REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KIKUYU

CRIMINAL CASE NO. 332 OF 2012

BETWEEN

REPUBLIC.....ODPP

VERSUS

JACKSON WANJUKI WACHIRA.....1ST ACCUSED

MONICA NJOKI.....2ND ACCUSED

JUDGMENT

1. The two accused persons herein were charged with two counts of having in possession in the course of trade, counterfeit goods contrary to **Section 32(a)** as read with **Section 35(1)** of the **Anti-Counterfeit Act, No.13 of 2008**. The particulars of count I were that on the 26th day of April, 2012 at about 5.00 p.m. being the tenants of a residential house situated at Kiuru Estate in Kikuyu within Kikuyu Division, Kiambu County, they did have in their possession, in the course of trade, 796 bottles each of 250 milliliters of counterfeit Kenya Cane spirit, the said goods having a total retail value of Kshs 199,000.00 without the authority of East African Breweries Limited.

2. On count II, the particulars were that on the 26th day of April, 2012 at about 5.00 p.m. being the tenants of a residential house situated at Kiuru Estate in Kikuyu within Kikuyu Division, Kiambu County, they had in their possession, 2 cartons of metallic bottle caps. 350 pieces of flat packaging cartons, 100 pieces of carton dividers and 400 bottles each of 250 milliliters of counterfeit Popov Vodka in violation of Trade Mark No. 31484 in class 33 belonging to Diageo North America, the subsidiary of East African Breweries Limited, the said goods, that is 400 bottles each of 250 ml Popov Vodka having a total retail value of Kshs 100,000/= without the authority of the East African Breweries Limited.

3. The prosecution called a total of 7 witnesses. A summary of their evidence is as follows: PW1, **Eliaza Kinyanjui Kihenya,** a spirit specialist at Kenya Breweries Limited (KBL), testified that vide a form dated 20/04/2012, a complaint was brought to their attention by East African Breweries Limited (EABL) through their agent Salama Fikira Agency against one **Jackson Wanjuki Wachira**, the 1st accused herein. The nature of the complaint was

that the alleged products found in their possession were suspected to have been counterfeit. Their mandate was then to carry out analyses to establish whether the said products emanated from EABL.

4. That on 09/07/2012, samples branded as 250 ml Kenya Cane were received in their laboratory. Subsequently, they conducted an analysis which revealed that the alcohol content in the samples did not match the company's specifications, the printed batch code on the front did not match the EABL machine coding specifications. On flavor analysis, it was discovered that there was a significant difference between the samples and the Kenya Cane from EABL. On further examination, the threading did not match the standard of KBL machine and the sample had a KRA stamp which could not be traced in their records. In addition, the location of the cap was on the wrong place, the genuine alcohol percentage in their product is 40% while the sample contained 34.69 % alcoholic content.

5. **PW2, Moses Kungu Kimani,** the Government Chemist, testified that they received a sample receipt form dated 18th June 2012 from Anti-Counterfeit Agency with the samples listed as Kenya Cane 250 ml in a glass bottle, Kenya Cane Spirit 750 ml, Kenya Cane 350 ml glass bottle, Gilbeys Special Dry Gin, Popov Vodka 250 ml glass bottle. That the requests were for analysis of ethanol, methanol, copper and lead. Upon conducting the analysis, the general conclusion according to PW2 was that the samples were not genuine products as they failed to comply with the set parameters of the Kenyan standards. A report was prepared and a certificate of analysis dated 12th July 2012 issued.

6. **PW3, Thomas Joseph Ramogi Odek,** an Inspector with Anti-Counterfeit Agency, being the Investigation Officer, testified that he received a complaint against one Jackson Wachira by agents of EABL, Salama Fikira concerning counterfeit alcoholic drinks. It was his evidence that they proceeded to Jackson Wachira's home at Kiuru estate accompanied with two police officers and found a lady by the name Monica Njoki, in the house. They explained the purpose of their visit and proceeded to conduct a search in the house. Upon conducting the search, they discovered several alcoholic products alleged to be products from EABL.

7. Subsequently, they seized the following products; 10 cartons of Popov Vodka 250 ml, 20 cartons of Kenya Cane 250 ml, 20 boxes of Kenya Cane, 100 pieces of carton dividers, 350

flat cartons and two cartons of metallic bottle caps. He took an inventory of the seized goods, the same is dated 26th April 2012. They then proceeded to arrest Monica Njoki (2nd accused) who apparently was the wife to the 1st accused. The seized goods were thereafter transferred to their depot for safe storage.

8. **PW4, John Kabue Maina,** a Kenya Bureau of Standards representative, testified that he received a request to test samples on 18th January 2017 from Anti-Counterfeit Authority (ACA). He proceeded to the ACA premises at Kiangombe, randomly drew 4 pieces of Popov Vodka 250 ml and 4 pieces of Kenya Cane 250 ml and submitted the same to the laboratory for testing. It was his evidence that the samples were subjected to tests on 3rd March 2017. The findings were as follows; Popov Vodka failed to comply with the ethanol alcohol content which had a figure of 34% against the requirement of 37%, the alcohol content in Kenya Cane was 34.5 % against the requirement of 35.5%. He later communicated the findings to the Chief Executive Officer of ACA vide a letter dated 10th March 2017.

9. **PW5, Wilfred Kariuki Gichobi,** the trade quality manager at EABL, testified that he received a sample submission form from ACA by one Thomas Odek. On 2nd February 2017, he received one bottle of Popov Vodka 250ml to conduct a physical and liquid analysis. On the liquid analysis, it was his evidence that the alcohol content did not meet their specifications. He further testified that they did a nosing test on the samples and the findings did not meet their standards. Upon finalizing the analysis, it was their conclusion that the samples were not genuine EABL products. **PW5** also confirmed that the capping on the samples had two lays which did not emanate from EABL.

10. **PW6, Paul Rubia Njenga**, a laboratory analyst at Kenya Bureau of Standards, testified that he received a request document (Exhibit 16) together with two samples of Popov Vodka and Kenya Cane and was requested to test the alcohol, methanol, total solid, volatile solid, higher alcohol and alderheights. He proceeded to carry out the analysis. His findings were that the products failed in one parameter in that the ethanol content indicated a percentage of 34.5% whereas the required standard is 37.5% the minimum. According to PW6's opinion, the longevity of a product or exposure to sunlight does not normally interfere with the results or the quality of a product.

11. **PW7, Mickey Matheka,** the legal manager at EABL, testified that a complaint was lodged on 20th April, 2012 by Salama Fikira to ACA on their behalf against one Jackson Wachira. It was his evidence that the registered proprietor of Kenya Cane is UDV Kenya Limited. He confirmed that as at 26th April 2012, the trademark was still valid. He produced the Certificate of trade mark as Exhibit 23. He further testified that UDV Kenya Limited had issued a power of attorney to EABL, the same is dated 30th April 2014 (Exhibit 25) and executed by two directors of the company, Tracy Barnes and Charles Ireland.

12. With regards to Popov Vodka, it was his evidence that the same was owned by a sister company called Diageo North America which granted UDV the license to manufacture and sell the said product. He produced the certificate of trademark for Popov No. 31484, class 33. He further produced the agreement between Diageo and UDV for protection of intellectual rights (Exhibit 27). He affirmed that EABL sand UDV did not grant any other entity or person any authority to manufacture the said product.

13. Upon close of the prosecution case, the accused persons were put on their defence. **DW1, Jackson Wanjuki Wachira,** gave a sworn testament. It was his evidence that on the material date, he picked a client and proceeded to Ngong racecourse using motor vehicle registration KBN 900F after which he dropped the client and proceeded home.

14. He denied ever living in Kiuru Estate and asserted that as at 26/04/2012, he was residing in Thogoto near the shopping center in a three-bedroom bungalow with his wife and two children for about half a year, which house belonged to one Florence Wairimu. That he lived in the said premises for about half a year before he moved in the year 2013. He produced various receipts as proof of payment of rent as Exhibit DMF-1.

15. According to DW1, he received a call on a particular day and the caller requested him to go to the ACA offices. Upon arriving at the said offices, he was informed that he was under arrest where after he was taken to Kikuyu Police Station and charged with the offence. He refuted the claims that police officers visited his premises as he did not reside in Kiuru. He also denied ever signing any inventory.

16. On cross examination, he stated that he was involved in car hire and taxi business with his motor vehicle registration KBN 900R. He further stated that the 2nd accused was not his

wife but they did have a child together. He maintained that he was living in Thogoto between the year 2011 and 2012.

17. **DW2, Monica Njoki Kaigwa,** gave a sworn statement. She testified that on the material day, she was at home with her four-month-old baby, her housegirl called Jane and her two brothers, Daniel Kaigwa and James Kaigwa when Inspector Odek and Inspector Sarich from ACA came and informed her that they were looking for Jackson Wanjuki Wachira. They stated that they had a search warrant and needed to search the premises. Following the search, they found alcoholic beverages which were suspected to be counterfeit.

18. Upon being interrogated, she informed the inspectors that the goods belonged to the 1st accused. **DW2** called him and informed him of the happenings, he however did not avail himself. Subsequently, they proceeded to Kikuyu Police Station. It was her argument that according to Exhibit 1, the complaint was against Jackson Wachira and Samuel Kiiru. According to her, she was only arrested because of Jackson's failure to avail himself at the police station which led to her being charged on 30th April 2012. She confirmed that the goods belonged to her husband, the 1st accused.

19. The defense closed its case and parties were directed to file their written submissions. The prosecution's submissions are dated 17th January 2022 and filed on even date while the 2nd accused's submissions are dated 18th January 2022 and filed on 30th January 2022.

Procedural posture

20. It is important to note that the two accused persons were put on the defense on 9th August 2018. Defense hearing was slated for 9th October 2018 where the 1st accused gave his sworn testimony. From that moment onwards, the 1st accused absconded court and warrants of arrest were issued. The trial court issued summons to the officer in charge of flying squad to appear before court to explain the efforts made in apprehending the 1st accused. On 8th August 2019, Inspector Beneah Muysoka from flying squad appeared before court and explained the steps he undertook to arrest the 1st accused. The exercise turned out futile as they were unable to trace his whereabouts.

21. Due to the 1st accused incessant non-attendance to court and numerous adjournments, the trial court eventually directed that the matter proceeds against the 2nd accused, in the

absence of the 1st accused, pursuant to Section 206 (1) of the Criminal Procedure Code. Consequently, the file was closed against the 1st accused and the matter proceeded for defense hearing against the 2nd accused.

Parties submissions

Prosecution's submissions

22. The prosecution framed seven issues for determination as follows; *whether the accused persons are the owners and in possession of the seized goods.* On this, they submitted that the goods were seized at the 1st and 2nd accused residence in Kiuru estate, as such they were found in possession within the meaning of Section 4 of the Penal Code. On *whether the seized goods were counterfeit,* it was submitted that the number of goods seized drew the inference that they were not for personal consumption but for retail, hence they were in the course of trade. *As to whether the seized goods were protected goods*, the prosecution contended that their witnesses adduced sufficient evidence to prove that the seized goods did not originate from EABL factories as they did not meet required specifications, further that the accused persons applied the trademarks on the seized goods without authorization or consent from the intellectual property owners. As such, the seized goods were thus counterfeit goods as defined by section 2 of the Anti-Counterfeit Act.

23. As regards the issue of *whether PW1, PW2, PW4, PW5, PW6 & PW7* were qualified expert witnesses, it was their submission that the said witnesses sufficiently demonstrated their expertise especially skilled with experience and knowledge of the complainant's trademark brands. Further that their evidence was independent. On *whether the goods were similar or calculated to be confused with or the protected goods,* the prosecution did a comparative feature analysis based on the evidence adduced by the witnesses and came to the conclusion that the suspected counterfeit goods were substantially similar to the effect that both counterfeit and original goods bear the names Kenya Cane and Popov Vodka, the goods were also similar in both the pronunciation and the overall appearance to the protected trademark, thus calculated to confuse the consumer who would most likely not be able to tell the difference. **(See Sabel BV vs Puma AG, Rudold Dassler Sport, Case C-251/95)**

24. On the issue of whether the courts should order for destruction of the counterfeit goods, the prosecution cited section 28(3) of the Anti-Counterfeit Act which places a mandatory requirement on the trial court to make a finding as to whether the subject goods are counterfeit or not before the goods can be released. Reliance was placed on the case of **Criminal Revision No. 176 of 2014, Republic vs National Printing Press & Another [2017] eKLR and Republic vs John Thuku Gicheha & Another [2018] eKLR** to buttress this position. The prosecution submits in conclusion that the offense has been proved to the required standards of proof beyond reasonable doubt against the accused persons.

2nd accused submissions

25. The 2nd accused submitted on two issues for determination, that is, the charge sheet being fatally and materially defective and whether the prosecution proved its case beyond reasonable doubt.

26. On the issue of the charge sheet, it was submitted that amendment charge sheet was materially and defective for the reasons that the two accused persons were charged on diverse dates, the 1st accused being on 10th May 2013 while the 2nd accused on 30th April 2012. That despite the lapse of time and different circumstances and dates between the arrest and arraignment before the court, the prosecution did not deem it fit to change the particulars of the offense in the amended charge sheet. As such, she contended that the charge was fatally and materially defective.

27. As regards the issue of whether the prosecution proved their case to the required standard, she submitted that she was only a victim of circumstances as the complaint was expressly against the 1st accused. According to her, Section 33 (1) and (2) of the Anti-Counterfeit Act 2008 clearly provides the basis of laying a complaint under Section 32 thereof and the findings be recorded in form ACA 8. She contended that she was never put under any investigations neither was there any complaint laid against her. That she was not identified as the importer, exporter, holder, distributor or manufacturer of the counterfeit good as provided for in ACA.8.

28. It was her contention that by dint of Section 32 (a), the prosecution failed to establish that the 2nd accused was in the business or profession of counterfeiting. That the investigators were aware of who they were looking for and who the owner of the seized goods was. As such, she was only booked and charged because of the frustrations of the culprit not showing up. They posited that if the 2nd accused was charged on the basis that the alleged counterfeits goods were found in her residential house, why then weren't the house help and other family members present at the time not arrested?

29. In furtherance to the above, it was her argument that the process of handling and moving the seized good were in contravention to Section 32 (b) of the Act as the samples were destroyed without an order issued by a court of competent jurisdiction hence it was not possible to establish that the products seized were counterfeit goods. In addition, Exhibit 16a and Exhibit 16b were only similar and not the actual samples tested.

30. The 2nd accused pointed out the glaring omission on PW2's testimony who testified that they did not have any document to indicate that they received samples from Anti-Counterfeit Agency. They faulted PW4, PW5, PW6 and PW7's evidence for producing reports and exhibits dated the year 2017 being 5 years after the alleged goods were transferred to the warehouse. In addition, the 2nd accused was unable to comprehend why some samples were tested in 2012 while others in 2017 after the same had been destroyed?

31. The 2nd accused submitted that the power of attorney (exhibit 25) by EABL was executed in 2014 which was long after charges had been preferred against the 2nd accused. As such it would not have been possible to infringe on trademarks which the complainant did not possess at the time since they were not the holders of the intellectual property rights in relation to UDV products at the time of laying the complaint. In conclusion, the 2nd accused urged that she was only a victim of circumstance and had nothing to do with the alleged counterfeit goods and should not have been charged in the first place. According to her, the prosecution's case contained many glaring doubts that cannot sustain a conviction. She urged the court that she be acquitted and set at liberty.

Issues for determination

32. I have carefully considered the evidence tendered by the prosecution as well as the defense. It is my considered view that the issues which fall for this court's determination are as follows;

    a. Whether the charge sheet was fatally and materially defective?

    b. Whether the prosecution tendered sufficient evidence to prove the charges beyond reasonable doubt?

    c. Whether the 2nd accused was criminally culpable for the offense?

    Analysis and determination

33. **On whether the charge sheet was fatally and materially defective**, it was the 2nd accused argument that the 1st accused was charged together with the 2nd accused in a consolidated charge sheet arising from two different cases, that is **files No. 332 of 2012** and **file No. 292 of 2013**. She therefore took issue with the fact that the particulars of the offense remained the same in the amended charge sheet when in fact both of them were charged separately and on diverse dates.

34. It is trite law that the proper test of whether a charge sheet is fatally defective is whether the defect on the charge sheet was prejudicial to the accused person to the extent that he or she was not aware of the nature of the charges preferred against them and as a result, they were not able to put up an appropriate defense. Thus, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been expounded in various case laws. For instance, the Supreme Court of India in **Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391]**, held that: -

    "Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

35. Similarly, in **Isaac Nyoro Kimita & another vs. R [2014] eKLR**, the court pronounced itself follows: -

"In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge?" *[Emphasis added]*

36. Looking at the record and the evidence in totality, it cannot be gainsaid that the 2nd accused did not understand the nature of the charges against her. It is quite clear from the particulars of the charge sheet that the charges were preferred based on the particular date and time the alleged offense was deemed to have occurred. It is also quite clear from her evidence and her questions to the prosecution witnesses during cross-examination that she understood what she had been charged with and the nature of the allegations.

37. Therefore, in as much as the particulars of the offense did not change, the charges disclosed the offences they were charged with. In my view, this did not render the charge sheet fatally defective. I say so because it is clear from the evidence that the 2nd accused admitted to being in the house at the time when the inspectors came to search the premises. She further admitted that the goods belonged to her husband, the 1st accused, and was categorical that the complaint was directly against the 1st accused and not herself.

38. Consequently, the issue of the accused persons being charged separately on diverse dates is immaterial in the circumstances. I find no defect in the charge sheet and, and if at all the charge sheet was defective for the reasons advanced by the 2nd accused, then the same was not prejudicial to her, in any event the same would be curable under ***Section 382*** of the ***Criminal Procedure Code*** which provides in part:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or

in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:..."

39. **As regards whether the prosecution tendered sufficient evidence to prove the charges beyond reasonable doubt,** it is also 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 v DPP 1935 AC 462** and **Miller v. Minister of Pensions 2 ALL 372-273.**

40. It not in dispute that the accused persons herein were charged with the offence of having in possession in the course of trade, counterfeit goods contrary to Section 32(a) of the Anti-Counterfeit Act No. 13 of 2008. The import of the Anti-Counterfeit Act No.13 of 2008 is to prohibit trade in counterfeit goods. Section 32(a) 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."

41. Therefore, in order to sustain a conviction for the offense, three elements need to be proved beyond reasonable doubt. These are;

a) That the accused person was in possession; b) in the course of trade;* and *c) of counterfeit goods.

42. In light of the above provisions thereof, did the prosecution tender sufficient evidence to prove all the above elements? The answer can only be found in a rigorous scrutiny, analysis and interrogation of the evidence adduced by the prosecution. On the first element of being in possession, PW 3, the Investigating Officer, testified that on the material day, he was accompanied with two other police officers on a mission. They proceeded to Kiuru Estate and found the 2nd accused in the house and informed her of the purpose of their visit.

43. They conducted a search in the premises and discovered the counterfeit goods. The goods were produced as Exhibits 9- Exhibit 13. He further produced an inventory report dated 26th April 2012 as Exhibit 14, signed by the 2nd accused and one Sammy Sarich to ascertain the description of seized goods.

44. DW1's evidence was in tandem with PW3's evidence. She narrated how the inspectors came to the premises, conducted the search, found the goods and seized the same. She affirmed that the goods belonged to the 1st accused. From the evidence adduced, it is undisputable that the alleged counterfeit goods were found in the residential house belonging to both the accused persons where they lived as a husband and wife in Kiuri Estate. As such, I find that the first element of having in possession was proved beyond doubt.

45. 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."

46. In view of the foregoing, the prosecution had a burden to prove that the alleged alcoholic beverages in question were as a result of counterfeiting of any item that bears an intellectual property right. Thus, the prosecution was required to tender sufficient evidence that the alleged drinks were manufactured, produced, packaged, re-packaged, labelled or made in imitation of protected goods in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods, all done without the authority of the owner of intellectual property right subsisting in Kenya or outside Kenya in respect of protected goods.

47. I need not belabour on the evidence of the prosecution witnesses as the same has been reproduced elsewhere in this judgment. However, suffice it to state that PW1, analysed

samples of Kenya Cane 250 ml and found that the alcohol content in the samples did not match their specifications. The analysis report was produced as **Exhibit 3.**

48. PW 2 also conducted an examination of the samples and found that the samples did not contain any established standards as per the Kenyan standards. He produced their certificate of analysis as **Exhibit 6.** PW4 testified that he carried out an inspection to determine the quality of the samples. His findings were that the samples failed to comply with the required standards. The inspection report was produced as **Exhibit 20.**

49. PW5 testified that he conducted a physical and liquid analysis on Popov Vodka 250 ml and the findings revealed that the alcohol content did not meet their specification. The report of their findings was produced as **Exhibit 22**. Similarly, PW6 received two samples of Popov Vodka and Kenya Cane for analysis and came to the general conclusion that the products failed in one of the parameters being the alcohol content showed 34.5% while the required standard was 37.5%. He produced his analysis report as **Exhibit 19,**

50. PW7's testimony that Kenya Cane trade mark registration No 71294 Class 33 alcoholic was still valid as at 26th April 2012. Certificate of registration of trademark dated 20th January 2014 produced as **Exhibit 23**. As regards, Popov Vodka, PW7 testified that Diageo licensed UDV Kenya to manufacture sell and distribute the said product as per their agreement dated 30th June 2009. **(Exhibit 27)** it was his evidence that the trade mark registration No. 31484, class 33 was still valid as at the time of the offense as it was set to expire on 23rd September 2014. **(Exhibit 26).**

51. I have anxiously analysed the above evidence as well as the annexed exhibits hereto. I take cognizant of the fact the prosecution witnesses are all expert witnesses in their trade or line of work as envisaged under Section 48 of the evidence Act. As such, their evidence appears credible and uncontroverted. From the extensive evidence tendered and the various exhibits produced, the findings lead to one logical conclusion, **that the samples analysed were not genuine EABL products.** Based on the foregoing, the prosecution has been able to establish the glaring differences between the counterfeit samples and the original products as per the required standards. It is thus my finding that the seized goods were counterfeit goods.

52. As to whether it was in the **course of trade; trade** is defined under section 2 to include business and profession. It has since been established, that the goods were found in the premises of the accused persons in large quantities. That coupled with the existence of the cartons of metallic bottle caps, flat packaging cartons, carton dividers, could only lead to one inference, that the said products were being mutated to bear a resemblance with the original products for purposes of trading to make a profit, albeit illegally. In her evidence in chief, the 2nd accused testified that the 1st accused's counterpart Samuel Kiiru used to run a wine and spirits outlet. In that regard, it is evident that the goods were seized in the course of trade. As such, I find and hold that the three elements of the offense were sufficiently and adequately proved to the required standard, beyond reasonable doubt.

