**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT MOSHI**

**LABOUR REVISION NO. 26 OF 2023**

*(Arising from Labour Dispute No. CMA/KLM/MOS/ARB/29/2022 of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi)*

**SHARE TANZANIA ................................................ APPLICANT**

VERSUS

**THOMAS CHARLES MMARY ............................ 1ST RESPONDENT**

**DOMISE MUSHI ............................................. 2ND RESPONDENT**

**VENERANDA VEDASTUS FUMBUKA ................. 3RD RESPONDENT**

**VIOLETH GIBSON MCHAU ............................... 4TH RESPONDENT**

**HABIBA HAMIS TINDWA ................................. 5TH RESPONDENT**

**SOLOMON DAUD BANATI ................................ 6TH RESPONDENT**

**STELLA ERNEST TESHA .................................... 7TH RESPONDENT**

**EMIGRED JOHN MSAKI .................................... 8TH RESPONDENT**

**ZAITUNI ABDULLY MRUMA ............................... 9TH RESPONDENT**

**ELIYA ISAMIL MSOFE ..................................... 10TH RESPONDENT**

**MICHAEL PHILIPO ......................................... 11TH RESPONDENT**

**SAMWEL LONGIDA MEIGWANI ..................... 12TH RESPONDENT**

## JUDGMENT

21/11/2023 & 08/12/2023

**SIMFUKWE, J.**

Share Tanzania hereinafter referred to as the Applicant filed this application after being aggrieved with the award of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/KLM/MOS/ARB/29/2022** of Moshi dated 28th April 2023. The application was filed under **Rule 24 (1) (2) (a) (b) (c) (d) (e)** and **(f), rule 24(3) (a) (b) (c)** and **(d)** and **Rule 28 (1) (c) (d)** and **(e) of the Labour Court Rules, GN No. 106 of 2007, section 91 (1)(a), Section 91 (2) (a)(b)(c) and section 91(4)(a)** and **(b), Section 94 (1) (b) of the Employment** and **Labour Relations Act, No. 6 of 2004,** as amended by **section 14(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 (ELRA)** and any other enabling provision of the law. The Applicant prayed for the following orders:

1. *That, this Honourable Court be pleased to call for the entire records inspect and examine the records of the*

*Commission for Mediation and Arbitration of Kilimanjaro at Moshi, in Labour Dispute No. CMA/KLM/MOS/ARB/29/2022, and revise the findings and an award delivered by Hon. Arbitrator Batenga on 28th April 2023 for being improperly procured, illegal, irrational, irregular and tainted with erroneous findings.*

2. *That this Honourable Court be pleased to set aside and quash the said award.*

The application was supported by an affidavit sworn by Augustina Deodat Lyimo, Principal Officer of the Applicant which was contested by the counter affidavit sworn by Mr. Thomas Charles Mmary, the first respondent on behalf of his fellow respondents.

The factual background of the dispute is to the effect that the applicant is a community-based organization, duly registered under the laws of Tanzania with its main office situated at Uchira, within Moshi district in Kilimanjaro Region. The organization is taking care of 69 children with special needs, 63 orphans with no special needs and ten single mothers whose children have various disabilities. The respondents were employed by the applicant on various dates since 2021. It has been alleged that the applicant has been facing financial constraints due to the outbreak of

corona pandemic. Thus, the applicant required the respondents to take three months unpaid leave. The respondents were not happy with such action taken by their employer. They instituted a labour dispute before the Commission for Mediation and Arbitration (CMA) which was decided in their favour. Dissatisfied with the decision of the CMA, the applicant filed the instant application for revision on the following grounds as expressed in the supporting affidavit:

- *i. The Arbitrator failed to consider evidence of the Applicant;*
- *ii. The Arbitrator erred in law by holding that there was unfair labour practice by the Applicant;*
- *iii. The award of the commission was irrational, illegal and tainted with erroneous findings.*

The application was heard by way of written submissions. Advocate Yoshua Mambo represented the applicant while the respondent had the service of Mr. Mudinda Jastin the Assistant Regional Secretary of TUICO.

On the outset, Mr. Yoshua Mambo, adopted the affidavit supporting the application to form part of his submission. He submitted to the effect that the respondents complained that they were issued with three months

unpaid leave without consultation and their consent. That, the respondents did not dispute nor had a problem with issuing of the leave but payment during three months leave. Mr. Yoshua informed this court that consent was obtained as they had oral agreement. However, the CMA found that the applicant had unfair labour practice in issuing three months unpaid leave. He was of the opinion that upon finding that the respondents were disputing unpaid leave and that three months unpaid leave was not issued properly, then the CMA had to order payment to the respondents and not re-instatement as the dispute was not related to termination. The respondents were not terminated but only requested to go on leave for three months.

Mr. Yoshua continued to state that, according to exhibits P2, P3, P4, P5, P6, P7, P8, P9 and P10, the applicant herein issued letters to the respondents for three months unpaid leave. Thus, the question before the Commission was whether lawful procedures were followed before issuing unpaid leave. DW1 stated that procedures were followed by the Chairman of the applicant's Board and there was consensus to that effect though orally made. Also, DW1 said that she was directed to handle over the said letters to the complainants (respondents). However, the findings of the

Commission at page 6 of the CMA Award were that the procedure was not followed and the aspect of payment was not considered.

The learned counsel reiterated evidence of PW1 and PW2 on the issue of procedure.

From the evidence of PW1, PW2, and DW1, Mr. Yoshua argued that it is evident that the applicant had economic hardship and was compelled to issue three months unpaid leave. He asserted that, in issuing the said leave procedures were followed as there was agreement to that effect. Mr. Yoshua emphasised that the parties had agreement of taking three months unpaid leave due to economic hardships. The problem is that there is no tangible written agreement to prove that fact. Thus, the respondents decided to use that loophole for their benefit.

Arguing against the order of re-instatement, Mr. Yoshua submitted that such order comes only where the Arbitrator finds that the employee was unfairly terminated. He implored this court to quash and set aside the order of re-instatement issued by the Arbitrator.

Mr. Mudinda Jastin, the respondents' Representative from TUICO started his reply by adopting his counter affidavit. He submitted that the Arbitrator

was legally and factually correct as nowhere in the record it is shown that the respondents were either consulted or consented to the unpaid leave as pleaded by the applicant that there was oral agreement in respect of leave. He referred to page 4 of the typed Award, third paragraph where the learned Arbitrator made reference to the evidence of DW-1 Augustina Deodati Lyimo a Human Resource Officer of the applicant when cross examined, and stated as follows:

> *"...Alitoa ushaidi kuwa hajui nini kilifanyika kabla ya kupewa barua za likizo bila malipo kutoka kwa Mwenyekiti wa Bodi ili awape walalamikaji. Kawaida mtoaji wa likizo kwa mlalamikiwa huwa ni idara ya rasilimali watu lakini kwenye suala hili la walalamikaji nafasi yake ilikuwa ni kugawa barua tu."*

From the above quoted words, Mr. Mudinda argued that even DW-1 knew that the applicant did not consult or inform the respondents and her department of Human Resources which is responsible for granting leave. He said that, the applicant's submission that there was an oral agreement is a false statement as it was not stated by her witness during the hearing. He stressed that, as recorded, the respondents were taken to unpaid leave

contrary to the organization and legal procedures of granting leave to the employees. That, at page 3 of the Award the Arbitrator stated that:

> *"...Alitoa ushaidi kuwa likizo zilikuwa zinapangwa kwa zamu na zamu ya mfanyakazi ikikaribia anapewa fomu anajaza kisha anapewa ruhusa ya Kwenda likizo."*

In line of what was stated by PW2, Mr. Mudinda commented that the applicant skipped the procedures with intention to act unfairly to the respondents who are their employees and forced them to take leave without paying them contrary to **Regulation 14(1) of the Employment and Labour Relations (General Regulations) G.N 47/2017** which states that:

> *"Subject to the provisions of section 31 of the Act, an employee shall comply with procedures for applying an annual leave which shall be set by employer."*

The same was stated by the Arbitrator at page 5 of the award that:

> *"...shahidi wa mlalamikiwa alieleza masuala ya likizo kwa mlalamikiwa yalishughulikiwa na idara ya Rasilimali Watu na mlalamikaji Domine aliieleza Tume kuwa utaratibu wao*

*wa likizo ulikuwa kwa kujaza fomu na kusubiri ruhusa ya kwenda likizo."*

From the above quotations, Mr. Mudinda underscored that the applicant acted unfairly to grant unpaid leave to the respondents by not adhering and complying to the lawful procedure for granting leave by the organization. Thus, the Hon. Arbitrator was correct by deciding that the applicant committed unfair Labour Practices to the respondents.

Mr. Mudinda explained further that the term "***unfair labour practice***" according to **Merrian Webster Dictionary** means "*various acts of the employer or labour organisations that violate the rights or protection applicable under labour laws."* He supported his contention with the case of **Samwel Akim Kajigili vs CRDB Bank PLC,** Labour Revision No. 18 of 2021) at page 9 &10 and the case of **Apollo Tyres SA (Pty) Ltd vs CCMA & Others** (2013) 34 ILJ 1120 (LAC) in which the Labour Appeal Court while dealing with an unfair labour practice related to a benefit quoted with approval from *Du Toil et al* on the meaning of unfairness as follows:

"... *unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended."*

Therefore, the respondents were unfairly taken to unpaid leave of three months meaning that their right to paid leave was violated by the applicant.

Moreover, Mr. Mudinda averred that evidence adduced by the respondents who were PW1 & PW2 as reflected at page 3 and 4 of the typed Award clearly shows that before being taken to unpaid leave, they were not consulted by the employer contrary to what was submitted before this court. He contended that, it is stipulated by the law that leave is one of the fundamental rights of employees and it should be a paid leave which should be reflected in the Employment Contract and if these rights are to be revised, consultation to the employees is a mandatory requirement of the law as stated under **section 15 (4)** of **Employment and Labour Relations Act.** He insisted that the applicant's action of issuing unpaid leave without consulting the respondents violated the provisions of law and amounts to unfair labour practices. Thus, the respondents are entitled to be reinstated back to work without loss of their unpaid salaries as decided by the Arbitrator.

Mr. Mudinda went on to submit that, the applicant failed to connect the unpaid leave with economic hardship of the organization through DW1's evidence and Exhibit S-1 a statement of financial position of the organization. That, during cross-examination, the applicant's witness stated that the exhibit tendered was for financial year from January 2021 to December 2021 while the leave was issued in June 2022. Further, she stated that the financial report did not show that the organization had bad financial condition for her to fail to honour expenses of the organization. He referred to page 4 of the typed Award. It was underlined that, the applicant failed to establish that he had good reasons to issue unpaid leave to the respondents.

Responding to the submission that the Arbitrator erred by ordering the applicant to reinstate the respondents and pay all the salaries; Mr. Mudinda argued to the contrary. He stated that, while the remedies for unfair dismissal are a closed list, the remedies for unfair labour practices are open-ended and include re-instatement as was ordered by the Arbitrator. He cited the case of **Minister of Safety & Security v SSSBC & Others [2010] 4 BLLR 428 (LC),** which held that:

*"An arbitrator's powers in unfair labour practice dispute are wider than those in unfair dismissal dispute."*

Countering the submission that the Arbitrator had erroneous findings, Mr. Mudinda clarified that at page 5-8 of the typed award, the Arbitrator evaluated evidence of both parties and finally derived the reasons of reaching such decision, in which the applicant completely failed to prove that the unpaid leave was fairly granted. Concerning the reasons for the decision, Mr. Mudinda disclosed that from Page 5-8 of the typed Award, the Arbitrator gave the reasons for reaching at such decision to the effect that there was unfair labour practice by granting unpaid leave to the respondents without justifiable reasons and unprocedurally.

On the issue of reliefs which were awarded to the respondents, Mr. Mudinda was of the view that the honourable Arbitrator was legally correct. That, the applicant's counsel misinterpreted and improperly understood the Arbitrator's award by failing to consider the weight of the evidence adduced by his witness. He questioned how could the remedy in the Award be disregarded upon the approval of unfair labour practices? He said that the question was elaborated well in the case of **Minister for Safety & Security v. SSSBC** (supra). Furthermore, Mr. Mudinda

expressed that the applicant has no legal grounds for his application as he has failed to prove how the Arbitrator erred to award the said remedy to the respondents while knowing that he failed to prove the fairness of labour practices effected to the respondents.

In his final remarks, Mr. Mudinda implored this Court to uphold the decision of the Honourable Arbitrator and dismiss this application and order the applicant to reinstate the respondents herein without loss of their renumerations immediately.

According to the submissions of both parties, affidavit in support of the application, counter affidavit and evidence in the CMA record, it is undisputed fact that the applicant herein required her employees, the respondents herein to take unpaid leave of three months. Therefore, the issue for consideration, is *whether by issuing unpaid leave to the respondents the applicant committed unfair labour practice*. This issue will cover all raised grounds of revision.

Commencing with the issue of unpaid leave, Mr. Yoshua for the applicant argued that the applicant and the respondents had prior oral agreement of taking three months unpaid leave due to economic hardship.

On the other hand, the respondents alleged that there was no evidence to prove that the respondents were consulted prior to issuing the said unpaid leave. They added that, even the issue of economic hardship was not established by the applicant in his evidence.

While addressing this issue, after making reference to the provisions of **Employment and Labour Relations Act** and **the Code of Good Practice GN 42 OF 2007**, at page 7 of the ruling the learned Arbitrator had this to say:

> *"Kwa miongozo hii ni dhahiri kuwa sheria inamtaka mwajiri akae na mwajiriwa wake kwaajili ya majadiliano kabla ya kufanya uamuzi unaohusu ajira ya mtu husika. Shahidi wa mlalamikiwa aliieleza Tume kuwa alipewa tu barua za likizo bila malipo awapatie walalamikaji na kukiri kuwa hapakuwa na vikao baina ya walalamikiwa na walalamikaji kabla ya kupewa barua hizo....*
>
> *Yani ujira wa mfanyakazi utalipwa kwa mwezi au kwa muda ambao wahusika watakuwa wamekubaliana. Walalamikaji na mlalamikiwa walikuwa na*

*makubaliano ya kulipwa mishahara yao kila mwezi, kama mlalamikiwa aliona uhitaji wa kusitisha malipo ya mishahara yao basi alipaswa kukubaliana nao. Ilikuwa ni wajibu wa mlalamikiwa kukaa vikao na walalamikaji kuwaeleza hali ya taasisi ilivyokuwa kiuchumi na kuwapa nafasi waamue kama wangekubaliana naye kwenda likizo bila malipo au la, lakini mlalamikiwa aliamua kuwanyima haki hii. Kwa kuwapa walalamikaji likizo bila malipo bila kuwa na makubaliano nao, Tume imejiridhisha kuwa mlalamikiwa alitenda kosa la kiajira lisilo la haki."*

The above reasoning of the Commission speaks loudly that, the Hon. Arbitrator evaluated evidence of both parties thoroughly, gave the reasons of her findings and concluded that the applicant's conduct, amounted to unfair labour practices. The applicant through DW1 testified that the employer issued the letters to the respondents requiring them to take three-months unpaid leave due to economic constraints of the applicant. She tendered financial statement of the organisation which was admitted as exhibit S-1.

The respondents through PW1 and PW2 among other things testified that they were issued with the said letters but they were not consulted prior to that, and this was their grievances according to CMA F.1.

**section 15(1)** and **(4) of ELRA** provides that:

> "***15***. *-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely-*
>
> *(a) name, age, permanent address and sex of the employee;*
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> *(b) place of recruitment;*
>
> *(c) job description;*
>
> *(d) date of commencement;*
>
> *(e) form and duration of the contract;*
>
> *(f) place of work;*
>
> *(g) hours of work;*

*(h) remuneration, the method of its calculation, and details of any benefits or payments in kind; and*

*(i) any other prescribed matter.*

*(4) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the written particulars to reflect the change and notify the employee of the change in writing."*

According to the above provision, whenever there are changes of the terms of contract, the employer must comply with two essential requirements; *first,* the employer must consult the employee and *second*, the employer must notify the employee of such changes in writing. That was not done in this case. The employer issued the letters for unpaid leave directly without any consultation nor notification.

Mr. Mudinda argued that the applicant failed to connect the unpaid leave with economic hardship through **exhibit S-1**. This court is of settled opinion that without consulting and notifying the respondents, it cannot

be said that the said unpaid leave was in connection to economic hardship. The employer was obliged to consult and notify the employees in writing and discuss the possible solutions of the said hardship before resorting to unpaid leave which in the first place is not provided for under the law as a solution to economic constraints. Thus, the employer contravened **section 15(4) of ELRA** (supra). The act of the applicant of issuing unpaid leave without consulting and notifying the respondents in writing, amounted to unfair labour practice.

Concerning the reliefs granted, I am of the opinion that the Hon. Arbitrator meant that the respondents should go back to work and be paid their salaries for the period which they were not at work (unpaid leave period plus the period of prosecuting this matter). For ease reference from page 7 last paragrapgh to page 8 first paragraph of the CMA award, it was stated that:

> *"Imethibitishwa kuwa walalamikaji walipewa likizo bila malipo isivyo halali* ***na kwa msingi huu basi wanastahili kurudishwa kazini na kulipwa mishahara yao kwa kipindi chote ambacho hawakuwa kazini."*** Emphasis added

Having said that and done, I hereby dismiss this application forthwith without costs on the reason that this is a labour matter.

It is so ordered.

Dated and delivered at Moshi, this 8th day of December 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

**08/12/2023**