

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION NO. 24 OF 2021

(Arising from the decision of Ho. Msuwakole, S. in Labour complaint No.

CMA/MZ/ILEM/155/2020/56/2020)

EQUITY FOR TANZANIA LTD..... APPLICANT

VERSUS

ALFRED ANDREW RESPONDENT

JUDGMENT

Date of last order: 16/03/2022
Date of Judgement: 31/03/2022

M. MNYUKWA, J.

The applicant filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 31/03/2021 in Labour Dispute No. CMA/MZ/ILEM/155/2020/56/2020. The application is made under section 91(1) (a) (b), 91(2)(a) and (b) together with 94 (1) (b) (i) of the Employment and Labour Relations Act, [CAP. 366 RE 2019] (herein the Act) and Rule 24(1), 24(2)(a), (b), (c), (d) and (f), 24(3)(a), (b), (c) and (d) and Rule 28(1)(a), (b), (c), (d) and (e) of the Labour Court Rules GN



No.106 of 2007 (herein GN No. 106 of 2007). The application is supported by the affidavit of the applicant's counsel.

The respondent challenged the application through the counter affidavit of his advocate. The matter proceeded by way of written submissions. In this Revision, the applicant was represented by Mr. Shabani Shirima, learned Counsel whereas Mr. Bruno Mvungi, learned counsel represented the respondent.

In his chamber summons the applicant prayed for the following orders: -

1. That this court be pleased to revise the award of CMA Award in Labour Dispute No. CMA/MZA/ILEM/155/2020/56/202 dated 31st March 2021 delivered by Hon. Msuwakole, S.
2. That this honourable court be pleased to revise the proceedings and issue such orders it deem fit.
3. Any other order(s) that this honourable court deems fit and just to grant.
4. Costs of the application be provided for.

The applicant has advanced 13 grounds of revision in his affidavit for the court to consider and determine, with the leave of the court, he added one ground of revision in his supplementary affidavit. The same



was challenged by the respondent who filed notice of opposition, counter affidavit and supplementary counter affidavit.

The brief facts of the case are that, according to the CMA Form No 1 which is the form that initiates complaint, the respondent was employed by the applicant on 1st November 2012 until 14th April 2020 when his contract of employment was terminated. It was alleged that the applicant was terminated on fraudulent activities, negligence and complaints from customers on performance of his duty of facilitating loans equipment to customers. It was alleged that the applicant was suspended from employment so as to give way to investigation. After completion of investigation, the respondent was served with the notice of hearing accompanied with the report of fraud but he did not appear on the hearing date. The applicant proceeded to follow the procedure of terminating the respondent. Aggrieved with the decision of the applicant, the respondent lodged a complaint before the CMA alleging that he was unfairly terminated as the procedure for termination was not followed but also the reasons for termination were not known to the respondent. He therefore claimed to be paid 12 months salaries, payment of the notice of termination, severance pay, repatriation costs. subsistence allowance and certificate of service.



The matter was heard interparty and the CMA delivered its Award on 31st March, 2021 where the complaint was decided in favour of the respondent on the reason that the termination was unfair both substantively and procedurally. Following the decision of the CMA, the applicant filed the present application for this court to revise the proceedings and the award delivered by Hon. S. Msuwakolo.

During submission, the counsel for the applicant combined all grounds of revision and prayed this court to grant the following orders: -

- 1. To call the records of the CMA and revise the proceedings and the decision on the ground that there are errors material to the merits of the dispute hence an erroneous conclusion involving injustice;*
- 2. To nullify the proceedings of the CMA as the evidence of the witnesses was taken without administering an oath/affirmation, exhibits were not endorsed by the arbitrator also the arbitrator failed to sign at the end of each testimony; and*
- 3. To quash the decision and the proceedings of CMA and issue such orders as it deems fit.*

In his submission the counsel for the applicant submitted on his supplementary ground of appeal and averred that the proceedings of the CMA are nullity on the ground that the evidence of the witnesses



were taken without an oath for example the evidence of DWI. He added that this irregularity vitiated the proceedings of CMA as it is illustrated in the case of **National Bank of Commerce Ltd vs Sabas Kessy**, Labour Revision No 277/2020 HC, Dar es Salaam.

He went on submitting that, on the other hand the arbitrator did not append signature at the end of the testimony of each witness since after re-examination, the arbitrator ended by writing that is all. On this point he stated that appending signature at the end of the witness's testimony signify the authenticity as it was held in the case of **National Bank of Commerce Ltd** (supra).

The counsel for the applicant further submitted that, the exhibit tendered before the CMA were not duly endorsed by arbitrator as required by law. He stated that the exhibits were only marked as AB-1, AB-2, AB-3, AB-4, AB-5, RS-1. RS-2 without bearing the date and the signature of admission by the arbitrator. He remarked that, failure to admit the tendered exhibits is fatal and its effect is to nullify the proceedings. He retires on this ground that, this anomaly was not featured in the applicant's grounds for revision, but still this court has power to look upon it.

In alternative, the applicant's counsel submitted that, the applicant followed all the procedure before terminating the respondent from



employment as he was warned towards his misconduct and negligence, he was suspended from employment, the investigation was carried on, he was given the right to be heard before the disciplinary committee though he did not attend, the outcome of the hearing was communicated to him, he was informed of his right to appeal and after termination, the respondent handed over the company's properties which is an evidence that he was aware with the whole processes of terminating him from employment.

He went on submitting that, the arbitrator erred in law and fact to analyze the evidence adduced before it and hence failed to reach at the proper decision. He gave an example stating that the arbitrator failed to analyze the evidence of DW2, DW3 and DW6 and that the applicant followed all the procedure before terminating the respondent.

The applicant's counsel retires his submission in chief praying this court to revise and quash the proceedings of the CMA and order re-hearing of the dispute before another arbitrator.

Responding to the application, the respondent's counsel prays the Court to adopt the counter affidavit filed on 15th June 2021 and 22nd February 2021 respectively to form part of his submissions and prayed this court to dismiss the application because it lacks merit.



On the issue of the witnesses to have testified without taking oath, the counsel for the respondent stated that, all the witnesses testified on oath including DW1. He submitted that the effect of failure to take oath is not to nullify the whole proceedings because the position of the Court of Appeal has changed as it was pointed out in the case of **North Mara Gold Mine Limited vs Khalid Abdallah Salum**, Civil Appeal No 463 of 2020 CAT at Musoma. He went on that when visited the CMA award the arbitrator shows that DW1 testified under oath. He added that DW1 was brought in CMA to prove the reason for termination and not the procedure which the CMA award faulted that the procedure was not followed. He enlightens that while weighing the evidence of DW1 against the consequences of nullifying the whole proceedings, it is clear that it will eventually affect the rights of the respondent who was terminated without following procedure and he is still suffer without being compensated. He retires on this point by stated that all witnesses testified under oath and if this court finds that DW1 was not under oath, this court should follow the position of the Court of Appeal in the case of **North Mara Gold Mine Limited** cited above.

On the second ground of revision as to the failure of the arbitrator to append signature at the end of each witness's testimony, the counsel for the respondent submitted that, the rules governing proceedings in



the CMA are silent on the requirement of appending the signature at the end of each witness who testified. He enlightens that, Rule 19(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN No 67 of 2007 empowers the arbitrator to determine the procedure on how the arbitration should be conducted. And for that end, in our case at hand the arbitrator chooses to authenticate the proceedings by allowing the witnesses and their advocate to sign after the evidence of the respective witness. He claimed that the signatures of the advocates for the parties can be seen after the end of the proceedings of that particular day and that was so to every other witness testified in the CMA. He added that all witnesses signed after giving their evidence and since the CMA is not a court and hence the procedure guiding them are simple and flexible to enable speed up the matters and maintain friendly relationship between the parties. He again cited the case of **North Mara Gold Mine Limited** which held that Rule 19(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 which gives the power to arbitrator to determine how the arbitration should be conducted. He went on to fault the decision of **National Bank of Commerce Ltd vs Sabas Kessy**, Labour Revision No 277/2020, HC Labour Division as a persuasive and this court is not bound by it.



