IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 162 OF 2022

(Arising from an Award issued on 15th October 2021 by Hon. Wilbard G.M, Arbitrator in Labour dispute No. CMA/DSM/UBG/128/19 at Ubungo)

BETWEEN

ALEX MUKURASI ..... APPLICANT

AND

UNIVERSITY OF DAR ES SALAAM COMPUTING CENTRE ..... RESPONDENT

RULING

Date of last Order & Ruling: 29/07/2022

B. E. K. Mganga, J.

On 06th July 2018 the parties herein entered into two years fixed term contract of employment. The respondent employed the applicant as Assistant Tutor/ Instructor for two years fixed term contract ending on 5th July 2020. It is alleged that following the respondent's restructuring due to operational requirement, respondent terminated employment of the applicant on 28th July 2019. Aggrieved with termination of his employment, on 28th October 2019, applicant referred the dispute to the Commission for Mediation and Arbitration (CMA)

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complaining that he was unfairly terminated. In the Referral Form (CMA F1), applicant indicated that he was claiming to be paid TZS. 12,698,400/=being repatriation costs, transport fare from Dar es Salaam to Bukoba and salary for the remaining period of the contract. Applicant indicated further in the said CMA F1 that he was claiming to be issued with a Certificate of Service.

Having heard evidence of both sides, Hon. Wilbard G.M, Arbitrator, on 15th October 2021 issued an award in favour of the applicant that termination was both substantively and procedurally fair. Despite that conclusion, the Arbitrator ordered the respondent to be paid TZS.2,950,000/= being transport allowance and TZS. 344,615/= being salary arrears all amounting to TZS. 3,294,615/=. Applicant felt resentful with the award, as a result, he filed the present application seeking revision of the said award. In the affidavit in support of the application, applicant raised six (6) grounds namely: -

1. *The Arbitrator erred in law and fact for failure to properly assess the evidence on record henceforth reached at a wrong decision.*
2. *The Arbitrator erred in law and fact for not examining the formula used calculating retrenchment benefits while the same has been clearly provided by the law under the First Schedule of the Employment and Labour Relations Act [Cap. 366 R.E.2019].*
3. *The Arbitrator erred in law and fact for not awarding the applicant the required severance pay and accrued leave as the computation used for*

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retrenchment entitlements did not reflect the computation of daily wage which is based on "ordinary days" according to First Schedule under section 26(1) of the Employment and Labour Relations Act [Cap. 366 R.E.2019].

4. *The Arbitrator erred in law and fact for not awarding the applicant transport costs of his personal effects to his place of domicile at Kabale, Bukoba.*
5. *The Arbitrator erred in law and fact for not awarding the applicant subsistence expenses while waiting for transportation of his personal effects to his place of domicile at Kabale, Bukoba as required by the law.*
6. *The Arbitrator erred in law and fact for not awarding the applicant his salary arrears and gratuity.*

By consent of the parties, the application was argued by way of written submissions. In the written submissions, the applicant enjoyed the service of Mr. Charles Komba, learned Advocate while the respondent enjoyed the service of Peter Ngowi, learned Advocate. Both sides duly filed their written submissions but at the time of composing the judgment, I carefully examined the CMA record and find that it shows that only one witness testified for the employer, the herein respondent but the name of the said witness is not disclosed. In addition to that, the record shows that both the said witness for the employer and Dogan Gasera (PW2) testified not under oath or affirmation. The record shows that the only witness who testified under oath is Alex Mukurasi (PW1) the applicant. Having confronted with that discrepancy,

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I invited learned counsels for both parties to address the Court the effect of these irregularities.

Responding to what the court noted in the CMA proceedings, Mr. Charles Komba, learned counsel for the applicant submitted that evidence of the undisclosed witness for the respondent cannot be considered as it is unclear as who testified on behalf of the respondent. He went on that it is the requirement of the law that the name of the witness must be disclosed and that the witness must take oath or affirm before testifying. In the circumstance of this application, counsel argued that since both the undisclosed witness of the respondent and Dogan Gasera (PW2) for the applicant testified not under oath or affirmation, their evidence cannot be considered. He therefore prayed that the Court should consider only evidence of Alex Mukurasi (PW1), the applicant who testified under oath. However, during submissions, Mr. Komba learned counsel for the applicant conceded that it is neither the respondent's fault for the name of her witness not to be recorded nor her evidence not to be recorded under oath. With that in mind, counsel for the applicant prayed that the Court should invoke its inherent powers under Section 95 of the Civil Procedure Code [Cap. 33 RE. 2022] and

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summon the two witnesses and testify under oath and thereafter consider this revision application.

On the other part, Mr. Peter Ngowi, learned counsel for the respondent submitted that the omission of the arbitrator to record the name of the respondent's witness and failure of both the said witness and PW2 to take oath or affirm before testifying vitiated the whole CMA proceedings. Further to that, Mr. Ngowi submitted that section 91 of the Employment and Labour Relations Act [Cap. 366 RE. 2019] gives powers to the Court either to nullify proceedings and quash the award and direct CMA to rectify the anomaly after trial *de novo*. Responding to the prayer by counsel for the applicant for the court to call the said two witnesses and record their evidence, Mr. Ngowi argued that this Court has no power to call and record evidence of witnesses who testified not under oath at CMA. He therefore prayed that CMA proceedings be nullified and the award arising therefrom be quashed and set aside and order trial *de novo*.

I have heard and considered submissions of both counsels relating to the discrepancy I have noted in the CMA record. It is undeniable that no name of the witness who testified on behalf of the respondent was disclosed, as such, it cannot be ascertained who that witness was. I

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therefore entirely agree with submissions of both counsels that that is fatal irregularity. The reason for that conclusion is clear because the law does not allow anonymity of witnesses save for witnesses who testifies under witness protection arrangements depending on the nature of the case. Still in that situation, the witness may be assigned pseudo name or only initials of the witness's names will be record unlike to the application at hand. More so, even under witness protection where the witness's name cannot be disclosed, the record must show that the name has not been disclosed to protect identity of the said witness. Unfortunately, this is not the case in the application at hand because there is neither pseudo name of the respondent's only single witness who testified nor indication that it was so done with intention of protecting the identity of the said witness. Without any name of the witness who testified at CMA on behalf of the respondent, this court cannot be able to refer to that evidence. That omission of mentioning the name of a witness who testified on behalf of the respondent has left a room for speculation of the name of that witness. In such situation, any person can in future claim to have testified on behalf of the respondent even though he /she might not have testified and come up with unfounded allegations against both the Arbitrator and the court.

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This court cannot act on speculation and will not allow speculation to grow in future based on the decision it has delivered which is why, I am of the considered opinion that the omission is fatal.

It is also undeniable that both the afore undisclosed witness for the respondent and PW2 for the applicant testified not under oath. It is a settled law that every witness before testifying must take oath or affirm. In fact, this 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. In the application at hand, the arbitrator violated these mandator provisions of the law by failure to record evidence of the two witnesses under oath or affirmation. This omission vitiated the whole CMA proceedings. A similar conclusion to the one I have taken was reached by the Court of Appeal in the case of **Portland Cement Co. Ltd v. Ekwabi Majigo,** Civil Appeal No.173/2019 [2021] TZCA 443 where the Court of appeal reiterated the position stated in the case of **Catholic University of Health and Allied Sciences (CUHAS)** 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**

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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. In the cited cases, the Court of Appeal held that omission vitiated the whole CMA proceedings consequently the proceedings were nullified, the award arising therefrom quashed and set aside and order trial *de novo*.

Mr. Komba, learned counsel for the applicant initially submitted that the court should only consider evidence of Alex Mukurasi (PW1) the applicant and make findings on merits of this application. But upon being asked by the court and upon reflection, he conceded that the omission was neither caused by the respondent nor the witness for the parties but by the Arbitrator. In my view, the invitation to consider only evidence of PW1 cannot be accepted as correctly conceded by counsel for the applicant because the respondent has nothing to do with the omissions and irregularities appearing in the CMA proceedings. For that reason, respondent cannot be punished for the fault she has not committed.

It was further submitted by Mr. Komba, learned counsel for the applicant that both the undisclosed witness for the respondent and

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Dogan Gasera (PW2) who testified for the applicant should be called before this court and the court record their evidence. Mr. Komba was of the view that the court can do so by invoking its inherent powers under section 95 of the Civil Procedure Code [Cap 33 R.E. 2019]. With due respect to counsel for the applicant, inherent powers of the court cannot be invoked in the circumstances of this application. Inherent powers of the court can only be used when there is no provision in the law but not in circumstances where there is a clear provision of the law but the same was not complied with by the Arbitrator. More so, that invitation cannot be accepted because this court has no original jurisdiction over the matter since that is the domain of CMA. In the application at hand, Dogan Gasera (PW2) and the unnamed respondent's witness testified without taking an oath or affirming. Their evidence was recorded in contravention of Rule 25(1) of GN. No. 67 of 2007. This being a revisionary court as per section 94 of the Employment and Labour Relations Act [Cap 366 R.E. 2019], this court cannot step into the shoes of the CMA by summoning the witnesses to rectify the omissions made by the trial arbitrator. I therefore agree with the submissions of Mr. Ngowi, learned counsel for the respondent and reject the invitation to invoke inherent powers of the court.

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Since the issue I have raised has disposed the application, I will not consider the grounds of revision raised by the applicant and submissions made thereto by the parties.

For the foregoing and being guided by the position of the Court of Appeal in the cited case above, I nullify the CMA's proceedings, quash, and set aside the award arising therefrom. I hereby order that CMA records be remitted back to CMA for retrial *de novo* before another arbitrator without delay.

Dated at Dar es Salaam this 29th July 2022.

B. E. K. Mganga
JUDGE

Ruling delivered on this 29th July 2022 in the presence of Charles Komba, Advocate for the applicant and Peter Ngowi, Advocate for the respondent.

B. E. K. Mganga
JUDGE

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