

# PROTECTING CONSUMERS' RIGHTS AGAINST COUNTERFEIT ELECTRONIC PRODUCTS IN TANZANIA

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## Abstract

This article analyzes the legal framework for protecting consumer rights against counterfeit electronic products (CEPs) in Tanzania. It deals with consumer protection specifically, consumers' right to safety against CEPs such as mobile phones, computers and television sets. Data was collected through documentary reviews and interviews. It notes that the protection of consumer rights is not constitutionally guaranteed. Further, multiple laws protecting businesses' interests, partly protect consumers' interests. There is no comprehensive law dealing with consumer protection to ensure consumers' right to safety save for the multiple laws, where consumer right to safety is partially guaranteed. Finally, the article recommends for consolidation of consumer protection provisions into a framework law to fully protect consumers in Tanzania.

**Keywords:** *Consumer, consumers' right to safety and CEPs, Tanzania.*

## 1.0. INTRODUCTION

The advancement in technology has made the imitation of electronic products simple and almost impossible to distinguish between

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counterfeit and original products.<sup>1</sup> As a result, an increase in the distribution of CEPs across the globe has become inevitable, exposing consumers to serious risks.<sup>2</sup> It has also made counterfeit electronic products accessible to consumers in both offline and online transactions.<sup>3</sup>

The electronics industry<sup>4</sup> has rapidly grown due to technological advancement and consumers are exposed to CEPs whose industry has also grown rapidly. It was estimated that by the end of 2020, the consumer electronics industry was to grow to a tune of USD 3 trillion.<sup>5</sup> Similarly, the counterfeit electronics industry was estimated to be worth USD 169 billion worldwide.<sup>6</sup> It has been noted further that one in ten electronic products sold worldwide may be counterfeit.<sup>7</sup> The CEPs are mainly smartphones, computers, and tablets.<sup>8</sup> The CEPs' economic value was estimated to reach USD 2.3 trillion and its negative impact on

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1 Consumer International (CI), "The Challenge of Protecting Consumers from Unsafe Products: A Global Picture," Consumer International, 2018, at p. 8 available at <https://www.consumersinternational.org/media/155104/productsafetyreport-full.pdf> (accessed on 9th February 2021).

2 ICC, "UN Conference on Trade and Development Intergovernmental Group of Experts on Consumer Law and Policy," Geneva, ICC-BASCAP, 9-10 July 2018, at p. 3.

3 Consumer International (CI), "The Challenge of Protecting Consumers from Unsafe Products: A Global Picture," above note 1, at p. 8. See also, OECD, "Challenges to Consumer Policy in the Digital Age," International Conference on Consumer Policy, Tokushima, 5-6 September 2019, at p. 11 available at <https://www.oecd.org/sti/consumer/challenges-to-consumer-policy-in-the-digital-age.pdf> (accessed 10 February 2021).

4 Electronics industry refers to industry producing electronic products like mobile phones, television sets, laptops etc and consumer electronics refers to "electronic devices purchased and used by consumers." See, Rouse, M., "What Does Consumer Electronics Mean?" available at <https://www.techopedia.com/definition/757/consumer-electronics-ce> (accessed 8 February 2021).

5 Corporation Service Company (CSC), "The Online Counterfeit Economy: Consumer Electronics" available at [cesglobal.com/cesglobal/pdfs/The-Cost-of%Online-Counterfeiting-Consumer-Electronics-EN.pdf](https://www.cesglobal.com/cesglobal/pdfs/The-Cost-of%Online-Counterfeiting-Consumer-Electronics-EN.pdf) (accessed 16 March 2020).

6 Ibid.

7 Ibid.

8 Ibid.

the global economy was expected to reach USD 4.2 trillion by 2022.<sup>9</sup> Likewise, the electronic markets are anticipated to exceed USD 1.5 trillion by 2023.<sup>10</sup>

Most CEPs are dangerous as they do not comply with safety and health requirements compared to genuine electronic products.<sup>11</sup> They can burst into flames by overheating because they are not subjected to rigorous health and quality checks during manufacturing and when distributed to consumers.<sup>12</sup> For example, it has been stated that counterfeit electronic handsets produce more radiation and contain harmful elements like lead.<sup>13</sup> Still, CEPs are illegally manufactured and sold to consumers in shady dealings.

The Organisation for Economic Co-operation and Development (OECD) describes counterfeit products as dangerous to health and life in the following words: “Counterfeit products are often substandard products that can be dangerous and pose health and safety risks that range from mild to life-threatening.”<sup>14</sup> This has equally been substantiated by the Director of the International Chamber of

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9 Kumar, A.K and Sherkhane, M.S., “Assessment of Gadgets Addiction and Its Impact on Health among Undergraduates,” 5(8) International Journal of Community Medicine and Public Health, 2018, p. 3624, at p. 3624.

10 “Counterfeit Electronics Online Jeopardizing Authentic Brands” available at <https://www.redpoints.com/blog/counterfeit-electronics/> (accessed 31 July 2022).

11 European Consumer Centre, “The Impact of Counterfeiting on Online Consumer Rights in Europe: The Risks of Buying Counterfeits on the Internet, and Tips from the ECC-Net for Consumers in Europe who want to Avoid Unpleasant surprises due to these Products,” March 2017.

12 Ibid. See also, Corporation Service Company (CSC), “The Online Counterfeit Economy: Consumer Electronics” above note 5.

13 BBC, “Tanzania ‘Cuts Off 630’ Fake Phones,” BBC News, 17th June 2016 available at <https://www.bbc.com/news/world-africa> (accessed 4 March 2020).

14 Barnier, V.D., “Counterfeiting: The Challenges for Governments, Companies and Consumers,” in Gill, M (ed), The Handbook of Security, London: Palgrave Macmillan, 2014, at p. 1049. See also, Mwita, S., “Tanzania: Fake Goods Cause Huge Economic Losses” Tanzania Daily News (Dar es Salaam), 26 June 2018, available at <https://allafrica.com/stories/201806260688.html> (accessed 25 January 2019).

Commerce-Business Action to Stop Counterfeiting and Piracy (ICC-BASCAP) who opines that “trade-in fake goods damage the economy, threaten health, safety of citizens and stiffs innovation and creativity.”<sup>15</sup> These observations reveal how CEPs not only affect the government, businesses and consumers but are also hazardous to human life.

Consumer protection is necessary to ensure consumers’ right to safety against CEPs which are carelessly and sold by dishonest business entities and individuals.<sup>16</sup> Usually, a counterfeit product is sold in the market under a slightly different brand name or as an original product.<sup>17</sup> Such inauthentic products directly infringe intellectual property rights.<sup>18</sup> However, it is almost impossible to trace the origin of the counterfeit products sold as original ones.<sup>19</sup> Also, it is estimated that legitimate companies lose about USD 100 billion of global revenue due to CEPs each year.<sup>20</sup>

CEPs are reported to take a large part of business in the markets.<sup>21</sup> In Tanzania, some counterfeit products are domestically manufactured while others are imported from Asia, the Middle East, and Latin America.<sup>22</sup> Also, large amounts of CEPs imported to East African

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15 “Global Impacts of Counterfeiting and Piracy to reach US\$4.2 trillion by 2022,” available at <https://iccwbo.org/media-wall/news-speeches/global-impacts-counterfeiting-piracy-reach-us4-2-trillion-2022/> (accessed 22 December 2020).

16 Confederation of Tanzania Industries (CTI), “The State of Counterfeit Goods in Tanzania,” October 2017, at p. 23, available at <http://www.best-dialogue.org/wp-content/uploads/2018/01/CTI-Counterfeit-report-Oct-2017.pdf?x82837> (accessed 22 March 2019).

17 Pecht, M., “The Counterfeit Electronic Problem,” 1(7) *Open Journal of Social Sciences*, 2013, p. 12, at p. 12.

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 Confederation of Tanzania Industries (CTI), “The State of Counterfeit Goods in Tanzania,” above note 16, at p. 16.

