IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CIVIL APPEAL NO. 237 OF 2021

GABRIEL BONIFACE NKAKATISI.....APPELLANT

VERSUS

THE BOARD OF TRUSTEES OF

THE NATIONAL SOCIAL SECURITY FUND (NSSF) .....RESPONDENT

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

(Mansoor, J.)

dated the 28th day of September, 2018

in

Labour Revision No. 2 of 2018

.....

JUDGMENT OF THE COURT

2nd & 9th May, 2022.

FIKIRINI, J.A.:

The appellant, Gabriel Boniface Nkakatisi was previously employed by Said Salim Bakhresa & Co. Limited until he resigned on 31st October, 2013. The appellant was then employed and stationed at Dodoma, by the National Social Security Fund (the NSSF) on 1st November, 2012, as a data entry assistant, initially on a temporary

basis and eventually in 2014, was changed to a permanent basis. During his employment on a temporary basis, the appellant personally and voluntarily paid contributions to NSSF, which qualified him to become a member of the NSSF retirement benefits fund.

Following the resignation from his employment with his previous employer, at the time when already employed by the respondent, and was studying for his Master's Degree and doing his research in Singida, the appellant applied for his NSSF benefits in Morogoro, for the contributions he made while with his former employer, which he was paid Tzs. 4, 024, 464.21. In the meantime, he also applied for the same NSSF benefits while in Singida. The respondent detected fraud in the benefits claims made.

The respondent conducted investigations. Upon completion of the investigations, the appellant was served with a letter to show cause why disciplinary measures should not be taken against him. He appeared before the Disciplinary Hearing Committee on 24th November, 2016, at the NSSF Head Office, Dar es Salaam. The

appellant was found guilty and ultimately his employment was terminated on 15th December, 2016 for being involved in fraudulent transactions in Morogoro and Singida. The appellant admitted to having committed the two fraudulent transactions.

Consequent to the termination, the appellant approached the Commission for Mediation and Arbitration (the CMA) claiming unfair termination. The process started with mediation and after that has failed, the dispute was placed before the Arbitrator. Parties were heard, and in the end, the Arbitrator ruled that the termination of the appellant was substantively fair but unprocedural since the appellant was not availed with the investigation report, thus concluding that the appellant was not afforded a fair hearing. The CMA ordered the respondent to pay the appellant 12 months' salaries under section 40 (1) (c) of the Employment and Labour Relations Act, No. 6 of 2004 (the ELRA).

Upset by the decision, the respondent successfully preferred a revision before the High Court, styled as Labour Revision No. 2 of

2018. The High Court allowed the revision after concluding that the principles of natural justice were observed by the employer and the Disciplinary Committee. The termination was thus substantially and procedurally fair. The CMA decision and the award dated 7th December, 2017 were revised, quashed, and set aside.

The appellant was aggrieved by the High Court decision and appealed to this Court on four grounds of appeal:

1. *That, the learned High Court Judge erred in law in overturning the CMA award when indeed the appellant had not been given a fair hearing.*

2. *That, the learned High Court Judge erred in law in holding that the employer had no duty to supply the appellant with the investigation report which formed basis of commencing the disciplinary charges against him.*

3. *That, the learned High Court Judge erred in law in holding that the principles of natural justice were complied with by the respondent and the Disciplinary Committee.*

4. *That, the learned High Court Judge erred in law in issuing a decree on appeal when no appeal was pending before the Labour Court.*

On 5th May, 2022 when this appeal was called on for hearing, Mr. Paul B. S. M. Nyangarika, learned counsel, appeared representing the appellant. On the respondent's part Ms. Jenipher Kaaya, learned Senior State Attorney assisted by Ms. Jacquline Kinyasi, Mr. Frank Mgeta, and Mr. Boaz Msoffe all learned State Attorneys, appeared representing the respondent.

Before commencing the hearing, we invited the learned counsel for the parties to address us on the propriety of the proceedings before the CMA as the record of appeal on various pages indicated all witnesses testified without being sworn or affirmed, which is contrary to the requirement under rule 19 (2) (a) read together with rule 25 (1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 67 of 2007 (GN. No. 67 of 2007).

Mr. Nyangarika affirmatively acknowledged our observation that all the witnesses who testified before the CMA did so without being sworn. On her part, Ms. Kaaya also upon perusal of the record of appeal admitted to the Court's observation of the impropriety of the

proceedings. They thus urged us to invoke our powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and nullify the proceedings, quash the decisions of the CMA and resultant revision before the High Court, set aside the CMA award, and order the record to be remitted back to the CMA for rehearing.

It is trite law that witnesses take oath before they give evidence. Such requirement is also provided by section 4(a) of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019] (the Act) as a mandatory requirement. The provision provides thus:

> "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".*

The CMA is a court within section 4(a) of the Act as the term "court" under section 2 of the Act is defined to include every person or body of persons having authority to receive evidence upon oath or affirmation.

Besides the requirement under section 4 (a) of the Act, Arbitrators at the CMA in the exercise of their duties have been vested with powers to administer oaths or accept affirmations under rule 19(2)(a) of GN No. 67 of 2007. The provision states:

> "19 (2) *The powers of the Arbitrator include: -*
>
> *(a) Administer oath or accept affirmation from any person called to give evidence;"*

And this goes hand in hand with the provision of rule 25(1) of GN. No. 67 of 2007, that witnesses before the CMA are required to give evidence under oath. The provision provides:

> *"The parties shall attempt to prove their respective cases through evidence and* ***witnesses shall testify under oath*** *through the following process* "[Emphasis supplied]

It thus goes without saying that it is a mandatory requirement that any person who appears in court as a witness has to be sworn or affirmed before giving testimony.

This Court on several occasions when faced with an akin scenario as it did in the **Catholic University of Health and Allied**

Sciences (CUHAS) v. Ephiphania Mkunde Athanas, Civil Appeal No. 257 of 2020 (unreported), underscored firmly that the failure of the Arbitrator to administer oath on the witness is fatal to the proceedings rendering the same null and void.

In the record of appeal before us, it is evident that four witnesses gave evidence without taking an oath or being affirmed. This is found on pages 25, 34, 41, and 48 of the record of appeal, when PW1, DW1, DW2, and DW3 testified. What can be found on record are the particulars of the witnesses including their religions but without any indication that the witnesses were sworn or affirmed before testifying. In our view, mentioning their religion is not a proof that they were sworn or affirmed. The record must speak for itself loud and clear by indicating that witnesses were sworn or affirmed before giving their testimonies.

In the **Catholic University of Health and Allied Sciences** (supra), the Court had this to say when stressing on the requirement of witness to testify under oath or affirmation: -

> *"Rule 25 (1) of GN. No. 67 of 2007 compels a witness to testify under oath.* ***Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case****.....On the basis of the above stated reasons, we find that the omission vitiates the proceedings of the CMA. In the event, we hereby quash the same and those of the High Court."* [Emphasis added]

See also: **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019 and **Unilever Tea Tanzania Limited v. Davis Paul Chaula**, Civil Appeal No. 290 of 2019, and **Attu J. Myna v Cfao Motors Tanzania Limited,** Civil Appeal No. 269 of 2021 (all unreported).

The consequences of not administering oaths or affirmations accepted before giving evidence vitiates the proceedings and prejudices the parties' case.

We hereby invoke the powers bestowed on us in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and nullify the proceedings, quash the CMA and High Court decisions, set aside

the CMA's award, and the High Court order which revised the award and no order as to costs.

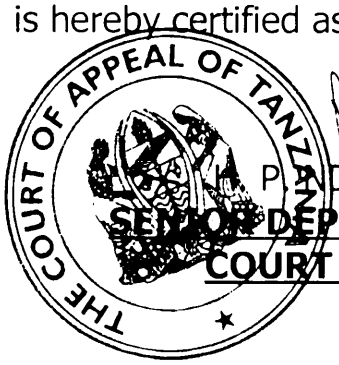
DATED at **DODOMA** this 9th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 9th day of May, 2022 in the presence of Mr. Paul B. S. M. Nyangarika, learned counsel for the Appellant and Mr. Calimius Ruhinda, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL