



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIM APP 175 OF 2000

JAMES IRUNGU MANYEKI ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 174 OF 2000

PETER NJOROGE WAKABA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

These two appeals were consolidated and heard together. James Irungu (Cr.A.175/2000) was accused 2 while Peter Wakaba (Cr.A.174/2000) was accused 3 in Cr.C.3047/99. They were charged with another in 3 counts. The first 2 counts stated that on 27.9.99 at Gatu House, Ngara Nairobi Irungu was found with 112 copies of a book titled The Sun and the Wind, 52 copies of a book titled The Greedy Host and 10 copies of a book titled Tit for Tat for sale without the rights of the publisher M/s Phoenix Publishers Company Limited C/S 16 (1) (b) as read with S. 16(5) of the Copyright Act, hereinafter the Act, (Cap.130) (Count 2). Wakaba was charged that C/S. 16(1) (d) as read with S.16(5) of the same Act, at Linfield Trading Company along Desai Road, Ngara Nairobi, he was found in possession of 916 copies of The Sun and The Wind, 816 of the Greedy Host and 283 of Tit for Tat otherwise than for private and domestic use without the rights of the publisher M/s Phoenix Publishers Company Limited. (See count 3).

The other accused was the subject of count 1. It is not applicable in this appeal. After trial each of the 2 appellants was given a 9-month prison term. On 27.11.2000 2 separate petitions of appeal were filed by Mrs. Thoronjo but they are identical in all respects. At the trial Mr. Njore came in for Wakaba (Cr.A. 174/2000) and also led Mrs. Thoronjo in Irungu's appeal. He argued the 5 points on appeal to the effect that the lower court assumed that the complainant M/s Phoenix Publishers Company Limited held copyrights over the books in issue when in fact holding such rights was not proved by tendering evidence before the court; that the substance and efficacy of the evidence the prosecution case was not fully brought out, and here stress was laid on the facts that those who printed the books did so on sight of valid print and bind orders yet they were not charged as the appellants were for contravening the Copyright Act. It was added that while Wakaba merely financed Irungu for the printing of the books in issue, the

books he was found with were held in respect of a lien over them to be paid back his money.

That in fact the books were kept wrapped in cartons. Generally alluding to the claim that the Learned Trial Magistrate did not properly apply the law under which the appellants were charged Mr. Njore concluded that the sentences were harsh in the circumstance and that Irungu was a long time T.B. patient, to whom imprisonment would prove very detrimental. Indeed Mr. Njore did go over specific provisions of the Act to show that the appellants' appeal ought to be allowed. The Learned State Counsel did concede the appeal on the main ground that whoever the complainant was, he/it did not prove by placing before court that he/it surely held the copyrights complained about as having been infringed. First the legal provisions under which the appellants were charged. As for Count 2 which Irungu faced S.16 (1) (b) reads:

“16.(1) Any person who, at a time when copyright or the rights of a performer subsists in a work – (a) (b) sells or lets for hire or by way of trade exposes or offers for sale or hire any infringing copy; (c) - (f) – shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright or the rights of a performer would or might thereby be infringed, be guilty of an 10 offence.” The charge against Wakaba fell under S.16(1)(d) which, to add, says: “(d) possesses otherwise than for his private and domestic use, any infringing copy;”

The penalty is found in S.16(5) of the Act – one convicted under S.16 (1) (b) and/or (d) shall be liable to a fine not exceeding Sh.100,000/= or to imprisonment for a term not exceeding 2 years or to both. Stopping here for a while, it is worth to note that the penalty is either a fine or 2 years imprisonment or both. It is principle in sentencing that where a penalty of a fine is provided for first as the case is here, it ought to be the first option for a convicting court to impose. Of course with aggravating circumstances a prison term should be imposed and in the worst of cases if it can be so said, both fine and imprisonment should be imposed. Before going on to determine this appeal, this court is alive to the state of what is called intellectual property in Kenya and the world today. It is the general thrust that individual's original works i.e. by which one has exerted his/her intellect be protected. Such original works should not be exploited by others without the authority of the originator.

The work is a property. So for this reason enforcement of copyrights and related rights is becoming more and more a matter of focus and old laws like this Act (Cap.130) first put into operation on 1.4.66 have to be heavily amended or just overhauled altogether because of the fast changing scene of producing, spreading and infringing on copyright. Having made that general, probably not very well informed observation, the present case was in respect of literary work. Books were cited as the subject of copyright which Irungu was selling or had exposed to sell copies thereof. For Wakaba it was alleged that he was found in possession of the books otherwise than for his private or domestic use. Essentially that the number of copies in his possession could not have been for his private or domestic use. From the charges as laid, both appellants allegedly committed the respective offences as laid because such exposure for sale or the selling or the possession of the books was without he rights of the publisher M/s Phoenix Publishers Company Limited.

Then the fist question to face was whether the said M/s Phoenix had the publisher's rights over the books in issue. This the State had to prove before moving to the other aspects of the case. The word “right” or “rights” was not readily found in the definition part of Cap 130, but the word copyright is defined: “ ‘Copyright’ means copyright under this Act” May this court take the liberty to say that that “definition” is most unhelpful. But the Act's use of “rights” and “copyright,” if they can be assumed to say the same thing one may have recourse to Halsbury's Laws of England 4th Edition at paragraph 801, if any help is forthcoming. “801. Meaning of Copyright: Copyright is the exclusive right to do, and to authorize others to do (in the United Kingdom or in any other country to which the relevant provision of the Copyright Act 1956 extends) certain acts in relation to literary, dramatic and musical works The acts concerned vary according to the subject matter: in general, the existence of copyright protects the maker of a work or other subject matter from the appropriation of his labours by another.”

The quotation above relates to the U.K. whose Act of 1956, if it still operates, is longer and wider on subjects but apparently excluding criminal prosecutions. Here in Kenya there is in force this Act

(Cap.130) but it can be said that the principles are in substance the same. There being no dispute that we are here concerned with literary works only, copyright is conferred (S.4) on a qualified person only who may be an author or a coauthor if that person is an individual who is a citizen of or is domiciled or resident in Kenya. But if that qualified person is a corporate body as, the complainant M/s Phoenix Publishers Company Limited claimed were, that company must have been registered under the relevant laws of Kenya. Now again stopping here for a while, was it proved in the lower court that M/s Phoenix Publishers Limited was duly incorporated in Kenya in order to have copyright conferred on it? Did that complainant produce a certificate of incorporation before the Learned Trial Magistrate? It does not appear so. This leads to the next question, did the complainant hold copyright over the books the appellants were selling or possessing respectively? To answer this question focus now shifts to Gacheche Waruingi (P.W.2). Gacheche (P.W.2) said this before the Learned Trial Magistrate: "I am a publisher. I make books and distribute them. My company is called Phoenix Ltd." Taking this to mean that M/s Phoenix are authors of the books which were on sale at huge discounts in Machakos town, and that it what led to the prosecution of the appellants, P.W.2 went on to assert: "We have the exclusive rights to publish and distribute these books." Gacheche went on to describe particulars of their books and answered in cross examination to Mr. Mungata (for the 1st accused who was acquitted) that: "I am a publisher. I am the Managing Director of Phoenix Publishers. We have exclusive rights. I entered into agreement with the author and the agreement is registered with the Government of Kenya." Then P.W.2 went on to name one Anne Muindi as the author of The Sun and the Wind. That she gave him exclusive rights to publish and distribute the book. So far so good.

It is generally correct to state that with certain exceptions the author is entitled to the copyright of his/her work, here a book (see para.858, Halisburys 4th Edition, S.13 of the Act). Or that copyright can be acquired by transfer – either by assignment or testamentary disposition because copyright subject to such course is treated as movable property (para.865 Halisburys, S.14 Cap. 130) or indeed by licence (para.876 Halisbury's, S.15 Cap. 130). Gacheche told the court that he had agreement or agreements to publish and distribute the books with which the appellants were charged and that those agreements were registered with the Government of Kenya. The Learned Trial Magistrate did state in his judgement: " No doubt the books produced in court were not published by Phoenix Publishers who have exclusive rights to print them."

Not quite so. This was an assumption that led the Learned Trial Magistrate to fall in grave error. The charge read that the sale or possession of these books by the respective appellants were without the rights of the publisher M/s Phoenix. It was incumbent on the prosecution to prove that such rights actually existed. This could or ought to have been done by Gacheche (P.W.2) placing before the lower court, the agreement or agreements he had with the authors of those works. Only that would show that either by assignment or licence whichever, M/s Phoenix indeed had the exclusive rights to the books in issue and therefore the appellants were infringing the same. This was a criminal trial and all alleged particulars of a charge must be proved – not merely claimed and not proved, but assumed.

And for failure by the prosecution to prove that M/s Phoenix indeed held rights to be protected the State did not prove its case beyond reasonable doubt and accordingly these appeals ought to be allowed. The Learned State Counsel rightly conceded the appeal on this point. It may however be pertinent to refer in passing to another point or two which came up. Irungu said in defence that one Mr. Murage approached him and told him that he worked for M/s Phoenix Books and they wanted to sell some of their books. That Murage produced Irungu some documents to show that indeed he worked for M/s Phoenix Books. That Wakaba was involved when financing became an issue and that was how he was found having the subject books. On his part Wakaba met his two neighbours Irungu – the co-appellant and the said Murage to get into the deal to produce the books in issue and sell. Seemingly Wakaba took on the part of the financing of the deal.

The books were printed. His mates failed to produce their contributions. One of them was arrested and Wakaba took and kept some of the books on account of the money he was owed. The books were recovered from his shop in cartons wrapped (see Jane Nduta Wakaba P.W.10). Had the Learned Trial Magistrate brought into play S.16(1) of the Act to asses if the appellants were acting in good faith and had no reasonable grounds to suppose that copyright was not about to be infringed he may have as well

acquitted them. In sum these appeals are allowed. Conviction quashed and sentences set aside. Had the appeal been dismissed this court would have inclined to substitute the prison terms with fines as the first option. It may as well be added that laws governing copyright, trade marks and patents can be intricate and requires care in implementing them. It shall be necessary that prosecutors and courts approach cases under any regime of laws in this regard with utmost care so that not only should those who breach them are caught and dealt with but also so that authors, performers etc. are protected. It is desired so for individuals and the nation as a whole.

Judgement accordingly. Appeals allowed. Appellants to be set at liberty forthwith unless otherwise lawfully held. It is however this court's view that the books in issue should not be returned to them, the appeal having been allowed on a purely technical point of law. The appellants do not seem not to have rights over the books.

Delivered on 18th December 2000.

J. W. MWERA

JUDGE.