IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION APPLICATION NO. 277 OF 2020

NATIONAL BANK OF COMMERCE LTD..... APPLICANT

VERSUS

SABAS KESSY..... RESPONDENT

JUDGMENT

Last order 23/8/2021

Date of Judgment 24/09/2021

B.E.K. Mganga, J

Respondent was employed by the applicant as supervisor customer Experience at Corporate Branch Dar es salaam. On 4th October 2016 applicant terminated employment of the respondent. Aggrieved by termination decision, on 25th October 2016, respondent filed a labour dispute at the Commission for Mediation and Arbitration (CMA) claiming to be reinstated without loss of remuneration from the date of termination on ground that there were no valid reasons for termination and further that he was not given right to be heard. In proving that termination was unfair,

Sabas Cyril Kessy, the respondent testified as PW1 and opted not to call any other witness. On the other hand, the applicant called two witnesses namely, Sweetbert Marco Mapolu and Mathias Raymond Mjuamungu who testified as DW1 and DW2 respectively to prove that termination of employment of the respondent was fair.

On 19th October 2018, Mwakisopile, I.E., arbitrator, issued an award in favour of the respondent that termination was unfair both on substantive and procedure and proceeded to order respondent be reinstated without loss of TZS 58,420,000/= equal to remuneration of twenty (20) months' salary. Aggrieved by the said award, applicant filed a Notice of Application supported by an affidavit seeking to revise the said award. The affidavit in support of the application contains six (6) legal issues to be considered by this court namely;-

1. *That honorable Arbitrator immensely failed to reasonably assess the applicant's evidence in comparison with the respondent's evidence and erroneously concluded that the respondent was unfairly terminated.*
2. *That honorable Arbitrator erred both in law and fact in holding that the chairman of the disciplinary hearing has no mandate to make a decision.*
3. *That Honorable Arbitrator erred in facts and law in concluding that the reasons for termination of the respondent were not proved while the applicant proved the case on the required standard and also there was admission from the respondent himself.*

4. *That Honorable Arbitrator failed to analyse the evidence brought by the parties hence reached on erroneous conclusion in his findings.*
5. *That Honorable Arbitrator grossly erred in law and facts in awarding reinstatement without loss of remuneration while the offences were clearly proved and admitted by the respondent.*
6. *That Honorable Arbitrator improperly failed to direct his mind on the facts, evidence and law governing termination on misconduct and he immensely declined to consider them and thus delivering at (sic) erroneous award which has occasioned injustice to the applicant.*

On the date of hearing the application, Mr. Evod Mushi, Advocate appeared and argued for and on behalf of the applicant while Prosper Mrema, Advocate appeared and argued for and on behalf of the respondent. After hearing counsels' arguments, I adjourned the matter for a date of judgment. In the due course of composing the judgment, I perused the CMA record and find that all witnesses testified not on oath and that the Arbitrator did not sign at the end of evidence of each witness. Further to that, exhibits were not properly endorsed as there is no date indicating as to when they were received, no endorsement by the arbitrator and no CMA stamp. I therefore summoned both counsels and required them to address me the effect of these omissions.

Mr. Mr. Evod Mushi, counsel for the applicant submitted that it is true that these omissions were committed by the arbitrator. He submitted that

these irregularities have vitiated the CMA proceedings. On his side, Mr. Prosper Mrema, counsel for the respondent concurred that the irregularities render the proceedings to be nullified.

I am in agreement with submissions of both counsels that these irregularities have vitiated the whole proceedings at CMA. It is my considered opinion that the central issue of taking an oath or affirmation at CMA can be traced be traced from Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. 67 of 2007 that gives power to arbitrators to administer or accept an affirmation. The said Rule provides:-

19(2) the powers of the Arbitrator include to-

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

(b) ***summon a person for questioning attending a hearing, and order the person to produce a book, document or object relevant to the dispute, if that person's attendance may assist in resolving the dispute".***

On the other hand, Rule 25(1), (2) and (3) of GN. No. 67 of 2007 provides that witnesses shall testify on oath and provides the procedure on how examination in chief, cross examination, re-examination can be conducted and provides a stage at which arbitrator can put questions to a

witness. It is my opinion that these Rules namely 19(2) and 25(1) both of GN. No. 67 of 2007 has to be read together whenever arbitrator is handling a dispute. As pointed above, witnesses gave evidence not on oath in violation of Rule 25(1) of GN. No. 67 of 2007 that requires witnesses to take oath or affirm before giving their evidence before CMA. It is also clear from the CMA file that arbitrator did not sign at the end of evidence of each witness. The Court of Appeal was confronted with a similar issue in the case of ***Iringa International School v. Elizabeth post, Civil Application No. 155 of 2019,*** (unreported). In resolving issue of omission of the arbitrator to sign at the end of evidence of each witness, the Court of Appeal held:-

> *"Although the laws governing proceedings before the CMA happen to be silent on the requirement of the evidence being signed, it is still a considered view of the court that for the purposes of vouching the authenticity, correctness and providing safeguards of the proceedings, the evidence of each witness need to be signed by the arbitrator".*

The Court of Appeal went on to quote the provisions of Order XVIII rule 5 of the CPC 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."

The court of Appeal further quoted section 210(1) of the CPA as it provides:-

"S. 210(1) In trials other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-

(a) The evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing under his personal direction and superintendence and shall be signed by him and shall form part of the record."

The Court of Appeal restated its holding in the case of ***Yohana Mussa Makubi and Another vs Republic, Criminal Appeal No. 556 of 2015*** (unreported) that:-

"...a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings."

Court of Appeal went on to quote reasons for appending the signature by a judge or a magistrate at the end of the testimony of every witness as it was held in the case of ***Yohana Makubi*** (supra) that:-

*"...in the absence of the signature of the trial [Judge] at the end of the testimony of every witness; **firstly**, it is impossible to authenticate who took down such evidence, **secondly**, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants' counsel,*

***thirdly**, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; **fourthly**, such evidence does not constitute part of the record of trial and the record before us".*

On the omission of witnesses to take an oath or affirmation, the Court of Appeal found that omission invalidates the evidence. A similar position was taken by the Court of Appeal in the case of ***Tanzania Portland Cement Co. Ltd v. Ekwabi Majigo, Civil Appeal No. 173 of 2019*** (unreported) where the Court of Appeal restated its position in the case of ***Catholic University of Health and Allied Science (CUHS) v. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020*** after it has reproduced the provision of Rule 25 of GN. No. 67 of 2007 held that:-

"... it is mandatory for a witness to take oath before he or she gives evidence before the CMA...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."

In the final analysis, the Court of Appeal in the ***Iringa International School*** (supra) held that:-

*"For reasons that the witnesses before 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**...we find that the omissions vitiate the proceedings of the CMA...we hereby quash the proceedings both of the CMA and that of the High Court..."*

Apart from the foregoing, exhibits were not properly endorsed. There is no date showing as to when the exhibit was admitted, stamp of CMA and signature or initial of the arbitrator. Both Rule 19 and 25 of GN. No.67 of 2007 and the whole GN. No. 67 of 2007 is silent on how documentary exhibits can be received and marked. I am of the view that Rule 19(b) of GN. No. 67 of 2007 that empowers arbitrator to order a person to produce documents that can assist him in determination of the dispute was intended that the documents received has to be properly marked so that it can be known as to when it was received at CMA. As all documentary exhibits in the CMA file are, it is not known the date they were received, there is neither a signature of the arbitrator nor a CMA stamp. All exhibits cannot therefore be differentiated from all other documents marked and filed by the parties. I am of the view that failure to properly mark exhibits received is fatal. I am fortified by the decision of the Court of Appeal in the case of ***A.A.R. Insurance (T) Ltd vs Beatus Kisusi, Civil Appeal No. 67 of 2015*** (unreported) where it was held:-

> ***"Once the exhibit is admitted, ... it must be endorsed as provided under O.XIII, R.4 of the CPC...the need to endorse is to do away with tempering with admitted documentary exhibits."***

In the case of ***Ally Omary Abdi vs Amina Khalil Ally Hildid (As an administratix of the estate of the late Kalile Ally Hildid), Civil Appeal No. 103 of 2016*** (unreported) the Court of Appeal held:-

> ***"Endorsements on documents cleared for admission in terms of Order XIII Rule 4 is one way to ensure the genuineness of documents which parties tendered...faced with the irregularity of the trial court using as evidence the documents which were not endorsed in compliance with Order XIII Rule 4 of CPC, the Court would invoke its powers of revision ... to quash all the trial proceedings which followed the exhibition of unendorsed exhibit..."***

For the foregoing, I find that these irregularities are fatal and has vitiated the proceedings of CMA. Guided by the above cited cases of the Court of Appeal, I hereby quash the proceedings of CMA and set aside the award. I hereby order the file be dispatched to CMA for the labour dispute between the applicant and the respondent to be heard de novo before another arbitratoras vitiated the proceedings of CMA.

Wonders will never end. I have wondered how a person mandated with duties of dispensing justice has decided to use a language that is used by few people of his group while out public office. In the application at hand, the arbitrator used some words such as ***w/wenzake to mean wafanyakazi wenzake, DC to mean Disciplinary hearing, 7bu to***

mean sababu, wa2 to mean watu, M/kaji to mean mlalamikaji, m/kiwaji to mean mlalamikiwaji etc. Arbitrators are public officers or quasi-judicial officers, therefore at all times, they should abide by the procedures of conducting business in public offices or in administration of justice. It is more so, as they are determining rights of the parties in labour disputes hence administrating justice. They should therefore, as much as they can, ensure that their records reflect decency.

For all said hereinabove and done and being guided by the above cited cases of the Court of Appeal, I hereby quash the proceedings of CMA and set aside the award. I hereby order the file be dispatched to CMA for the labour dispute between the applicant and the respondent to be heard de novo before another arbitrator. No order as to costs.

It is so ordered

B.E.K. Mganga
JUDGE
24/09/2021