22 Malakata, M., “Microsoft Urges African Authorities to Combat Counterfeit

Phone Imports,” *PC World News*, 12 September 2014, available at <https://www.pcworld.com/article/2682792/microsoft-urges-african-authorities-to-combat-counterfeit-phone-imports.html> (accessed 4 March 2020).

countries come from China, India, the United Arab Emirates, Indonesia, Taiwan, and Thailand.<sup>23</sup>

The CEPs complained against in the Tanzanian market include mobile phones, computers, television sets and others, upon which this article focuses.<sup>24</sup> This article focuses on consumer protection against CEPs over other counterfeit products due for the following reasons;- First, CEPs are among the most commonly encountered products.<sup>25</sup> Second, unlike other industrial products, the electronic products industry has been growing rapidly.<sup>26</sup> Third, CEPs are most dangerous due to their potential risks to consumers.<sup>27</sup> Fourth, Tanzania has the highest number of mobile phone users and the data indicates that 86.2 per cent of its population have access to mobile phones.<sup>28</sup> Also, the data shows that 70 per cent of Tanzanians use mobile phones daily for communications and 80.8 per cent use mobile phones to access financial services.<sup>29</sup> Counterfeit products including CEPs are still a challenge in Tanzania.

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23 Gumba, D, et al, "Trade and Counterfeit Goods: Stiffer Penalties Needed to Curb Counterfeit in East Africa," 2019, available <https://enactafrica.org/enact-observer/stiffer-penalties-needed-to-curb-counterfeits-in-east-africa> (accessed 29 March 2022).

24 Confederation of Tanzania Industries (CTI), "The State of Counterfeit Goods in Tanzania," above note 16, at pp. 6 and 65.

25 United Nations on Drugs and Crime (UNODOC), "The Globalization of Crime: A Transnational Organized Crime Threat Assessment, United Nations, 2010, at p. 173.

26 Corporation Service Company (CSC), "The Online Counterfeit Economy: Consumer Electronics" above note 5.

27 ICE, "Counterfeit Goods: A Danger to Public Safety," available at <https://www.ice.gov/features/dangers-counterfeit-items> (accessed 13 July 2023).

28 Dindai, M., "Tanzania Among Countries with the Highest Number of Mobile Phones," Taifa Daily, 20 July 2022, available at <https://taifadaily.com/tanzania-among-countries-with-the-highest-number-of-mobile-phones/> (accessed 13 July 2023).

29 Kamer, L., "Frequency of Mobile Phone Usage in Tanzania 2021 by Area of Residence," available at <https://www.statista.com/statistics/1289221/frequency-of-use-of-mobile-phone-in-tanzania-by-area-of-residence/> (accessed 13 July 2023); See also, Ubwani, Z., "How Mobile Phones are Driving Digital Financial Services Growth," The Citizen (Arusha), 24 June 2022, available at <https://www.thecitizen.co.tz/tanzania/news/national/how-mobile-phones-are-driving-digital-financial-services-growth-3858428> (accessed 13 July 2023).

In 2016, it was reported that almost 40 per cent of mobile phones used by consumers were counterfeit.<sup>30</sup> As a result, the Tanzania Communications Regulatory Authority (TCRA) disabled them from network service and more than 1.5 million consumers lost communication.<sup>31</sup> Also, recently the Fair Competition Commission (FCC) seized counterfeit products including CEPs worth Tshs. 15 billion in Tanzania.<sup>32</sup> This article, therefore, analyzes the legal framework on consumer protection and how it ensures consumers' right to safety against CEPs. It further discusses the shortfalls in the legal framework, and briefly discusses consumer protection against CEPs in East Africa and the effects of CEPs on consumers. This article employs documentary reviews and interviews for data collection. It also adopts the theory of social costs which advocates strict liability against counterfeit offenders. Finally, it concludes and recommends.

## **2.0. KEY CONCEPTS OF CONSUMER PROTECTION**

There are various key terms concerning consumer protection and CEPs including consumers, consumers' right to safety, electronic products and CEPs.

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30 Sanchez, D., "40% of Mobiles in Tanzania are Fake and They are About to Lose Service" Tanzania Daily News (Dar es Salaam), 02 March 2016, available at <https://moguldom.com/120519/tanzania-plans-disable-fake-mobile-phones-june-17/> (accessed 4 March 2020).

31 Athumani, R., "Tanzania: Government Blocks Two Million Fake Phones from Market," Tanzania Daily News (Dar es Salaam), 27 July 2016, available at <https://allafrica.com/stories/201607270361.html> (accessed 27 February 2020). See also, Lamtey, G., "Africa: Hazards of Fake Phones Exposed," The Citizen (Dar es Salaam), 28 January 2016, available at <https://www.the-citizen.co.tz/magazine/businessweek/1843772-3052380-6t4njfz/index.html> (accessed 3 March 2020).

32 Malanga, A., "Tanzania and Kenya Agree to Jointly Fight Counterfeit Products," The Citizen, (Dar es Salaam), 12 April, 2023, available at <https://www.thecitizen.co.tz/tanzania/news/business/tanzania-and-kenya-agree-to-joinly-fight-counterfeit-products-4196302> (accessed 13 April 2023).

## 2.1. Consumer

According to the Fair Competition Act (FCA), a consumer is “any person who purchases or offers to purchase goods or services otherwise than for resale but does not include a person who purchases any goods or services to use them in the production or manufacture of any goods or articles for sale.”<sup>33</sup> The term consumer differs from the term customer under the FCA. A customer is not necessarily the end-user of the product. However, an end-user is not necessarily the purchaser, in the distribution chain of a good or service.<sup>34</sup>

## 2.2. Consumers' Right to Safety

The law is silent on the meaning of consumers' right to safety. Even the Constitution of the United Republic of Tanzania (CURT) does not recognize the consumers' right to safety under the Bill of Rights where other fundamental rights are enshrined. However, the right to safety can be defined to mean the right to be safe and secure upon consumption of products purchased.<sup>35</sup> The sale of dangerous products is regarded as a violation of the consumer's right to safety,<sup>36</sup> the right which requires consumer protection against businesses offering harmful products.<sup>37</sup> However, the Court has tried to impliedly protect the right to safety through the right to life under article 14 of the CURT. In the case of *Festo*

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33 The Fair Competition Act, Cap. 285 [R.E 2019], s. 2; and the Standard Form (Consumer Contracts) Regulations, GN No. 305 of 2014, Reg 3.

34 Market Business News (MBN), “Consumers-Definition and Meaning,” available at <https://marketbusinessnews.com/financial-glossary/consumers-definition-meaning/> (accessed 20 June 2021).

35 Gupta, C.B., ISC Commerce, New Delhi: S. Chand and Company Pvt. Ltd, 2016, at p. 364.

36 Alsmadi, S and Alnawas, I, “Consumer Rights Today: Are They in Business or Out of Business?” 4(1) International Journal of Marketing Studies, 2012, p.159, at p.162.

37 Consumer International (CI), Consumers in the Information Society: Access, Fairness and Representation, Kuala Lumpur: Consumer International, 2012, at p.132; See also, Mohan, D., “People's Right to Safety,” 6(2) Health and Human Rights, 2014, p. 161, available on <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2014/04/10-Mohan.pdf> (accessed 19 January 2022); Also see, Paul, M.M., Consumer Education Manual for Children, Laxmi Book Publication Solapur, 2017, at p. 3; and Lal, B.S., Introduction to Consumer Rights and Responsibilities, 2016 p. 295 at p. 296, available at <https://www.researchgate.net/publication> (accessed 20 April 2021).

*Balegele and 794 Others v. Dar es Salaam City Council*,<sup>38</sup> the Court stated that the duty of the respondent is not to create sources of danger to the residents' health. Moreover, the court stated that the respondent acted contrary to article 14 of the CURT which guarantees the right to life. The court upheld the same decision in the case of *Felix Joseph Mavika and 40 Others v. Dar es Salaam City Commission*.<sup>39</sup>

### 2.3 Counterfeit Products

The law does not define the term counterfeit but it defines counterfeiting to mean the process under which goods are manufactured, produced, packaged, repackaged, labelled, or otherwise made to be confused with protected goods without the consent of the owner of any intellectual property rights in Tanzania or elsewhere.<sup>40</sup> The Merchandise Marks Regulations defines the term counterfeit goods as “pirated or offending products.”<sup>41</sup> Also, the Merchandise Marks Act (MMA) provides the meaning of counterfeit goods to mean goods resulting from counterfeiting and includes any method employed in the process.<sup>42</sup>

### 2.4 Counterfeit Electronic Products (CEPs)

The law is silent on what it means by the phrase electronic products. However, it can be defined to mean a product that depends on electric currents or electromagnetic fields to work.<sup>43</sup> Electronic products are

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38 High Court of Tanzania, *Dar es Salaam*, Misc. Civil Case No. 90 of 1991 (Unreported).

39 High Court of Tanzania, *Dar es Salaam*, Civil Case No. 316 of 2002 (Unreported).

40 The Merchandise Marks Regulations, GN No. 89 of 2008, Regs. 2(a) and (b).

41 *Ibid.*

42 The Merchandise Marks Act, Cap. 85 [R.E 2002], s. 2 and the Zanzibar Fair Competition and Consumer Protection Act, No. 5 of 2018, s. 65.

43 Environmental Agency, “Guidance: Electrical and Electronic Equipment (EEE) Covered by the WEEE Regulations,” available at <https://www.gov.uk/government/publications/electrical-and-electronic-equipment-eee-covered-by-the-weee-regulations/electrical-and-electronic-equipment-eee-covered-by-the-weee-regulations> (accessed 19 June 2021).

electronic devices or gadgets.<sup>44</sup> Also, it is silent on the phrase counterfeit electronic product, which can however be referred to as an electronic product manufactured by a person who forges the trademark of the registered proprietor.<sup>45</sup> A trademark means any visible sign used in the product to show the difference between products.<sup>46</sup> Generally, CEPs are electronic products produced by the non-owner of the trademark intended to deceive consumers in the market.<sup>47</sup>

Hereunder is the analysis of the legal framework on the protection of consumers' right to safety against CEPs.

### **3.0. LEGAL FRAMEWORK FOR CONSUMER PROTECTION FOR COUNTERFEIT ELECTRONIC PRODUCTS**

#### **3.1. The Constitution of the United Republic of Tanzania (CURT)**

The CURT<sup>48</sup> as a supreme law of the land is expected to lay down the foundation of consumer protection in terms of the rights, duties of individuals and general principles. However, the findings show that the CURT does not provide for consumer protection or consumer rights and related matters. It is further noted that the CURT generally provide for various constitutional rights which are for all individuals. The constitutional rights enshrined in the CURT include the right to life, freedom of association and expression among others.

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44 Kumar and Sherkhane, "Assessment of Gadgets Addiction and Its Impact on Health among Undergraduates," above note 9, at p. 3624.

45 The Trade and Service Marks Act, Cap. 326 [R.E 2019], s. 32.

46 *Id.*, s.2.

47 International Trademark Association (ITA), "Counterfeiting (Intended for a Non- Legal Audience)," available at <https://www.inta.org/fact-sheets/counterfeiting-intended-for-a-non-legal-audience/> (accessed 19 June 2021). See also, "Counterfeit Electronics Online Jeopardizing Authentic Brands," above note 10.

48 The Constitution of the United Republic of Tanzania, Cap. 2 [R.E 2008].

On the same note, the CURT is silent on consumers' right to safety, unlike the Constitutions of some other countries which expressly provide for consumer protection and rights. For instance, the Constitution of the Republic of Kenya guarantees consumer protection as it contains express provisions related to consumer rights. Article 46(1) of the Constitution of Kenya provides for consumer protection specifically consumer rights including the safety of consumers.<sup>49</sup> Article 38 of the Constitution of India provides for consumer protection.<sup>50</sup> Generally, the CURT has no express provision on consumer protection.

Comparatively, the CURT provides for various human rights in Chapter One, Part III which deals with rights and duties.<sup>51</sup> It protects consumer rights indirectly through the protection of other rights like the right to life which guarantees the protection of the lives of every individual including the consumer.<sup>52</sup> It provides that "Every person has the right to live and the protection of his life by the society under the law."<sup>53</sup> However, this provision is specific for the right to life and not the right to safety. Similarly, the provision requires society to protect the life of an individual according to the law. Therefore, unless the court extends the interpretation of the right to life to include consumers' right to safety, there is no constitutional guarantee of consumer protection in Tanzania. Consumers' right to safety is fundamental and it requires special attention as well as much weight. This is due to the fact that consumers' right to safety like the right to life forms the foundation for the enjoyment of other rights.

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49 The Constitution of Kenya, 2010, Art. 46 (1).

50 The Constitution of India, 2020 Art. 38.

51 Cap. 2 [R.E 2008], Arts. 12-29.

52 *Id.*, Art. 14.

53 *Ibid.*

Also, the CURT protects consumers' right to freedom of association.<sup>54</sup> This right to freedom entails that every person is free to associate with others. Also, it includes forming associations to pursue some interests which, however, should be to pursue a lawful purpose.<sup>55</sup> Consumers as a group have the right to freedom of association, they can form their associations to protect and pursue their legitimate rights and interests. However, the consumer protection laws do not provide for the establishment of consumer associations to supplement what has been provided by the CURT.

Hence, it is argued that effective consumer protection requires consumer rights be incorporated under the fundamental human rights framework in the Constitution.<sup>56</sup> It is further argued that consumer rights should be among the human rights as provided under the Bill of Rights in the CURT of Tanzania and international human rights legal instruments such as the Universal Declaration of Human Rights (UDHR),<sup>57</sup> International Covenant on Civil and Political Rights (ICCPR)<sup>58</sup> and International Covenant on Economic, Social and Cultural Rights (ICESCR) at international level.<sup>59</sup> However, the argument that consumer rights should be part of human rights has been subject to debate among scholars worldwide.<sup>60</sup>

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54 *Id.*, Art. 20 (1).

55 *Ibid.*

56 Jagielska, M and Jagielska, M., "Are Consumer Rights Human Rights" in Devenney, J and Kenny, M., (eds.), *European Consumer Protection*, Cambridge: Cambridge University Press, 2012, p. 336, at p. 336.

57 The Universal Declaration of Human Rights, 1948.

58 The International Covenant on Civil and Political Rights, 1966.

59 The International Covenant on Economic, Social and Cultural Rights, 1966.

60 Jagielska and Jagielska, "Are Consumer Rights Human Rights," above note 56, at p. 336.

Kingisepp states that consumer rights have some potential to become soft human rights.<sup>61</sup> Similarly, Deutch argues that consumer rights are economic rights that may be recognized as human rights rather than some other new rights.<sup>62</sup> These legal scholars suggest on the premise that consumer rights are the rights of all people and every person is occasionally a consumer.<sup>63</sup> Also, this argument has been supported by Kanyabuhinya who is of the view that consumer rights should have the same status as human rights.<sup>64</sup>

However, the findings reveal that consumer rights having a similar status as human rights still could face some limitations in Tanzania. Currently, there are limitations in the enforcement of the fundamental rights provided under the Bill of Rights in the CURT. This can be observed under section 4 of the amendment of the Basic Rights and Duties Enforcement Act (BRADEA) of 2020. It introduced some notable changes<sup>65</sup> like adding subsection 2 of section 4 of the BRADEA which introduced the requirement that, stands as a limitation in the petition filed against human rights violations.<sup>66</sup> This provision requires that the Court of competent jurisdiction shall only admit the human rights application or petition if it is accompanied by an affidavit to the extent which the violation has affected petitioners personally.<sup>67</sup> The implication of this, is to curtail either natural or legal persons to file an application or

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61 Kingisepp, M., "The Constitutional Approach to Basic Consumer Rights," available at [https://www.juridicainternational.eu/article\\_full.php?uri=2012\\_XIX\\_49\\_the-constitutional-approach-to-basic-consumer-rights](https://www.juridicainternational.eu/article_full.php?uri=2012_XIX_49_the-constitutional-approach-to-basic-consumer-rights) (accessed 3 July 2023).

62 Deutch, S., "Are Consumer Rights Human Rights?" 32(3) *Osgoode Hall Law Journal*, 1994, p. 537, at p. 541.

63 Ibid.

64 Kanyabuhinya, "Legal Challenges in Addressing Counterfeit Goods in Tanzania Mainland: The Right of Consumers to Redress," PhD Thesis, Dar es Salaam: University of Dar es Salaam, 2014, at p. 74.

65 The Written Laws (Miscellaneous Amendments) Act, GN No. 6 of 2020, Part III.

66 The Basic Rights and Duties Enforcement Act, Cap 3 [R.E 2019], s. 4(2) and the Basic Right and Duties Enforcement (Practice and Procedure) Rules, GN No. 304 of 2014, Rule 4.

67 Cap. 3 [R.E 2019], s. 4(2).

petition on behalf of the person or group of people affected by the violation of rights which is also vital to consumer protection.

### **3.2. The Merchandise Marks Act (MMA) and its Regulations**

The MMA<sup>68</sup> controls the unlawful use of marks and trade descriptions about merchandise. It controls the counterfeit by banning them in Mainland Tanzania. Specifically, the law prohibits persons from selling products bearing a false or forged trademark.<sup>69</sup> It is an offence for a person to forge or imitate the trademark of another person. Even though the MMA considers counterfeit products including CEPs a criminal offence, it limits the period within which to prosecute counterfeit offences to strictly five years.<sup>70</sup> This means that a person found in possession or dealing with counterfeit products cannot be prosecuted after the expiry of five years since the commission of the offence. This is certainly not proportionate to the gravity of the offence and the effects imposed on consumers.

The Merchandise Marks Regulations<sup>71</sup> made under section 18A of the MMA provide for the meaning of important phrases such as “counterfeiting” and “counterfeit goods.”<sup>72</sup> These Regulations define counterfeiting as the process under which goods are manufactured, produced, packaged, repackaged, labelled, or otherwise made to be confused with protected goods without the consent of the owner of any intellectual property rights in Tanzania or elsewhere.<sup>73</sup> Counterfeit goods are referred to as “pirated or offending products.”<sup>74</sup>

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68 Cap. 85 [R.E 2002], s. 18A.

69 Id, s. 3.

70 Id, s. 17.

71 GN No. 89 of 2008.

72 Id, Reg. 2.

73 The Merchandise Marks Regulations, 2008, Regs. 2(a) and (b).

74 Id, Reg. 2.

Also, the Regulations provide for the functions and powers of the Chief Inspector of merchandise marks.<sup>75</sup> They establish the Interdepartmental Task Force (ITF).<sup>76</sup> The institutions that form the ITF include the Attorney General Chambers, Police Force (PF), Tanzania Revenue Authority (TRA), Tanzania Bureau of Standards (TBS) and Tanzania Medicines and Medical Devices Authority (TMDA).<sup>77</sup> As well, these Regulations require the officers of these institutions located in zones, regions, districts, and stations to enforce the decisions of the Chief Inspector in their respective areas.<sup>78</sup> The aforementioned institutions forming the ITF are required to facilitate and ensure the smooth execution of the decisions and orders of the Chief Inspector.<sup>79</sup>

Furthermore, the Regulations lay down procedures for seizure and detention of counterfeit products.<sup>80</sup> The Chief Inspector is empowered by the law to receive information regarding offending products.<sup>81</sup> Where necessary, he may enter and search or use force to obtain access to premises suspected of harbouring offending products.<sup>82</sup>

### **3.4. The Trade and Service Marks Act (TSMa)**

The TSMa<sup>83</sup> deals with the process of trade and service mark registration and protection of such registered trade and service marks. This legislation provides for the requirements and application procedures for a sign to be registered as a trademark.<sup>84</sup> The rationale of trademarks is to

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75 Id, Regs. 2 and 3

76 Id, Reg. 8.

77 Id, Reg. 8(2).

78 Id, Reg. 11(1)(a).

79 Id Regs. 24(1)(a)(c) and (d).

80 Id, Reg. 31(1).

81 Id, Reg. 30 (1).

82 Ibid.

83 Cap. 326 [R.E 2019].

84 Id, Part V.

differentiate and identify the products produced and sold to consumers by one business entity against other business entities.<sup>85</sup> The TSMA protects the registered trade and service marks for seven years from the date of registration.<sup>86</sup> Upon expiration of the period of seven years, it is subject to renewal for ten years from the date of expiration of the original registration or the last renewal.<sup>87</sup> After registration or renewal of the trademark, the TSMA grants an exclusive right of use to the proprietor about the sale or importation of products.<sup>88</sup>

The registered proprietor has the right to sue any person who infringes or falsely uses the registered service mark without authorization of the proprietor.<sup>89</sup> Counterfeit is an offence that is prohibited and punishable under the provisions of the TSMA.<sup>90</sup> Apart from that, this law provides for penalties for infringement of trademark registration.<sup>91</sup> However, a person shall not be deemed to have committed an offence under the Act if the registered proprietor appears consented to the use of such a trademark.<sup>92</sup>

### **3.5. The Fair Competition Act (FCA)**

The FCA<sup>93</sup> provides for the promotion and protection of fair and effective competition in trade and commerce.<sup>94</sup> It also provides for the protection of consumers against unfair and misleading market conduct.<sup>95</sup>

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85 WIPO, "Trademarks: What is a Trademark?", WIPO, available at <https://www.wipo.int> (accessed 20 December 2022).

86 Cap. 326 [R.E 2019], s. 29(1).

87 *Id.*, s. 29(2).

88 *Id.*, s. 31.

89 *Id.*, s. 32(1).

90 *Id.*, s. 32.

91 *Id.*, Part XII.

92 *Id.*, s.32(3)(a).

93 The Fair Competition Act, Cap. 285 [R.E 2019].

94 *Id.*, long title.

95 *Ibid.*

The main purpose of this law is to improve the overall well-being of Tanzanians through the promotion and protection of effective competition.<sup>96</sup> Also, the FCA prevents unfair and misleading market practices in the country.<sup>97</sup> Moreover, this protection of effective competition increases efficiency in the production, distribution, and supply of products, promotes innovation, maximizes resource efficiency, and protects consumers.<sup>98</sup>

The FCA contains provisions for consumers including product safety standards and it prohibits the supply of unsafe goods.<sup>99</sup> It also incorporates consumer protection among its objectives.<sup>100</sup> It prohibits unfair business practices to ensure fair and effective competition in the market and the protection of consumers.<sup>101</sup> Unlike the Zanzibar Fair Competition and Consumer Protection Act<sup>102</sup> which provides for the prohibition of counterfeit goods, the FCA is silent. The provision under the consumer protection law in Zanzibar is an expression of Zanzibar's seriousness in protecting consumers against counterfeit products. However, the FCA falls short since it does not even mention the phrase counterfeit and comprises no express consumer rights that guarantee consumer protection and assures consumers' right to safety.

Besides, the FCA punishes a person who supplies unsafe products to consumers in the market.<sup>103</sup> It imposes fines on persons who fail to comply with the law related to the recall of unsafe products of not less

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96 *Id.*, s. 3.

97 *Id.*, s. 15.

98 *Id.*, ss. 3(a)-(d).

99 *Id.*, s. 49.

