

**Decision No. 428 /2013**

Dated: 29/10/2015

**Judgment**

**IN THE NAME OF THE LEBANESE PEOPLE**

The Tenth Chamber of the Appeal Court in Beirut,

Upon examination and deliberation;

It appears that Zuhair Ali Ghaddar, represented by his Attorney at law, George Haddad, had appealed, on 11/04/201, against “Societe des Produits Nestle, S.A”, the Public Prosecution and Mohammed Ziyad Mohammed Saeed Da'da', the decision issued by the Single Criminal Judge in Beirut on case No. 383/2010 dated 27/03/2013, and ordering the following:

1. To convict him and the Respondent Da'da' of the misdemeanour provided for in Article 702 of the Penal Code, and imprison each of them thereunder for a period of three months, and impose upon each of them a fine of one million Lebanese Pounds; and of the misdemeanour provided for in Article 714 of the Penal Code and impose upon each of them thereunder a fine of five hundred thousand Lebanese Pounds; and of the misdemeanour provided for in Article 114 of the Consumer Protection Law No. 759 dated 4/2/2005 and imprison each of them thereunder for a period of four month and impose upon them a fine of seventy-five million Lebanese Pounds, provided that in the event of non-payment, each of them shall be imprisoned for one day against every ten thousand Lebanese Pounds;
2. To merge the sanctions so that only the last sentence shall be enforced against each of them;
3. To publish the judgment in two daily newspapers, Annahar and Assafir, and post it on the door of the Court Hall;
4. To confiscate the goods seized and listed in the Minutes of the preliminary investigation No. 348/302 dated 25/08/2009;
5. To compel him to deliver, within fifteen days, the seizures upon which he was appointed as a judicial receiver by virtue of the minutes mentioned in clause (4) above;
6. To declare them not guilty of the misdemeanour set forth in Article 109 of the Consumer Protection Law;
7. To compel them to pay to the Plaintiff / Respondent Company a compensation of twenty million Lebanese Pounds;

8. To impose upon them all fees and expenses;

It appears that after discussing the facts, the following legal provisions were stated:

**First:** To declare him not guilty of the offense provided for in Article 114 of Law No. 659/2005 for lack of evidence, and by extension on grounds of insufficient evidence and even more for mere doubts in the absence of the moral element, namely, the knowledge of existence of the trademark's infringement or counterfeiting;

**Second:** To abate the prosecutions against him for the misdemeanours set forth in Articles 702 and 714 of the Penal Code, in the absence of their material and moral elements;

and requested to accept the appeal, overturn the judgment, publish and remand the case, declare him not guilty of the offense provided for in Article / 114 / of Law No. 659/2005, discontinue the proceedings against him for the crimes provided for in Articles 702 and 714 of the Penal Code, and impose upon the Respondent all fees and expenses; and

It appears as well that the Appellant was tried in presence and the Respondent Da'da' was tried in absentia; and the Attorney at law of the Respondent Company and the representative of the Public Prosecution had requested the rejection of Appeal;

Therefore,

**First - The Form:**

Whereas the appeal had been submitted within the legal time limit and fulfils the other procedural requirements, it shall be thereby approved in form;

**Second - The substance:**

**A- Background facts:**

The Respondent Company is specialized with the manufacture, export and trade of foodstuffs bearing its trademarks, in many countries around the world, including Lebanon; among which the Nescafé brand related to coffee and its derivatives and registered at the Intellectual Property Protection in the Ministry of Economy under No. 120,909 on 27/02/2009 in categories 30 and 32; and

Acting upon a complaint filed by the Company after having taken knowledge of the marketing of counterfeit goods bearing its trademark in the Lebanese market, the Cybercrime and Intellectual Property Rights Bureau conducted an investigation under the minutes No. 348/302 dated 25/08/2009, and raided the warehouse of the Appellant where it seized (3800) three thousand eight hundred counterfeit jars of Nescafe Gold (100g), and (240) two hundred forty counterfeit jars of Nescafe Gold (200g), upon which the Appellant Ziad was appointed as a judicial receiver; and

In the course of investigation, the Appellant stated that he had purchased the counterfeit products from the Respondent, Ziad Da'da', a merchant who works on Syria-Lebanon line, and that he had paid (45) forty-five USD for each box of (12) twelve jars (100g) and (44) forty four USD for each box of (6) six jars (200mg); and added that he had purchased, in total, 302 boxes of the first type (100g) and 53 boxes of the second type (200g), and that he resells the first for (60) sixty dollars and the second for (85) eighty five dollars, and denied that the goods are counterfeit; and

In the first instance trial, the Appellant failed to attend the interrogation despite the fact that he was duly summoned; thereafter, the Court assigned an expert to determine whether the seized goods comprise counterfeit items or not. The expert carried out his tasks and submitted his report;

**B - The legal Provisions:**

Whereas the Appellant requests the Court to overturn the judgment, and declare him not guilty of the crime set forth in Article 114 of Law No. 659/2005 for lack of evidence, and by extension on grounds of insufficient evidence and even more for mere doubts since he did not know that the goods were counterfeit when he purchased them; and

Whereas the third paragraph of the same Article provides for the punishment of anyone who proceeds to sell or offer for sale products bearing an infringing or counterfeit mark; and

Whereas the existence of a match between the products of the Respondent, and the goods seized at the Appellant's shop, in terms of the size and shape of the jars and the colour and size of the font, with a difference in the words (Hei? Em-> harmonish) that are written as (Bei? Em-> hurmonish) on the counterfeit goods, was established in the case file and, particularly, in the report of the expert who was appointed at the beginning; and

Whereas the counterfeit of the goods is established, as well as their offer for sale in the Appellant's warehouse and the sale of a part thereof; and

Whereas it is established as well, on grounds of the appellant's confessions, that he is a major retailer of foodstuffs, which indicates that he has the experience and ability to distinguish between original and counterfeit goods, especially that he used to purchase said products from the Respondent Company and to deal with it as established in his initial statement; and

Whereas the Appellant's purchase of the seized products at a price lower than that he used to pay to the Respondent Company, indicates that he was aware that the said products are not the Company's original ones; and

Whereas the presentation purchase invoice of said products from Ziad Da'da' Establishment in Majdal Anjar, is not deemed a sufficient reason to acquit him of the offense;

First: Because he denied knowing the phone number of the seller;

Second: Because the officers who conducted the preliminary investigation did not find Ziad Da'da' or his establishment in Majdal Anjar or any person who knows him; and

Whereas on the basis of the aforementioned, the Appellant's offer for sale of the counterfeit goods, knowingly, is established, and thus the first reason for appeal shall be rejected; and

Whereas the Appellant also argues that the criminal elements of Articles 702 and 714 of the Penal Code are not materialised, and requests the reversal of the judgment and the abatement of prosecutions against him; and

Whereas Article 702 provides for the punishment of anyone who misleads consumer by knowingly selling or putting on the market products bearing a counterfeited or imitated mark; and

Whereas Article 714 provides for the punishment of anyone who by means of deceit or false claims deviates in bad faith others' customers in his favour; and

Whereas in the course of examination of the first reason for appeal, the counterfeit was established, as well as the Appellant's knowledge thereof and the sale and offer for sale of the counterfeit goods, the extent of deceit shall thus be discussed; and

Whereas the Appellant had personally admitted that he had sold a part of the goods, subject of the invoice invoked by him, while the remaining and seized part was offered for sale, and thus, the buyers have been actually deceived, believing the product they have purchased is original; and whereas the counterfeit in the form that has been described above would mislead the average person and can only be detected by experts and professional traders; and

Whereas the offer for sale of counterfeit products constitutes in itself a means of deceit and a false claim that these products belong to the Respondent Company, and would deviate its customers in favour of the Appellant, which actually occurred with regards to what has been sold of those products; and

Whereas on the basis of the above mentioned, the elements of Articles 702 and 714 of the Penal Code are materialised, and thus, the statements of the Appellant to the contrary are legally incorrect and shall thereby be rejected; and

Whereas there is no longer a need to discuss other motives and demands for being implicitly addressed, and whereas there is no longer a need to further discussion or reasoning, noting that the Appellant did not contest the judgment in terms of the sentence or personal rights:

**Therefore;**

Has ordered by majority vote the following:

- To accept the appeal in form and reject it in substance; to confirm the first instance judgment in respect of the Appellant Zuhair Ghaddar and impose upon him all the fees;

Judgment rendered by default against the Appellant, in absentia against the Respondent Ziad Da'da', and in presence against the Respondent Company, issued and made public, in the presence of the representative of the Public Prosecution, in Beirut on 29/10/2015.