IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION NO. 15 OF 2019

WAMBURA CHAMA & 2 OTHERS ..... APPLICANT

VERSUS

GEITA GOLD MINING LIMITED ..... RESPONDENT

JUDGMENT

4th March, 2021 & 10th March, 2021

ISMAIL, J.

The applicants in the instant proceedings were employees of the respondent. On 2nd September, 2015, their services were dispensed with on allegations of serious misconduct. Feeling hard done by the termination, they instituted a labour dispute in the Commission for Mediation and Arbitration (CMA) Mwanza, to challenge the termination, on the ground that the same was substantively and procedurally unfair. Their efforts to overturn the respondent's decision fell through, as the arbitrator found that the applicants' claims were lacking in merit. Consequently, they were dismissed, hence their decision to prefer the instant application.

The applicants' joint affidavit, sworn in support of the application has listed areas of disgruntlement against the arbitrator's award. These areas point to the weaknesses that are alleged to have been committed by the arbitrator. In consequence of all this, the applicants are urging the Court to set aside the arbitral award and order compensation for an unfair termination, together with payment of statutory benefits due to them.

Pursuant to the counter-affidavit, sworn by the respondent's senior legal counsel and company secretary, the respondent has shrugged off all of the applicants' contentions, averring that the impugned award is nothing short of incredible and a well-reasoned decision that has observed all the requirements of the law. With respect to termination, the respondent's averment is that the same was fair, in procedure and substance. It was the respondent's view that the instant application is lacking in merit and deserves nothing except a dismissal.

The matter was called up for hearing and the parties submitted on their respective cases. As I was composing the decision, I came to realise that there was an issue that took the matter to a different dimension. It is at that point in time that I called upon the parties to address me on that issue. This was in respect of whether the witnesses who testified in the

CMA did that while on oath or affirmation and, if not, what is the consequence of the failure to comply with that requirement.

In his brief submission, the third applicant contended that all of the witnesses who testified before the CMA did so on oath and affirmation. This is confirmed by the recording of the particulars of the said witnesses, including their denomination as it appears in the proceedings. It was his argument that the arbitrator's word on this would be of great assistance to the Court.

For his part, Mr. Geoffrey Kange, learned counsel for the respondent, confirmed the 3rd applicant's contention that witnesses testified on oath. He was quick to submit, however, that the Court is led by the proceedings and that the proceedings that bred this application do not indicate that such witnesses took oath before they testified. The learned counsel contended that DW1 and DW2 whose testimony appears at pages 7 and 13 of the proceedings contain the word "*oath*" immediately before the substance of their testimony, connoting that they both took an oath before testifying.

Mr. Kange further submitted that the requirement of Rule 25(1) of Labour Institutions (Mediation and Arbitration) Guideline Rules, GN. No. 67 of 2007, GN. 67 of 2007, and section 4 (a) (b) of the Oaths and Statutory

Declarations Act, Cap. 34 R.E. 2019, is that the witness's testimony should be given under oath. Submitting on the consequences of the omission, the learned counsel invited me to be enjoined by the decision of the Court of Appeal in ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase***, CAT-Civil Appeal No. 257 of 2020 (MZA-unreported), in which it was held that evidence taken in non-compliance with the cited provisions is no evidence, and the recourse is to remit the matter to CMA for retrial.

Mr. Kange held the view that, since DW1 and DW2 testified on oath, then the Court should base its decision on the unblemished testimony while expunging the rest of the non-compliant evidence. In the alternative, argued Mr. Kange, if the word "oath' used by the arbitrator is deemed to be insufficient, the Court should remit the matter to CMA for retrial.

In rejoinder, the 3rd applicant was opposed to ordering a retrial since he held the view that that route was long and expensive. To mitigate the consequence, the 3rd applicant urged the Court to take that the testimony was given under oath and go ahead and make a decision as scheduled.

As hinted earlier, the contest in this matter has been narrowed down to the question of compliance with the requirements with Rule 25 (1) of

GN. No. 67 of 2007 and, gathering from the parties' submissions, the narrower question resides in the consequences of the non-compliance with the imperative requirement of the law. While the third applicant is routing for dispensation with the need to let the matter go back for re-trial, the view taken by Mr. Kange is that the Court should, as a matter of first priority, make the decision on the basis of the unscathed testimony of DW1 and DW2. As I delve into the parties' positions, it behooves me to reproduce the substance of Rule 25 (1) of GN. No. 67 of 2007 which sets the foundation for the requirement. It provides as follows:

> *"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 other 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 the 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.* [Emphasis added]

Glancing through the proceedings, it is clear that when DW1 and DW2 testified, their personal particulars were recorded after which the arbitrator wrote the word "oath". This practice was not repeated with respect to any of the witnesses who testified after that. It not clear what the arbitrator meant or intended to achieve by writing the word **"oath"**, but I am not convinced that mere application of that word, without saying that the witness was sworn, means that such witnesses were indeed under oath as at the time of testifying, within the true meaning of Rule 25 (1) of GN. No. 67 of 2007, or within the confines of section 4 (a) of Cap. 34. I hold, with respect, that the counsel's contention on this aspect lacks the spine that would make it resonate. I take the view that, just as it is the

case with the rest of the witnesses, DW1 and DW2's testimony was taken without subjecting the witnesses to oaths or affirmations.

On what happens in such cases, I am in agreement with Mr. Kange, that the consequence of all this is to render the testimony worthless and liable to expunging. This has been held in a number of decisions of this Court and the Court of Appeal. These are: ***Geita Gold Mining Ltd v. Erick Mboyi***, HC-Labour Revision No. 34 of 2020; ***Mashauri Jeck v. Grumeti Reserves Ltd***, HC-Revision Application No. 79 of 2017; and ***Huawei Technologies Tanzania Co. Ltd v. Ramadhani Hassan Mshana & Another***, HC-Revision Application No. 49 of 2018; and ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase***, CAT-Civil Appeal No. 257 of 2020 (all unreported). In ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase*** (supra), the upper Bench splendidly guided as follows:

> *"From the provision which has been reproduced above, it is mandatory for a witness to take oath before he or she gives evidence before the CMA. This is also in conformity with s.4 (a) of the Act cited by the appellant's counsel. That provision states as follows:*

"4

Subject to any provision to the contrary contained in any written law, an oath shall be made by-

(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath or before a court."

Under s.2 of Cap. 34, the word court has been defined to include every person or body of persons having authority to receive evidence upon oath or affirmation. In our considered view, the CMA falls under that definition and particularly so because as stated above, rule 25 (1) of GN No. 67 of 2007 compels a witness to testify under oath.

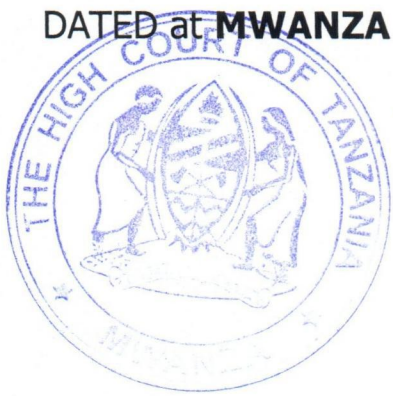
Where the law makes it mandatory for a person who is competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case. – See for example, the cases of ***Nestory Simchimba v. Republic*** *(supra) cited by the appellant's counsel and* ***Hamis Chuma @ Hando Mhoja and Another v. Republic****, Criminal Appeal No. 371 of 2015 (unreported).*

On the basis of the above stated reasons, we find that the omission vitiates the proceedings of the CMA. In the event, we hereby quash the same and those of the High Court."

I take the view that, while the parties would wish that the matter proceeded and be determined on merit, the sad reality is that doing that would be an act of perpetuating the illegality, and operating against the requirements of the law which dictate that such wrongs be righted by having the entire proceedings vitiated. Emboldened by the Court of Appeal's astute reasoning in ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase***, (supra), I quash the proceedings of the CMA, set aside the award and remit the matter back to CMA for trial *de-novo* before another arbitrator, without any undue delay.

It is so ordered.

DATED at **MWANZA** this 10th day of March, 2021.



M.K. ISMAIL

JUDGE

Date: 10/03/2021

Coram: Hon. M. K. Ismail, J

3rd Applicant: Present online. Mobile No. 0762 530256

Respondent: Present online. Mobile No. 0754 454 579

B/C: J. Mhina

Court:

Judgment delivered in chamber, in the virtual attendance of the 3rd applicant and in the presence of Mr. Geofrey Kange, learned Counsel for the respondent.

M. K. Ismail

JUDGE

At Mwanza

10th March, 2021