REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 33 OF 2018

PURITY NYAKIO WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted with the offence of being in possession of counterfeit goods contrary to Section 32(a) as read together with Section 35(1)(a) of the Anti-Counterfeit Act No.13 of 2008 and subsequently sentenced to pay a fine of Kshs. 10,000/- and in default to serve 12 months imprisonment.

2. She then filed the instant appeal against both conviction and sentence vide a petition of appeal dated 6/09/2020 wherein she has raised three (3) grounds *to wit;*

> *1) That the learned magistrate erred in law by convicting the appellant while there was no complainant in the case as the law requires.*
>
> *2) That the learned magistrate erred in law and in fact by convicting the appellant against the weight of evidence.*
>
> *3) The learned magistrate erred in law and fact by dismissing the appellant's defence without justification.*

3. At the hearing of the appeal, the parties elected to canvass the same by way of written submissions.

B. Submission by the parties

4. The appellant submitted that the prosecution failed to prove its case against the appellant as the charge sheet was defective for reasons that the complainant was not the owner of the intellectual property rights of the alleged counterfeit goods as envisaged under Section 33 of the Kenya Anti-Counterfeit Act No. 13 of 2008. Further that there was no evidence of the inspector under Section 22 of the Act and thus the raid was irregularly and illegally carried out. The police officers who carried out the raid did not prepare a list of goods seized in triplicate or sign the same and thus contravened Section 25 of the Act. That no witness was called to confirm the alleged goods were counterfeit as no chemical analysis was done so as to compare it with genuine one on chemical composition.

5. The respondent on the other hand submitted that the offence which the appellant faced and its ingredients were proved beyond reasonable doubt as she was found in possession of three crates and thirteen bottles of Vienna Beer. Further that, failure to call a representative of Keroche Industries as a witness was not fatal; that the appellant's evidence was considered but the appellant failed to adduce evidence to rebut the overwhelming testimony of PW2. The court was invited to apply the principles in **Odhiambo –vs- Republic (Criminal Appeal No. 280 of 2004** and **Okeno –vs- R.**

C. Issues for determination

6. In deciding an appeal, the appellate court has a duty to subject the evidence tendered before the trial court as a whole, to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions on evidence. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See **Okeno v. Republic [1972] E.A. 32** and **PON v Republic [2019] eKLR).** Further, as Odunga J held in **Alex Nzalu Ndaka v Republic [2019] eKLR**, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case. What matters in the analysis is the substance and not its length.

7. In appreciation of the above principles, I have analyzed the evidence which was tendered in the trial court by both the appellant and the respondent. I have also considered the amended grounds of appeal and the written submissions by the parties herein. It is my opinion that the issue which this court is invited to determine on, is whether the prosecution tendered sufficient evidence to prove the charges against the appellant herein.

D. Analysis of evidence, application of the law and determination

8. It is trite that the burden of prove in criminal cases is always on the prosecution to prove the elements of an offence which an accused is charged with. The standard of prove is always that of beyond reasonable doubt (See section 107 of the Evidence Act Cap 80 Laws of Kenya, **Woolington v DPP 1935 AC 462** and **Miller v. Minister of Pensions 2 ALL 372-273.**

9. As I have noted, the appellant herein was charged with the offence of being in possession of counterfeit goods contrary to Section 32(a) of the Anti-Counterfeit Act No. 13 of 2008.

10. The purpose of the Anti-Counterfeit Act No.13 of 2008 is to prohibit trade in counterfeit goods. Section 32(a) provides for the offence the appellant had been charged with. It provides that;

"It shall be an offence for any person to- (a) have in his possession or control in the course of trade any counterfeit goods."

11. To sustain a conviction, the prosecution needed prove, beyond reasonable doubt, three elements: -

a) That the appellant was in possession;

b) of counterfeit goods;

c) in the course of trade.

12. The question which then needs to be answered is whether the prosecution tendered sufficient evidence to prove all the above elements?

13. As to whether the appellant was in possession, from the appellant's evidence, it is not disputed that she was employed at Milili bar wherein the beer was confiscated. As such, it is not in dispute that she was in possession of the same.

14. As to whether it was in the course of trade; **trade** is defined under section 2 to include business and profession. The appellant admitted to having been arrested while in a bar wherein she was a bar maid. As such, the appellant was in possession of the goods while in the course of trade.

15. 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."

16. "**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.."

17. As such, the prosecution had a burden to prove that the goods (beer in question) were as a result of counterfeiting of any item that bears an intellectual property right. To do so, the prosecution was required to tender sufficient evidence that the beer was 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. The prosecution further had a duty to tender evidence to the effect that all that was done without the authority of the owner of intellectual property right subsisting in Kenya or outside Kenya in respect of protected goods.

18. PW2 the government analyst testified that he received two bottles of Vienna beer suspected to be counterfeit and a control sample for Vienna beer and that upon examination, he found that the two bottles contained suspended particles as compared to the control sample and that, in his view, they were counterfeit.

19. In my opinion, the mere fact that the said beer was found to contain suspended particles as compared to the control sample does not make the same counterfeit. For a good or product to be said to be counterfeit, more was required from the prosecution.

20. The allegation facing the appellant herein has been made in relation to the beer itself (the liquid), the evidence ought to be tendered as to how it was different from the control sample so as to make the control sample to have been imitated in such manner and to such a degree that the said beer was identical to the control sample. There was no evidence as to how the beer in question was a counterfeit of the control sample. In my opinion, mere presence of particles in the said samples may be unlawful but that does not make the goods counterfeit goods in

terms of section 32 (a) and Section 2 of the Act which deals with counterfeiting.

21. The appellant submitted before this court that there was no evidence of the inspector under Section 22 of the Act and thus the raid was irregularly and illegally carried out. The said section provides for appointment of inspectors for the purposes of enforcing the provisions of the Act. However, sub-section 3 thereof provide **police officer** as some of designates inspectors for purposes of the Act and thus the submissions in that respect were misplaced.

22. Taking all the above into consideration, the prosecution failed to discharge its burden of prove to the required standard. As such the conviction and sentence imposed upon the appellant was unsafe and unsatisfactory and the same based on insufficient evidence. The conviction is hereby quashed and the sentence set aside.

23. Orders accordingly.

Delivered, dated and signed at Embu this 16th day of December, 2020.

L. NJUGUNA

JUDGE

……for the Appellant

……for the Respondent