

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

REVISION NO. 380 OF 2022

*(From the decision of the Commission for Mediation and Arbitration at Pwani in Labour Dispute No. REF:
CMA/PWN/MKR/103/2021/24/2021 Ngalika, E.: Arbitrator, Dated 03rd October, 2022)*

BETWEEN

LODHIA STEEL INDUSTRIES LTDAPPLICANT

AND

HANIFU SADRU HANIFU.....RESPONDENT

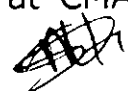
JUDGEMENT

11th May – 16th June, 2023

OPIYO, J.

The applicant prayed for this Court to call, examine the proceeding, revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in a Labour Dispute No. CMA/PWN/MKR/103/2021/24 delivered by Ho. Ngalika, E. (Arbitrator) on 03rd October, 2022.

Briefly the facts of this matter will be appreciated as follows; the respondent was the employee of the applicant and later on was terminated for misconduct on breaching of trust. Not satisfied he filed at CMA for



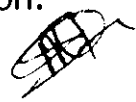
unfair termination. The matter was heard and the award was in favour of the respondent. The arbitrator found that the respondent was terminated without neither being reason for termination nor following proper procedure for terminating his employment contract. Aggrieved by the award the applicant filed this application. This application is supported by the Affidavit of Godfrey Godfrey Ndimbo, principal officer of the Applicant based on the following grounds for revision: -

1. Whether it was proper for the arbitrator to record evidence of the witnesses without taking oath and without appending signature at the end of each witness testimony.
2. Whether it was proper for the arbitrator to hold that the respondent was terminated unfairly in terms of reason and procedure.
3. Whether the reliefs granted by the arbitrator are tenable in law.

The application was heard by way of written submissions. Both parties were represented by Learned Advocates. Mr. Sabas Shayo represented the applicant and Mr. Jerry Jeremiah Kahema stood for the respondent. The first ground for revision is whether it was proper for the arbitrator to record evidence of the witnesses without taking oath and without appending signature at the end of each witness testimony? Submitting on the above

first ground, Mr. Shayo stated that, it is the legal requirement to append signature immediately after witness has given an oath and after the witness has finished testifying. He continued that, the arbitrator failed to append signature after the witnesses have taken oath and he also failed to append signature after recording the testimony of the witnesses.

He submitted further that CMA proceedings reveals that, upon taking oath of Juma Musa Amiri (R1), Godfrey Ndimbo (R3) and Hanifu Sadru Hanifu, the arbitrator proceeded with recording their respective testimonies without first signing after the oath. He stated that, it is the position of the law that, an arbitrator must append his/her signature after taking an oath without firstly proceeding with taking the testimony. He supported his point by referring to the case of **Geita Gold Mining Limited Vs. Hamis Hassan Saidi, Consolidated Labour Revision No. 57 and 58 of 2022, at page 7 and** the case of **Geoffrey Raymond Kasambula Vs. Total Tanzania Limited**, Civil Appeal No. 320 of 2019, CAT at page 8. He then added that from the above quoted decisions an arbitrator was mandated to sign immediately upon taking an oath/affirmation.



He then continued to submit that on the failure of arbitrator to sign after he had taken the testimony of second applicant's witness which he state is contrary to the position of the law. He cemented his point by referring to the case of **Joseph Elisha vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019, CAT (unreported). He then stated that, it is an established and settled position of the law that, an arbitrator must sign after taking the testimony of each witness and the failure to do so vitiates the proceedings.

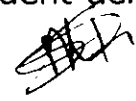
In reply to the first issue, Mr. Kahema submitted that, it is a trite position of law that a law cannot act retrospectively (section 15 of the Interpretation of Laws Act [CAP 1 R.E 2019]). For him the same applies to the position developed by the Courts of law. He stated that, the position of appending signatures by the judicial officers after taking oath by the judicial officers as developed in the **Geoffrey Raymond Kasambula's** case took effect on the 1st day of December, 2022 and so cannot affect the cases that had already been decided. He continued that, the impugned decision was delivered on 3rd day of October, 2022 some months before the position in the **Geoffrey Raymond Kasambula's** case came into operation. He was of the view that, the failure of the Arbitrator to append signature after taking oath as established in the **Geoffrey Raymond**



Kasambula's case has been misconceived basing on the principle of retrospective effect.

He submitted further that the procedural amendments of law as well as case law apply retrospective only to the pending cases, but not to the cases that have already been decided. He supported his point by referring to the case of **Lala Wino v Karatu District Council** (Civil Appl. No. 132 of 2018) [2019] TZCA 46. On the issue of appending signature he submitted that, after all the witnesses testified under oath the arbitrator appended his signature in terms rule 19 of the Mediation and Arbitration Guidelines Rules. For him the authorities cited by the applicant are distinguishable to the case at hand as the arbitrator complied with the law in respect of taking oath and appending signatures after recording evidence.

In determination of this ground the court had time to consider the above submissions by rival parties. The first ground raises two issues which are oaths were not properly taken by witnesses as the arbitrator did not append his signature thereafter and after witnesses' testimony. Starting with the first allegation, the applicant stated that witnesses did not take oath while testify at the CMA. The allegation which the respondent denied



by stating that all witnesses took oath. In going through the CMA records it is evidenced that all witnesses took oath as the arbitrator before recording each witness's testimony showed that such witness was under oath as he wrote '*Shahidi ametoa ushahidi chini ya kiapo*' to mean the 'witness testified under oath.'

On the second allegation the applicant stated that the arbitrator did not append signature at the end of each witness's oath and testimony and he referred to the case of **Geoffrey Raymond Kasambula vs Total Tanzania Limited** (supra). The respondent on the other hand stated that, the law cannot act retrospectively as when the referred case by the applicant was pronounced the CMA decision between the parties had already been decided. The court on the alleged issue of appending signature at the end of the witness's oath had found that the honourable justice of appeal agreed that the rule is not a mandatory procedure at CMA, but for her it was something amounting to a good practice which was ought to be adhered to. That means the application of appending signature after the oath ought to have started from there onwards as opined by the court of appeal in the above case. Therefore as this came after the CMA decision, it cannot act restrictively as correctly submitted by Mr. Kahema.

The next issue was not appending at signature of the arbitrator after the testimony of the witnesses. The applicant alleged that the signature was not appended at the end of testimony of PW2. Not appending signature at the end of each witness indeed vitiates proceedings. Going through the CMA proceedings it is revealed that the arbitrator signed at every end of the re-examination of each witnesses save for the testimony of PW2. That, means the arbitrator knew the importance of appending signatures at the end of each witness' testimony but overlooked doing so for all witnesses' testimonies.

Upon the above finding as the signature was not appended to the testimony of PW2 alone, it will not be wise to nullify entire CMA proceeding. Instead, it is my view that the nullification should only affect the unsigned proceedings and the award therefrom. This is because interest of justice is not properly served by nullifying even the testimonies that were properly recorded. In the case of **North Mara Gold Mine Ltd v Khalid Abdallah Salum, Civil Appeal No. 463 of 2020 CAT, Wambali, JR.** only the testimonies of PW1 and DW1 was nullified for being taken without oath.

For the reason, the first ground of revision is allowed in part as explained above, Consequently I nullify CMA award and proceedings of the CMA in respect of testimony of PW2 only. I order that Labour Dispute No CMA/PWN/MKR/103/2021/24 be remitted to CMA for rehearing the testimony of PW2 before a different arbitrator who shall, after the rehearing proceed to compose a fresh award as soon as possible considering all the evidence in totality.



M.P. OPIYO,

JUDGE

16/06/2023