IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT BUKOBA

LABOUR REVISION NO. 10 OF 2021

BETWEEN

EDITH NABABI...APPLICANT

AND

KEMEBOS ENGLISH MEDIUM
BOARDING PRIMARY SCHOOL..RESPONDENT

JUDGMENT

Date of Last Order: 24/08/2022

Date of Ruling: 02/09/2022

A. E. MWIPOPO, J.

The applicant namely Edith Nababi was employed by KEMEBOS English Medium Primary School, the respondent herein, as a teacher in 2007. She asserted that their relationship was good until on 02.08. 017 when the respondent orally terminated her employment. The applicant referred a dispute for unfair termination to the Commission for Mediation and Arbitration at Bukoba (CMA). The CMA in its award found that the applicant was not terminated by the respondent as there is no evidence to support her claims. The CMA found that even if the said

employment was not terminated fairly still in absence of the working permit the applicant's employment was null and void as result she does not deserve to be paid remedies for unfair termination. The Commission awarded the applicant payment for 7 days she worked. The applicant was aggrieved with the Commission award and filed the present revision.

The application was filed by the Notice of Application and applicant's Affidavit. In the Notice of Application the applicant is praying for the following orders:-

1. *That this honourable Court be pleased to call and revise the proceedings and order of the Commission for Mediation and Arbitration made on 25.05.2018 in the Labour Dispute No. CMA/BUK/72/2017 and issue appropriate orders.*
2. *This Hon. Court be pleased to set aside the award of the CMA made on 25.05.2018 in the Labour Dispute No. CMA/BUK/72/2017.*
3. *Cost of this application.*

The applicant has five following grounds of revision which are found in paragraph 5, 6, 7, 8 and 9 of the affidavit as follows hereunder:-

i. *That the honourable Arbitrator failed to record procedure of this dispute especially the cross examination of the respondent which resulted to applicant to loose the case.*
ii. *That the honourable Arbitrator misdirected herself for condemning applicant to work without permit which is the fault of the respondent who*

did not submit applicant's requesting for working permit to respective authority and as result the respondent got advantages from his own wrong.

iii. *That the honourable Arbitrator quoted wrongly legal authority which states that a person who is not a citizen of Tanzania and work in Tanzania without working permit works under illegal contract hence has no legal relief at the time he is terminated from work without checking the circumstances of these two different scenario.*

iv. *That the honourable Arbitrator by ordering the respondent to pay the applicant her 7 days salary is in contradiction to her decision regarding the applicant working under illegal contract where the CMA heard that she is not entitled no relief when she was terminated.*

v. *That the arbitrator also failed to analyze the truth of evidence adduced by the applicant hence arrived in a lopsided decision against the applicant.*

The respondent opposed the application through counter affidavit sworn by her counsel.

On the hearing date, the applicant appeared in person, whereas, the respondent was represented by Mr. Frank John, advocate. The hearing of the application proceeded by way of written submissions following the order of this Court after the applicant made a prayer for hearing to proceed by written submission which was supported by the counsel for the respondent. Both parties filed their written submissions within time.

In her submission, the applicant said that the Hon. Arbitrator failed to record crucial evidence which could prove her oral termination of the employment, particularly on respondent's response during cross examination. The applicant testified that she was orally informed of the termination by head teacher in his office. In such situation the applicant could not prove her case without circumstantial evidence. In her testimony, the applicant presented passport, visitor's pass, promotion letter and NSSF contribution to prove that she was employed from 2007 to 2017. This evidence proved that the respondent evidence is not the truth since respondent's witnesses alleged that applicant was employed in 2009. The respondent did not present anything to prove that applicant was employed from 2009 to 2017 for that reason respondent evidence is not a trustful. It was not possible for the applicant to call other teachers to testify against their employer and she did not record the headteacher when the headteacher terminated her employment orally. The Arbitrator did not record some question the applicant did ask the respondent during cross examination such as where the respondent went to look for the applicant after she stopped reporting in office.

On the issue of working permit, the applicant submitted that the respondent testified that applicant's working permit ended on 30.09.2009 but he employed the applicant up to 31.07.2017 which means applicant was hired without valid working permit. The trial Arbitrator erred to believe the respondent who testified that applicant absconded at the time when he was in the process of renewing the

working permit. The respondent failed to fulfil the obligation in the contract which is against the regulation 10 (1) of the Non – Citizen (Employment Regulations) Act No. 1 of 2015 and section 26 (1) of the National Employment Promotion Service Act, Cap. 243 R.E. 2022. The law provides punishment for both employer and employee for contravening the law. It was wrong for the Commission to condemn the applicant and leave the respondent free despite contravening the law for 10 good years under the statement that he was processing working permit. The respondent has to be punished too.

The applicant went on to state in the submission that the Hon. Arbitrator misconceived the legal authority in the case of **Rock City Tours Ltd vs. Andy Nurray**'s case when she came to the conclusion that by the applicant working without a valid working permit was not entitled with any legal benefit from the respondent, and on contrary ordered the respondent to pay seven days salary. The decision in the cited case and another case of Serengeti Breweries Limited vs. Hector Sequeiraa, Civil Application No. 373 of 2018, (CAT), means that once it is proved that employment contract was concluded with non – citizen who has no valid working permit the CMA lacks jurisdiction to entertain such dispute since it ceases to be employment contract. For that reason the CMA had no jurisdiction to determine the matter, but surprisingly the Arbitrator proceeded to adjudicate the matter.

In reply, the counsel for the respondent submitted that the present application for revision has no merits. The applicant was never terminated by the respondent rather she absented herself from her duties without notice from her employer as it was evidence by register book – Exhibit D1. Applicant absented herself from work from 07.08.2017 to 25.08.2017 after she filed the dispute in the CMA. Applicant has testified that she was terminated and later on she left. But, there was no evidence which proved that she was terminated by the respondent. The absence from work is serious misconduct which lead to termination, thus, even if the employer decided to terminate her he was right. The applicant could have benefited from the remedies for unfair termination if she proved that she was unfairly terminated. As she was not terminated, the applicant should not enjoy the benefits for unfair termination as it was stated in the cited case of **Rock City Tours Ltd vs. Andy Nurray,** Revision No. 69 of 2013, High Court Labour Division at Mwanza, (unreported).

In her rejoinder, the applicant submitted that the Exhibit D1 (attendance register) does not prove that applicant absented herself from work. The applicant was supposed to submit the evidence to prove that she was never employed by the respondent. The applicant's son remained at school until he did his examination after the Government Education Officer order. There was uneasy relationship between the applicant and the respondent. She added that the respondent had no intention to continue with applicant's employment as he was

processing working permit, but the said working permit was not obtained for 10 years. She said that this is afterthought which has no basis. The issue of working permit did not feature in proceedings and judgment before the CMA.

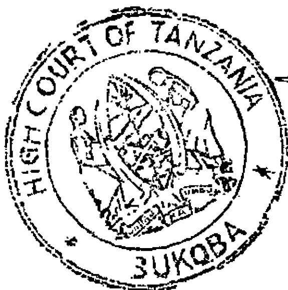
In determination of this revision, I find it appropriate to determine first the issue of jurisdiction of the CMA to entertain and determine this dispute which is part of the applicants grounds of appeal found in paragraph 6, 7 and 8 of applicant's affidavit and it was submitted by the applicant in the last two pages of her submission in chief. The issue is crucial and it raises a point of law. The applicant said that after the Commission found that the employment contract was concluded with non – citizen who has no valid working permit, it was not supposed to determine the matter on merits. The respondent said nothing concerning the said issue raised by the applicant.

There is no dispute that the applicant who is non-citizen was employed by the respondent from June, 2004 to August. 2017. The applicant is the citizen of Uganda. Their employment relationship ended in 07.08.2017. Further, there is no dispute that from 2009 to 2017 the applicant was working to the respondent without working permit. However, there is no work permit which was tendered as exhibit to prove that before 2009 the applicant had a working permit. What I find in the record is application for work permit of the applicant dated 24/08/2007. The respondent asserted that he was still working on applicant's working permit when the applicant referred the labour dispute to the CMA on 25.08.2017.

It is certain that the parties herein entered into employment relationship unlawfully. The evidence available in record shows that the applicant was employed by the respondent without obtaining working permit. This is contrary to section 9 (1) and (2) of the Non-Citizens (Employment Regulation) Act, 2015 and section 26 (1) of the National Employment and Promotion Services Act, Cap. 243 R.E. 2002. It is the respondent who had duty to obtained the work permit for the applicant according to section 10 (1) of the Non-Citizens (Employment Regulation) Act, 2015 and section 27 (1) of the National Employment and Promotion Services Act, Cap. 243 R.E. 2002.

Among the documents which are needed in the application according to section 10 (2) (b) of Non-Citizen (Employment Regulation) Act and the Second schedule thereto is employment contract of the respective employee. This means that the employment contract of non-citizen employee is voidable upon obtaining work permit. Since the work permit was never obtained it means the respective employment contract was not valid. The employment relationship was illegal. The CMA after finding out that the applicant, who is non-citizen, was working without working permit, it was supposed to end there and hold that it has no jurisdiction to determine the matter since there was no valid employment contract. The same position was stated by this Court in the cited case of **Rock City Tours Ltd vs. Andy Nurray**, (supra).

Therefore, the CMA had no jurisdiction to determine the matter after finding that the applicant is a non-citizen working without permit. For that reason, the proceedings before the CMA is nullity. I proceed to quash the whole proceedings of the CMA for lack of Jurisdiction and its award is set aside. As the grounds of revision on the jurisdiction of the CMA to determine the dispute has disposed of the dispute, the remaining grounds of revision will not be determined. This being the labour matter, each party shall bear its own cost. It so ordered accordingly.

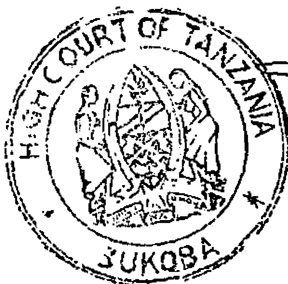


A.E. Mwipopo

Judge

02/09/2022

Court: The Judgment was delivered today 02/09/2022 in the presence of Applicant and in the absence of the respondent.



A.E. Mwipopo

Judge

02/09/2022