THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO.100 OF 2017
(Arising out of EDT Complaint No.14 of 2015)

UMEME LTD::APPELLANT

VERSUS

RURIHOONA ELISAMA::RESPONDENT

JUDGMENT

BEFORE: JUSTICE SSEKAANA MUSA

This is an appeal arising out of the decision of the Electricity Disputes Tribunal in EDT Complaint No. 14 of 2015 filed by the respondent. The Appellant being dissatisfied with the decision of the tribunal appealed to this court. This appeal was brought on the following grounds;

1. The honourable members of the Tribunal failed to properly evaluate the evidence on record and came to the wrong conclusion that the disconnection of the Complainant's power was unlawful
2. The honourable members of the Tribunal erred in law and fact when they awarded special damages that had not been specifically proved.
3. The honourable members of the Tribunal erred in law and fact when they awarded the Respondent general damages
4. The honourable members of the Tribunal erred in law and fact when they failed to correctly and objectively evaluate the evidence on the record thereby arriving at a wrong decision.

The appellant prayed that the judgment and decree of the Electricity Disputes Tribunal dated 30th October 2017 be set aside, the appeal be allowed and costs be given to the appellant as well as any other reliefs deemed fit by this court.

The respondent filed a cross appeal on two grounds that is;

1. That the Learned Members of the Honorable Electricity Disputes Tribunal erred in law and fact when they failed to properly evaluate the evidence on record and awarded only UGX 80,000,000/= (Uganda Shillings Eighty million only) as Special Damages.

2. That the Learned Members of the Honorable Electricity Disputes Tribunal erred in law and fact when they awarded the Cross Appellant General Damages of UGX 10,000,000/= (Uganda shillings ten million only)

The respondent/cross appellant prayed that this court dismiss the appeal and allow the cross appeal. He also prayed that the judgment and decree of the Electricity Disputes Tribunal dated 30th October 2017 be set aside, the costs of the appeal, the cross appeal and of the proceedings in the Electricity Disputes Tribunal be awarded to the cross appellant.

The facts of the original complaint handled by the Honorable Members of the Electricity Disputes Tribunal are that the Cross Appellant herein was a customer of the Cross Respondent under Account No. 200882402 and meter No. UM200089 and was connected to a three (3) Phase power supply with a transformer purchased by himself and installed unto his land at Kizinda Mashonga 11KV Grid.

The Cross Appellant operated the business of maize milling, poultry, piggery, feeds processing and transportation. The business operated smoothly until an exorbitant electricity bill of UGX 19,499,790 (Uganda shillings nineteen million four hundred ninety nine thousand seven hundred ninety only). This was protested by the Cross appellant and Umeme responded by disconnecting supply and left him on a single phase that could not run his machines.

Umeme then removed the meter and brought another without any explanations. The Cross Appellant spent a long period of time without power and lost income. He claimed for compensation of UGX 478,341,000/= (Uganda Shillings four hundred seventy eight million, three hundred forty one thousand shillings only) and the Honorable Members of the Electricity Disputes Tribunal awarded UGX 80,000,000/= (Uganda Shillings Eighty million only) as Special Damages and General Damages of UGX 10,000,000/= (Uganda shillings ten million only).

The appeal and cross appeal were heard and the parties were tasked to file final written submissions. Both parties filed submissions that were considered by this court. The appellant however filed their submissions grossly out of time leaving the respondent no chance to respond.

We shall first of all remind ourselves of our duty as a first appellate court to re-evaluate evidence. Following the cases of **Pandya vs R (1957) EA 336; Kifamunte Henry vs Uganda Criminal Appeal No.10.1997, Bogere Moses and Another v Uganda Criminal Appeal No.1/1997,** the Supreme Court stated the duty of a first appellate court in **Father Nanensio Begumisa and 3 Others vs Eric Tiberaga SCCA 17/20 (22.6.04 at Mengo from CACA 47/20000 [2004] KALR 236.**

The court observed that the legal obligation on a first appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

The Court with approval, quoted the Court of Appeal of England which stated the Common Law position in **Coghlan v Cumberland (1898) 1ch.704** as follows:-

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other; materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong….. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances

may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

In **Pandya vs R (1957) EA 336,** the Court of Appeal for Eastern Africa quoted the passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction.

I shall, therefore, in the course of this judgement re-appraise the evidence on record.

The appellant in their submissions argued ground 1 and 4 together then 2 and 3 separately. The respondent argued ground 1 of the appeal and then proceeded to handle the grounds raised in the cross appeal.

I shall handle ground 1and 4 of the appeal first then I shall proceed to handle ground 2 and 3 of the appeal as well as grounds 1 and two the cross appeal together as they relate to a similar issue.

Appellant's submissions

Ground 1 and 4

The honourable members of the Tribunal at page 7 of the Judgment held thus;

"*Clearly the first disconnection for 19,653,087/= which had no basis and was later quietly removed by the Respondent as an over bill was illegal"*

And further at Page 8 of the Judgment, that,

"at all material times the Respondent was aware of the endless dispute by the complainant but ignored this and disconnected the complainant. We have no difficulty in the circumstances in concluding that the second disconnection was illegal"

We submit that this finding was erroneous and in total disregard of the evidence and the provisions of the Electricity (Primary Grid Code) Regulations.

According to the evidence of CW1 at page 6 of the Record of proceedings, he testified that when officials of the Appellant first disconnected him they left him another meter as they took the other one for testing. Whereas he contested the sum of UGX 19,988,594/=, in cross examination at page 8 of the record of proceedings, he admitted that he had an outstanding bill of UGX 152,296/= and that he had not paid the said bill.

Contrary to the finding of the Tribunal, the Appellant was entitled to disconnect the Respondent from power supply pursuant to **Reg15.1.1.**of the Electricity (Primary Grid Code) Regulations. The amount due or indicated is immaterial in as far as the reason for disconnection is concerned.

With respect to the second disconnection, the Respondent did not dispute the consumption relating to UGX 3,747,000/= constituent in the sum payable or demanded vide CEx. 5. Again this was reason enough for the Appellant to disconnect the Respondent from power supply.

In both cases, there was no bar to the disconnection as there was no complaint pending before the Electricity Regulatory Authority or the Electricity Disputes Tribunal or other instance where disconnection is not permitted as provided for in **Reg. 15.6.1.**

We do wish to further note that Reg. 20.3.2 of the Electricity (Primary Grid Code) Regulations referred to by the Tribunal was quoted out of context. It refers to disconnections made pursuant to Reg. 20.3.1subject to Reg. 20.1.3 which is not the case in the case before you my Lord.

We do therefore humbly invite this honourable court to find that the tribunal erred in law and fact when they failed to properly evaluate the evidence thereby reaching a decision that the disconnection was illegal.

Respondent's submissions

Your Lordship, four grounds of Appeal were presented by the Appellant and we propose to argue ground one which is the only separate ground from the ones of the Cross Appeal.

My Lord, the fourth ground that provides "The Learned Trial Magistrate erred in law and fact in failing to correctly and objectively evaluate the evidence on record and thus arrived at wrong a decision" is clearly misconceived as the Appeal arises from the Electricity Disputes Tribunal and not a magistrate's court but we shall read it *Mutatis Mutandis* and argue against the Appeal.

My Lord, in regards to the First Ground,the Learned members of the Electricity Disputes Tribunal failed to properly evaluate the evidence and came to the wrong conclusion when they held that the disconnection of the Respondent's power by the Appellant was unlawful, we argue that the Honorable Members of the Electricity Disputes Tribunal were spot on when they held on page 8 of the Judgment that the disconnection of electricity supply to the Cross Appellant herein was illegal. They rightly relied on the testimony of **RW1- YAHAYA**

KIGGUNDU who testified on page 77 of the record of Appeal that there was an error in the billing and thus they reversed the bill.

My Lord, the members of the Tribunal were alive to the provisions of the ***Electricity (Primary Grid Code) Regulations 2003 in specific Regulation 12.5.1*** that provides that "where a customer is over charged as a result of an error by a licensee, the licensee shall rectify the anomaly at the next billing".

The Tribunal also in our view rightly held on page 7 of the Judgment that the bill was normalized after the Complainant had suffered to major disconnections.

The actions of the Appellant of disconnecting power even when there was a dispute made the disconnections illegal, ***Regulation 20.3.2 of the Electricity (Primary Grid Code) Regulations 2003*** provides that "A licensee shall not disconnect supply to a customer's supply if there is a dispute between the consumer and the licensee which has been notified by the consumer" and as such the Honorable Members of the Tribunal held rightly that the disconnection was illegal.

The other grounds of Appeal are captured in the arguments for the Cross Appeal and we pray that this Honorable Court considers them as well and is pleased to dismiss the Appeal with Costs.

Court's analysis

As per the evidence on record, it is not disputed that the appellant disconnected the respondent's power supply twice as already stated above. The appellant

argues that both times the power supply was disconnected, it was done so lawfully.

Counsel for the appellant in their submissions cited **Regulations 15.1.1 the Electricity (Primary Grid Code) Regulations** submitting that the amount due or indicated is immaterial in as far as the reason for disconnection is concerned.

15.1.1 states that; ***A licensee may disconnect supply to a consumer's supply address if a consumer has not paid or adhered to the consumer's obligation to make payments in accordance with an agreed payment plan.***

There is no where under that regulation that is to the effect that the amount due or indicated is immaterial in as far as disconnection is concerned. With due respect to counsel, this section was quoted without context.

Regulation 15.6.1.a further states that a licensee shall not disconnect supply to a consumer's supply address where a consumer has made a complaint directly related to the reason for the prepared disconnection to ERA, the Tribunal or the Court or another external dispute resolution body and the complaint remains unresolved.

The appellant's witness at the tribunal proceedings, RW1 Mr. Yahya Kiggundu testified that the respondent (now) disputed the bills and he asked him to put the complaint in writing which complaint he delivered to the appellant's offices. The respondents meter was then removed and purportedly taken for testing but was never returned but the appellant was instead given a new meter but the bills still contained the disputed figure.

From all that evidence it is absurd that the appellant wants to hide behind the law stating that the respondent never filed a complaint before ERA, the Tribunal or the Court or another external dispute resolution body. The respondent was advised by the appellant's witness to write a complaint which he did therefore meaning that the appellant was duly aware of the pending unresolved dispute. The appellant ought to have rectified the anomaly in the respondent's bill at the next billing as required under Regulation 12.5.1.

The appellant's claim that the second disconnection was as a result of the amount admitted by the respondent does not hold water. The disconnection order on record did not state so. I concur with the ruling of the tribunal on this issue where they stated that the disconnection order ought to have stated the amount of UGX 3.700.000 as alleged by the appellant (then respondent).

Considering the foregoing, I find that the tribunal properly evaluated the evidence on record and reached a correct conclusion that the respondent's power supply disconnection was unlawful.

Ground 1 & 4 of the appeal therefore fail.

I shall now turn to the issue of damages awarded to the respondent by the tribunal. Both parties in their respective appeals raised grounds with regard to the awards given.

The tribunal awarded UGX 80.000.000 as special damages as well as UGX 10.000.000 as general damages.

Appellant's submissions

We note that the tribunal placed heavy reliance on the auditor's report to award the special damages. In our opinion, this report was defective and should not have been relied upon by the Tribunal for the following reasons:-

i) the auditor admitted failing to include the tax liability component in his report which he admitted would reduce the profits;

ii) the auditor claimed that he had a working file with receipts, payment vouchers, list of liabilities and assets and evidence of dividends to support his figures. None of these documents were submitted to the tribunal.

iii) the report was neither dated nor signed by the complainant.

We do submit that the Tribunal engaged in speculation and conjecture when it went to hold that;

"while he has no documents to specifically prove how much he lost in terms of sales, and profit in making forced sell of his stocks of poultry and pigs and future earning, we have no doubt in our minds basing on his evidence and that of his witness that the loss must have been substantial.

The legal position is that where a party has in its possession particular documents vital to its case and declines to produce them, a court would draw an adverse inference that the omission to produce them was deliberate and intended to cover some degree of truth which would injure its case. In the instant case, the omission to avail documentary evidence of sales, purchases and disbursement by the Complainant would lead to an adverse inference that there is some truth the complainant wanted to avoid.

Further the existence of the documents and opportunity to present them such as in the trial case makes any attempt to admit oral evidence of the content of thereof a contemptuous disregard of the Parole Evidence rule.

The burden to prove the existence of facts such as the loss, the existence of the stock of poultry and pigs or the sale thereof at the instance of the disconnection of rests on the Respondent and he failed to discharge that duty.

It is also inconceivable that an individual such as the Respondent earns a net profit of UGX 484,656,487/= and does not pay business of income tax in which case he would by way of returns made or actual tax paid to URA demonstrate that what he referred to as business on a "small scale" in CEx. 7 has such a turnover.

The Respondent neither pleaded nor specifically proved the special damages of UGX 80,000,000/= awarded. The Tribunal in its judgment does not show how it arrived at that amount. We pray that court be pleased to find that there was no basis for an award of special damages by the honourable tribunal.

Before taking leave of this ground, I wish to comment on the authorities cited by the tribunal to support their decision. In the case of W. M. KYAMBADDE versus MPIGI DISTRICT ADMINISTRATION (1983) HCB 44, there was no such conclusion as "*in otherwords in some cases special damages may be proved on the balance of probabilities" whereas in SYLWAN K. TUMWESIGYE versus TRANS SAHARA INTERNATIONAL GENERAL TRADING COMPANY CAUSE NO. 95 OF 2005, the learned Judge awarded general damages and not special damages.*

The law that an appellate Court will not interfere with an award of damages by a trial Court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely wrong principles of law or that the amount is so high or so low as to make it an entirely an erroneous estimate of the damages to which the Respondent is entitled.

In light of our submissions on grounds 1 and 4, there is no basis for the award of UGX 10,000,000/= or the UGX 100,000,000/= sought by way of cross appeal.

Without prejudice to the foregoing, we wish to note that the Tribunal exercised a jurisdiction not vested in it. Reg. 21 of the Electricity (Primary Grid Code) Regulations provides for complaints and the procedure thereof. In particular Reg. 21.2.2. which provides for the Electricity Disputes Tribunal to sit in appellate or referral capacity in matters resolved or decided by ERA.

The electricity Disputes Tribunal therefore had no jurisdiction to hear Complaint No. 14 of 2015. It acted illegally and the decision therefrom is also illegal.

Respondent's submissions

My Lord, the Members of the Honorable Electricity Disputes Tribunal were alive to the law on page 11 of the Judgment when they held as per the case ***of Sylwan Kakugu Tumwesigye Vs. Trans Sahara International General Trading (HCT-00-CC-CS-0095 of 2005)*** where Hon. Justice Kiryabwire held that Special Damages must be strictly pleaded and proved but need not be supported by documentary evidence in all cases and thus concluded that " in other words in some cases special damages may be proved on the balance of probabilities"

Your Lordship, on page 9 of the Judgment, the Auditor testified and established that the Business of the Cross Appellant had had a net profit of UGX 484,656,487/= (Uganda shillings four hundred eighty four million six hundred fifty six thousand four hundred eighty seven only) for the year ending December 2013 and as such if the circumstances had remained constant without the interruption in supply of Electricity to the business, a similar profit would be realized.

My Lord, the Honorable Members of the Tribunal also held rightly on Page 12 of the Judgment that there was no evidence provided by the Cross Respondent contradicting that the Cross Appellant had a big farm of piggery, poultry, food processing and that his work depended on Electricity and that when his power was disconnected on 24th February 2014, he was left on a single phase that only enough for lighting and nothing more.

The Members of the Electricity Tribunal further on Page 12 of the Judgment held that the Cross Appellant was completely disconnected on 17/10/2014 and that while he has no documents to specifically prove how much he lost in terms of sales, and profit in making forced sell of his stocks of poultry, pigs and future earnings, we have no doubt in our minds that basing on his evidence and that of his witnesses, that the loss must have been substantial or significant.

Your Lordship, with that assertion above, it surprised the Cross Appellant that only UGX 80,000,000/= (Uganda Shillings Eighty million only) as Special Damages.

Your Lordship, it is also prudent to note that the said evidence was availed to the lawyer who was working on the case and had been relied on in mediation but he failed to tender/provide them at the hearing of the case and the Advocate made an attempt to provide the same at submission level basing on the fact that the Tribunal shall conduct its proceedings without procedural formality but shall observe rules of natural justice as provided in ***Section 111(4) of the Electricity Act 1999*** which implies that the Tribunal shall not follow the strict rules of admitting evidence as the Traditional Courts and as such this evidence that the Cross Appellant provided earlier should have been considered.

We thus pray that this Honorable Court finds the award of UGX 80,000,000/= (Uganda Shillings Eighty million only) as Special Damages as not sufficient and instead order for UGX 478,341,000/= (Uganda Shillings four hundred seventy eight million, three hundred forty one thousand shillings only)

GROUND TWO.

Your Lordship, the Learned Members of the Honorable Electricity Disputes Tribunal erred in law and fact when they awarded the Cross Appellant General Damages of UGX 10,000,000/= (Uganda shillings ten million only)

Your Lordship, the Honorable Members of the Tribunal held on page 13 of the Judgment that General Damages are such as the law will presume to be the direct and natural or probable consequence of the act complained.

My Lord, the case of **Waiglobe (U) Limited v Sai Beverages Limited (CIVIL SUIT No. 0016 OF 2017) [2017] UGHCCD 172 (14 December 2017)** General damages are defined by Justice Mubiru as what the law presumes to be the direct,

natural or probable consequence that will have resulted from the defendant's breach of contract. They are normally damages at large and can be nominal or substantial depending on the circumstances of each case.

The members of the Tribunal having found on page 8 of the Judgment that the Respondent (Umeme) had illegally disconnected power to the Cross Appellant herein, they ought to have proceeded to award general damagesdirect and natural or probable consequence of the act complained.

The Tribunal having established the fact that the disconnections were illegally done and that they caused the Cross Appellant substantial/significant loss of profit, then a modest award of more than the UGX 10,000,000/= (Uganda Shillings Ten million only) that the Tribunal sought fit to award and ought to have issued general damages to a tune of UGX 100,000,000/= (Uganda shillings one hundred million only) as befitting.

Court's analysis

The appellant submitted that the respondent did not specifically plead and prove the special damages as awarded by the tribunal.

According to ***Section 111(4) of the Electricity Act 1999***, the Tribunal shall conduct its proceedings without procedural formality but shall observe the rules of natural justice.

With that in mind as well as the nature of the pleadings in the tribunal, there is less formality in their proceedings as compared to traditional courts of law.

I shall therefore disregard the appellant's submission as to specific pleading of special damages. With regard to the specific proof of the special damages awarded, the tribunal cautioned itself; "*The next question is whether the special damages were strictly proved. During his evidence in chief, the complainant did not avail to the tribunal documentary evidence of sales, purchases and disbursements. He merely threw figures to the tribunal without supportive documents. He informed the tribunal that he would rely on the audit report to prove his profit. When the auditor was asked about the relevant documents, he said he had the file but neither him nor the complainant made an attempt to produce the documents in proof of their case. Throughout cross-examination, the complainant, his lawyers and witness were given enough caution that their documents were paramount to the case but all seemed to have taken the issue lightly....it is the view of the tribunal that although special damages were pleaded, no evidence was adduced to show conclusively how the net profit of UGX 484,656,487 was arrived at.*"

The tribunal cited the case ***Sylvan Kakugu Tumwesigyire v Trans Sahara International General Trading L.L.C. (HCT-00-CC-CS-0095 of 2005).***

In that case the Hon. Justice Geoffrey Kiryabwire held that; This is a claim for special damages which must be claimed specially and strictly proved. Counsel for the plaintiff however submitted that strict proof need not always mean proof supported by documentary evidence. In this regard he referred me to the case of; Sylvan Kakugu –Vs- Tropical Africa Bank__Civil Suit No. 1 of 2001. In that case the Hon. Lady Justice Faith Mwandha held, *"...in the case of Kyambadde –Vs- Mpigi District Adm. [1983] HCB 44 and Senyakazane –Vs- Attorney General [1984[HCB it was held that special damages must*

be claimed specifically and strictly proved but need not to be supported by documentary evidence in all cases. It was further held that where no evidence is led to prove special damages the claim should be disallowed... In the instant case the plaintiff specifically pleaded the special damages and he proved them specifically..."
In other wards in some cases special damages may be proved on the balance of probability.
In this case there was no documentary evidence of these items. The evidence of the plaintiff was that the items were packed in the motor vehicle that went missing. The receipts are said have been packed in the items in the motor vehicles for customs valuation purposes.
It is fairly well known that the business community used to pack items in vehicles they bought from the U. A. E. until the revenue authorities recently banned the practice. It is perceivable that this also was done in this case. The value is also quite small. The onus to rebut this evidence would have been on the defendant which was not done. On the balance of probability I find that the plaintiff has proved the case for the items of US$1,150 and is entitled to a refund of the said money."

The tribunal was alive to the law relating to special damages. The tribunal also cited a paper published by Hon Justice Bart Katureebe on damages.

I have reviewed all the evidence on record and find that the tribunal correctly assessed the special damages it awarded the respondent. Contrary to the submission of counsel for the appellant, the tribunal considered the flaws in the audit report, the lack of documents among others that counsel raised. The tribunal held; ***"putting into account the complainant's evidence of the loss that***

was occasioned to him, the lack of documents, receipts and invoices notwithstanding, the failure of the respondent to rebut material evidence of the complainant's loss, the information gathered from the audit report and discounting the loss established by the auditor with the vagaries of business, we think an award of UGX 80.000.000 is sufficient to atone the complainant's loss…"

With regard to the general damages; counsel submitted that there was no basis for the award.

It has been established by decided cases that *"Damages may be awarded for inconvenience caused by the Defendant"* – **UCB vs Kigozi [2002] IEA 305.** And that **"***to be eligible for general damages, the Plaintiff should have suffered loss or inconvenience to justify award of general damages"* – **Musisi Edward vs Babihuga Hild [2007] HCB Vol. 1 83 at Pp. 84.**

"It is now also settled that substantial physical inconvenience, or even inconvenience which is not strictly physical, and discomfort caused by breach of contract will entitle the Plaintiff to damages" – **Robbialac Paints (U) Ltd vs. K.B Construction Ltd [1976] HCB 49.**

The respondent suffered loss as a result of the unlawful disconnection of his power supply by the appellant. I find the award of the tribunal as having been appropriate in the circumstances.

Counsel also submitted that the tribunal had no jurisdiction to hear the complaint. Section 109 of the Electricity Act Cap 145 states that; the tribunal shall

have the jurisdiction to hear and determine all matters referred to it relating to the electricity sector.

Regulation 21 cited by counsel for the appellate is to the effect that the consumer may refer a complaint the Electricity Regulatory Authority and a decision by ERA is appealable to the Tribunal. This regulation does not bar a consumer from filing a complaint directly to the Tribunal as it has jurisdiction to hear all disputes relating to the electricity sector.

It is on that the basis that the appeal and cross appeal are dismissed.

The judgment of the Tribunal is upheld.

Costs of the appeal to the respondent.

I so order

SSEKAANA MUSA
JUDGE