IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 16 OF 2022

MIC TANZANIA LTD ..... APPELLANT

VERSUS

ALBERT P. MILANZI ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania Labour Division at Mtwara)

(Twaib, J.)

dated the 2nd day of October, 2018
in
Labour Revision No. 13 of 2017

.....

JUDGMENT OF THE COURT

15th & 22nd March, 2022

KENTE, J.A.:

The appellant's application for revision of an award dated 18th August, 2017 issued by the Commission for Mediation and Arbitration of Mtwara (henceforth the CMA), was dismissed by the High Court (Twaib, J.), sitting at Mtwara on the ground that the contract of employment of one Albet Milanzi (hereinafter the respondent), was procedurally but unfairly terminated. This appeal is against that decision.

Mr. Rahim Mbwambo, learned advocate whose Law Firm represented the appellant company Mic Tanzania Limited, had lodged a memorandum of appeal containing three grounds, thus:

1. *That, the learned High Court Judge erred at law in not finding that the respondent was not an employee of the applicant (sic), as such not entitled to any of the compensation granted by the Trial Arbitrator.*

2. *That, the learned High Court Judge erred at law in not deciding the issues raised and argued before him to wit whether the respondent was earning a monthly salary of TZS.770,000/=, whether the respondent was entitled to TZS.770,000/= remuneration in lieu of termination notice and whether the respondent was entitled to remuneration equal to TZS.770,000/= as annual leave; and.*

3. *That, the learned High Court Judge erred at law in upholding the trial Arbitrator's finding that the respondent was entitled to TZS.4,620,000/= as subsistence allowance without legal justification.*

The background giving rise to the present appeal may be summarized as follows: On 14th January, 2015, the appellant company and the respondent entered into an agreement under which the respondent was appointed as area supervisor for purposes of supervising the selling of the appellant's products and services. Apparently, sometimes in 2017, the said agreement came to an end thereby triggering the dispute between the appellant company and the respondent. Whereas, the respondent successfully alleged before the CMA and the High Court that, he was employed by the appellant company and that his employment contract was unfairly terminated, the appellant company stood steadfast on their position maintaining that, the respondent was an independent contractor and that the contractual relationship between him and the appellant came to an end on 13th January, 2017 when neither party requested for its renewal.

In this appeal, the appellant company was represented by Mr. Ndanu Emmanuel, learned counsel while the respondent appeared in person to resist the appeal, without any legal representation.

At the outset, pursuant to Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), Mr. Ndanu sought and obtained leave of the Court to argue an additional ground of appeal

which he said was very crucial. There being no objection from the respondent, we granted the prayer by the learned counsel for the appellant. To be viewed in a proper perspective, we framed the additional ground of appeal preferred by Mr. Ndanu, thus:

> *"The evidence before the CMA was recorded irregularly contrary to the governing provisions of the law".*

In his submission on this ground, which we think is sufficient to dispose of this matter, and, after adopting the written submissions made in support of the first three grounds of appeal, Mr. Ndanu contended that, the evidence of the witnesses who appeared to testify before the CMA was recorded without the said witnesses being caused to take oath or simply to affirm. Mr. Ndanu submitted that, that was contrary to Rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rule, GN No. 67 of 2007 (hereinafter the CMA Rules). Going forward, the learned counsel submitted that, to compound the problem, the arbitrator did not sign at the end of the testimony of each witness to authenticate the proceedings. For this reason, the learned counsel contended, the proceedings were vitiated and therefore he urged that, the only way forward was for this Court to nullify the proceedings of the two lower courts, set aside the award and order for trial *de novo* before

the CMA. To support his arguments and prayer, the learned counsel referred us to our earlier decision in **Joseph Elisha v Tanzania Postal Bank Civil Appeal No. 157 of 2019** (unreported).

For his part, the respondent, being a lay person fending for himself, had nothing significant to say in opposition to Mr. Ndanu's relatively brief but well versed submissions. The only thing the respondent could say is that, for Mr. Ndanu to say that the witnesses were neither sworn nor affirmed and that the Court should nullify the entire proceedings and set aside the award, that was similar if not equivalent to the appellant disowning his own witnesses. According to the respondent, there is no reason whatsoever for the case to be remitted to the CMA so as to be heard anew.

We have considered the submissions made by Mr. Ndanu together with the authority he cited to us. The fact that during the trial the witnesses were not made to take oath or to affirm before they went on to give evidence and that the arbitrator did not append his signature at the end of the testimony of each witness, does not attract any controversy. It is plain for all and sundry to see. Therefore, the next issue is on the correctness, legality and regularity or otherwise of the proceedings in the CMA which, together with the award, were affirmed

by the High Court. As already observed, Mr. Ndanu while pointing out the glaring omission by the CMA, he insisted that the same was so grave as to render the entire proceedings and award by CMA legally a nullity. Without hesitation, we accept Mr. Ndanu's unfaltering submission.

We have taken great pains to wade through the record of appeal together with the original record of the CMA. Our findings are consistent with those of Mr. Ndanu. That is to say, the evidence of the appellant's witnesses and that of the respondent was not given under oath contrary to rule 25 (1) of G.N No. 67 of 2007. For the avoidance of doubt, the above cited rule requires the parties to a labour dispute such as the instant one, in an attempt to prove their respective cases, to lead evidence through the witnesses who must testify under oath throughout the common three stages of examination of witnesses namely, examination in-chief, cross -examination and re-examination. It follows therefore in our judgment that, before any witness can give evidence before the CMA, he must take oath. In this view, we are reinforced by the provisions of section 4(a) of the Oaths and Statutory Declarations Act (Cap 34 R.E 2019) (henceforth the Act) which provides that:

> 4. *"Subject to any provision to the contrary contained in any written law, an oath shall be made by –*

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

The term "court" is defined under section 2 of the said Act to include, every person or body of persons having by law or consent of the parties authority to receive evidence upon oath or affirmation but does not include a courtmartial established under the National Defence Act. (Act No. 24 of 1966). Obviously, the CMA falls within the scope of the above cited provision of the law.

In the light of what we have said so far and in view of the mandatory requirements of the law, we are firmly of the opinion that, where, as it happened in the case in hands, the law requires a person who is competent and compellable to testify on oath, the omission to do so, vitiates the proceeding as it prejudices the parties. All we can do at this stage is to also observe that, one has to bear in mind that, by saying so, we can neither profess being innovative in jurisprudence nor be accused of disturbing the well established principle of law. That is exactly what we said when we were faced with a similar situation in the cases of **Hamisi Chuma @ Hando Mhoja and Another v. Republic, Criminal Appeal No. 371 of 2015** and **Catholic University of**

Health and allied Sciences (CUHAS) v. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020 (both unreported). We also followed the same principle in the case of **Joseph Elisha** (supra) to which we were ably referred by Mr. Ndanu.

With regard to the omission by the arbitrator to append his signature to the evidence of the witnesses, once again, we are not blazing a trail through an uncharted territory. Taking inspiration from section 210 (1) (a) of the Criminal Procedure Act, [Cap 20 R.E 2019], and Order XVIII rule 5 of the Civil Procedure Code [Cap 33 R.E 2019] we held in **Joseph Elisha** (supra) that, the effect of failure by the presiding judicial officer to append signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings. (**See also Mhajiri Uladi and Another v. Republic**, Criminal Appeal No. 234 of 2020 and **Chacha S/o Ghati Magige v. Republic**, Criminal Appeal No. 406 of 2017 (both unreported).

In the upshot, and for the foregoing reasons, we are inclined to agree with Mr. Ndanu that, indeed the omission by the arbitrator of the CMA to administer oath to the witnesses before they went on to testify and to append signature to each witness's evidence, had the cumulative effect of vitiating the entire proceedings before the CMA.

Without recourse to the remaining grounds, we allow the appeal, quash the proceedings of the CMA and set aside the resultant award. Likewise, we do the same to the proceedings and judgment of the High Court which affirmed the decision of the CMA. In the interest of justice, we remit the matter to the CMA for the parties to be heard *de novo* before another arbitrator, with all possible expedition. This being a labour dispute, we make no order as to costs.

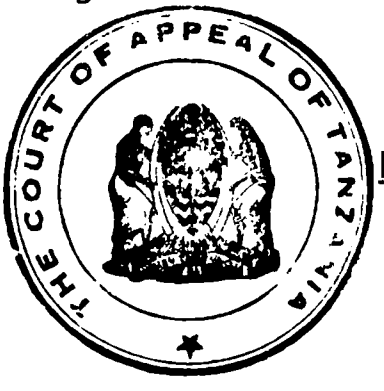
DATED at **MTWARA** this 21st day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered on 22nd day of March, 2022 in the presence of Mr. Raphael Kambona holding brief of Mr. Ndanu Emmanuel, learned counsel for the appellant and the respondent present in person, unrepresented is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL