IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 12 OF 2019

PASCHAL MUSHI.....1ST APPELLANT

SABINA SUNGURA.....2ND APPELLANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LTD (TANESCO).....1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA).....2ND RESPONDENT

JUDGMENT

The brief facts constituting this appeal is that, on 14th October, 2015 the appellants' house located at Kibaha, Picha ya Ndege was gutted down by fire and all the properties therein were destroyed. The appellants lodged a complaint at Energy and Water Utilities Regulatory Authority (hereinafter referred to as "EWURA") praying for an order that the 1st respondent pays them TZS 200,000,000.00 being compensation for the house and the properties therein allegedly that the fire was caused by the 1st respondent's defective

meter. Upon interparty hearing, the complaint was dismissed for want of merits. The appellants herein being dissatisfied with the whole decision of EWURA, delivered at Kibaha – Njuweni Hotel on 22nd day of June, 2019 lodged the instant appeal to this Tribunal on four grounds, namely:

1. That, the Authority erred in law and facts by failure to consider the evidence on the face of record about the source of fire.
2. That, the Authority erred in law and facts by reaching its decision without considering the evidence of negligence on part of the 1st respondent.
3. That, the Authority erred in law and facts for holding that, the source of fire was not defective meter by basing on information of neighbours, while disregarding the evidence of the eye witnesses.
4. That, the Authority erred in law and facts by failing to award any compensation while the appellants suffered loss as a result of fire.

WHEREFORE, the appellants sought for the following orders:

1. This appeal be allowed and the whole decision of the Authority be quashed and set aside.
2. This Tribunal orders that the source of fire was due to defective electric meter, and there was negligence on part of the 1st respondent.

3. This Tribunal be pleased to order the 1st respondent to pay the appellants jointly general damages for the loss of personal effects and house in result of fire.

4. Any other order (s) or relief (s) this Tribunal may deem fit and just to grant.

5. Costs of this appeal be provided.

Only the 1st respondent filed written skeleton arguments in accordance to rule 28 of the Fair Competition Tribunal Rules of 2012.

At the hearing, the appellants were duly represented by senior counsel Mafuru Mafuru. The 1st respondent was represented by senior counsel Thadeo Mwabulambo while the 2nd respondent was represented by counsel Hawa Lweno.

Mr. Mafuru argued jointly the first and third grounds. Thereafter, he argued second and fourth grounds together. On the first and third grounds, Mr. Mafuru referred the Tribunal on page 83 – 84 of the record of appeal, where there is the holding of the Authority that the appellant failed totally to provide evidence in regard to the source of fire. That, no eye witness who witnessed the source of fire. Mr. Mafuru asserted that CW2 was told by CW3 that the source of fire was defective meter and that CW3 told CW2 the source of fire and that there is no direct evidence which established the source of fire.

Mr. Mafuru referred the Tribunal on the requirement of the one who alleges has to prove the case as per Section 110 (1) and (2) of the Evidence Act, 1967. The standard is on balance of probabilities. Section 110 (1) & (2) of the Law of Evidence (Cap. 6) R.E 2019 provides that:

(1) Whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person

And section 111 of the Evidence Act, *supra* provides that:

> "The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."

On evaluating evidence, counsel Mafuru submitted that the court has to be guided by relevancy, substance materiality and reliability. Counsel Mafuru quoted the case of **DPP v. Sharif Mohamed Athuman & 6 Others, Criminal Appeal No. 74/2016 (CAT)**. The gist of contention on the first and third grounds, as per counsel Mafuru was that the evidence of CW2 and CW3 are found at page 37 – 43, CW5 is at page 44 – 58. At page 40 of the record of appeal CW2 believed the meter had exploded. The defective meter had been reported several times at Kibaha but no actions were taken.

Mr. Mafuru went on to argue that, going through the evidence of CW2 no *sintilla* of evidence that CW2 told CW3. There is independent evidence of CW3 as per page 46 of the record of appeal who made an investigation. They found that the meter was completely burnt. The source of fire was the meter which was always defective. By evidence is loud that the source of fire was defective meter.

In response, Mr. Mwabulambo admitted that the meter was inside the house, and it was installed in 1999. According to Mr. Mwabulambo, during those days, meters were scarce, theft was high, meters were installed inside for safety but that is not a fidelity to say it was a source of fire. It was the duty of the appellant to prove that the fire was caused by TANESCO infrastructure. Mr. Mwabulambo denied the assertion that the meter exploded. It was burnt, the meter never explodes but it shrunk. Due to materials the meter is made of, it cannot explode added Mr. Mwabulambo. At page 39 – CW2 is testifying hearsay that it was the defective meter. At page 16 of the record and page 36, 37 there is contradiction on the source of fire. At page 41, there is evidence that, no problem happened after TANESCO put a clamp. According to testimony of RW1 at page 57, it is clear that defect could be backward.

On her part, counsel Lweno made few additions. She submitted that, in arriving at its decision, EWURA considered oral testimonies of the parties, documentary evidence, finding from site visit and

applicable laws. Upon site visit on November, 2015 and considering the totality of evidence the appellant failed to discharge their duty of proving their allegation on balance of probabilities.

Counsel Lweno submitted that, page 82 of the proceedings, on site visit, EWURA found the respondent's infrastructures were intact and not changed since the incident. There was contradiction in evidence of CW2 and CW3 which we clearly observed from their testimonies. On the case of DPP cited, counsel Lweno asserted that it is irrelevant and inapplicable on admissibility of evidence.

With due respect to senior counsel Mafuru, as we did observe in **Ibrahim Amani Fundi v. Tanzania Electric Supply Company Limited and Energy and Water Utilities Regulatory Authority, Tribunal Appeal No. 1 of 2016.** The Tribunal, being an appellate body, 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. In this appeal, it is plainly in record. The testimony of CW1 was hearsay as he was not at the scene. At page 32 of the proceedings, it is clear that the incident occurred when CW1 was on safari to Zambia. On that basis, the whole of evidence of CW1 was a hearsay evidence. The 2nd respondent was therefore correct for not taking any consideration on that kind of testimony. Section 62 of the Evidence Act, Cap 6 provides the general rule on the admissibility of hearsay evidence. It requires that oral evidence in all cases be

direct. That is the best evidence. Whatever is not direct is hearsay and not admissible. Even if admitted, it is of no value. The Court of Appeal of Tanzania in the case of **Vumi Liapenda Mushi v. The Republic, Criminal Appeal No. 327 of 2016 at Arusha** (unreported) observed that hearsay evidence is of no evidential value. The same must be discredited.

The decisive question, however, is; what was the source of fire? According to CW2, the source of fire was defective meter but there was nothing in record to establish such cause. Further, during cross examination CW2 admitted that she did not experience any problem before fire incident. It is evident at page 13 of the proceedings.

Again, at page 10 of the same proceedings, as pointed out by the 1st respondent in its skeleton arguments, CW2 testified that:

> **I got to the living room and found it on fire, I managed to get out through the back door.** (Emphasis by the Tribunal).

From the above piece of evidence of CW2, it is doubtful if she could make a proper decision. Any reasonable person was to get out of the house immediately to save her life and not concentrate on what caused the fire accident.

Though counsel Mafuru has refuted the argument that there was contradiction of evidences on the claimant side, the record remains clear and proves the existence of contradiction. The Tribunal will

consider some of the contradictions. CW2 testimony was to the effect that "mita ililipuka" meaning that the meter exploded. CW2 added that after explosion, the fire spread to the whole room. As pointed out by Mr. Mwabulambo in his skeleton arguments, **Black Law Dictionary** *(*without citation*)* defines the term explode to mean *a sudden and rapid combustion causing violent expansion of the air or the sudden bursting or breaking up in piece from internal or other forces.*

Equally, ***Conscise Oxford English Dictionary, 11th edition, Oxford University Press, 2008*** *defines the term explode "as burst or shatter violently, especially as a result of rapid combustion or excessive internal pressure."*

From the above interpretation of the word explode, it follows, therefore, that during fire investigation conducted by fire brigade the meter was not on its location because if the meter exploded it busted into pieces and spread all over the area. As such, during the period of investigation there was nothing in the wall to suggest that the fire started at the meter.

Again, the testimony of CW3 is based on the hearsay, he was not in a position to know that the meter was defective as during investigation the meter was already burnt part of said report states as follows:

"SABABU YA MOTO

Hitilafu katika mita ya umeme iliyopo sebuleni (shuhuda wa kwanza Sabina d/o Hamisi Sungura) anathibitisha kwa kusema aliona moto umepamba mahali hapo kabla haujasambaa." (Emphasis by the Tribunal)

This statement shows that the fire investigation report was based on information given by CW2 and was not based on expert opinion. As such, it was not a scientific report rather a report based on hearsay evidence from a lay person.

Though we agree with senior counsel Mafuru that on evaluating evidence, the court has to be guided by relevancy, substance materiality and reliability, in this case, hearsay evidence and contradictory statement of evidence from CW1, CW2 and CW3 cannot be said to be reliable, relevant or material in substance. A contradictory evidence is not an evidence of value as it applies with a hearsay evidence. The appellant had a sole duty of proving the source of fire was the defective meter. In the cited case of **Richard Mchimbulugu Kabudi v. Tanzania Electricity Supply Company Ltd and The Energy and Water Utilities Regulatory Authority, FCT, Appeal No. 6 of 2018 (**at page 19 para 2) this Tribunal had this to say:

"We noted the appellant failed to prove its case on the standard required by law. No evidence was adduced to prove that fire started from the bracket or pole. The law is very clear he who alleges has to prove..."

As noted earlier, the appellant in the instant case dutifully failed to prove that the source of fire accident to his house was the defective meter of the 1st respondent. As such the complaint was not proved on balance of preponderance.

On the 2nd ground, counsel Mafuru referred at pages 84 and 85 where the Authority held that the 1st respondent had no duty of care where the source is not respondent's infrastructure. In view of Counsel Mafuru, Tanesco was negligence in attending the faults reported for action. But the evidence on record shows there was a breach of statutory duty. Counsel Mafuru made reference to **the commentary of Winfield and Jolowicz on Tort, 12th edition, Sweet and Maxwell, 1984 at page 162** in which the author observed that the breach of duty must have caused the damage.

On the 4th ground, that the authority erred for failure to grant compensation. The evidence is loud and clear that the appellant deserved compensation upon proof of source of fire and negligence.

In reply on negligence, counsel Mwabulambo submitted that the appellants failed to establish source of fire, so that is why one cannot implicate Tanesco for negligence. Thus, Tanesco cannot pay someone who has not established evidence to entitle him/her compensation.

In reply on negligence, counsel Lweno reiterated EWURA's finding at page 83 of the record as it was unable to find the 1st respondent negligent for failure to establish source of fire.

Equally, on compensation, there was no proof of source of fire and EWURA cannot grant damages to the appellant on what he is not entitled. Further, in their testimonies they said the house is worth 80,150,000/= and not 200,000,000/= as claimed.

In rejoinder, Mr. Mafuru reiterated his submission in chief. Thus, Tanesco did not do their duty. Negligence is established on the part of the 1st respondent, so long as the source of fire was on defective meter.

The Tribunal has carefully gone through the submission and arguments on the 2nd and 4th grounds of the appeal. As correctly submitted by the respondents, the appellants failed to prove the source of fire to be; **one** the defective meter; **two**, the explosion of the alleged defective meter. As such, there is no weightier evidence which suggest that the 1st respondent was negligent.

Apart from that, it was the duty of the appellants to establish the negligence on the part of 1st respondent but the appellants failed to do the same and therefore the 2nd respondent was correct to hold that the 1st respondent was not negligent.

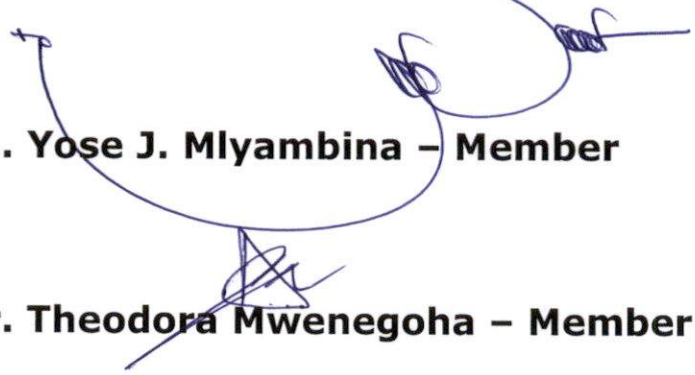
Indeed, failure of the appellant to prove that the fire which burnt their house was actually caused by the 1st respondent's meter,

justified the 2nd respondent not to issue any kind of compensation to the appellant.

In totality of the above findings, this appeal is found to have no merits. But considering the nature of the appeal, we end up dismissing it with no order as to costs. Order accordingly.

Dated at Dar es Salaam this 13th day of August, 2020.

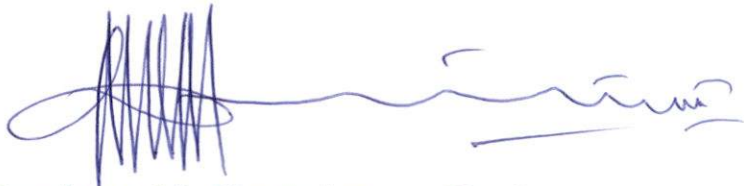
Hon. Judge Stephen M. Magoiga – Chairman



Hon. Yose J. Mlyambina – Member

Hon. Dr. Theodora Mwenegoha – Member

Judgment delivered this 13th day of August, 2020 in the presence of Sia Ngowi Advocate for the Appellant, Hawa Lweno Advocate for the 2nd Respondent also holding brief for Thadeo Mwabulambo, Advocate for the 1st Respondent.



Hon. Judge Stephen M. Magoiga – Chairman

Hon. Yose J. Mlyambina – Member

Hon. Dr. Theodora Mwenegoha – Member

13/8/2020