

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

**REVISION NO. 394 OF 2021**

**VICTORIA JOHN MWAKALASYA.....1<sup>st</sup> APPLICANT**

**RICHARD DAMIAN KATULI .....2<sup>nd</sup> APPLICANT**

**VERSUS**

**FIRST NATIONAL BANK TANZANIA (LTD)..... RESPONDENT**

(From the decision of the Commission for Mediation and Arbitration at Temeke)

(BATENGA: Arbitrator)

Dated 29<sup>th</sup> June 2020

in

**CMA/DSM/TEM/R.295/122/19**

**JUDGEMENT**

30<sup>th</sup> May 2022

**Rwizile J**

This application is for Revision. It emanates from the decision of the Commission for Mediation and Arbitration (CMA). By the chamber summons, supported by a joint affidavit of the applicants, this application was filed. It has been alleged that the applicants were employed by the respondent on permanent contracts of employment. Whereas the 1<sup>st</sup> applicant was employed as external sales consultant in 2015, the 2<sup>nd</sup> applicant was employed on similar terms as customer service officer in 2012. Their employment however, was terminated on 29<sup>th</sup> May 2019, due to gross misconduct.

Not happy with the decision of the respondent, the applicants filed a labour dispute with the Commission for Mediation and Arbitration (CMA). They were however not successful, since their application was dismissed because termination was not only substantively fair, but also procedurally so. Again, not satisfied, they failed, this application. In the affidavit supporting this application, they have advanced 8 grounds for which this application is based at para 17.

At the hearing, the parties were represented by Mr. Rashid Kasisiko learned advocate for the applicant, while the respondent enjoyed service of Mr. Innocent Mushi learned advocate, who were asked to address the court on the effect of failure of the arbitrator to record evidence under oath/affirmation.

Both advocates were in agreement that failure to recorded evidence under oath/affirmation is in conflict with Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007. I was also referred to the cases of **Catholic University of Health and Allied Science (CUHAS)**, Civil Appeal No. 257 of 2020 (unreported) and the case of **North Mara Gold Mine Limited vs Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020, (CA), Unreported. The learned advocates held the view that this application, is unmaintainable since the irregularity is incurable. I was asked to nullify the award and the proceedings and order a retrial.

Having considered submissions of the parties, I have to note that the law governing recording of evidence under oath before the CMA, is Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007 as submitted which states: -

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

Further, section 4(a) of the Oaths and Statutory Declaration Act [CAP. 34 R.E. 2019] provides: -

*"S. 4-*

*Subject to any provision to the contrary contained in any written law an oath shall be made by-*

*(a) Any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court"*

This court is of the view that, when a witness does not take oath, his evidence has no probative value and non-compliance has devastating effects. This position was reached in the case of **Catholic University of Health and Allied Science (CUHAS)**, supra, when the Court of Appeal stated: -

*"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' cases."*

This decision was also followed in the case of **North Mara Gold Mine Limited vs Khalid Abdallah Salum (supra)**.

In yet another case of **Iringa International School v Elizabeth Post**, Civil Appeal No. 155 of 2019, Court of Appeal elaborated that: -

*"For reasons that the witness before the CMA gave evidence without having first taken oath...and also on the above stated position of the law, we find that the omissions vitiate the proceedings of the CMA...we hereby quash the proceedings both of the CMA and of the High Court."*

There is no dispute therefore to hold that whenever evidence is not taken under oath /affirmation, the effect of doing so is expunging the same from the record. Therefore, the award and proceedings are quashed and the matter is remitted to the CMA for a rétrial before another arbitrator with competent jurisdiction.



**A. K. Rwizile**

**JUDGE**

**30.05.2022**