

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A, SEHEL, J.A., And FIKIRINI, J.A.)**

**CIVIL APPEAL NO. 173 OF 2019**

**TANZANIA PORTLAND CEMENT CO. LTD. ....APPELLANT**

**VERSUS**

**EKWABI MAJIGO..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania (Labour Division)  
at Dar es Salaam)**

**(Wambura, J.)**

**dated the 17<sup>th</sup> day of July, 2019**

**in**

**Revision No. 8 of 2018**

**.....**

**JUDGMENT OF THE COURT**

17<sup>th</sup> August, & 2<sup>nd</sup> September, 2021

**SEHEL, J.A.:**

This is an appeal against the decision of the High Court (Labour Division) in Revision No. 8 of 2018 that affirmed the Award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/R.49/15/537 (the labour dispute).

The brief facts leading to the present appeal are such that: - the respondent was employed by the appellant, Tanzania Portland Cement Co.

Ltd on 4<sup>th</sup> December, 2006 in the position of a sales manager. In 2010, he was promoted to the position of Sales and Marketing Director. He held that position till his termination on 15<sup>th</sup> January, 2015. He was alleged to have taken bribe from a client with a motive of securing or extending distribution deals. He was also alleged to have issued fraud credit note to a client, interpolation of middleman to transport cement for his self-benefit, contravening the suspension directives and non-cooperation during the investigation. Aggrieved by such termination, he filed a complaint before the CMA alleging that he was unfairly terminated from service and sought to be reinstated or compensated for breach of employment contract.

In order to establish that the termination of the appellant was substantially and procedural fair, the respondent called a total of four witnesses, Danford Semwenda (DW1), Jonex Joel Kinyonyi (DW2), Ebenezer Ammon (DW3) and Alfonso Rodriguez (DW4). On his part, the respondent testified himself as PW2 and called one witness, Lazaro Paulo Masunga (PW1). After hearing the evidence from both parties, the CMA found that the termination was substantially and procedurally unfair. It thus ordered the appellant to be reinstated unconditionally without loss of

benefits and be paid Tanzania Shillings one million only (TZS. 1,000,000.00) as nominal damages.

The appellant was not satisfied with the award. It filed an application for revision vide Revision No. 391 of 2016 in the High Court of Tanzania, Labour Division (the High Court). When that application was called for hearing on 23<sup>rd</sup> October, 2017 before Honourable Moshi, J, the respondent conceded to it on procedural technicality. Accordingly, the learned Judge remitted the award to the arbitrator to deliver it in accordance with the law.

According to the record of appeal, the corrected award was delivered to the respondent on 30<sup>th</sup> November, 2017 and the appellant on 6<sup>th</sup> December, 2017. Still aggrieved, the appellant lodged another revision application vide Revision No. 8 of 2018 in the High Court, the subject of the present appeal. After hearing the parties, the High Court concurred with the arbitrator that termination of employment of the respondent was substantially unfair because the applicant failed to prove the allegations against the respondent. On the procedure for termination, the High Court found that the procedure was followed hence termination was procedurally

fair. For the reason that the procedure was fair, the learned Judge varied the arbitrator's award of unconditional reinstatement without loss of benefit to payment of compensation of 12 months' salary plus other entitlements in line with section 40 (3) of the Employment and Labour Relations Act, Cap. R.E. 366 of 2019 (ELRA). Still aggrieved, the appellant filed the present appeal.

The appellant listed the following four grounds in its memorandum of appeal: -

- 1. That, having correctly found that the CMA records do not show that the court order issued on 25<sup>th</sup> February, 2017 was fully complied with, the High Court erred in law in disregarding such irregularity and continued determining the matter as it did.*
- 2. That, the High Court erred in law in failing to hold that the CMA's award has never been delivered in accordance with the law.*
- 3. That, the High Court Judge misdirected herself on the application of section 40 (3) of the Employment and Labour Relations Act, Cap. R.E. 366 of 2019 (ELRA) and thereby erred in law in leaving*

*the appellant's grievances against the finding of the CMA of ordering the reinstatement of the respondent unresolved.*

4. *That, the High Court Judge erred in law in not finding the CMA's award irregular for distortions of evidence resulting from composing the award in a different language from that of the proceedings."*

At the hearing of the appeal, the appellant was represented by Messrs. Timon Vitalis and Andrew Rweikiza, learned advocates whereas the respondent had the services of Mrs. Victoria Paulo and Mr. Eliphafra Ally, also learned advocates.

At the very outset, before the parties were allowed to submit on the grounds of appeal, we invited them to address us on the propriety of the proceedings of the CMA regard being had to the fact that the testimonies of some of the witnesses were received without oath or affirmation.

Mr. Vitalis was first to address us. He readily conceded that the appeal is not proper before us because the CMA's proceeding is flawed with procedural technicality in that some of the witnesses of the appellant, DW1 at page 36 and DW2 at page 40 and all the witnesses for the

respondent, PW1 and PW2 at pages 56 and 62, respectively was received without oath or affirmation thus their evidence was no evidence in the eyes of law and could not be acted on to determine the appeal before us. He elaborated that rule 25 (1) of the Labour Institutions (Mediation and Arbitration) Rules, Government Notice No. 67 of 2007 (henceforth GN No. 67 of 2007) mandatorily requires a witness before the CMA to take oath or affirmation before the reception of any witness's evidence and a contravention of it invalidated the entire trial court proceedings. It was his submission that since the evidence of the DW1, DW2, PW1 and PW2 was received without oath or affirmation then their testimonies were invalid. He contended that after discarding the evidence of the respondent who was a complainant there would be no other evidence left to support the complainant before the CMA. He therefore urged us to nullify the proceedings of the CMA, quash and set aside the award and remit back the labour dispute to the CMA for retrial.

Mrs. Paulo supported the submission made by her learned friend Mr. Vitalis. She conceded that the testimonies of all witnesses for the respondent and two witnesses from the part of the appellant were received

without oath or affirmation. She also agreed that such an omission rendered their evidence invalid thus vitiated the CMA's proceedings. On the way forward, she agreed with the submission of the learned advocate for the appellant that the labour dispute be remitted back to the CMA for a retrial.

In rejoinder, Mr. Vitalis reiterated his submission that the omission is so fatal as it vitiated the entire proceedings of the CMA.

Having dispassionately considered the submissions by the parties and gone through the record of appeal particularly the record of the CMA what is evident is that the mainstay issue for determination is the validity of the CMA's proceedings.

Indeed, as rightly observed by the learned counsel for the parties, except for the testimonies of DW3 and DW4 other witnesses for the appellant and all witnesses for the respondent were received without oath or affirmation. It is on record that the evidence of DW1 at page 35 -38, DW2 at page 40 - 42, PW1 at page 56 – 61 and PW2 at page 62 – 71 was received without oath or affirmation. This is in contravention of section 25 (1) of GN No. 67 of 2007 which provides: -

*"25 (1) The parties shall attempt to prove their respective cases through evidence and **witnesses shall testify under oath through the following process –***

*(a) Examination in Chief -*

*(i) The party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;*

*(ii) Parties are predicted to ask leading questions during an examination in chief.*

*(b) Cross-examination: -*

*(i) The other party or parties to the dispute may after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute;*

*(ii) Obtain additional information from the witness or challenge any aspect of the evidence given by the witness; leading questions are allowed at this stage of proceedings.*

*(c) Re-examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross-*



*examination and the purpose of re-examination.*

*"[Emphasis added]."*

This Court has repeatedly emphasized the need of every witness who is competent to take oath or affirmation before the reception of his or her evidence in the trial court including the CMA otherwise the testimony of such witness amounts to no evidence in law thus it becomes invalid and vitiates the proceedings as it prejudices the parties' case (see the cases of **Kabula Luhende v. The Republic**, Criminal Appeal No. 281 of 2014, **Hamis Chuma @ Hnado Mhoja and Another v. The Republic**, Criminal Appeal No. 371 of 2015, **Jafari s/o Ramadhani v. The Republic**, Criminal Appeal No. 311 of 2017, **Nestory Simchimba v. The Republic**, Criminal Appeal No. 454 of 2017, and **Catholic University of Health and Allied Science (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020, (All unreported)).

For instance, in the case of **Catholic University of Health and Allied Science (CUHAS)** (supra) where the Court was faced with a similar circumstance, it held that the irregularity vitiating the proceedings. In that appeal, both the witness for the appellant and the respondent gave

their evidence without oath or affirmation. After reproducing the provisions of section 25 (1) of GN No. 67 of 2007, the Court stated: -

*"From the provision which has been reproduced above, it is mandatory for a witness to take oath before he or she gives evidence before the CMA...where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case."*

In the same vein, since DW1, DW2, PW1 and PW2 were competent witnesses whose testimonies ought to have been received under oath or affirmation but that requirement was not observed, their evidence becomes invalid and vitiated the entire proceedings in the CMA. Consequently, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 414 R. E. 2019 and declare that the entire proceedings of the CMA are a nullity. We therefore quash the same. We further nullify and quash the proceedings of the High Court because they emanated from nullity proceedings of the CMA.

In the end, we set aside the award of the CMA and the judgment and decree of the High Court. On the way forward, we direct that the record be remitted back to the CMA for the labour dispute to be tried *de novo* before another arbitrator. We make no order as to costs because the appeal arose from a labour dispute.

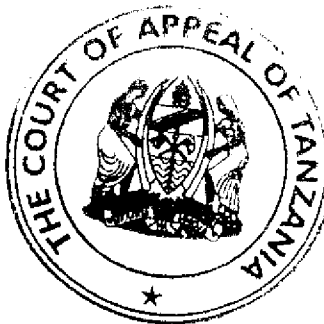
**DATED** at **Dar es Salaam** this 30<sup>th</sup> day of August, 2021

A. G. MWARIJA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

The judgment delivered this 2<sup>nd</sup> day of September, 2021 in the presence of Mr. Baraka Msana, learned counsel for the Appellant and Ms. Victoria Paulo, learned counsel for the Respondent is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**