

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

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

CIVIL APPEAL NO. 198 OF 2019

**SNV NETHERLANDS DEVELOPMENT
ORGANIZATION TANZANIAAPPELLANT**

VERSUS

ANNE FIDELIS.....RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania,
Labour Division at Mwanza)**

(Rumanyika, J.)

dated the 14th day of May, 2019

in

Labour Revision No. 60 of 2018

RULING OF THE COURT

12th & 14th July, 2022

KEREFU, J.A.:

The appellant, SNV Netherlands Development Organization Tanzania, appeals against the decision of the High Court of Tanzania, Labour Division (Rumanyika, J, as he then was) dated 14th May, 2019 in Labour Revision No. 60 of 2018 challenging the award issued by the Commission for Mediation and Arbitration of Mwanza (the CMA) on 31st July, 2018 in favour of Anne Fidelis, the respondent herein, in Labour Dispute No. CMA/MZ/NYAM/ARB/138/2017 (the labour dispute).

In order to appreciate the context in which the labour dispute arose and later this appeal, we find it apposite to briefly provide the material facts of the matter as obtained from the record of the appeal. It

goes thus; on 15th July, 2004 the respondent was employed by the appellant as an Office Administrator with a three-year employment contract starting from 15th July, 2004 to 15th July, 2007, subject for renewal. Then, later, due to organizational structural change, the respondent's position was changed from Office Administrator to General Support Officer (GSO).

Subsequently, on 20th June, 2016, the respondent signed a new employment contract for an indefinite period of time and her role was again changed from GSO to Project Administrator (PA), this was also necessitated by organizational change and operational requirements. Again, on 16th January, 2017, her position was changed from PA to Operations Officer.

On 22nd September, 2017, the appellant announced the organizational retrenchment plans which stated clearly that it intended to bring new projects under the donor funds that will require new job positions and skills. Thus, all staff with no matching skills to the new job requirements were to be retrenched to give room for new recruitments. As a result, on 20th October, 2017, the respondent was issued with a notice terminating her employment contract on allegedly operational requirements which were to take effect from 20th January, 2018.

Aggrieved by the appellant's termination notice and convinced that there were no valid reasons for termination of her employment contract, the respondent, on 17th November, 2017, lodged a labour dispute against the appellant in the CMA, challenging the unfair termination of her employment contract.

Having heard the parties, the CMA determined the matter in favour of the respondent and ordered the appellant to reinstate her OR in the alternative, pay her compensation of twelve (12) months' salaries together with her terminal benefits under section 40 (1) (c) and 44 of the Employment and Labour Relations Act, [Cap. 336, Act No. 6 of 2004] (the ELRA) as follows: (i) Compensation at the tune of TZS 39,600,000.00; (ii) One month salary in lieu of notice TZS 3,300,000.00; and (iii) severance allowance TZS 7,700,000.00. The appellant was also ordered to pay repatriation costs of the respondent and her personal effects within ten days subject to the payment of subsistence expenses from the date of the unfair termination to the date of repatriation.

Aggrieved by the CMA decision, on 19th September, 2018, the appellant filed Labour Revision No. 60 of 2018 in the High Court. The said application was confronted with a notice of preliminary objection raised by the respondent to the effect that the application was filed out

of the prescribed period under section 91 (1) (a) of the ELRA which requires an application of that nature to be filed within six weeks (42 days) from the date when the applicant was served with the impugned award. The said point of objection was challenged by the counsel for the appellant. However, in its ruling dated 14th May, 2019, the learned High Court Judge sustained the preliminary objection and proceeded to dismiss the appellant's application for being time barred.

Still dissatisfied, the appellant lodged the current appeal. In the memorandum of appeal, the appellant has preferred five (5) grounds of complaints. However, for reasons which will be apparently shortly, we do not deem it appropriate, for the purpose of this ruling, to reproduce them herein.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Innocent Michael, learned counsel whereas the respondent was represented by Mr. Joseph Kinango, also learned counsel.

However, and before we could embark on hearing of the appeal on merit, we wanted to satisfy ourselves on the propriety or otherwise of the proceedings before the CMA taking into account that testimonies of all witnesses for both parties were received without oath or

affirmation contrary to the mandatory provisions of the law. As such, we invited the counsel for the parties to address us on that issue.

In his response, Mr. Michael readily conceded that the appeal is not proper before us because the CMA's proceeding is flawed with procedural irregularity as the testimonies of all witnesses for both parties were received without oath or affirmation thus, their evidence had no evidential value in the eyes of the law and could not be acted upon to determine the appeal before us. To amplify further on his point, he referred us to pages 151, 161, 168 and 171 of the record of appeal where witnesses for the parties testified and adduced evidence before the CMA. He then insisted that, since the testimonies of all witnesses were received without oath or affirmation then, their evidence was invalid to support or challenge the labour dispute. On that basis, he urged us to nullify the entire proceedings and award issued by the CMA as well as the proceedings and the decision of the High Court and remit the case file to the CMA for retrial *de novo*.

On his part, Mr. Kinango supported the submission made by his learned friend that the testimonies of all witnesses for both parties were received without oath or affirmation. He as well argued that, the said infraction had rendered their evidence invalid thus vitiated the entire

High Court and the CMA's proceedings. On the way forward, he also urged us to remit the case file to the CMA for a retrial *de novo*.

Having dispassionately considered the submissions made by the learned counsel for the parties and perused the record of appeal before us, the main issue for our determination is the validity or otherwise of the proceedings before the CMA.

To determine the said issue, we have revisited the evidence of all witnesses for both parties before the CMA in the record of appeal together with the original record of the CMA. Our findings are consistent with the submissions of the learned counsel for the parties as the record bears it out that the testimonies for all witnesses for the parties were received without oath or affirmation. Thus, the evidence of Sara Obel (DW1) at pages 151 to 161, Richard Komba (DW2) at pages 161 to 167, Grace Augustino (DW3) at pages 168 to 169 and finally, Anne Fidelis (PW1) at pages 171 to 179 was received without oath or affirmation. This is contrary to section 19 (2) (a) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007 (the CMA Rules), which gives power to the arbitrator to administer oath or affirmation to any person who is called to give evidence. For clarity, the said provision provides that:

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

In addition, Rule 25 (1) of the same Rules provides in mandatory terms the requirement for a witness to give evidence under oath or affirmation, that:

*"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 proceedings.

(c) re-examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross examination and the purpose of re-examination is to correct or clarify evidence covered during cross – examination. "[Emphasis added].

The above cited rule requires the parties to a labour dispute, such as the instant one, in an attempt to prove their respective cases, to lead evidence through the witnesses who must testify under oath throughout the common three stages of examination of witnesses namely, examination in-chief, cross -examination and re-examination. It follows therefore that, before any witness can give evidence before the CMA, he or she must take oath. The above requirement, is reinforced by the provisions of sections 2 and 4 (a) of the Oaths and Statutory Declarations Act, [Cap 34 R.E 2019]. Specifically, section 4 (a) provides that:

"Subject to any provision to the contrary contained in any written law, an oath shall be made by any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court"

The term "*court*" is defined under section 2 of the said Act to include, every person or body of persons having by law or consent of the parties' authority to receive evidence upon oath or affirmation but does not include a court martial established under the National Defence Act (Act No. 24 of 1966). Obviously, the CMA falls within the scope of the above cited provision of the law.

This Court has repeatedly emphasized the need of every witness who is competent to take oath or affirmation before the reception of his or her evidence in the trial court including the CMA. If such evidence is received without oath or affirmation, it amounts to no evidence in law and thus it becomes invalid and vitiates the proceedings as it prejudices the parties' case. See for instance the cases of **Hamisi Chuma @ Hando Mhoja and Another v. Republic**, Criminal Appeal No. 371 of 2015 and **Catholic University of Health and Allied Science (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020, (both unreported)). Specifically, in **Catholic University of Health and Allied Science (CUHAS)** (*supra*), the Court when faced with an akin situation, it held that the irregularity vitiated the entire CMA proceedings. In that appeal, both the witness for the appellant and the respondent gave their evidence without oath or affirmation. After

reproducing the provisions of section 25 (1) of the CMA Rules cited above, the Court stated 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." [Emphasis added].

Similarly, in the appeal at hand, since DW1, DW2, DW3 and PW1 were competent witnesses whose testimonies ought to have been received under oath or affirmation but that was not done, their evidence becomes invalid and had thus vitiated the entire proceedings before the CMA.

Consequently, we invoke revisional powers vested in this Court under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] and hereby nullify the entire proceedings of the CMA and quash the resultant award. We further nullify the proceedings before the High Court in Labour Revision No. 60 of 2018, quash the decision and set aside the subsequent orders thereto as they emanated from a nullity proceeding.

In the event, and for the interest of justice, we remit the case file to the CMA for the parties to be heard *de novo* before another arbitrator, with all possible expedition and in accordance with the law. Since, this is a labour related matter, we make no order as to costs.

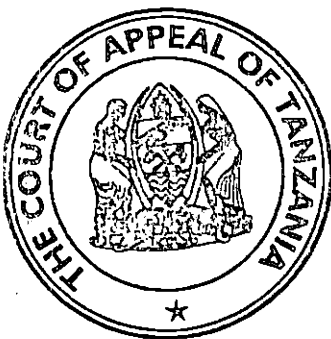
DATED at MWANZA this 13th day of July, 2022.


S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

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




H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL