

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 263 OF 2020**

(ARISING FROM LABOUR DISPUTE NO. CMA/DSM/ILA/R. 582/18)

**PROFESSOR JOSEPH K. SHIJA.....APPLICANT**

**versus**

**INTERNATIONAL MEDICAL**

**AND TECHNOLOGICAL UNIVERSITY.....1<sup>st</sup> RESPONDENT**

**MR. KATURI SUBBARAO..... 2<sup>nd</sup> RESPONDENT**

**THE REGISTERED TRUSTEE OF VIGNAN**

**EDUCATION FOUNDATION(TANZANIA).....3<sup>rd</sup>RESPONDENT**

**JUDGMENT**

17<sup>th</sup> September & 6<sup>th</sup> October 2021

**Rwizile, J**

The applicant, has filed this application against the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/ILA/R. 582/18, praying for: -

1. This Honorable Court be pleased to revise and set aside the whole award by Commission for Mediation and Arbitration at Dar es salaam in Labour Dispute No. CMA/MORO/03/2019 delivered by Hon. Mbeyale, R-Arbitrator, on 29<sup>th</sup> day of May 2020.

2. Any other relief(s) the honorable Court deems fit to grant.

The application is bolstered by the affidavit of Professor Joseph K. Shija stating grounds for which this application is grounded. Opposing the application, the respondent filed the counter affidavit sworn by Gilbert N. Mushi respondents' Advocate.

At the hearing, the applicant was represented by Mr. Selemani Almasi, learned Advocate. The hearing of the application was by way of written submissions. Supporting the application Mr. Almasi submitted that it is undisputed that the applicant was employed by the respondents on fixed term contract of two years in 20<sup>th</sup> February 2008 as a vice Chancellor. Later on, the contract was renewed by default in 2012. His employment contract, exhibit-JS1 is to that effect. He was paid USD 3000 per month. The dispute is the existence of five years contract with an increased salary of USD 5000. The respondents disputed through Dw2 that the applicant was improperly appointed because it was not in accordance with the University Charter, exhibit D1.

The Counsel submitted that Article 1 of the University Charter provides that it "shall be deemed to have come into operation on 31<sup>st</sup> December 2006". He was of the view that by using the word deemed, impliedly, it means,

the applicant's employment contract was also valid and enforceable even after coming into force of the charter. In bolstering his stance, he cited the case of **Shiminimana Hisaya & 2 Others v. The Republic**, Criminal Appeal No. 6 of 2004 at Mwanza (unreported).

The learned counsel was of the view that the charter has no impact of nullifying the applicant's employment contract. Therefore, the arbitrator was wrong in holding that the applicant's contract was invalid.

It was further argued that the best evidence on the validity of applicant's employment can be found on exhibit-JS4 as marked in CMA proceedings. The letter was written and signed by the founder and Chairman of IMTU. On the said letter, not only the founder acknowledged the existence and validity of employment contract, but also admitted the fact that the applicant has been working with the respondents as Vice Chancellor.

On whether the applicant had another contract of five years, the Counsel argued that in proving the existence of the same, the applicant has tendered exhibit JS3 a cheque. In his view, it proves a monthly pay of USD 5000. This he said is attributed to the new contract of five years. Email conversations between him and Chairman of the Council, were tendered as exhibit JS2. The Counsel argued that applicant's monthly payment was

made in cash or cheque and his contract was supposed to be issued upon the returning of the University lawyer. In view of the learned counsel, the applicant has proved, has a five-years contract that commenced on December 2011. At the time of his termination, it was argued, the applicant remained with 22 months' period of the contract.

Arguing on fairness in terminating applicant's employment, the Counsel averred that exhibit JS4, which is a relieving letter, justifies unfairness in terminating applicant. This shows, the counsel made it clear, that the applicant was relieved from employment. However, he added, the close scrutiny of the reasons shows, he was terminated because of alleged employed on temporary basis and was working less time as the University needed a full-time person.

It was further argued that the evidence of Dw2 regarding reasons for termination contradict a relieving letter- exhibit JS4. Therefore, the view was held that, the respondents have never advanced justifiable and fair reason for termination. He stated that even the procedure for termination was breached as the applicant was not afforded with the right to be heard. Lastly it was submitted that the arbitrator erred in law and fact by not awarding the applicant his salary for the days he worked in July and

August 2013. He said, it is a salary and notice before breach. It was submitted as well, that this is contrary to section 41(5) of the Employment and Labour Relations Act, [Cap 366 R.E 2019]. Further it was argued that the applicant was entitled to be paid 22 months as the remaining period.

Opposing the application, it was argued that article 8(1) of the University Charter- exhibit D1, the words "shall be deemed to have come into operation on 31<sup>st</sup> December 2006" meant the Charter in fact was in existence and came into force on 31<sup>st</sup> December 2006. Supporting his argument, Mr. Mushi referred to the **Shiminimana's case** (supra). He was of the view that the case cited lacks court seal and it is not signed contrary to Order XX Rule 3 of the [CPC R.E of 2019], therefore its authenticity is questionable, it should not be considered by this court.

It was further argued that basing on the meaning of the word 'deem' the arbitrator was right in holding that the IMTU Charter (Exhibit D1) came into operation on 31<sup>st</sup> December 2006. Therefore, exhibit JS1 is null and void. He added that the acts of the respondent to continue paying the

applicant's salary does not justify or validate the contract even after promulgation of the Charter.

On the second ground regarding the existence of five years contract, the Counsel submitted that as IMTU Charter was promulgated in 2010, hiring the Vice Chancellor is as per article 8(1). Therefore, it was argued, the applicant's allegations regarding email conversation with Chairman lacks legal basis. He had no mandate to act on the same. Apart from conversation, even the purported agreement was never signed by the parties. He further averred that even the payment of 5000 USD as per exhibit JS3 does not show any purpose of payment. Whether it was salary arrears or any other payment.

On last ground, as to whether the respondent had breached the contract, the respondent's Counsel submitted that since the purported employment contract was null and void ab initio, there was nothing breached.

Having considered parties' rival submissions and the record, this Court is called upon to determine; *whether there was any valid contract between the parties, then the next question is whether there was a breach of any contract and lastly to what reliefs parties are entitled to?* The determination

of the above will have disposed of, the issues raised by the applicant in the affidavit.

In addressing the disputed facts, stating with the first issue the relevant provisions are sections 10 and 11 of the Law of Contract, [Cap 345 R.E 2019] which provides that; -

*"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

*Section 11(1)*

*"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.*

*(2) An agreement by a person who is not hereby declared to be competent to contract is void"*

It is a well-established principle of law that once there is agreement, it is by its nature binding on the parties as discussed in the case of **Benda Kasanda Ndassi vs. Makafuli Motors Ltd**, Rev. No. 25/2011 HC Labour Division DSM and **Hotel Sultan Palace Zanzibar vs. Daniel Laizer &**

**Another**, Civil. Appl. No. 104 of 2004, (HC) unreported where it was held that: -

*"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

From the above I am of the view that parties are bound by valid contracts that are signed and entered by competent persons to do so. Section 10 of the Law of Contract Act, is clear to that effect. In record, the application seems to be appointed by Chairman namely Mr. M. Srinivasa Rao as by employment contract of 2008, exhibit JS1. The alleged extended five years contract is by email conversation done by the same Chairman and the applicant. This is however, contrary to Article 8(1) of ITMU Charter of 2010 which demand the Vice Chancellor to be appointed by the founder.

In the event, the charter came into operation on 31<sup>st</sup> December 2006, while the applicant was appointed by the person disqualified in law to make such appointments as per Article 8(1) of ITMU Charter of 2010.

Worse, still, the appointment was proved by email conversation. The contract in question is not signed by the legally authorised person. It



apparent that, employment agreements as other types of agreements should comply with basis elements available in contract as I have endeavoured to show.

For the foregoing, I have no hesitation to say that applicant entered a contract with a person who is not hereby declared to be competent to contract in the terms of the Charter governing appointments of the Vice Chancellor. It follows therefore, since the dispute hinges on the validity of the employment contract. Surfaces to say, there cannot be termination, in my view, of the contract that does not exist. The application has no merit. It is dismissed. Each party has to bear its own costs.



**A.K.Rwizile**

**JUDGE**

**06.10.2021**