



**Nyambura v Republic (Criminal Appeal E103 of 2022)  
[2023] KEHC 20829 (KLR) (Crim) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E103 OF 2022  
DR KAVEDZA, J  
JULY 28, 2023**

**BETWEEN**

**ROSE NYAMBURA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence imposed by Hon.  
G. Onsarigo (S.R.M) on 17th June 2022 at Nairobi City Law Court  
Criminal Case No. 1224 of 2019 Republic vs Rose Nyambura)*

**JUDGMENT**

1. The appellant was charged and convicted for the offence of importing into Kenya counterfeit goods contrary to section 32 (f) as read with section 35 (1) (a) of the [Anti-Counterfeit Act](#) No 3 of 2008 Laws of Kenya. She was convicted and sentenced to pay a fine of Kshs 3,000,000 in default to serve four (4) years imprisonment. The trial court also directed that the seized counterfeit goods be forfeited to the state for onward destruction. Being dissatisfied, she challenged her conviction and sentence.
2. She filed a petition of appeal raising eight (8) grounds. The grounds have been coalized as follows. She challenged the totality of the prosecution's evidence against which she was convicted. She complained that the trial court failed to consider her defence. She contended that the trial court failed to consider the mitigating circumstances during sentencing.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of [Okeno vs Republic](#) [1972] EA 32 and further in the Court of Appeal case of [Mark Oruri Mose vs Republic](#) [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter



but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

4. The prosecution called five (5) witnesses in support of their case. Eunice Njuguna (PW 1) testified that she is employed at Kenya Industrial Property Institute as an Assistant Registrar of trademarks. It was her testimony she entered the trademark Havells No 67508 into the register with effect from February 8, 2010 valid for 10 years to February 8, 2020. The trademark was registered in respect of classes 7, 9 & 11 in the name QRG Enterprises Limited a company incorporated under Indian Law. Havel's logo No 67509 was registered on February 8, 2010 in the same class and was valid until February 8, 2020. Another trademark No 5336 known as Havel's was registered on July 30, 2010 and valid to July 30, 2022. She indicates that this was only for class 9 being electrical switches, miniature circuit breakers, leakage circuit breakers, electric wires and cables, a meter, vault meters, electric relay distribution boards, fuses, and thermostats.
5. She further testified that she carried out a search with respect to the trademark name of Kavell and found that it was not registered in Kenya. She told the court that it was an agent of QRG Enterprises who had applied for the search. On cross-examination, she indicated that she did not inspect the electronic devices bearing the trademark Kavell.
6. Alexander Musyoki (PW 2) a Port Clerk at Songhong freight services told the court that his duties entailed cargo verification from containers. On May 4, 2019, he was assigned documents to verify if the goods declared are the ones in the container. At around 1 pm, Anti-Counterfeit Officers arrived and asked him to unload the goods for verification. He was asked to separate the boxes with the brand Havel. The officers opened the boxes and confirmed that the goods were circuit breakers. He was later informed that the same were counterfeit. He was asked to retain the goods in the container which was transferred to the customs warehouse. He indicated the seal number and the container number.
7. He narrated that on May 16, 2019, Anti-Counterfeit Officers transferred the 65 boxes which were allegedly counterfeit to a customs warehouse. A form was filled to that effect and the goods were now officially seized. On cross-examination, he testified that the goods imported are usually in the importers' name in this case, it was Hamburg Movers. He also told the court that he could not tell whether the goods were counterfeit or not.
8. Douglas Muriuki Mburugu (PW 3) testified that he is a director of Hamburg Movers which consolidates goods and imports them on behalf of small-scale importers. In addition, he is a manager at Songhong Limited a clearing agent. He told the court that the appellant was one of his many clients and he imported goods from China on her behalf. Once goods from their various clients are enough to fill a container, they apply for inspection by a Kenya Revenue Authority agent in China. If they meet the required standards, they are shipped to Kenya. In March 2019, the appellant's shipment of 65 cartons arrived in Mombasa and was railed to the Inland Container Depot in Nairobi. In the manifest, the appellant had imported 65 carton boxes which were opened in the presence of KRA and Anti-counterfeit officers. She was contacted and the company paid Kshs 167,750 and her goods were in entry 98,204.
9. Veronica Ndinda Matali (PW 4) an Anti-Counterfeit agent told the court that she was directed to verify container number TCNU20371007. She was in the company of PW 3 who was the imported, PW 2, a representative from the clearing company who opened the container. He removed the carton boxes containing the circuit breakers marked Kavells. He told the court that the goods were suspected to be counterfeit because of the similarity of the trademark to Havells a registered trademark in Kenya. She prepared a report dated 04.05.2019 which was produced in court.



10. On cross-examination, she testified that the appellant was summoned she met her at the Anti-Counterfeit Agency where she was informed of the verification results. Further that they submitted a prize list and valued a piece of the Kavell seized at Kshs 11,360 with a total estimated value of Kshs 13,384. She indicated that they do not value the counterfeit with the baseline for determining the price being that of the original.
11. Isaac Muthaura (PW 5) an employee of the Anti-Counterfeit Authority told the court that on May 4, 2019, he was in a routine inspection when he was alerted that had suspected counterfeit goods. In the company of PW 4, PW 2, and one Kimanzi, confirmed the consignment of circuit breakers of different dimensions. They found them suspicious because of the similarity in trademark to Havells a genuine brand. After verification, the goods were returned to the contained, locked, and sealed. Later, the container was moved to the customs warehouse and Form 89 and a seizure notice were duly issued by KRA after the goods were officially seized. On cross-examination, he indicated the manufacturer of the goods was not indicated in the importation documents. Further that the appellant paid for the goods.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on her defence. She opted to give sworn evidence. She testified that in 2019, she ordered goods from China and paid a sum of USD 6,999. The goods were delivered to Songhong and paid Kshs 167,750 and was directed to pick up the goods. However, she did not find the goods and was informed by a Customer Assistant that similar goods had been taken to Kangundo Road. She met a Chinese National who informed her that she will get her goods in a week. She was later summoned to the Copyright Offices and told to write a statement confirming that the goods belonged to her which she denied. Thereafter, she made a report to the police station on the disappearance of her goods. In July 2019, she was arraigned in court. she maintained that it was not the first time she had ordered goods.
13. The trial court found her guilty and convicted her accordingly.

### **Analysis And Determination.**

14. In her appeal, the appellant challenged the totality of the prosecution's evidence against which she was convicted. She submitted that the goods in question bear the name Kavell which is a different trademark and brand from Havell and thus cannot be deemed to be a counterfeit of the other. Further, the KRA office in China physically inspected and confirmed the goods to be exported to Kenya. They thus met the required standard required in the Kenyan market. She contended that PW 1 did not physically inspect the electronics bearing the name Kavell to determine whether they were counterfeit or not.
15. The issue for determination is whether the prosecution proved beyond reasonable doubt the charges against the appellant. Section 32 (1) (f) of the *Anti-Counterfeit Act, 2008* states as follows:

It shall be an offence for any person to - import into, transit through, tranship within, or export from Kenya, except for private and domestic use of the importer or exporter as the case may be, any counterfeit goods;
16. The first issue for determination is whether the appellant actually imported the goods in the nature of Kavell Isolator Circuit breakers without the Authority of QRG Enterprises Limited which owns the intellectual property of Havell. The court was told that Douglas Muriuki Mburugu PW 3, imported the container TCNU20371007 on behalf of small traders who could not individually fill up a single container. The appellant was one of the traders who had been introduced to him by one of his sales agents. The appellant was given an address to deliver her goods in China for export to Kenya. The goods



in issue were 65 cartons of circuit breakers from Jeixin Trading Company ordered by the appellant. He produced a payment confirmation that the appellant paid Kshs167,750 for the importation of the goods. He also produced receipts and a payment confirmation informing her of the arrival of the goods and the collection details.

