**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1040 of 2010**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS AND**

**ALLIED WORKERS ………………......................... CLAIMANT/APPLICANT**

**VERSUS**

**BOARD OF GOVERNORS KERUGOYA**

**BOYS SECONDARY ……………..…….........……..………RESPONDENT**

**JUDGMENT**

The Claimant is the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHIEHA WORKERS). The Respondent is the Board of Governors for Kerugoya Boys Secondary School. The Claimant filed a memorandum of claim on 9th September, 2010 on behalf of its member one Charles Njue Gichuki (the grievant). The Respondent filed the memorandum of Defence and counter-claim on 5th November, 2010.

The Claimant is praying for judgment against the Respondent for:

(a) Three months salary as notice being Ksh.15,880 x 3 making Ksh.47,640.

(b) Service gratuity for 20 years service at Ksh.11,690 x 20 making Ksh.233,800.

(c) 12 months salary compensation for loss of employment Ksh.11,690 x 12 making Ksh.140,280.

(d) Costs of the cause.

The case came up for hearing on 11th October, 2012. The grievant testified that by the letter dated 30th March, 1987 he was appointed as the School Bursar for the Respondent. The letter stated that the employment was subject to the terms of an agreement between the Ministry of Education and the Claimant Union for the time being in force on the terms and conditions of service of persons employed by the Respondent as established under the Education (Board of Governors) Order, 1964. During the hearing and the submissions by the parties, it was not disputed that the grievant was a member of the claimant Union.

By a letter dated 21st March, 2006 the Respondent issued the grievant with a last warning for allegedly increasing the school workers' salary without authority from the Respondent. By a letter dated 27th July, 2005, the grievant had written to the Respondent denying having increased the school workers' salaries

without the Respondent's authority. The matter appears to have been settled and rested by the Respondent's last warning letter of 21st March, 2006.

The grievant testified that his employment was terminated by the letter dated 19th October, 2006 addressed to him by the Respondent. The letter stated as follows:

***"Charles Njue Gichuki***
***P.O. Box 27***
***KERUGOYA***
***<u>RE: TERMINATION OF EMPLOYMENT DUE TO GROSS MISCONDUCT</u>***

***During the months of March, April and May, 2005, you increased workers salaries without consultation with the Principal or the School Board of Governors. You therefore incurred an expenditure of Ksh.105,845 without authority from the Board of Governors.***

***Reversing payments of these salaries created a lot of tension between the school workers and the Board of Governors. After several sittings of the Board, it was resolved that you be given a last warning which was given to you through a letter Ref. NTS/KER/1/73 dated 21st March, 2006.***

***On Wednesday 11th October, 2006 when the BOG Chairman and the PTA Chairman had come to School to discuss the agenda for the full BOG meeting that was scheduled for Friday, 13th October, 2006, you presented to them new salaries for the school workers and they wondered when and where the salaries were agreed. You even had calculated the arrears and had come to the conclusion that each student had Sh.1,605 additional fees to pay for the arrears.***

***This indicated that you had again taken the decision on salaries on your own and without consulting with either the Principal or the Board of Governors. This further embarrassed the BOG because the matter went to the school workers first before coming to the Board, as it was prepared, typed and filed by the school office workers.***

***The move is incitive to workers and meant to cause further tension among them when the Board fails to comply.***

***Having had a last warning over the same issue, the Board of Governors views this as an act of gross misconduct on your part, and it is left with no alternative than to terminate your employment as School Bursar on these grounds.***

***SIGNED***

***L.M. MUNYIRI***

***SECRETARY, B.O.G."***

The grievant responded to the termination by the letter dated 21st October, 2006 addressed to the Respondent's Secretary as follows:

***"The Principal***
***Kerugoya Boys Sec. School***
***P.O. Box 27***
***KERUGOYA***

***<u>RE: TERMINATION OF MY SERVICES</u>***

***Your letter dated 19th October, 2006 refers.***

***I was rather shocked to receive your termination letter accusing me of presenting new salaries to the Chairman B.O.G. and P.T.A. Chairman.***

***You remember you came personally to my office asked me to prepare the same and hand over to you by 11th October, 2006. You had now turned against me. This is a clear indication that you were out to terminate my services and now you have achieved your goal.***

***If you did not ask me to do so summon me during full Board meeting so that I can enlighten the members of the Board our differences and why you don't need me in this school. I would be grateful if you can invite the Union officials.***

***Yours faithfully***
***SIGNED***

**CHARLES N. GICHUKI**

**BURSAR**

***c.c. The Branch Secretary***

***Kudheiha Workers***
***Kerugoya"***

In the memorandum of defence and counterclaim filed for the Respondent by the Honourable Attorney General, the Respondent averred that it was a fundamental term of the grievant's employment contract that he would only incur expenditure when authorized by the Respondent, carry out his work in accordance with the Respondent's instructions and financial guidelines and perform his duties carefully and properly. That the grievant breached the said fundamental term which amounted to gross misconduct thereby leading to the summary dismissal.

The respondent did not call any witness. However, it filed copies of the minutes of its meetings. Crucial to this dispute are the minutes of the Respondent's consultative meeting held on 11th October, 2006. The grievant was in attendance. Minute No. MIN.3/2006 recorded the proceedings on the issue of the budget for the year 2007. The relevant part provided as follows:

***"MIN. 3/2006: BUDGET FOR THE YEAR 2007***

***1) Personal emoluments***

***Schedules prepared by the bursar on personal emoluments were rejected by the Committee. Matters contained in this schedules were not discussed by the Board of Governors. The schedules included higher Board of Governors workers' salaries which have not been passed by the B.O.G. The schedules had even indebted the school for the year 2005 and 2006 through salary arrears of Shs.1,106,376 which required fees to be increased by Sh.1,527 per student to clear. "***

Minute No. MIN. 4:2006 was on "***Any Other Business."*** The minute provided as follows with regard to the issues in dispute in this case.

***"MIN. 4:2006 A.O.B.***
***1) BOG Workers Salaries***

***Review of BOG Workers salaries will be considered by the Board at the appropriate time. A research will be carried out on how other neighbouring schools are paying their workers"***

It is important to note that the court has perused the Minutes of 11th October, 2006. As relates to the

schedules on the BOG workers' salaries, the Respondent appears to have considered the schedules as a proper agenda and decided upon a clear way forward. Nowhere was it recorded that the Respondent was embarrassed and that the matter had gone to school workers first before being tabled to the Respondent's meeting. This consideration is crucial and the court will come back to it later in this judgment.

The issues for determination in this case are two, namely:

1. Whether the grievant's employment was terminated unfairly; and

2. Whether the grievant is entitled to judgment as prayed for.

On whether the employment was terminated unfairly, it was submitted for the claimant that:

(a) the grievant was entitled to a termination notice and a hearing before the termination as provided for in Section 41 of the Employment Act, 2007;

(b) summary dismissal being not available in the case, the dismissal was unfair because Section 41 of the Act was breached; and

(c) the Respondent's Secretary was only entitled to interdict and dismissal was the prerogative of the Respondent under Clause 6 of the Collective Agreement so that the Respondent's Secretary having usurped the powers of the Respondent to purport to dismiss the grievant, the dismissal was unfair for want of due process.

Counsel for the Respondent submitted that one ground for summary dismissal is a provision of the contract of employment. The grievant in this case failed to produce any evidence to show that the Respondent had increased its workers' salaries. As such, the grievant had engaged in a gross misconduct that attracted summary dismissal without a notice and a hearing as envisaged in Section 41 of the Employment Act, 2007.

This court has addressed the point in issue in the case of Linus Barasa Odhiambo Vs Wells Fargo Limited, Industrial Court Cause No. 275 of 2012 at page 11 – 12. The court stated as follows:

***"The court has carefully considered this point and finds that summary dismissal is a dismissal which the employer is entitled to dismiss without notice. In particular subsection 44(2) of the Act provides that subject to provisions of Section 44 of the Act (providing for summary dismissal), no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Summary dismissal is lawful only where the criteria prescribed under Section 44 of the Act is complied with. Under Subsection 44 (3), summary dismissal is tenable only where, "the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service". Such conduct on the part of the employee is referred to as "gross misconduct" under subsection 44(4) of the Act. Where the ground for summary dismissal constitute justifiable or lawful grounds for such dismissal, that is, amount to gross misconduct, then the employer is not culpable for breach of any law and is free from liability; and in such instances Section 41 of the Act prescribing notification of alleged misconduct and hearing before termination shall not apply. However, where the circumstances are such that the grounds for removal are such that they did not amount to gross misconduct, then the wings of Section 41 will spread out and the employee is entitled to the full protection of the Section. Accordingly, disputes of summary dismissal will be subjected to the test in Section 41 of the Act whenever the employee disputes existence of gross misconduct in any instance of such dismissal. Employers stand advised that the power to dismiss summarily must therefore be exercised sparingly and in the most obvious cases of gross misconduct. It is a discretion that stands on a thin line and to avoid the price of unfair dismissal or termination, it were safer for the employer to follow the wide path of due process through notification and hearing as provided for in Section 41 of the Act…."***

The court upholds that opinion.

In the instant case, the grievant presented schedules to the Respondent being proposals to increase salaries for the Respondent's workers. It was never shown and proved that the grievant embarrassed the Respondent by tabling the relevant agenda for consideration at the Respondent's meeting on 11th October, 2006. It cannot be said that the grievant breached any operational policies or systems of the Respondent by presenting the schedules of the salaries before the Respondent's meeting. The court considers that in fact, the duty to present such Agenda properly vested in the Respondent's Secretary and the grievant could not have presented the schedules without the full knowledge and concurrence of the Respondent's Secretary.

