

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 404 OF 2020

THE COPYCAT TANZANIA LIMITED..... APPELLANT

AND

MARIAM CHAMBA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Aboud, J.)

dated 4th day of September, 2020

in

Labour Revision No. 421 of 2019

JUDGMENT OF THE COURT

21st February & 10th March 2022

LILA, JA:-

The present appeal emanated from the High Court decision in Labour Application No. 421 of 2019 in which the appellant had sought revision of the arbitral award by the Commission for Mediation and Arbitration (the CMA) in a labour dispute lodged by the respondent in which she alleged that the appellant constructively terminated her from employment. An order for reinstatement was found unfavourable. Instead, the CMA ordered payment of TZS 100,000,000.00 as being

general damages *as a solace*. The High Court did not find merit in the Revision. It, instead, sustained the arbitrator's award and also ordered the appellant to pay the respondent twelve (12) months' salary as compensation for unfair termination.

The High Court decision aggrieved the appellant, hence the present appeal grounded upon a three point memorandum of appeal which grounds are not relevant for the disposal of this appeal. Accordingly, we find it unnecessary to recite them.

We wish to start by narrating, albeit briefly, the factual setting that led to the lodgement of this appeal. As the record will bear testimony, the respondent's career development with the appellant was a successful one. Upon her recruitment on 01/06/1996, she rose from the rank of junior clerical position to the position of Head of Human Resources and Administration which post she held till her resignation from employment on 07/08/2015. What happened to her is not of immediate relevance here. Suffice it to say that she successfully lodged a labour dispute claiming constructive termination before the CMA. Although her desire to be reinstated was turned down, the CMA awarded her damages to the tune of TZS 100 Million which was

challenged by way of revision in the High Court by the appellant. The High Court added salt onto a fresh wound when it sustained the CMA award and also ordered the appellant to pay twelve (12) months' salary as compensation for unfair termination. That decision precipitated lodgement of this appeal.

Before us for hearing of the appeal, the appellant was represented by Mr. Rahim Mbwambo, learned advocate, whereas the respondent enjoyed the services of Mr. Antipas Seraphin Lackam, also learned advocate.

As we were perusing the record of appeal, it came to our notice that witnesses by both sides were not sworn in or affirmed before their respective testimonies were recorded before the CMA. Alive to the imperative requirement to ensure witnesses' testimonies are recorded under oath in terms of Rule 19 (2) (a) and 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N No. 67 of 2007 (G.N No. 67 of 2007), we found ourselves, before the hearing of the appeal could commence in earnest, constrained to invite the learned advocates to address us on whether in view of the patent defect, we could proceed with the hearing of the appeal on merits.

Both counsel were agreeable with the Court's observation that the cited provisions were violated as a consequence of which the testimonies were of no evidential value. They could, in that advent, not hold but urge the Court to nullify the proceedings and award by the CMA as well as the High Court proceedings and judgment and then order the record of the CMA to be remitted back for it to hear and determine the dispute afresh. And, as it was a matter initiated by the Court, none of them pressed for costs.

We feel no remorse in associating ourselves with the concurrent views by the learned counsel that the arbitrator abdicated his duty stipulated under Rule 19 (2) (a) of G.N. No. 67 of 2007 which empowers him to administer oath to any person who appeared to give evidence. That Rule provides:

"Rule 19

(2) The power of the arbitrator include to-

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

A concurrent obligation is placed on the parties to the dispute to prove their cases on oath. That is in terms of Rule 25 (1) of G.N. No. 67

of 2007 which, in mandatory terms, puts a requirement for a witness to give evidence on oath. It states:-

*"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 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 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 further opportunity to ask questions to the witness relating to issues dealt with during cross examination and the purpose of re-examination."

(Emphasis added)

Contrary to the above exposition of the law, the record shows vividly that witnesses for both sides testified before the CMA without being sworn. For the appellant, both Mr. Denis Nyongesa, Head of Human Resources and Mr. Michael Anthony Godfrey, Chief Executive Officer, gave evidence on 20/05/2016, respectively. It is indicated that they were christians but were not sworn before their evidence was taken. Similarly, Mariam Chamba, the sole witness for the respondent, testified on 31/05/2016 but was not affirmed after her religion was indicated as being a muslim. There is no gainsaying that their evidence was not recorded in conformity with the guidelines governing recording of evidence.

In the Court's recent decisions in **Catholic University of Health and Allied Sciences (CUHAS) v Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 and **Unilever Tea Tanzania Limited v Davis Paulo Chaula**, Civil Appeal No. 290 of 2019 (both unreported), this

Court grappled with identical situations and pronounced itself that such a violation renders the evidence invalid and therefore vitiates the proceedings. For instance, in the latter case it was categorically 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..."

This position becomes more sound as it accords with the provisions of sections 2 and 4 of the Oaths and Statutory Declarations Act [Cap. 34 R. E. 2019] which, read together, imperatively oblige witnesses in judicial proceedings to give evidence upon oath or affirmation.

In the circumstances, we accept the invitation by the learned counsel to invoke the revisional powers this Court is clothed with in terms of section 4(2) of Appellate Jurisdiction Act, Cap. 141 (R. E. 2019), as we hereby do, to nullify the proceedings and the award by the CMA as well as the proceedings and judgment of the High Court as they emanated from a nullity. We further order that the record of the CMA be remitted back for it to hear and determine the dispute afresh and in

compliance with the law. For the interest of justice, we direct the dispute be presided over by another arbitrator. We make no order for costs.

DATED at DAR ES SALAAM this 7th day of March, 2022.

S. A. LILA

JUSTICE OF APPEAL

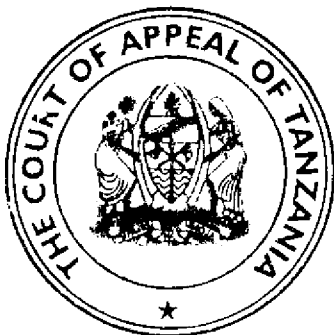
L. S. MWANDAMBO

JUSTICE OF APPEAL

L. L. MASHAKA

JUSTICE OF APPEAL

The Judgment delivered this 10th day of March, 2022 in the presence of Mr. Brave Saronga, learned counsel holding brief for Mr. Rahim Mbwambo, learned counsel for the Appellant and Ms. Esther Msangi, learned counsel holding brief for Mr. Antipas Seraphin Lackam, learned counsel for the Respondent is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "H. P. Ndesamburo".

H. P. NDESAMBURO

SENIOR DEPUTY REGISTRAR

COURT OF APPEAL