

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**HIGH COURT CIVIL SUIT NO 283 OF 2012**

**AL HAJJI NASSER NTEGE SEBAGALA}.....PLAINTIFF**

**VS**

**MTN UGANDA LTD}.....DEFENDANT**

**SMS MEDIA LTD}.....THIRD PARTY**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff filed this action is for declaration that the Defendant's use and/or sale of the Plaintiff's speeches/addresses as ring tones/caller tunes coded as numbers 504529, 504530, 504528 and 504531 constitute an infringement of his copyright. Secondly the Plaintiff seeks a permanent injunction restraining the Defendant from further violation of the said copyright. Secondly for an order of audit of all the proceeds received by the Defendant from the use of the Plaintiffs said copyright and delivery up of the same to the Plaintiff. Furthermore the Plaintiff seeks general damages, exemplary damages, and aggravated damages, costs of the suit and interest on the claims from the date of accrual at the rate of 20% per month and further interest at 20% per month from the date of judgement until payment in full.

The Defendant opposed the suit and denies liability to the Plaintiff. Furthermore the Defendant asserts that it does not own and did not acquire any copyright in the speeches the subject matter of the suit. The speeches were publicly broadcast in Uganda as current news of public and political events. Secondly the Plaintiff was an active participant as a Mayor of Kampala City Council and also ministerial nominee. Furthermore the Defendant asserts that the Plaintiff is not the author or physical person who created the works in the ring tones as described in the plaint. Alternatively the Defendant claimed indemnity from the third-party SMS Media Ltd in case the court finds that it is liable for copyright infringement.

The third-party Messieurs SMS Media Ltd also denies the claims of the Plaintiff and further contend that the Plaintiff is not the proprietor of the Copyright in the sound recordings which is the subject matter of the suit. To the contrary the Third Party avers that it is the owner of the recording by virtue of reducing it to material form and that it has the exclusive moral and economic rights to the recording.

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Counsel further relies on the case of **Walter vs. Lane (1900) AC 539** at pages 556 – 557 for the definition of the author of a speech by Lord Brampton. It means the author of the language orally uttered by the person. This suit was decided under the Copyright act 1842 which had no requirement of originality that is currently intertwined with authorship under the current Ugandan law. Furthermore the Plaintiff's Counsel submitted that it is now well settled that a secretary who takes notes in shorthand does not thereby gain copyright in that shorthand or in its transcript in the case of **Donoghue vs. Allied Newspapers Ltd [1938] Chancery 106 (109 – 110)**. Park Farwell LJ held that the author is the person responsible for the works expression and not the one responsible for the works reduction into tangible form.

As far as the originality test inherent under section 4 of the Copyright and Neighbouring Rights Act 2006 of Uganda is concerned, it was held in the case of **Walter versus Lane** (supra) that the work must express or reflect the author's personality, the internal turmoil of the author and labour itself is insufficient. There must be something in the work reflecting the personality of the author. Furthermore in **University of London press Ltd versus University tutorial Ltd (1916) to Chancery 61 at page 608** the court described the word "original" is not concerned with inventive thought as copyright laws are not concerned with originality of ideas which is in the realm of intellectual property laws but the expression of thought. The work must not be copied from another work as it should be original to the author.

Finally the Plaintiff's Counsel submitted that from the evidence adduced at the trial, the ringtones are reflective of the Plaintiff's and not the author's personality, his internal turmoil and they comprised solely of the original speeches of the Plaintiff. The Plaintiff did not imitate anyone and he polished his skill of addressing the public over many years. The exhibits demonstrate the Plaintiff's unique and confident style of addressing his audience, engaging them and even teasing them without attracting offence, affectionately, uniquely but thoughtfully, communicating his message and he passes the originality test. In the premises the Plaintiff is the author of the ringtones and the copyright in the suit ringtones vests in him.

