

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. E056 OF 2022

(Being an appeal from the conviction and sentence by Hon. V. Ochanda in Murang'a CM's Court Criminal Case No.639 of 2020 dated 6th October 2022)

DAVID NG'ANG'A KIIRU.....

.....APPELLANT

VERSUS

REPUBLIC.....

.....RESPONDENT

JUDGEMENT

1. The appellant, *David Ng'ang'a Kiiru* was tried and convicted in two counts with the following offences;

Count 1 - 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*.

The particulars thereof alleged that on 6th November 2020 at Kaganda Shopping Centre, Kahuro Sub County within Murang'a County, the appellant was found in possession of counterfeit goods to wit 7 bundles of Supermatch Kings counterfeit cigarettes repacks, 5 packets of Supermatch Kings counterfeit cigarettes for export, 12 packets of Supermatch Kings counterfeit cigarettes repacks, 6 sticks of Supermatch Kings counterfeit cigarettes repacks of an estimated street value of Kshs.17,46 in contravention of the said Act.

Count 2 - Being in possession of uncustomed goods Contrary to *Section 200 (d) (iii)* of the *East Africa Community Customs Management Act of 2004*.

The particulars were that on 6th day of July, 2020 at Kaganda Trading Centre in Kahuro Sub-county within Murang'a County, the appellant was found in possession of uncustomed goods to wit 5 packets of Supermatch Kings cigarettes for export of an estimated street value of Kshs.1,000 in contravention of the said Act.

2. Upon conviction in Count 1, he was sentenced to pay a fine of Kshs.100,000 in default to serve 24 months imprisonment while in Count 2, he was sentenced to pay a fine of Kshs.20,000 in default to serve 6 months imprisonment.
3. He was dissatisfied with his conviction and sentence hence this appeal. In his petition of appeal lodged by his advocates on record *M/s J. N. Mbutia & Company Advocates*, he relied on six grounds of Appeal which are reproduced verbatim hereunder: -

- (i) ***That the trial magistrate erred in fact and in law in finding that the accused was found in possession of the counterfeit goods;***
- (ii) ***The trial magistrate misdirected herself on the fact and made gross assumptions that Mama Shiko was the appellants wife, and took judicial notice of facts which the prosecution was required to prove. The court wrongly based the judicial notice on the appellant's position of Member of County Assembly for the area;***
- (iii) ***The learned trial magistrate made contradictory and incomprehensible findings that both the appellant and his wife and a***

certain Benson were all in possession of the cigarettes;

- (iv) The learned trial magistrate completely failed to make any findings on the failure by the inspector of contrabands from Mastermind Tobacco to supply the appellant with the inventory of the recovered goods;***
- (v) The learned trial magistrate erred in fact and in law, in concluding that the shop where the contrabands were found, was owned by the appellant and his wife, despite the failure by the prosecution to produce in evidence the shop trading license;***
- (vi) The sentence of Kshs. 100,000 fine or 24 months imprisonment in default for the first count and Kshs. 20,000 or 6 months imprisonment in default for the second count were excessively harsh.***

4. The appeal was prosecuted by way of written submissions. Those of the appellant were filed on 21st December 2024 while the respondent through learned prosecution counsel *Ms. Muriu* filed its submissions in response on 13th February 2025.

5. In the submissions filed on his behalf by the firm of *J.N. Mbuthia & Company Advocates*, the appellant submitted that he was wrongly convicted as the prosecution had not proved beyond reasonable doubt that he had been found in possession of the alleged counterfeit cigarettes. He faulted the learned trial magistrate for having made findings which were not supported by the evidence on record.

He argued that it was his wife who was found manning the shop and that possession of the cigarettes by his wife did not mean possession by him; that as he was not found in possession of the cigarettes nor was he found trading with them, the charges in each count were not proved against him to the standard required by the law. He urged the court to allow his appeal and set aside his conviction and sentence.

6. On its part, the respondent supported the appellant's conviction arguing that through its four witnesses, it had proved all the essential ingredients of the offences charged in both counts beyond any reasonable doubt. The

respondent urged me to dismiss the appeal in its entirety for lack of merit.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am well cognizant of my duty as the first appellate court which is to exhaustively re-evaluate and reconsider afresh the evidence presented before the trial court to arrive at my own independent conclusion regarding whether or not the appellant was properly convicted and sentenced. In doing so, I should bear in mind that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses. ***See : Okeno V Republic [1972] EA 32; Mark Oiruri Mose V Republic [2013] KECA 67 (KLR).***

8. Guided by the above principle, I have carefully considered the grounds of appeal; the parties rival written submissions and the evidence on record. I have also read and understood the judgement delivered by the trial court.

