IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CIVIL APPEAL NO. 413 OF 2020

UNILEVER TEA TANZANIA LIMITED ..... APPELLANT

VERSUS

DAVID JOHN ..... RESPONDENT

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

(Matogolo, J.)

dated the 7th day of February, 2020
in
Miscellaneous Labour Application No. 02 of 2019

JUDGMENT OF THE COURT

28th & 30th September, 2021

KWARIKO, J.A.:

David John, the respondent, was employed by the appellant on 28/12/2006 as a field supervisor. Unfortunately, on 03/05/2016 his contract of employment was terminated.

The facts that led to the respondent's termination are as follows. The respondent was charged before the disciplinary committee with the offence of misconducts, namely; gross negligence and gross dishonest behaviour. After the conduct of disciplinary hearing, he was found guilty on both offences hence was eventually terminated. Being aggrieved, he instituted labour dispute against the appellant before the Commission for

Mediation and Arbitration (the CMA) at Mafinga, alleging unfair termination from his employment. At the conclusion of the hearing, the CMA decided the matter in favour of the respondent.

The appellant was aggrieved by that decision. However, it was late to file its application for revision to the High Court, hence applied for extension of time to do so vide Misc. Labour Application No. 2 of 2019. After hearing the parties, the High Court (Matogolo, J.) dismissed the application for lack of merit. Dissatisfied, the appellant is before the Court on appeal.

Before this Court, the appellant raised the following two grounds of appeal:

1. *The trial Court erred in law and in fact by refusing to grant the Appellant order to extend time for [it] to file Revision of the Arbitrator Award of 04th July, 2020 in Dispute Number CMA/IR/MAF/38/2016 (Honourable Furtunatha Muzee Arb.) despite the fact that the Appellant had established sufficient reasons for delay.*
2. *The trial Court erred in law by determining [the] application while the Respondent failed to effect service of the Notice of Opposition and/or Affidavit in the Appellant as per requirement set forth under*

Rule 9 (1) (a)-(f), 9(2) (a) – (f) and 9 (3) (a) – (d) and 9 (4) of the Labour Court Rules, 2007 (GN No. 106 of 2007).

For his part, the respondent, filed a notice of preliminary objection on 13th September, 2021 challenging the competence of the appeal.

When the appeal was called on for hearing, Mr. Jackson Bidya, learned advocate, appeared for the appellant while the respondent was represented by Mr. Emmanuel Chengula assisted by Mr. Franklin Chonjo, both learned advocates.

Before the hearing commenced, we drew the attention of the learned counsel of the parties on the propriety of the proceedings before the CMA on two things. **First,** the witnesses who testified before the CMA did not give evidence on oath and **second,** the arbitrator did not append signature at the end of each witness's evidence. We therefore invited the counsel to address us on the legal effect of those omissions.

In his submission, Mr. Bidya agreed that the witnesses who testified before the CMA were not sworn before they gave their respective evidence and further that the arbitrator did not sign at the end of evidence of each witness. Submitting on the effect of the irregularities, Mr. Bidya argued that the omissions are fatal to the proceedings before the CMA and the resultant proceedings in the High Court rendering them a nullity. In

support of his argument, the learned counsel referred us to the recent decision of the Court in the case of **Unilever Tea Tanzania Limited v. Davis Paulo Chaula,** Civil Appeal No. 290 of 2019 (unreported). As to the way forward, he urged us to order a retrial of the dispute before the CMA. Concurring with the position taken by the appellant's counsel, Mr. Chengula decided to abandon the preliminary objection he had earlier on filed challenging the competence of the appeal.

On our part, regarding the omission by the arbitrator to administer oath to the witnesses, we observe that the record of appeal shows at pages 74 to 88 that the evidence by the appellant and that of the two witnesses for the respondent, was not given on oath. The duty of the arbitrator to administer oath to witnesses is given under rule 19 (2) (a) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N No. 67 of 2007 (the Rules). It provides thus:

> *"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."*

The omission to administer oath to the witnesses contravened the provisions of rule 25 (1) of the Rules which states that:

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

[Emphasis added]

According to the cited provision, it is imperative that the witnesses should be sworn before giving evidence. Not only the foregoing provisions of the law, but also section 4 (a) of the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019] makes it mandatory for the witnesses to take oath before giving evidence in court as follows:

"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 clear that witnesses are mandatorily required to take oath before giving evidence and failure to do so vitiates the proceedings. In the case of **Unilever Tea Tanzania Limited** (supra), where witnesses testified without oath before the CMA, the Court stated that:

"Since therefore, swearing in of a witness before he testifies is a mandatory requirement, there is no gainsaying that the omission vitiates the

proceedings because it renders the evidence which is not taken under oath, invalid."

See also- **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020 and **Iringa International School v. Elizabeth Post,** Civil Appeal No. 155 of 2019 (both unreported).

The second ailment is the failure by the arbitrator to append signature at the end of each witness's evidence. Though there is no requirement under the Rules obliging the arbitrator to sign witnesses' evidence, we are of the considered view that the omission is fatal to the proceedings. This is because it jeopardizes the authenticity, correctness, and veracity of the evidence of the witnesses as it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witnesses since the recorder of the evidence is unknown.

On this issue, inspiration can be taken from the Civil Procedure Code [CAP 33 R.E. 2019] (the CPC) and the Criminal Procedure Act [CAP 20 R.E. 2019] whereby signing of witness's evidence is a mandatory requirement. For instance, 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]

Oftentimes, the Court has stated that, failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings. In the case of **Chacha s/o Ghati @ Magige v. R**, Criminal Appeal No. 406 of 2017 (unreported), the Court observed thus:

> *".... we entertain no doubt that since the proceedings of the trial court were not signed by the trial Judge after recording evidence of witnesses for both sides, they are not authentic. As a result, they are not material proceedings in determination of the current appeal."*

Similarly, see- **Yohana Mussa Makubi & Another v. R,** Criminal Appeal No. 556 of 2015 (unreported).

Consequently, failure by the arbitrator to administer oath to the witnesses and the omission to append his signature at the end of each witness's evidence, vitiated the proceedings before the CMA. As such, under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], we proceed to quash those proceedings and set aside the award as well

as the proceedings and judgment of the High Court which originated in a nullity.

As to the way forward, we remit the matter to the CMA for the Labour Dispute to be heard *de novo* by another arbitrator. Since the appeal originates from a labour dispute, we make no order as to costs.

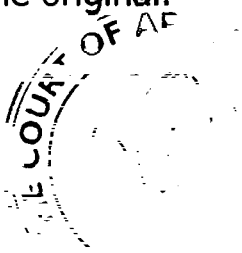
DATED at **IRINGA** this 30th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 30th day of September, 2021 in the presence of Mr. Emmanuel Chengula, learned counsel holding brief for Mr. Jackson Bidya, learned counsel for the Appellant and Mr. Emmanuel Chengula, learned counsel for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL