

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 526 OF 2017

FRANCIS MWANGI KIMURI.....CLAIMANT

VERSUS

TIMAFLOR LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein was employed on a 3 month seasonal contract in June 2006 and was employed as a store attendant on a 6 month seasonal contract after expiry of the first contract. He was appointed as a scout on 1st March 2007 with a 2 month probationary period. He was promoted to store keeper on 1st June 2008 and his basic salary reviewed upwards from Kshs. 5,500/- to Kshs. 8,696/- a month. His salary was raised over time and at the time of dismissal was earning Kshs. 20,400/- a month. His services were terminated on 21st February 2017 and he avers that the balance of the sum of Kshs. 2,496/- was not paid as at the time of dismissal. He averred that he was not issued with a show cause notice prior to the termination and the termination did not disclose any reasonable cause for termination. He therefore sought payment of the increment salary underpayment of Kshs. 259,984/-, salary in lieu of notice – Kshs. 20,400/-, gratuity for 11 years worked at the rate of one month's salary for each year worked – Kshs. 224,400/-. The Claimant also sought costs of the suit as well interest.

2. The Respondent filed a defence in which it averred that the Claimant's salary was reviewed on the basis of the company's policies and procedures. The Respondent averred that the Claimant's claim was farfetched and mischievous as he was paid his terminal dues in full upon the exit and he duly executed a disclaimer rendering the suit an attempt to unjustly enrich himself. The Respondent sought the dismissal of the Claimant's suit with costs.

3. The Claimant testified as did Judy Njeri Ndai, the Respondent's witness. He testified that he was the longest serving employee at the time of his dismissal as he was employee no. 9. No. 1-8 had left the Respondent's employment by the time he was dismissed. He stated that he was dismissed unfairly. He testified that he that he was paid Kshs. 156,408/- for the 10 years service though he was entitled to Kshs. 204,000/- and that there was a balance of Kshs. 47,592/-. He sought payment of the underpayment upon his promotion to store keeper. He sought Kshs. 259,984/-. He stated that he was dismissed on 21st February 2017 and that he was not invited to a disciplinary hearing before his dismissal or given a chance to avail an employee of his choice at a hearing prior to dismissal. He was referred to the Respondent's bundle at page 48 and stated that it captured the defence he gave at the disciplinary hearing. He testified that he was not given an opportunity to appeal and that the meeting was a very quick meeting. He denied receiving the letters of warning that were exhibited by the Respondent. He thus sought the balance of his gratuity and the prayers in the claim. He was cross-examined and stated that the sum he sought was for 104 months which is 8 years and 6 months. He stated that he ceased being a store keeper in 2007 and that at the time of his dismissal he was a scout. He admitted that he signed in acknowledgement when he was paid and confirmed that he did not issue a protest. In re-exam he stated that the sum he received was not what he was entitled to. He testified that he acknowledged the payment and said he would go to court. He stated that he was a store keeper till November 2013.

4. The Respondent's witness stated that she was the HR manager and that the Claimant's performance went down and the contract was therefore terminated. She stated that the position was explained to the Claimant and that he was not awarded the salary increment as he was transferred after 3 weeks and was never confirmed. She stated that the gratuity was paid according to the CBA and that the Claimant received the sums that were due. She testified that warning letters were issued as well as performance concerns. She stated that he received the documents and also attended the disciplinary meeting where he was heard. She stated that he was given an opportunity to defend himself and he was not barred from bringing an employee of his choice. She testified that the dismissal was procedural and that he signed the minutes. She stated that he was not owed anything. In cross-exam she stated that the CBA was not filed and that the salary was not raised as the Claimant was not confirmed and that the increment was not effect or captured in payslips. She stated that the warning letters were valid for only 1 year and that he used to sign for them but did not sign for the performance concerns. She testified that the Claimant was entitled to be accompanied and that he was ok without any representation at the meeting. She stated that the Claimant was heard and the decision to terminate was made by the panel. She stated that he could appeal and that he was given the reason for the dismissal. In re-exam she testified that he did not work for 104 months as a store keeper. She stated that he worked as a stores keeper for 3 weeks and that the payslips were erroneous as he worked as a scout.

5. The parties were to file written submissions. The Respondent is the only party that filed submissions. It submitted that the Claimant did not reveal that he had signed a disclaimer wherein the Claimant even had a witness Mwatha who the Respondent argued should have been called had there been duress. The Respondent submitted that the Claimant did not plead duress or coercion. The definition of the two words in Blacks Law Dictionary 8th Edition was recited and the Respondent submitted that there was no duress or coercion. Reliance was placed on the cases of **Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the Estate of the late Krishan Lal Mahajan [2017] eKLR** and **Katiwa Kanguli v Bamburi Cement Limited [2015] eKLR** for the argument that a discharge such as the one executed herein constituted an unequivocal representation that all the dues had been paid and short of proving that this representation was secured through fraud, duress, mistake, undue influence or representation the employee cannot be allowed to disown it. The Respondent also cited the cases of **Trinity Prime Investments Ltd v Lion of Kenya Insurance Company Limited [2015] eKLR** and **John Karanja Muiruri v Njuca Consolidated Company Limited**

[2018] eKLR on the issue of discharge and submitted that a discharge is a contract binding on the parties. The Respondent submitted that parties are bound by their pleadings and relied on the case of **Hellen Wangari Wangechi v Carumera Muthoni Githua [2015] eKLR**. The Respondent submitted that the Claimant's suit should be dismissed with costs.

6. The Claimant's case is that he was unfairly dismissed and that he did not receive his terminal dues. He asserts that he was not accorded a hearing. Section 41 of the Employment Act provides as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

7. From the facts of the case, the Claimant's disciplinary process was recorded in the minutes of the disciplinary meeting held on 21st February 2017. The Claimant is recorded as being present and giving his defence. The Claimant was entitled to the procedural and substantive fairness and he received it from the accounts he and the Respondent's witness gave. The Claimant received payment of some terminal dues and he signed a discharge. That discharge was in the following terms: *I, Francis Mwangi of Tima 3 acknowledge receipt of the sum of One hundred thousand and sixty four eight hundred ninety six (words and figures). In full and final settlement and discharge of all sums due to me and also acknowledge that I have no further claims against the company including claims for reinstatement into my job or to further compensation arising out of my termination. I further confirm that I have left the services of Timaflor Ltd without any injuries sustained and have no claims regarding the same.* The discharge was signed by the Claimant and witnessed by the Claimant's witness. It was also signed by the Respondent's Human Resources Manager, approved by accounts and the General Manager. The discharge constituted a complete discharge from any liability in respect of the claim. The Claimant absolved the Respondent from such a claim and even if the sum paid was less than the amount he would have wanted. He did not plead duress or coercion and therefore the discharge is not impugned at all. I agree with the reasoning of the Court of Appeal in the case of **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** held that:-

In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.

The long and short of the foregoing is that the dismissal was not unfair or unlawful and the suit before me is devoid of merit. It is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 21st day of November 2018

Nzioki wa Makau

JUDGE