Having done so, I find that only two key issues emerge for my determination which are;

- (i) *Whether the guilt of the appellant in each count was proved beyond any reasonable doubt.*
- (ii) *If the answer to the first issue above is in the affirmative, whether the sentence meted out against the appellant in each count was harsh or excessive.*

9. Regarding the first issue, in count 1, as noted earlier, the appellant 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* (the Act).

Section 32 (a) of the Act makes it an offence for any person to;

(a) “ have in possession or control in the course of trade, any counterfeit goods”

10. From the above definition of the offence, it is clear that for the prosecution to sustain a safe conviction, it must prove beyond any reasonable doubt the following three ingredients of the offence.

- (a) That the appellant was in possession or control
- (b) of counterfeit goods

(c) In the course of trade.

11. Possession has been defined in *Blacks Law Dictionary 10th Edition* at Page 1351 as;

(i) ***“The fact of having or holding property in one’s power; the exercise of dominion over property.***

(ii) ***The rights under which one may exercise control over something to the exclusion of all other; the continuing exercise of a claim to the exclusive use of a material aspect.....”***

12. *The Anti-counterfeit Act* does not define what possession in the context of offences created under the Act entailed but it is noteworthy that possession as defined in the *Penal Code* includes both actual and constructive possession.

Possession is defined in *Section 2* of the *Penal Code* as follows;

(a) ***“be in possession of” or “have in possession” includes not only having in one’s own possession, but also knowingly having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to***

or occupied by oneself or not, for the use on behalf of oneself or of any other person ...”

- 13.** In this case, the prosecution case as narrated by PW1, PW2 and PW4 is that on 6th November 2020, PW1, a security officer with *Mastermind Tobacco Kenya Ltd* was conducting operations at a place known as Kahuro when he received information that there was someone having counterfeit goods at Kaganda. Accompanied by PW2 and PW4 who were police officers, they proceeded to the identified place at Kaganda known as *Mama Shiko Shop*. In the shop, they found a lady who declined to have the shop searched in the absence of her husband who was not in the shop at the time. Her husband, who is the appellant herein was called and when he arrived, the search was conducted by PW1 and this is when the alleged counterfeit and unaccustomed cigarettes were recovered.
- 14.** According to PW1 and PW3, the cigarettes were recovered under shelves, behind the door and others were hidden in a gunny bag.

Upon cross examination, PW4 recalled having seen PW1 record an inventory of the cigarettes recovered in the shop but no such inventory was produced in evidence during the trial.

- 15.** The recovered cigarettes were presented to PW3, *Mastermind Tobacco* Quality Assurance Officer who after his analysis concluded in his report produced as *P Exhibit 8* that the cigarettes were indeed counterfeits as they did not have the physical features found in genuine Supermatch cigarettes, whose intellectual property rights were held by Mastermind.
- 16.** When placed on his defence, the appellant in his unsworn statement denied having any interest in *Mama Shiko's* shop and denied having been present during the search which yielded recovery of the alleged counterfeit Supermatch cigarettes. He further denied ownership of the said cigarettes.
- 17.** In her judgement, the learned trial magistrate, other than finding that the appellant, his wife *Mama Shiko* and one

Benson were present during the search did not make clear findings to justify her conclusion that the appellant was, as a matter of fact, found in possession of the contraband cigarettes. Her claim that the prosecution witnesses testified that the appellant was the one who was pulling out the cigarettes during the search was not supported by the evidence on record.

- 18.** Upon my independent appraisal of the evidence on record, I find that it is not disputed that the appellant was not found in the shop in which the cigarettes in question were recovered. The shop was being operated by one *Mama Shiko*. The fact that *Mama Shiko* resisted to have a search conducted in the shop until the same was sanctioned by the appellant does not by itself mean that it is the appellant who owned or operated the shop or that he was aware of existence of the alleged counterfeit cigarettes in the shop.
- 19.** There is undisputed evidence that the said cigarettes were not openly displayed on the shop shelves. They were recovered hidden under the shelves, behind the door and in

a gunny bag. The prosecution witnesses did not say that it is the appellant who led the search team to the different places in which the cigarettes were recovered. In fact, according to PW1, the appellant denied that he sold cigarettes in the shop.

- 20.** Having denied the charge, the prosecution was under a duty to adduce concrete and credible evidence proving beyond doubt that either the appellant was in physical possession of the said counterfeit cigarettes or that he knowingly allowed *Mama Shiko* to stock the cigarettes in the shop for his or her benefit. The prosecution failed to adduce evidence to prove that the appellant was in fact aware of existence of the alleged contraband cigarettes in the shop.
- 21.** Given the foregoing, I am satisfied that the prosecution failed to prove to the required legal standard that the appellant was found in actual or constructive possession of the said cigarettes. The evidence on record points to the lady described as *Mama Shiko* to be the person who was found in possession of the said cigarettes and it is not clear

why the appellant was selected for prosecution and no action was taken against the said *Mama Shiko*.

22. In this case, it is clear that the learned trial magistrate failed to thoroughly interrogate the evidence placed before her and took judicial notice of matters that were irrelevant to the issues that were placed before her for determination and thus arrived at the erroneous conclusion that the prosecution had proved against the appellant the first and crucial element of the offences preferred against him which was possession of the alleged contraband cigarettes.

22. Having found as I have above, I find that it will be unnecessary to delve into the task of establishing whether or not the prosecution had proved the other two elements of the offence charged in count one because the other two elements are predicated upon proof of possession. This means that if possession was not proved, the prosecution case would automatically collapse.

23. That said, I think it is also important to note that even if possession was proved in this case, the charge in count one

would still have failed because the prosecution failed to adduce sufficient evidence to prove to the required legal standard that the cigarettes in question were indeed counterfeits.

23. I say so because counterfeit goods are defined in *Section 2* of the *Anti-Counterfeit Act* to mean;

“ goods that are the result of counterfeiting any item that bears an intellectual property right and includes any means used for purposes of counterfeiting”

24. Counterfeiting on the other hand is defined in the same provision 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;

- (b) the manufacture, production or making, whether in Kenya, the subject matter of that intellectual property, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;**
- (c) the manufacturing, producing or making of copies, in Kenya, in violation of an author's rights or related rights;**
- (d)**

24. In this case, other than the oral assertion by PW3, the prosecution did not adduce any other evidence, documentary or otherwise, to prove that the appellant had either manufactured, made, packaged, repackaged or labelled the cigarettes to imitate supermatch cigarettes without the authority of the complainant, *Mastermind Tobacco* who allegedly had intellectual property rights over Supermatch Cigarettes. The prosecution also failed to adduce evidence to prove that the said *Mastermind Tobacco*

did in fact have intellectual property rights to Supermatch cigarettes.

- 25.** With regard to Count 2, as stated earlier, the appellant was charged with the offence of being in possession of uncustomed goods contrary to *Section 200 (d)* of the *East African Community Customs Management Act of 2004*. As the wording of the penal provision connotes, possession of the alleged uncustomed goods is a prerequisite to commission of the offence.
- 26.** As demonstrated earlier, the prosecution in this case failed to prove to the required legal standard that the appellant was either in actual or constructive possession of all the Supermatch cigarettes which were produced as exhibits during the trial including the 5 packets subject of Count 2.
- 27.** Drawing from the foregoing, I am satisfied that in this case, the prosecution failed to prove beyond any reasonable doubt the charges preferred against the appellant in both Count 1 and Count 2. Consequently, it is my finding that the appeal is merited and it is hereby allowed. The appellant's

conviction in each count is hereby quashed and the sentence imposed in each count is accordingly set aside.

28. As the appellant was out on bond pending determination of the appeal, and now that the appeal has been concluded, the bond granted has served its purpose and now stands cancelled.

29. Lastly, the court record confirms that on 6th October 2022, the appellant paid the fines imposed by the trial court in each count and since his appeal has been successful and the sentences imposed in each count have been set aside, I order that the amounts paid as fine in each count be refunded to him.

It is so ordered.

DATED, SIGNED and DELIVERED at **MURANGA** this 12th day of November 2025.

HON. C. W. GITHUA
JUDGE

In the presence of:

The appellant

Mr. Mbutia for the Appellant

Ms. Manyal for the Respondent

Ms. Susan Waiganjo, Court Assistant