

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CIVIL APPEAL NO. 235 OF 2021

NATIONAL MICROFINANCE BANK PLC.....APPELLANT

VERSUS

ALICE MWAMSOJO.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour
Division at Dodoma)**

(Masaju, J.)

dated 22nd day of December, 2020

in

Labour Revision No. 16 of 2018

.....

RULING OF THE COURT

2nd & 5th May, 2022.

FIKIRINI, J.A.:

The respondent, Alice Mwamsojo was employed by the appellant, National Microfinance Bank Plc (NMB) as a Bank Officer from 12th July, 2013 up to 15th August, 2017 when her employment was terminated for gross negligence while on duty, following a loss of Tzs. 268,460,000/ at NMB Singida branch. Irked by the termination she complained to the Commission for Mediation and Arbitration (CMA) at Singida, protesting her

termination as unfair. After hearing the parties, the CMA made its decision in favour of the respondent by ordering the appellant to either re-instate the respondent in terms of section 40 (1) (a) of the Employment Labour Relations Act, No. 6 of 2004 (the ELRA) or compensate her to the tune of Tzs. 35, 367, 607.70/= and issued her with a written warning.

Displeased with the CMA decision, the appellant preferred a revision before the High Court, which was dismissed on 22nd December, 2020, for the reasons that the appellant failed to establish that the respondent was responsible for the loss occasioned and therefore unfairly terminated. Undeterred the appellant appealed to this Court raising seven (7) grounds of appeal, but for the reason which will be apparent soon, those grounds will not be reproduced.

On 2nd May, 2022 when this appeal was called for hearing, Mr. Sabas Shayo appeared for the appellant while Mr. Leonard Mwanamonga Haule for the respondent, both learned counsel.

With leave of the Court, Mr. Shayo raised a point of law that though it was not one of the appellant's grounds of appeal but was worth

consideration by this Court before embarking on the appeal before it. He contended that the evidence of the three (3) witnesses who testified before the CMA was taken contrary to dictates of rule 19 (2) (a) read together with rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, Government Notice No. 67 of 2007 (GN No. 67 of 2007), that a witness should give evidence on oath or affirmation.

Elaborating on his point, he contended that the testimonies of Alice Mwamsojo (PW1) on page 550, Abias Mayalu (DW1) on page 520, and Prudence Emil (DW2) on page 533 of the record of appeal were taken without the Arbitrator, first, administering oath or affirmation to witnesses. Examination of the pages referred to, simply indicated “kiapo” which he submitted is not enough. He also referred us to section 4 of the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2019 (the Act), which illustrates that an oath or affirmation should be administered before one gives evidence before the court. Since all the three witnesses testified without oaths or affirmation being administered, the proceedings and the award emanating therefrom are vitiated, as the testimonies taken without proper

oaths or affirmation being administered are as good as no evidence was adduced. Supporting his submission, he cited to us the case of **North Mara Gold Mines Ltd v Halid Abdallah Salum**, Civil Appeal No. 463 of 2020 (unreported).

On the strength of his submission, he urged us in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 to invoke revisional power and nullify the proceedings of the CMA and the resultant High Court decision and order a retrial before another Arbitrator.

Mr. Haule acknowledged that to be the reality and thus did not object to the prayer based on our previous decisions on the subject.

We considered the point raised carefully and since this is not a new territory the issue will not detain us long. Our perusal of the record of appeal at pages 521, 533, and 551 of the record of appeal the word “kiapo” meaning oath or affirmation feature, however, that does not prove to us if the Arbitrator exercised his power, and administered an oath or accepted affirmation from those witnesses.

The provisions governing witness's oaths or affirmation are expressed under rule 19 (2) (a) of the GN No. 67 of 2007 which provides as follows:

"19 (2) The powers of the Arbitrator include: -

*(a) Administer oath or accept affirmation
from any person called to give evidence;"*

This provision has to be read together with rule 25 (1) GN No. 67 of 2007, which states:

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

Oaths and affirmations are also covered under section 4 (a) of the Act, which provides as follows:

" 4. 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;"

It is, therefore, a mandatory requirement that before giving evidence the witness has to take an oath or affirmation accepted from the witness, this includes witnesses before the CMA. At the CMA the Arbitrator has a duty of making sure the provisions of rule 19 (2) (a) which has to be read together with rule 25 (1) of the GN No. 67 of 2007, have been complied with.

This issue has been discussed in a number of our decisions such as in the **Tanzania Portland Cement Co. Ltd v. Ekwasi Majigo**, Civil Appeal No. 173 of 2019, **Unilever Tea Tanzania Limited v. Davis Paul Chaula**, Civil Appeal No. 290 of 2019, **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020, **The Copycat Tanzania Limited v. Mariam Chamba**, Civil Appeal No. 404 of 2020, **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019, and **Attu J. Myna v. Cfao Motors Tanzania Limited**, Civil Appeal No. 269 of 2021 (all unreported) plus **North Mara Gold Mines Ltd** (supra) cited by the counsel for the

appellant. Failure by the Arbitrator to administer an oath or accept affirmation is fatal and renders the proceedings a nullity.

In the matter before us, as correctly submitted by Mr. Shayo, and supported by Mr. Haule, the Arbitrator did not exercise his powers and administer oaths or accept affirmations. As a result, the evidence of those three witnesses was taken without compliance with the provisions of the law, hence vitiating the proceedings. In the case of **North Mara Gold Mines Ltd** (supra) even though facts are different, as in that situation some of the witnesses were sworn, and others were not. The Court nullified proceedings related to only those witnesses for whom no oath was administered and left the properly administered oath and evidence intact. In the present situation, all three witnesses gave unsworn testimonies.

Borrowing a leaf from the decisions above since PW1, DW1, and DW2 all gave their evidence without oath administered or affirmation accepted, has undoubtedly vitiated the proceedings before the CMA. For not being sworn their evidence was as good as no evidence was given.

Consequently, we invoke the provisions of section 4(2) of the AJA to revise and nullify the proceedings of the CMA and the resultant award. Likewise, the proceedings of the High Court in Labour Revision No. 16 of 2018 are nullified and quashed. We order that Labour Dispute No. CMA/SGD/ 68/ 2017 be remitted to the CMA for rehearing the testimonies of PW1, DW1, and DW2 before another Arbitrator. In the end, considering the circumstances of this appeal, we make no order as to costs.

DATED at DODOMA this 4th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered this 5th day of May, 2022 in the presence of Mr. Ezekiel Amon Mwakapeje, learned counsel holding brief for Mr. Sabas Shayo and Mr. Leonard Mwanambaga Haule, both learned counsel for the Appellant and Respondent respectively is hereby certified as a true copy of the original.

