IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT COURT OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 63 OF 2019

(C/F CMA /ARS/ARB/40/2019)

ALICE M. KALEMELA.....APPLICANT

VERSUS

ENABOISHU SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

11/10/2021 & 08/11/2021

GWAE, J

This application has been preferred in this court by the applicant, Alice M. Kalemela against her former employer Enaboishu Secondary School. The applicant is seeking revision of the Commission for Mediation and Arbitration (CMA) award dated 3rd July 2019 delivered by Hon. Mourice Egbert Sekabila, Arbitrator.

The application is supported by a sworn affidavit of the applicant where reasons for this revision are stated. On the other hand, the respondent opposed the application through a counter affidavit duly sworn by one Samwel Elisha Mollel, the head master of the respondent.

This revision ascends out of the following context. The applicant, a Kenyan by origin who was employed by the respondent way back from 1st February 2018 as a teacher, on the 11th December 2018 the applicant's employment was terminated for reason of working without having a work permit. Aggrieved by the respondent's decision terminating her employment, the applicant referred her complaint to the CMA praying for payment of her salary on the remaining part of her contract, gratuity, salary arrears, notice, annual leave, severance pay and certificate of service, transport and allowance.

After deliberation of the matter, the CMA dismissed the complaint on reasons that in the absence of a requisite work permit, the contract between the applicant and the respondent was void and illegal. Thus, the Commission could not comment anything on fairness of the termination of the applicant's employment and therefore the disput was dismissed for want of merit.

Dissatisfied, the applicant has preferred to filing of this application for revision equipped with the following grounds;

1. That, the honourable arbitrator grossly failed to consider the applicant's evidence tendered during the hearing hence

reached to an unjustifiable conclusion that there was a fair termination.

2. That, the honourable arbitrator grossly failed to comprehend the semantic meaning of the wording in exhibit D2 and exhibit D3.
3. That, the honourable arbitrator erred in law and in fact in failure to see the procedural and substantive issues and based on Immigration Act.

On hearing of this application, the applicant was represented by Miss. Farida Juma, Personal Representative while the respondent was represented by Mr. G. Sanava the learned counsel. With leave of the court, the application was disposed of by way of written submission.

Supporting her application, Miss Farida maintained that the arbitrator failed to observe that the applicant herein was both substantively and procedural unfairly terminated. She further elaborated that the respondent herein had no valid reasons to terminate the applicant's employment and more so procedures for termination were not adhered to as the applicant was not called in a disciplinary hearing to defend her allegations. It was therefore her opinion that, the applicant was unfairly terminated. Miss Farida also faulted the award of the Arbitrator by his act of invoking provisions of the Immigration Act while dealing with labour issues, stating that this dispute

being a labour issue the Arbitrator was therefore bound to follow the labour laws only. According to her, the invocation of the Immigration Laws, constituted a nationality discrimination to the applicant from working with the respondent.

On the part of the respondent, Mr. Sanava joined hands with the Arbitrator's award by arguing that, since the applicant admitted before the CMA to be a Kenyan by her nationality and the undisputed fact that, she had no working permit, therefore, according to section 26 (1) of the National Employment Services Act Cap 243 R.E 2002 and section 16 (2) of the Immigration Act Cap 54 Revised Edition, 2002, the applicant lacked capacity to enter into a lawfully employment contract with the respondent and therefore her allegations on unfair termination could not be salvaged by the Labour Laws. More so, Mr. Sanava urged this court to make a reference to a decision of the late Hon. Rweyemamu, J (May her soul rest in peace) in the case **of Rock City Tours Ltd vs. Andy Nurray,** Labour Revision No. 69 of 2013 at Mwanza (unreported).

Having considered the application, submissions by the parties, Labour Laws together with the Laws cited by Mr. Sanava, records from the CMA and case laws, it is now time for this court to determine the merit or demerit of

this application. In my determination of this application, I shall be guided by one issue, to wit; **whether the Commission was justified to dismiss the dispute.**

It is the undisputed fact that, the applicant herein is a foreigner, not a Tanzanian national and that, she was employed by the respondent as a teacher teaching biology. The respondent's testimony with regard to the alleged reasons for termination goes as follow; that sometimes in the year 2018 the respondent decided to conduct an inspection as to her employees' qualifications and it was at that time when the respondent was revealed to be a Kenyan. She was given time to present her work permit to the respondent however she could not do so. She was eventually terminated on reason of working in Tanzania particularly with the respondent without a work permit.

The applicant testified to be employed by the respondent but unfairly terminated. On cross examination the applicant stated that she is a Kenyan by nationality and she is currently living at Nairobi. When asked as to whether she had a work permit, she admitted to have possessed none save a business pass. On further cross examination, the applicant stated that she had previously worked with other schools which are; Arusha Modern School

and St. Joseph Ngarenaro and in all that time she had been teaching without a work permit.

That being the court's observations, the next question is whether the Arbitrator was justified to have the respondent's complaint dismissed. In answering this question, I shall be guided by the decision of the Court of Appeal of Tanzania in **Serengeti Breweries Ltd v. Hector Sequeiraa,** Civil Application No. 373/18/2018 (Unreported). According to this case, it is apparent that, the very first question to be raised in matters where there is an absence of the work permit is on the jurisdiction of the CMA to determine the matter.

The Court of Appeal in addressing this issue made a reference to the case of **Rock City Ltd** (supra) where the respondent initially worked with a work permit however his application for renewal of the work permit was rejected but she continued working, this court (The late Hon. Rweyemamu, J) was faced with similar situation and stated that, where there is an absence of a working permit the question of jurisdiction should be raised before the CMA. It was further held that, the absence of a working permit renders the employment contract between an employer and an employee null and void, reference was further made to section 14 (1) (1) (a) and (b) (i), (ii) and (iii)

of the Labour Institutions Act, Cap 300 Revised Edition, 2019 which stipulates the jurisdiction of the CMA that is mediating and arbitrating any dispute concerning labour matter between any employer and any employee. This court went on holding that;

> "Since the contract between the employer and the employee was void therefore there was no employer-employee relationship and thus the CMA had no jurisdiction to entertain a matter which did not involve an employer and employee".

I have also ventured into the laws regulating work permits to foreigners who wish to work in Tanzania particularly section 26 (1) of the National Employment and Promotion Services Act Cap 243 Revised Edition, 2002 which provides that;

> "No person shall employ any foreigner, and no foreigner shall take up any employment with any employer, except under and in accordance with a work permit issued to such foreigner."

Reading from this provision of the law, it is the duty of the employer to ensure that he or she employees a foreigner who is a holder of a valid work permit however employees are also prohibited by the law to engage in

employment with an employer without being issued with a valid work permit. The circumstances of this dispute are controversial especially as to how did the respondent employ the applicant without noting that she is a foreigner? The question to be asked is whether the applicant did submit her education certificates or Curriculum Vitae at the time she was applying for the job? The answer is yes, her certificates or CV would inevitably reveal her identity as a Kenyan by her nationality and not otherwise.

In view of the above finding, I am not convinced by the respondent evidence that at the time they were employing the applicant they did not know that she was not a Tanzanian, actually this evidence has left a lot to be desired, in my firm view, the respondent in this case cannot escape from the liability. Nevertheless, even though the respondent is responsible for employing non-citizen without the requisite work permit yet the applicant was also not supposed to have engaged in the employment with the respondent without being issued with a valid work permit.

Without further ado this court is of the firm view that the CMA was legally justified to have dismissed the complaint. In fact, this court would wish to add that, the CMA lacked jurisdiction to entertain the matter and therefore it was proper for it to dismiss the matter since the contract entered

by the parties was void abinitio as per section 2 (2) (g) of the Law of Contract Act, Cap 345 Revised Edition.

That being said, this application for revision is bound to fail and is hereby dismissed for want of merit. The CMA's award is hereby confirmed. Each party shall bear its own costs since this is a labour dispute not frivolously preferred.

It is so ordered.

M. R. GWAE
JUDGE
08/11/2021