IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

CONSOLIDATED REVISION APPLICATION NO. 189 AND 201 OF 2020

THE GUARDIAN LIMITED..... APPLICANT/RESPONDENT

VERSUS

WARIANDE NDEMFOO SHOO..... RESPONDENT/APPLICANT

JUDGMENT

Last order 24/8/2021

Date of Judgment 24/09/2021

B.E.K. Mganga, J

This is a consolidation application. The Guardian Limited is the applicant in application No. 189 of 2020 while Wariande Ndemfoo Shoo is the respondent. On the other hand, Wariande Ndemfoo Shoo is the applicant in revision application No 201 of 2020 while the Guardian Limited is the respondent.

Brief facts leading to this application are that, sometimes, Wariande Ndemfoo Shoo was employed by the Guardian Limited. It appears that their relations somehow went sour. Due to that sour relationship, on 16th May 2017 Wariande Ndemfoo Shoo referred a labour dispute to the Commission for Mediation and Arbitration (CMA) claiming (i) that he was

unfairly terminated by the applicant and (ii) unpaid salaries from March 2015 to May 2017. In the bid to prove that termination of his employment was unfair, Wariande Ndemfoo Shoo testified as **PW1** and called Shaban Omary, Irene Chizuzu and David Joseph Hango who testified as **PW2, PW3** and **PW4** respectively. On the other hand, Joachim David Nkunda (**DW1**) and Simon Moses Marwa (**DW2**) testified defending the decision of the Guardian Limited that termination of employment of Wariande Ndemfoo Shoo was fair.

On 15th April 2020, Kiangi N., Arbitrator, issued an award that termination of employment of the Wariande Ndemfoo Shoo was unfair and proceeded to award Wariande Ndemfoo Shoo be paid TZS 35,888,461/=. The Guardian Limited was aggrieved by the said award as a result on 22nd May 2020, she filed revision application No. 189 of 2020 seeking to revise the said award. On the other hand, Mr. Wariande Ndemfoo Shoo was also aggrieved by the award as a result he filed revision application No. 201 of 2020 hence this consolidated revision application. The affidavit sworn by Emmanuel Matongo, the principal officer of the Guardian Limited, the applicant, in support of the Notice of Application in revision application No. 189 of 2020, contains seven(7) grounds of revision. On the other hand, the

affidavit affirmed by Nyaronyo Mwita Kicheere, advocate in support of the Notice of Application in Revision application No. 201 of 2020 filed by Wariande Ndemfoo Shoo contains three (3) grounds of revision.

The application was disposed by way of written submissions. The Guardian Limited enjoyed the service of Mbuga Jonathan, advocate while Wariande Ndemfoo Shoo enjoyed the service of Nyaronyo Mwita Kicheere, advocate. On conclusion of written submissions by the parties, I adjourned the matter and set for orders on 24th September 2021. Before composing the judgment, I went through the CMA file and find that all witnesses testified under oath, but the arbitrator did not sign at the end of evidence of each witness. I noted further that exhibits were not properly endorsed. I decided to summon counsels for the parties and asked them to address me on the effect of these omissions.

Mr. Jonathan, counsel for the Guardian Limited submitted that, it is true that the arbitrator did not sign at the end of evidence of each witness and that exhibits were not properly endorsed hence there was violation of the law. He went on that Order XVIII Rule 5 of CPC requires the presiding officer to append a signature at the end of evidence of each witness. In addition, he submitted that, Order XIII Rule 4 of the CPC, requires the

presiding officer to endorse on each exhibit tendered. He submitted further that the arbitrator did not comply with the law hence authenticity of both evidence and exhibits are in jeopardy. He concluded that the effect of these irregularities vitiates the CMA proceedings.

On the other hand Mr. Kicheere, counsel for Wariande Ndemfoo Shoo, concurred with the submissions by Mr. Jonathan and submitted that the matter be remitted back to CMA to be tried *de novo*.

I have considered submissions of counsels and I am in agreement with them that the flaw in this application vitiated the proceedings. Reasons for that are not far. It is clear that Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. 67 of 2007 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 Rule 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 on oath, but the arbitrator did not sign at the end of evidence of each witness.

In the case of ***Iringa International School v. Elizabeth post, Civil Application No. 155 of 2019,*** (unreported), the Court of Appeal had an advantage of discussing a similar issue of witnesses giving evidence not on oath and failure of the arbitrator to sign at the end of evidence of each witness. In resolving that issue, 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".*

In the final analysis, the Court of Appeal 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..."*

Circumstances in the revision at hand falls squarely in the ***Iringa international School case (supra)***.

Rule 19(2)(b) of GN. No. 67 of 2007 gives power to the arbitrator to order a person to produce a ***document or object relevant to the dispute, if that person's attendance may assist in resolving the dispute***". In order that document to assist the arbitrator, it has to be cleared for admission and all other issues that may help it to be regarded as authentic has to be mate as submitted by Mr. Jonathan, advocate for the Guardian Limited. In the application at hand, exhibits were not properly marked. There is nothing showing as to when they were

received, no endorsement by the arbitrator and no stamp of CMA. In short, exhibits that were tendered in evidence cannot be differentiated with other documents filed by the parties at the time of filing their pleadings. It is my view that, that is irregular. The intent behind Rule 19(2) of GN. No. 67 of 2007 is that documents received by the arbitrator should assist him or any other person in future to decide the case. As exhibits were not properly endorsed, it cannot be said that the intent of the said Rule was achieved. It is clear that exhibits were not properly endorsed. Though both Rule 19 and 25 of GN. No.67 of 2007 and the whole GN. are silent on how documentary exhibits can be received and marked, 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 all said hereinabove and being guided by the above cited cases of the Court of Appeal, I hereby quash the proceedings of CMA and set aside the award that is the basis of consolidated revision No. 189 and 201 both of 2020. I hereby order the CMA 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
24/09/2021