

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KITALE

CRIMINAL CASE NUMBER 3269 OF 2014

REPUBLIC

VERSUS

PETER MWANGI.....ACCUSED

JUDGEMENT

- 1) The accused person is charged with having in possession in the course of trade counterfeit goods contrary to section 32(a) as read with section 35(1)(a) of the Anti-counterfeit Act 2008, the particulars being that on the 24th of May 2014, trading as Digital Communication located at Lodwar bus stage in Kitale town within Trans Nzoia County, he was found in possession of 12 mobile phones all valued at Ksh. 220,000 calculated to be taken as Samsung mobile phones which are protected under trade mark number 53074 owned by Samsung Electronics Company Limited of the republic of Korea.
- 2) The accused person denied the offence and in its endeavor to prove the charges the prosecution called four witnesses. In defence the accused person gave a

sworn statement and did not call any witness. The accused person was represented by learned counsel; Mr. Wanyama.

3) **Elina Mnari** (PW1) who was an inspector with the anti-counterfeit agency told the court that on 22/5/14 together with her colleague Inspector Sarich(PW4), they were assigned a case to investigate after a complaint was lodged by Samsung electronics company about some traders in Kitale town who were dealing in mobile phones disguised as Samsung brands thereby infringing on the Samsung trademark no. 53074. It was her evidence that on 23/5/14, they travelled to Kitale town and together with two police officers and a representative from Samsung company(PW3), they proceeded to the shops suspected in selling the counterfeit products. She told the court that since they were investigating several shops, they split up and her colleague Sarich went to Digital communication shop owned by the accused person herein wherein the 12 counterfeit mobile phones were seized and accused person arrested. She identified the 12 mobile phones seized from the accused persons shop (P/Exhibits 3,4,5,6,7,8,9,10,11,12, 13 and 14). She identified some of the features they used to distinguish the counterfeit phones since some only had a sticker with the names Samsung yet in genuine Samsung phones the name is engraved, others had the Samsung sticker on the cover yet inside they had different brand names such as Sembom, Ilitel and chief hero. She concluded

that the mobile phones seized from the accused person were counterfeit and meant to cheat the customers and also deny the owners of the property rights from benefiting from their hard work.

On cross examination she conceded that she had not gone to Digital communication shop and she was not present when the phones were seized. She also confirmed that she did not know where the accused person was arrested since she first met him at their vehicle.

4) **Samuel Githua Mbugua** (PW2) was a legal counsel working with Samsung Electronics Company. It was his evidence that trademark number 53074 in respect to the name Samsung was registered on 22/5/2002 and expired on 22/05/2022, he produced the certificate as P/Exhibit 22. He told the court that Samsung East Africa Company Ltd was a subsidiary of Samsung Electronics Company Korea which had given it the power of attorney to launch any civil or criminal proceedings on its behalf. He produced the power of attorney as P/Exhibit 20. He clarified that his predecessor one Jeff Kinati was the one who had lodged the complaint with the anti-counterfeit agency. He confirmed that in laying a complaint, several documents are issued being the indemnity form, affidavit, certificate of legal proceedings and a lay complain form. He produced the said documents on behalf of his predecessor whom he confirmed had already left the company as P/Exhibits 17, 18, 19 and 21.

On cross examination he confirmed that the power of attorney had not been notarized. He also confirmed that he did not have any document which proved that a company known as Samsung Electronics Company Korea existed. He also conceded that the futures of the Samsung phone would not be found in P/Exhibit 22(certificate to use in legal proceedings) but in an industrial design.

5) **John Paul Macharia (PW3)** was a trade marketing manager working for Samsung Company. It was his evidence that on 24/5/14 he was at Kitale town where he had been accompanied by officials from the anti-counterfeit agency (PW1 and PW4) to inspect shops in Kitale town. He told the court that they went to the bus park area which hosts several mobile phone shops. He testified that they had entered a shop called Digital communications where he inspected the phones on display and identified several phones which were counterfeit which were seized and booked by the anti-counterfeit officers. He went ahead to explain in detail how he identified the counterfeit phones. In regards to P/Exhibit 3, he told the court that it was fake since its model number did not exist in Samsung phones and further that on its screen it was written Ilitel which is not a Samsung model. He also confirmed that when he powered on the said phone it did not display the features of a Samsung phone and further he used a software command by pressing XH1234H and the phone did not respond to that and all these made him conclude it was a counterfeit phone. It was his evidence

that he had subjected the above procedure to all the seized phones and confirmed they were all counterfeit. He produced his analysis report as P/Exhibit 16.

On cross examination he admitted that he had nothing to show he worked for Samsung East Africa Limited. He further conceded that all the features' of the Samsung mobile phones would be found in the industrial design.

6) **Sammy Sarich** (PW4) was an inspector working with the anti-counterfeit agency. He gave similar evidence to PW1. He however confirmed that he was the one who had gone to the digital communications shop where he had found the accused person herein who had identified himself as the shop owner. It was his evidence that they had recovered 12 mobile phones from the said shop which had been identified as counterfeit and they seized the phones and prepared an inventory. He identified the phones seized (P/Exhibits 3,4,5,6,7,8,9,10,11,12, 13 and 14) explaining in detail how they were able to identify the said phones as counterfeit.

On cross examination he confirmed that when they went to Digital communication shop they had found the accused person with another boy but it was the accused who had identified himself as the shop owner. He confirmed that he did not impound a business licence. He however averred that there was a council licence bearing the names of the accused but conceded the same had not

been produced before the court. He also confirmed that one needed a certificate of industrial design to tell the features of genuine Samsung phones and the same had not been produced.

7) In defence the accused person told the court that on the material day, he was called by his friend John Kamau who informed him that there were people in his shop and requested him to go check what was happening. It was his evidence that he went to the said shop where he found Kamau's salesman one Ali together with officers from the anti-counterfeit agency who informed him that they had found counterfeit phones in that shop and they impounded the same. He told the court that he followed the said officers to the police station so that he could know if the impounded phones would be returned but to his surprise he was arrested and booked for being found with counterfeit phones. He denied committing the offence and maintained that the shop in question was not his but it belonged to his friend John Kamau whom he was merely assisting. On cross examination he confirmed that he did not have any evidence showing that Digital Communication shop belonged to John Kamau and not him. He also confirmed that the person found in the shop was Ali who was John's salesman. He denied having been arrested at the shop and averred that he had taken himself to the police station to find out about the fate of the confiscated phones. He however acknowledged that he was the one who had signed the inventory.

8) I have considered the prosecution evidence, defence evidence as well as closing submissions filed by both parties. In my considered view, in order to prove the charges the prosecution needed to establish the following;

a) That the mobile phones seized (P/Exhibit 3 to 14) were counterfeit.

b) That the accused person was the owner of Digital communication shop.

9) On the 1st issue, it was the prosecution evidence that the mobile phones (P/Exhibits 3 to 14) allegedly seized from the accused person were counterfeit. Each of the witnesses explained to the court their basis for terming the said phones as counterfeit. It was the evidence of PW1 that she was able to identify the said mobile phones as counterfeit due to the branding and physical attributes. She told the court that some of the phones had two brand names with a Samsung sticker on the front but a different brand name at the back yet all Samsung phones bear the brand name Samsung only. She further stated that in the said phones the brand name Samsung was affixed using a sticker yet genuine Samsung phones had the brand name engraved. Her evidence was echoed by her colleague who testified as PW4 and gave a similar account on how he was able to identify the said phones as counterfeit. The evidence of PW3 who was the expert witness for the prosecution was aimed at cementing the assertions that indeed the recovered phones were counterfeit. He produced a report (P/Exhibit 16) which gave the basis for terming the phones as counterfeit.

From the said report, it was noted that the mobile phones did not respond to the Samsung software command *#1234#. Secondly the IMEI numbers were inconsistent with the Samsung global IMEI database, lastly the physical look and software interface were said to be inconsistent with the properties of genuine Samsung mobile phones. The said report annexed an analysis carried out on all the phones with a conclusion that they were all counterfeit.

10) On his part, the defence submitted that the prosecution had failed to demonstrate that the 12 mobile phones (P/Exhibits 3 to 14) were indeed counterfeit. Firstly the defence took an issue with the qualifications of PW3 as an expert witness. It was the defence contention that PW3 had only demonstrated that he was qualified in training in product management and training in software yet he did not demonstrate whether he had any expertise in intellectual property. Further the defence averred that PW3 did not demonstrate to the court the science and criteria he used to determine that the mobile phones were counterfeit so that the court could test the accuracy of his opinion and form an independent opinion by applying the criteria to the proven facts. The defence went further to fault PW3 for using what they termed as vague test parameters. The defence maintained that in law the features of protected goods are found in their industrial designs and not a certificate of trademark and since such industrial designs were not produced to demonstrate the unique physical

features that are only found in Samsung phones then it was never proven that the phones were counterfeit.

11) The court needs to determine if the weight of the prosecution evidence and in particular that of its expert witness (PW3) was enough to persuade the court that the mobile phones recovered were counterfeit. I opine not. I say so because; firstly the prosecution did not produce an industrial design which would show the unique features only found in Samsung mobile phones. Both PW3 and PW4 conceded that an industrial design was required to show the salient features of genuine Samsung brands. While it is not in dispute that the brand name Samsung was a protected trademark as evidenced by the certificate to use in legal proceedings (P/Exhibit 22), the said certificate did not provide the unique features of the Samsung brand. From the expert report (P/Exhibit 16) an analysis was done on the said phones and the reports annexed. Having carefully scrutinized the analysis reports, it's stated that the Samsung models which had been counterfeited were Galaxy Y duos, Galaxy mini, Galaxy pocket, Chief Hero, Note 3, Galaxy Ace and Chat 3572. I believe it was imperative for the prosecution to avail "genuine" samples of the aforementioned models for the court to compare and see how they differed with those said to be counterfeit; this was never done. Although I do applaud the efforts made by the prosecution in trying to prove that the mobile phones were counterfeit, I do believe that the

evidence adduced was not sufficient to establish beyond any reasonable doubt that the mobile phones (P/Exhibit 3 to 14) were indeed counterfeit.

12) On the 2nd issue, it was vital for the prosecution to prove that the accused was the owner of Digital communications shop in essence making him the owner of the recovered mobile phones. In defence, the accused person has denied being the owner and/or proprietor of the shop known as Digital communications and instead averred that the same belonged to his friend John Kamau. In his evidence PW4 claimed that there was a council licence for the said shop bearing the names of the accused person, however the said licence was never produced in evidence. Neither was a business licence bearing the names of the accused as the proprietor of Digital communications produced. Section 107(1) of the evidence act CAP 80 Laws of Kenya provides that; *“whoever desires any court to give judgment as to any right or liability dependent on facts which he asserts must prove those facts exist”*. In this regard it was incumbent upon the prosecution to prove that indeed the said shop (Digital communication) belonged to the accused person, no such evidence was tendered. Granted the accused person may not have proven that the said shop belonged to his friend; John Kamau, however in a criminal trial the burden of proof never shifts to the accused person but always remains with the prosecution to prove that the accused committed the offence. The prosecutions

averments that the accused person was the owner of the said Digital communication shop since he was the one who had signed the inventory (P/Exhibit 1) was not convincing. I say so because, below the said signature it's clearly indicated *owner/agent* which means that the accused may have signed the inventory as an agent and not necessarily as the owner. Further the accused person averred that there was a sales boy in the said shop by the names of "Ali". The same was acknowledged by PW4 on cross examination. The prosecution did not deem it fit to record the statement of the said witness who would have assisted them prove whom his employer at Digital communications shop was.

13) Having considered the evidence in its totality, I am not satisfied that the guilt of the accused person was proven beyond any reasonable doubt and as such I believe any conviction would be unsafe. Consequently I find the accused person not guilty and acquit him accordingly pursuant to section 215 of the C.P.C on the charge of having in possession in the course of trade counterfeit goods contrary to section 32(a) as read with section 35(1)(a) of the Anti-counterfeit Act 2008. He shall be set at liberty forthwith unless otherwise lawfully held

Prepared, dated and signed this 18th day of November 2016.


C.N.MUGO

R.MAGISTRATE

I CERTIFY THIS IS A TRUE
COPY OF THE ORIGINAL.


Senior Resident Magistrate - Kitale

Date: 18/11/2016