100 *Id.*, 3.

101 *Id.*, Part IV.

102 The Zanzibar Fair Competition and Consumer Protection Act, No. 5 of 2018, s. 65.

103 Cap. 285 [R.E 2019], s.53(9).

than fifty thousand shillings and not more than one million shillings or one-year imprisonment or both.<sup>104</sup> Nonetheless, for a body corporate, the fine is not less than one hundred thousand shillings and it does not exceed five million shillings.<sup>105</sup> The FCA insists on product safety, information and suppliers are required to adhere to these requirements.<sup>106</sup> It discourages the supply of unsafe products.<sup>107</sup> This law supports standards that products must conform to for consumers' safety and suppliers must comply with given standards.<sup>108</sup>

Equally, the FCA established the National Consumer Advocacy Council (NCAC) to represent consumers' interests.<sup>109</sup> The NCAC among others has the power to establish regional and sector consumer committees to achieve the objective of consumer protection. Yet, it has never commenced its operations since 2003 when it was statutorily established.<sup>110</sup> Too, the regional and sector consumer committees have never been established to represent consumers' interests. Therefore, consumers' interests are partially represented or unrepresented at all.

### **3.6. The Fair Competition Tribunal Rules**

The Fair Competition Tribunal (FCT) Rules<sup>111</sup> were made under section 98 of the Fair Competition Act. These Rules categorically point out that the appeal by a party aggrieved by the decision or appealable orders of the Fair Competition Commission (FCC) or regulatory authorities shall

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104 *Id.*, s. 53(9)(a).

105 *Id.*, s. 53(9)(b).

106 *Id.*, Part VIII.

107 *Id.*, s. 49(1)(a).

108 *Id.*, s. 49(2).

109 *Id.*, s. 92(1).

110 Dailynews Reporter, "Deputy Minister Gives Update on Formation of Consumer' Advocacy Council" available at [Dailynews.co.tz/news/2021-06-16](http://Dailynews.co.tz/news/2021-06-16) (accessed 8 February 2022).

111 The Fair Competition Tribunal Rules, GN No. 219 of 2012.

be determined by the Tribunal.<sup>112</sup> As far as counterfeit products are concerned, the FCT has jurisdiction to entertain appeals from the Chief Inspector of merchandise marks.<sup>113</sup> The court has no jurisdiction to entertain an appeal as per the case of *ABRI General Traders Limited v. ABRO Industries Inc.*<sup>114</sup>

Furthermore, the FCT Rules provide for procedures of filing appeals and the time frame within which one has to file an appeal before the Tribunal which is twenty-one days from when the notice of appeal was lodged.<sup>115</sup> They require an aggrieved party to lodge a notice of appeal before filing the memorandum of appeal.<sup>116</sup> These Rules provide for the manner of hearing appeals and the quorum of hearing an appeal which is three members of the Tribunal including the chairperson.<sup>117</sup> They also provide for the manner of delivering a decision.<sup>118</sup>

Additionally, the FCT Rules provide that the decisions or orders of the Tribunal shall be enforced and executed as those of the High Court of Tanzania (HCT).<sup>119</sup> However, the Tribunal's decisions or orders shall be subject to review<sup>120</sup> which can be conducted by the Tribunal itself or upon application by the aggrieved party. The application has to be made using a memorandum of review which shall be substantially in "Form G" provided under the second schedule to the FCT Rules.<sup>121</sup> Thus, the order of the Tribunal is not appealable to the Court of Appeal of

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112 Id, Reg. 3.

113 GN No. 89 of 2008, Reg. 51.

114 High Court of Tanzania (Dar es Salaam Sub-Registry), at Dar es Salaam, Civil Case No. 41 of 2022 (Unreported).

115 GN No. 219 of 2012, Reg. 11(1).

116 Id, Reg. 11.

117 Id, Reg. 29.

118 Id, Reg. 38.

119 Id, Reg. 49.

120 Id, Reg. 50(1).

121 Id, Reg. 50(2).

Tanzania (CAT) as stated in the case of *Tanga Cement Public Limited Company* previously known as *Tanga Cement Company Limited v. Fair Competition Commission and the Attorney General*.<sup>122</sup>

### 3.7. The Standards Act and its Regulations

The Standards Act<sup>123</sup> provides for the promotion of standardization of specifications of commodities and services. This legislation was enacted in 2009 to repeal and replace the Standards Act of 1975.<sup>124</sup> The Standards provide for the functions, management, and control of the Tanzania Bureau of Standards (TBS) and other related matters.<sup>125</sup> Accordingly, its main purpose is to promote the standardization of the specification of products.<sup>126</sup>

It is the legislation that guarantees consumer protection by ensuring that products offered in the market are safe and fit for consumption.<sup>127</sup> It establishes the TBS which acts as a custodian, overseer and observer of the standards and qualities of products in Tanzania.<sup>128</sup> The TBS is charged with the responsibility of establishing standards and specifying compulsory standards.<sup>129</sup> The Standards Act deals with standards of products and controls the entry of substandard products into the market. It punishes a person who commits an offence of dealing in substandard products with not less than a term of two years imprisonment or a fine of not less than 50 million and not more than 100 million or both.<sup>130</sup>

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122 Misc. Commercial Application No. 152 of 2021, High Court of Tanzania (Commercial Division), Dar es Salaam, (Unreported).

123 The Standards Act, Cap. 130 [R.E. 2019].

124 *Id.*, s. 38.

125 *Id.*, long title.

126 *Ibid.*

127 The Standards (Recall, Seizure, and Disposal of Products) Regulations, GN No. 682 of 2021, Regs. 9(1) and 12(1).

128 *Id.*, s. 3.

129 *Id.*, ss. 16 and 17.

130 *Id.*, s. 27.

However, when the offender confesses to the commission of the offence, the TBS can compound the offence and award the punishment of the fine amounting to twenty million only.

The standards set by the TBS under the Standards Act are recognized internationally and they guarantee consumers' right to be supplied with safe, fit, quality, and standard products including importation.<sup>131</sup> It is alleged that most counterfeit products are substandard, thus prohibition of substandard products helps to control counterfeit products.<sup>132</sup> Accordingly, the Standards Act protects consumers against counterfeit products because of its emphasis on the standard of the products offered to consumers.

#### **4.0. SHORTFALLS IN CONTROLLING COUNTERFEIT ELECTRONIC PRODUCTS**

##### **4.1. Laws Controlling CEPs Do Not Protect Consumers**

The FCA is considered the main consumer protection legislation. Among its objectives is to protect and promote fair and effective competition in the market.<sup>133</sup> It prohibits unfair business practices to ensure fair and effective competition in the market and the protection of consumers.<sup>134</sup> Also, the FCA contains consumer protection among its objects and provisions on product safety standards as it prohibits the supply of unsafe products.<sup>135</sup> However, competition law does not protect the interests of consumers directly. As a result, Tunney is of the view that

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131 The Standards (Compulsory Batch Certification of Imports) Regulations, GN No. 405 of 2009, Reg 2.

132 Ahimbisibwe, R.K., "Counterfeiting and Its Impact on Social Economic Development," Uganda National Bureau of Standards, available at [https://www.wipo.int/edocs/mdocs/africa/en/wipo\\_hl\\_ip\\_kla\\_15/wipo\\_hl\\_ip\\_kla\\_15\\_t\\_6\\_a.pdf](https://www.wipo.int/edocs/mdocs/africa/en/wipo_hl_ip_kla_15/wipo_hl_ip_kla_15_t_6_a.pdf) (accessed 28 March 2022).

133 Cap. 285 [R.E 2019], s. 3.

134 Id, Part IV.

135 Id, s. 49.

“competition law has never even sought to protect the consumer in a direct fashion.”<sup>136</sup>

For example, the Republic of South African Consumer Protection Act comprehensively provides for fundamental consumer rights, unlike the FCA which lacks such provision.<sup>137</sup> The express provision of consumer rights is vital for the assurance of consumer protection in any country. The lack of the provision for consumer rights under the main consumer protection law implies that consumer rights cannot be clearly identified and consumers hardly pursue their rights in case of violation.

Furthermore, express recognition of the matter through the provision of the law shows that the matter is important and has been seriously considered. This is supported by Eze who argues that consumer protection law and consumer rights are inseparable as the latter comes first.<sup>138</sup> Eze further states that the primary purpose of consumer protection law is to ensure that consumers may exercise their legal rights and to improve the effectiveness of consumer protection.<sup>139</sup> Hence, as Eze argues effective protection of consumers' interests requires the consumer protection law to expressly provide for consumer rights.

Also, the Standards Act and its Regulations do not protect consumers. The law of standard prohibits the supply of substandard products in the market.<sup>140</sup> This legislation ensures that consumers access products of acceptable standards in the market.<sup>141</sup> However, the Standards Act does

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136 Tunney, J., “The Ghost Host Community in the Evolution of Travel Law in World Trade Contexts: A Pragmatic Cosmopolitan Perspective,” in Burns, P.M and Novelli, M., (eds.) *Tourism and Social Identities: Global Frameworks and Local Realities*, New York: Routledge, 2006, p. 61, at p.68.

137 The Republic of South African Consumer Protection Act, No. 68 of 2008, Chapter two, Parts A-I.

138 Eze, A.G., “Consumer Rights as Constitutional Rights-A Comparative Analysis of Some Selected Jurisdiction,” 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2011, p. 184, at p. 184.

139 Ibid.

140 GN No. 682 of 2021, Reg. 12(1).

141 Ibid.

not even mention the phrase counterfeit products though most counterfeit products are substandard. Also, this law does not contain express provisions for consumer protection. Therefore, counterfeit products including CEPs which are not substandard are not covered.

Furthermore, the MMA and its Regulations control how business trademarks are used in their products. It prohibits the manufacture, sale, and distribution of counterfeit products. In addition to violating intellectual property rights, counterfeit products can pose serious dangers to the health and safety of consumers. Still, it has been observed that the MMA and its Regulations do not comprise consumer protection matters among its provisions as they do not even mention the term “consumer.”<sup>142</sup>

The TSMA and its Regulations also do not contain consumer protection but, protect businesses who are the proprietors of trademarks and registered users.<sup>143</sup> Thus, although consumers are also beneficiaries of the TSMA, this law does not even mention the term “consumer” throughout its provisions. Also, unlike consumers, TSMA considers businesses as victims of counterfeit products including CEPs.<sup>144</sup>

#### **4.2. Scattered Consumer Protection Provisions**

Consumer provisions are scattered in various laws with diverse objectives. These laws include the FCA,<sup>145</sup> the Standards Act,<sup>146</sup> the MMA,<sup>147</sup> the TSMA,<sup>148</sup> and their Regulations. It has been observed that there is no express provision on consumer rights under the FCA

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142 Cap. 85, [R.E 2002], ss. 3 and 6.

143 Cap. 326 [R.E 2019], ss. 31 and 42.

144 Id, s. 30.

145 Cap. 285 [R.E 2019].

146 Cap.130 [R.E 2019].

147 Cap. 85 [R.E 2002].

148 Cap. 326 [R.E 2019].

although it provides consumer protection among its objectives. Other laws are silent on consumer protection.<sup>149</sup> However, they expressly deal with other matters related to business. Notably, the FCA promotes and protects fair competition among businesses,<sup>150</sup> the MMA prohibits counterfeiting,<sup>151</sup> the Standards Act regulates standards of the products offered by businesses in the market,<sup>152</sup> and the TSMA protects the exclusive right of businesses that are owners of registered trademarks.<sup>153</sup>

It is argued that effective consumer protection requires consumer-friendly legislation for consumers to be easily informed of their rights.<sup>154</sup> It requires a special and focused law for the assurance of efficient consumer protection.<sup>155</sup> Some countries have specific and comprehensive laws which deal with consumer protection matters specifically, separate from the business matters. These countries include but are not limited to Kenya, South Africa, and India. Their consumer protection laws are the Kenyan Consumer Protection Act,<sup>156</sup> the South African Consumer Protection Act<sup>157</sup> and the Indian Consumer Protection Act.<sup>158</sup> In Tanzania however, there is no specific consumer protection legislation but consumer provisions are scattered in multiple laws.

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149 Cap. 285 [R.E 2019], s. 3.

150 Ibid.

151 Cap. 85 [R.E 2002], s. 3 and 6.

152 Cap. 130 [R.E 2019], long title.

153 Cap. 326 [R.E 2019], s. 31.

154 Rajadurai, M.M and Barclay, E.D., "Unfair Contract Terms in Malaysia: The Gap in the Consumer Protection (Amendment) Act 2010," 1 Legal Network Series, 2014, p. 1, at p. 30.

155 Ibid.

156 The Kenyan Consumer Protection Act, No. 46 of 2012.

157 The South African Consumer Protection Act, No. 68 of 2008.

158 The Indian Consumer Protection Act, No. 35 of 2019.

### 4.3. Narrow Construction of the Counterfeit Offence

Counterfeiting as an offence has been constructed under consumer protection laws particularly the MMA as the main anti-counterfeit law.<sup>159</sup> This law just identifies the acts that amount to counterfeit products including electronic products that contravene the provisions of the law.<sup>160</sup> Such offences are enshrined under sections 3(1) (a)-(i) of the MMA which provides that:<sup>161</sup>

*A person shall not in the course of trade own, possess or be in control of any counterfeit goods; manufacture, produce or make any counterfeit goods; sell or expose any counterfeit goods; apply any false trade description of goods; or dispose of in any manner any counterfeit goods.*

The law further provides that any person who infringes this provision of the law commits an offence and upon conviction shall be liable.<sup>162</sup> According to these provisions of the law, a person is deemed to contravene the provision of the law if he is involved in any of the acts mentioned in the quotation above. The way the MMA establishes the offence covers all producers and those who are not producers of counterfeit products. However, the offence is narrow for it does not consider the risks associated with counterfeit goods to consumers. Particularly, it excludes “the import or export for private use by the importer or exporter of such goods.”<sup>163</sup> It is observed that, to ensure consumers’ right to safety one could expect the anti-counterfeit law to cover all transactions and leave no room for consumers to access counterfeit products. It is because the effects of CEPs on consumers are similar even if such products were imported for private use.

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159 Cap. 85 [R.E 2002].

160 Id, s. 4.

161 Id, s. 3(1)(a) and (i).

162 Id, s. 3(2).

163 Id, s. 3(1)(g).

#### 4.4. Limitation Period for Prosecuting Counterfeit Offences

Unlike other criminal offences, counterfeiting offences under the MMA have a limited period within which to institute criminal proceedings.<sup>164</sup> The MMA prohibits counterfeiting of products and it categorizes counterfeiting of products including electronic products as a criminal offence.<sup>165</sup> Furthermore, it provides for a restriction of the time within which a person who contravenes the law may be charged. Accordingly, charges must be instituted before the expiration of five years from the time of the commission of the alleged offence.<sup>166</sup> Therefore, the MMA has a loophole that can easily be manoeuvred by unscrupulous businesses at the expense of the safety of consumers.

It should be noted that sometimes the effects of CEPs cannot easily be observed because the effects include both short-term and long-term.<sup>167</sup> In both ways, the effects require some time before they surface. This means that some effects of CEPs can be revealed after the expiry of five years while the prosecution of counterfeit offences is limited under the anti-counterfeit law. Therefore, the limitation imposed on the prosecution period overrides the objectives of the laws that include the protection of consumers from CEPs. Also, the *lacuna* provides room for some unscrupulous businesses involved in counterfeit of products to escape accountability and dishonest businesses to benefit from their wrongs. Thus, it waters down the efforts made towards controlling such products including CEPs and assurance of consumers' right to safety.

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164 Ibid.

165 Id, s. 3 and 6.

166 Id, s. 17.

167 Kohn, et al, Sustainability in Question: The Search for a Conceptual Framework, Cheltenham: Edward Elgar Publishing Limited, 1999, at p. 286.

#### **4.5. Chief Inspector’s Discretionary Power to Prosecute Counterfeit Offences**

The Chief Inspector of merchandise marks has the discretionary power to commit the suspected offender to the Director of Public Prosecutors (DPP) for criminal prosecution. The Merchandise Marks Regulations use the phrase “the Chief Inspector may” commit the suspected offender to the DPP for criminal prosecution.<sup>168</sup> According to the Interpretation of Laws Act the word “may” entails that the person may exercise such power or not.<sup>169</sup> Thus, this provision does not compel the Chief Inspector to commit the counterfeit offender to the DPP for prosecution, since it depends on his discretion.

Again, taking into account consumer protection to ensure the safety of consumers and referring to the theory of social costs it is argued that anti-counterfeit laws should grant mandatory power to the Chief Inspector in committing the suspected offender of counterfeit products to the DPP. This is because “the counterfeit offence” is a criminal offence which must be prosecuted. Also, as the social costs theory requires, it is expected that a person involved in counterfeit of products should be strictly liable to ensure consumers are safe. Consequently, with discretionary powers, consumer protection is not considered fundamental since, consumers are exposed to the danger associated with CEPs.

#### **4.6. Disregard of Consumer Protection Matters**

The laws dealing with both business and consumer matters disregard the latter. Consumers are left to fight for themselves because there is no specific institution that deals with their matters<sup>170</sup> which are disregarded because of the laxity to establish a strong institution that protects

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168 GN No.89 of 2008, Reg 50.

169 The Interpretation of Laws Act, Cap. 1 [R.E. 2020], s. 53(1).

170 The TCAS Official, Interview by the Author, (7 June 2021, TCAS, Dar es Salaam).

consumer rights. For example, the FCC which protects both the interests of competitors and consumers was established in 2007, only four (4) years after its statutory establishment in 2003.<sup>171</sup> On the contrary, the NCAC was statutorily established (20) years ago and has not yet been implemented.<sup>172</sup> The implication of the delay in the implementation of the body to represent consumers' interests shows that consumer matters are not taken seriously.

Apart from that, consumer protection matters are disregarded because there is no Special Consumer Court (SCC) or an institution empowered to entertain consumer complaints exclusively. It was suggested during an interview that a special court or special institution for dealing with consumer protection matters should be established essentially to deal with the problems associated with purchase and consumption-related matters.<sup>173</sup> Since consumer protection is a sensitive matter, their matters should be prioritised. Thus, the establishment of the SCC with exclusive jurisdiction and friendly procedure in hearing and determining consumer cases is paramount. Since, it will assist consumers to pursue their complaints at lower costs and without delay.

## **5.0. CONSUMER PROTECTION AGAINST CEPs IN EAST AFRICA**

The primary goal of sub-regional and regional integration is to cooperate in trade, investment and development in general while consumer protection matters are compromised.<sup>174</sup> The observation of the EAC consumer protection against CEPs under the EAC framework shows

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171 UNACTAD, Voluntary Peer Review of Competition Law and Policy: United Republic of Tanzania Overview, Geneva: United Nations, 2012, at p.1.

172 Daily News Reporter, "Data on National Consumer Advocacy Council," above note 110.

173 Academic Staff, Interview by the Author (13 July 2021, RUCU, Iringa); and Academic Staff, Interview by the Author (27 August 2021, UDOM, Dodoma).

174 CEHURD, "Anti-Counterfeiting Laws and Access to Essential Medicines in East and Southern Africa," EQUINET, CEHURD, TARSC Policy Brief No. 22, 2010, at p. 70.

that they are regulated by the EAC Competition Act<sup>175</sup> and the EAC Customs Management Act.<sup>176</sup>

On one hand, the EAC Competition Act was enacted to promote and protect fair competition in the Community.<sup>177</sup> Also, the EAC Competition Act includes provisions that relate to consumer protection under parts III, VII, and IX.<sup>178</sup> Further, the EAC Competition Act establishes the East African Competition Authority (EACA) to carry out its objectives. The EACCA is vested with exclusive original jurisdiction in cases of violations of the EAC Competition Act.<sup>179</sup>

Moreover, unlike the European Union (EU) experience where the National Competition Authorities (NCAs) work together with the EU Directorate General for Competition in the enforcement of competition rules, the NCAs and courts in the Partner States lack jurisdiction to determine matters arising from the EAC Competition Act.<sup>180</sup> It is further stated that the EACA and the East African Court of Justice (EACJ) have no appellate power over NCAs.<sup>181</sup> This is because the EACA has jurisdiction over cross-border cases.<sup>182</sup>

On the other hand, the EAC Customs Management Act was enacted in 2004<sup>183</sup> and came into force in 2005<sup>184</sup> to deal with the management and

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175 The East African Community Competition Act, 2006.

176 The East African Community Customs Management Act, 2004.

177 The East African Community Competition Act, s 3(a)(ii).

178 *Id.*, Parts. III, VII and IX.

179 *Id.*, s. 44(1).

180 Ministry of Trade and Industry (MTI), "Rwanda Competition and Consumer Protection Policy," Kigali, July 2010, at pp. 4-5.

181 *Ibid.*

182 *Ibid.*

183 The East African Community Customs Management Act, 2004.

184 *Ibid.*

administration of customs within the Community.<sup>185</sup> This Act deals with the prevention and suppression of particular crimes including dealings in counterfeits.<sup>186</sup> It generally prohibits the importation of counterfeit goods.<sup>187</sup> Also, it imposes a penalty to a person who contravenes the law which is a maximum of five (5) years imprisonment or a fine equal to 50 per cent of 54 the dutiable value of the goods or both.<sup>188</sup>

However, some of the EAC Partner States like Rwanda and Burundi are yet to enact their national anti-counterfeit laws. The situation in Uganda is worse since in 2015 the government withdrew its Anti-counterfeit Bill of 2010 from the Parliament for the reason that the laws in place were enough.<sup>189</sup> Unlike Kenya and Tanzania with specific anti-counterfeit legislation, in March 2022 the Ugandan Members of Parliament reported that although there is the EAC Customs Management Act to curb counterfeit products, strict implementation has failed thus the counterfeit products flow keeps on.<sup>190</sup> According to the Ugandan National Bureau of Standards (UNBS), 54 per cent of products in their market are either fake or counterfeit.<sup>191</sup>

On the part of Kenya and Tanzania as stated above they have specific anti-counterfeit laws but not fully harmonized with the EAC anti-counterfeit law. For example, the Kenyan Anti-Counterfeit Act<sup>192</sup> was

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185 *Id.*, long title.

186 *Id.*, s. 3.

187 *Id.*, 2nd Schedule.

188 *Id.*, s. 200 (d)(iii).

189 "Government Withdraws the Anti-Counterfeiting Goods Bill," available at <https://www.parliamentwatch.ug/news-amp-updates/government-withdraws-the-anti-counterfeiting-goods-bill/> (accessed 18 January 2023).

190 "UNBS Does Not Have Capacity to Protect Ugandans against Fake Goods: MPs" available at <https://www.independent.co.ug/unbs-does-not-have-capacity-to-protect-ugandas-against-fake-goods-mps/> (accessed 15 January 2023).

