

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI

CRIMINAL CASE NO 663 OF 2016

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VERSUS

PATRICK GICHUHI NYAMBURA.....

ACCUSED

J U D G M E N T

Background

The accused person herein has been charged with the following offences under the Anti-Counterfeit Act 2008 Laws of Kenya namely;

- Three counts of having in possession in the course of Trade, counterfeit Goods Contrary to section 32 as read with section 35 (1)(a) of the Anti counterfeit Act.

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General particulars are that on the 19th day of February, 2016 at about 2.00 PM trading as Wanyambura (A) Agencies, located at stall number S38 in plot number 209/682 along Mfangano Street, within the county of Nairobi, with others not before court he did have in his possession in the course of trade, counterfeit goods namely loose pages of All England law reports 1972, All England Law reports 1999, All England Law reports 2013 all valued at Kes. 2,387,061/-: Atkins court Forms 2nd Edition 14, Atkins court forms 2nd Edition 18, Atkins court forms 2nd Edition 21(1) and Atkins court forms 2nd Edition all valued at Kes. 1,099,871/-: soft copies of all England reports, Atkins Court forms, Hasbury's Laws of England and Encyclopedia of forms and Precedents contained in HP Compact CPU serial number CZC7450WAC and Dell Optilex 700 CPU serial number 26KQKF1 all valued at Kes. 6,674,715.00 without the authority of RELX(UK) Limited trading as LEXISNEXIS

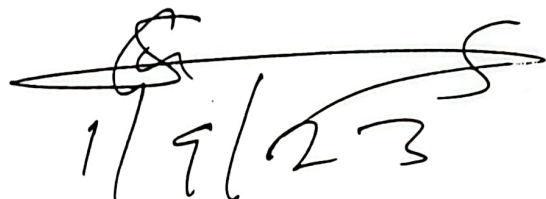
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who own the author's rights.

- In the third count he is charged with making, in the course of Trade, counterfeit goods contrary to section 32(b) as read with section 35(1)(a) of the Anti-counterfeit Act.

The general particulars are that on 19th day of February 2016 at about 2.00 pm trading as Wanyambura (A) agencies, located at stall number S38 in plot Number 209/682 along Mfangano street within the County of Nairobi with others not before court he made copies, in the course of trade of All England law reports 1972,1999 and 2013 all valued at Kes. 2,387,061/- without the authority of RELX(UK) limited trading as LexisNexis who own the authors rights.

After pleading not guilty to the offences, the matter proceeded for hearing where the prosecution called a total of seven witnesses to testify. The accused person was represented by

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Mr. J.Maina advocate.

Herein below is a summary of the testimony of the said witnesses. It is however important to note that the proceedings in this case have been taken down by a number of my colleagues before I took over the conduct of this matter. This judgment therefore incorporates those said proceedings taken before and those taken by my own hand. **Summary and highlights of the Prosecution's case.**

PW1 Agnes Akal an advocate working for Coulson Harney advocates testified that the said from is instructed by the complainant herein to act as an enforcement agent with regard to counterfeit matter. Being the local agents of RELX(UK) also known as Lexxis Nexis they have the power of attorney to pursue claims on behalf of the complainant company. This complaint was lodged by a partner in their law firm as against the accused person on 19/2/2016 when they went to the Anti counterfeit agency and were given police officers and proceeded to the accused person's business

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premises along Mfangano street and the investigating officer introduced the team to the accused person and explained the purpose of his visit whereupon they proceeded to search the said premises. Upon conclusion of the search, they seized the complainant's publications along with the accused person's computers and printing materials. After the seizure the investigating officer took an inventory of all seized items which the accused voluntarily signed in their presence. A forensic experts did an analysis of the items seized from the accused person's shop.

PW2 Eileen Dinah Ambasa Imisa an IT professional and an associate partner at Secunex Techologies testified that on 10/3/2016 at Westland's commercial center two Central processing units were brought to their office by Mr. Casper Oluoch and Nabil Khan. The two CPUs were of made by Dell and HP respectively and they were expected to conduct a forensic analysis on the contents of the hard drives of the said CPUs. They analyzed the said CPUs on behalf of M/s Coulson

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Haney advocates who had contracted them to do so. The Dell CPU had one drive containing the relevant evidence while the HP CPU had two drives but only one drive had the necessary evidence. The two hard drives had some folders with the All England and Halsbury's reports and a list of quotations and delivery notes. They also found some images of Atkins law reports, encyclopedia on forms. They copied all the items that were found on the three hard drives into one hard disc namely transcend 1TB which was played and ultimately produced in court as an exhibit (Pex12). After the said analysis they handed back the CPUs to Casper Oluoch and they did not interfere with the said hard drives in any way so that the contents therein are lost.

