IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 105 OF 2021

BULYANHULU GOLD MINES LIMITED .... APPELLANT

VERSUS

KENETH ROBERT FOURIE.. RESPONDENT

[Appeal from the Decision of the High Court of Tanzania (Labour Division) at Shinyanga]

(Mkwizu, J.)

dated the 10th day of July, 2021
in
Labour Revision No. 15 of 2020

....

JUDGMENT OF THE COURT

15th & 22nd July, 2022

GALEBA, J.A.:

In this appeal, Bulyanhulu Gold Mines Limited, the appellant employed Keneth Robert Fourie, the respondent as a Fixed Plant Maintenance Specialist for a fixed term of 24 months effective 1st July 2017. It however, transpired that about thirteen (13) months later, on 31st August, 2018, the respondent was terminated on grounds of ill health. He was aggrieved by the termination and by a CMA F. 1, signed

on 18th September 2018, he instituted Labour Dispute No. RF/CMA/SHY/KHM/205/2018 in the Commission for Mediation and Arbitration at Shinyanga (the CMA), praying for payment of a total of United States Dollars 484,902.00. That amount was composed of four figures; **one,** US$ 222,859.00 being 13 months' gross salary for the remaining period of the contract; **two**, US$ 205,716.00 being twelve months' gross salary as compensation for unfair termination; **three**, US$ 4,898.00 being 9 days leave accrued but not taken, and; **four**, US$ 51,429.00 being 3 months' gross salary in lieu of notice. He also claimed for an amount he did not specify, under the sub title: accumulated international saving plan until 17th September 2019. He also indicated that the appellant had no reason to terminate him and even the legal procedures to do so were not abided by. The appellant disputed the claim, but at the end of the trial, the CMA awarded the appellant an amount of USD$ 484,902.00, as pleaded plus an unspecified amount being accumulated international savings plan proceeds. This award aggrieved the appellant who lodged Labour Revision No. 15 of 2020 before the High Court, Labour Division at Shinyanga. The High Court

considered the parties' arguments and partly agreed with the CMA award and partly reversed it. Although the decision of the High Court set aside some of the respondent's reliefs in favour of the appellant, still the appellant was not at all pleased with the decision, hence the present appeal.

In this appeal, the appellant raised 3 grounds of appeal, but for reasons that will become obvious in the course of this judgment, we will only entertain the first ground of appeal which is a complaint that:

> *"That the Learned High Court Judge erred in law in upholding the award of the Commission for Mediation and Arbitration which is based on unsworn testimony."*

When this appeal came up for hearing on 15th July, 2022, Mr. Faustin Anton Malongo together with Ms. Caroline Lucas Kivuyo both learned advocates, entered appearance for the appellant. The respondent had the services of Ms. Oliva Mkanzabi Malekia, also learned advocate.

As counsel for the appellant had lodged written submissions in compliance with rule 106 (1) of the Tanzania Court of Appeal Rules 2009, (the Rules), in supporting the appeal, Mr. Malongo informed us that they did not wish to add anything in clarifying their written submissions. He only prayed that we consider the submissions and allow the appeal, with orders that the matter be remitted to the CMA for a fresh trial.

Although Ms. Malekia, had as well lodged the submissions in objecting to the appeal, she indicated to us, and we permitted her to exercise her right under rule 106 (10) (a) and (11) of the Rules, to clarify further her position maintained in the respondent's written submissions.

The gist of the first ground of appeal as per the appellant's written submissions, is that, as it can be observed at page 6 of the record of appeal, one of the appellant's witnesses, named Shukuru Mwainunu adduced evidence but, he was not sworn first. That anomaly, according to the appellant's counsel, offended the provisions of rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, Government Notice No. 67 of 2007, (the Mediation and Arbitration Rules). To support the appellant's position, Mr. Malongo relied on the

case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 (unreported). According to him, the requirement for all witnesses to take oath before adducing evidence in the CMA was a basic and a mandatory requirement which has to be complied with as a matter of law. As indicated above, their prayer was for this Court to nullify the entire proceedings and award of the CMA and to quash the judgment of the High Court with directions that the matter be heard afresh at the CMA.

Ms. Malekia was not at all intimidated by Mr. Malongo's submissions. She stuck to her guns, that despite the anomaly, the Court was not out of options in order to ensure that justice is done. She submitted that, the option in the circumstances, was for the Court to expunge the offensive evidence of Shukuru Mwainunu and proceed with the business of the day, that is, to hear and to determine the other grounds of appeal. If we understood Ms. Malekia well, her point was that expunging Shukuru Mwainunu's evidence from the record cannot, in any way, affect the award of the CMA and, therefore, the judgment of the High Court.

Reacting to our inquiry on whether the disputed evidence of Shukuru Mwainunu was taken into account in reaching at the decision in the CMA award, the learned advocate was of a clear affirmative response. Nonetheless, she was of a firm position that, despite the fact that the award of the CMA contained the substance of the evidence of Shukuru Mwainunu, the evidence could be expunged leaving the award, valid and unaffected. Ms. Malekia referred us to this Court's decision in **North Mara Gold Mine Limited v. Khalid Abdallah Salum,** Civil Appeal No. 463 of 2020, (unreported), to support her position.

In rejoinder, Ms. Kivuyo, reiterated what they had submitted in the written submissions but added that the authority cited by Ms. Malekia in **North Mara Gold Mine Limited** (supra), supported the appellant's position because in that case the offensive evidence was expunged and the matter was remitted to the CMA for trial *de novo* which was their prayer in this appeal.

To begin with, we have perused the record of the CMA and we are satisfied that, before it, three witnesses testified, two for the defence and one for the applicant's case. Shukuru Mwainunu, (DW1) and Dr.

Kudra Said Mfaume, (DW2), testified for the appellant and only the respondent adduced evidence in the CMA to support his case. Of the three, no oath or affirmation was administered in respect of Shukuru Mwainunu. The other two were either sworn or affirmed and adduced their evidence, quite in compliance with the law. The above status is common ground and no dispute exists in respect thereof.

Before getting to the CMA proceedings, we think it is appropriate, to lay ground as for this Court's position generally, on issues of taking evidence from witnesses in all courts. Before taking evidence from a witness in a court of law, it is mandatory for a judicial officer presiding over the proceedings to administer oath to a witness before the latter can adduce his or her evidence. This is a deep-rooted rule of court practise that is now a traditional legal norm in this jurisdiction. That is what this Court reaffirmed in the case of **Attu J. Myna v. CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021 (unreported). In that case this Court observed that:

> *"It is now clear that the law makes it mandatory for the witnesses giving evidence in court to do so under*

oath. It follows therefore that the omission by the witnesses to take oath before giving evidence in this case is fatal and it vitiates the proceedings."

See also **Tanzania Portland Cement Co. Ltd v. Ekwasi Majigo,** Civil Appeal No. 173 of 2019 and **The Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020 (both unreported).

With that general position in mind our take off, point we propose, to be rules 19 (2) (a) and 25 (1) of the Mediation and Arbitration Rules. Those rules provide as follows:

"19 (2) The power of the arbitrator includes to-

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

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 ...

(b) cross examination ... and;

(c) re- examination ..."

[Emphasis added]

This Court has interpreted rule 25 (1) of the Mediation and Arbitration Rules read together with section 4 (a) of the Oaths and Statutory Declarations Act, [Cap 34 R.E. 2019], to be the law imposing a mandatory obligation on the arbitrator to carry out his or her duty of administering oath provided for under rule 19 (2) of the same Rules, without exception, choice or discretion. The compliance with the requirement is as critically important for the CMA, as it is profoundly indispensable for normal courts. Evidence taken on oath or affirmation guarantees its competence, dependability, credibility and even authenticity. In this respect, this Court observed in the case of **SNV Netherlands Development Organization Tanzania v. Anne Fidelis**, Civil Appeal No. 198 of 2019 (unreported) that:

> *"This Court has repeatedly emphasized the need of every witness who is competent to take oath or affirmation before the reception of his or her evidence in the trial court including the CMA. If such evidence is received without oath or affirmation, it amounts to*

no evidence in law and thus it becomes invalid and vitiates the proceedings as it prejudices the parties' case."

See also this Court's decision in **Capital Drilling (T) v. Alex Barthazali Kabendera,** Civil Appeal No. 370 of 2019 (unreported). So, we are clear in our mind that the evidence taken in the CMA, without the arbitrator first administering oath or affirmation in respect of one of the witnesses is no better than nothing at all, such that it cannot survive a slightest move to have it expunged from the record. In the circumstances, we cannot therefore ask ourselves twice on the kind of legal action to in respect of the evidence of Shukuru Mwainunu. We thus, confidently expunge it from the record of the CMA.

That, however, does not end the matter, for it provides no way forward consequent to the blow on the defence case in the CMA. Determination of what next is crucial because the real contest between Mr. Malongo and Ms. Malekia was the way forward. Mr. Malongo's view was that we expunge the offensive evidence of the witness and remit the record to the CMA for trial *de novo,* whereas Ms. Malekia's stand point

was that, in the aftermath of expunging the erroneously recorded evidence, we proceed to determine the appeal based on other grounds of appeal because the expunged evidence would have no effect on the CMA award.

One point we want to make clear in the context of Ms. Malekia's argument that after expunging the offensive evidence, we proceed with hearing of the appeal. The award of the CMA is contained in the record of appeal from page 188 to page 204. Out of those pages, pages 192 and 193, the CMA summarized the substance of the evidence of Shukuru Mwainunu which we have just expunged from the record. The evidence is also touched on here and there throughout the award and the same evidence was part of the material that the arbitrator relied upon in reaching at her decision contained in the award. That means, the CMA relied on some evidence which is illegal and which ought not to have been relied upon. That is so because the illegality of the evidence of Shukuru Mwainunu by being relied upon by the arbitrator in composing the award, the evidence contaminated and adulterated the award thereby rendering it corrupted and leaving it impure for purposes of the

law. That is why we do not agree, at any level, with Ms. Malekia on the issue of retaining the award as valid. And yes, we will rely on the case of **North Mara Gold Mine Limited** (supra), but we will do so, in terms of what it decided, not what Ms. Malekia said it decided. In that case, the award of the CMA was not saved, it was nullified. That is why in no time the award of the CMA in this matter will necessarily have to suffer pain of equal measure as the evidence of Shukuru Mwainunu.

Based on the above discussion and without any further ado, the award of the CMA is hereby nullified. Since, no appeal or revision can stem and proceed from a nullity, the proceedings and the judgment of the High Court in Labour Revision No. 15 of 2020 are equally nullified and quashed because the appeal was challenging the award which has been nullified. What survives the orders we have just made so far, is the proceedings of the CMA before the evidence was taken, and the evidence of the respondent, PW1 and Dr. Kudra Said Mfaume, DW1.

As for the way forward, we intend to invent no wheel in these proceedings; we will adopt the style in **North Mara Gold Mine Limited** (supra). In that case, the evidence of PW1 and DW1 was recorded

without oath or affirmation. Like we have done in this appeal, the Court expunged the unsworn evidence, nullified the award of the CMA and quashed the judgment of the High Court. Next, it stated:

> *"Ultimately, we order that Labour Dispute No. CMA/MUS/187/2019 be remitted to the CMA for rehearing the testimonies of PW1 and DW1 before another Arbitrator in accordance with the law, followed by composing the award as soon as practicable."*

As we already did what is necessary, that is to make the deserving orders, in the circumstances of this matter, this appeal is allowed based on the first ground of appeal. Meanwhile, we direct that the original record in Labour Dispute No. RF/CMA/SHY/KHM/205/2018 be remitted to the CMA for taking evidence of DW1, Shukuru Mwainunu according to law, and composing a fresh award. For avoidance of any uncertainties, the proceedings of the CMA may be presided over by any arbitrator including the one who did so in the previous proceedings. Considering the nature of the matter and the orders just made, seeking to resolve

other grounds of appeal would be worthless. Lastly, we make no order as to costs, since the matter is a labour dispute.

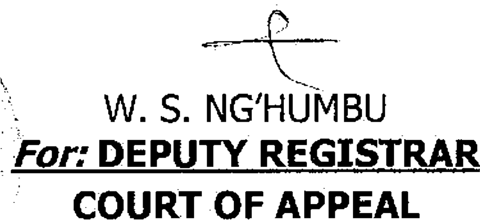
DATED at **SHINYANGA**, this 22nd day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of July, 2022 in the presence of Mr. Imani Mfuru, learned counsel for the Appellant, and Mr. Imani Mfuru holding brief for Ms. Oliva Mkanzabi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



W. S. NG'HUMBU
***For:* DEPUTY REGISTRAR**
COURT OF APPEAL