

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

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

**CIVIL APPEAL NO. 157 OF 2019**

**JOSEPH ELISHA ..... APPELLANT**

**VERSUS**

**TANZANIA POSTAL BANK ..... RESPONDENT**

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

**(Kente, J.)**

**dated the 26<sup>th</sup> day of February, 2019**

**in**

**Labour Revision No. 47 of 2017**

-----

**JUDGMENT OF THE COURT**

17<sup>th</sup> & 24<sup>th</sup> September, 2021

**KWARIKO, J.A.:**

This appeal arises from the decision of the High Court of Tanzania at Iringa in Labour Revision No. 47 of 2017 (Kente, J) (as he then was).

The facts of the case which culminated into this appeal can briefly be stated as follows. The appellant Joseph Elisha was employed by the respondent in the capacity of the Bank Operations Officer from 29<sup>th</sup> October, 2012. He was posted to the respondent's Iringa Branch. The record shows further that, the appellant was suspended from employment on allegations of being involved in fraudulent banking transactions which occasioned loss to his employer. Subsequently, on 11<sup>th</sup> March, 2016, the

appellant was terminated from employment on allegations of gross misconduct.

The appellant was aggrieved by the termination of his employment hence he referred the dispute to the Commission for Mediation and Arbitration in Iringa (the CMA). At the conclusion of the trial, the CMA decided in favour of the appellant and held that he was unfairly terminated from employment. Dissatisfied with that decision, the respondent successfully applied for revision of the award before the High Court.

Before this Court, the appellant has preferred the following three grounds of appeal:

- 1. That, the Honourable first appellate court erred in fact and law in overturning the well-reasoned decision of the Commission by ignoring the watertight evidence and defence raised by the appellant herein who was the complainant and based on poor and weak evidence of the respondent who was the respondent at the Commission as such occasioned a miscarriage of justice on the part of the appellant herein.*
- 2. That, the honourable first appellate court erred in fact and law by concluding that the appellant's termination herein was fairly arrived in the premise of procedure and reasons the fact which is incorrect as well observed by the trial Commission.*

*3. That, the honourable first appellate court erred in fact and in law in re-evaluating the evidence of the Commission and in that regard, it resorted to base the argumentation on matters not material to the case thence arrived to the absurd decision of quashing the right decision of the Commission for Mediation and Arbitration.*

On the day the appeal was called on for hearing, the appellant was represented by Mr. Fred Peter Kalonga, learned advocate whilst the respondent was represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Mr. Innocent Mhina, learned Senior State Attorney, Mr. Edwin Joshua Webiro and Ms. Ansila Makyao, both learned State Attorneys.

Before the hearing could commence, in earnest, the Court wanted to satisfy itself on the propriety of the proceedings of the CMA for two reasons. One, omission to take oath by the witnesses before it; and two, failure by the arbitrator to append his signature at the end of each witness's testimony. We thus invited the counsel for the parties to address us on those issues.

For his part, Mr. Kalonga conceded that the witnesses from both sides did not take oath before they gave their respective testimony. He argued that the omission contravened the provision of rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No.

67 of 2007 (henceforth the CMA Rules), which makes it mandatory for the witnesses to take oath when they give their testimonies before the CMA. The learned counsel submitted further that the arbitrator did not append his signature at the end of the testimony of each witness to authenticate the proceedings. Mr. Kalonga contended that the omission vitiated the proceedings and urged us to nullify them and set aside the award with an order of retrial of the dispute before the CMA.

On the other hand, Mr. Nyoni, concurred with the submission of his learned friend but urged us to strike out the appeal.

Having considered the submissions made by the counsel for both parties, we shall commence our deliberation with the omission by the arbitrator to administer oath to the witnesses during the trial. Having perused the record of appeal, the evidence of the respondent's two witnesses features from page 101 to 111, whilst the appellant's evidence is found from page 112 to 120. None of these witnesses took oath before giving their testimonies. This was a clear contravention of rule 25 (1) of the CMA Rules which provides thus:

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

[Emphasis ours]

Apart from the foregoing requirement, the arbitrator has been given powers to administer oath or accept affirmation from any person called to give evidence. Rule 19 (2) (a) of the Rules provides:

*"Rule 19*

*(2) The powers of the Arbitrator include to-*

*(a) administer an oath or accept an affirmation  
from any person called to give evidence."*

Similarly, section 4 (a) of the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019] makes it mandatory for the witnesses giving evidence in court to do so under oath. It provides:

*"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."*

Since it is mandatory for the witnesses to take oath before giving evidence, its omission vitiates the proceedings. Faced with similar situation where witnesses testified without oath before the CMA, in the case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 (unreported), the Court stated thus:

*"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."*

See also **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019 (unreported).

The next issue is the failure by the arbitrator to append his signature at the end of each witness's evidence. Upon perusal of the record of appeal, we have found that the arbitrator did not sign the evidence of all witnesses from both parties when they testified from page 101 to 120. Though the Rules governing the proceedings at the CMA do not contain any provision regarding signing of the witness's testimony by the arbitrator, it is our view that the requirement is imperative to safeguard the authenticity and correctness of the record. However, we wish to take inspiration from the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) and the Civil Procedure Code [CAP 33 R.E. 2019] (the CPC) whereby signing of witness's evidence is a mandatory requirement. Section 210 (1) (a) of the CPA provides thus:

*"(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 added]

Whereas Order XVIII rule 5 of the CPC provides thus:

*"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 added]

Going forward, in its various decisions, the Court has pronounced itself that the effect of failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings. One such pronouncement is in the case of **Mhajiri Uladi**

**and Another v. R**, Criminal Appeal No. 234 of 2020 (unreported), where it was stated thus:

*"As demonstrated in this appeal, the testimonies of all witnesses were not signed by the learned trial Judge not only the authenticity of the testimonies of the witnesses but also the veracity of the trial court record itself is questionable. In absence of the signature of the person who recorded the evidence, it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witness since the recorder of such evidence is unknown. On account of such omission, the entire trial court proceedings recorded after the conduct of the preliminary hearing are vitiated because they are not authentic."*

See also **Chacha s/o Ghati @ Magige v. R**, Criminal Appeal No. 406 of 2017 (unreported); and **Iringa International School** (supra).

In the event, the omission to administer oath to the witnesses and failure by the arbitrator to append signature at the end of each witness's testimony vitiated the proceedings before the CMA. Therefore, through our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], we proceed to quash the proceedings of the CMA and set aside the award as well as the proceedings and judgment of the



High Court which upheld that award. For the justice to be done, we remit the record to the CMA for the dispute to be heard *denovo* before another arbitrator. Since the matter arose from a labour dispute, we make no order as to costs.

**DATED at IRINGA** this 24<sup>th</sup> day of September, 2021.


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

M. A. KWARIKO  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 24<sup>th</sup> day of September, 2021 in the presence of Ms. Ansila Makyao, learned State Attorney for the Respondent. She also held brief for Mr. Peter Kalonga, counsel of the Appellant, is hereby certified as a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**