

REPUBLIC OF KENYA
IN THE CM'S COURT AT MILIMANI
CR NO 169 OF 2020

REPUBLIC.....PROSECUTOR

VS

GEORGE OTIENO OKWANY

PEKARI INVESTMENTS COMPANY

LIMITED.....ACCUSED PERSONS

JUDGEMENT

The accused persons herein were jointly 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 No 13 of 2008. It was alleged that on 2nd November 2019 at around 1500 hours at Pekari Investments Co. Limited along Jogoo road in Nairobi within Nairobi county the accused person was found in possession of counterfeit goods to wit SKF branded rolling bearings to wit 2735 pieces valued at Kshs. 31,967,437 without the authority of Atkiebolaget SKF the registered owner of the SKF mark registered under trademark number 23473 and trademark number 23470 registered in the Republic of Kenya under the Trademarks Act which goods imitated the protected goods in such manner and to such degree the goods are substantially similar to the protected goods.

In count two the accused person was charged with the offence of Importing into the Country (Kenya) counterfeit goods. It was alleged that on diverse dates between 3rd July 2015 and 24th December 2016 at Pekari Investment Limited along Jogoo road in Nairobi the accused persons imported into Kenya counterfeit goods

to wit 187 pieces SKF branded rolling bearings pieces valued at Kshs. 89,012 without the authority of Atkiebolaget SKF the registered owner of the SKF mark registered under trademark number 23473 and trademark number 23470 registered in the Republic of Kenya under the Trademarks Act which goods imitated the protected goods in such manner and to such degree the goods are substantially similar to the protected goods.

Prosecution Case

PW 1 had the power of attorney to act on behalf of the complainant. He testified that on 22/10/2019 they received photographs of sample products bought from the accused person's company, the 2nd accused person herein. They analyzed the photographs and concluded that the products were counterfeit. He told the court that they had different methods of verification. They looked at marking on packaging materials, the font in relation to package and date of production in their production records if the bar code on the package corresponds to authentic bar codes. They would check for atleast three different indications that deviate from the original. From the picture he was able to identify what was counterfeited. He stated that exhibit B identified the counterfeit products supplied from the 2nd accused person. He stated that the package was counterfeit, the font was different and the manufacturing country was different. The rolling bearings originate from Italy. The counterfeit was marked Malaysia. He did a report dated 2/11/2019 based on the photographs. He filed a complaint with ACA Kenya on 7/11/2019 and supported ACA with the raid on 2/11/2019 in Pekari's warehouse along Jogoo road. He inspected the products on site. The products were then seized based on PW 1's verification report. PW 1 told the court that the products were packed in counterfeit boxes marked SKF Brand. The box was not made according to

standard, sample B's bar code was false. He inspected the products and picked samples for detailed verification. He found that all the products were counterfeit. After the verification is when he made a complaint with ACA.

PW 2 was an ACA Inspector. He told the court that on 2/11/2019 he was accompanied by officers from Interpol to do an inspection along Jogoo road at Pekari Investments. He stated that a complaint had been made by SKF about counterfeit roller bearings being sold by the accused person. On arrival at the premises they found the accused person in the shop. They explained why they were there. They inspected the main shop. They did not find the bearings they were looking for. The accused person was asked to open the store which was next to the shop. They found the roller bearings branded SKF which were 2735 pieces in total. They were allegedly valued at Kshs. 31,967,437.20. The seized goods were entered into an inventory number 008258 and moved to the ACA depot for safe keeping. On 3/12/2019 PW 2 submitted samples to SKF for analysis. On 16/12/2019 PW 2 received an analysis report from SKF confirming that the seized goods were counterfeit. The goods were examined by PW 1 who prepared an Analysis Report. PW 2 told the court that the accused person informed him that he purchased the said goods locally and others he had imported. He provided PW 2 and his team with the importation documents. They then arrested the accused person and arraigned him in court. He further stated that the proprietor of Pekari Investments Limited the 2nd accused person herein was George Otieno Okwany, the 1st accused person.

At the close of the prosecution case the accused persons were found to have a case to answer and they were placed on their defence. The 1st accused person elected to

give sworn evidence and call no witnesses.

Defence Case

DW 1 was the 1st accused person herein. He stated that ACA representatives went to his premises. He cooperated with them. He told the court that he had been selling bearings where he sold bearings when he worked for an SKF Distributor from 1998 to 2010. Then in the year 2010 he started Pekari Investments. He would get his bearings from China because he knew China was mandated to make bearings. He presented the invoices, receipts for payment and delivery notes for the goods in evidence together with the importation documents. He further stated that his clients had not been complaining to him that the bearings he sold to them were counterfeit and he believed the bearings he purchased from China were genuine.

Defence Submissions

The defence filed their submissions on 5th June 2023. They submitted that the prosecution had failed to prove their case beyond reasonable doubt that the seized goods were counterfeit. As such the case should be dismissed and the seized goods returned to the accused person.

Analysis and Findings

I have carefully analyzed the evidence adduced herein presented by the prosecution and the defence.

It is trite law 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 v DPP 1935 AC 462 and Miller v. Minister of Pensions 2 ALL 372-273.

