IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 8 OF 2020

HAMISI RAMADHANI .....APPELLANT

VERSUS

VODACOM TANZANIA PLC ..... 1ST RESPONDENT

TANZANIA COMMUNICATIONS

REGULATORY AUTHORITY .....2ND RESPONDENT

JUDGMENT

The Appellant, HAMISI RAMADHANI, aggrieved by the decision of the 2nd Respondent herein above given at Dar es Salaam on the 17th day of April, 2020 appeals to this Tribunal against part of the decision on the following grounds of appeal, namely:-

1. That 2nd Respondent having found that the 1st Respondent was in fundamental breach of the contract erred in law and fact for failure to award prompt reliefs sought;
2. The 2nd Respondent erred in law and fact for failing to realize that while in the course of follow-ups with the 1st Respondent, the Appellant had incurred necessary damage;

3. The 2nd Respondent erred in law and fact in holding that with the gross violation of the contract done by the 1st Respondent, the Appellant still continue to generate profits without regard to damage necessitated by the 1st Respondent's breach;
4. The 2nd Respondent erred in law and fact in failing to realize that, during the alleged transaction, what the Appellant subscribed was the internet service for corporate and not for individual customer as ruled;
5. The 2nd Respondent erred in law and fact by failure to analyse evidences tendered by the Appellant during trial in proving the sustained injuries.

On those grounds, the Appellant prayed that this Tribunal be pleased to issue the following orders namely:-

i. Part of the 2nd Respondent's findings be revised and set aside to the extent pleaded in the raised grounds above in favour of the Appellant;
ii. An order for grant of the sought reliefs for compensation, general damages and reimbursement of subscription fees;
iii. Costs for this appeal and in the Authority below;
iv. Any other relief this Tribunal may deem fit and just to grant.

Upon being served with the memorandum of appeal, the Respondents as required under Rule 19(1) and (2) of the Fair Competition Tribunal Rules, 2012, each filed reply to the memorandum of appeal disputing the grounds raised as unmerited

and each invited this Tribunal to find and hold that this appeal is without any useful merits and proceed to dismiss it with costs.

The facts pertaining from this appeal, albeit in brief, are that, on 10th October, 2017, the Appellant under the solicitation of the 1st Respondent's officers subscribed to special offer of internet worthy Tshs.100,000.00 package to be paid monthly. The fact goes that, despite the fact that the Appellant complied with all the conditions as given by the 1st Respondent, he was not given the services to the chosen package as up to the end of November, 2017. Further follow-ups by the Appellant to get the services was in vain, but later was told that, there were technical issues that caused the delay to get the services and further directed to pay an additional amount of Tshs.100,000.00 which he paid as instructed. This as well did not work. Subsequently, the matter was referred to the 2nd Respondent with several prayers of reliefs and which after hearing the complaint, delivered its decision on 17th day of April, 2020, with an order that, the 1st Respondent does provide internet service to the Appellant under the category of individual customer for five (5) months free of charge as compensation for disturbance caused during follow-ups. Aggrieved by that order, the Appellant appealed to this Tribunal, hence, this judgement in appeal.

When this appeal was called on for hearing, the Appellant was enjoying the legal services of Mr. Desderius Hekwe, learned Advocate. The 1st Respondent had the legal services of Mr. Juvenalis

Ngowi, learned Advocate and the 2nd Respondent was represented by Ms. Happiness Flavian, learned State Attorney.

Mr. Hekwe when invited to argue the appeal, at the outset informed the Tribunal that, he prays to drop grounds 2, 3 and 5 of the memorandum of appeal which were all boiling down to special damages and remains with the 1st ground of appeal and 4th ground of appeal which the latter now will be ground number two.

Arguing ground number one, the learned Advocate for the Appellant prayed to adopt the memorandum of appeal and the skeleton written arguments in support of the first ground of appeal.

In his oral arguments, Mr. Hekwe submitted that, after the 2nd Respondent found that the 1st Respondent was in breach of the contract, it ought to have awarded prompt payments because the breach forced the Appellant to look for another service provider, the order is not clear whether it was specific performance or general damages. According to Mr. Hekwe, at least Tshs.100,000,000.00 would do justice to this case because he suffered psychologically in the course of following up the matter.

The 1st Respondent's Advocate submitted in response to the 1st ground of appeal that, the arguments that the 1st Respondent was found in breach of the terms of the contract are not true and are misleading. According to Mr. Ngowi, what the 2nd Respondent held was that, the 1st Respondent was negligent in investigating whether

the Appellant had paid proper fees. The learned Advocate for the 1st Respondent argued in rebuttal that what was awarded was proper and should not be disturbed. He invited the Tribunal to find no merits in the first ground of appeal.

The 2nd Respondent's State Attorney joined hands with what was submitted by Mr. Ngowi and added briefly that the Appellant complained individually and even the demand notice was referring to Hamisi Ramadhan and not the corporate entity. Eventually, the learned State Attorney for the 2nd Respondent prayed that this ground be dismissed for want of merits.

Having carefully considered the rivaling arguments by the learned counsel for the parties, gone carefully through the proceedings, we have no doubt that, the Appellant proved that he actually paid to the 1st Respondent Tshs.200,000.00 as agreed and as directed by the officers of the 1st Respondent. Our above finding is supported by the ruling of the 2nd Respondent at page 7 when the 2nd Respondent categorically found and stated, we quote in verbatim, that:-

> "Hivyo ingekuwa barua pepe ya Bw. Chacha ina maanisha laki moja ya tarehe 10 Disemba 2018, tungetegemea barua pepe hiyo ingetumwa baada ya tarehe 10 Disemba, 2018. Lakini kwa mujibu wa vielelezo vilivyowasilishwa mbele ya Kamati hususani barua pepe ya Bw. Chacha ilitumwa tarehe 4 Septemba 2018, hii ina maana kuwa kabla mlalamikiwa kulipa kiasi kingine cha Tshs.100,000.00 na ndicho kinachorejewa kwenye barua pepe ya

Bw. Chacha ya tarehe 4 Septemba 2018 kwa maneno "... kindly pay the remaining Tshs.100,000.00 to make a total of Tshs.200,000.00 deposit ..." Na ndio maana baada ya ile barua pepe ya Bw. Chacha ndipo mlalamikaji akatekeleza maelekezo kwa kulipa hicho kiasi hicho cha pesa cha tarehe 10 Disemba."

Reading from the above findings of the 2nd Respondent, there are certain facts which are not in dispute and the 1st Respondent never even cross appealed to challenge them. These are; **one,** the Appellant paid to the 1st Respondent for corporate customer trading as H5 Printer as Managing Director as reflected even in the complaint form. **Two,** the change and forcing the Appellant to individual customer was deliberate and calculated efforts by the 1st Respondent to avoid liability because at all material time the Appellant was clear that he wanted internet for his business which was not provided at all by the 1st Respondent. **Three,** the 1st Respondent took the money of the Appellant way back in October, 2017 but deliberately and for lay excuses failed to provide the services paid for and worse still failed to refund the money immediately. This is no other than breach of contract and clear taking advantage of the consumer. Be it corporate or individual customer, the 1st Respondent had no justification whatsoever to solicit money from customers for services she could not offer. Consumer needs to be protected in our country.

Four, guided by the provisions of section 73 of the Law of Contract Act, CAP 345 R.E. 2019, is clear that where breach is proved, the affected person is entitled to compensation. The said provision for ease of reference provides, thus:-

Section 73 (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) NA

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

(4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Guided by the above provisions of the law and the circumstances of this appeal, the 1st Respondent no way can escape compensation to the Appellant and be reminded that it owes duty to consumers of any product it puts on sale and failure to provide services for which money has been collected is unfounded and cannot be tolerated.

The argument by the learned Advocate for the 1st Respondent that, no breach was proved, and that, breach, if any, was breach for promise, is far from convincing this Tribunal to find otherwise in the circumstances of this appeal. The five (5) months awarded was not what the Appellant asked for in the complaint form and proved that he is no longer interested in the service he prays for refund of the money paid. From the pleadings, therefore, the order of the 2nd Respondent was against what the Appellant had asked for and no reasons were given why the 2nd Respondent ordered for provisions of services which the Appellant shows was no longer interested and in need of. Consumers in this country must be protected and not be forced to take what they don't need and by so holding we are in tandem with the spirit of the law in this country to protect consumers.

In the totality of the above reasons, we find merits in the first ground of appeal that, this was a proper case for the 2nd Respondent for reasons stated above to order compensation commensurate to the circumstances of this case. That said and done we find the first ground to have merits and we allow it.

This takes us to the 4th ground which is now 2nd ground that, the 2nd Respondent erred in law and fact by failing to analyze evidence tendered by the Appellant during trial in proving the sustained injuries. This point will not much detain this Tribunal. The Appellant in the complaint form claimed reimbursement of the Tshs.200,000.00, payment of Tshs.20,000,000.00 being costs incurred in securing services from other service providers, payment of Tshs.5,000,000.00 being transport costs incurred in follow ups of the services, payment of Tshs.5,000,000.00 being money spent in communicating with the Respondent in the course of the dispute, payment of Tshs.200,000,000.00 being loss of customers and general damages to the tune of Tshs. 300,000,000.00. Most of the reliefs claimed, are specific claims, which is trite law in our jurisdiction even without citing any case law, needed strict proof to be granted. These are; one, claim of cost incurred in getting services from other service providers; two, transport costs, compensation for costs incurred in communicating with the 1st Respondent; and three, loss of business.

All the above claims were not strictly proved; hence, there is nothing to fault the findings of the 2nd Respondent on these claims.

However, on the reimbursement of Tshs. 200,000.00 paid and no services provided, this claim was proved and we grant it here as prayed. We order an immediate refund of the money to the

Appellant. No doubt, the Appellant is no longer interested to the services paid for.

On the general damages, though claimed and quantified to the tune of Tshs. 300,000,000.00, the quantification was unnecessary. There is no dispute the Appellant is entitled to compensation. To what tune, is the consideration of this Tribunal now. This Tribunal has considered the conduct of the 1st Respondent and the way she treated the Appellant, no doubt, it demonstrated high degree of negligence, recklessness and breach of contract to provide services she solicited from the innocent customer/consumer. To us, it does not matter whether the services were personal or corporate, but what matters is, did the 1st Respondent provide what the Appellant wanted and in case of failure was the refund done immediately?

The argument by Mr, Ngowi for the 1st Respondent that, what was awarded was proper, in our opinion, it was not what the Appellant prayed for and no reasons were given to justify the departure from the pleaded prayers. The conduct of the 1st Respondent cannot go unpunished in the circumstances of this appeal. Consumer protection is the spirit embodied in the law establishing this Tribunal. 1st Respondent's conduct was clear violation of its consumer's/customer's rights. We, thus, allow this ground partially to the extent explained above and partially disallow it to the extent explained above

On the whole we allow the appeal and set aside the order of the 2nd Respondent on provision for five (5) months service which is no longer required by the Appellant and instead we substitute it with the following orders:-

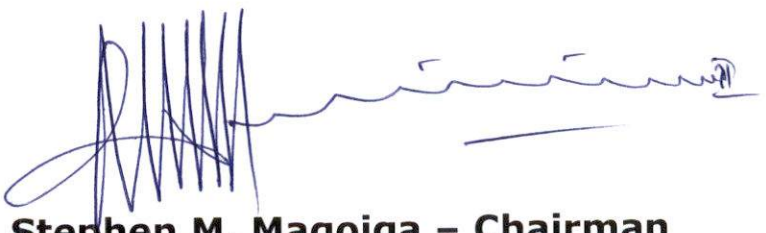
I. The 1st Respondent is hereby ordered to immediately reimburse the Appellant with Tshs. 200,000.00 paid since 2017 for services not provided for.

II. The 1st Respondent is equally ordered to pay the Appellant Tshs. 15,000,000.00 being general damages for breach of contract.

III. Guided by the decision in the case of ZUBERI AUGOSTINO Vs. ANICET MUGABE [1992] TLR 137 this Tribunal hereby under the prayer of any other relief the Tribunal may deem fit to grant though not strictly proved but the justice demands that the Appellant is entitled to Tshs.5,000,000.00 being costs of following up the matter since 2017 to date.

IV. The 1st Respondent is ordered as well to pay the Appellant costs of this appeal in this Tribunal and the Authority below subject to taxation.

It is so ordered and directed.



Hon. Judge Stephen M. Magoiga – Chairman

Dr. Onesmo M. Kyauke – Member

Prof. Honest P. Ngowi – Member

23/09/2021

Judgment delivered this 23rd day of September, 2021 in the presence of Mwombeki Kyabemerwa holding brief for Desderius Hekwe Advocate for the Appellant, Hilary Hassan Advocate for the 1st Respondent and in the absence of Advocate for the 2nd Respondent.

Hon. Judge Stephen M. Magoiga – Chairman

Dr. Onesmo M. Kyauke – Member

Prof. Honest P. Ngowi – Member

23/09/2021