IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 269 OF 2021

ATTU J. MYNA..... APPELLANT

VERSUS

CFAO MOTORS TANZANIA LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Muruke, J.)

dated the 30th day of November, 2020
in
Labour Revision No. 204 of 2019

JUDGMENT OF THE COURT

25th March & 5th April, 2022

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania, Labour Division at Dar es Salaam in Labour Revision No. 204 of 2019.

The facts of the case leading to this appeal can briefly be stated as follows. The appellant was employed by the respondent in the capacity of the Marketing Manager for a specific period of two years from 15th February, 2016 to 14th February, 2018. However, on 20th June, 2016, the appellant's employment was terminated by retrenchment on the basis of operational requirements. Aggrieved, the appellant instituted a labour dispute in the Commission for Mediation and Arbitration (the CMA) at Dar

es Salaam claiming that the respondent had breached the contract of employment. At the end, the CMA decided in favour of the appellant for the reason that she was unfairly terminated from employment for contravening section 38 (d) (iii) of the Employment and Labour Relations Act [CAP 366 R.E. 2019] (the ELRA].

The respondent was dissatisfied with the decision of the CMA, hence she successfully applied for revision of the award before the High Court. In turn, the appellant was not pleased with the decision of the High Court and thus preferred this appeal raising four grounds, which for reasons that will become apparent in the course of this decision, we find no need to reproduce them herein.

When the appeal was called on for hearing, the appellant was represented by Mr. Sylivanus Mayenga, learned advocate assisted by Ms. Advera Kamuzora also learned advocate, whilst Mr. Arnold Luoga, learned advocate, appeared for the respondent.

Upon perusal of the record of appeal, we noticed that the witnesses for both sides did not take oath before their testimonies were recorded by the CMA. We also noticed that at the CMA, the arbitrator did not append signature at the end of each witness's evidence. Therefore, before the hearing could commence, we invited the counsel for the parties to address us on those anomalies.

When he took the stage to address those issues, Mr. Mayenga argued as follows. **First,** that since the record shows that the witnesses declared their respective religions, it means that they took oath before they testified only that the arbitrator did not indicate that the witnesses were sworn and/or affirmed. He argued further that since the CMA is not a court, the mediators and arbitrators are not expected to fully adhere to the rules of procedure as they may do things but forget to note them down. He contended that in this case the Arbitrator complied with rule 25 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, Government Notice No. 67 of 2007 (GN No. 67 of 2007). It was Mr. Mayenga's further contention that, the omission is curable under section 9 of the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019] (the Act) and section 88 of the ELRA for, no injustice has been occasioned in this matter. To give credence to his argument, the learned counsel referred us to the Court's decision in the case of **Hassan Bacho Nassoro v. R,** Criminal Appeal No. 264 of 2020 (unreported).

Secondly, Mr. Mayenga conceded that the arbitrator did not append signature at the end of each witness's evidence. He however urged the Court to find that the omission is immaterial hence could not invalidate the proceedings. He contended that since the proceedings of the CMA were signed and certified as true copy of the original proceedings

at the end, they are authentic. Responding to the Court's probing, Mr. Mayenga submitted that the arbitrators are required to follow the procedure and they are qualified to perform their duties.

For his part, Mr. Luoga conceded that the witnesses from both sides were not sworn before they gave their respective testimonies contrary to rules 19 and 25 of GN No. 67 of 2007. He argued that the arbitrator has no discretion to decide whether to administer oath to witnesses or not. The learned counsel conceded further that the arbitrator erred for failure to append signature at the end of each witness's testimony. He therefore concluded that both omissions were fatal to the proceedings of the CMA and urged the Court to nullify them together with the proceedings of the High Court which arose therefrom. As to the way forward, Mr. Luoga implored us to order a retrial of the dispute before the CMA.

In his brief rejoinder, Mr. Mayenga drew our attention to page 223 of the record of appeal where the Arbitrator indicated that PW1 had testified under oath. He also opposed the idea of a retrial and instead urged us to remit the record to the CMA with instruction to the Arbitrator to indicate that the witnesses took oath before they gave their evidence. Finally, he argued that rule 19 (1) of GN No. 67 of 2007 gives discretion to the arbitrator on how to conduct the business of the CMA.

Having considered the submissions made by the counsel for both parties, we shall commence our deliberation with the issue raised by Mr. Mayenga that the CMA is not a court so the arbitrators and mediators are not fully bound by the rules of procedure. It is our view that, the fact that the witnesses who appear before the arbitrators are required to give evidence under oath, the CMA is a court. This is in accordance with section 2 of the Act, which defines a court as follows:

> *"Includes every person or body of persons having by law or consent of parties authority to receive evidence upon oath or affirmation but does not include a court-martial established under the National Defence Act."*

We shall now revert to the omission by the Arbitrator to administer oath to the witnesses during the trial. Having perused the record of appeal, the evidence of the appellant's two witnesses features from page 114 to 119, whilst the respondent's evidence is found from page 126 to 137. None of these witnesses took oath before giving their testimonies. One of the powers exercisable by the arbitrator under Rule 19 (2) (a) of GN No. 67 of 2007 is to administer oath or accept an affirmation from a person called to give evidence. It provides thus:

> *"Rule 19*
>
> *(2) The powers of the Arbitrator include to-*

(a) administer an oath or accept an affirmation from any person called to give evidence."

