**IN THE COURT OF APPEAL OF TANZANIA**

**AT MUSOMA**

**(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CIVIL APPEAL NO. 463 OF 2020**

**NORTH MARA GOLD MINE LIMITED.....APPELLANT**

**VERSUS**

**KHALID ABDALLAH SALUM .....RESPONDENT**

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

**Dated the 16th day of April, 2020**
**in**
**Labour Revision No. 25 of 2019**

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**JUDGMENT OF THE COURT**

4th November & 10th January, 2022

**WAMBALI, J.A.:**

Khalid Abdallah Salum, the respondent was an employee of North Mara Gold Mine Limited, the appellant, from 5th October 2008 as a General Operator until 6th June, 2019 when his employment was terminated on ground of misconduct. Consequent to the termination, the respondent approached the Commission for Mediation and Arbitration (the CMA) where he claimed compensation of one hundred (100) months salaries for unfair termination. As the process of mediation failed, the dispute was placed before the Arbitrator who heard evidence from both parties and in the end, he ruled that the termination of the respondent was unfair as the appellant failed to prove that there was valid or fair

reason thereof. In the circumstances, in terms of section 40(1) (c) of the Employment and Labour Relations Act, 2004 (ELRA) the Arbitrator awarded the respondent 48 months' salaries as compensation.

Dissatisfied with the CMA award, through Labour Revision No.25 of 2019, the appellant unsuccessfully challenged it before the High Court of Tanzania at Musoma. In short, the revision was dismissed, hence the appellant lodged the instant appeal to this Court through a memorandum of appeal comprising two grounds of appeal. However, through the written and oral submissions in support of the appeal, the appellant sought leave of the Court to add two grounds of appeal. The requisite leave was granted by the Court as the respondent had no objection. In this regard, a total of four grounds of appeal are rearranged and reproduced as hereunder: -

1. *The High Court judge erred in law in upholding the CMA award which was based on proceedings which were a nullity as the Arbitrator did not sign at the end of each witness testimony.*
2. *The High Court judge erred in law in upholding the CMA award which was based on the unsworn testimonies of witnesses.*
3. *The learned High Court judge erred in fact and in law in failing to hold that the compensation of 48 months salaries that was awarded by the CMA to*

*the respondent for unfair termination was not proper.*

4. *The learned High Court judge erred in fact and in law in holding that the Arbitrator assigned reasons for awarding 48 months salaries which is above the prescribed minimum of 12 months salaries.*

The appeal was called on for hearing in the presence of Mr.Faustin Anthon Malongo learned advocate for the appellant and Mr. Ernest Mhagama learned advocate for the respondent. Notably, both counsel represented the parties at the High Court. It is also not insignificant, we think, to point out that counsel for the parties adopted their respective written submissions which were lodged earlier on and submitted briefly orally in respect of the grounds of appeal which were added after leave was granted by the Court.

With respect to the first ground of appeal, Mr. Malongo submitted that the Arbitrator did not sign at the end of the testimonies of the parties' witnesses, that is, Isaack Kandonga (PW1), Enock Nguka (PW2) for the appellant and Khalid Abdallah Salum (DW1) for the respondent. In his firm submission, he contended that the omission by the Arbitrator vitiated the proceedings of the CMA and that of the High Court. He supported his submission by relying on the decisions of the Court in **Iringa International School v. Elizabeth Post**, Civil Appeal No.155

of 2019 and **Unilever Tea Tanzania Limited v. Davis Paul Chaula**, Civil Appeal No. 290 of 2019 (both unreported).

To this end, the learned counsel for the appellant submitted that since the Arbitrator did not sign as required by law, the Court should follow its previous decisions referred to above and invoke section 4(2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2019 to revise and nullify the proceedings and set aside the award of the CMA and the judgment of the High Court. Moreover, he stated that in the circumstances of the case at hand, the dispute between the parties should be remitted to the CMA for a fresh hearing before another Arbitrator.

When Mr. Malongo was prompted by the Court on whether the style adopted by the Arbitrator to cause the signatures of the parties and their advocate to be appended before and after the witness's testimony was aimed to authenticate the proceedings in the record, he was adamant that is not the requirement of the law. He maintained that the law as propounded in **Iringa International School v. Elizabeth Post** (supra) requires the Arbitrator to sign at the end of the witness's testimony and not the witness or his/ her advocate. However, he acknowledged that unlike the present case, in that decision there was no indication of similar signing by witnesses and advocates.

On his part, Mr. Mhagama unreservedly supported the submission of the appellant's counsel that the Arbitrator did not sign at the end of each witness's testimony. However, he argued that Rule 19(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. No. 67 of 2007 (the Rules) empowers the Arbitrator to determine the procedure on how the arbitration should be conducted. In our case, he argued, the Arbitrator chose to authenticate the record of proceedings with respect to the evidence of the witnesses by the signatures of the witnesses themselves and their advocates. He added that the CMA is not a court but a Commission and so, it applies simple and flexible procedures in order to speed up matters and maintain cordial relationship between employers and employees (the parties) who appear before it.

Mr. Mhagama therefore strongly defended the style adopted by the Arbitrator and argued that this was not the case in the two decisions of the Court referred to above by the counsel for the appellant. Basically, he maintained that since the situation in the present case is different from what transpired during the proceedings at the CMA and prompted the previous decisions of the Court stated above, the same are distinguishable and inapplicable in the circumstances of the appeal at hand. He thus urged us to dismiss the first ground of appeal.

Having heard the contending submissions of the counsel for the parties on this issue and thoroughly perused the record of appeal and original record, there is no dispute that the Arbitrator did not sign the proceedings after the testimonies of the parties' witnesses. We are aware that the Rules guiding CMA proceedings during arbitration are silent on the requirement of signing at the end of the particular witness's testimony. To this end, the Court in **Iringa International School v. Elizabeth Post** and **Unilever Tea Tanzania Limited v. Davis Paulo Chaula** (supra) took inspiration from Order XVIII Rule 5 of the Civil Procedure Code, [Cap 33 R. E. 2019] (the CPC) and thereby it revised and nullified the entire CMA proceedings and the High Court by invoking the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2019 (the AJA).

However, in the instant appeal, in the circumstances of what has been exposed above with regard to the style which was adopted by the Arbitrator in causing the signature of the parties and their advocates to be appended at the beginning of the proceedings before the witnesses started to testify and after they finished their testimonies, we find this to be in conformity with the provisions of Rule 19(1) of the Rules. For clarity, Rule 19(1) of the Rules provides as follows: -

*"19(1) An Arbitrator has the power to determine how the arbitration should be conducted".*

We are of the considered opinion that in the light of the style adopted by the Arbitrator of authenticating the witnesses' evidence no miscarriage of justice was caused to the parties. We hold this firm view because, firstly, there is no dispute that the parties in this appeal have not questioned the authenticity of the proceedings with regard to the testimonies of witnesses for both sides. Indeed, this being a record of the proceedings of the trial CMA, it cannot be easily impeached as it is presumed to be authentic of what transpired before it. Besides, in view of the submissions of the counsel for the parties before us, it has not been contended that the substance of the evidence recorded by the CMA does not reflect what the witnesses testified at the trial. It is in this regard that in **Halfan Sudi v. Abieza Chichili** [1998] T. L. R. 527 at page 529 the Court stated that: -

*"We entirely agree with our learned brother, MNZAVAS, JA and the authorities relied on which are loud and clear that, "A court record is a serious document. It should not be lightly impeached. There is always presumption that a court record accurately represents what happened".*

Secondly, since in terms of Rule 19(1) of the Rules, the Arbitrator is empowered to determine how the arbitration proceedings should be conducted and parties have not complained on the genuineness of the witnesses' testimonies, we think the procedure adopted by the Arbitrator of causing the witnesses' and the advocates' signatures to be appended at the beginning and end of the evidence ensured the authenticity of what transpired during arbitration.

We therefore find that the failure of the Arbitrator to append signature at the end of each witness's testimony did not, in the circumstances of this case, occasion miscarriage of justice to the parties.

Moreover, we firmly hold that the circumstances of this matter differ with the circumstances which led to the decisions of the Court relied upon by the appellant's counsel to urge us to nullify the entire proceedings of the trial CMA and the High Court on revision. We are also aware of the decision of the Court in **Joseph Elisha v. Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 (unreported) in which it was acknowledged that though the Rules governing arbitration proceedings before the CMA do not contain provisions regarding the signing of the witnesses' testimony by the Arbitrator, it is imperative that the signing be done to safeguard the authenticity and correctness of the record. Nevertheless, we think the above observation is not applicable in the

circumstances of this case, because, as we have stated above, we are of the considered opinion that the style adopted by the Arbitrator in causing the signature of the parties and advocates to be appended before and after each witness's testimony is in line with the provisions of Rule 19(1) of the Rules. More importantly, we think the purpose of Rule 19(1) is to make the procedure applicable in arbitration proceedings before the CMA as simple as possible without strictly resorting to the provisions of the CPC to attain substantive justice as we observed in **Finca Tanzania Ltd v. Wildman Masika and 11 Others**, Civil Appeal No. 173 of 2016 (unreported).

It is in this regard that in an akin situation in **North Mara Gold Mine Limited v. Isaac Sultan**, Civil Appeal No.458 of 2020 (unreported), we stated as follows: -

> *"Our conclusion on this ground is that this case is distinguishable from the case of* ***Iringa International School; Unilever Tea Tanzania Limited and Joseph Elisha v. Tanzania Postal Bank*** *(supra) because in this case the Arbitrator designed his own way of authenticating the evidence, which is within his powers to do in terms of Rule 19(1) of the Rules. We are fully satisfied that the absence of Arbitrator's signature at the end of the testimony of each witness in*

*this case, did not vitiate the proceedings nor prejudice any party because, if anything, any possible suspicion on the authenticity of those proceedings, was cleared by the parties and advocates signing".*

Consequently, on the basis of our deliberation above, we dismiss the first ground of appeal.

With regard to the second ground of appeal, we wish to note that during the hearing of the appeal, counsel for the appellant contended that though the Arbitrator indicated in his award as reflected at page 125 of the record of appeal that Isaack Kandonga, the first witness of the appellant was sworn, the record of proceedings of the CMA at page 14 of the same record of appeal plainly shows that the respective witness was not sworn as required by law. In his submission, the award did not state the true position of what transpired at the CMA when the witness testified.

In the circumstances, relying on the decisions of the Court in **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No.257 of 2020 (unreported) and **Iringa International School v. Elizabeth Post** (supra), the appellant's counsel firmly contended that failure of the Arbitrator to administer oath on the witness is fatal to the proceedings

rendering the same null and void. He therefore urged us to invoke the revision power of the Court to nullify the entire proceedings of the CMA and of the High Court, set aside the award and the judgment for emanating from nullity proceedings, and ultimately order a trial *denovo* as it was done in the referred decisions of the Court.

In response, Mr. Mhagama argued that in practice no witness testifies before the CMA without being sworn or affirmed. Though he conceded that there is no indication as per the record of appeal that the respondent did not take oath, that is not the case with Isaack Kandonga who testified for the appellant. In his view, as the witness is recorded in the award as having taken oath, that was in the mind of the Arbitrator that he took oath though he did not indicate so at page 14 of the record of appeal. The learned advocate emphasized that as the award is part of the record of proceedings of the CMA, it cannot be easily impeached at this stage; on the contrary, it should be taken that Isaack Kandonga took oath as stated by the Arbitrator in the award.

In the alternative, Mr. Mhagama submitted that if the Court finds that the respective witnesses did not take oath and thus the law was offended, we should expunge their evidence and proceed to determine the appeal based on the issue of compensation pursuant to section 40(1)(a) of the ELRA. In his firm opinion, the Court cannot nullify the entire

proceedings of the CMA as it was done in its previous decisions relied upon by the appellant's counsel, because in those cases, it was common ground that all witnesses were not sworn or affirmed, which is not the situation in the present appeal.

In rejoinder, firstly, Mr. Malongo emphasized that as the award emanated from nullity proceedings, it is also null and so are the proceedings of the High Court. He contended further that though the Arbitrator indicated in the award that Isaack Kandonga was sworn, his decision was based on what he had in his mind, but not what was recorded in the proceedings as reflected at page 14 of the record of appeal.

Secondly, he argued that the appellant contests not only the compensation awarded to the respondent but also the entire award which is based on nullity proceedings. Thus, he argued that the Court cannot decide based on the remaining evidence after expunging part of the proceedings in which witnesses were not sworn. Besides, he submitted, if the respondent's evidence is expunged, nothing will remain in the record in support of his complaint. To this end, Mr. Malongo reiterated his earlier prayer to the Court to have the entire proceedings of the CMA and the High Court nullified followed by an order of trial *denovo*.

Basically, one of the duties of the Arbitrator who presides over the proceedings at the CMA is to administer oath or accept affirmation from a witness. For the sake of consistence, Rule 19(2) of the Rules provides as follows: -

> *"19(2) The powers of the Administrator include: -*
>
> *(a) Administer oath or accept affirmation from any person called to give evidence.*
>
> *(b) N / A".*

Moreover, Rule 25 (1) of the Rules provides that parties at the arbitration proceedings before the CMA shall attempt to prove their respective cases through evidence and witnesses shall testify under oath or affirmation.

In the instant appeal, there is, firstly, no dispute that the Arbitrator did not exercise his powers bestowed on him under Rule 19(2) (a) of the Rules to administer oath to PW1 and DW1.

Secondly, it is not in dispute that the provisions of Rule 25(1) of the Rules was not complied with in respect of PW1 and DW1 as their evidence was not taken on oath. We are aware that failure of the witness to take an oath or affirmation before he testifies, contravenes the law as held by the Court in **Catholic University of Health and**

**Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase** (supra). The question which follow is what is the consequence of the irregularity.

We are alive to the contending arguments of the counsel for the parties on this issue. While the appellant's counsel contended that the entire proceedings of the CMA should be nullified, the respondent's counsel is of the view that the evidence of the two witnesses, that is, PW1 and DW1 should be discounted and thereby proceed with the determination of the appeal on merit by considering the remaining evidence in the record of appeal.

We have carefully given thought to the contending submissions. However, we are settled that according to the record of appeal, it is only PW1 and DW1 who did not take oath before they testified. We are therefore of the considered opinion that it is only the proceedings in respect of these two witnesses whose evidence should be nullified and quashed from the CMA's record of proceedings. Certainly, the nullification will also apply to the award of the CMA and the proceedings of the High Court in Labour Revision No. 25 of 2019. We hold this view because in the circumstances of this case, it will not be in the interest of justice to nullify all the CMA proceedings, including the evidence of PW2 who took oath before he testified for the appellant. Besides, we are satisfied that the circumstances which led to the nullification of the entire

proceedings of the CMA in the decisions of the Court in **Iringa International School v. Elizabeth Post**, **Unilever Tea Tanzania Limited v. Davis Paulo Chaula and Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase** (supra) are distinguishable with the circumstances in the appeal at hand. It is not in dispute that in the former, it was patently found that all witnesses for the parties were not sworn, which is not the case in the present appeal.

On the other hand, we have no hesitation to state that in the circumstances of this case, we are not inclined to proceed with the determination of the appeal based on the remaining evidence in the record of appeal as suggested by Mr. Mhagama. For it is not doubted that it is only the evidence of PW2 for the appellant which survives the nullification. In the result, we allow the second ground of appeal. In this regard, we find no need of venturing into the deliberation of the remaining grounds of appeal reproduced above.

Consequently, we invoke the provisions of section 4(2) of the AJA to revise and nullify the proceedings of the CMA with respect to the evidence of PW1 and DW1 and the resultant award. Equally important, the proceedings of the High Court in Labour Revision No.25 of 2019 are nullified and quashed. Ultimately, we order that Labour Dispute No.

CMA/ MUS/ 187/ 2019 be remitted to the CMA for rehearing the testimonies of PW1 and DW1 before another Arbitrator in accordance with the law followed by composing the award as soon as practicable.

In the end, considering the circumstances of this appeal, we make no order as to costs.

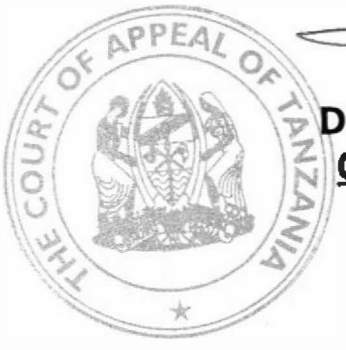
**DATED** at **DAR ES SALAAM** this 30th day of December, 2021.

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The Judgment delivered this 10th day of January, 2022 in the presence of Mr. Imani Mfuru, counsel for the Appellant and Mr. Imani Mfuru holding brief for Mr. Ernest Mhagama, counsel for the Respondent is hereby certified as a true copy of the original.




J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**