

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LABOUR REVISION No. 6 OF 2022

*(Arising from the Commission for Mediation and Arbitration for
Mara at Musoma in Labour Dispute No. CMA/MUS/55 of 2021)*

AKO GROUP LTD APPLICANT

Versus

1. CHARLES JOSEPH LAMECK

2. ENOCK MARWA

3. ABIOLA JAPHET WILSON



..... RESPONDENT

RULING

15.09.2022 & 15.09.2022

Mtulya, J.:

On the 24th day of September last year, 2021, the full court of Court of Appeal of Tanzania (the Court) was invited in **Iringa** to resolve a dispute on interpretation of Rule 19 (2) (a) and 25 (1) of the **Labour Institutions (Mediation and Arbitration Guidelines) Rules**, GN. No. 67 of 2007 (the Rules), in the precedent of **Joseph Elisha v. Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 (the appeal).

During the hearing of the appeal, it was found that Rule 25 (1) makes it mandatory for witnesses to take oath before producing testimonies in the **Commission for Mediation and**

Arbitration (the Commission), and the arbitrator is mandated under Rule 19 (2) (a) of the Rules to administer oaths or accept affirmations from any person summoned to give evidence. Similarly, the Court also noted section 4 (a) of the **Oaths and Statutory Declarations Act** [Cap. 34 R.E. 2019] makes it mandatory for witnesses giving evidence in courts to do so under oath. Finally, the Court, at page 5 of the decision held that: *since it is mandatory for witnesses to take oath before giving evidence, its omission vitiates the proceedings*. The authorities in **Catholic University of Heath & Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 and **Iringa International School v. Elizaneth Post**, Civil Appeal No. 155 of 2019, were invited in the judgment of the appeal to substantiate the position.

However, the Court faced with difficulties after noting that the Rules are silent on a provision regulating presence of the arbitrator's signature at the end of every witness's testimony to authenticate the record. In resolving the *lacunae* in the Rules, the Court had consulted Rule 5 of Order XVIII of the **Civil Procedure Code** [Cap. 33 R.E 2019] (the Code), section 210 (1) (a) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act), and precedents in **Mhajiri Uladi & Another v. Republic**, Criminal

Appeal No. 234 of 2020; **Chacha Ghati @ Magige v. Republic**, Criminal Appeal No. 406 of 2017; and **Iringa International School v. Elizabeth Post** (supra), and at page 6 of the judgment settled that:

Though the Rules governing the proceedings at the CMA do not contain any provision regarding signing of the witness's testimony by the arbitrator, it is our view that the requirement is imperative to safeguard the authenticity and correctness of the record.

In its conclusion, the Court had directives on the appropriate available remedies on such failure to append arbitrator's signature at the end of every witness's testimonies. At page 8 of the judgment, it stated:

*...the failure by the arbitrator to append signature at the end of each witness's testimony vitiated the proceedings before the CMA...we proceed to quash the proceedings of the CMA and set aside the award as well as the proceedings and judgment of the High Court which upheld that award. For justice to be done, we remit the record to the CMA for the dispute to be heard **de novo** before another arbitrator.*

The reasoning of the Court in arriving at the decision is displayed at the same page 8 of the judgment to the effect that:

As demonstrated in this appeal, the testimonies of all witnesses were not signed...not only the authenticity of the testimonies of the witnesses but also the veracity of the trial court record itself is questionable. In absence of signature of the person who record the evidence, it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witness since the recorder of such evidence is unknown...on account of such omission, the entire proceedings recorded...are vitiated because they are not authentic.

This thinking and reasoning was cherished by this court at the end of last year in **RATCO Company Limited v. Said Salim Said**, Labour Revision No. 5 of 2020 and early this year in **Rubango Mfungo v. Nyafuru Andrea Esore**, Land Appeal Case No. 95 of 2021. However, that was not the end of the story. On 5th April this year, 2022, the Court was invited again in **Dar Es Salaam** to adjust its previous interpretation in a situation where original proceedings were signed and certified by arbitrator at the end of the record. Reading the reply of the Court, as

extracted from page 8, 9, and 10 of the judgment in **Attu J. Myna v. CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021, and the gist is:

Fortunately, this is not a new territory...the anomaly relates to the failure by the arbitrator to append signature at the end of each witness's evidence...it is our view that the requirement is pertinent in order to safeguard the authenticity and correctness of the record...there is plethora of Court's decisions to the effect that, failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings...Mr. Mayenga tried to impress upon us that since the proceedings were signed at the end, then they were authentic. As shown above, the anomaly stems from failure by the arbitrator to endorse each witness's testimony. Therefore, the signing at the end of the proceedings cannot authenticate the witness's evidence.

Finally, the Court quashed the judgment and set aside the award and proceedings of the Commission and for interest of justice and way forward, the Court ordered for *trial de novo*. In

the present appeal, four (4) witnesses were summoned to appear and testify in **the Commission for Mediation and Arbitration for Mara at Musoma** (Musoma Commission) in **Labour Dispute No. CMA/MUS/55 of 2021** (the dispute) on 9th November 2021.

However, during testimonies recording, the arbitrator in the dispute had declined to append signature at the end of every witness's testimony. When the dispute was scheduled for revision hearing in this court on 31st August 2022, Mr. Baraka Bundara, learned counsel for the applicant, Ako Group Ltd, took the floor of this court and complained that the arbitrator in the dispute at the tribunal administered oath to all witnesses, but declined without reasons on appending his signature at the end of every witness's testimony.

According to Mr. Bundala, the proceedings in the Musoma Commission were tainted with irregularities and prayed this court to quash the award and set aside proceedings of the Commission in the dispute and order for *trial de novo*. In order to bolster his argument, Mr. Bundala cited the precedent in **Joseph Elisha v. Tanzania Postal Bank** (supra). The submission and cited precedent was received with a surprise from Ms. Mary Joakimu,

learned counsel for the respondents, **Mr. Charles Joseph Lameck, Mr. Enock Marwa Alphonse** and **Mr. Abiola Japhet Wilson**. Following the surprise Ms. Joakimu prayed for leave to consult further authorities on the subject. However, on 15th September 2022, when the matter was scheduled again for hearing in this court, Ms. Joakimu conceded the appeal arguing that available precedents show that arbitrators are mandatorily required to sign at the end of each witness's statement. With the available remedies in the circumstances, she supported the thinking of Mr. Bundala.

From the cited precedents in this Ruling on the subject of appending signature at the end of each witness's statement and considering the record of this revision, it is obvious that the well-established practice of the Court was violated by the Commission in the dispute. The available remedies in the circumstances, as from the recent precedent of the Court, is to quash the award and set aside proceedings of the Commission in the dispute and order for *trial de novo*. This court shall follow the course.

I am therefore moved to quash the award, set aside any orders and proceedings emanated from Musoma Commission in the dispute. For justice to be done, I remit the record to the

Musoma Commission for the dispute be heard *de novo* before another arbitrator. I do so without any order as to costs as this is a labour dispute. Each party shall bear its costs.

It is so ordered.




F. H. Mtulya

Judge

15.09.2022

This ruling was pronounced in chambers under the seal of this court in the presence of Mr. Lucas Bundala learned counsel for the applicant, **Ako Group Ltd** and in the presence of Ms. Mary Joakimu, learned counsel for the respondents, **Mr. Charles Joseph Lameck, Mr. Enock Marwa Alphonse** and **Mr. Abiola Japhet Wilson**.


F. H. Mtulya

Judge

15.09.2022