

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

REVISION APPLICATION NO. 84 OF 2023

*(Arising from an Award issued on 16/12/2022 by Hon. G.M. Gerald, Arbitrator in Labour dispute No.
CMA/DSM/KIN/594/2020 at Kinondoni)*

KASHINJE JAMES MSUYA APPLICANT

VERSUS

SHAMSYE SECONDARY SCHOOL RESPONDENT

RULING

*Date of the last Order: 17/05/2023
Date of Ruling: 22/05/2023*

B. E. K. Mganga, J.

Applicant filed this application seeking the Court to revised CMA award issued on 16th December 2022 in Labour dispute No. CMA/DSM/KIN/594/2020. In support of the application, applicant filed the affidavit sworn by Godwin Anthony Fissoo, his advocate containing six grounds. On the other hand, respondent filed the notice of Opposition and the counter affidavit affirmed by Omari Dudu Hamisi.

When the application was called on for hearing, Mr. Godwin Anthony Fissoo, learned counsel appeared for and on behalf of the applicant while Mr. Gasper Mwakanyemba, learned advocate appeared for and on behalf of the respondent.

Before allowing the parties to argued grounds raised by the applicant, I went through CMA record and find that evidence of Hussein Abdallah Mbegu (DW2) and Kashinje James Msuya (PW1) were recorded not under oath. I therefore asked learned counsel to address the court the effect of that omission.

Responding to the issue raised by the court, Mr. Fissoo, learned counsel for the applicant submitted that both Advocates were present at CMA and they are aware that witnesses took oath before testifying but it seems the arbitrator did not record. Counsel for the applicant submitted that since the record does not show that witnesses took oath before giving their evidence, the Court should not consider that evidence. He therefore prayed the court to nullify CMA proceedings and order trial *de novo*.

On his side, Mr. Mwakanyemba, learned counsel for the respondent concurred with submissions made on behalf of the applicant because the omission is fatal. He cited the case of ***Tumwise Mahenge V. National***

Microfinance Bank PLC, Civil Appeal No. 586 of 2020, CAT (unreported) to support his submissions and prayed proceedings be nullified and order trial *de novo* before a different arbitrator.

I have considered submissions made on behalf of the parties and I entirely agree with them. It is clear that evidence of both DW2 and PW1 was recorded 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. More so, Rule 25(2) of GN. No. 67 of 2007(supra) requires witnesses to take oath or affirmation before adducing evidence. Not only that but also, the requirement of a witness to take oath or affirm before giving evidence is mandatory 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. There is a litany of case laws that failure to record evidence under oath or affirmation is fatal and vitiates proceedings. See the case of [Gabriel Boniface Nkakatisi vs. The Board of Trustees of the National Social\(NSSF\)](#), 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 No. 117/16 of 2018 and 199 of 2019, all unreported. In the case of **Attu J. Myna v. CFAO Motors**, 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. I therefore nullify CMA proceedings, quash, and set aside the award arising therefrom. I remit the

CMA record to CMA so that the dispute between the parties can be heard by a different arbitrator without delay.

Dated at Dar es Salaam on this 22nd May 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on this 22nd May 2023 in chambers in the absence of the parties.



B. E. K. Mganga
JUDGE