

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA LABOUR DIVISION
AT DAR ES SALAAM**

**CONSOLIDATED REVISION NO. 187 OF 2013
BETWEEN
INSTITUTE OF SOCIAL WORK..... APPLICANT
VERSUS
ELIA KASALILE AND 20 OTHERS..... RESPONDENTS
AND
REVISION NO. 199 OF 2013
BETWEEN
ELIA KASALILE AND 20 OTHERS..... APPLICANTS
VERSUS
INSTITUTE OF SOCIAL WORK..... RESPONDENT**

(ORIGINAL FILE CMA/DSM/KIN/678)

JUDGMENT

04/09/2015 & 04/12/2015

Mipawa, J.

In these *sui generis* (unique) applications for revision, both the Employer/The Institute of Social Work (herein after to be referred to as the Employer); and the employees Elia Kasalile and 20 others (to be referred to as the employees) opposed the award issued by the CMA.¹

The legal issue called upon this Court to decide on the same is centred on the concept of strike under the labour parlance, namely strike in dispute of right and strike in disputes of interest.

¹ CMA refers to the Commission for Mediation and Arbitration, established by section 12 of the Labour Institutions Act No. 7 of 2004

Both parties had the right to oppose the award issued by the CMA before this Court under section 91 (1) (a) and (b) of the Employment and Labour Relations Act No. 6 of 2004 (herein after to be referred to as the Act), into which grounds for challenging that award are specified under section 91 (2) (a), (b) and (c),² of the Act; and rules 24 (1), (2) (3); 28 (1) (a), (b), (c), (d) and (e) of the Labour Court Rules.³

Before going into the merits of these applications and for one to easily appreciate the same, a brief background of this application is of great importance.

The employees were employed into different posts and on different dates, by the Institute of Social Work into the posts of Assistant Lecturer and others into Tutorial Assistants on permanent terms. They were terminated on 17/08/2011 after going into a strike from 28/06/2011 till 21/07/2011. Thereafter on 02/09/2011 they filed to the CMA their dispute opposing the decision of the employer.

At the CMA, the employees through Diamond Attorneys submitted that they were terminated unfairly both substantively as well as procedurally hence prayed for reinstatement without loss of remuneration or to be paid 24 months' salary each.⁴

The employer through Prime Attorneys by witness Mr. Mlwande C.D. Madihi, a Principal Officer at the Institute of Social Work submitted that the

² Added by the Written Laws (Miscellaneous Amendment Act) No. 3 of 2010, where the award is unlawful, irrational and illogical

³ Government Notice No.106 of 2007

⁴ See CMA award at p. 1 and 2 issued on 11/04/2013 in CMA/KIN/678/11, before Peter Ngowi

complainants went into a strike (unlawful one) at the Institute which was conducted by THTU,⁵ a trade union not a bargaining unit at the work place. That strike made all the activities at the Institute stand still. That the Institution Board together with the Permanent Secretary of the Ministry of Health and Social Welfare made initiatives to resolve the situation but became futile. And that even when they were called for disciplinary hearing did not turn up even after using ***Mwenyekiti wa Mtaa*** hence the disciplinary hearing was conducted ***ex-parte***.

Another witness Mr. Mussoline Mshanga ***Mwenyekiti wa Mtaa*** under oath submitted that he was given 21 letters so as to distribute the same to the employees between 03/08/2011 till 05/08/2011 but all rejected to receive those letters hence he decided to write a letter to the employer explaining the same.⁶

On their side the employees submitted that their employment contracts were terminated with no reasons thereto and that even the procedures were not followed thus prayed that they be reinstated without loss of remuneration or be paid salaries equivalent to 24 months each.⁷

The CMA after hearing both parties, on the issue of substantive fairness decided that there was a dispute filed at the CMA which when yet to be solved the employees went for the strike hence it was a strike on dispute of right and not the dispute of interest. The THTU was not a trade union with majority and therefore it had no power to call for the strike and that THTU was contesting against the decision of the employer. Therefore,

⁵ THTU refers to Tanzania Higher Learning Trade Union

⁶ *op.cit* note 4

⁷ *op. cit* note 4, at p 6

the strike called by THTU, a trade union was not lawful because the case that was filed to the CMA was on dispute of right and not a dispute of interest hence involving in that strike attracted a higher penalty thereto. Hence the Honourable Arbitrator confirmed the decision of the employer on substantive reasons.

On procedural aspect, the Honourable Arbitrator decided that the employer did not give enough right to the employees in the whole process before termination. For easy of reference I produce the portion of the CMA award.....*Tume baada ya kupitia ushahidi wa pande zote mbili kwa kina imegundua kwamba hakuna ushahidi wowote uliotolewa na mlalamikiwa kuonyesha kwamba walalamikaji walipewa hati zao za mashtaka wala wito wa kuitwa kuuhudhuria kweney kikao chochote cha nidhamu kama ilivyodaiwa na mashahidi wote watatu wa mlalamikaji...*⁸ The CMA was of the view that the employer did not put into consideration Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007. Even though DW-3 submitted that the employee rejected service there was no proof on the same. The CMA was also of the view that under section 112 of the Tanzania Evidence Act Cap 6 RE 2002 as amended places the burden of proof to the person who wishes the Court to believe in its existence. And that the Commission does not believe if all the employees were staying at the same place and therefore only used one mjumbe. That there was contradictory evidence hence the employees were not given chance to defend themselves during the disciplinary hearing in that

⁸ *ibid* at p. 10

unlawful strike and that makes that whole process of termination to be unfair as per section 37 (2) of the Act.⁹

On the relief, the Honourable Arbitrator was of the view that following the nature of the employer's work and the nature of the dispute it was not possible for the employees to be reinstated. He therefore granted the following to each of the employees.

1. Elia Kisalile **Mshahara wake wa mwezi 997,700/= x 12 = 11,972,400 + Notisi 997,700/= + Kiinua mgongo cha mwaka 1=268,611= Jumla Kuu 13,238,711/=**¹⁰.
2. Nyamoni Warioba **Mshahara wake wa mwezi 997,700/= x 12 =11,972,400/=+ Notisi 997,700/=+ Kiinua mgongo cha mwaka 1= 268,611= Jumla Kuu 12,241,011/=**.
3. Viscal Kihongo **Mshahara wake wa mwezi 2, 007,500/=x 12 =24,090,000/= + Notisi 2,007,500/= + Kiinua mgongo cha miaka 8= 4,323,846=Jumla Kuu 30,421,346/=**¹¹.
4. Mwajuma Hussein **Mshahara wake wa mwezi 997,700/=x 12 = 11,972,400/= + Notisi 997,700/= + Kiinua mgongo cha mwaka 1 268,611=Jumla Kuu 13,238,711/=**.
5. Marwa Fanuel **Mshahara wake wa mwezi 1,872,400/= x 12 = 22,468,800/= + Notisi 1,872,400= +Kiinua Mgongo cha Miaka 2=1,008,215/= Jumla Kuu 25,349,415/=**.

⁹ The Employment and Labour Relations Act No. 6 of 2004

¹⁰ *op.cit* note 4 at p. 14

¹¹ *op.cit* note 4, ps 14,15 and 16

6. Kiswemi Malingo **Mshahara wake wa Mwezi 2,007,500/= x 12 =24,090,000/= + Notisi 2,007,500/=+ Kiinua Mgongo cha miaka 4 2,161,923= Jumla Kuu 28,259,423/=.**
7. Rindstone Bilabamu Ezekiel **Mshahara wake wa Mawezi 1,778,400/=x 12= 21,340,800/=+ Notisi 1,778,400= + Kiinua Mgongo cha Miaka 7= 3,351,600 =Jumla Kuu 24,692,400/=.**
8. Deodatus Mkumbe **Mshahara wake wa Mwezi 997,700/=x 12 =11,972,400/= + Notisi 997,700 = + Kiinua Mgongo cha Mwaka 1 =268,611 Jumla Kuu 13,238,711/=.**
9. Aziel Elinipenda **Mshahara wake wa mwezi 2,190,500/= x12 = 26,286,00/= + Notisi 2,190,500/= + Kiinua Mgongo cha Miaka 7=4,128,250/= Jumla Kuu 32,604,750/=.**
10. Rita Mtinga **Mshahara wake wa mwezi 997,700/= 11,972,400/= +Notisi 997,700 + Kiinua Mgongo cha mwaka 1= 268,611 Jumla Kuu 13,238,711/=.**
11. Adolphina Salvatory **Mshahara wake wa mwezi 2,007,500/= + 12 =24,090,000/= + Notisi 2,007,500/= + Kiinua Mgongo cha miaka 4 =2,161,923 Jumla Kuu 28,259,423/=.**
12. Elizabeth Edward Bitegela **Mshahara wake wa mwezi 2,190,500/= X 12 =26,286,000/= + Notisi 2,190,500/=Kiinua Mgongo cha miaka 6 = 3,538,500/= Jumla Kuu = 32,015,000/=.**

13. Daud Chanila **Mshahara wake wa mwezi 1,574,013/= X 12 = 18,888,156/= + Notisi 1,574,013/= + Kiinua Mgongo cha miaka 8= 3,390,181= Jumla Kuu = 23,852,350/=.**
14. Yassin Mwita **Mshahara wake wa mwezi 1,825,400/= X 12 = 21,904,800/= + Notisi 1,825,400/= + Kiinua cha miaka 2= 982,907 = Jumla Kuu = 24,713,107/=.**
15. Susan Samson **Mshahara wake wa mwezi 1,825,400/= X 12 = 21,904,800/= + Notisi 1,825,400/= + Kiinua Mgongo cha miaka 2= 982,907= Jumla Kuu = 24,713,107/=.**
16. Joseph Fransi Sunguya **Mshahara wake wa mwezi 997,700/= X 12 = 11,972,400/= + Notisi 997,700/ = + Kiinua Mgongo cha mwaka 1= 268,611/= Jumla Kuu = 13,328,711/=.**
17. Constantine Njalambaya **Mshahara wake wa mwezi 1,825,400/= X 12 = 21,904,800/= + Notisi 1,825,400/= + Kiinua Mgongo cha miaka 2 = 982,907/= Jumla Kuu = 24,713,107/=.**
18. Caroline L. Mutagwaba **Mshahara wake wa mwezi 1,731,400/= X 12= 20,776,800/= + Notisi 1,731,400/= Total =+ Kiinua Mgongo cha Miaka 4= 1,864,584/= Jumla Kuu = 24,372,784/=.**
19. Mariana Makuu **Mshahara wake wa mwezi 1,825,400/= X 12=21,904,800/= + Notisi 1,825,400/= + Kiinua Mgongo cha miaka 4 = 1,965,815= Jumla Kuu = 25,696,015/=.**

20. Nzigu Faustine **Mshahara wake wa mwezi 2,007,500/= X 12**
= 24,090,000/= + Notisi 2,007,500/= Kiinua Mgongo cha
miaka 4 = 2,161,923/= Jumla Kuu = 28,289,523/=.

On payment of transportation costs the Commission declined from granting the same because there was no any evidence to justify those payments. And on Social Security payments the Commission advised the employees to channel their claims to the proper forum. The employer was given 14 days to make payment of the monies entitled to the employees.

That decision of the Arbitrator triggered both the employer and the employees hence these applications.

Before this Honorable Court the Employer was represented by Mr. Emmanuel Safari Learned Counsel from Prime Attorneys, while the employees had the Legal advocacy from Mr. Audax K. Vedasto, Learned Counsel from Auda & Company Advocates.

The hearing for these applications went on by way of written submission and it was adhered to.

The employer's grounds for revisions were numerated in the supporting affidavit of the application and herein under the same will be discussed.

And the employees' grounds for revisions were that:-

1. That termination was blessed on undisclosed offences.
2. That termination was done on reasons different from those used for termination.

To make a coherent floor I will deal with the grounds raised by the employer and parties submissions thereto and then the employees' submissions and the relief thereto.

1. *Whether it was proper for the Arbitrator to award 21 employees while the CMA F1 was filled and signed by one complainant employee, namely Elias Kasalile without indicating that he was suing for himself and on behalf of 21 employee.*

Submitting on this issue the employer's Learned Counsel argued that the arbitrator erred in law by giving an award to person who did not file the dispute to the CMA as the dispute to the CMA was filed by one Elia Kasalile and other employees did not prove their case. That the law under section 86 (1), makes it clear that the party initiating the dispute to the CMA must file the same in a prescribed form as well as under rule 12 (1) of the Labour Institutions (Mediation and Arbitration) Rules.¹² That CMA Form No 1 was filled and filed by one Elia Kasalile on 2nd September 2011 and hence the dispute CMA/KIN/678/11 was filed to the CMA by only one person.

Also Mr. Safari Learned Counsel for the Employer argued that it was not clear whether the dispute filed was a representative suit for one Elia Kasalile to represent others. He concluded that the other 19 employees did not file the dispute to the CMA.

Responding to these issues, Mr. Audax Learned Counsel for the employees submitted that the employer only attached part of the CMA Form1 which does not have the names of the other employees. He directed

¹² Government Notice No. 64 of 2007

this Court to rule 5 and 12 of the GN 64 which direct the parties on how to file a dispute especially where there are numerous persons. He therefore called upon this Court to dismiss the 1, 13 and 14 issues.

I find it proper to rule out on this issue after going through the records and parties submission it is the humble holding of this Court that it is true that the CMA Form No 1 has the name of one Elia Kasalile filed on, but the original CMA records has the names attached with that form indicating the names of the other employees. That was done so as to avoid multiplicity of forms to the CMA and it has been the holding of this Court that where there are numerous employees filling dispute to the CMA one can fill in the said form and indicate the names of the other employees to the dispute.¹³ That first ground of application fails.

2. Whether the arbitrator considered 21 affidavits of all the affidavits.

Mr. Safari argued that one of the complainants Mchereli Machumbana did not file his affidavit and therefore did not prove his case and therefore the award on that aspect should be set aside.

Mr. Audax submitted that the contention that the arbitrator granted Mchereli Machumbana while he did not file the affidavit is misconceived because the CMA award at page 14-16 contained the names of the employees but no name of Mchereli Machumbana.¹⁴

¹³ See Revision Application No. 273/2014 between Security Group(T) Ltd Vs Kisozi Nasibu & 7 others,HCLD at Dar Es Salaam[unreported]before Mipawa,J,delivered on 24/04/2015.

¹⁴ See employees' written submission at p 4 filed on 21/08/2014

On this issue this Court rules out rightly that the since Mchereli Machumbana did not file the affidavit so as to prove his case ***it was proper for the arbitrator not to award him anything.*** Therefore this issue is dismissed *in toto*.

3. *Whether the employees were denied right to be heard as per evidence tendered at the CMA and whether the employee were notified for disciplinary hearing.*

Mr. Safari jointly argued on these issues that the employee refused disciplinary hearing notifications and that the support that the employer wanted to summon calls operators at the CMA. That the employer filed three affidavits for three persons who gave various documents to show the steps taken before termination. That it was very clear how the employees were notified by the employer and that the arbitrator rejected the prayer of the employer to call phone operators on the justification that they were sms for collecting their letters. And that was not recorded by the arbitrator.

That the employer made efforts to get the employees through the local government but they rejected service of the same. That was done through Mr. Mussoline E. Mshanga and that the employees rejected the same right away filed disputes at the CMA and to the labour Court. In the labour Court it was Misc. Application no 57/2011.¹⁵

Since there was ample evidence on the same that service was done but the employees refused the same. Mr. Safari argued that the employer was right to proceed with the hearing of the disciplinary hence the

¹⁵ See employers written submission at p 14

employer terminated the employees by following proper procedures. That rules 13 (6) of GN. 42 gives mandate to the employer to proceed with the hearing in the absence of the employees where an employee unreasonably refuses to attend the disciplinary hearing.¹⁶ Therefore the employees were given chance to be heard but did not take up the same and the employer had to proceed with the process of disciplinary hearing and that the employees were informed of the outcome of the disciplinary hearing through the media.

Mr. Safari argued that since they refused the opportunity they had been given then the arbitrator was to rule out that the employee were given chance of being heard but refused hence termination was proper.

There are two immediate legal issues to be deal unto by this Court:-

- i. Whether there was a strikes.
- ii. Whether the right to be heard was afforded to the employees before termination.

On whether there was a strike, it is of great importance to define the legal word strike. The Employment and Labour Relations Act under section 4 define strike as:-

...A total or partial stoppage of work by employees if the stoppage is to compel their employer, any other employer, or an employers' association to which the employer belongs, to accept, modify or abandon any

¹⁶ *ibid* at p 16

*demand that may form the subject matter of the dispute of interest...*¹⁷

Again the law provides that:-

80-(1) subject to the provisions of this section, employees may engage in a lawful strike if:-

- i. If the dispute is the dispute of interest.*
- ii. The dispute has been referred in the prescribed form to the Commission for Mediation.*
- iii.*

As noted from the records it is true that the employees involved in a strike from 28/06/2011 to 21/07/2011. After the dispute that was filed to the Commission became futile. The main reasons for the dispute was for the employee to challenge the decision made by the Institute. That decision was that.....**MAAMUZI YOTE YALIYOFANYWA NA TAASISI NI KINYUME CHA SHERIA YA NCHI HIVYO YABATILISHE**. It was not made clear what exactly was that decision of the employer and how far the employees were affected by the same.

The dispute before the CMA as ruled out by the Arbitrator was a dispute of Right and dispute of Interest.

But this Court finds proper again to look into the meaning of the two terms. Dispute of interest means:-

... a dispute about creation of the right (such as employees demanding that their employer must provide their children with after school care

¹⁷ Section 4 of the Employment and Labour Relations Act No. 6 of 2004

where this has never been done) or more commonly about the variation of the existing right(for example where an employee demand an increase in wage)...¹⁸

While Dispute of right means:-

...a dispute on the interpretation or application of already existing right. These rights may originate in the common law (such as the right that an employer has to give reasonable commands to an employee) contract (such as the right to overtime pay contained in the existing contract of employment or in a collective agreement) or in Legislation (for example the right not to be unfairly terminated)...¹⁹

The strike that was called and done by the employees was on dispute of right and not dispute of interest contrary to section 80 (1) (a) of the Employment and Labour Relations Act No. 6 of 2004 hence a misconduct warranting termination.

On this aspect this Court finds no reason to fault or shake the decision of the arbitrator on substantive fairness of the termination.

On the issue of procedural fairness as seen earlier the arbitrator ruled out that the employees were not give time to be heard hence unlawful termination. He grounded that under section 37 of the Act. That there was

¹⁸ See Revision No. 10 of 2014 Reli Assets Holding Co. Ltd. Vs. Japhet Casmil &1500 others, HCLD At Tabora, before Mipawa, J., at p. 19, footnote 26 (unreported)

¹⁹ *op. cit* note 18 footnote 25

contradiction in the evidence by Mr. Mussoline Mshanga ...**Mjumbe wa Mtaa** on whether he served the employees for the call on disciplinary hearing and knew them all (contradictory evidence).

Going through the records especially CMA proceedings it can be easily noted that the employer made efforts despite the tense of the situation to summon the employees to appear for the disciplinary hearing by using local government Authority namely **Mwenyekiti wa Mtaa**. It is not sufficiently clear if there was proof of service to the employees for appearing in the disciplinary hearing. It is noted that the employer terminated the employees through the Media; **likewise call for hearing of the disciplinary hearing could have been made alternatively to the way used for termination.**

That act of employer failing to have proper proof of service for call of disciplinary hearing partly polluted the process of termination on procedural aspects. The arbitrator's holding on procedural unfairness is upheld.

Reliefs to the parties: to the employers.

In the present case, all the twenty one employees had engaged in a strike for a month and the Institute's business namely providing education to the young men and women of this Country had deteriorated which led to the closing of the Institute. Since there was partly pollution of the disciplinary hearing, this Court makes the following orders.

1. The Employer's Revision application No. 187 of 2013 between The Institute of Social Work Vs. Elia Kasalile and 20 others is hereby partly

merited. The CMA award in CMA/KIN/678/11 on grant of twelve months salary to the twenty one employees ***quashed and set aside***, thus this Court orders payment of ***four months' salary ONLY***, to each employee due to procedural unfairness to wit:-

- i. Elia Kisalile **Mshahara wake wa mwezi 997,700/=x 4 = 3,990,800/=.**
- ii. Nyamoni Warioba **Mshahara wake wa mwezi 997,700/= x 4 = Tshs 3,990,800/=.**
- iii. Viscal Kihongo **Mshahara wake wa mwezi 2, 007,500/=x 4= Tshs 8,030,000/=.**
- iv. Mwajuma Hussein **Mshahara wake wa mwezi 997,700/=x 4 = 3,990,800/=.**
- v. **Marwa Fanuel Mshahara wake wa mwezi 1,872,400/= x 4 = Tshs 7,489,600 /.=.**
- vi. **Kiswemi Malingo Mshahara wake wa Mwezi 2,007,500/= x 4 = Tshs 8,030,000/=.**
- vii. **Rindstone Bilabamu Ezekiel Mshahara wake wa Mwezi 1,778,400/=x 4= Tshs 7,113,600/=.**
- viii. **Deodatus Mkumbe Mshahara wake wa Mwezi 997,700/=x 4 = Tshs 3,990,800/=.**
- ix. **Azlel Elinipenda Mshahara wake wa mwezi 2,190,500/= x4 = Tshs 8,762 000/=.**
- x. **Rita Mtinga Mshahara wake wa mwezi 997,700/= x4= Tshs 3,990,800/=.**
- xi. **Adolphina Salvatory Mshahara wake wa mwezi 2,007,500/= x 4=Tshs 8,030,000/=.**
- xii. **Elizabeth Edward Bitegela Mshahara wake wa mwezi 2,190,500/= X 4 = Tshs 8,762,000/=.**

- xiii. **Daud Chanila Mshahara wake wa mwezi 1,574,013/= X 4 = Tshs 6,296,052/=.**
- xiv. **Yassin Mwita Mshahara wake wa mwezi 1,825,400/= X 4 = Tshs 7,301,600/=.**
- xv. **Susan Samson Mshahara wake wa mwezi 1,825,400/= X 4 = Tshs 7,301,600/=.**
- xvi. **Joseph Fransi Sunguya Mshahara wake wa mwezi 997,700/= X 4 = Tshs 3,990,800/=.**
- xvii. **Constantine Njalambaya Mshahara wake wa mwezi 1,825,400/= X 4 = Tshs 7,301,600/=.**
- xviii. **Caroline L. Mutagwaba Mshahara wake wa mwezi 1,731,400/= X 4= Tshs 6,925,600/=.**
- xix. **Mariana Makuu Mshahara wake wa mwezi 1,825,400/= X 4=Tshs 7,301,600/=.**
- xx. **Nzigu Faustine Mshahara wake wa mwezi 2,007,500/= X 4 = Tshs 8,030,000/=.**

2. The grant of severance pay is set aside as there was a valid reason for termination (misconduct).²⁰
3. The Grant of one Month Salary in lieu of Notice if not paid during termination it is to be paid as well.

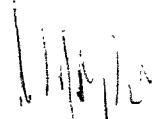
To the employees:-

- i. Following the decision made in Revision No. 187 of 2013, the Revision Application No. 199 of 2013 between Elia Kasalile Vs. Institute of Social Work is hereby dismissed for lack of merit as the employees cannot be reinstated because

²⁰ See section 42 (3) (a) of The Employment and Labour Relations Act No. 6 of 2004

there was valid reasons for termination except four months' salary to each employee as explained earlier.

In the foregoing, it is so ordered.



I.S. Mipawa

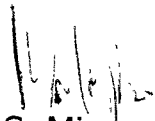
JUDGE

04/12/2015

Appearance:-

1. Applicants in Revision No. 187/2013 and 199/2013 - Present
2. Respondents in Revision No. 187/2013 and 199/2013 - Present

Court: Judgment has been read today in the presence of employees and Advocate Ndanu holding briefs of Advocate Audas Vedastus for Employees. The employers advocate or his representative are not present though have information.



I.S. Mipawa

JUDGE

04/12/2015