

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

REVISION APPLICATION NO. 221 OF 2022

*(Arising from an Award issued on 30/12/ 2019, Hon. Kokusiima, L, Arbitrator, in Labour dispute No.
CMA/DSM/TEM/44/2017/2018 /2017 at Temeke)*

TANZANIA CIGARETTE PUBLIC LIMITED COMPANY APPLICANT

VERSUS

FRANCIS IMAN & ANOTHER..... RESPONDENTS

RULING

*Date of last Order: 06/09/2022
Date of Ruling: 16/9/2022*

B. E. K. Mganga, J.

On 26th July 2017, respondents filed labour dispute No. CMA/DSM/TEM/44/2017/2018 /2017 before the Commission for Mediation and Arbitration (CMA) at Temeke complaining that they were unfairly retrenched. On 30th December 2019, Hon. Kokusiima, L, Arbitrator, issued an award in favour of the respondents that termination of their employment was unfair. The arbitrator awarded Francis Iman, the 1st respondent to be paid TZS 52,906,000/= and Theresia Msakai, the 2nd respondent to be paid TZS 32,117,500/=. Applicant was aggrieved with the said award hence this application for revision.

When the application was called for hearing, Mr. Emmanuel Msengezi, Advocate appeared and argued for and on behalf of the applicant while Mr. Erick Rweyemamu, Advocate appeared and argued for and on behalf of the respondent.

Before learned counsels has addressed the court on the grounds advanced by the applicant, I asked them to address one legal issue relating to procedure of recording evidence at CMA because when I was perusing the CMA file, I noted that only Derick Stanley (DW1), Besta Sadallah (DW2) and Francis Iman (PW1) testified under oath. On the other hand, Jerimah Nyari (DW2) and Theresia Mizambwa Msaki (PW2) their evidence was not recorded under oath. I asked counsels to address the effect of evidence of both DW2 and PW2 to be recorded not under oath.

Responding to that the issue raised by the court, Mr. Msengezi, advocate for the applicant, submitted that it is true as the court has pointed out that evidence of PW2 and DW2 was recorded not under oath as the CMA proceedings does not show that oath was taken. He went on that legally speaking, these two witnesses did not testify, hence their alleged evidence that was used by the arbitrator cannot be considered. Counsel concluded that the omission vitiated the CMA award and proceedings and prayed that

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

On the other hand, Mr. Rweyemamu, advocate for the respondent, concurred with submissions made on behalf of the applicant, that CMA proceedings be nullified, the award be quashed and order trial de novo.

I agree with submissions made by counsel on the effect of recording evidence without administering oath or affirmation to the witness. I further agree with their submissions of the way forward. It has been constantly held by both this court and the Court of Appeal 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. Arbitrators are therefore, required to use these powers. As correctly submitted by counsels, 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 DW2 and PW2 under oath or affirmation. This omission vitiated the whole CMA proceedings.

The Court of Appeal was confronted with a similar issue in a litany of cases including [Joseph Elisha's case](#) (supra), [Bulyanhulu Gold Mines Ltd's case](#) (supra), [SNV Netherlands Development Organization Tanzania v. Anne Fidelis](#) (Civil Appeal 198 of 2019) [2022] TZCA 427, [Tanzania Portland Cement Co. Ltd v. Ekwabi Majigo](#), Civil Appeal No. 173 of 2019[2021] TZCA and [Attu J. Myna v. CFAO Motors](#), Civil Appeal No. 269 of 2021 [2022] TZCA 187, [Joseph Elisha vs. Tanzania Postal Bank](#), Civil Appeal No. 157 of 2019, CAT (unreported) and [Bulyanhulu Gold Mines Ltd vs. Keneth Robert Fourie](#), Civil Appeal No. 105 of 2021, CAT (unreported), to mention but a few. In [Attu J. Myna's case](#) (supra) 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."

In all the above cited cases, the court of appeal held that the omission vitiated the CMA proceedings and therefore nullified the CMA proceedings, quashed, and set aside the award arising therefrom and ordered trial de novo.

Guided by the above cited cases, I find that the omission vitiated the whole proceedings. That said and done, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom. I further order that the CMA records be remitted back to the CMA for the dispute between the parties to be heard de novo before another arbitrator without delay.

Dated at Dar es Salaam this 16th September 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 16th September 2022 in chambers in the presence of Erick Rweyemamu, Advocate for the respondents but in absence of the applicant.



B. E. K. Mganga
JUDGE