



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 94 OF 2016

ARISTIDE MAREGE NYANG'AU.....CLAIMANT

-VERSUS-

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. At all material time the Claimant was an employee of the Respondent having been employed as a security from October 2003 until March 2014, when he exited the employment. The manner of the exit, and the import thereof is in controversy in this matter. The Claimant asserts that he was wrongfully and unfairly terminated and therefore entitled to the couple of reliefs that he has sought in his statement of claim. The Respondent wholly denies the claim, contending that the Claimant voluntarily resigned from his employment, and therefore the characterization of the separation as unfair and wrongful termination is with no basis. Further the Claimant is not entitled to any of the reliefs he has sought.

THE CLAIMANT'S CASE

2. The Claimant's case is encompassed in his statement of claim herein filed, the witness statement dated 14th January 2019, his further witness statement dated 25th May 2019, and the brief oral testimony in Court that was for purposes of clarifying contents of the two witness statements that the Court adopted as his evidence in chief, by consent of the parties.

3. The documents namely, a certificate of service dated 23rd March,2015, the letter to confirm NSSF remittances dated 24th March, 2015, the NSSF statement of account, copy of bank statement and a letter dated 30th September,2015, were all produced as CEXH.1-5 in that order.

4. The Claimant stated that he got into the employment of the Respondent sometimes in the month of 2003 as a security guard, and that at the time of separating with the Respondent he was earning a salary of **Khs. 9,895**.

5. The Claimant contended that his employee-employer relationship with the Respondent was one that was harmonious till on or about the 1st March,2014 when it got into turbulence. On the 1st March,2014, the Respondent's site Supervisor one Mr. Wangio redeployed the Claimant to a new station. He instructed that the redeployment was to take effect the following day at 6:00 am. This abrupt change was without any early notification to the Claimant. However, he reported at the new station as was assigned. This change came in with a host of challenges, among them that the reporting and work time for the new station were different from that which he was used to in his previous station,8.00 am to 8.00 pm.

6. Faced with this challenge, the Claimant got constrained to approach the supervisor, the supervisor directed him to raise the issue with the Human Resource Manager. He asserted that this he did. However, all did not end well, immediately he aired the challenge to manager, the manager ordered him to remove his uniform and leave the premises since his services were no longer required.

7. The claimant further stated that he was told that, he would be called to pick his final dues, call which never came in, compelling him to seek services of an advocate.

8. That the manner in which his employment was terminated was unfair and inhuman, and therefore entitling him to the reliefs he has sought in his pleading.

9. In the further statement the Claimant stated that after the Human Resource Manager told that his services were no longer required, he

ordered him to write a resignation letter, as a pass for payment of his terminal dues.

10. He alleges that he was coerced into writing the resignation letter. That despite the fact that he complied with his employer's demands he was never paid his terminal dues. He denies the Respondent's assertion that it paid him all his dues in the month of March, 2015.

11. Cross examined by Counsel for the Respondent, the Claimant stated that he was dismissed by the Respondent. That he was forced to resign, so that he would be paid his terminal dues. At the time of the termination he was serving at Utalii 7th floor. Immediately prior to his deployment to this station, he had served at Kenya Methodist University Towers up to the 28th February, 2014. The claimant denied knowledge of the reason for his redeployment. Shown a letter by Kenya Methodist university, he asserted that he was not aware of any compliant by them.

12. That contrary to what counsel was putting to him, the Complainant was never summoned at any time by the Respondent over an alleged misconduct on his part.

13. Shown and questioned over a letter dated 5th March 2015, in response, the claimant stated that he is the one who wrote the letter. He asserted that what he meant in the letter was that where he was redeployed to, was not ideal to him, as he would not make it there in an acceptable time, and leaving late, would entail a risk to him. That he proposed that the Respondent should give him an alternative station, but this proposal was met with a directive that he resigns.

14. He admitted that he signed the clearance form and that at the top, the form indicates that his station was Kenya Methodist University, as at the time he was clearing.

15. He further admitted that his statement of account reflects an entry for Kshs. 9,895. The entry being of a date in April, a time when he had already left the employment of the Respondent.

16. That the second witness statement was done by him after the Respondent had filed its documents. He stated that weekly he had a one day off. He was unable to state specifically for which public holidays he was not paid for despite having worked on them.

17. Throughout his employment with the respondent, he was not satisfied with the salary, however he did not at any time complain about its insufficiency.

18. In re-examination, he reiterated that he did not resign voluntarily. That the signature on the Respondent's document dated 23.03.2015, is not his. That the KSHS.5000, appearing on the form was an amount that he was surcharged. Out of the Kshs. 9,895, that was paid to him by the respondent, Kshs. 5000, was deducted there from.

19. He contended that he continuously worked overtime but never saw an improvement on his payslip.

The Claimant's Submissions

20. The Claimant's counsel in his written submissions submitted that the Respondent's position that the Claimant resigned from his employment voluntarily is totally untrue. That the Claimant was coerced to resign in order to receive his dues. The claimant cross examined on the resignation letter, he was not shaken off his position that he was forced to resign.

21. Putting reliance on Section 107 of the Evidence Act, which places the burden of proof of any fact on the person who wishes to rely on the same, the Claimant submitted that having disputed writing such a resignation letter voluntarily, it became incumbent upon the Respondent to prove that indeed there was no coercion and that the letter was written unequivocally by him. He asserts that the Respondent did not place forth any evidence wherefrom it can be concluded that the Claimant resigned voluntarily.

22. Counsel submitted further that in **Stephen Miheso V Kaimosi Tea Estate Limited [2014] eKLR**, a matter which had similar facts like the instant matter, the court found in favour of the Claimant therein. He urged this Court to be persuaded by the decision and make a finding as was made therein.

23. It was submitted that the Claimant was clear in his testimony, that he was never paid his terminal dues, and that he never signed any payment voucher to the effect that he had been paid. During the hearing he disputed the signature on the Respondent's document of payment dated 23rd March, 2015. That comparing the signature on that document and his obtaining on his pleadings, it comes out eminently that they are dissimilar.

24. In the submissions, a view was taken to the effect that in their haste to cover up their unlawful summary dismissal, the Respondent proceeded to prepare a discharge voucher for the Claimant and append a signature thereon, purporting it to be the claimant's. That in any event the amount of Kshs. 5000 alleged to have been paid through the payment voucher, was latter refunded on demand by the Respondent. That this, the Respondent's witness did not rebut.

25. Reliance was placed on the provisions of Section 70 of the Evidence Act, which provides:

“ if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in the person's handwriting must be proved to be in his handwriting.”

26. Counsel, taking a position that the Claimant was dismissed from his service of employment, made detailed submissions regarding procedural unfairness that reveals itself in the dismissal. He posed a question, “ **was fair procedure applied before the Claimant’s dismissal?** Then made submissions in answer to the question.

27. The Claimant was ordered dismissed for raising a grievance on the unilateral and adverse changes in terms of service, the Human Resource Manager of the Respondent, verbally dismissed the Claimant. That prior to the change i.e. the redeployment, the Claimant was not consulted or given a redeployment letter. He submits an employer is forbidden to alter an employee’s employment contract without consulting the employee. He cites the case of **Elizabeth Kwamboka Khaemba vs BOG Cardinal Otunga Mosocho & 2 others [2014] KLR**, to buttress this submission.

28. Counsel submitted that Section 43 of the Employment Act, 2007 provides that in matters termination of an employment contract, the employer is required to prove the reason for dismissal, and where the employer fails to do so, the termination shall be deemed unfair within the meaning of Section 45 of the Act.

29. It was further submitted that the claimant was never served with any show cause letter and that he was not invited for any disciplinary hearing to defend himself against any charges that were levelled against him, before he was dismissed. This amounted to an affront on procedural fairness, rendering the termination, unfair. Fortification was sought in the decisions in **Donald Odeke v Fidelity Security Ltd, cause Number 1998 of 2011, and Kenya Union of Commercial Food and Allied Workers Union vs Meru North Farmers Sacco Ltd Cause NO. 74 of 2013**.

30. That there lacked a valid reason for the dismissal and therefore the same was substantively unfair.

31. On the reliefs sought in the Claimant’s pleading, and the claimant maintaining that there was a dismissal, it was submitted that pursuant to the provisions of Section 36 of the Employment Act, the Claimant is entitled to a one month’s salary in lieu of notice. Regarding overtime, it was stated that there was ample evidence before court establishing that the Claimant used to work from 8:00 am to 8:00 pm and was never paid at 1.5 rate for each extra hour worked. This amounts to unfair labour practices on the part of the Respondent.

32. It was submitted that the Respondent did not place any evidence before court to rebut the Claimant’s evidence that he was never given leave as entitled to or payment in place thereof. Section 28 of the Employment Act is instructive on this.

33. On the Claim for unpaid house allowance, reliance was placed on the provisions of Section 31 of the Employment Act. It was further contended that the claimant was never paid a consolidated salary. He was not given a house. He was not paid house allowance. Section 20 of the Act placed an obligation on the Respondent to produce an itemized pay statement to prove that the Claimant’s house allowance was a component in the gross salary.

34. It was submitted further that the Claimant’s pleadings and testimony that he used to work on public holidays without being paid finds support in the Respondent’s witness’s admission under cross examination that there was no payment for holidays worked. That Section 17 of the Act provides the anchor for the Claimant’s entitlement to payment for public holidays worked.

35. On the Compensatory relief under the provisions of Section 49[1][c], the Claimant submits that the maximum compensation awardable i.e. 12 months’ gross salary should be granted in his favour.

The Respondent’s Case

36. Upon being served with the Claimant’s pleadings, the Respondent filed a defence and answer to the claimant’s memorandum of claim, A witness statement by one Risper Obure, and documents that were marked as appendix 1-4. The witness statement was later on substituted by that of Samuel Ogunde Obanda. Plus, the brief oral testimony in court, by RW 1, that was for purposes of clarifying a few areas of the witness statement, and the documents, and that evidence which came up under cross examination and re-examination, the Respondent’s case resides in there.

37. Samuel Ogunde Obanda, presenting himself as the Human Resource Manager of the Respondent, testified in opposition to the Claimant’s case, but in support of his employer’s.

38. The witness stated that the Claimant was in the employment of the Respondent from October 2010 to March 2014 when he resigned. At the time of his resignation, he was earning a gross salary of Kshs. 10,500.

39. At the time of his resignation, the Claimant was stationed at Kenya Methodist University, Nairobi Campus.

40. The witness stated that, on the 1ST March, 2014, the respondent received a complaint from the KEMU’s security officer to the effect that the Claimant had absented himself from his station of work. This prompted them to decide to redeploy him to another building. He declined on the ground that he had got a job elsewhere.

41. That on the 5th March, 2014, the Claimant appeared at the Respondent’s Headquarters, and when he was told of the intended transfer he opted to resign. That Upon resignation, a clearance process was commenced, which was concluded and the Claimant given his dues.

42. At all material times, the claimant proceeded for leave, and therefore his claim for unpaid leave is untenable. That the salary of Kshs. 10,500 was a consolidated salary.

43. Under cross examination by counsel for the Claimant, the witness reiterated that at the time of the Claimant's resignation, the latter's work station was at KEMU Towers, and that there was a complaint by the client. However, no officer from the client entity was called to testify.

44. It was not possible for the Respondent to conduct a disciplinary proceeding over a somebody who had resigned, he asserted.

45. That the Respondent did not place before court any document to prove payment for public holidays worked. Documents indicate that he received Kshs. 5000. There was no refund to the Respondent.

The Respondent's Submissions

46. The submissions for and on behalf of the Respondent largely revolved around whether or not the claimant resigned voluntarily, the implication of a voluntary resignation on a matter like the instant one and whether the Claimant was entitled to any of the reliefs sought in his statement of claim.

47. It was submitted that the claimant voluntarily resigned. That his allegation that he was coerced to resign was unfounded, and unestablished. It is not enough to assert coercion. There must be shown and proved particulars thereof.

48. On the submission that the burden of proof, to prove that there was coercion to resign, the Respondent sought fortification in the provisions of Section 107 of the Employment Act. Reliance was further placed in the provisions of Section 109 of the Evidence Act which provides that the burden of proof as to the any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the prove of that fact shall lie on any particular person.

49. In **Steve Mutua Munga vs- Homegrown Kenya Limited & 2others [2013] eKLR**, the Court adopted the definition of the term coercion from the Black's dictionary 8th edition, which comprises compulsion by physical force or threat of force. Elements of coercion also include where a person acts out of fear of actual or threatened confinement. The Claimant did not demonstrate any of these elements or all of them.

50. In **Edward Machuka Nyamora vs- Kenya Animal Genetic Resource Centre [formerly Central Artificial Insemination Station] [2018] Eklr**, the Claimant alleged that a written resignation letter was under coercion. The court observed that the letter did not provide reasons for resignation and proceeded to dismiss the claim. The court further stated that the burden of proving that he was forced to resign was squarely on the claimant who failed to prove the same. It was submitted.

51. As regards the approach a court faced with a situation like the one at hand should employ, Counsel submits that the answer is found in the holding in **Alfred Nephath Mwaniki vs Barclays Bank of Kenya Ltd [2005] eKLR**, thus;

“There were two witnesses presented to this court-the plaintiff himself and Musa. I must analyse their respective testimonies to determine the issue: “Was the resignation freely give” ‘Was there any force used’ This case turns on the facts and facts alone, I must prefer the testimony of one witness more than the other, and I must take into account the totality of the evidence, all other factors, including the environment, and the context within which the letter of resignation was given.

52. The resignation letter was in the handwriting of the Claimant, he supplied the words thereon, and one can get the impression that he was resigning because he could not manage the early hours that he could have been required to work in the new station.

53. It was further submitted that it is trite law that parties are bound by their pleadings. In this case, The Claimant neither pleaded in his memorandum of claim that he had resigned nor that he had been coerced to resign. He could not therefore lead evidence to allege that he had not resigned voluntarily yet he had not even pleaded that he had resigned. On this Counsel cited the holding in **Daniel Otieno Migore vs-South Nyanza Sugar Co Ltd [2018] eKLR**, thus;

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which the proceedings derive from. It hence follows that any evidence adduced in a matter that tends to be at variance with the pleadings must be disregarded.”

54. In the Respondent's view, the allegation of coercion is an afterthought, considering the first time it is brought up in the matter.

55. Maintaining that the Claimant signed the acknowledgement form, Counsel submitted that his disputing of the signature thereon was not founded, other than just disputing, he never tendered evidence to support his claim. His on this, was an afterthought.

56. Court is urged to be persuaded by the holding in the case of **Evans Arthur Mulolwe-vs- Attorney general & another [2019] eKLR** where the learned judge observed as follows;

“It is significant to note that the claimant was never charged with forging his letter of appointment and fraudulently obtaining salary from KWS. It is more curious that the chairman of the board Mr. Collins Church never filed a complaint with the police that the claimant had forged his signatures and granted himself new terms and conditions of services fraudulently. It is telling that Mr. Collins church was not involved at all in the investigations and the criminal proceedings conducted against the claimant. Clearly, the issue of the letter dated 24th June 2004 being a forgery is an afterthought and cannot be validly used to obtain from the claimant remuneration that had been granted to him by the chairman of the Board of Directors Mr. Collins Church.”

57. Counsel went ahead to, pose a question, whether the claimant was dismissed from employment, and made a submission thereon. He submitted that section 47(5) of the employment Act is clear that in a claim of unfair termination or wrongful dismissal, the burden of proving the ingredients of unfairness and wrongfulness lies with the employee. Section 47(5) states;

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee., while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

58. The respondent urges the court to consider the case of **Kennedy Maina Mirera-vs – Barclays Bank of Kenya Limited (2018) eKLR** where it was held;

“It is the court’s considered view that sections 43 (1) and 47 (5) of the employment Act, must be construed so as not to nullify the conventional and accepted law on the burden of proof....”

59. The respondent also urges the court to consider the case of **Nicholus Kipkemoi Korir -VS- Hatari Security Guards Limited [2016] eKLR**, where the court held that;

“It is settled rule in all civil claims is that a party who intends a court to find or decide any matter in his or her favour must prove the allegations to the required standard or proof in civil claims which is on a balance of probability. Further under section 47 (5) of the employment act in any complaint of unfair termination or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination or wrongful dismissal lies on the employer

..... It is therefore not enough for the employee to simply make allegations on oath or pleadings which are not backed by any evidence and expects the court to find in his or her favour.

