



**Munduarigha & 2 others v Milly Glassworks Limited (Cause 249, 250 & 251 of 2017 (Consolidated)) [2022] KEELRC 1714 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1714 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 249, 250 & 251 OF 2017 (CONSOLIDATED)**

**B ONGAYA, J  
JULY 22, 2022**

**BETWEEN**

**BONIFACE MUNDUARIGHA ..... 1<sup>ST</sup> CLAIMANT**

**THADDEUS APIMA MOTUKA ..... 2<sup>ND</sup> CLAIMANT**

**KENNEDY NYAMWANCHA OBUCHI ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**MILLY GLASSWORKS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The three (3) claimants filed their respective memorandum of claims on April 5, 2017 through Mburu Nyamboye & Co Advocates. The claimants were employed by the respondent until December 14, 2016 when the respondent allegedly terminated their contracts of service. The 1<sup>st</sup> claimant was employed since 2008, the 2<sup>nd</sup> claimant since 2007 and the 3<sup>rd</sup> claimant since October 10, 2008. It is their case that they had a clean record of service and they claim for payment of terminal dues on the headings of payment in lieu of termination notice, unpaid public holidays, unpaid leave allowance, unpaid house allowance and compensation for unfair termination.
2. The respondent filed a response to claim on May 17, 2017 in each of the suits and through Muthee Soni & Associates Advocates. The respondent pleaded as follows. The claimants were casual labourers who were never terminated on December 4, 2016. Further, being casual labourers, the respondent desired to convert them to contract workers and on December 1, 2016 the respondent offered each claimant a contract to sign. Each refused to sign the contract as offered and thereafter deserted work without notice, never to be seen again. Further, at that time of deserting duty, each was paid a consolidated wage. The respondent prayed that their respective suits be dismissed.



3. The 1<sup>st</sup> and 2<sup>nd</sup> claimants testified to support their respective cases. The 3<sup>rd</sup> claimant did not testify at all. The respondent failed to bring its witness and failed to file final submissions within the time as was directed by the court. Final submissions were filed for the claimants.
4. The court has considered the material on record and makes findings as follows:
  1. The parties were in a contract of service as pleaded and submitted for the claimants. The 1<sup>st</sup> and 2<sup>nd</sup> claimants testified that they worked for the respondent as casual labourers and sometimes in December, 2016 the respondent asked each one of them to sign a fresh contract. Each asked to be paid for years already served. The respondent offered to pay for 3 years and when the parties disagreed, the contract of service ended without notice. The 1<sup>st</sup> claimant testified that the contract ended on December 15, 2016 and he received Kshs 48,000.00 with no statement of payment on particulars of the payment. The 2<sup>nd</sup> claimant also testified that he received some terminal payments but without a payslip.
  2. The court returns that in view of the testimony by the 1<sup>st</sup> and 2<sup>nd</sup> claimants, the contract of service ended when the claimants refused to sign a contract of service translating their terms of service from casual to written contract terms. The 1<sup>st</sup> and 2<sup>nd</sup> claimants confirmed that each claimant was a member of NSSF and NHIF. The court therefore finds their refusal to sign the written contract on account that the respondent was willing to pay only 3 years of service and not the full term or years served amounted to irresponsible grievance that had no foundation. In particular, in absence of a contractual term to the contrary, the claimants were entitled to NSSF contributions for their pension dues and nothing else for the services already rendered up to the separation date and as per section 35 (5) and (6) of the *Employment Act*, 2007. It appears to the court that the respondent was generous in paying them 3 years in service payment over and above the NSSF contributions that had already been made. In the circumstances, the respondent's pleading and submission that there was no termination but the claimants deserted duty when they refused to sign the written contracts of service is upheld. The court considers that the contract of service ended at the instance of the claimant's voluntary refusal to continue in employment by declining to sign the written contract of service as was offered. Thus the court returns that the respondent never terminated the claimants' employment. Allegations of unfair termination and compensation in that regard will collapse.
  3. The claim for house allowance is found unjustified as it appears the parties agreed on a consolidated daily wage with reasonable provision for housing accommodation as envisaged in section 31 of the *Employment Act*. Indeed, there appears to be no grievance in that regard throughout the considerably long period of casual service.
  4. The 1<sup>st</sup> and 2<sup>nd</sup> claimants testified that up to the date they were required to sign a written contract and each refused to do so, they had been working for the respondent on casual basis. The 2<sup>nd</sup> claimant specifically testified that he was paid Kshs 572.00 per day and the 1<sup>st</sup> claimant testified that he earned Kshs 527.00 per day. The court returns that by that evidence of casual employment the claim for payment on public holidays worked and in lieu of annual leave are found inconsistent and unjustified in the circumstances of the case. In any event, the claimants have not pleaded and by evidence shown that there had been persisting grievance about annual leave and pay for work on public holidays.
  5. The respondent did not file final submissions as was directed and did not avail its witness so that there will be no orders on costs.
5. In conclusion judgment is hereby entered for the respondent against the claimants with orders:



- 1) The claimants' respective suits are hereby dismissed.
- 2) No orders on costs of the suits.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS  
FRIDAY 22<sup>ND</sup> JULY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

