IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 5 OF 2012

SIFALINE JUMA MFINANGA.....APPELLANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY

LIMITED ....1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY

AUTHORITY ..... 2ND RESPONDENT

JUDGMENT

Sifaine Juma Mfinanga is appealing against the decision of the Energy and Water Utilities Regulatory Authority, (also known by its acronym "EWURA)", the 2nd respondent herein, dated 19th September, 2012 in respect of a complaint against Tanzania Electric Supply Company Limited (also known by its acronym "TANESCO"), the 1st respondent. Appellant claimed compensation for the loss of a house and properties therein,

which were destroyed by fire alleged to have resulted from an electric fault caused by TANESCO.

In the complaint before EWURA, the appellant claimed a total of Tshs. 292, 180,000 as material damage and Tshs. 150,000,000 for emotional shock. TANESCO denied to have been responsible for the fire on the ground that: (1) there was no electrical fault in the networks, (2) there was no over voltage, (3) there was no evidence of loose connection or short circuit for cooper wires on its side, and (4) there was no indication of over current that could cause fire.

EWURA dismissed the complaint after finding that the appellant had failed to prove that TANESCO was responsible for causing the fire.

In her Amended Memorandum of Appeal, the appellant has faulted the 2nd Respondent's decision on the following grounds:

1. The Board of Directors of EWURA erred in law in not properly trying the merits of the appellant's claims in quasi judicial manner as required by law.
2. That the Board of Directors of EWURA erred in law and facts in not considering the fact that the standard of proof required was on balance of probability and that the appellant did prove her claims on the balance of probability.

3. The Board of Directors of EWURA erred in law and facts by not considering, evaluating and giving weight evidence adduced by **RW1, RW2** and **DW2** when giving the award.
4. That the Board of Directors of EWURA erred in law and facts by holding that the source of fire can only be established by direct evidence.
5. That the Board of Directors of EWURA erred in law and facts by not awarding damages' to the complainant.

In its Reply to the Amended Memorandum of Appeal, TANESCO has maintained that the decision by EWURA was based on the evidence at the trial. And that EWURA considered, evaluated and gave appropriate weight to the facts of the accident and evidence adduced by parties in reaching its decision. In addition, TANESCO submitted that EWURA was right in not awarding the appellant damages as there was no justification.

In its Reply to the Amended Memorandum of Appeal, EWURA stated that, in reaching at the decision appealed against, facts of the case, submissions by parties, evidence adduced as well as appropriate laws were considered. Furthermore, EWURA stated that the appellant failed to prove, on the balance of probability or at all, that the fire which destroyed her house was caused by TANESCO. In conclusion, EWURA stated that due to that failure, the appellant is not entitled to any kind of damages.

Apart from pleadings, parties also filed list of authorities, skeleton arguments and written submissions which this Tribunal took into consideration, *inter alia*, in reaching this decision.

In the submissions, learned counsel for the Appellant combined ground two and three together. He submitted that the cause of fire was electrical fault at the Appellant's house. Clearly, TANESCO supplies the electricity to the Appellant's house as well as determine and control the voltage of electricity. Learned counsel for the Appellant submitted that since there is no dispute as to who is the supplier and what had caused the fire, EWURA erred in holding that the appellant failed to prove the appellant's claim while there was sufficient evidence, on the balance of probability that TANESCO caused the electrical fault which resulted in the outbreak of fire.

In addition, learned counsel for the appellant submitted that EWURA did not consider the evidence adduced by the Appellant at all. Although in its decision, EWURA indicated that it had taken into consideration appellant's evidence but found it unhelpful in determining the source of fire, submitted the appellant's counsel. The Appellant's counsel contended that the only witness on the part of the appellant's case (CW1) testified that there was an electrical fault from the electricity supplied by TANESCO. Learned counsel further pointed out that it was the testimony by CW1 that the LUKU meter supplied by TANESCO had burst and as a result

the fire started from the LUKU meter and spread throughout the house. It was also a submission by the appellant's counsel that it was a testimony by CW1 that the wiring of the house was approved by TANESCO. In addition, Appellant counsel insisted that the appellant tendered a report on the fire (Exhibit "C1") which was prepared by a fire and rescue officer who testified as DW2. The Appellant's counsel maintained that TANESCO did not object to the report indicating that the fire had started from the LUKU meter and spread throughout the house.