60. RW I testified that upon receiving complaints from KEMU about the claimant, the respondent instituted disciplinary proceedings against the claimant. The proceedings, as per the Respondents policy, began by the way of summons to the claimant.

61. On the claimant’s allegation that he was not given a re-deployment, letter, it was submitted that from the evidence adduced, when the respondent received complaints from KEMU about the claimant, the respondent sought to re-assign the claimant to a new station following the complaint. The claimant responded to the summons issued on 02/03/2014 but instead of addressing the issue of the summons, he chose to tender a resignation.

62. That having resigned, the employer -employee relationship terminated. Consequently, the Respondent could not issue a redeployment letter or undertake any disciplinary proceedings. The Respondent no longer had any authority over the Claimant. Any further action could be null and void. Reliance was placed on the decisions in **Herbert Wafula Waswa vs- Kenya Wildlife Services [2020]**, and **Kennedy Obala Oaga vs Kenya Ports Authority [2018] eKLR**.

63. On the Claimant’s sought reliefs, it was submitted that since the Claimant voluntarily resigned from employment, the compensatory relief cannot be availed to him. The respondent relied on **David K. Cheruiyot v Barclays Bank of Kenya Limited [2015] eKLR**, Where the Court held, **“Is the claimant entitled to prayers sought? My answer is No. Having chosen to resign, the Claimant cannot claim any dues for wrongful termination.**

64. On the claimant’s prayer for pay for public holidays worked without pay, counsel submitted that the Claimant lacked specificity. He did not prove. That he kept on stating that he did not know how much he was being paid.

65. Regarding the claim for House Allowance, the Respondent submitted that the Respondent’s witness categorically testified that the salary that the Claimant was earning was a consolidated salary, therefore inclusive of house allowance. That this evidence was not rebutted by the Claimant.

66. He tied up the submissions by urging this court to find that the Claimant’s claim is a fit candidate to meet the fate of dismissal with costs.

Determination

67. From the material placed before me, I consider the following issues as issues for determination in this matter;

[I]. Whether the Claimant resigned and if so whether he resigned voluntarily.

[ii] Whether the Claimant was dismissed from his employment.

[iii]. Whether the Claimant is entitled to the reliefs sought in the memorandum of Claim.

Whether the Claimant resigned, and if so was the resignation Voluntary?

68. From the onset, it is important to state that the whole purpose of a **pleading, be it a statement of claim, defence or reply is to define the issues** between the parties, to confine the evidence of the trial to matters relevant to those issues, and ensure that the trial proceeds to

judgement without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from pleadings. Put in another way, a party should know in advance, in broad outline the case he will have to meet at the trial.

69. No doubt, numerous judicial attention has been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In **Adetoun Oladeji [NIG]Ltd vs- Nigeria Breweries PLC S.C 91/2002**, Judge Pius Aderemi J.S.C expressed himself;

“ It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

70. Sir Jack Jacob in his article entitled **“The present importance of pleadings”** cited with approval by the learned Judges of the Malawi Supreme Court in **Malawi Railways Ltd V- Nyasulu [1998] MWSC**, aptly captures it thus;

“As the parties are adversaries, it is left to each one of them to formulate his own case, subject to the basic rules of pleadings..... for the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part on the duty of the court to enter upon any inquiry into the case before it, other than to adjudicate upon specific matters in dispute which the parties themselves have raised by way of pleadings. To do so would be to enter upon the realm of speculation. Moreover, such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or a defence not made or raised by or against a party is equivalent not to hearing him at all and thus be a denial of justice.....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is not strictly adhered to. In such an agenda there is no room for an item called “any other business” in the sense that points other than those raised may be raised without notice.”

71. This is the jurisprudence obtaining in **Daniel Otieno Migore vs- South Nyanza Sugar Ltd [2018] eKLR**, cited by counsel for the Respondent.

