

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: WAMBALI, J.A., MAIGE, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 134 OF 2020

SAHARA MEDIA GROUP LIMITED.....APPELLANT

VERSUS

ANATORY JOHN..... RESPONDENT

**(Appeal from the ruling and order of the High Court of
Tanzania at Mwanza)**

(Rumanyika, J.)

dated the 28th day of August, 2019

in

Revision Case No. 89 of 2018

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JUDGMENT OF THE COURT

16th & 28th August 2023

MGONYA, J.A.:

The instant appeal is against the ruling and order of the High Court of Tanzania at Mwanza, dated 28th August, 2019 in Revision No. 89 of 2018. In its decision, the High Court, which dismissed the appellant's application for revision, upheld the award issued by the Commission for Mediation and Arbitration (the CMA) in favour of the respondent except for payment of TZS. 1,105,000.00 monthly salary in lieu of notice which

was set aside. Aggrieved by the decision, the appellant has preferred the present appeal.

The brief facts leading to this matter reveal that, the respondent entered into an employment contract with the appellant as news presenter for Star Television for three years from 15th September, 2015 for a consideration of a monthly salary of TZS. 800,000.00. However, in the course of his employment, the respondent alleged intolerable working conditions occasioned by employer's failure to pay his salary. The respondent was therefore of the opinion that the intolerable working conditions amounted to constructive termination as the appellant had stopped paying his salaries from June 2016 which resulted to unbearable living conditions on his part. Therefore, he issued a notice of resignation on 2nd December, 2016 which was confirmed by the appellant through a letter dated 6th December, 2016. The respondent further alleged that the forced resignation amounted to unfair termination as there was a breach of contract by the appellant. After resignation, the respondent further sued the appellant to the CMA through Labour Dispute No. CMA/MZ/ILEM/1068/2016 in which he claimed for compensation.

As intimated above, the CMA ruled in favour of the respondent, the decision which was confirmed by the High Court on revision except for the payment of cash in lieu of notice which was reversed. The appellant has thus approached the Court through a memorandum of appeal comprising five grounds of appeal. However, for the reason to be apparent shortly, we do not intend to reproduce the respective grounds herein.

At the hearing of the appeal, the appellant was represented by Mr. Boniphace Sariro learned advocate, whereas the respondent enjoyed the services of Mr. Innocent Michael, also learned advocate.

According to the record of appeal, on 27/2/2017 when the dispute between the parties was placed before the CMA for hearing, the respondent appeared in person and also testified as a witness. On the other side, Ms. Martha Musiba, the appellant's learned counsel who also signed documents as principal officer of the appellant, appeared for the appellant and was also later treated by the Arbitrator in his decision as a witness though the procedure was not followed as required by law.

Before we commenced consideration of the grounds of appeal, we wanted to satisfy ourselves whether the proceedings before the CMA were proper. We did so on account of the fact that though the appellant's counsel Ms. Martha Musiba informed the Arbitrator before the trial had started and after the closure of the respondent's case that, the appellant had no witness and that she would only explain the substance of the case, in the end, the CMA treated her as a principal officer of the appellant and received her evidence without been sworn.

We therefore invited the advocates for the parties to address us on the propriety of the CMA proceedings. In their submissions, both counsel were in agreement that the CMA proceedings were irregular as the Arbitrator treated Ms. Musiba's statement as testimony on the case and admitted documentary exhibits she tendered which had no any evidential value. The learned counsel agreed that what was done was a nullity. They thus urged the Court to nullify the proceedings and set aside the award together with the High Court's proceedings in Revision No. 89 of 2018 because they originated from nullity proceedings. Further, they prayed that the case file of the CMA be remitted back to it so that it can

proceed with the hearing of the dispute immediately from the stage after the closure of the respondent's case by allowing parties to present closing arguments, if any, and deliver the decision.

Having heard the concurrent submissions by the counsel for the parties, the issue for determination is, what should be the way forward in the circumstances.

It is in the record of appeal that Ms. Musiba right from the beginning informed the CMA that, the appellant did not have any witnesses and that as the appellant's advocate, she would only present the appellant's case. In this regard, page 79 of the record of appeal reveals the situation, where it was recorded:

"Upande wa mlalamikiwa wakili anaendelea hana shahidi yeyote, ataiwakilisha kesi mwenyewe."

It is further noted that after the respondent had closed his case, the Arbitrator proceeded to close the respondent's case and then noted that the appellant's side had no witness but the appellant's advocate prayed to submit on what she knew about the case. Specifically, the

proceedings of the CMA at page 84 of the record of appeal reveals the following:

"Tume

*Upande wa mlalamikaji hauna shahidi mwingine,
umefunga Ushahidi wake. Upande wa
mlalamikiwa hauna shahidi, wakili anaomba
kuwasilisha kile anachofahamu."*

Thereafter, Ms. Musiba continued with her submission. However, in the course of her submission, she successfully tendered two exhibits and the same were admitted in evidence as exhibits CD 1 and CD 2 in favour of the appellant. More importantly, in its decision, the Arbitrator considered the statement of the appellant's advocate and exhibits as part of the evidence and consistently referred Ms. Martha Musiba as a witness despite not being sworn.

Considering the CMA proceedings, it is our view that what the Arbitrator did was improper as it is not clear as to whether Ms. Musiba testified as the witness of the appellant by being the principal officer or as an advocate at the time. Even if Ms. Musiba was a witness, her purported evidence having been taken without oath or affirmation, would

be inadmissible. Unfortunately, the so-called testimony of Ms. Musiba and exhibits were used by the Arbitrator on the decision to determine the rights of the parties.

It is trite law that, evidence of a witness at the CMA should be taken under oath. Rule 25 (1) of GN. No. 67 of 2007 provides:

*"The parties shall attempt to prove their respective cases through evidence and **witnesses shall testify under oath** through the following process..."* [Emphasis supplied].

In the case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 [2020] TZCA 1890 (11 December 2020, TanzLii) when this Court faced an akin situation, we stated as follows:

"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."

Likewise, in the case of **Peter Jacob Weroma & Others v. AKO Group Limited** (Civil Appeal No. 172 of 2021) [2023] TZCA 17295 (1

June 2023) [TanzLii], the Court quashed the proceedings before the CMA as well as those of the High Court in Revision as the same originated from the nullity proceedings.

In the case at hand, though Ms. Musiba could not act both as the counsel for the appellant and her witness, yet the CMA wrongly considered her statement and the documents she tendered and admitted as evidence. In the circumstances, the proceedings of the CMA from the stage when the so called defence of the appellant started as well as the High Court on revision has to suffer the consequence of being nullified as they emanated from nullity proceedings as correctly submitted by counsel for the parties.

Consequently, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 [R. E. 2019], we revise and nullify the proceedings of the CMA immediately from the stage after the closure of the respondent's case on 27th February, 2017. Similarly, we nullify the proceedings of the High Court in Revision No. 89 of 2018. In the result, we order that the case file of the CMA be remitted back to it for hearing from the stage stated above by granting the parties the right to present closing

arguments and deliver the decision as the appellant had indicated that she had no witness. For the interest of justice, we further direct that the expeditious hearing at the CMA be presided over by another Arbitrator. We make no order as to the costs.

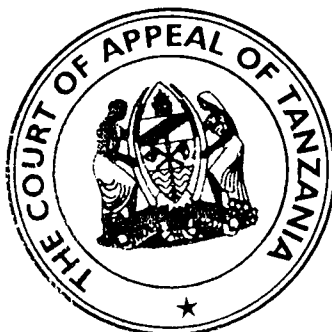
DATED at MWANZA this 26th day of August, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2023 in the presence of Mr. Boniphace Sariro, learned counsel for the Appellant who took brief for Mr. Innocent Michael for the Respondent, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL