

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 155 OF 2019

IRINGA INTERNATIONAL SCHOOL APPELLANT

VERSUS

ELIZABETH POST RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania
at Iringa)**

(Matogolo, J.)

dated the 19th day of October, 2018

in

Labour Revision No. 2 of 2017

JUDGMENT OF THE COURT

14th & 20th September, 2021

MWAMPASHI, J.A.:

The appellant, Iringa International School was a losing party, firstly, in Labour Dispute No. CMA/IR/82/2016 before the Commission for Mediation and Arbitration at Iringa (the CMA) and then in Labour Revision No. 02 of 2017 before the High Court of Tanzania, Labour Division, at Iringa. The respondent, Elizabeth Post, was on 13th January, 2016 employed by the appellant as a boarding parent/matron on a term of two years and a half contract. After serving for six months the contract was terminated by the appellant on operational reasons. Dissatisfied, the

respondent successfully sued the appellant in the CMA for breach of the contract and was awarded Tshs. 73,248,000/= or USD 33,600.00 being the salaries of the remaining period of the contract term. Aggrieved, the appellant unsuccessfully applied for revision of the CMA award before the High Court in which the decision of the CMA was upheld. Aggrieved further, the appellant has preferred the instant appeal.

When this appeal came on for hearing, Mr. Barnabas Pascal Nyalusi, learned counsel, represented the appellant whereas Mr. Jally Willy Mongo, also learned counsel, held the brief of the respondent's counsel, Mr. Jackson Abraham Chauia, with instructions to proceed with the hearing.

Before the hearing could be commenced, Mr. Nyalusi rose and made two prayers; first, that he be granted leave, in terms of Rule 96(7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to lodge a supplementary record of appeal to include a drawn order which was omitted from the record of appeal and second, that the hearing be adjourned. Notwithstanding the prayers made by Mr. Nyalusi, the Court drew the attention of the learned counsel to the propriety or otherwise of the proceedings before the CMA particularly on the fact that the witnesses who testified before the CMA did not give their evidence on oath and secondly that the arbitrator did not append her signature at the end of

the evidence of each of the witnesses. We, thus, invited the counsel for the parties to address us on the effects of the omissions pointed out above.

In response to the above raised points, Mr. Nyalusi, agreed that, indeed, all the witnesses who testified before the CMA were not sworn before they gave their evidence and also that the arbitrator did not sign at the end of the testimony of each witness. He further contended that the omissions are fatal rendering the proceedings a nullity. He thus urged us to invoke our powers under section 4(2) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019] (the AJA) read together with Rule 38 of the Rules by nullifying the proceedings, setting aside the award and by ordering retrial.

Mr. Mongo joined hands with Mr. Nyalusi. He added that the failure by the arbitrator to administer oath to the witnesses before taking their evidence offended Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007 (GN No. 67 of 2007) which requires that every witness in the CMA shall testify under oath. He insisted that the failure to do so invalidates the evidence. He thus asked the Court to declare the proceedings before the CMA a nullity, quash the

proceedings of both the CMA and the High Court, set aside the award and remit the matter back to the CMA for retrial.

Beginning with the omission by the arbitrator to administer oath to the witnesses, the record of appeal from page 44 to 72 clearly shows that the evidence of the respondent and that of the three witnesses for the appellant, was not given under oath. The evidence from these witnesses was therefore taken in contravention of Rule 25(1) of GN No. 67 of 2007 which provides that:

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

[Emphasis supplied]

Apart from the above reproduced provision under which witnesses before the CMA are mandatorily required to take oath before they give evidence, such requirement is also provided by section 4(a) of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019] (the Act) which provides thus:

"s. 4 –

Subject to any provision to the contrary contained in any written law an oath shall be made by-

(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court"

It is worth noting, at this juncture, that the CMA is a court within section 4(a) of the Act because according to s. 2 of the Act the word "court" is defined to include every person or body of persons having authority to receive evidence upon oath or affirmation. Under rule 19(2)(a) of GN No. 67 of 2007 the arbitrator has powers to administer an oath or accept an affirmation from any person called to give evidence before the CMA and under rule 25(1) of GN No. 67 of 2007, witnesses before the CMA are required to give evidence under oath.

