

TANZANIA / JUDGMENT

Oryx v Community n Kaale fnl

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1 IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
DAR ES SALAAM COMMERCIAL CASE NO. 81 OF 2023 ORYX OIL COMPANY LTD
..... PLAINTIFF VERSUS COMMUNITY PETROLEUM LIMITED
.....1ST DEFENDANT PETER KAALE2ND
DEFENDANT

JUDGMENT

July 5th, 2024 & Sept. 6th, 2024 Morris, J In this suit, the plaintiff sues the defendants claiming that the latter breached the contract between him and the latter. He alleges that the defendants, applying fraud schemes, failed to pay the full purchase price of the petroleum he supplied to them. He seeks the Court to declare such breach and order them to compensate the plaintiff with TZS 3,563,106,526.00 along with other auxiliary reliefs. The defendants deny all his allegations towards establishment of their liability and/or remedies sought therefrom. 2 Deciphering the history of this case, in brief, the plaintiff is a registered and licenced dealer in importation and distribution of petroleum oil and related products (petroleum products). Between 2014 and 2019 he allegedly supplied petroleum products to the first defendant at the service station by the name of Barabara ya Taifa in Kilimanjaro region. According to the plaintiff, this service station was duly registered under the proprietorship of Alphonse Joseph Mwacha. However, it was controlled and run by the defendants. Further, it was the plaintiff's claim that, the supply of the petroleum products was based on both oral and documentary agreements of the parties herein. The business modus operandi between the parties was allegedly on cash basis. Accordingly, the defendants were required to issue purchase orders to the plaintiff; pay for the ordered goods; and supply proof of payment to the plaintiff. The latter would in return, verify the orders; confirm the payment thereof; and release the petroleum products to the defendants. In his pleadings, the plaintiff asserted that the reconciliation of his account revealed that by 2019, the defendants had received goods for which they did not pay. The amount due to the plaintiff was allegedly TZS 3,563,106,526.00 as confirmed by PricewaterhouseCoopers Ltd (PWC), the auditors appointed by the plaintiff in that regard. Moreover, the plaintiff alleged that defendants unscrupulously obtained the petroleum products without actually paying for the same. To him, the non-payment by the latter amounted to both breach of the agreement between them; and conspiracy to defraud and injure the plaintiff which culminated into his loss of about TZS 3.6 billion. Ardently, the defendants maintained constant denial of the plaintiff's allegations throughout the trial and

craved for dismissal of the suit with costs. The rivalry between them led the Court to frame three (3) issues for determination, viz.;

- i) Whether there was any contract for supply of petroleum products between the plaintiff and the defendants. ii) Whether there was breach of the said contract. iii) To what reliefs are parties entitled. Both parties were represented by respective counsel. Mr. Jeremiah Tarimo, learned advocate appeared for the plaintiff. However, the defendants retained advocate Benito Mandele for defence. In accordance with rules 49 and 50 of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules); the plaintiff filed the witness 4 statements of and called Messrs. Iman Mtafya and Josiah Wangwe to testify as PW1 and PW2 respectively. Further, Mr. Peter Kaale lodged his statement and testified in favour of the defence as DW1. During the trial, the witnesses' statements were adopted by the Court as main evidence of the respective witnesses. In addition, PW1, PW2 and DW1 appeared for cross and re-examination sessions pursuant to the law. Besides, the plaintiff tendered eight (8) exhibits: the official search for Barabara ya Taifa from BRELA (P1); the official search for the first defendant from BRELA (P2); the purchase orders, delivery notes, pick slips, receipts and emails (P3 & P4); the bank statements (P5 & P6); the PWC forensic audit report (P7); and the Court order of 16.06.2023 (P7). However, the defence had no exhibit to tender. The Court makes reference to the relevant exhibits in the analysis of evidence herein. The first plaintiff's witness (PW1) reiterated the averments in the pleadings. Further, he maintained that the business relationship between the plaintiff and the defendants started around 2014 from an oral agreement but supported with purchase orders, delivery notes and pick slips. He insisted the goods were delivered at the service station which, though registered in the name of Alphonse Joseph Mwacha, was under the operations of the 5 defendants from 2014-2019. He reiterated that the placed orders were delivered by the plaintiff to the defendants upon verification of payment as exhibited by the delivery notes (P3 & P4). It was his further testimony that reconciliation and independent audit done in 2019 uncovered the loss of TZS 3,563,106,526.00 to the plaintiff. On being cross examined, he confirmed that the defendants were cash customers who required no contract but confirmed payment by emails and purchase orders. He also affirmed that the claimed loss ran from 2014 to 2019 as established by PWC (P7). In addition, he testified that Mr. Peter Kaale (second defendant) was not contacted by PWC; the report from the auditors was for the plaintiff's internal use; and that its use was subject to disclaimers. In addition, the second witness of the plaintiff (PW2) reasserted what PW1 had testified. Nevertheless, he added that the client on P3 was Barabara ya Taifa which was a business name but its operations were under the defendants. He confirmed the service station was not sued in this case. It was his further testimony that the pick slips were not signed by the defendants; and the plaintiff's staff called Washokera was certifying payment 6 after verifying the same. Likewise, he stated that between 2014 and 2018 there was no fraud report but in 2019 there was one by PWC (P7). The defence, on its part, had the testimony of DW1 primarily complimenting the denials in the written statement of defence (WSD). DW1 started by echoing that the defendants had no contract with the plaintiff whatsoever. He also denied issuing or signing any purchase orders,

delivery notes or pick slips (P3) to establish any connection between the plaintiff and the defendants. Further, he stated that the plaintiff's allegations of fraud are still under the investigation of the state organs. During cross examination, DW1 confirmed that the first defendant traded in petroleum with the plaintiff at KIA and Barabara ya Taifa service stations in Kilimanjaro between 2014 and 2019 on cash basis; and communicating with or confirming payment to the plaintiff by email. Apart from the above witness statements and oral testimonies, the parties filed the respective final submissions. I commend both counsel for the expressive and lucid closing speeches. Each side summarised the strong point of own case and pointed out the apparent feebleness in the opposite side's suit. The submissions of parties are discussed in line with the framed

issues.

7 The first issue places an invitation to the Court to determine whether there was any contract for supply of petroleum products between the plaintiff and the defendants. Regarding this issue, it was submitted for the plaintiff that the defendants concluded a valid contract between them and the former party. The type of the contract per the plaintiff was partly oral and partly through purchase documents (P3 & P4). To the plaintiff, because the second defendant signed these exhibits and confirmed payments to the plaintiff through the emails (P5 & P6); the claims regarding existence of contract between the parties were proved. To buttress this argument, the plaintiff's counsel argued that under section 10 of the Law of Contract Act, Cap.345 R.E. 2019 (the LCA) the purchase orders, pick slips, delivery notes and emails (P3 & P4) constituted a valid contract. Moreover, it was submitted by the plaintiff that, because the second defendant (DW1) admitted upon being cross examined that he operated the two service stations; the plaintiff's allegations hereof were proved in line with *Miller v Minister of Pensions* (1947) 2 ALL ER 372. On such note, the plaintiff argued that the first issue should be answered in the affirmative. 8 With regard to the second issue, the plaintiff submitted that the defendants were obliged to pay the purchase price for the petroleum products under the contract. Thus, failure to pay the price in full, the defendants breached the same [J & H and Ritchie Ltd v Lloyd Ltd (2007) UKHL 9; (2007) 2 ALL ER 353]. Towards this conclusion, it was the plaintiff's assertion that the corresponding purchase documents established that the loss revealed in the bank statements (P5 & P6) manifested the breach by the defendants. To the plaintiff, PW1 and PW2 satisfactorily testified in proof that the defendants fraudulently obtained the goods for which no commensurate payments were made in his favour. According to him, discrepancies in payments by the defendants coupled with their fraudulent manipulations of the plaintiff's financial verification procedures, caused the loss of TZS 3.6 billion to plaintiff. Likewise, he stated that, PW1 and PW2 were not cross-examined regarding the debt in the bank statements. Moreover, the counsel for the plaintiff argued that DW1's testimony was not to be trusted because he did not prove full payment of the supplied petrol products to the defendants. 9 Reliance was placed on *Ignazio Messina v Willow Investments SPRL*, Civ. Appl. No. 21 of 2001; *Damas Assesy v Raymond Mgonda Paula and Others*, Civ. Appl. No. 32/17 of 2018; *Gorge Jonas Lesilwa v R*, Crim. Appeal No. 374 of 2020 (unreported); and Sir J. Woodroffe and S.A. Alis *Law of Evidence*, 17th edition Vol.11; Butterworths, New Delhi

2002. He finally prayed that the second issue should also be answered in the affirmative. In connection to the third issue, the plaintiff was brief but firm that because the defendants breached the contract, they should be condemned by the Court to pay compensation presented in the plaint pursuant to section 73 of the LCA. Further, it was the plaintiff's assertion that he was subjected to other losses in relation to conciliation of the accounts, forensic auditing, and recovery measures. To him, general damages were justified in the present matter in line with *Bamprass Star Services Station Ltd v Mrs. Fatuma Mwale* [2000] TLR 390. In addition, he cited section 74 of the LCA and *Francis Andrew v Kamyn Industries (T) Ltd* [1986] TLR 31 to buttress his point that the mistakes of the defendants warranted payment of the pleaded interest 10 amounts and costs of the suit. It was his final conclusion that the suit was proved to the required standards. On his part, the defendant submitted generally against the whole suit without analysing the framed issues one by one. To him, the plaintiff failed to prove the breach of contract or loss suffered, if at all. He argued that there was no contract tendered or evidence produced to prove existence of the alleged contract between the parties herein. He also submitted that Mr. Peter Kaale (second defendant) was no the proprietor of Barabara ya Taifa and there was no proof to connect the defendants to the stated service station. In addition, the defence counsel argued that not only Mr. Kaale was wrongly sued because the first defendant is a juristic person; but also another shareholder of the first defendant (if shareholders were suable) was not joined which omission attracted negative inference to the plaintiff [*Costantine B. Assenga v Elizabeth Peter and 4 Others*, Civ. Appeal No. 70 of 2019(unreported)]. It was also the defence submissions that all the purported purchase credentials (P3 & P4) did not contain the defendants' names nor were they signed by the second defendant. Further, he asserted that the subject exhibits (P3 & P4) revealed that one Washokera verified the payments for 11 Barabara ya Taifa service station but he was not joined as the defendant. According to the defence, such nonjoinder was fatal in terms of *Baya Lusana v R*, Crim. Appeal No. 593 of 2017 (unreported). Regarding the tendered bank statements (P5 & P6), the defence counsel stated that the statements did not connect the defendants to the suit howsoever. His line of argument hereof was that it was confirmed by the plaintiff that the defendants were "cash customers" whose payment transactions were duly verified by the plaintiff before releasing the goods, thus the plaintiff cannot deny being paid after lapse of a long duration. Moreover, he submitted that the account statements contained many customers' transactions which anomaly distorted credibility of these exhibits. Similarly, the defence argued that deposit of money by the second defendant in the plaintiff's account did not legally make him part of the contract because consideration in a contract may be paid by anyone. The defendants also contested the evidence in the PWC' report (P7). To them, the report was non credible based on a number of factors. They included the author's disclaimer for the same not to be used by other parties without written authorisation (which was not tendered in Court along with the report); the same was made in accordance with international standards 12 (see page 3 of P7); and that the report did not connect Mr. Washokera with the second defendant. To finalise, the defence submitted that because in their pleadings the defendants specifically denied the plaintiff's averments, they are bound by such pleadings pursuant to *Martin Fredrick Rajab v Ilemela Municipal Council and Another*, Civ. Appeal No. 197 of 2019 (unreported). Hence, they reiterated their prayer for dismissal of the suit with costs.

Having summarised evidence and submissions of parties, I now turn to determine the first issue. Under it, the Court is to determine whether there existed a valid contract between the plaintiff and the defendants. The plaintiff maintained that the contract between him and the defendants was partly oral and partly based on purchase credentials (paragraphs 4, 7, 12 and 13 of the plaint). Thus, I am inclined to determine this issue by considering the pleaded limbs of the contract, one at a time. In so doing, I will be answering if the parties hereof concluded the oral contract and/or whether the availed documents on record constituted a competent contract in the eyes of law. Regarding the existence of oral contract, I first preface the critical tenets of this kind of contract. The Court considers a number of 13 fundamentals establishing the oral contract. One, the valid oral contract is as good and as binding as any written counterpart. Section 5(1) of the Sale of Goods Act, Cap 214 R.E. 2002 (the SGA) is categorical that a “word of mouth” may constitute a valid contract of sale. Further, under section 10 of the LCA every agreement is a contract provided it consists of the minimum statutory prerequisite. Thus, the oral agreement complying with the conditions of the law becomes a contract. Two, a company may enter into a valid oral agreement with another company or individuals. See, for instance, Engen Petroleum (T) Limited vs Tanganyika Investment Oil & Transport Limited, Civ. Appeal No. 103 of 2003; and Leonard Dominic Rubuye t/a Rubuye Agrochemical Supplies vs Yara Tanzania Limited, Civ. Appeal No. 219 of 2018 (both unreported). The basis hereof is that the corporate body is a juristic person capable of executing a binding contract. Three, proof of existence and terms of the oral contract is a clear question of facts. Normally, such proof may be achieved through a number of factors including, the testimony of a person who witnessed the conclusion of the agreement; inference from parties’ conduct prior to or at or post effectuation of the agreement; and circumstantial evidence [Sudhir Kumar Lakhanpal 14 v Rajan Kapoor and Regalia Tanzania Ltd, Civ Case No. 125 of 2019; and Mathias Erasto Manga vs M/S Simon Group (T) Ltd, Comm. Case No. 1 of 2012 (both unreported)]. As alluded to before, the plaintiff’s pleadings towards establishment of the contract between parties herein are to the effect that the same was “partly in writing and partly by word of mouth”. I thus, find it imperative to test the foregoing factors in the present suit. A couple of sub enquiries here will involve asking oneself if there was evidence from the person who witnessed the formation of the agreement. The plaint discloses that the plaintiff and the second defendant held various meetings in Dar es salaam and in Kilimanjaro (para 4 of the plaint). Though the person from the opposite side was specifically identified in the pleadings and witness statement (paras 8 of PW1 and PW2 statements) as Mr. Kaale – the second defendant; the counterpart from the plaintiff was concealed. Further, none between PW1 and PW2 testified that he took part in or was present during the conclusion of the subject agreement. As such, the exact entering of oral agreement and terms therein remain unproved. I hold the view that the disclosure and procurement of such person was crucial in this case. Among other usefulness, his attendance would benefit the Court 15 to confirm his mandate from the plaintiff; or credibility of testimonies; or the conduct of the parties prior and after the formation of the agreement. This omission falls within the tenets of negative inference. In the absence of the testimony of such person, the Court embarks on analysis of other factors. That is, are there documents in the record to complement the allegations that parties entered into a valid agreement? The plaintiff tendered P3 and P4 to buttress his averment that the defendants had a

binding contract of sale with him. I will test this contention further. Firstly, the exhibits do not bear the names of the defendants herein as clients of the plaintiff, save for the emails wrote by the second defendants to the plaintiff. Apparently, DW1 conceded during cross examination that he was communicating with the plaintiff via emails. Nevertheless, the subject emails are insufficient in details. All that is most relevant therein is the author's constant statements that "we have deposited" so much money in a certain bank; and the subject being payment for fuel or Barabara ya Taifa. However, the emails did not state or indicate the corresponding invoices that were being settled or the amount of fuel purchased. 16 Secondly, the plaintiff's bank statements (P5 & P6) has payment entries effected by Peter Kaale (second defendant) or Barabara ya Taifa. Such payments are evident, for example, on 03.02.2014; 09.04.2014; 06.06.2014; 21.12.2015; 02.03.2016; 19.12.2016; and 25.04.2019. However, as was the case in the email correspondences, these entries do not expressly indicate the respective amount of gasoline or invoices that were settled and/or purpose of the payments. Another notable aspect from such exhibits in this regard is that such entries do not expressly name the first defendant howsoever. Thirdly, from the PWC report (P7), the plaintiff's standard routine for both credit and cash customers involved passing the vetting test before he traded with them. In particular, clause 2.13 at page 7 of the subject report reveals that "all Oryx customers, whether cash or credit, must undergo Know Your Customer ('KYC') procedures and sign a contract with Oryx (plaintiff)". While I am still on the subject, no such contract between the plaintiff and the defendants was tendered in Court. Fourthly, uncontroverted evidence on record points out that Barabara ya Taifa (service station) through its proprietor- Mr. Alphonse Mwacha signed a franchise contract with the plaintiff in which the second defendant 17 was designated as a site manager. Precisely, clause 2.8 at page 6 of the PWC report (P7) states as quoted below. "2.8 Our review of the Contract for the Franchise of a Retail Service Station³ between Barabara ya Taifa and Oryx signed on 13 July 2015 shows Mr. Alphonse Joseph Mwacha ("Mr. Mwacha") as the Franchisee and Mr. Kaale as the Site Manager. The Oryx Know Your Customer ("KYC") form for KIA lists Mr. Kaale as the Director at KIA Community". From the foregoing excerpt, critical analysis will certainly lead to a number of conclusions. One, Barabara ya Taifa as a service station operated on the basis of franchise agreement between Oryx and Mr. Mwacha (the former party's proprietor per exhibit P1). Two, the said agreement was signed in 2015 and there is no evidence on record of its termination or discharge. Three, the second defendant (Mr. Peter Kaale) was the site manager (not franchisee). Four, Mr. Kaale was a Director at KIA Community – the party which is not joined in this suit. Fifthly, the same report (P7 - clause 2.9) exhibits that the service station (Barabara ya Taifa) was handed over to Mr. Kaale by Mr. Mwacha and the former "became in charge of running the day-to-day operations". Further, PW2 testified in re-examination that the service station was 18 operated by the second defendant but being owned by the first defendant. However, the plaintiff did not produce evidence to substantiate that: for instance, the purported handing-over was formal, legal and binding the tripartite parties (the plaintiff, Mr. Mwacha and Mr. Kaale); or that such step transformed Mr. Kaale from the position of the site manager (in the franchise agreement) to being the proprietor of Barabara ya Taifa. Moreover, the franchisee (who legally was a party to the agreement) was not joined or sued in this case as a necessary party. In addition, or alternative; Mr. Mwacha was not procured to testify on behalf of the plaintiff from

which testimony the Court would draw necessary inferences as to the scope of the pleaded relationship between the plaintiff and the defendants in this regard. At this knot, I am justified to hold that Mr. Mwacha was a key witness in order to iron-out the imminent discrepancies as to the privity in the franchise contract between the plaintiff and Mr. Mwacha (Barabara ya Taifa). The law is very expressive that such kind of omission rationalizes the Court to draw negative inference against the party in whose favour such witness would have otherwise testified. I proceed to so draw adverse inference against the plaintiff under the authority in Hemedi Saidi v Mohamedi 19 Mbilu [1984] TLR 113; Simon Kamoga v SHANTA Mining Co. Limited, Lab. Rev. No. 08 of 2020; and Sungura Athumani v R, Crim. Appeal No.291 of 2016 (both unreported). Sixthly, in further evaluation of circumstances of this suit so as to see if the parties herein had an inferable contract of sale, the Court is mindful of the undisputed fact that the first defendant is corporate being (P2). In this regard, the evidence from the plaintiff does not create the necessary nexus between the first defendant (an independent juristic person) and Barabara ya Taifa (the business name of Mr. Mwacha). That is, there is no array of proof of how the duly incorporated company operated under the business name. Seventhly, the plaintiff is consistent in his pleadings that the petroleum products were supplied to the first defendant at Barabara ya Taifa gas station. Paragraphs 3, 5, 7(a), 9, 10 and 11 of the plaintiff bear such express averments. Part of paragraph 9 for instance stated that “upon reconciliation of account in July 2019, the Plaintiff discovered that the quantity of petroleum products supplied to the 1st Defendant does not tally with the actual payments made to the Plaintiff”. But the rest of the evidence, 20 purport to establish that the named service station was handed to and/or was being controlled and run by the second defendant. I find that the foregoing inconsistency is so significant against the proof of alleged contractual relationship between the plaintiff and the first defendant. In this connection, I reiterate the well settled principle of law that parties to the suit are bound by own pleadings. In this regard, see, Salim Said Mtomekela v Mohamed Abdallah Mohamed, CoA Civil Appeal No. 149 of 2019; Scan Tan Tour v The Catholic Diocese of Mbulu, CoA Civil Appeal No. 78 of 2012; Lawrance Surumbu Tara v The Hon. Attorney General and 2 Others, CoA Civil Appeal No. 56 of 2012; (all unreported); and James Funke Ngwagilo v Attorney General [2004] TLR 161. Eighthly, the defence raised the argument that PWC report (P7) was not to be used in this matter as part of evidence. The basis of such argument was that the subject exhibit contained a disclaimer which made it the plaintiff’s sole internal document; and whose use by the third party was subject to prior written consent of the author (PWC). I find it necessary to evaluate such contention at this moment. With adequate respect to the defence, the use of the said exhibit in this matter does not fall in PWC’ disclaimer or condition precedent. The report was produced in this Court by 21 the plaintiff. Oryx is not a third party in the context of P7. In other words, the report was prepared for the plaintiff’s “internal use and benefit”. Institution and pursuit of this matter by the plaintiff squarely fitted in the purposes of the report. Further, the Court, even by the modest stretch of logic, is not a third party hereof howsoever. As I steer towards the endpoint of the first issue, the interrogated aspects above can be recapped by restating the provisions of section 5 (1) of the SGA. It states as follows: “Subject to the provisions of this Act and of any other written law in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of

the parties” (emphasis added). Testing the quoted provision to the facts of this case along with the analysis rendered earlier; the obvious deductions are easy to encapsulate here. It is evident that the plaintiff and the defendants did not execute a written contract. The first category is obviously ruled out. Further, the pleaded agreement between them on the basis of the word of mouth was not proved in this case. That is, in the absence of the testimony from the particular person who concluded such agreement or was involved in setting 22 the covenants thereof or who witnessed the parties entering into the alleged agreement; I find it rather difficult to rule in favour of existence of the contract of sale of this nature between the parties herein. Without over-repeating myself, the tendered documents by the plaintiff drifted the would-be association of the parties further and further apart. Indeed, the circumstances that were pleaded and proved by the plaintiff indicated that the first defendant was not competently, directly or specifically involved in the authorship or execution of the tendered exhibits. Moreover, the plexus of Mr. Kaale in the alleged transactions was more linked to Barabara ya Taifa (gas station) rather than the first defendant. Be that as it may, the legal status between Barabara ya Taifa and Mr. Kaale, on the one hand; and between Mr. Alphonse Mwacha (contracted franchisee by the plaintiff) and Mr. Kaale (site manager -cum-in-charge of the service station) on the other; stood established vaguely, if at all. Likewise, the nature of relationship between Messrs. Mwacha and Kaale jointly and the plaintiff independently was also left blurry. In view of the analysis, arguments, reasoning and conclusions rendered above; the first issue is answered in the disaffirmation. I 23 accordingly do not pass it. In the interest of precision, there was no contract for supply of petroleum products between the plaintiff and the defendants. I now move to the second issue. The same is dependent on the outcome of the first issue. The current issue was framed for the Court to determine if there was breach of the contract between the parties in this suit. After determining the first issue untowardly, the Court is accordingly left with less or no contention to resolve. In the absence of the contract, it is a futile undertaking to give through to breach thereof. The Court’s precious and professional resources will go up in smoke. In this connection, therefore, I hasten to hold that the second issue is equally answered in the negative. The third issue is about the reliefs the parties are entitled to. Obviously, this too, treads on the outcomes of the previous issues. It is undisputed that the two previous issues have been determined in disaffirmation. Consequently, the present issue will not detain me for long. If the plaintiff suffered any damages, as pleaded and/or testified herein or otherwise; such losses cannot be legitimately adjudged on the defendants in the absence of the valid contract between them and/or breach of the proved contract. Surely, the plaintiff’s claims fail for want of the legal foundation. The third issue stands determined accordingly. 24 The upshot of this case is, therefore, dismissal for want of merit. Nevertheless, the circumstances surrounding this matter, do not warrant grant of costs. In consequence, I make no order as to costs. It is so ordered. The right of appeal is explained to parties. C.K.K. Morris Judge September 6th, 2024 Judgement delivered this 6th day of September 2024 in the presence of Ms. Zena Njovu and Ms. Winnie Mandele, Advocates for the plaintiff and defendants respectively. C.K.K. Morris Judge September 6th, 2024

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