17. The second issue is whether the imported goods were counterfeit within the meaning of section 32(f) of the *Anti-Counterfeit Act, 2008*. The relevant question that needs to be answered is what constitutes a 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.
18. Further, “intellectual property right” includes—
  - (a) any right protected under the *Copyright Act, 2001* (No 12 of 2001);
  - (b) any plant breeders’ right granted under the *Seeds and Plant Varieties Act* (cap 326);
  - (c) any right protected under the *Trade Marks Act* (cap 506); and
  - (d) any right protected under the *Industrial Property Act, 2001* (No 3 of 2001);

Intellectual property owners have their own specific and distinct features of security protected under the law that distinguish their genuine products from counterfeit goods without distinct features. For a product to be labelled genuine, it must be containing those distinct security features, and any other product without their features is termed as counterfeit unless sanctioned by the intellectual property owner.

19. PW 1 the Assistant registrar at Kenya Industrial Property Institute conducted a search to find out whether the ‘Kavell’ was a registered trademark in Kenya. The search was conducted on an application by an agent of QRG Enterprises who own the intellectual property rights to the trademark Hevell and Havel brand. PW 2, a clearing and forwarding agent with Songhong stated that the goods were verified. The Bill of Lading provided the consignee as Hamburg Movers Limited and the description of goods as circuit breakers among other items. The notice of seizure produced described the seized goods as Kavel isolation circuit breakers in container TCNU2037107. On her part, the appellant stated that, although she imported Circuit breakers through PW 3, the goods in question were not hers. She maintained that she imported genuine goods.
20. From the evidence adduced, it is undisputed that goods were imported by Hamburg Movers, PW 3’s company. The record confirms that although the container had consolidated goods, there was a clear distinction between the owners of each item. In this case, the 65 cartons were imported on behalf of the appellant. PW 4 testified that she made the application for the samples of the suspected counterfeit goods. She produced in court the analysis report dated May 4, 2019 which confirmed that that the circuit breakers were counterfeit goods. This is because they did not have the features and characteristics of genuine Havell circuit breakers originating from the complainant and its permitted users. She showed the court both the counterfeit circuit breaker and the original one.
21. On her part, the appellant failed to sufficiently challenge the prosecution’s evidence on the counterfeit. From the evidence on record, PW 1, PW 4, and PW 5 all gave expert evidence and proved beyond reasonable doubt that the seized goods were counterfeit.
22. In the appeal, the appellant argued that the trial court failed to adequately consider her defence. From the record, the trial court considered her defence and found it to be unbelievable. This was the justification for the rejection of the defence evidence. I, therefore, reject the appellant’s ground in that regard.



23. On sentence, the appellant challenged her sentence as not being in consideration of the mitigation. The appellant was sentenced to pay a fine of Kshs 3,000,000 in default to serve four (4) years imprisonment. Section 35 (1) (a) of the *Anti-Counterfeit Act, 2008* provides as follows:

‘Any 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;’

24. It is my finding that the trial court rightly exercised its discretion in prescribing a fine on the appellant. For determination is whether the default sentence was lawful or illegal. The starting point is an examination of section 28 of the *Penal Code* which guides courts on the imposition of default sentences. The relevant provision is section 28 (2) which states as follows:

“(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount	Maximum period
Not exceeding Sh. 500 .....	14 days
Exceeding Sh. 500 but not	
Exceeding Sh. 2,500 .....	1 month
Exceeding Sh. 2,500 but not exceeding	
Sh. 15,000 .....	3 months
Exceeding Sh. 15,000 but not exceeding	
Sh.50,000 .....	6 months
Exceeding Sh. 50,000	12 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”

25. It is not disputed that the applicant was sentenced to a fine of Kshs3,000,000 which amount exceeded Kshs50,000 for which the law prescribed a default sentence of 12 months’ imprisonment. The default sentence of four (4) years imposed on the appellant by the trial court was unlawful. In the premises, the sentence is hereby set aside and is substituted with a sentence of Kshs3,000,000 in default to serve 12 months imprisonment. The default sentence will take effect from the date of sentence by the trial court on June 17, 2022.

It is so ordered.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023**



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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Ms. Chege for the State

Mr. Gachomo for the appellant

Appellant present virtually.

Joy C/A

