

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**DAR ES SALAAM**

**REVISION APPLICATION NO. 32 OF 2019**

**COCA COLA KWANZA LIMITED..... APPLICANT**

**VERSUS**

**LAINI PEMBE MWARANGI..... RESPONDENT**

**RULING**

Last order 28/9/2021

Date of Ruling 28/09/2021

**B.E.K. Mganga, J**

Respondent was employed by the applicant as store clerk. On 19<sup>th</sup> June 2015 applicant terminated employment of the respondent. Aggrieved by termination decision, respondent filed a labour dispute No. CMA/DSM/KIN/R.459/15 at the Commission for Mediation and Arbitration (CMA) alleging that he was unfairly terminated. Respondent gave evidence under oath to prove that his termination was unfair. On the other hand, Neema Kingston and Obadia Lameck Lwiza gave evidence not under oath alleging that termination was fair. On 10<sup>th</sup> August 2018, Lemwel D, arbitrator

issued an award that termination was unfair and awarded ordered respondent to be paid TZS 4,666,970/=. Applicant was aggrieved by that award as a result filed this revision application.

On the date of hearing of the application, Mr. Godfrey Tesha, Advocate appeared and argued on behalf of the applicant while Mr. Hemed Mtoni, the Personal Representative, appeared and argued on behalf of the respondent. Before parties has advanced their arguments, I asked them to address me the effect of Neema Kingston and Obadia Lameck Lwiza to testify while not under oath.

Mr. Godfrey Tesha, Advocate, advocate submitted that the omission is in violation of Rule 25(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 67 of 2007 that requires witnesses to take oath or affirm before giving their evidence. He went on that the same omission violated section 4(a) of the Oaths and Statutory Declaration Act [cap. 34 R.E. 2019]. He concluded that evidence of the said two witnesses is worthless to be considered by the court. He therefore prayed the dispute be heard de novo. On his part, Mr. Mtoni, personal representative of the respondent concurred with the submission made by Mr. Tesha , advocate for the applicant.

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-*

- (a) administer an oath or accept an affirmation from any person called to give evidence;***
- (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, Neema Kingston and Obadia Lameck Lwiza 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 ***Iringa International School v. Elizabeth post, Civil Application No. 155 of 2019***, (unreported) and found that the omission invalidates the evidence. A similar position was taken by the Court of Appeal in the case of ***Tanzania Portland Cement Co. Ltd v. Ekwabi Majigo, Civil Appeal No. 173 of 2019*** (unreported) where 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 ***Iringa International School*** (supra) held that:-

*"For reasons that the witnesses before CMA gave evidence without having first taken oath and as the arbitrator did not append her signature at the end of the testimony of every witness...we find that the*

*omissions vitiate the proceedings of the CMA...we hereby quash the proceedings both of the CMA and that of the High Court..."*

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**

28/09/2021