

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CIVIL CASE NO 162 OF 2021

ANSELM TRYPHONE NGAIZA alias SOGGY DOGGY

ANTER.....1ST PLAINTIFF

FLORENCE MARTIN KASSELA alia DATAZ 2ND PLAINTIFF

VERSUS

HOMEBOX OFFICE, INC DEFENDANT

RULING

MKWIZU, J:

The plaintiff in this case brought an action against the defendant seeking the award of the general, punitive, and special damage for copyright infringement. During the course of the trial when the PW1 purported to tender in evidence an audial CD containing the song *Sikutaki Tena* co-owned by the 1st and 2nd plaintiff and DVD -R for the movie *Sometimes in April*, by the defendant but which was downloaded from the website in which the song *Sikutaki Tena* is said to have been played without the owner's consent, Mr. Koyugi advocate for the defendant raised an objection against the admissibility of the said two objects hence this ruling to resolve the matter.

Mr. Koyugi 's grounds of objection are that the CD containing the song *Sikutaki Tena* is not a master copy and therefore secondary evidence tendered in contravention of section 66 of the Evidence Act Cap 6 RE 2022 that if the witness was to rely on a copy was to comply with sections 67,

65, and 64 of the Evidence Act. He relied on First **National Bank Tanzania Limited V Hussein Mohamed Salwar t/a Pugu Hardware and Another**, commercial Case No. 57 of 2019(unreported).

The second argument is that the witness has not laid the foundation for the receipt of the CD in evidence contrary to section 64A of the Evidence Act, Cap 6 RE 2022 and 18 of the ETA No 13 of 2015. To him evidence has failed to establish the reliability of the digital data being tendered, how it was generated, stored, or communicated. He maintained that, no evidence by witness statement or certificate of authenticity that sufficiently identifies the type of equipment that was used to produce the music, the type of equipment in which the music /data was stored since 2000, the way integrity of the electronic data was protected and who had the custody of this digital data from 2000.

He insisted that PW1 evidence he cooperated with an unidentified person to burn the music into a CD shows that the CD produced is not a master record but rather a copy burned by him in association with another unidentified person without clarification as to when this was performed and whether the burning did not interfere with the digital Data. He on this cited to the court the cases of **Emmanuel Godfrey Masonga v. Edward Franz Mwalongo, The Returning Officer for Njombe town council and the AG**, Misc Civil cause No 6 of 2015, page 24-26, 28, **Hussein Kausar Rajan V Republic**, Criminal Appeal No 670 of 2020 page 14 and 15

As to the admissibility of the DVD-R for the movie named "*Sometimes in April*" Mr. Koyugi said, no foundation was laid by a witness for the

same to be produced in court as secondary evidence. A purported Notice to produce that was served on them did not have a copy of the item they attached to it to enable the defendant to understand which item they were requesting contrary to the court practice which requires a copy of the document subject to the Notice to produce to be attached to the Notice to produce so as to enable a party who is being addressed by the Notice to produce to compare it with the one in his possession. He on that ground prayed the admissions of DVD-R be rejected.

In response to the preliminary objections, **Mr. Mwandry's advocate** was of the view that all cases cited are distinguishable. He contended further that the issue of a certificate of authenticity is not a mandatory requirement.

Speaking on the objection as to the authenticity of the DVD-R, Mr. Mwandry said, the evidence is clear that the witness downloaded the DVD-R from the web using his computer named Lenovo and that he burned the Video on a CD using his own computer. He implored the court to find the issue of the Master Copy raised by the defendant's counsel because of the filed Notice to produce. He affirmed that section 18 of the ETA, 2015, does not deny the witness tendering a copy of a video CD/DVD. He cited to the court a case of **Onesmo Nangole V Dr. Stivin Lemomo Kiruswa and 2 Others**, Civil Appeal No 117 of 2017 CAT- Dar es Salaam pages 19 -25 stressing that the requisite introduction was laid down, the witness saw the movie produced in 2005, he retrieved it and burned it in a CD that he is now tendering in court.

I will begin with the issue of the Notice to produce that is said to contain no copy of the intended evidence that was to be produced by the

defendant. Indeed, the notice to produce filed in court on 11th August 2023 contains only a list of evidence that the defendant was required to produce including the original master copy of the movie titled "*Sometimes in April*" of the year 2005 in which the song title "*Sikutaki tena*" was used as a sound truck. The defendant acknowledges receipt of the notice. They did not respond to the notice until 17/8/2023 when the plaintiffs relied on the DVD R that was downloaded from the website. Their point is that non-attaching to the notice a copy of the intended evidence excluded them from knowing exactly the intended evidence.

I think this is an assertion brought to court as an afterthought. *Firstly*, there is no legal requirement that the notice to be produced should be accompanied by a copy of the intended evidence. This is just a practice intended for clarity. In this case, the information contained in the notice is very clear to be understood by any reasonable person. It needed no copy of the requested item to grasp the plaintiff's intention.

Secondly, if that was the case, the defendant's counsel ought to have sought clarification from the plaintiff early before the hearing. Justice is not a hide-and-seek game; the plaintiffs could not have known that the defendant was in a dilemma. The defendant's silence was an affirmation that she possessed the requested evidence by the plaintiff, and she should not be heard complaining about the matter at this late hour. In any case, the facts supported by the tendered CD and DVD are not contested. Section 67 (1) provides:

"67.-(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases-

(a) when the original is shown or appears to be in the possession or power of-

(i) the person against whom the document is sought to be proved.

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;”(Bold is mine)

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest”(Bold is mine)

Generally, secondary evidence is admissible in evidence where the existence of its original is not contested and whereby the nature of the proceedings, the defendant must have known that she would be required to produce the primary evidence.

In the instant case, the DVD-R tendered in court is said to contain a downloaded movie “Sometimes in April” from the website in which the plaintiff's song Sikutaki *tena* was played. Both the existence of the song *Sikutaki tena* and the Movie *Sometimes in April* containing the song *Sikutaki tena* is not contested. The defendant has averred in paragraphs 5.5 and 5.6 of her written statement of defence that :

5.5. "The plaintiff alleges that in 2005, i.e. some 16 years before the institution of these proceedings, the Defendant

released a television film, titled SOMETIMES IN APRIL. The defendant states that, as is established practice in the television and film industry, it included in the film a number of musical works. One of these was a [portion of the song SIKUTAKI TENA, the song in which the plaintiffs claim to co-own the copyright. It is further stated that the alleged film lasts over 2 hours, and the alleged use comprises only a portion of the SIKUTAKIN TENA song which lasts for less than a minute, as the music plays in the background during a single scene with an actor speaking over the music during most of its use. The defendant denies that it merely used this musical work without any attempt to secure authorization to do so since a license was in fact secured to use the work in the film for payment of the amount of Euros Four Thousand Six hundred (Euros 4,600), (an equivalent USD 5,218) to which amount was duly paid..."

5.6. this licence was entered into between Never Again Production Ltd c/o the defendant, a company involved in the production of the film for the defendant, and Smooth Vibes Music Project limited or ("Smooth Vibes"), an entity that was understood to be representing the plaintiffs as their publisher. .."

That is what Plaintiff wants to prove by tendering the disputed Audial CD for the song ***sikutaki tena*** and the DVD-R for the Movie ***sometimes in April***. Looking at the nature and circumstances of this case the defendant must have known that he would be required to produce the original Movie. Thus, in terms of section 68 read together with section 67 (1) (a) and

(b)of the Evidence Act plaintiff was justified to tender the downloaded copy of the DVD R. See Mohamed **Enterprises (Tanzania) Limited and Another V Shishir Shyamsingh**, Civil Case No 3 of 2021(H/C Unreported)

The other point tends to challenge the authenticity of the electronic evidence tendered. In terms of Section 64 A of the Law of Evidence Act, Cap. 6 [R.E 2019], electronic evidence is admissible evidence in the court of law through the procedures laid down under Section 18 of the Electronic Transaction Act No. 13 of 2015 which is couched thus:

18(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on the ground that it is a data message.

(2) In determining the admissibility and evidential weight of a data message, the following shall be considered-

(a) the reliability of the manner in which the data message was generated, stored or communicated.

(b) the reliability of the manner in which the integrity of the data message was maintained.

*(c) the manner in which its originator was identified;
and*

(d) any other factor that may be relevant in assessing the weight of evidence.

(3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-

(a) There is evidence that supports a finding that at all material times, the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system.

(b) it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a part of the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

(4) For purposes of determining whether an electronic record is admissible under this section, evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record.”

Reading of the above section reveals that issues relating to the admissibility and weight of any electronic evidence are to be resolved by

looking at the reliability of the evidence introduced in evidence in terms of the way the data message was generated, stored, or communicated, the way the integrity of the data message was maintained and the manner in which its originator was identified together with other rules governing the admissibility of evidence in a court of law. However, subsection 3 of section 18 above establishes a presumption as to the correctness of the computer device used unless otherwise proved. This means that whenever electronic evidence is tendered in court, the presumption is, that the computer or the device used in generating, storing, or communicating the said evidence was properly working unless otherwise proved.

PW1's evidence is very clear on how he obtained the two devices, the audial CD for the song "*Sikutaki Tena*" and the DVD-R for the movie "*Sometimes in April*." PW1 evidence is that the song Sikutaki Tena was recorded by the third plaintiff and burned the audial CD from the Computer owned by the 3rd plaintiff and he downloaded the DVD -R for the Move Sometimes in April from the Website through the torrent link through his own laptop make, Lenovo on 15th October 2021.

The defendant's counsel's query lies in the authenticity of the presented evidence. However, there is no material presented upon which this court can soundly rely to suspect the authenticity of the used computers or devices in this matter. I would have expected the defendant to raise solid issues downgrading the authenticity of the evidence tendered but this wasn't done rendering the objection to admissibility unfounded.

From what has been explained above the Audial CD for the song *Sikutaki Tena* and the DVD-R for the movie *Sometimes in April* are declared

admissible in evidence. The defendant's objections are overruled with costs to be in the course.

DATED at DAR ES SALAAM this 1st day of September 2023.



E. Y Mkwizu
Judge
1/9/2023