Learned counsel for the appellant further argued that the appellant testimony was supported by not only DW2 and Exhibit C, but also DW1 who confirmed that there was an electrical fault, in that, LUKU meter had bust and fire broke out. Citing the case of ***Hamisi Rajabu Dibagula Vs. The Republic, Criminal Appeal No. 13 of 2001, Court of Appeal of Tanzania at Dar Es Salaam (unreported)*** learned counsel for the appellant argued that this disregard of evidence by EWURA is a gross misdirection and led to the miscarriage of justice.

Submitting further, learned counsel for the appellant argued that although the evidence adduced by CW1, DW1 and DW2 proves on the balance of probability that, the source of fire was electrical fault, EWURA failed to apply its mind and reason to this fact and instead, considered other facts like where the actual fire started and evidence of RW1 and RW2 which are immaterial, inaccurate

and hearsay, as a result, it arrived at a wrong conclusion. Moreover, learned counsel for the appellant submitted that EWURA misinterpreted the evidence of DW1 which suggested that fire had started from the circuit breaker and wrongly held that it contradicts that of CW1 and DW2 which suggested that the fire had started from the LUKU meter.

Combining grounds 1 and 4 of the appeal, learned counsel for the appellant submitted that, the source of fire was established by not only direct and circumstantial evidence but also expert evidence. He further submitted that having been so established, it was wrong for EWURA to hold that the source of fire could not be established. The appellant's counsel concluded that EWURA abrogated its function of determining the issue which it had framed.

On ground 5 of the appeal, learned counsel for the appellant strongly argued that since the damages were not disputed and the appellant had proved special damages to the tune of Tanzanian Shillings Two Hundred Eighty Million Only (Tshs. 280,000,000/=), and Tanzanian Shillings Twelve Million Only (Tshs. 12,000,000/=) the same be granted as prayed. Learned counsel was of the view that the amount of Tanzanian Shillings One Hundred Fifty Million Only (Tshs. 150,000,000/=) being general damages be granted by this Tribunal as prayed.

Replying to the submissions by the appellant, learned counsel for the 1st respondent, adopted the style of the appellant's counsel of combining grounds 2 and 3 of appeal together. The argued that the appellant has failed to prove the two contentious issues which are the source of fire and whether TANESCO was responsible for the said fire to the required standard of proof in civil matters. Citing the cases of ***Katabe Kachochoba V. Republic [1986] TLR 170***, ***Omary Ahmed V. Republic [1983] TLR 52*** and ***Dharsi Manji & Sons V. Amri Said [1972] HCD 234***, learned counsel for the 1st respondent argued that the evidence of CWI, DW1 and DW2 relied upon by the appellant has no merit on the appellant's case. He further argued that it is not credible for lack of force to constitute a greater weight of evidence, expertise in the analysis of power fluctuations, origin of fire, inaccuracy, vagueness and having been mere hearsay.

Learned counsel for the 1st respondent further argued that sections 110 (1) and (2) and 111 of the Law of Evidence Act CAP 6 R.E. [2002] requires the appellant to prove the existence of logic and does not require EWURA to invent evidence through application of logic and reasoning. EWURA is required to appraise the evidence before it. Counsel for the 1st respondent claimed that although electrical power fluctuations are common in the electrical industry, they do not necessarily cause fire outbreaks. He maintained that if such fluctuations were present, a number of

electrical users in the vicinity would have suffered the same as the appellant.

In reply to the remaining grounds of appeal, learned counsel for the 1st respondent stated that the appellant has failed to prove the source of fire by direct, circumstantial and/or expert evidence. According to the 1st respondent counsel EWURA rightly held that the source of fire was unknown and could not condemn TANESCO to compensate the appellant as it was not responsible for the alleged loss.

Replying to the submissions by the appellant, learned counsel for the 2nd respondent brought to the attention of the Tribunal section 29 (2) of the EWURA Act, CAP. 414 R.E. 2002 which provides for grounds of appeal from the decision of EWURA. He argued that the learned counsel for the appellant has framed issues for determination that has raised new grounds of appeal, either directly or by implication. Thus, requested the Tribunal to deal with grounds of appeal as raised in the memorandum of appeal and in accordance with section 29 (2) of the EWURA Act.

On the 1st ground of the appeal, learned counsel for the 2nd respondent stated that the appellant has not shown the law that was violated while dealing with the matter. According to the 2nd respondent's counsel, appellant has failed to discharge the burden of proof as required by section 110 of the Law of Evidence Act.

As regards grounds 2 and 3 of the appeal, learned counsel for the 2nd respondent argued that, according to the law of negligence, the appellant was supposed to prove that TANESCO was responsible for the fire and that TANESCO breached its duty. He maintained that the appellant concentrated on establishing where the fire had started rather than what caused the fire, who had a duty of care and whether there is any breach of that duty of care.

The 2nd respondent's counsel maintained that EWURA had appraised the evidence adduced by the appellant including testimonies of CW1, DW1 and DW2 as seen in pages 5, 6 and 7 of the award contrary to the submissions by learned counsel for the appellant that such evidence was disregarded.

With respect to grounds 4 & 5 of the appeal, learned counsel for the 2nd respondent argued that the appellant could have proved the source of fire by any of the three means namely, direct, circumstantial and expert evidence. He maintained that the evidence provided by the appellant was not reliable for being hearsay, and inaccurate. The 2nd respondent's counsel insisted that, for the appellant to be entitled to damages claimed, she had a duty to establish the existence of duty of care, breach of that duty and negligence in breach of duty, short of which, appeal lacks merits.

By way of a rejoinder, the appellant's counsel submitted that all grounds of appeal are in accordance with section 29 (2) of the

EWURA Act. Issues raised in his submission in chief originated from skeleton arguments filed under rule 28 (1) of the Fair Competition Rules, 2012 G.N. 219 of 2012 with a purpose of assisting the Tribunal to reach a decision and not amending the grounds of appeal. He added that the issue of the origin of fire was not disputed, since, all parties are in agreement that the fire was caused by an electric fault. He concluded that, the only issue for determination by EWURA was whether TANESCO was responsible for the electrical fault. Appellant counsel submitted that ***Katabe Kachochoba V. Republic*** and ***Omary V. Republic*** cases impose a higher standard of proof beyond reasonable doubt. He argued that these cases are of criminal nature and, therefore, should not be relied upon. To finalize, learned counsel maintained that EWURA should have considered all evidence adduced before it and not only pieces of evidence as was the case.

From the perusal of the Tribunal original records, the following facts are not in dispute. The appellant, on 6th July, 2011, almost two months after the occurrence of the fire accident through the service of Majaliwa, Nyange & Associates (Advocates) wrote a demand notice to TANESCO 1st respondent claiming compensation for material damage to the tune of Tanzanian Shillings Two Hundred Ninety Two Million One Hundred Eighty Thousand Only (Tshs. 292,180,000/=) and emotional shock to the tune of Tanzanian Shillings Fifty Million Only (Tshs. 50,000,000/=).

TANESCO, the 1st respondent replied on 12th July, 2011 asking the appellant to bear with them while communicating with the Kimara Office. Appellant wrote a final demand notice on 27th July, 2011 claiming the same as the first notice save for the compensation for emotional shock which was raised to Tanzanian Shillings One Hundred Fifty Million Only (Tshs. 150,000,000/=). On 7th December, 2011 the appellant wrote to EWURA seeking assistance in the matter and served a copy thereof to TANESCO. On 26th March, 2012 TANESCO wrote to EWURA disassociating itself from the fire accident for technical reasons provided therein and served a copy thereof to the Appellant. On 27th March, 2012 the appellant lodged a formal complaint before EWURA.

In order to reach a decision, the following issues were framed for consideration by EWURA:

1. What is the source of fire?
2. Whether the respondent is responsible or liable for electrical fault which occurred at the appellant's house, and
3. Whether the appellant is entitled to any damages as a result of the fire outbreak caused by the electrical fault.

The respondent called two witnesses, an electrical technician (RW1) and an electrical engineer (RW2) who testified that the fire was caused by electrical fault not occasioned by TANESCO but other factors like improper wiring and the use of sub-standard

electronics materials. EWURA further summoned two witnesses, an eyewitness (DW1) and the fire and rescue officer who prepared the fire report (DW2). DW2 testified that the fire was caused by electrical fault originating from the LUKU meter and could not have been caused by other factors like lantern lamp or candle because it burned the whole house and not just one area.

As regards the grounds of appeal raised by the appellant, we shall discuss the 2nd and 3rd grounds of appeal together since the thrust of these two grounds of appeal is whether or not there was evidence to warrant a finding that TANESCO was responsible for the fire ultimately compensate the appellant.

It is common ground that in answering grounds 2 and 3 of the appeal, it is worth noting that TANESCO is **responsible for generation, transmission and distribution of electricity in the country. Distribution is done through a network of cables, wires and other electrical items such as meters which are installed in the electricity consumer's premises but is the property of TANESCO.** On the other hand, the consumer is responsible for wiring his/her premises in order to be able to consume electricity supplied by TANESCO. Where there is a fault in ones electrical system leading to fire, the cause could come from either the distributor's side or the consumer's side.

In her testimony (CW1), the appellant has boldly claimed that the fire was caused by an electrical fault on TANESCO's side. The

reason being that the LUKU meter, main switch and circuit breaker had burnt. To prove her claim she tendered Exhibit "C1" and Exhibit "C2" together with some photographs showing the burnt electrical equipments and household items. Testimony of an eyewitness (DW1) and fire and rescue officer (DW2) further substantiate that, fire started from the LUKU meter, main switch and circuit breaker and later spread all over the house. However, there is no evidence as to what could have caused the fire apart from claiming that there was power fluctuation that caused electrical fault resulting in the fire. In contrast, RW1 and RW2, electrical specialists working for TANESCO, testified that there was neither proof of electrical fault or shot circuit that could cause fire in the networks; nor report on any problem from other consumers in the same area as the appellant. RW1 and RW2 further testified that power fluctuation is common in the country but it does not necessarily result in fire.

We find it necessary to adopt the reasoning of the Court of Appeal in **Japan Cooperation Agency (JICA) V. Khaki Complex Limited [2006] TLR 343**, in which the Court of Appeal of Tanzania cited with approval the case of **Peters V. Sunday Post Limited (1958) EA 424** after considering **Watt v. Thomas (1947) AC 484** held-

> "It is a strong thing for an appellate court to differ from the finding on a question of fact,

> of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellant court itself have come to a different conclusion".

On a full consideration of the available evidence, we are of the settled view that, apart from Exhibit "C1" and Exhibit "C2" which were rightly admitted as evidence, oral evidence of CW1, DW1, DW2, RW1 and RW2 were all essential in reaching a decision. The decision by 2nd respondent suggests that EWURA did not only record the evidence given but also considered the evidence of both the appellant and the respondent in reaching the decision.

Without further ado, we shall exercise our jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.

A copy of Exhibit "C1" in our records does not state at all what had caused the fire, it only mentions where the fire had started. But looking at page 5 of the decision of EWURA same Exhibit "C1" is shown to state that the source of fire was unknown. Exhibit

"C2" gives a lengthy analysis of the accident and the electrical condition of TANESCO networks, electrical items such as LUKU meter and electrical system at the appellant's house. Exhibit "C2" categorically concluded that TANESCO was not responsible for the fire. Given what is provided in Exhibits "C1" and "C2", is there any proposition that TANESCO could be responsible for the fire outbreak in the appellant's house? Is the fire and rescue officer in the position to analyze sources of fire since he does not possess any special knowledge on electrical matters? The answer to this questions is in the negative. EWURA rightly held that Exhibit "C1" is of no use as it does not establish at all what the source of fire was, thus, it gives no proposition as to who may be responsible for the fire. On the other hand, Exhibit "C2" provides for technical analysis of electrical condition and items relating to the appellant. Exhibit C2 merely indicates that there was no problem at all on TANESCO's side otherwise other consumers in the same vicinity who are supplied with electricity using the same network would have experienced the same problem. So, Exhibit "C2", however detailed, still gives no proposition as to what was the source of fire and who was responsible.

As regards oral evidence, the testimony by DW1, the only eyewitness, that she was watching TV when she noticed power fluctuation at around 7 p.m. with bulbs going from dim to strong light. DW1 testified that power fluctuation was followed by a roaring sound from the LUKU meter and sparks of fire coming

from the circuit breaker. This evidence signifies that there was an electrical problem in the house. DW1 testimony is about the whole incidence and what had actually happened. DW1 does not have any special knowledge in electricity to be able to reach an opinion that fire was caused by electrical fault on the side of TANESCO and/or due to negligence of consumer. CW1 and DW2 testimonies were not only hearsay but also misplaced for reasons that they addressed the beginning of the fire and not the source. We are inclined to agree with the learned counsel for the 1st respondent that **"source"** and **"start"** are different. While **"start"** means the beginning/commencement of thing, **"source"** is much deeper as it shows the point at which something comes into being, that is, point of origin.

In the light of the above review of the evidence, did the appellant substantiate her claim? We do not think so. It was upon the appellant to establish the source of fire, but she failed to do so. The appellant evidence just established where the fire had actually started. In doing so she relied on hearsay evidence from DW1 who was watching TV.

With all due respect, we do not agree with the argument by the learned counsel for the appellant that the matter was proved to the required standard. Proof on the balance of probability can only be met by the greater weight of the evidence established not necessarily by the greater number of witnesses.

The evidence adduced by the appellant inevitably justifies the decision by 2nd respondent (EWURA) as it is not sufficient and/or substantial to incline a fair and impartial mind to the appellants' side that TANESCO was responsible for the fire. The appellant was required to prove that the electrical fault was occasioned by an error from TANESCO. We therefore find grounds 2 and 3 of the appeal with no merit.

As regards ground 1 of the appeal, the appellant has failed to establish which conduct, act or omission by EWURA is contrary to the law. EWURA, being an administrative body, is governed by the parent Act, sector legislation, rules and regulations made therein. All disputes are heard in accordance with the law. If the appellant feels that his claim was not so heard then she should substantiate her claim. This ground too lacks merit.

As regards grounds 4 and 5 of the appeal, we also find they lack merit. It is obvious that EWURA's finding that the source of fire can be established by circumstantial, direct or expert evidence is correct and the evidence was properly evaluated.

Now, having found that all grounds of appeal lack merit, the question is, is the appellant entitled to any compensation? We find the answer to be in the negative.

In the decision of this Tribunal in **Juma Mpuya V. Celtel Tanzania Limited, Appeal No. 1/2007** it was stated that:

"We are mindful of the legal principles that **damages are the pecuniary compensation, obtainable by success in an action, for a wrong, which is either a tort or a breach of contract**, the compensation being in the form of a lump sum, which is awarded unconditionally. The object of an award of damages is to give the plaintiff or injured party compensation for the damage, loss or injury he has suffered so as to put him in position he would have been in had the tort not been committed or had the contract been performed." (Emphasis by the Tribunal)

In the **Tanzania Saruji Corporation V. African Marble Company Limited [2004] TLR 155**, the Court of Appeal stated at page 157:

"The position is that general damages are such as the law will presume to be the direct, natural and probable consequence of the act complained of, ... **the defendant's wrong doing must, therefore, have been the cause, if not the sole, or a particularly significant, cause of the damage.**" (Emphasis by the Tribunal)

The appellant failed to prove that the fire was caused by either act or omission of the 1st respondent. Thus the appellant is not entitled to any damages.

In the event, and for the reasons stated above, we accordingly dismiss this appeal in its entirety for being devoid of merit.

Costs are within the Tribunal's discretion, though they follow the event, in the circumstances of this particular case, we would refrain from making any order as to costs.

DATED at Dar es Salaam this 15th day of August, 2014.

Judge Z. G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Ms Salma M. Maghimbi – Member

Judgment delivered this 19th day of November, 2014 in the presence of Dora Mallaba holding brief of Mr. Edward Chuwa for the appellant, Goodluck Lyimo, for the 2nd respondent and in the absence of 1st respondent duly notified.

Judge Z. G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

19/11/2014