

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**LABOUR REVISION NO. 94 OF 2021**

*(From the decision of the Commission for Mediation and Arbitration of DSM at  
Kinondoni) (Lemwely: Arbitrator) dated 15<sup>th</sup> May 2018 in Labour  
Dispute No. CMA/DSM/KIN/R. 453/15*

**BETWEEN**

**ST. MARY'S INTERNATIONAL ACADEMY LTD.....APPLICANT**

**VERSUS**

**EMMANUEL KIDDU.....RESPONDENT**

**JUDGEMENT**

**09<sup>th</sup> June 2022 & 15<sup>th</sup> June 2022**

**K. T. R. MTEULE, J.**

This Revision application originates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No.CMA/DSM/KIN/R.453/15. The Applicant **ST. MARY'S INTERNATIONAL LTD.** is praying for the following orders:-

1. That this Honorable Court be pleased to call for the record of the Labour Dispute No.CMA/DSM/KIN/R.453/15 and revise the award therefrom and set it aside.
2. Any other order the Court may deem fit and equitable to grant.

A brief background of the dispute is explained hereunder. The respondent is a citizen of Uganda who was originally employed by the Applicant as a teacher since 4<sup>th</sup> February 1999. He was promoted to become a Head Master, before being demoted to Laboratory Supervisor. On 22<sup>nd</sup> July 2015 he was transferred to Mbeya as a normal Teacher. Not satisfied with the transfer decision he appealed to the Board of the Management. On 13<sup>th</sup> August 2015 the Board upheld the transfer decision and on 19<sup>th</sup> August 2015 the respondent rejected the decision for what he claimed to be the reason of his security. On 15<sup>th</sup> September 2015 the applicant terminated the Respondent's employment due to his failure to comply with the transfer decision. Aggrieved by the termination, the Respondent referred the matter to the CMA. At the CMA the matter was decided in respondent's favor. Dissatisfied with the CMA award, the Applicant filed the present application.

The applicant advanced three legal issues of revision as stated at paragraph 20 of his affidavit as follows:-

- i) Whether a foreigner without a work permit can sue for unfair termination.

- ii) Whether who refused to be employed in a position where his skills are needed can go ahead and sue for unfair termination.
- iii) Whether the CMA crowned itself with jurisdiction it did not have.

In this application parties were represented. The applicant enjoyed the legal services of Mr. Emmanuel Augustino, Advocate, whereas the Respondent drafted his own submission. The hearing of the matter proceeded by a way of written submissions following the parties' prayer on 28<sup>th</sup> April 2022. I thank both parties for complying with the Court's schedules in filing their respective submission.

Arguing in support of the application, the Applicant's submissions focused only on the issues concerning work permit and the jurisdiction of the CMA. Mr. Augustino stated that in the opening statements at the CMA, the issue of work permit was raised as the respondent was not a Citizen of United Republic of Tanzania, but the arbitrator decided to ignore it. It is Mr. Augustino's views that the CMA lacked jurisdiction in entertaining this matter on the reason that parties had no valid contract due to the lack of work permit on the part of the Respondent. According to the him, the contract between the parties having been entered without working permit, contravened

**section 26 (1) of the National Employment and Promotion Service Act, Cap 243 R.E 2002.** Supporting his submission, Mr. Augustino cited the case of **Serengeti Breweries Ltd. v. Hector Sequeira**, Civil Application No. 373/18/2018 (unreported). The Applicant therefore prayed for the CMA award to be set aside for want of jurisdiction in the CMA.

Disputing the application, the Respondent submitted the issue of work permit was not among the issues framed at the trial Court therefore the same cannot be raised at the revision stage. He named the issues in the CMA to be (1) **whether there was a valid reason for termination, (2) whether respondent's termination was implemented in accordance with the law and (3) to what reliefs are parties are entitled to.** He is of the view that since the issue of working permit was not raised at the CMA, then **Section 26 (1) of the National Employment and Promotion Services Act, Cap 243** and the case of **Serengeti Breweries Ltd. v. Hector Sequeira**, Civil Application No. 373/18/2018 (unreported) are irrelevant to this application.

The Respondent disputed the allegation that he did not have work permit. According to the Respondent, it is evidenced at paragraph 8 of the Applicant's affidavit in support of this application that the Respondent had a work permit.

The Respondent further denied having the issue of work permit raised in the CMA. According to the Respondent, it is apparent in the CMA record that the Respondent was terminated because of declining the transfer to Mbeya and no testimony was given at all to prove the issue of work permit in the CMA. To bolster his submissions, the Respondent cited the case of **Happy Watoto Homes and Schools v. Edward Mwololo**, Revision Application No. 98 of 2018, High Court of Tanzania, at Arusha, at page 6 (unreported) where the court declined to deal with the issue of resident permit which was raised in the CMA during the submissions without having been proved during hearing.

The Respondent recalled the questions raised during cross examination which focused on resident permit and not work permit. He accused the Applicant's counsel of trying to mislead this Court.

Having considered the submissions made by both parties, affidavit and counter affidavit and CMA record I find that the issues for determination in disposing this application is **whether the applicants have provided sufficient cause/ground for this Court to revise the CMA award.** At the CMA the arbitrator found that the respondent's termination was unlawful both substantively and procedurally. In addressing the issue posed before this Court I find worth to address three legal issues raised by the applicants in his affidavit as stated above.

Since the applicant argued only two issues among the ones raised in the affidavit, I will consider the unargued issue as neglected. I will therefore focus only on the jurisdiction of the CMA and the issue of the possession of the work permit by the Applicant which were addressed in the Applicant's submissions.

In addressing the first issues as to **whether a foreigner without a working permit may sue for unfair termination and the 3<sup>rd</sup> issue as to whether the CMA had jurisdiction,** I have noted a debate which remains unresolved. This debate is centred on the dispute raised by the Respondent who argued that the issue of work permit was never a matter in dispute in the CMA.

It is undisputed that **section 26 (1) of the National Employment and Promotion Services Act, Cap 243 Revised Edition, 2019** prohibits employers from employing any foreigner and a foreigner from taking up any employment with any employer, except in accordance with a work permit issued to such a foreigner. However, the question in this matter is whether the Respondent did not actually have a work permit.

I have tried to go through the record of the CMA in search of any confirmed statement which proved that the Applicant therein, who is the instant Respondent, did not have any work permit at the time of termination of employment. I could not find any words at page 4 of the CMA awards as cited by the Applicant, which conclusively confirms that the Respondent did not have resident permit. As rightly submitted by the Respondent, in his own words, the deponent of the Applicant's affidavit confirmed at paragraph 8 of the said affidavit that the Respondent had a work permit at his hands when he was transferred to Mbeya. The following words are quoted from the affidavit ***"That the Respondent declined the appointment in Mbeya despite having in hand a work permit"***. In the evidence given in the CMA by one Genuin Mhenga who was the Applicant's

Head of Finance and Administration, in more than once, he denied to have any knowledge as to whether the respondent had a work permit or not. His quoted statement in evidence stated: - "*Siwezi kujua kama alikuwa na work permit*". On being further questioned as to whether they had already obtained work permit before the employer was sent to Mbeya he stated: - "Siwezi kujua sababu sihusiki na permit. Whether the Respondent had a work permit or not is a matter of evidence and it needed to be proved.

It is on evidence in the CMA that the Respondent possessed 6 months' work permit when his employment contract commenced on 04<sup>th</sup> February 1999. It was not clear in the evidence as to whether in 2002 when the law was revised, the permit was ever renewed. Since it was not an issue in the CMA, I don't think that giving that evidence was actually necessary.

It was the Applicant who was on duty to prove the matter. Although the evidence missed in the CMA, I have already stated that the Applicant's affidavit confirmed existence of such work permit. It is not my intention to use this evidence at this stage of revision but in my view, since there was no evidence of missing work permit, the same needs to be assumed. This is because the Applicant and the



Respondent were in a contractual relationship which required them to possess a work permit. It was a mutual agreement amongst themselves which should be assumed to be lawful unless otherwise established or proved to be unlawful.

I borrow leaf from my fellow Judge Hon. Kamuzora in **Happy Watoto Homes and Schools v. Edward Mwololo supra** where she stated:-

**"It must be noted that, the issue on whether the respondent has the working permit or not at the time the dispute arose is a matter of fact that need to be proved by evidence. If that was a matter in Contention, the same could have been raised as an issue and be dealt with by the CMA. The CMA was right not to deal with the issue that was instigated during the final submission. Allowing such action would prejudice the respondent as he would have been condemned unheard."**

In the instant matter, the issue was not raised, neither in the evidence nor in the written submissions in the CMA. The arbitrator did not have a duty to consider it. I have a view that lawfulness of an

act needs to be assumed if no evidence to prove the unlawfulness. Therefore, as to whether the Respondent did not have work permit, I am of the view that, since no evidence sufficiently adduced in the CMA to prove it, the question is answered in the negative.

Having found no prove to establish that the Respondent lacked work permit, I see nothing which could limit the jurisdiction of the CMA in entertaining the matter. The cases cited by the Applicant differ from the one in this matter because in those cases, lack of work permit was not a disputed fact.

From the above reasons I find the Application with no merit. The Application is dismissed. I confirm the award of the Commission for Mediation and Arbitration. Each party to the suit to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 15<sup>th</sup> day of June, 2022.



**KATARINA REVOCATI MTEULE**

**JUDGE**

**15/06/2022**