IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO 138 OF 2022

AFLIX EAST AFRICA LIMITED..... .....APPLICANT

VERSUS

JOSEPH ERIC CASSE..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Kinondoni)

(Mpulla: Arbitrator)

Dated 22nd April, 2022

in

REF: No. CMA/DSM/KIN/229/66/2021

JUDGEMENT

21st July & 09th September 2022

Rwizile, J

This application is for revision. It has been preferred by the applicant to challenge the decision of the Commission for Mediation and Arbitration (CMA). Facts, the culmination of which is this matter, can albeit brief, be stated that; the applicant is a company registered under the laws of Tanzania. In 2020, it offered a job opportunity to the respondent to work as its Chief Executive Officer. Being a South African, the respondent accepted an offer and moved to Tanzania upon signing a letter of offer.

Among the conditions for foreigners to work in the country is to secure the work and residence permit.

The respondent on arrival, he was issued with the business visa, while the applicant committed and had by the terms of the offer to process residence and work permit for him. This however, did not happen. For the reasons that are not readily ostensible, but until the business visa was about to expire, the applicant had not secured the permits. The respondent, unhappy, had no option except resigning. He filed a labour dispute with the CMA, claiming for breach of contract and then prayed for general damages for loss of time and opportunities.

Upon affording parties, a hearing, the commission, in a considered award, held, there was no employment relationship between the parties. It then dismissed the claim of breach of contract for want of jurisdiction but proceeded to award 60,000 USD as compensation for lost of time and opportunities due to unfair labour practices on party of the applicant.

This award incensed the applicant hence this application. In the affidavit supporting this application, 4 issues were raised to wit;

i. *That, the Honourable Arbitrator erred in fact and in law by proceeding to determine the dispute between the parties after*

holding that the commission has no power and/or jurisdiction to determine the rights of the parties.

ii. *That, the Honourable Arbitrator erred in fact and in law by awarding general damages to the respondent after dismissing the claims for breach of contract and hold that there was no valid employment contract between the parties.*

iii. *That, the Honourable Arbitrator erred in fact and law in interpreting the purpose and applicability of Rule 23(7) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, 2007 (GN No. 67/2007).*

iv. *That, the Honourable Arbitrator erred in fact and law by failure to appreciate the fact that since there was no breach of contract then remedies for breach of contract such as General damages could not be determined independently and in isolation from the breach of contract.*

Mr. Rico Adolf Mzeru of Aymak Attorneys appeared for the applicant as he did before the Commission, while the respondent was enjoying services of Mr. Essau Abraham Sengo of Abrasen and Co. Advocates and Legal Consultants.

Before me parties had oral arguments submitted. Mr. Rico argued the first and second issues on jurisdiction that upon the commission ruling that it had no jurisdiction, it had no powers to award damages. It was his view that parties cannot vest jurisdiction to the arbitrator because, it is a creature of the statute. He further held the view that rule 23 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN No. 67 of 2007, was misapplied. According to the learned counsel, the Commission is vested with powers under section 14 of Labour Institutions Act [Cap 300. R.E 2019] which powers, he said, are limited to adjudication of matters arising from employment and labour relations.

Mr. Rico strongly argued that, since there was no employment relationship due to lack of permit, there was no room to invite unfair labour practice, which featured at the time the arbitrator was composing an award. This court was invited to consider the following a fleet of cases in respect of the subject under discussion.

i. **Rocky City Tours Ltd vs Andy Nurry**, Revision No 69 of 2013 at page 6-8
ii. **Richard Nkomo vs Hodi (Hotel Management) CO. Ltd, T/A Maunt Meru Hotel,** Revision No. 102 of 2020 at page 28

iii. **Alice kalemela vs Enaboishu Secondary School,** Revision No. 63 of 2019 at page 6-8

iv. **Richard Zakaria Odongo vs Alliance Boys Secondary and High School,** Revision No. 20 of 2017 at page 3-4

v. **Serengeti Breweries Ltd vs Hector Sequeiraa**, Civil Appeal No. 373/18 of 2018 at 12-14

Proceeding to argue the next two grounds, it was submitted that, under section 73 of the Law of Contract Act [Cap. 345 R.E 2019], damages are the result of breach of contract. He said, since it was found, there was no valid contract between the two parties, there was no justification whatsoever to award compensation to the respondent. According to the learned counsel, general damages stated in the CMAF1 is not a dispute but a relief. It could not therefore, he argued form the basis of the award in the absence of the claim. The learned counsel therefore prayed; the application be granted.

In response, Mr. Essau learned counsel did not counter submit on the first two issues. He indeed admitted that the Commission, rightly held, it had no jurisdiction to hear the dispute of breach of contract, because there was no employment relationship between the parties.

But it was his argument that despite having no jurisdiction because there was no contract of employment, still, the Commission was right to award compensation in the manner it.

This, according to him, is based on the reason that where there is an injury, there is always a right. The learned counsel strongly argued that CMAF1 pleaded breach of contract and claims of damages for time lost and lost opportunities. It was his view that, general damages are not only awarded upon breach of contract, but also in incidences where other wrongs are committed such as in tortious liability.

Mr. Essau did not stop, he went further and said, damages are an independent claim which is covered under section 4 of Employment and Labour Relations Act [Cap 366 R.E 2019]. The learned counsel hailed the Commission for having properly considered the claims and hence the award of damages. He said, the applicant failed to secure a work permit for 8 months, when the respondent was already in the country contrary to Regulation 10 of Non-Citizen (Employment Regulations), 2015, which clearly states that the permit to work in the country should be issued before the foreigner come in the country. Lastly, this court was asked to dismiss the application for want of merit.

By way of a rejoinder, it was clear from Mr. Rico that since the Commission held to have no jurisdiction to deal with the matter, and since the respondent has not counter-submitted on the point, it should be taken as a position admitted. He added, that section 3 and 4 of the ELRA deals with the nature of a dispute and definition of an employee. According to him, the respondent is not covered. The Commission therefore, he stated has mandate to handle only labour disputes. As to the application of Non-Citizen (Employment Regulations) 2015, it was his view that parties are enjoined to apply Regulation 10 of the same.

Upon hearing arguments, I find one point in contention for determination. This is *whether, the Commission had powers to award compensation to the respondent based on unfair labour practice even after having held there was no contract between the parties.*

I consider this to be a main point for determination because there is no doubt that the Commission's finding that there was no valid contract between the parties because the respondent had no permit to work in Tanzania. This is, I think, the position of the law and the decision of this court in **Rocky City Tours Ltd vs Andy Nurry (supra)**, which first introduced the subject. It has been consistently followed by this court and to some extent endorsed by the Court of Appeal in the case of **Serengeti**

Breweries Ltd vs Hector Sequeiraa (supra). It is now settled therefore that working in the country without residence and work permit is not only bad in law but also an offence. Therefore, one cannot enforce a contract illegally obtained.

This lands me in the determination of the contested issue. It is payment of damages of 60,000USD as the product of unfair labour practice. To start with, the commission at page 11 to 12 had this to say;

> *"...On the basis of such analysis, the first and second issues are answered in that the Commission has no power and/or jurisdiction to determine the rights of the parties based on the premature agreement. It is therefore the order of the Commission that the claims based on breach of the assumed two years' employment contract are baseless hence dismissed. My analysis and response to the first two issues above automatically suggests the answer to the third issue as to whether there was breach of contract or not. It goes without saying that there cannot be breach of the contract which does not exist because the complainant was not qualified due to lack of permits..."*

The above extract tells it all, that **first** there was no contract between the parties. **Second**, that in the absence of the valid contract of employment

there was nothing to enforce. It is clear because the Commission has powers to enforce terms of the contract which existed, but was breached. **Third,** in the absence of the employment relationship between the parties, there is no application of the labour law.

The above notwithstanding, the commission was of the view that under section 4 of the ELRA Act, even though there was no contract still there was a labour dispute. The commission was categorical that there was a dispute concerning a labour matter.

To appreciate this stance, I think I have to cite the definition of the word dispute as defined under section 4 of the Act.

> *"dispute"-*
>
> *(a) means any dispute concerning a labour matter between any employer or registered employers' association on the one hand, and any employee or registered trade union on the other hand; and*
>
> *(b) includes an alleged dispute;*

From the forgoing, a dispute as defined by the law, **first,** it has to be a labour matter. **Second**, it has to be between two competing sides, the employer or a registered employers' association and **third,** an employee or a registered trade union.

Since the commission had ruled out in its own words, "*there cannot be breach of the contract which does not exist*" which I agree with, then it had no audacity to hold that there was a labour dispute between the parties. It follows therefore that there cannot be a labour matter, where there is no employment relationship between the parties. This means, any discretion, say, that applicable under rule 23(7) of GN No. 67 of 2007, which the Commission purported to apply, may exist upon establishing employment relationship between the parties.

It can also be safely said, unfair labour practice exists when there is an employment relationship between the parties. I think it must be an act of the employer or union that violates the labour laws. Going by the pleadings, as submitted, the respondent had one claim before the Commission. It was gauged under CMAF1, which is the nature of dispute. The respondent pleaded breach of contract and then went ahead to *claim for general damages for time wasted and loss of opportunities.*

I agree with Mr. Rico that general damages are not the nature of claim. It cannot, I think, be a stand-alone claim. It is elementary that damages are reliefs awarded upon breach of duty. The applicant as it has been rightly held had no employment relationship with the respondent, all what they did was a nullity right from the start.

The respondent was in the country for 8 months working for the applicant. He did not even complain that he was not paid according to the terms of the offer. The dispute arose between them when the permit was not issue for the reason best known to the applicant and the business visa, he held expired.

Lastly, the question of unfair labour practice was not dealt with by the Commission during the hearing. It only featured in the award. No party at any time was given a chance to be heard on it. I think, the Commission was wrong. Having thought there was such an issue, it was the duty of the Commission to hear both parties. Simply deciding as he did was condemning them unheard with is grave legal mistake.

In my view, the Commission misdirected its mind to hold that it had powers to deal with the subject matter of labour dispute after it had ruled out that there was no employment relationship and so not clothed with jurisdiction. It follows therefore that the application has merit. The CMA award dated 22nd April, 2022 is quashed and orders therefrom set aside. There is no order as to costs.

A. K. Rwizile

JUDGE

09.09.2022