7th February 2008. There is no evidence to show that the Grievant took leave for the year 2008. Since the Grievant was dismissed with effect from 17th July 2008, he is entitled to payment in lieu of the prorata Leave days not taken for the year 2008.

The record for the off days filed by the Respondent for the subordinate staff does not include the Grievant hence the Court finds that the Grievant was not granted off days for 3 years as claimed.

Applicability of the CBA

The Claimant was employed on 1st February 1988 and the letter of appointment expressly incorporated the terms of the existing CBA to his contract.

The Education (Board of Governors) (Amendment) *Order, 1993, Legal Notice No. 263 of 1993* issued by the Minister pursuant to *Section 10(1) of* the *Education Act Cap 211 of the Laws of Kenya* reads:

"2 The Education (Board of Governors) Order is amended by deleting regulation 17, and substituting it with the following:

17. A Board may enter into an agreement of recognition with any trade Union competent to negotiate terms and conditions of service for and on behalf of any Section of the employees of the Board, and the Board shall sign similar agreement on its own behalf."

This notice superseded the Memorandum of Agreement (CBA) between the Ministry of Education, Science and Technology and KUDHEIHA, with regard to those employees that were employed and joined the Union after the said notice but did not nullify the terms of the CBA that had already been incorporated into the individual contracts of the employees.

See the decision of Hon. Justice Paul K. Kosgei (as he then was) in the **Industrial Court of Kenya Cause No. 39 of 2008 between KUDHEIHA V. Masii Secondary School** where the Hon. Judge stated at page 11:

> **"As regards the second question i.e. the applicability of the Collective Bargaining Agreement between the Union and the Ministry of Education to the Grievant's case, we do not need to re-invent the wheel as this Court has dealt with a similar situation in the past. In Cause 110 of 2005 (KUDHEIHA workers) V. Musa Gitau Primary School) this Court stated as follows on the effect of L. N. NO. 263 of 1993:**
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> **"As regards the first question the Respondent concedes that prior to the enactment of Legal Notice No. 263 of 1993, the Collective Bargaining Agreement between the Ministry and the Union regulated the Grievants terms and conditions of service. The admission is consistent with the principle that once a Collective Bargaining Agreement is registered between a Union and an employer, one of its consequences is that the terms and conditions contained in the Collective Bargaining Agreement supersedes the terms and conditions in the employees individual contracts of employment, except where the individual terms are superior to those in the Collective Bargaining Agreement. We do not however accept the Respondent's view that Legal Notice No. 263 of 1993 took away the employees rights contained in the Collective Bargaining Agreement. What the Legal Notice did was to provide that future Collective Bargaining Agreements would have to be negotiated directly between the Union and the Board of Governors of the School under the Ministry. The terms and conditions of service in the expired Collective Bargaining Agreement remain applicable to the Grievants and the Respondents' employees employed during**

the subsistence of the Collective Bargaining Agreement, until amended by a new Collective Bargaining Agreement or fresh individual contracts of employment. The amendments would however, have to take into account the terms and conditions in the said Collective Bargaining Agreement as the minimum terms and conditions of the affected employees."

I could not agree more with the finding of the erstwhile Industrial Court.

On the facts of this case, the Respondent has sought to rely on a letter dated 28/7/92 to show that the Grievant was an habitual absentee. There was no such warning for absenteeism until the 24th October, 2007 about 15 years down the line. Even the letter of 24th October 2007 does not specify when the Grievant was absent.

This was followed by a letter dated 21/1/2008 for a different offence of "Lateness to duty" wherein it is alleged that the Grievant arrived to work late on Sunday 20th January 2008 at 7.17 p.m. This was termed the 2nd warning.

On 11th May 2008, he received another letter for reporting to work on the same day 1 hour late and was alleged to have been drunk. This is the offence that led to his suspension on 22nd may 2008 for failure to respond to the notice to show cause and this was added on as an offence of insubordination.

On 16/7/2008, the Grievant was summarily dismissed from work.

The Court has considered the personal record of the Grievant especially that he had served the Respondent for a period of 20 years. He was dismissed for the offence of coming to work late by one hour and was alleged to have been drunk.

The Claimant has consistently denied that he was under the influence of alcohol at the time and stated that he was being victimized.

The Respondent took his failure to respond to the charges as a further offence of insubordination. This was clearly a mis-step by the Principal because the Grievant had the right to keep silent in a situation where he felt the Principal was biased against him. This clearly could not be insubordination.

The Board was misled by the Principal in this regard hence the decision to not only terminate an employee of 20 years from his employment but to also deny him any terminal benefits after such a long service to the Respondent.

The Grievant was born in 1959 and was at the time of dismissal 49 years old and only a few years to retirement.

Considering all the circumstances of this case, this is a proper case for reducing the summary dismissal to a normal termination in the interest of justice and fair play.

It is unjust to deprive an employee of service gratuity that had accumulated for a period of 20 years because of what the Court considers, a minor offence of coming to work one hour late. The Respondent did not establish that the Grievant had taken any alcohol and the Court regards the allegation as not proved given that it was denied by the Grievant and he persists in such denial to date.

In the final analysis the Court awards the Grievant as follows:

1. Three months pay in lieu of notice in terms of the CBA in the sum of Ksh. 23,490/=.

2. Service gratuity for the 20 years at the rate of one month salary for each completed year of service in the sum of Ksh. 156,000/=

3. Prorata annual leave for the year 2008 in the sum of Kshs. 5,481/=

4. Half salary for the 27 days under suspension from 22nd May to 17th July 2008 in the sum of Ksh. 3,915/=

5. Weekly off days for 36 months in the sum of Ksh. 40,716/=

6. The Grievant to be issued with a certificate of service for 20 years.
7. Total award is Kenya Shillings 230,202/=.

The Respondent is to pay the said amount to the Grievant with interest at Court rates from the date of this Judgment to payment in full and costs of the suit.

Dated and Delivered at Nairobi this 26th day of February, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE