IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 65 OF 2020

(Original CMA/MWZ/NYAM/343/2019)

SAMEER AFRICA (T) LTD ---------- APPLICANT

VERSUS

VIVIAN AUDAX MULOKOZI---------- RESPONDENT

JUDGMENT

13th April & 13th May, 2021

TIGANGA, J

In this matter the court has been moved under sections 91(3) and 94(f) of the Employment and Labour Relations Act No. 6 of 2004, Rules 24(1),(2)(a),(b),(c),(d),(e),(f), and (3)(a),(b),(c) and (d), and Rule 28 (1),(c),(d) and (e) of the Labour Court Rules, 2007 GN No.106 of 2007. The application has been preferred by chamber summons which was supported by the affidavit sworn by Pendo Msengi, an officer of the applicant conversant with the facts of the case and competent to depose the affidavit in this case. Together with these two documents, the notice of

application and notice of representation were also filed. The orders sought in the chamber summons are:

1. For this court to call for record, proceedings and award of the Commission for Meditation and Arbitration of Mwanza, at Mwanza in Labour Dispute No. CMA/MZA/NYAM/343/2019 and revise, quash and set aside the same on the grounds that;
    (a) The award of the commission dated 27th July 2020 is unlawful, illogical and irrational; and
    (b) Any other relief(s) as this court may deem just to grant.

The affidavit filed in support of the application over and above pointing out the grounds for the application, it also narrates the historical background of the dispute, which put it to light that, the respondent was employed by the applicant on 01.09.2018 as sales and stock administrator whose work station was in Mwanza. In the year 2019, the applicant faced financial challenges which forced it to downsize its operations which included the closure of its operation in Mwanza.

Contemplating possible retrenchment and aware that the same was inevitable under the circumstances, notified the employees of this and called meeting to that effect, that was on 29th May 2019. On 16th

September, 2019, the consultation meeting on the retrenchment was held at the applicant's offices, Mwanza, in which the respondent attended and dully signed the minutes of the said meeting. The meetings communicated the issue of retrenchment and consultation on retrenchment and all related matters including payment of severance allowance and terminal benefits which were ultimately agreed upon. He said the respondent together with her fellow employee received the formal letter of retrenchment and mutual separation agreement, the respondent together with other staffs signed the said agreement.

As there was no opposition against the intended retrenchment, on 30/09/2019 the employment of all staffs including the respondent were terminated by serving them letters which contained a list of all their entitlement including certificate of service.

After the process of retrenchment, the applicant paid to the respondent Tshs. 2,898,713.71 being her terminal benefits, but surprisingly while the respondent was in the process of filling in and signing the exit clearance forms for the payment of her final dues to be processed and be effected, he declined to sign the mutual separation agreement as agreed

on ground of non payment of an insurance claim which was a different matter altogether, un related to the retrenchment process.

On 23/10/2019, the respondent filed Labour Dispute No. CMA/MZA/NYAM/343/2019 before CMA Mwanza, alleging breach of contract based on retrenchment. While the dispute was pending the respondent completed the clearance exercise and submitted her clearance form and was paid all her final dues on 30/10/2019 in account No. 2000050396 NIC Bank. But despite the payment of terminal benefits, the said dispute was heard and on 30/07/2020, the CMA delivered its award holding that the applicant breached the respondent's contract of employment, the procedure for retrenchment were not followed, and there were no valid reasons for termination of the respondent's employment. It consequently ordered that, the respondent be paid the sum of Tshs. 10,422,500/=being her salaries for the remaining 11 months.

The applicant complains that the award is tainted with a number of legal issues as follows;

(a) The legality and correctness of the commission's findings that the applicant breached the respondent's contract of employment.

(b) The legality and correctness of the commission's findings that the applicant did not follow the procedures in retrenchment of the respondent while the respondent had never filed any dispute to challenge the retrenchment process.

(c) In the alternative to ground (b) the legality and correctness of the commission in entertaining the dispute of breach of contract while the complainant had never filed any dispute to complain on the retrenchment process.

(d) The legality and correctness of the commissions in disregarding the applicants evidence proving economic hardship that prompted the retrenchment while accepting the respondent's testimony.

(e) The legality and correctness of the commission's findings for being centered on unfair termination while the dispute which was before it was for breach of contract,

(f) The legality and correctness of the commission's findings that the respondent should be paid the sum of Tshs. 10,422,500/= being her salaries for the remaining 11

months without considering that the respondent was paid her final dues, the total of Tshs. 2,894,713.71.

In consequences thereof, the applicant depose that for the interest of justice, the award be revised in terms of the following reliefs as follows;

i) The commission's proceedings and award dated 16th September, 2019 be quashed and set aside,

ii) The commission's order for payment of Tshs. 10,422,500/= to the respondent being her salaries for the remaining 11 months be set aside,

iii) Any other relief that this honourable Court deems fit to grant.

The application was opposed by filing the Notice of opposition, counter affidavit, sworn by the respondent, Vivian Audax Mulokozi, and the notice of representation. In the counter affidavit the respondent disputed most of the facts in the affidavit sworn and filed in support of the application and the applicant is put to strict proof thereof. In the

alternative, she deposed that the applicant did not produce evidence on financial difficulties/loss of business.

She also contended that, the applicant did not issue notice of intention to retrench and as such, the applicant took no any measures to avoid or minimize the intended retrenchment. Further more, she deposed that the respondent did not agree on the same retrenchment and applicant neither adduced valid reasons for retrenchment nor complied with statutory procedures and the said mutual separation agreement was not signed by the respondent.

Although the terminal benefit were paid, the same are ineffectual in respect of the Labour Dispute at hand. The respondent deposed further that, she did not consent to the retrenchment, one of the indication being that, she refused to sign the insurance form, and therefore the CMA was justified when it held that the termination of the respondent's employment was without valid reasons and that the payment of terminal benefits had no bearing of the breach of contract.

Countering the allegations in paragraph (a) to (f) she deposed that the respondents claim before the Commission for Mediation and Arbitration, was for breach of contract based on retrenchment without

complying with procedure. As the applicant did not adduce evidence in respect of the existence of the financial difficulties or loss of business, therefore the CMA was justified to conclude that the applicants breached the respondents fixed term contract of employment, and was therefore justified to award compensation for the remaining period of 11 months. She deposed therefore that the application lacks merits therefore it be dismissed.

With leave of the court, the application was argued by way of written submissions. The applicant was represented by Mr. Renatus Lubango Shiduki, learned Advocate, while the respondent was represented by Mr. Mussa Joseph Nyamwelo, also learned Advocate.

The submissions by the applicant did not only advance the arguments in support of the application, but also gave a brief background of the disputes between the parties which I have already pointed out herein above as contained in the affidavit filed in support of the application, therefore for purposes of brevity, I will not repeat.

The applicant submitted on the out set that, when he was preparing for the hearing, after he was supplied with the proceedings by the CMA, he noted a crucial point of law which is vital and prayed that although it was

not included in the in the ground of revision, he be allowed to raise and argue it at this stage. To support such a prayer, he cited the authority in the case of **Tanzania – China Friendship Textile Co. Ltd vs Our Lady of the Usambara Sister** [2006] T.L.R 70 and the decision of this Court at Mbeya, in **Agricultural Imputs Trust Fund vs Stephano Simon Mwampashi,** Civil Appeal No. 09/2018, in which it was held *inter alia* that;

> *"In fact, CAT and this court have ruled on several occasions that, matters of law can be raised at any stage including an appellate stage by either the court or the parties, as long as the parties are accorded the opportunity to address the same. See* ***Tanzania Pharmaceutical Industries Limited vs Dr. Ephaim Njau,*** *AR-Civil Application No.05 of 1996 CAT- (un repored)"*

The point he was insisting to raise at this particular point is that, the commission delivered its award basing on unsworn testimonies of the witnesses of both sides. He submitted that, it is equally trite and settled that any legal proceedings including labour matters based on unsworn testimonies are nullity in law. To buttress on that point, he relied on the decision of the Court of Appeal in the case of **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphamia Mkude Athanase**, Civil Appeal No. 257/2020 at Mwanza (unreported) in which the

Court of Appeal quashed and set aside the award of the Commission on the ground that the same based on testimonies taken without oath in contravention of rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) GN. No. 67 of 2007 and section 4(a) and (b) of the Oath and Statutory Declarations Act [Cap. 34 R.E 2019]

He submitted that, looking at the proceedings, at page 4 and 14, only the particulars of the witnesses were recorded, but it has not been indicated that, the said witnesses took oath before testifying. He submitted that a mere stating the witnesses' religion does not necessarily mean that the witnesses took oath. Without such an indication according to him, it can not be said that the witnesses took oath before testifying. Therefore the proceedings and award are vitiated by such omission.

Without prejudice to the foregoing, on the rest of six legal issue raised in the affidavit, he first asked to adopt the whole affidavit, and asked the court to determine the said issues basing on the affidavit. He however asked to be allowed to submit on the first legal issue which is on the breach of contract of employment to ascertain that, whether the same was breached by the applicant?

According to him, he submitted that, this addresses two issues recorded at the commission. The same being central to the revision at hand, he submitted that looking at the proceedings and evidence, the respondent failed to indicate which provision of the contract was breached by the applicant. He submitted that the said contract was admitted on 21st January 2020. According to him, the base upon which the CMA based is the words used by the respondent that at the time when the applicant is saying that the business went down, she kept on selling, therefore that is the sign that the applicant failed to prove that his business went down.

He said the law requires the employee to prove the breach of contract but the employer to prove that the termination was fair. He in the end submitted that the commission's proceedings and award is a nullity, therefore it is thus vitiated for being a nullity. He asked the court to quash the proceedings, and set aside the award.

The counsel for the respondent submitted in reply that, the counsel for the applicant did not first ask for leave of the court to add and argue an additional ground of failure to take oath before witnesses had testified. He therefore invited the court to reject such approach allegedly suggested by the counsel for the applicant.

On the other hand, he submitted that the case of **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphamia Mkude Athanase**, (supra) is distinguishable to the case at hand as in that case, the said issue was raised as one of the ground of appeal, while in the case at hand, the applicant has just raised it in the course of writing the submission that denied the respondent adequate right to respond by way of counter affidavit.

He submitted further that, certainly, if one read the award issued by the CMA, would come to the conclusion that, the CMA delivered the award based on sworn testimonies of the witnesses of both parties. To support his argument, she referred this court at page 2 of the judgment, the third paragraph which indicates that the CMA delivered the decision basing on the sworn testimony.

He submitted that the CMA proceedings should not be read in isolation, it should be read with the award within the parameter of complementarity as articulated in the case of **Samwel Sichone vs Bulebe Hamisi**, Civil Application No. 08 of 2015 CAT Mbeya Registry, in which the Court of Appeal cited with approval the case of **Principal**

Secretary Ministry of Defence and National Service vs Devram Valambhia (1992) TLR 387 where it was held that;

> *"A notice of Motion and the accompanied affidavit are in very nature of things* ***complementary*** *to each other and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the bases of that, it is clear what relief is being sought, then the court should consider and determine the matter regard being had to the objection if any, raised by the opposite party."*

He further submitted that, if the court finds that there are such anomalies in the CMA proceedings as submitted by the counsel for the applicant, he invited the court to exercise its discretion to disregard the said anomaly pursuant to the provision of rule 3(1) and 55(1), (2) of the Labour Court Rules, 2007, GN. No. 106 of 2007. Made under section 55(1) of the Labour Institutions Act [Cap 300 R.E 2019] which designate labour court as the court of equity and to adopt any appointed procedure in view of achieving the object of the Act and, or the good end of justice.

Without prejudicing the foregoing, the counsel for respondent adopted the counter affidavit and the notice of opposition filed in this court by the respondent. Regarding the nature of the dispute, the counsel submitted via the amended Form No. 1 in clause 3 that, the nature of

dispute in this matter is breach of contract based on retrenchment. Basing on that nature of the dispute, the CMA framed three issues for determination, the main issue being whether the procedure of breach of contract based on retrenchment was complied with. On that, he submitted that the above issue was resolved in negative as the applicant failed to discharge its duty as there was no fair and valid reasons for termination of the respondent's employment.

To support his arguments, he submitted that, the applicant was supposed to rely on the provision of section 38(1)(a)(b)(c)(i)(ii)(iii)(iv) and (v) and (d) of the Employment and Labour Relation Act, read together with section 23(4)(a)(b)(c)(d)(e)(f) and (5)(6)(a)(b) and (c), Rule 24(1) and (2), Rule 25(2) of the Employment and Labour Relations (Code of Good Practice), Rules, GN.42 of 2007, which provides for the procedures to be followed. However, according to him, the said procedure was not followed in the termination of the employment of the respondent.

He said the position that the procedure was not followed, formed part of the testimony of the respondent, but the applicant did not cross examine on that aspect, he submitted that, the principle in the case of

Juma Kasema Nhumbu vs the Republic, Criminal Appeal No. 550 of 2016 CAT- Tabora.

> *"That failure to cross examine a witness on a certain matter is deems to have accepted that matter and will be estopped from asking the court to disbelieve what the witness said as the silence is tantamount to accepting the truth."*

He in the end, asked for the application to be dismissed for want of merits.

In rejoinder filed by the applicant, he insisted that the point of law can be raised at any time provided once raised parties are accorded with opportunity to be heard, he recited the case **Tanzania China Friendship Textile Co. Ltd and Stephano S. Mawampashi**, (supra). He also recited the case of **CUHAS** as cited above.

He further insisted that, failure to take the testimony of the witnesses under oath is fatal and this court should have the evidence expunged from the record. In his further argument, he distinguished the decision of **Samwel Sichone** (supra) as the same is inapplicable in the case at hand. In his opinion, the anomaly is fundamental and cannot be ignored or disregarded. On the rest of the submission he reiterated on what he submitted in chief.

From the above summary, it is evident that the issue of the Arbitrator none swearing of the witness was raised by the applicant during the submission. It was so raised and argued without first seeking and obtaining leave of the court to argue it. I entirely agree with the counsel for the respondent that, it was un procedural.

However, it is a principle of law as held in the case of **Tanzania – China Friendship Textile Co. Ltd vs Our Lady of the Usambara Sister** [2006] T.L.R 70 referred to by my sister Hon. Mongella, J in the decision of this Court at Mbeya, in **Agricultural Inputs Trust Fund vs Stephano Simon Mwampashi,** Civil Appeal No. 09/2018, depicts the correct position of the law on at what time matters of law can be raised and argued. In these decisions the courts held *inter alia* that, matters of law can be raised at any stage including an appellate stage by either the court or the parties, as long as the parties are accorded the opportunity to address the same.

The raised issue is a matter of law, as it is the requirement under rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) GN. No. 67 of 2007, that evidence even before the CMA must be recorded

on oath. This becomes a mandatory requirement when read together with section 4(a) of the Oath and Statutory Declarations Act [Cap 34 RE 2019]

In this case, having regarded the fact that, what has been raised by the counsel for the applicant is important matter of law, which when proved may vitiate the proceedings, it goes without saying that, even if the parties would not have raised it, the court would have moved itself to raise it subject to the requirement that it must afford the parties the opportunity to be heard on the said alleged anomaly.

The fact that is was raised at the submission stage does not matter, as long as the opposite party was served with the submissions, got knowledge of what has been raised, and had opportunity to respond when filing the reply submissions.

It is worthy to note that, in the address of the said issue, the counsel for the respondent did not dispute the fact that the proceedings do not indicate that both parties' witnesses took oath before giving their evidence. However, he submitted that the award suggest that witnesses gave their evidence an oath, as the Arbitrator's understanding is that, the evidence

was given under oath and that following that inference from the award, he suggests this court to find that, the evidence was recorded under oath.

With respect to the counsel for the respondent, I am not prepared to accept his proposition because the law in rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) GN. No. 67 of 2007 makes it a mandatory requirement that, witnesses shall testify under oath.

It then needs to be complied with in the manner which is express, clear and apparent in the proceedings that the witness took oath before giving their evidence; it should not be implied as the counsel for the respondent wants it to be conceived. This means the proceedings must show that the evidence was given on oath or affirmation depending on the nature of the witness's belief.

In the case of **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphamia Mkude Athanase**, (supra), the Court of Appeal having deliberated on the provision of rule 25(1) of the GN. No. 67/2007 concluded that;

> *"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, it is also in conformity with sections 4(a) and 2 of the Oath and Statutory Declaration, Act, which define the word court to include Tribunals, and any other body with authority to received evidence, therefore thus read together with Rule 25 of the GN No. 67/2007, compels the witness testifying before CMA to testify under oath"

The court went further that;

"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 prejudice the parties case.....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 and set aside the award".

In this case, the respondent has asked this court to find that the case cited above is distinguished in this case simply because, in that case the issue of failure to take oath was raised as one of the grounds of appeal, unlike in this case in which it was not so raised, but was raised at the submission stage. In as far as I am entirely in agreement, that the circumstances in which the issues were raised are slightly different in both cases. However, I am not prepared to agree with the distinguishability of the cited authority in the case at hand, as the authority gives a general

principle of law which cut across both circumstances. That said, I find the authority cited by the counsel for the applicant in respect of this aspect to be relevant and applicable in this case.

Having so found, I find the fact that the proceedings do not show that the evidence of both parties' witnesses were given and recorded on oath, is fatal to the evidence given and relied upon by the Arbitrator. The same vitiates the proceedings and therefore deserves on that ground alone, I, under section 94(1)(b)(i) of the Employment and Labour Relations Act, [Cap 366 R.E 2019], revise the proceedings and the award, and just like the Court of Appeal did in the case of **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphamia Mkude Athanase**, (supra), quash the proceeding of the CMA and set aside the award.

On the way forward, I order the matter to be remitted to the Commission for Mediation and Arbitration, for the labour dispute to be heard *de novo* before another Arbitrator. Since this is a labour matter, I make no any order as to costs.

It is so ordered.

DATED at **MWANZA** this 13th day of May, 2021

J. C. Tiganga

Judge

13/05/2021

Judgment delivered in the presence of the counsel for the parties on line via audio conference. Right of Appeal explained and guaranteed.

THE HIGH COURT OF TANZANIA MWANZA

J. C. TIGANGA

JUDGE

13/05/2021