

REPUBLIC OF KENYA

JURISDICTION: IN THE CM'S COURT AT MILIMANI

FILE NUMBER: CRIMINAL CASE NO 1006/2015

BETWEEN: REPUBLIC V/S ESTHER MWANIA & ANO.

CORAM: R.K. ONDIEKI- SPM.

DELIVERED: 12th JUNE 2023.

JUDGEMENT OF THE COURT:

1. Morris Muteti(PW1) told the court that he is the Chief Enforcement Officer at Anti Counterfeit Agency and that on the 12th March 2015 there was a complaint by the complainant who are the producers of Hewlett Packers (Hp) toners and printing machines through its agency Halliday Finch and the witness received five documents from Halliday Finch in support of the complaint which include affidavit to lay a complaint marked as MFI 1, the complaint form marked as MFI 2, Indemnity form as MFI 3, submissions of particulars of

intellectual property rights as MFI4 and Trade mark certificate marked as MFI 5.

2. The witness said that while armed with these documents, the witness in the company of the police officers and a representative of Hp one Denis Erakeni stormed the accused persons shop in Nairobi which was suspected to selling counterfeit toners and a search was carried out and a recovery of 36 tonners were recovered and a n inventory was prepared and marked MFI 6. The inventory was signed among others the accused Esther Mwanja. The arresting officers took possession of business permit marked as MFI 7, copy of the ID card as MFI 8.
3. The recoveries were taken to the Counterfeit depot and *Haliday Finch* took some for analysis and a report was prepared and sampling form was marked as MFI 9 and a power of Attorney to Denis Otieno was marked MFI 10, analysis Report was marked MFI 11, price computation was marked as MFI 12Agency clearance

form as MFI 13 and all these documents were produced as Exhibit 16.

4. Under cross examination, the witness said that they introduced themselves as they entered the premises and that the tonners on display were genuine and he does not understand why Halliday Finch suspected the accused was selling counterfeit products. Anti-Counterfeit agencies have police and Dennis is not an inspector and the staff card is a certificate of authority. The witness said that they did not have a genuine tonner on that material day.
5. Peter Erick Otieno(PW2) told court that he is a Brand consultant with Halliday Finch and based in Senegal. The witness said that he has power of attorney authorizing him to investigate and file lawful petitions in respect to marks held at Hewlett Packard. In support the witness produced the employment letter, National ID card and Power of attorney as Exhibits 14, 15 and 16. The witness lodge a complaint against Tonermart

Technologies on 9th March 2015 and at the time the power of attorney was valid.

6. Upon arrival at the premises of the accused persons there was a display and setting of counterfeit products which were branded as Hp purporting them to be genuine. The accused further produced complaint form as Exhibit 2, affidavit as Exhibit 1, indemnity form as Exhibit 3, submissions of intellectual property as Exhibit 4, grade mark as Exhibit 5 and a receipt number 1865 as Exhibit 17.
7. Under cross examination, the witness said that he is a brand protection Consultant and employed by Halliday Finch and that his Id number is not indicated in the Power of Attorney. His name does not either appear in the submissions of particulars of intellectual property. The witness said that there is a certificate used in legal proceedings and that there is a receipt dated 12th March, 2015 to show that he lodged a complaint and that he received information that Tonermart

Technologies was displaying and setting counterfeit Hp tonner.

8. Dennis Otieno Ereki (PW3) told the court that he is the deputy Brand Manager and a lead investigator in respect to Hp brand and that on 11 March 2015, a complaint was made to the Counterfeit Authority that there were shops in the CBD Nairobi which were selling counterfeit Hp products. On 12th March 2015 in the company of ACA officials and the Police they went to the premises of Tonermart Technologies and did a search and found 36 toners which were not genuine as they lacked the essential features. They had no security features, some had excess blue and some had boxes redone. An inventory was prepared and produced as Exhibit 6(a) to (d). The 33 recovered toners were marked as MFI 18.
9. The witness further said that he is a trained expert from South Africa and Ethiopia and is able to identify HP

components with its signs, repackaging various cover marks on HP products.

10. In her defence the accused Esther Mwanja, told the court that exhibit 1 says that HP Company is the owner of the patent but the name in the charge sheet is different- HP Company USA. Exhibit 2 show the owner to be HP Development Lp which is different from the one in the charge sheet.
11. The accused further told the court that whatever was impounded from her shop did not reach the court as what is in the court is different from what was recovered from her shop as exhibit 9-23 and 4 were not in the inventory. PW3 did not produce any document or certificate to show that as at 12th March 2015 he had a certificate of expertise. Exhibit 21 is dated 17th December 2018 and so as at the time he testified in court, he had not trained as an expert. The price receipt did not have any receipts to show the prices of each item.

12. Tonermart Technologies is a business concern and not a company and as such, the accused is not a director as alleged and there were serial numbers of the exhibits produced in court and in any event, the accused sources the products from China, Dubai which are inspected by KRA and KEBS.

13. Under cross examination, the witness said that the products are genuine and that she imports them from China and Dubai even though she did not have documentations to that effect.

Analysis and Determination:

14. It is trite that the burden of prove in criminal cases is always on the prosecution to prove the elements of an offence which an accused is charged with. The standard of prove is always that of beyond reasonable doubt (See section 107 of the Evidence Act Cap 80 Laws of Kenya, Woolington Vs DPP 1935 AC 462 and Miller Vs. Minister of Pensions 2 ALL 372-273).

15. The accused person herein was charged with the offence of being in possession of counterfeit goods contrary to Section 32(a) of the Anti-Counterfeit Act No. 13 of 2008. So the purpose of the Anti-Counterfeit Act No.13 of 2008 is to prohibit trade in counterfeit goods. Section 32(a) provides for the offence the appellant had been charged with. It provides that; **“It shall be an offence for any person to- (a) have in his possession or control in the course of trade any counterfeit goods.”**

16. For the prosecution to sustain a conviction, the prosecution needed prove, beyond reasonable doubt, three elements: -a) That the appellant was in possession b) of counterfeit goods and c) in the course of trade.

Possession:

17. As to whether the accused was in possession, it is clear that the accused in her testimony says that Tonermart Technologies is a business and that it is not disputed

that she was attendant to the business on the day she was arrested from the Tonermart Technologies premises where the recoveries were made. As such, it is not in dispute that she was in possession of the products at the time.

In the course of trade:

18. As to whether it was in the course of trade. The word trade is defined under section 2 to include business and profession. The accused admitted to having been arrested while in the shop selling the products. As such, the accused was in possession of the goods while in the course of trade.

Counterfeit goods:

19. As to whether the said goods were counterfeit, Section 2 of the Act defines "Counterfeit goods" as; **"goods that are the result of counterfeiting any item that bears an intellectual property right, and**

includes any means used for purposes of counterfeiting.”

20. Equally the word “Counterfeiting” is defined as; **“taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya or outside 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.”**

21. Therefore, now, beware that the prosecution had a burden to prove that the goods (toners) were as a result of counterfeiting of any item that bears an intellectual property right. To do so, the prosecution was required to tender sufficient evidence that the toners were

manufactured, produced, packaged, re-packaged, labelled or made in imitation of protected goods in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods. The prosecution further had a duty to tender evidence to the effect that all that was done without the authority of the owner of intellectual property right subsisting in Kenya or outside Kenya in respect of protected goods.

22. Taking the totality of the evidence, it is clear that the prosecution was able to surmount the first two ingredients and that is possession and in the course of trade but as regards the issue of counterfeiting as set out in section 2 of the Act, it has set out a host of ingredients that must be proved. In respect to this case, PW3 said that *"...some of the toners were missing required identities. Some had no security features, some had excess blues among other features to show that a box was redone..."*

23. I hear the witness to say that the accused may have manufactured and repackaged the products to appear as genuine Hp Toners. On the other part, the accused said that he imports these products from China and Dubai. Given this scenario, it was incumbent for the prosecution to tender evidence of manufacturing and repackaging beyond reasonable doubt for a very simple reason; the accused said that she imports the products from China and Dubai.

24. Consequently, I take judicial notice by dint of the provisions of section 60 (1) (o) of the Evidence Act, Chapter 80, Laws of Kenya that many are the business people who frequently travel to Asia among other places to import diverse wares for sale locally. Undeniably and conspicuous are the investors from China who have flooded the Kenyan markets and as such the prosecution ought to have gone a step further and prove beyond reasonable doubt, that indeed the

accused founded a plant manufacturing and repackaging these toners.

25. Ultimately, I make a finding that the charges against the accused were not proved beyond reasonable doubts and for those reasons, I acquit the accused person under section 215 of the CPC and set her free unless otherwise lawfully held back.

Delivered in the open court this 12th June, 2023.



Hon. R.K. ONDIEKI,

MBA(HR), LLB(Special), LLB(General), BA(Econ).

SENIOR PRINCIPAL MAGISTRATE.

MILIMANI LAW COURTS.

I Certify that this is a true copy
of the Original
11th July, 2023.
CHIEF MAGISTRATE
MILIMANI LAW COURTS