



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

AT NAIROBI

CAUSE NUMBER 274 OF 2012

OMONDI OGOLLA CAROLLY.....CLAIMANT

VERSUS

BOTANICAL EXTRACTS EPZ LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant herein averred that he was employed by the respondent on 1st December, 2006 as a mason. His contract was extended to 10th April, 2007 when the respondent hired him on permanent terms as an assistant operator. He worked continuously until 5th December, 2011 when he was served with letter dismissing him summarily from employment with effect from 24th November, 2011.

2. According to the claimant on 11th October, 2011 he sought from the respondent personnel manager permission to go on unpaid study leave to conclude his studies which commenced while he was on forced leave. The personnel manager allowed him to go on leave effective 11th October, 2011 to 20th December, 2011.

According to the claimant the dismissal letter alleged that he failed to report on duty when he was recalled from study leave yet he never recovered any phone call, letter or any communication from the respondent recalling him back to work.

3. The claimant further averred that in the month of August and September, 2011 he did not receive his salary because of allegedly being absent from work. The claimant therefore complained that the respondent's action of terminating his services was unfair and unlawful and therefore sought an order for compensation from the court.

4. The respondent on its part refuted the claimant's claims and averred that in 2006 owing to poor rainfall the respondent was not able to obtain raw material for normal operational requirement. The respondent communicated the position to Ministry of Labour and Human Resource and to the claimant. The claimant and respondent mutually agreed that the claimant was to report on duty on call, upon revival of operations.

5. On 13th May, 2011 the respondent recalled the claimant to duty with a reporting date of 20th May, 2011. On 21st October, 2011 the claimant reported to duty and immediately applied for study leave to commence forthwith without any approvals sought as per his application. The respondent further averred that the claimant without seeking for approval, consent and authorization of the respondent and in total

disregard of the respondent's management deserted his proper appointed place of work.

6. According to the respondent, the leave sought by the claimant was untenable to the respondent's operational requirements having been out of normal operations for 2 years. According to the respondent, the claimant was informed that he was required to report back to work and on 24th November, 2011 after the claimant had deserted work for one month the respondent proceeded to terminate the claimant's services. The respondent further counterclaimed against the claimant for breach of contract through desertion.

7. In his oral evidence in court, the claimant repeated the averments in the memorandum of claim and further stated that his leave was verbally approved but late he was issued with a letter declining the request for leave and later dismissed. The respondent did not call any witness nor file any submissions.

8. The reason for dismissal or termination or employment ought to be a reasonable one. That is to say, it ought to be a reason any reasonable employer would consider dismissal or termination of contract as the best decision in the circumstances. Absence from duty without authority is one of the reasons an employee can be dismissed summarily.

9. The parties herein agreed to suspend the contract of employment due to down time for supply of raw materials. In the meantime the claimant herein commenced studies presumably to sharpen his skills or improve his prospects of landing greener pastures. The leave application form attached to the claimant's memorandum of claim stated on the face of it as follows:

“ I ve been compelled to request for the same because the inability of the personnel manager to allow me a chance to complete a semester study that I pre-started before being recalled. The manager denied me a chance to work from 7 am to 4 pm”.

10. It would seem the claimant did not intend to desert work. He even made a proposal to have his shift changed but apparently the personnel manager refused. The respondent never reacted to this allegation in its defence nor attended court to tender any evidence to rebut this allegation.

11. In the circumstances the court is of the view that the reason for the claimant's dismissal was unfair and hereby awards the claimant as follows:

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|---|----------------|
| a. One month's pay in lieu of notice | 12,000 |
| b. Salary deducted while on forced leave | 375,660 |
| c. Unpaid salary for August and September 2011 | 24,000 |
| d. Ten months salary as compensation for unfair termination of services | <u>120,000</u> |
| | <u>531,000</u> |

e. Costs

l. Items (a), (b), (c) and (d) shall be subject to statutory deductions.

m. It is so ordered.

Dated at Nairobi this 2nd day of March 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 2nd day of March 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the claimant

..... for the Respondent