



**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 1228 OF 2010**

*(Before D.K.N. Marete)*

**JOAN JELAGAT BIWOTT.....1ST CLAIMANT**

**JAMES MAINA GAITHUMA.....2ND CLAIMANT**

**SIMON MAINA MACHARIA.....3RD CLAIMANT**

Versus

**REGIONAL REACH LIMITED.....1ST RESPONDENT**

**MEDIAMAX NETWORKS LIMITED.....2ND RESPONDENT**

**JUDGEMENT**

This matter came to court vide a Memorandum of Claim dated 27th September, 2010 and filed on 11th October instant. This was followed by an Ammended Statement of Claim amended on 26th October, 2011 and filed on the same date. The issues in dispute therein are cited as;

- a. *Severance pay on constructive termination of employment*
- b. *Unpaid salary*
- c. *Damages for Unlawful and Constructive Termination of Employment*
- d. *Unpaid Overtime Allowance*

When the matter came for hearing on 5th June, 2013 the parties agreed that it be consolidated with Industrial Cause No. 1197 of 2010 (Joan Jelagat Biwott) and 1435 of 2010 (Simon Maina Macharia) for expedient hearing and disposal of the matters in dispute. The 2nd claimant's matter becomes the test case as the facts are all similar in the others.

The respondent in her Respondent's Memorandum denies the claims and prays that the same be dismissed with costs.

The 2nd claimant's case is that by a letter of appointment dated 28th October, 1995, the respondent appointed the claimant to the position of messenger/driver effective on 1st November, 1995. The

claimant performed his duties diligently and in such recognition the 1st respondent raised his salary from Ksh.4,500.00 to Ksh.36,886.00 all inclusive. He was also paid an overtime allowance of Ksh.100.00 per hour.

On or about 13th November, 2009, the 2nd respondent wrote to the claimant on the following terms;

- a. *The 2<sup>nd</sup> Respondent had allegedly purchased the business of the 1<sup>st</sup> Respondent, who had been the Claimants employer for 14 years.*
- b. *The Claimant should sign a pre-prepared letter of resignation thereby effectively forfeiting his terminal benefits accrued from the 14 years working relationship with the 1<sup>st</sup> Respondent.*
- c. *The Claimant should sign a new Employment Contract with the 2<sup>nd</sup> Respondent and relieve the 1<sup>st</sup> Respondent of any claim in regard to terminal benefits.*

This had not been communicated to the claimants any earlier.

The claimant promptly wrote to the Managing Director of the 1st respondent seeking further details of the alleged transfer and also enquiring about the fate of his terminal dues and on 26th April, 2010, the respondent did reply and explain the circumstances of the terms of business with a rider that;

*'failure to sign the Contract of Employment will be a confirmation that you no longer wish to remain an employee and the company will have no alternative but to issue a Termination Notice after this period'.*

*"The Claimant however insisted that he was not an employee of the 2<sup>nd</sup> Respondent, Mediamax Network Limited but rather of the 1<sup>st</sup> Respondent, Regional Reach Limited. In a letter dated 22<sup>nd</sup> June 2010, the Claimant admitted to having received the contract from Mediamax Network Limited but declined to sign it since he did not agree to some of the terms that were included."*

The claimant did not sign the Contract of Employment due to the respondent's failure to explain the issue of terminal dues but he did continue to discharge his duties until the 24th August, 2010 when he was blocked from assessment to this office and place of work. This, he submits, amounted to constructive dismissal.

The claimant deems the acts of the respondent a violation of his rights and observes that a notice of termination has never been issued and the respondents have refused, failed or neglected to pay his salary and allowances for periods between 1st June, 2010 to 24th August, 2010. He prays for;

17. *The claimant's Claim is for:-*

- a. *Severance pay equivalent of 1 month for each year worked*
- b. *Unpaid salary from 1<sup>st</sup> June to 24<sup>th</sup> August 2010*
- d. *Damages for unlawful termination, being 3 months salary in lieu of notice*

18. *The Claimant claim against the Respondent is the sum of Kenya shillings 804,509.10 being his statutory and contractual dues computed as follows:*

- a) *Severance pay equivalent of 1 month's*

salary for 15 years of service	Kshs.553,290.00
b) Unpaid salary (1 <sup>st</sup> June 2010 to 24 <sup>th</sup> August 2010)	Kshs.103,280.00
c) Damages for Unlawful Termination (3 months salary)	Kshs.110,658.00
d) Unpaid Overtime Allowance	Kshs.37,280.30
<b>TOTAL</b>	<b><u>Kshs.804,509.10</u></b>

He ultimately sets his prayers as follows;

*REASONS WHEREFORE the Claimants prays for judgement against the Respondent for:-*

- a. *Kshs.804,509.10*
- b. *Costs of the suit*
- c. *Interest on (a) and (b) at courts rates from the date of demand until payment in full.*

The respondent's case is that on transfer of the 1st respondent's business to the 2nd respondent on 9th October, 2009, all employees were required to resign from the employment of the 1st respondent and sign a Contract of Employment with the 2nd respondent. The new contract recognized the terms and years of service in the previous employment and effectively transferred these to the new employment.

The claimant was informed of the new terms in a letter dated 13th November, 2009 by a letter dated 11th April, 2010 he enquired as to how this would be computed and this was answered in this letter of 26th April, 2010 where he was warned that a failure to sign the employment contract would be a confirmation that the claimant no longer wished to be in employment. It would appear that this game was played on and on with the claimant insisting that he would not sign the letter of resignation and offer until the issues raised were clarified and agreeable.

This was the case for the core claimants Joan Jelagat Biwott and Simon Maina Macharia respectively.

The issues for determination therefore are;

1. Was there a termination of the employment of the claimant"
2. Was the termination of the claimant's employment, if at all, wrongful, unfair and unlawful"
3. Is the claimant entitled to the relief sought"
4. Who bears the costs of this suit"

The 1st issue for determination is whether there was termination of employment of the claimants. Each party holds a contrary view on this. This matter came for hearing on 12th March, 2013 whereby all the three claimants testified and reiterated their respective claims. On cross-examination, James Kamau Gaithuma testified that he last worked on 24th August, 2010 but his last pay was in May, 2010. He worked for the 1st respondent. The other two claimants also testified in the same version.

DW1, Annbell Iraki testified that she was head of Human Resource for the respondent for two years. She testified that her duties including recruitment, retention and partnership with the other departments of the company. She had worked with the respondent as a Business Officer and was absorbed in Human Resource in 2010. She eloquently testified in reiteration of the defense case.

Gaithuma had put in 14 years while the 1st respondent, Jelagat had put in 11 years and 5 months. Simon, the 3rd respondent had put in 8 years and 10 months. The claimants continued in the employment of the 2nd respondent but declined to comply with the terms of renewal of the contract of employment. They were paid for all the time they worked for the 2nd respondent.

From the evidence and submission of the parties, it would appear that there was no termination of the employment of the claimants. The claimants disagreed or were not certain of the new terms of employment and therefore rejected the contract despite an answer and clarification on the same by the 2nd respondent. This effectively terminated their employment. I therefore find that the claimant indeed chose to go their way and that there was no termination of employment.

The 2nd and 3rd issues for determination fall by the wayside in the absence of a termination of the employment of the claimants.

I therefore dismiss the claims with costs to the respondent.

Delivered, dated and signed the 16th day of July, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mr. Nderitu instructed by Macharia Nderitu & Co. Advocates for the claimants.
2. Mr. Masese instructed by Federation of Kenya Employers for the respondent.



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