

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 84 OF 2020

OTHMAN ISSA IRANGAAPPLICANT

AND

JAMIIYATUL-AKHLAAQUL-ISLAM (JAI).....RESPONDENT

JUDGMENT

Date of Last Order: 9/08/2021

Date of Judgment: 24/9/2021

B. E. K. MGANGA, J.

On 19th November 2018 applicant referred a Labour dispute to the Commission for Mediation and Arbitration alleging that he was unfairly terminated by the respondent. On her side, the respondent disputed both allegations that applicant was her employee and that was unfairly terminated. Othman Issa Iranga (PW1), applicant is the only witness who testified on his side to prove allegations against the respondent. On the other hand, Abdulrazak Mahmoud Kingwande (DW1), Khamis Mmanga (DW2), Aboubakar John (DW3) and Hamisi Mbuli (DW4) testified on behalf

of the respondent. On 31st January 2020, Kiangi, N, Arbitrator, after assessing evidence of the parties, issued an award by holding that there was no employee – employer relationship between applicant and the respondent. Applicant was aggrieved by the said award as a result he filed this application seeking the court to revise award on two grounds namely: -

(i) That, the nature of the dispute before the CMA was mishandled in the procedure as during hearing, respondent did not provide and prove that applicant had no permission to complain about salary deduction.

(ii) That, arbitrator erred in law and fact in holding that applicant was not an employee of the respondent and that there was no unfair termination of employment.

The application was disposed by way of written submissions whereas applicant had no advocate while respondent enjoyed the service of Omari Kilwanda, advocate. Parties complied with submission scheduling orders and filed their respective submissions in time. I perused the CMA record at the time of composing my judgment and find that all witnesses affirmed before giving their evidence, but the Arbitrator did not sign at the end of evidence of each witness. Before composing the judgment, I summoned the parties to address me the effect of the omissions of the Arbitrator to sign at the end of evidence of each witness.

Applicant, being a lay person had nothing to say other than leaving it to the court to decide. Mr. Kilwanda, advocate counsel for the respondent did not attend though he was summoned to appear. It was reported that Mr. Kilwanda was attending another case at Mkuranga District Court, a subordinate court to this Court. That is unbecoming especially when informed in advance that he was supposed to appear before me today. Instead, he sent Suzan Barnabas advocate. The said Suzan Barnabas could not address me because her name is not in the Notice of representation. I therefore decided to proceed with the case and compose my judgment after briefly hearing the applicant on the issue I raised.

The court of Appeal was confronted with similar irregularities in the case of ***Iringa International School v. Elizabeth post, Civil Application No. 155 of 2019, CAT*** (unreported). In the said case, 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 was as it was held in the case of **Yohana Makubi** (supra):-

*"...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".*

The Court of Appeal went on 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..."*

In the application at hand, witnesses gave evidence on oath, but the arbitrator did not append his signature at the end of the testimony of every witness. Not only that but also, evidence was taken in the form of question and answers. These irregularities are fatal and has vitiated the proceedings of CMA. Guided by the above cited case of the Court of Appeal, I hereby quash the proceedings of the 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