PW3 Weldon Sigei an inspector with the anti-counterfeit Agency confirmed that they received this complaint from M/s Coulson Haney advocates concerning the accused person who was trading as Wa Nyambura agencies. The file was allocated to inspector Casper Oluoch and himself to investigate. They


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visited the accused person's premises along Mfangano Street and upon found him at work. Upon the completion of the obligatory introductions, they proceeded to search the premises. He confirms having signed on the inventory of items recovered as a witness. Among the documents that were seized were loose pages of All England reports which they found at the out tray of the printing machine and the photocopier. This led them to conclude that the accused person was engaged in the process of reproduction of copyrighted material. They then seized the full units of the two Dell and HP computers together with the two photocopying machines branded Canon and Ricoh. Upon seizure of the said items, they were delivered to their depot and issued samples for analysis to the agent. They also subjected the hard drives of the CPU for forensic analysis.

PW4 Tiberias Onyango Otsieno a private investigator and partner at speedchase services testified that on 23/7/2015 they received instructions from Coulson Haney to investigate

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the entity known as WaNyambura agencies. They were required to make purchases of four textbooks i.e. All England law reports of 1936-2013, Atkins court forms, Encyclopedia of forms and precedents and Halsbury's laws of England. They were also to find out how the entity was able to procure the aforesaid books for sale. Thirdly they were to establish if the said entity was carrying out illegal reproduction of the said books.

They began their enquiry in Tanzania where they went to the Law school in Tanzania where they met on Issa who claimed that they were expected a fresh stock of supply of the texts from the accused person. The said Issa also confirmed to them that the accused person equally supplies the books to Zambia. They went to Lusaka Zambia and called the accused person using a Zambia line posing as potential buyers. The accused person agreed to meet them at an office in Zambia but during the said meeting he appeared suspicious of their intentions but agreed to a second meeting when he came with four books

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that they purchased from him to gain his trust.

They then placed an order for the books they sought, and the accused person promised to deliver in two weeks whereupon he gave them a proforma invoice for the said orders.

They then visited the accused person's business premises in Kenya where they conducted surveillance on his activities, and they were able to establish that he was printing and binding the said books that were on their targeted list. They thereafter compiled their report and handed it to the client.

On 19/2/2019 they accompanied anti counterfeit officers who raided the accused person's stall at Mfangano street and the recoveries were made.

PW5 Caper Oluoch a colleague to PW3 Weldon Sigei essentially corroborated the account of the said witness regarding the steps they took in the investigation once they received the complaint from M/s Coulson Haney. He is the one who took the three CPUs that were seized from the accused person's business premises to Secunex technologies

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for forensic analysis and received the forensic report on the exercise.

PW6 James Harper an inhouse lawyer for Lexis Nexis testified that they were made aware of the company called Wanyambura that was trading with their intellectual property rights without their consent. He is the one who executed the power of attorney that empowered M/s Coulson Haney to act on their behalf with respect to this complaint. He is also aware that the accused person's premises were visited by officers from the Anti Counterfeit unit and the recoveries were made. The accused did not have reason to have those documents in his possession and neither did he have their permission to make copies for sale.

PW7 Richard Crouch a director of Research solutions at Lexxis Nexis testified that having studied the evidence that was gleaned from the investigations, it was clear that their materials had been copied and the quality did not appear to be of their standard. The digital forensic evidence indicated

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that there was a large cache of material held in the hard drives of the accused person. The brands of Buttersworth and Lexis Nexis were infringed upon by the accused person since he was not one of their customers.

At the close of the prosecution case this court made a ruling to the effect that the accused person had a case to answer, and he was accordingly placed on his defense. He elected to give a sworn statement with no witness(es) to call.

The accused person's defense.

In his defense the accused person conceded that from 2013 to the period of his arrest he was in the photocopying business where he would just photocopy documents for customers and for law students at the university of Nairobi. For the students they would come with their own book, and he would photocopy pages for them and thereafter charge Kes. 1. And 30 cents per page. He denies ever being to Tanzania or Zambia on cross border business. He confirms the search that was done in his business premises on 19/2/2016 and the items

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that were recovered save for the fact that the photocopying machine was not presented in court as evidence. As for the two computers recovered, he stated that the same would be used by students in their research because the same was connected to a WIFI hot spot. There are no printers or binding machines in the said office. He also confirmed having signed on the inventory on his own free will.

For Prosecution exhibit number 15 he clarified that the same are extracts from All England Law reports 2013 volume 4 pages 953 to 1078 but that he has never seen the original book. For exhibit number 32 was Atkins book on court forms which was brought to him by students. The said book is a secondhand book. These books would be left by students, and he had kept them on his drawer but had not worked on them.

