IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KWARIKO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 108 OF 2018

JOHN FORTUNATUS MAKOKO ..... APPELLANT

VERSUS

GPH INDUSTIRES LIMITED ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mwanza)

(Matupa, J.)

dated the 7th day of December, 2018

in

Labour Revision No. 99 of 2016

RULING OF THE COURT

29th November & 3rd December, 2021

MKUYE, J.A.:

This appeal originates from the decision of the High Court of Tanzania (Labour Division) at Mwanza, (Matupa, J.) in Labour Revision No. 99 of 2016 dated 7th December, 2018. The revision giving rise to the impugned decision was lodged by the appellant, John Fortunatus Makoko, against the award of the Commission for Mediation and Arbitration (the CMA) at Mwanza in Labour Dispute No. CMA/ILEM/18/2016 between the appellant and GPH Industries Limited, the respondent.

Briefly, the facts leading to this appeal go thus: The appellant was employed by the respondent in the capacity of transport manager. The engagement was based on an oral agreement in which the appellant was to receive a salary to the tune of Tshs. 1,500,000/=. Then, later, the appellant having worked for a period of three months, (from 12th November, 2014 to 25th February, 2015) his employment came to an end on the instance of the respondent citing inability to perform the duties assigned to him as a ground for termination.

While the respondent maintained that the appellant was terminated sometimes at the end of January, 2015; the appellant alleged that he was enrolled by the respondent for a computer course and upon reporting back at his work place, he was terminated. He, thus, maintained that his employment was terminated on 18th December, 2015.

Dissatisfied with the termination of his employment, the appellant referred the matter to the CMA and as the mediation failed, the matter proceeded for arbitration. Upon hearing the parties, the arbitrator found that **one,** since the appellant worked for a period of less than six months, he was precluded from raising a claim on unfair termination; and that he was not covered by section 35 of the Employment and

Labour Relations Act, 2004 (No. 6 of 2004) (the ELRA). **Two,** that, the referral was time barred as it was referred to the CMA beyond the prescribed period of thirty (30) days from the date of termination. Consequently, the referral to the CMA was dismissed.

Aggrieved by the decision of CMA, the appellant lodged in the High Court Labour Division No. 99 of 2016 which was also dismissed on account that it was time barred in terms of section 35 of the ELRA.

Still disgruntled, the appellant has now appealed to this Court. He has marshalled a memorandum of appeal on five grounds of appeal which for a reason to become apparent shortly, we do not intend to reproduce them.

When the appeal was called on for hearing, the appellant appeared in person without any representation; whereas the respondent was represented by Mr. Emmanuel John, learned advocate who held brief for Mr. Leonard S. Joseph, learned counsel for the respondent with the instructions to proceed.

Before the hearing of appeal could proceed in earnest, the Court required the parties to address it on two points. **One,** whether or not the witnesses who testified before the CMA gave their testimonies on

oath or affirmation. **Two,** whether the arbitrator appended his signature after each witness had completed to adduce his/her evidence. To put it differently, whether there was a signature of the arbitrator at the end of each witness's evidence.

Both parties conceded to both issues raised by the Court. They were at one that the record of appeal shows that the witnesses gave their evidence without having been sworn or affirmed. Apart from that they contended that the arbitrator did not append his signature after the witnesses had completed to give their evidence.

As to the way forward, both parties argued that the failure by the witnesses to take oath before giving their evidence and the omission by the arbitrator to append his signature at the end of each witness's testimony was a fatal irregularity. In addition, while referring to the case of **Unilever Tea Tanzania Limited v. David John,** Civil Appeal No. 413 of 2020 (unreported), Mr. John contented that failure to append signature vitiates the authenticity of the evidence recorded by him. In this regard, each party implored the Court to nullify the proceedings of both the CMA and High Court, quash the award and the judgment and set aside the orders resulting therefrom and consequently, order for a trial *de novo* before another arbitrator.

In addressing the issue relating to the witnesses testifying without oath, we wish to begin by recapitulating the provisions of Rules 19 and 25 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007 (GN No. 67 of 2007) (henceforth, the "Mediation and Arbitration Rules"). Rule 19(2) (a) of the Mediation and Arbitration Rules requires any witness to take oath or affirmation before giving testimony. Also, Rule 25(1) of the same Rules imposes a mandatory requirement for witnesses to give evidence under oath. It states as follows:

> *"25(1) The parties shall attempt to prove their respective cases through evidence and the witnesses shall testify under oath through the stage following process."*

In the matter at hand, we agree with both parties that the witnesses did testify without taking oath. Looking at pages 56, 64 and 69 of the record of appeal, it is evident that John Makoko, David Galati and Partenus Rwechungura, respectively, gave their evidence without first taking oaths. This means that their evidence was taken contrary to Rule 25(1) of the Mediation and Arbitration Rules cited above and section 4 (a) and (b) of the Oaths and Statutory Declarations Act, [Cap. 34 R.E. 2019] which provides for an oath to be made by any person who

may be lawfully examined upon oath be required to give evidence upon oath by or before the court.

In the case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020 (unreported) when the Court was confronted with an akin scenario, it had this to say:

> *"Where the law makes it mandatory for a person who is competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties."*

Also, in the case of **Iringa International School v. Elizabeth Post,** Civil Appeal No. 155 of 2019 (unreported) where the arbitrator omitted to administer oath to the witnesses and thus allowing them to testify or to give their evidence without oath, the Court stated as follows:

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

Applying the above authorities, we find that even in this case, the omission by the arbitrator to administer oath to the witnesses before they gave their testimonies, vitiated the proceedings before the CMA.

In relation to the issue that the arbitrator omitted to append his signature at the end of the testimony of each witness, it is also apparent on the record of appeal. The record bears out that when John Makoko concluded his testimony at page 64 of the record of appeal, the arbitrator did not append his signature. Also, at page 69 of the record it is shown, after David Galati concluded his testimony, the signature of the arbitrator was not appended. Equally, at page 70 of the record of appeal after Partenus Rwechungura conluded his testimony, the arbitrator did not sign.

We are mindful of the fact that, the requirement to append signature after the witnesses' testimony is not a requirement under the Mediation and Arbitration Rules. However, it is our considered view that, such requirement is vital for the assurance of authenticity, correctness and veracity of the witness's evidence. In the absence of such signature, it may be difficult to ascertain the truthness of the evidence of the witnesses recorded by a person who did not want to commit himself on what he recorded.

In any case, as the requirement to append signature at the end of witnesses' evidence is not covered under the Mediation and Arbitration Rules, we wish to take inspiration from the Civil Procedure Code [Cap.

33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E. 2019] which have similar provisions imposing a mandatory requirement for the presiding officer to sign the witnesses' evidence. For instance, Order XVIII Rule 5 of the CPC provides as follows:

> *"The evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and the judge or magistrate shall sign the same."*

In time without number, this Court has held that failure to append signature after recording the witnesses' evidence is a fatal irregularity vitiating the entire proceedings – see **Yohana Mussa Makubi v. Republic,** Criminal Appeal No. 556 of 2015; **Sabasaba Enos @ Joseph v. Republic,** Criminal Appeal No. 411 of 2017; **Chacha Ghati @ Magige v. Republic,** Criminal Appeal No. 406 of 2017 (all unreported); **Unilever Tea Tanzania Limited** (supra) and **Iringa International School** (supra).

In the latter case of **Iringa International School** (supra), for example, where the Court was faced with a situation in which the

arbitrator failed to administer oath to the witnesses before they gave evidence and omitted to append his signature at the end of witnesses' evidence, it considered the issues and stated as follows:

> *"For reasons that the witnesses before the CMA gave evidence without having first taken oath and as the arbitrator did not append her signature at the end of the testimony of every witness and also on the above stated position of the law, we find that the omissions vitiated the proceedings of the CMA."*

In the said case, the Court consequently invoked section 4(2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002] (henceforth "the AJA") and quashed the proceedings of both the CMA and High Court.

In the same vein in this case, we entertain no doubt that the anomalies vitiated the proceedings of both CMA and the High Court thus rendering them a nullity.

Consequently, in terms of section 4(2) of the AJA, we hereby nullify the proceedings of both CMA and the High Court, quash the award of the CMA and judgment of the High Court and set aside the orders thereof. Further to that, we order that the matter be remitted to the CMA for the same to be tried *de novo* before another arbitrator. As

the appeal emanates from a labour dispute, we order that each party should bear its own costs.

DATED at **MWANZA** this 2nd day of December, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 3rd day of December, 2021 in the presence of Appellant in person and Mr. Emmanuel John, learned counsel for the Respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL