IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 314 OF 2022

COASTAL TRAVEL LIMITED.....1st APPLICANT

VERSUS

OFFIONG RUSSEL EKERETE.....RESPONDENT

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

(William; Arbitrator)

Dated 9th September, 2022

in

REF: CMA/DSM/KIN/187/2021/91/2021

JUDGEMENT

15th February & 3rd March 2023

Rwizile, J

This is an application for revision. The applicant has asked this court to call for and revise the decision of the Commission for Mediation and Arbitration dated 9th September 2022. The leading information behind this application can be stated that; parties had employment relationship. The respondent was employed as an ICT-Director on contractual basis. His first contract of two years commenced on 1st December 2018. On 1st December 2020, a new

contract of two years was signed with effective date 4th December 2020 to 3rd December 2022.

However, this second contract was terminated due to a dispute that arose on 31st May 2021. The respondent was not happy with the events and so filed a dispute with the Commission. He claimed the sum of 160,000.00 USD for breach of contract. Before the Commission, the matter was heard and found that the applicant breached the contract of employment. She was ordered to pay the respondent 18 months salaries equal to 112,176.00 USD.

The applicant was however not satisfied with the decision, hence this application. Before this court, she has advanced four grounds in support of the application as hereunder;

i. *The arbitrator erred in law and in fact by awarding payment of 18 months salaries to the respondent who did not have a valid work permit*

ii. *That the arbitrator erred in law and fact by deciding that there was a valid contract of employment in the circumstance where the respondent did not manage to obtain a valid work permit.*

iii. *The arbitrator erred in law and in fact by deciding without considering the requirement of the law regarding work permit for a non-citizen*

iv. *The arbitrator erred in law and fact by deciding a matter which was not within her jurisdiction.*

Mr. Aggrey Kamazima of Kamazima & Co. Advocates submitted for the applicant in writing that the respondent being a non-citizen had no work permit during his second contract. He said, the contract entered between the parties is against the law since, the law prohibits employing foreigners without work permit. He took support in section (9)(1)(2) (a) & (b) and 10(2)(b) read with Item 1 of the second Schedule to the Non-Citizen (Employment Regulation) Act, No. 1 of 2015, as well as section 11(1)(a) & (b). The learned counsel further, asked this court to refer to the case of **Alice M. Kalemela vs Enaboishu Secondary School**, Labour Revision No. 63 of 2019at page 6. He added, that the law does not only prohibit employment of the non-citizen without a permit but also criminalizes the Act, where if found guilty, one may be sentenced to pay fine or imprisonment or both. In similar terms, I was asked to refer to the National Employment Promotion Service Act [Cap. 243 R.E 2002].

In arguing the last ground, it was his view that, the Commission had no jurisdiction to try a matter out of its jurisdiction as it was the position in the case of **Serengeti Breweries Ltd v Hector Sequeiraa**, Civil Appeal, No. 373/18/2018. It was the learned counsel's prayer that this application be granted.

In his more detailed written submission challenging the application, Mr. Hendry Polycarp Kimaro learned Advocate argued in respect of the first ground that the respondent entered in the second contract when his work permit was still valid. He said, the same was about to expire when the new contract was signed. In his view, the applicant being aware of all that and having the duty to look for the respondent's permit did not bother to do so. Instead, he went on arguing, he paid the respondent salaries until when termination was made.

He submitted that, it was due to retrenchment that the respondent was terminated and not due to absence of the valid permit which the applicant takes advantage on.

Submitting on the second ground, the learned counsel was clear that since the applicant had the duty to look for the permit for the respondent, its

absence does not invalidate the employment contract. The learned counsel asked this court not to blame the respondent but rather, it was the applicant who did not take his responsibility to secure the permit. He asked this court therefore not to allow the applicant to benefit from her own wrong as held in the case of **F.M Foundation Pre-Primary School vs Goodness Tumaini Kitaa and Another**, Labour Revision No. 31 of 2021 at page 6.

Based on the foregoing, it was the view of the learned counsel that the respondent is entitled to his benefits as under section 36(a)(iii) of the Employment and Labour Relations Act. [Cap 366 R.E 2019], since the applicant is estopped from denying the fact that the contract was valid. He cited section 123 of the Evidence Act.

The advocate further argued that the applicant has the burden of proving as under section 111 of the Evidence Act, that the permit was applied for but denied. He did not bring evidence, he added and asked this court to be guided by the case of **Zanzibar Telecom Ltd vs Petrofuel Tanzania Ltd**, Civil Appeal No. 69 of 2014 at page 23-24.

It was further argued that the applicant cannot apply the cases of **Alice M. Kalemela vs Enaboishu Secondary School** and **Serengeti Breweries**

Ltd v Hector Sequeiraa (supra) because they are distinguishable with the case at hand.

He said, the applicant did not bring evidence as held in the recent case of this court in **Wallace Ngereza Togolai v John the Baptist Girls Secondary School**, Revision No.506 of 2020. In the case, he further argued, it was held that validity of contract cannot be challenged at the Commission. It has to be taken as an afterthought. He argued further that the contract was valid and parties have to respect the sanctity of contract as held in the case of **Simon Kichele Chacha vs Aveline M. Kalikawe**, Civil Appeal No. 160 of 2018.

Further, it was argued that according to the applicant, reasons for retrenchment is failure to obtain a work permit. In his view, retrenchment is by reason stated under rule 23(2) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No.42 of 2007 and section 38 of ELRA. He asked this court therefore to refer to the cases of **Mtambua Shamte and 64 Others vs Care Sanitation and Suppliers,** Revision No 154 of 2010 at page 10, **Macrina Rwechungura vs Mwananchi Communication Ltd**, Revision No. 473 of 2016 at page 23-26, and the

case of **Sijaona Moshi & 28 Others vs Double Tree by Hilton & Golden Sands Service Apartment Ltd,** Revision 540 of 2019.

Submitting on the 3rd issue, it was submitted that the arbitrator considered the issue of validity of contract due to absence of the valid work permit. The learned counsel held the view that, the award made it clear at page 20-24 by referring to the case of **Wallace Ngereza Togolai v John the Baptist Girls Secondary School** (supra) and ruled out that there was no evidence and that it was not proper to challenge the validity of contract at the hearing before the Commission.

On the last ground, it was argued that the Commission considered the issue of validity of permit. He said, the cases of **Alice M. Kalemela vs Enaboishu Secondary School** and **Serengeti Breweries Ltd v Hector Sequeiraa** (supra) are distinguishable to the case at hand. It was his conclusion that the Commission was vested with jurisdiction to hear the dispute. I was therefore asked to dismiss this application.

By rejoining, Mr. Kamazima reiterated his submission in chief but added that the illegal contract can not be enforced. In this, he referred me to the unauthentic case of **Kenya Airways Limited vs Satwant Satwant Singh Flora,** Civil Appeal No. 54 of 2005 [2013] eKLR at page 8.

Having considered submissions of the parties, it is clear to me that the highly contested issue whether the respondent had a valid contract of employment. To determine the issue, I have to consider the evidence produced by the parties. There is common agreement that the respondent is a foreigner from Britain. He was employed as chief of ICT on contract of two years. First, he obtained a work permit from relevant authorities. His work permit class C was issued on 5th December 2018 which expired on 4th December 2020, along this, he had a class B residence permit which expired at the same time. Exhibits D1 and D2 respectively are good to that effect. His employment contract exhibit P1, where he was employed as Chief Technology Officer and so permitted to work as such as D1 and D2 also expired on 4th December 2020.

Following, the expiry of the contract and therefore work permit, a new contract was entered on 1st December 2020 to last for two years, until 3rd December 2022, exhibit P2 collectively. The new contract was under similar terms of employment as the previous one.

It seems, things did not work as planned for the parties. Until termination of this second contract by retrenchment notice (exhibit P6) on 31st May 2021, the respondent had neither obtained work permit nor residence permit. The evidence clearly shows, the applicant despite having not obtained the permits for the respondent from 4th December 2020, she went assigning him duties and paid his salaries and other entitlements.

This is the reason why the respondent's counsel was keen in claiming that the applicant being at the centre of the dispute did not tender any evidence proving that the permits were applied for and denied. It was insisted and rightly so that upon failure to come to an agreement between the parties and following failure to follow the retrenchment procedure, the applicant wants to hide in the question of work and residence permits. It was the learned counsel's view that allowing him that chance is to let her benefit from her own wrong.

Whether parties had a valid contract is the question of law. It has been submitted by the applicant that the respondent having failed to obtain the work and residence permit had no employment contract to enforce.

This court held in the case of **Rock City Tours Ltd vs Andy Nurray,** Revision No. 69 of 2013, which was also followed in the **Alice M. Kalemela vs Enaboishu Secondary School (supra).** That the law prohibits, a foreigner to work in Tanzania without a valid work permit. It should be noted that in the case of **Rock City** (supra), the court was giving interpretation of section 26 of the National Employment and Promotion Services, Act, 1999. However, the section was repealed by section 27 of the Non-Citizen (Employment Regulations) Act, No. 1 of 2015. A more or less similar provision was enacted under section 9 of the Act which provides:

9.(1) A non-citizen shall not engage in any occupation for reward, profit or non-profit unless he-

(a) has a valid work permit that allows that person to engage in the occupation specified in the valid work permit; or

(b) is the holder of a valid certificate of exemption issued to him under this Act.

(2) A person shall not employ, engage or cause to be employed or engaged in any occupation a non-citizen unless-

(a) the non-citizen has a valid work permit that allows that person to be employed in the occupation specified in the valid work permit; or

(b) the non-citizen has a valid certificate of exemption issued to him under this Act.

The respondent despite having no valid work and residence permit continued to enjoy rendering services to the applicant. In my view, both the applicant and the respondent have the duty to make sure the law was fully observed. It is clear to me that section 30 of the Immigration Act, imposes such duty to both parties. It states as hereunder;

30.-(1) No person shall engage in paid employment under an employer resident in Tanzania except under a permit issued in accordance with the provisions of the Non-Citizens (Employment Regulation) Act.

(2) No person shall for gain or reward engage in any prescribed trade, business, profession or other occupation except in accordance with the terms of an appropriate permit issued in accordance with the Non-Citizens (Employment Regulation) Act.

The record shows, the respondent after expiry of his work permit applied to the Commissioner general of Immigration for special pass. Under Regulation 12 of the Immigration Regulations, 1997, he was issued with the special pass. It was issued on 16th December 2020 and was to stay in Tanzania for some months-exhibit D3. It seems, he had another special pass on 24th March 2021, on similar terms-exhibit D4. The pass plainly prohibits the holder to engage in employment, trade, business or profession.

According to Regulation 12 of the Immigration Regulations, special pass is reserved for temporary purposes when a foreigner is sorting out a cause of business to engage in. It states as hereunder;

> *(1) A Special Pass may be issued by the Director of Immigration Services to any person living in or entering the United Republic, if in the opinion of the Director it is desirable, for any of the following reasons, to issue such a pass–*
>
> *(a) in order to afford him an opportunity of making an inquiry for the purpose of determining whether such person is entitled to a residence permit or is otherwise entitled to remain in or enter the United Republic under the Act or these Regulations, or to determine such person's immigration status;*

(b) in order to afford such person a reasonable opportunity of applying for and obtaining a residence permit or a pass other than a Special Pass or of completing any immigration formality.

It is apparent from the record therefore that since expiry of the permit on 4th December 2020, the respondent obtained a two special passes until termination date. He was well aware, he was not allowed to engage in any business or work for gain.

It follows therefore that the question of validity of the contract of his employment comes in. I think, as held in the case of **Rock City** and **Alice Kalemela.** Validity of contract is an issue that goes to the root of jurisdiction of the Court or Commission. It can therefore be raised and considered at any time even at this stage. The respondent has asked this court to take reference in the decision of this court in the case of **Wallace Ngereza Togolai** (supra).

I have read the same, it only dealt with the question of failure by party to raise the issue of validity of contract at the early stage. I am not sure, if the same, was all about non observance of the law by the employer that leads to an employee engaging in employment without any valid work permit.

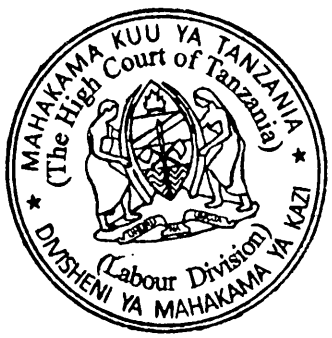
The question that the employee worked without valid permit was not discussed, neither did the court refer to such an issue. That being the position, the case at hand is different from that one.

In the case of **Serengeti Breweries Ltd v Hector Sequeiraa** (supra), the Court Appeal held, despite the fact that this court is not bound by its own decisions, but the decision of the court given in previous occasions cannot be simply ignored. Regard must be given and appreciated. In the same case, the Court held that the question of validity of employment contract is a substantial issue that goes touched jurisdiction of the court.

I therefore agree with the applicant that the respondent worked without permit for the period of time since entering into the second contract. Regardless of who had the duty to process the permit, the respondent as a foreigner was enjoined to follow the law of the land.

It means, as held in the two cases I have just cited, it is illegal to work without work permit. In my considered opinion, it is safe to hold that since the second contract of employment with the respondent was done in total contravention of the law. It cannot be valid not only in law but also in equity. To equity, one goes with clean hands. The respondent's contract therefore cannot be enforced because it was invalid.

Having decided on the validity of contract, I have to therefore conclude that there is no need to deal with other grounds since this one disposes the whole application. For the forgoing reasons therefore, this application has merit. The decision of the Commission is quashed and orders set aside. No order as to costs.



A.K. Rwizile

JUDGE

03.03.2023