

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB - REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 162 OF 2021

ANSELM TRYPHONE NGAIZA

@ SOGGY DOGGY ANTER1ST PLAINTIFF

FLORENCE MARTIN KASSELA @ DATAZ.....2ND PLAINTIFF

ENRICO FIGUEIREDO @ ENRICO.....3RD PLAINTIFF

VERSUS

HOME BOX OFFICE INC.....DEFENDANT

JUDGMENT

Dated: 24th May & 26th July, 2024

KARAYEMAHA, J.

This judgment is in respect of a suit instituted by Anselm Tryphone Ngaiza @ Soggy Doggy Anter and Florence Martin Kassela @ Dataz and Enrico Figueiredo @ Enrico, the 1st, 2nd and 3rd plaintiffs herein. The 1st and 2nd plaintiffs are musicians and the 3rd plaintiff is a producer. They all live and work for gain in Dar es Salaam Region.



The defendant is the company registered under the laws of the United States of America and is dealing with creation of motion pictures, theoretical drama and original television programs and made for cable movies, documentaries, movies and comedy specials.

On 8th October, 2021, the plaintiffs filed this case thus setting in motion issues and matters that form the basis of this judgment. The essence of the plaintiffs' suit as pleaded in the plaint is that, the 1st and 2nd plaintiffs being registered members of Copyright Society of Tanzania (COSOTA) with registration numbers A086543 and A086544 respectively, wrote the lyrics of a song SIKUTAKI TENA. The song was produced by the 3rd plaintiff a member of COSOTA. The song was composed in 2000 and was eventually published to all local radios, radio cassettes, audio CDs and Television (TV) stations in East Africa and the world at large. Ultimately, the song was registered at COSOTA under the laws of the United Republic of Tanzania and received a certificate of verification of right. After it was suitable consumption standards, the 1st and 2nd plaintiffs being the co-owners of the song, conducted



performances in various shows and concerts within the United republic of Tanzania and sister East African countries such as Kenya and Uganda.

It is averred that in 2005, the song SIKUTAKI TENA was used as a soundtrack in the renowned movie titled SOMETIMES IN APRIL produced by Daniel Delume, a producer of movie industry. The movie depicted the terrifying backdrop of the unforgettable Genocide incident that occurred in the Republic of Rwanda in 1994. This movie was written and directed by Haitian Filmmaker, namely, Raoul Pek. It was distributed by, among others, HBO being the distributor and also the sound/music engineers and producers through Erick Devulder, Jean – Pierrre Laforce and Stephane Thiebaut. It is contended that the defendant sold the movie to consumers worldwide and eventually received economic gains and is still benefiting from it to date.

The plaintiffs' case is that the song SIKUTAKI TENA was used in the movie particularly on running time between seven minutes and twenty seconds to eight minutes and sixteen seconds (00:07–00:08:16).



The words/lyrics of the song were in Kiswahili and English languages being the originality languages used in recording by the plaintiffs. They contend that the defendant was neither given with consent, license, notice nor approval to use the song SIKUTAKI TENA.

Plaintiffs' laments are that the defendant being the owner of the movie titled SOMETIMES IN APRIL knew about the production of the same but never contacted them on the use of their audio music. Their further wailings are that they were not paid any sum of money by the defendant despite the fact that they are the lawful owners of all economic and moral rights of the song.

It is pleaded further with cogency and strong conviction that the defendant has accumulated a lot of money and gained popularity and fame by using the song SIKUTAKI TENA from her movie. It is so stated bearing in mind the fact that the movie was sold in numerous parts of the world and the selling is still going through social media such as YOUTUBE, websites, CDs, and different electronic fora. The prior selling and the on-going selling of the movie with a sound track of the song



SIKUTAKI TENA has allegedly had an impact on the copyrights of the plaintiffs. Plaintiffs have conceded this conduct as stealing artistic work hence a criminal act. They allege that the defendant malevolently and deliberately used the song in the movie. They contend therefore that they are entitled to damages against the said copyright infringement.

