

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

REVISION APPLICATION NO. 181 OF 2021

BETWEEN

SADY MWANG'ONDA APPLICANT

AND

NATIONAL BANK OF COMMERCE LIMITED RESPONDENT

RULING

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

B. E. K. Mganga, J.

The facts of this application in brief are that, on 1st August 2016, the parties entered employment relationship for unspecified period. The applicant was posted at Mbagala NBC Branch as Branch Manager. On 29th June 2018 the respondent discovered that a total of TZS 244,570,550/= were missing at the duty station of the applicant. Having so discovered, the respondent directed the applicant to give explanations in writing as to how the said money went missing. On 27th July 2018, the respondent served the applicant with the charge showing that the later was negligent in carrying out his duties that resulted to the loss of the aforementioned money. Respondent did not end there but conducted a disciplinary hearing

as a result, applicant was found guilty and thereafter his employment was terminated.

Aggrieved by termination of his employment, on 21st September 2018, applicant filed Labour Complaint No. CMA/DSM/REM/574/18/198/18 before the Commission for Mediation and Arbitration henceforth CMA at Temeke claiming that he was unfair terminated. In the referral Form (CMA F1), applicant prayed to be reinstated without loss of remuneration. Having heard and considered evidence of both sides, on 24th December 2019, Hon. M. Batenga, issued an award that termination of employment of the applicant was both substantively and procedurally fair.

Applicant was still unhappy with the outcome of the dispute he filed at CMA, as a result, he filed this application seeking the court to revise the said award. In his affidavit in support of the notice of application, applicant raised six legal issues to be considered by this court. On the other hand, the respondent filed the notice of opposition together with the counter affidavit sworn by Desmond Malyi, her principal officer opposing the application.

When the application was called for hearing, applicant was represented by Mr. Omary Mwinyimkuu Mwenegoha, learned counsel while

the respondent was represented by Ms. Comfort Opuku, learned counsel. Before the two advocates has submitted on the legal issues raised by the applicant, I drew their attention that the CMA record shows that all witnesses namely, Sweetbert Mapolu (DW1), Meshack Ally Shashi (DW2) and Sady Abdul Mwang'onda (PW1) testified not under oath or affirmation. I therefore asked them to address the court the effect of this omission.

Responding to the issue raised by the court, Mr. Mwenegoha, learned counsel for the applicant, submitted that the Court of Appeal was confronted with a similar issue in the case of **Joseph Elisha v. Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 (unreported) and **Gabriel Boniface Nkankatisi v. The Board of Trustees of National Social Security Fund**, Civil Appeal No. 237 of 2021, (unreported) and held that the omission vitiates proceedings. Counsel submitted that in the two cases, the Court of Appeal nullified proceedings and ordered trial *de novo*. He therefore prayed that CMA proceedings be nullified and order trial *de novo*.

On her side, Ms. Opuku, learned counsel for the respondent concurred with the submissions by counsel for the applicant because that is the correct position of the law since evidence was not recorded under oath. In addition to the cases cited by counsel for the applicant, Ms. Opuku,

counsel for the respondent, cited the case of ***NBC v. Roselyn Kakolo***, Revision No. 372 of 2020, HC (unreported) and prayed that CMA proceedings be nullified and order trial de novo before a different arbitrator.

I entirely agree with submissions and prayers made by both learned counsels that CMA Proceedings be nullified, the award arising therefrom be quashed and set aside because that is the correct position of the law as it was held by the Court of Appeal and this court in the afore cited cases. A similar position 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) 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

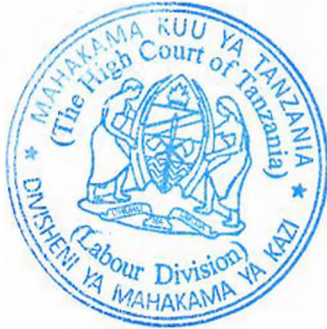
and Arbitration Guidelines) Rules, GN. No. 67 of 2007, to administer an oath or affirmation to a person called as a witness. Arbitrators are therefore, required to use that power. More so, it is a mandatory requirement under the provisions of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 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. This omission vitiated the whole CMA proceedings.

For the foregoing and being guided by the above cited Court of Appeal decisions, 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 Omari Mwinyimkuu Mwenegoha, Advocate for the applicant and Comfort Opuku Advocate for the respondent.




B. E. K. Mganga
JUDGE