The court has also considered Clause 6 of the Collective Agreement which bound the parties. The relevant paragraph (b) states that the Board (Respondent) reserved the right to terminate the service of an employee (such as the grievant) instantly and without notice or pay in lieu of notice for reasons of gross misconduct and on account of any of the matters that amount to gross misconduct as enumerated in the Employment Act. The Court finds that the Authority to dismiss the grievant was therefore vested in the Respondent Board which never exercised its authority in the grievant's case. Instead the Respondent's Secretary acted behind the Respondent, usurped the authority reserved for the Respondent and pretended to summarily dismiss the grievant on the basis of imaginary particulars of gross misconduct. The reasons for dismissal were not valid and the procedure invoked was unfair. The court finds that the wings of Section 41 must now spread out and the Respondent is liable to pay the price of unfair termination. The termination was unfair on account of procedural impropriety and invalidity of the reasons for termination.

The second issue for determination is whether the grievant is entitled to the remedies as prayed for in the statement of claim.

The first prayer is for Ksh.47,640 being three months salary in lieu of the notice for termination. Clause 6(a)(ii) of the Collective Agreement provides for payment of three months in lieu of notice or three months notice for employees of five or more than five years service. The grievant had served since 1987. He is entitled to the remedy as prayed for and the court grants the same.

The second remedy prayed for is service gratuity of Ksh.233,800 for service of 20 years. Counsel for Respondent submitted that the grievant was not entitled to that claim and remedy because he was a member of the National Social Security Fund and therefore not entitled under Section 35(6) of the Employment Act, 2007. It was submitted for the grievant that he was entitled to gratuity in view of the provisions of Clause 31 of the Collective Agreement. The Clause provides as follows:

***"31. SERVICE GRATUITY***

***Payment of service gratuity for the employees employed by Board of Governors Institutions who retire/retires, shall be paid at the rate of one twelveth of each completed months of service based on his/her current salary.***

***Grounds for service Gratuity***

***Minimum of:***

***(a) (i) Ten years of continuous service***

***(ii) Attainment of 50 years of age or compulsory retirement age of 55 years.***

***(b) Ill health***

***(c) Public Health"***

Counsel for the Respondent submitted that the grievant was not entitled to service gratuity under Clause 31 because he did not retire. Instead, Counsel submitted, the grievant was dismissed and therefore the Clause did not apply. Counsel's submissions would not hold if the grievant had been lawfully

dismissed. However, the court has found that the grievant was unfairly terminated and submissions by Counsel for the Respondent consequently fail.

To determine whether the grievant is entitled to gratuity under the clause the court must be satisfied that the grievant passes the minimum test under the Clause. Under Clause 31(a) the grievant must have worked for ten continuous years and have attained 50 years or be retiring at compulsory retirement age of 55 years. The grievant did not provide evidence as to his current age or age at termination. Gratuity on this ground will therefore fail. Under Clause 31(b) the ground is ill-health and the court finds that the same does not apply to this case.

Clause 31(c) provides for public interests. Public interest means general welfare of the public that warrants recognition and protection (see definition in Black's Law Dictionary, 9th Edition). The court considers that such recognition and protection would be by legislation or by decision of the court. The issue in the instant case is whether there exist general welfare of the public that can attract the court's protection and recognition. The court finds that where the employer and employee have agreed to payment of gratuity, it is in the public interest that the employer pays the gratuity if the only reason for failure to do so is unfair termination like it is the circumstance in this case. The court also finds that Section 35(6) precluding payment for service as prescribed in the Act in cases of membership to the National Social Security Fund is a mere minimum provision. It does not preclude parties to agree to better service payments as it is the position in this Cause. The court considers that in matters of termination dues, where an employee is entitled to more than one option, the general principle shall be that the employee shall elect, and if he or she fails to elect, be deemed to have elected the most favourable option. Accordingly, the court grants the grievant a sum of Ksh.233,800 for service of 20 years and as computed in accordance with the provision of Clause 31 of the Collective Agreement.

The grievant has also prayed for 12 months salary compensation for loss of employment being Ksh.140,280/=. Under Section 49(1) (c) the court may grant payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. The grievant's gross monthly salary at dismissal was Ksh.15,880.00. He testified that he was, at the time of the hearing, engaged as a dairy farmer. The hearing was on 11th October, 2012 and he was dismissed with effect from 19th October, 2006.

It is about six years since dismissal and the court takes into account the effort the Claimant has had to undertake to get into self-employment as a dairy farmer. The court also takes judicial notice that had the grievant not been unfairly terminated, being a public officer serving in a public school, he would be entitled to retire at the enhanced retirement age of 60 years. Accordingly, the court grants the claimant Ksh.190,560.00 being twelve months gross salary.

The court has found that the grievant was unfairly dismissed by the Respondent's Secretary who wrongfully usurped the authority of the Respondent to dismiss. The court considers that had the Respondent been given an opportunity to exercise its powers, the dispute in the cause may not have arisen. The Respondent may not have incurred the liability the court will order in this cause. The Respondent being a public body, it could be that it may, in exercise of due process of justice, consider recovering its losses from the Secretary. Be it as it may, judgment is entered against the Respondent for:

(a) payment to the grievant of Ksh.472,000.00 being service pay, payment in lieu of notice and compensation for unfair termination; and

(b) payment of the costs of this cause.

Signed, dated and delivered this 12th day of October, 2012.

**BYRAM ONGAYA**
**JUDGE**