IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 320 OF 2019

GEOFFREY RAYMOND KASAMBULA..... APPELANT

VERSUS

TOTAL TANZANIA LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam
(Wambura, J.)

dated the 13th day of September, 2019
in
Revision No. 280 of 2018

.....

RULING OF THE COURT

26 September & 1st December, 2022

MKUYE, J.A.:

In this appeal, the appellant Geoffrey Raymond Kasambula has appealed against the decision and decree of the High Court (Labour Division) dated 13th September 2019, (Wambura, J.) in Revision No.280 of 2018.

The historical background of the matter leading to this appeal is that the appellant was employed by the respondent, Total Tanzania Limited, on 15th September 1998. He held various positions up to the position of Maintenance Coordinator at a salary of Tshs.1,595,578.00 per month until his termination. According to the respondent, the ground for his termination was that she was not satisfied with the

appellant's work performance as the records of his Annual Performance Review indicated that he performed poorly since 2014.

On 1st October 2015, the respondent convened a disciplinary committee where the appellant was called upon to answer charges against his poor work performance. At the end, the respondent decided to terminate the appellant's employment.

Aggrieved by the respondent's decision to terminate him, the appellant instituted proceedings at the Commission for Mediation and Arbitration (CMA) complaining that his termination was unfair both procedurally and substantively. He sought for reinstatement without any loss of remuneration from the date of his termination.

Upon hearing both parties, the CMA found that the appellant had been unfairly terminated and awarded him compensation equal to twelve months salary. Disgruntled, the appellant lodged an application for revision before the High Court which, upon hearing both parties, it made a finding that the appellant had been fairly terminated both procedurally and substantively. As to his terminal benefits, it held that the appellant was entitled to one month salary in lieu of notice, one month salary in lieu of annual leave if not taken, repatriation costs to his place of recruitment and a Certificate of Service.

Still undaunted by the decision of the High Court, the appellant has appealed to this Court on three grounds of appeal as follows:

> *"1) That the learned High Court Judge erred in law and facts by failing to realize that there was no poor performance by the appellant.*
>
> *2) That, the learned High Court Judge erred in law and facts by considering respondents' prayers without being properly moved.*
>
> *3) That, the learned High Court Judge erred in law and facts by disregarding that there was no reason for termination as well as procedure for termination was not followed as provided by the law."*

At the hearing of the appeal, the appellant was represented by Mr. Sosten Mbedule learned counsel, while Mr. Ramadhani Karume, also learned counsel, represented the respondent. Both counsel also filed their respective written submissions as per the law.

Ahead of hearing of the appeal in earnest, the Court wished to satisfy itself on whether or otherwise the arbitrator had appended his signature at the end of each witness's testimony, more so, having in mind the stance taken by the Court in its decisions on the aspect.

Mr. Mbedule, much as he readily conceded that the arbitrator did not append his signature after the end of each witness's testimonies, he

also assailed him for failure to sign after the witnesses had taken their oaths before testifying.

Beginning with the second limb of the infraction, Mr. Mbedule submitted that after Manimba Kikuli (PW1) (See page 140 of the record of appeal), Amelye Ernest Nyembe (PW2) (page 148) and Geofrey Kasambula (DW1) (page 158-159) had taken their oaths, the arbitrator did not append his signature thereafter. While relying on the case of **The Copycat Tanzania Limited v. Mariamu Chamba**, Civil Appeal No.404 of 2020 (unreported), he argued that failure by the arbitrator to sign after the witnesses had taken their oaths vitiated the proceedings rendering them to be a nullity.

Regarding the first limb of the infraction, he took us to pages 158-159 of the record of appeal where PW1 testified but there was no signature of the arbitrator appended at the end of his testimony. He went on to point out that after PW2 had testified as shown at page 154 of the record of appeal the arbitrator did not sign. Likewise, he said, the arbitrator did not append his signature at the end of the testimony of DW1 as shown at page 169 of the record of appeal.

Due to this anomaly, Mr. Mbedule contented that it vitiated the whole proceedings. He, thereafter, beseeched the Court to nullify the proceedings, quash the decision and order for a retrial in terms of

section 4 (2) of the Appellate Jurisdiction Act, [Cap.141 R.E.2019] (the AJA). He also prayed to be spared from costs.

In response, Mr. Karume, contended that the witnesses, PW1, PW2 and DW1 as shown at pages 141,148 and 159 respectively, were sworn before they gave their testimonies. He elaborated that, although rule 19 (2) (a) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, 2007 (GN No.67 of 2007) (henceforth the "Mediation and Arbitration Guidelines Rules"), provides for among others the powers of the arbitrator in the course of arbitration, to administer oath or affirmation to a witness to give evidence, the provision does not require him to sign after the oath or affirmation is taken. As regards the arbitrator's failure to append his signature at the end of each witness's testimony, he argued, although it is a practice for the arbitrator to sign at the end of each witness's evidence in this matter, the arbitrator did not sign.

In rejoinder, Mr. Mbedule stressed that failure to append signatures after the witnesses had completed to testify vitiated the proceedings and thus rendered them a nullity. He also reiterated his prayer made earlier on for the nullification of the proceedings, quashing the decision and ordering for a retrial.

We have considered the arguments from both sides and, we think, the issues for our determination are two. **One**, whether the arbitrator signed after the respective witness's had taken their oaths. **Two**, whether the arbitrator signed after the completion of each witnesses' testimony.

On the first issue, we wish to begin with restating the provisions of rule 19 (2) (a) and 25 (1) of Mediation and Arbitration Guidelines Rules regarding oaths. Rule 19 (2) (a) states as follows:

> *"The powers of the arbitrator include to -*
> *(a) administer an oath or accept an affirmation from any person called to give evidence."*

According to the above cited provision, the arbitrator is given power to administer oath or accept affirmation to a person required to adduce evidence on a matter before the CMA.

On the other hand, rule 25 (a) of the same Mediation and Arbitration Guidelines Rules requires the parties and witnesses to prove their respective cases by evidence which is to be given under oath in the following terms:

> *"The parties shall attempt to prove their cases through evidence and witnesses shall testify under oath through the following process-..."*

This position of the law was emphasized in the cases of **Unilever Tea Tanzania Limited v. David John,** Civil Appeal No.413 of 2020; **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020; **Unilever Tea Tanzania Limited v. Godfrey Oyema**, Civil Appeal No.416 of 2020 (all unreported); and **The Copycat Tanzania Limited** (supra). For instance, in the case of **The Copycat Tanzania Limited,** (supra) after the Court had been satisfied that the witnesses testified not on oath or affirmation as required by rules 19 (2) (a) and 25 (1) of the Mediation and Arbitration Guidelines Rules made a finding that the infraction rendered the evidence taken invalid and, therefore, vitiated the proceedings.

In the matter at hand, the record bears out that PW1, PW2 and DW1 as shown at pages 141, 148 and 159 of the record of appeal respectively who were each recorded as Christians were subjected to take oath. For instance, at pages 140 to 141 of the record of appeal it is recorded as follows:

> *"Ushahidi*
> *Jina: Manimba Kikuli*
> *Kazi: Engineering Manager*
> *Makazi: Ununio Tegeta*
> *Dini: Mkristo*
> *Umri : 36 years*

Ameapishwa DW1."

Thereafter, the witness started to testify. Of course, there was no signature appended by the arbitrator immediately after the witness had taken oath as shown in the record. However, it is true as was stated by Mr. Karume that rule 19 (2) (a) of the Mediation and Arbitration Guidelines Rules which guides on oaths to be taken does not specifically provide for the arbitrator to append his/her signature thereafter. On the other hand, we do not deny the fact that it has been a matter of practice for a presiding officer to append signature after the oath or affirmation is taken by a witness before testifying. This is important, in our view, to authenticate that the purported witness had undertaken to speak the truth before the Court ahead of adducing his/her evidence. In this regard, in the matter at hand, despite that the record shows that the respective witnesses were sworn or affirmed, we still emphasize that the arbitrator ought to append his signature thereafter.

With regard to the second issue, whether the arbitrator appended his signature after the end of the witnesses' evidence, we equally agree with both learned counsel that the arbitrator did not sign at the end of PW1, PW2 and DW1's evidence. As was rightly contented by both counsel, there is no signature of arbitrator appended at the end of each

witness's evidence as depicted at pages 145, 154 and 164 of the record of appeal.

This Court was faced with a similar situation in numerous cases. Just to mention a few they include **Yohana Musa Makubi and Another v. Republic,** Criminal Appeal No.556 of 2015; **Sabasaba Enos @ Joseph v. Republic** Criminal Appeal No.411 of 2017; **Iringa International School v. Elizabeth Post**, Civil Appeal No.155 of 2019 (all unreported), **Catholic University of Health and Allied Sciences CUHAS** (supra) and **Unilever Tea Tanzania Limited** (supra). For instance, in the latter case of **Unilever Tea Tanzania Limited** (supra) the Court stated as follows:

> *"...Though there is no requirement under the Rules obliging the arbitrator to sign witnesses' evidence, we are of the considered view that the omission is fatal to the proceedings. This is because it jeopardizes the authenticity, correctness, and veracity of the evidence of the witnesses as it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witnesses since the recorder of the evidence is unknown".*

In the same case, the Court took inspiration from the provisions of the Civil Procedure Code [Cap 33 R.E.2019] and Criminal Procedure Act,

[Cap 20 R.E.2019] which provide for a mandatory requirement for the judge or magistrate to sign the witnesses' evidence side.

Also, times without number this Court has emphasized that failure to append a signature to the witnesses' evidence vitiates the authenticity of the evidence taken and it is fatal to the proceedings. We took this stance in the case of **Chacha s/o Ghati @ Magige v. Republic,** Criminal Appeal No.406 of 2017 (unreported) when we stated as follows:

> *"...we entertain no doubt that since the proceedings of the trial court were not signed by the trial Judge after recording evidence of witnesses for both sides, they are not authentic. As a result, they are not material proceedings in determination of the current appeal,"*

[See **also Yohana Musa Makubi and Another** (supra), **Sabasaba Enos @ Joseph** (supra) and **Unilever Tea Tanzania Limited** (supra)]

Even in this case, guided by the above cited authorities, we are settled in our mind that the omission to sign at the end of the witnesses' evidence vitiated the proceedings of the CMA. Given the circumstances, in terms of section 4 (2) of the AJA, we nullify the proceedings and set aside the award of the CMA as well as the proceedings and judgment of the High Court as they originated from a nullity.

As to the way forward, we order that the matter should be remitted back to the CMA so as the labour dispute can be heard *de novo* by another Arbitrator. However, this being a labour matter, we make no order as to costs.

It is so ordered.

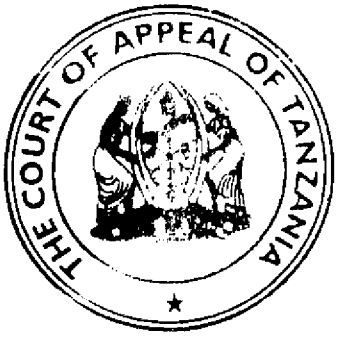
DATED at **DAR ES SALAAM** this 22nd day of November, 2022.

R.K. MKUYE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P.F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered at Arusha via video conference this 1st day of December, 2022 in the presence of Mr. Charles Lugaila holding brief for Mr. Sostenes Mbedule, counsel for the Appellant and Mr. Charles Lugaila holding brief for Mr. Ramaldhani Karume, counsel for the Respondents, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL