REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 37 OF 2018

IRENE WANJIRU MWANGI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant, *Irene Wanjiru Mwangi* was charged and convicted of the offence of being in possession of counterfeit goods contrary to *Section 32 (a)* as read with *Section 35 (1) (a)* of the *Anti-Counterfeit Act No. 13 of 2008*.

2. The particulars of the offence alleged that on 4th June 2017 at around 18:45 hours at Silver Bar in Kathangariri Trading Centre, Embu County, she was found in possession of counterfeit goods namely, three crates and thirteen bottles of Vienna ice beer valued at KShs.11,440.

3. Upon conviction, the appellant was sentenced to pay a fine of KShs.10,000 in default to serve twelve months imprisonment. She was dissatisfied with the trial court's decision. Through the Law Firm of *Mugambi Njeru & Company Advocates*, she proffered the instant appeal relying on three grounds which are reproduced herebelow:

> ***i. That the learned magistrate erred in law by convicting the appellant while there was no complainant in the case as the law requires.***
>
> ***ii. That the learned magistrate erred in law and fact by convicting the appellant against the weight of the evidence.***
>
> ***iii. The learned magistrate erred in law and fact by dismissing the appellant defence without justification.***

4. On the date the appeal was slated for hearing, learned counsel for the appellant, *Mr. Mugambi* and learned prosecuting counsel *Ms. Mati* chose to entirely rely on written submissions which they had previously filed.

5. In his submissions, *Mr. Mugambi* contended that the learned trial magistrate erred in convicting the appellant in a case which did not have a complainant; that *Keroche Industries* ought to have been the complainant in the case and not the Republic in view of *Section 33* of the *Anti-Counterfeit Act No. 133 of 2008*; that the appellant was wrongly convicted since the evidence offered by the prosecution did not support the charge and her defence was rejected by the trial court without any justification. Counsel urged the court to find merit in the appeal and allow it.

6. The appeal is contested by the state. In her submissions, learned prosecuting counsel supported the appellant's conviction arguing that it was properly entered since in her view, the prosecution had proved all the essential ingredients of the charge beyond any reasonable doubt. She invited the court to dismiss the appeal for lack of merit.

7. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am alive to the duty of a first appellate court which is to revisit, re-evaluate and re-consider the evidence adduced before the trial court to arrive at its own independent conclusions. In so doing however, the court must bear in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See: ***Kiilu & Another V Republic, [2005] KLR 175 ; Kinyanjui V Republic, [2004] 2 KLR 364***.

8. I have carefully considered the grounds of appeal, the evidence on record and the parties' rival submissions. I have also read the judgment of the trial court. Having done so, I find that two main issues crystalize for my determination which are:

i. Whether the appellant was convicted in a case which did not have a complainant.

ii. Whether the evidence on record sufficiently proved the charge preferred against the appellant beyond reasonable doubt.

9. On the first issue, it was submitted on behalf of the appellant that under *Section 33* of the *Anti-Counterfeit Act of 2008*, *Keroche Industries* being the manufacturers of the beer alleged to have been counterfeited ought to have been the complainant and not he Republic as stated in the charge sheet. The respondent did not make any response to this submission.

10. The *Anti-Counterfeit Act* (the Act) defines a complainant in the following terms:

> ***"complainant means a person, institution, government agency or state corporation entitled to lay a complaint under section 33(1), or who has laid such a complaint."***

Section 33 (1) of the *Act* provides as follows:

> ***"Any holder of an intellectual property right, his successor in title, licensee or agent may, in respect of any protected goods, where he has reasonable cause to suspect that an offence under section 32 has been or is being committed, or is likely to be committed, by any person, lay a complaint with the Executive Director."***

11. In my view, *Section 33 (1)* above does not define who a complainant should be in a criminal case instituted against a person who is suspected of having committed any of the offences enumerated in *Section 32* of the *Act*. The provision's side heading which is "laying a complaint" attests to this. The section only gives the holder of an intellectual property right who has reasonable cause to suspect that an offence with regard to his protected goods had been or was likely to be committed a right to lodge a complaint with the Executive Director who is then mandated to take appropriate steps to remedy the situation which may include causing prosecution of the suspected culprit.

12. The intellectual property holder therefore becomes a complainant in the sense that he complains about infringement of his property rights but once the complaint becomes the subject of a criminal prosecution, the complainant becomes the Republic and the person or institution that lodged the complaint to the police becomes the key witness in the criminal case.

13. I say this because though the *Criminal Procedure Code* does not define the word complainant, Blacks Law Dictionary 10th Edition at page 344 defines the word complaint as a formal charge accusing a person of an offence. This definition coupled with the provisions of *Article 157 (5)* of the *Constitution* leaves no doubt that the Republic through the Director of Public Prosecutions is for all practical purposes the complainant in all criminal cases.

14. It is only the Director of Public Prosecutions (DPP) who is constitutionally mandated to institute, undertake or terminate the prosecution of any person suspected of having committed a criminal offence. That is why criminal cases are styled as disputes between the accused person and the State or the Republic. The DPP is represented in courts during a trial by the prosecutor or as is currently the case, a prosecuting counsel. Consequently, the argument by learned counsel that the appellant was convicted in a case which did not have a complainant is based on a misconception of the law.

15. My finding above is fortified by the holding of the Court of Appeal in ***Roy Richard Elirema & Another V Republic, Criminal Appeal No. 67 of 2002***, where the court when defining the complainant in reference to *Section 202* of the *Criminal Procedure Code* expressed itself as follows:

> ***"The parties named in section 202, for example, are the complainant and the accused person. If the "complainant" is aware of the hearing date and is absent without explanation, the court may acquit an accused person, unless the Court sees some other good reason for adjourning the hearing. The "complainant" in this context has been interpreted to mean the 'Republic' in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic."***

I believe I have said enough to make the point that the complainant in the case in which the appellant was convicted was the Republic as stated in the charge sheet and not *Keroche Industries* as claimed by the appellant.

16. Turning to the second issue, the trial court's record shows that three witnesses gave evidence in support of the prosecution case. PW1 and PW3 were police officers who testified on how they arrested the appellant on 4th June 2017 in Silver Bar in which they found 3 crates and 14 bottles of suspected counterfeit Vienna ice beer which they confiscated. They claimed to have been in the company of personnel from *Keroche Industries,* the manufacturers of the alleged counterfeited goods.

17. However, no witness was called by the prosecution from *Keroche Industries* to prove that *Keroche Industries* holds, as matter of fact, intellectual property rights on the goods alleged to be counterfeits and to demonstrate that the 3 crates and 14 bottles of Vienna ice beer subject of the charge were counterfeits and were not their genuine products. This was a fatal omission by the prosecution considering that counterfeit goods are defined in *Section 2* of the *Act* 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. The evidence of PW2, the Government Analyst and his report did not help the prosecution case as he did not carry out any scientific analysis to establish whether the beer alleged to be counterfeit had the same chemical composition as the control sample (genuine beer) submitted to him for analysis. He only examined them through UV light and concluded that the beers were counterfeit only because they had suspended particles which allegedly made them unfit for human consumption. In my view, this did not amount to proof that the said beers were actually counterfeit goods.

19. The learned trial magistrate clearly failed to thoroughly interrogate the evidence produced by the prosecution and came to the erroneous

conclusion that the prosecution had proved the charge preferred against the appellant beyond reasonable doubt. My own independent analysis reveals that the evidence on record fell far short of establishing the charges facing the appellant in the trial court beyond reasonable doubt.

20. For the foregoing reasons, I find that the appellant was not properly convicted. Consequently, I find merit in this appeal and it is hereby allowed. The appellant's conviction is accordingly quashed and the sentence meted by the trial court set aside.

21. I have noted from the court record that on 28th August 2018, the appellant paid the fine of KShs.10,000 imposed by the trial court. As the appellant was wrongly convicted and was not liable to be sentenced in the first place, I direct that the amount paid as fine be refunded to the appellant forthwith.

It is so ordered.

DATED and **SIGNED** at **NAIROBI** this 24th day of November 2020.

C. W. GITHUA

JUDGE

DATED and **DELIVERED at EMBU** this 2nd day of December 2020.

L. NJUGUNA

JUDGE