

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E253 OF 2019**

RADIO AFRICA LIMITED.....PLAINTIFF

-VERSUS-

THE STANDARD GROUP PLC.....1<sup>ST</sup> DEFENDANT

KENYA BROADCASTING CORPORATION.....2<sup>ND</sup> DEFENDANT

**RULING**

1. This Court in its Judgment delivered on 20<sup>th</sup> September 2024, declared that the plaintiff was the sole local broadcaster vested with exclusive rights to transmit live audio broadcasts with commentary of the 2019/2020 English Premier League within Kenya, and further directed that an enquiry be conducted to assess damages arising from the infringement of the plaintiff's copyright, or at the plaintiff's election, an account of the profits earned by the 1<sup>st</sup> defendant as a result of the infringement.
2. Subsequently, the plaintiff filed an affidavit sworn on 24<sup>th</sup> January 2025, by Mr. Steven Amollo Agembo, the plaintiff's Radio Jambo's Program Controller, in support of the enquiry as to damages. Mr. Agembo averred that under Section 35 of the Copyright Act, the plaintiff may, in place of damages, opt to be awarded a sum calculated on the basis of a reasonable royalty that would have been payable by a licensee. He noted that pursuant to a Content Syndication Agreement dated 17<sup>th</sup> May 2019, the plaintiff paid a total sum of USD 1,782,000.00 (net of taxes) at a subsidized rate for the rights to broadcast with commentary the 2019/2022 English Premier League within Kenya, broken down by season and consequently claimed the sum of

USD 1,782,000.00 as the license fee that would have been payable, had a lawful license agreement existed between the plaintiff and the 1<sup>st</sup> defendant.

3. The 1<sup>st</sup> defendant then filed a replying affidavit sworn on 19<sup>th</sup> March 2025 by Mr. Jesse Waigwa, the 1<sup>st</sup> defendant's Legal Manager Mr. Waigwa averred that this Court found the plaintiff to have held an exclusive license to distribute the relevant content in Kenya and that copyright infringement occurred only in respect of three matches being, Leicester v Wolves, Newcastle United v Arsenal and Manchester United v Chelsea, broadcasted on 11<sup>th</sup> August 2019. He stated that the Court however noted that the infringement ceased upon issuance and compliance with an order of injunction. He stated that although the plaintiff elected under Section 35 of the Copyright Act to seek reasonable royalty damages amounting to USD 1,782,000/=, the said sum represents the entire contract value for three seasons and lacks a demonstrable basis, particularly since the contract relied upon was heavily redacted.
4. Mr. Waigwa contended that damages should be confined strictly to the three infringing matches and not the full contractual period and urged the Court to consider prevailing local market rates, which he claimed was approximately Kshs.100,000/= per match, based on comparable agreements involving the same content provider. Alternatively, Counsel proposed a prorated assessment based on the plaintiff's admitted 2019/2020 license fee of USD 495,000.00 for 190 matches, yielding a per-match value of USD 2,605.26 and total damages of USD 7,815.78 for three matches. He further provided an alternative prorated calculation derived from the 1<sup>st</sup> defendant's later Syndication Agreement, resulting in a significantly lower per-match figure. Mr. Waigwa asserted that it would be unjust to award damages for three full seasons when liability was established for only three matches, and therefore prayed that the plaintiff's claimed damages to be adjusted accordingly.

5. The enquiry was canvassed by way of written submissions. From the Judiciary CTS, there is no evidence of the filing of written submissions by the plaintiff, despite having been given an opportunity to file the same. The 1<sup>st</sup> defendant's submissions were filed by the law firm of TripleOKLaw Advocates LLP on 22<sup>nd</sup> September 2025.
6. Mr. Ochieng, learned Counsel for the 1<sup>st</sup> defendant acknowledged that the plaintiff has elected to seek relief under Section 35(4) of the Copyright Act based on a reasonable royalty, which is defined as the royalty a willing licensee would pay while still making a reasonable profit as defined in the **Black's Law Dictionary 9<sup>th</sup> Edition 2009** at page 1445, taking into account the unique circumstances of the case. He contended that the plaintiff's reliance on the Content Syndication Agreement dated 17<sup>th</sup> May 2019 to claim USD 1,782,000.00 for three seasons is misplaced, as the infringement did not occur over the entire contract period. Counsel submitted that the Agreement produced is heavily redacted and does not disclose the alleged contract sums. He stated that the amounts claimed are significantly inflated.
7. He relied on the Court of Appeal case of **David Bagine v Martin Bundi** [1997] KECA 54 (KLR), and argued that the plaintiff failed to prove the alleged license fees, as even its witness could not confirm the sums paid, contrary to the evidentiary burden and the requirement for special damages to be strictly proved. Mr. Ochieng urged this Court to be guided by prevailing market rates demonstrated through a comparable agreement between the 1<sup>st</sup> defendant and the same content provider, under which USD 430,000.00 was paid for three seasons, translating to approximately USD 754.39 per match based on access to 190 matches per season.
8. Counsel also submitted that any damages should be strictly prorated to cover only the limited period and matches during which infringement was found to have occurred in the 2019/2020 season. In conclusion, Mr.

Ochieng maintained that the plaintiff did not justify the inflated sums claimed and urged the Court to assess damages on a prorated and reasonable royalty basis, supported by the evidence on record.

#### **ANALYSIS AND DETERMINATION.**

9. I have considered and analyzed the affidavit evidence filed, together with the written submissions by Counsel for the 1<sup>st</sup> defendant. The issue that arises for determination is what the appropriate quantum of damages payable to the plaintiff for the infringement of its copyright by the 1<sup>st</sup> defendant is.
10. This Court in its Judgment delivered on 20<sup>th</sup> September 2024, found that the plaintiff held exclusive rights to broadcast live audio transmissions with commentary of the 2019/2020 English Premier League within Kenya and that the 1<sup>st</sup> defendant infringed upon those rights. The scope of the infringement was however expressly confined to the broadcasting of three matches namely, Leicester v Wolves, Newcastle United v Arsenal and Manchester United v Chelsea, on 11<sup>th</sup> August 2019. The Court further noted that the infringement ceased immediately upon the issuance of injunctive orders, and for that reason declined to award aggravated damages.
11. The plaintiff elected to pursue a relief under Section 35(4) of the Copyright Act, which permits the Court, in lieu of general damages, to award a sum calculated on the basis of a reasonable royalty that would have been payable by a licensee. It states that –

***Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for infringement the following reliefs shall be available to the plaintiff -***

- a) *the relief by way of damages, injunction, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights;*
- b) *delivery up to the plaintiff of any article in the possession of the defendant which appears to the court to be an infringing copy, or any article used or intended to be used for making infringing copies;*
- c) *in lieu of damages, the plaintiff at his option, be awarded an amount calculated on the basis of reasonable royalty which would have been payable by a licensee in respect of the work or type of work concerned;*
- d) *for the purpose of determining the amount of damages or a reasonable royalty to be awarded under this section or section 33(2), the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiries as the court considers necessary; and*
- e) *before the owner of the right institutes proceedings under this section, he shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee may intervene in such proceedings and recover any damages he may have suffered as a result of the infringement concerned or a reasonable royalty to which he may be entitled.*

12. A reasonable royalty, as defined in **Black's Law Dictionary**, is the amount that a willing licensee would pay to a rights' holder while still making a reasonable profit, when taking into account the particular circumstances of

the case. This standard necessarily requires a close nexus between the proved infringement and the quantum awarded. Section 35(4)(d) allows the Court to make an order for an enquiry to be conducted for purposes of determining the amount of damages to be awarded. In the case of **British United Provident Association Limited v Bupa Kenya Limited** [2020] KEHC 9972 (KLR), the Court in making an order for enquiry held as follows –

*A Plaintiff bringing an action for infringement of intellectual property may choose to prove damages contemporaneously with liability. But it may, like here, first seek to establish infringement and once infringement has been determined to move to the next step of proving damages. It seems to me that this latter approach could be a more efficient way of use of the Court's time. Parties should allow the Court to make a decision as to whether there is infringement in the first place, so that an inquiry of damages is undertaken only if necessary. The parties and Court should strive to make the proceedings on liability efficient and expeditious.*

*As to the taking of account of profits of an infringer, the philosophy behind the remedy is that a party who has profited unlawfully from using or riding on another's intellectual property should not be allowed to keep the profits made from such venture. To permit that would be to allow for unjust enrichment.*

13. The plaintiff urged this Court to adopt the sum of USD 1,782,000.00, being the total consideration allegedly paid under the Content Syndication Agreement dated 17<sup>th</sup> May 2019 for three Premier League seasons. I however agree with the 1<sup>st</sup> defendant that this approach is untenable. Firstly,

the infringement did not occur over the entire duration of the contract or across three seasons, but was limited to three matches at the beginning of the 2019/2020 season. Secondly, the plaintiff did not adduce any evidence as to the payment of the alleged license fees. In line with settled principles of evidence, special damages and analogous claims must not only be specifically pleaded, but must also be strictly proved. On the material before this Court, the plaintiff has not demonstrated a reliable evidentiary basis for the global sum of USD 1,782,000.00 claimed as reasonable royalty.

14. To the contrary, the 1<sup>st</sup> defendant placed before the Court comparative material demonstrating prevailing market rates through a similar agreement entered into with the same content provider, Wireless Group Media (GB) Limited, under which USD 430,000.00 was paid for three seasons. When prorated against the number of matches accessible per season, this translates to a significantly lower per-match figure. The 1<sup>st</sup> defendant also provided an alternative prorated computation based on the plaintiff's admitted licence fee of USD 495,000.00 for the 2019/2020 season, yielding a per-match value of USD 2,605.26 and a total of USD 7,815.78 for three matches.
15. In my considered view, the guiding principle in assessing reasonable royalty damages is proportionality. It would be manifestly unjust to award damages equivalent to the entire contractual consideration of three full seasons, when liability was established in respect of only three matches and when the infringement was promptly restrained by a Court Order. The reasonable royalty must therefore be confined to, and reflective of, the limited scope and duration of the infringement.
16. This Court finds therefore, that the plaintiff is not entitled to the lump sum of USD 1,782,000.00 as claimed. The appropriate measure of damages is a prorated reasonable royalty corresponding only to the three matches in respect of which infringement was proved during the 2019/2020 season. In

assessing that sum, the Court is entitled to be guided by both the plaintiff's admitted seasonal licence fee and the prevailing market rates demonstrated by comparable agreements on record.

17. In view of the foregoing, this Court adopts the licence fee of USD 495,000.00 for the 2019/2020 season covering 190 matches as stated by the plaintiff. When prorated, this yields a per-match value of USD 2,605.26 and an aggregate sum of USD 7,815.78, in respect of the three matches the 1<sup>st</sup> defendant was found to have infringed upon.
18. In the circumstances, I make the following orders -
- i) The 1<sup>st</sup> defendant shall pay the plaintiff the sum of USD 7,815.78, being the quantum of damages payable for the infringement of the plaintiff's copyright; and**
  - ii) The plaintiff is hereby awarded interest on (i) above at Court rates from the date of filing suit until payment in full.**

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 20<sup>th</sup> day of February 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Kiptum h/b for Mr. Kahura for the plaintiff

Mr. Samuel Ochieng for the 1<sup>st</sup> defendant

Ms B. Wokabi – Court Assistant.