



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/59/2017

CITATION: DICKSON MALEL VS KERIO VALLEY DEVELOPMENT AUTHORITY

JUDGMENT

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 59 OF 2017

DICKSON MALEL.....CLAIMANT

VERSUS

KERIO VALLEY DEVT. AUTHORITY.....RESPONDENT

JUDGEMENT

The Claimant pleaded that he was on 5th November, 2020 employed by the respondent as Hydrology Observer where according to him he served with distinction earning him commendation from respondent to proceed for study leave in the year 2009. Upon completion of his studies and attaining Diploma in Water Technology he was transferred to respondent's Engineering department. This was done on 4th January, 2012 and to take effect immediately.

On 27th July, 2013 the Claimant averred that he received a letter alleging that he had deserted duty for which he would for disciplinary action. According to the Claimant, the letter was unreasonable, unjust and seriously deficient in that the same was addressed to TOT station yet he had been transferred from the station and further the allegations that he had deserted duties was incorrect as he had never deserted duties.

The Claimant further alleged that the disciplinary hearing was unfair and biased since he was harassed, bullied and never given an opportunity to defend himself.

The respondent on its part pleaded that the Claimant was employed as Hydrology Observer on 1st December,2000 and was to be based at Kibimoi but subject to transfer to other stations at the respondent's sole discretion.

The respondent further admitted that the Claimant applied for study leave to undertake a diploma course in Water Technology at Rift Valley Institute of Science and Technology. The leave was approved for a period of 2 years from 12th January,2009. Upon completion of the Course the Claimant requested for change of designation which was approved by management and the Claimant requested to report to the Senior Superintendent Engineer based at Tot for assignment of duties.

On 27th July, 2013 the respondent wrote a letter to the Claimant to show cause why disciplinary action should not be taken against him for desertion of duty which was a misconduct as per section 10.4.1(a) of Respondent's regulations.

The Claimant responded to the Show Cause letter alleging he was based at Chepkum, a sub station of Aror station and that he was being assigned duties by the civil engineer at the head office and that the officer in charge of Tot station did not know where he was. The respondent was not satisfied with the explanation given hence invited the Claimant to appear before the staff disciplinary committee. The Claimant appeared before the Committee to answer the charges of desertion of duty.

The Committee found that the Claimant was not able to give any credible justification for his absence and for that reason he was summarily

dismissed from employment for being absent from duty without lawful cause for a period exceeding 14 days. The Claimant was given an opportunity to appeal against the decision which he did on 29th September, 2013 and was on 11th November, 2013 invited to appear before the staff appeals committee. The Appeals Committee did not find any reason to disturb the findings of the lower disciplinary Committee.

At the oral hearing the Claimant further stated that he was on study leave for two years and reported to work after his study leave. When he resumed work, he was asked to write a letter requesting for a change of department which he did and it was accepted that he moves from Security to Engineering department. He was to report to the Senior Superintendent Engineer. He reported and was allocated duties.

According to him he worked in the department until he was issued with a letter of desertion of duties. The letter of desertion was addressed to Tot but he was in Eldoret. He responded to the letter and was later called for disciplinary hearing and was dismissed after the disciplinary hearing. He appealed against the dismissal and was called for the appeals hearings.

In cross-examination he stated that when he finished his studies, he reported to the Civil Engineering Department however the Senior Superintendent never gave him any letter assigning him duties. He further stated that he was based at Chepkum and he knew the status of the Chepkum project. The observation that he had no knowledge of the project was the Committees' own observation. He further stated that he had no letter to show he never went on leave.

The respondent's witness Mr. Josephat Motende informed the Court that he worked for the respondent as Human Resource Officer and that he joined in 1999. It was his evidence that he knew the Claimant, He confirmed that the Claimant applied for study leave and at that time the Claimant was based at Tot as a Security Guard. After studies the Claimant was advised to proceed to his station. The Claimant requested for transfer from Tot to Eldoret but the request was declined and he was advised to continue at Tot.

It was Mr. Motande's evidence that management usually conducts Supervision in field stations to check if staff were at the station and performing their work. In the process, the team discovered the Claimant never resumed duties. This triggered disciplinary proceedings against him. It was further his evidence that there was no letter assigning the Claimant duties in Eldoret or Chepkum. The Claimant was supposed to work under another officer in Tot who was to assign him duties.

In cross-examination he stated that the Office of Superintendent Engineer was in Eldoret and that the Claimant was to report to the Engineer for assignment of duties. There was however no letter showing the Claimant was assigned duties and that official communication was written. The instructions to the Claimant to go to Tot was verbal because that was where the Claimant was based. He conceded that the respondent was at fault only on communication.

In re-examination he stated that there was no work the Claimant could have done at the headquarters.

It was common ground that the reason for the dismissal of the Claimant was on account of desertion of duties. According to the respondent, the Claimant failed to report to his work station at Tot upon completion of his study leave. According to the respondent, the Claimant had requested to be transferred to Eldoret from Tot but this was declined.

The letter dated "DM3" in the Claimant's bundle of documents which communicated to the Claimant's change of department informed him that he had been deployed to the Engineering Department where he was to report to the Senior Superintendent Engineer for assignment of duties.

Mr. Motende in his evidence before the Court stated that Superintendent Engineer was based at Eldoret and that the rejection of the Claimant's request to be transferred to Eldoret was verbal. However, as per the minutes of the disciplinary hearing held on 19th August, 2013, it is minuted that the Engineer confirmed knowing the Claimant during the time he supervised him for four months from February, 2012 at the headquarters During the four months the Claimant was pursuing his transfer from Tot to Eldoret.

This aspect can be confirmed by the Claimant's response to the Show Cause letter where he stated that he was assigned duties in Eldoret for four months while he was requesting for transfer, then the Civil Engineer assigned him duties in Chepkum near Aror. According to the Claimant he was assigned duties by the Civil Engineer hence the officer in charge of Tot did not know where he was working.

Desertion of duty is a lawful reason for summary dismissal. However, the case for desertion must be clear and the employee concerned must be shown to have absented themselves from work without lawful excuse or permission of the employer.

In the case before me, the Claimant by a letter dated 4th January, 2012 was advised of his deployment to the Engineering Department where he was to report to Senior Superintendent Engineer for assignment of duties. This was confirmed by the Superintendent Engineer who as observed earlier in the judgment stated he supervised the Claimant for four months while the letter pursued his transfer to Eldoret.

Whereas the respondent alleges the Claimant's transfer to Eldoret was refused and he was advised to return to Tot, no evidence was presented before the Court to support this. Further the respondent's witness Mr. Motende informed the Court that the Engineering Department was at Eldoret and not Tot. The foregoing considered together with the allegation by the Claimant that he had been assigned duties at Chepkum by the Civil Engineer creates a cloud over whether the Claimant's case can be purely regarded as one of desertion of duty.

Assuming it was, the confusion around the issue made dismissal a disproportionate measure against the Claimant. A warning could have been proportionate in the circumstances.

For the above reasons the Court finds and holds that the dismissal of the Claimant was unfair in the circumstances.

The Court therefore awards the Claimant as follows: -

One month's salary in lieu of notice 20,021

Eight months salary as compensation for unfair termination 160,168 180,189

(c Costs of the suit.

Items (a) and (b) shall attract taxes and statutory deductions.

It is so ordered.

DATED AT ELDORET THIS 11TH DAY OF JUNE, 2021

DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-06-11 10:06:38+03