IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION APPLICATION NO. 329 & 351 OF 2022

(Arising from an Award issued on 7/9/2022 by Hon. Kiwelu L, Arbitrator in Labour dispute No. CMA/DSM/KIN/R. 48/18 at Kinondoni)

ISSA BARNABAS PAKATA ..... APPLICANT/RESPONDENT

VERSUS

VICTORIA FINANCE PLC ..... RESPONDENT/APPLICANT

RULING

Date of last Order: 16/11/2022
Date of Ruling: 28/11/2022

B. E. K. Mganga, J.

On 16th February 2015, Victoria Finance Plc herein after referred to as the employer, entered a contract of employment for unspecified period with Issa Barnabas Pakata, hereinafter referred to as the employee. In the said unspecified period contract of employment, the employer employed the employee as Loan Officer. On 4th November 2017, the employer suspended the employee from work alleging that the employee committed gross negligence. On 14th December 2017, the employer terminated employment of the employee. Aggrieved with termination, the employee filed Labour dispute No.

CMA/DSM/KIN/R.48/18 before the Commission for Mediation and Arbitration (CMA) at Kinondoni. On 7th September 2022 by Hon. Kiwelu L, Arbitrator, having heard evidence of the parties and submissions thereof, issued an award that termination was substantively fair but procedurally unfair. Based on procedural unfairness, the arbitrator awarded the employee to be paid TZS 10, 200,000/= being 12 months' salary compensation, TZS 850,000/= being one month salary in lieu of notice and TZS 850,000/= being one month salary as leave pay, all amounting to TZS 11,900,000/=.

The employee was aggrieved by the said award hence as a result he filed revision No. 329 of 2022 seeking the court to revise the said award. On the other hand, the employer was also aggrieved by the award hence she filed revision No. 351 of 2022. Since the two revision applications emanates from the same CMA proceedings and award, on 7th November 2022, after being addressed by counsels for the parties, I issued a consolidation order for the two-revision application to be heard together.

When the two consolidated revision applications were called on for hearing, Mr. Elisaria Mosha, advocate appeared for the Employee while Halima Semanda, Advocate appeared for the employer. Before the two learned advocates have conversed on the grounds of revision

appearing in the affidavits in support of the Notices of Applications, I asked them also in their submissions to address the court the effects of the omissions or irregularities I noted in the CMA record. At the time I was perusing the CMA record, in noted that initially DW1 testified under oath in chief, cross examination and re-examination thereafter was discharged. After some days, counsel for the employer prayed DW1 be recalled for further cross examination. As there was no objection to the prayer, DW1 was recalled, but no oath was administered nor reminded that he is testifying under oath. DW1 was therefore cross examined and re-examined and thereafter was discharged. After three witnesses had testified, counsel for the employer prayed DW1 be recalled. Counsel for the employee objected but the objection was overruled. DW1 was recalled, at this time, he gave evidence in chief, cross examination, and re-examination but his evidence was recorded not under oath.

Responding on the issue raised by the court, Mr. Mosha, learned advocate for the employee submitted that the record is clear that initially DW1 testified under oath and was examined in chief, cross examined and re-examined and was thereafter discharged. At a later stage, by oral application by the parties, DW1 was recalled for further cross examination by the Advocate for the employee. He

submitted further that, after DW2, DW3 and DW4 had testified and being discharged, advocate for the employer prayed that DW1 be recalled to testify afresh. The prayer was granted and DW1 testified in chief, cross examined and re-examined. He conceded that, at this time, no oath was taken by DW1 or warned that he was under oath. Counsel for the employee went on that, the procedure adopted by the arbitrator was not correct because Rule 19(2)(a) of GN. No. 67 of 2007 read together with Rule 25(1) of GN. No. 67 of 2007 read together with Section 4(a) of the Oath and Statutory Declaration Act Cap. 34 RE. 2019, requires oath to be administered. Counsel submitted that failure to administer oath is fatal and renders proceedings a nullity and cited the case of ***North Mara Gold Mine Ltd V. Khalid Abdallah Salum***, Civil Appeal No. 463 of 2020, CAT (unreported) and ***National Microfinance Bank PLC V. Alice Mwamsojo,*** Civil Appeal No. 235 Counsel prayed the award be quashed and set aside and the CMA record be returned to CMA so that evidence of DW1 can be recorded by a different arbitrator who will compose a new award.

Mr. Mosha, learned advocate for the employee submitted added that, the grounds advanced by Counsel for the employee at the time

of recalling DW1 was that, after being engaged by the employee, he perused the CMA record and find that an Advocate who was initially representing the employee did not cross examine DW1 on some matters. He argued that, section 147(4) of Evidence Act [Cap. 6 R.E. 2019] is very wide because it allows the Court to recall a witness. In his submissions, he conceded that for recalling of a witness, there must be a real issue that is crucial for dispersion of justice. Counsel did not address the court on the grounds of revision contained in the affidavit of the employee in support of the application meaning that the issue raised by the court was sufficient to dispose of the application.

On her side, Ms. Semanda, learned counsel for the employer joined hand with counsel for the employee that the record shows that after being recalled, DW1 testified not under oath and that failure to take oath vitiated proceedings and cited the case of ***Catholic University of Health and Allied Sciences (CUHAS) V. Epiphania Mkunde Athanase,*** Civil Appeal No. 257 of 2020, CAT (unreported). She submitted further that, initially DW1 testified under oath but when he was recalled, he testified in chief, cross examination, and re-examination not under oath. Counsel for the

employer argued that it was proper for DW1 to be recalled to testify in chief, cross examination, and re-examination. She went on that, reasons advanced by Counsel for the employee to recall DW1 for cross examination on the ground that counsel who was representing the employee failed to cross examine the witness on some issues was not a sufficient ground for recalling a witness. Ms. Semanda submitted further that, DW1 was recalled for the 2nd time on ground that the witness who was supposed to testify on behalf of the employer was not available. During submissions, counsel for the employer conceded that recalling of a witness cannot be used to fill gaps in evidence and that both parties prayed DW1 to be recalled to fill gaps in their evidence. Counsel for the employer prayed that CMA proceedings be nullified, the award quashed and set aside and order trial *de novo* before a different arbitrator. Similarly, counsel for the employer did not also address grounds advanced in the affidavit in support of the application filed by the employer.

Having considered submissions of both sides, it is my view that it was correctly submitted by both counsels that the procedure adopted by the arbitrator in recalling and recording evidence of DW1 was improper. The record shows that on 22nd October 2019,

Hemenegild Peter Kiyangi (DW1) testified in chief, was cross examined by Hemed Mtani, TUICO Secretary for the employee followed by re-examination and thereafter was discharged. The matter was adjourned for the employer to call other witnesses. On 20th January 2020, Elisaria Mosha, learned advocate for the employee prayed under section 147 of the Evidence Act [Cap. 6 R.E. 2019] that DW1 be recalled for cross examination. In his prayer, Mr. Mosha is recorded stating:-

> " *Kif. 147(4) Evidence Act tunaomba witness aliyetoa ushahidi (CCO) arudishwe kuitwa kwa further X-examination kwani sis ni wapya ktk shauri hili na ndiye shahidi pekee aliyekuwepo* ***ktk*** *shasuri la nidhamu(DH). Kwa kuwa hii ni tume ya equity tunaomba ni interest ya justice hivyo tunaomba aitwe kwa X-examination na kifungu hicho hicho kinampa D kufanya re-examination"* (emphasis is mine)

That prayer was not resisted by Bora Nicholaus advocate for the employer, as a result, DW1 was recalled and advocate for the employee cross examined him on 17th March 2020, re-examined by the employer was conducted on the same date as a result DW1 was discharged on the same day. Thereafter, on different dates, employer called Philip Pascal Kirenga (DW2), Charles Victor Mwavanga (DW3) and Doreen Anold Mganga (DW4) and prayed to call the last witness on 8th December 2020. On the later date, no witness was called, as a

result, the matter was adjourned. On 8th February 2021, Bora, advocate for the employer is recorded stating:-

> *"Bora: Kwa mujibu wa kifungu cha 147(4) ya Evidence Act, naomba kumrudisha shahidi DW1 kwa maswali zaidi **7bu** shahidi tuliyetegemea awepo ratiba yake ni ngumu hawezi kuja kutoa ushahidi. Kwa ajili ya kuokoa muda naomba shahidi huyu atoe ushahidi ukizingatia pia shahidi niliyetaka kumleta hayupo tena Victoria Finance."*
> (Emphasis is mine)

Counsel for the employee objected the prayer, but the objection was overruled, as a result, DW1 was recalled to testify in chief, cross examination, and re-examination. This time, evidence of DW1 was recorded not under oath and gave different evidence from the one he gave before being recalled because he tendered even some new exhibits. It cannot therefore be assumed that DW1 was still under oath while he was discharged before being recalled. Therefore, the whole evidence he adduced after being recalled was given not under oath.

It is clear that, at the time counsel for the employee prayed DW1 be recalled, he intended to fill the gaps in his evidence. The same to counsel for the employer. I have read section 147(4) of the Evidence Act[Cap. 6 R.E. 2019] relied on by the parties in recalling DW1 and find that the said section allows a witness to be recalled either for further examination in chief or cross examination. But, in

my view, the said section cannot be used as an open cheque for witnesses to be recalled to fill gaps in evidence. It is my view that, grounds advanced by counsel for the employee in recalling DW1 allegedly that the witness was not properly cross examined by the person who was prosecuting the matter on behalf of the employee, was intended to fill the gap. If that is allowed, then, we may have endless cross examination because parties after noting that they overlooked a certain issue they will engage a new advocate, who, after perusal of the court record, will pray witnesses be recalled for further cross examination. That cannot be allowed. One a litigant chooses an advocate to prosecute his or her case, also takes the risk of competence and incompetency of that advocate. The party cannot thereafter be heard complaining that the advocate was not competent because the advocate failed to do this and that. More so, if that can be allowed, then, soon than later, we will have many conflicts amongst advocates as there may be scramble for cases and others hijacking cases of their fellows on based on competence after so convincing their clients. That may cause this noble profession untrustworthy and the public will loose trust. From where I am standing, in my view, nobody is competent in all aspects but we try to be competent. The mere fact that an advocate overlooked to cross

examine a witness on a certain issue, in my view, should not be a ground for recalling a witness for further cross examination. Permission to recall a witness under section 147(4) of the Evidence Act(supra) is a discretion of the court. That discretion should be used judiciously otherwise it can cause chaos. It is my view that submission by counsel for the employee that the said section is wide cannot be valid. That section can only be used when there are material issues presented before the court for dispensation of justice. That section can be invoked for example when a new issue arose after the witness has testified and it was not to the knowledge of the parties at the time the witness was testifying. That section cannot be invoked lightly as counsel for the employee thinks.

Again, the employer prayed DW1 to be recalled to testify afresh meaning that the evidence he gave previously should be disregarded. Due that prayer, DW1 was recalled and testified in chief, was cross examined and re-examined. In his evidence testifying after being recalled after the prayer of the employer, DW1 testified not under oath. Reasons advanced by the employer, in my view, as conceded by counsel for the employer, was intended to fill the gaps in evidence of the employer as it is clearly shown in the paragraph quoted above. It is my view that, if the intended witness was

unavailable, the employer was supposed to apply the provisions in the Evidence Act(supra) to make sure that evidence of the said witness can be admitted or else, she was supposed to pray for adjournment. Otherwise, at the time DW1 was called to testify for the first time, counsel for the employer was duty bound to make sure that he (DW1) gives evidence covering all situations. In so doing, employer could have avoided recalling the said DW1 to testify and cover other areas that the employer thought will be covered by another witness. In short, the employer prayed DW1 to be recalled to fill the gaps in her evidence. That cannot in my view, be the purpose and intent of enactment of section 147(4) of the Evidence Act(supra).

As pointed hereinabove and as it was conceded by both counsels, after being recalled, evidence of DW1 was recorded not under oath. That evidence was recorded in violation of the mandatory provisions of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E 2019] and Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 that requires before a witness to testify, to take oath or affirmation. The effect of that omission is that proceedings were vitiated. See the case of **Gabriel Boniface Nkakatisi vs. The Board of Trustees of**

the National Social Security Fund (NSSF) Civil Appeal No. 237 of 2021**, National Microfinance Bank PLC vs. Alice Mwamsojo,** Civil Appeal No. 235 of 2021, **Attu J. Myna v. CFAO Motors Tanzania Limited,** Civil Appeal No. 269 of 2021, **Unilever Tea Tanzania Limited v. Godfrey Oyema**, Civil Appeal No. 416 of 2020, **The Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020, **North Mara Gold mine Limited v. Khalid Abdallah Salum,** Civil Appeal No. 463 of 2020, **Unilever Tea Tanzania Limited v. David John,** Civil Appeal No. 413 of 2020, and **Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited and another,** Consolidated Civil Appeal No. 117/16 of 2018 and 199 of 2019.

Counsel for the employee submitted relying on the case of ***North Mara Gold mine Limited*** (supra) that the award should be quashed and set aside and return the file to CMA so that only evidence of DW1 can be recorded and the arbitrator compose the award because other witnesses testified under oath. This prayed has some problems because when DW1 was called to testify afresh, the arbitrator did not indicate that his previous evidence he testified under oath was expunged from the record. As it is, there is evidence

of DW1 while under oath prior to be recalled to testify unfortunately not under oath. Worse, the arbitrator considered the two sets of evidence of DW1 in the award. That in my view, is fatal. I have also declined to accept the invitation by counsel for the employee for another reason. As it can be observed from the bolded words in the two quoted paragraphs, the arbitrator in recording evidence of the parties sometimes used a language only well-known to his peer groups or agemates forgetting that proceedings are for public consumption more likely the courts in the higher ladder. For example, the arbitrator wrote "**ktk**" to mean "**katika**" but the three letter may mean also "**kutoka**" etc depending on how someone interprets them. The arbitrator wrote "**7bu**" to mean "**sababu**" but does necessarily "**7bu**" mean "**sababu**". These are just few examples in the proceedings which may not necessarily mean what witnesses stated in their evidence. I feel that injustice can be occasioned to either side because interpretation of the abbreviations used by the arbitrator may differ. As a cordial advise, arbitrators should at all times of recoding proceedings desist to use jargon languages and abbreviations they use in their normal day life while out of office. They should always stick to official languages at the time of

conducting official duties of arbitration. Let unofficial abbreviations and jargon languages be reserved for other social events.

For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and order trial de novo before a different arbitrator without delay.

Dated in Dar es Salaam on this 28th November 2022.

B. E. K. Mganga
JUDGE

Ruling delivered on this 28th November 2022 in chambers in the presence of Elisaria Mosha, Advocate for the employee, the Applicant in Revision No. 329 of 2022 and respondent Revision No. 351 of 2022 and Kelvin Ngeleja, Advocate for the employer, the respondent in Revision No. 329 of 2022 and applicant in Revision No. 351 of 2022.

B. E. K. Mganga
JUDGE