

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LABOUR REVISION NO. 21 OF 2021

(Arising from Labour Dispute No. CMA/MUS/144/2019)

BETWEEN

NORTH MARA GOLD MINE LIMITED APPLICANT

VERSUS

SIMON GODFREY MSENKA & 30 OTHERS RESPONDENTS

RULING

16th & 23rd March, 2022

A. A. MBAGWA, J.

In this application, the applicant, North Mara Gold Mine Limited applies for revision of the Award by the Commission for Mediation and Arbitration for Mara at Musoma in Labour Dispute No. CMA/MUS/144/2019 between herself and the respondents. The application was made by the way of Notice of Application, Chamber Summons and supported by three affidavits sworn by applicant's human resource officers, Emmanuel Kipingu and Elisha Kagoro, and applicant's counsel, Faustin Malongo.

Before going any further, I find it apposite to narrate relevant facts which constitute the brief background of the matter. It goes as follows: before the Commission for Mediation and Arbitration for Mara at Musoma (the

CMA) the respondents filed the employment disputes against the applicant. They claimed for unfair termination. After a full trial, on the 30th day of July, 2021, the CMA issued an award in favour of the respondents. The award ordered the applicant to compensate each respondent eighty (80) months' salary remuneration. That decision was not of the applicant's desire, hence this revisional application.

When the matter was called on for hearing, Mr. Faustin Malongo, the learned advocate appeared for applicant whilst the respondents enjoyed the services of Mr. Ernest Mhagama, the learned advocate.

At the every outset, Mr. Malongo informed the Court that both counsels had agreed that this application could be disposed of by one main issue namely, that some witnesses did not take oaths before they adduced their testimonies at the CMA and that some witnesses' testimonies were not signed by the sitting Arbitrator.

In support of the revision, Mr. Malongo submitted that, the 1st to 16th witnesses of the applicants did not take oath before testifying at the CMA. He contended that the skipped procedure is fatal because it is against rules 19 (2) (a) and 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67 of 2007. He cemented his submission by referring the case of **North Mara Gold Mine Limited vs Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020 CAT at Musoma.

Mr. Malongo proceeded to submit that the proceedings in respect of 1st to 16th witnesses should be quashed and the award should be set aside. Consequently, the witnesses affected should be heard afresh before another Arbitrator, Mr. Malongo opined.

Mr. Malongo further argued that one witness named Mwijarubi Shadrack Mwijarubi whose testimony is found at page 455 of the typed proceedings of the CMA, gave his evidence under oath but the Arbitrator did not append his signature at the end of his evidence. He prayed the Court to quash the proceedings in respect of the said evidence and order his evidence to be taken afresh before a different Arbitrator.

Mr. Mhagama, learned counsel for the respondents did not contest. He assented to Mr. Malongo submission.

Upon hearing the parties' submissions and thoroughly passing through the record, the key issue for determination of this revision is whether, on the strength of anomalies highlighted, the CMA's proceedings are a nullity.

Embarking on the issue of failure to take oath by some witnesses before testifying, I would first be taking into account the position stipulated under rule 19 (2) (a) of the GN No. 67 of 2007 which is to the effect that one of the duties of the Arbitrator is to administer oath or accept affirmation from a witness. The rule provides as follows;

“19. (2) The powers of Arbitrator include to-

(a) administer an oath or accept affirmation from any person called to give evidence;”

Besides, rule 25 (1) of the Rules provides that the witnesses shall give their testimonies on oath before the CMA.

In this application at hand, it is openly evidenced in the proceedings of the CMA that the provisions of rules 19 (2) (a) and 25 (1) of the GN No. 67 of 2007 were not complied with. Mr. Malongo submitted that the said procedure was not observed for 1st up to 16th applicants' witnesses who testified before Nnembuka, K. the Arbitrator. However, upon navigating through the record, I found that even the 24th witness of the respondent who testified before Msuwakollo S. did not take oath. That makes a total number of seventeen (17) witnesses who adduced their testimonies without taking oath. Owing to the above irregularities, I nullify the proceedings in respect of the 1st to 17th applicants' witnesses and 24th respondent's witness. See the case of **North Mara Gold Mine Limited vs Khalid Abdallah Salum** (supra).

As regards to the issue of failure to append signature by the Arbitrator at the end of some witnesses' evidence, Mr. Malongo submitted that one witness named Mwijarubi Shadrack Mwijarubi at page 455 of the typed proceedings of the CMA his evidence was taken under oath but the

Arbitrator did not append his signature at the end of his evidence. He prayed the Court to quash the proceedings in respect of the said evidence and order the evidence to be taken afresh before a different Arbitrator.

Unlike Mr. Malongo who noted only Mwijarubi Shadrack, when I went through the CMA's proceedings, I found a total number of nineteen (19) witnesses whose evidence was not authenticated (not signed at the end). Those are 2nd to 17th and 19th applicants' witnesses, 11th applicants' recalled witness and 22nd respondent's witness (Mwijarubi Shadrack Mwijarubi).

The CMA's proceedings in respect of the mentioned witnesses show that after examination in chief the counsel who led the examination in chief appended his signature and after cross examination the respective witness appended his/her signature. However, after re-examination neither the advocate, witness nor the Arbitrator appended the signature.

Though the Rules governing the proceedings at the CMA do not contain any provision demanding appending signature at the end of witness testimony by the sitting Arbitrator, the Court of Appeal, in the case of **Joseph Elisha vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 (unreported), ruled out that the procedure is necessary to safeguard the authenticity and correctness of the record.

Persuaded by the provision of rule 19 (1) of the GN No. 67 of 2007 which empower the Arbitrator to determine how the arbitration proceedings should be conducted, the Court of Appeal in the case of **North Mara Gold Mine Limited vs Khalid Abdallah Salum** (supra) stated that;

“...we think the procedure adopted by the Arbitrator of causing the witnesses’ and the advocates’ signatures to be appended at the beginning and end of the evidence ensured the authenticity of what transpired during arbitration.

We therefore find that the failure of the Arbitrator to append signature at the end of each witness’s testimony did not, in the circumstances of this case, occasion miscarriage of justice to the parties.”

From the above illustration my concern is what “***the end of witness evidence***” mean. In my view, the witness testimony or evidence ends when the re-examination is done. Leaving the re-examination part unsigned, implies that part of the witness testimony is not authenticated. Thus, in our case at hand, it is my opinion that the evidence of 2nd to 17th and 19th applicants’ witnesses, 11th applicants’ recalled witness and 22nd respondent’s witness was not dully authenticated.

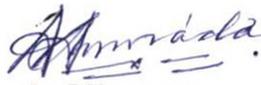
In the circumstances, I am inclined to revise and nullify the proceedings of the CMA in respect of the 1st to 17th and 19th applicants’ witnesses, 11th

applicants' recalled witness, 22nd and 24th respondent's witnesses. Consequently, I set aside the award dated 30/07/2021 which emanated from irregular proceedings. On the way forward, I order that the case file be remitted to the CMA for rehearing the testimonies of 1st to 17th and 19th applicants' witnesses, 11th applicants' recalled witness, 22nd and 24th respondent's witnesses according to the law. The hearing should be conducted before another Arbitrator besides the two namely, Nnembuka K. and Msuwakollo S. I make no order as to costs due to circumstances of this case.

It is so ordered.

The right of appeal is explained.




A. A. Mbagwa

JUDGE

23/03/2022

Court: the ruling has been delivered in the presence of Imani Mfuru, counsel for applicant and Ernest Mhagama, counsel for the respondents this 23rd day of March, 2022.


A. A. Mbagwa

JUDGE

23/03/2022