IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 370 OF 2019

CAPITAL DRILLING (T) LIMITED.....APPELLANT

VERSUS

ALEX BARTHAZALI KABENDERA.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mwanza)

(Gwae, J.)

dated the 19th day of February 2019
in
Revision Application No. 18 of 2017

.....

JUDGMENT OF THE COURT

12th & 14th July, 2022

KIHWELO, J.A.:

The appellant, Capital Drilling (T) Limited, seeks to challenge the decision of the High Court of Tanzania, at Mwanza (Gwae, J.) dated 19th February, 2019 which reversed the decision of the Commission for Mediation and Arbitration (CMA) in Employment Dispute No. CMA/MZ/GEITA/199/2016 which dismissed the respondent's complaint on account that the appellant had proved and established that there were sufficient reasons that warranted

the respondent's termination of employment and that the procedure for termination was also fair.

The factual setting of this matter as unveiled by the record of appeal may be recapitulated as follows. The respondent was an employee of the appellant for fixed term contracts in the capacity of boiler maker since 1.07.2008 up to 30.06.2016 and later, his services were terminated on account of gross misconduct that occurred on 27.12.2015, in which he was found attempting to steal five scrap rods, hidden under a vehicle chasis in a truck with Registration No. T 956 ASF and without a waybill contrary to the appellant's procedures of transporting cargo. Initially, the respondent was served with a suspension letter dated 8.01.2016 pending disciplinary hearing. Subsequently, following the disciplinary hearing, the respondent was found guilty of gross dishonesty and on 11.01.2016 was served with a letter terminating his employment.

Aggrieved by the termination, the respondent lodged a complaint before the CMA. He complained that he was unfairly terminated since there was no valid reasons for his termination and that the procedures applied in his termination were neither in conformity with labour laws nor principles of natural justice. He thus, prayed that his termination be declared unfair and

therefore, he should either be reinstated or paid 12 months salaries as compensation on top of all other terminal benefits. Having heard the dispute, the CMA decided that, the respondent was fairly terminated. It found that from the evidence provided, the appellant proved that the procedure was fair and just before termination and that the respondent did not violate the provision of section 37 (2) (c) of the Employment and Labour Relations Act, [Cap. 366 R.E. 2002] read together with Rule 13 of Government Notice No. 42 of 2007.

Suffice to say that, the respondent unamused by the award of the CMA challenged that decision before the High Court by way of revision. He argued that the appellant had no valid reason for termination and did not follow fair and just procedure. He further challenged the CMA decision on the grounds that it was arrived at without compliance to the laid down procedures. Upon hearing the parties on merit, the High Court (Gwae, J.) in a sign of relief to the respondent, it allowed the respondent's appeal to the extent of the unfairness of his termination of employment and ordered the appellant to pay fourteen (14) months' salary as compensation for unfair termination. The High Court decision precipitated this appeal in which the appellant has

preferred two (2) grounds which for reasons to be apparent shortly we are not going to reproduce them.

When, eventually, the appeal was placed before us for hearing on 12th July, 2022, the appellant had the services of Ms. Ernestilla John Bahati, learned counsel while the respondent was represented by Mr. Innocent Michael, learned counsel.

Before we could go into the hearing of the appeal in earnest, we prompted the learned counsel to address us on the apparent infraction which came to our notice upon scrutiny of the record of appeal that, witnesses by both sides were not sworn in or affirmed before their respective testimonies were recorded at the CMA. Upon a brief dialogue between the bench and the bar, it was unanimously agreed that counsel should address the Court in that issue and the preliminary objections which was raised by the respondent and lodged in court on 28.06.2022 were abandoned.

Ms. Bahati conceded that there were irregularities in the proceedings of the CMA in that the Arbitrator recorded the evidence of the witnesses without having required them to take oath. In support of her proposition she referred us to pages 15, 17, 20, 25, 32, 42,45, and 47 of the record of appeal and contended that this is a patent defect whose effect is to vitiate the

proceedings of the CMA. She cited to us section 19 (2) (a) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N. 67 of 2007 (G.N. No.67). She argued that, since the High Court proceedings and the decision subject of the appeal arose from defective proceedings of the CMA they equally have no leg to stand. She therefore, implored us in the interest of justice to nullify the proceedings and award by the CMA as well as the High Court proceedings and judgment and then order the record of the CMA to be remitted back for it to hear and determine the dispute afresh.

On his part, Mr. Michael conceded to the defects and subscribed to all what the counsel for the appellant submitted without more.

The gravamen of this appeal lies in the manner upon which the arbitrator recorded the evidence of witnesses. A careful scrutiny of the record of appeal reveals to us that, the arbitrator did not exercise the powers under section 19 (2) (a) of G.N. No. 67 to administer oath to the witnesses before recording their evidence. As concurrently submitted by the learned counsel this was a fatal irregularity. Our starting point will involve a reflection of the law that provides for the requirements of arbitrators to administer oath to any person who appears before them to give evidence. For the sake of

clarity, we wish to reproduce the provision of Rule 19 of G.N. No. 67 which provides thus;

> *"Rule 19*
>
> *(2) The power of the arbitrator includes to-*
>
> *(a) administer an oath or accept an affirmation from any person called to give evidence."*

A similar obligation is placed on the parties to the dispute to prove their cases on oath. That is in terms of Rule 25 (1) of G.N. No. 67 which provides in mandatory terms the requirement for a witness to give evidence on oath. The provision reads;

> *"25- (1) The parties shall attempt to prove their respective cases through evidence and* ***witnesses shall testify under oath*** *through the following process-*
>
> *(a) Examination in chief-*
>
> *(i) The party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;*
>
> *(ii) Parties are predicted to ask leading questions during an examination in chief.*
>
> *(b) Cross examination: -*

(i) The other party or parties to the dispute may, after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute.

(ii) Obtain additional information from the witness or challenge any aspect of the evidence given by the witness; leading questions are allowed at this stage of the proceedings.

(c) Re-examination, the party that initially called the witness has further opportunity to ask questions to the witness relating to issues dealt with during cross examination." [Emphasis added]

Clearly, taking oath before testifying is a mandatory requirement which cannot be glossed over and its omission vitiates the proceedings since it renders the evidence invalid. Luckily, this Court has had occasion to pronounce itself on this issue in the decisions of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020, **Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020 and **Unilever Tea Tanzania**

Limited v. Davis Paulo Chaula, Civil Appeal No. 290 of 2019 (all unreported).

Speaking of the above provisions, it is perhaps, pertinent to observe that, the provisions are conspicuously clear and loudly speak for themselves in that, there is no middle ground when it comes to compliance to the letter and spirit of these provisions.

The position above becomes even more solid and sound as it is in conformity with sections 2 and 4 of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019] which, read together, obliges witnesses in judicial proceedings to give evidence upon oath or affirmation.

Now, as it can clearly be seen from record, and we think this should not detain us much, and as rightly argued by Ms. Bahati, the arbitrator abdicated the duty stipulated under Rule 19 (2) (a) as well as Rule 25 (1) of G.N. No. 67. This is evidently clear from pages 15 to 47 where James Reuben, Andrew John, Raymond Gibson, Alex Balthazali Kabendera, George Wilbert, Gerald Maengo, and Abeid Hasim testified without taking oath whose consequence is to make their testimonies of no evidential value and hence the proceedings becoming nullity.

In the circumstances above, and for the foregoing reasons, we invoke the revisional powers in terms of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E.2019], as we hereby do, to nullify the proceedings and set aside the award by the CMA as well as the proceedings and judgment of the High Court. We order that, the record be remitted to the CMA for the Labour Dispute to be heard *de novo*. For the interest of justice, we direct that the dispute be presided over by another arbitrator.

This being an appeal arising from a labour dispute, we make no order as to costs.

DATED at **MWANZA** this 13th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 14th day of July, 2022 in the presence of Ms. Milembe Faith Lameck, learned counsel for the respondent who also holds brief for Ms. Bahati, learned counsel for the appellant is hereby certified as true copy of the original.

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL