



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO. 2184 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 29<sup>th</sup> June, 2017)**

**WILSON KIPKURUI YEGON.....CLAIMANT**

**VERSUS**

**TOTAL TOUCH EXPRESS LIMITED.....1<sup>ST</sup> RESPONDENT**

**MANAGING DIRECTOR .....2<sup>ND</sup> RESPONDENT**

**MANAGER ADMINISTRATION & HUMAN RESOURCE...3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Memorandum of Claim on 30.10.2012 through the firm of Sang & Langat Advocates seeking damages for unlawful dismissal.
2. He states that he was employed by the Respondent as Documentation and/or Verification Clerk with the Respondent's documentation department on permanent and pensionable terms. He contends that the law implied into his contract of employment that unless the contract was terminated by any other lawful cause or death, the statutory retirement age of 60 years applied.
3. It is his contention that on 19.10.2010, the Respondent through its Managing Director and the Manager Administration & Human Resource purported to terminate the Plaintiff's employment summarily without notice and without proof of reason for termination. That he remonstrated this decision by bringing to the Respondent's officials the provisions of the law pertaining to retirement but the Respondent would hear none of it and he was advised to collect his terminal dues.
4. The Claimant goes on to state that on 3<sup>rd</sup> November, 2010, after he had been allegedly terminated he received a call from the Commercial Manager who wanted to know why the Plaintiff refused to take up the new position given to him to which he responded and stated that he had been dismissed without notice.
5. He further states that the Respondent purported to grant an extension of employment under the guise that he was the only one who could handle a situation that was giving them a nightmare. The Plaintiff declined to take up this extension.
6. The Claimant as such prays for damages for termination of employment in total disregard of the

express and mandatory provisions of the law.

7. The Respondents filed a reply to the Memorandum of Claim wherein they admit the employment relationship but state that in October 2010, the Claimant altered/amended/modified phytosanitary certificates and invoices belonging to Intergen Kenya Limited a client of the 1<sup>st</sup> Respondent which was discovered by Kenya Plant Health Inspectorate Service (KEPHIS) who slapped a ban on the export of Intergreen Kenya Limited goods.

8. They allege that the Claimant was on duty on the date of the said incident and when he was confronted on the issue he verbally acknowledged and admitted that he had altered the documents. Thereafter the Respondents had a management meeting whereby it was resolved that the Claimant would be presented with two options to wit, transfer to another department or summary dismissal. They state that the Claimant elected the latter by signing a copy of the letter of dismissal.

9. The Respondents contend that the Claimant is not entitled to any payments claimed and deny that he suffered loss and damage as a result of the termination of the Contract. Further that the Claimant had no pending leave days and all statutory deductions were remitted as required.

10. They also aver that the Claimant was the author of his own misfortune in addition to poor performance which the Respondents had previously issued him with warning letters about.

11. At the trial, the parties led evidence as per their pleadings and proceeded to file submissions.

12. The Claimant submits that his termination was contrary to Article 47(1) of the Constitution of Kenya 2010 and cite the case of **Shankar Sakalani vs. DHL Global Forwarding (K) Limited (2012) eKLR** where it was held:

***“The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values including human rights”.***

13. They thus aver that in the instant case, the Respondent was bound to accord the Claimant the right to fair administrative action through observation of the rules of natural justice and as expressly envisaged in section 45(5) of the Act.

14. They submit that the Claimant’s dismissal was unconstitutional in addition to being unlawful as the provisions of Sections 41 and 45 were not followed by the Respondent in effecting their dismissal. Consequently, they pray for general damages and rely on the case of **East African Airways vs. Knight (1975) EA 165** where it was argued that the Plaintiff’s claim for damages should have been in the form of special damages, precisely quantified and not a claim for general damages. It was held:

***“Mr. Knight was deprived of his career, of the opportunity to serve the Corporation for at least another 13 years. It is quite impossible to say what he would have earned during that period by way of salary and allowances, which fluctuate... who can say what his rank and earnings, would have been had he been allowed to continue in service with the Corporation until he reached retiring age? It is for damages for the ruin of his career, extending over a long period, and involving imponderables as to his future earnings which are not capable of exact assessment. In these circumstances I agree with the judge, and with the submissions of Sir William Lindsay who appeared for Mr. Knight in the Court below and on this appeal, that damages in this case were at large, and were properly claimed as general damages”.***

15. They state that loss of earnings claimed can be awarded as provided in the aforementioned case. Further that the Court has jurisdiction and power to award damages as provided in Section 12 (3) of the Employment and Labour Relations Court Act.

