



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.958 OF 2012

JANE MACHARIA CHEGE.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....1ST RESPONDENT

VICE CHANCELLOR PROF. OLIVE M. MUGENDI.....2ND RESPONDENT

DEPUTY VICE CHANCELLOR (ADMINISTRATION) PROF. PAUL .K. WAINAINA.....3RD RESPONDENT

REGISTRAR (ADMINISTRATION) PROF. GODFREY S. MSE.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 06.06.2012 through Ashiruma and Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) The respondent to pay the claimant's terminal benefits as quantified below:
 - a) Gratuity or service 25% of basic pay for 24 months period of contract Kshs. 538, 242.00.
 - b) One month pay in lieu of notice Kshs. 154, 242.00.
 - c) Payment in lieu of leave of 19 days Kshs. 154, 242.00.
 - d) Unpaid salary being Kshs. 44, 853.50 per month for the months of December 2011, January 2012, and February 2012 Kshs. 134, 560.50
 - e) Total Kshs. 981, 866.50.
- 2) The respondent to pay the claimant compensation for the illegal and unlawful termination of employment.
- 3) The respondent to unequivocally recant and withdraw the libellous contents of the suspension and termination letters, issue a certificate of service to the claimant and pay reasonable compensation for libel.
- 4) Respondents to pay costs of the suit with interest.
- 5) Any other orders or relief that the Honourable Court may deem just and expedient to grant.

The memorandum of response was filed on 12.07.2012 through Mohammed Muigai Advocates. The respondent prayed that the claimant's memorandum of claim be dismissed with costs.

The claimant was employed by the respondent as a procurement manager (grade 13) in the Finance, Planning and Development Division on a term of 2 years renewable contract effective 16.11.2009. The claimant served the term successfully and on 20.09.2011 she was appointed on a contract as procurement manager (grade 14) on a 2 years' renewable contract effective 16.09.2011. The contract was due to lapse on 16.09.2013.

The claimant issued her resignation notice dated 05.12.2011 that as per her terms of service she was giving a one month notice of resignation effective 01.12.2011 to 31.12.2011. The respondent rejected the notice by the internal memo dated 06.12.2011. The memo stated that the rejection was on account of the fact that there were pending issues that related to the procurement of 336 computers. By the letter dated 06.12.2011 the claimant was suspended pending appearance at the Senior Board of Discipline. The reason for suspension was that it had come to the attention of the university that the claimant procured on behalf of the university 336 computers which did not comply to specifications. She was on suspension on half salary until further notice and the university medical cover in her favour was to be cancelled immediately.

The claimant, by the letter dated 03.01.2012, was invited to appear before the Senior Board of Discipline on 12.01.2012 at 9.00am to defend herself against the charge of procuring on behalf of the respondent 336 computers which did not comply to specifications. She was advised that she was at liberty to send a written defence to the Deputy Vice-Chancellor (Administration) before the date of the meeting. The meeting appears not to have taken place as was scheduled and the claimant was re-invited to appear on 26.01.2012 as per the letter dated 17.01.2012. The respondent's letter dated 24.01.2012 referred to its letter of 03.01.2012 and stated the following additional charges:

- a) Procuring on behalf of the university 336 computers without obtaining requisite authority from management.
- b) Procuring on behalf of the university 336 computers without following procurement rules on validation of prices.

The letter stated that the hearing was scheduled for 26.01.2012.

The Senior Board of Discipline convened on 26.01.2012 at 2.30pm as was scheduled. The 2nd respondent was chairing and the claimant attended as scheduled. Her oral defence as recorded in the minutes of the proceedings was as follows:

- a) The procurement of the 336 computers was through open tendering and the tender committee had approved the procurement.
- b) When the 336 computers were delivered at the university, they did not fit the required specifications and the order was cancelled.
- c) The claimant had received a request for computers for the use at the Post Modern Library. She gave a list of computer suppliers to ICT Director and which list had earlier on been approved by the tender committee. She asked the ICT Director (as the technical person) to recommend a supplier with readily available computers for use at the Library.
- d) One Mr. Ng'ang'a of ICT Department recommended option 2 but he changed specifications from 320GB to 500GB. The claimant then used option 2 as mandated by the tender committee. She gave the order for 2nd option without including Ng'ang'a's changes to the specifications of 500GB because to her 2nd option meant to be 320GB.
- e) The claimant learned that the computers had been supplied when PPOA wrote indicating that a different supplier had supplied yet with the same specifications from the order that had earlier been cancelled.
- f) The claimant and the Director ICT investigated the matter jointly by going to the School of Engineering and they established that the computers were different from the order on the LPO.
- g) The claimant sought details of the deliveries at stores but her efforts were frustrated. She then asked Ng'ang'a of ICT to write a memo on the computers that had been delivered. Ng'ang'a wrote indicating that 336 computers were received against the specifications in the LPO.
- h) The claimant had admitted to have alerted the 1st respondent of the first batch of computers that were rejected because they were many in number. She did not explain why in the second consignment she did not alert the university management of the anomaly.
- i) Further the claimant had admitted that the LPO had different specifications of computers 500GB and not 320GB and that the same could have been an error. She explained to the Board that changing specifications was a major procurement anomaly and against the law. She had then decided when she felt that she had offered her optimum.

The minutes show that the Board observed that the LPO indicated 500GB which was a change in specifications that had been suggested by Ng'ang'a of the ICT Department. She had been shown the actual LPO where she had changed specifications without consulting the Tender Committee. For the first batch of computers she got the stores to thoroughly check them on delivery. She had then alerted the university that the delivery was for wrong specifications. She did not explain why she did not do the same for the delivery of the 2nd batch. The 1st batch having been rejected she needed to start the process afresh by obtaining the tender committee's approval but she did not do so. The minutes state that the Board observed that she unilaterally went to check the nature of the 2nd batch of the computers in total disregard of the team that was mandated to check the specifications. That she had failed to contact other 5 firms for them to quote afresh after the specifications had changed. Prior to ordering the 2nd batch she did not seek approval of the tender committee and she only tabled it for ratification after the computers had been delivered. In realising that she had breached procurement rules, she sought to resign but the same was rejected pending the disciplinary case.

