

**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.2129 OF 2016**

**REPUBLIC - VS- (1) DOUGLAS MBUGUA**

**(2) SUSAN MWANIKI**

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**JUDGMENT**

The accused persons **DOUGLAS MBUGUA** and **SUSAN MWANIKI** have been charged jointly 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) of the Anti-counterfeit Act 2008 laws of Kenya. The charge is contained in 8 counts.

Particulars are that on 26/4/16 at about 1.30 pm at WAKI SUPPLIERS AGENCIES in Kitale town within Trans-Nzoia County being owner and employee

respectively and others not before court they did have in their possession

**COUNT I:** 5 pieces of each model of HP Black toner cartridges models 12A, 83A, 05A each valued at Kshs. 7200/=, 7,200/= and 8,300respectivley calculated to be confused with genuine HP toner cartridges which is a protected good under trade mark no.67361 owned by Hewlett Packard Limited all valued at Kshs. 113,500/=.

**COUNT II:** 10 pieces of each model of HP Black toner cartridges model 126A and 85A each valued at Kshs. 5.500/= and 6,800/= respectively calculated to be confused with genuine HP toner cartridges which is a protected good under trade mark no. 67361 owned by Hewlett Packard Limited all valued at Kshs. 123,000/=.

**COUNT III:** 3 pieces of each model of HP Black toner cartridges model 55A and 51A each valued at Kshs. 14800/= and 12,500/= respectively. Calculated to be confused with genuine HP toner cartridges which is a protected good under trade mark no. 67361 owned by Hewlett Packard Ltd all valued at Kshs. 81,900/=.

**COURT IV:** 7 pieces of HP Black toner cartridges model 305A each valued at Kshs. 8,500/= calculated to be confused with genuine HP toner cartridges which is a protected good under trade mark no. 67361 owned by Hewlett packed Limited all valued at Kshs. 59,500/=.

**COUNT V:** 8 pieces of HP Black toner cartridges model 80A each valued at Kshs. 11,000/= a calculated to be confused with genuine. HP toner cartridges which is a protected good under trade mark no.67361 owned by Hewlett Packard Limited all valued at Kshs. 88,000/=.

**COUNT VII:** 2 pieces of HP Black toner cartridges model 128A each valued at 7,500/= calculated to be confused with genuine HP toner cartridges which is a protected good under trade mark no. 67361 owner by Hewlett Packard Limited all valued at Kshs. 15,000/=.

**COUNT VIII:** 1 piece of each model of HP Black toner cartridges models 125A, 35A and 124A each valued at Kshs. 7,000/=: 6,000 and 7,700/= respectively. Calculated to be confused with genuine HP toner cartridges which is a protected goods under trademark no.67361 owned by Hewlett Packard Ltd all valued at Kshs. 21,600/=.

The accused have denied all the charges.

**PROSECUTION EVIDENCE:** PW1 George Manderu Mwachengo an investigator with Halliday Finch Ltd duly incorporated (Pexhibit P3,4).

He produce Pexhibit 5(a) (b)(c)(d) Power of Attorney permitting him to act as agent of the company.

He produced a complaint letter dated 5/9/15 addressed to the Anti-counterfeit Agency with regard to counterfeit ink and toner products for Hewlett Packard the company he was acting for as Pexhibit 6, 7 and 8 as well as an affidavit in support of a complaint made on 5/9/2016 Pexhibit 9.

He produced a certificate of trademark no. 67361 for HP issued by the Kenya intellectual property institute Pexhibit 10. He confirmed that a complaint had been made concerning counterfeit ink and toners on sale in Kitale which later led to the charges based on the complaint dated 5/9/16 which he was instrumental in laying.

**PW2 Sergeant Peter Kariuki** of Kitale police station testified that a 26/4/2016. The OCS assigned him duties to accompany officers from the Ant-counterfeit Agency headed by Mr. Osman within Kitale town.

At around 1pm they went to the 1<sup>st</sup> accused's bookshop where inspections were done and some items namely toner and ink were confiscated as suspected counterfeit products. He arrested the 2<sup>nd</sup> accused who was present at the shop and took her to the station. He recalled that an inventory was signed Pexhibit 11(a)(b). He was also able to identify the items confiscated at the time Pexhibit P12(a)(b)(c)(d)(e)(f)(g)(h)(i)(j)(k)(i)(m)(n)(o)(p)(q).

He however explained that his role was merely to provide security for the operation only and could therefore not tell the fake from the genuine goods.

PW3 Peter Otieno a Brand protection consultant with Halliday Finch Africa Pexhibit (P13,14) testified that his work involved carrying out investigations, Law enforcement raid and expert analysis on products. He confirmed that indeed he had training to identify a counterfeit HP product (both ink and toners)Pexhibit 15(a)(b)(c)(d).

On 13/5/2016 he recalled that he travelled to Eldoret in order to perform expert analysis on products that the Anti counterfeit agency offices had seized in Kitale town during raids. The instructions had come by way of an e-mail dated 4/5/16 exhibit 16.

He proceeded to conduct analysis in the lab from samples collected Pexhibit i7(a) and (b) on 13/5/16.

He went on to demonstrate how the products were analyzed by different methods.

- (1) The security seal. He demonstrated how the box of the packaging of HP products is tilted up and down to reveal an O.K word while left and right would reveal tick S which would interchange with O.K depending on the direction moved Pexhibit 12m was used to demonstrate.
- (2) On the side of the box was the word professional which did not have the normal O but a small Zero. He demonstrated that the presence of the O was an indication it was counterfeit Pexhibit 18(a) was used for demonstration purposes.
- (3) A tint mark on the rear of the product was also one of the security features he demonstrated as ...../which was on the genuine product box Pexhibit 18(a) while Pexhibit 12m did not have.
- (4) The court was also shown the temperature gauge where there is a letter F which he observed had the upper stroke pointed and longer than the lower on O which is different from F the letter as we know it.

He stated that any product without the said feature was a counterfeit and does not originate from an HP product.

He went on to state that he performed laboratory tests on the toners which were open and split in the process. The process of which they were destroyed because the testing was very messy and could not be produced in court.

He went on to explain that all the products seized were counterfeit and had the tendency of clogging the printer sensor, releasing faded copies in lesser numbers of about 40% - 47% of both black and colour HP intended.

He went on to produce the 77 pieces of toner he inspected as Pexhibit 19, 14 15(a)-(d)-17(a) and (b) as well as Pexhibit 18.

He identified the counterfeit as Pexhibit 12(a)-12(q).

As for the 2 inks he confirmed they were genuine he returned them to the Anti-counterfeit Agency Eldoret.

It was his testimony that the products open demonstrated on TV. Periodic newspaper Adverts flyers and trailers on the Internet.

He further claimed that Peter Eric Otieno and Peter Otieno on the certificates were referring to one and the same person Pexhibit 13 and 14.

PW4 Dennis Otieno an employee of Halliday Finch testified after PW1 George Otieno left the company.

He produced the powers of Attorney signed by Hewlett Packard to their company Pexhibit 21

certificate of use in legal proceedings Pexhibit P10 and trademarks of Hewlett Packard Pexhibit 20.

He further explained that power of Attorney is received every year with Pexhibit 21 having been issued on 29/3/18 and extended to the year 2020.

PW5 Job Nyango Liembe a staff at the Anti-counterfeit Agency Department and inspector testified that on 26/4/2016 at 1.30 they visited Waki Bookshop under police escort of police officers Kariuki and Ndhiwa.

He recollected that they found the 2<sup>nd</sup> accused and introduced themselves and proceeded to inspect their products on sale after consulting the 1<sup>st</sup> accused the owner of the shop.

He left with police officer Mr. Ndhiwa to another shop as his other colleagues carried out inspection at the shop when he came back he found his colleagues had confiscated suspected counterfeit products in cartridges and toners and was present as an inventory was being taken and items marked. He identified.

He saw the inventory being signed by the 2<sup>nd</sup> accused, Sergeant Kariuki, P.C Samuel Ndhiwa, Obadiah beu and Caroline Wangui.

He identified signed inventory dated 26/3/2016 as Pexhibit 11(a) and (b) respectively. He also was able to identify Pexhibit 12(a)-(q) as the items that were confiscated at the time and taken to the Eldoret Report.

He confirmed that within company that day of 2 police officer PW2 PC Ndhiwa Yusuf Osman and

Thomas Musungu. He was also aware receipts were confiscated in the process a form was then filled and samples forwarded for analysis both locally and abroad.

PW6 Yusuf Osman Yusuf of the Mombasa Anti-counterfeit Agency but previously in Eldoret testified that he was gazetted on 20/8/10 vide gazette notice no. 9713 as a counterfeit Agency inspector. He testified that on 26/4/16 he was in the company of two other inspectors from the Agency Job Nyongesa and Thomas Musungu when they conducted investigations at Waki bookshop among others.

The shop was dealing in computer accessories and upon getting police escort from the OCS Kitale police station. He introduced himself and went ahead to conduct inspections at the shop.

They were assisted by accused 2 and other employees within the shop whereas some products were genuine others were counterfeit and after separating them they prepared an inventory of the counterfeit and had all participants sign including accused 2. In total 77 pieces of HP toner cartridges and 2 pieces of Ink cartridges were recovered. The 2 were later found to be genuine.

He also received a receipt and Business permit for the shop in the name of Waki Suppliers Agency Pexhibit 23 and P3 respectively.

The confiscated items were marked as Pexhibit 12(a)-(q).

He went on to demonstrate the procedure in determining genuine and counterfeit goods as well as follows:-

(1) By way of the Hologram. The genuine HP toners markings of O.K and.....tick should visibly be seen when box is moved up and down and sideways Pexhibit 12(a).

(2) The serial numbers should be charred and embossed as well as well ingrained whereas the counterfeit are stamped with some numbers.

The procedure in the cases of counterfeit goods the box would remain closed Pexhibit 12(K).

(3) The arrows in genuine HP toners should not be sharp but blunt Pexhibit 18.

(4) The word professional should be Zero 0 and not O the alphabet.

(5) The slash/ should appear on all boxes of the genuine product Pexhibit 12K.

(6) The temperature gauge with letter F for the genuine products should be F as opposed to F Pexhibit 12(a).

In his view once a box failed on any given feature made the entire box counterfeit. He used exhibit P18 as the genuine sample for comparison

- exhibit 12(a).
- Exhibit 12(k) were marked as not genuine.

3. Model no. 126A 10 pieces labeled as 1/10 2/10 3/10 4/10 5/10 6/10 7/10 8/10 9/10 10/10 were shown not to be genuine and were marked as Pexhibit 12(a).

4. Model no. 55A labeled as 1/3 2/3 3/3 were observed as not meeting the criteria and were produced a Pexhibit 12(c).

5. Model 125A one piece was marked as exhibit P(d). The same did not meet the requirements.

6. Model 128A 2 pieces Pexhibit 12(c) similarly was found to be counterfeit.

7. Model no. 49A (4 pieces) was found to fall short of the requirements. They were marked as Pexhibit F.
- Model 75A 4 pieces were found to be counterfeit and marked as Pexhibit 12(h).
  - Model 305A 7 pieces were found not to be genuine and were marked as Pexhibit 12(i).
  - Model 53A 4 pieces did not meet the genuine features either and was marked as Pexhibit 12(j).
  - Model 85A 8 pieces unceaied of 10 as 2 were taken a samples for analysis also did not meet the essential features and were marked as Pexhibit 12L.
  - Model 83A 5 pieces similarly did not meet the set down criteria. They were marked as Pexhibit 12(m).
  - Model 35A one piece was also found to be counterfeit and was marked as exhibit 12(O)
  - Model 05A one piece was also found to be counterfeit Pexhibit 12(P).

- Model 12A one piece did not meet the requirements and was marked as Pexhibit 12(q).

He produced the inventory of the items that were confiscated as Pexhibit 11a and 11b respectively.

A search at the registrar of companies did not yield any feedback for the Registrar as to whether the accused 1<sup>st</sup> accused company was duly registered.

PW3 was later approached by an officer from Halliday Finch who wrote an e-mail dated 4/5/16 while he wrote to a representative of HP at Halliday Finch and indicated to him of the seizures made at the 1<sup>st</sup> accused shop in Kitale. He went on to request for analysis of the items Pexhibit P16 and 24.

PW3 then proceeded to conduct the analysis at their offices and Pexhibit 19 was sent to him for

verification in the prescribed form ACA6 serial no. 1409 on 13/5/16 for non destructive tests.

The reports received back was that the 21 ink cartridges were genuine but all the 77 pieces of toner cartridges were counterfeit.

Although an out of court settlement was proposed, the Head office of the Anti-counterfeit Agency downed down the offer. He went on to produce Pexhibit 24, 16, 19 and 22 respectively.

Under cross-examination he testified that other than being an investigator, he had powers to prosecute deserved from section 22 and 30 of the Anti-counterfeit Agency Act which certificate he had in court.

Although he was often trained on the twice yearly changes of features he was not aware if the members of the public were even trained as well.

He admitted that the inventory did not indicate if he had taken receipts, trade license, receipts for purchases. Further he assessed exhibit 23 and 22 did not have the 1<sup>st</sup> accused's name or telephone number but the 1<sup>st</sup> accused had admitted the business was his.

He only took receipts of cash sales but not those of the suppliers.

It was his view that the 1<sup>st</sup> accused has a duty and responsibility to conduct the diligence, get the right products engage a visibility study for HP products by googling for the same online.

Nevertheless he confirmed that once a box is found to be counterfeit the contents were never checked as

a genuine product comes in a wholesome packaging. He also noted that part of the investigations were let to Thomas Musungu after he left the Eldoret offices.

On his recall to the witness stand the witness PW6 was able to avail the missing exhibits namely:-

- Model 5A 5 pieces 1/5, 2/5 3/5 4/5 and 5/5. He found the one 1 for temperature not elongated as well as the Hologram which was not indicating the movement of O.K and the tick as well as the Os of professional and the arrows had both sharp ends. He produced them as Pexhibit 12(e).
- Model 51A 3 pieces marked as 1/3 2/3 and 3/3 were found to be counterfeit and marked as Pexhibt 12(g).
- Model 36A 4 pieces 1/4 2/4 and 4/4 were also found to be counterfeits and produced as Pexhibit 12(A).

PW7 Thomas Musungu formerly of the Anti-counterfeit Agency in Eldoret offices of the North Rift region before he left for KRA.

He testified that on 26/4/16 PW2, PW5, PW6 and himself among others were conducting a surveillance to establish genuine HP products on sale in Kitale town.

Upon identifying the 1<sup>st</sup> accused shop they were able to inspect and identify that they considered genuine and counterfeit goods at the bookshop after explaining to the 2<sup>nd</sup> accused and others at the shop they prepared an inventory of the items they suspected to be counterfeit.

He too verified that the features they relied on were:-

- (1) The Hologram on the HP toners and ink cartridges the O.K and tick ..... markings movement.
- (2) The serial numbers and the rest.

He identified the inventory Pexhibit P1(a)(b) after which the confiscated products were taken to the Eldoret offices after they were registered and booked vide Kitale police station OB no. 58/26/4/16 and the accused charged soon thereafter he signed from the Agency and handed over the investigations to another officer.

Although he claimed that he had posed as a customer and considered the price too low he did not make any purchases of the HP products.

He recalled that they did receive copies of cash sale receipts for purposes of further investigations.

The accused persons were placed on their defence and elected to give unsworn statements.

**DEFENCE EVIDENCE** The 1<sup>st</sup> accused DW1 testified on the material date of the said incident. He as in Nairobi when he learnt that his shop had been

raided. He authorized the inspection of the bookshop under the supervision of the 2<sup>nd</sup> accused who was in-charge at the time- i.e 26/4/2016.

He later visited the Agencies Eldoret offices as PW6 had requested. He forwarded to him copies of the receipts and invoices of the purchases of the toners.

He however noted none of the Agencies personnel had ever conducted any training on them to inform them of how to detect counterfeit items.

He denied that the items exhibits were counterfeits and produced a bunch of receipts as Dexhibit 1.

The 2<sup>nd</sup> accused DW2 also testified that on 26/4/16 she was in the shop when 3 people came to the shop. She worked at 1pm. After introducing themselves as Anti-counterfeit Agency. Personnel

they sought permission to inspect their inks and toners which they did following DW1's approval.

It's after inspection that the personnel gave them tips on how to distinguish the real and counterfeit HP products. The officers then took away all the toners suspected to be counterfeit after which she signed on inventory and was handed over as suspects to the Kitale police station.

She recalled that the officers were shown the receipts and invoices for the purchases. She also enlisted several of their suppliers from Nairobi which the officers said they would investigate and PW6 left them his telephone number.

She was released after 3 hours at the Kitale police station and charged after 6 months or so. She denied the charge.

At the close of the defence case the defence filed their submissions in court.

### **SUBMISSIONS**

The defence in its submissions referred the court to the case of Benard Omondi Odullo Vs Republic Criminal Appeal no.66 of 2000 MSA where the Appeal was allowed because of lack of explanation for the delay, unclear of custody of samples and breach of claim of custody.

While referring to the manner of storage custody and analysis they gave was a mix up of the good and they may not be the same as those seized from the shop.

They state further that the presence of 2 ink cartridges that were found to be genuine was a clear

indication there products were genuine and not counterfeit.

They also observed that the inspection of goods was allowed and no hidden items were found. They refer to the fact that no follow up was made to follow up on whether the suppliers existed or not raising doubts as to when truthfulness of the evidence of PW6 and 7.

They also noted the contradiction of the PW6 and PW7 when PW6 denying receipts were given while PW7 admitted they were shown and given receipts and invoices from suppliers. They took issue with the charges having been hurriedly instigated yet it was not easy for a layperson to know the existing covert features of the HP products.

It was their observation that PW1's powers of Attorney had not been extended to authorize him to act on behalf of the HP company.

They referred to the inventory which did not conform to the prescribed form at section 25 of the relevant Act (ACA).

The defence has also challenged the capacity of PW6 both as the inspector of goods, arresting officer as well as the investigating officer which position none conflict of legal interest hence prejudicial to the defence.

They conclude that their arrest was merely on suspicion and lack of proper investigation and call for an acquittal of the charges.

### **ANALYSIS AND DETERMINATION**

The court has carefully considered the above matter, evidence, exhibits as well as the submissions by the defence counsel.

The evidence so far tendered brings out some issues which appear to be undisputed by both parties i.e prosecution and defence.

1. That a raid was conducted at Waki Bookshop by PW2, PW5, PW6 and PW7 and others who did not testify in the case on 26/4/2016 at around 1pm.
2. That the shop was owned by the 1<sup>st</sup> accused and managed by the 2<sup>nd</sup> accused.
3. That upon inspection of the ink cartridges and toners at the shop several were confiscated on suspicion that they were counterfeit. The inventory Pexhibit 11(a)(b) are the items in details and Pexhibit 16 as well confirms so.
4. That the said raid was conducted pursuant to a complaint lodged by PW1 Pexhibit 6. However worth noting is that the same was made on

5/9/2016 (after the raid has been conducted) as well as an indemnity agreement signed by PW1 and others which undertaking to indemnify the Anti-counterfeit Agency herein referred to as ACA against any liability that may arise from seizure of the said goods Pexhibit 7.

5. That PW1 did obtain a power of Attorney donated to him by Hewlett Packard effectively appointing him as a true and lawful Agent of the company. The said power of Attorney was sealed on 14/6/16 Pexhibit 5(a)(b)(c)(d).
6. That the 2 pieces of ink cartridges submitted for samples as per Pexhibit 19 by PW6 were found to be genuine but because of the nature of analysis conducted could not be availed in their original form due to what was said to be a mess of testing.

MIG MORANGA

**SPM**

What the court will therefore have to consider is whether there was sufficient proof to confirm the various toner cartridges as set forth in the charges were counterfeit as alleged by the complainant.

On the issue of possession of the same the defence has alluded in their submissions that there was no proof that the exhibits produced in court were those that had been confiscated for further investigations by the Agency.

However it is worth noting that the 2<sup>nd</sup> accused was present and also signed the inventory of the said items.

A close look at the HP black toner cartridges described in the inventory Pexhibit 11(a) and (b) they do tally with those that the Agency availed in court as exhibits and which part of the court record.

No contrary evidence of denial of the cartridges was brought forth by the defence to show the goods were altered or that they were not the same ones found in their possession.

The items that were shown to the court were well marked and in cases where the boxes consisted of say model 12A they were 5 pieces which were marked s 1/5,2/5, 2/5, 4/5 and 5/5.

Each of the boxes were properly marked and there was no variance that occurred since all the boxes were accounted for.

PW6 had since been moved to the Mombasa or Coast region and when he came to court he did give an explanation as to why some were missing but on his recall he did avail the rest and which also still had the very markings they had which corresponded with the quantities of the items picked.

The court finds that this defence was not a true reflection of the exhibits. The court does find that there was no evidence that the pieces produced were not the same ones confiscated from the 1<sup>st</sup> accused's shop.

From the various offences to succeed the court must first make a finding that they were found in possession of the accused person.

The court on this aspect finds that the prosecution has proved beyond any reasonable doubt that the items as enlisted in all the 8 counts were indeed appearing in the inventory of the items collected by the PW5, PW6 and 7.

### **ON COUNT 1**

Model no. 12A had 5 pieces model 83A had 5 pieces model 05A had 5 pieces. They were marked as Pexhibit 12(a) 12m and 12p respectively.

### **COUNT II**

Model 126A had 10 pieces and was marked Pexhibit 12b where model 85A was marked a Pexhibits 12(L).

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### **COUNT III**

Model 55A and 51A were marked as Pexhibit 12(a) and 12(g) respectively with 3 pieces each.

### **COUNT IV**

Model 305 had 7 pieces marked as Pexhibit 12(i).

### **COUNT V:**

Model 80A 8 pieces were marked as Pexhibit 12(k).

**COUNT VI**

Models 49A.

Models 78A.

Models 53A.

Model 36A.

Each have 3 pieces each and were marked 12(f), 12(h), 12(i) and 12(n) respectively.

**COUNT VII**

Model 128A 2 pieces were marked as Pexhibit 12 (e).

**COUNT VIII**

Models 125A, 35A, 124A

1 piece each were marked as Pexhibit 12(a) 12(o) and 12Q respectively.

### **COUNT IX**

2 ink cartridges model 22 were not availed for reasons stated by PW3 in his evidence.

The other issue the court must determine is whether the black ink and toner cartridges were calculated to be confiscated with genuine HP toner cartridges or ink cartridges under trademark no. 67361.

There is sufficient evidence in the case that indeed a trademark was registered under the Trademarks Act Cap 50 on 15/9/2009 valid up to 15/9/2019 under trademark no. 67361. Pexhibit 10 is confirmation of the same.

For the court to make finding on this issue there must be direct or indirect evidence that would confirm that the accused person knew and deliberately displayed

them for sale with the full knowledge that they were counterfeit goods.

From the evidence of PW6 and PW7 there is no clear evidence that from the conduct of the accused persons that they were aware of the same being counterfeit.

In fact both witnesses said they took time to educate the 2<sup>nd</sup> accused and other shop attendants on what it is they were relying to make a determination of which were counterfeit or not.

The conclusion the court made is that the shop had genuine and non genuine products as well.

Reference to section (2) of ACA consequently refers to the abuse of intellectual property rights. There is no doubt and as shown by PW6 that Intellectual property owners have their own specific and distinct feature as of security protected under the law and

hence distinguish their products from other counterfeit goods.

For a product to be so labeled at HP it therefore must of necessarily have all the security features and any product without their features will be termed as counterfeit unless it has been sanctioned by the Intellectual property owners.

For a product to be genuine it must meet all the standards of manufacture and production.

Counterfeit cases are premises on opinion evidence mainly by expecting and which PW3 stated that the covert feature are only disclosed to fact founders such as the courts.

It was PW6s case that if any product failed on even one of the genuine features then the entire product is termed counterfeit.

He further added that whenever the products made movements within the Box then they would also be termed as counterfeit. The details of security features were discussed earlier in my Judgment.

For the court to first make a finding that the item were counterfeit we must be convinced so suffice to say that evidence of the expertly is often persuasive.

Having gone through the entire evidence the court noted that all the exhibits as mentioned in the various count 1-8 did not meet the security features on the genuine products and in the absence of any contrary evidence the court has no reason to doubt that they were all counterfeit products.

The witnesses PW3, PW4, 5 and 6 have all provided documents which confirm they are indeed experts in witness that concern HP produces documents produced namely Pexhibits 15(a)(b)(c)(d).

Indicate regular trainings by HP. The court therefore has no doubt they fell under the description of section 48 of the Evidence Act and which evidence as a general rule is not binding on the court.

It must be considered along other evidence of the court has to make any findings on the same.

The court has referred to the case of C. D Desouza VS B. R. Sharna (1953) 26KLR 41 at P42 for guidance whereas this court had no doubt on the qualifications of the witnesses there are some issues that came to light namely from PW3. It was his evidence that information on the HP products is always on T.V News paper periodic A Advertisements, flyers, Trailers and

the like. None was shown or referred to specifically in the prior period. The court was considering the case.

He further said the information could be found on internet searches, written proposals and weekly advertisements.

He also said that the covert security features knew to the IP owners and a few trained personnel charged from time to time.

He went on to say and admit. It is not easy and one needs to follow trait which needed guidance information especially from those selling.

There was no evidence to show that the sellers of products and especially so the accused were even trained to conduct the same. There ought to be a

requirement that all who wish to sell HP products perhaps do register with the Agencies like Halliday Finch and then undergo various training to help them identify the genuine from counterfeit products.

The begging question is did it really serve any useful purpose to educate them only when the inspection was ongoing . In the courts view the IP owners did not do enough before possibly blaming the seller.

There is adequate evidence especially by PW7 that receipts and invoices were furnished to the Inspection team? There is also no evidence they sought to contact the suppliers of the said items since they were known perhaps then if that had been done. They could be said to have done due diligence is establishing the source and do a better job at

curbing the sale of counterfeit goods.

Actually a retailer in the courts view was not enough perhaps they could have better served as witnesses in a thoroughly investigated case to establish the source and thereby send a message home.

For as long as this was not done then it will mean the culprits will always go scot free as most likely in this case.

PW6 concedes the convert features are not in the public domain and are counterfeit without training he said, it was definitely not easy for anyone to detect a counterfeit.

It is clear to the court that for the court to make a finding of fact there has to be evidence of mens rea.

The production of Dexhibit one shows the accused made purchases from known entities which the Inspector PW6 had information of and could have contacted to collect any further information.

The court has no doubt from observation that the goods shown to the court by PW6 had boxes with similar features as the genuine HP products and to a common man's eye it may be difficult and confusing. The degree of similarity was great.

From a reading of the offence it is clear that for criminal counterfeiting there has to be mens rea. The accused must be intentionally and knowingly acting in a manner to confuse the consumers.

It is the courts view that in the current case criminal liability cannot be attached to the accused who claim they sold the items in good faith and belief that the products were legitimate.

There was need for instance for the witnesses to show the HP literature on the genuine features on their products. Since the features change from time to time it was necessary to categorize the various boxes of cartridges to the period when they were genuine.

Even for the box marked as exhibit P19 as the genuine sample for made 83A the courts notes that

there was no written confirmation from HP confirming the ownership and authenticity of the original product and if this was done then it could confirm that it's security features enabled him to form basis of analysis and comparison for the alleged counterfeit products.

As expert witness representing interests of HP they owed the court such a report for their evidence to be conclusive and convincing enough for the court to make a find of guilt on the part of the accused persons herein.

This more so because what could be a covert feature today may change. Such changes needed to be identified and whether a product manufactured within that period met the necessary requirements or not.

Whereas the court does appreciate the genuine and serious efforts by the witnesses to prove the prosecution case. The evidence looked at in its entirety in the courts view does not meet the standard of proof beyond all reasonable doubt.

As stated the court finds that a certificate by HP would have gone a long way to persuade this court and help the court and help the court arrive at an authoritative conclusion that indeed the good herein

were counterfeit or not.

On count 9 there was not findings of product authentication by Peter Otieno PW3 the HP ink was genuine hence the said count was unnecessary.

The reason for the above scenario is that the accused were charged prematurely. The proper procedure in the courts view was for the Agency to first confiscate the suspected counterfeit and proceed to conduct analysis on the same.

The analysis was done on 13/5/18. 2016 as per the analysis done. Yet the accused persons were already charged on 11/5/2016.

How does the Agency explain the charges on 11/5/2016 when the actual findings as per the records was on 13/5/2016 was unnecessary to have the accused arrested on 26/4/16 shortly after the inspection of the goods was not a case of a predetermined mind.

That also brings about the fact that the power of Attorney for the witnesses were obtained after the case or charged were preferred.

That PW1 he obtained the affidavit Dexhibit 9 on 5<sup>th</sup> September 2016. The power of Attorney Pexhibit 5a is bonded on 14<sup>th</sup> June 2016. The matter was instituted on 11/5/16.

Indemnity Agreement is also dated 5/9/16 Pexhibit 6 was this a situation of first charging the person them obtaining the requisite authority or authorization. The question also begs the bonafides of the ACA in the entire procedure and manner of conducting the case herein.

The court is of the view that any powers to Act ought to have been issued before Action is taken in the protection of engagement of IP rights and not after the court has already been moved.

The court finds therefore that the evidence herein on counts 1-8 fall short of what the court would find conclusive evidence against the accused persons herein.

As stated earlier the genuine product Pexhibit 19 had no written certificate with a clear list of authentic security features from HP which would show the basis and grounds on which PW3 PW4 and PW6s agreed knowledge was derived for which section 54 of the Evidence Act provides for admission of such experts evidence. It could also have been important if HP could have through its rights produced in evidence show when alleged original or genuine products were produced by HP and the products services as well.

It is also noted that the complaint was laid on 5/9/2016 Pexhibit 6(b) why was it made after the accused had already been charged in court.

From the court observation the proceedings herein were not only rushed but hastily brought about before due procedure was followed since it was not shown they did so on their own motion (section 22). As stated in the a foregoing.

Observations on lack of a certificate on the genuine HP products to form the basis of making a finding on the counterfeit goods, the finds and hold that the prosecution has failed to prove that the accused persons were therefore criminally liable and the prosecution has failed to prove its case beyond all reasonable doubt.

A conviction based on the arrest evidence will be

based on insufficient evidence which in law would be unsafe.

I therefore find the accused persons not guilty on all the offences counts 1,2,3,4,5,6,7,8 and 9 of

Having been in possession on the course of trade and counterfeit goods contrary to section 32(a) as read with section 35(1) of the Anti-Counterfeit Act 2008 Laws of Kenya.

Both accused persons are acquitted accordingly under section 215 of the Criminal Procedure Code.

Right of Appeal 14 days.

MIG MORANGA

SPM

2/6/2020

Judgment read over in open court in the presence of Ms Kibe for the accused MS Nyawira watching brief for Anti-counterfeit Agency.

MIG MORANGA

sPM

**MS KIBE:** I pray for the release of cash bail.

**COURT:** I order that the cash bail be released to the depositor upon proper identification.

MIG MORANGA

SPM

**2/6/2020**

**MS NYAWIRA:** I pray for a copy of the judgment.

**COURT:** I order the judgment be typed forthwith and furnished to the parties.

MIG MORANGA

SPM

**2/6/2020**

**MS NYAWIRA:** I pray that the exhibits be destroyed. They most probably have expired and were products OF 2014-2015 or earlier.

**MS KIBE ADVOCATE:** My clients have no objection.

**COURT:** The court has considered the time matter had taken in court and possible expiry of the same and since the toner cartridges are in the custody of ACA. I order that they be photographed and thereafter destroyed. The accused persons to be informed of the exercise.

MIG MORANGA

**SPM**

**COURT:** I order a copy of the typed judgment be furnished to the parties herein. Executive officer  
To urgently assign the file.

MIG MORANGA

**SPM**

CERTIFIED THAT THIS IS A TRUE  
COPY OF THE ORIGINAL  
.....  
CHIEF MAGISTRATE  
DATE ... 9.11.2022

**COURT:** The court has considered the time matter had taken in court and possible expiry of the same and since the toner cartridges are in the custody of ACA. I order that they be photographed and thereafter destroyed. The accused persons to be informed of the exercise.

MIG MORANGA

**SPM**

**COURT:** I order a copy of the typed judgment be furnished to the parties herein. Executive officer To urgently assign the file.

MIG MORANGA

**SPM**

CERTIFY THAT THIS IS A TRUE  
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.....  
CHIEF MAGISTRATE  
DATE ... 9.11.2020