REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 658 OF 2013

ROYAL MEDIA SERVICES LIMITED.....APPELLANT

VERSUS

JOHN KATANA HARRISON.....RESPONDENT

(Being an appeal from the judgment of Hon. C. Obulutsa (Ag. CM)

in CMCC No. 6161 of 2009 delivered on 28th November 2013)

JUDGMENT

1. This appeal challenges the judgment of *Hon. C. Obulutsa (Ag. CM)* in CMCC No. 6161 of 2009 delivered on 28th November 2013.

2. In the impugned judgment, the respondent, *John Katana Harrison*, then the plaintiff, was awarded KShs.3,000,000 as general damages for infringement of his copyright in the musical works known as *"kazi ni kazi"*. An order of injunction was also granted restraining the appellant, *Royal Media Services*, then the defendant, from reproducing or using the said musical works (song) without the respondent's consent. The respondent was also awarded costs of the suit and interest.

3. In its memorandum of appeal, the appellant advanced five grounds of appeal as follows:

> *i. THAT the learned trial magistrate erred in law and in fact by wholly ignoring the appellant's defence and the submissions of its counsel which could have mitigated the damages.*
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> *ii. THAT the learned trial magistrate erred in making the order that the appellant does pay Kshs.3,000,000/ as damages which is so manifestly excessive as to be erroneous in the circumstances.*
>
> *iii. THAT the learned trial magistrate erred in holding the appellant liable to pay damages as the respondent had failed to prove the extent of the damage suffered.*
>
> *iv. THAT the learned trial magistrate erred in law and in fact by ignoring the fact that the appellant had used the respondent's song for education and public information purposes and no commercial gain was intended and thus allowed under Section 26 of the Copyright Act.*
>
> *v. THAT the award made by the learned trial magistrate now threatens to stifle one of the media's major roles namely to educate its listeners and the public in general.*

4. When the appeal came up for hearing, the appellant's proposal to have the appeal prosecuted by way of written submissions was accepted by the court. Parties thereafter filed their written submissions which were highlighted before me on 19th September 2019 by learned counsel *Mr. Munyori* who represented the appellant and learned counsel *Mr. Rombo* who appeared for the respondent.

5. By way of background, the respondent had by his plaint dated 9th September 2009 sued the appellant seeking inter alia damages for infringement of his copyright and related rights in the musical works known as *kazi ni kazi* which the appellant allegedly reproduced or published on Radio Citizen and public media in its *Chapa Kazi* programme without a licence or authority from the respondent.

6. In its statement of defence dated 14th September 2009, the appellant denied having infringed on the respondent's copyright as alleged or at all and put him to strict proof thereof. In the alternative, the appellant pleaded the defence of fair dealing and public interest claiming that the

respondent's work was solely used for education and information of the public about the need to embrace a work culture and was not used for commercial purposes.

7. During the hearing, each of the parties called one witness. In his evidence, PW1 testified that he was a musician by profession, a composer, song writer and producer; that he composed and produced the song after he was inspired by *matatu* drivers and operators. He played the song before the trial court and produced its CD as Pexhibit1.

8. Further, PW1 testified that in the year 2005, he became aware that Citizen radio was playing the song in its programme *chapa kazi* which was running from Monday to Friday. He recorded the programme which he also played in court. According to the respondent, he wrote to the appellant but his letter did not elicit any response. He also complained to the Copyrights Board. He maintained that he did not give the appellant the song and he did not permit the appellant to use it for any purpose adding that during the time the appellant was airing the song, he could not use it for any purpose; that as a member of Music Copyright Society of Kenya (MCSK), he would have been earning KShs.700 per session or KShs.300,000 per year for use of the song.

9. The appellant's witness, *Julian Macharia*, testified as DW1. She confirmed that the appellant used the song in its programme *chapa kazi* which was designed to encourage people to work; that they used the song as a signature tune but stopped using it in the year 2009 after the respondent complained. In addition, DW1 stated that the appellant was willing to amicably settle the matter but parties failed to agree.

10. In cross-examination, DW1 admitted that the appellant started playing the song in 2005. In re-examination, she claimed that it was the respondent who had supplied them with the song.

11. In his judgment, the learned trial magistrate made a finding of fact that the appellant had infringed on the respondent's copyright for almost four years hence the award of damages in the sum of KShs.3,000,000.

12. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am fully aware of my duty as the first appellate court which as succinctly summarised by the Court of Appeal in the case of ***Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123*** is to:

> ***"…. re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

13. At the outset, I wish to point out that though an appellate court has jurisdiction to interfere with findings of fact made by the lower court, this power must be exercised cautiously. The principles which guide an appellate court in deciding whether or not to interfere with findings of fact made by the lower court have been laid down in a number of authorities. A citation of two of those authorities will suffice. In ***Makube V Nyamoro, [1983] KLR 403***, the Court of Appeal enunciated those principles as follows:

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong legal principles in reaching the findings he did. …"***

14. In ***Kiruga V Kiruga & Another, [1988] KLR 348***, the Court of Appeal stated that:

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong…. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."***

15. Bearing in mind the above principles, and having carefully considered the grounds of appeal, the rival written and oral submissions made on behalf of the parties as well as the evidence on record, I find that the twin issues for my determination in this appeal is whether the trial magistrate erred in finding that the appellant had infringed on the respondent's copyright as alleged and if the answer to this question is in the negative, whether the damages awarded to the respondent were manifestly excessive.

16. Turning to the first issue, I find that in the trial court, the fact that the respondent was the original composer and producer of the song was not disputed. It was also not disputed that the appellant had used the song in its *chapa kazi* programme from the year 2005 to 2009.

17. The *Copyright Act, 2001 Chapter 130* of the *Laws of Kenya (the Act)* which has since been repealed and replaced by the *Copyright Act No. 12 of 2016* is the applicable law in this appeal since it was the legal regime that governed matters related to copyrights in various fields at the time the suit was filed.

18. Given that the authorship or ownership of the song by the respondent was not disputed, it follows that by virtue of *Section 23* as read with *Section 31* of the *Act*, the respondent was the owner of the song's copyright. *Section 23 (1)* aforesaid states as follows:

> ***"Copyright shall be conferred by this section on every work eligible for copyright of which the author, or, in the case of a work of joint authorship, any of the authors is, at the time when the work is made, a citizen of, or is domiciled or ordinarily resident in, Kenya or is a body corporate which is incorporated under or in accordance with the laws of Kenya."***

Section 31 (1) of the *Act* further expounds on the above provision by stating that *"copyright conferred by Sections 23 and 24 shall vest initially in the author …."*

The appellant's argument that the respondent did not prove that he was the owner of the copyright of the song is thus unmerited. Failure to produce a certificate to that effect though relevant was not material in view of the fact that his authorship of the song was not disputed.

19. The next question that I must now answer is this – was the respondent's copyright in the song infringed by the appellant?

To answer this question, I must be guided by *Section 35 (1)* of the *Act* which defines what constitutes infringement. The provision is in the following terms:

> ***"Copyright or related rights shall be infringed by a person who, without the***
>
> ***license of the owner of the copyright or related rights—***
>
> ***(a) does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or***
>
> ***(b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy."***

In this case, the respondent asserted both in his pleadings and in his evidence that he had not permitted the appellant to use his song in any way. The appellant though claiming through DW1 that the respondent had given the song to it failed to adduce any evidence to prove that the respondent had indeed permitted or otherwise licenced it to use his song.

20. In its submissions, the appellant urged the court to find that the learned trial magistrate erred in his decision as he did not consider the defences of fair dealing and public interest that had been raised by the appellant in its defence. In my view, the Copyright Act does not expressly recognize public interest *per se* as a defence to copyright infringement. Public interest concerns are incorporated in the defence of fair dealing which is provided for under *Section 26 (1)* of the *Act. Section 26 (1)* of the *Act* in so far as is relevant to this appeal states as follows:

> ***"Copyright in a literary, musical, artistic or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts—***
>
> ***(a) the reproduction in any material form of the original work;***
>
> ***(b) ….;"***

21. The Supreme Court has had an opportunity to address itself to the defence of fair dealing in ***Communications Commission of Kenya & 5 Others V Royal Media Services Ltd & 3 Others, [2014] eKLR*** which was cited by the appellant. In that case, the court stated as follows:

> ***"… Fair dealing is thus a defence against copyright infringement. The Copyright Act does not define what is 'fair', and it is something that depends on the facts of each case. As Lord Denning remarked in Hubbard v. Vosper [1972] 1 All ER. 1023, at. P. 1027 (C.A.),***
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> ***"It is impossible to define what is 'fair dealing'. It must be a question of degree."***
>
> ***The Supreme Court of Canada, in CCH Canadian Ltd. v. Law Society of Upper Canada [2004] 1 S.C.R. 339, 366; 2004 SCC13 (CCH),adopted criteria of fairness that had been established by the lower Court; these were:(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. The Court considered that although all these factors were unlikely to arise in every case, they were a dependable basis for determining "fairness" in future cases.***
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> ***Although the Canadian case dealt with copyright infringement vis-à-vis print media, its yardsticks are relevant and can be applied in the instant case, to determine whether the actions of the appellants fall within the copyright exception….."***

22. I agree with the appellant that the learned trial magistrate did not address his mind to the defence of fair dealing which was clearly pleaded in the appellant's statement of defence and was even expounded in its submissions. This court being the first appellate court is consequently duty bound to consider and determine whether the said defence was applicable in this case.

23. The appellant has contended and this has not been denied by the respondent that the purpose of the programme *chapa kazi* in which the song was being played was to inspire people to work. However, my analysis of the evidence on record reveals that it is not the song which was used to educate the public to embrace a work culture. In DW1's admission, the programme contained a segment in which they interviewed different people. The respondent's song was only used as a signature tune since it was in alignment with the programme. Besides, the respondent claimed in his evidence and this was not disputed by the appellant, that the use of the song by the appellant created unfair competition in the market with his original song since he was unable to use it elsewhere where he could have earned some money from it. The Supreme Court in the ***Communications Commission of Kenya & 5 Others V Royal Media Services Ltd & 3 Others, [supra]*** recognized that the effect of having the reproduced work competing with the original work had potential for unfair dealing.

24. In view of all the foregoing, I find that the defence of fair dealing was not established by the appellant in this case. I am thus satisfied that even though the learned trial magistrate did not consider the aforesaid defence, he arrived at the correct conclusion that the appellant had

infringed on the respondent's copyright in the song.

25. With regard to the quantum of damages, it is trite that the award of damages is always at the discretion of the trial court. However, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.

26. It is also settled that an appellate court should be slow to interfere with an award of damages made by the trial court. The court should only disturb such an award if it is satisfied that in arriving at its decision, the trial court considered irrelevant facts or failed to consider relevant ones; or that the award is inordinately high or low that it must be a wholly erroneous estimate of the damage suffered. See: ***Butt V Khan, (1981) KLR 349, Kemfro Africa Ltd T/A Meru Express Services, (1976) & Another V Lubia & Another, No. 2 (1985) eKLR*****.**

27. A look at the trial court's judgment on quantum reveals that the learned trial magistrate considered the evidence and submissions placed before him by both parties as well as the fact that the appellant had played the song in a radio station which had wide outreach for a period of four years. I do not find anything in the trial court's decision on quantum to suggest that he considered any irrelevant factor or that he applied the wrong legal principles. I cannot also say that the award of KShs.3,000,000 was inordinately high. I therefore do not find any basis to interfere with the award made by the trial court and it is hereby upheld.

28. For all the reasons stated hereinabove, it is my finding that the appellant's appeal lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 19th day December, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Chege holding brief for Mr. Munyori for the appellant

Mr. Achungo holding brief for Mr. Mr. Rombo the respondent

Mr. Kibet: Court Assistant