



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1219 OF 2015

EDWIN LUKHUBI WANGWE.....CLAIMANT

VERSUS

BRAND TRACK LIMITED.....RESPONDENT

JUDGMENT

1. Edwin Lukhubi Wangwe (Claimant) was employed by Brand Track Ltd (Respondent) on 1 October 2011 as a Dispatch Helper. The contract was to run up to 31 December 2011, and was subject to renewal.
2. On 7 November 2012, the Respondent wrote to the Claimant to inform him of his summary dismissal.
3. The reasons given were that the Claimant had been found in custody of stolen goods, and that he had failed to report to work on 5 October 2012 and 6 October 2012.
4. The Claimant was aggrieved and he instituted legal proceedings against the Respondent on 10 July 2015, stating the Issues in Dispute as
 - (i) Whether the Claimant's dismissal was lawful and fair
 - (ii) Whether the Claimant is entitled to terminal dues.
5. The Respondent filed a *Reply to Statement of Claim* on 2 October 2015 denying the pleas by the Claimant, and the Cause was heard on 21 January 2019 when the Claimant testified and closed his case.
6. The Respondent's case came up for hearing on 20 March 2019 and its Production Manager testified (an attempt by the parties to settle the dispute out of Court did not succeed).
7. The Claimant filed his submissions on 4 April 2019 while the Respondent filed its submissions on 2 July 2019.
8. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as
 - (i) Whether the summary dismissal of the Claimant was unfair
 - (ii) Whether the Claimant was underpaid and
 - (iii) Appropriate remedies/orders.

Unfair termination of employment

Procedural fairness

9. This was a case of summary dismissal and therefore the question of *written of notice of termination of employment* as contemplated by section 35(1)(c) of the Employment Act, 2007 does not arise.
10. However, the hearing required by section 41(1) & (2) of the Act was mandatory.
11. The Claimant testified that while on sick off, he was called on 7 November 2012 and was issued with the summary dismissal letter.

12. The Respondent's witness stated that the summary dismissal was preceded with a notice.

13. When pressed, the witness stated that the summary dismissal letter served as the notice of termination of employment (in the view of the Court, a dismissal or termination of employment letter cannot serve or substitute for the notice of termination contemplated by section 35(1) of the Employment Act, 2007).

14. The witness however was silent as to whether the Claimant was afforded an opportunity to make representations before the dismissal as required by section 41(2) of the Employment Act, 2007.

15. If a hearing was held, the witness did not disclose the name of the person who heard the representations from the Claimant, or produce any minutes or notes of such a hearing.

16. The Court can conclude therefore that the summary dismissal of the Claimant was procedurally unfair.

Substantive fairness

17. With the finding on procedural fairness, it is not necessary for the Court to examine whether the Respondent discharged the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007.

Compensation

18. The Claimant served the Respondent for about 1 year and in consideration of the length of service, the Court is of the view that the equivalent of 2 months' gross wage would be fair as compensation (gross wage was Kshs 9,867/-).

Pay in lieu of notice

19. The Claimant's dismissal was unfair, and the Court finds he is entitled to the equivalent of 1 month wage as salary in lieu of notice (the basic monthly wage was Kshs 9,000/-).

Underpayments

20. The Claimant sought Kshs 6,780/- being underpayments for the period 1 June 2012 to November 2012.

21. Underpayment of wages would occur where an employer pays wages below the prescribed minimum wages (where applicable) or where wages paid are below the contractually agreed rates.

22. The Claimant was designated as *Dispatch Helper*. He did not demonstrate any nexus between his designation and/or duties with any of the designated occupations in the *Regulation of Wages (General) (Amendment) Order* wherein minimum wages are prescribed for certain occupations.

23. Further, the Claimant produced only 1 pay slip for February 2012. The pay slip was not relevant for period for which the underpayments were claimed.

24. Without evidence as how much he was earning from 1 June 2012 to November 2012, and whether the wage was below the prescribed minimum wage or the contractually agreed wage, the Court finds that this head of claim was not proved.

Conclusion and Orders

25. The Court finds and declares that the summary dismissal of the Claimant was unfair and awards him

(a) Compensation	Kshs 19,734/-
(b) Pay in lieu of notice	Kshs 9,000/-
TOTAL	Kshs 27,734/-

26. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Gomba instructed by Charles Gomba & Co. Advocates

For Respondent Mr. Njugi instructed by Njugi B.G. & Co. Advocates

Court Assistant Lindsey