ORIGINAL

IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 3 OF 2014

TANZANIA ELECTRIC SUPPLY

COMPANY LIMITED .....APPELLANT

VERSUS

SAMWEL MHINA ..... 1ST RESPONDENT

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY ..... 2ND RESPONDENT

JUDGMENT

This is an appeal arising from the decision of the Energy and Water Utilities Regulatory Authority, (also known by its acronym "EWURA"), the 2nd respondent herein, dated 8th August, 2014. The decision is in respect of a complaint by the 1st respondent, Samwel Mhina, against Tanzania Electric Supply Company Limited (also known by its acronym "TANESCO"), the appellant herein. The complaint was on compensation for the loss of a house and

properties therein, which were destroyed by fire alleged to have been caused by an electric fault. The complainant claimed that the fire resulted from an over current which passed through a jumper wire put by TANESCO on transformer line number 3 connecting electricity to his house. TANESCO denied responsibility on the reason that supply system to the complainant being inspected, found to be safe, and intact on the date of accident.

EWURA found TANESCO to be in breach of the duty of care owed to the complainant. EWURA further ordered TANESCO to pay the complainant Tanzanian Shillings seventy million only (70,000,000/=) being the value of the burnt house and Tanzanian Shillings ten million only (10,000,000/=) being compensation for special damages.

The appellant being dissatisfied with the decision of EWURA filed an appeal on 29th August, 2014. The memorandum of appeal raises the following grounds of appeal:

1. The Board of Directors of EWURA erred in law in making decisions in tortuous matter in which the Authority is not vested with jurisdiction.
2. The Board of Directors of EWURA erred in law and fact in ignoring Exhibit C2 which categorically states that the source of fire is UNKOWN.

3. The Board of Directors of EWURA erred in law and fact by not putting in consideration the reality on the site when both parties visited locus in quo.
4. The Board of Directors of EWURA erred in law and fact in holding that RW1 and RW3 suggested that the fire started at the pole which supply power to the complainant's house which is not true.
5. The Board of Directors of EWURA erred in law and fact by basing the decision on the testimony of CW2 and CW5 which is not proved.
6. The Board of Directors of EWURA erred in law and fact by neglecting completely the testimony of RW1, RW2 and RW3 who visited locus in quo.

The replies to the memorandum of appeal filed by the 1st and 2nd respondents on 23rd September, 2014 and 15th September, 2014 respectively vigorously oppose the appeal on the ground that the decision appealed against cannot be faulted. The 2nd respondent having jurisdiction in accordance with the law, took into consideration all facts and evidence adduced by parties and acted fairly in evaluating the adduced evidence which resulted in a reasoned and just decision.

Apart from pleadings, parties also filed list of authorities and skeleton arguments in accordance with rules 22 and 28 of the Fair Competition Tribunal Rules, G.N. No. 219 of 2012

(hereinafter referred to as "FCT Rules"). On the hearing day Ms. Batilda Mally, learned advocate appeared for the appellant; Mr. Luguvu and Mr. Nditabula of Nyanza Law Chambers appeared for the 1st respondent and Mr. Mkuba Kasmir of ADCA Veritas Law Group appeared for the 2nd respondent.

On ground 1 of appeal, Ms. Mally submitted that under section 34 of the EWURA Act, Cap 414 R.E. 2002 (hereinafter referred to as "EWURA Act") the 2nd respondent is not vested with powers to deal with tortuous complaints while at the same time admitting that such complaints resulting from electrical supply, installation, equipment or any part thereof are covered under section 33(2)(f) of the Electricity Act No. 10 of 2008 (hereinafter referred to as "Electricity Act") which also falls under the ambit of the 2nd respondent's powers. Ms. Mally further asserted that to succeed in tort there must be a legal duty, breach of the duty and suffering on the part of the one who claims compensation. Ms. Mally added that the appellant having no duty of care cannot be held liable in tort. In addition, Ms. Mally invited the Tribunal to apply the "rule of the things of the same kind and nature" to determine whether burning of the house falls under the same nature within the wording of section 34 of the EWURA Act.

As regards ground 2 of appeal, Ms. Mally submitted that since Exhibit C2 clearly says that the source of fire was unknown, the 2nd respondent wrongly concluded that the source of fire was

electricity. Ms. Mally stated that the fire could have been caused by other electric appliances that were in the house or even the gas cooker. Ms. Mally asserted that the testimonies on the source of fire of CW1 and CW3 were mere hearsay as they were both absent at the time the accident occurred. Also, the testimony of CW2 on the source of fire was not corroborated. Furthermore, Ms. Mally stated that the testimony of CW5 cannot be relied upon since he is not an expert in electricity and cannot differentiate between the source and the starting point which are two different things.

As regards ground 3 of appeal, Ms. Mally submitted that when visiting the locus quo appellant's electricity system did not indicate any signs of having being burnt thus the fire did not start from the pole as claimed by the 1st respondent. The transformer was also inspected and there was no jumper replacing fuses at all.

Arguing grounds 4, 5 and 6 of appeal together, Ms. Mally submitted that if the fire had started at the pole then other customers sharing the same point with the 1st respondent would have experienced the same problem. Ms. Mally further stated CW2 and CW3 testimonies were mere fabrications as they failed to substantiate their testimonies. In addition, Ms. Mally asserted that testimony of RW1 was not taken into account by the 2nd respondent despite being technical evidence. She further asserted

that, testimonies of RW2 and RW3 who visited the loqus quo while the 1st respondent, his wife and the maid were all absent was not given appropriate weight. Ms. Mally, as a final point, submitted that the fire could have been caused by other electric appliances or the gas cooker.

In responding to the submissions by the appellant's learned counsel, Mr. Luguvu, learned counsel for the 1st respondent, asserted that the appeal has no legs to stand on. He submitted that the 2nd respondent is expressly empowered to determine the matter under sections 34 (1) of the EWURA Act and 33(2) (f) of the Electricity Act. Mr. Luguvu further stated that even though exhibit C2 says that the source of fire is not known it does not mean that the source of fire cannot be established by the circumstances of the case. Mr. Luguru added that testimonies of RW1 and RW2 were evasive as to the use of jumper wire which is incapable to protect over current.

On his part, learned counsel for the 2nd respondent, Mr. Mkuba replied by submitting that the 2nd respondent acted in accordance with the powers provided under the Ewura Act. Mr. Mkuba further submitted that the 2nd respondent rightly evaluated all presented evidence and took into account all such evidence to arrive at its decision. Mr. Mkuba asserted that exhibit C1 shows the picture of the transformer clearly indicate a problem. C1 shows the transformer fuses going to the 1st respondent's neighbours are

clearly seen while no such fuse is seen going to the 1st respondent's house. Lack of fuse and use of a jumper wire as an alternative caused danger and make it easy for the fire to erupt. Mr. Mkuba submitted that in totality all the evidence of the complainant and the respondent were taken into account.

Ms. Mally's rejoinder submission was brief and on the point that if the fuse on the transformer is not visible it does not mean that there was no fuse.

We have carefully considered the submissions and arguments advanced by the contending learned counsel in this matter. To start with, we find it necessary to point out that it is not the first time that the appellant raises the issue of jurisdiction of EWURA in dealing with tortuous matter. In Tribunal Appeal No. 3 of 2013 in Elizabeth Kiunsi v. TANESCO and EWURA, this Tribunal gave a decision dated 20th November, 2014 on the same matter. It was held as follows:

> **"As already stated earlier, ground 8 of the appeal mainly raises one issue, whether or not the 2nd respondent in the discharge of its regulatory functions has jurisdiction to entertain matters related to loss of property or physical injury as a result of negligence arising out of supply of regulated goods and services.**

It was a contention by Ms Mally, learned counsel for the appellant, that EWURA was vested with powers under section 34 of the EWURA Act to deal with complaints which are connected with supply, possible supply or purported supply of goods or services. She further contended that since the burning of the house is a matter related to tort, the complaint falls under tortious liability in which the 2nd respondent has no jurisdiction to entertain the matter at all. In her view, the issue was not supply of electricity but a complaint based on tort. She cited the case of Mohamed Kassim Ngayaika (supra) to buttress her argument.

With much respect, we find it extremely difficult to agree with Ms Mally's contention. In our view, the scope of section 34 of the EWURA Act read together with section 33(2) of the Electricity Act, Act No. 10 of 2008 is wide enough to accommodate complaints based on damages as a result of negligence as in the instant case. Section 34(1) of the EWURA Act is very clear in its wording that it

shall apply to any complaint against a supplier of regulated goods or services in relation to any matter connected with supply, possible supply or purported supply of goods or services. Indeed, if EWURA had no such powers one would wonder why EWURA has been given powers under section 33(2) of the Electricity Act, Act No. 10 of 2008 which is the sector legislation regulating generation, transmission, transformation, distribution, supply and the use of electricity power to make rules prescribing penalties for, inter alia, offences relating to negligently cause of injury or damage to any person or property in respect of any electrical supply, installation, equipment or any part thereof. We therefore agree with Ms Kihemba's submissions that EWURA had jurisdiction to hear and determine the complaint lodged before it by the 1st respondent.

However, we must hurriedly say that our logical interpretation of the provisions of the law reproduced hereinabove and particularly sections 34(1) of the EWURA Act and 33(2)

of the Electricity Act, Act No. 10 of 2008 read together is that the powers of the 2nd respondent to entertain tortious matters in the discharge of its regulatory functions is without no limitation and is subject to sector legislation. At the instant case, EWURA has only powers to entertain tortious matters arising out of the electricity sector in relation to negligent acts causing physical injury or damage/loss of property. In our view, EWURA has no power to entertain tortious matter relating to loss of life which, in our opinion, exclusively falls within the jurisdiction of the ordinary courts of law. If this jurisdiction was meant to be given to EWURA then the law could have clearly provided so.

We should also say that even if there are Rules made under the Electricity Act, Act No. 10 of 2008 which empowers EWURA to hear and determine tortious matters in respect of loss of life arising out of electricity sector, they would be void for being inconsistent with section 33(2) of the Electricity Act,

2008 in terms of section 36(1) of the Interpretation of Laws Act, Cap. 1 R.E. 2002 which provides that *"subsidiary legislation shall not be inconsistent with provisions of the written law under which it is made and that subsidiary legislation shall be void to the extent of any such inconsistency".*

It is also our strong view that such powers to entertain complaints based on tort to the extent stated above has been given to EWURA as a regulator so that it can discharge its duties and functions in accordance with sections 6 and 7 of the EWURA Act read together with section 6(1) of the Electricity Act, 2008. As regards other sectors that are regulated by EWURA, we are of the considered view that EWURA will have such powers subject to sector legislation."

Having held so and there being no appeal preferred by TANESCO to date challenging the decision, it is considered a good law that EWURA has powers to entertain tortuous matter arising out of electrical supply, installation, equipment or any part thereof in relation to negligent acts causing physical injury or damage/loss of property. Without further ado we hereby dismiss ground 1 of

appeal. We call upon the appellant to keep record of our decision on this matter to avoid unnecessary repetition.

We will now address the remaining grounds of appeal which are all related to matters of evidence.

As regards ground 2, exhibit C2 is a fire report prepared and tendered by a firefighter, Mr. Saleh Ali Mohamed, who has been working in the Fire and Safety Services for 21 years (see page 2 of proceedings dated 8th November, 2002). Exhibit C2 which seems to be in Swahili does not form part of record of appeal. In the appellant's skeleton arguments it is stated as follows:

> **The report which was tendered to the Authority and admitted as Exhibit C2 on the first page it says that "Ulipoanza moto: KWENYE WAYA UNAOINGIA UMEME NDANI YA NYUMBA". Then the report further says: SEHEMU YA PILI – MAELEZO YA MOTO.**
>
> **CHANZO KINACHOFIKIRIWA KUANZISHA MOTO "HAKIJULIKANI"**

Mr. Salehe Ali Mohamed who testified as a complainant witness (CW3) testified that based on his experience he can tell where the fire had started which was from the wires that transmit power to the house. When asked the question on the source of fire, CW3 replied that he could not have known the source of fire because

he was not there when the fire started. On cross – examination, CW3 testified that he has no expertise to determine the source of fire but he can tell where the fire had started based on experience. Relevant parts of CW3 testimony read as follows:

> **CA:** When you arrive and find that a house has burned can you know where the fire started?
>
> **CW3:** Yes, I can know.
>
> **CA:** What guides you to know the source of fire?
>
> **CW3:** It is based on my experience on the job.
>
> **CA:** According to your expertise, where did the fire start?
>
> **CW3:** It started from the wires that transmit power to the house.
>
> .....
>
> **CA:** If you were not there how did you know?
>
> **CW3:** ... I saw the area where the fire started had been completely destroyed compared to other areas of the house.
>
> **CA:** Which area was that?
>
> **CW3:** Where TANESCO wires enter the house.
>
> **CA:** Based on your experience, what do you think was the source of fire?
>
> **CW3:** I can't know as I wasn't there when the fire started.
>
> ...
>
> ...

RA: Do you have the expertise to know what the source of fire is?

CW3: No

RA: So your testimony that the source of fire started from the wires is not certain?

CW3: It is certain.

RA: So you agree with me that the source of fire is unknown?

CW3: Yes

CW3 emphatically testified that the fire started where TANESCO wires entered the house. This is the point of origin; the source. The confusion on the source of fire and/or where the fire started that we have observed in CW3 testimony and exhibit C2 may be attributed to either interchangeable use of "source" and "cause", custom and/or limited expertise.

We must add that "source" meaning the originator as defined in the Black's Law Dictionary 8th Edition; or "source" meaning a place, person, or thing from which something originates or can be obtained as defined in the Oxford Dictionary differs from "cause" although they are used interchangeably. Exhibit C2 address itself to the source of fire meaning the point of origin. Where did the fire originated from? Did it originate at the pole, transformer, circuit breaker, lead in wire, switch or any other object that could cause fire to erupt? The answer to this question is provided by CW3 through his testimony produced above as well as exhibit C2.

At page 6 of the decision appealed against the 2nd respondent stated as follows:

> **"We have noted that Exhibit 'C2' categorically states that the source of fire is unknown. Apart from the fact that Exhibit 'C2' is not conclusive as to the source of fire, it identifies the point of fire which, in our opinion, may be useful in determining the possible cause of fire. Exhibit 'C2' states that, the fire started from the pole supplying electricity to the Complainant's house."**

Nevertheless, the critical issue in this matter is what was the cause of fire? "Cause" meaning something that produces an effect or result as defined in the Black's Law Dictionary 8th Edition or "cause" meaning a person or thing that gives rise to an action, phenomenon or condition as defined in the Oxford Dictionary is critical in the sense that it addresses the root of the fire outbreak. Is it electrical fault, unregulated power, arson, depleted wiring system or depleted electrical object that caused the fire? What caused the fire formed part of the issues agreed upon by parties on 20th July, 2012. Proceedings of 20th July, 2012 read as follows:

> **Chairman:** It is OK let's proceed. The issues have been agreed as follows:
>
> 1) what is the cause of fire

2) ....

The source and cause of fire are technical matters that must be sufficiently established in order to reach a fair decision as to who is responsible for the loss incurred in case of fire. Unfortunately, in our jurisdiction we lack fire scientists who carry out fire investigation and produce fire investigation report which could assist in determining liability in cases such as the current one. In developed countries like USA, there are fire investigation professionals who analyse fire related accidents in order to establish both the source and cause of fire. Usually, fire investigators come into play after fire extinguishers have extinguished the fire. Lack of professional body/persons in fire investigation is a challenge that we must seriously consider in ensuring justice is done. I believe 2nd respondent as a Regulator will take up this matter as a challenge to be worked upon immediately.

In the absence of fire investigation report prepared by a **professional fire investigator**, the source and cause of fire may be established by looking at the totality of the evidence submitted by parties. There being no evidence of inspection of the 1st respondent's wiring system, there being no evidence that the house was not properly wired or that the wires were worn out due to normal wear and tear and considering the total evidence before the 2nd respondent, EWURA rightly held that the appellant

was responsible despite the presence of Exhibit C2 which categorically states that the source of fire is UNKOWN. The 2nd respondent did not ignore exhibit C2. The 2nd respondent gave due consideration and weight to exhibit C2. Exhibit C2 cannot be considered as conclusive proof that the source (cause) of fire is unknown considering the expertise and duties of firefighters who produce such reports. It is the totality of the evidence presented before the 2nd respondent that would give conclusive decision as to who is responsible for the fire. By itself, exhibit C2 having not been conclusive evidence to overbear other evidence to the contrary was not adequate to support a conclusion that the source of fire was unknown. Thus, a mere statement that the source of fire is UNKOWN does not guarantee a decision to that effect in the presence of other evidence to the contrary. We therefore find ground 2 of the appeal without merit and we accordingly dismiss the same.

Coming to ground 3 of the appeal, Ms Mally argued that the reality on the site when both parties herein visited the *locus in quo* was not taken into consideration by the 2nd respondent. According to Ms Mally, this reality is the status of the appellant's electricity system which was safe. Conduit and wires did not indicate any sign that they were burnt. There was no jumper used instead of a fuse thus, no indication that fire started at the pole as claimed by the 1st respondent and his witnesses.

Page 8 of the decision of the 2nd respondent state as follows:

> **"Furthermore, the inspection conducted by the Division of the Authority revealed that the Complainant is being supplied power from transformer line 3. The inspection also revealed that the blue cable supplying power to the Complainant's house is black at the tapping point which indicates that at least at one time there was fire, heat or smoke that changed the insulator color from blue to black. It is our further observation that since the jumper wire that was used by the Respondent as the fuse in the circuit supplying power to the Complainant's house was different from other fuses in the same transformer before the accident implies that the original fuse in that particular circuit was either damaged or burnt due to overload."**

Moreover, the evidence on record shows that site visit was conducted on 22 May 2013 from 10 hours onward (see the order of the 2nd respondent in proceedings of 23rd April, 2013). Prior to site visit, the 1st respondent notified EWURA that on 23rd and 25th November, 2012 the appellant had made changes to the transformer in question by removing and replacing fuse and

jumper. The 1st respondent tendered his notification letter on 23rd April, 2013 and the same was admitted as evidence.

The appellant did not produce any evidence explaining the changes that the appellant made to the transformer on 23rd and 25th November, 2012 as notified by the 1st respondent. What the appellant dispute is the observation made by the 2nd respondent in the above reproduced paragraph. The appellant, however, has not provided the basis upon which this Tribunal can sustain this ground of appeal. There is no site visit report or any minutes taken during the visit to the *locus in quo*. The appellant request that the Tribunal visit the *locus in quo* is not maintainable since that would amount to taking fresh evidence and opening the case for a fresh hearing which is not desirable on appeal.

Having said so, we also find ground 3 of the appeal without merit and accordingly we dismiss the same.

Turning to ground 4 of the appeal, we would like to point out that the 2nd respondent when analysing the evidence submitted with respect to the first agreed issue stated as follows:

> **Also, the fact that CW2 and CW5 experienced power problems on the fateful day proves on the balance of probabilities that the fire started at the pole supplying power to the Complainant's house <u>as suggested by RW1 and RW3</u>.** (Emphasis by the Tribunal)

It was the contention of Ms. Mally that RW1 and RW2 never suggested that fire started at the pole. Also, Ms. Mally contended that the 2nd respondent's conclusion that the fire started at the pole based on uncorroborated claims by CW2 and CW5 was wrong since it is quite impossible for the fire to start there and the pole remain intact.

We must say that not everything that transpired before the 2nd respondent form part of the records of appeal. Nevertheless, the evidence on record does not indicate that RW1 and RW3 suggested that fire started at the pole. Poles form part of TANESCO's supply and transmission equipments. RW1 – Mr. Mahawa Cosmas Mkaka who is an electrical engineer working for TANESCO and RW3 – Mr. Alamu Kiwohere Kanuti, an electrician also working with TANESCO emphatically testified that the fire started from inside of the 1st respondent's house. RW1 and RW3 testified that wires from the pole to the bracket which transmits and supply power to the 1st respondent's house were safe but cut by TANESCO emergency team headed by RW3 in order to stop the supply of power to the 1st respondent's house after the fire had erupted.

The testimonies of RW1 and RW3 regarding the start point of the fire read as follows:

> **RA:** Explain the condition of the wires and pole that you found there

RW1: The wires were in good condition but were worn out because of fire

RA: Tell us, as an electrician, what was the source of fire?

RW3: The source of fire was unknown because the fire started from the inside of the house ...

RA: When you go to the incident area, how was TANESCO's infrastructure?

RW3: Fine except at the Complainant's house where the problem had started.

Based on the evidence on record, we do not see any suggestion from the testimonies of RW1 and RW3 that fire started from the pole. We therefore allow ground 4 of appeal.

We will now address ground 5 of appeal in which the appellant contended that the 2nd respondent was wrong to base its decision on uncorroborated claims by CW2 and CW5.

CW2 – Mrs. Dafrosa Kamili, a neighbour of the 1st respondent testified that he experienced electrical problems on the same day that the 1st respondent's house got burned and had seen fire starting at the pole. (See the proceedings of 20th July, 2012)

CW5 – Mr. Fokasius Rafael Miku, another neighbour testified that on the date that the respondent's house got burned, there were multiple power cuts in the area. CW5 also testified that he heard an explosion and experienced electrical problems such as busted lights and circuit breaker explosion in his house.

Thereafter, CW5 saw fire at the bracket supplying power to the 1st respondent's house from his window. (See the proceedings of 8th November, 2012)

The testimonies of CW2 and CW5 purely rest on points of fact, that is; whether there was electrical fault on 21st January, 2012, whether the fire that gutted down the 1st respondent's house was caused by that electrical fault; and whether the fire started from the pole or/and the bracket.

It is elementary that facts may be proved by oral evidence. Section 61 of the Law of the Evidence Act, Cap 6 R.E. 2002 (hereinafter referred to as "the Evidence Act") provides as follows:

> **61. All facts, except the contents of a document, may be proved by oral evidence.**

In addition, for the oral evidence to be sufficient, it is required to be direct. Section 62 of the Evidence Act provides as follows:

> **62. – (1) Oral evidence must, in all cases whatever, be direct; that is to say-**
>
> **(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it**

(b) If it refers to a fact which could be heard, it must the evidence of a witness who says he heard it;

(c) If it referes to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) .....

.....

(2) If oral evidence refers to the existence or condition of any material thing other than a document, the court may, as it thinks fit, require the production of such material thing for its inspection.

We hesitate to agree with the appellant that CW2 and CW5 testimonies were not proved since the testimonies by themselves amount to evidence. The 2nd respondent had the opportunity of requiring production of bulbs and or any electrical instrument that claimed to have been affected by the electrical fault that occurred on 21st January, 2012. CW2 and CW5 testimonies are direct and therefore could form the basis of the decision. In view thereof, ground 5 of the appeal is also dismissed.

As regards ground 6 of appeal, the appellant contends that the 2nd respondent completely neglected the testimonies of RW1 – Mr. Mkaka, the electrical engineer working for TANESCO, RW2 – Mr. Emmanuel Uno, a driver with the TANESCO Kinondoni North Emergency Department and RW3 – Mr. Kanuti, the electrician from TANESCO.

RW2 and RW3 visited *locus in quo* on the same day that the fire had erupted testified that when they reached the premises they found the house burning and neighbours rescuing children and one car from the house. RW2 and RW3 also testified that there was no adult in the house. (See proceedings of 7th March, 2013) In addition, RW1, electrical expert, who visited the *locus in quo* two days after the accident for purposes of inspecting electrical lines which he found to be safe, outlined various reasons which could cause a house to burn. Those relating to electricity are such as when two live wires come into contact, if a live wire comes into contact with a neutral wire, if a wire is too small to handle the electricity load causing the wire to break, worn out wires which come into contact, if a circuit breaker fails to trip due to the earth resistant being high, a loose connection, sparks or a defective circuit breaker. Those relating to other factors are such as gas cooker, candles, cigarette butts and matches to mention just few. (See proceedings of 9th November 2012). RW1 and RW3 also testified that the fire was not caused by negligence on the part of TANESCO's technicians and denied to have used a jumper in the

place of the fuse on the transformer when carrying out maintenance work a day earlier as claimed by CW1 and CW5. According to RW1 if a jumper wire is used on the transformer, electricity would flow directly, thus, no protection to the customer at all. RW1 and RW3 further testified that customers who tap power from the same pole were not affected in the same way as the 1st respondent.

We must acknowledge the technicality involved in this matter especially in the testimonies of RW1 and RW3. Moreover, we must also acknowledge that the testimonies of RW1 and RW3 contradict each other on the aspect of which fuse blew, between fuse number 1 and number 3 which the 1st respondent claim to have been replaced by a jumper on 20.1.2012 resulting in the fire outbreak in the 1st respondent's house. This contradiction could be due to the fact that RW1 and RW2 were not present when maintenance of the transformer was carried out on 20/1/2012. Despite their emphatic testimony that the blown fuse was replaced by another fuse not a jumper, their evidence is hearsay.

RW1 and RW3 testimonies also contradict each other on the aspect of whether or not line patrol was performed when the power was restored on 20.1.2012. In addition, RW1 categorically testified that 1st respondent's meter was not inspected before 20.1.2012 and confirmed that only customers who report a problem get inspected.

In the proceedings of 9th November, 2012, RW1, upon being shown Exhibit C1 – the picture of the transformer showing the transformer base and the PC cut out, RW1 acknowledged that on one PC cut out there was a fuse while on the other PC cut out a fuse was not visible. Moreover, RW1 testified that he did not find the lead-in-wire or the meter when he went to inspect the debris which implies that they were either burnt or removed.

As an appellate body, the Tribunal reviews evidence in order to determine whether the decision of the 2nd respondent reached upon the evidence in question should stand.

The testimonies of RW1, RW2 and RW3 failed to sufficiently rebut the 1st respondents' contention supported by exhibit C1 that on 20.1.2012 the emergency team removed the blown fuse and put a jumper instead of a rated fuse which resulted into the fire. The 2nd respondent simply based its decision on the evidence that has the most convincing force. By doing so, it did not completely neglect the appellant's evidence. As stated by the 2nd respondent in his skeleton arguments, the 2nd respondent took into consideration the facts of the matter, testimonies and material evidence that were presented to it "and the testimonies of RW1; RW2 and RW3 did not present strong evidence to exonerate the appellant from liability."

In addition, in the absence of fire investigation report exonerating the appellant from liability, the line patrol report and the

inspection of the 1st respondent's electrical system report; observations of the 2nd respondent after visiting the *locus in quo;* and the direct evidence of CW2 and CW5 on what had occurred on 21st January, 2012 we find it difficult to depart from the 2nd respondent's conclusion that the fire was caused by the negligence on the part of the appellant. A mere fact that the children were alone in the house when the fire erupted does not shift the liability to the 1st respondent.

It is our opinion that on the basis of all the testimonies, evidence tendered, observation made by the 2nd respondent when visiting the *locus in quo* and submissions made by parties, the decision of the 2nd respondent to hold the appellant responsible for the fire that caused the 1st respondent's house to burn is reasonable and therefore cannot be faulted. The 1st respondent proved on the balance of probability that the fire resulted from the negligence on the part of the appellant. The standard of proof has been met and the appellant failed to sufficiently refute the 1st respondent's claim. The standard of proof is met not necessarily by the greater number of witnesses but by evidence that has the most convincing force.

In the event, and for the reasons stated above, we uphold ground 4 of appeal and dismiss the other grounds of appeal with costs.

It is so ordered.

Judge Z.G. Muruke – Chairman

Mrs. Nakazael L. Tenga – Member

Mr. Gregory L. Ndanu – Member

Judgment delivered today 23/04/2015 in the presence of Mr. Luguvu for the 1st respondent, Mr. Dinani holding brief of Mr. Mkuba for the 2nd respondent and in the absence of the appellant duly notified.

Judge Z.G. Muruke – Chairman

Mrs. Nakazael L. Tenga – Member

Mr. Gregory L. Ndanu – Member

23/04/2015