The Board then decided that her services be terminated under Article 9.4 (iii) (on removal for good cause) of her terms of service and section 44(4) (c) of the Employment Act, 2007 for negligence of duty and flouting procurement regulations. The termination letter was dated 20.02.2012. The letter advised her that she was free to lodge an appeal against the termination.

The 1st issue for determination is whether the termination of the claimant's service with the 1st respondent was unfair. The evidence is clear

that the claimant was given a notice and a hearing as per section 41 of the Employment Act, 2007 and it was not alleged or shown that the agreed disciplinary procedure had been breached. Thus the Court returns that the termination was with due process or fair procedure.

The next consideration is whether the reason for termination was valid. The evidence is that the first batch of 336 computers was rejected when they failed to fit the specification. Each piece of the rejected computers was at Kshs.60, 000.00 by M/s Computacare. Upon rejection the 2nd batch was supplied at Kshs.64, 595.00 per piece by a new supplier M/s Wincomp Services. In the letter dated 08.11.2011 addressed to Director General of Public Procurement Oversight Authority (PPOA) the 2nd respondent confirmed that the respondent's tender committee had duly awarded the supply to M/s Wincomp Services. The minutes of the tender committee held on 20.07.2011 show that M/s Computacare had failed to meet specifications and the order was cancelled as required by the university. The committee then awarded M/s Wincomp Services to supply the 336 computers at a total cost of Kshs. 21, 703, 920.00. The Court has considered the evidence and returns that as at the time of termination, the respondent has failed to establish that the claimant procured on behalf of the university 336 computers which did not comply to specifications, without authority from management, and without following procurement rules on validation. While the Senior Board of Management purported to observe that the LPO indicated 500GB which was a change in specifications that had been suggested by Ng'ang'a of ICT Department and had been shown to the claimant at the hearing, the LPO was not exhibited in Court and the evidence was that the tender committee had approved the 2nd supply by M/s Wincomp Services. In any event there was no established reasonable justification on the part of the Board that a genuine error may have occurred in the manner the claimant construed the specifications as 1st and 2nd. In the opinion of the Court without such reasonable justification showing that the error was genuine, then it was excusable especially that the claimant had demonstrated elaborate steps taken to correct the situation and which was verified by the 2nd respondent's letter to PPOA dated 08.11.2011. The Court therefore returns that the reasons were not valid as envisaged in section 43 and 45 of the Act as at the time of the termination. The Court has considered that Ng'ang'a of the respondent's ICT department had been reinstated by the 1st respondent's Council in similar circumstances and thus the termination was not the best action in the circumstances of the case. Further the Court returns that the avenue for administrative appeal and the failure by the claimant to prefer such appeal did not in any way impair the claimant's suit because once the claimant was terminated, a cause of action accrued in terms of section 90 of the Employment Act, 2007 and she was entitled to move the Court.

Thus, the Court returns that the termination was unfair in substance for want of a genuine reason for termination as at the time of termination.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimant prays for gratuity or service 25% of basic pay for 24 months period of contract Kshs. 538, 242.00. The claimant testified that she had been paid gratuity for her ended term of 2 years. For the running contract she was at work from 16.09.2011 to 20.02.2012. Gratuity was at 25% basic salary after completion of the contract of service and at termination the claimant had served 5 months 4 days making a basic pay of Kshs. 89, 707.00 per month making Kshs. 460, 495.90 by 25% thus, **Kshs.115, 124.00**.

b) The termination was unfair and without the contractual notice and the claimant is awarded one month pay in lieu of notice **Kshs. 154, 242.00**.

c) The claimant prays for payment in lieu of leave of 19 days Kshs. 154, 242.00. The leave form filed for the respondent shows that as at 25.10.2011 the outstanding leave days were 9 and the Courts returns that the dues in lieu of leave will be **Kshs.26, 912.10**.

d) The claimant prayed for unpaid salary being Kshs. 44, 853.50 per month for the months of December 2011, January 2012, and February 2012 **Kshs. 134, 560.50**. The Court returns that the claimant is entitled as prayed in view of the outcome of unfair termination.

e) The claimant prayed for the respondent to pay the claimant compensation for the illegal and unlawful termination of employment. The Court has considered the mitigating factors in favour of the respondent that the claimant had otherwise opted to resign, she did not desire to continue in the employment, she conceded an error in the specifications and the Court returns that one month gross pay for the unfair termination making **Kshs. 154, 532.00** will meet ends of justice in the case.

f) The claimant prayed that the respondent to unequivocally recant and withdraw the libellous contents of the suspension and termination letters, issue a certificate of service to the claimant and pay reasonable compensation for libel. The Court returns that the letters were internal to the respondent and there was no established publication to 3rd parties. Thus a claim in defamation will fail. Further the claimant made no submissions to guide the Court on award of damages and the prayer is deemed abandoned save the declaration that the termination was unfair.

g) The respondents will pay costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination of the claimant's contract of service with the respondent was unfair in substance.
- 2) The respondent to pay the claimant a sum of **Kshs.585, 370.50** by 31.12.2018 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- 3) The respondent to deliver a certificate of service to the claimant by 01.12.2018 per section 51 of Employment Act, 2007.
- 4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 23rd November, 2018.

BYRAM ONGAYA

JUDGE