

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 586 OF 2020

TUMWISE MAHENGHE.....APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC.....RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Dodoma**

(Hon. Mansoor. J)

dated the 24th day of September, 2020

in

Labour Revision No. 17 of 2018

RULING OF THE COURT

30th November & 7th December, 2022

MAKUNGU, J.A.:

Before us is an appeal lodged by the appellant on 24th November, 2020 intending to impugn the decision of the High Court of Tanzania at Dodoma (Mansoor, J.) dated 24th September, 2018. The revision giving rise to the impugned decision was lodged by the respondent, National Microfinance Bank PLC, against the award of the Commission for Mediation and Arbitration (the CMA) at Singida in Labour Dispute No. CMA/SGD/67/2017 between the appellant and the respondent.

Briefly, the facts leading to this appeal go thus: The appellant on 15th September, 2008 was employed by the respondent in the position

of a Bank Officer and on 7th October, 2009 she was appointed as a Loan Officer.

While serving the above post, on 31st October, 2016 she was appointed as an acting Bank Office Manager (BOM) Singida Branch effective from 2nd November, 2016. Then on 15th August, 2017 her employment came to an end after being found guilty of gross negligence by the respondent's Zonal Office Disciplinary Committee at Dodoma.

Dissatisfied with the termination of her employment, the appellant referred the matter to the CMA at Singida, protesting her termination as being unfair. After hearing the parties, the CMA made its decision in favour of the appellant by ordering the respondent to either re-instate the appellant in terms of section 40 (1) (a) of the Employment and Labour Relations Act, No. 6 of 2004 (the ELRA) or compensate her to the tune of TZS. 51,133,420.50/=.

Aggrieved by the decision of CMA, the respondent lodged in the High Court Labour Revision No. 17 of 2018 which was allowed on 24th September, 2020 and the award passed by the CMA was set aside. 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.

At the hearing of this appeal on 1/12/2022, Messrs. Leonard Mwanamonga Haule and Sabas Shayo, learned advocates, appeared for the appellant and respondent, respectively.

Before Mr. Haule began his submission on the grounds of appeal, he informed the Court that after he had carefully revisited the proceedings, especially, the proceedings of CMA, he noted 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, 2007 (G. N No. 67 of 2007) (henceforth, the Mediation and Arbitration Rules”) that a witness should give evidence on oath or affirmation.

Elaborating on his point, he contended that the testimonies of those witnesses were taken without the Arbitrator, first, administering oath or affirmation to them. The proceedings simply indicated the word “kiapo” which he submitted is not enough. He also referred us to section 4 of the Oaths and Statutory Declaration Act, [Cap 34 R. E. 2019] (the Act), which illustrates that an oath or affirmation should be administered before one gives evidence before a court. Supporting his submission, he cited to us the case of **National Microfinance Bank PLC v. Alice Mwamsojo**, Civil Appeal No. 235 of 2021 (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 (the AJA) to invoke our revisional powers and nullify the proceedings of the CMA and the resultant High Court decision and order a retrial before another Arbitrator.

In reply, Mr. Shayo supported the submission made by the learned advocate for the appellant that the proceedings of the CMA were marred with the procedural irregularities. He thus did not object to the prayer based on our previous decisions on the subject.

In addressing this issue, we wish to begin by recapitulating the provisions of rules 19 and 25 of the Mediation and Arbitration Rules. Rule 19(2) 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 ..." [emphasis added]*

In the matter at hand, we agree with both counsel of the parties that the witnesses did testify without taking oath. Looking at pages 26,

47 and 62 of the record of appeal the word “kiapo” meaning oath or affirmation feature, however, that does not prove to us that the Arbitrator exercised his power, and administered an oath or accepted affirmation from those witnesses. It is evident that Abias Mayalu (DW1), Prudence Emil (DW2 and Tumwise Mahenge (PW1), 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 Act, which provides for an oath to be made by any person who may be lawfully examined upon oath or 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 Mkude 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."

The above position was further echoed by the Court in the **Tanzania Portland Cement Co. Limited v. Ekwasi Majigo**, Civil Appeal No. 173 of 2019, **Unilever Tea Tanzania Limited v. Devis Paul Chaula**, Civil Appeal No. 250 of 2019, **The Copycat Tanzania Limited v. Mariam Chamba**, Civil Appeal No. 404 of 2020 and **Attu J. Myna v. Cfao Motors Tanzania Limited**, Civil Appeal No. 269 of 2021 (all unreported) plus **National Microfinance Bank Plc v. Alice Mwamsojo**, (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 same vein in this appeal, we entertain no doubt that the anomaly vitiated the proceedings of both the CMA and the High Court thus rendering them a nullity.

Consequently, in terms of section 4 (2) of the AJA, we hereby nullify the proceeding 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 DODOMA this 7th day of December, 2022.


R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered on 7th day of December, 2022 in the presence of Ezekiel Amon, holding brief for Mr. Leonard Haule, learned counsel for the Appellant and Mr. Sabas Shayo, learned counsel for the respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL