IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI., J.A. And MWAMPASHI., J.A.)

CIVIL APPEAL NO. 416 OF 2020

UNILEVER TEA TANZANIA LIMITED.....APPELLANT

VERSUS

GODFREY OYEMA .....RESPONDENT

[Appeal from the Ruling and Drawn Order of the High Court of Tanzania, (Labour Division) at Iringa]

(Matogolo, J.)

dated the 14th day of February, 2020

in

Labour Revision No. 27 of 2018

.....

JUDGMENT OF THE COURT

23rd & 28th March, 2022

LILA, J.A.:

The appellant's appeal seeks to challenge the High Court's finding in Labour Revision No. 27 of 2018 in which it declined to revise the award by the Commission for Mediation and Arbitration (the CMA) issued on 16/11/2018. The CMA made a finding that the respondent was constructively terminated from employment and it ordered the appellant to pay him a total of TZS 108,322,558.28.

Brief facts leading to this appeal are not complicated and mostly undisputed. We shall tell. The appellant and the respondent were in

employment relationship since 10/03/2015 when the former employed the later as Environmental Officer and was upgraded to Environmental Compliance Manager on 01/09/2015. However, on 09/04/2018, the respondent tendered a resignation letter and on 16/04/2018 he initiated a labour dispute before the CMA claiming constructive termination. Two witnesses, one for each side, gave evidence before the arbitrator. For the appellant one John Mhavile, the General Manager, testified whereas Godfrey Mchunguzi Oyema, the appellant, was the only witness for his side. As other facts are not necessary for our determination of this appeal, we shall stop here. Suffice it to say that, at the conclusion of the hearing, the CMA issued an award which aggrieved the appellant whose application for revision was turned down by the High Court hence the instant appeal.

Presently, the appellant brought to the fore three grounds of grievances seeking to fault the High Court's finding. However, Mr. Emanuel Kyashama, learned counsel, who acted for the appellant, at the outset of the hearing of this appeal sought leave of the Court, in terms of Rule 4(2)(a) of the Tanzania Court of Appeal Rules, 2019, to bring to our attention two procedural infractions apparent on the face of the record which he thought are decisive and might render hearing of the

grounds of appeal unnecessary. They concerned witnesses' evidences being taken not on oath or affirmation and the arbitrator's failure to append his signature after recording evidence of each witness.

Mr. Yusuph Luwumba, who advocated for the respondent, had no qualms with the prayer by his learned friend. Given the stance the Court has taken in our recent decisions, we agreed with the learned counsel of the parties and asked them to direct their respective arsenals on the two procedural flaws only.

Quite briefly but focused, Mr. Kyashama took us through the relevant pages of the proceedings before the CMA and pointed out that the record bears out that Mr. John Mhavile whose evidence was taken on 07/09/2018 as reflected at page 6 to 9 of the record and Mr. Godfrey Mchunguzi Oyema whose evidence was recorded on 19/10/2018 as reflected at pages 10 to 14 were not sworn before their respective testimonies were recorded. He took it to be a total non-compliance with the provisions of Rule 25 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007 (the CMA Rules) which is a fatal irregularity rendering the proceedings a nullity. In supporting his assertion, he referred us to our recent decision in **Unilever Tea**

Tanzania Limited v. Davis Paulo Chaula, Civil Appeal No.290 of 2019 (unreported).

Elaborating on the second infraction, Mr. Kyashama faulted the arbitrator for not appending his signature after he had concluded taking the testimonies of Mr. John Mhavile and Mr. Godfrey Mchunguzi Oyema at pages 9 and 14, respectively. The authenticity of the evidence is questionable, he insisted. When we put up a question to him whether he was thereby impeaching the contents of the record of appeal, he maintained that signing after every witness's testimony is an assurance to its authenticity. Our pronouncement in the case of **Unilever TEA Tanzania Limited v. Davis Paulo Chaula** (supra) was, again, referred to us. He beseeched us not to depart from the course previously taken by the Court by nullifying the proceedings before the CMA and setting aside the CMA award, nullifying the proceedings before the High Court and the order sustaining the CMA award and finally making an order for retrial by the CMA but before another arbitrator.

