REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 208 OF 2018

KENYA HOTELS & HOTELS WORKERS UNION....CLAIMANT

VERSUS

MATTAN ISSA RESTAURANT.....RESPONDENT

JUDGMENT

1. The Kenya Hotels & Allied Workers Union (the Union) sued Mattan Issa Restaurant (Respondent), and the issue in dispute was stated as:

Unprocedural suspension of Moses Emusungut (the Grievant).

2. In paragraph 4 of the Memorandum of Claim, the Union sought the following remedies:

> 4.0 Prayers
>
> 4.1 THAT, the Honourable Court be pleased to declare the suspension of Moses Emusugut unfair.
>
> 4.2 THAT the Honourable Court be pleased to quash the suspension of Moses Emusugut and order his reinstatement.
>
> 4.3 THAT the Honourable Court be pleased to order payment of salary to Moses Emusugut for the period while on suspension.
>
> 4.4 THAT in the alternative, the Grievant be deemed terminated and be paid as tabulated in the witness statement.
>
> 4.5 THAT costs of this suit be provided for by the Respondent.

3. It is apparent from the prayers that the Union was contending *constructive dismissal* as an alternative cause of action.

4. The Respondent filed a Response to the Memorandum of Claim on 25 September 2018, and the Cause was heard on 20 January 2020 and 23 March 2021.

5. The Grievant and one witness for the Respondent testified.

6. The Union filed its submissions on 30 April 2021, and the Respondent filed its submissions on 7 June 2021.

7. The Court has considered the pleadings, evidence and submissions.

Nature of employment

8. The Respondent contended that the Grievant was a casual employee because he would work for a month or two and at a time and would then disappear.

9. The Grievant, however asserted that he served the Respondent from 2003.

10. Before the dispute was placed before the Court, the parties had gone for conciliation, and the Conciliator made a finding of fact that the Grievant worked with the Respondent from 2003 until 2016.

11. In an employment relationship, it is the obligation of the employer to reduce the contract into writing.

12. The Respondent did not produce any documentary evidence to make the Court depart from the findings of the Conciliator on the nature of the employment relationship as envisaged by section 10(7) of the Employment Act, 2007 (conciliation is a statute anchored process).

Whether suspension of the Grievant was lawful

13. The Grievant was *verbally* suspended on or around 3 September 2016. He was not informed of the duration of the suspension.

14. The Union discussed the suspension with the Respondent, and on 20 September 2016, they agreed that the Grievant be issued with a warning letter.

15. The Grievant was not paid wages during the suspension.

16. Suspension of an employee under the common law without pay where the contract does not provide for the same is unlawful (see *McKenzie v Smith* (1976) IRLR 345).

17. The Respondent did not disclose the source of the power to suspend the Grievant without pay or demonstrate that after the suspension, it paid him wages for the period of 18 days.

18. The Court, therefore, finds that the suspension of the Grievant was unlawful

19. The Grievant would therefore be entitled to the wages during the suspension period (the prescribed minimum daily rate at the time was Kshs 527/-) and the Court awards the Grievant Kshs 9,486/-.

Breach of contract

Accrued leave

20. The parties went through conciliation, and in a Report dated 7 March 2018, the Conciliator recommended that the Respondent pay the Grievant accumulated leave up to 36 months (36 years) preceding the suspension.

21. The parties did not dispute the findings and recommendations of the Conciliator, and the Court will adopt the same.

22. The Union computed the accrued leave as amounting to Kshs 37,944/-, and since the Respondent did not interrogate the same, the Court will allow the same.

Underpayment of wages

23. The Conciliator made a finding that the Grievant was underpaid and recommended that the Respondent makes good the underpayments for a period of 12 months.

24. The prescribed minimum daily wage was Kshs 527/- while the Respondent was paying the Grievant a daily wage of Kshs 400/-.

25. The Court will allow this head of the claim in the sum of Kshs 39,624/- (Kshs 127 x 26 days x 12 months).

Constructive dismissal

26. *Constructive dismissal* occurs where an employer makes the work environment intolerable, thus leading the employee to leave, and assert unfair dismissal from employment.

27. The Union and the Respondent discussed the reinstatement of the Grievant from suspension. The Respondent set certain conditions which the Union and the Grievant rejected.

28. In the Conciliator's Report, he recommended that the Union and the Grievant fulfil the conditions set by the Respondent.

29. Some of the conditions were that the Grievant would register with the National Social Security Fund and the production of a national identity card.

30. The Union did not demonstrate that the Grievant registered with the Fund or had a national identity card (it was testified that the Grievant was a Ugandan national while he stated he was a Kenyan).

31. The Court is, therefore, unable to find that this was a case of *constructive dismissal*.

Conclusion and Orders

32. The Court finds and declares that the suspension of the Grievant was unlawful, and that the Respondent was in breach of contract.

33. The Grievant is awarded:

(i) Wages during suspension	Kshs 9,486/-
(ii) Accrued leave	Kshs 37,944/-
(iii) Underpayments	Kshs 39,624/-
TOTAL	**Kshs 87,054/-**

34. The Union does not have a recognition agreement with the Respondent. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF OCTOBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR UNION MR SIMIYU, DEPUTY SECRETARY-GENERAL

FOR RESPONDENT MR ODENY INSTRUCTED BY BRUCE ODENY & CO. ADVOCATES

COURT ASSISTANT CHRISPO AURA