



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL REVISION NO. 176 OF 2014**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**NATIONAL PRINTING PRESS .....1<sup>ST</sup> RESPONDENT**

**JOHN TERER .....2<sup>ND</sup> RESPONDENT**

***(Application for revision of the order of Hon. B. Kasavuli, SRM dated 21<sup>st</sup> September 2016 in Criminal Case No. 1522 of 2014 at the Senior Resident's Magistrates Court at Winam)***

**RULING**

1. Before the subordinate court, the National Printing Press Limited and its directors; Maganbhai Devji Tanna and John Terer were charged with three counts of being in possession of counterfeit goods contrary to **section 32(a)** as read with **section 35(1)(a)** of the ***Anti-Counterfeit Act, 2008***. It was alleged that they had the following goods in their possession;

(i) 63,888 pieces of 6080 HB made in Ching pencils bearing the “Black and Red” design valued at Kshs, 2,874,960.00 calculated to be taken as protected goods made by Staedler GMBH and Co. KG of Germany, the owners of the registered trademark number 645587.

(ii) 312 pieces of “Nine 900 HB” pencils bearing the “Black and Red” design valued at Kshs. 14,040.00 calculated to be taken as protected goods made by Staedler GMBH and Co. KG of Germany, the owners of the registered trademark number 645587.

(iii) 3,204 pieces of “NATARAJ” pencils bearing the “Black and Red” design valued at Kshs. 144,180.00 calculated to be taken as protected goods made by Staedler GMBH and Co. KG of Germany, the owners of the registered trademark number 645587.

2. After several false starts, the accused were acquitted under **section 210** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** after the prosecution failed to offer any evidence. After the acquittal, counsel for the accused applied that all the items seized from the accused be released to them. The trial magistrate acceded to the order and directed that the items seized, presumably the allegedly counterfeit goods, be released to them.

3. It is the order of release that precipitated this application for revision contained in the letter dated 21<sup>st</sup> September 2016. The applicant's case is that the learned magistrate acted contrary to **section 28(3)** of the

**Anti-Counterfeit Act, 2008** when he directed that the seized items be released. The provision states as follows;

*The court before which a person is charged with an offence under this Act shall, whether the person is convicted of the offence or not, order that any goods in his possession which appear to the court to be counterfeit goods, be destroyed or otherwise dealt with as the court may deem appropriate.*

4. The applicant's case is that the learned magistrate did not deal with the goods in accordance with the provision and as such the resulting order was incorrect, illegal and irregular and ought to be corrected by this court.

5. Counsel for the respondents opposed the application. He submitted that the accused were acquitted and after such acquittal, the issue whether the goods were counterfeit or not could not be re-opened. He emphasized that without proof of guilt, the trial magistrate could not proceed any further with the matter and had no alternative but to order release of the seized items. Counsel called in aid **Article 50** of the Constitution which underpins the rights of the accused including the right to be presumed innocent until proven guilty and urged that once the accused was acquitted the court could have not have any recourse against the goods. Counsel further argued that since the goods were not brought to court, the court could not order forfeiture in light of the acquittal.

6. Counsel for the respondent also submitted that since the respondent was entitled to appeal against the acquittal under **section 348A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, this application for revision was barred by **section 364(5)** of the **Criminal Procedure Code** which provides as follows;

*When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*

7. I will deal with the issue of jurisdiction first. The right of appeal by the respondent, being a statutory right, is provided for under **section 348A(1)** of the **Criminal Procedure Code** which states:

*When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.*

8. The order sought to be revised does not fall within the provisions of **section 348A(1)** of the **Criminal Procedure Code** as it is not an acquittal or refusal to admit a complaint or formal charge or an order dismissing a charge from which an appeal by the State lies as of right but against an order directing release of the seized items. This being the case, the application for revision is properly before the court.

9. On the substance of the application, **section 28(3)** of the **Anti-Counterfeit Act**, empowers the court to deal with goods that appear counterfeit despite acquittal. The provision is framed in mandatory terms and imposes on the court the duty to deal with the goods where they appear to be counterfeit. The purpose of the **Anti-Counterfeit Act** is to prohibit trade in counterfeit goods by prescribing sanctions not only against person but also against the goods. Thus, even where the person is acquitted, the court is still empowered to conduct an inquiry into whether the goods are counterfeit.

10. The words "**appear to the court to be counterfeit**" in **section 28(3)** of the Act are not intended to be a perfunctory exercise but one where the court takes evidence and decides one way or another (see **R v Hon. V. J. Yator and 2 Others exp Abdi Samad Ibrahim Hussein MSA HC Misc. App. No. 35 of 2014 [2015]eKLR**). The duty of the court to hear both sides consistent with the duty to provide a fair hearing and decide.

11. I therefore find and hold that the learned trial magistrate erred in failing consider **section 28(3)** of the **Anti-Counterfeit Act, 2008** which empowers the court to conduct an inquiry into whether the goods seized are counterfeit. I accordingly revise and set aside the order made on 8<sup>th</sup> September 2016 directing the release of seized goods.

12. The matter is referred to the learned magistrate to determine whether the goods are counterfeit in accordance with **section 28(3)** of the **Anti-Counterfeit Act, 2008**. In the meantime, the seized goods shall remain *in situ* pending determination of the matter before the subordinate court.

**DATED** and **DELIVERED** at **KISUMU** this **31<sup>st</sup>** day of **January** 2017.

**D.S. MAJANJA**

**JUDGE**

Mr Adera, Advocate instructed by the Officer of the Director of Public Prosecutions for the applicant.

Mr Ragot instructed by Otieno, Ragot and Company Advocates for the respondent.