IN THE FAIR COMPETITION TRIBUNAL
AT DA ES SALAAM

TRIBUNAL APPEAL NO. 2 OF 2012

AIRTEL TANZANIA LTD……APPELLANT
VERSUS
SEMENI SIWA SILAYO……1ST RESPONDENT
TANZANIA COMMUNICATIONS REGULATORY AUTHORITY (TCRA)……2ND RESPONDENT

JUDGMENT

The appellant, AIRTEL TANZANIA LIMITED, is appealing against the decision by Tanzania Communication Regulatory Authority (TCRA), the 2nd respondent herein, dated/delivered on 8th June, 2012 in favour of the 1st respondent, Semeni Siwa Silayo.

The brief background giving rise to the appeal is that, Semeni Siwa Silayo is a registered owner and user of mobile phone number 0784280760 from Airtel (formerly Zain) since 15th July, 2009. The same number has been registered with NMB Mobile Services, ie. Mobile Banking transactions. The 1st respondent has been using the said number for communication with different customers and fellow businessmen, until 30th May, 2011 at 4.00 pm when suddenly the said phone stopped working having displayed message "**Registration failed").**

Mr. Silayo called Airtel using his relative's phone number to inform them about the problem and further requested to block his number because it was linked to his bank account. He went to Kariakoo to do a Sim swap but it could not be done. He went again, only to be told that sim swap could not be done because his details are different from those in the system.

On 31st May, 2011 he checked at the ATM and found among other transactions, Tanzanian Shillings Two hundred thousand only (200,000/=), withdrawn from his NMB bank account during the time his phone was inactive. Mr. Silayo called ATM Number to report the matter. Finally account was blocked on the following day ie. 1st June, 2011 at NMB Bank House. Mr. Silayo reported the matter to the police upon advice by NMB Bank Official. On 31st May, 2011 the 1st respondent complained again to the 2nd respondent (TCRA). Upon checking Airtel established that the number was interfered with.

Again Mr. Silayo complained to police and 2nd respondent, where was advised to write a letter requesting for further details from the 2nd respondent on how the 1st respondent's phone was tempered with. Mr. Silayo wrote a demand notice through his lawyer Msemwa & Co. Advocates, who was informed that, the number will be given back but not the money. To Mr. Silayo's disappointment and surprise, until when he filed the complaint

with TCRA, appellant neither heeded to the complaint nor took any steps against the responsible persons.

Dissatisfied the 1st respondent lodged a complaint with the 2nd respondent complaining on the following:-

(i) Unjustified Sim Swap of his number, giving it somebody else who at the end used it to steal money from his account.

(ii) Earlier denial by Airtel to give back his number denying that he is not the rightful owner, while he had received a reward letter and card from them showing that he is one of their loyal customers.

(iii) The unnecessary delay led to his loss of funds in the NMB account.

(iv) Airtel's lack of cooperation in providing print outs and necessary information that would have facilitated police investigations.

The appellant, then respondent, at the TCRA Complaints Committee, maintained that, they acted appropriately. They disputed to have received police letter, hence lack of response to it.

The 2nd respondent's Complaints Committee found the appellant, to have acted negligently by allowing sim swap to another person

who used the complainant's number to draw the money. The 2nd respondent/TCRA after being satisfied that: one, the 1st respondent was the rightful owner of the number; two, there was a delay in sim swapping; three, Tshs. 200,000/= as well as other mobile related transactions were drawn from 1st respondent's account when his phone was inactive, ordered as follows:

(i) Compensation of Tanzanian Shillings four million only (4,000,000/=) for Airtel's mishandling of the customer and initial denial that Mr. Siwa Silayo is not their customer.

(ii) Payment of Tanzanian Shillings two million only (2,000,000/=) to Mr. Siwa Silayo to cover his costs of following up the matter.

(iii) Payment of time of Tanzanian Shillings five million only (5,000,000/=) to TCRA as penalty as per section 13 of the consumer protection regulations 2011 for contravening consumer protection.

(iv) Apology to Mr. Siwa Silayo in writing and copied to the Authority.

Aggrieved, the 2nd respondent lodged notice on 20th June, 2012 and an appeal rising following grounds namely:-

1. The **REGULATORY BODY** erred in law and fact by holding that the **APPELLANT** mishandled the 1st respondent and denied that he was its customer.

2. That the **REGULATORY BODY** erred grossly in law by meting out a criminal penalty of Tshs. 5,000,000/= without placing formal charges in respect thereof and affording the **APPELLANT** a right to be heard on such charges before holding the **APPELLANT** criminally liable.

3. That the **REGULATORY BODY** erred grossly in law by becoming prosecutor, judge and beneficiary of the penalty money as far as the alleged criminal responsibility of the **APPELLANT** was concerned.

4. That the **REGULATORY BODY** erred in law and in fact by failing to appreciate the fact no money would be withdrawn from the National Microfinance Bank Limited without full participation of the 1st **RESPONDENT.**

5. That the **REGULATORY BODY** erred in law and in fact by failing to appreciate and or distinguish the obligations of National Microfinance Bank Limited from those of the **APPELLANT** in safeguarding the interests of the 1st **RESPONDENT**.

6. That the **REGULATORY BODY** grossly erred in law and in fact by condemning the **APPELLANT** to penalties for misdeeds, if any, committed or resulting from operations managed by a third party namely National Microfinance Bank Limited.

7. That the **REGULATORY BODY** grossly erred in law and in fact for being biased against the interests of the **APPELLANT** by failing to record and analyse evidence tendered by the **APPELLANT** before the **REGULATORY BODY.**

8. That the **REGULATORY BODY** being a **REGULATOR** of the National Microfinance Bank Limited as far as NMB Mobile service is concerned, grossly erred in law and in fact by failing to summon and question the said National Microfinance Bank Limited so as to disclose the person who withdrew the **1st RESPONDENT's** money out of the NMB's Automatic Teller Machines (ATM).

9. That the **REGULATORY BODY** grossly erred in law and in fact by failing to observe and implement statutory provisions applicable for customer complaints resolution procedures.

10. That the **REGULATORY BODY** erred in law and in fact by holding that the **APPELLANT** did not cooperate and

advise the 1st **RESPONDENT** on how to sort out the problem with the Police.

11. That the **REGULATORY BODY** erred in law and in fact by awarding Tshs. 2,000,000/= as costs to the 1st **RESPONDENT** for following up the matter without any proof to that effect.

12. That the **REGULATORY BODY** erred in law and in fact by awarding Tshs. 4,000,000/= as compensation to the **1st RESPONDENT** without there being assessment of such damages.

On the hearing date, Mr. Zephania Galeba represented appellant, Mr. Panya and Aliko advocates represented the 1st respondent, while Mr. Joannes Kalungura and Al-hassan Bwanga represented the 2nd respondent.

Initially, Mr. Galeba informed this Tribunal that they are abandoning ground no. 9, and that he will consolidate most of the grounds in the course of arguing the appeal. In absence of any objection from the respondent's counsel, the Tribunal marked ground no. 9 abandoned, and allowed the appellant's counsel to submit on the rest of the grounds as requested.

In support of ground no. 1 & 10 of the appeal, Mr. Galeba submitted that, Airtel did cooperate by giving print out of numbers called between 28/05/2011 and 31/08/2011 as shown in table 9. On 15/07/2011, Airtel replied a letter of Msemwa and Co. advocates. Besides there is no evidence on record to support that appellant said that the 1st respondent was not its customer. So it was an error on the part of the 2nd respondent to hold that, appellant denied the 1st respondent.

Submitting on ground 2 & 3, Mr. Galeba alerted the Tribunal that, under Rule 13 of the Electronic and Postal Communications (Consumer protection) Regulation 2011, TCRA imposed the penalty without formally charging the appellant and in a way TCRA became prosecutor and Judge which is against the rules of natural justice. It was further submitted that, in the complaints form filed by Mr. Silayo, 1st respondent Tab 3, Airtel was called to defend only 3 claims namely (1) refund of the money, compensation and costs, no more. The appellant was not given time to argue anything of a criminal nature. Rule 13 is cited in the decision which is wrong. The fine is an alternative to imprisonment. The issue is, would it be possible to send Director of the appellant to prison without affording him the right to be heard? According to Mr. Galeba, the 2nd respondent was supposed to close the matter and call the appellant to be heard on the criminal charge before conviction. The 2nd

respondent/TCRA placed itself in the place of a Judge without there being a charge, and beneficiary of the penalty money that it ordered the appellant to pay which is totally against rules of natural justice.

On grounds 4, 5, 6 & 8 the appellant's counsel submitted that, in mobile banking, parties are bank and customer. The mobile company does not know what happens between customer and the bank. The mobile company gives a network for Bank operations by its customer. The mobile company cannot know which customer has an amount in a certain bank. There are pins used in the transfer of money. As between amount and the identification of the pin that is matter within the domain, of the bank's customer. Pins are given by bank and not by the mobile company. It is not possible to withdraw money from a person's bank account without knowing the pin number.

Mr. Galeba further told this Tribunal that, in a Ruling Tab 7 page 3 para 3, it is reasonable to suspect that the person who called Mr. Siwa Silayo, is the one who stole the money. But TCRA did not investigate as to who called Mr. Silayo. The 1st Respondent himself was not careful as he gave his details to an unknown person on the phone. It was further submitted that, transfer by Airtel money operated by mobile company money, is different from mobile banking operations. The 2nd Respondent who is also

a regulator of mobile banking ought to have summoned NMB explaination. Looking at Tab 4, statement of account of the 1st respondent SEMENI SIWA SILAYO at page 2, 5th item from the bottom, it is clear that, the 1st respondent withdrew the amount of Tshs. 400,000/= on 30/05/2011 and yet he included in the claim against the appellant. The only institution that could have given evidence is NMB apart from the 1st respondent. But the 2nd respondent did not call any witness from NMB. Therefore, it was Mr. Galeba's submission that the 2nd respondent had no evidence to prove that, the appellant is responsible for the loss of the money of the 1st respondent.

On ground 7, the appellant's counsel submitted that, if the 2nd respondent had correctly analyzed the evidence it would have found that the loss was caused by the 1st respondent. If TCRA had analyzed bank statement it would have found that Tshs. 400,000/= was withdrawn at ATM on 30/05/2011.

Submitting on ground 11, Mr. Galeba told this Tribunal that, the costs were wrongly awarded. The 1st respondent did not make any specific claim and there is no evidence as to how the costs were arrived at. No documents were produced to prove and justify the costs awarded. There is no receipt of trade or anything to justify the award of costs which was on the high side. Mr. Galeba submitted finally in support of ground 12 that, there is

no reason given as to how damages were assessed and arrived at. Appellant's counsel finally prayed for grant of orders sought in the memorandum of appeal.

On the other hand, the 1st respondent's counsel Mr. Panya notified the Tribunal that, the response will be in terms of what is clarified by the appellant's counsel.

On the 1st and 10th ground of appeal, Mr. Panya submitted that, there is no good reason to dispute the negligence and act of the appellant as held by the 2nd respondent. The appellant's counsel relied on information given to the 1st respondent to report to the police as enough assistance that must be given by mobile operator company to a customer. Mr. Silayo is an innocent customer who reported to the appellant that he suspect unusual activity on his line operated by the appellant immediately after the 1st respondent lost connectivity. The appellant has reasonable duty of care to the 1st respondent as a customer. But the appellant took three (3) days from the time they became aware of the fateful incidence to act on the complaint by Mr. Siwa Silayo. Submission by the counsel for the appellant is an admission that, the appellant being the giant mobile operator who had all the equipments, systems, knowledge, man power, technology to act on the 1st respondent's complaint, but directed 1st respondent to go to police is appellant's admission of

negligence. What the appellant did is swapping the line of the 1st respondent after three (3) days. The appellant was to act in a manner that could safeguard the interests of Mr. Siwa Silayo, as their customer, insisted Mr. Panya counsel for the 1st respondent.