On the new ground raised during the applicant's submission that the exhibits were not duly endorsed, the respondent's counsel submitted that, the cited case of **National Bank of Commerce Ltd** (supra) is not binding to this court and that this court should be bound by the decision of the Court of Appeal in the case of **North Mara Gold Mine Limited** (supra). He claimed that Rule 19 and 25 of the GN No 67 of 2007 are silent on how documentary exhibits can be received and marked. He added that, the position of the Court of Appeal is that a decree cannot be reversed on mere technical grounds unless it had resulted into failure of justice as it was held in the case of **Elizabeth Mboya vs Amina** [2000] TLR 122.

On the alternative grounds submitted by the applicant, the counsel for respondent averred that the applicant did not follow the procedure of terminating the respondent from employment and the procedure purported to be followed by the applicant were all found to be untrue by the arbitrator.

He went on that the notice of hearing was not served to the respondent and if at all was served, the same does not qualify to be treated as a notice under the labour laws and that was rightly explained by the arbitrator in her arbitral award as reflected on page 35 to 37. He added that the disciplinary hearing was not well conducted as it was



observed by the arbitrator in her decision as shown on page 36 to 41 of the Award that the respondent was not paid his terminal benefits.

The counsel for respondent retires his submission by claiming that the applicant had no valid reasons to terminate the respondent from employment and he did not follow the proper procedure of terminating him from employment. He therefore prayed the application to be dismissed.

In rejoinder the applicant counsel reiterated what he had submitted in chief and upon going through his submission, nothing useful was added.

After considering the rival submissions from both counsels, I find the main issue for consideration and determination is whether the application for revision is merited.

Starting with the first ground of revision the applicant's counsel claimed that the proceedings of the CMA are nullity for the reason that the witnesses who testified on both sides their evidence were taken without administering oath. That assertion was strongly challenged by the respondent's counsel who submitted that, all witnesses their testimony was taken after administering oath, and he alleged that even DW1 his evidence was taken after administering oath as it is seen on CMA Award, and in case the court find that DWI did not take oath

before testified, this court should take the position of the Court of Appeal in the case of **North Mara Gold Mine Limited.** (supra)

From the submission of the parties on the issue of administering oath before a witness testified, I find it relevant to visit the guiding law which is the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007. Rule 25 provides the mandatory requirement of the witness to testify under oath. The Rule provides that: -

*25(1) The parties shall attempt to prove their respective cases through evidence and **witnesses shall testify under oath...** (emphasis is mine in the bolded words).*

The above Rule, requires every witness to testify under oath and the importance of oath when a witness testify, does not need emphasis, as it well known that among other things, it acts as a verbal promise to tell the truth, encouraging truthful testimony from the witnesses and act as a credence to what the witness has testified.

For the purposes of proving the applicant's assertion that all witnesses did not testify under oath, I have had time to revisit both the hand written and the typed proceedings of the CMA. As it is clearly seen at page 12, 24, 32, 41,55, that five witnesses of the applicant that is DW2, DW3, DW4, DW5 and DW6 testified under oath. When I revisited



the typed proceedings, I find the typing error before the evidence of DW5 was taken the record on page 41 of the proceedings reads as "*baada ya hapo Ushahidi unaendelea*". However, upon revisiting the handwritten proceedings, I find the proceedings reads as "*baada ya kiapo ushahidi unaendelea*". Therefore, since the typed proceedings originated from the handwritten proceedings which is considered as original, I hold the view that five witnesses of the applicant testified under oath.

Again, I have revisited the typed proceedings and find that the respondent that is PW1 did not call any other witness and he testify under oath as it is reflected at page 68 of the CMA typed proceedings. In that end, the record of the CMA in both handwritten and typed proceedings, shows that only DW1 did not take oath before testifying as it is seen on page 6 of the typed proceedings of the CMA.

While acknowledging that witness shall testify under oath, I entirely agree with the counsel for the respondent that in order to administer justice to the parties and taking the route of the Court of Appeal on the consequence of the failure of the witness to take oath before testifying, it is indeed the proceedings in respect of DW1 only which is supposed to be nullified and quashed from the CMA record of



proceedings and Award. In the case of **North Mara Gold Mine Limited** (supra) it was pointed out that:

"... We are therefore of the of the considered opinion that it is only the proceedings in respect of these two witnesses whose evidence should be nullified and quashed from the CMA's record of proceedings. Certainly, the nullification will also apply to the award of the CMA and the proceedings of the High Court...."

I have not taken the view of the Court of Appeal in the case of **Iringa International School vs Elizabeth Post**, Civil Appeal No 155 of 2019 as argued by the counsel for the applicant as the same is distinguishable in our case at hand since at **Iringa International School** (supra) all witnesses did not take oath before testified unlike in our case at hand where only DW1 testified without taking oath.

As to the way forward after quashing and nullifying the proceedings in the case of **North Mara Gold Mine Limited** (supra), the Court of Appeal ordered the labour dispute to be remitted to the CMA for re-hearing the testimonies of the witnesses who testified without oath and thereafter the arbitrator shall compose the Award.



Guided by the above decision, I hereby invoke my power and follow the footsteps of the court of Appeal of Tanzania and order the file to be remitted to the CMA for re-hearing by taking under oath the evidence of DW1 in accordance to the law and followed by composing the award as soon as practicable.

On the second ground of revision it is the argument of the applicant's counsel that the arbitrator did not append his signature at the end of every witness testimony. He claimed that the re-examination ended with the words *that is all*. He went on citing the consequence of the failure to append signature as it was stated in the case of **National Bank of Commerce** (supra) that an omission to do so is fatal to the proceedings.

The applicant's assertion was vehemently disputed by the respondent's counsel who submitted that the Rules guiding CMA proceedings are silent on the requirement of the arbitrator to sign at the end of the witness testimony and instead the Rules gives them a loophole to determine the procedure on how the arbitration should be conducted as it is seen on Rule 19(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007. The counsel added that, in our case at hand the arbitrator chooses to authenticate the records of proceedings by having the signature of the witnesses and their



respective advocate(s). He therefore argued this court to take the position of **North Mara Gold Mine Limited** (supra) regarding the style of authenticating the proceedings of the CMA.

By way of emphasis, I wish to state that one of the tests on the evidence in which the court may rely on it is that the evidence must be authentic in order to be proved as genuine so as to be relied on when reaching decision. As it was correctly argued by the counsel for the respondent that the Rules governing the conduct of the proceedings at CMA are silent on the requirement of appending signature of the arbitrator at the end of witness testimony. As if that is not enough, the Rules are also silent that in case of inadequacy the arbitrator should resort into which law.

Additionally, Rule 19(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 provides that:

"An arbitrator has the power to determine how the arbitration should be conducted."

Upon going through CMA proceedings, I find that the arbitrator had adopted his own style of authenticating the proceedings requiring the advocates of the applicant and the respondent who was unrepresented, to sign on their first appearance to the court, after setting the date of hearing. Again the respective witness signed after the



examination in chief and the advocate of the applicant and the respondent signed the proceedings at the end of the court business on the particular day. Furthermore, on every adjournment or order made by the arbitrator, the applicant advocate and the respondent signed the proceedings.

Besides, as it was rightly argued by the counsel for the respondent, the evidence of DW1, DW2, DW3, DW4 was taken on 28.08/2020 and the signature of the applicant's advocate is seen at the end of proceedings of that particular day.

In the case of **North Mara Gold Mine Limited** (as cited above), the Court of Appeal of Tanzania when facing with the more less the same situation of the witnesses and their respective advocate to append the signature in the proceedings had this to say:

"However, in the instant appeal, in the circumstances of what has been exposed above with regard to the style which was adopted by the arbitrator in causing the signature of the parties and their respective advocates to be appended at the beginning of the proceedings before the witnesses started to testify and after they finished testimonies, we find this to be in conformity with the provisions of Rule 19 (1) of the Rules..."

They went further by stated that:



"We are of the considered opinion that in the light of the style adopted by the arbitrator of authenticating the witnesses' evidence no miscarriage of justice was caused to the parties. We hold this firm view because, firstly, there is no dispute that the parties in this appeal question the authenticity of the proceedings with regard to the testimonies of witnesses for both sides. Indeed, this being a record of the proceedings of the trial CMA, it can not be easily impeached as it is presumed to be authentic of what transpired before it. Besides, in view of the submissions of the counsel for the parties before us, it has not been contended that the substance of the evidence recorded by the CMA does not reflect what the witnesses testified at the trial."

As I earlier pointed out, in our present case the arbitrator authenticates the proceedings by causing the advocate of the party and the respondent to sign after the testimonies of all witnesses at the end of the day and every witness who testified also signed in his evidence given in the examination in chief. Indeed, as it was held in the case of **North Mara Gold Mine Limited** (supra) the parties in the present revision through their respective submissions did not question the authenticity of the proceedings with regard to the testimonies, Thus the same presumed to be genuine evidence representing what parties testified before the CMA.



Therefore, guided by the decision of the Court of Appeal in the case of **North Mara Gold Mine Limited** (supra), I am of the considered view that failure of the arbitrator to append signature at the end of each witness testimony did not occasion miscarriage of justice to the parties and therefore I find this ground of revision lacks merit and I hereby dismissed it.

On the new ground of revision, the applicant's counsel averred that the arbitrator failed to endorse the exhibit which renders the proceedings to be nullity. On his part the counsel for the respondent submitted that the parties in the present revision did not question the authenticity of the proceedings in regard to the style of the arbitrator to mark the exhibit. He therefore retires his submission by stated that Rule 19(1) gives the arbitrator mandate to conduct his proceedings and that the record of the court can not be easily impeached.

In our case at hand, the arbitrator adopted his own style of admitting the exhibit by marking them as Exhibit AB-1, AB-2, AB-3, AB-4, AB-5, RS-1 and RS-2 without endorsing them with initial/signature and date.

In the case of **Finca Tanzania LTD vs Wildman Masika and 11 others**, Civil Appeal No 173 of 2016. CAT at Iringa (unreported),



when the Court of Appeal facing with the similar situation of the exhibit being admitted without the arbitrator endorsing the signature and date, it proceeded to quote Regulation 19 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 and held that:

"It is apparent from the quoted provisions that the arbitrator has the power to regulate and determine the practice and procedure of how arbitration should be conducted, including in our view, how to handle the documents tendered by parties during arbitration. There is nothing in the Mediation and Arbitration Guidelines Rules which call for the strict application of order XIII Rule 4(1) of the CPC in the arbitration proceeding before the CMA. Moreover, the Rules do not provide for any resort to the CPC where there is a lacuna in the procedure to be applicable in the CMA. Besides, to argue for the application of CPC strictly where there is lacuna in the Mediation and Arbitration Guidelines Rules during arbitration process is, in our view, to defeat the very purpose of the said Rules which aim to make the procedure as simple as possible to attain substantive justice to the parties in view of the nature of the proceedings. ..."

Guided by the above decision of the Court of Appeal and taking into consideration that the Rules regulating the conduct of the proceedings at CMA aimed at ensuring the attainment of substantive justice by using the simple and flexible procedure and to maintain a



good relationship and harmony between the employer and the employee, my mind is settled that, the style of the arbitrator to mark the exhibit the way he did, did not occasion failure of justice and therefore cannot result the proceedings to be nullified. For that reason, I find this ground to have lacked merit and it is hereby dismissed.

Having said so, I have no hesitation to state that in the circumstance of this case, I will not dispose the remaining grounds of appeal after quashing and nullifying the evidence of DW1 so as not to prejudice the arbitrator's decision after rehearing the said witness as ordered.

In the final analysis, I proceed to remit the file to CMA for rehearing the testimony of DW1 before another arbitrator and ordered him to compose the award as soon as practicable.



No order as to costs. It is so ordered.


M. MNYUKWA
JUDGE
31/03/2022

Court: Judgement delivered on 31/03/2022 in the presence of parties' advocate.


M. MNYUKWA
JUDGE
31/03/2022