Efforts were made to have the antagonism between parties resolved. These included several meetings held at COSOTA. All endeavours delivered no success. Having failed to resolve their differences, plaintiffs instituted the instant suit and the following reliefs are prayed:

- (a) Order for payment of Ten million US dollars which is equivalent to twenty-two billion eight hundred and seventy-nine million and one hundred thousand Tanzanian shillings only (22,879,100,000/=).*
- (b) Payment of punitive damages that will be assessed by this honourable Court.*



- (c) Interest at 18% from the date when the infringement was made to the date of judgment.*
- (d) Interest at the court rate of 12% from the date of judgment to the date of payment.*
- (e) A public apology on defendant's official website and Tanzania social media for theft that has been done.*
- (f) Costs of this suit to be borne by the defendant.*
- (g) Any other reliefs as the honourable court may deem fit and just to grant.*

In its written statement of defence (WSD), the defendant has strongly denied the claim and that plaintiffs are not entitled to any damages against the defendant. It contended that all times it acted in good faith on the understanding that the musical work under dispute was duly licensed to it for use in the film SOMETIMES IN APRIL. It averred that the license was entered into between Never Again Production Ltd. c/o the defendant, a company involved in the production of the film for the defendant and Rugemarila Mutahaba the proprietor of



Smooth Vibes Music Project Limited (Smooth Vibes) an entity that was understood to be representing the plaintiffs, as their publisher. In view of that, it stated, the defendant had no intent to infringe or knowledge of the plaintiffs and was not aware of claims of alleged claims copyright infringement until August, 2019.

Most importantly the defendant asserted in paragraph 5.12 of its defence that single equitable payment was made in good faith in terms of the license agreement as per the law:

"The amount paid to the plaintiffs' publisher is in line with the industry norms. Indeed, the highest payment made for use of any song in the film SOMETIMES IN APRIL was USD 8,000 (Eight Thousand US Dollar) and the lowest was USD 3,000 (Three Thousand US Dollar). Purely in an effort to resolve the dispute and without making any admission whatsoever, the defendant offered to pay plaintiffs the same amount that it had already paid to Smooth Vibes in the spirit of attaining an amicable settlement, and also made further efforts. The defendant therefore reiterates that it acted in good faith at all times, with respect for the plaintiffs and on the understanding that the license was entered into on behalf of the plaintiffs.

It was further averred that a full-length feature of over 2 hours



and the extent of the use of the song in the film is minimal because only a portion of which played in the background of a single scene was for less a minute with a character speaking over the song during the majority of its use. That there is no depreciation to the value of the copyright alleged by the plaintiffs. On that basis the defendant prayed the suit to be dismissed with costs on the reason that the amount claimed and other reliefs are baseless.

In their reply to the WSD, plaintiffs maintained that they are co-owners of the song SIKUTAKI TENA which was used in a film SOMETIMES IN APRIL. It was also asserted that they never had any agreement with any person or company and entrust their economic and moral rights of their artistical works. It was contended further that the defendant did not look for the plaintiffs or do due diligence to prove that plaintiffs consented to the alleged agreement.

When the case came before my predecessor on 9th August, 2023, Mr. Mwanri, withdrew the 3rd plaintiff's case and thereafter four issues



were agreed upon by the parties and endorsed by this Court to guide the conduct of the proceedings and these issues are:

1. Whether the plaintiffs owned the copyright in the song titled SIKUTAKI TENA.
2. If the answer in the first issue is in the affirmative, whether the defendant infringed the plaintiffs' copyright.
3. Whether the plaintiff gave the mandate to the defendant or third party to use the song SIKUTAKI TENA in the movie titled SOMETIMES IN APRIL.
4. To what reliefs are parties entitled to.

Whereas hearing of the evidence in chief took the form of witness statements, filed ahead of the hearing of the parties' cases, cross-examination was conducted physically and remotely. The plaintiffs were represented by Mr. Erick Mwanri, learned advocate assisted by Mr. Albert Mukoyogo, learned advocate, while the defendant was ably represented



by Mr. Jacktone Koyugi, learned advocate assisted by Mr. Haron Oyugi and Mr. Nsajigwa Bukuku, learned advocates.

I will however not reproduce the testimonies and submissions, but they will certainly be taken into consideration, when analyzing the case.

The first issue requires this court to pronounce itself on the ownership of the artistic works that constitute the contention between the parties. Before proceeding any further, I find it relevant to reproduce and/or discuss some legal provisions which address matters related to copyright and its infringement. Section 4 of the Copyright and Neighbouring Act [Cap. 218 R.E. 2019] (hereinafter the "Copyright Act), defines "copyright" as:

"The sole legal right to print, publish, perform film or record a literary or artistic or musical work".

Under section 5(1) of the Copyright Act, authors of original literary and artistic works are entitled to copyright protection for their works under the Act. Section 5 (1), (2) and (3) of Cap. 218 gives a detailed and extensive range of such rights. They cover:



"5 (1) Authors of original Works in which literary and artistic works shall lie copyright may Subsist entitled to copyright protection for their works under this Act, by the sole fact of, the creation of such works.

(2) In this section literary and artistic works shall include in particular-

(a) books, pamphlets and other writings, including Computer programs; addresses,

(b) lectures, other 11 Sermons and works of the same nature;

(c) dramatic and dramatic - musical works-.I 28 No. 7 Copyright and Neighbouring Rights 1999

(d) musical works (vocal and instrumental), whether or not they include accompanying words;

(e) choreographic works and pantomimes; cinematographer works, other and audiovisual works

(g) works of drawing, painting, architecture, sculpture, engraving, lithography and tapestry;

(h) photographic works including works expressed by processes analogous to photography; Copyright and Neighbouring Rights 1999 30 No. 7 works of applied art,

(i) whether handicraft or produced on an industrial scale-31



0) illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.

(3) Works shall be protected irrespective of their form of expression, their quality and the purpose for which they were created.”[Emphasis added]

Copyright in a literary and artistic work comprises the exclusive economic and moral rights of the author under sections 9, 10, and 11 of the Copyright Act. Section 9(1) provides as follows:

"Subject to the provisions of sections 12 to 21 the author shall have the exclusive right to carry out or to authorize the following acts in relation to the work-

(a) Reproduction of the work;

(b) Distribution of the work;

(c)

(d) Public exhibition of the work;

(e) Translation of the work;

(f) Adaption of the work;

(g)

(h)

(0)



(j) Importation of copies of the work"

Section 11(a) of the Copyright Act provides for moral rights where it states that the author of protected work shall have the right to claim ownership of his work that his authorship is indicated in connection with any of the acts referred to in section 9 of the Copyright Act. Section 11(b) of the Copyright Act provides for reliefs granted in relation to any distribution, mutilation, or other modification of, and any other derogatory actions in relation to the protected work where such acts are prejudicial to his honour and reputation.

Section 12 of the Copyright Act provides for conditions related to free use of the protected work which reads:

"12(1) Notwithstanding the provisions of section 9, the following uses of a protected work, either in the original or in translation shall be permissible without the authors' consent and the obligation to pay remuneration for the use of the work.

(2) In the case of any work except computer programs and architectural works, that has been law fully published.

(a) the production, translation, adaptation, arrangement, or other transformation of such work exclusively for the user's



own personal and private use provided that such reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.

(b).....

(c) the utilization of the work by way of illustration in publication broadcasts programs distributed by cable, or sound or visual recordings for teaching, to the extent justified by the purpose or the communication for teaching purposes of the work broadcast or distributed by cable for the use in schools, education, universities, and professional training, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast, the programme distributed by cable or the recording..."

In a nutshell, therefore, it can be simply stated that, a copyright is a head of intellectual property right that protects the original works of authorship, the moment the author fixes the work in a tangible or non tangible form of expression. This position draws harmony and credibility from the decision of the Court in **Macmillan Aidan (T) Ltd v. Nyambari Nyangwine & 2 Others**, HC-Comm. Case No. 210 of 2010 (unreported), in which it was held:



"Copyright entails a bundle of exclusive rights that enable the creator to control the economic use of such works whereby he or she through such exclusive right may authorize or restrict inter alia, reproduction of a work in copies, distribution of the copies to the public, translation or adaptation of the work."

Back to the issue in question, I have to consider whether the plaintiffs authored the song SIKUTAKI TENA. On this issue, PW1 and PW2 testified that they are the owners of the artistic work around which the claim for infringement loops. PW1 stated in his witness statement that he wrote the lyrics and sang the song SIKUTAKI TENA with PW2. By the act of singing together, they contended that they co-owned the song. Plaintiffs have, through PW1, tendered exhibit P2 Original Copyright Clearance Certificate dated 18th September, 2018 with reference number CST/DOC/CL/CERT/Vol.111/484 to evidence registration of the said work. They are convinced that this certificate conveyed ownership of the works exclusively produced by the plaintiffs. In addition, PW1 tendered exhibit P3, verification of Rights with reference number CST/DOC/RG/WORKS/VOL.11/288, with intention to



prove that both plaintiffs are joint authors and co-owners of the musical work SIKUTAKI TENA. In a bid to prove that they are the original owners, the plaintiffs tendered exhibit P9 which include a CD with an audio sound track of a song SIKUTAKI TENA. I listened to the song in the CD and compared its sound heard in the CD titled SOMETIMES IN APRIL (2005) (Full Movie) part of exhibit P9 too. Fairly speaking, singers sound tally 100%. Mr. Mwanri submitted cogently and with conviction that the plaint and WSD support the plaintiffs' claim that they are the lawful owners.

The plaintiffs' submission and testimony have been viciously challenged by the defence evidence and submission. However, some aspects support the plaintiffs' contention. Mr. Koyugi's submission addressed the matter by relying on the provisions of sections 5 (1) (2) of the Copyright Act. As shown above, these provisions offer protection of authors of original literary or artistic work upon registration. He submitted that copyright in a literary and artistic work comprises the exclusive economic and moral rights of the author under sections 9, 10



and 11 of the Copyright Act. He was guided by the case of **Jutoram Kabatele Mahall v. Vocational Education Training Authority**, Civil Appeal No. 63 of 2019 (CAT-DSM) (unreported) and **RSA Ltd v. Hanspaul Automech Ltd & Another**, HC-Comm. Case No. 160 of 2014 (unreported).

The defence's contention is that plaintiffs failed to produce the song SIKUTAKI TENA in evidence but only an excerpt of the movie SOMETIMES IN APRIL which was produced as exhibit P9. In fact, the defendant contend that rights alleged by plaintiffs by producing a copyright clearance certificate dated 18th September, 2018 were registered subsequent to the release of the movie and that there needed an explanation of the delay of 18 years.

The defendant contended further in her submission that the plaintiffs failed to prove their case to the balance of probability a standard required under section 110 of the evidence Act [Cap. 6 R.E. 2022] (hereinafter the Evidence Act]. The defence capitalised on the discrepancies apparent on paragraphs 5, 6 and 7 of the plaint to cement



her conviction that the song was not co-owned by the plaintiffs. It was argued that contents of those paragraphs contradicted the plaintiffs' pleadings and evidence adduced by the witnesses through witnesses' statements filed in court.

Mr. Koyugi argued further that the plaintiffs failed to establish significant and original contribution in their alleged song SIKUTAKI TENA. His centre of argument is that the 2nd plaintiff did not reveal direct responsibility towards the creation of the said song. He submitted that her role was singing not creating it. Hence, does not become one of the co-owners of the copyright which she alleges the defendant has infringed.

The learned counsel complained further that plaintiffs failed to call material witnesses from COSOTA who, in his view, would have been material and important to explain the process, requirements of copy right registration. In his conviction, the contemplated witness would further explain how, when and why the plaintiffs' alleged copyright in the alleged song was only registered in 2018 while it was produced in



2000. In addition, he held the view that the witness from COSOTA would have explained the effects of registering a work with COSOTA, failure to register as well as the effect or consequences of the inordinate delay in registering with COSOTA. He urged this court to interpret the plaintiffs' conduct as a factor which disabled them to give a constructive notice to the third parties/general public of the existence of the copyrighted work.

I dismiss this contention because the defendant did not even attempt to apply to lodge a third-party notice or even pray for extension of time in order to give notice to the general public of the existence of work. However, this contention contradicts the defendant's disposition in the WSD that they got license from Ruge Mutahaba of Smooth Vibes.

Connected to the above pointed out shortcoming, Mr. Koyugi complained further that plaintiffs were to call the Producer of the alleged song one Enrico Figuiredo @ Enrico. The learned counsel was convinced that Enrico would provide evidence on whether or not plaintiffs were the author of the disputed song and whether he produced it in 2000. He added that exhibit P13 a receipt of payment of TZS. 150,000/= dated 7th



January, 2000 was issued by Sound Crafters not by Enrico in his personal capacity to the 2nd plaintiff and no evidence submitted showing that Enrico was a Principal Officer from Sound Crafters. As to the aftermath of this failure, Mr. Koyugi submitted confidently seeking guidance in **Baya s/o Lusana v. The Republic**, Criminal Appeal No. 593 of 2017 (CAT-Mwanza) [2021] TZCA 16 (15February, 2021) TanzLII at page 12 that:

"Failure to call the material witnesses entitles this court to draw an inference adverse to the prosecution".

Mr. Koyugi was not tired to punch holes in the plaintiffs' case. He submitted that the plaintiffs failed to present before the Court master recording of the song in dispute, chrome tape, lyrics (handwritten paper on which the song was written and availability of various third parties' songs titled SIKUTAKI TENA.

I have with great care read DW1's witness statement in comparison with Mr. Koyugi's contentions. Apart from tendering exhibit DE7 which is a collection of musicians who created and sung songs titled



SIKUTAKI TENA, plaintiffs being among them, and admitting that the song SIKUTAKI TENA was used in a film SOMETIMES IN APRIL, he did not point out the name of the artist whose song was used in that film. This is also exhibited in his evidence when he was subjected to cross-questions. Nevertheless, exhibit DE5 tendered by him is very clear. This exhibit presents a complaint by the 1st plaintiff that the song used in a movie SOMETIMES IN APRIL is his. It unerringly, points out that the song belonged to the plaintiffs. This means the original owner are the plaintiffs. Mr. Koyugi had to make reference to this piece of evidence before distancing himself from it in his submission.

The argument circumambulating the 1st issue is whether plaintiffs have proved that they are owners of the song SIKUTAKI TENA. I am alive to the settled principle in law that in civil litigation the burden of proof lies on the plaintiff to prove his case in terms of section 110(1) and (2) and section 112 of the Evidence Act and is on the balance of probabilities. In the case of **Anthony M. Masanga v Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No 118 of 2014 (unreported), the CAT held:



"Let's begin by re-emphasising the ever cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of section 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition 2002."

In this case plaintiffs are duty bound to prove that the work is original and was created by them. This requirement is consistent with the position, as it presently obtains in our jurisdiction and highlighted by the Court in **RSA Ltd v. Hanspaul Automech Ltd & Another, HC-Comm.** Case No. 160 of 2014 (unreported), wherein it was held:

*"For a work to be protected by copyright, under section 5 of the Copyright and the Neighbouring Rights Act, [Cap. 218 RE 2002] plaintiff has to prove that **the work is original and belongs to him**. That means, it has to be original in the real sense and the plaintiff has to be creator of the real sense."*[Emphasis added]

In this case, plaintiffs have done enough to meet the standard enshrined in section 110 of the Evidence Act and the decision in **RSA Ltd** (supra). They managed to confidently and perfectly show through



exhibit P9 that they are the author of the song SIKUTAKI TENA and through exhibit P3 that they are joint authorship and co-owners. This evidence is supported by exhibit DE5 which indicates that the song in dispute was authored by the plaintiffs.

It is further categorical in the WSD that the defendant used a minimal part of the song after obtaining license from Ruge Mutahaba. Though given lesser weight, the witness statement of Eryne Dennis Epidu narrates clearly how the defendant approached Ruge Mutahaba with an intention to use the song in dispute in its movie. It reveals how he was assigned a duty to find owners of the song. After labouring for a long time, he finally landed in the hands of the 2nd plaintiff. After getting her consent, they entered into an agreement with the defendant and finally the song was used in the movie. On my dismay, Mr. Koyugi is denying this evidence.

Further more, in its WSD paragraph 5.12 the defendant admitted to seat with plaintiffs to amicably settle the dispute. In my considered view, the defendant is taken to have acknowledged that plaintiffs are



owners of the song in dispute and wished to pay them. It did so on the understanding that the license agreement was entered into on behalf of the plaintiffs. The WSD shows further in paragraph 9.2 that the defendant engaged in mediation process at COSOTA which process stranded to a halt in good faith to pay the plaintiffs EUR4,600. In my considered opinion, the defendant's intention was not to maintain its reputation but to pay the owners of the song.

At this juncture, the defendant is to be reminded of the cardinal principle of pleadings obtaining in our jurisdiction. It is that parties are bound by their pleadings and cannot be allowed to raise different matters without due amendments being properly made. Furthermore, the court is bound by the pleadings of the parties as they are themselves. For this legal position see, **Joao Oliveira and another v. IT Started in Africa Limited and another**, Civil Appeal No. 186 of 2020, **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019, **James Funke Gwagilo v. Attorney General** [2004] TLR 161.

Thus, having admitted that plaintiffs are owners, with due respect,



I differ with Mr. Koyugi's contentions that plaintiffs were to produce witnesses from COSOTA and Enrico, present before the Court master recording of the song in dispute, chrome tape, lyrics (handwritten paper on which the song was written and availability of various third parties' songs titled SIKUTAKI TENA.

From the testimonies adduced by the plaintiffs, both oral and documentary, and the defence evidence particularly of DW1 there is no refuting that the rights that are the subject of the alleged infringement were duly created by plaintiffs. The only contention by the defendant is that registration of these copyrights was done subsequent to the production of the movie, that is, after 18 years, of the alleged infringement. In my considered view, the timing of the registration is a focus for another spell. It is enough that the defendant acknowledged that the said rights were duly registered by the plaintiffs and were theirs. All in all, the first issue is answered in the affirmative.

Issues revolving around jurisdiction and the suit being time barred, were dealt with by this court in the ruling handed down on 24th



February, 2024 by her Ladyship Mgonya, J (as she then was). This court is *functus officio*.

The second issue is whether the defendant infringed the plaintiffs' copyright. Plaintiffs claim that the defendant used their song SIKUTAKI TENA in its movie SOMETIMES IN APRIL without consent, notice, approval and sold the movie for gain. This conducted was taken as an infringement of their copyright to their literary work, moral and economic rights. It is contended further that there is no proof of any licence and agreement tendered in Court.

The defendant has categorically denied the allegations mounted by the plaintiffs. It has stated, **firstly**, that license was entered into between Never Again Productions Ltd. c/o the defendant and Smooth Vibes Music Project Limited which represented the plaintiffs and paid. **Secondly**, that it acted at all times under the *bona fide* belief that a licence had been secured for the song in dispute. **Thirdly**, that the extent of use of the alleged copyright work is *de minimis*, that the minimal portion of the work used is not in itself an original and



identifiable copyright work, and insufficient to constitute copyright infringement. **Fourthly**, that the defendant has not published in any way reproduced the disputed work within the United Republic of Tanzania.

It must be clear that infringement of copyrights arises or occurs where a party, not the owner thereof, exploits one of the rights without permission. It entails improperly copying or creating a new work based on the original version. In terms of an Article authored and published by the **British Academy and the Publishers Association** at p. 15, infringement must involve exploiting a substantial part of the copyright without prior authorization of the copyright owner.

I must, therefore, state at the wake, without any fear of being contradicted, that the defendant infringed the copyright, moral and economic rights as claimed by the plaintiffs. I am solidified by exhibit P8 (mediation report) whereby COSOTA found evidence tabled before it to have proved that the defendant infringed the plaintiffs' copyright. For



that matter I differ with the defendant's counsel for the following reasons: **First**, I am of the view that plaintiffs have proved the work is original and theirs and obtained the copyright on 18th September, 2018 as discerned from the evidence of PW1 and PW2 and exhibits P2 and P3.

Secondly, it is uncontested that the defendant used the song SIKUTAKI TENA in his movie SOMETIMES IN APRIL. There is clear evidence from PW1, PW2, DW1, DW3 and DW4 and Eryne Dennis Epidu substantially substantiating this fact.

Thirdly, the defendant has not staged a robust defence that before this court that it obtained licence from Smooth Vibes or any other person.

It seems to me that usage of a minimal part of the work is not a defence in as long as that part is protected by law. Section 12 of the Copyright Act does not shield the defendant for using a minimal part of the song. In my considered opinion, therefore, usage of protected copyrighted work however small it may be, amounts to an infringement. The defendant had to obtain consent, licence of approval from plaintiffs



before using it. If, assuming, he got licence from Smooth Vibes, the defendant a luminary film producer/maker was expected to produce tangible evidence in Court. I take the view that infringement substantially depends more on the quality than the quantity of what has been taken. See **Ladbroke (Football) Ltd v. William Hill (Football) Ltd** [1964] 1 WLR 273 where Lord Reid had this to say:

"Infringement "substantially" depends more on the quality than the quantity of what has been taken", and that it is when the copyrighted work is reproduced, distributed, performed, publicly displayed, or made into derivative work without the permission of the copyright owner, that an infringement may be alleged."

See also **Tanzania-China Friendship Textile Company Limited v. Nida Textile Mills (T) Ltd (Nida)**, Civil Case No. 106 of 2020.

Fourthly, pondering the testimonies, as adduced by the disputants in this case, what is clear, as stated earlier on, is that the rights under dispute officially became the plaintiffs' intellectual property or artistic work simply because they were registered with COSOTA. It is,



also, a certainty, that the defendant did not obtain authorisation from the plaintiffs. This conclusion answers affirmatively both the 2nd and 3rd issues because on the balance of probabilities, plaintiffs' version is more credible and believable than that of the respondent on these two issues.

The task of the Court in the third issue is to declare reliefs that the parties may be entitled to. This is a significant task that follows the findings made with respect to the substantive issues. In this case, the prayers sought are myriad. They are a mix of money claims which are essentially compensatory, punitive damages, public apology, interest and costs of this suit.

Earlier on, this court has examined the evidence tabled by plaintiffs and held that they have managed to convince this Court on the balance of probabilities that acts of infringement were perpetrated by the defendant, and that plaintiffs' artistic works were irregularly and illegally used by and for the benefit of the defendant. The Court has pronounced itself on that. This, therefore, calls for a swift and decisive



action that will make the defendant pay for its improper use of the plaintiffs' artistic work protected copyrights and other neighbouring rights. This can be done through ordering payment of compensation and public apology.

Let me start with the amount of Ten million US dollars which is equivalent to TZS. 22,879,100,000/=. Plaintiffs allege that this is the quantum that constitutes damages for the damage suffered as a result of the infringement of copyright. By its very own depiction, this is a claim for specific damages. Although the defendant fervently contested this fact, this is the position of this Court and I take a bearing from the ruling of this Court on the preliminary objection handed down on 24th February, 2023. Before getting to the nitty gritty of the discussion on this item, it is apt that the rationale behind claim and grant of damages be restated. Halsbury's Laws of England 3rd Edition Volume 11 (page 216) defines damages in the following words:

"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether



that act or default is a breach of contract or a tort or to put more shortly damages are the compensation given by process of law to a person for the wrong that another has done to him."

In the words of Asquith, LJ., held in **Victoria Laundry v. Newman** [1949] 2 KB 528 at page 539, damages are aimed at putting the plaintiff "... *in the same position, so far as money can do so, as if his rights had been observed.*"

Deliberating on this issue, the Court of Appeal of Tanzania borrowed a leaf from Lord Wilberforce that he pronounced in **Johnson and Another v. Agnew** [1980] AC 367. This was in the case of **Hotel Travertine Limited v. M/S Gailey & Roberts Limited** [2009] TLR 158. The following position was given with respect to damages that:

"The general principle for the assessment of damages is compensatory i.e. the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of breach"

The message distilled from the above referred authorities is that,



specific damages must be specifically pleaded and specifically proved. This is the settled law in our land and indeed has been stated in a litany of Court decisions. They include the decision of **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137, wherein it was held:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved."

In the present case, the claim of these damages is stated in the plaint and in unsubstantiated specifics and absolutes given in the witness statements by PW1 and PW2. They testified that the movie titles **SOMETIMES IN APRIL** owned by the defendant was broadcasted all over the world and through mainstream media, social medias such as YouTube, websites, prime video, vudu, Netflix.com, just watch, Microsoft.com, Google Play and sold at USD12.99. Having examined exhibit P10 (websites pages screenshotted by plaintiffs), a true picture has been displayed demonstrating how the movie was broadcasted all over the world and how much it was rented and bought as contended by the plaintiffs. For instance, the movies were sold through Prime video at



USD 9.99 and rented at USD 3.99; vudu.com at USD 7.99 and rented at USD 2.99; Netflix.com (no amount disclosed), JustWatch at USD3.99; Microsoft.com rented at USD3.99 and Google Play at USD17.89. Plaintiffs contend that these medias were used constantly from the date the movie was produced and broadcasted. I agree with them and take a soft variation from Mr. Koyugi's contention that the film is a "made for TV" film and no profit was and the like was generated from the film. This is totally misleading. As was predicted and expected by her Ladyship Mgonya, J. (as she then was) in her ruling handed down on 24th February, 2023, plaintiffs were duty bound to offer credible evidence on specific damages.

I have given thoughtful consideration to these amounts and contentions by the plaintiffs. In my view, plaintiffs have shown that the movie SOMETIMES IN APRIL containing a song SIKUTAKI TENA was advertised for selling and renting through different medias. The defendant has not put-up firm defence showing that it was its movie was not advertised through those medias and price set. However, no reliable



evidence from the plaintiffs showing that people accessed those medias and purchased the movies. The plaintiffs have also failed to prove on the balance of probabilities that the defendant has gained profit over and above USD10,000,000. In my considered view, whatever is said amounts to imagination. Therefore, exhibit P10 is of no substantial help in proving specific damages.

Mr. Mwanri argued that it was the defendant who was supposed to give details of the amount of money they made out of the movie. I completely disconnect myself from his view. My settled view is that this prayer is lacking in any material sense sufficient to move the Court to order what the plaintiff has not proved. I am persuaded by the holding in **Tanzania-China Friendship Textile Company Limited case (supra)** that:

"It is neither comprehensible nor plausible for the plaintiff to pass on the baton of proving her case to a party who does not bear the legal and evidential burden of doing so. To demand the Court to issue an order that violates the canon of evidence with respect to burden of proof is, to say the least, ludicrous, and I am not convinced that such is an



allowable practice. I choose to resist this urge and dismiss these prayers."

I fully subscribe to the above holding in relation to the settled principle that he who alleges must prove. Now, that plaintiffs have not provided details of proceeds and profit posted by the defendant from the use of the infringed rights, I hold that they have failed to prove strictly special damages.

Nevertheless, it is no doubt that generally plaintiff have managed to prove their case. Failure to strictly prove special damages does not mean that the defendant's conduct left the plaintiffs uninjured or without suffering. This means that they have to be restored to the position they would be if the defendant had entered into agreement with them and obtained license. In a nut shell, plaintiffs are entitled to remedy. On this position I seek guidance in the case of **China Henan Intrnational Co-opration Group Co. Ltd v Salvand K.A. Rwegasira**, Civil Appeal No. 57 of 2011 (unreported). In that case the Court of Appeal talking through Massati, JA stated that:

"... it is fundamental legal principle in the administration



of justice that there is no wrong without a remedy 'ubi jusi ibi remedium'. So, although the respondent has failed to prove the special damages he pleaded, there is no doubt in our judgement that some wrong was committed. So, he cannot be left without a remedy. We think that justice of the case demands that we give him some relief. We do so under 'any other reliefs' which he had prayed for his plaint".

Overall, owing to the factors of the case at hand and considering what DW1 stated in his evidence and exhibited by a document marked exhibit DE6, USD60,000 will meet the end of justice and it is so assessed.

With respect to general damages, both Mr. Mwanri and Koyugi made lucid and researched submissions, my reaction is that they were not pleaded hence cannot be awarded.

Regarding the punitive damages I find it simple. This is due to the earlier finding of this court that placed the plaintiff on the culpable role of having contravened the copyright and rights of the plaintiffs. Principally, punitive damages, also known as exemplary damages,



are the damages awarded separately from the actual damages from an event. Courts generally award punitive damages only when it is determined that the defendant has acted in a particularly harmful way.

In the instant case, the claim of punitive damages has been pleaded based on the infringement of the plaintiffs' copyrights, a contention which has since been established, and the defendant's culpability is now a matter of inevitability. Needless to say, I find the defendant's act harmful not only to the plaintiffs but to the music industry in Tanzania. Further to that, this infringement, an abhorrent practice, has had an adverse impact on the plaintiffs.

It is my conviction that this is a fit case where punitive damages can be awarded to put to halt the defendant's habit of stealing and exploiting artists and above all infringing their copyright. Satisfied that the claim is justified, I hold the view that the sum of USD40,000 is an adequate payment which is assessed in order to punish the defendant for outrageous conduct. It is so assessed to reform, deter the defendant



and others from engaging in conduct similar to that which forms the basis of this lawsuit.

Consequently, the plaintiffs' claim succeeds to and the following reliefs are granted against the defendant:

- (i) Payment of USD60,000 for injury caused to plaintiffs.
- (ii) Payment of USD40,000 being punitive damages.
- (iii) Interest at 18% from the date when the infringement was made to the date of judgment.
- (iv) Interest at the court rate of 12% from the date of judgment to the date of payment.
- (v) Public apologize by the defendant on her official website and Tanzania social media for theft that has been done.
- (vi) Costs of this suit.

It is ordered accordingly.

Dated at DAR ES SALAAM this 26th day of July, 2024



A handwritten signature in black ink, appearing to read "J. M. Karayemaha".

J. M. Karayemaha
JUDGE