In the alternative and without prejudice the Plaintiff's Counsel submitted that the Plaintiffs claim against the Defendant is for unjust enrichment. He relied on the case of **Nipun Norattam Bhatia vs. Crane Bank Ltd CACA 75/2006** wherein the court of appeal cited with approval the speech of Lord Wright in **Fibrosa Spolka vs. Fairbairn Lawson Combe Barbour Ltd (1943) AC 32** at page 61 as authority for the principle that the equitable remedy against unjust enrichment applies to prevent one from getting money off or some benefit derived from another which is against the conscience that he should keep it as money obtained through undue advantage. The unchallenged evidence adduced at the trial show not only unfairness of the Defendant but also manifest arrogance. Consequently the Plaintiff's Counsel prayed that in the event that the court does not rule in favour of the Plaintiff on the ground of having a copyright to the ringtones, the court should find him vested with rights in the subject matter on the strength of the equitable principle which bars the Defendant from unjustly enriching itself from the materials in question.

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In reply the Defendant's Counsel relies on certain facts in evidence. Firstly the Plaintiff is and was at all material times a prominent politician and a national leader in Uganda. At the material time he was a former Mayor for Kampala city and had been nominated for appointment as a Cabinet Minister. Secondly the recording of the materials that was subsequently converted into ringtones was carried out by the employees of the third-party, at Parliament from an interview given to a group of assembled journalists and other persons on the occasion of the Plaintiffs vetting by the Parliament of Uganda. Thirdly the recording of the interview and the adaptation of the interview into the form of ring tones was carried out by the third-party.

As far as the first issue is concerned the Defendant's Counsel contends that the Plaintiff's Counsel submitted on a different issue which is **whether the Plaintiff has any rights in the subject caller tunes/ringtones?** Whereas the issue agreed upon in court was **whether the Plaintiff has any copyright in the caller tunes, which are the subject of this suit?**

As far as this issue is concerned it is the Defendant's submission that the Plaintiff does not have the copyright in the caller tunes, the subject matter of the suit. It is not in dispute and there is common ground that the caller tunes contain the Plaintiff's voice. However the Plaintiff was not the author thereof. The Defendants Counsel submitted that section 4 (1) of the Copyright and Neighbouring Rights Act, 2006 grants protection to the author of works specified in section 5 where such work is original and is reduced into material form. The list of works protected are provided for under section 5 and demonstrate that they include dramatic, dramatic – musical and musical works; audiovisual works and sound recording, including cinematographic works and any other works of a similar nature. They include works of drawing, painting, photography, typography, mosaic, architecture, sculpture, engraving, lithography and tapestry.

He submitted that an interview or speech such as the one which is the subject matter of this suit is not one of the works that are eligible for copyright under the provisions of section 5 of the Copyright and Neighbouring Rights Act. The list of works eligible for copyright demonstrates that an interview such as the one held by the Plaintiff, the subject matter of this suit is not eligible for copyright. Counsel submitted that legislature in its wisdom did not include speeches and interviews as works eligible for copyright. On that ground alone, the Defendants Counsel submitted that the Plaintiff's suit ought to be dismissed.

In any event the Defendants Counsel submitted that even if the court were to find that the interview held by the Plaintiff is a work that is eligible for copyright, the Plaintiff is not the author of the works and therefore not vested with the Copyright thereof. It relies on section 2 of the Copyright and neighbouring rights act for the definition of the term "author" as the person who created or creates work protected under section 5 and includes: "the person or authority commissioning work or employing a person making the work in the course of employment." The totality of the evidence demonstrates that the Plaintiff is not the author of the audiovisual recording which led to the caller tunes. Similarly the Defendant is not the author of the caller

tunes. The audiovisual recording is the work of the third-party. It is the third-party who commissioned its employees to record the interview of the Defendant. Similarly the works, the subject matter of the suit is the work of the third-party who commissioned its employees to adopt the interview, reduce its speed, made it catchy and interesting and reduced into the appropriate format for caller tunes.

The original audiovisual recording of the interview with the Plaintiff was adduced in evidence by the third-party and played in court. It demonstrates that the Plaintiff cannot be called the author of the works on the following grounds namely:

- The Plaintiff was answering questions put to him by various persons about the proceedings of the parliamentary vetting committee and other subjects and on the audiovisual recordings there are several voices and persons speaking and it is not exclusively the Plaintiff who was speaking.
- The Plaintiff did not give a speech of any kind but he merely answered questions that were asked by the assembled journalists and other present people.
- The Plaintiff did not refer to or consult any notes or prepared speech.
- The Plaintiff did not record or commission anyone to record the speech but rather it was recorded through the independent efforts of the third-party.

The caller tunes were adopted from the audiovisual recording adduced in evidence and the adaptation and conversion was carried out by the third-party. It had nothing to do with the Plaintiff save for the fact that it carried his voice, which does not ipso facto bestow upon the Plaintiff rights as an author. Furthermore the Defendants Counsel relies on the decision of this court in **HCCS No. 298 of 2012 Sikuku Agaitano vs. Uganda Baati** where the Defendant had used the image of the Plaintiff in photographs and videos for the advertisement of itself and its products. The court held that the persons who created and did the video shooting or the person who carried out the work of shooting the photos and video are the author or authors of the works.

The Defendant's Counsel contends that the basis of the Plaintiffs claim is the assertion that he is the author of the questioned works. However as demonstrated the Plaintiff is not the author of the works. Even if the court were to find that the Plaintiff was the author of the interview, the Defendant's Counsel contends that the Plaintiff would not be entitled to protection under the law and would have no copyright because the work was not original and the Plaintiff never made any arrangements to reduce the work into material form. Furthermore the Plaintiff answers to journalists were neither reduced to material form nor were they original. The Plaintiff never reduced the tunes into material form. The embodiment of the interview was that the Plaintiff was getting out of the precincts of Parliament when he was accosted by journalists and other persons and was interviewed as to the proceedings of the Appointments Committee of Parliament and other matters. It was a spontaneous interview and the Plaintiff admitted under cross examination and it is as well apparent from the audiovisual recording that was played in court as exhibit TP

D1. The Plaintiff could not have anticipated the interview and questions could not have been prepared and the text of the answers prepared and in any case none was produced in evidence.

As far as the submission that the works must pass the originality test is concerned, section 4 (3) of the Copyright and Neighbouring Rights Act 2006 stipulates that the work is only original if it is the product of the independent efforts of the author. The caller tunes in controversy are not the product of the independent efforts of the Plaintiff. Similarly the Plaintiff did not reduce the interview into material form in anyway. In those circumstances the Plaintiff did not acquire a copyright as envisaged under section 4 of the Copyright and Neighbouring Rights Act 2006. With regard to the case cited by the Plaintiff's Counsel of **The Estate of Martin Luther King Jr. Inc versus CBS Inc**, Counsel contended that the decision was based on the provisions of the Copyright Act 1909 of the United States and the Plaintiff's Counsel has not demonstrated whether the provisions of that law are similar to the Ugandan Copyright and Neighbouring Rights Act. Secondly in that case the copyright which was granted concerned the texts of a written and prepared speech of Dr King making the case distinguishable from the current controversy.

On the question of the alternative remedy of unjust enrichment, the Plaintiff is not entitled to seek a remedy in the alternative because at the scheduling conference there was no issue that was framed for the court's determination. The Defendants Counsel contends that the joint conferencing memorandum signed by both parties is binding and therefore the parties can only expect a decision of the court on the agreed issues as framed and not others. This is in accordance with Order 21 rule 5 of the Civil Procedure Rules.

Secondly the cause of action of unjust enrichment is pleaded in the amended plaint. The Plaintiff is not entitled to seek any alternative remedies in relation to the alleged unjust enrichment. Furthermore at the hearing no evidence was led by the Plaintiff to prove unjust enrichment. The evidence does not show any enrichment, what extent if any and how unjust it may have been. In any case the claim for unjust enrichment is not sustainable. The Plaintiff did not acquire any copyright in this suit caller tunes and does not permit copyright in the interview. Consequently the Defendant or the Third Party cannot be held to have unjustly enriched themselves at the expense of the Plaintiff in the absence of a legal right over the caller tunes. In the premises the Defendants Counsel maintains that the case of **Nipun Norattam Bhattia vs. Crane Bank Ltd** cited by the Plaintiff's Counsel supports the Defendants submission that the question of unjust enrichment does not arise in the circumstances of this case. In the case of **Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour [1943] AC 32**, the ratio in the case is that it would be inequitable in the circumstances for the Defendant to keep the money obtained. Such an action is for money had and received. However in the circumstances of this case, the third-party is the one that recorded the caller tunes and made the necessary arrangements to reduce them into caller tunes. The Plaintiffs made no contribution at all. It would be equitable for the third-party who expended time and effort to keep the proceeds of the caller tunes. Furthermore





Furthermore Counsel maintained that a speech by its nature is a reduction into tangible form or material form without any further deed. He relied on Black's Law Dictionary 9th edition for the definition of the word "tangible" as a work capable of being understood by the mind. Secondly the definition of "tangible medium" which is an expression in copyright to mean any material form in which a work can be expressed and communicated either directly or through a machine. He further submitted that it is no wonder that the authorities recognise that a speech or address and sermons can enjoy copyright protection. He submitted that this would rest the controversy about copyright in speeches. The method of reduction of the speeches into material form is immaterial on the question of authorship of the material. Counsel submitted that the two tests for establishing authorship are originality and work having been reduced into a tangible form and not by whom.

What is meant to be original is the work that is capable of copyright protection. As far as the Plaintiff's case is concerned, the Plaintiff's Counsel submitted that speeches like works of literature are capable of protection. It is not the method of reduction into tangible form. Section 5 (1) (a) of the Copyright and Neighbouring Rights Act makes provision for works of a similar nature to addresses, someone is et cetera. Furthermore section 5 (1) (j) includes any other work in the field of literature in whatever manner delivered known or to be known in the future.

Secondly there has to be independent effort as envisaged in section 4 (3) of the Act. The independent work is not the recording but the creation of the work. Counsel submitted that at the trial the Plaintiff adduced unchallenged evidence of this independent effort. Secondly the Plaintiff led unchallenged evidence that he envisaged the attention of the media whom he had prepared to address in the particular incident at Parliament. He was not ambushed by the journalist and he expended his effort, skill and judgment arising from experience to address the media.

Even if the speeches were to be treated as interviews in spite of the departure from pleadings of the defence, it is settled law that an interviewee is possessed of copyright in his answers in the case of **Suid vs. Newsweek, 503 F. Supp 146 (D.D.C. 1980)**) and in **Quinto versus Legal times, 506 F. Supp. 554 (D.D.C. 1981)**) where it was held that in the interviewer and interviewee have ownership interests in their separate contributions.

With reference to the case of Target vs. WMAQ Channel S Chicago, 57.U.S.P.Q 2d 1083 (SD 111.2000), the case dealt with performance and not copyright. It also concerned common law and not statutory law. Thirdly the court considered the prisoners non-registration of copyright under applicable law whereas in Uganda copyright is not subject to any formality. The court further considered the prisoners expressive unprotected ideas unlike in this suit were the evidence of the Plaintiff's skill, effort was adduced and his expressions were unique, confident, affectionate yet respectful. Finally there were considerations of the right to free speech as the Defendant in that suit was a media house unlike the Defendants in this suit.

The Plaintiff's Counsel further submitted that the mode of presentation includes one's expression such as dressing and posture which was absent from the above suit concerning the prisoner Taggard.

As far as the argument with regard to the commissioning of work as conferring copyright under section 8 of the Copyright and Neighbouring Rights Act is concerned, the Plaintiff's Counsel maintains that the provision is inapplicable. He contends that the provision applies where the copyright work is created by a person in the employment of another.

As far as the argument that the third-party produced the works is concerned, during cross examination the Plaintiff's Counsel challenged the Defendant's testimony that they recorded the Plaintiff's speeches. The witness of the third-party Mr Kaheru could not remember or identify from the screen any member of its staff at the recording. He further admitted that the third-party is not a media house.

The Third Party could not be an author of the works and the best that they can claim is to be a producer with neighbouring rights and not copyright. If anything they were mere recorders and not even producers. A producer envisaged is one who lawfully put together works under direction and in an arrangement with the author. The Plaintiff's speeches were not produced and certainly not by the Defendants.

With regard to reliance by the third Defendant on the case of **Swatch Gorry Management Services versus Bloomberg**, the authority is inapplicable on the ground that there was a requirement for registration which is not a requirement in Uganda. Secondly the cases were decided on the basis of the common law of copyright as opposed to statutory provisions. Section 14 of the Judicature Act disallows reference to common law where written law makes provision. Furthermore both cases referred to were decided on the premise that holding otherwise would be derogating from the constitutional exercise of free speech.

In the case of **Sikuku Agaitano versus Uganda Baati** (supra), the decision is not binding and secondly it is distinguishable on the basis of the facts. The Plaintiff was an employee of the Defendant which is not the case in this current suit. Secondly the recordings had been made in the course of the Plaintiffs work. Thirdly the Plaintiff claimed performance and not copyright and reference in that suit to copyright was obiter dictum.

With regard to the case of **The Estate of Martin Luther king** (supra) that the copyright existed in the written text is not correct. What was copyrighted was the delivered/performed the speech. The Plaintiff's Counsel further reiterated submissions that this refers to the exercise of one's oral faculties and not to writings.

As far as the case of **Walter versus Lane (1900) AC 539** is concerned, it is an outdated authority with regard to what was known as the "reporters copyright". The case had been decided







capable of being reproduced. The caller tunes were marketed to the subscribers of the Defendant. The Defendant obtained the caller tunes from the third-party.

Both parties through their Counsel endorsed a joint scheduling memorandum which was filed on court record on 31 January 2014. At the scheduling conference the following issues were agreed after some slight amendment to the issues agreed to in the joint scheduling memorandum namely:

1. Whether the Plaintiff has copyright in the caller tunes, which are the subject of the suit?
2. Whether or not the Defendant and/or third-party infringed the Plaintiff's copyright?
3. Whether the Plaintiff's speeches are protected works under the Copyright and Neighbouring Rights Act? (Not agreed to).
4. What remedies are available to the parties?

At the course of the hearing it has become apparent that the first two issues and the third issue are intertwined. The first issue is specific to whether the Plaintiff has copyright in the caller tunes, the subject matter of the suit. I do not see much prejudice in the fact that the issues were framed differently by both Counsels. In the main submissions, the Plaintiff's Counsel framed the issue number one as: Whether or not the Plaintiff has any rights in the subject, tunes/ringtones? On the other hand the Defendant's Counsel framed the issue as: Whether the Plaintiff has any copyright in the caller tunes, which are the subject of the suit?

There is no substantial difference between the two framing of the issue and none of the parties are prejudiced as the subject matter discussed addresses the same controversy. The issue as framed in the court after an amendment to the agreed issues in the presence of both Counsel is as follows:

- 1. Whether the Plaintiff has copyright in the caller tunes, which are the subject of the suit?**

To be more specific the subject matter of this suit according to the Plaintiff's plaint has been further narrowed down in the submissions of the Plaintiff's Counsel to the caller tunes specified in paragraph 3 (a) of the amended plaint and not to other caller tunes also having the Plaintiff's voice. Secondly, paragraph 3 (a) avers the cause of action of infringement of copyright. Thirdly the Plaintiff's Counsel submitted on the right of copyright based on authorship of the works which is the subject matter of the suit. Further submissions were made on an alternative cause of action based on unjust enrichment.

I further agree with the approach of the Plaintiff's Counsel in the sense that the controversy about whether the Plaintiff has copyright in the caller tunes is substantially a matter of interpretation and not evidence though some evidence may be relevant as to how the caller tunes were generated by the Third Party. However for purposes of considering the first central issue, it is an



and Neighbouring Rights Act to the extent that translations, adaptations and other transformation of pre-existing works under subsection 1 may be copyrighted.

I agree with the Plaintiff's Counsel to the extent that in either subsection 1 or subsection 2 of section 5 of the Copyright and Neighbouring Rights Act, the common denominator is subsection 1 which deals with the kinds of works that may enjoy or are eligible for copyright protection. Subsection 2 thereof deals with the pre-existing works defined by subsection 1 of section 5 of the Copyright and Neighbouring Rights Act 2006. The wording of section 5 (1) of the Copyright and Neighbouring Rights Act is crucial and I will quote:

"(1) The following literary, scientific and artistic works are eligible for copyright –..."

Before taking leave in order to look at the definition of an "author", it is necessary to emphasise section 4 of the Copyright and Neighbouring Rights Act. Both Counsels emphasised section 4 (1) which provides that: "The author of any work specified in section 5 shall have the right of protection of the work, where the work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which it is created." Further critical matters may be highlighted from this subsection. These are "work", "originality of the work" and "created or creation of the work".

The pertinent questions posed by the Defendant's Counsel and to be considered are whether the Plaintiff created the works and whether the Plaintiff reduced the work to material form and lastly whether the work is original? The question posed is to answer the question as to who the author of the works is.

The questions flow from the ingredients prescribed by sections 4 and 5 of the Copyright and Neighbouring Rights Act. Consequently it has to be considered whether the Plaintiff is the creator of the works. Secondly whether it is the Plaintiff who reduced the work into material form and lastly whether the work is an original work of the Plaintiff.

It is the third-party's pleading and submission that the third-party created the works and is the author and therefore owner of the works.

I have carefully considered the novel controversy generated by the facts of this case and the submissions of Counsel. The question of who is the author of the works has generated a unique controversy. It is not disputed that the works comprised of audio recordings which were rendered into ringtones by the third-party and thereafter sold to the Defendant who does not deny having offered it as ringtones to its transcribers.

The word "author" in relation to sound recording is problematic and may be susceptible to various meanings if the provision of the law is not considered carefully. The definition of the word "author" under section 2 of the Copyright and Neighbouring Rights Act is not exhaustive and requires other provision for a definite meaning as we shall demonstrate. The question of who

is an author also depends on the facts and circumstances without losing sight of the definition. What must be highlighted is that section 4 (1) of the Copyright and Neighbouring Rights Act, protects the works of an author as listed under section 5 of the said Act. In other words an author is associated with "works" and the creation of such works or work. It is the Plaintiff's case that the Plaintiff used his skill and experience in delivering the "talk". There is factual controversy as to whether the ringtones comprise of a "speech" or "speeches".

Strangely the Plaintiff's Counsel wants to bind the Defendant on the pleadings on the ground that they conceded to the fact that the ringtones comprise of "speeches" and he accordingly objected to the submission that the speeches were elicited by interviews from journalists. The written statement of defence of the Defendant in paragraph 5 (b) refers to "speeches" in the following averment namely: "The said speeches were publicly broadcast in Uganda as current news of public and political events". A careful analysis of the pleadings shows that the Defendant was responding to the averments in the plaint. Paragraphs 4 (a) of the original plaint refers to the Plaintiff's speeches/addresses as contained in the ringtones. Secondly this is contained in paragraph 4 (b) of the amended plaint. In paragraph 3 the Plaintiff makes a reference to the said speeches/addresses. Similarly in paragraph 4 (a) to 4 (i) of the amended plaint, several references are made by the Plaintiff to the said speeches/addresses of the Plaintiff.

The conclusion is that the Defendant was responding to the pleadings of the Plaintiff on the subject matter pleaded which is the speeches/addresses of the Plaintiff captured in the ringtones, the subject matter of the suit. In the premises the Defendant is not bound by the pleading that the ringtones are speeches of the Plaintiff and the nature or characterisation of the ringtone whether as speeches, talks or any other characterisation can be established from evidence. The pleadings did not amount to an admission of fact. Even if they made a reference to the word "speeches", under section 57 of the Evidence Act, an admitted fact may be proved otherwise than by what is contained in an admission. In this case evidence was adduced in exhibit TPD1 which is a video recording of the event where the speeches were recorded from. The evidence demonstrates whether what transpired arose from a question and answer session or a speech and will help the court in the characterisation of the ringtones.

I have attentively listened to and watched the video exhibit TPD1 and it proves that the Plaintiff came out of one of the entrances to the Parliament building and was immediately surrounded by several persons all pointing recording equipment at the Plaintiff. Several questions were posed to the Plaintiff and he answered them variously both in English and in Luganda. The questions were posed by different people without any apparent order and the Plaintiff was not even seated. The Plaintiff did not deliver a speech but was responding to questions put to him by several persons whose identities are not disclosed by the video recording or specifically identified by TPW1. Out of the several questions asked, the Plaintiff answers were recorded as well as the questions and answers eventually ended up with the Third Party. It is my conclusion that whoever asked the questions need not be established for purposes of characterising the works.

The Plaintiff may have responded using his characteristic style and skill and his answers obviously generated a lot of merriment.

The other question is whether it is material to characterise the Plaintiff's answers to the various questions as "a talk or address". There was no formal arrangement that may lead to the characterisation of the event as a press release. The Plaintiff was surrounded by numerous persons and asked by several other persons who were not in view of the camera which recorded the event.

That notwithstanding **Words and Phrases Legally Defined** adopts several statutory definitions in the UK of the word "author". The first definition is found under the Copyright Act 1956 section 35 (5) thereof which defines the word "author" in relation to sound recording or a cinematographic film to mean the maker of the recording or the film. I have not seen any further meaning in relation to sound recording. Secondly the provision is a statutory. The second definition of the word "author" which also is apparently based on statutory provisions or with a statutory basis can be found in Osborn's Concise Law Dictionary 11th edition at page 45 as follows:

"For copyright purposes, the author is the person who creates the work. This is taken to be the producer of the sound recording, the producer and principal director of the film, the person making the broadcast, the publisher in the case of the typographical arrangement of a published edition."

Notwithstanding the statutory basis of the UK law on sound recordings, it is still useful for comparative purposes to consider how the issue has been handled in the UK.

In paragraph 113 of Halsbury's laws of England fourth edition reissue volume 9 (2), it is written that:

"in the case of both sound recordings and films the author is taken to be the producer, that is to say the person who made the arrangements necessary for making the recording or film, as the case may be, although in the case of films made on or after 1 July 1994 the principal director is also an author.

The difficulty presented by the definition is the fact that the Plaintiff was recorded not by his own arrangement but by the Third Party's agents. A sound recording is defined by section 2 of the Copyright and Neighbouring Rights Act, 2006 to mean any exclusively aural fixation of sound in a material carrier such as a tape, disc or other similar material but does not include audiovisual work including sound. The ringtones or caller tunes comprised of sound recordings and not audiovisual work. The audiovisual work exhibit TPD1 is just evidence of how the recording was made and the circumstances in which the Plaintiff's voice was recorded in the question and answer session.











of the recording of the Plaintiff's voice in the sense that it carried out the fixation of the Plaintiff's voice in a material form and was able to reproduce it and sell it to the Defendant. Before doing that, it compiled the Plaintiff's answers to different people and to different questions and merged the answers together with the audible background sounds of reactions from members of the public who were present. On the other hand the Plaintiff never arranged the recording and never consented to the use of his voice in the manner in which it was utilised by the third-party and the Defendant as ringtones for sale to the subscribers of the Defendant. In the premises he could not have been the author of the works to which he never consented or willingly participated.

Before taking leave of the matter I have considered the question of moral rights accruing to an author.

Moral rights mean the right to claim authorship or performance as provided in sections 10 and 23 of the Copyright and Neighbouring Rights Act, 2006. The further definition of moral rights is found under section 10 of the Copyright and Neighbouring Rights Act but to the extent of the definition of an author, section 10 is inapplicable to the Plaintiff's situation. This is evident from the wording of section 10 (1) of the Copyright and Neighbouring Rights Act which provides that the author of any work protected by copyright shall have a moral right. By application of the definition of the word "author" as used in the enactment, the Plaintiff is not the author of the works and therefore the provisions of section 10 of the Copyright and Neighbouring Rights Act, 2006 are inapplicable to the Plaintiff.

With regard to the provisions of section 23 of the Copyright and Neighbouring Rights Act, the provision falls under neighbouring rights. Section 21 (1) defines neighbouring rights as rights attached to the auxiliary role played by performers, producers of sound recording and audiovisual and broadcasting companies. A performer has a right to be identified as the performer and to have his or her name mentioned each time the performance of the broadcast of communication of the fixation is used according to section 3 of the Copyright and Neighbouring Rights Act.

Was the Plaintiff a performer? The expression "performer" is defined under section 2 of the Copyright and Neighbouring Rights Act inclusively to include an actor or actress, singer, musician, dancer or other persons, who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expression of folklore. Furthermore the expression "performance" means the presentation of the work by actions such as dancing, acting, playing, reciting, singing, delivering, declaiming or projecting to listeners or spectators.

Was there presentation of the work through delivery? In the case of **Sikuku Agaitano vs. Uganda Baati HCCS No. 0298 of 2012**, I had occasion to consider the meaning of the expression "performer". The Plaintiff's photos appeared in a promotional magazine of the Defendant. However the evidence was that the Plaintiff was notified that there would be a filming of them while at work. At page 12 of the decision I held that the reference to

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**Ltd, Court of Appeal Civil Appeal Number 75 of 2006.** In the judgment it was noted that English law for a long time has accepted a third category of remedies that is different from that in tort and contract which provides against unjust enrichment or benefit according to the speech of Lord Wright in the case of **Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 and 61**. I have generally considered this definition in the citation of the case as **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 at Page 135** in the judgment of Lord Wright. The case was for money paid for a consideration which failed where he held that:

“It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.”

Illustrations by Lord Wright of the principle of recovery for unjust enrichment are as follows: ‘Money paid under a mistake of fact’; ‘money paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had in fact been cancelled’; ‘prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due;’ “In such circumstances there was no intention to enrich the payee”. He further held that “the gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost.”

I further wish to make reference to the **Oxford Dictionary of Law Fifth edition** definition of the term "quasi contract" at page 401 that:

“A field of law covering cases in which one person has been unduly enriched at the expense of another and is under an obligation *quasi ex contractu* (as if from a contract) to make restitution to him. In many cases of quasi-contract, the Defendant has received the benefit from the claimant himself. The claimant may have paid money to him under a mistake of fact, or under a void contract, or may have supplied services under the mistaken belief that he was contractually bound to do so. In that case, he is entitled to be paid a reasonable sum and is said to sue on a *quantum meruit* (as much as he deserved). Alternatively, the claimant may have been required to pay to a Third Party money for which the Defendant was primarily liable. The Defendant's receipt of the benefit need not necessarily, however, have been from the claimant. It is enough that it was at the latter's expense, and he may therefore be liable in quasi-contract for money paid to him by a Third Party on account of the claimant.”



As far as the third-party is concerned, the action of the Defendant against the third-party is an action by the Defendant against the Third Party and costs cannot be imposed on the Plaintiff. As far as the claim for indemnity against the Third Party is concerned though no order was made against the Defendant, the Defendants claim against the Third Party stands dismissed with costs enforceable against the Defendant.

Judgment delivered in open court the 6th of March 2015.

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Peter Kauma for the Third Party

Nelson Walusimbi for the Plaintiff

Bruce Musinguzi and Joseph Matsiko for the Defendant

Plaintiff in court

Simon Kaheru and Stephen Banage for the Third Party

Bosco Sempijja Manager Legal Affairs of the Defendant in Court.

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**6 March 2015**