IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 1 OF 2016

IBRAHIM AMANI FUNDI ..... APPLICANT

VERSUS

TANZANIA ELECTRIC SUPPLY

COMPANY LIMITED ..... 1ST RESPONDENT

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY ..... 2ND RESPONDENT

JUDGMENT

On 15th September, 2008, the house of Ibrahim Fundi, the appellant herein, was burnt into ashes. On 21st October, 2008, the Energy and Water Utilities Regulatory Authority (EWURA) 2nd respondent received a complaint from the appellant on the fire incident against Tanzania Electric Supply Company Ltd (TANESCO), the 1st respondent. The appellant's complaint before the 2nd respondent was that, the fire that destroyed his house and properties started from the meter and spread to the main switch therein which he alleged was caused by an electric fault from the 1st respondent's system. Consequently, Ibrahim Fundi

claimed for compensation amounting to Tshs. 36,372,200/= being the value of the destroyed house and properties therein.

After receipt of the reply from the 1st respondent (TANESCO) efforts to mediate the parties by the 2nd respondent's complaint unit were made and proved futile. On 14th February, 2012 Ibrahim Fundi's complaint was referred to the Division of the 2nd respondent for hearing. The matter proceeded for hearing before the 2nd respondent until 8th August, 2014 when it was dismissed for failure by appellant (then complainant) to substantiate his claim against TANESCO (1st respondent).

Mr. Ibrahim Fundi, being dissatisfied, did not file appeal within time. He filed application for extension of time to file notice of appeal against the decision of the 2nd respondent on 8th August, 2014. After being granted leave to file notice of appeal out of time by this Tribunal, he filed the same on 11th May, 2015. Thereafter, the appellant was required to file records of appeal within 21 days of lodging his notice of appeal in terms of rule 11(1) of the Fair Competition Tribunal Rules 2012 GN No. 210 of 2012. However, the appellant failed to file records of appeal within time. On 14th August, 2015 he filed another application for extension of time under rule 21(1) and 26 of the FCT rules 2012.

Considering the circumstances explained in the affidavit, that the appellant was depending on legal aid briefs and based on the principle of right to be heard, this Tribunal granted appellant 14

days extension of time within which to file his appeal from 8th February, 2016, hence the present appeal before us.

The appeal before us raises 6 grounds of appeal, namely:

1. That the trial Regulatory erred in law and fact in evaluating evidence and came to wrong conclusion.
2. That the trial Regulatory erred in law and fact by failing to consider that the source of fire was caused by the 1st respondent.
3. That the trial Regulatory Authority erred in law and fact by failing to consider that the appellant had several times reported about the problem.
4. That the trial Regulatory Authority failed to consider evidence of DW2 who explained the source of fire.
5. That the trial Regulatory Authority erred in law and on finding that the 1st respondent is not liable despite supplying poor quality service.
6. That the trial regulatory Authority erred in conducting the trial by post pone it unreasonably, the case was filed in 2008 but award was delivery in August, 2014.

Respondent having filed reply to the memorandum of appeal, issues for determination are:

(i) Whether the trial authority Authority erred in law and in fact in evaluating evidence and came to the wrong decision.

(ii) Whether the 2nd respondent erred in law and fact by failing to consider that the source of fire was caused by the 1st respondent.

(iii) Whether the appellant had on several occasions reported power problems to the 1st respondent.

(iv) Whether the 2nd respondent failed to consider the evidence of DW2.

(v) Whether the 1st respondent is liable to pay compensation to the appellant.

On the date set for hearing, the appellant appeared in person, the 1st respondent was represented by Mr. Florence Kahatano, while 2nd respondent used the services of Mr. Thomas Sipemba, learned advocate. The appellant prayed for the appeal to be disposed of by way of written submission. Tribunal granted the same after having consulted respondent's counsel.

As a matter of convenience, we will first consider ground 1, 2 and 4 together as, in our view, these grounds revolve around one central issue, that is, whether the 2nd respondent failed to properly evaluate the evidence presented before it and as a result arrived at a wrong conclusion. It is worth noting that in his

written submission the appellant abandoned ground 6 of the appeal.

Arguing the appeal, the appellant's counsel submitted that failure by the authority to accept testimony of the 2nd witness was fatal. The appellant's counsel further submitted that 2nd witness testified that the fire was so severe that a major part of the house was destroyed completely. To the appellant that piece of evidence was to be accepted by the 2nd respondent. The appellant maintained that, had the Authority properly evaluated evidence that was presented before it, especially that of expert witness, the conclusion would have been that it is the 1st respondent's act that caused eruption of fire.

In response, the 1st respondent submitted that, the trial Authority considered the appellant's evidence including expert evidence of Engineer Mwesigwa Kamulali who conducted investigation as independent consultant. According to the 1st respondent, at the end of investigations, the expert witness concluded that the source of fire was due to the burning of the cables but he could not technically say who was responsible with the accident. It was further submitted by 1st respondent that, the complaint was resolved in favour of the 1st respondent not because it was handled as criminal case but rather the appellant failed to discharge the burden in proving that the source of fire that

destroyed his house was an electric accident caused by 1st respondent's acts.

On the other hand, the 2nd respondent submitted that, the authority was right in holding that the appellant did not establish by evidence that it is the 1st respondent act that caused fire to his house. From the extract of the proceedings dated 29th February, 2012 at page 3, the appellant's testimony simply explains that his house caught fire that was caused by an electric fault. There is no any evidence verbal or otherwise which was given by the witness as to the source of fire. In such a situation, the 2nd respondent's counsel insisted that it is not proper to hold that the case was proved on the balance of probability, insisted.

With due respect to the appellant's counsel, we think that the 1st and 2nd respondent are right. It is apparent from the record that neither the appellant (CW1) nor **the 2nd witness CW2, Mr. Kimaro, told the authority in their testimony** the source of fire. According to **exhibit C1 Fire Accident Report from Fire and Rescue Department**, the fire started from the electricity meter and spread to the main switch. However, the fire brigade failed to establish the source of fire as they concluded that **"chanzo cha moto hakijulikani"** which literally means that, **the source of fire is unknown**. The appellant's contention that expert evidence of Mr. Mwesiga Kamulali (DW) support his case

is, in fact, not true. For clarity, evidence of (DW) on the proceedings dated 15th April, 2014 at page 2 documents the following question and answer:

> **"Chairperson: Based on your investigation, can you tell us anything on the source of fire?**
>
> **DW: What I have written in the report is what we saw. We couldn't determine exactly that it was TANESCO's fault or that Mr. Fundi's installation that was the problem due to the time lapse between the incident happening and the investigation taking place. It is possible that the service line might have had problems or a possible short circuit from TANESCO's part of customers. The source of fire was electricity but we could not prove beyond reasonable doubt that it was TANESCO or customer's fault that the fire occurred. That is all I can say for the time being".**

From the above piece of evidence, we do not see the basis of the appellant averment that the evidence presented support that it is the 1st respondent's act that led to the fire outbreak which burnt

down his house. Unfortunately, there is no any other evidence to the contrary. Looking at exhibit C1 and C2 and testimonies of CW1, Ibrahim Fundi (the appellant) CW2, Mr. Kimaro (appellant's neighbour), RW1, and RW2 both witnesses stated that fire started inside the appellant's house. From the evidence on record, it is hard to say whether the source of fire originated from the 1st respondent supply system or from the complainant's internal electric equipment.

Indeed, we do not see any reason to interfere with the finding of the 2nd respondent. It is therefore our firm view that the trial authority did correctly evaluate the evidence and facts and arrived at a correct conclusion. At this juncture, we find it important to point out that while this Tribunal, being an appellate body, has jurisdiction to interfere with the findings of the trial authority on matters of fact to determine whether the conclusions of the trial authority should stand, such jurisdiction is exercised with caution. This Tribunal can only interfere with such findings if there is no evidence to support a particular conclusion or if it is shown that the trial authority has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. This is a long established principle of law in East Africa as stated by the Court of Appeal for Eastern Africa in the case **of Peter v. Sunday Post Ltd (1958) EA 424** which was also adopted by the Court of Appeal in the case of **Melita**

Naikiminjal & Loishitaari Nakiminjal v. Sailevo Loibanguti (1998) T.L.R 120. Unfortunately, the appellant has failed to demonstrate any of the three prerequisites that would convince this Tribunal to interfere with the findings of the trial authority. With the above findings ground no. 1, 2 and 4 lacks merits, and we accordingly dismiss the same. This conclusion brings us face to face with ground 3 of the appeal.

Coming to ground 3 of the appeal, the issue for consideration and determination is whether the appellant had on several occasions reported power problems to the 1st respondent. The appellant's counsel submitted that the evidence of DW, Engineer Mwesiga Kamulali, and complainant himself, Ibrahim Fundi, (CW1) prove that there were several reports to the 1st respondent on the appellant's meter problem but nothing was done. It was further submitted that, the 1st respondent failed to produce service contract between the appellant and herself, and yet, the trial Authority failed to make proper analysis of evidence and as a result came to the wrong conclusion.

Countering this submission, learned counsel for the 1st respondent submitted that the appellant in his own testimony on 29th February, 2012 before the Authority, stated that he used to experience problems inside his house at the main switch. The appellant used to call TANESCO to rectify the problems. Learned

counsel therefore maintained that, the appellant's allegations on non-attendance to the problem reported in relation to meter were baseless.

On his part, counsel for the 2nd respondent submitted that from the evidence presented before the Authority, there were no power problems reported on the fateful day except for one witness who claimed that his circuit breaker tripped off just before the accident. The 2nd respondent's counsel insisted that from the proceedings dated 29th September, 2012 the only power problem reported was that of 2001. He maintains that since the fire in dispute occurred 8 years later, it is not proper to connect the report of 2001 that was attended to and the fire incident of 2008.

Having heard both parties on this issue, it is worth nothing that, throughout the proceedings there is no evidence that Mr. Ibrahim Fundi reported any meter problem that was not attended by the 1st respondent. Apart from what has been said by CW2, Mr. Kimaro, that they reported on the date that fire erupted at the appellant's house, there is no other evidence to prove the presence of other reports. On being asked whether he has evidence to prove, Mr. Ibrahim Fundi replied that, the documents were inside the house that was reduced into ashes by fire. With the above situation, since the appellant is the one alleging, the

2nd respondent was to be convinced by evidence from the appellant at the hearing. With bare assertion, the 2nd respondent was correctly right to hold that, there is no evidence to prove that the appellant reported power problems to the 1st respondent. We, as the Tribunal, share the same view with the 2nd respondent that he who alleges must prove. It is unfortunate, if at all, that, there were reports that were burnt in the course of fire accident at the appellant's house. This Tribunal being an appellant forum, is bound by record of proceedings. There is nothing on record for us to believe and act on and reverse the findings of the Authority. Indeed, we would say that the appellant failed to discharge his burden of proof on a balance of probability to prove his own case.

After the above observation, and in the light of evidence on record, we are at one with the 1st and 2nd respondent that the 3rd ground of appeal is equally devoid of merit and is accordingly dismissed.

As regards ground 5, the issue before us is whether the 2nd respondent erred in law and fact in finding that the 1st respondent is not liable on allegation of poor quality service. Appellant's counsel submitted that, it is evident that 1st respondent did supply poor service which is the cause of the fire that burnt the appellant's house, who built the house in his lifetime. Appellant's counsel maintained that, poor service could be the reasons to

provide compensation as they fail to give source of fire. He submitted that on the balance of probabilities it is the 1st respondent who did cause the fault to the innocent old man's house. The case took 5 years and the old man is still pushing for his right. Appellant's counsel, insisted that, appellant was not represented at the authority, and thus pleaded with this Tribunal to consider his case fairly and decide in his favour.

Resisting ground 5 of the appeal, the 1st respondent submitted that, it is not true that 1st respondent supplied poor quality electricity, since the appellant failed to support or prove his allegation. The 1st respondent's counsel insisted that these are mere fabrications because the appellant does not possess any expertise and neither did he engaged an expert to enable him to arrive at conclusion that the quality of electricity on the date of accident.

The 2nd respondent on his part strongly submitted that, the issue of quality of electricity was never raised as an issue before the authority. There was no evidence to support poor service by the appellant, therefore, the 2nd respondent cannot be held liable for the fire outbreak.

It is worth noting that what was before the authority for determination was as follows:

(i) What was the source of fire

(ii) Whether there was negligence on either party

(iii) Whether either party suffered damage, as a result of negligence.

(iv) What reliefs are parties entitled.

As correctly submitted by the 2nd respondent, the issue of quality electricity was not one of the issues framed and determined on the hearing of the complaint by Ibrahimn Fundi, the appellant herein. This Tribunal, being an appellate forum, will only deal with issues that were discussed by parties and that were reflected in the proceedings. Having noted as above, this is a new issue that never featured in the proceedings. We therefore, cannot deal with the issue at appellate stage because it is an afterthought point raised as ground of appeal. We find authority to hold so from the decision of the Court of Appeal in the case of **Melita Naikiminjal** (supra) where the Court of Appeal was faced with a similar situation in which an issue that was not raised by the appellant in the first appeal in the High Court was raised for the first time in the Court of Appeal. The Court of Appeal had this to say:

> "Obviously, the appellants cannot be heard to complain against the first appellate judge, **as that judge was not bound to decide the appeal on issues or matters not raised by the appellants.**

Again, the Court of Appeal for Eastern Africa in the case of **Alwi A. Seggaf v. Abed A. Algeredi (1961) E.A 777** in a slight different context said the following:

> "It may be that there is substance in Mr. Chaddah's contention, but, in my opinion, **to allow the point to be taken for the first time on second appeal could be grossly unfair to the appellant. The point was never pleaded, was never in issue at the trial and the relevant facts were never investigated" (**Emphasis by the Tribunal).

Having satisfied ourselves that the issue of quality of electricity was not an issue that was discussed before the Authority, we accordingly dismiss ground 5 of the appeal for lack of merits.

This brings us to the final issue as to whether the appellant, from the proceedings and evidence available, is entitled to damages i.e payments of Tshs. 36,372,200/=. This question should not detain us much. As already stated, the 1st respondent was not responsible for the fire outbreak that destroyed the appellant's house. Damages normally arise out of breach of contract or duty of care. They follow an event that has not been done, in a proper manner. In the present case, there is nothing that the 1st respondent breached or ought to have done to prevent the appellant's suffering. Thus, the 1st respondent cannot be condemned for the fire incidence. That being the case, the 1st

respondent cannot be held liable in damages. We find authority to hold so from the decision of the Court of Appeal in the case of **Tanzania Saruji Corporatin v. African Mabble Company Limited (2004) TLR 155,** the Court of Appeal remarked at page 157:

> **"The position is that general damages are such as the law will presume to be the direct natural and probable consequences 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)

Also this Tribunal in the case of **Juma Mpuya v. Celtel Tanzania Limited (Appeal No. 1 of 2007)** held 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. For ease of reference we quote the relevant part of the judgment at page 18:

> "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 ours)

Before we conclude our judgment, we should admit that we sincerely sympathise with the appellant for the fire incidence that gutted down his house. However, sympathy cannot override the law as it was held by the Court of Appeal in the case of **Mokeshi Mlowe v. R. (Criminal Appeal No. 125 of 2007 at Iringa**) (unreported) and followed by the decision of the High Court in the case of **Oceanic Bay Hotel Ltd v. Real Insurance (Tanzania) Ltd (2013) 2 EA 214**. Had the appellant proved his case on a balance of probability, the trial authority would have arrived at a different conclusion. Unfortunately, as we already have seen, the appellant failed to discharge that duty and consequently, this Tribunal (no matter how sympathetic we can be) cannot in law interfere with the findings of the trial authority.

In the final analysis, having found that all grounds of appeal are devoid of merit, the appellant is not entitled to damages. Consequently, the entire appeal is hereby dismissed.

Bearing in mind the circumstances of this case that the appellant was represented by the Legal Aid of the Tanganyika Law Society, we would refrain from making any order as to costs.

It is so ordered.

Judge Z.G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Mr. Gregory L. Ndanu – Member

22/06/2016

Judgment delivered this 22nd day of June, 2016 in the presence of Dimesh Manji Advocate for the appellant, Mr. Kahatano for the 1st respondent and Mr. Jonathan Luluga holding brief of Mr. Juvenalis Ngowi for the 2nd respondent.

Judge Z.G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Mr. Gregory L. Ndanu – Member

22/06/2016