IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A., And MASOUD, J.A.)

CIVIL APPEAL NO. 274 OF 2020

ONAEL MOSES MPEKU.....APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania,
Labour Division at Dar es Salaam)

(Wambura, J.)

dated the 15th day of May, 2020
in
Labour Revision No. 461 of 2019

JUDGMENT OF THE COURT

5th & 13th July, 2023

KEREFU, J.A.:

The appellant, Onael Moses Mpeku, appeals against the decision of the High Court of Tanzania, Labour Division (Wambura, J.) dated 15th May, 2020 in Labour Revision No. 461 of 2019 challenging the award issued by the Commission for Mediation and Arbitration at Dar es Salaam (the CMA) on 5th March, 2019 in favour of the respondent, National Bank of Commerce Limited (the NBC), in Labour Dispute No. CMA/DSM/ILA/R.407/17/673 (the labour dispute).

In order to appreciate the context in which the labour dispute arose and later this appeal, we find it apposite to briefly provide the material facts of the matter as obtained from the record of appeal. It

goes thus; on 6th October, 1988 the appellant was employed by the respondent on various positions and at different places until 13th July, 2016 when his employment was terminated for misconduct of gross insubordination. At the time of termination, he was the Operations Manager at the NBC Singida Branch. Aggrieved by the said termination and convinced that there were no valid reasons for the termination of his employment, the appellant approached the CMA where he contested unfair termination of his employment based on unfair reasons and procedures and prayed for reinstatement and/or payment of terminal benefits. As the process of mediation failed, the dispute was placed before the arbitrator who heard evidence from both parties and, in the end, found that the termination of the appellant was fair as the respondent had valid reasons to do so and all procedures were complied with. He, however ordered the respondent to pay the appellant one - month salary for the accumulated annual leave at the tune of TZS 1,542,378.00 and payment for nine (9) working days i.e from 1st August, 2016 to 9th August, 2016 at the tune of TZS 533,900.00 making total of TZS 2,076,278.00.

Unsatisfied with that decision, the appellant, on 17th April, 2019, lodged a Labour Revision No. 461 of 2019 in the High Court challenging the award issued by the CMA. Having heard the parties, the learned

High Court Judge, though she concurred with the findings of the CMA that the respondent had valid reasons to terminate the appellant's employment, thus the termination was substantively fair, she found that the procedures were not complied with, thus procedurally unfair termination. On that basis, she varied the CMA's award by ordering the respondent to pay the appellant six (6) months' salary at the tune of TZS 9,254,268.00 together with terminal benefits.

Still unsatisfied, the appellant lodged the current appeal. In the memorandum of appeal, the appellant has preferred three grounds of complaints. However, for reasons which will be apparently shortly, we do not deem it appropriate, for the purpose of this judgment, to reproduce them herein.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Bahati Mabula, learned counsel whereas the respondent was represented by Mr. Joseph Ndazi, also learned counsel. It is noteworthy that, pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the learned counsel for the appellant had earlier on lodged his written submission in support of the appeal, which he sought to adopt to form part of his oral submissions. On the other part, the learned counsel for the respondent did not file any reply

submissions, as he opted to address us in terms of Rule 106 (10) (b) of the Rules.

However, before we could embark on the hearing of the appeal on merit, we wanted to satisfy ourselves on the propriety or otherwise of the proceedings before the CMA. We decided to take that route due to the fact that, upon our perusal of the record of appeal together with the original record, we noticed that testimonies of all witnesses for both parties were received without oath or affirmation contrary to the mandatory requirement of Rules 19 (2) (a) and 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N. No. 67 of 2007 (G.N. No. 67 of 2007). As such, we invited the learned counsel for the parties to address us on that issue.

In his response, apart from conceding that, according to the said records, the testimonies of all witnesses for both parties were received without oath or affirmation contrary to the requirement of the provisions of Rule 25 (1) of the G.N. No. 67 of 2007, Mr. Mabula urged us to find the said omission as a technical error because, in practice no witness testifies before the CMA without being sworn or affirmed. It was his further argument that, since all witnesses indicated their names and types of their religions and/or denominations, before giving their testimonies, it should be taken that they gave their evidence under oath

and/or affirmation. In the premises, the learned counsel invited us to be pleased to invoke the principle of overriding objective under section 3A of the Appellate Jurisdiction Act, [Cap. 141 R. E 2019] (the AJA), which is geared towards expeditious and timely resolution of all matters and proceed with the hearing of the appeal on merit.

On his part, Mr. Ndazi disputed the submission and the prayers made by his learned friend by arguing that, since the testimonies of all witnesses for both parties were received without oath or affirmation, their evidence had no evidential value in the eyes of the law and could not be acted upon to determine the appeal before us. To amplify further on this point, the learned counsel added that, even the said evidence was invalid to support or challenge the labour dispute before the CMA and the High Court. He as well argued that, the said infraction had rendered the said evidence invalid thus vitiated the entire proceedings of the CMA and that of the High Court. He further contended that the principle of overriding objective cited by Mr. Mabula is not applicable in the circumstances of this appeal, as the same is not designed to disregard the mandatory provisions of the procedural law. On the way forward, Mr. Ndazi urged us to nullify the entire proceedings and award issued by the CMA as well as the proceedings and the decision of the

High Court as they stemmed from nullity proceedings and remit the case file to the CMA for retrial.

In a brief rejoinder and upon further reflection, Mr. Mabula associated himself with the submission made by his learned friend and he also urged us to nullify the proceedings and award issued by the CMA as well as that of the High Court and remit the case file to the CMA for a retrial.

Having dispassionately considered the submissions made by the learned counsel for the parties and perused the record of appeal before us, the main issue for our determination is the validity or otherwise of the proceedings before the CMA.

To determine the said issue, we have revisited the evidence of all witnesses for both parties before the CMA in the record of appeal together with the original record of the CMA. Our findings are consistent with the submissions of the learned counsel for the parties as the two-records bear it out that the testimonies for all witnesses for the parties were received without oath or affirmation. Thus, the evidence of Sweetber Mafuru (DW1) at pages 164 to 170, Japhet Mazumira (DW2) at pages 173 to 180 and finally, Onael Moses Mpeku (PW1) at pages 3 to 8 of the supplementary record of appeal were all received without oath or affirmation. It is clear that the arbitrator had abdicated his duty

stipulated under Rule 19 (2) (a) of the G.N. No. 67 of 2007 which empowers him to administer oath to any person who appears before him to give evidence. For clarity, the said Rule provides that:

> *"19 (2) The power of the arbitrator includes to-*
>
> *(a) administer an oath or accept an affirmation from any person called to give evidence."*

A concurrent obligation is placed on the parties to the dispute to prove their cases on oath or affirmation. This is pursuant to Rule 25 (1) of the same G.N. No. 67 of 2007 which provides that:

> *"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-*
>
> *(i) the party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;*
>
> *(ii) parties are predicted to ask leading questions during an examination in chief.*
>
> *(b) cross-examination: -*
>
> *(i) the other party or parties to the dispute may, after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute;*

(ii) obtain additional information from the witness or challenge any aspect of the evidence given by the witness; leading questions are allowed at this stage of proceedings.

(c) re-examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross examination and the purpose of re-examination is to correct or clarify evidence covered during cross – examination". [Emphasis added].

The above cited rule requires the parties to a labour dispute, such as the instant one, in an attempt to prove their respective cases, to lead evidence through the witnesses who must testify under oath or affirmation throughout the common three stages of examination of witnesses namely, examination in-chief, cross -examination and re-examination. It follows therefore that, before any witness can give evidence before the CMA, he or she must take oath. The above requirement, is reinforced by the provisions of sections 2 and 4 (a) of the Oaths and Statutory Declarations Act, [Cap 34 R.E 2019]. Specifically, section 4 (a) provides that:

"Subject to any provision to the contrary contained in any written law, an oath shall be made by 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 term "*court*" is defined under section 2 of the said Act to include, every person or body of persons having by law or consent of the parties' authority to receive evidence upon oath or affirmation but does not include a court martial established under the National Defence Act, [Cap. 192 R.E 2002]. Obviously, the CMA falls within the scope of the above cited provision of the law.

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 for instance the cases of **Catholic University of Health and Allied Science (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020, [2020] TZCA 1890: [11 December 2020: TANZLII], **SNV Netherlands Development Organization Tanzania v. Anne Fidelis,** Civil Appeal No. 198 of 2019 [2022] TZCA 427: [14 July 2022: TANZLII] and **Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020 [2022] TZCA 107: [10 March 2022: TANZLII]. Specifically, in **Catholic**

University of Health and Allied Science (CUHAS) (supra), the Court when faced with an akin situation, it held that the irregularity vitiated the entire CMA proceedings. In that appeal, witnesses for both parties gave their evidence without oath or affirmation. After reproducing the provisions of Rule 25 (1) of the G.N. No. 67 of 2007 cited above, the Court stated that:

> *"...**it is mandatory for a witness to take oath before he or she gives evidence before the CMA**... 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.**"* [Emphasis added].

Similarly, in the instant appeal, since apart from indicating that they were Christians, the evidence of DW1, DW2 and PW1, was received without oaths or affirmation, it amounts to no evidence in law, thus invalid to support or challenge the labour dispute which was before the CMA, the High Court and later the appeal before this Court. That, the said omission had vitiated the entire proceedings before the CMA and the High Court.

Consequently, we invoke revisional powers bestowed in this Court under section 4 (2) of the AJA and hereby nullify the entire proceedings of the CMA and quash the resultant award. We further nullify the

proceedings before the High Court in Labour Revision No. 461 of 2019 and set aside the subsequent orders thereto as they emanated from nullity proceedings.

In the event, and for the interest of justice, we remit the case file to the CMA for the parties to be heard afresh before another arbitrator, with all possible expedition and in accordance with the law. Since, this is a labour related matter, we make no order as to costs.

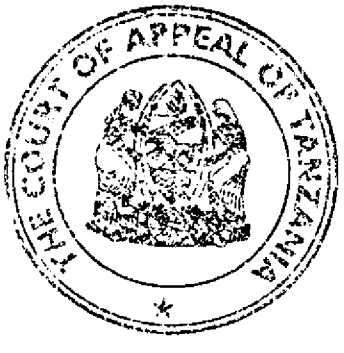
DATED at **DAR ES SALAAM** this 12th day of July, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 13th day of July, 2023 in the presence of Mr. Bahati Mabula, learned advocate for the appellant also holding brief for Mr. Joseph Ndazi, learned counsel for the respondent is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL