IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 70 OF 2020

(Arising from the decision and award of the Commission for Mediation and Arbitration at Arusha in dispute No. CMA/ARS/386/19/198/19)

COLMAN FOCUS TESHA.....APPLICANT

VERSUS

STAR HIGH SCHOOL.....RESPONDENT

JUDGMENT

22/11/2021 & 14/03/2022

GWAE, J

On the 11th July 2019, the applicant, Colman Focus Tesha referred a dispute in the Commission for Mediation and Arbitration of Arusha at Arusha (Commission) against the respondent, Star High School claiming for payment of Tshs. 25, 939,000/=being salaries of six months, remaining period of his contract of employment. In his referral form, applicant added that, the termination of his employment had mentally affected him.

The Commission in its award dated 15th June 2020 dismissed the applicant's complaints on the ground that the contract of employment between the parties is not enforceable by any court of law due to reason

that the same was void abinitio in sense the applicant did not possess a teaching permit or teaching license.

The award of the Commission aggrieved the applicant. He thus filed this application for revision armed with the following grounds;

1. That the Hon. Arbitrator erred in law and fact by holding that, the contract between the applicant and respondent was void contract without parties being heard on the new issue framed by the arbitrator himself
2. That, the Hon Arbitrator erred in law and fact by holding that, the matter is not labour dispute while there was labour a valid employment between the parties

The applicant and respondent were enjoying legal services from Maganga (Personal representative) and Miss Rehema Kitally (advocate) respectively. Parties' representatives sought and obtained leave to argue this application by way of written submission.

The representative for the applicant supported ground 1 argued that, the arbitrator was not legally empowered to raise the new issue on illegality or otherwise of the parties' contract of employment and eventually based his award on that new issue. According to Mr. Maganga, the

arbitrator denied the parties the right to be heard, thus rendering the whole award a nullity. He embraced his arguments by victim a decision of the Court of Appeal in **Juma Jaffer v. Manager Ltd and two others**, Civil Appeal No. 2 of 2002 (unreported) where it was held;

> "The parties and the court are bound by the pleadings and issues framed and proceed to deliberation on such issues. This issue was not before a trial court and hence it was not dealt with the first appellate court, therefore, erred in deliberating and deciding upon an issue which was not pleaded in the first place"

As to the second ground the applicant's personal representative submitted that the applicant and respondent had entered into contract of employment as employee and employer respectively as per section 4 of the Employment and Labour Relations Act, CAP 366 Revised Edition, 2019

Praying for an order of the court dismissing this revision for being devoid of merit, the learned counsel for the respondent admittedly argued that it is a cardinal principle that cases are decided on the issues agreed by the parties and the court however she seriously attacked the applicant's assertion there was new issue raised by learned arbitrator as void contract was not a new issue but it was a point of concern taken into account by the Commission while dealing with 1st issue, whether there was a breach of

contract by any party to the dispute. She cited section 44 and section 49 of the National Education, Act, 1978 and Regulation 5 (1) of the Education (Registration of Teachers) Regulations G.N. No. 297 of 2002 which require permit only certified, licensed and registered teacher or any person who is not a trained teacher may apply to the Commissioner for issuance of a teaching permit.

Miss Kitaly also argued that the applicant's alternative prayer that the dispute be heard afresh is not proper in the circumstances of the case as there is spirit of ensuring that litigation comes to an end. She then urged this court to make a reference to the case of **Upendo Masawe Uriovs. The Small Things**, Labour Revision No. 22 of 2020 (unreported) where it was rightly emphasized that litigation has to come to an end and not to walk in court's corridors for years because one party has been negligent in handling her case for the detriment of the other party.

Having briefly summarized the parties' written submission, I am to determine the applicant's grounds for the sought revision, starting with the 1st ground. I am of the sound mind that the parties and courts are bound by the pleadings as correctly argued by the parties' representatives. I am further of the increasing view that a court or tribunal should not raise new

issue and base its decision adversely against either party without availing the parties an opportunity of being heard. The right to be heard is fundamental right which ought to be observed by our courts and this position was judicially underscored in **Abbas Sherally and another vs. Abdukl S. H. M. Fazaiboy**, Civil Application No. 33 of 2002 (unreported) where the Court of Appeal of Tanzania held;

> "The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"

See also the decision of the Court of Appeal in **VIP Engineering and Marketing Limited and Others vs. City Bank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported).

That being the case, I should therefore be carefully look at the parties' pleadings, the impugned award as well as the proceedings before the Commission. If as depicted in the proceedings, the Commission did not err in law in basing its decision on the void contract since even the respondent's witnesses (DW-DW3) and the applicant's testimony based on

the issue of teaching license and or teaching permit (AW1, Kwamba nipeleke teaching permit ndani ya siku 30 na bila ya hapo disqualified yourself). The parties in view were fully engaged on the issue of validity or otherwise of the contract, reason for termination was also made known to the applicant through notice of termination and letter of termination. Good enough testimonies of the parties were all about teaching license and teaching permit. Hence, the parties were trying to ascertain if the contract between them was valid or invalid.

Moreover, validity or otherwise of the contract of employment is basic to the extent that a party cannot enforce his or her right arising from it if the contract itself was illegal otherwise the court or the Commission shall have no jurisdiction to determinate the dispute if the contract between the parties was legally invalid or if the contract was immoral. I therefore feel bound by the decision of this Court (**Rweyemamu**, J, may her soul be in everlasting peace) in **Rock City Tours vs. Andy Nurray**, Revision Application No. 63 of 2013 (unreported) when dealing with an issue as whether the court could legitimately revise the subsequent proceedings and award, where the question of validity of the contract involved was not part of the issue framed and decided, it was held;

> "My understanding of the law and procedure is that this court has powers to revise a CMA award following an application or issue or suo motto and it has powers to do so where it is of the opinion, that sec. 91 (2) (A) (B) (C) of the ELRA read together with Rules 28 of the Labour Court Rules, ...
> The court went on holding that the question of validity of the contract can be inquired into at any stage of proceedings, including at the revision stage because it goes to the root of the case."

Basing on the above holding of the court and considering the fundamental requirement for a person who is not professionally a teacher to apply for a teaching permit pursuant to section 49 (1) of the Education Act (supra) and since the applicant had not applied and obtained a license or permit to teach. The contract between them was therefore void as rightly held by the Commission. The applicant's contention that he was not heard on that issue is nothing but an afterthought since each party was heard on that particular issue which was part and parcel of the 1st issue framed by the Parties and the Commission. Having found as herein above, the 2nd ground is also answered that there was no valid contract between the parties and therefore the arbitrator was justified in holding the matter was not entertainable by the Commission.

In the light of the foregoing reasons, this application is thus dismissed in its entirety. I shall not order costs of this application since the matter is labour case.

M. R. GWAE,
JUDGE
14/3/2022

Court: Right of Appeal fully explained

M. R. GWAE,
JUDGE
14/3/2022