

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION NO. 498 OF 2020

SIMON EFREM..... APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LIMITED.....RESPONDENT

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

(Faraja: Arbitrator)

Dated 31th August 2020

in

CMA/DSM/ILA/R.475/18/482

JUDGEMENT

08th & 11th March 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (Commission). It is filed by the chamber summons supported by the affidavit of the applicant stating grounds for which this application is based.

In fact, the applicant was employed by the respondent in 2012. Sometimes in 2015, their relationship went sour leading to termination. The reasons for termination were the alleged misconduct on party of the applicant. Not satisfied with termination, the applicant referred a dispute to the commission claiming for reinstatement without loss of benefits due

to unfair termination. The Commission after a trial, dismissed the dispute for lack of merit. The applicant was not satisfied, hence this application.

The applicant being represented by Mr. Sabasi Shayo learned advocate preferred 8 issues for determination as follows;

- i. Whether the respondent had a fair reason to terminate the applicant herein.*
- ii. Whether the applicant was properly terminated by the respondent herein and whether termination was an appropriate sanction thereto?*
- iii. Whether the provisions which the applicant herein was charged for were in compliance with Rule 12(1)(a)(b)(i), (ii), (iv), (iv) of the Employment and Labour Relations (Code of Good Practice) of GN No. 42 of 2007.*
- iv. Whether Exhibit D-7 was properly admitted by the Commission for Mediation and Arbitration (CMA).*
- v. Whether the applicant was charged by a proper HR policy in view of the evidence on record.*
- vi. Whether part of the evidence which the arbitrator relied upon in his award was adduced before the Commission for Mediation and Arbitration (CMA).*

vii. *Whether the respondent followed a fair procedure in terminating the applicant herein.*

viii. *What reliefs are parties entitled to?*

When the matter was set for hearing, and upon perusal of the record from the CMA, it was discovered that the evidence of Dw1, one Ana Robert Mpangala did not take oath before her evidence was recorded. I asked the learned advocates to address me on this issue.

On party of Mr. Shayo for the applicant, he asked this court to nullify the evidence that was not taken under oath and the award. He asked me to remit the record of the same to the Commission for a fresh recording of evidence and then compose a judgement.

In his view, the case of **North Mara Gold Mine Ltd vs Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020, arrived at the similar position.

On the side of Mr. Mapembe learned advocate for the respondent, he was in agreement with Mr. Shayo but went further to ask this court to nullify the entire proceedings and judgement. In support, he referred to the case of **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020. He argued further that, rule 25(1) and 19 (2) (a) of GN No. 67 of 2007, section 4 of the Oaths and Statutory Declaration Act and section 4 of the Employment

and Labour Relations Act, are in mandatory terms. Failure to apply the same fully, the evidence not taken under oath vitiates the proceedings.

In addition, but by way of rejoinder, Mr. Shayo was keen that the case of **North Mara Gold Mine Ltd (supra)**, being the latest decision of the Court of Appeal and that which considered the cases of **CUHAS (supra)** should be followed.

Having given a careful thought of the submission of the parties, I have to note that the 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] provides: -

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 non-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), 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."

In yet another case of **Iringa International School v Elizabeth Post**, Civil Appeal No. 155 of 2019, Court of Appeal of Tanzania at Iringa, the court 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."

There is no dispute therefore to hold that whenever the evidence is not taken under oath /affirmation, the effect of doing so is expunging the same from the record. In the application at hand, it is only the evidence of Dw1 which did not follow the law.

The rest of the evidence is not therefore affected. As Mr. Shayo submitted, the effect of vitiating the proceedings is apparent when the whole evidence is taken without oath. This is what was held in the case of **North Mara Gold Mine** (supra). The court faced with similar situation like the one at the table, only nullified the evidence not recorded under oath and so the award. The case of CUHAS and that of **Iringa International School** (supra) are therefore distinguishable.

Based on the position above, this court, as it has observed, the evidence of Dw1 was not taken under oath. The evidence is expunged from the record. Therefore, the award is set aside. For that reason, the court orders the Labour Dispute CMA/DSM/ILA/R.475/18/482, be remitted to the CMA for rehearing of the evidence of Dw1 before another Arbitrator with competent jurisdiction. Parties to bear own costs.




A.K. Rwizile

JUDGE

11.03.2022