

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 151 OF 2020

REHEMA MASHAYO..... APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA TANZANIA LIMITED..... RESPONDENT

RULING

Last order 28/9/2021

Date of Ruling 8/10/2021

B.E.K. Mganga, J

Applicant was employed by the respondent as Personal Assistance to the Chief Executive Officer with effect from 2nd April 2012. On 1st March 2017 applicant received a re-assignment letter from the respondent whereby she was transferred from being Personal Assistant to the Chief Executive Officer to Administration Assistant cum Receptionist reporting to the procurement officer. Applicant felt that she was demoted as a result on 29th June 2017 she referred a Labour dispute to the Commission for Mediation and Arbitration hereinafter referred to as CMA for unfair discrimination practices of being demoted and cessation of her allowances.

Having heard witnesses both for the applicant and the respondent, on 13th March 2020, Nyangaya, P, Arbitrator delivered an award in favour of the respondent. Applicant was aggrieved by the award hence this application for revision.

When the application was called for hearing on 8th October 2021, after perusal of the CMA record, I found that John Samwel Mbezi(DW1), Zainaba Issa Mushi(DW2) and Rehema Mashayo (PW1), the only witnesses in this file, testified not under Oath. I therefore asked counsels for both applicant and respondent to address me the effect of the omission.

Mr. Nzaro Kachenje, counsel for the applicant submitted that the omission vitiated proceedings and prayed CMA proceedings be nullified and the award set aside and order trial *de novo*. On his side, Mr. Fredrick Masawe August, Counsel for the respondent joined hand with counsel for the applicant. To support his stance, Mr. Fredrick, counsel for the respondent cited the case of ***Unilever Tea Tanzania Limited v. Davis Paulo Chaula, Civil Appeal No. 290 of 2019***, CAT (unreported).

I am in agreement with submissions of both counsels that these irregularities have vitiated the whole proceedings at CMA. It is my considered opinion that the central issue of taking an oath or affirmation at

CMA can be traced from Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. 67 of 2007 that gives power to arbitrators to administer or accept an affirmation. The said Rule provides:-

19(2) the powers of the Arbitrator include to-

- 1. (a) administer an oath or accept an affirmation from any person called to give evidence;**
- 2. (b) summon a person for questioning attending a hearing, and order the person to produce a book, document or object relevant to the dispute, if that person's attendance may assist in resolving the dispute".**

On the other hand, Rule 25(1), (2) and (3) of GN. No. 67 of 2007 provides that witnesses shall testify on oath and provides the procedure on how examination in chief, cross examination, re-examination can be conducted and provides a stage at which arbitrator can put questions to a witness. It is my opinion that these Rules namely 19(2) and 25(1) both of GN. No. 67 of 2007 has to be read together whenever arbitrator is handling a dispute. As pointed above, John Samwel Mbezi(DW1), Zainab Issa Mushi (DW2) and Rehema Mashayo (PW1) gave their evidence not on oath in violation of Rule 25(1) of GN. No. 67 of 2007 and section 4(a) of the Oaths and Statutory Declaration Act [cap. 34 R.E. 2019] that requires witnesses

to take oath or affirm before giving their evidence before CMA. The Court of Appeal was confronted with a similar issue in the case of ***Unilever Tea Tanzania Limited***, (supra), ***Joseph Elisha v. Tanzania Postal bank, Civil Appeal No. 157 of 2019*** (unreported), ***Iringa International School v. Elizabeth Post, Civil Application No. 155 of 2019***, (unreported) and ***Tanzania Portland Cement Co. Ltd v. Ekwabi Majigo, Civil Appeal No. 173 of 2019*** (unreported) and found that the omission invalidates the evidence. In the case of ***Tanzania Portland Cement*** (supra) the Court of Appeal restated its position in the case of ***Catholic University of Health and Allied Science (CUHS) v. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020*** after it has reproduced the provision of Rule 25 of GN. No. 67 of 2007 held that:-

"... it is mandatory for a witness to take oath before he or she gives evidence before the CMA...where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case."

In the final analysis, the Court of Appeal in the ***Tanzania Portland Cement*** (supra) held that:-

*"In the same vein, since DW, DW2, Pw1 and Pw2 were competent witnesses whose testimonies ought to have been received under oath or affirmation but that requirement was not observed, **their evidence becomes***

invalid and vitiated the entire proceedings in the CMA...the entire proceedings of the CMA are a nullity.

For the foregoing, I find that the irregularity is fatal and has vitiated the proceedings of CMA. Guided by the above cited cases of the Court of Appeal, I hereby quash the proceedings of CMA and set aside the award. I hereby order the file be dispatched to CMA for the Labour dispute between the applicant and the respondent to be heard *de novo* before another arbitrator.

It is so ordered



B.E.K. Mganga

JUDGE

8/10/2021