

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT MAKADARA**

**PCR CASE NO. 2762 OF 2011**

**REPUBLIC .....PROSECUTOR**

**- VERSUS -**

**FANG JIAWEI.....1ST ACCUSED**

**SAIYILI LI .....2<sup>ND</sup> ACCUSED**

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

Fang Jiawei and Saiyi Li hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> accused respectively are charged with having in possession on the course of trade counterfeit goods contrary to section 32(2) as read with S. 35(1) of the Anti Counterfeit Act 2008 no. 13 Laws of Kenya.

The particulars are that on the 23<sup>rd</sup> day of September 2011 at about 2.00p.m.on the second floor of Sky Mall house along Luthuli Avenue in Nairobi, did have in their possession in the course of trade counterfeit Nokia Mobile Phones, accessories and spare parts all totaling to 9035 items all of a total value of Ksh.30,914,320. These items illegally wore the trade mark Nokia that is protected by Nokia Corporation under the Kenya Trade Marks Act. Two witnesses testified for the prosecution.

Casper Owino Mark Oluoch Works with Anit-Counterfeit Agency. He testified that sometimes on the 20<sup>th</sup> day of September 2011 a complaint was lodged with the Executive Director of the Anti-Counterfeit Agency as required under s.33(1) of the Anti Counterfeit Act which provides:

*“Any holder of an intellectual property right, his successor in title, licence or*

*Agent may, in respect of any protected goods where he has reasonable cause  
To suspect that an offence under s.32 has been or is being committed, or is  
Likely to be committed by any person lay a complaint with the Executive  
Director”*

The said complaint was made by one Tobias Van Depol an employee of I.C.R. International corporate research (Cyprus) Ltd., he swore an affidavit (exhibit No.2) produced a power of Attorney donated by Nokia corporation and notarised in Finland on 20.7.2011. the witness also produced receipts of payment for the power of Attorney, the laying of the complaint.

A letter confirming Tobias employment with I.C.R. and signed by one Peter Alcock and a trade certificate signed by the trade mark Registrar.

On the 23<sup>rd</sup> day of September, 2011 while in the company of Tobias the complainant, the police and another Anti-Counterfeit Agency official they proceeded to SkyMall House along Luthuli Avenue. They made their way to second floor where they found a sign “Okia Electronics” they found a man called Kasimu who said that he was a caretaker but he did not have the keys to the premises. After a short while the 2<sup>nd</sup> accused was one of the Directors of Okia Electronics opened for them and they proceeded to inspect the goods. They proceeded to seize mobile phones accessories and stickers all in all totaling 9035. An inventory was signed by the complainant and the accused and the seized goods were moved to the Anti-Counterfeit stores.

Samples were taken so as to determine whether the goods were counterfeit or not. The complainant in the case is Tobias Van Depol who is an employee of I.C.R (Cyprus) and a qualified expert for Nokia. He told the court that he had worked for Nokia for three

and half years. A report had been made by an outlet which had been inspected before that they were sourcing their Nokia products from Okia electronics. He made the complaint while armed with an affidavit sworn on 21/9/2011, a power of Attorney given by Nokia to I.C.R. A verification certificate that he is a qualified [Nokia products officer and a letter of employment by I.C.R. (Cyprus). He is the one that determined the counterfeit Nokia phones and accessories that were seized and samples taken and later produced in court as exhibits. He went through the samples giving reasons why they were not genuine Nokia produces. They had recovered screen covers or face plates at the premises which were being used to rebrand the phones so as to appear as genuine Nokia Phones. These screen covers were made were made of plastic whereas the genuine Nokia ones are made of glass. A check on the phones showed some of them had initials made in China. They did not have five mega fixed camera. They had no auto focus. They had no warranties, no instructor manuals, head phones were not branded Nokia, the batteries were not fro Nokia products. Some of the boxes were not branded Nokia. Some showed different brands of phones but upon opening it, placed inside, were found phones with the Nokia brand.

Other phones though showing Nokia brand had batteries for CCIT A brand of phones made in China. In his defence the 1<sup>st</sup> accused testified that he works for Okia electronics company together with the 2<sup>nd</sup> accused who is his brother and that they import Okia phones from China and sell them at Sky Mall Luthuli Avenue. He further told the court that on the material day police went for him at his house and took him to the shop where they proceeded to confiscate goods from therein. He further denied the allegation that he was present during the inspection as he had been placed in a different room. After

seizing the goods they were taken to police station and did not know where the goods were taken. He denied stocking Nokia Products. He further stated that he signed the inventory without the addendum of some 734 items. He alluded to turf wars between their company and others they had sold goods on credit as the source of their misery. His co-accused corroborated his evidence in material particulars and so did their manager one Kassim Kombo.

There are several issues for determination by this court. The first one relates to Nokia trade mark. This is an integral requirement under the Act and indeed the particulars of the charge itself attest to this by stating that "these items illegally bore the trade mark 'Nokia' that is protected by Nokia Corporation under the Kenya trade marks Act.

The prosecution did attempt to produce a certificate of Registration of the Nokia trade mark but the document itself had the warning that it was not admissible in a court of law. Ultimately the court had no option but to reflect it.

It was in evidence that the registration had expired sometimes in the year 2007 and evidence of renewal of the registration was not satisfactory.

The prosecution was required to prove the existence of a Nokia trade mark protected by Nokia Corporation under the trade marks Act. This I find has not been accomplished.

Under Regulation 13(2) (2) a complainant is required to execute an indemnity. It proves an intellectual property right owner as his agent who wishes to lay a complainant. The complaint shall be accompanied by an indemnity in form A.C.A 9 signed by the complainant indemnifying the agency from any claim for wrongful seizure removal or detention of alleged counterfeit goods.

The indemnity allegedly signed by Nokia Corporation was not as required under A.C.A. 9 but under A.C.A. 8 which is a completely watered down version and which does not serve its intended purpose. This was done despite the wording of A.C.A.9 which relates to indemnity and which provides; no wording to be changed or altered in this indemnity.

Tobias Van Depol (P.W.2) acted as an agent of Nokia Corporation in this case. He is the one who swore the affidavit. He is the one who signed the indemnity he was the Nokia expert. He alleged that he was doing these acts in accordance to a power of attorney donated to him. Was that power of attorney expressly or impliedly granted to him? A perusal of the document shows that Nokia Corporation gave a power of Attorney to a company called I.C.R. Kenya Limited. The witness told the court that he is employed by I.C.R. Cyprus Limited. The nexus between I.E. Kenya Limited and I.C.R. Cyprus Limited is not clearly established. He is not an employee of I.C.R. Kenya Limited the donee of the power of attorney. So which power of attorney was he exercising? I find none as he was no an employee of I.C.R. Kenya Limited and no power of attorney had been granted to him as a person.

P.w.2 according to his evidence in chief is a British Citizen employed by I.C.R. Cyprus Limited and tasked to lead operations in Africa as a director. He testified in court of the role he played in the present case and provides other operations. He concedes that he has no work permit to enable him work in Kenya yet the role he played in this case and others that were not taken to count clearly shows that the man has been working in Kenya but has been doing so without the necessary legal documents/requirements which renders his work illegal.

The way the goods were seized is put to question. The team of Anti-Counterfeit officials and police allegedly went to the premises at about 10.00a.m. and left at 5.00p.m. It is in evidence that the 1<sup>st</sup> accused signed a blank inventory of the seized goods form. The goods were inspected in the absence of the accused persons though they were in the same premises but detained in a separate room. The goods were also transported from their premises to Anti-Counterfeit premises in their absence. Exhibit 40 which is the inventory was clearly tampered with by placing an addendum which was not signed by the accused persons. The accused persons were not informed of the alterations. This inventory was also prepared at night 8.30p.m. but not as indicated in the document itself which reads 2.30p.m.

S.25(1)(a) and (b) of the Act and Regulation 8 of the Regulations are clear that an inspector has to prepare an inventory of the seized goods from A.C.A 2 in quadruplicate. The person from whom the goods are seized has to check the inventory for correctness, then the inspector shall cause that persons to sign a certificate and each copy of the inventory and to furnish the suspect with a copy.

It is apparent that this legal requirement was not followed. In the present case, the inventory of seized goods (exhibit 40) which was produced in court by the inspector is materially different from the one which he supplied the accused persons.

A reading of the charge shows that the accused persons have been charged in their individual capacities. The seized goods were found in the premises of Okia electrical Limited, which is a limited liability company as can be deduced from its heading. It is in evidence that the two accused persons are its directors. The charge does not include the company itself which I find to be irregular. I find this case to be riddled with numerous

inconsistencies and irregularities as enumerated supra. The prosecution has not proved its case beyond reasonable doubt and the accused persons are found not guilty of the charges facing them c/s 32(a) as read with s.35(1) of the Anti-counterfeit Act 2008 and they are acquitted under s.215 of the Criminal Procedure Code. They are set at liberty unless otherwise lawfully held.

Judgment read and delivered in open court this 9<sup>th</sup> day of March 2012 in the presence of the prosecution and the defence Mr. Ongade for the accused.

M.M. MUYA

C.M.

Ongade – I apply for release of passports and cashbail. I also apply for certified copies of the proceedings and judgment. As regards the goods themselves there is a report that the goods that were stored have been tampered with by filtering while on their way to the market. On 10.2.12 the accused purchased phones Okia C61 and CCITC17 which are goods that are part of the goods seized. They are purchased at an outlet at Luthuli Avenue. We have evidence of cash sale purchases.

The accused persons reported this matter to Central police station and the complainant was booked as OB 73/10/2/2012. Although no charges has been pressed as that we shall be seeking the courts directions with regard to the release of the goods we pray for the furnishing of an independent official. I also wish to specifically make an application that the goods held by the Agency be released to the accused persons.

Prosecutor – We are also requesting for certified copies of the said proceeding as they are pending appeal we pray that the goods not be released. We are not sure where the alleged goods were sold if at all.

Mr. Ongade – we oppose for the application for stay. The prosecution is not automatic of appeal. They can only appeal on matters of law. There is no good reason for stay. An application of that nature cannot be made orally. We oppose the application.

M.M. MUYA

C.M.

Certified copies of the proceedings and judgment of the court to be furnished to the defence and the prosecution cashbail to be released to the depositors. Exhibits to e released to the accused persons. Exhibits to be released to the accused persons after expiry of appeal window of 14 days from today.

M.M. MUYA

C.M.