The accused persons herein were jointly charged in count one with the offence of being in possession of counterfeit goods contrary to Section 32(a) as read with Section 35(1) (a) of the Anti-Counterfeit Act No. 13 of 2008. 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 accused persons 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.”

To sustain a conviction, the prosecution needed prove, beyond reasonable doubt, three elements: -

- a) That the accused persons were in possession;*
- b) of counterfeit goods;*
- c) in the course of trade.*

The question which then needs to be answered is whether the prosecution tendered sufficient evidence to prove all the above elements? As to whether the accused persons were in possession, from the 1st accused person's evidence, it is not disputed that the 1st accused person was the proprietor of Pekari Investments Company the 2nd accused person herein wherein the roller bearings the subject matter of this case were confiscated. When the 1st accused person was at work, the ACA officers raided the shop. As such, it is not in dispute that the accused persons were in possession of the same.

As to whether it was in the course of trade; trade is defined under section 2 to include business and profession. The 1st accused person admitted to having been arrested while working in the shop selling roller bearings which he imported from China. As such, the accused persons were in possession of the goods while in the course of trade.

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.”

“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..”

As such, the prosecution had a burden to prove that the goods (roller bearings in question) 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 roller bearings 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.

PW1 testified that he did not initially physically examine the goods seized being SKF branded bearings but was sent digital photographs which he analysed. Upon examination, he found that the bearings were counterfeits. He stated that he later physically checked the goods after the accused persons had been charged in court. He produced in court a sample of a SKF bearing saying the same originated from Italy and not China. He carried a few samples, five of them which he said he analysed and verified were counterfeits. He however admitted that the said seizure was done on 2/11/2019 before the complaint was lodged in 7/11/2019. What PW 1 provided before the court was his analysis report for the samples he analysed. The goods seized were 2735 items of 525 different products with a total weight of 2,500 kgs. He did not provide to the court various models of the brand bearings to show their distinctions and for them to be compared to the control sample and that, in his view, they were counterfeit. Further, PW 1 in his report at page 3 stated that “on the basis of this random check it is justifiable to assume that all other products with the same product designation are also counterfeit.” It is evident that PW 1 did not analyse all the products seized. There was one Harris Kariuki Kimani who was mentioned as being the one who sent the initial photographs to SKF offices once he collected samples. The said Harris did not testify in this case.

DW 1 did demonstrate to the court that Pekari Investments Company was a registered company and he was in the business of selling roller bearings having previously worked for an SKF Distributor. He would import roller bearings which they would source from China. They would place orders and the goods would be delivered. He presented to court the certificates for conformity and the orders for consignment. He also presented the invoices and delivery notes He told the court that the goods he imported were manufactured in China by known suppliers. They were then cleared to be sold in Kenya. The question becomes how were the said goods cleared by the clearing agencies including the complainant herein if the same were counterfeits?

In my opinion, the mere fact that the said roller bearings were found to differ from the control sample PW 1 provided for SKF roller bearings does not make the same counterfeit. For a good or product to be said to be counterfeit, more was required from the prosecution. The allegations facing the accused persons herein has been made in relation to the roller bearings themselves. PW 1 stated that unique characteristics that were absent in the seized bearings. The evidence ought to be tendered as to how the seized bearings were different from the control sample so as to make the control sample to have been imitated in such manner and to such a degree that the said roller bearings were identical to the control samples. There was no evidence as to how the bearings in question were counterfeits of the control sample. In my opinion, the difference in packaging and place of manufacturing in the said SKF sample may be unlawful but that does not make the goods counterfeit goods in terms of section 32 (a) and Section 2 of the Act which deals with counterfeiting.

Taking all the evidence into account, the prosecution failed to prove their case to the required standard in counts one as charged. The accused persons are acquitted as charged as per the provisions of Section 215 of the CPC.

In count two the accused person was charged with the offence of Importing into the Country (Kenya) counterfeit goods. It was alleged that on diverse dates between 3rd July 2015 and 24th December 2016 at Pekari Investment Limited along Jogoo road in Nairobi the accused persons imported into Kenya counterfeit goods to wit 187 pieces SKF branded rolling bearings pieces valued at Kshs. 89,012 without the authority of Atkiebolaget SKF the registered owner of the SKF mark registered under trademark number 23473 and trademark number 23470 registered in the Republic of Kenya under the Trademarks Act which goods imitated the protected goods in such manner and to such degree the goods are substantially similar to the protected goods.

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process he had been doing for his business and none of the clearing authorities at the point of entry seized his goods. As such as it has already been demonstrated this charge was not proved. As such the accused persons Taking all the evidence into account, the prosecution failed to prove their case to the required standard in counts two as charged. The accused persons are acquitted as charged as per the provisions of Section 215 of the CPC. Right of Appeal 14 days explained.

W. M. Njagi

HON C M NJAGI PM

Dated, signed and delivered in Nairobi on *9th* June 2023

In the presence of:

Mr. Kuchungu for Accd persons

Ms. Kihamba for Accs

Ms. Mume for State

Accd persons

C/A Carew

I Certify that this is a true copy of the Original

W. M. Njagi
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CHIEF MAGISTRATE
MILIMANI LAW COURTS

9/6/23