

REPUBLIC OF KENYA
IN THE CM'S COURT AT MILIMANI
CR NO 695 OF 2019

REPUBLIC.....PROSECUTOR

VS

LYDIA MUTHONI WAMBUI.....ACCUSED PERSON

JUDGEMENT

Introduction

The accused person herein Lydia Muthoni Wambui was charged with the offence of Having in Possession in the course of trade counterfeit goods contrary to Section 32A as read with Section 35 (1) (a) of the Anti-Counterfeit Act. It was alleged that on 25/1/2019 at about 12.30 p.m. the accused person while conducting business as Lymph Dice Enterprises at Kampala Business Centre at River Road/Duruma Road Junction in Nairobi, she did have in her possession in the course of trade counterfeit HP branded Toner Catridges namely, assorted 19 pieces of HP Branded Toner Catridges without the authority of Hewlette – Packard Development Company L.P, the owner of the HP trademark No. 67361 of class 2 all with a retail value of Kshs. 182,000.

Prosecution Case

PW 1 worked for Haliday Finch which company is a vendor for Hewlette Packard (HP). He stated that HP Company had contracted Haliday Finch to conduct market survey and product investigations. He worked with Haliday Finch as a Product Expert Investigator. Regarding this matter, they conducted a market survey and investigations within Nairobi Central Business District (CBD). On 21/1/2019 they officially lodged a complaint with the ACA in Nairobi on behalf of Hewlette Packard. On 25/1/2019 they were called in by ACA officers. They

and police officers left for Nairobi Central police station. They were assigned 15 officers. They then headed to the outlet based at Kampala Business Centre along Nduruma road. ACA Inspector Thomas Odek, PW 2 herein introduced the team to the shop attendant who gave a go ahead for the team to access the shop. They separated the counterfeit items from what was genuine. They left the genuine items in the shop and picked the suspected counterfeit items. They documented the same. The shop attendant who was also the owner signed for them. The items were one piece of cartridge branded HP, 19 pieces of HP Toner Cartridges, two glue guns, 67 pieces of glue sticks were all registered in the inventory dated 25/1/2019. The goods were then packed in a sack. On 9/4/2019 PW 1 made an application for the inspection of seized goods at the ACA office. He was given ACA form number 0966. He was also given samples of the toners seized. He then lodged a complaint on 26/2/2019 with the ACA and swore an affidavit in support of the complaint. On 27/2/2019 payment for the complaint was made which was Kshs. 18,000. After collecting the samples from ACA, PW 1 did an analysis of 19 counterfeit HP Toners. They picked three of the toners for proper analysis. All of them were found to be counterfeit. He then made his report. He reiterated that he was a trained expert. It was his evidence that the toners the subject matter of this case had their package reused, repacked and sealed with glue. This was unlike the original box which was machine glued. He provided a sample of the genuine toner. He then stated that when comparing the original he could tell the seized toners were counterfeit. PW 1 then provided a HP Value calculator and told the court that the value of the counterfeit goods was Kshs. 195,810.

PW 2 worked as an Inspector with the Anti Counterfeit Authority (ACA). On 25/1/2019 he was assigned this case to investigate. He was with IP Abdi Fatah. They agreed with the Haliday Finch representative to meet at Central police station. When they arrived at the police station they explained to the OCS Central

police station about their operation and requested for backup of officers. They then left. They were directed to Kampala Business Centre to a shop on the ground floor named Lymph Dice Enterprises. At the shop PW 2 introduced himself and the team to a man who was there and stated that they wanted to inspect. They were allowed into the shop as the owner was called. They carried out the inspection. A total of 19 cartridges were identified as counterfeit. They were seized all labelled HP. They also seized two glue guns and 67 glue sticks. An inventory was prepared. After the seizure PW 2 did a notice to notify the complainant dated 6/2/2019 through email. The notice explains the requirements the complainant is to meet including the inspection fee and taking samples for further analysis. On 9/4/2019 the Haliday Finch representative visited the go down where the seized goods are stored. He inspected the seized goods and took them for analysis. They retained three toner cartridges for their own use. On 16/4/2019 PW 2 received a report from Haliday Finch. The cartridges were counterfeits. One ink cartridge was genuine. On 26/4/2019 PW 2 wrote to the Registrar of Companies for details of ownership of the shop. He received a response on 30/4/2019 which indicated that the company was owned by the accused person as the proprietor and director.

At the close of the prosecution case the accused person was found to have a case to answer and was placed on her defence. She elected to give sworn evidence and call no witnesses.

Defence Case

DW 1 testified on 25/1/2019 she was not at her shop. At 12 noon her assistant called her informing her that ACA officers were at her shop. Within 30 minutes she was at the shop. she found that they had put her toners and catrdges in sacks. She recorded what had been put aside and it was 19 toner cartridges and 3 pieces

of ink cartridges. The officers however did not record their serial numbers. She then signed the form and the officers left. She was later charged in court. She stated that she was not present when the cartridges were tested and therefore she did not know what was tested.

Analysis and Findings

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^s herein ^{was} ~~were~~ jointly charged in count one, two and three 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.*

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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 person was in possession, the prosecution adduced evidence that the accused person was the owner of the shop Lymph Dice Enterprises. There was a letter dated 30/4/2019 from the Registrar of Companies confirming 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~~ ^{1st} accused person admitted to having been arrested while working in the shop selling ^{cameras} ~~watches~~ having been employed by the 2nd and 3rd ~~accused persons herein~~. As such, the accused persons ^{was} 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.."*

The prosecution further provided evidence of the counterfeit goods being tested

and being proved to be counterfeit of the trade mark HP brand. The counterfeit goods had been affixed with the protected mark HP. There were also glue sticks and glue that were seized. The counterfeit HP cartridges were found by PW 1 to be reglued and resealed. The accused person acknowledged that the goods were seized from her shop. she raised an issue with the goods being tested in her absence. However, a report was filed in court for the inspection. I do find that the prosecution proved their case to the required standard. The accused person is convicted as per the provisions of Section 215 CPC.



HON C M NJAGI

SENIOR RESIDENT MAGISTRATE

Dated, signed and delivered in Nairobi on

5th October
July 2022

In the presence of:

Mr Mwangi for Accd
Ms Mwangi for Accd
Ms Mwangi for Accd
C/A Accus
Accd person