IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 334 OF 2022

(Arising from an Award issued on 25th July 2022 by Hon. Mbena, M.S, Arbitrator, in Labour dispute No. CMA/DSM/KIN/20/2020/81/2020 at Kinondoni)

EVELYN AUGUSTE..... APPLICANT

VERSUS

DENTSU AEGIS NETWORK TANZANIA LTD..... RESPONDENT

JUDGMENT

Date of Last Order:17/02/2023
Date of Judgment: 28/02/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st March 2017 applicant entered a two years fixed term contract of employment with the respondent as Media Director. The said contract was expected to expire on 1st April 2019. Before expiry of the said contract, respondent contemplated retrenchment on ground of economic constrains. Applicant was among the affected employees. Respondent issued a notice of consultation, however, the same was not conducted due to the applicant's health condition. It is alleged that prior conclusion of the retrenchment processes, applicant resigned from her employment. It is

alleged that after her resignation the applicant knocked the doors of the Commission of Mediation and Arbitration (CMA) where she filed a dispute of constructive termination. At CMA applicant was claiming to be paid salary for the 19 remaining months period in her contract as compensation for constructive termination, severance pay, leave accrued, notice and general damages all total amounting to TZS. 261,880,292.086.

After hearing evidence of sides, the arbitrator issued the award in favour of the respondent that, there was no constructive termination. Being dissatisfied with the award, applicant filed this application to challenge the award.

By consent of the parties this application was argued by way of written submissions. In compliance with submission schedules, applicant enjoyed the service of Didace Celestine Kayombo, learned advocate while the respondent enjoyed the service of Oliver Mkanzabi, Learned Advocate.

At the time of composing the judgement, I went through the parties' written submissions and CMA records and noted that evidence of Evelyne Auguste (PW1) was not taken under oath. I also noted that it was recorded that Edward Shila (DW2) was ready to testify under oath.

I therefore summoned counsel for the parties to address the court the effect of PW1 to testify not under oath and evidence of DW2 to be recorded showing that he was ready to testify under oath.

At the time of hearing the issue raised by the court, applicant was represented by Melchior Hurubano, learned advocate while respondent was represented by Suzan Michael, learned advocate.

Responding to the issue raised by the court, Mr. Hurubano submitted that since evidence of Evelyne Auguste (PW1) was recorded not under oath, and the evidence of Edward Shila (DW2), was recorded showing that the said witness was ready to testify under oath, that was incurable irregularity. He further submitted that, on the eyes of the law, there is no evidence either of PW1 or DW2. Counsel for the applicant prayed that CMA proceedings be nullified, and the award be quashed and set aside.

On the other hand, Ms. Michael learned counsel for the respondent admitted that the record shows the evidence of PW1 was recorded not under oath, and that evidence of DW2 was recorded showing the witness promised take oath. She in fact submitted that evidence of DW2 also was not recorded under oath.

Counsel for the respondent further submitted that, failure to take oath is a mere technicality that should be disregarded by this court. She argued that the court should consider the well-known principle that litigation must come to an end. She added that ordering trial *de novo* will waste time of the parties and CMA. She therefore invited the court to apply the principle of overriding objective and continue to determine the matter. However, upon reflection, she conceded that in taking oath, a witness promises to tell nothing but the truth.

I have duly considered submissions made on behalf of the parties and in disposing this application wish to start with the issue raised by the court *suo moto*.

It was submitted by counsel for the respondent that in taking oath, a witness promises to tell nothing but the truth. I agree with those submissions. But I should also point that not all witnesses who takes oath or affirms tells nothing but the truth. I am of that view because, there are many judgments both of this court and the Court of Appeal in which a witness or witnesses were found to have told lies in their evidence. But that cannot do away with the need of the witness to take oath or affirm prior giving evidence. I am of that view because taking oath is a mandatory requirement of the law as provided for under Rule

25(1) of Labour Institution (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 and Section 4 of Oaths and Statutory Declarations Act [Cap 34 RE.2019]. In addition to that, Rule 19(2)(a) of GN. No. 67 of 2007, gives the Arbitrator power to administer oath or accept affirmation to the witness before they give their evidence. The said Rule provides: -

> *"19(2) The powers of the Arbitrator include to-*
>
> *(a)* ***administer an oath or accept an affirmation from any person called to give evidence."***

As submitted by both learned counsel, it is apparent on record that Evelyne Auguste (PW1) and Edward Shila (DW20, testified without taking oath or affirmation. That means, the arbitrator did not execute his duty of administering oath to these witnesses and continued to record their evidence and went on to rely on that evidence. That was contrary to the dictate of the law.

In her submissions, counsel for the respondent was of the opinion that omission was a mere technicality and invited the court to apply the overriding objective principle and continue to decide the matter on merit. With due respect to counsel for the respondent, taking oath before giving evidence is a requirement of the law. It cannot be

regarded as a technicality. There is a litany of case laws both by this court and the Court of Appeal that failure to testify under oath is a fatal irregularity which cannot just be cured by the principle of overriding objectives. In the case of **SGS Societe Generate De Surveillance SA & Another vs V. I. P Engineering and Marketing Limited & Another**, Civil Appeal No. 124 of 2017 that:-

> *"It should be noted that the overriding objective principle was not meant to enable parties to circumvent the mandatory rules of the court to turn blind to the mandatory provisions of the procedural law which goes to the foundation of the case."*

As correctly submitted by counsel for the respondent, taking oath or affirmation prior giving evidence gives assurance that the witness may speak truth. The court cannot act on evidence of a witness who did not at first place give assurance that he will tell nothing but the truth. In other words, the court cannot waste its precious time to record evidence of a witness who will tell lies. As pointed out hereinabove, not all witnesses who testifies under oath or affirmation tells the truth. In my view, that can only be discovered after assessing evidence of all witnesses in totality.

It is now settled the law that, the omission to give evidence under oath is a fatal and it vitiates proceedings. This position has

been insisted by the Court of appeal in a litany of cases. Some of those cases is the case of See the case of **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, ***SNV Netherlands Development Organization Tanzania vs Anne Fidelis*** (Civil Appeal 198 of 2019) [2022] TZCA 427, **Tumwise Mahenge vs National Microfinance Bank,** Civil Appeal No.586/2020,[2022] TZCA 794, ***Iringa International School vs Elizabeth Post*** (Civil Appeal 155 of 2019) [2021] TZCA 496, ***Tanzania Portland Cement Co. Ltd***

vs Ekwabi Majigo (Civil Appeal 173 of 2019) [2021] TZCA 443 to mention but a few. In ***Iringa International's* case** (supra) the Court of Appeal held: -

> *"The requirement for witnesses to give evidence under oath is mandatory and the omission to do so vitiates the proceedings."*

For the foregoing, I hereby nullify CMA proceeding, quash and set aside the subsequent award. I further order that the matter be remitted to CMA to be heard *de novo* before another Arbitrator.

Dated at Dar es Salaam on this 28th February 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 28th February 2023 in chambers in the presence of Didace Kanyambo, Advocate for the Applicant and Suzan Michael, Advocate for the Respondent.

B. E. K. Mganga
JUDGE