



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 375 OF 2011**

**JOHN WILLICE OPOT..... CLAIMANT**

**VERSUS**

**STAREHE BOYS CENTRE..... RESPONDENT**

**JUDGMENT**

The present suit was commenced by a Statement of Claim dated 7<sup>th</sup> March and filed in court on 14<sup>th</sup> March 2011.

The Claimant alleges that he was employed by the Respondent in 2003 and was wrongfully dismissed ostensibly for engaging in active politics in violation of his constitutional rights on 8<sup>th</sup> September 2010. He further alleges that he was not paid the whole of his entitled pay in lieu of notice and other terminal benefits. He prays for the following orders against the Respondent.

- a. Kshs.205,169 being arrears of salary in lieu of notice and service pay.
- b. A declaration that the termination was wrongful.
- c. Damages.
- d. Compensation.
- e. Costs of the suit.
- f. Any other relief the court deems fit to grant.

On 8<sup>th</sup> July 2011 the Respondent filed a Reply to the Statement of Claim. The Reply is dated 7<sup>th</sup> July 2011. The Respondent filed an Amended Reply to Statements of Claim on 22<sup>nd</sup> July 2011 pursuant to leave granted by the court on 13<sup>th</sup> July 2011.

In the Amended Reply to Statement of Claim the Respondent denies the claim by the Claimant and alleges that the claimant was terminated in public interest for gross misconduct, conflict of interest and unlawfulness/illegality. The Respondent further alleges that the Statement of Claim is frivolous, vexatious, fatally defective and fit for striking out/dismissal. It prays that the suit be dismissed with costs.

The case was heard on 10<sup>th</sup> May 2013. The Claimant testified on his behalf while the Respondent called 1 witness Mr. Martin Kamba, the Assistant Director in charge of boarding.

The main facts of the case are not contested. The Claimant was employed by the Respondent in or about

2003/2004 as Assistant Games Master. His employment was terminated on 8<sup>th</sup> September 2010 for engaging in active politics by campaigning for Starehe Parliamentary seat. Upon termination he was paid 1 months' salary in lieu of notice at Shs.25,080 (net) and service pay of Shs.59,631.

The Claimant alleges that he was a member of Kenya Union of Domestic, Hotels, Education Institutions, Hospitals and Allied Workers (KUDHEIHA) and was entitled to 2 months notice instead of 1 months' notice that he was paid. He further alleges that he worked for 7 years but was paid service for only 2 years. The Respondent on the other hand alleges that the Claimant worked for less than 6 years and was paid his full terminal benefits.

Having considered the pleadings, the *viva voce* evidence and the submission, the issues for consideration are the following;

1. When the Claimant was employed.
2. Whether the Claimant's terms were covered by KUDHEIHA Collective Bargaining Agreement.
3. Whether the Claimant was subject to the Teachers Service Commission Code of Regulations and Public Service Code of Regulations.
4. Whether the Claimant's constitutional rights were infringed by his dismissal.
5. Whether the Claimant is entitled to his prayer.

#### **1. When the Claimant was employed**

The Claimant alleges he was employed on 1<sup>st</sup> October 2003. He refers to a letter he wrote on behalf of the Respondent on 19<sup>th</sup> April 2004 in his capacity as Assistant Games Master, Statement from NSSF showing remittances from October 2003 and thereafter continuously to August 2010, payslip for June 2004 and tenancy agreement signed on 14<sup>th</sup> June 2004. The Respondent on the other hand relied on the letter of appointment dated 15<sup>th</sup> October 2004 and alleges that the Claimant was employed in October 2004.

I have considered the evidence on record and especially the NSSF statement which shows continuous remittance of both Claimant's and Respondent's contribution to NSSF from October 2003. The Respondent has not denied the authenticity of the NSSF statement.

I therefore find that the Claimant was employed on 1<sup>st</sup> October 2003.

#### **2. Whether the claimant's terms were covered by KUDHEIHA Collective Bargaining Agreement**

The Claimant alleges that his terms were covered by the collective agreement between the Ministry of Education and KUDHEIHA workers, a copy of which he produced in his supplementary bundle of Documents as appendix 5. I note that the Agreement is incomplete and does not have both the 1<sup>st</sup> page and the last page. It does not show the period it covers or the signatures page. Although it has a cover page the contents commence from the middle of clause 3. The Respondent has stated that it is a stranger to the agreement and further that even if the agreement existed, the same has lapsed and in any event does not cover the Claimant.

In his letter dated 6<sup>th</sup> September 2010 which is exhibited as Annex 2 to the Respondent's Amended Memorandum of Defence, the Claimant emphatically asserts that Starehe Boys Centre and School is a Non Governmental body (NGO). The constitution of Starehe Boys Centre produced by the Respondent as annexure 4 in its supplementary list of Documents does not show that the Respondent is owned, sponsored or run by the Ministry of Education.

For these reasons I find that the Claimant's terms of employment were not covered by the KUDHEIHA agreement.

### **3. Whether the Claimant was subject to the Code of Regulations for Teachers and the Code of Regulations for Public Service.**

The Respondent has alleged that the Claimant's terms of employment were subject to both the Code of Regulations for Teachers and the Code of Regulations for Public Service. The Claimant denies the same and states he was not an employee of Teachers Service Commission or a Public Servant.

Regulation 6 of the Code of Regulation for Teachers annexed as Appendix 3 of the Respondents Amended Reply states that the regulations shall apply to all teachers employed by the Commission.

The Code of Regulations for Public Service at the last paragraph to the preamble at page (iii) states that the Code is applicable to the Civil Service. Starehe Boys Centre, as I have already observed above, is not part of the public or civil service. The Claimant was not an employee of either the Teachers Service Commission or the Public Service Commission. His terms and conditions of service were therefore not subject to the Code of Regulations for Teachers and the Code of Regulations for Public Service.

In any event the 2 codes could not apply to him simultaneously as alleged by the Respondent.

### **4. Whether the Claimant's Constitutional Rights were infringed by his dismissal**

The Claimant has alleged at paragraph 4 of the Statement of Claim that he was wrongfully dismissed for engaging in active politics in violation of his constitutional rights to freedom of association under article 36 of the Constitution and right to participate in the activities of a political party or campaign for a political cause under Article 38 of the Constitution.

The Respondent on the other hand alleges that the participation of the Claimant in active politics breached his employment terms and conditions of service as these rights are not absolute and were not supposed to encroach or prejudice the enjoyment of rights and freedoms for other school staff and students who are outwardly politically non aligned.

The Respondent does not deny the allegation of terminating the Claimant's employment for engaging in political activities. Indeed these are the grounds for termination in the letter of termination. The Respondent however justifies its action on the grounds that the involvement of the Claimant in political activities constitute gross misconduct, conflict of interest and/or illegality.

Section 44 of the Employment Act sets out what constitutes gross misconduct for which disciplinary action may be taken against an employee. Engaging in political activity is not listed as one of the grounds constituting gross misconduct under that section. The Respondent has not shown that there were any terms and conditions of service affecting the Claimant that prohibited him from participating in active politics. Section 46 of the Employment Act expressly provides that political opinion or affiliation shall not constitute a fair reason for dismissal or for imposition of a disciplinary penalty. If the Respondent wished to import the terms of either the Teachers Code of Regulations or the Public Service Code of Regulations into the Claimants terms of employment, it should either have stated so in his letter of appointment or in some other document specifically applying to the Respondent's employees who are not subject to the Teachers or Public Service Code or Regulations.

Section 12 of the Employment Act requires every employer who employs at least 50 employees to have disciplinary rules in a document which is reasonably accessible to the employees. The Respondent did not produce any such rules.

The Claimant testified that he had been involved in active politics with the knowledge of the Respondent over a period of time and this had not interfered with his work. This was not denied by the Respondent.

The Respondent has argued that its constitution at paragraph 3 states that the Centre shall not participate in any activity of a political nature. The constitution does not however state that this applies to employees of the Respondent.

For the foregoing reasons I find that the Claimant's constitutional rights of freedom of association and right to participate in political activities was infringed by the Respondent and the termination of his employment was therefore unfair.

**5. Whether the Claimant is entitled to the prayers.**

I will consider the prayers in this order.

**a. Kshs.205,169 for arrears of salary in lieu of notice and service.**

**i. Notice**

Having found that the Claimant's terms of employment were not subject to the KUDHEIHA Collective Bargaining Agreement, he was only entitled to 1 months salary in lieu of notice which the Respondent has already paid.

The Claim of notice is therefore dismissed.

**ii. Service**

I have held above that the Claimant was employed on 1<sup>st</sup> October 2003. By the date of his termination on 8<sup>th</sup> September 2010 he had worked for 6 years and 11 months. He was therefore entitled to be paid service for 6 years. Having been paid service for 5 years, I award him the balance being Kshs.15,303.50.

**b. Damages**

No submissions were made by the Claimant under this head. I therefore make no orders in respect thereof.

**c. Compensation**

The Claimant has urged the court to award compensation in the sum of Kshs.3,672,840 being 10 years salary. He has relied on the case of Ombanya v Gailey Roberts Ltd (1974) EA 522.

I find that the case is not applicable as it was decided before enactment of the Employment Act 2007 which caps compensation at a maximum of 12 months salary.

Having found that the termination of the Claimant's employment was unfair, he is entitled to compensation. Taking into account all the circumstances of the case, I award him 12 months salary as compensation in the sum of Kshs.367,284.

The Claimant shall also have costs of the suit.

In summary therefore I enter judgment for the Claimant against the Respondent as follows;

- i. I declare the termination of the claimant's employment by the Respondent as unfair.
- ii. I award the Claimant Kshs.382,587.50
- iii. Costs of the suit.

Orders accordingly

Read in open Court this 17<sup>th</sup> day of September 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Ms. Omondi h/b for Mr. Rombo for Claimants**

**Mr. Maweu for Respondent**