THE STANDARDS AND BURDEN OF PROOF IN LABOUR DISPUTES: ANALYSIS OF THE ROLE OF EVIDENCE

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Abstract

The law of evidence in labour disputes is intended to provide guidance to Mediators, Arbitrators and Judges on how and what evidence can be admitted or rejected in the proceedings in order to prevent or at least minimize the chances of miscarriage of justice. Evidence is the cornerstone in administration of justice in any proceedings. Properly admitted or rejected evidence build the trust to the parties against the adjudicator, institution and minimizes the great chances of review, revision and appeal which may result to delays in administration of labour justice. Proceedings without following the basic safeguards in law of evidence might result to the parties calling the institution trusted to administer justice kangaroo court or tribunal.

It has become more and more necessary in a welfare state to keep a balance between capital and labour. Though it is delicate task, nevertheless it has to be performed quickly. To facilitate such quick disposal, there must be trained personnel capable of dealing with labour problems. And the only way employment tribunals could become expert bodies, trained in this particular field is to deal with these special probles and thus gain experience. Such experience conduces to the development of a body of rules substantive nature, dealing with such specialized matters and thus facilitates the quicker disposal of employment problem

The experience shows that most of the review, revision and appeals reflect the reality that the area of evidence in its totality has challenges to adjudicators which in most cases are contributed by the parties and their representatives from the commencement of the proceedings to the disposal of the matter. Most of the disputes are either ordered to start afresh due to the challenges which emanates from the aspect of evidence, contributing to the excessive delay of labour disputes which is contrary to the spirit of expedition. This paper makes analysis of the law of evidence in labour dispute and come up with some way forward.

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1.0. INTRODUCTION

Normally, the dispute is decided by having regards to all evidential materials properly tendered and admitted or put legally on record before an adjudicator[2]. This exercise is followed by thorough assessment of the same in order to have at the end a sound decision. The jurisprudence of labour law requires arbitrators to deal with the substance of a dispute between the parties. They must cut through all the claims and counter- claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the ELRA permits arbitrators to 'conduct the arbitration in a manner that the arbitrator considers appropriate but in doing so, arbitrator must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties[3].

The arbitrators in conducting proceedings must be guided with the minimum of legal formalities which suggests that arbitration proceedings are not a court of law. Their proceedings are strictly speaking not required to mimic rules and procedures adopted in courts of law. To this end, the arbitrator has discretion to elect among others, an inquisitorial or adversarial approach in conducting arbitration proceedings and even admitting hearsay evidence as the key evidence. Such a choice, in my view, should be dictated by the nature of the dispute, the parties to the dispute as well as all other factors that might be relevant in order to achieve the goal of dealing with the substantial merits of the dispute fairly, even-handedly, quickly and with minimum of legal formalities[4].

The above position in the jurisprudence of labour law has contributed to the more flexibility and simplicity in handling labour disputes and on the other hand has resulted to the friendlier manner of resolving disputes. The system has advanced less technicalities and costless proceedings. However, on the other hand the same has brought some challenges since the procedures such as admission or rejection and weighing up of the credibility of evidence is more discretional where in most cases arbitrators are guided by their wisdom [the quality of having experience, knowledge,

[2] Rules 24(6) and 25 of the Government Notice No.67 of 2007
[3] Section 88(4) of the Employment and Labour Relations Act No. 6 of 2004
[4] Sections 88(4) and 88(5) of the Employment and Labour Relations Act No. 6 of 2004

and good judgement] which in most cases the wisdom is relative since one arbitrator might admit the same evidence but another arbitrator might reject it.

2.0. THE STANDARD OF PROOF IN GENERAL

Generally, there are three standard of proof which are *balance or preponderance of probability; clear and convincing* and *beyond reasonable doubt*. The clear and convincing standard is distinguishable from the preponderance standards (more likely than not) and the criminal standard of beyond reasonable doubt. To meet the clear and convincing standard, the probabilities must be highly likely or highly probable. There is no dispute that the mathematical percentage probability for the preponderance standard is set at *50% plus* X where X is greater than zero. For present purposes, I will refer to this as the *51%* standard.

Kelvin M. Clermont in his article Death of Paradox: The Killer Logic beneath the Standards of proof[5] states "…. The law today limit its choice to no more than three standards of proof-preponderance, clearly convincing, and beyond a reasonable doubt-from among the infinite range of probabilities stretching from slightly probable to virtual certainty; the law did not always recognize this limitation, but with time the law has acknowledged that conceivable spectrum of standards coalesced irresistibly into three."

Variant attempts have been made in the USA to assign a percentage probability for the other two standards of proof. USA studies amongst judges and jurors have revealed that many of the equated the clear and convincing standards of proof with a probability of 75%. Fredrick E. Vars in his article Toward a General Theory of standards of Proof[6] highlights the following:

"The assumption that preponderance standard equated 0.5X100=50% and the clear and –convincing standard equals to 0.75X100=75% has both descriptive and normative components. Descriptively, as reported…a large survey of judges found a mean, median and mode of 0.75 for the clear- and- convincing-evidence standard. This is from evidence, but it obscures the fact that 65% of judges picked a level other than 0.75 and that the responses in general, ranged from 0.5 to 1.

In mathematical terms, the criminal standard has often been equated with a *90%* probability. My preference is to associate the clear and convincing stand with a

[5] Natre Dame Law Review Vol 88 Issue 3 (2-1-2013) p 1061
[6] Catholic University Law Review Vol 60 Issue 1 Fall 2010 article 3

70+% probability which is the mid-point between the preponderance standard 50 +% and the criminal standard of *90+%*. With that in mind when a party is has proved the civil case to the degree of *50+%* there is highly likelihood of wining that case if the evidence is properly assessed. As to what extent the winning party shall enjoy depend also on the assessment of the weight, strength and the force of evidence and allocation of the right to the winning party.

3.0. THE STANDARD OF PROOF IN LABOUR DISPUTE.

It is well know that the standard of proof in labour disputes is proof on the balance of probabilities or preponderance of probability, and that this means that the party bearing the burden of proof must prove that her case is more probable than not or the quality or fact of being greater in number, quality or importance. In evidence is the greater weight of the evidence required than the other. The preponderance is based on the more convincing evidence and its probable truth or accuracy and not the amount of evidence.

The labour law provides that, the burden of proof lies with the employer but is sufficient for the employer to prove the reason on a balance of probabilities[7].

The law of Evidence Act reflect the position above that what matter is the quality of witness and evidence not the quantity of witnesses and evidence. The law provides that subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any facts[8]. The labour Law does not provide the particular number of witnesses to prove for example fair or unfair termination. Therefore, the same principle is applicable in labour matters

Thus, one clearly knowledgeable witness may provide a preponderance of evidence over dozen witnesses with hazy testimony or a signed agreement with definite terms may outweigh opinion or speculation about what parties intended

4.0. THE BURDEN OF PROOF IN LABOUR DISPUTES

The burden of proof can be defined as the duty or obligation placed upon a party to prove or disapprove a disputed fact or assertion or contention. It is the duty allocated to a person who refers the dispute to show by a preponderance of evidence or weight

[7] Rule 9(3) of the Government Notice No.42 of 2007
[8] Section 143 of the Evidence Act [CAP. 6 R.E.2002]

of evidence 50+% that all the facts necessary to win an award are probably true. For example when an employee alleges to have been terminated in absence of the clear evidence and the employer deny to terminate her, the employee is duty bound to establish the existence of termination as established in the case of CRJ Construction Co (T) Ltd vs Maneno Ndalije & Another[9] before the burden of proof shift to the employer to prove that termination was fair.

The court had this to say:-"Looking at the evidence in record I find the respondents contentions to be mere allegations not supported by any evidence. There is no any evidence which proves that the respondents allege to have been terminated from employment and the applicant denies to have terminated them. I find the respondents had the duty to establish the termination by evidence."

Further, where an employee claims overtime, constructive termination, breach of contract of employment as per Daniel S/O Shotoli vs GPH Industries[10] and discrimination it is her duty to establish the evidential facts substantiating the existence of liability to the employer the relevant case of Stephano Chambo vs J.D. International Ltd[11]

However, the burden of proof is not always static on the complainant or plaintiff. In some issues such as proof of fair termination of employment the burden of proof shift to an employer who is the respondent or defendant[12]as stipulated in the cases Maeleza Security Service Ltd vs Samson Andrew[13] and Eddy Martin Nyinyoo vs Real Security Group & Marine.[14]

The literature from South Africa[15] on the issue of onus of proof in dismissal disputes provides that: in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal is fair. This section places the onus/burden of proving that she was dismissed in one of the sense provided for in section 187 of LRA (36 of ELRA) on the employee. Once this is discharged, the onus passes to the employer to prove that the dismissal was fair. This part of the provision is similar to the Tanzanian labour law[16].

[9] Labour Revision No.205 of 2015 (unreported) and Section 112 of the Evidence Act [CAP 6 R.E 2002]
[10] Labour Revision No.72 of 2017(unreported)
[11] Labour Revision No.2 of 2010(unreported)
[12] Section 39 of ELRA and Rule 24(3) of the G.N. No.67 of 2007
[13] Labour Revision No.20 of 2011(Unreported)
[14] Labour Revision No. 114 of 2011(Unreported)
[15] Labour Relations Act No.66 of 1995 as amended from time to time
[16] Section 39 of the Employment and Labour Relations Act No.6 of 2004

In the case of Kroukam vs SA Airlink (PTY) Ltd[17] the Labour Appeal Court of South Africa held that: "it is not for an employee to prove the reason for termination or dismissal but to produce evidence sufficient to raise the issue and once this evidentiary burden is discharged, the onus shifts to the employer to prove that the termination or dismissal was for fair reason."

Under the jurisprudence of labour law, it is trite that, the burden of proof depends on what is being proved[18]. If the contested issue is fairness of termination, the burden of proof is always on the employer[19]. If the contested issue is compliance with the requirements of any provisions of labour law, the burden of proof is on a person who has failed to keep a record required by any labour law[20]. If the controverted issue is contravention of a right of protection conferred by labour law, the person who alleges the contravention has a burden to prove it[21].

5.0. ADMISIBILITY OF EVIDENCE IN LABOUR DISPUTES

Labour law requires arbitrators to deal with the substance of a dispute between the parties. They must cut through all the claims and counter- claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the ELRA permits arbitrators to 'conduct the arbitration in a manner that the arbitrator considers appropriate but in doing so, arbitrators must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the ELRA enjoins them to do."

Conducting proceedings 'with the minimum of legal formalities' suggests that arbitration proceedings are not a court of law. Their proceedings are strictly speaking not required to mimic rules and procedures adopted in courts of law. To this end, the arbitrator has discretion to elect among others, an inquisitorial or adversarial approach in conducting arbitration proceedings. Such a choice, in my view, should be dictated by the nature of the dispute, the parties to the dispute as well as all other factors that might be relevant in order to achieve the goal of dealing with the substantial merits of the dispute fairly, even-handedly, quickly and with minimum of

[17] [2005] 12 BLLR 1172 (LAC) at para 27 and 28 as per Davis AJA
[18] Labour Revision No. 277 of 2013 (unreported)
[19] Section 39 of the Employment and Lbour Relations Act No. 6 of 2004
[20] Section 15 of the Employment and Labour Relations Act No.6 of 2004
[21] Sections 60(2) of the Labour Institutions Act No. 7 of 2004

legal formalities."

Before admitting the evidence, the adjudicator is required to satisfy himself on the issues of relevance (the quality of being closely connected or appropriate); authenticity (the genuineness or originality of evidence; and the Hearsay rule.

The labour law is not subject to the technical rules of evidence which apply in those courts: It empowers the arbitrator to conduct the arbitration in such manner that the arbitrator considers appropriate in order to determine the dispute both fairly and quickly. In doing so the arbitrator has discretion to admit or reject with sound reason(s) the evidence tendered before her by invoking the law which enjoin her with that power[22]. The arbitrator is enjoined with power even to admit or reject the hearsay evidence. Unfortunately, the ELRA is silent on how hearsay evidence should be approached. The law, however, provides that arbitrations must be conducted with minimum of legal formalities. Thus this law offers some guidance on how to deal with issues such as admissibility of evidence. The determining factor whether the evidence should be admitted or rejected is the provision of the law[23].

However, when considering whether or not hearsay evidence to be admitted at arbitration hearing, the arbitrator need to consider whether or not it is in the interests of justice to admit such evidence. The following factors should be taken into consideration when contemplating whether or not hearsay evidence should be admitted or rejected: the nature of the proceedings; the nature of the evidence; the purpose for which evidence is tendered; the probative (relevance) value of the evidence; the reason the evidence is not given by the person upon whose credibility the probative value of such evidence depends; and any prejudice to a party should such evidence be admitted.

It is consequently clear that whether or not evidence should be admitted at the CMA will depend on the circumstances of each case. The position of the court with regard to the admission of evidence at the Commission need to be supplemented by the Law of Evidence Act as per the case of James Leonidas Ngonge vs DAWASCO[24] and Benard Mtaki & Abdallah Rusuli vs Williamson Diamonds Limited[25], the Electronic Transactions Act[26] and the Civil Procedure Code[27] on admissibility and evidential

[22] Section 88(5) of the Employment and Labour Relations Act No. 6 of 2004 when read together with Rules 5, 19, 22(2) 24(6) and 25 of the Government No.67 of 2007
[23] Ibid No. 22
[24] Ibid No. 8 and Labour Revision No. 382 of 2013 (Unreported)
[25] Labour Revision No. 14 of 2013 (unreported)
[26] Act No. 13 of 2015

weight of traditional and electronic evidence. The Electronic Transactions Act[28] *inter-alia* provides that:- In any legal proceedings, nothing in the rules of evidence shall apply so as to deny admissibility of data message on the ground that it is a data message. See the cases of Lazarus Mrisho Mafie and Another vs Odelo Gasper Kalenga @ Maiso Gasper[29]; Serengeti Breweries Limited vs Break Point Outdoor Caterers Limited[30], Exam Bank (T) Limited vs Kilimanjaro Coffee Company Limited[31]and Emmanuel Godfrey Masonga vs Eduard Franz Mwalongo & 2others[32]

The above position is fortified by the Labour Law[33] which provides that:- if in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disapproving an alleged terms of employment stipulated in subsection(1) shall be on the employer. The proceedings before the Commission for Mediation and Arbitration are legal proceedings; therefore the Electronic Transactions Act is applicable.

The Labour Court has been insisting Arbitrators to abide with the Civil Procedure Code before admitting the evidence to be part of the proceedings. In the case of Warsame Bakery vs Mussa Misungwi Mjija[34] the court held that: - the arbitrator never complied with the provisions of Order XVIII Rule 4 and 5 of the Civil Procedure Code, Cap. 33 require evidence of witnesses, among others to be signed by the Arbitrator. The court went on stating that, the provisions are mandatory. That means, there is no evidence on record to consider. I hereby expunge all. The matter is remitted to the Commission for rehearing before an arbitrator with competent jurisdiction.

The court in many occasions have been nullifying the awards of the Commission on the ground of non-compliance of Labour Law which requires a witness before starting to testify, to take an oath or affirmation[35] and before admitting or rejecting a document to label and sign the document and the proceedings as required by Order XVII, Rule 5 of the Civil Procedure Code[36] and the cases of Mwanza Urban Water Supply and Sanitation Authority vs Beatus Gwantemi[37] and Joseph Chrisant Kilucha

[27] CAP 33 R.E 2002
[28] Section 18(1) of No. footer 13
[29] Commercial Case No. 10 of 2008 (unreported)
[30] Commercial Case No. 132 of 2014 (unreported)
[31] Commercial Case No. 29 of 2011 (Unreported)
[32] Miscellaneous Civil Cause No. 6 of 2015 (unreported)
[33] Section 15(6) of ELRA
[34] Labour Revision No. 78 of 2018 (unreported)
[35] Rule 25(1) of the G.N.No.67 of 2007
[36] Ibid No. 26
[37] Labaour Revision No. 16 of 2018 (unreported)

vs BCEC[38].

6.0. EVALUATING EVIDENCE ON A BALANCE OR PREPONDERANCE OF PROBABILITIES

Determination of the dispute on balance of probability means that the arbitrator or adjudicator must weigh up all of the evidence properly adduced or/and tendered and admitted as a whole and determine what version is more probable than the other. It involves findings of facts based on an assessment of credibility of the probabilities, and the assessment of the applicable rules in the light of those findings in order to come to a conclusion.

Employers, chairpersons or arbitrators are often confronted with the situations where the evidence around alleged misconduct of an employee comes down to the words of one person against that of another; or where there are several possible explanations or versions around alleged misconduct. With this in mind, how such a matter should be decided in terms of the rules of evidence.

In labour dispute, specifically in the alleged unfair termination of employment, it is trite that the employer bears the onus to prove is allegation against an employee on the balance of probabilities[39]. This standard must be distinguished from the standard applied in criminal cases, namely proof beyond a reasonable doubt as stated by the Tanzania apex Court in the case of Adam Ally vs The Republic[40].

"In this case the court observed that:- with the greatest respect to the learned appellate magistrate, we are constrained to take a different view of the evidence before the trial court. More so because the evidence was not subjected to any analysis. The evidence of identification was extremely scanty. It is common knowledge that such weak evidence cannot be used to corroborate the testimony of PW1. We cannot say with the certainty required in the criminal case, that the guilty of the appellant was proved beyond reasonable doubt. The benefit of doubt should have been given to the appellant".

An employer is not required to prove the commission of misconduct by employee beyond a reasonable doubt-i.e. that if any reasonable doubt or possibility of another explanation exists as to the employee's guilty, he cannot be found guilty. Confusion

[38] Labour Revision No.36 of 2018 (unreported)
[39] Rule 9(3) of the Government Notice No.42 of 2007
[40] Criminal Appeal No. 121 of 2002

as to the standard of proof often leads to the employee thinking that it is sufficient to poke holes in the version of the employer's witnesses to create doubt or offer other possibilities, but then fails to present an alternative probable version of his own. In weighing up the probabilities, the adjudicator is not required to exclude every possible doubt in order to conclude the employee's guilty.

It is also important to note that all of the evidence together must be evaluated to determine the matter-the credibility of individual witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered in a piecemeal. They are party of single investigation into the acceptability or otherwise of the employer's or the employee's version. The version presented by the employer to substantiate the allegations of misconduct, must be found on the whole to be more probable or likely than that of the employee. There is no dispute that mathematically percentage probability for the preponderance standard is set at 50% plus x where x where x is greater than zero. The position is well illustrated in the case Mtambua Shamte and 64 others vs Care Sanitation and Suppliers[41].

In the recent case of Multi-choice Tanzania Ltd vs Felix Nyari[42] the court stated that the employee is also duty bound to disapprove the allegation of misconduct on the balance of probability, that is mathematically 50% plus. A finding on a balance of probabilities is also not merely a mathematical balancing of evidence or for that matter, the number of witnesses on each side. In the case of Selamolele vs Makhado[43] the approach to the question whether the onus has been discharged was dealt with as follows:- "ultimately the question is whether the onus on the party, who asserts a stste of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable".

In the case of Assmang Ltd (Assmang Chrome Dwarsriver Mine) vs Commission for Conciliation, Mediation and Arbitration and Others[44] the Labour Court has considered what it means to discharge an onus on a balance of probabilities. It started that it is not enough for the chairperson to simply find the evidence seems to be

[41] Labour Revision No. 154 of 2010 (unreported)
[42] Labour Revision No. 9 of 2018 (unreported)
[43] 1988(2) SA 372 (V) at 374 J-375 B
[44] [2015] 6 BLLR 589 (LC)

evenly balanced (or that neither side's evidence had been discredited) and that therefore, the employer had not discharged its onus especially if the evidence on both sides are diametrically opposed and mutually destructive. The conflicting versions must be made. Both versions cannot be allowed to stand and a finding made on onus alone. The court stated that, the enquiry is two-fold: there has to be balanced of the probabilities; and there has to be a finding on credibility of the witnesses.

In this regard the Court referred to the matter of Stellenbosch Farmers' Winery Group Ltd and Another vs Martel et Cie and Others[45] where the supreme Court of Appeals has laid out the accepted test applicable to both a trial in court and arbitrators when faced with a factual dispute, in particular when faced with two irreconcilable version. According to this judgement (at para 5) the court had to come to the conclusion on the disputed issues by making findings on (1) the credibility (trustworthiness or believability) of the various factual witnesses; (2) their reliability (accurate and consistent or competent); and the probabilities(likelihood or prospect).

The ***credibility*** of a witness would *inter-alia* depend on the witness' condour and the demeanour when she is testifying as illustrated in the cases of Magnus Assenga vs Directoe, Automobile Ltd[46]; Mahamud Sabala vs Ausdrill (T) Ltd[47] and Ngoma Mgeta Muyabi vs NMB PLC[48] . In this regard it is relevant to consider for example whether the witness answered the question in a logical and straightforward manner; whether attempted to avoid or evade answering questions; was the witness reluctant to answer questions that he should have knowledge; whether he exaggerate the answer; implicate himself and admit culpability; become aggressive and emotional and the calibre and cogency of his performance compared to other witnesses testifying about the same incidence or event; his bias, latent and blatant; internal contradictions in his evidence and external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statement or action.

The ***reliability*** of a witness will depend, apart from some of the factors above, the opportunities he had experience or observe the event or incidence in question; and the quality, integrity and independence of his to recall thereof as illustrated in the case of Amratlal. H. Transport & Garage vs Said Mohamed Yaba[49] in this case the

[45] 2003 (1) SA 11 of (SCA)
[46] Labour Revision No. 122 of 2008 (unreported)
[47] Labour Revision no 59 of 2013 (unreported)
[48] Labour Revision No. 84 of 2019 (unreported)
[49] Labour Revision No. 15 of 2008 (unreported)

documentary evidence was not accorded any weight in the assessment of evidence since it was the forged one.

In determining the ***probabilities***, the adjudicator is required to assess the probabilities and improbabilities of each and every version on each of the disputed facts and then determine which the most probable version is. In the process, the nature or type of the evidence should be considered, for example, whether it is direct, hearsay, expert, and opinion. Direct evidence is more reliable than hearsay evidence. Opinion evidence is not much reliable, unless it is of an expert. It is also trite that the hearsay evidence is not much reliable unless it is corroborated though not always.

In this regard, another important evidentiary rule pointed out by the Labour Appeal Court of South Africa in the case of ABSA Brokers (Pty) Ltd vs CCMA & Others[50] the court ruled that:- "It is an essential part of administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness as per the case of Van Tonder vs Killian No en Ander[51]. He has not only a right to cross-examination, but indeed, also a responsibility to cross-examine a witness if it is intended to argue that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that is not speaking the truth and thereafter be afforded an opportunity of providing an explanation as per Zwart and Monsell vs Snobberie (Cape) (Pty) Ltd[52]. A failure to cross-examine may, in general, imply an acceptance of the witness' testimony..."

7.0. SOME CHALLENGES ASSOCIATED WITH EVIDENCE

In the light of the above assessment of all of the above, there are various challenges from the law, case laws, and parties and to the adjudicators. With law, the area of regulation of evidence is not properly covered which renders the adjudicators to assume more discretion powers in either admitting or rejecting the evidence because of the lack of proper guidance. There are also, the conflicting decisions with regards to the application of other laws such as the Law of Evidence and Civil Procedure Code to supplement the labour law; this is well illustrated in the case of Alhamdu Ndimkanwa & Others vs Director, Vick Fish Mwanza Ltd[53]. This case exempted the application of the Civil Procedure Code in labour matter.

[50] JA45/03 of 26 May 2005
[51] (1992) 1 SA 67 (T) at 721
[52] (1984 (1) PH F19 (A))
[53] Labour Revision No. 196 2009 (unreported)

The parties are burdened with the onus of proof in order succeed and are duty bound to make selection of what kind of evidence to be applied in a certain dispute. It is also their duty to introduce the evidence, file the same and tender during the hearing subject to examination and at last present arguments to the same. The practice same of them are not discharging the burden as stated above which effect to the administration of justice has. *For example* some parties do only file the documents thinking that they have already tendered them. Some are not filing the documents as required by the rule thinking that they will introduce, file and tender the documents on the date fixed for hearing or during the filing of the closing arguments or at the revision or not filing at all. The position is illustrated in the cases of Deus Morris Alexander vs Sanvik Mining & Construction (T) Ltd[54] and Gerald Bitaliho vs Nyota Tanzania Ltd[55].

To adjudicators some challenges are issues such as the admissibility of evidence; allocation of burden of standard and burden of proof; libelling or naming and signing of documents; not making ruling to the objected evidence or admitting document without awareness of the parties; assessment of evidence like hearsay, opinion, character, similar fact, evidence of video recording, photographs, breathalysers and face evidence; using evidence not tendered and presuming that once evidence is not cross-examined is automatic credible. The position above is supported by the cases of Godfrey Rwekiza & 11 Others vs Stanley Mining Services (T) Ltd[56].Yaaqub Ismail Enzron vs Mbaraka Bawaziri Filling Station[57]. Gasper Peter vs Mtwa Urban Water Supply Authority[58]. And Super Confectoney (Victoria Bakery vs Idd Bakari[59]

8.0. THE WAY FORWARD

The challenges discussed above must be jointly tackled and the society must be informed on the proper way to go for the betterment of employment and labour industries. In the wise words of DR, Binilith S. Mahenge, a medical doctor and Regional Commissioner Dodoma when addressing the public at the law day[60] said that, "it is better to have wrong solution to a properly formulated problem than to have elegant solution to a wrongly formulated problem". On the other the above

[54] Labour Revision No. 14 2011(unreported)
[55] Labour Revision No. 308 2010(unreported)
[56] Labour Revision No.23 of 2013 (unreported)
[57] Labour Revision No. 33 of 2018 (unreported)
[58] Labour Revision No. 35 of 2017(unreported CAT)
[59] Labour Revision No. 84 of 2018 (unreported)
[60] 2019 Dodoma

statement complement the statement that the end justifies the means.

The law of evidence being the procedural law and law in action is the means toward attainment of justice as stated in the case of R vs Sussex Justices, ex parte McCarthy[61]. Therefore, the law of evidence prays a vital role in the administration of justice. The following are recommended way forward.

- Review of the labour laws to harmonize with other laws and the decision of the court
- Parties to be encourage to settle the matter amicably through mediation
- Adjudicator are required not only to summarise the evidence but also to assess or evaluate the same
- An adjudicators are to be alert to the introduction of evidence and ought not to remain passive in that regard
- In applying section 88(4)(5) of ELRA/6/2004 and Rules 5, 19, 22, 24 and 25 the adjudicators must be careful to ensure that fairness is not compromised
- Parties must as early as possible in the proceedings make known the intention to use secondary and hearsay evidence so that the other parties are able to appreciate the evidentially ambit or challenge it or them
- The adjudicator must explain to the parties the significance of the provision of section 88(5) of ELRA or of the alternative fair standard and procedure adopted in dealing with admission or rejection of evidence
- The adjudicator must timeously rule out on the admission or rejection of the evidence this is crucial to ensure fairness in administration of justice
- Continuous legal education to this area must be emphasized because of the nature of the subject is the law in action and has the mathematics character
- Joint workshop and seminars to the stakeholders and labour practitioners
- Emphasis on the specialization in labour law

[61] [1924)