IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 252 OF 2022

(Arising from an Award issued on 15th May 2018 by Hon. M. Chengula, Arbitrator in labour dispute No. CMA/DSM/KIN/R.329/14/70 at Kinondoni)

CITI BANK TANZANIA LIMITED..... APPLICANT

VERSUS

EDNA NDANGUZI .....1ST RESPONDENT

EMMA MWENDA.....2ND RESPONDENT

JUDGMENT

Date of last Order & Judgment: 30/08/2022

B. E. K. Mganga, J.

On 1st June 2005, applicant employed the 1st respondent as Teller and on 11th December 2000 employed the 2nd respondent as Senior Clerk. Respondents worked for the applicant until on 25th April 2014 when they were both terminated from their employment. Aggrieved with termination, on 09th September 2014 respondents filed Labour dispute No. CMA/DSM/KIN/R.329/14/70 before the Commission for Mediation and Arbitration (CMA) at Kinondoni complaining that they were unfairly terminated. On 18th May 2018, Hon. M. Chengula, Arbitrator, having heard evidence of both sides issued an award that

termination of employment of the respondents was both substantively and procedurally unfair. Based on those findings, the Arbitrator awarded the 1st respondent to be paid TZS 45,110,819.40 and the 2nd respondent to be paid TZS 53,455,982 and be issued with a certificate of service.

Feeling resentful with the award, applicant filed this application imploring the court to revise the said award. In the affidavit in support of the Notice of Application, Mr. Paschal Kamala, advocate raised two grounds namely: -

i. *That arbitrator erred in law and fact for the misinterpretation and irrational evaluation of the evidence on record.*
ii. *That the arbitrator erred in law and facts for ordering respondents' compensation of the 12th months without regards to the binding precedents of this court and the loss occasioned to the applicant.*

When the matter was scheduled for hearing, Mr. John Kamugisha, learned counsel for the applicant informed the court that he has noted a legal defect in the CMA's proceedings relating to the evidence of the witnesses. He stated that, evidence of all witnesses was recorded not under oath or affirmation. He therefore prayed leave to argue that legal issue as it was not among the grounds for revision. On his party, Mr. Evold Mushi, Counsel for the respondents did not oppose that prayer. I therefore granted leave to counsel for the applicant.

In arguing the application, Mr Kamugisha, learned counsel for the applicant, submitted that at the CMA, Fred Mwakaba (DW1) who testified on behalf of the applicant on one hand, and Edna Ndaguzi (PW1) and Emma Mwenda (PW2), the respondents, on the other hand, their evidence were recorded not under oath. Counsel submitted further that the omission was in violation of Rule 19(2) of the Labour Institution Mediation and Arbitration Guidelines, Rules, GN. No. 67 of 2007 which requires the arbitrator to administer oath. He went on that Rule 25(2) of GN. No. 67 of 2007(supra) requires witnesses to take oath or affirmation before adducing evidence. He added that the same requirement of taking oath or affirmation before giving evidence is provided for under the provisions of Section 4(a) of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019] and that the said requirement is mandatory. To strengthen his submission, he cited a litany of case laws to wit, **Gabriel Boniface Nkakatisi vs. The Board of Trustees of the National ui Social Security Fund (NSSF)** Civil Appeal No. 237 of 2021**, National Microfinance Bank PLC vs. Alice Mwamsojo, Civil Appeal No. 235 of 2021**, **Attu J. Myna v. CFAO Motors Tanzania Limited,** Civil Appeal No. 269 of 2021, **Unilever Tea Tanzania Limited v. Godfrey Oyema**, Civil Appeal No. 416 of 2020, **The Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020, **North**

Mara Gold mine Limited v. Khalid Abdallah Salum, Civil Appeal No. 463 of 2020, **Unilever Tea Tanzania Limited v. David John**, Civil Appeal No. 413 of 2020, and **Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited and another**, Consolidated Civil Appeal No. 117/16 of 2018 and 199 of 2019 to the position that it is mandatory to take oath and that the omission vitiates the whole proceedings. He therefore implored the Court to nullify CMA proceedings and order trial *de novo*.

During hearing, the court asked parties to address whether it was proper for the arbitrator not to record full names of the respondents ta the time they were testifying. The court noted that 1st respondent was recorded as Edna and 2nd respondent as Emma.

Responding to the issue raised by the court, Mr. Kamugisha submitted that normally in proceedings names of the witnesses are recorded in full so that their identity can easily be established. He argued further that in the application at hand, identities of the respondents were not properly established at the time they were testifying, as such, it can be argued that the persons who testified are not the respondents. He submitted that the omission is fatal.

I should point out that for obvious reasons, and understandably, Mr. Kamugisha did not submit on other grounds raised in the affidavit in support of the application.

Mr. Mushi, learned counsel for the respondent, concurred with the submissions made on behalf of the applicant that evidence of all witnesses was recorded not under oath or affirmation and that the omission vitiated the CMA Proceedings. He joined hand with counsel for the applicant by praying that proceedings be nullified and order trial *de novo*.

Responding on the issue relating to failure to record full names of the respondents, Mr. Mushi initially submitted that it is not necessary to record full names of the witness. But upon reflection, he changed his opinion and submitted that the requirement to record full names of the witness is to certify that the person who testified is the one who appeared and not otherwise. He was of the view also that the omission is fatal.

I respectfully agree with submissions of both counsel that evidence of all witnesses was recorded not under oath or affirmation and that the omission vitiated the whole CMA proceedings. It is true that 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 oath or affirmation to a person called as a witness. As correctly submitted by counsel for the applicant, 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 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. A litany of cases cited by counsel for the applicant is loud to that position. A litany of cases cited by counsel for the applicant is loud to that position. In the case of **Attu J. Myna v. CFAO Motors,** in the list of a litany of cases cited by counsel for the applicant, the Court of appeal held: -

" It is now clear that the law makes it mandatory for witnesses giving evidence in court to do so under oath. It follows therefore that the omission by the witnesses to take oath before giving evidence in this case is fatal and it vitiates the proceedings."

Likely in the **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 the Court stated that:

> *'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' case.'*

Guided by the cited Court of Appeal decisions, I hereby hold that the omission vitiated the whole CMA proceedings.

On the omission to record the full name of the witnesses, I fully agree with submissions by counsel that it is fatal because identities of witnesses were not sufficiently disclosed. In other words, the identity of the person who appeared before the arbitrator and who was ready to submit himself before God or gods for punishment if he tells lies after taking oath or affirmation or to be charged for perjury was not sufficiently established. By recording a single name i.e., Edna or Emma, it cannot be ascertained that "Edna" or "Emma" is the same 1st or 2nd respondent respectively. That being the position, at any rate, those persons cannot be charged for perjury if anything happens. It cannot also be ascertained that the same person who was recorded by a single name is the one who laid himself bare headed before his God or gods for punishment if he/she tells lie. The least I can say is that the

arbitrator conducted hearing of this matter casually. I advise all arbitrators that they are dealing with serious issues relating to rights and fates of the parties hence they should also take arbitration proceedings seriously.

That said and done, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom. I further order that CMA record should be remitted back to CMA so that the dispute between the parties can be heard de novo before a different arbitrator who is serious without delay.

Dated at Dar es Salaam this 30th August 2022.

B. E. K. Mganga
JUDGE

Ruling delivered on this 30th August 2022 in chambers in the presence of John Kamugisha Counsel for the applicant and Evold Mushi, Counsel for the respondents.

B. E. K. Mganga
JUDGE