

**IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA**

**AT DAR ES SALAAM**

**TRIBUNAL APPEAL NO. 7 OF 2021**



**MKUCHA GENERAL ENTERPRISES .....APPELLANT**

**VERSUS**

**ORXY GAS TANZANIA LIMITED .....1<sup>ST</sup> RESPONDENT**

**ENERGY AND WATER UTILITIES**

**REGULATORY AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

The appellant, MKUCHA GENERAL ENTERPRISES, being aggrieved by the decision of the 2<sup>nd</sup> respondent has preferred this appeal to this Honourable Tribunal against the whole of the said decision on the following grounds, namely:-

1. That the trial Authority erred in law and fact when it based its decision on evidence not tendered before it;
2. That the trial Authority erred in law and fact for basing its decision on hearsay evidence;

3. That the trial Authority erred in law and fact when it based its decision on beliefs other than evidence before it;
4. That the trial Authority erred in law and fact when it shifted the burden of proving the complaints from the complainant to the respondent;
5. That the trial Authority erred in law and fact when it based its decision contradictory evidence or testimonies;
6. That the trial Authority erred in law and fact when it ruled that the respondent exchanged the complainant cylinders with other retailers and removing them from Mtwara region market without proof to that effect;
7. That the trial Authority erred in law and fact when it awarded general damages without the same being prayed for and assessed.

On the totality of the above grounds of appeal, the appellant prayed that this Tribunal be pleased to allow the appeal and the whole decision of the Authority be quashed and set aside, give any other order or relief it deems fit and just to grant and that each party to bear its own costs.

Upon being served with the memorandum of appeal, each respondent in compliance with Rule 19 of the Fair Competition Tribunal Rules G.N. 219 of 2012 (FCT Rules, 2012) filed reply to the memorandum of appeal disputing this appeal on the reasons

that all grounds raised are devoid of any useful merits and prayed that the instant appeal be dismissed with costs.

The facts pertaining to this appeal are imperative though in brief to be stated. On April, 2020 the 1<sup>st</sup> respondent complained before the 2<sup>nd</sup> respondent about the appellant's illegal act of collecting and removing its Liquidated Petroleum Gas (LPG) cylinders from different agents in Mtwara and Lindi regions and exchanging them with O-Gas cylinders without the 1<sup>st</sup> respondent's consent and further taking them out of Mtwara and Lindi regions.

Further facts were that the act of the appellant who is the O-Gas super dealer in Mtwara and Lindi regions was meant and calculated to take the 1<sup>st</sup> respondent out of business.

The 2<sup>nd</sup> respondent after hearing the complaint inter parties found in favour of the 1<sup>st</sup> respondent and consequently granted the 1<sup>st</sup> respondent with several monetary reliefs. Aggrieved by the decision of EWURA, the appellant preferred this appeal, hence, this judgment in appeal after hearing parties on merits.

When this appeal was called on for hearing the appellant was enjoying the legal services of Ms. Gladys Edes Tesha, learned advocate. The 1<sup>st</sup> respondent was advocated by Mr. Eliezer Kileo, learned advocate and the 2<sup>nd</sup> respondent was enjoying the legal services of Ms. Hawa Lweno, learned State Attorney.

Ms. Tesha arguing the appeal adopted the written skeleton arguments in support of the appeal. In the skeleton arguments, the learned advocate for the appellant consolidated grounds 1, 2 and 3 which all boil down to the 2<sup>nd</sup> respondent erring in both law and fact when it based its decision on evidence not tendered, hearsay and beliefs thus the 2<sup>nd</sup> respondent's decision is not based on evidence tendered before it at the trial. According to the learned advocate for the appellant, the 2<sup>nd</sup> respondent decision was heavily based on hearsay and admission made in the recording of the cautioned statement. Ms. Tesha attacked the findings and holding of the 2<sup>nd</sup> respondent that same was based on hearsay by both CW1 and CW2 who admitted that they did not witness the alleged illegal exchange of LPG cylinders because the information was from a third party who were never called to testify. CW2 testimony was that Rifati Sabihi and Amedeus confessed while recording their cautioned statements which were not tendered to confirm the admission. More so, it was the arguments of Ms. Tesha that the ownership of the motor vehicles T227 DNZ was based on belief which has no basis in law.

In her oral submissions, the learned advocate for the appellant added that section 62 of the Tanzania Evidence Act, [Cap 6 R.E.2019] provides the best evidence rule which is direct evidence and concluded that the evidence of CW1 and CW2 was based on hearsay, hence, inadmissible.

On the above reasons, Ms. Tesha invited this Tribunal to allow the appeal on the consolidated grounds.

In reply, Mr. Kileo told the Tribunal that they are opposing this appeal and in so doing filed reply to the memorandum of appeal and written skeleton arguments which he prayed to be adopted as part of his submission. Mr. Kileo strongly opposed the three consolidated grounds of appeal on hearsay, evidence not tendered and belief by showing that the decision of the 2<sup>nd</sup> respondent was based on direct evidence of CW2, CW3, CW4 and CW5 and exhibits C1 and C2 all in their totality, according to Mr. Kileo, cannot be said to be hearsay, belief and evidence not tendered in the circumstances of this appeal.

The learned advocate for the 1<sup>st</sup> respondent prayed that these grounds be dismissed for want of merits in their entirety.

On the part of the 2<sup>nd</sup> respondent, Ms. Lweno told the Tribunal that, they oppose the appeal and in doing so filed reply to the memorandum of appeal and written skeleton arguments which she prayed to be adopted as part of her submission. Brief to the point, the learned Attorney for the 2<sup>nd</sup> respondent stood to her guns that the decision of the 2<sup>nd</sup> respondent was based on oral testimonies of the witnesses, documentary evidence tendered by parties as exhibits, closing submissions and various applicable laws, including EWURA Act, [Cap 414 R.E.2019], Petroleum Act, [Cap 392

R.E.2019] and Petroleum (Liquidated Petroleum Gas Operations) Rules, G.N. 376 of 2018.

On that note, she urged the Tribunal to dismiss these consolidated grounds as baseless.

Nothing was rejoined by Ms. Tesha on these consolidated grounds.

Having listened and carefully considered the oral rivaling submissions of the trained legal minds for the parties, written skeleton arguments, authorities cited, record of appeal and decision of the 2<sup>nd</sup> respondent, with due respect to the learned advocate for the appellant, we are inclined to dismiss the consolidated grounds of appeal for want of merits. The reasons why we take this stance abound. **One**, even if we put aside part of the evidence regarding testimonies of CW1 and CW2, there will remain other available evidence on record to justify the decision of the 2<sup>nd</sup> respondent. These other direct evidence were testimonies of CW4 and CW5 and the contents of exhibits C1 and C2 which the appellant did not challenge their contents. **Two**, as correctly argued by both respondents, and rightly so in our opinion, no explanation was satisfactorily offered by the appellant on the LPG cylinders belonging to the 1<sup>st</sup> respondent that was found hidden in her godown that was clear abrogation of the law.

**Three**, it is not true that the evidence of CW2 was not direct and what he got from good Samaritans was he verified by himself and

he is the one who recorded the contents of exhibits C1 and C2 which were admitted without any objection on the part of the appellant.

On the above reasons, the appellant's arguments are far from convincing this Tribunal otherwise. The consolidated grounds of appeal, thus, are akin to fail. Hence, the first limb of grounds of appeal must be and are hereby dismissed.

On ground 5 of the appeal that whether the 2<sup>nd</sup> respondent's decision was based on contradictory testimony, the learned advocate for the appellant was brief and to the point that, the testimonies of CW2 and CW3 were contradictory on how they discovered the hidden cylinder in the godown of the appellant, and according to her, the contradiction is a major one and goes to the root of the complaint and should not be believed.

Nothing was added on this point during oral hearing.

Mr. Kileo on the other hand argued in rebuttal that no serious contradiction was proved, nevertheless, the contradiction, if any, was minor and was duly considered by the 2<sup>nd</sup> respondent analyzed and arrived at just decision in favour of the 1<sup>st</sup> respondent.

On the part of the 2<sup>nd</sup> respondent she was brief and focused that the decision was well founded on the basis of oral testimonies, documentary evidence and applicable laws.

Having dutifully considered the rivaling submissions on this ground and gone through the entire proceedings and the decision of the 2<sup>nd</sup> respondent, we are with due respect to the learned advocate for the appellant, find no serious contradiction as raised and argued by the appellant's counsel. The contradictions, if any, were minor lapses that did not affect the merits of the complaint as correctly decided by the 2<sup>nd</sup> respondent.

On that note, we find this ground as well of no useful merits and same must be and is hereby dismissed.

On ground 4 of appeal which was couched that the 2<sup>nd</sup> respondent shifted the burden of proof to the appellant. In this, Ms. Tesha argued that at page 27 of the proceedings the 2<sup>nd</sup> respondent shifted the burden to the appellant when the 2<sup>nd</sup> respondent raised the issue of individuals (Rifati and Amedeus) who were involved in the incident complained of, whether or not were not known to the appellant. On the other hand, the respondents denied that the 2<sup>nd</sup> respondent shifted the onus of proof to the appellant.

We have painfully tried to understand the point but in vain. The 1<sup>st</sup> respondent through witnesses proved that the appellant had LPG



cylinders belonging to the 1<sup>st</sup> respondent without her consent. It should be noted that CW2 was at all material time on the ground and in his testimony we find nothing that shifted the burden to the appellant. The documentary evidence tendered without objection continues to show that the 1<sup>st</sup> respondent was able to prove by his witness the claim of unlawful possession of the LPG cylinders by the appellant.

So without much ado this point has to fail in its entirety.

This takes the Tribunal to ground 6 of appeal which was couched that the 2<sup>nd</sup> respondent erred in law and fact when it ruled that the appellant exchanged the 1<sup>st</sup> respondent's LPG cylinders with other retailers and removing them from Mtwara region market without proof to that effect. In this ground the learned advocate for the appellant argued that as per testimonies of CW1 and CW2, it was not enough to substantiate the claim without calling the good samaritans who informed CW2 on the occurrence of the matter. Failure to call the good samaritans, the learned advocate for the appellant invited the Tribunal to draw negative inference against the 1<sup>st</sup> respondent for failure to summons its key witness.

On the other hand, the learned advocate for the 1<sup>st</sup> respondent replied that much as the LPG cylinders belonging to the 1<sup>st</sup> respondent were found in the godown of the appellant without her consent, which was satisfactorily established, then it was the duty of the appellant to give reasonable explanation how those LPG

cylinders arrived there. In this, the learned advocate for the 1<sup>st</sup> respondent, concluded that it was an act intended and calculated to take them out of market. According to Mr. Kileo, this point was proved by the testimonies of CW2, CW3 and CW4 who both witnessed a number of LPG cylinders belonging to the 1<sup>st</sup> respondent.

On the part of the 2<sup>nd</sup> respondent, Ms. Lweno was brief to the point that its decision was based on evidence and exhibits tendered after considering the applicable laws.

Nothing was rejoined from the appellant's learned advocate.

Having considered the rivaling arguments and revisited the entire proceedings and decision of the 2<sup>nd</sup> respondent, we are of the firm considered opinion that this ground is akin to fail in its entirety. Our stance is based on the proved facts that much as the appellant was found with such big number of LPG cylinders and offered no plausible explanation on how they reached its premises and was neither a dealer nor agent of the 1<sup>st</sup> respondent, it can be nothing but that he wanted to take them from the market as alleged. The conduct of the appellant in circumstances of this appeal was calculated to do none other than removing the 1<sup>st</sup> respondent's LPG cylinders from the market.

On the above reasons, the 6<sup>th</sup> ground of appeal has to fail as well for being devoid of any useful merits.

The last ground was couched that the trial Authority erred in law and fact when it awarded general damages without the same being prayed for and assessed. The learned advocate for the appellant's main contention on this ground was that the awarding of the general damages was done on wrong principle of law and the amount awarded was inordinately high compared to the number and value of the LPG cylinders seized during the incidents.

On the other hand, the 1<sup>st</sup> respondent advocate argued that the general damages were prayed for by CW1 and CW2 during their testimonies at pages 50 and 60 of the record respectively. More so, it was the submissions of Mr. Kileo that general damages are within the discretion of the court, Tribunal or authority after assessing the circumstances of each case, hence, need not be strictly proved. The above stance was also advanced by the 2<sup>nd</sup> respondent.

In rejoinder Ms. Tesha argued that the general damages awarded were high because apart from the awarded damages was fined Tshs. 5,000,000/- because nothing was proved how much was taken out of the market.

This ground will not detain us much. The quantity that the appellant counsel is arguing cannot be the case. The conduct of the appellant in this appeal seriously needed to be ordered to pay the damages. How much was to be ordered was within the discretion

of the trial Authority. All taken on board, we find no reason to disturb the findings of the Authority on this issue.

The appellant cannot fault the trial Authority on mere arguments that the PLG cylinders were few and the value was small. No principle of law in awarding the damages was stated and argued.

The trial Authority in awarding the damages clearly stated on its reasoned decision that it considered the gravity of the offences, associated risks posed to the public and to the industry, the 1<sup>st</sup> appellant's market disturbance and in order to deter the would like minded people who use dubious means to compete by doing illegal activities as done by the appellant and all considered it gave the amount that we find was reasonable in the circumstances.

On the totality of the above, we find no reason to disturb the findings of the Authority on this point. This ground too has to fail.

All said and done, the entire appeal must be and is hereby found to be devoid of any useful merits and is dismissed with costs to the 1<sup>st</sup> respondent.

It is so ordered.

Dated at Dar es Salaam this 2<sup>nd</sup> day of December, 2021.

  
**Hon. Judge Stephen M. Magoiga - Chairman**

**Prof. Honest P. Ngowi - Member**

**Dr. Godwill G. Wanga - Member**

**02/12/2021**

Judgment delivered this 2<sup>nd</sup> day of December, 2021 in the presence of Ms. Tesha for the appellant and Ms. Hawa Lweno State Attorney for the 2<sup>nd</sup> Respondent also holding brief of Sheza Kileo Advocate for the 1<sup>st</sup> Respondent.

**Hon. Judge Stephen M. Magoiga - Chairman**

**Prof. Honest P. Ngowi - Member**

**Dr. Godwill G. Wanga - Member**

**02/12/2021**

