

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR- ES SALAAM**

**LABOUR REVISION NO. 583 OF 2019**

**FREDRICK SALIELI MAKUNDI.....APPLICANT**

**VERSUS**

**TANZANIA POSTS CORPORATION.....RESPONDENT**

**RULING**

28<sup>th</sup> September & 1<sup>st</sup> October 2021

**Rwizile J.**

This application is for revision, where the applicant challenges the decision of the Commission for Mediation and Arbitration. It is filed under section 91(1)(a), (2)(b)(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, Rule 24(1), (2)(a), (b), (c), (d), (e) and (f) and (3)(a), (b), (c) and (d) and Rule 28(1)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007. It is supported by an affidavit of the applicant Fredrick Salieli Makundi, asking this court to mainly revise the decision of the CMA in Labour Dispute No. RF/CMA/DSM/ILA/R.981/2017 made on 24<sup>th</sup> May 2019.

The points for determination of this application are stated under para 10 of the affidavit supporting the application, all hinging on whether, the award was properly founded and if termination was both substantive and procedurally fair, so as to deny the applicant terminal benefits.

This application was heard by written submissions. Parties complied with the order as made by the court on 4<sup>th</sup> August 2021.

But it later came to the knowledge of this court, upon perusing the proceeding of the Commission, both original and typed, that the matter was heard viva voce. The evidence of witnesses for both sides at the trial was recorded on 26<sup>th</sup> September 2018, thus evidence of Elizabeth Charles Nkunga (Dw1), Abubakar Athuman (Dw2) on 14<sup>th</sup> December 2018 and Fredrick Salieli Makundi (Pw1) on 4<sup>th</sup> February 2019, all were note taken under oath and the arbitrator did not sign the same. This illegality prompted a request to the parties to address me on the propriety of such evidence.

Stella Simkoko learned counsel who appeared for the applicant was surprised of the status and informed the court that she was present and witnessed evidence being taken under oaths. She therefore asked this court to remit the record to the Commission for the same to be signed and brought back to this court. It was her view that this is the court of equity and so nullifying the proceedings would, occasion failure of justice, and that the same can be cured by the overriding objectives principle.

On party of M/S Mcharo learned State Attorney for the respondent, it was submitted that the record shows, evidence of Dw1, Dw2 and Pw1 was indeed taken without oath as the record clearly tells. It was submitted that this conflicts Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007. The learned Attorney held the view that the available remedy is to nullify the proceedings and order a retrial since the error has been occasioned by the arbitrator and not the parties. To support this finding, it was argued that the over riding objectives principle does not apply. I was referred to the case of **Iringa International School vs Elizabeth Post**, Civil Appeal No. 155 of 2019, where the Court of Appeal nullified the proceedings of the High Court and an award of the Commission and ordered a retrial.

Having considered the submission of the parties, I have to say that there is not dispute that the record of the CMA clearly indicates that the evidence was recorded without oath and the same was authenticated by the signature of the arbitrator. This happened in all evidence taken on the dates shown above. It was the evidence of Dw1 and Dw2 on the one hand, evidence of Pw1- the applicant on the other.

It is now settled that failure to take evidence under oath and failure to sign the same upon being taken fatally affects the case and vitiates the proceedings. This was discussed at length in the case of **Iringa International School vs Elizabeth Post**, (supra) at page 5, 7, 8 and 9.

As well, it was so held previous by the same court in the case of **Tanzania Portland cement Co Ltd vs Ekwabi Majengo**, Civil Appeal No. 173 of 2019. Based on the decision of the Court of Appeal that are binding on this court, I agree with the learned state Attorney that the effect of failure to record evidence under oath/affirmation and failure to sign the same vitiates the entire proceeding. In the matter at hand, the entire evidence was taken in that style. Therefore, the same is unworthy. I expunge the

same. Since expunging the same leaves no evidence at all, therefore the whole case falls.

The award is quashed and set aside. I order a retrial before another arbitrator with competent jurisdiction. I make no order as to costs, as this is a labour dispute.



  
**A.K.Rwizile**

**JUDGE**

**01.10.2021**