IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA

AT DAR ES SALAAM

IN THE MATTER OF APPEAL NO. 1 OF 2019

BETWEEN

TANZANIA ELECTRIC SUPPLY

COMPANY LIMITED .....APPELLANT

AND

RYAMBOGO MANYAMA MSIBA

(NEXT FRIEND TO MSIBA RYAMBOGO).....1ST RESPONDENT

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY .....2ND RESPONDENT

(Appeal arises from the decision of the Energy and water Utilities Regulatory Authority dated 21st December, 2018 on complaint number; EWURA/33/1/433)

JUDGEMENT

The appellant, TANZANIA ELECTRIC SUPPLY COMPANY LIMITED being aggrieved by the award of the 2nd respondent hereinabove, in favour of the 1st respondent, has come to this Tribunal by way

of appeal armed with six grounds of appeal faulting the 2nd respondent's findings, couched in the following language:-

1. That the 2nd respondent erred in law and fact by finding that the appellant is liable to the 1st respondent due to negligence by relying on assumed facts which were neither adduced nor proved by the 1st respondent.
2. That the 2nd respondent erred in law and facts by disregarding the evidence adduced by appellant on awareness safety campaign to the society of the 1st respondent.
3. That the 2nd respondent erred in law and facts by awarding the general damages of Tshs. 217, 000,000/= against the appellant in absence of proof of negligence.
4. That the 2nd respondent erred in law by making its finding upon issues which were not framed and recorded prior hearing.
5. That 2nd respondent erred in law and facts by changing the name of the complainant to Ryambogo Manyama Msiba

suing as next friend of the victim without any informal or formal application for amendment to institute a complaint.

6. That 2nd respondent erred in law and facts by arbitrating a dispute in which the complainant was not legally competent to institute a complaint.

Upon being served with the memorandum of appeal, the 1st respondent filed a reply to the grounds of appeal disputing all grounds of appeal raised and eventually prayed that the appeal be dismissed with costs. Simultaneously, the 1st respondent raised and filed a formal notice of preliminary objection on a appoint of law to the effect that:-

"That the appeal is incompetent as the service of the notice of appeal to the 1st respondent was made in contraventions of the mandatory provisions of Rule 9(4) of the Fair Competition Tribunal Rules, 2012."

Consequently, the counsel for 1st respondent prayed that the whole appeal be struck out with costs.

On the part of the 2nd respondent, it also filed a reply to the grounds of appeal and stated that this appeal is unmerited and prayed that same be dismissed with costs.

The facts of this appeal are that on 13th August 2017 at Chumwi Village in Musoma Rural District, one Msiba Ryambogo, 15 years old boy and a minor touched a stay wire which was linked to 33kV distribution line owned and operated by the appellant. The facts go that on that material day, the victim was grazing cattle with his brother, but as he passed near the wire and upon touching it, the minor suffered severe electricity shock and upon being taken to hospital for treatment, eventually the victim's two hands and one leg were amputated due to injuries suffered. A formal complaint was eventually lodged against the appellant and after hearing both parties, the 2nd respondent found the complainant proved his case and awarded the victim Tshs. 217,000,000/= as general damages for pains and psychological torture suffered as result of the electrical shock from the infrastructures owned and operated by the appellant and costs of the trial were equally awarded. The appellant, aggrieved by the

award and orders therein has as such appealed to this Tribunal, hence this judgement in appeal.

When this appeal was called for hearing, the appellant was enjoying the legal services of Mr. Laurean Kyarukuka, learned advocate. The 1st respondent was enjoying the legal services of Mr. Mashaka Fadhili Tuguta, learned counsel and the 2nd respondent was enjoying the legal services of Ms. Hawa Lweno, learned advocate. All learned advocates were ready for hearing. However, Mr. Tuguta informed the Tribunal that he prays to withdraw his preliminary objection on point of law to allow the appeal be heard on merits. His prayer was granted and the preliminary objection was marked withdrawn, paving way for the hearing of the appeal on merits.

Mr. Kyarukuka stood up to argue the appeal and informed this Tribunal that he will argue jointly grounds number 1,3 and 5 as one and ground 4 and 6 as one as well and he will wind up with ground number 2 separately.

On ground 1,3 and 5 it was the submission of Mr. Kyarukuka that these three grounds were the basis upon which the award was based, but same were made on facts not adduced and proved by the 1st respondent. According to Mr. Kyarukuka, it is upon those facts, the award of Tshs.217, 000,000/= was grounded. Those facts are negligence and the change of the name of the complainant from that of Msiba Ryambogo to that of Ryambogo Manyama Msiba suing as next friend, pointed out Mr. Kyarukuka. In the course, Mr. Kyarukuka prayed that ground number 4 be included in three grounds he is arguing jointly. According to Mr. Kyarukuka, the complainant was Msiba Ryambogo but in the award same was changed into Ryambogo Manyama Msiba without any formal amendment as envisaged in Regulation 11 of the EWURA (Consumer Complaint Settlement Procedure) Rules, 2012. Mr. Kyarukuka contended that since no amendment was done it was wrong to change and write Ryambogo Manyama Msiba without formal application for amendment.

On negligence which was attributed to the appellant, causing the victim to lose two hands and one leg, Mr. Kyarukuka submitted

that negligence was not proved and it was not one of the issues to warrant the 2nd respondent to hold that the respondent has duty of care to provide awareness to the use of electricity. The duty of care was not proved at all, lamented Mr. Kyarukuka. The issues framed are different from that parties had agreed and recorded before hearing started; as such occasioned failure of justice and the decision arrived at was wrong. In this, he submitted that no single witness testified that the victim touched the wire but the testimony was that the high-tension electricity current pulled the victim towards the wire. Further submitting, Mr. Kyarukuka told the Tribunal that on the issue of stay wire was introduced by the 2nd respondent and not witnesses. Further argument was that even the report from Muhimbili was introduced by the 2nd respondent which is at page 45 of the record of appeal and it was the document that was used to gauge the estimated loss of prosthetic devices. Mr. Kyarukuka charged that this was an expert opinion which was introduced in the award making process without hearing the appellant and that the Tshs. 217, 000,000/= was given based on that report.

Eventually, Mr. Kyarukuka prayed that the said report be expunged from the Tribunal record and it be held that it prejudiced the appellant. Moreover, it was the submission of Mr. Kyarukuka that sympathy was the basis of the grant of the money awarded by the 2nd respondent.

On the proof of negligence it was the submission of Mr. Kyarukuka that the 1st respondent had a duty to prove that the appellant did not do his duty. The evidence available shows the stay wire subject of this accident was cut and was hanging as some of its parts were removed. The learned counsel queried how TANESCO is responsible to a hanging wire and to his view there was no connection between the hanging wire and TANESCO as all respondents do not know who cut the wire to establish negligence. The learned counsel, therefore, concluded his submission that no negligence was proved on the part of the appellant. Mr. Kyarukuka contended that as there was no report of the wire prior the impugned accident, then, the appellant was not responsible and even after the accident the report came on 20/09/2016, while the accident occurred on 13/09/2016. The

appellant upon receipt of the report took action immediately. Not only that but even CW1 admitted that he did not report the accident until when he wrote the letter. Even the incidence was reported to police and not TANESCO.

Mr. Kyarukuka submitted that the extent of injury shows that CW5, the victim, touched the wire and when electrocuted was left unconscious, but CW1 says he talked to him; this to Mr. Kyarukuka leave a lot to be desired. Also, it was the argument of the counsel for appellant that the doctor who treated the victim never came to testify as such weakened the case of the complainant.

Mr. Kyarukuka cited the case of ISMAIL RASHID v. MARIAM MSATI, CIVIL APPEAL NO 75 0F 2015 in which it was held that exhibit not tendered cannot be basis of the decision and as such rendered the decision a nullity. Mr. Kyarukuka, to buttress his point cited the book of Clarke and Lindsell on Tort at pages 415 - 416 which discusses the duty of care and breach of duty to show that same was not proved in the instant appeal.

Eventually Mr. Kyarukuka for the reasons stated above prayed that this appeal be allowed and the award granted by the 2nd respondent be set aside with costs.

Mr. Tuguta for the 1st respondent was brief to the point, that on the issue of the parties' names is a mere technicality and urged this Tribunal not to consider it at all. On issues agreed and recorded, it was the reply and submission of Mr. Tuguta that in deed they were almost the same as they were just a guidance and added that the appellant was not prejudiced at all, even if found different because the decision was based on evidence tendered. According to Mr. Tuguta, the 2nd respondent was justified to her findings and the decision arrived was fair and just in the circumstances. Mr. Tuguta argued that what the 2nd respondent did was within her powers as there was no way they would have decided otherwise unless there was no connection between victim and TANESCO. Naturally, the appellant is the electricity service provider and his consumers are his members of the general public, victim inclusive. The law and duty of care flow naturally for the appellant to make sure his infrastructures

are not harmful to the general public as provided under Regulation 20(1) of Electricity (General Regulations) G.N. 63 of 2011 which require the appellant to guarantee the protection of public from danger. Because of that legal duty, the appellant and the victim become legal neighbours and the appellant was duty bound to foresee that his acts or omission do not cause damage to others. To buttress his point Mr. Tuguta cited the case of STAR SERVICES LIMITED v. Mrs. FATUMA MWALE [2000] TLR 390 AT PAGES 391-392 in which the appellant was held responsible for breach of duty and failure to take reasonable cause to prevent accident. On the same note, it was the strong submission of Mr. Tuguta that in the circumstances of this appeal, the appellant breached the duty of care for failure to visit her infrastructures and put warnings. To worsen the situation, it was the submission of Mr. Tuguta that the appellant never created awareness trainings to schools and villagers. He further submitted that CW5 testimony is very clear on this point. The stay wire was hanging for over six months and yet the appellant want to escape liability

on this highest order of negligence as testified at page 8 of the proceedings, lamented Mr. Tuguta.

Mr. Tuguta attacked the appellant case by referring to the evidence of RW2 who told the 2nd respondent at page 21 of the proceedings that it is the duty of TANESCO to inspect its infrastructures. That being the case, it was the argument of Mr. Tuguta that had the appellant been vigilant enough he would have discovered the defects on stay wire and avoid the dangers to the public. Mr. Tuguta equated the act of the appellant personnel not detecting the defect as someone who had duty but opted to do it and wanted to avoid liability and blame others. Mr. Tuguta concluded that the accident occurred because there was negligence on the part of the appellant.

On the issue of damages of Tshs. 217,000,000/= and its assessment it was the reply of Mr. Tuguta that same was not solely based on Muhimbili report but on several factors, which are the law, evidence, age and future prospects of the victim and the fact that he is permanently incapacitated, where now he is unable to do anything for himself including eating and other

activities. Mr. Tuguta was gentleman enough to concede to the prayer of expunging the Muhimbili report but went further to ask this Tribunal to make a fair assessment of the damages and invited the Tribunal to raise them from what was awarded to higher amount. To buttress his point the counsel cited the case of **BASHIR ALLY (MINOR) SUING BY NEXT FRIEND FATUMA ZABRON v. CLEMENCIA TALIMA AND 2 OTHERS [1988] TLR 215** in which the court went further to take factors and arrived at just decision. The learned counsel implored this Tribunal to make further assessment in the circumstances and vary the amount of damages awarded.

As to the sympathy raised it was the reply of the counsel for 1st respondent that same is nowhere on record but just a submission from the bar and invited us to ignore it. Also, as to the report that there was vandalism, it was the reply of Mr. Tuguta that it is nothing but speculation as no proof of such allegations. The allegations that CW1 never reported to TANESCO, it was the reply of Mr. Tuguta that the lifesaving after

the accident was paramount as the condition of the victim was critical but later everything was reported.

Further, Mr. Tuguta argued that prove was on balance of probability and the 1st respondent proved his case to the required standard and prayed that the decision of the 2nd respondent be affirmed and this Tribunal should not allow technicalities to defeat justice. On this point, Mr. Tuguta cited the case of **MOHAMED ISSA v. JOHN MACHELA, CIVIL APPEAL NO. 55 OF 2013 (CAT) MWANZA** (Unreported).

In respect of the decision of ISMAIL RASHID (supra) it was the submission of Mr. Tuguta that this is distinguishable as in that decision, the document in question was the sole basis of the decision but in this appeal the impugned report even if expunged still there is enough evidence and factors on record, to affirm the 2nd respondent decision. He surmised that each case must be decided on its own facts.

In conclusion, Mr. Tuguta prayed that this appeal be dismissed with costs.

On the other hand, the counsel for the 2nd respondent told the Tribunal that she strongly opposes this appeal. Ms. Lweno was of the firm view that there is a connection between responsibility and duty of care. According to her, this is a technical issue but does not touch the merits and evidence on record which was the basis of the decision. On a further note, it was the submission of the counsel for 2nd respondent that there are laws that casts duty of care to the appellant to the general public for her infrastructures on daily basis to make sure that no damage is caused to the public. The counsel mentioned these laws as Electricity Act, Electricity (General Regulations) which casts duty of care under regulation 21 to the appellant. According to Ms. Lweno the issue of safety cannot be escaped and the appellant failed to discharged her duty of care and caused the accident.

On how the accident occurred, it was the reply of Ms. Lweno that at page 10 of the award line 5 it is clear the victim was electrocuted and that is why he was seriously injured. There is evidence that cows passed near the wire but were not affected, however, there is no evidence as to how far the cows passed.

Also, as to the stay wire, the reply of Ms. Lweno was that at page 36 of the record of appeal, TANESCO witness is the one who explained the two types of wire and not the Authority as alleged. And that RW3 explained how dangerous is if one goes near the electricity and is contrary to what was admitted.

On expert report from Muhimbili, it was the reply of Ms. Lweno that they sought the expert opinion to help the Authority to arrive at just decision and according to her same did not in any way prejudiced the appellant, as there is enough evidence than the report. As to the vandalism at page 38 same was not proved and was rejected.

In the end the counsel for respondent prayed that this appeal be dismissed with costs.

In rejoinder, Mr. Kyarukuka was of the strong stance that issues are framed before hearing and not in the award, the fact that were changed show biasness on the part of the 2nd respondent.

On negligence, Mr. Kyarukuka admitted that they are obliged to have safe infrastructures but was quick to point out that

negligence on their part was not proved as there was evidence of ongoing checking the infrastructures. And as to the stay wire it was his rejoinder that same was permanent and was removed to avoid further damage.

In conclusion, the counsel for appellant reiterated his earlier prayers to allow this appeal with costs.

This marked the end of hearing of this appeal.

The task of this Tribunal now is to determine the merits or otherwise of this appeal. After hearing the counsel for appellant, the 1st and 2nd respondents counsel respectively in this appeal, like the trial Authority, there are certain facts not in dispute namely; **one**, there is no dispute that the victim, MSIBA RYAMBOGO was injured and his two hands and one leg were amputated following the electricity shock sustained at Chumwi village due to stay wire that was the property of the appellant. **Two,** there is no dispute that the victim was totally incapacitated in all walks of life. What is in dispute is whether the appellant was negligent in owning and managing its infrastructures as such

causing such serious accident. The trial Authority found the appellant negligent and awarded damages accordingly. In the 1st , 3rd, 4th, and 5th grounds of appeal, the main complaint of the appellant was that negligence was not proved, the award was awarded against the weight of evidence and, the award was based on issues not recorded at the beginning of the hearing and that it was wrong to change the name of the complainant without formal application and amendment. In the end, the counsel for appellant urged the Tribunal to allow the appeal with costs based on the above complaints. On the other hand, the respondents' counsel strongly opposed these complaints as baseless and urged this Tribunal to dismiss them with costs. This Tribunal will address each complaint and make a proper finding based on evidence on record.

As to the changing of names without amendment or application, this Tribunal after traversing the trial records seriously is of the considered opinion that this issue will not detain this Tribunal much. The name of the victim was in the form of complaint it was written Msiba Ryambogo and his representative was written

RYAMBOGO MSIBA/ IBRAHIM ALEX. On 14th May 2018 when hearing started, the complaint was represented by Mashaka Fadhili Tuguta as his legal counsel and by Ryambogo Manyama Msiba the father of Msiba Ryambogo (minor) in front of JULIANA WILLIAM Zonal Legal Officer of the appellant and no such objection was raised. This ground, is on the above reason, in our considered opinion, devoid of any useful merits and stand to fail miserably for want of merits. No prejudice was caused, Ryambogo was suing as next friend and to entertain it will amount to unnecessarily welcoming technicalities in this matter.

Another point taken was the issue of negligence, which to the opinion of this Tribunal, was the centre of contention in the trial and in this appeal. Mr. Kyarukuka strongly argued that negligence was not proved at all because the reason of the award was that appellant did not perform her legal duty by providing awareness to the community. More argument was that the stay wire was cut and was hanging because some of the objects were removed by unknown persons and it was wrong to hold TANESCO liable for acts which caused accident without

proof that it was caused by them. Both counsel for respondents stood to their guns that negligence was proved by submitting that naturally TANESCO is supplier of the electricity and is legally bound to have a duty of care which was breached by failure to take precautions before the accidents occurred. They cited Rule 20 (1) of the Electricity (General Regulations) G.N 63 of 2011 which require the appellant to guarantee protection to the general public, the victim inclusive. According to them, this was not done. They further argued that legally the victim and TANESCO are legal neighbours who owe each other duty of care. According to them, the appellant, breached that duty and cited the case of **STAR SERVICES LIMTED v. FATUMA MWALE [2000] TLR 390** to buttress their point. In their submission they pointed out that the appellant did not put any precautions, never created awareness at all to villagers and never inspected her infrastructure to avoid this eminent danger to the public. The Authority, among others, agreed with the complainant evidence that the appellant was negligent on reasons that there was no warning and was not in dispute that stay wire was hanging

causing the accident which devastated the life of the victim's life dreams.

This Tribunal has dutifully considered this point seriously and after visiting the whole evidence on record, we are of the strong opinion that negligence was proved. Just to add on the reasons advanced by the Authority in holding that negligence was proved is the testimony of the appellant's witnesses who testified at page 18 of the record which testimony was to the effect that:-

> **" ... the stay wire was designed to support during installation and was not meant for permanent support and thus why I agreed to remove the same.**

RW1 at page 18 of the record went on testifying that:-

> **" stay wire is a pole support and failure to fix as it was reported may result to a great danger taking into account that the line is high tension line."**

At page 19 of the record RW1 is recorded to testified that:

> **"we decided to remove the stay wire because it seems to be unnecessary."**

Also, was the testimony of RW2 at page 19 who had this to say:

"we noticed the stay wire was detached to the stay load and the wire was hanging near the pole."

Further testimony of RW2 was that:

"Stay grip was removed. I informed my supervisor and I advised to remove the stay wire because some of the parts were not there and he agreed. He inquired to know whether it will affect the support and I said no. The stay wire was installed to support installation, if removed could result no harm to the infrastructure...."

At page 20 of the record RW2 stated that:

"to remove stay wire the electricity must be off"

Under cross examination RW2 at page 20 had this to say:

"I am not sure how long did the stay wire was hanging...." And at page 21 RW2 went to tell the Authority that:

"if a person forgets to put insulator there is a high possibility of electricity passage through the stay wire.

As to RW3 his testimony at page 26 of the record was to the effect that:

" it is true that if a person passes near the electricity wire that has electricity of HIGH Tension will get affected. Way leave of 33Kv is 10 metres and is for safety reasons. Proximity within five metres to the electricity line (way Leave) is dangerous.

With this ample evidence on record and many more which speak by themselves, there is no doubt that any mindful Tribunal can say that the appellant was negligent. Indeed, the appellant through her own witnesses' testimonies was enhancing the complainant case and proved high degree of negligence on their part and when coupled with the complainant testimonies, the appellant was not only negligent but demonstrated a high degree of negligence. The testimonies of the appellant witnesses were

the best on this matter which demonstrated high degree of negligence, in the circumstances.

Another reason, is that the stay wire was not well attended and if the appellant had inspected their infrastructures, they could have detected that the stay wire was unnecessary and remove it before it caused such devastating accident. The fact that the appellant's own witnesses admitted that it was unnecessary for stay wire to be left there, as seen above, is another indication that the wire that caused accident was unnecessary wire that the appellant failed to remove after completion of infrastructure construction, as such this was another vindication of negligence on her part that he cannot avoid liability. The wire was a High Tension and any prudent person, like the appellant personnel, who are qualified personal are expected to make sure that all High-Tension line is well inspected, all dangers eliminated and necessary warnings put in place for general public to avoid causality of this nature. Failure to do this legal obligation on her part, is failure to accomplish her statutory obligation as rightly

argued and admitted by Mr. Kyarukuka that by law, the appellant has a duty of care to the general public.

Therefore, the appellant's argument that negligence was not proved is unfounded and against the strong and ample evidence on record which speak by itself that the appellant demonstrated high degree of negligence in the circumstances of this case. Equally, her argument that the victim was vandalizing the infrastructures is not supported by any evidence on record and therefore this limb has to fail miserably for want of merits.

Another point raised in the 4 consolidated grounds of appeal argued together is that issues that were agreed and recorded, were changed and other different issues were adopted in the award hence occasioned failure of justice by arriving at a wrong decision. This limb of argument won't detain this Tribunal much. Much as negligence has been proved as amply demonstrated above on the part of the appellant, the change of issues, if any, did not fetter the evidence on record whether the appellant is responsible for the complainant's injury or not. Indeed, it is the firm and strong opinion of this Tribunal that the appellant is

responsible for the complainant's injury in all intent and purposes, in the circumstances of this case. Nevertheless, still if we examine closely the issues allegedly to have been changed, the reality were not changed since, semantically, they mean the same thing. The key word to the 1st framed issue was "responsibility" which to our understanding is same as having duty of care in order to be held responsible. The 1st issue to our understanding was framed using ordinary English but it means the same when put in legal language thus did not occasioned any injustices. As rightly argued by counsel for respondents this limb of complaint is baseless and has to fail as well. More so, for the interest of justice it should be noted that Courts or Tribunal can amend, add or strike out issues at any time on such terms it thinks fit for the necessary determination of matters in controversy between the parties. So, what was done here was not fatal and did not occasion injustice.

In the end and for the above reasons, the 1st, 3rd, 4th and 5th grounds of appeal are found to be devoid of merits and same are hereby dismissed.

Another complaint of the appellant was that the award of Tshs. 217,000,000/= was based on Muhimbili report on Prosthetic devices. The expert report, according to Mr. Kyarukuka, was used in assessing the award but was admitted without the appellant been given an opportunity to defend nor was she given opportunity to cross examine the expert who issued the report. To buttress his point Mr. Kyarukuka cited the case **of ISMAIL RASHID v. MARIAM MSATI** (supra) in which an exhibit not tendered formed the basis of the decision and such the decision was declared a nullity. Eventually, Mr. Kyarukuka prayed that the same be expunged from the record. Mr. Tuguta and Ms. Lweno both opposed this argument, and counter argued that the award was not solely based on the expert opinion but was based on a number of factors such as the law, the evidence, the age, the future prospects of the complainant and that the report was just by the way and it is on prosthetic instruments and the period of change. The learned counsels distinguished the case of **ISMAIL RASHID** (supra) for the decision in that case was solely based on exhibit not tendered quite different to the instant appeal

where the authority considered several factors and the issue of expert was just by the way. On a further note, Mr. Tuguta conceded to the prayer to expunge the said expert report from the court record, but as for Ms. Lweno was not moved by the prayer and her argument was that technically they sought such report in order to do justice to both parties.

This Tribunal has listened and deliberated the rival argument of the parties on this point. To do justice to parties, we find it appropriate to bring what the Authority said and what was the basis of its decision on this appeal. At page 41 of the record (page 12 of the award) the authority had this to say:

"In arriving at this decision, the Authority has considered the law, the evidence, the age and the future prospects of the complainant as well as the expert advice provided by the Muhimbili Orthopedic Institute in their letter dated 2nd of October 2018 in which they advised that the complainant is permanently disabled and that he will require prosthetic instruments to support him for the rest of his life. The said instruments according to the

advice costs 13 million and are replaceable every after 5 years throughout the life of the person. Since according to the National Bureau of Statistics National Censures of 2012 life expectancy is 61 years and given the current age of the complainant is 16 years that means his prosthetic devices will require replacement about 9 times during his lifetime.

Apart from the medical considerations above, the Authority has also considered the age of the complaint and the fact that a young man in school his future dreams of becoming whoever he dreamed to, have been cut short including his future earning, career, and enjoyment of life. On the contrary he has until now endured injuries, pain, loss of limbs and psychological torture and permanent disability."

It is against this background, the 2nd respondent ordered the appellant to pay the 1st respondent Tshs. 217,000,000/=. The issue to be answered here is whether the expert report was the only basis of the decision and the grant of the award. This

Tribunal is of the considered opinion that the expert opinion was not the sole consideration for the grant of the general damages. The Authority was very clear in its conclusion that several factors were considered and for the interest of justice and given the circumstances of this appeal, it is correct to say that the expert report had very little influence on the Authority because eventually what was granted was general damages without specifying that it is for buying the aposthetic instruments or not. Mr. Kyarukuka prayed that the said report be expunged from the Tribunal's record, which prayer was conceded by Mr. Tuguta, but resisted by Ms. Lweno and she argued that the Authority was justified to seek the expert opinion.

This point won't detain this Tribunal much. Even if we expunge the report still there are other equal important factors that won't change the situation in this appeal. However, this Tribunal is of the considered opinion that since the report was sought and obtained outside the proceedings, same is hereby expunged from the Tribunal record.

This trickles this Tribunal to the 2nd ground of appeal that the 2nd respondent erred in law and fact by disregarding the evidence adduced by the appellant on awareness safety campaign to the society of the 1st respondent. Briefly and to the point Mr. Kyarukuka argued that exhibit R-3 tendered was not given due consideration it deserves. The reply by the respondents' counsel was that the Authority was fair and it gave due consideration the report and was justified in its decision. This Tribunal has given due consideration of the rival argument on this point and to be fair and with due respect to Mr. Kyarukuka, the Authority in its award gave the report its due regards and gave sound and good reasons why it found the report not enough to exonerate the appellant. The Authority was very clear that what was envisaged by the provisions of Regulation 20 (3) of G.N. 63/2011 was not in the report but same was meant to be for would be customers of the appellant and not the general public. This Tribunal after visiting the trial record and having seriously considered the testimony of the appellant on this issue, in particular, RW4 who is responsible for community awareness but his testimony was

that he did awareness to consumers and not the general public, in this he had this to testify:

> **"the awareness includes the project itself, electricity generation and flow, wiring, costs of the project and costs sharing, customer responsibility against that of the Government, proper electricity use, security, costs of purchasing after connection and provision of important and emergence numbers."**

But when RW4 was pressed with questions he admitted **not doing awareness in Chumwi A and B primary schools** for reasons not disclosed. When further pressed with questions RW4 had this to say:-

> **" we are aware that there is a need of doing awareness since the occurance of an accident but I am busy. Msiba can have the relief he prayed according to the law and practice of TANESCO."**

From the above testimony of RW4 one cannot fail to grasp that the appellant personnel who are assigned to do community

awareness are busy in the office than doing community awareness as to them was not their agenda and RW4 categorically stated that in case of accident, payment will be affected by TANESCO, according to law, the victim, Msiba inclusive. This is what made the 2nd Respondent conclud that the appellant's personnel who testified are arrogant, lack concern, lacked the best practice and public relations tools and techniques.

That said and done this point is devoid of useful merits in this appeal and same stand to fail equally like others.

In the upshot, all grounds of appeal advanced and argued stand to fail in this appeal. However, Mr. Tuguta invited this Tribunal not only to dismiss this appeal with costs but also prayed that this Tribunal finds it appropriate to vary the amount of award given because the victim is totally incapacitated. And there is nothing he can do on his own. The learned counsel ingeniously invited the victim to come forward during hearing, indeed, the victim as observed is 100% incapacitated. The trial Authority correctly considered the law, the evidence, the age, his prospects

and enjoyment of life. The extent of damage was not considered at all among the factors. The victim's two hands and one leg were amputated totally affecting the victim in all his walks of life. With only one leg left, the victim is 100% dependent on other people to the rest of his life. The counsel for the appellant neither objected to the prayer of the counsel for victim during rejoinder to vary the award by this Tribunal, nor objected when the counsel for victim brought forward the victim giving parties and the Tribunal chance to see the extent of damage caused. This Tribunal is alive that not in all situations can the powers of varying the award granted be exercised save in exceptional circumstances. The exceptional circumstance in this case is that the 2nd respondent failed to consider relevant factors in awarding damages. In the circumstances of this appeal the extent of damage was not considered, hence convincing and compelling this Tribunal to consider the same. Therefore, this Tribunal has given due consideration to the extent of damages along with other factors considered by the trial Authority and under its powers as contained in Rule 38 (a) of the Fair Competition

Tribunal Rules, 2012 is inclined to vary the amount of award from Tshs. 217,000,000/= to Tshs. 300,000,000/= as general damages. We fully understand no amount of money can bring back the amputated hands and leg but at least the amount can console the victim and relive him of pains and suffering in some way and assist him to make his life under the circumstances manageable.

That said and done the appeal is hereby dismissed with costs for want of merits.

It is so ordered.

Dated at Dar es Salaam this 28th day of May, 2019.

Hon. Stephen M. Magoiga – Chairman

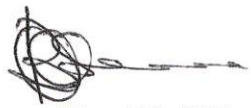
Hon. Butamo K. Phillip – Member

Dr. Theodora Mwenegoha – Member

28/5/2019

Judgment delivered in open chamber in Dar s Salaam this 28th day of May, 2019 in the presence of Elias Mkumbo, Principal Officer of the Appellant, Hawa Lweno holding brief for Mashaka Tuguta Advocate for the 1st Respondent and Hawa Lweno for the 2nd Respondent.

Hon. Stephen M. Magoiga – Chairman



Hon. Butamo K. Phillip – Member

Dr. Theodora Mwenegoha – Member

28/5/2019