

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 2158 OF 2015

JEMIMAH WANGECHI KARANJA.....CLAIMANT

VERSUS

LEADING EDGE FOODS & ENTERTAINMENT LTD

t/a JOHN & JO'S RESTAURANT.....RESPONDENT

JUDGMENT

1. The Claimant sued her erstwhile employer. She was a cashier at the establishment and was dismissed on 15th September 2015. She averred that her dismissal was unlawful and unfair for failure to give her reasons or notice of intention to terminate her employment. The Claimant averred that her dismissal was not in accord with due process and she was not afforded an opportunity to defend herself as she was allowed to work till the end of her shift and after handing over the cash register sales and confirmation of the tally was issued with the termination letter plus the certificate of service. She averred that under the Regulation of Wages (General) (Amendment) Order she was underpaid during her service and she thus sought underpayment of salary – Kshs. 715,796.55 for the years from January 2011, Kshs. 7,800/- overtime pay for 39 days worked, Kshs. 24,719.50 as one month's salary in lieu of notice, Kshs. 296,634/- being 12 month's salary as compensation, Kshs. 11,535.77 being annual leave not taken plus costs of the suit.

2. The Respondent filed a defence in which it averred that the Regulation of Wages (General) (Amendment) Orders do not apply to all and sundry and that there were industry specific wages orders for the hotel industry. The Respondent averred that the underpayments where applicable should be limited to 3 years in terms of Section 90 of the Employment Act. The Respondent averred that the Claimant signed a release form in which she declared that the Respondent had paid her all the terminal dues. The Respondent averred that the Claimant had been engaged in gross misconduct while at the workplace thus unable to perform her duties as a cashier and consequently necessitating the Respondent's herein to terminate the employment. The Respondent sought the dismissal of the suit with costs.

3. The Claimant testified and reiterated that her dismissal was a shock and was without due notice and without any reason. The Respondent's witness was barred from testifying as the witness presented to court had not recorded a statement. The Claimant stated that she was just given the letter of dismissal after her shift and was totally unprepared for the sudden exit. She thus sought judgment against the Respondent as per her claim before court. Written submissions were filed by both parties and the Claimant submitted that she was not paid her wages as stipulated in the Regulation of Wages (General) (Amendment) Order and that the Respondent did not issue her with payslips as required by law. The Claimant also relied on the case of **Ignas Karingo Mghona & 4 Others v Star of Hope International Foundation [2016] eKLR** where Rika J. held that claims for underpayment, accruals and arrears of salary or accrued annual leave are not defeated by passage of time but the employer in effect renews the claims each time the specific claim remains unpaid. The Claimant submitted that she was therefore entitled to the underpayment, leave dues and notice sought in her claim. She submitted that the requirements of hearing under Section 41 of the Employment Act were disregarded in her dismissal and placed reliance on the case of **David Gichana Omuya v Mombasa Maize Millers Ltd [2014] eKLR**. She also cited the case of **Boniface Mulandi v Ali Barbours Cave Restaurant [2016] eKLR** on the overtime claimed.

4. The Respondent submitted that there was no agreement on overtime and that all the Claimant had done in her claim was to throw figures in support of her claims without proof. The Respondent cited the case of **Rogoli Ole Manadiengi v General Cargo Services Limited [2016] eKLR** and submitted that the Claimant had failed to discharge the burden placed on her by providing the overtime, hours worked and when she worked overtime in excess of the scheduled hours of work. The Respondent also relied on the case of **Kesi Mohamed Salim v Kwale International Sugar Co. Ltd [2017] eKLR** on the issue of overtime. The case of **Michael Ng'ang'a Ruirii v Karani Mutitu [2018] eKLR** was cited for the proposition that the Claimant's claims for relief in some aspects was time barred in terms of Section 90 of the Employment Act. On the unpaid leave days the Respondent cited the case of **Amos Matehenge Muchai v Bradshaws of Mount Kenya Limited [2018] eKLR**. The Respondent submitted that the Claimant had not sought costs and was therefore not entitled and quoting **Halisbury's Laws of England 4th Edition, Vol. 37 page 552** submitted that the costs follow the event and that in the event the Claimant had not proved the case the suit ought to be dismissed with costs to the Respondent.

5. The Claimant signed a discharge whose effect was to release the Respondent, its affiliates and all its officers, directors, employees and agents from all actions, causes of actions, suits, debts, demands *et cetera* arising in any way directly or indirectly from her employment with the Respondent. The discharge was a contract she executed. The said discharge in my view constituted a complete discharge from any liability in respect of the claim from its plain reading, tenor and effect. Through it, the Claimant absolved the Respondent from such a claim as this. The Court of Appeal has had occasion to deal with such scenario. In the case of **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** held as follows:-

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.

6. The Claimant herein did not plead duress or coercion and therefore the discharge is not impugned at all. In the final analysis I find that the suit is not viable and I dismiss it with no order as to costs as costs are a discretionary remedy as buttressed by the treatise cited by the Respondent from Halisbury's Laws of England 4th Edition Volume 37.

It is so ordered.

Dated at Nairobi this 6th day of December 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 11th day of December 2018

Radido Stephen

JUDGE