He was not involved with the investigations and specifically with the forensic analysis done by Secunex hence he would not know there were soft copies of All England law reports in the said computers because he bought them as secondhand

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computers from someone else.

Upon close of the defense counsel for the defense, counsel watching brief for the complainant and the prosecuting counsel filed their final submissions which I have carefully considered. It is clear that parties are unanimous that the pre-eminent authority on such cases is the case of **Purity Nyakio Wachira-v-Republic (2020)eKLR**. The following issue(s) therefore commend themselves for determination.

Issues for determination.

- Whether the accused person was in possession of counterfeit goods in the course of his trade.
- Whether the defense of reasonable photocopying is available to the accused as argued by defense counsel.

Analysis and determination.

Turning to the counts in the charge sheet, it is clear that with regard to the second count, the accused was found with original secondhand books which cannot be claimed to have

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been counterfeit in any way. These were Atkins Court forms 2nd Edition, 14, 18, 21 and 32. Flowing from the first condition precedent set by case law of **Purity Nyakio Wachira**, the books are not counterfeit in any way and as such the second count is not sustainable at this stage.

It has also been established that the accused person was found in possession of several loose-leaf copies of selected pages of All England Law reports from various years and also two computers whose hard drives bore products belonging to the complainant.

I have noted the arguments by the defense counsel in his submissions that no shred or grain of evidence was adduced by the prosecution to show that the accused person had manufactured, produced, packaged/repackaged, labelled or made any books identical or substantially similar to such a degree and in such manner in imitation of the original publications of the complainant.

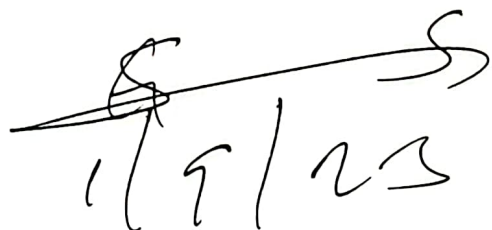
He proceeds to argue that the fact that there was no printing

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machine found in the premises of the accused makes it inconceivable that the accused person could have undertaken the alleged production and manufacture of colorable imitation of the complainant's original publication.

I would agree with the arguments by the said counsel especially with regard to the first and third counts on the charge sheet. The loose pages in of themselves without any other evidence to the contrary does not allude to the offences that the accused has been charged with in those two counts. In my view the defense of reasonable photocopying is available to the said accused person especially when one considers the concession by PW6 during cross examination on this point. The loose pages cannot be deemed counterfeit solely from the mere fact that they are photocopies of the original. For this reason, I am equally not satisfied that the said pages amounted to counterfeit goods within the meaning of the relevant Act.

Turning to the fourth count it is an indisputable fact that the

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two computers were retrieved from the accused person's business premises and further a forensic analysis of the hard drives revealed that they contained the publications listed in the said count 4 of the charge sheet. They were scanned copies of the entire publications in pdf format.

I have noted that the accused person in his defense denied knowledge of the contents of the said hard drives claiming that he bought the computers as second hand and did not know the contents of the hard drives. I however note that the nature of his business dealings actually speaks against him on this count. The nature of his trade was one of duplication or rather photocopying of materials and his major clients were students from law schools. A reproduction of an entire book, cover to end, cannot be explained by the defense of reasonable photocopying and looked in the context of the business that the accused person was engaging in then clearly the parameters of enunciated in the case of **Purity Nyakio** above have been met in my view. The accused person was in

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possession of the computers which contained the scanned books in pdf format and clearly the same were in his business premises which dealt with the photocopying of materials hence it was in the course of his trade.

The unavailability of printers and binding materials in the said premises does not diminish the evidence and the conclusion that the accused person was dealing with copyright materials and infringing on the rights of the copyright owner in my view.

Disposition.

My analysis and observation of the testamentary and documentary evidence on record and the law has led me to the conclusion that the prosecution have failed to discharge their burden of proof in all but one of the counts that they preferred against the accused persons.

The accused person is found not guilty with regard to counts one to three on the charge sheet and is duly acquitted under section 215 of the Criminal Procedure Code.

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He is however found guilty on the fourth count of the charge sheet on having in possession in the course of trade of counterfeit goods contrary to section 32(a) as read with section 35(1)(a) of the Anti-Counterfeit Act 2008 and is duly convicted under section 215 of the criminal procedure code.



Gilbert Shikwe (PM)

Dated and delivered in Milimani this 1st day of September

2023 in the presence of:

The Accd.

Mr T Muma S Accd.

Miss Mnyua W/S & Mrs
Thech S ODPF

Miss Akal W/S &

Comp.