



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1417 OF 2016

FRANCIS NDIRANGU GITHUA.....CLAIMANT

- VERSUS -

SOFTWARE GROUP KE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 31st July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 19.07.2016 in person. The claimant prayed for judgment against the respondent for:

- a. Reinstatement to his employment designation immediately without any loss of benefits, seniority and victimization.
- b. Payment of his salary from March 2016 up to the date of his reinstatement.
- c. Payment of his bonus and benefits for 2015.

In alternative:

- d. 12 months damages compensation for unfair termination at Kshs.109, 127.00 x 12 making Kshs.1, 309, 542.00.
- e. Service pay at 15 days each for the 4 years worked at Kshs.219, 048.00.
- f. 2 leave days for the period accumulated in the year 2016 Kshs.7, 275.00.
- g. Bonus for year 2015.
- h. Exemplary damages for discrimination and mental anguish.
- i. Exemplary damages for discrimination, mental anguish and psychological torture.
- j. Interest at Court rates from the date of unfair termination 16.02.2016 until payment in full.
- k. Costs of the suit.
- l. Any further relief the Honourable Court would deem fit.

The respondent filed the memorandum of reply to the claim on 23.08.2016 through Igeria & Ngugi Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The claimant filed the reply to response on 29.09.2016 and on 28.02.2017 appointed Nyingi Wanjiru & Company Advocates to act in the suit.

The parties opted that the suit be determined on the basis of the pleadings and documents on record without calling of the witnesses.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant as its Quality Assurance Analyst by

the agreement of employment dated 01.12.2011 and effective 01.12.2011. The claimant's case is that he was unfairly terminated by the termination of employment agreement dated 16.02.2016. The letter stated that the respondent had decided to terminate the employment of the claimant upon the reasons that the claimant had failed to tasks assigned at a standard that was acceptable to the respondent and the claimant was unable to improve on performance even after several performance reviews and re-shuffling into different departments. The letter stated that the respondent had paid out the one month notice and accrued leave days as per the terms of the contract of service.

The respondent's case is that the contract of employment was terminated by mutual agreement under clause 10 of the subsequent contract of service dated 01.08.2014 but which contract the claimant says was not executed at all and did not apply. The purported contract of employment dated 01.08.2014 as exhibited for the respondent is not signed by both parties and the Court returns that as submitted for the claimant it did not apply.

To answer the **1st issue** for determination the Court returns that the applicable contract of service was the one dated 01.12.2011.

To answer the **2nd issue** for determination the Court returns that the contract of employment was terminated by the letter dated 16.02.2016 as read together with the contract of termination of employment agreement dated 16.02.2016 and signed by both parties. In the termination agreement the parties waived all their liabilities, claims, causes of actions, rights and remedies they may have had against each other. The claimant agreed that the contract of service was being terminated for good cause. The claimant was to be paid Kshs.156, 389.00 being salary up to 16.02.2016, annual leave pay due to the employee, and 30 days' notice pay to the claimant.

The Court returns that the respondent has established that the contract was terminated by mutual agreement and the parties are bound accordingly. The termination was not unfair as was alleged by the claimant.

To answer the **3rd issue** for determination, the Court returns that the termination was not unfair and the claimant is not entitled to compensation for unfair termination as prayed for. Bonus for the year 2015 and the amount claimed remained at large and the same is found not established. In view of the terminal dues paid as per agreement of termination, all other prayers and claims will collapse. The service pay will equally fail because the claimant was a member of the NSSF and as per section 35 of the Employment Act, 2007 service pay was not due.

In conclusion the suit is hereby dismissed with orders the claimant to pay the respondent's partial costs of the suit fixed at Kshs. 30, 000.00.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 31st July, 2019**.

BYRAM ONGAYA

JUDGE