IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MMILLA, J.A. And MKUYE, J.A.)

CIVIL APPEAL NO. 145 OF 2016

1. **ELIA KASALILE .... 1ST APPELLANT**
2. **NYAMONI WARIOBA.. 2ND APPELLANT**
3. **VISCAL KIHONGO... 3RD APPELLANT**
4. **MWAJUMA HUSSEIN.. 4TH APPELLANT**
5. **MARWA PHANUEL... 5TH APPELLANT**
6. **KINSWEMI MALINGO... 6TH APPELLANT**
7. **RINDSTONE BILABAMU EZEKIEL.......................... 7TH APPELLANT**
8. **DEODATUS MKUMBE.. 8TH APPELLANT**
9. **AZIEL ELINIPENDA... 9TH APPELLANT**
10. **RITA MINGA...10TH APPELLANT**
11. **ADROPHINA SALVATORY....................................11TH APPELLANT**
12. **ELIZABETH EDWARD BITEGELA...........................12TH APPELLANT**
13. **DAUD CHANILA..13TH APPELLANT**
14. **YASSIN MWITA..14TH APPELLANT**
15. **SUSAN SAMSON..15TH APPELLANT**
16. **JOSEPH FRANCIS SUNGUYA.................................16TH APPELLANT**
17. **COSTANTINE NJALAMBAYA.................................17TH APPELLANT**
18. **CAROLINE L. MUTAGWABA..................................18TH APPELLANT**
19. **MARIANA MAKUU..19TH APPELLANT**
20. **NZIGU FAUSTINE...20TH APPELLANT**
21. **MACHUMBANA MCHELELI.....................................21ST APPELLANT**

VERSUS

THE INSTITUTE OF SOCIAL WORK....................................RESPONDENT

(Appeal from the decision of the High Court of Tanzania Labour Division at Dar es Salaam)

(Mipawa, J.)

dated the 4th December, 2015

in

Consolidated Revision No.187 of 2013 and Revision No.199 of 2013 From the decision of CMA (Ngowi, P.)

dated the 11th April, 2013

in

CMA/KIN/678/11

JUDGMENT OF THE COURT

10th November, 2017 & 10th April, 2018

MKUYE, J.A.:

The appellants, Elia Kasalile and 20 others were up to 17th August, 2011 employed by the Institute of Social Work (ISW), the respondent, as Assistant Lecturers and Tutorial Assistants on permanent terms. On 17th August, 2011 their employment was terminated after having allegedly participated in a strike from 28th June 2011 till 21st July 2011. Aggrieved by the said termination, on 2nd September 2011 the appellants referred the matter to the Commission for Mediation and Arbitration (the CMA) opposing the decision of the employer. The CMA entertained the matter and found that though the respondent had the right to terminate their employment substantively, the termination was flawed for the reason that the appellants were not given a chance to defend themselves during disciplinary hearing. It ruled that the whole process of termination was unfair as per section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004 (the ELR Act). The CMA awarded each appellant compensation of 12 months' salary, severance allowance, and one month's salary in lieu of Notice.

Aggrieved, both the respondent and the appellants lodged revision applications No. 187 of 2013 and 199 of 2013 respectively before the High

Court (Labour Division) whereby the High Court, in the consolidated applications, dealt with among other issues, two issues; namely **one,** whether there was a strike; and **two,** whether the right to be heard was afforded to the appellants before termination. The High Court found on the first issue that the appellants were involved in a strike and that since the allegedly organized and conducted strike was based on a dispute on a right and not on interest contrary to section 80(1) (a) of the ELR Act, then it warranted termination of their employment. As to the second issue, the High Court held that the appellants' termination was vitiated because they were not afforded the right to be heard. The High Court went further to determine the reliefs to which the parties were entitled and reduced the compensation awarded to the appellants from 12 months' salary to 4 months' salary; set aside the severance allowance; and upheld the one month's salary in lieu of the Notice.

Still aggrieved, the appellants have preferred this appeal while fronting 12 grounds of appeal as follows:

> *1. That the High Court erred in law by holding to the effect that an employer can legally terminate an employee's employment without specifying the offence committed leading to termination;*

2. *That the High Court erred in law by holding to the effect that the CMA to which the appellants referred their challenge of termination of their services was legally entitled to hold that the termination was fair on a reason not stated by the employer while terminating the employees;*
3. *That the High Court, having concluded that the appellants were not served with any disciplinary charge and were not given an opportunity of being fully heard, erred in law to proceed to hold that the termination consequently reached was valid and effective in law;*
4. *That the High Court erred in law to ignore the Court of Appeal's decision in* ***Mbeya – Rukwa v. Jestina Mwakyoma*** *(2003) TLR 251 at p.261 to the effect that a decision reached without fully hearing a person affected by it is void and of no effect;*
5. *That the High Court erred in law by holding to the effect that termination of 21 employees for purportedly taking part in a purported strike could be justified without establishing a part specifically played by each of the 21 employees in the alleged strike;*

6. *That the High Court erred in law to hold to the effect that absence of vacancy in the employer's establishment is not an issue of fact needing allegation and proof thereof before a tribunal deciding the matter;*
7. *That the High Court erred in law to hold to the effect that absence of vacancy in the employer's establishment in itself a lawful reason of not ordering reinstatement of an employee who is found to have been unfairly terminated;*
8. *That the High Court erred in law to hold to the effect that an employee whose employment has been found to have been terminated unfairly who is not reinstated is legally not entitled to any amount of wages except the compensatory wages provided by the law;*
9. *That the High Court erred in law in holding to the effect that once it has made up its mind to pay compensation for an employee whose employment has been terminated unfairly, the High Court (Labour Division) or the CMA has a discretion to give that employee payment of remuneration of less than 12 months of that employees' wages;*

10. *That the High Court erred in law in holding to the effect that lack of qualification to the right to repatriation in respect of some of the complainants before the Tribunal disqualified all the complainants from that right;*

11. *That the High Court erred in law in holding to the effect that it was legally justified to ignore the decision of the Court of Appeal in **Lekengere V Minister for Tourism** (2000) TLR and that of the High Court (Labour Division) in **Security Group (T) Ltd. V. Samson Yakobo** (Revision No. 171 of 2011) both to the effect that, what matters is that sufficient evidence to support one's case is available; and not that each of the several litigants in the case has himself testified towards denying the 21st appellant's relief of the case; and*

12. *That the High Court erred in law in holding to the effect that even having the respondent failed to make up its case that it terminated employment of the appellants fairly, no appellant who did not testify would be entitled to any relief."*

The appellants have urged us to set aside the decision of the High Court which dismissed their case and partly granted the respondent's case; and make an order for their reinstatement together with entitlement of all wages from the date of their termination to their reinstatement.

The respondent also filed a cross appeal, the notice of which was filed on 10/10/2016 with 4 grounds to the effect that:

> *1. That, the High Court Judge grossly erred in law by not finding and holding that labour dispute No. CMA/DSM/KIN/678/11 before the CMA was referred by one employee only, namely Elia Kasalile;*
>
> *2. That, the High Court Judge grossly erred in law by finding and holding that appellant's termination was procedurally unfair on ground of lack of proof of service;*
>
> *3. That, the High Court Judge grossly erred in law by not finding and holding that the 1st appellant (Elia Kasalile) was not mandated by the other 20 appellants to fill CMA F1 and file Labour Dispute No. CMA/DSM/KIN/678/11 before the CMA on behalf of the said 20 others; and*

> *4. That, the High Court Judge grossly erred in law by finding and holding that it was the holding of the High Court (Labour Division) in Revision Application No. 273 of 2014 between* ***Security (T) Ltd. Vs Kisozi Nasibu and 7 Others*** *that where there are numerous employees filing dispute to the CMA one can fill in the said form and indicate the names of the other employees to the dispute."*

When the appeal was called on for hearing all the appellants were represented by Mr. Audax Vedasto, learned counsel; while the respondent enjoyed the services of Mr. Emmanuel Safari, assisted by Mr. Nazario Michael, both learned advocates.