In this case, the Arbitrator did not exercise this power and did not administer oath to the witnesses as obliged under rule 25 (1) of GN No. 67 of 2007. It is provided under that provision as follows:

> *"The partles shall attempt to prove their respective cases through evidence and* ***witnesses shall testify under oath*** *through the following process."*
> [Emphasis ours]

Not only the cited provisions but also taking an oath before giving evidence is mandatory under section 4 (a) of the Act which provides thus:

> *"Subject to any provision 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."*

According to these provisions, taking an oath before giving evidence is mandatory and it is no exception to the witnesses who appear before the CMA. We are of the considered view that non-compliance with the requirement to take oath before the CMA is not curable under section 88 of the ELRA as contended by Mr. Mayenga. This provision gives room to the arbitrator to conduct arbitration in a manner that will ensure

substantial merits of the dispute with minimum of legal technicalities. It is our view that the provision is inapplicable where the law is couched in mandatory terms as shown herein above. Mr. Mayenga also relied on section 9 of the Act to rescue the situation. This provision states thus:

> *"Where in any judicial proceedings an oath or affirmation has been administered and taken, such oath or affirmation shall be deemed to have been properly administered or taken, notwithstanding any irregularity in the administration or the taking thereof, or any substitution of an oath for an affirmation, or of an affirmation for an oath, or of one form of affirmation for another."*

It is clear that this provision cannot cure the omission of not administering oath to witnesses. This is so because the same relates to irregularity in the oath or affirmation already administered. It the instant case, no oath or affirmation was ever administered to the witnesses whether rightly or wrongly.

Likewise, the case of **Hassan Bacho Nassor** (supra) cited by Mr. Mayenga is distinguishable from the case at hand. This is because in the cited case the contention by the appellant was that the trial court noting the word "affirm" it means the witnesses were not affirmed by the court but did so by themselves which is contrary to the law. The Court observed

that it was only a slip of the pen or a linguistic maze and in any case taking oath by one self or being led by the court is a matter of convenience and if it happened in that case, it did not affect the oath taken by the witnesses. This is contrary to the instant case where the Arbitrator did not show that the witnesses took oath before they gave evidence.

Mr. Mayenga argued further that the witnesses were really sworn only that the arbitrator did not indicate so in the record of appeal and more so because the witnesses had mentioned their respective religions. We are increasingly of the view that the court record should speak for itself. The Court cannot work on assumption; hence the Arbitrator was supposed to show in the proceedings that the witnesses took oath before they gave their respective evidence. Even though in the course of preparing the award, the Arbitrator indicated as shown at page 223 of the record of appeal that PW1 had taken oath before she gave evidence as contended by Mr. Mayenga, it will not serve any purpose because this ought to have been indicated soon after taking the personal particulars of each witness.

It is now clear that the law makes it mandatory for the 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. Fortunately, this is not a new

territory; as the Court has discussed it in its various decisions, some of which are **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020; **Tanzania Portland Cement Co. Ltd v. Ekwasi Majigo,** Civil Appeal No. 173 of 2019 and **The Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020 (all unreported). For instance, in the first case, upon reproducing the relevant provisions cited above, the Court found that failure by witnesses to take oath before they gave evidence vitiated the proceedings and it stated thus:

> *"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."*

The second anomaly relates to the failure by the arbitrator to append signature at the end of each witness's evidence. According to the record of appeal, the Arbitrator did not sign the evidence of all witnesses from both parties when they testified from page 114 to 137. We are aware that the Rules governing the proceedings at the CMA do not contain any provision regarding signing of the witness's testimony by the arbitrator. However, it is our view that the requirement is pertinent in order to safeguard the authenticity and correctness of the record. In this respect, we wish to take inspiration from the Civil Procedure Code [CAP 33 R.E.

2019] whereby signing of witness's evidence is a mandatory requirement. Order XVIII rule 5 thereof provides thus:

> *"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."***
> [Emphasis added]

See also section 210 (1) (a) of the Criminal Procedure Act [CAP 20 R.E. 2019].

There is plethora of Court's decisions to the effect that, failure to append a signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings. One of those decisions is the case of **Mhajiri Uladi and Another v. R,** Criminal Appeal No. 234 of 2020 (unreported), where it was observed as follows:

> *"As demonstrated in this appeal, the testimonies of all witnesses were not signed by the learned trial Judge not only the authenticity of the testimonies of the witnesses but also the veracity of the trial court record itself is questionable. In absence of the signature of the person who recorded the evidence, it cannot be said with certainty that what is*

contained in the record is the true account of the evidence of the witness since the recorder of such evidence is unknown. On account of such omission, the entire trial court proceedings recorded after the conduct of the preliminary hearing are vitiated because they are not authentic."

See also **Iringa International School v. Elizabeth Post,** Civil Appeal No. 155 of 2019 (unreported).

Mr. Mayenga tried to impress upon us that since the proceedings were signed at the end, then they were authentic. As shown above, the anomaly stems from failure by the Arbitrator to endorse each witness's testimony. Therefore, the signing at the end of the proceedings cannot authenticate the witnesses' evidence.

Eventually, the omission to administer oath to the witnesses and failure by the arbitrator to append signature at the end of each witness's testimony vitiated the proceedings before the CMA. Consequently, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], and proceed to quash the proceedings of the CMA and set aside the award as well as the proceedings and judgment of the High Court which upheld that award. As to the way forward, and for the sake of justice, we remit the record to the

CMA for the dispute to be heard afresh by another arbitrator. Since the matter arose from a labour dispute, we make no order as to costs.

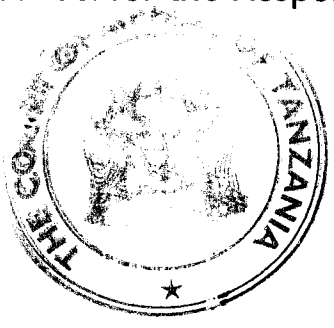
DATED at **DAR ES SALAAM** this 01st day of April, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered on 5th day of April, 2022 in the presence of Ms. Advera Kamuzora counsel for the appellant and Mr. Arnold Luoga Counsel for the Respondent, is hereby certified as a true copy of original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL