

**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. E151 OF 2020**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ABDIKARIM ADAN FARAH ..... ACCUSED**

**JUDGEMENT**

**The Charge**

Count I, the accused person herein Corner Bondeni Stores Limited and Abdikarim Adan Farah are charged with offence of importing into Kenya counterfeit goods contrary to section 32(f) as read with section 35(1)(a) of the Anti-Counterfeit Act, 2008, Laws of Kenya. The particulars of the offence are that the accused persons on 13<sup>th</sup> July, 2020 at Regional Container Freight Station within the County of Mombasa, being a Limited Liability Company and its Director did import into Kenya counterfeit goods contained in container no. FCIU9740862, to wit 66 cartons containing 15,840 copies of counterfeit books each valued at Kshs.325, making a total value of Kshs.5,148,000, without the authority of Storymoja, the registered owner of Kigogo, a registered copyright registered under Copyright Registration Number LT-14135, which goods imitated the protected goods in such manner and to such a degree that those counterfeit goods are substantially similar copies of the protected goods.

In count II, the accused persons Corner Bondeni Stores Limited and Abdikarim Adan Farah are charged with offence of importing into Kenya counterfeit goods contrary to section 32(f) as read with section 35(1)(a) of the Anti-Counterfeit Act, 2008, Laws of Kenya. The particulars of the offence are that the accused persons on 13<sup>th</sup> July, 2020 at Regional Container Freight Station within the County of Mombasa, being a Limited Liability Company and its Director did import into

Kenya counterfeit goods contained in container number FCIU9740862 , to wit 201 boxes containing 10,050 copies of counterfeit books, each valued at Kshs.618, making a total value of Kshs.6,210,900 without the authority of The Jomo Kenyatta Foundation, the registered owner of New Edition Primary Mathematics Pupils' Book 7, a registered trademark registered under Trademark Registration Number 65760 in class 16, 41 and 45, which goods imitated the protected goods in such manner and to such a degree that those counterfeit goods are substantially similar copies of the protected goods.

In count III, the accused persons Corner Bondeni Stores Limited and Abdikarim Adan Farah are charged with offence of importing into Kenya counterfeit goods contrary to section 32 (f) as read with section 35(1)(a) of the Anti-Counterfeit Act, 2008, Laws of Kenya. The particulars of the offence are that the accused persons on 13<sup>th</sup> July, 2020 at Regional Container Freight Station within the County of Mombasa, being a Limited Liability Company and its Director did import into Kenya counterfeit goods contained in container number FCIU9740862, to wit 127 cartons containing 15,240 copies of counterfeit books, each valued at Kshs.345, making a total value of Kshs.5,257,800, without the authority of Storymoja, the registered owner of Chozi la Heri, a registered copyright registered under Copyright Registration Number RZ01734, which goods imitated the protected goods in such manner and to such a degree that those counterfeit goods are substantially similar copies of the protected goods.

The accused person pleaded not guilty to the charges. The prosecution called a total of nine(9) witnesses.

### **Prosecution Case**

PW1 - Erick Ouma Okoth testified that he is a clearing and forwarding agent with Tatu Limited Company. He stated that he is the director of the company. It was his testimony that on 20/05/2020, he was at home but the company received an order to clear goods. He received information from his workers that they were clearing and had called Anti-Counterfeit goods. He testified that on

13/05/2020, the manager called him that they were clearing goods belonging to Corner Bondeni Stores Limited and upon calling Anti-Counterfeit, they were found to be fake. He stated that the clearing was handled by one Newton Kandie, and that he himself was not present when the goods were being verified by the Anti-Counterfeit. Upon cross-examination, he stated that he was not present when stripping and clearing of the goods was done.

PW2 – Newton Kandie testified that he is a clearing and forwarding agent with Tatu Limited Company as a Port Clerk. His duties are to verify goods in the field. He stated that on 11/07/2020, he had gone to verify container at Regional Container Freight. After he verified, KEBS personnel then told him that Anti-Counterfeit officers wanted to see the goods. He called them and they arrived on 13/07/2020 to verify the goods. He stated that they verified and found them counterfeit. The container was consolidated and he informed the office, the goods were removed and an inventory prepared. It was his testimony that his customer entry dated 10/07/2020 indicated that the goods were from China and the importer was Corner Bondeni Stores Limited. He produced in court the customer entry. The description of the goods were metallic chairs, sofas, beds, cabinet, wooden table and books. He also produced the bill of lading, pre-export verification form and import declaration form which showed Corner Bondeni Stores Limited as the consignee with 5999 kgs and other assorted goods. He testified that the books were packed in cartons and were opened in his presence and an inventory dated 13/07/2020 which he produced in court was prepared. He testified that he did not know Corner Bondeni Stores Limited in person but they were their clients. He positively identified the accused person whom he stated was the owner of Corner Bondeni Stores Limited. He was cross-examined by the defence counsel and stated that he is the one who was in the field. He stated that the consolidation of the container meant it had goods belonging to different people and it had thirteen (13) different items. He stated that the inventory which he signed was in regard for the books while no inventory was prepared for twelve (12) other items. That they were released and duty duly paid.

He stated that the tax was paid by Hassan Ahmed. A total of Kshs.2,200,310 was paid as duty but Hassan Ahmed was not in court. He testified that the goods went to Nairobi. He was shown the search for the company and that Corner Bondeni Stores Limited whose director is Abdikarim Adan Farah is based in Mombasa. He testified that the container had thirteen (13) items. The books were 267 and the price was 4.906, the weight was 5599 kilograms, value was 1310 dollars. He testified that the commercial invoice originated from exporter. He produced the exporter invoice and stated that the goods could be from different sellers. It was his testimony that he received the goods, did clearing and was paid. He was re-examined and stated that he was given the bill of lading by the importer, the owner of Corner Bondeni Stores Limited Abdikarim Adan Farah.

PW3 – Patrick Wakaya testified that he works with Jomo Kenyatta Foundation which deals with publishing of books and promoting them in schools. He testified that he received a phone call on 13/07/2020 from Nairobi that suspected goods had been nabbed and got in touch with Anti-Counterfeit officers whom he joined at CFS Miritini. He testified that he proceeded and found the goods there. He took a sample copy of primary mathematics class seven (7) and sent to their own quality assurance department in Nairobi for analysis. He produced the sample of primary mathematics class seven (7) Jomo Kenyatta Foundation and application for samples. The quality assurance department sent him the analysis report and he submitted it to Anti-Counterfeit. He produced the analysis report in court. He testified that it confirmed the disparities between their original copy and the sample copy. He stated that at CFS, the goods were in cartons but he did not know the exact number. He was cross-examined and stated that he was present when the stripping of the container was being done and was present when the books were removed from cartons which he signed. It was to ascertain whether the book is counterfeit. He testified that at stripping, the Anti-Counterfeit officers were present but he could not recall any officer taking any photos of the books. He stated that his work was to take the book, sign sample application form and take it to Nairobi.

PW4 – Godfrey Nyakundi stated that he works with Jomo Kenyatta Foundation as a quality assurance officer. He testified that his duties are to do technical specifications and publications. It was his testimony that on 21/07/2020, he was told to analyse the confiscated books and the original genuine books. After doing the analysis, the recovered books were imported while they do their printing locally. He produced in court one counterfeit book and one genuine book. He testified that the counterfeit is printed by English Press and reprint is running up to 2016. The original is done by printing services limited and the reprint is up to 2019. It was his testimony that the counterfeit book has a small spine meaning material used is less thus thickness of the paper is less. The counterfeit book has five stretching thread while the original has six. He stated that his finding was that the books recovered in Mombasa did not belong to Jomo Kenyatta Foundation and they were counterfeit. He testified that he did the report dated 21/07/2020 and signed. He produced the quality assurance report. He was cross-examined and stated that there was a small note saying the counterfeit books were from Mombasa. He stated that he also did a note for the original book. He did not produce the notes in court. It was his testimony that if old books are not sold, they become absolute and communication is done. He was re-examined and stated that the counterfeit books were recovered in Mombasa.

PW5 – Elsie Oyoo testified that she is the deputy company secretary and head of legal affairs at Jomo Kenyatta Foundation. She testified that her duty is to give policy and legal advice to senior management team and draft contracts. It was her testimony that Jomo Kenyatta Foundation is a state owned entity whose mandate is to publish books and education materials. She produced the certificate of incorporation. She stated that she had a document on behalf of Mrs. Baraza Rosemary who is former managing director JKF. She stated that the former managing director signed the documents for laying complaint for claim of counterfeit She stated that she understands her signature and handwriting. She also produced affidavit of Rosemary Baraza. She produced in court an indemnity

dated 22/07/2020 signed by Rosemary Baraza and indemnified Anti-Counterfeit agency. She stated that she is aware of the counterfeit books seized in Mombasa. She was cross-examined and stated that she could not identify which books were genuine or counterfeit. She stated that she did not know the person who prepared the indemnity and the affidavit. She testified that they do not print books at the company. The publishing department is the one which deals with issue of printing and reselling of outdated books.

PW6 – Paul Mutuku Kingola testified that he works with One Planet Publisher and Media Services Ltd as a sales manager. He stated that his duties are to oversee sales operations, manage sales team and market company products which includes set books. He testified that they participate in government tenders in publishing curriculum books. He produced the certificate of incorporation of One Planet Publishers in court. It was his testimony that he had an agreement dated 18/12/2017 between One Planet Publishers giving them rights to solely publish and sell and market the books.. He stated that the agreement was signed by both parties. He stated that One Planet Publishers had copyright of Chozi la Heri and produced copyright certificate in court. In July 2020, he received a call from his boss managing director One Planet Publishers and he was told that he had received a call from Anti-Counterfeit Agency that counterfeit goods had been confiscated in Mombasa. He testified that he was directed to go to Mombasa and on 14/07/2020, he arrived at Mombasa and met Chief Executive Officer Storymoja and also Anti-Counterfeit personnel at Changamwe. They were shown the boxes containing the books. There were 127 cartons each containing 120 copies of Chozi la Heri total 15,240 copies. He testified that their books had check tags at the back. It is a sticker put on the book that is scratched and has a code which confirm authenticity of the book. He produced in court the application samples for Chozi la Heri which he signed. He was given two copies which he produced in court. The genuine book has a check tag. The copies did not have check tag. He testified that they also do not print their books outside Kenya. He produced the original copies with check tags.

He produced the analysis report. It was his testimony that the cartons confiscated were 127 cartons and Corner Bondeni Stores Limited were the importer. He produced in court complaint dated 15/07/2020. He testified that their books as per the catalogue he showed in court goes at Kshs.345 a book plus 16% VAT. He also produced indemnity dated 15/07/2020. He was cross-examined and stated that on 13/07/2020, he was not called from Mombasa but was assigned the task. He arrived and found the books in a room but was absent during stripping. He stated that there were so many people and others were taking photos. He confirmed that the indemnity form did not have a stamp. He testified that he did the analysis in Mombasa on the same day he visited the site and did a report. He had travelled with copy of their books. He stated that he did not have the importation document in court.

PW7 – Muhiddin Mohammed Ngashe testified that he works at Storymoja Publishers as CEO. He stated that the parent company is No Boundaries Ltd but they trading as Storymoja. He produced in court the certificates of incorporation of No Boundaries and Storymoja. He testified that in 2017, he was working as sales operations manager and his duties included head of sales and copyright checking. It was his testimony that Storymoja was granted right to sell the book Kigogo by the author as per letter of authorization dated 05/01/2017 which he produced in court. He also produced the copyright certificate to print, publish and sell Kigogo. He testified that on 13/07/2020, he received a call from an officer from Anti-Counterfeit Agency who informed him that there was a container with books suspected to be counterfeit. He called an officer from Mombasa who confirmed. He arrived at Mombasa and on 15/07/2020 were taken to Regional Container Freight and they found cartons containing Kigogo among others goods. There were 66 cartons of Kigogo each containing 240 pieces. He testified that they then applied for samples on 15/07/2020 and requested for two copies of Kigogo. He produced the application for samples, samples and original Kigogo book. He testified that he they print their books locally and their books have security tag shown to court which has a unique 16 digits code giving

verification for authenticity of the book. It was his testimony that he compared the sizes and noticed the suspected counterfeit was bigger and thicker and the column, the original is lighter compared to suspected counterfeit and counterfeit had three stitches as compared to six for original. He produced in court the samples, original book and analysis report for Kigogo. After he confirmed the books counterfeit, they filled a complaint form dated 30/03/2021 and produced in court. He also produced the affidavit and indemnity. He stated that Kigogo book is sold at Kshs.325 a piece excluding VAT. He showed letter dated 07/07/2021 for recommended retail price. He testified that Kigogo is a set book approved from 2017 to 2021 and produced letter of approval from KICD. He was cross-examined and stated that he arrived when the container had already been stripped. He stated that he did not know the accused person. He testified that he did not sign the laying of complaint report but was done by Anti-Counterfeit Agency.

PW8 – No. 20/902/69 A.C Inspector Galgalo Guyo Mboni stated that he is attached at Mombasa Anti-Counterfeit Regional Office. He testified that on 13/07/2020, he accompanied his colleagues one Lang'at to Regional CFS at Miritini to conduct verification of container which had been held on suspicion that they were counterfeit goods. Upon reaching, they found the container in the yard, opened and goods removed partially. It was his testimony that they met one clearing agent, PW2 and led them through the verification. He was working for Tatu Ltd. He testified that he gave them import documents of container containing goods loaded with the said container. They were import declaration form, entry form and bill of lading. They indicated the importer was Corner Bondeni Stores Ltd and the goods were books among other things. It was his testimony that they found books by Jomo Kenyatta Foundation, One Planet and Storymoja which were suspected counterfeit. The publishers were contacted and they decided to seize the goods and an inventory was prepared and he signed. He testified that they moved the goods to KRA custom Warehouse. He stated that at the time of seizure, they had not arrested anyone. Upon cross-examination,



he stated that he was not present during stripping of the container and that they found the goods partially offloaded. He did not know other Anti-Counterfeit officers present to witness the stripping. He stated that there were several other goods including tents, chairs, books. He testified that they only detained the suspected counterfeit goods.

PW9 – Geoffrey Kirui Lang’at stated that their role is to investigate into counterfeit goods. It was his testimony that on 13/07/2020, he was called to office of regional head Mr. Yusuf with Galgalo and informed that there was a container awaiting their inspection as it was suspected to have counterfeit goods. He stated that they proceeded to CFS with Galgalo Guyo and met clearing agent Kandie who worked with Tatu Ltd. The container was number FCIU 9740862. He testified that they were informed by Kandie that other agencies like KEBS and KRA had inspected the container on 11/07/2020. They were the only agency to do verification. He stated that the field clerk organized for stripping of the container. They were issued with import entry documents which stated that Corner Bondeni Stores Ltd was the importer and goods were metallic chairs, sofa, mattresses, bed, cabinets books. He produced the custom entry form and the bill of lading. Import declaration form which he produced in court had Corner Bondeni Stores Ltd as importer. He also produced the pre-export verification. It was his testimony that the commercial invoice had exporter name from China and importer as Corner Bondeni Stores Ltd. He produced the commercial invoice. His testimony was that they found other goods but were interested in the books as they had been labeled as being published by local publisher but were imported. The publishers were Jomo Kenyatta Foundation, One Planet and Storymoja. The books were primary school mathematics pupil book 7 for JKF, copies were 10,050. The second book was Kigogo belonging to Storymoja and were 15,840 copies. The last was Chozi la Heri belonging to One Planet Publishers and were 15,240. Upon inquiring from clearing agent, he did not have any document to the effect that the local publishers had ordered the books from China. He stated that they contacted the local publishers who arrived the

following day. They stated that none of them imports books from outside and if they did, they ought to be the importers and consignee. It was his testimony that they prepared an inventory on 13/07/2020 and the owner of goods was Corner Bondeni Stores Limited. He testified that the goods description and quantity were stated in the inventory. He testified that he issued a notice of seizure to Newton Kandie to transmit to Corner Bondeni Stores Limited. They took the goods to warehouse for storage. He produced in court notice of goods deposited in Warehouse. On 14/07/2020, they served notice of seizure to Paul Mutuku Kingola representing One Planet Publishers. He produced notice of seizure dated 14/07/2020 and notice of seizure to Muhiddin Mohammed Ngashe of Storymoja. On Jomo Kenyatta Foundation, they had their representative in Mombasa who was issued with a sample of the seized goods. On 15/07/2020, they received application of sample no. 0364 from Paul Mutuku Kingola of One Planet Publishers whom he issued with two copies of Chozi la Heri. He received application of sample serve no. 0363 from Muhiddin Mohammed Ngashe of Storymoja whom he issued with two copies of Kigogo. He testified that he wrote a letter to Registrar of Companies and he also received analysis report from Jomo Kenyatta Foundation, Storymoja One Planet who all concluded that all the three books were counterfeit. On 15/07/2021, he wrote a letter to Registrar of Companies to get the director of Corner Bondeni Stores Limited. He produced in court the letter dated 15/07/2021. He stated that they referred him to the sole director of the company as Abdikarim Adan Farah. He produced the letter from Registrar of Companies. It was his testimony that on 05/08/2021, he wrote letter to KRA Coast inquiring about import profile but was not responded to. He stated that through his intelligence he obtained document and importation profile and ID No. of the accused person. He then wrote a letter to registrar of persons requesting for ID printout of Abdikarim Adan Farah. He produced the letter to KRA and letter dated 27/07/2020. He produced in court the report from registrar of persons. He testified that on 08/04/2021, he wrote a letter to Abdikarim Adan Farah He produced 66 cartons of Kigogo which were 15,840 copies, 10050 copies of Primary Mathematics and 127 cartons of Chozi la Heri which were

15,240 copies. Upon cross-examination by the defence counsel and stated that multi-agency involving KRA, KEBS, Anti-Counterfeit signed with clearing agents when stripping the goods. He stated that he did not have the form in court. He stated that they were absent on 11/07/2020 when the goods were first inspected. He testified that the stripping was done on 13/07/2020 but could not confirm if on 11/07/2020 there was any stripping as they were absent. On 13/07/2020, they broke off the seals. The accused person was not present during the stripping. He confirmed that the bill of lading, the import declaration form and commercial invoice did not tally with what they got in the container. He stated that he did not call Hassan Ahmed who paid duty for the goods. He stated that he did not inquire the details of the person from the bank. During stripping, there were no form filled. He stated that they did not inform the accused person or his advocate to be present during photo taking. He confirmed that the inventory was filled in absence of the accused person.

### **Defence Case**

DW1 – Abdikarim Adan Farah testified that he is an importer under Corner Bondeni Stores Limited. He has employed several Company agencies including Tatu Limited. He stated that he never imported any books. He was shown the bill of lading and stated that Tatu Limited Company are the ones who were dealing with clearance. He stated that it was directed to Abdi Raman Haji who is not his director. He produced the KRA slip dated 10/07/2020 paid at Gulf Africa Bank by Abdi Raman Haji whose name appears on quotation by Tatu Limited Company. It was his testimony that the ship was express Argentina which brought the goods under receipt no. 006055 dated 09/07/2020. He produced the receipt. He testified that there is no photo showing container and no other goods are captured. He stated that the photographs were taken before the container arrived in the country. He stated that no one has taken him to Court claiming their goods meaning that they all received their goods and the container

was also released. Upon cross-examination, he stated that Abdi Raman is not his employee. He testified that he did not import any books. He was re-examined and showed the bill of lading. He stated that he was the consignee and that consolidated goods are several and different goods belonging to different people in one container. He stated that the books were not his and did not know where they came from.

### **Prosecution's Submissions**

The prosecution submitted that the issues for determination were;

- i. *Whether the goods seized were counterfeit goods*
- ii. *Whether the Prosecution discharged its burden of proof*

On the first issue, the prosecution submitted that section 2 of the Anti-Counterfeit Act, 2008 defines counterfeiting and counterfeit goods. That counterfeit goods are goods that are the result of counterfeiting any item that bears an intellectual property right, and includes any means used for purposes of counterfeiting. They submitted that PW4, PW6 and PW7 all gave evidence that they took samples of the suspected counterfeit books, this being through exhibit 7, exhibit 18 and exhibit 28. Thereafter, PW4, PW6 and PW7 issued analysis report which they produced as exhibit 8, exhibit 21 and exhibit 31 respectively confirming that the seized goods were indeed counterfeit books.

On the second issue, the prosecution submitted that section 2 of the Anti-Counterfeit Act states that an importer includes any person who, at the relevant time; (c) represents that, or acts as if, he is the importer or owner of any goods so imported; (d) actually brings, or attempts to bring, any goods into Kenya. That section 35(4) of the Act provides that where an offence under the Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to, any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or

any person who was purporting to act in any such capacity, he as well as the body corporate commits an offence.

It was submitted that the Abdikarim Adan Farah in his sworn defence admitted that Corner Bondeni Stores Ltd belongs to him and he is the only director. He stated that he only imported 69 items and not what was quoted in the inventory. The prosecution submitted that the issue in dispute is how many items were imported by Abdikarim Adan Farah. That all the seized items were as per the ACA Inventory of Seized Goods and they were imported by the accused person without the authority and/or knowledge of the concerned Intellectual Property Right Holders.

Reliance was made on the case of *Peter Mwadime vs. Republic [2022] eKLR* where the court held that proof beyond reasonable doubt is not synonymous to proving a case with mathematical precision at 100%

The prosecution submitted that Abdikarim Adan Farah is the importer of the seized counterfeit goods and is thus liable for the offences in this matter.

### **Analysis and Determination**

I am to evaluate the evidence adduced by both the prosecution and the defence and determine if the prosecution has proved its case against the accused person to the required standard of beyond any reasonable doubt as to sustain a conviction.

The prosecution case is that the accused persons are a limited liability company and its director. The two are charged in three (3) counts for the offence of importing into Kenya goods contrary to section 32(f) as read with section 35(i)(a) of the Anti-Counterfeit Act, 2008.

Sections **32(f)** and **35(1)(a)** of the Anti-Counterfeit Act No. 13 of 2008 provide;

“ 32(f). It shall be an offence for any person to import into, transit through, transship within or export from Kenya, except for private and domestic use of the importer or exporter as the case may be, any counterfeit goods.

35(1)(a). A person convicted of an offence under section 32, shall be liable in the case of a first conviction for a term not exceeding five years, or to a fine, in respect of each article or item involved in the particular act of dealing in counterfeit goods to which the offence relates, not less than three times the value of the prevailing retail price of the goods, or both.”

I proceed to frame the issues for determination as follows;

- i. *Whether Corner Bondeni Stores Ltd is linked to the accused person Abdikarim Adan Farah*
- ii. *Whether Corner Bondeni Stores Ltd actually imported goods in the nature of Kigogo set books, New Edition Primary Mathematics Pupils' Book 7 and Chozi la Heri set books in container number FCIU9740862 into Kenya on 13<sup>th</sup> July, 2020*
- iii. *Whether the seized goods, if any, were counterfeit in terms of section 32(f) as read with section 35 (4)(1) of the Anti-Counterfeit Act No. 13 of 2008 Laws of Kenya*
- iv. *Whether the number of copies seized, if any, were the same as the number on the charge sheet*

On the first issue, it is undisputed that Corner Bondeni Stores Limited belongs to the accused Abdikarim Adan Farah as the sole director. He admitted the ownership and stated that he is the sole director. In addition, the letter from the Registrar of Companies indicated that Abdikarim Adan Farah is the sole director of the company with 1000 ordinary shares.

On the second issue, PW2 who is a clearing and forwarding agent with Tatu Limited Company stated that the goods were verified on 13/07/2021. He produced the Customs Entry Form dated 10/07/2020 which indicated that the importer/consignee was Corner Bondeni Stores Limited Mombasa, with the

agent being Tatu Limited Mombasa. It indicated that the container was number FCIU9740862 and item number 10 were books. The Bill of Lading provided the consignee as Corner Bondeni Stores Limited and the description of goods as books. This was confirmed by the Pre-Export Verification of Conformity certificate and the Import Declaration Form. The inventory of seized goods gave the description of goods as Kigogo by Pauline Kea, New Edition Primary Mathematics Pupils' Book 7 , Chozi la Heri by Assumpta K. Mate and Verification stickers. The inventory was signed by PW2, who is the alleged agent of Corner Bondeni Stores Limited. There was however no proof that the said PW2 was an agent of the accused person. The prosecution did not establish and neither did it prove that there existed agency principal relationship between Pw2 and the accused person herein. It is therefore not clear on whose behalf the said witness signed the documents for.

On his part, Abdikarim Adan Farah stated that the books were not his. He testified that he did not import any books. He stated that he was not the consignee and that the goods were consolidated meaning they belonged to different people. He stated that the bill of lading indicated only 69 cartons were imported, as opposed to the charge sheet which indicated 66 cartons, 201 cartons and 127 cartons. He stated that the goods were consolidated and belonged to different people but not his despite being a consignee.

From the evidence adduced, it is the Corner Bondeni Stores Limited which allegedly imported goods in the nature of Kigogo set books, New Edition Primary Mathematics Pupils' Book 7 and Chozi la Heri set books in container FCIU9740862 into Kenya on 13<sup>th</sup> July, 2020. The books imported were however under declared in the bill of lading. What remains undisputed is the books were imported. The accused denied having imported the books in question. From the import declaration form, it is Corner Bondieni Stores Limited, which imported the books. However, quantity that was imported is not clear. It is not clear that it is the accused person who imported the books. From the letter dated 28/07/2020 from Registrar of Companies, the director of Corner Bondeni Stores

Limited is one Abdikarim Adan Farah of postal address 42718 Mombasa. Form the bill of lading and import declaration form, the address given is 43492 which doesn't correspond to the one with registrar of companies. This therefore raises doubts as to whether the importer of the said goods is one and the same person as the director of the said company as per records held with registrar of companies.

On the third issue, section 2 of the Anti-Counterfeit Act, 2008 states that “*counterfeiting means 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, repackaging, labelling or making, whether in Kenya, of any good whereby those protected goods are imitated in such a degree that those other goods are identical or substantially similar copies of the protected goods.*”

Section 2 defines intellectual property right as (a) any right protected under the Copyright Act, 2001(No. 12 of 2001), (c) any right protected under the Trade Marks Act (Cap. 506)

Counterfeit goods are described under the same section 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.

PW4, PW6 and PW7 testified that they made the application for samples of the suspected counterfeit goods through Pexh.7, Pexh.18 and Pexh.28.

PW4 produced in court as Pexh.8 the analysis report dated 21/07/2020 which confirmed that the sample copies of Primary Mathematics Pupils' Book 7 were counterfeit. He showed in court the counterfeit book and the original genuine authentic book.

PW6 produced in court as Pexh.21 the analysis report dated 15/07/2020 which confirmed that the counterfeit copy of Chozi la Heri did not have security tag on



the back cover while the original book had. He showed in court the counterfeit and the original genuine authentic book.

PW7 produced in court as Pexh.31 the analysis report dated 15/07/2020 which confirmed that the sample copies of Kigogo were counterfeit. He filled a complaint form, affidavit and indemnity form all of which he produced in court.

The accused person did not sufficiently challenge the prosecution evidence on counterfeit. From the evidence on record, PW4, PW6 and PW7 all gave expert evidence and proved beyond any reasonable doubt that the seized books were counterfeit books. The prosecution therefore proved that the books seized were indeed counterfeit.

On the last issue, the charge sheet indicated that the counterfeit copies of Kigogo were in 66 cartons total 15,840 copies. For New Edition Primary Mathematics Pupils' Book 7, they were 201 cartons total 10,050 copies. The Chozi la Heri set books were in 127 cartons total 15,240 copies. The Import Declaration Form indicated that the books weighed 5999 kg. The Commercial Invoice indicated that the books were 267 pieces. The Customer Entry Form provided that the number of packages were 69. The Pre-Export Verification Form provided that the number of books were 267 pieces. PW9 admitted that the numbers did not tally with what he recorded in the inventory.

The inventory of the seized goods provided the quantity of the books as stated on the charge sheet. The total number was after the same were counted one by one. The said figures do not tally with what was allegedly imported.

Pexh. 35 proved that each Kigogo book cost Kshs.325: excluding VAT. Pexh.23 showed each Chozi la Heri book cost Kshs.345 excluding VAT while PW5 produced a letter proving each Primary Mathematics Pupils' Book 7 as Kshs.618.

On the issue as to whether it was in the course of trade; - Trade is defined under section 2 to include business and profession. The prosecution ought to have adduced evidence proving that the accused person was engaged in the business of importation of goods.

However, in relation to the matter at hand, the prosecution failed to prove satisfactorily that the accused person did engage in import- export business. Thus it is my finding that on this particular issue, the prosecution failed to discharge its duty of proving beyond reasonable doubt that the accused was in the course of trading in importation of the counterfeit goods and establishment of a nexus between the accused's any known business and the import-export business.

With the foregoing, the prosecution has failed to prove to the required standard the charge brought before the accused and as such it would be unsafe to find the accused guilty of the offence of importing into Kenya counterfeit goods contrary to section 32(f) as read with 35(1)(a) of the Anti- Counterfeit Act 2008 Laws of Kenya. I therefore find the accused person not guilty and acquit him under section 215 of the Criminal Procedure Code as charged

Judgement Dated, Signed and Delivered on this ..... 24<sup>th</sup> day of Nov' ..... 2022 in open Court at Mombasa

~~R. M. AMWAYI~~  
SENIOR RESIDENT MAGISTRATE

**In the Presence of;**

Accused: present  
For the State: Mr. Sombu  
Court Assistant: Mr. Kitternet

24/11/2022

Mr hoodi: I pay for a pm of the same. The accused has furnished CB and KAU \$400,000