53. The final issue for determination is the **criminal culpability** of the 2nd accused. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of **SAWE v REPUBLIC [2003] eKLR** had this to say: -

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

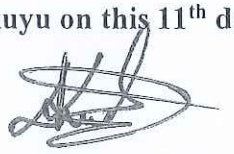
54. The court must therefore satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. In this case, the circumstances were that the 1st and 2nd accused were living together as husband and wife in Kiura Estate where the counterfeit goods were seized. She confirmed that indeed the goods belonged to the 1st accused in as much as she denied having anything to do with them. According to her evidence, she was only arrested because the 1st accused was uncooperative. She also took issue with the fact that the other members of the household were not arrested. I humbly reject this line of argument for the reason that she was the owner of the house and was privy to any happenings therein.

55. From the evidence on record, it clear that the 2nd accused was well aware of what the 1st accused was trading in. It is not in the ordinary for one to have in their possession all that consignment in their home and fail to question the motive or intention behind their existence. The 2nd accused feign of ignorance at this point can therefore not stand. The onus or responsibility solely lies on the owner of the premises. The fact that she was aware that Samuel Kiiru was running a wines and spirit shop is proof that she was in the know that the goods were being counterfeited for purposes of selling to the unsuspected consumers. Thus, the irresistible inference that points to the guilt of the 2nd accused is that she was either working in cohorts with the 1st accused, and or she was largely benefitting from the proceeds of the illegal trade or both.

56. Accordingly, I have considered the prosecution's evidence and it is manifestly clear that a combination of the chain of events narrated above, when considered as a whole points irresistibility to the 2nd accused person as having in possession in the course of trade, the counterfeit goods, being Kenya Cane and Popov Vodka as per the particulars in the charge sheet. I am therefore satisfied that the prosecution has adduced all circumstantial evidence available in support of its case against the 2nd accused person.

57. In conclusion, and taking all the above into consideration, I find that the prosecution discharged its burden to the required standard being beyond reasonable doubt. In the circumstances, the 2nd accused is hereby found guilty in both counts for the offense of having in possession in the course of trade counterfeit goods contrary to Section 32 (a) as read with Section 35 (1) of the Anti-Counterfeit Act and is hereby convicted accordingly.

Dated, Signed and Delivered at Kikuyu on this 11th day of May, 2022



HON. L. K. NYABANDO

RESIDENT MAGISTRATE

Judgment read and delivered in open court in the presence of the 2nd accused person, Mr. Nguru, learned counsel for the 2nd accused, Mr. Omache watching brief for Anti-Counterfeit Authorit, C/P Kirimi and Court Assistant Alamisi.

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RULING ON SENTENCING

1. **Monica Njoki,** the 2nd accused herein, was on 11th May, 2022 convicted in two counts for the offense of having in possession in the course of trade counterfeit goods contrary to Section 32 (a) as read with Section 35 (1) of the Anti-Counterfeit Act.

2. In mitigation, Mr. Nguru, learned counsel who appeared for the 2nd accused, drew to the court's attention that this matter was instituted in the year 2012, hence it is very old. He stated that the 2nd accused has consistently been coming to court for a period of 10 years. That the 1st and 2nd accused had a baby who was 4 months old as at the time of the arrest. Counsel further pointed out that following the institution of these charges, the accused persons relationship came to an end, as a result, the 2nd accused being a single mother has had to bring up her child single handedly. For the aforementioned reasons, counsel prayed for this court's leniency and urged this court to consider a nominal sentence and a non-custodial sentence.
3. In response, the prosecution stated that the accused may be treated as a first offender as she had no previous convictions.
4. I have considered the mitigation by counsel and I have also taken into account the 2nd accused conduct throughout the course of the trial. From the record of proceedings, it seemingly appears to me that the 2nd accused was cooperative, forthcoming with information, did not failed to attend and any failure to attend was reasonably explained. She is a first offender as no previous records have been established.

5. It is trite that in sentencing, the courts have to take into account the gravity of the offence, the circumstances of the offence, as well as mitigating factors. Section 35 of the Anti-Counterfeit Act prescribes the penalty for the offense as follows;

   "(1) A person convicted of an offence under section 32, shall be liable—

   (a) in the case of a first conviction, to imprisonment 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;

6. The import of that provision therefore is that the court can sentence the accused person for an imprisonment term **not exceeding** five years or to a fine **not less** than three times the value of the prevailing retail price for the goods or both. In light of the above provision, and the nature of the offence herein, it is significant to note I have also taken into consideration the potential health risks and safety concerns for consumers who unknowingly consume such counterfeit beverages which present serious, adverse effects on people's health. Aside from the health risks, the trade in illicit drinks damages the legitimate retailers and businesses due to the economic sabotage as well as loss of revenue for the government. It is therefore in the public interest that this vice should be condemned in the strongest terms possible and deterrent measures employed for those involved in such illicit business.

7. That notwithstanding, I take cognizant of the most recent jurisprudence as regards the issue of mandatory minimum sentences that was recently enunciated in the case of **Philip Mueke Maingi & Another Vs Director of Public Prosecution & Another, Petition No. E017 of 2021** where learned Judge, **Hon. Justice G.V Odunga**, sitting in Machakos pronounced himself thus:

   "87. That now brings me to mandatory minimum sentences. When one talks of mandatory minimum sentences, what immediately comes to one's mind are the sentence imposed under the Sexual Offences Act, though the matter ought not to be restricted to those offences..."

   ...

   He went on to add that

"90. It is clear that minimum mandatory sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances.

Further;

96.In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that: Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders. ...

111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the Constitution. ...It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional (emphasis mine)

112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed"

8. Having reproduced the above excerpts, I duly resonate with the observations therein and hold a similar view that court's discretion in metting out sentences ought not to be taken away by the imposition of mandatory minimum sentences. It is in this regard and guided by the above authority, I am inclined to depart from the mandatory minimum sentence prescribed in Section 35(a) which provides that the fine ought not to be LESS THAN three times the retail value of the article in question.

9. Taking into account the prevailing circumstances of this matter, the mitigation, and the authorities relied on, I hereby exercise my unfettered discretion and sentence the 2nd accused in the following terms:

a. **On count 1, the accused shall pay a fine of Kshs 200,000/= in default to serve Six (6) month's imprisonment.**
b. **On count II, the accused shall pay a fine of Kshs 200,000/= in default to serve Six (6) month's imprisonment.**
c. **In addition, having found that the seized goods were counterfeit, this court directs that the same be forfeited to the state for onward destruction in compliance with Section 28(3) of the Anti-Counterfeit Act.**
d. **The sentences shall run consecutively.**
e. **Right of appeal 14 days.**

Orders accordingly

Dated signed and delivered at Kikuyu on this 18th day of May, 2022

HON. L. K. NYABANDO

RESIDENT MAGISTRATE

Ruling delivered in open court in the presence of the 2nd accused person, Mr. Nguru for the accused alongside Mr. Mwendwa, Mr. Peter for ACA, C/P Kirmi and C/A Alamisi.

Mr. Nguru : I pray for a certified copy of the judgment and typed proceedings.

Court: Certified copies of the judgment and typed proceedings to issue to parties upon payment of requisite fees.

18.05.2022

Certified True Copy of Original
.....
Senior Resident Magistrate
Kikuyu
Date....22/1/22.....