

IN THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA

CRIMINAL CASE NUMBER 3074 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ERICK ESHITIKA AWINO..... ACCUSED

JUDGEMENT

ERIC ESHITIKA AWINO was arraigned before the court facing a charge 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 counterfeit Act, 2008 Laws of Kenya.

The particulars of the offence are that on 30th June 2016 at about 14:30 Pm at **LASER WORLD** in Kakamega town within Kakamega county being the owner and others not before court you did have in your possession in the course of trade HP toners catridges models C285A nineteen pieces, CB436A one piece, CE413A one piece, CF210A one piece, CE412A one piece, CE505 one piece, CE411A two pieces, CE255A one piece, CE320A one piece, Q2612A one piece, CF280A two pieces, Q7553A one piece, C7115A one piece, Q2613A two pieces CE255A one piece, Q6511A two pieces, CB542A three pieces, Q5949A two pieces, CB541A one piece, CF283A two pieces all valued at Kenya shillings 287,500/-m intended to be confused with genuine HP toner catridges, which is a protected good under trade mark number 67361 owned by Hewlett Packard limited.

Accused pleaded not guilty. This prompted the prosecution to call for the evidence of :

EFFIE MONICA ALUOCH PW1, EVANS NGUGI KINYANJUI PW2, ROBERT KIPTANUI CHIRCHIR PW3

PW1 told the court that she is an Inspector with the Anti Counterfeit Agency based in Kisumu and that her duties involve to conduct surveillance, inspection and investigations on matters related to counterfeit. This they do by going to shops and checking on products that are being sold to see if they are genuine as per her training. So on 30th June 2016 while in company of police escort visited a shop called Laser World for inspection within Kakamega town. They found the accused person who introduced himself as the owner and allowed her to inspect the goods he was selling which included tonners and computer accessories. It was her testimony that a number of the tonners had no fixtures and were suspected not to be genuine. They removed them from the shelves and 49 pieces of tonners were found not to be genuine. An inventory was prepared and the goods seized were produced as exhibits.

PW2 told the court that he is the brand protection manager with Halliday Finch and his duty is to investigate and detect the branding and trade name on behalf of the owner. He produced a power of Attorney from the company. Also produced by this witness was an expert certification of H.P to be

used in legal proceedings. He told the court that on 27th July 2016 he was deployed to go to the Kisumu office to examine the above listed products which he found not genuine.

PW3 is a police Inspector who works with the Anti counterfeit testified as to how they had received intelligence reports of people selling counterfeit products within Kakamega town. That they visited the shops while in company of the police from Kakamega police station. They visited a shop Lazer World along Sudi road where they found accused person and that after introductions he allowed them to carryout inspection and examination of the goods on display for sale within his shop. He was found with all the goods listed on the charge sheet. They were found to be counterfeit goods. He gave the details. This witness was later recalled to produce some exhibits that were not before the court. The accused person was accorded an opportunity to cross examine all of the prosecution witnesses. When the accused was placed on his defence he informed the court that he works as a technician and was at the shop working on a client's printer. He did not mention the name of the client but gave the name of the owner of Laser World.

Determination

The court needs to establish whether the prosecution has discharged the burden of proof beyond reasonable doubt. At this stage it is incumbent upon the court to evaluate the evidence in its entirety and determine whether it measured up to the standard of proof of *beyond reasonable* doubt.

In this case the accused person has maintained that he was not the owner of the shop. It is not disputed that the accused was arrested from that shop. He has also not denied that he met the prosecution witnesses while at the said shop but has maintained that he was working at the shop. I have looked at the permit issued by the County Government with respect to this shop called Laser World and find that the person in whose name it was issued is not indicated. It was crucial for the prosecution to establish who was the owner of this shop. Again when I look at the inventory of seized goods it is not clear whether the accused person was signing as the owner or agent of the seized goods. No doubt the seized goods are protected goods going by the evidence of **PW2** who took the court through the similarity and differences between the suspected counterfeit goods with the original goods meant to confuse the public with the suspected goods appearing as the protected goods by use of the registered mark to goods without consent of the owner of the mark.

These are charges which are serious in nature. It was crucial for the prosecution to establish who the owner of these counterfeit goods is. There was nothing produced by the prosecution to prove that accused person was the owner of the counterfeit goods that were produced. There is nothing linking him to the exhibits at all. It is his word against that of the prosecution witnesses. **PW3** told the court that the only reason why they arrested the accused person was that **he was found at that shop**. The prosecution did not find out whether he was the owner, customer or employee or at all what he was doing there. Accused in his defence has denied the charges and given the name of the owner of this shop. At the end of it all when I weigh the case of the prosecution vis a vis the defence of accused a lot of doubts arise in the mind of the court as to whether this accused person was found in actual possession and in the course of trading counterfeit goods contrary to section 35(1)(a) of the Anti-counterfeit Act, 2008 Laws of Kenya. This case has not been proved as per the legal standards required of beyond reasonable doubt. Consequently I acquit the accused person under section 215 criminal procedure code.

R. J. M. de la S.

H. J. M.
J. S. M.
2016

Accused is to be set free forthwith unless otherwise lawfully held.

H.W.
Hazel Wandere

SPM

2.3.22

Judgement delivered by me in open court at Kakamega.

Present

Accused.

Mrs. Susan for the State

Mr. Moses for the court.

Complainants are also present

[Signature]
S.P.M.

2.3.22

Order
complaints are terminated
State.

Certified True Copy of the Original
Date... 2/3/22... Sign... *[Signature]*
CM / SPM / PM / SRM / RM
KAKAMEGA LAW COURTS

[Signature]
S.P.M.
2.3.22