

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION NO. 198 OF 2021

DANIEL MAMUYA APPLICANT

VERSUS

**GULF CONCRETE &
CEMENT PRODUCTION CO. LTD..... RESPONDENT**

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(Nyangaya: Arbitrator)

Date 29th August 2018

in

CMA/DSM/KIN/R.140/15/540

JUDGEMENT

28th February & 01st March 2022

Rwizile J

The applicant is praying for setting aside the decision of the Commission for Mediation and Arbitration (CMA) in dispute, CMA/DSM/KIN/R140/15 delivered on 29.08.2018.

It was stated that the applicant was employed by the respondent as a technician in Dar es Salaam. On 2014 was sent to work in Arusha and Mbeya. He was not paid subsistence allowance as per contract. When he claimed for it, the employer stopped paying him his salary. When he

returned to Dar es Salaam he claimed for the allowance and salary arrears. The respondent refused. It is from this saga that the working environment became intolerable. He was terminated like the respondent claimed, he filled the case at CMA but the mediator delivered the award against him on the ground of being out of time. Not satisfied, he filed this application. The following grounds were advanced, thus;

- i. That, the arbitrator improperly dismissed the matter without following proper procedure and against the evidence adduced before the tribunal.*
- ii. That, the matter was open based on constructive termination hence, no proper time of termination except the day the applicant decides to quit from the employment.*
- iii. That, the arbitrator misdirected herself on the concept of who should keep employment record and consequently shifted the burden to the applicant to prove the date of termination.*
- iv. That, no procedure was followed to terminate the applicant fairly, no substantive reason by the respondent to substantiate the reason for termination*

Mr. Aaron Allan Lesindamu, learned advocate appeared for the applicant, whereas the respondent was represented by Mr. Heriolotu Boniface, Learned Advocate.

During hearing of the main application, the court Suo Moto came into finding that on CMA records, testimonies of the witnesses were taken without oath and so advocates were asked by the court to address it on its propriety.

Mr. Aaron, the learned advocate for the applicant stated that; in the event the court has discovered evidence was not recorded under oath, its effect is to nullify the proceedings and order a retrial.

The advocate for the respondent was in similar position and asked this court to act as asked by the applicant's advocate.

Before the commission, the relevant law governing recording of evidence under oath is Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007 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] states: -

"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 value and none compliance has devastating effects. This position was stated in the case of **Catholic University of Health and Allied Science (CUHAS)**, Civil Appeal No. 257 of 2020 (unreported) was 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."

In the case of **Iringa International School v Elizabeth Post**, Civil Appeal No. 155 of 2019, Court of Appeal of Tanzania at Iringa, where it elaborates 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..."

Basing on the position stated by the Court of Appeal, this court, as it has observed that all witnesses did not take oath. Their evidence is expunged from the record. Therefore, the whole proceeding is nullified and the award set aside. For this reason, the court orders the Labour Dispute No. CMA/DSM/KIN/R.140/15 be remitted to the CMA for rehearing before another Arbitrator with competent jurisdiction. Parties to bear own costs.




A.K. Rwizile

JUDGE

01.03.2022