Mr. Luwumba, who initially came up with a suggestion that indication by the arbitrator in his award that the two witnesses were sworn ahead of their respective testimonies being recorded was sufficient compliance with the CMA Rules, on reflection, he conceded

that the record ought to have shown that they were sworn as Rule 25 of the CMA Rules dictates before they testified and not in the award. To that effect, he entirely agreed with Mr. Kyashama's arguments and the obtaining legal consequences thereof.

We must, at once, hasten to commend Mr. Luwumba for his change of position. It is indeed evident that the evidence was not recorded in accordance with the requirements under the law. Here we have in mind the provisions of Rules 19(2)(a) and 25(1) of the CMA Rules. The former vests the arbitrator with the power to administer an oath or accept affirmation by the witnesses appearing before him so as to testify. That provision states: -

> *"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."*

Administration of an oath or accepting affirmation is, therefore, a function which the arbitrator is mandated to perform in the conduct of his duties the abrogation of which is not proper. There was a reason for being clothed with that authority or power. In terms of Rule 25(1) of the

CMA Rules, it is a condition precedent that witnesses and parties appearing before him to testify in a labour dispute are imperatively required to prove their cases on oath. In very clear terms, the Rule 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)

We cannot, given the wording of the above Rule, avoid firmly stating here that taking an oath or being affirmed is a precondition before one's evidence is taken before an arbitrator. The arbitrator is obligated to comply with this requirement before recording the evidence of witnesses who appear before him.

It is clear from the record that the testimonies by Mr. John Mhavile and Mr. Godfrey Mchunguzi Oyema who were recorded to be Christians were recorded not on oath. That was obviously wrong and was a breach of the mandatory provisions of the Rules as demonstrated above. Akin situations faced the Court in the case of **Unilever Tea Tanzania Limited v. Davis Paulo Chaula (supra)** cited by Mr. Kyashama, **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 and recently in **The POLYCAP Tanzania Limited v. Mariam Chamba,**

Civil Appeal No, 404 of 2020 (all unreported) and in all these cases we consistently held that the omission vitiates the proceedings because the evidence is rendered invalid. We see no good reason to depart from that stance. We do the same in the instant appeal.

Much as our foregoing finding conclusively disposes of the appeal hence no need to consider the other anomaly highlighted above, we find ourselves compelled to comment, albeit briefly, on the argument earlier raised by Mr. Luwumba although he later withdrew it. The point was that the arbitrator indicated, in his award at page 16 of the record, to have had sworn the witnesses before he took their respective testimonies which presupposed that he did so before he took their testimonies but inadvertently forgot to indicate so in the record. We hasten to say that the CMA Rules regulate the procedure for recording evidence of a witness or a party to a labour dispute. Rule 25(1) of the CMA Rules is couched in mandatory terms. Its compliance must be vivid on the record. A witness or a party must take an oath or affirmation before his evidence is taken and the record should reflect so. The record must speak by itself. Otherwise, doing what was done herein does not serve the intended purpose. To this conclusion, Mr. Luwumba was right to retreat.

In fine, invoking our powers of revision bestowed on us under section 4(2) of the appellate Jurisdiction Act, Cap. 141 R. E. 2019, we hereby quash the proceedings and an award issued by the CMA as well as the proceedings and order by the High Court upholding the CMA award. We direct the record of the CMA to be remitted back to it, for it to hear and determine the dispute afresh. The same has to be presided over by another arbitrator. We make no order for cost, this being a labour matter.

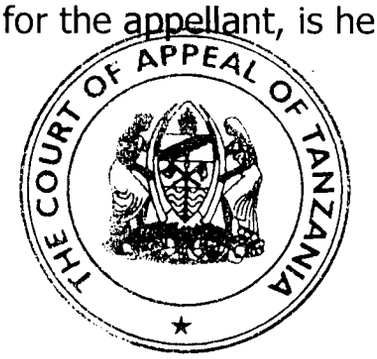
DATED at **IRINGA** this 28th day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This judgment delivered on 28th day of March, 2022 in the presence of Mr. Yusuph Luwumba learned counsel for the respondent, who is also holding brief for Mr. Emmanuel Kyashama, learned counsel for the appellant, is hereby certified as a true copy of original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL