



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NUMBER 892 OF 2013**

**JOSEPH OGETO.....CLAIMANT**

**VERSUS**

**KENYATTA UNIVERSITY.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that he was employed by the respondent as an accountant on 6<sup>th</sup> February, 1997 and worked as a senior accountant in different divisions until 8<sup>th</sup> June 2011 when through a letter dated June 2011 he was suspended from duty and asked to cease performing his duties. The reason for suspension was that on 26<sup>th</sup> June, 2011 he received on behalf of the respondent 364 computers alleging that they were a per specification while in fact they did not. This conduct of receiving the computer not meeting specifications was according to the respondent scandalous and disgraceful contrary to article 9.4 (iii) (c) of the claimant's letter of appointment.

2. On the respondent's part it stated that on 9<sup>th</sup> February, 2011 the respondent issued LPO to Computercare Consultants for 336 HP Compaq or equivalent 500MB MT Intel Core 2 Duo E8500 which were valued at Kshs 20,160,000/=. The items were delivered on 25<sup>th</sup> and 26<sup>th</sup> May 2011 and the claimant was the one who received them, however there was a problem with what was delivered. The computers were different from what was ordered. This was an issue which required the inspection of the computers since the discrepancy could not be noted through bare perusal of the LPO and delivery note.

3. According to the respondent, it was the claimant's responsibility to identify issues like this but on this occasion he failed to flag the discrepancy he however signed the delivery notes for wrong computers. When this was discovered, the respondent informed the claimant of the charges he was facing and suspended him and informed him he would be called for a disciplinary hearing which was done on 19<sup>th</sup> October, 2011. He attended and was given a chance to tell his side of the story. The respondent found his version unsatisfactory and decided to summarily dismiss him for negligently performing his duties. He appealed against the dismissal, however the appeal did not take off on various dates and on 14<sup>th</sup> January, 2013 when it came up the claimant failed to attend the hearing.

4. In his evidence before the court the claimant further stated that he was suspended in June, 2011 and dismissed in November, 2011. Before dismissal he appeared before the disciplinary committee. It was his evidence that he received 330 computers first and that 6 came later. It was his evidence that he received the computers together with the auditor, an ICT person and someone from procurement and that he was the one who signed the delivery note. It was his evidence that the computers were not paid for by the respondent. Upon dismissal he claimed he was not paid and further that he had no previous disciplinary issues.

5. In cross-examination he stated that he was a section head of the central stores and that the goods received were as per specifications. It was his evidence that he received the computers for custody pending inspection. The inspection team was to confirm if the specifications were as per the LPO. The inspection team was to confirm if all the specifications were as per the LPO.

6. The respondent's witness Mr Lucas Njoroge informed the court that he was working for the respondent as the Head of Stores. According to him the claimant was Stores In charge and was supposed to verify all the goods received and confirm if they were in order. The goods were supposed to be as per the users needs. In Mr Njoroge's view, the delivery note confirmed that the goods as ordered were received. By signing the delivery note the claimant confirmed to the supplier that the goods were as per the order yet they were not.

7. According to the witness, it was possible for one to verify 336 computers and that the claimant was not prevented from asking for help. It was further his evidence that the University did not pay for the computers. They were exchanged for those which met the specifications. Mr Njoroge also stated that the University had Inspection and Acceptance Committee which was to meet and accept the goods but they did not.

8. The respondent's second witness Mr Nderitu Gakaria informed the court that he was the respondent's Human Resource Manager. According to him, the claimant was in charge of stores management and receiving goods. According to him, the claimant was suspended to

give room for investigations. He appealed before the Senior Board of Discipline where he was accused of receiving computers with different specifications from what was on the LPO. The claimant accepted he had made a mistake but stated he had not made such a mistake before. According to him, the board observed that the claimant had signed the delivery note implying the goods delivered were as per the order. In cross-examination he stated that the disciplinary procedure in the CBA was followed and further that the case was a summary dismissal case hence notice was not necessary.

9. Termination of employment is a prerogative of an employer, however such prerogative ought to exercise for good reason removed from caprice. The test usually is whether a reasonable employer confronted with the situation would consider termination as the best option in the circumstances. If the answer is in the affirmative, the court will not interfere.

10. Under section 43(1) of the Employment Act, an employer is required to prove reasons for the termination of employment and where the employer fails to do so, the termination shall be deemed unfair under Section 45. Sub section (2) provides that reasons for the termination are matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate the services of the employee.

11. The claimant herein was dismissed because he received some computers meant for the respondent yet they did not meet the specifications contained in the LPO. The computers were 336 in number and he received them alone yet there was an Acceptance and Inspection Committee to which he was a member and ought to have been the one receiving the computers. The respondent considered the claimant's action of signing the delivery note for the computers as acknowledgement that the computers met the necessary specifications yet they did not. According to the claimant he received the custody of the computers pending inspection.

12. It was in evidence that the respondent did not pay for the computers and that they were returned and replaced with the ones meeting the correct specifications. The respondent made no allegation of fraudulent intention on the part of the claimant to receive substandard goods passing them off as the goods ordered in return for any favour or personal gain. The matter appeared to have been purely a mistake and in any event there was an acceptance and inspection committee through which the computers could have had to pass through first before formal receipt by the respondent.

13. The explanation by the claimant that his act of signing the delivery note was simply to take custody of the items pending inspection was plausible and ought to have been considered by the respondent to give the claimant the benefit of doubt.

14. In the courts view dismissal was very harsh in the circumstances. The issue could have been better dealt with by a warning letter. To this extent the respondent has failed to prove that there existed a good or valid reason to terminate the claimant's service hence the termination is hereby declared unfair within the meaning of section 45 of the Employment Act.

15. In conclusion the court hereby awards the claimant as follows:

a. One month's salary in lieu of notice	137,260
b. Ten months salary as compensation	
for unfair termination of service	<u>1,372,600</u>
	<b><u>1,509,860</u></b>

c. Costs of the suit

d. Items (a) and (b) shall be subject to taxes and statutory deductions.

e. Decretal sum to attract interest at court rates from date of judgement till payment in full.

16. It is so ordered.

Dated at Nairobi this 31<sup>st</sup> day of May, 2019

**Abuodha J. N.**

**Judge**

Delivered this 31<sup>st</sup> day of May, 2019

**Maureen Onyango**

**Principal Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.