IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 228 OF 2019

CHRISTIAN MINDE..... APPELLANT

VERSUS

TANESCO..... RESPONDENT

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

(Utamwa, J.)

dated the 16th day of April, 2019
in
Labour Revision No. 7 of 2018

.....

JUDGMENT OF THE COURT

4th & 9th November, 2022

GALEBA, J.A.:

On 12th June, 1992 the appellant, Christian Minde was employed by the respondent, the Tanzania Electric Supply Company Limited (TANESCO). That relation ended on 20th May 2011, when the respondent terminated the appellant's services. His termination was on account of allegations of gross misconduct that led to unexplained disappearance of a Concentric Single Core Cable measuring 16,059 meters long, thereby occasioning loss of Tanzania Shillings 175,231,688.22 to the respondent. At the time of his

termination, the appellant held the position of Regional Supplies and Transport Officer in TANESCO, and was responsible for Tabora Region.

Aggrieved by the termination, the appellant challenged that act of his employer, *vide* Labour Dispute No. CMA/TAB/DISP/52/2011 before the Commission for Mediation and Arbitration at Tabora, (the CMA). Amicable settlement by way of mediation failed, and arbitration hearing followed. The respondent called three witnesses to justify the termination and the appellant testified on his own behalf. Nonetheless, at the end of the arbitration, the appellant's claim for reinstatement, was dismissed for want of merit on 22nd January 2013. The appellant was not satisfied by the award. He lodged Labour Revision No. 7 of 2018 before the High Court of Tanzania at Tabora, to challenge the award of the CMA. This revision, like his claims in the CMA, did not succeed; it was dismissed for want of merit on 16th April 2019. This decision of the High Court aggrieved the appellant. Thus, he lodged the present appeal in which he raised three grounds.

It turned out however, that two of the grounds were later abandoned and the one remaining was not contested by the respondent's advocate. We will get back to the details of all that, in just a moment.

When this appeal was called on for hearing on 4th November, 2022, Messrs. Noel Edward Nkombe and Saikon Justin Nokoren, both learned advocates, entered appearance for the appellant. The respondent enjoyed the services of a team of four learned State Attorneys, led by Mr. Ponziano Lukosi, learned Principal State Attorney from the Office of the Solicitor General. Other State Attorneys on the respondent's side, were Mr. Lameck Merumba, learned Senior State Attorney, Mr. George Kalenda and Ms. Juliana Kipeja, both learned State Attorneys.

As hinted on a while ago, when Mr. Nokoren took the floor to address the Court on the appeal, he made a prayer requesting us to mark the second and third grounds of appeal abandoned. He informed the Court that in pursuit of this appeal, the appellant would maintain and pursue only the first ground of appeal which was to the effect that:

> *"That both the learned Judge of the High Court and the trial Commission for Mediation and Arbitration (CMA) erred in law to decide in favour of the respondent on the bases of the respondent's unsworn evidence adduced before the CMA."*

When we inquired from Mr. Kalenda whether he had any observation, he had no objection to Mr. Nokoren's decision to abandon the two grounds.

He further conceded to the substance of the remaining ground of appeal which is quoted above. He submitted that the ground was meritorious because the evidence of Elias J. Chilwanga DW1, Jane Lipembe, DW2 and that of Benard Paulo Masalu DW3, was taken without oath or affirmation. He prayed that the evidence of these witnesses be expunged from the record. However, because the evidence of PW1, Christian Minde was taken on oath, such evidence, he insisted, should not be expunged. He finally moved the Court, after expunging the evidence of the three defence witnesses, also to nullify the award of the CMA and all the proceedings of the High Court and set aside the judgment. He finally prayed that an order be made directing that the original record of the CMA be remitted back to that commission for it to hear the evidence from the respondent's witnesses and compose a fresh award.

On his part, Mr. Nokoren, was in agreement with every aspect proposed by his adversary, including the way forward, except for one prayer; the prayer that the evidence of PW1, be left intact. He submitted that the evidence of PW1, should, like that of DW1, DW2 and DW3, be expunged from the record, because the Arbitrator did not append his signature, immediately after recording that evidence.

In rejoinder, Mr. Kalenda in quite emphatic terms, insisted that the evidence of PW1, should not be expunged, and cited to us this Court's decision in **North Mara Gold Mine Limited v. Khalid Abddallah Salum,** Civil Appeal No. 463 of 2020 (unreported).

Briefly, parties were in agreement that the first ground of appeal be allowed with orders that the matter be remitted to the CMA for retrial by taking evidence from the respondent's side, after expunging the offensive evidence and nullifying all the proceedings at the High Court and setting aside its judgment and, of course, the CMA award. That we shall do in due course, but one issue remains unresolved, that is, whether, as we expunge the evidence of the three respondent's witness, should we also expunge that of the appellant, for him to give evidence afresh as prayed by his own advocate.

In short, learned advocates are right on their submissions that the evidence of DW1, DW2 and DW3 between pages 25 to 28, 28 to 38 and 38 to 47 respectively, was recorded by the CMA without administering oath to those witnesses. In law, that anomaly offended rules 19 (2) (a) and 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, Government Notice No. 67 of 2007, (the Mediation and Arbitration Rules),

read together with section 4 (a) of the Oaths and Statutory Declarations Act, [Cap 34 R.E. 2019] (the Oaths Act). Rules 19 (2) (a) and 25 (1) of the Mediation and Arbitration 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]

Section 4 (a) of the Oaths Act provides that:

> *"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."*

This Court has interpreted rule 25 (1) of the Mediation and Arbitration Rules in conjunction with section 4 (a) of the Oaths Act, 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 or discretion. The compliance with the requirement is a must, to both the CMA and to normal courts. Evidence taken on oath or affirmation guarantees competence and dependability of the evidence taken. 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 decisions in **Attu J. Myna v. CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021 and **Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020 (both unreported).

So, we are in agreement with both learned counsel that since the evidence of DW1, DW2 and DW3 in the CMA was recorded unlawfully without

the arbitrator first administering oath or affirmation, that evidence is not only invalid but the same is no better than the evidence that was not taken. Thus, without any further ado, the evidence of DW1, DW2 and DW3 is hereby expunged from the record. Following this stance, we will make consequent directives and orders on the way forward in due course, but for now we will turn to a short discussion on the issue we earlier framed of whether the evidence of PW1 should also go, or it should be retained.

We propose to start with section 39 of the Employment and Labour Relations Act, [Cap 366 R.E. 2019] (the ELRA), read together with rule 24 (3) of the Mediation and Arbitration Rules. The said section 39 of the ELRA provides as follows:

> *"In any proceedings concerning unfair termination of an employee by an employer,* ***the employer shall prove that the termination is fair.***"
>
> [Emphasis added]

In complementing the above quoted provision, rule 24 (3) of the Mediation and Arbitration Rules provides as follows:

> *"(3) The first party to make an opening statement shall present its case first throughout the proceedings. If the*

parties do not agree about who shall start, the Arbitrator shall be required to make a ruling in this regard.
Provided that, in a dispute over an alleged unfair termination of employment, ***the employer will be required to start as it has to prove that the termination was fair.***"

[Emphasis added]

In view of the above provisions of the ELRA and of the Mediation and Arbitration Rules, here are a few observations we wish to make. **First**, both provisions require the employer to start defending its position in adducing evidence in justifying that the disputed termination of the complainant was fair. After the complainant has fully heard the whole evidence of the employer, he then comes in, not only to restate his position that the termination was unfair, but also to prosecute his case while well and fully versed with the entire evidence constituting the position of the employer. Thus, in this case as the dispute is for unfair termination, the sequence is that the employer must start to adduce his evidence and the aggrieved employee comes next.

Second, according to the prayers made by counsel for both parties at the hearing, given the nature of the respondent, a public body and a legal entity, the orders and directions that we will eventually make, will not be

compelling her, to necessarily call the same witnesses, that is Elias J. Chilwanga, Jane Lipembe and Benard Paulo Masalu, whose evidence we expunged above. Once we order a trial *de novo*, any witnesses in number and character may be called by the respondent. In that context, this Court cannot safely guarantee, that the evidence that will be tendered by the respondent at the retrial, will be identical in substance to the expunged version, to which the appellant responded in June, 2012. Had we been sure that the evidence to be tendered by the respondent when the matter comes up for retrial, is identical in import, then we would entertain no concerns or issues with leaving the appellant's evidence intact.

Third, generally the position obtaining in this country, is that a retrial is ordered where the original trial was illegal or defective and justice demands it, like in the present case. However, a retrial cannot be ordered where, doing so would amount to putting a party, whose evidence is expunged, in an advantageous position with a clear potentiality of coming up with a better version of the evidence to defeat that of the other party. In the **Director of Public Prosecutions v. Wambura Mahega @ Kisiroti**, Criminal Appeal No. 282 of 2017 (unreported), although, a criminal matter, after a thorough discussion of what was decided in **Fatehali Manji v. R,** [1966] E. A. 341,

we observed that, in making a decision whether to order a retrial or not, the overriding factor to consider, is what do the interests of justice dictate in the circumstances at hand.

When pressing for retention of PW1's evidence on record, Mr. Kalenda referred us to the case of **North Mara Gold Mine Limited** (supra), arguing that in that case, the Court held that the record to be expunged, is only of the offensive evidence. We agree, but this Court has observed on countless occasions, that each case must be decided based on its own facts. In the case referred, there was no party pushing for expunging the remaining evidence of PW2. In this case, PW1 wants his own evidence expunged for reasons that the arbitrator who recorded it did not sign it. However, Mr. Kalenda failed to demonstrate how the respondent would be prejudiced if the appellant would be permitted to adduce evidence afresh just as the respondent. So, we are not persuaded by his contention in that respect.

Considering the observations, we have highlighted above, the interests of justice of this matter do not dictate that we compel the appellant (PW1) to maintain the evidence he adduced over ten (10) years ago on 28th June, 2012 in response to the expunged version of the respondent's evidence. That is so because we will have assumed, which we have observed to be risky and

uncertain, that PW1's evidence of 2012 constitutes relevant response to the evidence which will be adduced by the respondent at a retrial. That kind of guess work, we restrain ourself to do. Interests of justice in this matter, demand that once the respondent will have adduced her evidence by using whoever will be her witness or witnesses, then the appellant be permitted to testify in defending his position based on the evidence he will have heard at the retrial.

Based on the above discussion, and consequent to expunging the evidence of DW1, DW2 and DW3 above, the evidence of PW1 is also expunged from the record. We also nullify the award of the CMA in Labour Dispute No. CMA/TAB/DISP/52/2011, dated 22nd January, 2013. Further, since no valid Labour Revision to the High Court, could have emanated from an invalid award, the entire proceedings in Labour Revision No. 7 of 2018, are equally nullified and the judgment of that court is quashed. All orders emanating from the quashed judgment, are hereby set aside.

In brief, all proceedings of the CMA immediately following the five (5) issues that were drawn at page 24 of the record of appeal onwards, is the only part of the CMA record that we have nullified. The issues and any record

of the CMA before their framing, constitutes a valid record of that Commission.

Thus, this appeal is hereby allowed. Meanwhile, we direct that the original record in Labour Dispute No. CMA/TAB/DISP/52/2011 be remitted to the CMA at Tabora for taking evidence afresh from both parties according to law, and composing a new award. For avoidance of any doubt, a retrial ordered may be presided over by any other arbitrator. Lastly, we make no order as to costs, since the matter is a labour dispute.

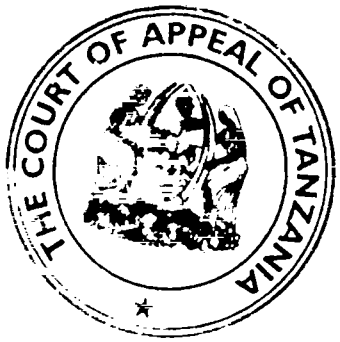
DATED at **TABORA** this 9th day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 09th day of November, 2022 in the presence Mr. Saikon Justin Nokoren, learned counsel for the Appellant and Mr Lameck Merumba, Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL