

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MAKADARA

CRIMINAL CASE NO. 1226 OF 2011

REPUBLICPROSECUTOR

VERSUS

EDWARD KABIRU MWANGIACCUSED

J U D G M E N T

Edward Kabiru Mwangi hereinafter referred to as the accused is charged with having in possession, in the course of trade, counterfeit goods contrary to section 32(a) as read with section 35(i) of the Anti-Counterfeit Act 2008 of the Laws of Kenya.

The particulars are that on the 2nd day of June 2011 at about 11.00 am at Backmart Electronics merchant Ltd. located along Nanyuki road in Industrial Area, within Nairobi area, with others not before the court did have in his possession, in the course of trade counterfeit goods namely 915 cartons X 6 pieces of 2 feet fluorescent fittings, 824 cartons X 6 pieces of 4 feet fluorescent fittings. 1295 cartons X 25 pieces of 4ft fluorescent tubes, 2,115 cartons X 48 pieces of assorted energy saving bulbs, 163 cartons X 32 pieces of transformers (chokes, 1259 cartons X 25 pieces of 2ft fluorescent tubes 1 X 80 of labels marked Phillips, 27 cartons X 6 pieces of 2ft fluorescent fittings, 241 pieces of energy saving bulbs and 36 pieces of Bazookas Phillips all illegally bearing the trade mark "Phillips" which is owned by Koninklijke Phillips electronics N.V. of

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P.O. Box 220 5609 AE Eindhoven Netherlands through registered trademark No.19131; the said goods having a total value of Ksh.23,851,440/=.

On the 2nd day of June 2011 (what has been referred to in these proceedings as) a raid was conducted at a location along Nanyuki road at a go down going by the name Backmart Electronic Merchant Ltd. belonging to the accused in this case.

This raid was conducted by officers from the Kenya Anti-Counterfeit Agency who were in the company of some police officers and representative of a company going by the name of International Research corporate Kenya Ltd. (ICR)

Prior to the raid, a complaint had been lodged with the Anti-Counterfeit Agency on the 27th day of May 2011.

During the raid an assortment of electrical fittings as enumerated in the charge sheet were carted away and taken to the Anti-Counterfeit Agency stores after they were said to be counterfeited goods.

What clearly transpired from the evidence before the court is that the main movers in this case were the officers from I.C.R. and the role played by the police and the Anti-Counterfeit Agency was largely peripheral.

PW 5 (the Investigating officer) PC David Muthuri of Industrial Area's role as stated by him was to receive the statements of the witnesses and

samples of the seized goods together with the inventory and later formally charging the accused.

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This case is therefore anchored on the evidence of one Liam Johns who holds himself out as an expert from Phillips company. He told the court that he is based in Cyprus - Europe and works with International Corporate Research as Managing Director. It is he who had made a complaint on behalf of Phillips with the Anti-Counterfeit Agency alleging that they suspect that there were counterfeit goods inside a warehouse at Industrial area and that the owner of intellectual property rights was Phillips electronics and he was their authorized representative. He further testified that he lodged the complaint on 27.5.2011 and made a payment of Ksh.10,000/= and was issued with a receipt No.8230944 (exh. No.3).

He further told the court that he had a power of attorney empowering him to lodge a complaint - dated 13.5.2011 and issued in Netherlands by Phillips (exh. no.4). He also produced a second Power of Attorney also dated 13.5.2011 bearing a Kenyan address and the nominee being Industrial Corporate Research. It was conceded that one of them (the letter) was backdated to coincide and conform with the original and the necessary stamp duty was paid. He also swore an affidavit in support of his complaint. He also produced a certificate from KIRPI indicating that Phillips is registered trademark in Kenya.

It is his evidence that on the material day with the assistance of officers from Anti-Counterfeit Agency and police they visited the go down in question and seized the items mentioned in the charge sheet and make an inventory to that effect which was signed by the parties. The items were loaded onto three trucks and transported to the Industrial area police station and later to Anti-Counterfeit Agency Headquarters where they were later stored.

Upon examining the items seized at the Go down belonging to the accused in respect of the 2 feet fluorescent fittings he found the labeling not straight the colour was green not blue. It was not firm or securely fixed hence the noise it was making upon shaking with the hand. There was also a cello tape placed to secure the packaging. It was his contention that it should have been machine pressed but not by hand. That it shows that it is made in Holland but Phillips no longer manufactures such items in Holland but does so in Thailand, Poland and Indonesia. Also the officer and the Phillips logo on the fittings were not produced by high quality machine under quality control.

Inside the packaging there is a blue starter upon checking the quality it was found to be inferior. The quality of the printing was also found to be inferior.

As for the 4 feet fitting, it is identical to the 2 feet fitting. It was contended by the witness that the labeling on the box was suspect and therefore counterfeit. The security label was also counterfeit. It did not

contain the security code. The quality of the wrapping was inadequate. The labeling of the brand Phillips was said to be fading and not straight. The wordings were said to be upside down. That there was one starter on the fake one.

On the energy saving bulbs, the printing was said to be fading and not in straight line. It did not bear security labeling and codes. On the wattage, the original reads 8 watts whereas the fake one reads eleven watts. The words Phillips are also not on a straight line. That the original has many holes whereas the fake one has faded ones. The original with six holes inside the bulb on the fake one consisting of only three.

It was conceded that the emergency Bazooka product was not a Phillips one.

In his defence the accused told the court that he had been dealing with electrical goods since 1987 and Phillips products for over ten years. It was further his evidence that they have been sourcing the goods from both the local and international market and that he was able to tell which goods were genuine and which were not.

It was his contention that Phillips company has been changing its products from time to time, from metal holders to plastic ones. The packaging also has not been static changing from time to time. There have also been an introduction of new products like energy saving bulbs, solar energy saving bulbs. Initially the products were made from Holland

and France but now they are manufactured from various countries. It was his contention that the goods found in his premises were genuine ones and what the expert (P.W.2) could say about them was only that they appeared suspicious.

Further upon request to be supplied with the genuine ones by Anti-Counterfeit Agency they were referred to Nabico agencies. They went and bought products from the said Nabico agencies. The goods were shown to the expert, they were not different from the ones found in the go down off the accused and what the expert could say was that investigations should also be carried on Nabico Stores.

He told the court that in respect of the items found in his go down there is a distinct difference between a single tube-fitting and double tube fitting. A double tube fitting has two starters which are not mounted on the fitting. The single tube fitting does not make noise because the starter is mounted on the fitting. The twin tube fitting carries a different colour from the signal one for purposes of differentiation. It is his contention that the report could not differentiate those basic aspects of the products and the experts training of two days was put into focus. The accused further maintains that there was nothing to stop them from importing goods from outside the country or from sourcing them locally and they produced receipts to that effect and that the accused had not been given the opportunity of explaining how he had sourced the products.

I have gone through the written submissions by counsel for defence and I do concur with his contentions that as at the time the Anti-Counterfeit officers went for raid the complainants had not provided any samples of the genuine goods and the alleged counterfeit goods and that no samples had been provided to the prosecution witnesses P.W.1, P.W.3, P.W.4 at the time of giving evidence in court.

Secondly that the complain form exhibit no.12 referred to the infringement of a trade mark but not counterfeit goods.

Thirdly that at the time of the raid the agency did not have knowledge of the place the raid was to be carried out and further that the complainant was in total control of the security, labour and the details of the raid.

As argued earlier on, it was the P.C.R. officers/personnel who appeared to be on tip of things and the role of the Agency was Secondary or peripheral and they had no means of verifying the information given to them.

Counsel contends that the rules enacted under S.37 of the Anti-counterfeit Act were not complied with. I do agree, especially on the issue of power of Attorney. It is a fact that as at the time of the raid the kipper of Attorney was not properly attested to having been attested on 9/6/2011 after the raid was conducted on 2.6.2011 and the stamp duty having also been paid on 9.8.2011 when the matter was already before the court.

It is also the evidence of P.W.1 the Depot manager that no samples were applied for or released to the complainant for comparison or verification.

Further that at the time of the hearing of the case P.W.1 could not tell the difference between the genuine and counterfeit products relying wholly on the expertise of P.W.2.

The defense has attacked the expertise of P.W.2 thus;

He became an expert on Philips products on the 11th day of May 2011.

He was trained in Netherlands for only two days. He had never visited any factory where the Philips products are manufactured.

That he did not seem to have sufficient knowledge of Phillips products as during cross-examination he would answer to questions to the effect that in the event of more clarification ask Phillips.

It was also the defence contention that the "expert" was working in the country by dint of carrying out raids the completing forms without a valid work permit.

That he did not produce samples of the genuine products to the Agency and to the court and only came with 2 feet tube, 4 feet tube fitting and 8 watts energy saving bulb.

It is further the defence contention that the mark Philips is registered for the electrical goods but not for the packaging and that the packaging may differ depending on;

- (a) the factory and the country of origin

- (b) adoption of charging technology
 - (c) improvement on the manufacturing machines
 - (d) the market it is intended
 - (e) rebranding or improvement of the image and packaging
- and lastly the need to contract counterfeiters.

That there was no evidence on counterfeiting on the Bazookas is not in dispute and so was with the Chokes.

S.32(a) of the Anti-Counterfeit Act provides; it shall be an offence for any person to ;

- (a) have in his possession or control in the course of trade, any counterfeit goods.

Subsection 2 defines counterfeiting as taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya or elsewhere in respect of protected goods.

- (b) the manufacturer, production, packaging, repackaging, labeling or elsewhere in Kenya of any goods where by these protected goods are imitated in such a manner and to such a degree that those other goods are identical or substantially similar copies of protected goods"

Counsel for the defence did argue that the definition above stated may amount to infringement of a trade mark and that the complaint and power of Attorney refer to infringement of a trade mark and that this is governed by the Trade Mark Act Cap 506 Laws of Kenya.

Further in matters pertaining to Trade Mark Act S.2 defines the court as the High Court and hence this court therefore has no jurisdiction to entertain this matter. I do not wish to split hairs on the matter of counterfeit and infringement of a Trade Mark suffice to say that the Agency in its wisdom decided to bring a charge under the Anti-Counterfeit Act instead of the Trade Mark Act though the complaint may have been that of infringement of a Trade Mark.

Under the Anti-Counterfeit Act this court has jurisdiction on the issue of P.W.2's expertise.

I do agree with the defence that his expertise was largely wanting in scope and experience. His educational background is such that he only reached Diploma Level and in a field unrelated to engineering. He told the court that he became a Philips products expert on 11th May, 2011 barely two weeks before the raid on the accused's premises.

The reason why he was being referred to as expert is that he underwent training in Netherlands for two days only and had never visited any factory where the Philips products are made.

During evidence in chief and in particular cross-examination he did not exhibit proper articulation of issues and in some instances did answer that a clarification could be sought from Phillips Netherlands. Yet this is the man the prosecution solely relied on proving that the goods seized were indeed counterfeit ones. He started jumbling from the beginning starting with his working in the country without a valid work

permit, questionable Power of Attorney, failure to comply with the rules as envisaged under S.37 of the Act and in particular failure to produce the samples of the genuine products to the Agency and to the court.

It is the prosecution case that the genuine products from Phillips are to be found at an outlet called Nabico Enterprises Ltd. Who are the sole authorized dealers.

The defence duly went and purchased several products, produced them in court plus their receipts and the expert was confronted with the said products which resemble those that had been seized from the accused go down and his only answer was that it seemed that Nabico was also dealing with counterfeit products and he would have them investigated.

So if the basis of the prosecution case is that genuine products can only be found at Nabico Enterprises then how come that the products bought from Nabico can also be labeled as suspiciously counterfeit by the same expert from where can Kenyans get the genuine Phillips products?

I find that this is a case wrought with myriad and serious contradictions which go to the core of the matter. The case has not been proved beyond reasonable doubt and the accused person is found not guilty on the charge of possession of counterfeit goods c/s 32(a) of the Anti-Counterfeit Act and is acquitted under s.215 of the Criminal Procedure Code. He is set at liberty, unless otherwise lawfully held.

Judgment read and delivered this 18th day of November, 2011 in the presence of the prosecution and the defence Mr. Mbaabu.

M.M. MUYA

C.M.

Mr. Mbaabu for the accused

We pray that the goods seized be released forthwith and the cash bail deposited.

M.M. MUYA

C.M.

Prosecutor - no objection

Court - Cash bail to be released to the depositor and the seized goods to the Accused.

M.M. MUYA

C.M.