

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

REVISION APPLICATION NO. 388 OF 2021

BETWEEN

JOYCE MAPUNDA & 7 OTHERS APPLICANTS

AND

KIOO LIMITED..... RESPONDENT

RULING

Date of Ruling: 06/05/2022

B. E. K. Mganga, J.

Joyce Mapunda and 7 others all being employees of the respondent filed a claim of unfair termination before the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/TEM/178/2016. Having evidence and submissions of the parties, the Arbitrator struck out the dispute filed by the applicants on ground that they filed the dispute against a wrong party. Feeling resentful with that decision, they filed the present application challenging the award. The notice of application was supported by the affidavit sworn by Joyce Mapunda. In opposing the application, respondent filed the counter affidavit of Athuman Said.

By consent of the parties, the application was disposed of by written submissions. At the time of composing the judgment, I perused the CMA record and noted that William Bongo (DW1) and Linda Daniel Njoolay (DW2) who testified on behalf of the respondent, their evidence was recorded under oath. But the evidence of Joyce Mapunda (PW1) who was the only witness for the applicants and Deodatus Kaziulaya Mkuba (DW3), their evidence was recorded not under oath. Having confronted with that situation, I resummoned the parties to address me on the effect of that omission.

Responding on the issues raised by the court on the effect evidence of both PW1 and DW3 to be recorded not on oath, Joyce Mapunda, on behalf of the applicants submitted that, she took an oath, but the arbitrator seems did not record. She submitted that she took oath as a guarantee that she will state nothing but the truth. She emphatically submitted that she took oath, but she does not know what happened for the arbitrator not to record the same. As to what should be done, Ms. Joyce Mapunda left it to the Court to decide.

On his part, Mathias Kabengwe, Advocate for the Respondent submitted that, the Court cannot act on evidence not taken under oath. He prayed that, evidence of Joyce Mapunda (PW1) and Deodatus Kaziulaya Mkuba (DW3) that was taken not under oath be expunged and remain with evidence of two witnesses for the respondent. In his submissions, counsel for the respondent submitted that, it is the arbitrator who was recording hence, applicants are in no way could have been aware that the arbitrator did not record that oath was taken. During submissions, counsel for the respondent conceded that it will cause injustice to the applicants if the court relies on evidence of the two witnesses for the respondent who were recorded to have testified under oath but expunging evidence of the applicants. Counsel for the respondent prayed, in the interest of justice, that CMA proceedings be nullified and order trial *de novo*.

It is clear from the CMA record as pointed hereinabove that Joyce Mapunda (PW1) and Deodatus Kaziulaya Mkuba (DW3) testified not under oath. The requirement of giving evidence under oath is mandatory, as it is provided for under Rule 25(1) of the Labour

Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007. The said Rule 25(1) of GN. No. 67 of 2007 provides: -

*"25(1) The parties shall attempt to prove their respective cases through evidence and **witnesses shall testify under oath** through the following process..."*

As submitted by Joyce Mapunda, taking an oath is an assurance to the court that a witness promised to tell nothing but the truth. In absence of that promise, that assurance cannot be ascertained. In my view, since evidence of PW1 and DW3 were recorded not under oath, that was violation of the law and vitiated the whole proceedings. The Court of Appeal had an advantage of discussing a similar issue in the case of **Portland Cement Co. Ltd vs. Ekwabi Majigo**, Civil Appeal No.173/2019 (unreported) and **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 (unreported), wherein it was held that: -

"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".

Being guided by the position of the Court of Appeal in the cited cases, I hereby nullify the CMA proceedings, quash, and set aside the CMA award. I hereby direct that CMA records be remitted back to CMA

so that the dispute between the parties can be heard *de novo* before another arbitrator without delay.

Dated at Dar es Salaam this 6th May 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 6th May 2022 in the presence of Ms. Joyce Mapunda, applicant and Mathias Kabengwe, Advocate for the Respondent.



B. E. K. Mganga
JUDGE