

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

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

**CIVIL APPEAL NO. 290 OF 2019**

**UNILEVER TEA TANZANIA LIMITED ..... APPELLANT**

**VERSUS**

**DAVIS PAULO CHAULA ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,  
Labour Division at Iringa)**

**(Banzi, J.)**

**dated the 12<sup>th</sup> day of April, 2019  
in  
Labour Revision No. 30 of 2017**

-----  
**JUDGMENT OF THE COURT**

22<sup>nd</sup> & 24<sup>th</sup> September, 2021

**MWARIJA, J.A.:**

The respondent, David Paulo Chaula was an employee of the appellant, Unilever Tea Tanzania Limited, having been employed since 1997 in the position of a Security Guard. On 26/8/2016 he was terminated from employment on the grounds of absenteeism and gross insubordination. The appellant's disciplinary committee (the committee) found that the respondent had refused to register himself in the newly introduced biometric attendance system intended to simplify and

centralize the payroll system. The committee also found him guilty of having absconded from duty for four consecutive days from 25/5/2016 to 28/5/2016. The appellant had also, prior to the respondent's termination, served him with seven written warnings following his frequent absenteeism.

The respondent was aggrieved by the appellant's decision to terminate him from employment and therefore, on 2/9/2016, he filed a complaint before the Commission for Mediation and Arbitration, Mafinga (the CMA), Labour Dispute No. CMA/IR/MAF/60/2016. He complained that he was unfairly terminated and thus prayed for an order awarding him compensation and other terminal benefits for having been unfairly terminated. Having heard the dispute, the CMA decided that the respondent was fairly terminated. It found thus that he was not entitled to terminal benefits provided under s. 40 (1) (c) of the Employment and Labour Relations Act [Cap. 366 R.E. 2002].

Aggrieved by the decision of the CMA, the respondent applied for revision before the High Court of Tanzania (Labour Division). He challenged the finding of the CMA that the appellant had valid and fair reasons for terminating his employment. He also challenged that decision contending that it was arrived at without following the laid down

procedure. Having heard the parties, the High Court (Banzi, J.), reversed the decision of the CMA. It found, first, that since prior to his termination, the respondent had been served with written warnings as a result of his absenteeism, it was inappropriate to charge him, on the same day of the last written warning, with the charge based on the same breach, before the committee, the outcome of which resulted into his termination. The learned Judge was of the view that the respondent was, as a result, subjected to double punishment.

With regard to the ground of refusal to register himself in the biometric attendance system, the High Court agreed with the CMA that his termination on that ground was for valid reason because by that refusal, he committed gross insubordination. It found however that, although the termination was substantially fair, it was procedurally unfair. The learned High Court Judge observed that, in conducting disciplinary proceedings, the committee breached the provisions of rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N No. 42 of 2007 in that; according to the procedure, investigation should have been conducted to ascertain whether there are grounds for the hearing to be held. Since that was not done, the learned Judge found that the respondent's termination was procedurally unfair.

Having so found, the High Court declared that the decision of the CMA was erroneous and therefore, reversed it and proceeded to award the respondent compensation of twelve month's salary computed at the amount which was payable at the date of his termination.

The appellant was aggrieved by the decision of the High Court and thus brought this appeal raising a total of eight grounds which for reasons to be apparent herein, we are not going to consider them.

At the hearing of the appeal, the appellant was represented by Mr. Jackson Bidya, learned counsel. On his part, the respondent appeared in person, unrepresented.

Before the appeal could proceed to hearing, the Court wanted to satisfy itself on the propriety or otherwise of the proceedings of the CMA, in particular, the manner in which the evidence of the witnesses was taken. From the record, the Arbitrator recorded the evidence of the witness for the appellant Dania Kema and that of the respondent without having required them to take oath. As a result, the witnesses did not testify under oath.

Mr. Bidya conceded to the existence of the irregularity point out by the Court and submitted that the omission has the effect of vitiating the

proceedings of the CMA. He argued that, under rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N No. 67 of 2007 (hereinafter referred to shortly as "*G.N No. 67 of 2007*"), the witnesses ought to have taken oath before they testified. He added that the proceedings are also defective for want of the Arbitrator's signature after the recorded evidence of the witnesses.

On his part, apart from conceding to the defects, the respondent did not have any substantial argument to make, understandably because the point at issue was one of law.

It is clear from the record that the Arbitrator did not exercise the power vested in her by rule 19 (2) (a) of G.N. No. 67 of 2007, to administer oath to the witnesses before she recorded their evidence. As submitted by the appellant's counsel, the omission contravenes the provisions of rule 25 (1) of G.N No. 67 of 2007 which states as follows:

*"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 witnesses 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].*

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. This is more so, regard being had to s. 4 (a) of the Oaths

and Statutory Declarations Act [Cap. 34 R.E. 2019] (the Act) which states that:

"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."*

This provision applies to the CMA by virtue of s. 2 of the Act read together with rule 25 (1) of G.N No. 67 of 2007 - See the cases of **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).

As stated above, Mr. Bidya has argued that the proceedings are also defective for want of the Arbitrator's signature on the recorded testimony of the witnesses. We agree with him. The record clearly shows that the Arbitrator did not insert her signature at the end of the recorded evidence of the witnesses. Without the signature of the Arbitrator, the authenticity of evidence of the witnesses would obviously be put to doubt and for that

reason, be invalid. – See the case of **Iringa International School** (supra). In that case in which, like in the case at hand, the Arbitrator did not insert her signature in the proceedings after recording the evidence of each of the witnesses, the Court took inspiration from *inter alia*, O.XVIII r. 5 of the Civil Procedure Code [Cap. 33 R.E. 2019] which states 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.**"*

Upon consideration that the purpose of signing the proceedings is to authenticate them, the Court held that the omission vitiated the proceedings of the CMA. The position applies to this case as well.

Having found that the irregularities have the effect of vitiating the proceedings, we have no option but to exercise the powers of revision vested in the Court by s. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and quash them as we hereby do. Consequently, the proceedings of the High Court are also hereby quashed and the award is



set aside. On the way forward, we order that the record be remitted to the CMA for hearing of the dispute *de novo* before another Arbitrator.

This being an appeal arising 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 Mr. Jackson Bidya, learned counsel for the Appellant and Davis Paulo Chaula, the Respondent in person, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "S. J. Kainda".

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