

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 680 OF 2018

GELATO DREAMS AND 2 OTHERS..... APPLICANTS

VERSUS

ZAWADI NYERERE NYAKIRIGA..... RESPONDENT

RULING

Last order 28/9/2021

Date of Ruling 28/09/2021

B.E.K. Mganga, J

Respondent was employed by the applicant but on 1st September 2014 she was terminated while still under probation. Aggrieved by termination decision, she filed a labour dispute at the Commission for Mediation and Arbitration (CMA) alleging breach of contract and claiming for repatriation costs. In proving breach of contract, Zawadi Nyerere Nyakiriga testified as PW1 and was the only witness who testified on her part. Carl Davis testified as DW1 in the bid to prove that there was no breach of contract. On 16th August 2018, Mkombozi, Z.B, arbitrator issued

an award in favour of the respondent. The was applicant aggrieved by that award as a result filed this revision application.

On the date of hearing of the application, the applicant enjoyed the service of Victoria Mgonja, advocate while the respondent enjoyed the service of Michael Mgombozi, the personal representative. Before parties has advanced their arguments, I asked them to address me whether it was proper for the said Zawadi Nyerere Nyakiriga to testify while not under oath and the effect thereof.

Victoria Mgonja, advocate on behalf of the applicant submitted that it was not proper and that this court cannot act on the evidence given not under oath. She submitted further that, it is as good as if the said Zawadi Nyerere Nyakiriga did not give evidence hence there is no evidence on her behalf to be considered by this court. She therefore prayed CMA proceedings be nullified, the award be set aside and order retrial.

On his part, Michael Mgombozi, the personal representative for the respondent, was of similar view. He submitted that witnesses took their evidence on oath but only the arbitrator did not record. He was of the further view that parties should not be punished for the mistakes done by

arbitrators. He however conceded that there is nothing in the CMA file to show that the said Zawadi Nyerere Nyakiriga(Pw1) testified under oath.

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, Zawadi Nyerere Nyakiriga gave her 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. 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). On the omission of witnesses to take an oath or affirmation, the Court of Appeal 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