

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 32 OF 2020

MOHAMED KIVUGO..... APPLICANT

VERSUS

GUULED TRANSPORT CO. LTD..... RESPONDENT

JUDGMENT

Last order 23/8/2021

Date of Judgment 24/09/2021

B.E.K. Mganga, J

The applicant was an employee of the respondent since 2014 and continued with employment until on 31st December 2018 when his employment was terminated. Applicant filed a labour dispute to the Commission for Mediation and Arbitration challenging his termination alleging that termination was unfair. Mohamed Omary Kivugo (**PW1**), the applicant and Omar Hamad Kichenje (**PW2**) testified with the bid to prove that termination of the applicant was unfair. The respondent paraded Shaban Mussa Mnegero who testified as **DW1** and Abdi Helsi Hussein who

testified as **DW2**. On 23rd December 2019, M. Batenga, Arbitrator, issued an award the applicant was not comfortable with, as a result he filed an application before this court so that the said award can be revised.

The affidavit of the applicant in support of the Notice of Application contains three ground of revision namely:

- 1. The honorable arbitrator erred in law and fact by finding that the employer(respondent) did follow procedures of termination of the applicant.*
- 2. The honorable arbitrator erred in law and fact by failure to order the respondent to give back property owned by the applicant.*
- 3. The honorable arbitrator erred in law and fact by failure to evaluate evidence adduced by the applicant during hearing.*

The application was disposed by written submissions. In the said written submissions, the applicant enjoyed the service of Sophia Bhoke Rolya, advocate while the respondent enjoyed the service of Safia S. Mbunda, advocate. I adjourned this Revision Application and scheduled judgment to be delivered on 24th September 2021. At the time of composing my judgment, I went through the CMA file and find that all witnesses testified **not under oath** and further that arbitrator did not sign at the end of evidence of each witness. I noted also that arbitrator did not sign and stamp on exhibits and there is nothing showing as to when

exhibits were tendered. In short, it is difficult to differentiate exhibits received, from other documents that were filed by the parties at the time of filing their respective pleadings. Being confronted with these short falls, I decided to summon counsels for the parties and asked them to address me the effect of these omissions.

Ms. Sophia Bhoke Rolya, counsel for the applicant submitted that effect of testifying not under oath renders that evidence to be worthless hence cannot be acted upon by the court. She submitted further that exhibits that were not properly endorsed by the arbitrator cannot be used as evidence worth to be considered by the court. She argued that the arbitrator was supposed to sign at the end of evidence of each witness. She concluded that, these irregularities have vitiated proceeding and prayed for retrial.

Ms. Safia S. Mbunda, counsel for the respondent though notified to attend in person, she did not. Instead, she sent Zuberi Rajabu, an intern to appear. As the said Zuberi Rajabu, an intern, was not mentioned in the notice of representation has nothing to address me as he had no right of audience. I should point out here that, this is unbecoming behaviour to an

advocate who is an officer of the court. I therefore proceeded to hear counsel for the applicant on the issue I raised.

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, witnesses gave evidence not on oath in

violation of Rule 25(1) of GN. No. 67 of 2007 that requires witnesses to take oath or affirm before giving their evidence before CMA. It is also clear from the CMA file that arbitrator did not sign at the end of evidence of each witness. 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). In resolving issue of omission of the arbitrator to sign at the end of evidence of each witness, the Court of Appeal held:-

"Although the laws governing proceedings before the CMA happen to be silent on the requirement of the evidence being signed, it is still a considered view of the court that for the purposes of vouching the authenticity, correctness and providing safeguards of the proceedings, the evidence of each witness need to be signed by the arbitrator".

The Court of Appeal went on to quote the provisions of Order XVIII rule 5 of the CPC as follows:

*"The evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, **not ordinarily in the form of question and answer, but in that of a narrative and the judge or magistrate shall sign the same.**"*

The court of Appeal further quoted section 210(1) of the CPA as it provides:-

"S. 210(1) In trials other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-

(a) The evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing under his personal direction and superintendence and shall be signed by him and shall form part of the record."

The Court of Appeal restated its holding in the case of ***Yohana Mussa Makubi and Another vs Republic, Criminal Appeal No. 556 of 2015***

(unreported) that:-

"...a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings."

Court of Appeal went on to quote reasons for appending the signature by a judge or a magistrate at the end of the testimony of every witness as it was held in the case of ***Yohana Makubi*** (supra) that:-

*"...in the absence of the signature of the trial [Judge] at the end of the testimony of every witness; **firstly**, it is impossible to authenticate who took down such evidence, **secondly**, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants' counsel, **thirdly**, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; **fourthly**, such evidence does not constitute part of the record of trial and the record before us".*

On the omission of witnesses to testify without taking an oath or affirmation, the Court of Appeal found that 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..."*

Apart from the foregoing, exhibits were not properly endorsed. There is no date showing as to when the exhibit was admitted, stamp of CMA and signature or initial of the arbitrator. Both Rule 19 and 25 of GN. No.67 of 2007 and the whole GN. No. 67 of 2007 is silent on how documentary exhibits can be received and marked. I am of the view that Rule 19(b) of GN. No. 67 of 2007 that empowers arbitrator to order a person to produce documents that can assist him in determination of the dispute was intended that the documents received has to be properly marked so that it can be known as to when it was received at CMA. As all documentary exhibits in the CMA file are not marked as to when they were received, there is neither a signature of the arbitrator nor a CMA stamp. All exhibits cannot therefore be differentiated from all other documents marked and filed by the parties. I am of the view that failure to properly mark exhibits received is fatal. I am fortified by the decision of the Court of Appeal in the case of ***A.A.R. Insurance (T) Ltd vs Beatus Kisusi, Civil Appeal No. 67 of 2015*** (unreported) where it was held:-

"Once the exhibit is admitted, ... it must be endorsed as provided under O.XIII, R.4 of the CPC...the need to endorse is to do away with tempering with admitted documentary exhibits."

In the case of ***Ally Omary Abdi vs Amina Khalil Ally Hildid (As an administratix of the estate of the late Kalile Ally Hildid), Civil Appeal No. 103 of 2016*** (unreported) the Court of Appeal held:-

"Endorsements on documents cleared for admission in terms of Order XIII Rule 4 is one way to ensure the genuineness of documents which parties tendered...faced with the irregularity of the trial court using as evidence the documents which were not endorsed in compliance with Order XIII Rule 4 of CPC, the Court would invoke its powers of revision ... to quash all the trial proceedings which followed the exhibition of unendorsed exhibit..."

For the foregoing, I find that these irregularities are 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. No order as to costs.

It is so ordered



B.E.K. Mganga

JUDGE

24/09/2021