

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 418 OF 2020

BETWEEN

EMMANUEL GIMU APPLICANT

AND

DHL TANZANIA LIMITED RESPONDENT

RULING

Date last order: 22/10/2021

Date of ruling: 16/11/2021

B. E. K. Mganga, J.

In the year 2012, the respondent employed the applicant but on 11th September 2018, she terminated that employment relationship as the applicant was charged for gross negligence that allegedly caused the respondent to suffer pecuniary loss of One Million Euro. Applicant was dissatisfied with termination as a result, on 22nd August 2018 he filed labour dispute No. CMA/DSM/KIN/1068/18/1351 claiming to be paid TZS 13,504,615/= complaining that he was unfairly terminated.

On 8th September 2020 Wilbard, G.M, arbitrator issued an award dismissing the complaint by the applicant on ground that termination was

fair both substantively and procedurally. Aggrieved by the said award, applicant filed this application seeking the court to revise the said award.

The application was argued by way of written submissions. In the due course of composing my judgment, I found that Christopher Mboje (DW2), Christine Kironde (DW3) and Emmanuel Gimu (PW1) testified not under oath. Only one Shulu Ismail Mwadhan (DW1) testified under oath. Having confronted myself with that situation, I resummoned counsel to address the court on the effect of the omission of DW2, DW3 and PW1 testify not under oath.

Mr. Lucas Nyagawa, Advocate for the Applicant, while responding to the issue raised, submitted that evidence always has to be taken under oath. The effect of taking evidence not under oath is that the said evidence cannot be relied upon by the court. He went on that; the omission vitiates the proceedings and that the only remedy is to quash and set aside an award and proceedings and order trial *de novo*.

On the other hand, Jaqueline Kapinga, Advocate for the Respondent, submitted that, parties have no control on how proceedings of the Court are taken. Therefore, penalizing the parties may cause in justice. This court has power to determine the matters brought before it. She therefore invited the court to invoke overriding principle and hold that evidence was

correctly and legally taken. When asked by the court as to whether, the overriding principle can be used to circumvent the law, she readily conceded that it cannot. After conceding, she joined hands with counsel for the applicant and prayed that proceedings be quashed and order trial *de novo*.

Having considered the submissions made by counsels for the parties, I concur with them that evidence was taken, but in contravention of the law. The reason for my concurrence with their submissions is not far because, Rule 25(1) of the Labour Institutions (Mediation and Arbitrations Guidelines Rules, 2007. GN. No. 67 of 2007 requires every person called as a witness to take an oath or affirm before giving his/her evidence. This is mandatory. The same mandatory requirement is provided for under Section 4(a) of the Oaths and Statutory Declaration Act (Cap. 34 R.E.2019). Violation of these provisions vitiates the whole proceedings. The reason behind is that a person takes an oath as a promise to God or gods or superior power to tell the truth and that if he/she tells lies, punishment may be given by God or gods or the said superior power. Therefore, taking an oath or affirmation is an assurance that a witness will tell nothing but a truth. I am alive and there is evidence that, even who gives evidence under oath or affirmation may tell lie, but that is not a justification for not

subjecting the witnesses to take oath or affirmation in compliance of the law.

Both Counsel has submitted and prayed that CMA proceedings be nullified, the award be quashed and set aside and order trial *de novo*. I am in agreement with this submission because that is the correct position given by the Court of Appeal in many decisions one of them being **Tanzania Portland Cement Company Limited V. Ekwebi Majigo**, Civil Appeal No. 173 of 2019 (unreported).

Guided by that decision of the Court of Appeal, I hereby nullify CMA proceedings, quash and set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay.



B.E.K. Mganga

JUDGE

16/11/2021