

**THE REPUBLIC OF UGANDA**

IN THE CHIEF MAGISTRATE'S COURT OF BUGANDA ROAD  
AT KAMPALA  
CRIMINAL CASE NO. 309 OF 2009

UGANDA ..... PROSECUTOR

**VERSUS**

A1: SANDE BRIAN )  
A2: NANYANZI PALMA ) ..... ACCUSED

**BEFORE HIS WORSHIP VINCENT EMMY MUGABO**  
**CHIEF MAGISTRATE:**

**J U D G M E N T:**

The two accused persons Sande Brian herein referred to as A1 and Nanyanzi Palma hereinafter referred to as A2 were initially charged with two other accused persons who were not produced in court. Trial proceeded against the two accused persons.

A1 and A2 are jointly charged with 5 counts of infringement of Copyrights C/s 46 (1) and 47 (1)a of The Copyrights and Neighbouring Act 2006.

The first count alleges that accused person A1 and A2 and other others still at large on the 19<sup>th</sup> day of Feb. 2009 at Gazaland Plaza in the Kampala district without lawful authority under the Copyrights and Neighbouring Act reproduced VCDS produced by Judith Babirye without her consent.

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true copy of the original  
16 JUN 2010  
Chief Magistrate  
BUGANDA ROAD COURT KAMPALA

The second count involves the music of Wilson Bugembe who testified as PW2. As a composer he testified that he sold his music for distribution to Silver Ndawula the agreement was identified as Pexh.7. The second agreement as Pexh.8. The agreements with Kabito Brian were admitted as Pexh.9, 10, and Pexh.11.

The accused persons therefore had no rights whatsoever to reproduce or distribute the music covered in those agreements. It is my considered opinion that prosecution has proved its case beyond any reasonable doubt on this count.

I accordingly find A1 guilty of infringing Copyrights C/s 46 (1) and he is convicted on the same. I also find A2 of infringing on Copy Rights C/s 46 (1) and convict her on the same.

The third count relates to the music of Catherine Kusasira. The said Catherine Kusasira did not testify on behalf of prosecution. Neither did any of the promoters claim to have distribution rights from Kusasira. I do not find sufficient evidence on this count. The 2 accused persons are accordingly acquitted on the third count.

The 4<sup>th</sup> count relates to infringing on the music of Nantongo who did not testify and no promoter claims to have the distribution rights. Just like count 3 the evidence on record

is not sufficient to sustain the charges against the 2 accused persons and they are accordingly acquitted on the same.

Finally the 5<sup>th</sup> count is on possession of the duplicating machine. The first and 2<sup>nd</sup> accused persons admitted having possession of the duplicating machines but contended that they were using them for duplicating local videos not music. The accused persons were found with coloured covers for music DVD boxes a clear indication that they were in the process of duplicating music belonging to Ugandan artists especially Judith Babirye and Wilson Bugembe. As already resolved in counts I and II the 2 accused persons had no express authorization to duplicate the said music. It is also highly circumstantial that the accused persons were using the same machine to duplicate the music. I have no doubt in mind that the duplicating machines were being used for illegal purposes in contravention to S.46 (4) of the Copyrights and Neighbouring Rights Act 2006. The state has proved its case beyond reasonable doubt. Accordingly I find AI and A2 guilty of possession of a machine knowing that it is to be used for making infringing copies of work c/s 46 (4) and are both convicted on the same.

On the whole the accused persons are convicted on counts I, II and 5 and are acquitted on counts 3 and 4.

**Sgd: Vincent Emmy Mugabo**  
**Chief Magistrate**  
**14/06/2010**

**7/05/10:** 2 accused present.  
Kebirungi Scovia for State  
Joy court clerk

**Pros:** For Judgment.

**Court:** Judgment not ready. Bail extended to 7/06/10 for judgment.

**Sgd: Vincent Emmy Mugabo**  
**Chief Magistrate**  
**07/05/10**

**10/06/10:** 2 accused present  
Joyce Tushabe for state  
Joy court clerk

**Pros:** For Judgment.

**Court:** Bail extended to Monday 14/06/10 for Judgment.

**Sgd Vincent Emmy Mugabo**  
**Chief Magistrate**  
**10/06/10**

**14/06/10:** 2 accused present  
Joyce Tushabe for state  
Joy court clerk

**Pros:** For Judgment.

**Court:** Judgment read and delivered in open court.  
Accused persons are convicted on counts I, II and  
5 and acquitted on count 3 and 4.

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Chief Magistrate  
BUGANDA ROAD COURT KAMPALA

**Pros:** I pray for a deterrent sentence to deter accused persons and to deter other would be offenders.

**Allocutus- A1:** I pray court to have mercy, a deterrent sentence should not be considered . We should be offered a fine. Our machines were impounded . Court should give us a fair fine that would be able to be paid by us.

**Allocutus A2:** I pray to have mercy many factors are to be considered. I have children. Court should not consider imprisonment.

**Court:** I believe the state has no previous criminal record against the accused persons since there is no mention of the same. I treat them as first offenders. I agree that there is need to give a deterrent sentence to deter the accused persons now convicted and hopefully to reform them and at the same time to pass on the same message to the community that its unlawful and illegal to infringe on copy Rights. I believe the 2 accused persons are capable of reforming and would therefore not be given the maximum sentences provided under the law.

In the circumstances I would sentence you as hereunder.

For A1 on count I, you will pay a fine of Ug. Shs.1.5m/= or in default to a term of imprisonment for 1 year.

On count II you will pay a fine of 1.5m or in default a term of imprisonment for 1 year.

On count 5. A1 is sentenced to a fine of Ug. Shs.500,000/= or 6 months imprisonment .

In total A1 will pay a fine of Ug. Shs.3.5m/= or serve a term of imprisonment for 2 ½ years.

Regarding AII.

Count I. Pay a fine of Ug. Shs.1.5m/= or in default serve a term of imprisonment for 1 year.

Count II. Pay a fine of Ug. Shs.1.5m/= or in default serve a term of imprisonment for 1 year.

Count 5. A2 is sentenced to a fine of Ug. Shs.500,000/= or 6 months imprisonment.

In total A2 will pay a fine of 3.5m/= or serve a term of imprisonment for 2 ½ years.

In addition the duplicators are forfeited to the state and the duplicated music CDS, VCDS and DVDS will be destroyed

Right of Appeal fully explained to be within 14 days from now.

**Sgd: Vincent Emmy Mugabo**  
**Chief Magistrate**  
**14/06/10**

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Its alleged on the 2<sup>nd</sup> count that A1 and A2 and others still at large on the 19<sup>th</sup> Feb. 2009 at Gazaland Plaza in the Kampala district without lawful authority under the Copyrights and Neighbouring Act reproduced and sold music on CDS, DVDS and VCDS produced by Bugembe Wilson without his consent.

The third count alleges that A1, A2 and others still at large on the 19<sup>th</sup> day of Feb. 2009 at Gaza land in the Kampala district without lawful authority under the Copyrights and Neighbouring Act reproduced and sold music on CDS, DVDs and VCDS produced by Catherine Kusasira without her consent.

Its alleged on the 4<sup>th</sup> count that A1 and A2 and others still at large on the 19<sup>th</sup> day of Feb. 2009 at Gaza land Plaza in the Kampala district without lawful authority under the Copy Rights and Neighbouring act reproduced and sold music on CDS, DVDS and VCDS produced by Nantongo without her consent.

Finally on count 5 it is alleged that A1 and A2 on the 19<sup>th</sup> Feb. 2009 at Gaza land Plaza in the Kampala district under the Copy rights and Neighbouring Act had in their possession a duplicator machine knowing that it would be used for making infringing copies of work.



The accused person denied the charges in striving to prove its case, prosecution led the evidence of 7 witnesses.

PW1 Judith Babirye Niwo a musician

PW2 Wilson Bugembe a singer/artist

PW3 Kabiito Brian, buyer of Copy Rights under X-zone International.

PW4 Silver Ndaula, music promoter under Lusyn Enterprises.

PW5 Cadet ASP Tumugumye a police officer attached to Lira Police station formerly at Kawala Police Post.

PW6 Sebuliba George a business man dealing in music

PW7 No.34578 PC Musasizi Robert attached Nakapiriti Police Station formerly at CPS Kampala.

At close of prosecution case the two accused persons were found with case to answer. They both elected to make sworn testimonies and close their respective defences.

It is a cardinal principle of English Criminal, that the burden of proving the guilty of an accused lies squarely on the prosecution and does not, with a few exceptions shift to the accused.

The burden is only discharged on proof beyond any reasonable doubt, speaking of the degree of proof required in criminal law

**LORD DENNING** said

**“..... .that degree is well settled.**

**It need not reach certainty, but it must carry a high degree of probability. Proof beyond doubt does not mean beyond the shadow of doubt.**

**The law would fail to protect the community if it admitted fanciful probabilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote probability in his favour which can be dismissed with the sentence “of course it is possible but not in the least probable”. The case is proved beyond reasonable doubt but nothing short of that will suffice.”**

**MILLER V MINISTER OF PENSIONS (1947) 2 ALLER 323.**

Whenever an allegation of crime is made against a man. It is the duty of the court to quote **LORD KENYON’S** advice.

**“If the scales of evidence hang anything like even, to throw into them some grains of mercy”.**

In short to give the accused person the benefit of doubt. But as it has been said elsewhere:

**“not, be it noted, of every doubt, but only of a doubt for which reasons can be given”.**

And as it was said by a great Irish chief Justice;

**“to warrant an acquittal the doubt must not be light or capricious such as timidly or passion prompts and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rationale understanding will suggest to a honest heart; the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice or subdued by fear”**

**KENDAL BUSHE CJ DUBLIN UNIVERSITY MAG.  
XVIII, 85.**

The accused persons are to be convicted on the strength of the prosecution case but not on the weakness of the defence as the accused person has no duty to present an unassailable defence – see Isreal Epuku S/O Achiehi v Republic (1934) IEACA 166.

With the above principles of law in mind I now approach this case.

The basic issue for consideration is whether the evidence is sufficient to sustain the charges against the accused persons. S.46 (1) of the Copy Rights and Neighbouring Right Act 2006 provides that an infringement of copy Rights or Neighbourng Rights occurs where without a valid transfer, licence, assignment or other authorization under this Act a person deals with any work, or performance contrary to the permitted free use and in particular where the person does or causes or permits another person to –

- a) reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;
- b) distribute in Uganda by way of sale, hire, rental or like manners; or
- c) .....

S.47 thereof provides for offences and penalties stating that a person who, without the authorization of or licence from the rights owner or his or her agent

- a) publishes, distributes, or reproduces the work
- b) .....
- c) .....
- d) .....
- e) .....

Commits an offence and is liable on conviction to a fine not exceeding one hundred currency points or imprisonment not exceeding 4 years or both.

- 2) .....
- 3) .....
- 4) A person who sells or buys in the course of trade or imports any apparatus, article, machine or thing, knowing that it is to be used for making infringing copies of work, commits an offence and is liable on conviction to a fine not exceeding fifty currency points or imprisonment not exceeding one year or both.
- 5) In addition to the punishment prescribed by sub section (4) the court shall, where an offence is committed under the sub section order the forfeiture of the apparatus article or thing which is the subject matter of the offence or which is used in connection with the commission of the offence.

Sec.50 (2) thereof provides that in addition to any other punishment that may be imposed by the court under this Act, the court may order -

- a) that all sums of money arising out of the offence and received by the offender be accounted for by the offender and paid to the person entitled to the economic right under this Act; and
- b) that all reproduction, duplication, translation, extracts, imitations and all other materials involved in the infringement be forfeited and disposed off as the court may direct.

The gist of the prosecution case is that A1, A2 and others still at large were in illegal business of duplicating music and selling it to the public. At time of inspection duplicating machines were recovered from the shop of accused persons. Paper prints to be used as covers to the DVDs, CDS and VCDS were also recovered. Both recorded DVDS, CDS, VCDS and empty ones were recovered.

On his part A1 denied the allegation contending that he was never burning or selling CDS. He further contends in the building there were other mass producers who were not arrested.

In cross examination by the state he stated that he was only using the duplicators to duplicate local movies and not music.

A2 also denied selling or burning CDS. She denied selling or copying music CDS. In cross examination she stated that they only duplicate movies and not music. The duplicating was being used to duplicate movies for sell and not music. She stated that she co-owned the shop with A1. It is not in contention two accused persons were operating a shop in Gaza land dealing in music.

PW5 D/Cadet ASP Tugume was involved in the operation which recovered several exhibits from the shop of the two accused persons. These included 18 duplicated DVDS, 72

CDS, and empty CDS which were collectively admitted as PEX.14, 2 duplicators admitted as PEXH.15. The coloured covers for the DVDS boxes admitted as PEXH.16. Court noted that indeed these CDS were quite different from the ones earlier exhibited by the promoters like PEX.13 and PEX.12.

The evidence of PW5 was well corroborated by PW6 Sebuliba George who was in the business of music and was involved in operation that led to the arrest of the two accused persons.

PW6 listed the songs on the CDS and DVDS that had been duplicated. The list was admitted for prosecution as PEXh.17.

PW7 No.34578 PC Musasizi Robert was also involved in the operation that led to the arrest of A2 at Gaza land dealing with duplicated music in the shop of Palma Videos. A2 was found with duplicated music and two duplicating machines. The certificate of search made at the shop and signed by A2 who was in the shop and it was admitted for prosecution as PEXh.18 . I have no doubt in mind whatsoever that A1 and A2 were reproducing and duplicating music without the express authorization for commercial use and not private use in their shop Palma Videos. The 2 accused persons

were distributing that music by way of sale which contravenes the provisions of the Copy Rights and Neighbouring right Act 2006.

On the first count Judith Babirye testified as PW1 and testified on the process of music production up to the time it reaches the ender user either as a listener or an audience. Production and distribution of the music is limited to the person who buys the distribution rights. The purchaser can sub contract or give out distribution rights. She was able to identify contracts between herself with Silvester Ndaula of Lusyn Enterprises, Brian Kabiito of X-Zone International. The two accused persons were not known to the composer. Kabiito Brian testified as PW3 and Silver Ndaula testified as PW4 none had sub-contracted their distribution rights to the two accused persons. It therefore follows that the duplication of the music belonging to artist Judith Babirye, Silver Ndaula and Brian Kabito by the accused persons was illegal and contravened the provisions of S.46 (1) the Copy Rights and Neighbouring Right Act 2006. I find that prosecution has led evidence on this charge beyond any reasonable doubt. I accordingly find A1 guilty on the first count and convict him on the same. I also find A2 guilty on the first count and she is accordingly convicted on the same.