

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO 20 OF 2017

(FROM THE DECISION IN CMA/MZA/407 OF 2017)

RICHARD ZAKARIA ODONGOAPPLICANT

VERSUS

**ALLIANCE BOYS SECONDARY..... RESPONDENT
& HIGH SCHOOL**

RULING

27.11.2018 & 22.1.2019

Matupa, J.

The applicant who is a Kenyan, was employed by the respondent without a valid work permit, had later his employment agreement terminated by the respondent for that reason. He was unsuccessful in his bid to challenge the termination before the Commission of Mediation and Arbitration. He has moved this court for an order that, the said decision of the CMA, which declined jurisdiction be revised because it was obtained after the mandatory period of thirty days. He also contends that, the decision lacks merit, because, if I understood him, the question of legality

of contract does not arise, as he was recruited through an agent in Kenya, and therefore he did not enter the contract here in Tanzania.

The application is clearly misconceived. The applicant admits that he is a Kenyan. He also admits that he does not have a valid work permit. He is therefore subject of section 26 of the National Employment Promotion Service Act, Cap 243 of the 2002 Revised Edition of laws of Tanzania, which directs in mandatory terms that:-

*26. (1) No person shall employ any foreigner, and **no foreigner shall take up any employment with any employer, except under and in accordance with a work permit issued to such foreigner.***

*(2) **Any person who contravenes the provisions of this section commits an offence and is liable on conviction, to a fine not less than one million shillings or to imprisonment for a term not less than six months or to both such fine and imprisonment.***

The CMA answered in the negative, the question if at all there was a valid employment contract between the parties, in the absence of the mandatory work permit. In answering the question, the Commission relied on section 11 of the Contract Act. I don't think this approach by the Commission was correct. The applicant is not disqualified to contract simply for being a foreigner. The question of capacity to contract would arise if it was established that he was a minor, or of unsound mind or that he is

disqualified by some legislation. The commission erroneously, assumed that the provisions of the National Employment Promotion Service Act, disqualify foreigners from entering into employment contracts. The truth is that the provisions do not disqualify them from entering employment contracts. Rather, the law regulates the employment of non-citizens subject to work permits one may hold. Where a non-citizen does not hold such a work permit, the contract becomes illegal under section 23 of the Law of Contract Act, which provides as follows

as such but the contract is illegal for failure to abide with the law. Section

23. (1) The consideration or object of an agreement is lawful, unless—

- (a) it is forbidden by law;*
- (b) **is of such a nature that, if permitted, it would defeat the provisions of any law;***
- (c) is fraudulent;*
- (d) involves or implies injury to the person or property of another; or*
- (e) the court regards it as immoral or opposed to public policy.*

The proper way to approach the contract of employment of a foreigner like the applicant is through by way of the foregoing provisions of


section 23. The contract of employment is lawful, unless it is of such a nature that, if permitted, it would defeat the provisions of any law. The commission rightly held that the objects of the present contract of employment which the applicant relies on does not possess a valid work permit. This will defeat the provisions of section 26 of the National Employment Promotion Services Act, it is therefore illegal. Such a contract cannot be enforced by courts.

The applicant seems to argue that the applicant contracted the services through an agent in Kenya and transported him here to Tanzania for the purposes of finalizing formalities of employment. That is true. However, that is a different relief all together, and it cannot be likened to the relief of contract for employment. What I understand him to mean is this, the respondent has to honour his commitment of formalizing the necessary permits and not to renege on his promise to employ him. Up to this point therefore, the respondent could be in breach of a promise to employ, but not the employment contract itself, which has not yet come to fruition. Once it had occurred to the Commission that the object of the purported contract of employment was illegal, it was enjoined to decline jurisdiction.

Lastly, i agree with the applicant that the decision of the Commission was rendered outside the period of thirty days as required by section 88(9) of the Employment and Labour Relations Act. I would have nullified the proceedings if that decision would serve justice to the parties. Since I have decided that the dispute is an ordinary breach of contract, I do not think the nullification will serve the justice of the case. After all, the nullification of the proceedings would only revert the matter to the same Commission, which as I have held, does not have the jurisdiction to deal with a agreement which is not a contract of employment.

In the result, the application is hereby declined, and it is accordingly, dismissed.

Dated at Mwanza this 22nd day of January, 2019.


S.B.M.G. Matupa
Judge

Date: 22.1.2019

Coram: Hon. Matupa, J

Applicant: present in person

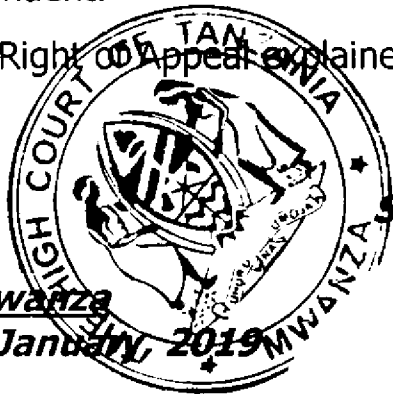
Respondent: Mr Tuguta for the Respondent

B/c; I. Isangi

Court:

The ruling was delivered in chambers this 22nd day of January, 2019 in the presence of the applicant in person and also Mr Tuguta for the Respondent.

Right of Appeal explained.



S.B.M.G. Matupa
Judge

At Mwanza

22nd January, 2019