As to what is the effect of omitting to administer oath to witnesses before they give their evidence, the law is settled. The requirement for witnesses to give evidence under oath is mandatory and the omission to do so vitiates the proceedings. The law was restated by the Court in the case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 (unreported) wherein the Court, faced with an identical situation as it is in the instant matter, held among other things, that:

"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' cases."

As regards to the omission by the arbitrator to append a signature at the end of the testimony of each witness, it is clear from the record that the respondent gave her evidence on 04th November, 2016. Her evidence appears at pages 43 to 53 of the record of appeal. However, at the end of her testimony on page 53, the arbitrator did not append her signature. Similarly, the arbitrator did not append her signature at page 64 on 11th November, 2016 to mark the end of the testimony of the first witness for the appellant and on pages 69 and 72 to mark the end of the testimonies of the second and third witnesses for the appellant.

Although the laws governing proceedings before the CMA happen to be silent on the requirement of the evidence being signed, it is still a considered view of this Court that for purposes of vouching the authenticity, correctness and providing safe guards of the proceedings, the evidence of each witness need to be signed by the arbitrator. On this, we need to draw inspiration from the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) wherein it is mandatorily provided that the evidence of each witness must be signed. Order XVIII rule 5 of the CPC provides as follows:

*"The evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the Personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and **the judge or magistrate shall sign the same.**"*

[Emphasis supplied]

Further, under section 210(1) of the CPA it is provided that:

"S. 210(1) In trials other than trials under section 213, by or before a Magistrate, the evidence of the witnesses shall be recorded in the following manner-

*(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence **and shall be signed by him** and shall form part of the record."*

[Emphasis supplied]

In a countless number of cases including **Yohana Mussa Makubi and Another vs Republic**, Criminal Appeal No. 556 of 2015, **Sabasaba Enos @ Joseph vs Republic**, Criminal Appeal No. 411 of 2017, **Chacha s/o Ghati @ Magige vs Republic**, Criminal Appeal No. 406 of 2017

and **Mhajiri Uladi & Another vs Republic**, Criminal Appeal No. 234 of 2020, (all unreported), this Court has insisted that a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings. In **Yohana Makubi and Another** (supra) the Court held, among other things, that:

*“.. in the absence of the signature of the trial [Judge] at the end of the testimony of every witness; **firstly**, it is impossible to authenticate who took down such evidence, **secondly**, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants’ counsel, **thirdly**, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; **fourthly**, such evidence does not constitute part of the record of trial and the record before us”.*

For reasons that the witnesses before the CMA gave evidence without having first taken oath and as the arbitrator did not append her signature at the end of the testimony of every witness and also on the above stated position of the law, we find that the omissions vitiate the proceedings of the CMA. Consequently, in the exercise of the powers of revision conferred in the Court by section 4(2) of the AJA, we hereby quash the proceedings both of the CMA and of the High Court. We also

set aside the award of the CMA as well as the High Court judgment which upheld that award. Lastly, we order that the matter be remitted to the CMA for the labour dispute in question to be heard *de novo* before another Arbitrator. As the appeal originates from a labour dispute, we make no order as to costs.

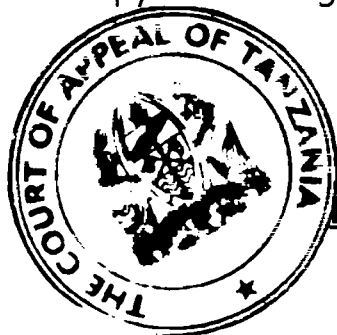
DATED at **IRINGA** this 20th day of September, 2021.

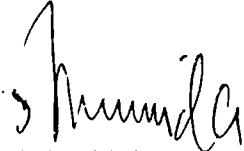
A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered this 20th day of September, 2021 in the presence of Mr. Barnabas Nyalusi, learned counsel for the Appellant and Mr. Jally Mongo, learned counsel for the Respondent, is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL