

**IN THE FAIR COMPETITION TRIBUNAL  
AT DAR ES SALAAM**



**IN THE MATTER OF AN APPEAL NO. 17 OF 2018**

**BETWEEN**

**VODACOM TANZANIA PLC.....APPELLANT**

**AND**

**ABOUBAKAR ALLY.....1<sup>st</sup> RESPONDENT**

**TANZANIA COMMUNICATIONS**

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

**RULING**

On 31<sup>st</sup> day of August, 2018, the appellant herein lodged to this Tribunal a memorandum of appeal containing four grounds of appeal trying to challenge the decision of the 2<sup>nd</sup> respondent in Complaint No. TCRA/LAL/02/29/MEI/2018 dated 20<sup>th</sup> July, 2018.

In response to the appeal, both respondents filed their reply to the memorandum of appeal in which they challenged the appellant's appeal in its entirety and asked the Tribunal to dismiss the same with costs.

On 6<sup>th</sup> day of December, 2018 the 2<sup>nd</sup> respondent filed herein a notice of a preliminary objection that the appeal is incompetent for failure to comply with Rule 11 (6) of the Fair Competition Tribunal Rules, GN 219 of 2012 (hereinafter referred to as “the FCT Rules”).

When the appeal came for hearing on 10<sup>th</sup> December, 2018 the learned counsel for appellant Mr. Gasper Nyika prayed to this Tribunal for an order of having both the appeal and the preliminary objection argued together. The prayer was conceded by both respondents.

To have an evenly flow, we find it prudent to first consider the preliminary objection and determine if the objection has merit or not before considering the appeal itself, because the consideration of the appeal will depend on the outcome of the preliminary objection raised by the 2<sup>nd</sup> respondent.

Learned advocate for the 2<sup>nd</sup> respondent, Ms. Happiness Flavian submitted that the records of appeal filed by the appellant does not contain the records of proceedings as required by rule 11 (6) of the FCT Rules. She contended that the proceedings of the Complaint’s Committee are necessary to reach a fair and just decision as in its absence, the appeal before the Tribunal is incompetent. She therefore prayed for the appeal to be rejected under rule 31 (1) (c) of the FCT Rules.

Responding to the submissions, Mr. Nyika argued that the objection presupposes that when the Complaint's Committee sits, records its proceedings which is not the case. He argued that there is no provision of the law that the committee records proceedings which can be attached to the appeal. He thus contended that the rule is not applicable to the matter at hand.

In the alternative, he argued that the decision of the committee contains sufficient information for the Tribunal to determine the appeal since the decision has details on how the proceedings were conducted and how the evidences were received. He therefore prayed for the objection to be overruled.

Ms. Flavian briefly rejoined that the appellant has not explained that it tried to seek the proceedings and was denied as such it is illogical to argue that there are no proceedings.

It is garnered from the submissions made by the counsels that there is no dispute that the appeal lacks records of proceedings. Rule 11 (3) of the FCT Rules provides:

*"An appeal shall be instituted by lodging with the Tribunal:*

*a) Five copies of the memorandum of appeal or cross appeal for the use of the Tribunal and for each party in the appeal;*

- b) Five copies of record of appeal or cross appeal for the use of the Tribunal and for each party in the appeal; and*
- c) Security for costs where applicable."*

The record of appeal according to sub rule 6 of Rule 11 of the FCT Rules comprises of pleadings, proceedings and the decision appealed against.

It should be observed here that sub-rule (3) to rule 11 of the FCT Rules is couched in mandatory terms. It has used the word "shall" which connotes that the function must be performed. This is clearly provided for by the provisions of section 53 (2) of the Interpretation of Laws Act, Cap. 1. For easy of reference, it is reproduced hereunder:

*"Where in a written law the word 'shall' is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

It follows then that in the matter at hand, it was imperative upon the appellant to comply with the provisions of rule 11 (3) and (6) of the FCT Rules. The position of the law is not disputed by the counsel for the appellant. He however argued that it is not applicable to the present appeal because the Complaints' Committee does not have record of proceedings. With due respect to his contention, as rightly observed by the learned advocate for the 2<sup>nd</sup> respondent there is no scintilla of evidence to

suggest that the Complaint's Committee has no records of proceedings. We are not told as to whether the appellant tried to secure one but failed. There being no such material evidence upon which the Tribunal can safely hold that the Complaint's Committee had no records of proceedings then we have no other option than to hold that the mandatory provisions of rule 11 (3) and (6) of the FCT Rules have been offended against by the appellant. The imminent question that remains is what will be the fate of this appeal. Rule 31 (1)(c) of the FCT Rules provides:

*"The Tribunal may, after giving the parties an opportunity to be heard, reject an appeal in whole or in part at any stage of the proceedings where:*

*a).....*

*b).....*

*c) The appellant or applicant has failed to comply with any rule, direction or order of the Tribunal; or*

*d)....."*

In view of the above position of the law and by a concession made by the learned counsel for the appellant on noncompliance with the mandatory provisions of rule 11 (3) and (6) of the FCT Rules, we find merit in the preliminary objection and sustain it.

The ultimate result is to reject the appeal in whole. The appeal is hereby rejected in whole with costs. It is so ordered.

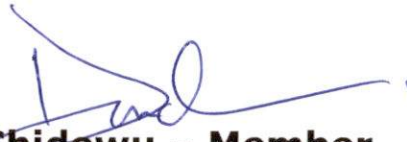
Dated at Dar es Salaam this 09<sup>th</sup> day of January, 2018.



**Judge Barke M.A. Sehel – Chairperson**



**Hon. Yose J. Mlyambina – Member**



**Hon. Donald L. Chidowu – Member**

**09/01/2019**