

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 260 OF 2020

BETWEEN

JOHN MKINGA..... APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED..... RESPONDENT

RULING

Date of Last Order: 8/10/2021

Date of Ruling: 8/10/2021

B.E.K. MGANGA, J.

On 1st May 2007, respondent employed the applicant in the position of Forklift. On 24th October 2016 respondent terminated employment of the applicant on allegation of fighting with a fellow employee at workplace which is misconduct. Aggrieved by the said termination, applicant referred the dispute to the Commission for Mediation and Arbitration henceforth CMA. Having heard evidence of both parties, on 29th May 2020, Nyangaya, P, Arbitrator, issued an award in favour of the respondent that termination was fair both substantively and on procedure. Applicant was aggrieved by the said award hence this application for revision.

When the application came for hearing on 10th August 2021, Mr. Elisaria Mosha, advocate assisted by Yohana Thomas, advocate appeared and argued for the applicant while Ruben Robert, advocate argued on behalf of the respondent. I scheduled judgment to be delivered on 8th October 2021. In the course of composing my judgment, I discovered that all five witnesses namely (i) Deogratias Gaspar Morsi (DW1), (ii) William Tukiko Asémbo (DW2), (iii) Kisa Wilfred Mwasomola (DW3), (iv) Deogratias Robert Sabilo (DW4) and (v) John Soko Mkinga (PW1) testified not under oath.

When the application came for judgment on 8th October 2021, only Mr. Erick Dengah, advocate for the respondent appeared. Counsel for the applicant did not enter appearance and no notice of absence was filed in court.

As counsel for applicant failed to appear and without notice, I asked Mr. Dengah, counsel for the respondent to address me the effect of the witnesses to testify not under oath.

Mr. Dengah, counsel for respondent submitted briefly that the omission vitiated CMA proceedings and prayed the same be nullified, the award be set aside and order trial *de novo*.

I am in agreement with Mr. Dengah, counsel for the respondent that evidence of all witnesses was recorded in violation of Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 G.N. No. 67 of 2007 read together with Rule 19 (2) (a) of the same G.N. It is clear from Rule 19 (2) (a) of the said G.N. that Arbitrator has powers to administer Oath and further that under Rule 25(1) of the same G.N., it is mandatory witnesses to testify under Oath. The mandatory requirement of witness to testify under Oath is also provided for under Section 4(a) of the Oaths and Statutory Declaration Act (Cap 34 R.E. 2019). It is therefore undisputed that the arbitrator, in recording evidence of the aforementioned witnesses violated aforementioned mandatory provisions. The omission of taking an oath or affirmation by witnesses before testifying vitiates proceedings.

The Court of Appeal was confronted with a similar issue in the case of **Tanzania Portland Cement Company Limited V. Ekwabi Majigo, Civil Appeal No. 173 of 2019, Iringa International School V. Elizabeth Post, Civil Appeal No. 155 of 2019, Joseph Elisha V. Tanzania Postal Bank, Civil Appeal No. 157 of 2019 and Unilever Tea Tanzania Limited V. Davis**


Paulo Chaula, Civil Appeal No. 290 of 2019. In all these cases, the Court of Appeal held that the omission vitiating proceedings. The Court of Appeal nullified CMA proceedings, set aside the award arising therefrom and ordered trial *de novo*.

The reason for the Court of Appeal to take that stance is clear, in my view, that evidence taken not under oath is rendered valueless. It is as if that a witness did not testify. In the application before me, since the only two witnesses their evidence were taken not under oath, it is equally that there is no evidence which I can examine/assess and make revision order.

For the foregoing, I am in agreement with counsel for the respondent that CMA proceedings be nullified, the award arising therefrom be set aside and order trial *de novo*. I therefore, hereby nullify CMA proceedings, set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay.

It is so ordered.




B.E.K. Mganga
JUDGE
08/10/2021