

REPUBLIC OF KENYA

JURISDICTION: IN THE CM'S COURT AT MILIMANI

FILE NUMBER: CRIMINAL CASE NO 908/2018

BETWEEN: REPUBLIC V/S CHARLES MUNENE

CORAM: R.K. ONDIEKI- SPM.

DELIVERED: 10th AUGUST, 2023.

JUDGEMENT OF THE COURT:

1. It is now cast in stone and founded in many jurisprudential decisions so often repeated and yet bear repetition that throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to the defense of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to an

acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

2. May I also add that the legal burden remains constant throughout a trial as it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

3. The accused is charged with the offence of having in possession in the course of trade, counterfeit goods contrary to section to section 32(a) as read with section 35(1) of the Anti-Counterfeit Act, No.13 of 2008 of the Laws of Kenya. Particulars of the offence being that on the 19th day of February, 2018 at about 1:00pm in Mlolongo you did have in your possession in the course of trade 60 pieces of counterfeit Union Assa Abloy 2 lever with brass scroll handle Door locks branded "UNION" without the authority of Assa Abloy (East Africa) Limited, the owners of the Trademark "UNION" registration No.58172 in class 6 under the Trade Mark Act at 1638 with a total retail value of Kshs98,280.00.

4. Thomas Joseph Ramogo Odek(PW1) told the court that he is an Inspector with Anti-Counterfeit Authority since the year 2010 as evidenced by a certificate of

authority as Exhibit 1 and Kenya Gazette Notice as Exhibit 2. On 10th February, 2018, in the company of Abdi Maalim, they carried out an investigation of assorted counterfeit goods at a premises at Mlolongo road along Mombasa Road at a Warehouse of a Chinese nationality and among them were Union Door Locks.

5. The witness further told the court that upon storming the warehouse, they took possession of two boxes with union door locks and compared it with a genuine sample and noticed that the two fake ones had the inner box wrongly misspelt as letter "A" was missing. The Chinese nationality told the officers that the goods belonged to another person and upon calling him, the accused came and loaded them into a motor vehicle. The accused equally told the officers that the goods belonged to one Peninah Njeri. The officers seized the goods and took them to a depot. Further the witness

marked the counterfeit two boxes of the locks as MFI 3 and the genuine box of the locks as MFI 4. The description of the fake lock is "*two lever with brass scroll handle*" The inner box was marked MFI 5.

6. Peninah Njeri did not heed the summons to go to the depot but instead the accused went for the goods and he marked the two boxes as MFI 6 an Inventory as MFI 6, Gazette notice as MFI 7, Seizure notice as MFI 8, a letter dated 17th April 2018 as MFI 9, sample of seized goods as MFI 10, AC8 form as MFI 11, affidavit by Humprey Kinyua as MFI 12, a copy of the document of use in legal proceedings as MFI 13, certificate of incorporation as MFI 14, analysis report dated 4th February 2022 as MFI 15, a receipt Number REQ 0127 dated 22nd January 2019 in the sum of Kshs17,000/= as Exhibit 16 and a price list as Exhibit 17.. The witness equally produced MFI 5 and MFI 16 as Exhibits 5 and 6 respectively.

7. Under cross examination, the witness said that the witness said that they found a Chinese national but did not take his particulars and further said that he was in charge of the depot. He was found in possession of the counterfeit goods and when one is found in possession of the goods, he is deemed to be in possession of the counterfeit goods.

8. The Chinese called the owner and the accused came to pick the goods. However, the accused said that the goods belonged to another and he gave the particulars of the owner and the officers left her to go. However later he charged the accused. The witness did not take photographs of the seized goods.

9. The witness further said that the goods were imported and the Chinese national was deemed to be the importer in law. However, the Chinese national refused to write a statement but he cooperated well.

10. Alexander Kaseki Muinde(PW2) told court that he does brand protection for Assa Abloy and in support of his evidence, he produced a number of certificates of resume to demonstrate that he is apart from being trained, has power of attorney and a certificate to be used in legal proceedings in court. The witness produced appointment letter pas Exhibit 18, a certificate as Exhibit 19, a letter of authority as Exhibit 20, Power of Attorney dated 6th January 2020 as exhibit 21 and Trade certificate as Exhibit 13.

11. The witness upon analysing the seized lock, and while in the genuine lock, the outer package is branded *Assa Abloy*, in the counterfeit one, the outer package is plain. In the genuine lock it has a name *assa abloy* on the front page with space while in the counterfeit one, the word *assaabloy* is not spaced. While the genuine lock is made in China, the counterfeit does not state. In the genuine lock, it has a signal of red and black while

in the counterfeit is grey with some whitish. The genuine lock has a batch number but the counterfeit does not have a batch number.

12. The witness produced the Analysis Report as Exhibit 15, genuine brass as Exhibit 23 and aluminium brass as Exhibit 24, genuine carton box as Exhibit 3 and the counterfeit as Exhibit 4.

13. Under cross examination, the witness said that he recorded one statement dated 4th February 2022 and that he is an expert and is able to differentiate between the genuine and counterfeit locks. The word *China* is engraved in the genuine lock while the counterfeit does not have the word *China* and that his analysis is based on the two samples that he had collected.

14. Humprey Kinyua (PW3) told the court that he is Managing Director of Assa Abloy from the year 2015 and that his duties are administrative, revenue

generation, product introduction, innovation, compliance and as assigned from time to time.

15. The witness said that in the year 2018, they were informed that counterfeit locks were seized and so he filed a complaint accompanied by an affidavit. The witness produced the complaint as Exhibit 11 and the affidavit as Exhibit 12.

16. Under cross examination, the witness said that he appoints officers to produce documents in court and that PW3 is one of the agents who carry out market surveillance. The witness further said that Assa Abloy is based in Sweden but has branches in China, South Africa, Dubai, Spain among other regions but not in Kenya and Nigeria. China exports Assa Abloy to Kenya. Further, the witness said that packages change from time to time and some features differ from one place to another. However, there is no law restraining a purchaser from purchasing from another country but

there is intergroup policy that a customer domiciled in Kenya, the other country cannot sell to that customer.

17. The witness said that customers have been purchasing these products from South Africa and Dubai and the features differ from one region to another. The witness was not sure as to whether China does manufacture and exports to its branches only.

18. The accused person Charles Munene Muita told court that he works as a driver cum staff at Kenyatta Traders Hardware and that on 16th February, 2018 he was send to pick a consignment from a hardware owned by a Chinese national and upon presenting a payment receipt, the stock was loaded into a pick up. At that time the officers from ACA arrived and took two cartons to ACA offices and he took 48 cartons to a Store at Kahawa.

19. Come June 2018, the ACA officers went to the shop and served him with summons but he maintains that he does not sell the locks as alleged but Peninah does.
20. Under cross examination, the witness said that he was arrested with door locks after he had loaded them from a Chinese warehouse.

Analysis and Determination:

21. It is trite 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 Vs DPP 1935 AC 462 and Miller Vs. Minister of Pensions 2 ALL 372-273).
22. The accused person herein was charged with the offence of being in possession of counterfeit goods contrary to Section 32(a) of the Anti-Counterfeit Act

No. 13 of 2008. So 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 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."

23. For the prosecution to sustain a conviction, the prosecution needed prove, beyond reasonable doubt, three elements: -a) That the accused was in possession b) of counterfeit goods and c) in the course of trade.

Possession:

24. As to whether the accused was in possession, it is clear that on 19th February 2018, the accused was found by ACA officers at a Chinese warehouse where he had loaded the door locks onto a motor vehicle. These

officers took two boxes for analysis and according to the accused, he took the remaining 48 boxes to Kahawa Store. At the time and according to PW3 Thomas Joseph Ramogo Odek under cross examination, he said"
...One of the people we found there was a Chinese national and we did not take down his name, particulars as he told us that he was not the owner of the goods but was in charge of the depot. If one is found with the goods, he is deemed to be in possession of counterfeit goods. At the time we visited, he was in charge of the goods. However, he called the owner and we arrested the owner. I cannot tell who loaded the goods onto the motor vehicle. There were the only goods there. The accused said that he was sent to pick the goods and gave us the owner and her number and I left him go but later I charged him. The accused took the responsibility of the goods.... The goods were imported from China. The Chinese national was deemed to be importer by the law. We did inspection and we did not find the relevant documents

related to these goods. The Chinese national refused to write the statement but cooperated well."

25. It is also clear that that PW1 and PW2 testified and tabled a resume of their qualifications to differentiate the genuine from the counterfeit locks and filed analysis report produced as Exhibit 15 to confirm that the two boxes seized and analyzed from the accused person were counterfeit.

In the course of trade:

26. As to whether it was in the course of trade. The word trade is defined under section 2 to include business and profession. PW1 said that at the time of seizure of the goods, they searched the warehouse and found the name of the business as Pertinent Garments Limited and took the seizures to their offices. At the same time, the accused said that he works at Kenyatta hardware from where he was arrested and to this

much, the seized goods were impounded in the course of trade.

27. The accused admitted to having been arrested while in the shop selling the products. As such, the accused was in possession of the goods while in the course of trade.

Counterfeit goods:

28. 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."

29. Equally the word "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."

30. Therefore, now, beware that the prosecution had a burden to prove that the locks were as a result of counterfeiting of any item that bears an intellectual property right.

31. It is also clear that that PW1 and PW2 testified and tabled a resume of their qualifications to differentiate the genuine from the counterfeit locks and filed analysis report produced as Exhibit 15 to confirm that the two boxes seized and analyzed from the accused person were counterfeit. The locks were found at a Chinese warehouse packaged in cartons and on closer analysis of the cartons, and on strength of the Analysis

Report by Alexander Kaseki Muinde, the cartons feature did not match with the genuine cartons.

32. Undisputedly, no contrary report was ever produced as to the findings of the prosecution witnesses.

33. Taking the totality of the evidence, it is clear that the prosecution was able to surmount the last two ingredients and that is; in the course of trade and counterfeit but as regards the issue of possession, the court is a little bit uneasy with the prosecution evidence. This is why.

34. The counterfeit goods were found in possession of the Chinese National according to PW3 Thomas Joseph Ramogo Odek. The accused had gone the warehouse to pick the consignment having been sent by one Peninah Muita and according to prosecution witnesses, the accused gave out the full names and the telephone number of the person who sent him to pick

the goods and in law, though the goods were counterfeit, he gave an explanation that he was an agent sent to pick the consignment by Peninah Muita. Put differently, under section 111(1) of the Evidence Act, Cap 80 Laws of Kenya, the accused had given a plausible explanation and so had discharged the evidentiary burden and so the legal burden remained with the prosecution to prove that he had possession of the counterfeit door locks.

35. The verbatim quote under paragraph 24 herein is clear from the prosecution witnesses that the Chinese National was in law possession of the counterfeit door locks and not the accused. There was no evidence adduced how the door locks were being stored in that warehouse. Was the warehouse a leased one by Peninah Muita? If yes, are there any documentations that the warehouse was just a warehouse on lease? How did the consignment end up at the Chinese national warehouse?

36. Additionally, it is on record that the Chinese national declined to record a statement over the matter and as it were, this witness was a key witness on the aspect of possession of these door locks. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact and so in Donald Majiwa Achilwa and 2 other Vs R (2009) eKLR the Court stated that the law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness

been called his evidence would have tended to be adverse to the prosecution case.

37. In this case, the Chinese national and Peninah Muita were key witnesses who would have shed light on the issue of possession of these counterfeit door locks. Thus, the only inference that the court can draw from their non-attendance in court as witnesses is that had they testified, their evidence would have tended to be adverse to the prosecution and favourable to the accused person.

38. Ultimately, I make a finding that the charges against the accused were not proved beyond reasonable doubts and for those reasons, I acquit the accused person under section 215 of the CPC and set her free unless otherwise lawfully held back.

39. Pursuant to section 28 of the Anti-Counterfeit Act and having made a determination that the goods herein were counterfeit, an Order is hereby issued for

destruction of the goods after fourteen (14) days from the reading of this Judgement. Cash bail to be released to the depositor.

Delivered in the open court this 10th August, 2023.



Hon. R.K. ONDIEKI,

MBA(HR), LLB(Special), LLB(General), BA(Econ).

SENIOR PRINCIPAL MAGISTRATE.

MILIMANI LAW COURTS.

I Certify that this is a true copy
of the Original

 24/11/2023.
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CHIEF MAGISTRATE
MILIMANI LAW COURTS

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