

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

CONSOLIDATED REVISION APPLICATION NO. 150 & 487 OF 2021

*(Arising from an Award issued on 10/2/2021 by Hon. Kayugwa H, Arbitrator in Labour dispute No.
CMA/DSM/TEM/524/2019/199/2019 at Temeke)*

BETWEEN

**THE BOARD OF TRUSTEES OF
NATIONAL SOCIAL SECURITY FUND APPLICANT/RESPONDENT**

AND

WILLIAM YOHANE NKOROCHE & 23 OTHERS RESPONDENTS/APPLICANTS

RULING

Date of last order & Ruling: 14/7/2022

B. E. K. Mganga, J.

It is alleged that the National Social Security fund, the applicant in Revision Application No. 150 of 2021 and respondent in Revision Application No. 487 of 2021, was the employer of William Yohane Nkoroche and 23 others who are the respondents in Revision Application No. 150 of 2021 and Applicants in revision Application No. 487 of 2021. On 19th November 2019, William Yohane Nkoroche and 23 others filed Labour dispute No. CMA/DSM/TEM/524/2019/199/2019 before the Commission for

Mediation and Arbitration henceforth CMA at Temeke complaining that the National Social Security fund unfairly terminated their employment. In the referral Form (CMA F1) William Yohane Nkoroche and 23 others were therefore praying to be reinstated without loss of remuneration, payment of 12 months' salary as compensation, leave pay and one month salary in lieu of notice. During hearing at CMA, the National Social Security fund contended that William Yohane Nkoroche and 23 others were not her employees.

On 10th February 2021, Hon. Kayugwa H, arbitrator, having heard and considered evidence of both sides, issued and award that there was employer and employee relationship between the National Social Security fund and William Yohane Nkoroche and 23 others. The arbitrator further found that the National Social Security fund unfairly terminated employment of William Yohane Nkoroche and 23 others. The arbitrator therefore awarded William Yohane Nkoroche and 23 others to be paid a total of TZS 11,873,076/=.

The National Social Security fund was unhappy with the award as a result, she filed Revision application No. 150 of 2021 seeking the court to revise the said award. On the other hand, William Yohane Nkoroche and 23 others were not satisfied with the amount of money awarded to them, as a

result, they also filed revision application No. 487 of 2021 seeking the court to revise the award. Since the two revision applications originated from the same award, on 20th April 2022, when the two revision applications were called for orders, in the presence of the parties, I issued a consolidation order so that they can be argued together. I thereafter, adjourned the two applications for hearing on another date pending the CMA record to be forwarded to the court.

When the two applications were called for hearing on 14th July 2022, and upon perusal of the CMA record, I noted that evidence of Marystella Bingileki (DW1) the only witness who testified on behalf of National Social Security fund and the evidence of Zawadi Shabani (PW1), the only witness who testified on behalf of William Yohane Nkoroche and 23, were recorded not under oath or affirmation. I therefore asked the parties to address the Court the effect of this omission.

Responding to the issue raised by the court, Mr. Baraka Mgaya, learned State Attorney who appeared for National Social Security fund, submitted that it is the principle of the law that all witnesses must take an oath or affirm before giving their evidence. He also noted that the CMA record does not show that witnesses took oath or affirmation before giving their evidence. He concluded that since no oath or affirmation was taken,

there is no evidence to be relied upon in this application and that the omission vitiated the CMA proceedings. Learned State Attorney therefore prayed that CMA proceedings be nullified, the award be quashed and set aside.

On his side, Mr. Stephen Mboje, learned counsel for William Yohane Nkoroche and 23 others admitted that the CMA record does not show that witnesses took oath or affirmation prior testifying. He submitted that there are various decisions of both this court and the Court of Appeal that evidence taken not under oath cannot be acted upon. In the application at hand, counsel showed his grievance that the omission was not caused by the parties who are now must go back to CMA for retrial. At the end of his submissions, counsel prayed that CMA proceedings be nullified and order trial *de novo*.

I entirely agree with submissions and prayers made by both learned counsels that CMA Proceedings be nullified. In his submissions, Mr. Mgaya, learned State attorney prayed only that CMA proceedings be nullified but did not pray for an order of trial *de novo*. On his side, Mr. Mboje, prayed that CMA proceedings be nullified, and the court issue an order for retrial. I understand the concern by Mr. Mboje learned counsel because the omission was not caused by the witnesses of the parties but by the

arbitrator. Nevertheless, the law is settled that the omission to take oath or affirm vitiates the whole proceedings as it was held by the Court of Appeal in the case of ***Iringa International School v. Elizabeth post***, Civil Application No. 155 of 2019, ***Tanzania Portland Cement Co. Ltd v. Ekwabi Majigo***, Civil Appeal No. 173 of 2019 (unreported), ***Joseph Elisha v. Tanzania Postal Bank***, Civil Appeal No. 157 of 2019 [unreported], ***Unilever Tea Tanzania Limited v. Davis Paulo Chaula***, Civil Appeal No. 290 of 2019 (unreported) and ***Gabriel Boniface Nkankatsi v. The Board of Trustees of National Social Security Fund***, Civil Appeal No. 237 of 2021, CAT(unreported) to mention by a few.

The courts have constantly taken that position because arbitrators have power in terms of section 20(1)(c) of the Labour Institutions Act [Cap. 300 R.E. 2019] and Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, to administer an oath or affirmation to a person called as a witness. Arbitrators are therefore, required to use that power. More so, it is a mandatory requirement under the 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 before a witness testifies, must take an oath or affirmation. In the

application at hand, the arbitrator violated these mandator provisions of the law by failure to record evidence of the witnesses under oath or affirmation.

For the foregoing, I hereby nullify CMA proceedings and order trial *de novo* before a different arbitrator without delay.

Dated at Dar es Salaam this 14th July 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 14th July 2022 in the presence of Baraka Mgaya, State Attorney for the Applicant in Revision Application No. 150 of 2021 and Respondent in Revision Application No. 487 of 2021 and Stephen Mboje, Advocate for the Respondents in Revision Application No. 150 of 2021 and Applicants in Revision Application No.487 of 2021.



B. E. K. Mganga
JUDGE