

TANZANIA / JUDGMENT

vodacom t limited vs gervas geneya

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM CONSOLIDATED REVISION NO. 325 & 362 OF 2021 {Originating from Ruling of Hon. Wiibard, G. M, Arbitrator, dated 19th July 2021 in Labour dispute No. CMA/DSM/ILA/930/19 at Ilala) BETWEEN VODACOM (T) LIMITED..... APPLICANT/RESPONDENT AND GERVAS GENEVA..... RESPONDENT/APPLICANT

RULING

Date of last Order: 20/04/2022 Date of Ruling: 13/05/2022 B. E. K. Mqanqa, J. On 13th May 2009, Gervas Geneya, the applicant in Revision Application No. 362 of 2021 and respondent in Revision Application No. 325 of 2021 (hereinafter referred to as the employee) and Vodacom (T) Limited, the respondent in Revision Application No. 362 of 2021 and applicant in Revision Application No. 325 of 2021 (hereinafter referred as employee) entered into employment relationship. In the said i employment relationship, the employee was employed as Principal Specialist - Ant Money Laundering Compliance, the position which he served until 31st March 2021 when he was terminated on ground of misconduct. Aggrieved with the said termination, Gervas Geneya, the employee referred the dispute to the Commission for Mediation and Arbitration claiming that he was unfairly terminated. After hearing evidence of both sides, the arbitrator decided partly in favour of the employee and ordered the employer pay him six (6) months salaries as compensation and one (1) month salary in lieu of notice. Both the employer and the employee were dissatisfied with the award as a result, they knocked this court's door to challenge the award. As pointed above, the employer filed Revision Application No.325 of 2021 while the employee filed Revision Application No.362 of 2021. Since both applications emanated from the same CMA award, an order for consolidation was issued on 6th October 2021 hence this consolidated ruling. When the application was called for hearing, I went through CMA record and find that Henry Nyondo (DW1), Alice Lewice (DW2) Gervas Geneya (PW1) William Obeid Mziungu (PW2) and Isack Athuman Mruma 2 (PW3) the only witnesses who testified at CMA, their evidence was not recorded under oath. I therefore asked counsels for the parties to address the court on the effect of that omission. Ms. Saudia Kabora, learned counsel for the employer submitted that since the law requires witnesses to take an oath prior to testify, and since the record shows that no oath was taken, evidence of all witnesses who testified at CMA cannot be

relied upon by the court in these revision applications. Counsel submitted that the omission vitiated the proceedings and prayed that CMA proceedings be nullified, the award arising therefrom be quashed and set aside and order trial de novo. On her part Ms. Loy Sehemba, learned counsel for the employee submitted that it is true that proceedings do not show that witnesses took oath prior to testify and joined hand with submissions by counsel for the employer that the omission vitiated proceedings and prayed that CMA proceedings be nullified, quash, and set aside the award and order trial de novo. I agree with the submissions by both counsels that the omission vitiated the whole CMA proceedings. Because Rule 25 (1) of Labour Institution (Mediation and Arbitration) Guidelines, GN. No. 67 of 2007 3 requires witnesses to take an oath or affirmation before testifying. Rule 25(1) provides that: - "Rule 25(1) The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process..." The above quoted Rule has to be read together with Rule 19(2)(a) of the Labour Institutions (mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 which provides for the power of the arbitrator to administer oath. It is apparent on the CMA records that all witnesses testified without taking an oath or affirmation. That was contrary to Rule 25(1) of GN. No.67 of 2007 (supra). The effect of not complying with that mandatory requirement of the law was expounded by the Court of Appeal when faced with a similar circumstance in various cases. For instance, in the case of Catholic University of Health & Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase, Civil Appeal No.257/2020 the Court of Appeal held that; "... It is mandatory for a witness to take oath before he or she gives evidence before the CMA... where the law makes mandatory for a person who is competent witness to testify on oath, the omission to do so vitiates the whole proceedings because it prejudices the parties' cases"(emphasis added) 4 A similar position was taken by the Court of Appeal in the case of Tanzania Portland Cement Co. Ltd vs Ekwabi Majigo, Civil Appeal No. 173 of 2019 (unreported). Guided by the aforementioned provisions of the law and Court of Appeal decisions, I hold that the omission vitiated the whole CMA proceedings and hereby quash and set aside the award arising therefrom. I therefore order that CMA record should be remitted to CMA so that the dispute between the parties can be heard de novo before a different arbitrator without delay. Dated at Dar es Salaam this 13th May 2022. B. E. K. Mganga JUDGE Ruling delivered on this 13th May 2022 in Chambers in the presence of Saudia Kabora, Advocate for Vodacom (T)Limited, the applicant in Revision Application No. 325 of 2021 and respondent in Revision Application No. 362 of 2021 (the employer) and Loy Sehemba, Advocate for Gervas Geneya, applicant in revision application No. 362 of 5 2021 and respondent in revision application No. 325 of 2021 (the employee). B. E. K. Mganga U § JUDGE ■ 6

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