IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 257 OF 2020

CATHOLIC UNIVERSITY OF HEALTH AND ALLIED SCIENCES (CUHAS) ..... APPELLANT

VERSUS

EPIPHANIA MKUNDE ATHANASE ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Mgeyekwa, J.)

dated the 14th day of December, 2018
in
Revision No. 96 of 2017

.....

JUDGMENT OF THE COURT

7th & 10th December, 2020

MWARIJA, J.A.:

This appeal originates from the decision of the High Court of Tanzania at Mwanza (Mgeyekwa, J.) in Revision No. 96 of 2017. The revision giving rise to the impugned decision of the High Court was preferred by the appellant, the Catholic University of Health and Allied Sciences (CUHAS) against the award of the Commission for Mediation

and Arbitration (the CMA), Mwanza in Labour Dispute No. CMA/MZ/NYAM/228/2015 between the respondent, Epiphania Mkunde Athanase and the appellant.

The facts from which the appeal arose can be briefly stated as follows: The respondent was employed by the appellant as an Assistant Accountant II on renewable term of three years contract from 3rd November, 2008. Before the expiry of that term, on 25/11/2010 the respondent applied for three years study leave to pursue Masters Degree at the London School of Business and Finance in the United Kingdom (the U.K). By a letter dated 20/12/2010 the appellant granted her the sought leave and therefore, the respondent went to the U.K to commence her studies. Apart from approving her study leave, the appellant assisted her by contributing to her £ 2,000.00 which was half of the college fees. She was also hired an air ticket.

After expiry of the first contractual term of three years on 2/11/2011, the parties entered into another renewable employment contract term of three years from 3/11/2011. That contractual term

expired on 2/11/2014 and at first, by a letter dated 19/11/2014, the appellant informed the respondent that the employment contract would be renewed. She had by then applied for extension of the period of her study leave from the initial three years to five years. Conversely however, by a letter dated 5/6/2015, she was informed by the appellant that it had decided not to renew the contract.

The respondent was dissatisfied with the appellant's decision and therefore, on 3/7/2015 she referred the dispute to the CMA claiming *inter alia,* that the appellant had breached the contract thereby unfairly terminating her employment. She sought the following reliefs:

(i) Payment of 72 months salaries for breach of contract.

(ii) Payment of 24 months salaries for unfair termination and

(iii) Payment of 7 months salaries from November, 2014 to May, 2015.

Having heard the evidence of the appellant's witness, one Fr. Paul Elias Mndilo and that of the respondent, the Arbitrator was satisfied that the appellant had breached the contract between it and

the respondent. She based her finding on the fact that, after expiry of the second contractual term of three years on 2/11/2014, the appellant promised to renew the contract for another three years but dishonored that promise midway after commencement of the expected term of a renewed contract. The Arbitrator found further that, since the appellant's promise was made on 19/11/2014, seventeen days after the expiry of the second contract and commencement of the expected renewal thereof, the contract was in effect renewed by default.

As a result, the CMA awarded the respondent damages of 36 months salaries amounting to TZS 28,088,000.00, gratuity of 15% of the basic salary for three years from 3/11/2014 to 3/11/2017 and pension contributions for three years. It also ordered the appellant to provide the respondent with a certificate of service.

The appellant was aggrieved by the award and therefore, applied for revision before the High Court. In its decision, the High Court upheld the finding of the CMA, that by refusing to renew the respondent's employment contract, the appellant was at fault because,

following its acts as stated above, the respondent was under reasonable expection that the contract would be renewed. Aggrieved further, the appellant has preferred this appeal.

In its memorandum of appeal, the appellant has raised the following three grounds of appeal.

> *"1. That there is no evidence on record to support the learned Appellate Judge's finding that the Respondent is entitled to the remedy of reinstatement.*
>
> *2. That the learned Appellate Judge erred in holding that the contract of employment between the Appellant and the Respondent was automatically renewed.*
>
> *3. That the learned Appellate Judge erred in upholding the decision of the Commission for Mediation and Arbitration which was based on the unsworn testimonies of the parties."*

At the hearing of the appeal, the appellant was represented by Mr. Anthony Nasimire, learned counsel while Mr. Renatus Shiduki, also learned counsel, appeared for the respondent. Mr. Shiduki had earlier

on raised a preliminary objection challenging the competence of the appeal contending that the grounds of appeal raised by the appellant's counsel are not based on points of law thus offending the provisions of s.57 of the Labour Institutions Act, No. 7 of 2004 . However, after a short dialogue between the Court and the parties' advocates, while Mr. Shiduki decided to withdraw his preliminary objection, Mr. Nasimire abandoned the first and second grounds of appeal. As a consequence, Mr. Nasimire who had filed written submission in compliance with Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 as amended, relied only on the arguments relating to the third ground of appeal and proceeded to highlight them in his oral submission.

Submitting on that ground of appeal, the appellant's counsel argued that, since from the record, both the witness for the appellant and the respondent who was the witness for the defence, did not give their evidence on oath as mandatorily required by rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidlines), GN No. 67 of 2007 (GN No. 67 of 2007) the proceedings before the CMA were flouted and the evidence rendered invalid. To bolster his argument

further, the learned counsel cited s.4 (a) and (b) of the Oaths and Statutory Declarations Act [Cap.34 R.E. 2019] (the Act). Relying further on the Court's decision in the case of **Nestory Simchimba v. Republic,** Criminal Appeal No. 454 of 2017 (unreported), Mr. Nasimire submitted that, as a result of the omission by the Arbitrator to administer oath to the witnesses before they gave their evidence, the proceedings were vitiated. He thus implored us to allow the appeal, quash the proceedings of both the CMA and the High Court and set aside the award.

On his part, Mr. Shiduki conceded that the witnesses were not sworn before they gave their evidence. He agreed also that the omission vitiated the proceedings of the CMA. He prayed however, for an order that the labour dispute be remitted back to the CMA to be heard afresh.

Having perused the record of appeal as well as the original record of the CMA, we agree with the learned counsel for the parties that the evidence of the appellant's witness (PW1) and that of the respondent (DW1) was not given under oath. As submitted by Mr.

Nasimire, their evidence, was for that reason, recorded contrary to the provisions of rule 25(1) of GN No. 67 of 2007 which provides as follows:

> *"25-(1) The parties shall attempt to prove their respective cases through evidence and* ***witnesses shall testify under oath*** *through the following process –*
>
> *(a) Examination in Chief –*
>
> *(i) The party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;*
>
> *(ii) Parties are predicted to ask leading questions during an examination in chief.*
>
> *(b) Cross examination:-*
>
> *(i) The other party or parties to the dispute may, after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute;*

(ii) Obtain additional information from the witness or challenge any aspect of the evidence given by the witness; leading questions are allowed at this stage of proceedings.

(c) Re-examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross-examination and the purpose of re-examination." [Emphasis added]

From the provision which has been reproduced above, it is mandatory for a witness to take oath before he or she gives evidence before the CMA. This is also in conformity with s.4(a) of the Act cited by the appellant's counsel. That provision states as follows:-

"4-
Subject to any provision of to the contrary contained in any written law, an oath shall be made by –

(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court."

Under s.2 of Cap. 34, the word court has been defined to include every person or body of persons having authority to receive evidence upon oath or affirmation. In our considered view, the CMA falls under that definition and particularly so because as stated above, rule 25(1) of GN No. 67 of 2007 compels a witness to testify under oath.

Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so viatiates the proceedings because it prejudices the parties' case. – See for example, the cases of **Nestory Simchimba v. Republic,** (supra) cited by the appellant's counsel and **Hamis Chuma @ Hando Mhoja and Another v. Republic,** Criminal Appeal No. 371 of 2015. (unreported).

On the basis of the above stated reasons, we find that the omission vitiates the proceedings of the CMA. In the event, we hereby quash the same and those of the High Court. As a result, we set aside

the award of the CMA and the judgment of the High Court which varied the said award. On the way forward, we order that the matter be remitted to the CMA for the Labour Dispute to be heard *de novo* before another Arbitrator. Since the appeal originates from a labour dispute, we make no order as to costs.

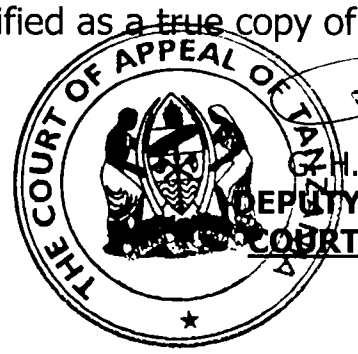
DATED at **MWANZA** this 10th day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 11th day of December, 2020 in the presence of Mr. Anthony Nasimire, learned Counsel for the Appellant also holding brief Mr. Renatus Lubango Shiduki for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL