IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 41 OF 2020

MICHAEL KABUME..... APPLICANT

VERSUS

KNAUF GYPSUM TANZANIA LTD..... RESPONDENT

RULING

Last order 28/9/2021

Date of Ruling 29/09/2021

B.E.K. Mganga, J

On 1st April 2019, Applicant filed labour dispute No. CMA/DSM/KIN/260/19/102 alleging that the respondent breached employment contract. Facts of the dispute in brief are that, applicant was called by the respondent for both written and oral interview for the position of safety Manager. After interview, applicant was informed, by the Human Resources Manager of the respondent, through WhatsApp message that he has won the position he applied for. That, several communications passed by, but later on applicant was informed that his appointment has been

cancelled due to financial crisis. Based on that background, applicant filed a labour dispute alleging that respondent breached employment contract and prayed to be paid TZS 33,000,000/= as unpaid salaries from 15th May 2018 to 1st April 2019 and general damage of TZS 100,000,000/=.

At CMA, only Michael Kabume, the applicant testified as PW1 to prove the allegation of breach and Mr. Paul Bakanga for the respondent though he was not marked either as DW or PW. It can only be concluded that he testified on behalf of the respondent after reading his evidence. After conclusion of hearing and submissions by the parties, on 31st December 2019, Wilbard G.M, arbitrator issued an award in favour of the respondent that there was no contract of employment between the applicant and the respondent. But the arbitrator awarded the applicant to be paid TZS 3,000,000/= as punitive damage on ground that the respondent made false statement to the applicant who was a candidate in the interview for employment. Applicant was aggrieved by the decision of the arbitrator as a result filed this revision application. In the affidavit in support of the application, applicant advanced six grounds of revision namely:-

1. *That the Arbitrator erred in law and fact for determining issues not being referred to at the stage of arbitration.*

2. *That the Arbitrator erred in law and fact for reaching to an award which is not definite, certain and concise.*
3. *That the Arbitrator erred in law and fact by reaching to a conclusion without legal basis nor legal foundation.*
4. *That the Arbitrator erred in law and fact by holding that there is no breach of contract between the parties.*
5. *That the Arbitrator erred in law and fact by awarding one month salary to wit TZSH (sic) 3,000,000/= being punitive damages of which was not the Applicant's relief sought.*
6. *That the Arbitrator erred in law and fact for issuing an award which is incompetent and incapable of determining rights of the parties.*

The application was disposed by way of written submissions. Applicant enjoyed the service of Akiza Rugemarila, advocate while the respondent enjoyed the service of Mr. Anwar Katakweba. The application was adjourned for necessary orders after parties has done with their submissions. During the time of composing my judgment I read the CMA file and found that witnesses testified while not under oath. I therefore summoned the parties to appear and asked them to address me the effect of **Michael Kabume, (PW1)** and **Mr. Paul Bakanga** who are the only witnesses, to testify while not under oath and whether it was proper for Paul Bakanga not to be properly marked.

Mr. Akiza Rugemarila, counsel for the applicant submitted that it was a slip of the pen that has not occasioned miscarriage of justice to the parties as they were heard at CMA and tendered exhibits. When asked by the court as to whether exhibits were received and properly marked by the arbitrator, Mr. Rugemarila, conceded that they were not properly marked. He conceded further that 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 was violated. He was quick to argue that CMA is not bound by technicalities. To his view, failure to take oath is an issue of technicality. He therefore prayed this court to invoke the overriding objectives and determine the application on merit.

On his side, Mr. Anwar Katakweba, counsel for the respondent submitted briefly that the omission has vitiated CMA proceedings. He cited the case of ***Joseph Elisha v. Tanzania Postal Bank, Civil Appeal No. 157 of 2019, CAT*** (unreported) to bolster the argument that omission of witnesses to take oath or affirm before testifying and failure of the arbitrator to append a signature at the end of evidence of each witness vitiated the whole proceedings. He therefore prayed this court to nullify proceedings and order the dispute be heard de novo.

In rejoinder, Mr. Rugemarila, counsel for the applicant, maintained that this court should invoke the overriding objective principle and determine the application on merit. He submitted that the application has taken long time in the court and that applicant has incurred a lot of costs and that the omission did not prejudice the parties.

In their submissions both counsels are in agreement that the CMA file does not show that witnesses took oath before giving their evidence. Their departure is what course should the court took. Mr. Rugemarila, counsel for the applicant has invited me to ignore the omission and invoke the overriding principle on ground that the omission to take an oath is technicality and pressed upon me to concentrate with substantive justice, but, Mr. Katakweba, counsel for the respondent was of the view that on the strength of the court of Appeal decision in the case of ***Joseph Elisha***, supra, CMA proceedings are nothing but a nullity.

With due respect to Mr. Rugemarila, counsel for the applicant. The fact that the application has been pending in court for a long time and that applicant has incurred some costs are not matters that can warrant the court to ignore clear provisions of the law. More so, the overriding principle is not there to allow judicial officers or quasi-judicial officers and or parties

to the dispute not to adhere to the clear provisions of the law. An invitation to ignore clear provisions of the law may turn our courts in a Kangaroo Courts or Moot courts. That is not the intention of the overriding objective principle. In the case of ***Sylvester Hillu Dawi and Another v. the Director of Public Prosecutions, Criminal Appeal No. 250 of 2006, CAT*** (unreported), the Court of Appeal had this to say:-

> *"...**The law on the issue is unambiguous and specific. It might appear harsh and perhaps unjust**, as Mr. Nyange vehemently argued. **But we cannot disregard it** as gallantly argued by him... The mandate given to the courts to administer justice in the country by the Constitution is very clear. We cannot circumvent the Constitution. The judiciary as provided under article 107 A of the Constitution is the only organ of the state having the final say in the administration of justice in the country. But it does not have unbridled powers. The courts must operate within the parameters of the Constitution. The Constitution in Articles 107A and 107B enjoins us to administer justice in accordance with the law of the land being guided by the five principles enunciated in article 107A(2). **So the invitation by Mr. Nyange to disregard the clear provisions of the law for sake of breaking new ground is not only an invitation to anarch but an invitation to violate the Constitution. We are not prepared to do that...We take it as settled law that if the language of a statute is clear, it must be enforced at all times to the letter. We cannot ignore it for the sake of venturing into the realms of idealism or breaking new grounds of the law. If we attempt to do so we shall only lose the confidence of the society which we are supposed to serve but also our legitimacy. Yes, in appropriate cases, but within the confines of the law, we shall not***

afraid of breaking new grounds in order to improve the justice we deliver. We are afraid to say that this is not one of those cases".

In my view, the Court of Appeal said all in the above quoted paragraph. There is no need for me to labour much on that.

In the application at hand, the law is clear that witnesses at CMA before testifying they have to toke oath or affirm. Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. 67 of 2007 provides:-

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

Rule 25(1), supra, has to be read together with Rule 19(2) of the same GN. that gives power to the arbitrator to administer or accept affirmation. The said Rule 19(2) 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; Rule 19(2) and 25(1) both of GN. No. 67 of 2007 has to be read together whenever arbitrator is handling a dispute

Not only that but also, section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E. 2019] provides that it is mandatory for a witness in court to testify under oath. The said section provides:-

> *"Subject to any provision to the contrary contained in any written law,* ***an oath shall be made by-***
>
> *(a)* ***any person who*** *may lawfully be examined upon oath or give or* ***be required to give evidence upon oath by or before a court****"*

As pointed above, Michael Kabume and Paul Bakanga 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]. These are clear provisions of the law that cannot be ignored in the venturing of breaking new grounds in the name of overriding objective principle. As pointed above, Paul Bakanga was not marked as either

witness for the complainant or for the defendant. In order to know which side between the two this witness testified for; one needs to read the whole of his evidence. Yet counsel for the applicant candidly submitted that no miscarriage of justice. From where I am standing, that position is not correct at all.

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 cases of ***Joseph Elisha (***supra) and ***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 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
29/09/2021