72. Looking at the Claimant's memorandum of claim, one can find no difficulty to state safely that the Claimant did not mention any thing to do with his resignation from employment. He never pleaded that he resigned, and or that he was coerced to resign. It is also a matter for noting that, in his initial witness statement he never stated any of this, yet it was in his knowledge.

73. When this matter came up for hearing before His Lordship Justice Radido on the 4th March 2019, he gave the following directions;

[I]. The respondent to file and serve a witness statement and other documents latest 8th March 2019.

[II]. Agreed issues to be filed before 15th March 2019,

[III]. Hearing date to be taken in the registry.

74. It is after the Respondent filed the statement and documents pursuant to the directions, that on the 9th September 2019, the Claimant filed a document captioned **further statement of Aristide Marege Nyangau**, for the first time admitting that he wrote a resignation letter, and attempted to run away from the import of letter by stating that he was coerced to write the same. This document was filed pursuant to a procedure unknown to this court, and without leave of the court.

75. Imperative to state that the two statements on record were adopted as evidence in chief. They are immensely at variance, and contradictory in content, therefore in substance. This does not at all help the Claimant's case but dooms it.

76. The Claimant did not at any time in the course of the proceedings move court for leave to amend his memorandum of claim, to bring on board, the admission that he wrote a resignation letter but under circumstances of coercion and force. The timing of the further statement and the attempt to bring on board the issue, leads to only one inescapable conclusion, this was an afterthought. Apparently, the Claimant had hoped that the fact of his resignation would not be raised or discovered at any time.

77. The Claimant having not pleaded coercion, cannot be allowed to rely on it to defeat the Respondent's defence. In any event, the Claimant totally failed to establish the fact that there was coercion and any or all of the ingredients of coercion as was captured in the case of **Steve Mutua Munga vs- Homegrown Kenya Ltd & 2 Others [2013] eKLR**.

78. Assuming that the Claimant had a right to raise the issue and rely on it, right which I have concluded he had not under the circumstances he tried to, section 109 of the Evidence Act placed a burden of proof on him to prove the fact. He never discharged this burden.

79. An allegation of coercion from the nature of its definition, is not a light matter. It must be pleaded with clarity and established with precision.

80. I am not in agreement with Counsel for the Claimant that Section 107 of the Evidence Act, placed the onus of proving that coercion did

not occur on the Respondent. What would shift to the Respondent was the evidential burden if the Claimant had discharged his burden under Section 109 of the Act.

81. Having considered the circumstances of this matter, the evidence by the parties and the submissions by counsel I have come to a conclusion that the Claimant did not rebut the Respondent's position that he resigned, and voluntarily so.

Whether the Claimant was dismissed

82. In matters dismissal of an employee or termination of his work, Section 45[5] of the Employment Act, places an obligation on the employee to prove the fact of dismissal or termination. This court having agreed with the position taken by the Respondent as hereinabove done, that the Claimant voluntarily resigned, then it follows that he did not discharge this burden. The answer to the issue is therefore in the alternative.

83. Consequently, I will deliberately not delve into considering the positions taken on matters like whether the dismissal was substantively fair, whether the dismissal was procedurally fair and whether redeployment amounted to a substantive change on a term of an employee's contract of employment.

What reliefs are available to the Claimant?

84. The Claimant sought for compensation pursuant to the provisions of Section 49[1] [c] of the Employment Act. This relief is only awardable where a termination or dismissal has been established to have been unfair or wrongful. Of course, it should be stated that awarding the compensatory relief is discretionary. Having failed to establish the fact of dismissal, the relief cannot be available to him.

85. The claims on, house allowance, pay for public days worked on but not paid for, overtime allowance, and unpaid leave allowance, are actionable independent of a claim for wrongful or unfair termination, or dismissal. Had there been sufficient material before me, I would have made an award under the heads. However, the evidence by the Claimant on these was outstandingly below par and not satisfactory. Largely, the Claimant just made assertions on them.

Conclusion

86. In the upshot, I find the Claimant's claim herein lacking in merit, and it is consequently dismissed with costs.

87. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

KEBIRA OCHARO

JUDGE

In Presence of

Onsoro (Ms) for the Claimant

Kiprono (Mr.) for the Respondent