Mr. Panya for the 1st respondent submitted vigorously that, according to section 100(1) of the Electronic and Posts Communications Act EPOCA, Act No. 3 of 2010, it is the duty of the 1st respondent to report the loss to the appellant as it is related to the mobile operator. In this case, the sim card was not lost. What was missing was coverage and that is why the 1st respondent went to the appellant. By swapping his sim card to another person it means that, his sim card was stolen. In the circumstances, the appellant was totally in control of what transpired. The appellant ought to have suspended the sim card and established an answer because the data base controlled by the 2nd respondent would have revealed. The act of directing the 1st respondent to go to police could have gone hand in hand with suspension of line by the appellant, lamented Mr. Panya.

The 1st respondent's counsel, Mr. ALIKO, having taken over from Mr. Panya submitted in support of ground 4, 5, 6 and 8 that, mobile Banking is a product between two giant service providers. In this case, the appellant and NMB are the main players. Operation of mobile banking is purely technical, therefore the

appellant and NMB are all service providers. There is no mobile banking without involvement of Mobile Service Provider (appellant). The appellant controls mobile banking system. If the appellant switches off his coverage, then there is no mobile banking. Transaction of withdrawing the money is completed through the phone. One need not to go to the bank. In fact, the 1st respondent can exonerate NMB but not the appellant. Therefore, the appellant is directly responsible for the loss caused to the 1st respondent insisted Mr. Aliko counsel for the 1st respondent.

Submitting on ground 7 counsel for the 1st respondent, admitted that, Tanzanian Shillings four hundred thousand only (400,000/=) was withdrawn at Bank ATM, but was made possible through the mobile phone. The appellant cannot deny that he had duty and liability simply because there is evidence that before sim swap a stranger called Mr. Silayo, who in turn gave him his details.

On ground 11, it was submitted that amount awarded is fair and reasonable and in fact on the lower side. The 1st respondent's counsel, finalized on ground 12 that, the relief claimed was compensation and not specific damages, and the compensation was awarded on the basis of fairness.

Mr. Kalungura for the 2nd respondent submitted that, the appellant is their licencee. The 1st respondent is a subscriber of their licencee, who submitted the dispute to TCRA Complaints Committee in accordance with TCRA Act (supra) and EPOCA (supra). Parties were heard and given opportunity to adduce evidence. After determination of the matter, the Complaints Committee gave its decision, now subject for appeal before this Tribunal. The 2nd respondent's counsel submitted that, the issue determined by the Complaint Committee was not loss of money, but customer care and quality of service by service provider. Mobile banking is regulated by two bodies. On communications sector by TCRA. On trafficking, the bank is given a number. On issue of function it is regulated by Bank of Tanzania. If the subscriber had no network on his mobile phone section 90(1) of EPOCA Act No. 3 of 2010 (supra) requires a subscriber to report to the operator. The 1st respondent later found that his line had been swapped to another person who took advantage of the information and stole the 1st respondent's money. The appellant did not block the simcard when they swapped. The subscriber went to report loss of functions of his simcard.

Mr. Kalungura for the 2nd respondent submitted that, the network provider (Airtel/appellant) had information about the customer/person who was using the number. He added that, it was wrong for Airtel to give the number to another person when

it was already registered in the name of the 1st respondent. This is why the 2nd respondent Complaints Committee held the appellant liable for negligence.

On ground 2, Mr. Kalungura rightly conceded that section cited in the decision of the 2nd respondent at page 3 is wrong. It was cited as section 13. It was supposed to be section 45 of the TCRA Act No. 12/2003 as amended by section 179 of EPOCA (supra).

Mr. Kalungura further submitted that, the committee considered the issue in the light of the gravity of sim swapping which is a dangerous practice if allowed, and if not stopped it could be endless. Mr. Bwanga, counsel for the 2nd respondent, having taken over from Mr. Kalungura further submitted that, one of the core duties of TCRA is

(i) To promote efficient competition and economic efficiency.
(ii) to protect interest of the consumers
(iii) To protect rights of consumers and regulated suppliers.

It is the duty of a regulator to hear complaints and make decisions after hearing both parties. The 2nd respondent therefore believed in the decision delivered by Complaints

Committee. Mr. Hassan Bwanga finally requested the Tribunal to uphold 2nd respondent's decision.

In rejoinder, Mr. Galeba replying to Mr. Kalungura's submission totally disagreed on issues that were before the committee, being consumer care and quality of service. According to Mr. Galeba, the issues before the Complaints Committee according to tab B3, were:-

- Kurudishiwa pesa - Refund of money
- Fidia - Compensation
- Gharama - Costs.

Mr. Galeba insisted that, the issue of customer service and, quality is just the evidence. Section 13 was the one that was introduced to be used but even if it was used instead of other provisions, yet it was wrong as the appellant was not given the opportunity to be heard. Mr. Galeba submitted that, the 2nd respondent's counsel said Judgment has an error, but the appellant maintained that it is problematic. The appellant further submitted that, the service level agreement referred to by the 2nd respondent's counsel Mr. Kalungura was not brought as evidence under rule 35 of the FCT Rules. FCT rules empowers Tribunal to do the following:-

35.- (1) In respect of any appeal, the Tribunal may-

(a) re-appraise the evidence and draw inferences of facts;

(b) in its discretion, take additional evidence or direct that Additional evidence be taken by the commission or the Relevant regulatory body; or

(c) call any person or expert as witness.

(2) In the event that the Tribunal determines to take additional evidence, such evidence may be oral or by affidavit and the Tribunal shall allow cross-examination.

(3) The parties shall have the right to be present when additional evidence is taken.

Mr. Galeba further submitted that, the argument raised by the 1st respondent's counsel, Mr. Panya, that the appellant was privy to the information of the bank, is totally wrong. A witness from the bank should have been brought to prove the issue. Airtel (the appellant) cannot control records (information of the bank). It was necessary for the 2nd respondent to investigate who called the 1st respondent and to whom the 1st respondent gave his personal details. The appellant's counsel insisted that, it is not true that mobile banking is a product of Airtel and NMB Bank. NMB must have been called to give evidence. NMB bank is the one who keeps the money. Let, the 2nd respondent not hide behind technology lamented Mr. Galeba. Evidence is required for

the money that was taken at the ATM to prove that the appellant is responsible, insisted Mr. Galeba for the appellant.

As regards ground 11 and 12, no documentary evidence was tendered, the appellant cannot be liable for damages, submitted Mr. Galeba for the appellant, and prayed for appeal to be allowed.

The Tribunal invoked Rule 35 of the FCT Rules 2012 to call two additional expert witnesses, on mobile banking. The importance of calling expert witness was also underscored by the House of Lords in the case of RV SHEPHARD (1993) AC 380. The House of Lord, upholding the conviction noted that, the nature of technology and requirement of the law is satisfied by calling a witness who was familiar with the computer. In the case at hand, a mobile banking expert and Automatic Teller Machine (ATM). The 1st Tribunal witness Mr. Daniel Marius, testified that, he works with Airtel (T) Ltd for 7 years now. Currently, he is stationed at Customer Service Department. He knows mobile banking. The Role of Airtel in mobile banking is on integration part. It is for Airtel customer to be provided with banking services through their handset. The money transaction is between the client and the Bank. Airtel is not involved in the affairs of the account. The Bank knows who has drawn money in the account. Bank normally have camera in their ATM. In the mobile banking Airtel benefits by maintaining its customer.

Through Airtel services client can access not only mobile banking but other services. Mr. Daniel Marius further testified that, in NMB Mobile Banking, Airtel, has a part to play whenever Airtel clients are involved. The success of mobile banking, depend very much on the good service offered by Airtel, as service provider of communication. Once there is a complaint on network, the client has to call Airtel. If there is defect on client line, then Airtel has responsibility of connecting the network.

On being cross examined by the Tribunal on swapping procedure, Mr. Daniel Marius replied that, request for swapping is normally done in writing for corporate clients. Normal clients, they just go to shops and ask for swapping orally. From 2013 consumer has to do swapping by writing a letter and attaching necessary documents. For those who cannot come physically to Airtel offices they apply online. To Airtel, it is proper request once there are:

(i) Registration form
(ii) Identity card used during registration
(iii) Oral examination.

Once the above requirements are met, then swapping is allowed. On being cross examined by Tribunal on unauthorized swap, he replied:- It is possible to authorize unwanted swapping once there is collusion. For any person to draw money in the ATM he must have security code (password). Password is the property of

the client. The owner of the account, he/she is not supposed to give the security code (password) to anybody else otherwise he/she will end up losing money.

Emmanuel Sebastian Robert, working with NMB ICT Department self services channel testified as a second expert witness for the Tribunal. He told the Tribunal that NMB ICT department, self service channel includes point of sale (POS) mobile and ATM. If a person wants to be NMB mobile banking customer has to comply with the following:

(i) Active account
(ii) Active ATM card
(iii) Registered user of mobile phone
(iv) Client has to register himself at the ATM machine and get password on his own
(v) Client will be requested by ATM machine to enter his phone number.
(vi) ATM machine will require client to enter password that he will be using in mobile banking.
(vii) ATM machine will ask the client to confirm the password.
(viii) ATM machine will issue message of congratulation to a particular person that he is the registered user of mobile banking.

(ix) The message from the Bank to the client through phone that once client want to use NMB mobile banking you have to start with *150*66

Mr. Emmanuel further testified that, there is no any cost on registration with NMB mobile banking. He added that, what causes theft through mobile phone in NMB banking is disclosure of NMB individual security code (password). Password is the secret of a client. Password can be used by another person once it is disclosed by the owner. Once password is entered, it is carried in the system. Mr. Emmanuel told the Tribunal that there are incidences where theft cannot be reported into the client account. In most cases, it is when client discloses his password. There is possibility of (a) guessing password, (b) using date of birth to get password or (c) some fix camera in ATM machine to observe password, (d) In some cases, client lose pin code. Mr. Emmanuel insisted that it is not possible by swapping only one can draw money. He must have password, to enable him enter in the ATM machine, because of international mobile subscriber identity (IMSI). International Mobile Subscriber Identity cannot be duplicated. Once there is line swap, one cannot use the line until he reports to NMB. IMSI System was not in use in the past, but now NMB use the system. Simcard is the property of the customer. For communication customer must have a line and the line connected. Once one of the item above is changed, then

there is no communication. Client pin code cannot be accessed by employee of the Telecommunication Company e.g Airtel, unless the owner discloses the pin code.

Before we proceed further, we deem it necessary to explain the role of mobile banking services in our economy. Mobile banking allows a bank customer to perform banking services via mobile phone and carry out banking transactions using the same mobile phone. The mobile sector in Tanzania is growing very fast, currently there are six active mobile companies and four of them are providing mobile banking services. The mobile banking services are being appreciated quickly by both customers and banking services provider. Mobile Banking Services can do the following:

(i) Transfer funds to any account within the same Bank Network (Intra Bank Funds Transfer)

(ii) Transfer funds to any mobile phone in the country

(iii) Can be used to pay bills and taxes and to purchase airtime for the same phone and others.

(iv) Has ability to send money to persons with no bank account or ATM cards

(v) Can respond to Balance Enquiry

(vi) Can give mini bank statements

(vii) Alerts use of bank card

(viii) Can provide online registration through subscriber's own phone.

(ix) Can change customer's PIN

(x) Give option to choose use of Kiswahili or English.

According to study conducted by Global System for Mobile Communications Associations (GSMA) taken in June 2013 it was revealed that 44% of adults in Tanzania used some form of mobile money in 2013, ahead of Kenya's 38%. The GSMA study indicated that, in December, 2013 alone, Tanzania conducted 99.9 million transactions worth a combined total of Tshs. 3.1 trillion (s 1.8 Billion). It was observed that, this is not simple achievement considering that only 14% of Tanzania adults use banks which was less than half the rate in Kenya. GSMA further noted that mobile – money account now outnumbers bank accounts in nine African countries Tanzania being amongst those.

Benefits of the mobile banking services are:

(i) It allows a customer to access his/her accounts anywhere anytime. This has become a good solution to the people living in the rural areas where the bank services are very stern. For example, before introduction of this service, teachers who are working in the rural areas used to travel long distances in order to collect their monthly salaries or even to know if the

salary has been deposited to their accounts or not. Currently they can easily access this information through service anywhere anytime.

(ii) The service allows a customer to transfer funds without hassle of visiting the bank therefore saves time and other important resources like workforce and money.

(iii) By using this service, it has become possible to have at least same level of banking services in the economically disadvantaged areas where it is not commercially viable to build bank infrastructure e.g. poor rural, mining areas, islands and such others.

(iv) It has become one of the tools for the National Strategy for Growth and Reduction of Poverty II (NSGRP/MKUKUTA II) as it helps to facilitate income distribution. E.g. Economic activities can be performed in the rural and payment be sent immediately from the urban where people have better economy.

(v) Mobile Banking service in Tanzania has potential for growth as telecommunications mobile sector is growing very fast and also the bank sector together with bank customers is appreciating it hurriedly.

(vi) On average there are no monthly service charges making it affordable to even low income earners.

Disadvantage of using mobile Banking services are:

(i) In spite of its quick acceptance in the country not all mobile companies have registered this service, only Vodacom, Tigo, Airtel and Zantel are providing this service.

(ii) The service is regulated by two regulatory authorities. The bank service is regulated by the Central Bank, and communication services is regulated by the TCRA. Sometimes it may be difficult to differentiate which regulator is responsible for what undertaking.

(iii) There is specified maximum amount transfer/transaction which sometimes limits the size of transaction to be conducted through this service.

(iv) Security of the mobile banking service depends very much on PIN facility which is secretly kept by the individual customer and recognized by the respective bank system when activated. The PIN operates through information communication technology which is a very dynamic technology, therefore prone to

detection by unfaithful people or it is unsafe when kept loosely.

The issue of disclosing pin code to a stranger and later loss of money through the bank account was discussed in the case of **Shojbur Rahman v. Barclays Bank PLC**, an appeal from the decision of District Judge Millard dated 24th October, 2012 reported in the Journal of Digital Evidence and Electronic Signature Law Review at page 169. Facts in brief are that, the claimant was a customer of the defendant bank at its Kings Cross Branch. On 14th November, 2008, Euro amounting to 20,400 was transferred by telephone from the claimant's Bonus Saver account to his current account leaving less than 100 Euro in the server account. The claimant's claim was therefore for amount of withdrawal, consequential loss and interests. The defendant bank declined to refund the money as they considered that Mr. Rahman (claimant) must have been negligent by disclosing his pin code for his account. Mr. Rahman denied to have given any person or security information. The Court concluded as follows:

> "Therefore, the claimant is liable for the losses until 00.20 on 15/11/2008, but the defendant (Bank) should reimburse him for debits after that time. I hope the parties will be able to agree the calculation of the relevant figure and interest. I don't know whether there will be issues regarding to costs but the parties should endevour to agree those also."

According to the paper titled Cyber security & Cyber law (Cyber crimes) presented on Training for Judiciary & Law Enforcers Zanzibar on 27/09/2014 by Adam Mambi cyber crime expert, Identity can get stolen by:

(1) Lurking around automatic teller machines (ATMs) and phone booths to capture PIN numbers by watching through binoculars as the numbers are being entered.
(2) Illegally obtaining personal credit reports.
(3) Accessing personal information accidentally sent to the wrong fax number,
(4) E-mail address or voice mail box.
(5) Scavenging through the garbage in search of credit card or loan applications, employer's files and identification data such a login ID's and passwords.
(6) Guessing the answers to one's security questions.
(7) Sending false messages on the internet spoofing in an effort to collect private information.
(8) Using software programs to intercept financial data, passwords, malware, spy wave.

There is no doubt that the above techniques facilitate wire transfer system which allow criminal organizations to enjoy swift and risk free conduit for moving money between individuals and between countries at large. **R.V. Thompson (1984) 3 ALL ER**

565 a case involved cybercrime committed in two different jurisdictions with different legal system (England & Kuwait). Thompson was employed as a Computer programme by a Bank in Kuwait. In the course of employment he diverted a plan to defraud the bank. Details of customers account were maintained on the bank's computer systems. In the course of work, he was able to obtain information about the following:

a particular goal was to identify what are referred to as "dormant accounts".

These possessed substantive credit balances, but had not been the subject of any debit or credits over a considerable period of time. The chances of fraud being identified by the account holders were minimum. Having identified 5 target accounts. Thomas opened 5 accounts in his own name at various branches of the bank. He compiled a programme which instructed the computer to transfer sums from these accounts to accounts which he had opened with the bank. In an effort to reduce further risk on detection, the programme did not come into effect until Thompson had left the bank's employment to return to England. On arrival in England, he opened some accounts in England banks and wrote to the manager of the Kuwait Bank instructing him to arrange for the transfer of balances from Kuwait to his new English account and this was done. He was discovered and he was determined by the Police. Charges of obtaining property were bought against him. An objection was raised that the

English Court had no jurisdiction in the attar as any offence would have been committed in Kuwait. Court of Appeal held the offence was committed at the moment when the Kuwait Manager acted upon Thompson's later and he was subject to the jurisdiction of English Court.

The international character of some computer crime has caused concern about the possibility of criminals escaping prosecution because of jurisdictional issues. For example in **R v Tomsett (1985) Crim L.R 369**, the accused sent a telex from London intending to divert funds from New York to the accused's account in Geneva. It was held in the Court of Appeal that, had the attempt been successful, the theft would have taken place in New York and the English courts would not have had jurisdiction to try the perpetrator.

The case of **LICRA v. Yahoo, 2000 United State Court of Appeals Ninth Circuit – 433 F.3d 1199** is another example of jurisdiction issue on International Cyber Crime. In this case two French public interest groups namely, *La Lique Contre le Racisme et L'antisemitisme (LICRA) and L'union des Etudiants Juifs de France (UEFJ)*(United States Court of Appeals, Ninth Circuit-433 F.3d 1199), decided to sue the Yahoo. Inc., a Delaware corporation located in California, USA. The alleged criminal offence was the offering for sale of Nazi memorabilia by the Yahoo, an Auction website accessible in France, which was

deemed illegal under French law. The plaintiffs sought an order prohibiting Yahoo from displaying the memorabilia in France. The French court, argued that it had personal jurisdiction to determine the case because the harm was caused in France. The court therefore, sought an expert opinion on the possibility for Yahoo to block access to illegal content to French users, rather than completely eliminating the website content worldwide. The France Court ultimately ordered the Yahoo Co., "to take all necessary measures at their availability, to discourage and render impossible all inspection on Yahoo.com to participate in the auction service of Nazi objects. Being dissatisfied by the France Court decision, Yahoo sought a declaratory judgment that the French decision could not be recognized in the U.S as this was not an offence under the U.S. laws. Besides, finding it had jurisdiction, the U.S. Court of Appeals later held that the California Court had no personal jurisdiction over the French parties and that France had every right to hold Yahoo accountable in France**.**

According to the Guardian Newspaper of 2nd April, 2015, at page 3, Minister of Communication, Science and Technology, Professor Makame Mbarawa, when tabling the Cyber Crime Bill 2015 noted that, Cyber Crime Costed Financial Institutions over 9 billion from 2010 – 2012. Professor further told the Members of Parliament that police report of August 2012 – 2014 shows that, there were

one hundred and eighty (180) incidents related to computer fraud and two hundred forty five (245) incidents related to ATM machine theft (ATM skimming).

In **R v Whiteley (1991) 93 Cr App R 381**, the Court of Appeal had an opportunity to examine the applicability of criminal damage when it heard the appeal against conviction of the **self-styled "mad hacker**"., the accused Whiteley gained unauthorized access to the |Joint Academic Network (JANET) and gave himself the status of Systems Manager. He deleted and added files, changed passwords and deleted audit files recording his activities. He was very skilled and even deleted a special program inserted to trap him. He was convicted for damaging computer disks. The Court of Appeal rejected his appeal confirming that the value of the disks had been impaired. The Lord Chief Justice, Lord Lane, said that the act required that tangible property had been damaged, not that the damage itself should be tangible.

According to the same Guardian Newspaper of 2nd April, 2015 at page 2, on an Article titled Bank expert offers tips on safeguarding bank accounts, Farha Mohamed, Stanbic Bank head of Channels is quoted to have said:

> "The more the information someone has about you, the more the likelihood for accessing your account they can

access your account. Never respond to an urgent email or phone call that requests account details. Your bank already knows your account details".

It was further stressed by Stanbic Channel Manager to his clients to ensure that clients access their bank account from a secure internet connection and not from a public system like an airport or coffee shop that could allow a criminal to intercept the information when it is signed by the client.

On the same Guardian Newspaper at page 3 on a title named "Dar Bank emphasize use of anti cybercrime cards"
Mr. Eugen Massawe, Exim Bank Head of Operations, in efforts to curb the prevailing cybercrimes and provide customers with reliable and safe banking services, urged Exim Bank client to collect their Faida chips and pin Debt cards introduced in January, 2015 to replace the existing magnetic stripe Faida Debit Card, because they provide enhanced security through an embedded chip that process the customer's date with unparallel security and hence making it virtually impossible to copy or tamper with.

The above efforts by the two Bank mentioned signify the extent of the problem. It is not only a caution to their clients but, banks are becoming pro-active in curbing money theft through

sophisticated cyber crime of international nature which is a pose threat to banks and financial institutions.

From the above overview, the 1st respondent's case is one of few cases reported to the respective authority to be dealt with. However, many cases are not reported.

From the evidence on records it is clear that, the appellant dealt with the 1st respondent complaint, but not to the satisfaction of the 1st respondent, and standard required. The 1st respondent demand notice Tab B4 a letter from Msemwa & Co. Advocates dated 20th June, 2011 was responded to by Airtel (appellant) on 15th July 2011 Tab B.5 in which relevant part reads as follow:

> *"We acknowledge with thanks receipt of your demand notice with ref. No. JM/ADV/018/2011 dated 20th June, 2011 on behalf of your client one Semeni Siwa Masawe. After going through your note, we thought that we need some further and better particulars from your client so that we can give the claim a thorough look and consideration and, if viable, avoid unnecessary litigation with our potential customer. In the circumstances, we kindly request that you avail us the following information……."*

From the content of Tab B5, there is no evidence of the appellant denying 1st respondent not to be its customer. What can be

gathered from Tab.5, the appellant requested for more information and further that Mr. Siwa Silayo was advised to channel claim of lost money to NMB. As correctly submitted by Mr. Galeba, that, the appellant did not deny the 1st respondent to be its customer at all. We hold so. The submission that the appellant denied the 1st respondent to be its customer is not supported by any evidence. Likewise the submission that, the appellant did not cooperate and advise the 1st respondent on how to sort out the problem with the police, is not backed by any evidence. According to Tab. B5 the appellant reply to the demand letter from Msemwa and Company advocates, dated 15th July, 2011 Mr. Silayo was advised which is substantiated by part of the appellant letter, that reads as follows:-

> *"…….Further, we note that your demand note suggests that your client lost some Tshs. 1,500,000/= from NMB Bank Account. We however believe that this was a misdirected claim since Airtel has no access, control or any influence with your client's bank account in NMB or any other bank account. A Bank account and mobile phone accounts are two distinct and separate things using different technologies, platform, ownership, operation and accessibility. We therefore believe that the claim on loss of cash from bank account be directed to the bank which maintains the said bank account".*

Reading between the lines, the appellant cannot be blamed for not advising the 1st respondent. Thus, ground no. 1 & 10 has merits, and we accordingly allow the same.

The issue raised on ground 2 of the appeal can easly be answered by Mr. Kalungura's submissions when he rightly conceded that section 13 of the Consumer Protection Regultions of 2011 cited in the decision of 2nd respondent at page 3 is wrong. The proper provisions would have been section 45 of the TCRA Act No. 12/2003 as amended by section 179 of EPOCA (supra).

Section 179 of EPOCA reads as follows:

> 179. The principal Act is amended in section 45 as renumbered by-
>
> (a) deleting sub-section (3) and substituting for it the following:
>
> "(3) A compliance order may require a person to refrain from the conduct which is in contravention of the provisions of this Act or regulations made under this Act or sector legislations to take actions required to be taken in order to comply with this Act or to pay fine as accessed by the Authority."
>
> (b) inserting immediately after sub-section (6) the following new subsections:

"(7) Any person who willfully delays or obstructs an inspector or a police or other authorized officer in the exercise of powers conferred upon him by or under this Act; commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding twenty four months or to both that fine and that imprisonment.

"(8) A court convicting a person of an offence under this Act may, in addition to any penalty that it may impose, order the forfeiture to the government of any electronic communication or broadcasting apparatus or other material in relation to it in connection with or by means of which the offence was committed.

"(9) Notwithstanding sub-section (2), no order of forfeiture shall be made where it is proved that the broadcasting apparatus in question is not owned by the person so convicted, and if the owner proves that he did not have any knowledge of the unlawful use of the apparatus by the person so.

In the light of the provision quoted above, jurisdiction to hear and determine matter of criminal nature squarely falls within the domain of the normal court. Not only rule 13 of the Consumer Protection Regulations of 2011 relied by 2nd respondent is

problematic as submitted by Mr. Galeba, but it is a serious anomaly. The 2nd respondent is mandated by the law to issue Compliance Order or to order a person to pay fine as assessed by the Authority.

> "A Compliance Order may require a person to refrain from the conduct which is in contravention of the provisions of this Act or regulations made under this Act or sector legislations to take actions required to be taken in order to comply with this Act or to pay fine as accessed by the Authority.

2nd respondent though mandated to order payment of fine, it is not under rule 13 of the Consumer Protection Regulations of 2011. As correctly admitted by Mr. Kalungura Counsel for the 2nd respondent that section 13 of the Consumer Protection Regulation was improperly cited, fine cannot be ordered under the above provision. It is an error on the part of second respondent decision. Thus, fine ordered under wrong provision of law cannot be sustained. Accordingly an order to pay fine of Tshs. 5,000,000/= to the 2nd respondent is hereby quashed. Thus ground no. 2 is accordingly allowed.

Having answered ground two above, the only issue left on ground 3 is the complaint on 2nd respondent acting as Prosecutor and Judge. With due respect, appellant's counsel has not exhausted the law that established and mandated 2nd respondent as a

regulator. 2nd respondent as an inquisitorial board, has mandate to investigate, prosecuting and make findings. Hearing at inquisitorial body is a structured hearing. The fact is that the inquisitorial hearing procedure envisaged by the TCRA Rules is a structured (or staged) hearing process, and in that regard, procedural fairness should be determined by finding out whether the stage process was observed. TCRA acted in accordance with the principles of natural justice and with full observance of all procedural tenets of a fair and just decision. The principles of natural justice are also referred to as principles of procedural fairness. However, while these principles are universally acknowledged, they are also context specific when one determines whether they have been adhered to. This was so persuasively stated in **Knight v Indian Head School Division No. 19(1990) 1 SCR 653, at 656-657** (TAB 1 to the Respondent's Skeleton Arguments) where the Supreme Court of Canada held as follows:-

> **"The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".**

Further on page 657 the court held that:-

> **"Every administrative body is the master of its own procedure and need not assume the trapping of a court. Here the requirements of procedural fairness**

were satisfied, even absent a structured hearing. 'Everything that h ad to be said had been said' and accordingly..."

To the Tribunal, on the basis of the above highly persuasive case, the determination as to whether the TCRA adhered to the principles of procedural fairness or natural justice should be by taking into account that the context within which cases are dealt with at the TCRA. The Role of regulator in the communication sector is to ensure quality supply of services and consumer protection of the communication sector, with a view to promote efficient competition in communication sector. Thus, appellant being service provider in the telecommunication sector, is supposed to be regulated by the 2nd respondent. As correctly submitted by Mr. Bwanga counsel for the 2nd respondent, one of the core duties of TCRA is:-

(i) To promote efficient competition in communication sector.

(ii) To protect interests of consumers

(iii) To protect rights of consumers and regulated suppliers.

There is nothing on record to suggest that, the 2nd respondent contravened the law as complained on ground 3. Accordingly, ground 3 is dismissed for lack of merits.

According to Tab B5 and B3, there was no dispute that the 1st respondent is the appellant's customer. There is no dispute that: One, unauthorized sim swap occurred in the 1st respondent line; Two, it took 3 days for the appellant to revive the line of the 1st respondent from 30th May, 2011 to 3rd June, 2011 despite the 1st respondent informing the appellant that his line is connected with his sim banking with NMB. Three, for 3 days the 1st respondent stayed without any communications. While there is no reasonable explanation on record as to the unauthorized sim swap. Definitely, the 2nd respondent as a regulator is mandated by the law to ensure protection of consumers of telecommunications services. However, the issue as to whether, the appellant is responsible in the payment of the money withdrawn at ATM, is answered by the two expert witnesses of the Tribunal. Mr. Daniel Marius who works with customer service department at Airtel said:

> "The Role of Airtel in mobile banking is on integration part. It is for Airtel customer to be provided with banking services through their handset. The money transaction is between the client and the bank. Airtel is not involved in the affairs of the account. The Bank knows who has drawn the money in the account"

The above piece of evidence has not been contradicted by both respondents' counsel. The role of Airtel/appellant in mobile banking is on integration part only, remains to be a fact.

Emmanuel Sebastian Robert, the 2nd Tribunal witness (expert witness), working with NMB ICT department testified as follows:

> "What causes theft through mobile phone in NMB banking is disclosure of NMB individual security code (password). Password is the secret of a client. Password can be used by another person once it is disclosed by the owner. There is possibility of (i) guessing password (ii) using date of birth to get password (iii) some fix camera in the ATM machine to observe password, (iv) some cases client loose pin code. It is not possible by swapping only one can draw money, one must have password to enable him enter in to the ATM machine".

From the evidence of 2nd Tribunal expert witnesses, it is clear that, for one to be able to draw the money at the ATM you must have a pin (password). It is on record that a person called the 1st respondent to enquiring his particulars. As clearly submitted by Mr. Galeba, the 2nd respondent as regular of communication system ought to have known such person, because all the mobile phone users are registered. Failure by the 2nd respondent who is mandated by the law, possessing all the technologies, and

manpower to investigate who called 1st respondent to inquire about his particulars is what, that is said, hiding behind technology as submitted by Mr. Galeba. We totally agree. It is on that strength that, ground no. 4, 5, 6 and 8 are allowed.

Ground no. 7 is on complaint against the 2nd respondent being biased to the extent of failure to record the appellant's evidence. Absolutely this ground, ought to fail. There is no any evidence on record that shows or suggests that the 2nd respondent was biased. There is no evidence attached to the appeal which was not acted upon. The evidence was acted upon, weight attached to the evidence is the issue to be argued in this appeal. Whether there was evidence not acted upon, it is the duty of the appellant to address the Tribunal, having power to review evidence on record and order accordingly. The appellant's counsel is at liberty with the leave of the Tribunal to call additional evidence as rightly done by the appellant's counsel. Nevertheless, the same witness brought before this Tribunal was to be availed to the committee of the 2nd respondent/TCRA. The opportunity utilized by the appellant, at first stage. The appellant has exercised the right on this appeal. The appellant's counsel is precluded from further complaining, after having been given opportunity to bring witness to this Tribunal. Thus, ground 7 also lacks merits.

On ground 11, the appellant's complaint is on the award of Tshs. 2,000,000/= as costs to the respondent for following up the

matter without any proof. This ground has merits. Costs incurred must be proved. This is normally called specific damages. They must be averred and proved. It is true that the 1st respondent made a serious follow up of the matter for the first three (3) days until revival of his line. He also made follow up to the hearing of the matter before TCRA. It is unfortunate that, the amount if any, is not accounted for. There is no basis as to how the sum of 2 million was arrived at by the 2nd respondent/TCRA. The Tribunal's finding is that, the 1st respondent did not provide sufficient evidence to establish the costs he incurred. The 1st respondent was supposed to do more than what he did. The 1st respondent being a businessman, as claimed, was expected to give an account of all the expenses incurred in the course, for example legal fees paid to Msemwa & Co. advocates to write demand notice (letter). There is nothing before us to act upon, as clearly seen from the record i.e the 1st respondent reply to memorandum of appeal. There is no attachment of any kind. The 1st respondent ought to have attached documents as proof of expenses. As said earlier, the Tribunal cannot act on bare assertion that there were costs incurred by the 1st respondent. Thus, ground no. 11 has merits. It is accordingly allowed.

The last issue is on awarding of Tshs. 4,000,000/= as compensation to the respondent, without there being assessment

of such damages. Before we address assessment, we wish to reiterate that, there is no dispute that, unauthorized sim swap happened and affected the 1st respondent. For three (3) days the 1st respondent was unable to communicate with whoever he intended to communicate with which is indeed a serious disruption of one's private affairs which he never anticipated when he registered himself as a customer to service provider as correctly asserted by Mr. ALIKO. The fact that, it took the appellant three (3) days to revive the line apart from being informed by the 1st respondent that his mobile number is connected with his NMB mobile account, the 1st respondent is entitled to damages. Yes, there was no such assessment by the 2nd respondent. However, this Tribunal having power to review evidence, and assessment of damages being a result from the reviewed evidence, Tribunal will deal with the matter. As shown above, the 1st respondent was cut off from communication for three (3) days due to unauthorized sim swap caused by the appellant who has the duty to ensure that, the 1st respondent as his customer is not interrupted. In the event of interruption, the appellant ought to have acted promptly to redress or rescure the situation. The taxing question is if the appellant did perform his duty?

The 1st respondent went down and up for three (3) days only to revive the line. It took almost a month to reply the 1st

respondent's advocate letter. In the course of proceedings, the appellant did not admit some of the glaring issues of unwanted sim swap. This clearly shows that, the appellant neglected to perform a legal duty yet, it took three (3) days to rectify the problems as per Tab 4B. There is nothing apart from negligence that one can detect. In fact, unwanted sim swap even for one minute is a great inconvenience that needs to be addressed seriously, let alone, three (3) days that appellant took to revive the line. Interfering with one's convenience and loss of contact has a serious adverse impact on one's life. Thus, ground no. 12 is without merit, and on further orders, this Tribunal having reviewed the evidence, it has increased the amount to Tanzanian Shillings five million only (5,000,000/=) as damages for unwanted sim swap.

In conclusion, therefore, appeal allowed to the extent shown above. Order for fine is hereby quashed. The amount of Tanzanian Shillings two million only (2,000,000/=) is set aside while the amounts of Tanzanian Shillings four million only (4,000,000/=) on general damages is increased to Tanzanian Shillings five million only (5,000,000/=).

Costs are within the Tribunal's discretion, though they follow the event. However, in the circumstance of this particular case, we would refrain from making any order as to costs.

Signed

Judge Z.G. Muruke – Chairman

Signed

Mrs. N.L. Tenga – Member

Signed

Mr. Onesmo Kyauke – Member

Judgment delivered this 23rd day of April, 2015 in the presence of Ms Rose Alex for the appellant, Mr. Panya for the 1st respondent,and Mr. Hassan Bwanga for the 2nd respondent.

Signed

Judge Z.G. Muruke – Chairman

Signed

Mrs. N.L. Tenga – Member

Signed

Mr. Onesmo Kyauke – Member

23/4/2015