**IN THE COURT OF APPE AL OF TANZANIA**

**AT DODOMA**

**(CORAM: MKUYE, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)**

**CIVIL APPEAL NO. 370 OF 2020**

**GREENWASTE PRO LIMITED .....APPELLANT**

**VERSUS**

**MWAJABU ALLY..... RESPONDENT**

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

**(Mansoor, J.)**

**dated the 21st day of August 2020**

**in**

**Labour Revision No. 14 of 2019**

---

## RULING OF THE COURT

29th November & 7th December, 2022

**KOROSSO, J.A.:**

The appeal before the Court derives from the decision of the High Court of Tanzania (Labour Division) of 21/8/2020 in Labour Revision No. 14 of 2019 (Mansoor, J.). The background leading to the instant appeal is that the respondent herein had filed a complaint in the Commission of Mediation and Arbitration (CMA) at Dodoma against the appellant herein claiming unfair termination from employment, payment of 24 months' salary; leave and certificate of service. At the trial, five issues were framed for determination of the case: one, whether there was an employer-employee relationship between the respondent (then the complainant)

and the appellant (then the respondent); two, whether the appellant terminated the respondent's employment and three, whether there were sufficient reasons for the respondent to terminate the respondent's employment; and four, whether, the procedures for termination were followed and fifthly, to what reliefs are the parties entitled.

At the CMA, the respondent's case was that she was an employee of the appellant, employed as a revenue collector paid Tshs. 300,000/= per month. On 1/4/2019, the appellant offered her a contract for revenue collection agency in which she was to be paid a commission and she declined the offer. The appellant on 9/4/2019 informed the respondent that her services were no longer required, which the respondent interpreted it as an act of retaliation having rejected the offer from the appellant. The engagement between the respondent and the appellant remained stagnant therefrom culminating in the CMA case. On the part of the appellant, it maintained that there had never been a work-related relationship between the two, but rather the respondent was an agent performing specified duties on its behalf. On 17/10/2019, the arbitrator delivered an arbitral award in favour of the respondent, awarding her twelve months' salary at the tune of Tshs. 3,600,000/=; one month's salary in lieu of notice Tshs. 300,000/-; and one month salary for the

untaken leave Tshs. 300,000/-. Essentially, awarding the respondent a total of Tshs. 4,200,000/-.

The appellant was aggrieved and filed in the High Court of Tanzania Labour Division sitting at Dodoma, Labour Revision No. 14 of 2019 whose decision delivered on 21/8/2020 by Mansoor, J. was in favour of the respondent, confirming the arbitral award by the CMA. Dissatisfied, the appellant filed the instant appeal before the Court premised on seven grounds of appeal which for reasons to be known in due course we shall not reproduce at this juncture.

On the day the appeal was called for hearing, Mr. Evance Ignace John, learned advocate, appeared for the appellant while the respondent who was present was represented by Mr. Erick Christopher, learned advocate.

At the inception of the hearing, we invited the counsel for the parties to address us on the propriety of the proceedings before the CMA on two matters. **One**, the fact that there are witnesses who testified in the CMA but did not give evidence on oath or affirmation, and **two**, the failure of the arbitrator to append his signature at the end of each of the witness' evidence.

The counsel for the respondent submitted stating that the record of appeal shows that Erick Mark (DW1) and Mwajabu Ally (PW1) gave evidence without taking an oath or affirmation. He contended that this is a fatal error. He also conceded to the fact that there was no signature appended by the arbitrator after the testimony of each witness, arguing that this was also a fatal error. He thus urged the Court to nullify and quash the proceedings of the CMA and the High Court in Revision and set aside the Judgment and order a retrial before the CMA. Stating that this is what justice demands in the circumstances.

On the part of the appellant's counsel, he supported the submissions and prayer by the learned counsel for the respondent stating that there is nothing further to add.

Having heard the counsel for the parties, certainly under rule 19(2)(a) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007 (the Mediation and Arbitration Rules) which governs the conduct of the proceedings in the CMA, the arbitrator has powers to administer an oath or accept an affirmation from any person called to give evidence before the CMA. Rule 25(1) of the Mediation and Arbitration Rules requires every witness in the CMA to testify under oath.

Suffice it to say, as observed in **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019 (unreported), the CMA is a court vide section 4(a) of the Oaths and Statutory Declarations Act [Cap 34 R.E. 2019) (the Oaths Act) and that according to section 2 of the Oaths Act, the word "court" is defined to include every person or body of persons having authority to receive evidence upon oath or affirmation. Section 2 defines a court as follows:

> *"Includes every person or body of persons having by law or consent of parties authority to receive evidence upon oath or affirmation but does not include a court-martial established under the National Defence Act."*

Therefore, taking into account the guidelines on the conduct of CMA proceedings which include witnesses giving evidence upon oath or affirmation certainly, the CMA is a court when conducting its proceedings.

In the instant appeal, the record of appeal shows at pages 34 and 39, that the arbitrator who presided over the proceedings did not administer an oath to DW1 and PW1 prior to recording their testimonies. As submitted by the counsel for the parties this was an anomaly. The Court has in numerous decisions emphasized the necessity to comply with the

requirement for the oath to be taken by the witnesses prior to adducing evidence in court.

According to the cited provisions, taking an oath before giving evidence is mandatory. We are alive to the provision of section 88 of the Employment and Labour Relations Act [Cap 266 R.E. 2019 ] (the ELRA) which gives room to the arbitrator to conduct the arbitration in a manner that will ensure substantial merits of the dispute with the minimum of legal technicalities however we are of the view that this provision is not applicable in the instant situation since section 4(a) of the Oaths Act and Rule 25(1) of the Mediation and Arbitration Rules are couched in mandatory terms. [See **Attu J. Myna v. CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021 (unreported)].

Therefore, the failure to administer oath on DW1 and PW1, is a fatal irregularity that vitiates the proceedings as observed in various decisions of this Court namely, **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 and **Tanzania Portland Cement Co. Ltd. v. Ekwasi Majigo**, Civil Appeal No. 173 of 2019 (both unreported). In **Catholic University of Health and Allied Sciences (CUHAS)** (supra), upon

making a finding that failure by witnesses to take oath before they gave evidence vitiated the proceedings, the Court stated:

> *"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."*

The second irregularity that was conceded by the counsel for both parties was the fact that the arbitrator in the instant case did not sign below the testimonies of the two witnesses as can be discerned from pages 39 and 43 of the record of appeal. The Court has in numerous decisions reiterated the fact that it is a requirement that the evidence of a witness upon completion of recording, for the presiding Judge/Magistrate/Arbitrator, as the case may be, to append her/his signature below the adduced evidence. This stance has been established in **Yohana Mussa Makubi and Another v. Republic**, Criminal Appeal No. 556 of 2015, **Chacha Ghati @Magige v. Republic**, Criminal Appeal No. 406 of 2017 (both unreported), **Iringa International School** (supra) and **Catholic University of Health and Allied Sciences (CUHAS)** (supra).

In the cited decisions, which we subscribe to, the Court has established that the omission to append a signature after the recording of the evidence of a witness is a fatal irregularity that vitiates the proceedings and subsequent judgment. We are alive of the fact that there is nowhere in the Rules guiding the conduct of proceedings at the CMA addressing this requirement. Nevertheless, we are of the firm view that the requirement is important for the purpose of ensuring the authenticity and correctness of the record. In **Attu J. Myna** (supra) when deliberating on a similar situation, the Court took inspiration from Order XVII rule 5 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) where the signing of the witness's evidence is a mandatory requirement. In criminal proceedings section 210(1)(b) of the Criminal Procedure Act [Cap 20 R.E. 2022] relevance and import were discussed in **Mhajiri Uladi and Another v. Republic**, Criminal Appeal No. 234 of 2020 (unreported) where the Court stated that failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings.

In the final analysis, the failure of the arbitrator of the CMA who presided over the case subject to the current appeal to administer an oath to DW1 and PW1 prior to recording their testimonies and to append his

signature at the end of recording each of the two witnesses' testimony, we hold vitiated the proceedings before the CMA. In consequence, we invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] and quash the proceedings of the CMA in CMA/DOM/2019 and set aside the award as well as the proceedings and judgment of the High Court which upheld the arbitral award in Labour Revision No. 14 of 2019.

In the end, in the interest of justice, we remit the record to the CMA for the dispute to be heard *de novo* before another arbitrator. In the circumstances, we make no order as to costs.

**DATED** at **DODOMA** this 7th day of December, 2022.

R. K. MKUYE
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

This Ruling delivered on 7th day of December, 2022 in the presence of Mr. Erick Christopher, learned counsel for the respondent holding brief for Mr. Evance Laswai, learned counsel for the appellant, is hereby certified as a true copy of the original.


R. W. CHAUNGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**