

CR. No. 878/18

**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT MOMBASA**  
**CRIMINAL CASE NO. 878 OF 2018**

REPUBLIC.....PROSECUTOR

**VERSUS**

ANTHONY KYALO KINGOO.....ACCUSEED

**RULING.**

**THE CHARGE:**

The accused person Anthony Kyalo Kingoo is charged with the offence 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.

*The particulars of the offence are that on 05.03.2018 at around 12:30pm at your shop dubbed "Tony Stores" located along Joe Kadenge Street at Mwembe Tayari area within Mombasa County, you were found having in your possession in the course of trade counterfeit mobile power banks valued at Kshs. 1,806,500.00 branded "**SAMSUNG**", a trade mark owned by Samsung Electronics Co. Limited of the Republic of Korea for goods protected under Trade Mark No. 53074 in accordance with the Trade Marks Act, Cap. 506, Laws of Kenya.*

**THE EVIDENCE:**

From the evidence, it emerged that on 23.02.2018, a member of the public Timothy Maitha Benson purchased a mobile phone power bank from a shop at Mwembe Tayari Mombasa at Kshs. 700.00 but found it not working. On 25.02.2018, he returned it and he was given a replacement upon adding Kshs. 200.00 which also did not work. He returned it and demanded for a refund but the seller declined. He proceeded to the Anti-Counterfeit Agency offices and lodged a complaint to IP. Elina Mrari, a duly appointed Copyright Inspector vide Gazette Notice No. 971 dated 20.08.2010 [PW-5] who recorded his statement. She then formed a team of officers among them IP. Abdi Hussein and CPL. Fondo. The complainant then led them to this shop where they found two men in the shop where several mobile phone accessories of various brands among them Samsung were displayed for sale. They identified themselves and asked the owner of the shop to identify himself which the one he identified as the accused did and surrendered a copy of his ID card [P. Exh. 19]. The other man identified himself as a shop attendant Mr. Charles Musembi Tom who also surrendered a copy of his ID card [P. Exh. 20]. She then demanded for a Single Business Permit issued by the County Government of Mombasa and she was given one for the year 2016 in the name of Mary Mbithe Mbila permitting her to deal in electrical accessories [P. Exh. 21]. She demanded for the contacts of the person named in the permit but was not given. Nonetheless, they entered the shop and upon inspection found several Samsung branded items which they suspected to be counterfeit. She seized Samsung branded power banks. While in the process of preparing an Inventory, this owner collapsed and was rushed to hospital. They continued with the exercise and completed the Inventory dated 05.03.2018 which Charles Musembi Tom signed on behalf of the owner and witnessed by IP. Abdullahi Abdi, IP. Fondo and herself. That in total, they seized 317 Samsung Power Banks. On 09.03.2018, the accused presented himself at the Agency offices where the seized goods were shown to him and he signed the Inventory dated 05.03.2018 [P. Exh. 4] and a copy given to him. She identified the items seized as follows: **Type A – 112 pieces [P. Exh. 3A]; Type B - 149 other pieces [P. Exh. 3B]; Type C – 56 pieces [P. Exh. 3C]**. Thereafter, she took the seized goods to their offices for storage where she handed them over to the Officer in Charge IP. Ibrahim Bulle after putting them in a gunny bag bearing the case number. Then vide a letter dated 03.04.2018, she forwarded the Notice of Seizure to the Trade

Mark owners through their agent the Anti – Illicit Trade Agency. Thereafter, they lodged a formal complaint on behalf of the owner of the trade mark. She then picked 8 pieces as samples and forwarded the same to them by courier [Wells Fargo] [Copy of receipt dated 12.04.2018 MFI – 22] for analysis upon preparation of a Sample Application [P. Exh. 11]. After analysis, she received a report confirming that all the samples were counterfeit.

The other witness who witnessed the seizure Abdilahi Abdi Hussein [PW-1], a duly gazetted Counterfeit Inspector told the court that the items recovered were: **112 Universal Battery Banks in blue package, 146 Universal Battery Banks in purple package and 50 Portable Smart Power Bank in white package.** He gave the total of the items as 308. That after seizure, they carried them to their depot and handed them over to the Depot Manager for safe custody.

Linda Karima Kaai [PW-4], the Legal Officer, Samsung (EA) Ltd told the court that their company had appointed Anti-Illicit Trade Agency Ltd to act on their behalf to counter entry of counterfeit goods into the local market. That they had donated a Power of Attorney to one Peter Mutula in this regard.

On his part, Peter Nzeki Mutula [PW-2] introduced himself as a Brand Protection Consultant working with the Anti-Illicit Trade Agency Ltd which has been duly appointed to act on behalf of Samsung to protect their brands. That he has been trained by Samsung Electronics EA Ltd as a product identification officer and issued with a certificate [P. Exh. 10]. He produced a Trade Mark Registration Certificate No. 40451 Class 9 commencing 26.02.1993 and expiring on 26.02.2024 for the Samsung logo [P. Exh. 8] and No. 53074 commencing 22.05.2002 and expiring on 22.05.2022 for the Samsung name [P. Exh. 9]. IP. Elina forwarded to him vide Sample Form No. 0308 dated 12.04.2018 [P. Exh. 11] through Securicor courier 8 samples of Samsung branded power banks which he also forwarded to the technical analyst Ken Gitonga by way of a letter dated 16.04.2018 [P. Exh. 12] addressed to the head of department John Paul Macharia requiring him to analyze the power banks. This letter was received by Ken Gitonga. That from his preliminary

observation, he found that the logo on these items did not comply with the one of Samsung because the first and last letters S & G do not touch the outer line. He then formed the opinion that they were counterfeit goods. He identified the 8 pieces he received and which he forwarded for analysis. Thereafter, he received a report confirming that the samples did not comply with the Samsung products hence counterfeit. He subsequently lodged a complaint with the Anti-Counterfeit Agency on behalf of Samsung Electronics Co. Ltd vide letter dated 10.04.2018 [P. Exh. 13A] and swore an affidavit in this respect on 10.04.2018 [P. Exh. 13B] and attached the Indemnity Form [P. Exh. 13C].

In cross-examination, he conceded that he did not know how the matter was investigated and could not tell whether the accused person committed any offence.

PW-3 Ken Gitonga a holder of a Diploma in Mechanical Engineering from TUK told the court that he works with Samsung East Africa Ltd as a Quality Engineer at the Internet and Mobile Division. His duties included testing of mobile devices as well as analyzing counterfeit products in liaison with the Anti-Illicit Trade Agency. That on 16.04.2018, he received a letter of the same date from Mr. Mutula [PW-2] forwarding to him 8 samples of power banks requiring him to analyze the same. He did a physical non-destructive test to one of them being P. Exh. 3C and found that it did not have its serial number, model code, had a torch unlike the genuine one and the brand name "Samsung" was not correctly placed. The other power banks [P. Exh. 3B] did not have a serial number. The other power bank [P. Exh. 3A] had LED colors, scaled outer body and had three USB ports unlike the one manufactured by Samsung hence not genuine. He did not have any of the genuine items because they have been phased out. After the analysis, he prepared and signed a report dated 16.04.2018 [P. Exh. 15] attaching therewith a letter dated 24.04.2018 showing the samples received, the criteria used and the outcome [P. Exh. 16].

The case for the Prosecution was closed at this point.

**THE LAW:**

32. Offences

It shall be an offence for any person to—

- (a) have in his possession or control in the course of trade, any counterfeit goods;
- (b) .....
- (c) .....
- (d).....
- (e) .....
- (f) .....
- (g) .....

From the law as stated above, it is necessary that we get the meaning of the word “**Counterfeiting**” and “**counterfeit goods**” as defined under the Act:

“**Counterfeiting**” means taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya in respect of protected goods—

- (a) the manufacture, production, packaging, re-packaging, labelling or making, whether in Kenya, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;
- (b) the manufacture, production or making, whether in Kenya or elsewhere, the subject matter of that intellectual property, or a colorable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his license;

- (c) the manufacturing, producing or making of copies, in Kenya or elsewhere, in violation of an author's rights or related rights;
- (d) in relation to medicine, the deliberate and fraudulent mislabeling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging:

Provided that nothing in this paragraph shall derogate from the existing provisions under the Industrial Property Act, 2001 (No. 3 of 2001),

**"Counterfeit Goods"** means goods that are the result of counterfeiting, and includes any means used for purposes of counterfeiting;

From the evidence, it emerged that Inspector Elina Mrari [PW-5] acting on a consumer complaint raided a shop suspected to be selling counterfeit goods which they seized. This brings into focus the duties of such inspector in the circumstances and how she was supposed to deal with such counterfeit goods until any suspect arrested is arraigned in court and tried. This is provided for under sections 25, 27 and 29 of the Act which provide:

#### **25. Duty of inspector upon seizure of goods**

- (1) An inspector who has seized any suspected counterfeit goods in accordance with section 23 shall—
  - (a) forthwith seal, clearly identify and categorize the goods and prepare, in quadruplicate, an inventory of such goods in the prescribed form and cause the person from whom the goods are seized to check the inventory for correctness, and, if correct, cause that person to make a certificate under his signature on each copy of the inventory and if the seized goods are removed under paragraph (c), the inspector shall endorse that fact under his signature on every copy of the inventory, in which case the inventory shall also serve as a receipt;

- (b) furnish one copy of the inventory to the person from whom the goods are seized and another to the complainant, if any, within five working days after the seizure;
- (c) as soon as possible, remove the goods, if transportable, to a counterfeit goods depot for safe storage, or, if not capable of being removed or transported, declare the goods to have been seized in situ, and seal off or seal and lock up the goods or place them under guard at the place where they were found, and thereupon that place shall be deemed to be a counterfeit goods depot;

**27. Storage and access to seized goods**

- (1) Goods that have been seized under section 23(1) shall be stored and kept in safe custody at a counterfeit goods depot until the person in charge of the depot—
  - (a) is ordered by a court to return, release, destroy or otherwise dispose of those goods as specified in the order:

**29. Counterfeit goods depot**

- (1) The Board may, by notice in the Gazette, designate any place to be a counterfeit goods depot for the purposes of this Act.
- (2) The Board shall appoint a fit and proper person to be in charge of a counterfeit goods depot.

The law as set out hereinabove very clearly sets out the procedure to be adopted right from the seizure, storage of goods seized until produced in court. Thereafter, the Regulations made under the Act provides for how an Inventory of the seized goods is to be done, taking of samples and submission of the samples to approved laboratories for analysis and testing. These are Regulations 8, 12 and 22 which provide:

**8. Inventory of seized goods**

- (1) An inspector shall record any goods or tools seized in accordance with the Act, in Form ACA 2 set out in the First Schedule.
- (2) Where a person from whom goods have been seized declines to sign the Form referred to in sub-rule (1) as required, the inspector shall make a note to that effect on the form.

**12. Taking of samples by an inspector**

- (1) For the purpose of obtaining a sample from goods seized under section 27(4) of the Act, an inspector shall select the sample from the batch of the goods seized.
- (2) An inspector shall select a sample of the goods seized and make a record of the sample taken in Form ACA 6 set out in the First Schedule.
- (3) The sample obtained under this regulation may be submitted to an approved laboratory for testing or analysis in Form ACA 7 set out in the First Schedule.

**22. Approved laboratories**

The Minister shall publish a list of approved laboratories for the purpose of testing or analyzing goods seized under the Act.

The law as set out herein above outlines the procedure upon seizure of the goods which in my view forms the basic requirements that the case for the prosecution was required to meet. In my view, these are the requirements:

*[i] The Inspector to seal, clearly identify and categorize the goods,*



*[ii] Prepare an Inventory in a prescribed form in quadruplicate to be verified by the person from whom the goods are seized by making a certificate under his signature and if he declines, the Inspector to make a note to that effect on the form,*

*[iii] If the goods are movable, the Inspector to endorse as such under his signature in every copy of the Inventory,*

*[iv] Take the goods seized to a designated Counterfeit Goods Depot for safe custody under a duly appointed fit and proper person in charge of the depot.*

*[v] The Inspector to take samples of the goods seized and make a record in an Application For Sample Form ACA 5,*

*[vi] Select the samples from the batch of goods seized and make a record in a Samples For Testing/Analysis Form ACA 6,*

*[vii] Submit the samples to an approved laboratory for testing or analysis in Form ACA 7,*

#### **ANALYSIS OF THE EVIDENCE AGAINST THE LAW:**

From the evidence, the seizing officer Inspector Elina Mrari [PW-5] told the court that upon seizure, she prepared an Inventory of Seized Goods [P. Exh. 4] before taking them to their offices for safe custody. Thereafter, she picked samples which she submitted to the Anti-Illicit Trade Agency for analysis by way of Securicor Courier. Upon analysis, she received a report that the goods seized were counterfeit hence the charges.

This evidence brings into question the manner in which the seized goods were handled, samples taken for onward transmission for testing/analysis. The law as I have put it hereinabove requires that immediately after seizure, the Inspector was supposed to clearly categorize and identify the goods seized. This seem not to have been done because all the 317 pieces produced in court were not marked despite having been allegedly categorized. Secondly, the

seizing Inspector was required to fill in an Inventory of Seized Goods in Form ACA 2 to be signed by the owner/agent. Thereafter, the goods seized were supposed to be removed to a Counterfeit Goods Depot for safe custody. The Inspector told the court that she removed the goods to their offices. She did not tell the court whether this was a place duly gazetted by the Board as Counterfeit Goods Depot. Thereafter, she was to submit samples for analysis/testing in an Application for Samples Form ACA 5 and also fill in an a Samples for Testing/Analysis ACA 6 and submit the samples by filling the Submission of Samples for Testing/Analysis Form ACA 7 for submission to an approved laboratory for testing/analysis. Despite filling Form ACA 5, there is no evidence that the samples were duly submitted to an approved laboratory for testing/analysis. In her evidence and as supported by Form ACA 5 [P. Exh. 11], the samples were submitted by way of Securicor Courier. The law does not provide for the submission of samples by way of courier. Despite this serious anomaly, the person who received them told the court that he received them by way of Wells Fargo Courier. These are two different entities. There is therefore a serious contradiction as to how the samples were submitted for testing/analysis. This contradiction coupled with failure by the Inspector to specifically mark the samples of the goods seized leaves a lot of doubt as to whether the samples allegedly analyzed and found to be counterfeit are the same ones seized and produced in court as exhibits. Further, the samples were allegedly sent to the Anti-Illicit Trade Agency Ltd for testing/analysis whose receiver also submitted the same to Samsung East Africa Ltd the owners of the trade mark for testing/analysis. There was no evidence placed before me to show that these two entities were duly approved laboratories under the Act. If so, the court was not told when the Minister for the time being responsible for Industrialization published them for the purposes of testing or analyzing goods seized under the Act. Without this very crucial piece of evidence, the evidence of both PW- 2 and 3 that forms the nerve center of this prosecution has no basis and is inadmissible. Without this evidence, the case for the prosecution cannot stand.

Despite this, for the offence of being in possession in the course of trade counterfeit goods contrary to section 32 (a) of the Act to be deemed to have been sufficiently established by the prosecution, the following ingredients must be demonstrated:

- (i) Identify the original products counterfeited;*
- (ii) Produce the counterfeit products;*
- (iii) Show that the person charged was in possession in the course of trading.*

The evidence as adduced did not meet this threshold. Firstly, though the alleged counterfeit goods were produced, the original counterfeited goods were not produced. The witness who carried out the testing/analysis admitted that they are no longer being manufactured because they have been phased out. Since this is the position of the maker of the original product, it means that there were no goods that were actually counterfeited. Secondly, according to the Investigating Officer, the accused person was found in the shop and admitted being the owner of the same. She demanded and was given a Single Business Permit issued by the County Government of Mombasa [P. Exh. 21] which was in the name of Mary Mbuthye Mbila. She demanded from the accused contacts of this person but he failed to give. She decided to charge him because he confessed that he was trading in the goods in the name of his wife. If this be so, then this amounts to a confession which was supposed to be recorded in the manner provided under section 25A of the Evidence Act, CAP 80 Laws of Kenya. This having not been done means that the evidence is inadmissible. The person charged was not the one in possession in the course of trading counterfeit goods since he is not shown in the Single Business Permit as such a trader. Being found in this shop in itself is not conclusive proof that he was the trader. There are chances that he could either be a shop attendant or a customer. Further, this prosecution was occasioned by a consumer complaint by one Timothy Maitha Benson who despite recording a statement was not called to testify. No reason was given to explain the failure to call him. Secondly, during the seizure, the person who allegedly signed the Seizure Form on behalf of the accused was Charles Musembi Tom who was also not called as a witness. No reason was given as well. These witnesses were in my view very crucial to the successful prosecution of this case. The only inference I can draw from their not being called as witnesses is that their evidence would have been adverse to the case for the Prosecution.

*From the foregoing evidence, I find that the prosecution failed to place before the court sufficient evidence that the accused person was found having in his possession in course of trade counterfeit goods contrary to section 32 (a) of the Anti-Counterfeit Act, 2008 so as to require him being placed on his defence. As a consequence, I dismiss the charge and acquit the accused person under section 210 of the Criminal Procedure Code. He be set at liberty forthwith unless otherwise lawfully being held. The surety is discharged. The exhibits that were produced in court as P. Exh. 3A, 3B & 3C be restored to the person from whom they were seized in accordance with the provisions of section 28 (3) of the Anti-Counterfeit Act, 2008 after the expiry of fourteen (14) days from the date of this ruling.*



HON.H. NYAKWEBA,

PRINCIPAL MAGISTRATE

**CERTIFICATE:**

This ruling read, signed by myself and delivered in open court this 27<sup>th</sup> day of March, 2019. In open court. In the presence of: Prosecution Counsel: ~~Ms. Mwangi~~ C/A: Mr. Hamisi, the accused person and Mr. Chacha h/b Mr. Munzyu Advocate for the accused person.



HON. H. NYAKWEBA,

PRINCIPAL MAGISTRATE

27.3.2019