

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
DAR ES SALAAM
REVISION APPLICATION NO. 397 OF 2020

BETWEEN

NATIONAL BANK OF COMMERCE.....APPLICANT

AND

ROSELYN KAKOLO.....RESPONDENT

RULING

Date of Last Order: 03/03/2022

Date of Ruling: 14/03/2022

B. E. K. Mganga, J.

It is on record that the parties had been in employment relationship from 14th October 1986 to 27th March 2019 when their relationship became sour after the respondent was terminated. Aggrieved with termination of her employment, respondent referred labour dispute No. CMA/ DSM/ILA/R.334/19 before the Commission for Mediation and Arbitration (CMA). On 21st August 2020 the arbitrator issued an award in favour the respondent that she was unfairly terminated.

Applicant being resentful with the award issued in favour of the respondent, filed the present application imploring this court to revise and set aside the CMA's award. The notice of application was supported by an affidavit of Desmond Malyi, the principal officer of the applicant. On the other hand, the respondent filed the counter affidavit opposing the application.

When the matter was scheduled for hearing, as I was examining the record, I found that Sweetbert Marco Mapolu (DW1) and Stivin Frank Kangoma (DW2) the only applicant's witnesses testified not under oath, while Rose Kakolo, the Respondent testified under oath. I thus called upon the parties to address on the effect of the omission by DW1 and DW2 to take an oath before giving their evidence.

Responding to the issue raised by the court, Ms. Wivina Karoli, learned counsel for the applicant submitted that, it is true that the CMA record shows that both DW1 and DW2 testified not under oath. Counsel for the applicant submitted that the law requires a witness to testify under oath or affirmation and that both DW1 and DW2 testified in violation of the law. Counsel for the applicant prayed CMA proceedings

be nullified and the award arising therefrom be quashed and set aside and order trial *de novo*.

On his part, Mr. Elibahati Akyoo, learned counsel for the respondent, concurred with the submission made by learned counsel for the applicant that the omission vitiated the whole CMA proceeding and prayed for nullification of the CMA, quashing and setting aside the award and order trial *de novo*.

From the parties' submission, it is crystal clear that both Counsels conceded that there is procedural irregularity on the CMA proceedings and that, the said irregularity vitiated the whole CMA proceedings. I entirely agree with them. Under Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, the arbitrator has power to administer an oath or accept affirmation from any person called to give evidence. Rule 19 (a) (Supra) has to be read together with Rule 25(1), (2) and (3) of the same GN. No. 67 of 2007 which requires the witness to testify under oath. The said Rule 25(1) of GN. No. 67 of 2007: -

*"25(1) The parties shall attempt to prove their respective cases through evidence and **witnesses shall testify under oath** through the following process..."*

From the wording of Rules 25(1), taking of an oath by a witness before giving evidence is a mandatory requirement of law. Its omission vitiates the whole proceedings. There are numerous Court of Appeal decisions emphasizing on the effects of a witness testifying without taking an oath or affirmation. For instance, in the case of **Joseph Elisha v Tanzania Postal Bank, Civil Appeal No. 157 of 2019** (unreported) where the situation was similar to the one at hand namely, witnesses before CMA testified without taking oath, the Court reiterated the position stated in the case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020** (unreported) 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 abovementioned Court of Appeal decisions, I hereby nullify the whole CMA's proceedings, quash and set aside the award arising therefrom and order that CMA record should be remitted to CMA

so that the dispute between the parties can be heard *de novo* before another arbitrator without delay.

Dated at Dar es Salaam this 14th day of March 2022.



B.E.K. Mganga
JUDGE



Labour Court-TZ.