

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 318 OF 2019

BETWEEN

**BOARD OF TRUSTEE OF THE NATIONAL SOCIAL
SECURITY FUND.....APPLICANT**

AND

GEORGE THOMAS MHANDI..... RESPONDENT

RULING

Date of last order:07/12/2021

Date of Ruling: 07/12/2021

B.E.K.Mganga, J

The respondent was an employee of the applicant. It happened that their relationship went sour as a result applicant terminated employment of the respondent. Respondent filed labour Dispute No. CMA/DSM/ILA/570/12/475 praying to be reinstated on ground that he was unfairly terminated. On 6th May 2016, E. Mwidunda, Arbitrator issued an award in favour of the respondent.

Applicant was aggrieved by the said award as a result she filed this application seeking to revise the said award. Luciana Kagimbo, a principal officer of the applicant filed an affidavit in support of the

application. On the other hand, Daniel Haule Ngudungi, Advocate filed a counter affidavit to oppose the application on behalf of the respondent.

I perused the CMA record and find that Faraja Daudi (DW1), Sadick Chaewa Mvungi (DW2) Dominic Mbwete (DW3) and George Thomas (PW1) the only witnesses who testified at CMA, their evidence were recorded not under oath. When the application was called for hearing and before hearing grounds advanced by the applicant in the affidavit in support of the application, I asked both counsels to address the court the effect of the evidence of the aforementioned witnesses to be recorded not under oath or affirmation.

Responding on this issue, Mr. Marcelus Opiyo, counsel for the applicant submitted that in terms of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E.2019] every person called as a witness has to take an oath or affirm before his evidence is received by the court. He cited the Court of Appeal decision in the case of ***Iringa International School v. Elizabeth Post***, Civil Appeal No. 155 Of 2019 (Unreported) that the omission vitiated the whole CMA proceedings and the award arising therefrom. He therefore prayed that the proceedings be nullified, award be set aside and order trial *de novo*.

On the other hand, Jacqueline Kulwa, counsel for the respondent submitted that the court should invoke the overriding principle and determine the revision. It seems to her, that this was a merely technicality also she conceded that evidence of all witnesses was recorded not under oath or affirmation. When asked by the court as to whether there is evidence to be used by the court to make revisional order, she readily conceded that there is none, as witnessed did not take oath or affirm before testifying. When further probed by the court as to whether, the overriding principle require parties to ignore clear and mandatory provisions of the law, she conceded that it does not. Finally, upon reflection, counsel for the respondent concurred with the submissions by counsel for the applicant and prayer the prayer for an order of trial de novo.

I entirely agree with submissions of both counsels as that failure of the witnesses to take oath or affirm before testifying vitiates the entire proceedings and the award arising therefrom as it was held by the Court of Appeal in the *Iringa International School's case*, (supra) cited by counsel for the applicant. other cases to that effect are **Tanzania Portland Cement Co. Ltd V. Ekwabi Majigo**, Civil Appeal No. 173 of 2019 (unreported), *Joseph Elisha V. Tanzania Postal Bank*, Civil

Appeal No. 157 of 2019 [unreported], ***Unilever Tea Tanzania Limited vs. Davis Paulo Chaula, Civil Appeal No. 290 of 2019*** (unreported) to mention by a few.

Taking an oath or affirmation before a witness testifies is a mandatory requirement of the law. This mandatory requirement is provided for under section 4(a) of the Oaths and Statutory Declaration Act[cap. 34 R.E 2019] and Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, 2007, GN. No. 67 of 2007.

The logic and reasons for the position taken by the Court of Appeal in my view, is that, when a witness testifies under oath or affirmation, promises to tell nothing but the truth and submits himself or herself to his/her God or any other superior power that he /she should be punished if he/she tells lies. This does not mean that all who takes oath or affirmation tells the truth, but the court or a judicial body, in the first place has to be assured that the witness will tell nothing but the truth. No judicial officer is ready to waste time and other resources knowing that the witness will tell lies. Not only that but also, taking an oath or affirmation is compliance with the law. The courts are there to ensure that there is compliance with the law. If laws are enacted and being ignored, then there is no need of enacting them. But the effect of

failure to comply with the law may have a far-reaching effect to the society, which is why, laws has to be complied with. For the foregoing, I hereby nullify CMA proceedings, set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay.

For the foregoing, I hereby nullify CMA proceedings, set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay. I further order that the dispute should retain its CMA number.




B.E.K. Mganga
JUDGE
07/12/2021