16. The Respondent on the other hand submits that they informed the Claimant of the modification of the phytosanitary certificates and he was given an opportunity to explain himself and as such the

requirements of Section 41(1) of the Employment Act were followed.

17. They further submit that the Claimant admitted in evidence having been given an opportunity to transfer to another department and gave him time to consider this decision but he chose to terminate employment instead. They are of the view that the Claimant did not prove unfair dismissal as required in Section 47(5) of the Employment Act and as such the Claim ought to be dismissed with costs.

18. The Respondents also submit that the Claimant has failed to prove the damages sought and in the event the Court finds unfair termination, the prayers for damages as sought are not tenable and as such should not be allowed.

19. I have considered the evidence from both parties and submissions filed herein. The issues this Court determines are as follows:

**1. Whether there were valid reasons to warrant termination of the Claimant.**

**2. Whether due process was followed before the termination of the Claimant.**

**3. What remedies if any to grant in the circumstances.**

20. On the 1<sup>st</sup> issue, this Court notes that on 25<sup>th</sup> October 2010, the Claimant was served with a letter of summary dismissal which indicated as follows:

***“-----You are very much aware of the protocols that are to be followed in reference to your duties. You have however on two occasions tampered fraudulently with documents of KEPHIS which were intercepted. This is forgery and thus warrants summary dismissal and will not be accepted.***

***After questioning you on the same, you have not been able to produce a satisfactory explanation as to your cause of tampering with these documents. You have at the same time put the company and its clients in a fragile situation and again this will not be tolerated.***

***You leave us no choice but to terminate your services with us with immediate effect.***

***Please arrange with the finance office, on when you may collect your final dues”.***

21. The reason thus given about the dismissal of the Claimant was alteration of documents.

22. The Respondent’s witness informed Court of the discovery of this alteration as per their Appendix A. The witness did not point out what was altered though when cross examined, she indicated that it is Kephis who discovered the alteration and communicated to them. The communication from Kephis was also not produced in Court.

23. The Respondents have also indicated that they questioned the Claimant and he admitted the alteration though however, no proof that the Claimant was questioned about the said alteration and his admittance to it.

24. Under Section 43 of Employment & Labour Relations Court, reason that an employer relies on to terminate an employee should be tangible, existing reason and these should be supported by proper evidence. It is not enough for an employer to just state that a certain event has been committed by an employee and proceed to terminate him.

25. This is exactly what the Respondent did and in the absence of the proof of the existence of those reasons, it is my finding that there were no valid reasons to warrant dismissal of the Claimant.

26. The process taken by the Respondent before termination also comes under scrutiny. Section 41 of

Employment Act 2007 states as follows:

**“(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.”**

27. It is therefore apparent that the need for an oral disciplinary hearing and supported by Minutes of that process should be exhibited before Court as proof of a fair hearing accorded to the Claimant.

28. The Respondent insists that they gave the Claimant a hearing and the Claimant denies the same. There is no proof of this process. I therefore find that the Claimant was not accorded a fair hearing.

29. Under Section 45(2) of Employment Act:

**(2) “A *termination of employment by an employer is unfair if the employer fails to prove:***

**(a) *that the reason for the termination is valid;***

**(b) *that the reason for the termination is a fair reason:-***

**(i) *related to the employee’s conduct, capacity or compatibility; or***

**(ii) *based on the operational requirements of the employer; and***

**(c) *that the employment was terminated in accordance with fair procedure”.***

30. In the case at hand, there were no valid reasons to terminate the Claimant and neither was he given a fair hearing before the termination. I therefore find the dismissal unfair and unjustified and I declare it so.

31. In the premise I will find for the Claimant and award him as follows:-

**1. 1 month’s salary in lieu of notice Kshs. 39,500/=.**

**2. 12 months’ salary as damages for unlawful termination = 39,500 x 12 = 474,000**

**Total = 513,500/=**

**3. Certificate of service.**

**4. The other claim of NHIF and NSSF are not proved and are not awarded.**

**5. Respondent will pay costs of this suit.**

Read in open Court this 29<sup>th</sup> day of June 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Bonyo holding brief for Langat for Claimant – Present

No appearance for Respondent