Wanjiku v Christ is the Answer Ministries (CITAM) & another (Civil Suit 066 of 2020) [2025] KEHC 8774 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8774 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 066 OF 2020

FG MUGAMBI, J

JUNE 20, 2025

BETWEEN

REBECCA WANJIKU ..... PLAINTIFF

AND

CHRIST IS THE ANSWER MINISTRIES (CITAM) ..... 1ST DEFENDANT

ISAAC PETER KALUA ..... 2ND DEFENDANT

JUDGMENT

Background and Introduction

1. At the heart of the dispute between the plaintiff and the 1st defendant's men's choir group, led by the 2nd defendant, is a song titled Rungu Rwa Ihiga (hereinafter "the plaintiff's song"). The plaintiff, through her amended plaint dated 6th July 2021, and response to the amended statement of defence dated 15th September 2021 alleges that this song has been unlawfully infringed by the defendants through their rendition titled Athuri Mwihithe (the defendants' song).

2. The defendants, through their amended statement of defence dated 10th September 2021, deny the plaintiff's claim of copyright ownership in the song "Rungu Rwa Ihiga", contending that the work lacks originality as required under Section 22(3)(a) of the *Copyright Act*, 2001. They assert that their song "Athuri Mwihithe" is an independently created composition incorporating public domain elements, including the phrase "Rungu Rwa Ihiga", which they argue is a common Christian reference and not subject to copyright.

3. They maintain that no authorization was required for the use or performance of their song. They deny having uploaded or distributed the plaintiff's work without consent and assert that the content shared on the Men's Chorale YouTube channel was their own and not intended for profit making.

4. In response to the allegations of infringement, the defendants argue that any overlap with the plaintiff's song is incidental and falls within statutory exceptions. They emphasize that the phrase in question appears only briefly in their six-minute song and is not a dominant element. They further assert that their actions were not willful and do not constitute infringement.

5. The defendants note that the plaintiff only began publishing her work on YouTube in 2020, after this suit had commenced, and that other entities had used or performed the song prior to them without objection. They argue that the plaintiff has neither demonstrated prior claim nor suffered any specific damage.

6. Finally, they state they were unaware of any copyright claim, especially given the widespread and customary performance of the song at Kikuyu events, with no indication of the plaintiff's proprietary rights.

7. At the hearing, the plaintiff testified as PW2 and called one additional witness, Mary Wambui Kariuki, who serves as a member of the Vetting Committee of the Music Copyright Society of Kenya (MCSK). The defendants, on their part, called one witness, Isaac Peter Kalua, the 2nd defendant. I have carefully examined the witness statements and oral testimonies by the witnesses, which are consistent with the parties' respective pleadings as earlier outlined. The parties also filed their respective written submissions which I have equally considered. I do not propose to reproduce the entirety of the evidence and submissions here, but I shall refer to the relevant portions thereof in the analysis that follows.

Analysis and Determination

8. The three issues arising for determination are:

    i. Whether the defendants infringed the plaintiffs copyright;

    ii. Whether the defendants' defenses are sustainable;

    iii. Whether the plaintiff is entitled to the remedies she seeks.

Whether the defendants infringed the plaintiffs copyright:

9. In a claim for copyright infringement, the first and foundational inquiry is whether the plaintiff holds a valid copyright in the subject work. Section 2 of the *Copyright Act*, 2001 defines an author as the person who creates an original work eligible for protection under the Act. In this case, the plaintiff produced a Certificate of Registration of a Copyright Work No. CR.000475 dated 26th January 2011 in respect of the audio and visual of her song.

10. The certificate constitutes prima facie evidence of authorship and ownership of the work pursuant to Section 22A(3) of the *Copyright Act*. It affirms that the plaintiff is the author of the song "Rungu Rwa Ihiga" and that she enjoys the exclusive rights conferred by law, including the rights to reproduce, distribute, and publicly perform the work. Notably, in his testimony, DW1 expressly confirmed that the defendants do not lay any claim to authorship or ownership of the said song.

11. This uncontroverted position shifts the evidentiary burden on the defendants to then rebut the presumption of originality. It was up to the defendants to adduce credible evidence to show either that "Athuri Mwihithe" was independently created without reference to the plaintiff's work, or that their use of any elements from the plaintiff's composition falls within the statutory exceptions to infringement as set out in the *Copyright Act*.

12. The plaintiff alleges that the defendants unlawfully reproduced, distributed, and performed her copyrighted song without her consent, presenting it under the title "Athuri Mwihithe." She states that on or about 27th May 2015, the impugned performance was uploaded to a YouTube channel known as Mens Chorale, which she avers is owned or operated by the defendants and has an audience of approximately 2,900 subscribers.

13. She further contends that the defendants' version of the song is substantially similar to her original composition in terms of lyrics, melody, and rhythm. According to the plaintiff, these similarities are not coincidental but instead indicative of deliberate copying and adaptation of her work without authorization. She maintains that the defendants' actions constitute copyright infringement within the meaning of the *Copyright Act* and that the continued publication, distribution, and performance of the infringing work have caused her economic harm, including loss of income and erosion of artistic control over her composition.

14. In support of her claim, the plaintiff furnished the Court with a flash disk containing both the audio-visual recording of the defendants' performance and her own version of the song. These recordings were played during the hearing. There is no doubt that the defendants' piece is a combination of gospel songs performed in the Kikuyu language. The plaintiff identified the allegedly infringing segment as running from minute 2:43 to minute 6:13 of the defendants' track. She further submitted an English translation of this segment, stating that the words therein mirror her original lyrics verbatim.

15. During cross-examination, DW1 conceded that the lyrics in the impugned portion of the defendants' song are, in fact, identical to those in the plaintiff's composition. He acknowledged that the following lines are repeated verbatim in the segment running from minute 2:43 to 6:13:

> Men seek refuge under the rock
>
> Women seek refuge under the rock
>
> Young men seek refuge under the rock
>
> Young women seek refuge under the rock
>
> All people seek refuge under the rock

16. There is no serious dispute that the tune employed in both songs is substantially similar. PW1 testified unequivocally to this fact, and the audio evidence played in court supports this assertion. During cross examination DW1 was at pains to explain the striking similarities between the two songs. He testified that the lyrics in question were derived from the Book of Exodus 33:21–23, and insisted that the words could not have been expressed differently.

17. For context, the King James Version of Exodus 33:21–23, which the defendants cite as the scriptural source of their lyrics, reads as follows:

> "21 And the Lord said, Behold, there is a place by me, and thou shalt stand upon a rock:
>
> 22 And it shall come to pass, while my glory passeth by, that I will put thee in a clift of the rock, and will cover thee with my hand while I pass by:
>
> 23 And I will take away mine hand, and thou shalt see my back parts: but my face shall not be seen."

18. It is apparent from the above verses that, while they refer to a "rock" in a metaphorical and theological context, they do not contain the lyrical structure or language employed in either the plaintiff's or the

defendants' song. There is no textual basis in these verses for the repeated lines such as "Men seek refuge under the rock" and similar formulations addressed to women and youth. The biblical passage does not, in either expression or form, mirror the lyrics used in the impugned musical composition. This undermines the credibility of the defendants' claim that their song merely paraphrases or draws directly from scripture in a way that excludes original authorship by the plaintiff.

19. The applicable legal test in circumstances involving alleged copying of themes or ideas was articulated by the Supreme Court of India in the landmark decision of R.G. Anand V M/s Deluxe Films & Others, (1978) 4 SCC 118. In that case, the Court held:

    i. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work.

    ii. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. in such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendants work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable, the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

    iii. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to seeing the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

    iv. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises."

20. This decision reinforces the principle that copyright does not protect ideas or themes in the abstract, but rather the expression of those ideas. In the present case, even if the defendants and the plaintiff drew inspiration from similar biblical themes, what is protected is the plaintiff's particular arrangement of lyrics, rhythm, and musical structure. The repeated use of identical lyrics and a substantially similar melody over a significant portion of the defendants' song creates the unmistakable impression of copying, rather than independent creation. Accordingly, the reasoning in R.G. Anand supports the conclusion that the defendants' work amounts to a deliberate and unlawful appropriation of the plaintiff's protected expression.

21. The next issue for determination is whether the defendants' assertion that there was no infringement on the basis that their use of the plaintiff's lyrics and tune was merely "incidental" is tenable in law. The defendants rely on the general exceptions and limitations provided under the Second Schedule to the *Copyright Act*, and in particular paragraph *1*(f), which provides as follows:

> " The exclusive rights under section 26 shall not include the right to control—
>
> (f): the incidental inclusion of a copyright work in an artistic work, sound recording, audio visual work or broadcast;"

22. To my mind, this exception applies to shield from liability those who include protected material in a manner that is genuinely peripheral or unavoidable. It does not apply where the copied material forms a central, repeated, or substantial part of the new work.

23. The Court of Appeal in Nairobi Map Services Limited V Airtel Networks Kenya Limited & 2 Others, [2019] KECA 701 (KLR) considered the meaning and application of the phrase "incidental inclusion" under copyright law. In doing so, the Court examined comparative jurisprudence and notably referred to the decision in IPC Magazines Limited V MGN Limited [1998] FSR 431. In that case, the English High Court adopted the approach suggested by Laddie, Prescott, and Vitoria in The Modern Law of Copyright and Designs (3rd Ed, 2000), construing "incidental" to mean something "casual, inessential, subordinate or merely background".

24. Applying that reasoning, the Court of Appeal upheld the High Court's finding that the inclusion of a map in an advertisement was "secondary or subordinate to the overall objective of the advertisement," and thus properly classified as incidental.

25. This authority is useful in the present case. The defendants assert that their use of the plaintiff's lyrics and tune falls within the statutory exception for incidental inclusion under paragraph 1(f) of the Second Schedule to the *Copyright Act*.

26. In copyright law, the test for substantiality is qualitative rather than purely quantitative. The focus is not merely on the length of the portion copied, but on whether the portion taken constitutes a significant or essential part of the original work. As DW1 himself conceded, the defendants' segment conveys the core message of the song: a spiritual call for all people to seek refuge under the rock. It is, therefore, not only musically central but also conceptually integral.

27. However, unlike in Nairobi Map Services, where the protected content played a minor and background role, the segment of the defendants' song in which the impugned material appears is neither casual nor inessential. On the contrary, it spans over three minutes, nearly half the entire composition, and consists of lyrics and a tune that are central to the structure, rhythm, and message of the song.

28. In light of the principles affirmed by the Court of Appeal, it cannot be said that the plaintiff's work was used in a manner that was subordinate or merely background to the defendants' musical composition. The use was substantial, prominent, and expressive. I therefore find that the defence of incidental inclusion is not available to the defendants under the facts and circumstances of this case.

29. The defendants also asserted that the plaintiff's song is a piece of folklore that has been performed widely in various functions and versions within the Kikuyu community. However, beyond the bare assertions made in their pleadings and testimony, the defendants did not produce any evidence to support this claim. No witness was called to testify to the song's alleged traditional or communal origin, or to demonstrate that the song predates the plaintiff's authorship or exists in the public domain.

30. On the contrary, PW2 was categorical in her testimony that artists who had previously performed the song had expressly acknowledged her as the author and had done so with her permission. This assertion was not rebutted by any contrary evidence from the defence. A mere assertion that a song is widely performed in a particular language does not, without more, displace a claim of authorship supported by formal registration and uncontroverted testimony. I therefore find the defendants' claim that the work constitutes folklore to be unsubstantiated and legally untenable.

31. The fact that the plaintiff launched her YouTube channel on 11th November 2020, after the filing of this suit, is in my view inconsequential to the determination of copyright ownership or infringement. In my view, the date of publication on a digital platform does not displace or diminish the plaintiff's proprietary rights, which had already been established through formal registration. Having registered the copyright to the song on 26th January 2011, the plaintiff acquired the full bundle of exclusive

rights granted under the *Copyright Act*, including the rights to reproduce, perform, distribute, and communicate the work to the public.

32. These rights accrue from the moment of fixation and registration, and may be exercised at any time during the subsistence of the copyright. The plaintiff was therefore legally entitled to upload and disseminate her work on any platform of her choosing, regardless of whether that occurred before or after the institution of this suit. The timing of the YouTube upload is, accordingly, irrelevant to the question of whether infringement occurred.

33. What matters is whether the defendants used the protected work without authorization, and whether such use fell within the exclusive domain reserved to the copyright holder. On this point, the plaintiff's delayed public dissemination does not afford the defendants any defence or right of use. The rights conferred by law remain intact throughout the copyright term, and the plaintiff remains entitled to enforce them.

34. The defendants have stated that they do not sell their songs and that their performances are intended solely for ministry and spiritual edification, not for commercial gain. While this may be relevant in the context of assessing the quantum of damages, it does not negate liability for copyright infringement. By dint of the *Copyright Act*, the existence of a profit-making motive is not a prerequisite to establishing infringement; what matters is the unauthorized use of exclusive rights conferred upon the copyright holder.

Whether the plaintiff is entitled to the remedies she seeks:

35. Having found that there was an infringement of the plaintiff's copyright, I am satisfied that the plaintiff is entitled to the reliefs sought in the amended plaint, including injunctive relief and appropriate remedies to vindicate her rights.

36. With respect to the claim for general damages for infringement, I align with the observations made by the Court in Franz Frederichs V Kenya Medical Supplies Agency [2019] KEHC 5744 (KLR), where Tuiyott, J (as he then was) aptly recognized the evidentiary challenges that often accompany claims for general damages in copyright cases. General damages for copyright infringement are not easily ascertainable. Unlike liquidated claims, the Court is called upon to make a value judgment based on the extent of the infringement, the use to which the infringing work was put, the commercial or non-commercial nature of the infringement, and the harm occasioned to the plaintiff.

37. In the present case, the plaintiff did not provide evidence of lost income or commercial exploitation of the song by the defendants. The defendants, for their part, asserted that the song was not sold or monetized, and that it was used solely for ministry purposes. While this does not excuse the infringement, it is a relevant factor in assessing the scale of compensatory damages. The plaintiff's rights were clearly violated through the unauthorized use, reproduction, and public dissemination of her work on a digital platform accessible to the public. I take the view that the plaintiff is entitled to an award of general damages, not necessarily to reflect actual loss, but to vindicate her rights, affirm the principles of copyright protection, and deter similar violations.

38. I should note that I have considered the Notice to Produce dated 28th October 2020, issued by the plaintiff and duly served upon the defendants. The notice sought production of the video of the impugned song, as posted on the Mens Chorale YouTube channel on or about 27th May 2015. DW1, in his testimony, confirmed that the men's choir performed the song in 2015. He also acknowledged that once a song is posted on a digital platform such as YouTube, the number of views continues to grow over time, thereby extending its public reach.

39. Despite these admissions, the defendants did not comply with the Notice to Produce, nor did they offer any explanation for their failure to do so. In the absence of justification, I am entitled to draw an adverse inference, that the withheld material could have revealed information unfavourable to the defendants' position, possibly including metrics on viewership, audience engagement, or implicit commercial benefit.

40. Nevertheless, at this stage of the proceedings, the evidentiary value of that material may be diminished. Given the passage of time and the issuance of a temporary injunction, any data currently retrieved from the platform would not accurately reflect the status of dissemination or public exposure at the time the infringing content was actively circulating. As such, while the non-production supports the inference of potentially adverse content, it may no longer materially assist the Court in quantifying the extent of the infringement.

41. In Kinakie Co-operative Society V Green Hotel, (1988) KLR 242, the Court of Appeal also recognized the evidentiary and practical challenges that may arise in the quantification of damages in certain instances. The Court stated:

> " Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages."

42. Against this backdrop, I have considered various recent decisions of this Court regarding awards for copyright infringement. The plaintiff referred to Nyadiya V Equity Bank Kenya Ltd & 4 Others, [2022] KEHC 144416 (KLR), in which an award of Kshs. 5,000,000/= was made. However, that case is distinguishable, as the award was supported by evidence on loss and use of the impugned content.

43. Similarly, in Kimani V Safaricom Limited & 2 Others; Music Copyright Society of Kenya & Another (Third Party), [2023] KEHC 20085 (KLR), an award of Kshs. 4,500,000/= was issued on 6th July 2023. In Nyadiya [2022] KEHC 144416, the sum of Kshs. 5,000,000/= was again awarded, while in less commercially aggravating contexts, the courts have awarded more modest sums: Kshs. 700,000/= in Wanjiru V Machakos University, [2022] KEHC 10599 (KLR); Kshs. 500,000/= in Kuria V University of Kabianga, [2023] KEHC 809 (KLR); and Kshs. 650,000/= in Kamande V Maisha Flour Limited & Another, [2023] KEHC 22326 (KLR).

44. These decisions confirm that there is no rigid formula for quantifying damages for copyright infringement. Each case must be evaluated on its own merits, considering the nature of the infringement, the extent of dissemination, the conduct of the infringer, the commercial or non-commercial context of the use, and whether any financial harm or benefit was demonstrated.

45. Considering the facts and circumstances of the present case, including the uncontroverted finding of infringement, the non-commercial use by the defendants, the failure to disclose relevant digital evidence, and the plaintiff's assertion of moral and proprietary harm, I am of the considered view that an award of Kshs. 1,500,000/= is appropriate and proportionate to vindicate the plaintiff's rights.

Disposition

46. Accordingly, judgment is entered in favour of the plaintiff, against the defendants, jointly and severally, in the following terms:

    i. A permanent injunction is hereby issued restraining the defendants or any person acting in league with the defendants from making any sales, hire, distribution, performance,

reproduction and or other act that amounts to infringement of copyrights held by the plaintiff in the song titled "Rungu Rwa lhiga".

ii. An order is hereby issued directing the defendants to take down from all platforms, and to destroy any copies, records and or performances of the song titled "Rungu Rwa lhiga" under the title "Athuri Mwihithe" or any other title, within seven (7) days from the date of this judgment.

iii. The plaintiff is awarded general damages for infringement of copyright in the sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=), together with interest thereon at court rates from the date of filing suit until payment in full.

iv. The plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF JUNE 2025.

F. MUGAMBI

JUDGE

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