Both counsel submitted at length on all grounds of appeal and cross appeal through written and oral submissions, We are very grateful for their industry and it has been of much assistance in our deliberations. However, we wish to point out that after having carefully gone through all the grounds we have observed that the matter can conveniently be disposed of on the basis of grounds Nos. 1, 2, 3 and 4 of the memorandum of appeal and all the 4 grounds of the cross appeal which basically fall under three issues without necessarily dealing with all the grounds. The said issues are:

1) *Whether the appellants were served with charges preferred against them and notifications of hearing before the Disciplinary Committee; and afforded an opportunity to be heard.*
2) *Whether the reason for termination was disclosed and if so, whether it was proper to give a different reason from the one stated in the termination letters.*
3) *Whether or not the Labour Dispute No. CMA/DSM/KIN 678/11 before the CMA was preferred by one employee namely, Elia Kasalile or it involved even the other 20 appellants.*

At the very outset, we wish to point out that for convenience and smooth flow of our decision, we have opted to begin with the third issue regarding the involvement or non-involvement of all the appellants in Labour Dispute No. CMA/DSM/KIN 678/11 before the CMA.

Mr. Safari was the first to submit on the issue. He contended that the appeal by the 2nd to 21st appellants is incompetent because they did not file any case before the CMA. He said, they did not fill the CMA F1 as required by section 86(1) of the ELR Act, read together with rule 12 (1) of the Labour

Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 (the Mediation Rules). The CMA F1, he said, was filled and signed by Elia Kasalile on 2/9/2011 and he did not indicate that he was mandated by the 20 other employees to fill, sign and file the labour dispute on their behalf; and no application for a representative suit was filed seeking leave to represent them. Mr Safari submitted further that even the Judge who heard the revision erred in relying on the case of **Security (T) Ltd. V Kisozi Masibe & 7 Others,** Revision Application No. 273 of 2014 HC (Labour Division) (unreported) where it was stated that in filing a dispute to the CMA, one person can fill the form and indicate names of other employees to the dispute because it was distinguishable from the case at hand in which the first appellant filled the CMI F1 and attached a list of other employees. The case of **Cable Television Network (CTV) Ltd V Athumani Kuwinga,** Revision No 94 of 2009 was also referred to us in support of his argument.

In reply, Mr. Vedasto in the first place submitted that a labour suit is instituted by filling a Form. He submitted that the labour dispute before the CMA was filed by all the appellants in compliance with section 86 (1) of ELR Act, read together with rule 5(2) and (3) of the Mediation Rules. He said, the later rule allows documents to be signed by one employee authorized by other employees through a list of their names in writing together with their

signatures mandating that employee to sign documents on their behalf, which is to be attached to the said documents. He added that, even if there was such an error, the respondent did not raise it at an opportune time. At any rate, he said, the respondent was not prejudiced; and the cases of **Cable Television Network** and **Security Group Ltd** (supra) cited by the respondent were not applicable to this case.

As correctly argued by both counsel, section 86 (1) of the ELR Act and Rule 12(3) of the Mediation Rules require the labour dispute before the CMA to be filed through a prescribed form. The said provisions provide that:

> *"S. 86(1): Dispute referred to the Commission shall be in the **prescribed form.**"*
>
> *"R. 12(1): A party shall refer a dispute to the Commission for Mediation by completing and delivering the **prescribed form** ("the referral document").* [Emphasis added].

The Form referred to under the above cited provisions is CMA F. No. 1 set out in the Schedule to the Employment and Labour Relations (Forms) Rules 2007 (GN No. 65 of 2007), (the Forms Rules). Strictly speaking, the above provisions emphasize that the labour complaint which is brought before the CMA must be in the prescribed form.

Besides that, Rule 5(2) and (3) of the Mediation Rules allows one person who is mandated by other employees in writing, to sign and institute the labour dispute involving more than one employee. It stipulates as follows:

> *"(2) Where proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is* ***mandated by the other employees to do so.***
>
> *(3) Subject to sub-rule (2),* ***a list in writing of the employees who have mandated a particular employee to sign on their behalf, must be attached to the document. This list must be signed by the employees whose names appear on it.****"* [Emphasis added]

Moreover, it is worthwhile to note that, the requirement of attaching a list of names is not only provided under Rule 5 (2) and (3) of the Mediation Rules but it is also reflected in an item inserted in the same CMA F1 itself with a direction that ***"If there is more than one other party, write the details of the additional parties on a separate page and staple it to this Form."***

In the instant case, it is common ground that the CMA F1 as shown at page 11-14 of the court record was filled and signed by the 1st appellant, Elia Kasalile, and was referred to the Commission. This was in compliance with section 86 (1) of the ELR Act and Rule 12 (1) of Mediation Rules which require that the labour dispute to be lodged to the CMA must be in the prescribed form.

Admittedly, our perusal of the CMA F1 has revealed that paragraphs 1 and 2 seem to give details of only one person. This could be due to the manner that Form was designed as it asks for the particulars of a single person. However, paragraph 4 of the same Form at pages 12 to 13 of the record indicate inclusion of all appellants in as much as it refers to the reliefs claimed by the employees or for each employee. We propose to reproduce part of the said paragraph as hereunder:

> ***"OUTCOME OF MEDIATION***
> *What outcome do you seek?*
> 1) ....
> 2) *In case the employer fails to reinstate* ***the employees*** *he is obliged to pay the following:*
>   a) *compensation of not less than 12 months' salary (remuneration)* ***to each employee;***
>   b) ....
>   c) ....

> d) ....
> e) *Salary, medical allowance, energy, transport and housing allowance for August 2011,* ***for each employee;***
> f) *unpaid annual salary increment* ***for each employee;***
> g) *payments of salaries for the period* ***that employees were kept out of employment;***
> h) *monthly medical, housing, energy and transport allowance* ***for each employee for the period that the employees were kept out of employment;***
> i) ....
> j) ....
> k) *certificate of service* ***to each employee;***
> l) *compensation of all unauthorized deductions* ***on employees' salaries...***"
> [Emphasis added].

On the other hand, by virtue of Rule 5(2) and (3) of the Mediation Rules, the 2nd to 21st appellants as shown at page 17 and 18 of the court record gave a notice mandating Elia Kisalile to sign on their behalf through a list of their names in the separate piece of paper and signed against their names on 2/9/2011, the date when the CMA F1 was signed and attached to the said CMA F1 filed at the CMA. This shows that since the dispute at the CMA was filed by the appellants in accordance with section 86(1) of ELR Act, Rule 12(1) read together with Rule 5(2) and (3) of the Mediation Rules, then

it involved all the 21 appellants. As such, we do not think that the contention by Mr. Safari that the appellants ought to have filed an application for a representative suit under Order **VIII rule 7 of the Civil Procedure Code, Cap. 33, and R.E 2002** can stand. The reason is clear that, there are specific provisions under the labour laws which provide for the mode of filing of labour disputes involving more than one employee.

We have considered the cases of **Cable Television Network** (supra) and **Security Group (T) Ltd.** (supra) cited by the respondent, but we are settled in our mind that they are not applicable to this case. We say so because in **Cable's** case (supra) the High Court struck out the dispute because the CMA F1 was found to be incomplete for failure to indicate the date when the dispute arose which is not the issue in this case. As to the **Security's** case (supra), we agree with both counsel that it is distinguishable because in that case one person filled the CMA F1 and indicated names of other employees in the dispute, and the Hon. High Court Judge just made an observation that it was ideal for each employee to fill his/her own name in a single form and sign at the end. He did not make a finding that each party must fill his / her form. It was just an *orbiter dictum*.

But again, assuming the respondent perceived that the dispute involved the 1st appellant alone can it be said she was prejudiced? With respect, we think not! In our view, as was rightly argued by Mr. Vedasto, the respondent was not prejudiced at all. We say so because, in her statement in reply (page 19) to the CMA F1, affidavits of DW1, DW2 and DW3, their responses during hearing before CMA and her final submissions, the respondent made reference to all 21 appellants. It is our view that, if the respondent perceived that the dispute involved only one party, her responses would not have covered all the appellants. They would have made reference to only one person. But all the same, even if found that there was such an anomaly, we think in our considered view, it ought to have been raised at the earliest possible time as provided for under Order I rule 13 of the Civil Procedure Code, Cap. 33, RE 2002 which provides:

> *"All objections in the ground of non-rejoinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues have not been settled, or before such settlement unless the ground of objection has subsequently*

arisen; and ***any such objection not so taken shall be deemed to have been waived".***

[Emphasis added]

In this case, since the respondent failed to raise such issue at the earliest opportune time, it means that she waived it.

Given all these circumstances, we do not subscribe to the respondent's claim that since the CMA F1 was filled by the 1st appellant, then the case involved only the 1st appellant. We are satisfied that the dispute filed before the CMA did not only involve the first appellant (Elia Kasalile) but it also involved all the other 20 appellants.

We now turn to the issue of whether the appellants were served with charges preferred against them and the notices of hearing at the Disciplinary Committee; and were afforded an opportunity to be heard.

Addressing this issue, Mr. Vedasto contended that, though the CMA and High Court found that the termination was substantively fair but procedurally unfair, the appellants were not charged and served with the said charges and notifications for hearing. He added that, though the termination letters referred to the Public Service Regulations, 2003 and the ELR Act no charges were laid down against them. He was of the view that,

after the CMA and the High Court found that the appellants were neither charged nor heard, they ought to have reached a finding that the appellants were unfairly terminated. In that regard, while relying on the case of **Mbeya – Rukwa Auto Parts and Transport Ltd. Vs. Jestina George Mwakyoma,** (2003) TLR 251, he said that since the right to be heard was not observed, the decision thereof was void and of no effect.

On his part, Mr. Safari submitted that the appellants were given the opportunity to be heard but decided not to take that opportunity. As to the proof of service, he argued that the appellants refused service through their fellow employee, one Netty, and the Mwenyekiti wa Mtaa (Hamlet Chairperson) one Mussolin Mshanga. Under such circumstances, he submitted, the respondent was entitled to form a Disciplinary Committee under Rule 13 (6) of Good Practice and proceed *ex-parte.* As to failure to follow the case of **Mbeya-Rukwa** (supra), he said it is distinguishable.

In reply, Mr. Vedasto contended that though the respondent admitted that the appellants were not heard, he did not say anything on the effect of termination of the appellants without a charge or a hearing. He submitted further that much as the respondent said the service was effected, they did

not produce anything in the CMA such as the charges or notifications/ letters alleged to have been served to the appellants.

Essentially, this issue covers grounds Nos. 3 and 4 of the memorandum of appeal and ground No. 2 of the cross appeal. It is noteworthy that both the learned counsel, like the CMA and the High Court's findings, are at one that the appellants were not heard.

At page 3010 of the record, 2nd paragraph of the decision of the CMA, the Commissioner was satisfied that the appellants were not served with charges and notices of hearing and hence, were denied their Constitutional right to be heard before being condemned. We quote what the CMA stated:

> *"Tume baada ya kupitia ushahidi wa pande mbili kwa kina imegundua kwamba hakuna ushahidi wowote uliotolewa na mlalamikiwaji wa kuonyesha kwamba walalamikaji walipewa hati* ***zao za mashtaka wala wito wa kuitwa kuhudhuria kwenye kikao chochote cha nidhamu*** *kama ilivyodaiwa na mashahidl wote watatu wa mlalamikiwa... Kwamba, japokuwa shahidi wa tatu DW-3 alisema kwamba aliwapelekea wakakataa, bado mlalamikiwa ameshindwa kuwasiiisha* ***nakala hata moja kama kielelezo cha hati za mashtaka na barua za***

wito ambazo inadaiwa walalamikaji walizikataa kuzipokea".

[Emphasis added].

It is worthy to note that, where disciplinary proceedings may lead to termination of the employee's employment, the employer has the duty to prepare a formal charge against such an employee. Regulations 41(2) and 44(1) of the Public Service Regulations 2003 (GN No.168 of 2003) are pertinent on this aspect. The said regulations state as follows:

"41(2) Formal proceedings shall be instituted where in the opinion of the disciplinary authority the disciplinary offence which a public servant is alleged to have committed is of such gravity of offence which may warrant his dismissal, reduction in rank or reduction in salary"

44(1) No formal proceedings for disciplinary offence shall be instituted against a public servant ***unless he has been served with a charge or charges stating the nature of offence, which he is alleged to have committed."***

[Emphasis is added].

In this case, DW1 one Mlwande Madihi who was the acting Principal of the respondent, said he prepared the disciplinary charges and notifications in respect of the appellants. DW2 Netty Namkwasa, the secretary to the Principal, said she was given letters by DW1 and she called and sent messages to the appellants to collect them but after refusing she took them back to her boss. DW 3, Mussolin Mshanga said he was given the letters to serve the appellants and he served them at the offices and their homes though, he said, he did not know whom he served.

After having examined the evidence of DW1, DW2 and DW3 we have failed to glean any evidence which proves that there were charges and notifications prepared of which the appellants refused service. We say so because, though DW1 said he prepared the disciplinary charges and notifications, he did not explain the kind of charges or notifications he prepared or mention against whom among the appellants such charges and notification of hearing were prepared and handed to DW2 for service. Also, he did not attach them to his affidavit or produce them in the CMA. DW2 on her part said she called or sent a message to only three appellants, who responded to the call but refused service. This evidence, however, contradicted with her averment in her affidavit that she called all of them.

Further to that, she elaborated that the message she sent read: ***"Fika kwa mkuu wa chuo kuna ujumbe wako muhimu sana."*** However, in our view, even if such message was sent, it did not show that it related to "charges" or "notification" which were in connection with the disciplinary hearing. As to DW3, he said he was given 21 letters to serve 18 appellants who were in the list. According to him, he served them at their offices and their homes. Nevertheless, he did not explain as to who identified the appellants to him, and to whom he served at the offices and those he served at their homes, taking into account that he was a stranger to the institute. And worse enough, when DW3 was cross examined he admitted that he did not know who he served. This means that he could have served anyone who came across him.

With all these surrounding factors, we are satisfied that there were no such charges and notifications prepared and served to the appellants as required by the law. We agree with both the CMA and the High Court that there was no proof of service of charges and notification of hearing. We also hold that, under the circumstances even the *ex-parte* hearing conducted by the Disciplinary Committee under the provisions of Rule 13(6) of the Code

of Good Practice was prematurely done since there were no tangible efforts to serve the appellants.

As regards to the issue of whether the appellants were afforded an opportunity to be heard, we think it cannot detain us much. As was alluded to earlier on, both the CMA and the High Court ruled that the appellants were denied their right to be heard. At page 3011 of the record para 5 of the CMA's decision the Arbitrator remarked:

> *"Kutokana na aina ya ushahidi huo ni* ***rai ya tume kwamba walalamikaji hawakupewa nafasi ya kusikilizwa na kujitetea (right to be heard) dhidi ya tuhuma za mgomo usiokuwa halali*** *walizokuwa wanakabiliwa nazo kabla ya kuachishwa kazi, hivyo basi pamoja na kwamba mlalamikiwa alikuwa na sababu za msingi za kusitisha ajira za walalamikaji, alisitisha ajira hizo bila kufuata/kuzingatia taratibu zilizowekwa kisheria* ***hivyo usitishaji wa ajira za walalamikaji haukuwa halali kwa mujibu wa matakwa ya Sheria ya Ajira na Mahusiano Kazini Na. 6/2004".***
>
> [Emphasis added].

In addition to that, the High Court on the exercise of its revisional powers upheld this finding that the termination of appellants' employment was vitiated by lack of proof of proper service of notice of hearing. It observed at page 3032 as follows:

> *"The act of employer failing to* ***have proper proof of servlce for call of disciplinary hearing partly polluted the process of termination on procedural aspects. The arbitrator's holding on procedural unfalrness is upheld****".*
> [Emphasis added].

In our view, after the High Court ruled that the appellants were not given the right to be heard in the Disciplinary Committee of which we subscribe, it was required to nullify the proceedings and the decision of the CMA and order the appellants to be served properly and heard before the Disciplinary Committee, instead of proceeding to determine the application on merits as it did. The reason behind this is that the principles of natural justice require a party not to be condemned unheard. The other equally important reason is to discourage rash and arbitrary actions against employees. (See: The Book titled **The Formation and Termination of Employment Contracts in Tanzania,** Hamidu Milulu (Advocate), June 2013, at page 131).

In the case of **Mbeya- Rukwa Auto Parts** (supra), the High Court revoked the right of occupancy of M/S Kagera and the appellant without affording them an opportunity to be heard though M/S Kagera had once occupied and transferred it to the appellant but was allocated to the respondent before acquiring her certificate of occupancy. The Court held that:

> *"The right of hearing is a fundamental constitutional right in Tanzania by virtue of Article 13 (6) (a) of the Constitution."*

The Court went further to state that:

> *"The judge's decision to revoke the rights of M/S Kagera and the appellant, without giving them opportunity to be heard, was not only a violation of the Rules of natural justice, but also a contravention of the Constitution, hence void and of no effect."*

Even in this case, the respondent's termination of the appellants' employment without giving them the opportunity of being heard, violated the Constitutional right on principles of natural justice, therefore, it was void and of no effect.

With regard to the issue of whether the reason for termination was disclosed and, if so, whether it was proper to give a different reason from the one stated in the appellants' termination letters, Mr Vedasto argued that the appellants were terminated on an undisclosed offence contrary to section 37(1) of the ELR Act and he cited the case of **Air Services Ltd v Minister for Labour and 2 Others,** (1996) TLR 217 in support. He said, even the reason for termination stated in the termination letters issued on 17/8/2011 of "Makosa ya Kiutumishi" which is not provided under the law was different from the one given later through mass media and stated in the respondent's affidavit of "participating in an unlawful strike". He added that, after the CMA and the High Court found that the appellants were neither charged nor heard, they ought to find the reason for termination unfair.

On his part, Mr. Safari contended that the appellants' termination was for a valid reason shown in the termination letters "Makosa ya Kiutumishi" which is a general term, but the specific offence of participating in an unlawful strike was communicated later to each appellant through media.

It is common ground that, the appellants' employment was terminated and their letters of termination showed the reason for termination was "Makosa ya Kiutumishi". In his testimony DW1 at the CMA tried to equate

the terms "Makosa ya Kiutumishi" and "participating in an unlawful strike" which he said was communicated to each appellant through media. Mr. Safari submitted in Court that "Makosa ya Kiutumishi" was a general term, but the specific offence was of participating in an unlawful strike which was communicated later to each appellant through media. He did not avail us with any authority for that stance.

To our understanding, calling and participating in an unlawful strike is among the disciplinary offences provided for under Part VII which comprises sections 75-85 of the ELR Act. "Makosa ya Kiutumishi" is not among them. In addition, Rule 14 of the Code of Good Practice Rules elaborates that a strike which does not comply with the provisions of the ELR Act, constitutes a misconduct which may justify termination of employment under sections 75-85 of the Act. It also provides that where an employer wishes to charge an employee on a disciplinary offence he must prepare a charge which is clear to enable the employee understand the nature of the offence to which he is charged. It was, therefore, expected that the offence of participating in an unlawful strike, being a specific offence, would have been specifically shown in the charged offence; and in the letters of termination rather than referring to " Makosa ya Kiutumishi" which is taken as a general term for

disciplinary offences. Besides that, much as the respondent failed to avail us the authority for equating the two offences, she did not explain why they had to use the so called general term "Makosa ya Kiutumishi" while there are specific offences under sections 75-85 of the ELR Act. Neither did they explain the reason for changing the type of the offence which they said they communicated through media. As we have just ruled out that there was no proof of service of charges or their existence, we think, the respondent may have used the term "Makosa ya Kiutumishi" as she was not sure of the offence committed by the appellants. But all the same, the decisive point which remains is that "Makosa ya Kiutumishi" is not among the offences under Part VII of the ELR Act the commission of which could lead to termination of employment and as such, it was not proper to change them.

Likewise, section 37 of the ELR Act prohibits unfair termination of an employee. Subsection (2) of that section provides for the circumstances which may lead to unfair termination including failure to prove that the reason for termination is valid; that the reason is a fair reason; or that the employment was terminated in accordance with a fair procedure. Also rule 8(1) (c) and (d) of the ELR Code of Good Practice Rules reiterates that the

employer may terminate the employee's employment if he has a fair reason as defined under section 37(2) of the ELR Act.

In this case the fact that the respondent gave a different reason for termination in the termination letters which is "Makosa ya Kiutumishi" and that of "participating in an unlawful strike" through media later, which in our view, was not a proper means of communication unless there was an order of the court for a substituted service, proves that she had no valid or fair reason for the appellants' termination. Coupled with the reason that fair procedure before termination was not followed, it vitiates the whole process.

Having so discussed, we find that the suit involved all the 21 appellants; and that since the appellants were not charged and heard before being terminated from their employment, it is obvious that the respondent violated the cardinal principle of right to be heard. Consequently, the appellants' termination was void and of no effect.

In the final event, we find the appellants' appeal meritorious and allow it, while the respondent's cross appeal has no merit and dismiss it in its entirety. Hence, since the appellants were denied their fundamental right to be heard, we quash all the proceedings of the CMA and the High Court and set aside their decisions thereof. We further order that the appellants may,

if they so wish, institute proceedings against their employer before the CMA so that their rights can be determined. Given the fact that this matter originates from a labour dispute, we order that each party shall bear its own costs.

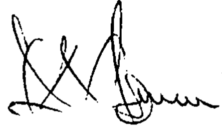
DATED at **DAR ES SALAAM** this 4th day of April, 2018.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL