

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

**REVISION NO. 165 OF 2021**

**BETWEEN**

**AZIZA I. MLAGGA ..... APPLICANT**

**VERSUS**

**DAR ES SALAAM SERENA HOTEL ..... RESPONDENT**

**JUDGEMENT**

**S.M. MAGHIMBI, J**

This Revision application is against the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/682/19/313 which was delivered on 24<sup>th</sup> December 2020 by Hon. J. R. Katto, Arbitrator, the applicant herein, is applying to this court for the following orders: -

- i. That the Honourable Labour Court be pleased to revise and set aside the Commission for Mediation and Arbitration Award read to both the applicant and the Respondent on 24<sup>th</sup> December 2020 in Labour Dispute No. CMA/DSM/ILA/682/19/313, by Honourable Arbitrator, J. R. Katto.
- ii. That the Honourable Court be pleased to call for proceedings in a dispute above with a view to satisfy itself as to legality and correctness thereof.

- iii. That any other relief(s) this Honourable Court deems just and fair be granted.

The application is supported by the Applicant's affidavit. To oppose the application, the counter affidavit of Sophia Mketto, Principal Officer of the Respondent was filed. The background of the dispute in brief is that the applicant was employed by the respondent on 01<sup>st</sup> August, 2007 as a Waitress. She was promoted to various positions until to the position of Food and Beverage Administrator, the position held until her termination. On 16<sup>th</sup> August, 2019 the applicant was terminated from employment on misconduct listed in her termination letter. Aggrieved by the termination the applicant referred the matter to the CMA claiming for unfair termination both substantively and procedurally. After considering the evidence of both parties the CMA found that the applicant's termination was fair both substantively and procedurally hence her claim was dismissed. Again, being dissatisfied by the CMA's award the applicant filed the present application on the above grounds:

- i. That, the honourable Arbitrator erred in law and facts in holding that the respondent had valid and fair reasons to terminate the applicant employment whilst the respondent had failed to prove the allegations (stealing drinks from respondent and being under influence of alcohol or drugs at work).

- ii. That the Honourable Arbitrator erred in law and facts considering the testimony of DW2 in his decision whilst she refused to take an oath before him hence rendered the decision based and unfair.
- iii. That the Honourable Arbitrator erred in law and facts by holding that the applicant was under influence of alcohol at work without prove of alcoholic meter leading him into unfair and unjust decision.
- iv. That, the Honourable Arbitrator erred in law and facts misdirected himself that the respondent's business prohibits entrance of drinks and foods from outside without prove as to whilst rules or regulations of the respondent rendered him to reach into a wrong decision.
- v. That the Honourable Arbitrator misdirected in facts by holding that the applicant accepted the allegation against her thus rendered him to reach into unjust and unfair decision.

The matter proceeded by way of written submission. At the hearing of the application the Applicant was represented by Mr. Maunda Raphael, Eric Aggrey Mwanri and Albert Mulokozi Mukoyogo, Advocates of Marke! & Co. Advocates whereas the Respondent was represented by Mr. Godwin Nesphory Nyaisa, Wilson Mukebezi, Stephen Axweso, Norbert Mwaifwani, Kavola Semu, Philip Lincoln Irungu, David Mganga

Chillo, Hendry Polycarp Kimario, Florian Frances, Robert Mosi, Caster Gerald, Emma – Sharlene Lyamuya and Ms. Catherine Mokiri, Advocates of B & E Ako Law. Since the second ground, if determined, positively affects the legality of the CMA proceedings I will proceed to determine it first ahead of the rest.

As to the second ground Mr. Maunda submitted that in our jurisdiction evidence is tendered through oath or affirmation. He stated that DW2 refused to swear on the ground that she believed and professed in Christian as well as Islam contrary to section 4 (a) (b) of the Oaths and Judicial Proceedings Act, Chapter 34 of the RE 2019 ('OJPA') and the Oaths and Affirmations Rules, GN No. 125 of 1967 made under section 8 of OJPA (the OJPA Rules).

Mr. Maunda continued to submit that the essence of having oath or affirmation before taking evidence is to secure and ensure the witness speaks the truth in the court of law about the matter. He stated that the oath taking signifies commitment of a witness to dispose true facts before the court so as to enable it to administer justice accordingly. He further submitted that DW2 was not among the witnesses who are exempted to take oath under section 127(1) of Evidence Act, [CAP 6 R.E. 2019] (TEA). To support his submission, he

cited the case of **Nestory Simchimba V. the Republic** Criminal Appeal No. 454 of 2017 (Unreported) stated that:

*'Failure by the court to affirm the appellant (DW1) before recording his defence evidence, similarly affected the appellant. His defence evidence equally suffers from a syndrome of being disregarded. The appellant remains with no defence evidence completely. The situation turns out to be like that of a person who did not defend himself.'*

Thus, Mr. Maunda urged the court not to consider the evidence of the relevant witness.

Responding to the second ground, Mr. Nyaisa submitted that they perused the CMA file and the record is silent on whether witnesses for both parties took oath before giving their testimony. He argued that it was the Arbitrators' duty to supervise the oath taking and record in the proceeding pursuant to Rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) GN NO 67 of 2001 and Section 4 (a) of the Oath and Statutory Declarations Act (Cap 34 of 2019). He added that there is no record indicating that DW2 refused to take oath hence the parties cannot be blamed for such omission.

He submitted further that the record not showing that the testimony of both parties' witnesses was given and recorded under oath

is fatal and vitiates the proceedings and the award. To support his submission, he cited the case of **Sammeer Africa (T) Ltd Vs. Vivian Audax Mulokozi**, Revision No 65 of 2020 (unreported) it was held that:-

*'With respect to the counsel for the Respondent, I am not prepared to accept his proposition because the law in Rule 25(1) of Labour Institution (Mediation and Arbitration) GN 67 of 2002 makes it a mandatory requirement that witness shall testify under oath. It is then needs to be complied with in a manner which is express, clear and apparent in the proceedings that the witness took oath before giving their evidence. It should not be implied as the counsel for the Respondent wants it to be conceived. This means that the proceedings must show that the evidence was given on oath or affirmation depending on the nature of the witness's beliefs... On the way forward, I order the matter be remitted to the Commission for Mediation and Arbitration, for the labour dispute to be heard de novo before another Arbitrator...'*

Mr. Nyaisa continued to submit that the above position was upheld in the Court of Appeal case of **Catholic University of Health and Allied Science (CUHAS) Vs. Epiphania Mkude Athanase**, Civil

Appeal No 257 of 2020 (unreported). On the basis of the above cited decisions the Learned Counsel prayed for the retrial of the matter.

I have gone through the CMA's proceedings; indeed the only testimony which was taken under oath is that of DW1. As to the evidence of DW2, the record is silent as to whether the said witness sworn or affirmed before testifying. As also submitted by the respondent's counsel, the testimony of PW1 (the applicant herein) was also taken without oath or affirmation contrary to Rule 25 (1) of GN 67/2007 which provides as follows: -

*"The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process"*

It is crystal clear that the testimony of the named witnesses was taken in contravention of the above cited Rule. The applicant alleges that DW2 refused to take oath but the record does not indicate so. What is in the record is that the evidence of DW2 and PW1 was taken without oath. The effects of taking oath without affirmation have been stated in the above cited cases of which I subscribe to. In the case of **Catholic University of Health and Allied Science (CUHAS) Vs. Epiphania Mkude Athanase**, (supra) it was held that:-

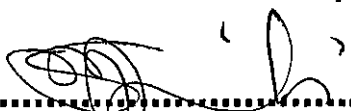
*'...having perused the records of appeal as well as the original records of the CMA, we agree with the learned counsel for the parties that the evidence of appellant's PW1 and that of the respondent DW1, was not given under oath. ...we find that the omission vitiates the proceedings of the CMA... we order the matter be remitted to the CMA for the Labour Dispute to be heard de novo before another Arbitrator.'*

In light of the above decisions and analysis, I hereby quash and set aside the testimonies of DW2 and that of PW1 for being taken without oath or affirmation and the subsequent award thereto. I therefore order the matter be remitted back to CMA for the testimonies of DW2 and PW1 to be heard afresh r. Since the second ground has disposed of the matter, I find no need to dwell on the remaining grounds.

It is so ordered.

Dated at Dar es Salaam this 14<sup>th</sup> day of March, 2022.



  
**S.M. MAGHIMBI**  
**JUDGE**