

REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT  
AT MOMBASA  
CRIMINAL CASE NO. 2239 OF 2011

REPUBLIC ..... PROSECUTOR

VERSUS

1. GEORAM SUPPLIER

2. GEORGE NDUNGU GITU ..... ACCUSED

JUDGEMENT

The accused persons herein were charged of the offence of importing into Kenya goods contrary to Section 32 (f) as read together with Section 2 and 35(1) of the Anti Counterfeit Act 2008 Laws of Kenya. That on the 23rd day of may 2011 at Kilindini Port Mombasa with others not before court being a limited Company and Director respectively did import into Kenya 11,243 pieces of counterfeit batten light 4 ft tube fittings which were contained in Container No. PCIU 819889-1 bearing Phillips Trade Mark which substantially similar and likely to deceive consumers in relation to the goods in respect of which the trade mark PHILLIPS is registered as Trade Mark Number 19131 without the Authority of Koninklyke Philips Electronics N.V the owners of the trade mark. Goods valued at Kshs 7,870,100.00/= And in Count II imported 2ft tubes fitting valued at Kshs 5,863,100.00 under similar circumstances. The prosecuting Agency lined up five witnesses in a bid to prove its case.

PW1 one Liam Scott Johns testified that he works with an investigating company that investigates counterfeit products on behalf of companies like Nokia, HP, Phillips and others. Stating that helps a product experts, he produced certificate of training as exhibit 1 to show he is trained in counterfeit goods. That he was acting on letter of instructions dated 20/5/2011 to Weights & Measures department to stop a container PCIU 819889 - 1 suspected of carrying counterfeit goods. On the 23/5/2013 inspection was conducted by weights and Measures and PW1 and the contents confirmed to be counterfeit in PW1's opinion and they were seized and held a certificate of Seizure was therefore held and prepared - MFI 3. PW2 signed the seizure form together with the other participants i.e. Michael Onyango from Weights and Measures, Joshua Osani of CID and Alias Rugut. PW3 confirmed there was a rep from Georam Supplies during the initial inspection and seizure.

PW1 attested to the fact that the goods were produced in Holland where Phillips does not produce lighting products.

He produced certificate of trade mark No. Phillips 19131 dated 11/2/1972 Exhibit 4 in the names **KONINKLIJKE PHILIPS ELECTRONICS NV - NETHERLANDS**. PW1 then launched a formal complaint at the A.C.A vide from a.c.a.8 dated 26/5/2013 Exhibit 5.

I.C.R Kenya Limited was the agent of Phillips in Kenya with authority to import consignments.

The Complaint was accompanied with letter of indemnity and affidavit by Liam Johns Exhibit 6 & 7.

PW1 had Power of Attorney to deal with Exhibit 8 granted at the Netherlands the Hague and Certified by Secretary in Charge of legal affairs at the Netherlands Kenyan Embassy Managing Director I.C.R confirms Liam as the Regional Director for Africa ICR Exhibit 10.

PW1 then testified as to how he took samples of the consignment 7 prepared product analysis report Exhibit 11.

He demonstrated a sample of the products against what he referred to as the original batten MFI Exbt 13. The sample was marked Exbt 12 printed out features like country of origin, logo, packaging, security label, product code.

The PW1 then concluded by saying the counterfeit is of poor quality and substandard. That Phillips puts security labels on products headed to Asia markets and not Europe and Africa as a policy.

Inspection report was produced as Exbt 15 and the invoice addressed to Georam Supplies the Importer from the Shinde Metals & Minerals was produced as Exhibit 16. After the matter was handed to the A.C.A the PW1, the Agency requested for samples for analysis and A Philips Product Analysis Report dated 4/4/2013 was produced Exbt 18.

On cross examination PW1 admitted his level of education or college where he studied Finance, Business & Economics. The product

expertise and the Certificate produced as Exbt 1 was admittedly conducted in anticipation of the seizure. PW1 is employed by ICR Cypress and I was in Kenya for that specific assignment but did not have express instructions from Phillips. He admitted of not having valid work permit to work in Kenya. Despite having been an employee of I.C.R Cypress he signed documents in Kenya on behalf of ICR Kenya & Phillips by extension. He admitted the samples requested vide Exbt 18 were A.C.A at Nairobi and that the samples were from A.C.A's custody not from the seized containers directly and that the analysis was done at Cypress. In Re-examination he testified that he was based at I.C.R Upperhill Office at the time and he was authorized to act for ICR in this assignment and was in Kenya for less than 3 years.

PW2 an inspector at the ACA gazetted in 2010 ho got information of seizure of a container suspected to be carrying counterfeit goods from Weights & Measures Mombasa; were sent to Mombasa with Osman were upon formal complaint by ACR Kenya. At the Console base container PCIU 819889 - 1 was shown to them by KRA Agents and a seizure form MFI 19 was issued. No inspection was done on that date but agreed & container handed to A.C.A Exbt 20.

.. after the container was handed to the ACA PW2 and the other officers did not inspect the ..... of the container but relied on the

inventory shown import documents/declarations. PW2 investigated and got details of the 1st ACC Company where the 2nd ACC & another were Directors registered on the 17/1/2011. He said 100% verification was conducted on the container on the 25.8.2011 and an inventory made (Exbt 24) witnessed by the PW2, the 2nd ACC, Console Base officials before A.C.A took samples Yusuff the Investigating Officer and Abdikadir the Depot Manager signed.

PW3 the Assistant Registrar confirmed the copy or records of the 1st accused company and ICR Kenya Limited.

PW4 Yussuf colleague of PW2 at the Inspectorate as Weights & Measures Inspector stated that on 23/5/2011 received information and travelled to Mombasa to inspect container No. PCIU 819889-1 and the seized it, put a padlock in it and issued seizure from Exbt 19 to the Manager CFS. They issued the Import/Console documents to verify the contents as they did not open the container. He further stated that upon own verification prepared inventory MFI 24 4 ft - 11,243 pieces and 2 ft 9772 pieces. He said efforts to procure original import documents failed as they were with the importer (the accused) He confirmed that they took samples and forwarded the same to ICR. On verification that the samples were not directly collected from the container by ICR or its officials. They then obtained search warrants for Georam, the Importer and proceeded to arrest the owner.....

be called an investigative process. Upon visiting the site the court said the container PCIU 819889 - 1 samples of the 4 ft tubes and 2 ft tubes shown. Container produced as Exbt 30, 4 ft fittings MFI - 34 and 2 ft fittings MFI 32. He relied on supplied security features but the same was not produced in court. He confirmed the inability to locate the other Director. He said he had own suspicion the goods were counterfeit and so subjected it for further analysis.

He relied on brief by PW1. He confirmed there was no 100% verification as they counted boxes and multiplied with 14 number in each box. On cross examination he admitted the 1st visit they did not open the container. He confirmed the letters from the Executive Director DMFI - 1 & DMFI - 2.

PW5 Another expert in products appointed by Philips on the 3.5.2013 Exbt 35 he claimed to be duly trained in counterfeit products. By Philips Netherlands. He produced training certificates MFI - 37, 38, 39, 40 and 41 the report of his analysis. He said original products are manufactured in Thailand wherein counterfeit are Holland. He went through the features of the product that he claimed were differentiating original from counterfeit.

On cross examination he admitted his appointment by Phillip dated 3/5/2013 was solely for this matter. He also admitted he is a dealer in lighting products in competition with the 1st accused in Philips.

and other lighting products. He took the court through the features and produced his report.

The prosecution closed its case and the accused was put on his defence and he opted to give unsworn statement and testified on how he had got his goods returned vide DMFI - 1 from Director of ACA which decision was later reversed. He imposed foul play and consideration of intravenous factors in deciding to prosecute him. He questioned the competence of PW1 in authoritatively verifying the authenticity of otherwise of the products and his legal status to work in Kenya when ICR Kenya Headquarters had its own employees. He also further questioned the motive behind ACA not availing any expert from Philips itself of Philip manufacturing country to ascertain the authenticity of the products and instead opted to avail PW1 from Cypress. In relation to PW2 the accused wondered why he did not open and verify the contents of the container at seizure and why he ignored together with the prosecuting ACA the letters from CEO ACA to release the goods which letters PW4 admitted knowing about. That PW5 was a business competitor and only out to settle business scores that PW5's appointment was malicious as he was brought in as an afterthought was long after the case was registered. He questioned the motive behind ACA conducting verification in exclusion of other vital stakeholders like KEBS, W/M and KRA.

The container had only ACA seal, he contended and added that no officer from Weights & Measures was ever called to testify, non from

KEBS to testify on quality nor was any called from KRA/Console base because, he alleged, they had received authorization from ACA to release the good as they were authentic products.

He concluded that the instant prosecution was actually a malicious afterthought sanctioned by the prosecutor and PW2 in cahoots with PW4 for selfish personal gains.

Submissions were made by both sides in support of their case and having considered both the submissions and the evidence of the prosecution and the defence I commence by stating that the defence opted to give unsworn statement in defence. It ..... law that unsworn statement is not evidence 'Senso Stricto' but holds a persuasive authority to the jury. It can very well be considered against the sworn evidence before the court in arriving at first analysis of the facts and issues for determination. Having reminded myself that much I proceed to the issues for determination before me.

The Sallent issues for determination in my considered opinion are;

1. Whether or not the accused person actually imported goods in the nature of Batten lightings fittings in container PCUI 819889-1 into Kenya on the 23.5.2011.
2. Whether the imported good, if any were counterfeit in terms of Section 32 (f) as read with Section 2 and 35(1) of the Anti



Counterfeit Act 2008 Laws of Kenya.

3. And whether the accused are therefore criminally liable as charged.

On the 1st issue whether or not the accused herein imported into Kenya goods in the nature of Burton Light fittings in container PCIU 819889-1 on the 23.5.2011, I will start by saying that its common ground that the importer of the container PCIU 819889-1 allegedly containing Burton Light fittings is Georam Supplies Limited. It is not controverted by the defence both in cross examination or in defence that the 1st accused person Georam Supplies did indeed import into Kenya Container No. PCIU 819889-1 into Kenya and the contents as declared on the exhibit 15; are Burton light fittings. There clear evidence was not controverted and or displaced by the defence.

PW3 the officer from the Registrar of Companies produced Exhibits 27 the Certificate of Incorporation of the 1st accused Company Georam Supplies Limited and further produced copy of records of Directors of the 1st accused company.

The 2nd accused is listed as Director of the 1st accused person together with another (Ref. To MFI 21 Exhibit 21). The 2nd Director was Steve Kitoto Mwandawiro of Box 7806 - 00200 Nairobi with 500 shares. Certified copy of Certificate of Incorporation was also produced as Exhibit 27. Exhibit 29 confirmed details of Exhibit 27 has not changed. It is therefore properly and beyond any doubts

established that the 1st and 2nd accused herein did indeed import into Kenya container Ref. PCIU 819889-1 which contained according to exhibit 15, Burton light fittings.

On the issue of whether or not the said imported goods were counterfeit in terms of Sections 32(f) as read with Section 35(1) of the Anti Counterfeit Act 2008 I proceed by looking at what Constitutes counterfeiting and/or counterfeit goods.

Reference to Section (2) of the A.C.A counterfeiting refers to the abuse of IP rights. IP owners have own specific and distinct features of security protected under the law that distinguish their genuine products from could be counterfeit goods otherwise manufacturers without the said distinct features. Suffice to say that for a product to be labeled genuine product, it must as of necessity contain these security features and any other product without their features will be termed at counterfeit unless sanctioned by IP owner. That is to say for a product to be a genuine product it must then meet the IP holder's standards of manufacturing/producing.

Counterfeiting cases are premised on opinion evidence and the evidence is believed to be highly persuasive to the court as to be conclusive prove of the fact of counterfeiting.

However its work noting at this stage that opinion evidence is not binding on the court but merely persuasive and hiding in the court's findings. The court has to be satisfied of especially expert opinions.

Now in effort to establish and prove the fact that the goods imported into Kenya by the accused persons were counterfeit, the prosecution called 2 expert witnesses to wit PW1 and PW5. The general rule under Section 48 of the evidence Act as regards expert opinions, the superior court in the case of:

**Amosam Builders Developers Limited Versus Gachie & 2 others held that;**

"Section 48 of the evidence Act (Cap 80) made provisions for evidence of expert witnesses as admissible in criminal trials. However as general rule the evidence was not binding on the court. The court had to consider it along with other evidence and form its own opinion on the matter in issue. The court was at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before court. This was the Holding in C. D. Desouza Vs BR. Sharma (1953) 26 KLR 41 at P.42.

**Who are experts?**

The court in answer hereof obiter stated that in Vander Donckt Vs Tuelluson (1849) 8 CB 12 Maule J said;

*"All persons, I think who practice a business or profession which requires them to possess a certain knowledge of the*

*matter in hand are experts so far from experience requires...."*

By ..... of Section 48 of the evidence Act, Experts are persons specially skilled in such held and in this case the science of Burton lights products, manufacture and production.

PW1 produced exhibits 1 as certificate of training and other documents. Power of Attorney (Exbt8) and Certificate from the Kenyan Embassy and letter from ICR. As regards Exhibit 1 and the issue as to whether therefore PW1 qualifies to be an expert witness as contemplated by Section 48 of the evidence Act; its worth noting that apart from the training Certificate signed by an unknown person in the Netherlands in the same month as the seizure and registration of the instant case, no other qualification and of skills document was presented to the court to show the 'special skills' allegedly possesses by the .... in the "science" of Burton light fittings produced by Philips. The PW1 did not establish any links or any valuable links of his Economics and Business College qualifications with the special Philips skills of production of Burton light fittings. He did not establish any involvement in and/or knowledge of the production processes and attending features thereof of the said Philips products nothing could have been more easier than an employee of Philips or special agent thereof showing special involvement employment or skills in the Science employed by Philips in the production of the Burton light fittings.

To my considered mind and ISO hold PW1 does not qualify as an expert contemplated under Section 48 of the evidence Act to give admissible opinion in terms of Section 48(2) of the Evidence Act.

That being as it may, PW1 referred to security features allegedly on genuine Philips products basis of which he compared the products with the ones in the container No. PCIU 819889 - 1 in samples; he did not establish by way of evidence, the source of his original Philips Burton light product his basis of the knowledge of the special security features allegedly maintained and kept by Philips nor did he show and confirmation from Philips of the authenticity of the so called Philips products special features. Philips did not furnish the expert (PW1) with written confirmation of ownership and authenticity of the original product produced by PW1 and the security features thereof to enable him form basis of analysis and comparison with the alleged counterfeit products.

PW1 contradicted PW2's testimony on to the countries in which Philips produce its products. PW1 said they are Malaysia and Australia whereas PW5 said its Thailand not Holland. No authentic or otherwise list was produced by Philips showing the actual countries where to produce Burton Light fittings. On the afore-stated reasons alone, I find that PW1's testimony/opinion is unbelievable and so reject its persuasion forthwith. PW5 was appointed allegedly in May

2013 long after the evidence of other witnesses had been taken. Its clearly from the onset, an afterthought and can be squarely described was static to seal loopholes. He is a business person in nairobi dealing with/in Phillips products. He is clearly a business rival to the accused.

That be as it may, he produced exhibits of his testimony in Philips products and his analysis report categorizing the products as counterfeit. He however did not establish special knowledge and possession of the Philips special features. He did not establish the source of the product he referred to as genuine Philips product as either from Philips or not. No written Certificate was produced to that effect. No clear list of authentic security features from Philips was available to show basis and ground on which his analysis is admissible under Section 54 of the Evidence Act. Am not persuaded to authoritatively reach the conclusion that PW1 was under-qualified as he was corroborated with PW5 a business rival who could not establish source of his ground of analysis and comparison can form a formidable opinion to guide the court/persuade it to conclude that the goods in PCIU 819889-1 were actually counterfeit goods. The two have not shown any reasonable link with the IP Holder Philips or specific list of actual authentic security features forming basis of their analysis needless to say, the two are not employees and or proper agents of the IP holder contemplated in the Anti Counterfeit Act. Nothing could have been easier than procuring an expert

involved in the production of Philips products, possessed of current special knowledge/skills in the relevant features of Philips products which features must be authenticated by Philips to come and establish this fact.

ICR Kenya has no specific letter of agency from Philips, at least non on record.

Just on the aforementioned scores of sufficient to say that the opinion evidence upon which such prosecutions are premised has not been placed before this court. Even without reference to PW2, PW3 and PW4. In relation to PW2 and PW4 they are more concerned with the seizure of the goods and the impeding prosecution.

Additionally no efforts from KEBS testified. No official of Weights and Measures were called and yet they were the 1st people to seize the goods.

No person from KRA or Console Base or KPA was called to testify.

Besides the original sample 13, there was no product certificate of authenticity and source of the sample was produced to show the features on the original Philips product.

Products in industries are labeled and produced in Serial numbers/codes as a matter of principle. No product code series/numbers were produced in evidence by PW1 to show when the alleged original products were produced by Philips and in what

product series. And above all no reason why analysis was carried out in Cypress by PW1 and Nairobi by PW5 instead of Philips producing country.

Reference to the persuasive testimony by the accused person in defence, Defence exhibits i.e. letter from the Executive Director and CEO of Anti Counterfeit Agency were; first not communication without prejudice and so can be relied on by the accused and

second, contents demonstrates the position of the Agency in regard the subject matter herein as they remain unrevoked.

The letter dated 14/12/2012 approximately a year and half after the container was seized, the CEO was of the opinion

*"the file relating to the above matter has been reviewed and the evidence therein has been determined to be sufficient to sustain a proper case in court. The loopholes in the case have been brought to the attention of the Complainant who has not been forthcoming with proper explanations and documentations ....."*

The letter continues; "so therefore proceed to have the criminal matter withdrawn and the container released."

There were clearly instructions from the boss to the prosecution Arm of the ACA. Again one ask; Could the accused be talking of these instructions when he says the instant prosecution is an afterthought calculated for selfish interests of the prosecutor and PW2 and 4?



Could it be the reason why no witness of authentic documents were forthcoming from the Philips Netherlands.

A look at the letter dated 17/12/2012 from the same Agency to the PW1's operations Deputy Commissioner Customs signed by one Casper Oluoch for the E. D. may be of help to answer or partly so do, the questions varied by the Dextbt 1 above.

The letter reads; " kindly note that this container has now been released to the owner by the Anti Counterfeit Agency .... kindly allow and facilitate the clearance....." &

All these coupled with the fact that no formal complaint/letter of Complaint was received from Philips besides the one by I.C.R Kenya, and that no witness ever came from Philip Netherlands, it is only logical to conclude upon careful evaluation of the prosecution evidence and the persuasive unsworn statement by the accused in defence, that no sufficient evidence has been tendered to prove that the goods imported into Kenya in Container PCIU 819889-1 were indeed counterfeit goods in terms of Section 32(f) read with Section 2 and 35(1) of the A.C Act 2008.


Consequently as to the 3rd issue as to whether the accused persons are therefore criminally liable as charged I find and hold that the prosecution has failed to prove its case beyond the standard in criminal trials or beyond reasonable doubt to warrant a conviction and any convictions based on the evidence herein will be based on

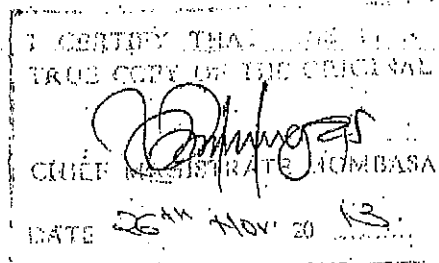
insufficient evidence and therefore unsafe.

I therefore find the accused person not guilty of the offences charged in the two counts of importing goods in to Kenya Contrary to Section 32(f) as read with Section 2 and 35(1) of the Anti Counterfeit Act 2008 and acquit them forthwith under section 215 of the CPC.

The Container PCIU 819889 – 1 produced as exhibit to be released to the importer Georam Supplies Limited.

Orders accordingly.

  
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Hon. G. O. Kimanga  
17/9/2013



My duties include to enter and search any premises or vehicles where counterfeit goods are suspected. I know P.W. 3. She came to our office lodged a complain in the office which was communicated to us. It was a complain of suspected counterfeit Vee Rubber Tyres and Tubes.

I was given the complain together with my colleague Abdikadir, Yussuf and Elina, who was the lead investigation.

On 18/1/11 we went to the premises. We were I and my three aforesaid colleague. We were in company of two officer allocated to us by O.C.P.D. officer:

We went to Tom Mboya Street. The premises where we reached at 1.00 o'clock. We found the business going on as usual. We gave our I.D and introduced ourselves. We were shown accused 2 (identified accused 2) then who introduced himself as the sales manager. We introduced ourselves and our mission i.e. conducting an inspection. We told him to cooperate and allowed us in. He was the sales manager. There were two sales lady. The door was closed even when we got there. The sales window was open and that is where we were communicating through. He locked the closed door with a padlock. He went upstairs and talked on phone. He came back and ignored us.

Elena went to court. Came back with a search warrant.

Accused 1 was then inside the shop upstairs and we had not seen him. He had called Central Police Station, informed police of strangers in his premises. Police came found their colleague and were actually

surprised. The accused opened the door we did not even serve him with the warrant. We did not even need a search warrant.

We talked with accused 2 for long trying to beg him to open.

When they opened, we got in Accused 1 appeared that time. He said he could not open for us when we enquired only. We got in and as it was late we decided to lock the shops. We used our padlocks. These are the one MFI.IIa - c.

We booked the two in the station at about 6.00 p.m.

The following day we went to the shop with both accused. We opened and inspected. Collected some items. This is the inventory I personally took down. It was signed by both accused. We took 46 tubes and 1228 tyres.

There are the Vee King Rubber tubes we took Ref. to MFI; 10. We took them to our office, we did further investigation, we took a sample to Vee-Rubber Corporation. We went via P.W. 3 who had a power of Attorney from Vee Rubber Corporation.

We were told the tyres were genuine only that they were not meant for export. The tubes were found to be counterfeit. We released the tyres back to accused. They were genuine but were not meant for use in Kenya market.

This is a genuine MFI. 17 wrapping for the genuine Vee tyres tubes.

This fake has name Vee King Rubber. The only different is word King put in between Vee and Rubber to confuse the consumer.

The logo for Vee Rubber is copied here. The size is the same. The layout and design are the same. The Vee Rubber tubes are manufactured by Vee Rubber Corporation. We don't know where this Vee King Rubber is manufactured.

The sole Agent of use Rubber Corporation is P.W. 3 She hold a power of Attorney to represent Vee Rubber Corporation rights and interests in Kenya.

She is a director of Cycle Company Limited. I do wish to produce MFI, 10 and MFI, 18 as exhibits 10 and 18 respectively. I also wish to produce padlocks as Pexhibit. MFI, 11(a) - c I do wish to produce the genuine wrapping as Pexhibit 17. I had not known accused before. That is all.

**Cross-Examined by Gachomo:**

A search warrant was enacted at about 4.50 p.m. . Once police officers from Central Police Station accused opened.

The two officers whom we were with identified themselves. I got accused 2 at the shop. I did not ask his address. We asked his names and he told us.

We had surrounded the place and I had no fear that he shall run away. I took down the inventory. Goods are described as Vee King tube suspected to be counterfeit tubes were 46 we got tyres. We took an inventory for tyres but I did not produce same as the case is about tubes, tyres were 1228 as per this inventory.

Only Vee King Rubber tubes confiscated. We did not indicate the word Kings. There MFI. 10 is what we recovered. We never recovered Vee Rubber Tubes. They are the 46 tubes we recovered. They are 46 (counts). They are 46. I am not sure how many were sent to Thailand. We sent the samples for testing via P.W. 3. The information that they are counterfeit came from Vee-Rubber. We do not register at the Agency. The Registration is done by Kenya Bureau of Standard. Its not necessary for an officer from there to come.

We went for a warrant as they refused to open the premises. We thought they were going to cooperate.

That is all.

**Prosecutor In Re-Examination:**

We recovered Vee King Rubber Tubes and Vee tyres. Accused 2 refused to open hence our going for a search warrant. They destructed us from carrying on our business.