IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 247 OF 2020

WEIR SERVICES TANZANIA LIMITED .....APPELLANT

VERSUS

JACQUES LOUIS BRUWER .....RESPONDENT

[Appeal from the Decision of the High Court of Tanzania, Labour Division at Mwanza]

(Madeha, J.)

dated the 30th day of September, 2019
in
Revision No. 11 of 2019

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JUDGMENT OF THE COURT

21st August & 19th October, 2023

KAIRO, J.A:

Jacques Louis Bruwer, the respondent, successfully initiated proceedings against his employer before the Commission for Mediation and Arbitration (the CMA) for Mwanza at Mwanza alleging to have been constructively terminated. He was awarded a total payment of ZAR 2,886,000/= as damages together with a clean Certificate of Service as per section 44 (2) of the Employment and Labour Relations Act No. 6 of 2004 (the ELRA). The appellant was further ordered to comply with the award within 45 days from the date of issuance of the award. Aggrieved, the appellant unsuccessfully preferred a revision at the High Court,

Labour sub registry at Mwanza which fully agreed with the CMA findings and orders. The appellant quest to overturn the said decision remained unfulfilled hence, the present appeal.

The brief background of this dispute is as follows: the respondent was employed by the appellant in a position of a Country Manager, in Tanzania, effective from 1st January, 2018 under a fixed term contract of employment of three years. According to the terms, the contract was to lapse on 31st December, 2020. However, the respondent worked only for 10 months as according to him, he was forced to resign from the post by the appellant.

The respondent thus decided to institute a labour dispute at the CMA claiming a compensation of ZAR 2,886,000/= being salaries of the remained 26 months for what he alleged to be constructive termination.

The appellant denied the allegations. She claimed that the respondent decided to resign from the employment out of his own volition so as to escape the disciplinary measures which were facing him. Thus, he was not entitled to the compensation claimed.

After hearing the parties, the CMA decided in favour of the respondent as above stated upon being satisfied that the respondent was constructively terminated by the appellant.

The appellant was unhappy with the decision and approached the High Court seeking to revise the CMA decision but to no avail. Displeased with the High Court outcome of the revision application, the appellant preferred the present appeal in which she initially pivoted it on five grounds of complaints. However, during the oral submission, she informed the Court that she was abandoning the first two grounds and remained with three grounds of which the second and third grounds were to be argued together. They are as follows:

(1) *The Honorable Judge erred in law in failing to consider that the effect of arbitrator receiving witness testimony without subjecting witnesses to oath contrary to rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines)* ***Rules, 2007 GN. No. 67 of 2007*** *(hereinafter GN. No. 67 of 2007) was a material irregularity which meant that there was no evidence upon which an award could have been made.*

(2) *The Honorable Judge erred in law in failing to give reasons for upholding the arbitrator's ruling that there was constructive termination of employment.*

(3) *The Honorable Judge misdirected herself in law as she failed to consider whether there*

was sufficient evidence to support the arbitrator's findings on the question of constructive termination.

At the hearing of this appeal, the appellant was represented by Mr. Waziri Mchome, learned advocate while Messrs. Salehe Nassoro and Innocent Bernard, both learned advocates represented the respondent.

On the first ground wherein, the complaint is failure to administer oath on the witnesses before testifying, Mr. Mchome argued that the witnesses from both sides were not sworn before giving their respective evidence contrary to the dictates of Rule 25 (1) of GN. No. 67 of 2007. He went on to elaborate that the testimonies of Jacques Louis Bruwer (PW1) on page 324, Gerrit Duvenhage (DW1) on page 332 and Vicent Lerionka (DW2) on page 340 of the record of appeal were taken by the arbitrator without first administering oath or affirmation on them. It was Mr. Mchome's contention that the omission was fatal and vitiated the proceedings. Consequently, there was no evidence in the proceedings upon which an award could have been made by the arbitrator. To back up his arguments, he cited to us the cases of **Attu J. Myna vs CFAO Motors Tanzania Limited,** Civil Appeal No. 269 of 2021 and **National Microfinance Bank PLC vs Alice Mwamsojo,** Civil Appeal No. 235 of 2021 (both unreported).

Mr. Mchome also invited the Court to depart from its own decision in **Tanzania Distillers Limited vs Bennetson Mishosho,** Civil Appeal No. 382 of 2019 (unreported) cited by the respondent which, according to him, used the oxygen principle so as not to discount the witnesses' evidence with similar irregularity.

In conclusion, Mr. Mchome urged the Court to invoke its revisional powers and nullify the proceedings of the CMA and the resultant High Court decision, thereafter, order a retrial in accordance with the law.

In response, Mr. Bernard prayed to adopt the respondent's written submission filed on 20th August, 2020 as part of his oral submission.

The learned counsel's submission in this aspect was two folds, argued alternatively. He first refuted the contention that rule 25 (1) of GN. No. 67 of 2007 was not complied with. Elaborating, he submitted that the arbitrator in this matter conducted what he called "the evidence stage" in accordance with the rule whereby he recorded the personal particulars of each witness and later, they were sworn before testifying. Mr. Bernard referred us to pages 324, 332 and 340 of the record of appeal which according to him prove that the witnesses were sworn or affirmed before their respective evidence was taken by the arbitrator. It *was*, therefore, his contention that rule 25 (1) of GN. No. 67 of 2007 was complied with contrary to what was argued by Mr. Mchome.

Mr. Bernard went on to argue that there is nothing in the Rules which requires a witness statement's oath or affirmation to be recorded in the proceedings. To back up his argument, he cited to us rule 32 (2) of the Labour Institution (Mediation and Arbitration) Rules (G.N No. 64 of 2007) which states that where the arbitrator records the proceedings through hand written, the arbitrator may not be required to record the proceedings word by word.

As regards the second issue, Mr. Bernard submitted that, the alleged irregularity even if it exists, is not fatal as argued by the appellant. He elaborated that, the CMA being a quasi-judicial body is not bound by the strict legal procedures due to what he stated to be its function of providing social justice rather than legal justice. He referred us to section 3 (a), (f) and 88 (4) and (5) of the ELRA. He went on to submit that, section 20 (1) (c) of the Labour Institutions Act No. 7 of 2004 (the LIA) which he stated to be the law regulating the powers of the arbitrators in the arbitration proceedings (including swearing witness) does not mandatorily require the arbitrator to exercise his/her powers strictly as argued by the appellant. He added that rule 25 (1) of GN. No. 67 of 2007, being a subsidiary legislation made under the LIA, cannot override the principal legislation. Thus, it was his contention that the omission, if any, cannot vitiate the arbitration proceedings.

That apart, Mr. Bernard also argued that the case of **Tanzania Distillers Limited** (supra) can salvage the situation in this case if the Court would find that the witnesses were not sworn or affirmed before giving their respective evidence. It was his contention that the said case is still good law and urged the Court to decline the invitation by Mr. Mchome to depart from it. Instead, he invited the Court to find the alleged irregularity devoid of merit and dismiss the same.

In rejoinder Mr. Mchome submitted that the mere citing of rule 25 (1) of GN. No. 67 of 2007 without recording the sworn statements is not enough and further it does not denote that the rule was complied with. As regards the status of the case of **Tanzania Distillers Limited** (supra), Mr. Mchome submitted that, there are other cases decided thereafter which still maintained that unsworn evidence is no evidence at all for having no evidential value and according to Mr. Mchome, it shows that the position in **Tanzania Distillers Limited** is not a good law and therefore cannot salvage the pointed-out irregularity. He, thus, reiterated his prayer to allow the appeal with orders that the matter be remitted to the CMA for a fresh trial.

Having gone through the record of appeal and considered the rival submissions made by the counsel for both parties, the main issue for our determination is whether or not the appeal is meritorious.

It is the argument of the appellant that the arbitrator did not administer oath or affirmation to the witnesses before giving their testimonies to which, he argued, offended the dictates of rule 25 (1) of GN. No. 67 of 2007. Consequently, it vitiated the proceedings and the resultant award by the CMA. Mr. Bernard refuted the argument by reasoning that the CMA being a quasi-judicial body is not strictly bound by the rules of procedures, including administering oath or affirmation to the witnesses who testified before it. The question therefore, is whether the CMA can dispense with the procedural requirement to swear or affirm witnesses who testify before it.

Essentially, section 4 (a) of the Oaths and Statutory Declaration Act [Cap 34 R. E. 2019] (the Oaths Act) imposes mandatory obligation on a court to administer oath/affirmation before a witness can testify before it. Section 2 of the Oaths Act defines the word "court" as follows:

> *"...includes every person or body of person 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".*

As to whether CMA has a status of a court when receiving evidence, the case of **SNV Netherlands Development Organization**

Tanzania vs Anne Fidels, Civil Appeal No. 198 of 2019 (unreported) gives the following guidance: -

> *"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".*** [Emphasis added]

Further, rule 19 (2) (a) of GN. No. 67 of 2007 provides that one of the duties of the arbitrator who presides over the proceedings at the CMA is to administer oath or accept affirmation from a witness. It states: -

> *"19 (2) The powers of the arbitrator include:*
> *(a) administer oath or accept affirmation from any person called to give evidence".*

Taking into account the duties of the Arbitrator and the guidelines on the conduct of the CMA proceedings which include witnesses giving evidence upon oath or affirmation, we have no doubt that the CMA for this purpose is a court when conducting its proceedings. As such, it is not dispensed with the legal procedure when receiving evidence from witnesses. In other words, the arbitrator has no choice whether or not to administer oath or affirmation to the witnesses.

Having found that the CMA is equally and mandatorily required to administer oath or affirmation before receiving witnesses' evidence, another issue for determination is whether the witnesses in this matter were sworn in or affirmed before testifying.

It was the contention of Mr. Bernad that, the arbitrator has recorded into the proceedings indicating that the evidence stage was conducted under rule 25 (1) of GN. No. 67 of 2007. As such, the witnesses were sworn/affirmed before giving their respective evidence and thus, rule 25 (1) of GN. No. 67 of 2007 was complied with. This contention was refuted by Mr. Mchome.

We have gone through the record of appeal and observed that on page 324 where PW1 started to testify, the arbitrator recorded as follows:

"EVIDENCE STAGE

RULE 25/GN. 67/2007"

The arbitrator then proceeded to take particulars of the witness and proceeded to record his testimony.

As for DW1 and DW2, their testimonies started on pages 334 and 340 respectively wherein we noted that the arbitrator recorded their particulars and went on to record their respective evidence. Nowhere in

the record of appeal had the arbitrator indicated that the witnesses were sworn or affirmed. It is a settled principle of law that the record should speak for itself and no speculation should be entertained as seemed to be suggested by Mr. Bernad. It is, therefore, our firm view that the arbitrator was obliged to show in the proceedings that he had administered oath or affirmation of the witnesses before giving their respective evidence as correctly submitted by Mr. Mchome. This is in accordance with the mandatory requirement under the rule 25 (1) of GN. No. 67 of 2007 which provides:

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

In his further argument, Mr. Bernad also invited this Court to follow our stance in **Tanzania Distillers Limited (supra),** in case the Court would find that the witnesses were not sworn or affirmed into which the unsworn evidence of the witness (PW1) was not discounted. The argument was vehemently refuted by Mr. Mchome who urged the Court to depart from the position of the said case.

We are fully aware of the position in **Tanzania Distillers Limited** (supra) and noted with appreciation the stance we gave therein.

However, in our view, the facts of the cited case are distinguishable to the case at hand. We say so because, in the cited case, only one witness (PW1) gave unsworn evidence. The rest (DW1, DW2 and DW5) were accordingly sworn before testifying. To the contrary, all of the three witnesses (PW1, DW1 and DW2) in the case at hand testified without being sworn or affirmed. It is noteworthy that, the Court on page 13 of the judgment of the cited case conceded that the unsworn evidence is irregular, but found that the flaw did not materially prejudice the other party therein. On that account, the Court in its wisdom declined to discount it. However, in the present case, we are with firm view that the irregularity goes to the root of the case itself because the credibility, authenticity as well as the reliability of the evidence given was shaken, as such prejudicial to the parties.

That apart, the cited case suspended the operation of rule 25 (1) of GN. No. 67 of 2007 for six months effective 23rd November, 2022, which arithmetically lapsed on 22nd May, 2023. As such the grace period had already expired by the time of hearing of this case on 21st August, 2023. Therefore, even if it the cases were not distinguishable, still the case at hand would not have been covered by the suspension period given. All in all, the cited case is inapplicable in the circumstances of this

case and therefore cannot salvage the pointed-out flaw, with much respect to Mr. Bernad.

Further to that, it should be noted that there are various decisions which came after **Tanzania Distillers Limited** (supra) which discounted the evidence with similar irregularity. These includes **Tumwise Mahenge vs. National Microfinance Bank PLC,** Civil Appeal No. 586 of 2020, **Green waste Pro Limited vs. Mwajabu Ally,** Civil Appeal No. 370 of 2020 both decided on 7th December, 2022, **Peter Jacob Werema and 11 Others vs Ako Group Limited,** Civil Appeal No. 172 of 2021 decided on 1st June, 2023 (all unreported) to mention, but a few.

Having found that the dictates of rule 25 (1) of GN. No. 67 of 2007 have been offended, the question is the consequences of such violation.

It is long settled that the law makes it mandatory for the witnesses giving evidence in court to do so under oath or affirmation. It follows thus, the omission to do so is fatal and vitiates the proceedings. There is a plethora of Court's decisions to that effect including **SNV Netherlands Development Organization Tanzania vs Ane Fidels** (supra), **North Mara Gold Mine Limited vs Khalid Abdallah Salum,** Civil Appeal no. 403 of 2020, **Bulyanhulu Gold Mines Limited vs Keneth Robert Fourie** Civil Appeal No. 105 of 2021 (both unreported).

In **SNV Netherlands Development Organization Tanzania vs Ane Fidels** (supra) the Court observed: -

> *"This Court has repeatedly emphasized the need of every witness who is competent to take oath or affirmation before the reception of his/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 prejudice the parties case".*

Further in **Catholic University of Health and Allied Sciences (Cuhas) vs Epiphania Mkunde Athonese,** Civil Appeal No. 257 of 2020 (unreported), the Court found that failure by witness to take oath before they gave the evidence vitiated the proceedings and it stated thus: -

> *"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates to proceedings because it prejudices the parties case".*

Flowing from the above position, we are constrained to allow the first ground of appeal. Consequently, we nullify the proceedings of the CMA and the resultant award. We similarly quash the proceedings before the High Court in Labour Revision No. 11 of 2019 as well as the

judgment from which this appeal emanated for being a nullity. We ultimately order the record be remitted to the CMA for rehearing of the dispute in accordance with the law before another arbitrator.

Given the nature of the dispute giving rise to the appeal, we make no order as to costs.

DATED at **DAR ES SALAAM** this 17th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 19th day of October, 2023 in the presence of Mr. Francis Kamuzora, learned counsel for the appellant and Mr. Salehe Nassoro, , learned counsel for the respondent who appeared remotely vide video conference facilities linked from Mwanza High Court, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL