



Kimani v Safaricom Limited & 2 others; Music Copyright Society of Kenya & another (Third party) (Civil Case 445 of 2015) [2023] KEHC 20085 (KLR) (Civ) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 445 OF 2015

AN ONGERI, J

JULY 6, 2023

BETWEEN

TIMSIMON KURIA KIMANI PLAINTIFF

AND

SAFARICOM LIMITED 1ST DEFENDANT

BENSOFT INTERACTIVE LIMITED 2ND DEFENDANT

MTECH COMMUNICATIONS LIMITED 3RD DEFENDANT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA THIRD PARTY

SUB SAHARA LIMITED THIRD PARTY

Duty of distributors and digital media stores to conduct due diligence on musical works provided to them by music copyright societies.

An author and copyright holder for musical works claimed infringement by the defendants. The defendants claimed indemnity contending that they obtained the rights to distribute the music from parties that alleged to be the holders of the copyrights and that indemnified them in the distribution contract from legal challenges from the artistes. The court held that music distribution companies and digital media stores had an obligation to carry out due diligence to ensure that artistes who was the owner of the copyright had signed a contract giving rights to their intellectual property before assigning the same. Whereas it was not possible to contact every artiste claimed to be represented by musical societies, distributors and digital media stores should be supplied with duly executed contracts signed by the artists.

Reported by John Ribia

Intellectual Property Law - copyright – musical works – where a party had reproduced, published, broadcasted, distributed, exhibited and sold musical works without consent from the author and copyright holder - whether



the actions of the 1st, 2nd and 3rd defendants to reproduce, publish, broadcast, distribute, exhibit and sell musical works copyrighted by the plaintiff without a subsisting agreement to do so infringed the plaintiff's copyright - , 2001 sections 2 and 35.

Intellectual Property Law – copyright – musical works – distribution - where a party had a platform that availed musical works for download at a cost – where the party had gained musical works to place in its platform via a third party that contended to be the copyright holder – where the alleged copyright holder had reproduced, published, broadcasted, distributed, exhibited and sold musical works without consent from the author and copyright holder - whether a commercial partner that distributed and published copyrighted works on the assumption that they had received authorization from the copyright holders was entitled to indemnity for infringement copyright - , 2001 sections 2 and 35.

Brief facts

The plaintiff was a popular Kenyan musical artist engaged in composing, writing, singing and performing music under the brand and stage name “Mr. Bamboo”. The plaintiff contended that he was the author of three musical works (Mama Africa, Yes Indeed and Move On) that had been jointly reproduced, published and broadcasted, distributed exhibited and sold by the defendants through the platform *Skiza* Tunes. The plaintiff contended his music was being downloaded by members of the public at the costs of Kshs. 75 cents per song and that the defendants had commercially benefited from his musical works.

Aggrieved the plaintiff filed the instant suit and sought orders that the defendants infringed his copyright in the musical works and that the records of downloads and revenue earned from his musical works by the defendants be published.

The 1st defendant contended that between 2009 and 2014 the 1st defendant entered into separate agreements with the 2nd and 3rd defendants to provide it with musical contents for use of the *Skiza* tunes. The 2nd defendant issued a third party notice to Music Copyright Society of Kenya (MCSK) to indemnify the 2nd defendant against all losses, liabilities and damage arising from breaches of contract or claims for copyright infringement. The 3rd defendant also issued a third party notice to the 2nd, 3rd party Sub Sahara Limited. They stated in the third party notice that the 2nd and 3rd party granted to the 3rd defendant a non-exclusive licence to communicate and reproduce any works within their repertory for the purpose of the use of the song “Move On”.

Issues

- i. Whether the actions of the 1st, 2nd and 3rd defendants to reproduce, publish, broadcast, distribute, exhibit and sell musical works copyrighted by the plaintiff without a subsisting agreement to do so infringed the plaintiff's copyright.
- ii. Whether a commercial partner that distributed and published copyrighted works on the assumption that they had received authorization from the copyright holders was entitled to indemnity for infringement copyright.

Held

1. The music pieces in question had been on sale since 2009. The 1st defendant did not deny that they used the said musical works. The 1st defendant admitted that the same were given to them by the 2nd and 3rd defendants. the 2nd and 3rd defendants did not deny that they are the ones who gave the musical works to the 1st defendant, they 2nd and 3rd defendants blamed the 1st and 2nd third parties whom they enjoined as parties to this suit. the 1st 2nd and 3rd defendants having admitted that they used the musical works of the plaintiff had infringed the plaintiff's copyright.
2. It was the duty of the 1st 2nd and 3rd defendants to carry out due diligence to ensure that artistes who was the owner of the copyright had signed a contract giving rights to their intellectual property before assigning the same. There was no evidence that the 1st 2nd and 3rd defendants sought to see any document assigning copyrights by the artistee before using the musical works.



3. The 1st 2nd and 3rd defendants were aware that there was an artiste responsible for the musical works. It may not be possible to contact every artiste to ensure they had assigned their rights but the 1st 2nd and 3rd defendants ought to have been supplied with duly executed contracts signed by the artistes.
4. The conduct of the 1st 2nd and 3rd defendants of using the musical works of artistes without the authority of the owners of copyrights had impoverished artistes in Kenya and led to exploitation of artistes who were at the mercy of parties who want to harvest where they had not worked for. The 1st 2nd and 3rd defendants infringed the plaintiff's copyrights in respect of the musical works subsisting in "Mama Africa", "Yes Indeed", and "Move On".
5. The 1st 2nd and 3rd defendants did not avail the records of how much they earned from the plaintiff's musical works. The court assessed general damages for infringement of right of Kshs. 1,500,000 per song in respect of musical works "Mama Africa", "Yes Indeed" and "Move On".
6. The 1st 2nd and 3rd defendants were at liberty to pursue the 1st and 2nd third parties (Music Copyright Society of Kenya and Sub Sahara Ltd (respectively)). The plaintiff had a right to be compensated by the 1st 2nd and 3rd defendants. The 1st 2nd and 3rd defendants were at liberty to follow the 1st and 2nd third parties since the plaintiff did not have a contract with the alleged 3rd parties. The 1st 2nd and 3rd defendants violated the rights of the plaintiff. The case was against the 1st 2nd and 3rd defendants. The 1st 2nd and 3rd defendants were at liberty to pursue the interested parties for indemnity.

Suit allowed: judgment entered in favour of the plaintiff against the 1st 2nd and 3rd defendants jointly and severally in the sum of Kshs. 4,500,000 together with costs of this suit and interest at court rates from the date of the instant judgment until payment in full.

Citations

Cases

Kenya

1. *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* Civil Appeal 154 of 2005; [2010] KECA 20 (KLR) - (Explained)
2. *Peevers, Mathew v Leo Slingerland & another* Civil Case 2112 of 1996; [2000] KEHC 337 (KLR) - (Explained)

Statutes

Kenya

1. Companies Act (Repealed) (cap 486) In general - (Cited)
2. Copyright Act, 2001 (cap 130) sections 2, 35(1)(a)(4); 36(4)- (Interpreted)

Advocates

None mentioned

JUDGMENT

- 1 The plaintiff in this case, Timsimon Kuria Kimani (hereafter referred to as the plaintiff only) filed a plaint dated December 22, 2015 against the three defendants Safaricom Limited, Bensoft Interactive Limited and MTECH Communications Limited (hereafter referred to as the 1st, 2nd and 3rd defendants respectively).
- 2 The plaintiff who is an artiste in the entertainment industry stated in the said plaint that he is engaged in composing, writing, singing and performing music under the brand and stage name "Mr Bamboo".
- 3 The 1st, 2nd and 3rd defendants are limited liability companies incorporated in Kenya under the provisions of the *Companies Act* (cap 486 Laws of Kenya).



- 4 The plaintiff further averred in the plaint that he has been in the entertainment industry for 15 years as at the time he filed this suit and he had embraced music as his professional career and he relied on it for his upkeep, livelihood and professional growth.
- 5 He relied on income derived from sale, promotion, distribution and licencing and performance of his musical works in different media platforms including but not limited to compact discs, distribution and sale of music on digital platforms, live performances and royalties upon licencing.
- 6 He further stated in the plaint that during his long career in music and the entertainment industry he has painstakingly built and maintained a wide following of his musical works by his fans in Kenya, the East African region and the world at large.
- 7 The plaintiff further averred in his plaint that amongst other musical works to his name, he has composed, written recorded an/or performed a number of musical compositions which have attracted a wide acclaim and recognition amongst his fans, including the following musical works.
- a. “Mama Africa” which he composed and recorded in 2007 being a collaboration with a well known artiste called “Akon”
 - b. “Yes Indeed” which was composed and recorded in 2005
 - c. “Move On” which he composed and recorded in the year 2012.
- 8 The plaintiff further averred that as the author of the said musical works, he expended substantial efforts, thereby giving the works original character and consequently pursuant to the provisions of the *Copyright Act* (cap 130 Laws of Kenya) he is entitled to intellectual property rights subsisting in the works in the form of copyright conferring him exclusive right to control the reproduction in any material form of his original work, adaptation, distribution to the public of the works by sale, retail, lease or hire or any similar arrangement as well as to communicate to the public and to broadcast the said works as substantial part thereof whether in original form or any other form.
- 9 The plaintiff also stated that he has expended substantial efforts and deployed massive resources both monetary and non-monetary in composing, writing, recording, promoting and marketing the said musical works and he did not recoup his investments due to copyright infringement by the 1st and 3rd defendants.
- 10 In the particulars of copying infringement he stated that the 1st and 2nd defendants jointly with respect to the songs “Mama Africa” and “Yes Indeed” and the 1st and 3rd defendants in respect of the song “Move On” jointly reproduced, published and broadcasted, distributed exhibited and sold and commercially benefited from those musical works without seeking or obtaining authorization and licence from the plaintiff.
- 11 He stated that the defendants have uploaded the said musical works and/or substantiated parts thereof on music known as online platform run by the 3rd defendant known as www.skiza.safaricom.com accessible to members of the public.
- 12 He also stated that the defendants have jointly and severally without seeking authority or being licensed converted the musical works into digital formats and offered the musical works for sale to the public through a service known as caller ring back tone and retained the earning therefrom without accounting any or pay thereof to the plaintiff.
- 13 The plaintiff further stated in his plaint that as a result of the defendant’s actions, the defendants have infringed the plaintiff’s economic rights and benefits protected under the *Copyright Act*.



- 14 The plaintiff pleaded that as a result he suffered the following
- a. Loss of exclusive right to distribute, sell to the public, the said musical works by sale, rental, hire, public performance and broadcasting.
 - b. Loss of substantial royalties that the plaintiff would otherwise earn through licensing of the said musical works to other entities.
 - c. Loss of opportunity to sell his music to other Premium Rate Service Providers (PRSP) and further that Airtel Kenya cancelled negotiations to enter into contract with the plaintiff upon discovering that the same were on the 1st defendant's skiza platform.
 - d. Loss of opportunity for financial assistance from production companies shooting and production of music videos to attract a worldwide audience of the plaintiff's music fans.
 - e. Loss of revenue from inability to assign infringed rights.
 - f. Potentially exposing the said musical works to CDs of infringement by 3rd parties.
 - g. Lower volume of music sales through the established media such as advertisements, performance and live shows due to the wide spread exposure of the music by the 1st defendants' on their platforms.
 - h. Loss of exclusive right to control and license the production of the said work in forms of digital format.
- 15 The plaintiff averred that the said musical works were being downloaded at a cost of cents 75 per song from the 1st defendant's portal from 2009 to 2014 when they were expunged following a demand notice from the plaintiff.
- 16 He further stated that the 2nd defendant admitted liability of infringement of the copyright subsisted in "Mama Africa" and "Yes Indeed" and invited the plaintiff in June 2015 to consider an amicable settlement and a draft agreement was made which the 2nd defendant refused to honour.
- 17 The plaintiff is seeking for the following damages against the defendants
- i. Against the 1st and 2nd defendants accounts and records of downloads made on 1st defendant's portals including on www.skiza.safaricom.com in respect of the plaintiff's musical works "Mama Africa" and "Yes Indeed".
 - ii. Against the 1st and 2nd defendants accounts and records of all sale proceeds realized from the sale and download of the plaintiff's musical works, namely "Mama Africa", and "Yes Indeed".
 - iii. An order for payment by the 1st and 3rd defendants to the plaintiff of such sum found due upon taking of account of proceeds of sale in respect of plaintiff's musical works, "Mama Africa" and "Yes Indeed".
 - iv. Against the 1st and 2nd defendants general damages for infringement of copyright in respect of "Mama Africa" and "Yes Indeed".
 - v. Against 1st and 3rd defendants accounts and records of downloads made on the 1st defendant's portal including ww.skiza.safaricom.com in respect of the plaintiff's musical work "Move On".
 - vi. Against the 1st and 3rd defendants, accounts and records of all sale proceeds received from the sale and download o the plaintiff's musical work "Move On".



- vii. An order for payment by the 1st and 3rd defendants to the plaintiff of such from fund due upon taking of account of proceeds of sale in respect of plaintiff's musical work "Move On"
 - viii. Against the 1st and 3rd defendants, general damages for infringement of copyright in respect of plaintiff's musical work "Move On".
 - ix. Interest on (iii), (iv), (vii) and (viii) above from the date of judgment until payment thereof in full.
 - x. Delivery to the plaintiff of all records held by the defendants both in hard and digital format in respect of musical woks "Mama Africa", "Yes Indeed" and "Move On".
 - xi. Costs of this suit against the defendants jointly and severally plus interest thereon from the date of judgment until settlement in full.
- 18 The 1st defendant entered appearance and filed a defence which was amended on February 3, 2016 denying the plaintiff's claim and stating that it operates a caller ring back tone (CRBT) service popularly known as skiza tunes which allows its subscribers to entertain their callers with the subscriber's selected favourite song or tone.
- 19 Further that in 2009 and 2014 the 1st defendant entered into separate agreements with the 2nd and 3rd defendants to provide it with musical contents for use of the skiza tunes.
- 20 The 2nd defendant issued a 3rd party notice to Music Copyright Society of Kenya (MCSK) to indemnify the 2nd defendant against all losses, liabilities and damage arising from breaches of contract or claims for copyright infringement.
- 21 The 2nd defendant also entered appearance and filed a defence dated March 14, 2016 denying the plaintiff's claim and stating that if at all the 2nd defendant uploaded any alleged musical works it was pursuant to non-exclusive licence by MSCK under licence agreement and a mechanical license agreement both permitting the 2nd defendant and his benefactors to deal with the subject musical works.
- 22 The 3rd defendant also entered appearance and filed a defence dated March 3, 2016 denying the plaintiff's claim and seeking a declaration that the 3rd defendant was wrongfully and erroneously enjoined as a party to the suit.
- 23 The 3rd defendant also issued a 3rd party notice to the 2nd, 3rd party Sub Sahara Limited. They stated in the 3rd party notice that the 2nd and 3rd party granted to the 3rd defendant a non-exclusive licence to communicate and reproduce any works within their repertory for the purpose of the use of the song "Move On".
- 24 The case proceeded by *viva voce*/ evidence. The plaintiff relied on his statement dated December 22, 2015. In it he stated that the 1st and 2nd defendants without his authority or licence offered to the public for profit his music works "Mama Africa", "Yess Indeed" and "Move On". The 1st defendant Safaricom Limited offered for sale digital versions of the said songs as telephone ringtones in the promotion of its services dubbed "Skiza Top Tunes" by putting the said songs on its portal between 2009 and 2014. The 1st defendant admitted having put up his works for a fee but denied liability on the ground that it had received the songs from the 2nd and 3rd defendants.
- 25 The 2nd defendant accepted liability for infringement of copyright and agreed to enter into a settlement agreement. His advocate drafted a deed for settlement forwarded the same to the 2nd defendant but refused to execute.



- 26 The plaintiff indicated that with regards to his song “Move On” the 1st defendant claimed to have received the same from the 3rd defendant. The plaintiff affirmed that as a result of the conduct of the defendants he has lost royalties as he was exposed to loss and damage
- 27 The plaintiff in his evidence in court stated that his father was a musician and he is also a musician and he has trained exclusively on music. He said the gist of his complaint was that in 2009 the 1st defendant started selling the three musical works through its skiza tune platform without his authority.
- 28 He said in 2009 he was in the USA promoting his music. He said the 1st defendant were selling “Mama Africa”, and a 3rd song called “Karibu” and 4th song called “Move On”.
- 29 The plaintiff said it can take upto 3 months to compose one song. He said after composing the song, one goes to production one has to hire a producer and the studio.
- 30 He said the mixing engineer and the mastering engineer have to be paid. The music is then marketed and distributed. He said his songs underwent all these processes.
- 31 The plaintiff said his money is derived by licensing and remuneration is expected when the songs are used by millions of subscribers and when the music is streamed on youtube.
- 32 The plaintiff said the 1st defendant did not pay him and he also lost the opportunity to exclusivity when his songs were used in safaricom skiza tune. He said he could not sell the songs to other Premium Rate Services Providers (PRSP).
- 33 The plaintiff said a demand notice was issued to the 1st defendant and they said they received the music from the 2nd defendant. He said the 1st defendant removed the songs upon receiving the demand notice.
- 34 The plaintiff said in his oral evidence in court that his stage name is Mr. Bamboo. He said the 1st defendant told him the song “Move On” was put on their platform by the 3rd defendant and the other songs were put by the 2nd defendant.
- 35 The plaintiff said the 2nd and 3rd defendants did not apologize to him for the use of his music. They blamed Music Copyright Society of Kenya (MCSK).
- 36 The plaintiff also said he did not authorize MCSK to distribute his music. He produced email communications between Victor Nzomo and Felicire Orin. He said his membership with MCSK did not authorize them to assign his music and that the same requires a separate contract which he did not have with any party including the 1st, 2nd and 3rd defendants.
- 37 In cross examination the plaintiff said the song “Mama Africa” was originally written by a song writer from West Africa. He said when a song is a remix it is sold and the proceeds are shared between the producer, performers and the writer. He said the going rate for a remix is 175,000 USD.
- 38 He also said the song “Yes Indeed” was composed by himself. He said it featured Rafftone by mistake. He said he joined MCSK in 2012.
- 39 The plaintiff also said in cross-examination that he received kshs 600,000 from CSK as down payment for infringement of the two musical works “Mama Africa” and “Yes Indeed”. He said the deed of agreement refers to other parties the 1st and 2nd defendants.
- 40 The 1st defendant called one witness DW 1 Mr Daniel Ndaba who adopted his written statement dated June 5, 2017 in which he stated that the 1st defendant entered into a content provision agreement dated May 12, 2009 with the 2nd defendant company wherein the 1st defendant company obtained from the 2nd defendant the rights. Licenses or sublicense to distribute, lease and sell the Plaintiff’s musical works



- “Mama Africa Remix” and “Yes Indeed” to the end user through the 1st defendant’s Company Portal and by way of Ring Back Tone Service Platform.
- 41 He further stated that the 1st defendant also entered into a content Provision agreement dated September 2, 2009 with the 3rd defendant company where the 1st defendant company obtained from the 3rd defendant the rights, licenses or sublicense to distribute, lease and sell musical works “Move On” to the end user through the 1st defendant portal.
- 42 The 2nd and 3rd defendant warranted to the 1st defendant company that they had obtained the requisite licenses to the rights to the musical works aforementioned including the right to distribute and/or assign rights to the said musical works. That therefore the 1st defendant was well within their rights when it uploaded the musical works on its platforms as there were valid subsisting agreements.
- 43 In his oral evidence in court DW 1 said that he works with the 1st defendant as a senior manager litigation. He said the 1st defendant offers telecommunication services and money remittances.
- 44 DW 1 said that skiza tunes are done by contractors and the contents are given to the 1st defendant by content service providers such as the 2nd and 3rd defendants.
- 45 DW 1 said the 2nd and 3rd defendants agreed to indemnify the 1st defendant against any loss in case of breach. He produced agreement dated May 12, 2009 and September 3, 2009 between the 1st defendant and the 2nd and 3rd defendants respectively.
- 46 DW 1 said in cross-examination the 2nd and 3rd defendants gave the 1st defendant licence documents. He said the 1st defendant in fully indemnified by the agreements between itself and the 2nd and 3rd defendants respectively.
- 47 The 2nd defendant also called one witness DW 2 Bernard Kioko who was a director of the 2nd defendant in 2009. DW 2 produced his witness statement dated June 30, 2017 which he produced as his evidence in chief. He stated that in order to supply and deliver digital content to its customers, the 2nd defendant entered into various contracts with copyright owners, their licensees or assignees with a view of securing digital content including sound recordings, underlying music works, artwork and copyrighted works.
- 48 DW2 stated that sometime in the year 2009, the 2nd defendant was licensed by Music Copyright Society of Kenya (MCSK) to provide content to Skiza Tunes. On May 27, 2017 before the 2nd defendant uploaded content he sought confirmation from MCSK as to whether it had right over several artists the plaintiff included. MCSK confirmed that the listed artistes key among them the plaintiff were members of MCSK and it was on this basis that the 2nd defendant uploaded music on the 1st defendants Skiza Platform.
- 49 DW 2 said in his oral evidence in court that the 2nd defendant was a content provider to the 1st defendant. He said he dealt with the plaintiff through the MCSK who confirmed that the plaintiff was their member.
- 50 MCSK admitted that they had made a mistake when the plaintiff raised a complaint and the plaintiff was paid ksh 600,000/= . DW 2 said in cross examination that prior to signing an agreement with the 1st defendant he had sustained licenses.
- 51 The 3rd defendant also called one witness William Kibiwot Chesire (DW 3) who said he is the CEO of the 3rd defendant. DW 3 adopted his written witness statement dated March 14, 2017 as his evidence in chief. In it he stated that on or about February 28, 2012 an agreement in respect to copyright and content distribution license was entered into between sub sahara limited and Mtech Communication



- Limited. The agreement was duly executed by the CEO of Mtech Communication Mr Ikechukwu Anoke who is currently retired.
- 52 The said agreement dated February 28, 2012 conferred authorization and rights over the musical work in respect to the song “Move On” to the 3rd defendant company from Sub Sahara Limited who had received the same rights and authorization from the author of the musical work via an artist recording contract between Benoit Kanema, Marcus Kibukosya, Mathew Wahkungu, Karun Mungai and Mykie Mutiimi of Camp Mula on one part and Suzzanne Gachukia of Sub Sahara Limited on the second part. The said agreement conferred rights and authorization from the authors of the musical work to Sub Sahara Limited who then in turn conferred the same rights and authorization to Mtech Communication Limited through an agreement dated February 28, 2012.
- 53 DW 3 said in his oral evidence in court that the 3rd defendant is a service provider for calls and ring tones on safaricom skiza platform. DW 3 said his company gave the 1st defendant the rights to sell the musical works and that they obtained the same from the 2nd third party Sub Sahara Limited.
- 54 DW 3 produced an agreement between the 3rd defendant and the 2nd and 3rd party dated February 28, 2012 and said the 2nd and 3rd party. He said it was not possible for the 3rd defendant to establish whether the 2nd and 3rd party had a licence with all the artistes.
- 55 DW 3 said they were sharing revenue with the 2nd 3rd party at 60:40%. He said when the 2nd 3rd party gave them the contents for sale to the 1st defendant he averred that they had the right to offer the content and signed an agreement to indemnify them if any action arose from any 3rd party.
- 56 He said they spent 1.5 million shillings to bring a producer from Nigeria to shoot the video and the profits would be shared at the ratio of 60:40%. The 3rd defendant was to get 60% and the 2nd 3rd party 40%. The cost of the video was to be shared at 50:50% but the 2nd 3rd party did not pay their part forcing the 3rd defendant to foot the entire bill.
- 57 DW 3 said the 2nd 3rd party issued them with Camp Mulla dated March 16, 2010. DW 2 admitted that they gave the song “Move On” to the 1st defendant and further that the song was attributed to the artiste and not Sarari Africa.
- 58 The parties filed written submissions as follows; the plaintiff submitted that 16. Section 2 of the *Copyright Act, 2001*. defines an 'author' in relation to a literary, musical, dramatic or artistic work, as the person who first makes or creates the work, and an 'owner of the copyright' as the first owner, an assignee or an exclusive licensee, as the case may be, of the relevant portion of the copyright. The plaintiff composed, wrote and recorded and/or performed the musical works namely, 'Mama Africa Remix', 'Yes Indeed' and 'Move On. The plaintiff argued that it is undisputed that he owns the copyrights and the Musical Rights to the aforementioned as admitted by the defendants DW1 and DW3 in their testimonies.
- 59 The plaintiff submitted that 'Infringement of Copyright', as indicated in section 35(1)(a) of the *Copyright Act, 2001*, occurs when a person, without the license of the owner of the copyright does, or causes to be done, an act the doing of which is controlled by the copyright. In other words, the ingredients for demonstrating copyright infringement are:
- a That the infringing party committed an act that is controlled by the copyright, i e, reproduction, adaptation/translation, distribution, communication to the public, etc; and
 - b That the infringing party committed the said act without the license/consent of the copyright owner.



- 60 It was the plaintiffs submission that on perusal of the record it was undisputed that his musical works were uploaded on the 1st defendant's platform by the 2nd and 3rd defendants. That uploading the musical works constitutes an act controlled by copyright within the meaning of section 2 of the Copyright Act, 2001.
- 61 The plaintiff also submitted that the infringing Act was committed without the Copyright Holder's Consent. This was evident as the defendants did not obtain the plaintiffs express consent before uploading as was admitted by DW1 during his testimony.
- 62 The plaintiff pointed out that the 1st defendant admitted that it allowed the uploading of the Musical Works on the Platform, on the belief that the 2nd and 3rd defendants had obtained Licenses from the copyright holders of the uploaded content. The plaintiff argued therefore that, the 1st and 2nd defendants cannot be excused from liability, as motive and intent are irrelevant to infringement. The two parties were perfectly aware of the potential infringement by the indemnity clauses they wrote in their respective agreements with each other. If they infringed, the remedy is written in those contracts but under no circumstances can the agreements shield them from liability to the plaintiff.
- 63) It was the plaintiff's submission therefore that he is awarded damages by virtue of section 36(4) of the Copyright Act. He further highlighted that section 35(4) of the Copyright Act does not require the owner of copyright to prove special damage in an action for infringement of copyright and that this is a material damage claim, and the plaintiff, being the copyright owner, is entitled to take legal proceedings for the protection of that property, even though he has not proved actual loss or damage. In support the plaintiff cited the Court of Appeal decision in Nkuene Dairy Farmers Cooperative Society & another v Ngacha Ndeiya (2010) eKLR, wherein the court stated thus:
- “In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of.”
- 64 As regards general damages the plaintiff submitted that any injury or loss suffered by a person either through an omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. That the question regarding the type, extent, and quantum of damages to be awarded in claims for infringement of intellectual property rights, has long been settled through a long line of decisions from Kenyan courts among them; Mathew Peevers v Leo Slingerland & another [2000] eKLR wherein Hon Justice Mbaluto (as he then was) rendered himself thus,
- “The evidence by the plaintiff was that once his music had been aired in the KTN, he could not use it any more. This means that the infringement by the defendants of the plaintiffs copyright rendered the music valueless. The plaintiff is therefore entitled to damages equivalent to the full value of the music. Regarding this the plaintiff stated that though potential earnings of a piece of music is limitless, it was difficult to give a specific figure to any particular piece. He said that some of his pieces had earned as much as Shs 1 million. On the basis of the evidence available and doing the best I can in the circumstances, I assess general damages for the infringement of the copyright at Kshs 300,000.”
- 65 The 1st defendant's submitted that it disputes that the plaintiff owns the copyright for the Musical Works identified. It was necessary for the Plaintiff to adduce evidence before this court to prove that he indeed owns the copyright to the Musical Works which he did not. The plaintiff never adduced



any evidence to prove when he allegedly authored and/or produced the Musical Works, the costs he incurred in producing the same, evidence of contracts that were entered into with the other artists, producers or record labels amongst other particulars.

- 66 The 1st defendant further submitted that with reference to the musical work ‘Yes Indeed’, the plaintiff was only featured in the song and there is no evidence before the court to prove that the plaintiff is the original author/composer/producer. That with the song ‘Move On’ the 2nd and 3rd party provided evidence proving that the said song was composed, written and performed by a band known as Camp Mulla. The 2nd and 3rd party also confirmed that it entered into an artist recording contract agreement dated March 16, 2010 with Camp Mulla, the author of the said musical work.
- 67 The 1st defendant submitted that it provides various platforms to licensed Content Service Providers (hereinafter CSPs) to upload their content which include musical works from various artistes. The 1st defendant entered into a Content Provision Agreement dated May 12, 2009 (hereinafter the Agreement) with the 2nd defendant wherein the 1st defendant obtained from the 2nd defendant the rights, licenses or sublicense to distribute, lease and sell the Musical Works to the end user through the 1st defendant’s Portal and by way of Ring Back Tone Service. That at all material times the aforementioned agreements were in force and therefore should it be held liable judgement should be entered against the 2nd and 3rd defendant only.
- 68 The 3rd defendant submitted that prior to its agreement with the 2nd defendant; the 2nd third party and itself entered into an Agreement to co finance the shooting of Camp Mulla’s music videos. As part of the Agreement, the parties were to mutually share the cost of production equally and they even went ahead and sought the services of Clarence Peters a renowned Music Director. The total amount that was to be offset was Kshs 1,546,870.00. That the 2nd third party did not fulfil its part of the contract necessitating the 3rd defendant to clear all the balance. By the time shooting was complete, the 2nd third party owed the 3rd defendant Kshs,773,435.00.
- 69 That as a result of this the parties agreed to get into a license Agreement to offset the said debt. It was thus part of the Agreement that the 2nd third party would grant the 3rd defendant all the musical works in their catalogue and that the 3rd defendant was at liberty to distribute to any third parties.
- 70 That therefore the question of ownership of “Move On”, if there was any had to be settled between the plaintiff, the 2nd third party and Camp Mulla. Further, the plaintiff confirmed that he had not presented any evidence of copyright ownership over the song “move on”.
- 71 I have carefully considered the evidence adduced by the parties in this suit together with their written submissions. I took over this case at the 3rd defendant’s hearing from Hon Justice Serگون.
- 72 The issues for determination are as follows;
- i. Whether the 1st, 2nd and 3rd defendants infringed the plaintiff’s copyrights in respect of the musical works subsisted in “Mama Africa”, “Yes Indeed” and “Move On”.
 - ii. Whether the plaintiff is entitled to the remedies he is seeking against the 1st, 2nd and 3rd defendants.
 - iii. Whether the 1st, 2nd and 3rd defendants are entitled to indemnity against the 1st and 2nd Third parties.
 - iv. Who pays the costs of this suit?



- 73 On the issue as to whether the 1st, 2nd and 3rd defendants infringed the plaintiff's copyright in respect of the musical works subsisting of "Mama Africa", "Yes Indeed" and "Move On" the plaintiff's evidence was that the 1st defendant was selling the said musical works on its portal without the authority and licence of the plaintiff.
- 74 I take cognizance that the uncontroverted evidence of the plaintiff is that the music pieces in question had been on sale since 2009; an attempt by the 2nd and 3rd defendants to co-finance a collaborative videos, I suppose of the same music in video form by a group calling itself Camp Mulla's was done in 2012.
- 75 I find that the 1st defendant did not deny that they used the said musical works. The 1st defendant admitted that the same were given to them by the 2nd and 3rd defendants.
- 76 I also find that the 2nd and 3rd defendants did not deny that they are the ones who gave the musical works to the 1st defendant, they 2nd and 3rd defendants blamed the 1st and 2nd third parties whom they enjoined as parties to this suit.
- 77 I therefore find that the 1st, 2nd and 3rd defendants having admitted that they used the musical works of the plaintiff have infringed the plaintiff's copyright.
- 78 It was the duty of the 1st, 2nd and 3rd defendants to carry out due diligence to ensure that artiste who is the owner of the copyright had signed a contract giving rights to their intellectual property before assigning the same.
- 79 There is no evidence that the 1st, 2nd and 3rd defendants sought to see any document assigning copyrights by the artiste before using the musical works.
- 80 The 1st, 2nd and 3rd defendants were aware that there was an artiste responsible for the musical works.
- 81 It may not be possible to contact every artiste to ensure they have assigned their rights but the 1st, 2nd and 3rd defendants ought to have been supplied with duly executed contracts signed by the artistes.
- 82 The conduct of the 1st, 2nd and 3rd defendants of using the musical works of artistes without the authority of the owners of copyrights has impoverished artistes in this country and led to exploitation of artistes who are at the mercy of parties who want to harvest where they have not worked.
- 83 I find that the 1st, 2nd and 3rd defendants infringed the plaintiff's copyrights in respect of the musical works subsisting in "Mama Africa", "Yes Indeed" and "Move On".
- 84 On the issue as to whether the plaintiff is entitled to the remedies he is seeking, I find that the plaintiff is seeking the following remedies;
- i. Against the 1st and 2nd defendants accounts and records of downloads made on 1st defendant's portals including on www.skiza.safaricom.com in respect of the plaintiff's musical works "Mama Africa" and "Yes Indeed".
 - ii. Against the 1st and 2nd defendants accounts and records of all sale proceeds realized from the sale and download of the plaintiff's musical works, namely "Mama Africa", and "Yes Indeed".
 - iii. An order for payment by the 1st and 3rd defendants to the plaintiff of such sum found due upon taking of account of proceeds of sale in respect of plaintiff's musical works, "Mama Africa" and "Yes Indeed".
 - iv. Against the 1st and 2nd defendants general damages for infringement of copyright in respect of "Mama Africa" and "Yes Indeed".



- v. Against 1st and 3rd defendants accounts and records of downloads made on the 1st defendant's portal including ww.skiza.safaricom.com in respect of the plaintiff's musical work "Move On".
- vi. Against the 1st and 3rd defendants, accounts and records of all sale proceeds received from the sale and download of the plaintiff's musical work "Move On".
- vii. An order for payment by the 1st and 3rd defendants to the plaintiff of such from fund due upon taking of account of proceeds of sale in respect of plaintiff's musical work "Move On"
- viii. Against the 1st and 3rd defendants, general damages for infringement of copyright in respect of plaintiff's musical work "Move On".
- ix. Interest on (iii), (iv), (vii) and (viii) above from the date of judgment until payment thereof in full.
- x. Delivery to the plaintiff of all records held by the defendants both in hard and digital format in respect of musical works "Mama Africa", "Yes Indeed" and "Move On".
- xi. Costs of this suit against the defendants jointly and severally plus interest thereon from the date of judgment until settlement in full.

85 I find that the 1st 2nd and 3rd defendants did not avail the records of how much they earned from the plaintiff's musical works.

86 I assess general damages for infringement of right of ksh 1,500,000 per song in respect of musical works "Mama Africa", "Yes Indeed" and "Move On".

87 On the issue as to whether the 1st 2nd and 3rd defendants are entitled to indemnity from the 1st, 2nd third parties, I find the 1st 2nd and 3rd defendants are at liberty to pursue the 1st and 2nd Third parties.

88 The 1st, 2nd and 3rd defendants are the ones who infringed the plaintiff's copyright and they are liable to compensate the plaintiff since they were duty bound to ensure the artistes had signed contracts assigning their rights before using those musical works.

89 I therefore find that the plaintiff has a right to be compensated by the 1st 2nd and 3rd defendants. The 1st 2nd and 3rd defendants are at liberty to follow the 1st and 2nd Third parties since the plaintiff does not have a contract with the alleged 3rd parties.

90 The 1st 2nd and 3rd defendants are the ones who violated the rights of the plaintiff. The case before the court is against the 1st 2nd and 3rd defendants. The 1st 2nd and 3rd defendants are at liberty to pursue the interested parties for indemnity.

91 On the issue as to who pays the costs of this suit, it is trite law that costs follow the event. I accordingly order that the 1st 2nd and 3rd defendants pay the plaintiff's costs of this suit.

92 Judgment be and is hereby entered in favor of the plaintiff against the 1st 2nd and 3rd defendants jointly and severally in the sum of kshs 4,500,000 together with costs of this suit and interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF JULY, 2023.

.....
A N ONGERI



JUDGE

In the presence of:

..... for the Plaintiff

.... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

.....for 1st Third Party

..... for the 2nd Third Party

