



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 140 OF 2013**

THE DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

CEORAM SUPPLIES LTD.

GEORGE NDUNGU GITU ..... RESPONDENT

(From the Acquittal in Criminal Case No. 2239 of 2011 of the Chief Magistrate's Court at Mombasa –  
**Hon. Kimanga - RM)**

**JUDGMENT**

The first Respondent is a limited liability company whereas the 2nd Respondent is a Director. The two had been charged in two Counts for the offence of importing into Kenya goods contrary to Section 32(f) as read with Section 2 and 35(i) of the Anti-Counterfeit Act 2008 Laws of Kenya.

Both were acquitted on the two Counts on the 17th day of September, 2013 under Section 215 of the Criminal Procedure Code.

The particulars in the first Count were that:

***“On the 23rd day of May, 2011 at Kilindini Port Mombasa within Mombasa County, jointly with others not before the Court being a limited liability company and a Director respectively did import into Kenya 11,243 pieces of counterfeit Bantern lights 4 ft tubes fittings which were in container no PCIU 819889-1 bearing the philips trade mark which is substantially similar and likely to deceive consumers in relation to the goods in respect of which the trade marks “philips” is registered as Trade mark number 19131 without the authority of Koninklijke philips Electronics N.V. the owners of the Trade Mark, the said goods being of the value of Ksh. 7,870,100/=”.***

The particulars in the second Count are to the effect that:-

***“On the 23rd of May, 2011 at Kilindini port in Mombasa within Mombasa County, jointly with others not before the Court being a limited company and Director respectively did import into Kenya 9,772 pieces of Counterfeit Bantern light 2 feet tubes fittings which were in container number PCIU 819889-1 bearing the philips Trade mark which is substantially similar and is likely to deceive consumers in relation to the goods in respect of which the Trade mark “Philips” is registered as Trade mark number 19131 without th authority of***

***Kovinklijke philips Electronics N.V the owners of the trade Mark. The said goods being valued at Ksh. 5,863,100/=***”.

Being dissatisfied with the acquittal of the Respondents and the subsequent order for the release of the exhibits the applicant has brought this appeal which is anchored on the grounds found in its petition of appeal.

Principally that the learned trial magistrate misinterpreted the law on Counterfeiting and that he ordered the release of the exhibits before the lapse of the time allowed for appeal.

Further, that he misdirected himself in law in that he considered facts of the country of the manufacturer of the subject goods as a key ingredient of the offence of importing into Kenya Counterfeit goods.

That he misdirected himself on the value of expert opinion in determining the ingredients of the offence of importing into Kenya counterfeit goods and attaching undue weight to the defence offered by the Accused persons.

I have duly perused the Judgment by the learned trial magistrate wherein at page 8 last paragraph he proceeded to frame the issues for determination as follows:-

- 1. Whether or not the Accused persons actually imported goods in the nature of Barten lighting fittings in container PCIU 819889-1 into Kenya on 23rd May, 2011.***
- 2. Whether the imported goods if any were counterfeit in terms of Section 32 (f) as read with Section 2 and 35(1) of the anti-counterfeit Act 2008 Laws of Kenya.***
- 3. Whether the Accused person are criminally liable.***

He proceeded to answer the first question/issue in the affirmative.

On the 2nd issue the trial magistrate noted that the prosecution had called two expert Witnesses PW 1 and PW 5 and he proceeded to ascertain whether the two Witnesses were experts as envisaged under Section 48 of the evidence Act. Upon an analysis of the evidence adduced before him he came to the conclusion that it had not been sufficiently proved that the exhibits were counterfeit goods.

I have anxiously gone through the Judgment of the learned trial magistrate and I am satisfied that he did show a clear appreciation of the law on Counterfeit and did apply that law correctly. In the present case,

It is alleged that he did unduly put reliance on the defence and in particular Dmfi 1 and Dmfi 2 letter dated 14th December, 2012 ordering withdrawal of the case and release of the goods on account of insufficient evidence to sustain a proper case before a Court of law.

Another letter dated 17th December, 2012 by the Agency to Kenya Revenue Authority to the effect that,

***“Kindly note that the Container has now been released to the owner by the Anti-Counterfeit Agency. Kindly allow and facilitate the clearance”.***

It is the reliance on these letters which is put into question.

In its submission its contended that the Respondents should have called the author of the letters as their Witnesses or call further evidence to fortify their defence. It is trite law that the burden of proof always lies on the prosecution to prove its case beyond reasonable doubt. It is not the business or a requirement for defence to prove its innocence.

On the issue of the release of the exhibits before expiry of fourteen (14) days window period for

appeal. It is prudent and proper procedure to order the release and or destruction of goods after the expiry of fourteen (14) days Window for appeal purposes. However, this will not have much bearing on the main appeal which I find to be without merit. The appeal is disallowed and the Judgment on acquittal confirmed.

Judgment delivered dated and signed this **22nd** day of **May, 2014**.

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**M. MUYA**

**JUDGE**

**22ND MAY, 2014**

***In the presence of :-***

Learned State Counsel Mureithi

Learned Counsel for defence Mr. Kadima

Court clerk Musundi