191 *Ibid.*

192 The Kenyan Anti-Counterfeit Act, No. 13 of 2008.

amended to establish the Anti-Counterfeit Authority (ACA).<sup>193</sup> However, it is still claimed that the ACA does not suffice in the fight against counterfeit products including electronic products which are the most counterfeited consumable goods.<sup>194</sup> The ACA reports that one in five goods sold in Kenya is counterfeit which risks the economy of the nation, consumers' safety and health.<sup>195</sup>

In 2021, Kenya introduced the Anti-Counterfeit (Recordation) Regulations made under the Anti-Counterfeit Act.<sup>196</sup> These Regulations provide a mandatory requirement for any company desiring to import into Kenya to record their particulars with ACA concerning their imports.<sup>197</sup> It is unlawful to import goods into Kenya without records to ACA.<sup>198</sup> The goal of the recordation system is to prevent the importation of counterfeit products. Initially, the recordation system was planned to start its operation on 1 July 2022.<sup>199</sup> However, it was extended to 1 January 2023.<sup>200</sup> Therefore, currently, the recordation system for curbing counterfeit products including electronic products is being implemented in Kenya.<sup>201</sup>

Furthermore, it was reported that counterfeit products are still a challenge in East Africa. For instance, during the last financial year 2021/2022 the FCC seized counterfeit products worth Tshs. 15 billion in Tanzania and the ACA in Kenya stated that in 2020 counterfeit

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193 *Id.*, s. 3(1).

194 Meneses, F and Pereira, D., "Kenya's Battle Against Counterfeits," *inventa*, available at <https://www.inventa.com/en/news/article/824/kenyas-battle-against-counterfeits> (accessed 20 January 2023).

195 *Ibid.*

196 The Kenyan Anti-Counterfeit Act, No. 13 of 2008, s. 34B.

197 The Anti-Counterfeit (Recordation) Regulations, LN No. 118 of 2021.

198 *Ibid.*

199 The ACA Public Notice No. 1 of 2022.

200 The ACA Public Notice No. 2 of 2022.

201 Meneses, F and Pereira, D., "Kenya's Battle Against Counterfeits," above note 194.

products counted to Kshs. 100 billion.<sup>202</sup> As a result, these two countries have agreed to join their efforts to fight against counterfeit products including CEPs to protect traders and investors of genuine products.<sup>203</sup> Also, to cement their relationship the ACA Executive Director stated that a single country cannot win the war against counterfeit products. In addition, he stated that “we need to join our forces.”<sup>204</sup> As well, the FCC Director said, “We are determined to cooperate in strategic, legal and execution areas.”<sup>205</sup> This implies that counterfeit products including electronic products are still a challenge in the EAC countries and consumers are still vulnerable to their effects.

## **6.0. EFFECTS OF CEPs ON CONSUMERS' RIGHT TO SAFETY**

### **6.1. CEPs Threaten Consumers' Health and Life**

CEPs are dangerous to the health and lives of consumers because they are not subject to safety and health measures, unlike genuine electronic products.<sup>206</sup> The effect of CEPs on the health and life of consumers can be evidenced through the Legal and Human Rights Centre (LHRC). It reported that among the incidences that threaten the right to life is the violation of consumer rights resulting from consumption of counterfeit products.<sup>207</sup> It further stated that counterfeit products negatively affect the health and safety of consumers.<sup>208</sup> Therefore, counterfeit products

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202 Malanga, A., “Tanzania and Kenya Agree to Jointly Fight Counterfeit Products,” above note 32.

203 Ibid.

204 Ibid.

205 Ibid.

206 LHRC, “The Legal and Human Rights Centre Report,” 2018, at p. 152. See also, Pecht, “The Counterfeit Electronic Problem,” above note 17, at p. 13.

207 Ibid.

208 Ibid.

are dangerous as they threaten both the health and lives of consumers.<sup>209</sup> For instance, Kong, Das and Petch explain that CEPs like batteries can leak acids which can cause explosions or start a fire.<sup>210</sup>

Additionally, since CEPs do not pass through health and safety measures, they can explode due to overheating which is dangerous to consumers.<sup>211</sup> Levis, Gennaro and Garbisa argue that even non-CEPs have adverse effects on consumers.<sup>212</sup> They state that a significant increase in health problems has been partly blamed on the long-time use of mobile phones which are said to cause head tumours that are, brain gliomas and acoustic nerve neuromas to people.<sup>213</sup> Thus, medical practitioners opined that the problems associated with the use of CEPs might be worse.<sup>214</sup> Therefore, CEPs are unacceptable because they expose the health and life of consumers to danger.

## 6.2. Visual Impairment

Visual impairment is also among the effects of CEPs on consumers. CEPs may cause visual impairment in users of electronic products.<sup>215</sup> It is likely to be experienced by consumers who use counterfeit mobile

209 Li, C., "Lessons Learned from the ACTA Process: An Industry Perspective," in Roffe, P and Seuba, X (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath*, Cambridge: Cambridge University Press, 2015, at p. 275.

210 Kong, L, Das, D and Pecht, M.G., "The Distribution and Detection Issues of Counterfeit-Ion Batteries," *Energies*, 2022, p. 1, at pp. 1-4.

211 ECC, "The Impact of Counterfeiting on Online Consumer Rights in Europe: The Risks of Buying Counterfeits on the Internet, and Tips from the ECC-Net for Consumers in Europe who want to Avoid Unpleasant surprises due to these Products," March 2017, available at [https://www.europe-consommateurs.eu/fileadmin/Media/PDF/publications/etudes\\_et\\_rapp...\(accessed 21 July 2023\)](https://www.europe-consommateurs.eu/fileadmin/Media/PDF/publications/etudes_et_rapp...(accessed 21 July 2023)).

212 Levis, A.G, Gennaro, V and Garbisa, S., "Business Bias as Usual: The Case of Electromagnetic Pollution," in Ramazzotti, P, Frigato, P and Elsner, W., (eds.), *Social Costs Today: Institutional Analyses of the Present Crises*, London: Routledge, 2012, p. 225, at pp. 233-35.

213 Ibid.

214 The Medical Practitioner, Interview by the Author (24 June 2021, Benjamin Mkapu Hospital, Dodoma).

215 Ibid.

phones, television sets, and computers.<sup>216</sup> However, it should be noted that there is no instrument used to examine whether a particular visual problem was caused by the consumption of CEPs.<sup>217</sup> The doctors reported that even genuine electronic products cause visual impairment when frequently used by consumers. Thus, they commented that the effects of CEPs might be worse.<sup>218</sup>

In addition, they posed that visual impairment may be partial or full, whereby the former may later become full visual impairment.<sup>219</sup> It was alleged that the cases of visual impairment have increased over time and when doctors examine patients, normally discover that they were using electronic products.<sup>220</sup> Therefore, the frequent use of electronic products has been linked to trauma experienced by several patients.<sup>221</sup> Likewise, doctors advise people to stop over-using electronic products for the sake of their health. They stated that the stop-to-use method assists them in correcting partial visual impairment in patients.<sup>222</sup> On this too, doctors stated that the condition might be worse for consumers of CEPs.<sup>223</sup>

### **6.3. Hearing Impairment**

Apart from visual impairment, CEPs may cause hearing impairment.<sup>224</sup> Also, there is no specific apparatus to measure and determine whether the particular hearing impairment has been caused by the consumption

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216 Ibid.

217 Ibid.

218 Ibid.

219 The Medical Practitioner, Interview by the Author (17 June 2021, Rabininsia Memorial Hospital, Dar es Salaam).

220 Ibid.

221 Levis, Gennaro and Garbisa, "Business Bias as Usual: The Case of Electromagnetic Pollution," above note 212, at pp. 233-35.

222 The Medical Practitioner, Interview by the Author (24 June 2021 Benjamin Mka Hospital, Dodoma).

223 Ibid.

224 Ibid.

of CEPs.<sup>225</sup> Furthermore, the doctors pointed out that, although there is no specific apparatus to examine the cause of hearing impairment in patients, their interviews with the patients revealed that, patients were loyal users of electronic products specifically mobile phones.<sup>226</sup> However, there is no evidence as to whether the mobile phone was genuine or counterfeit.<sup>227</sup> Therefore, the effects of CEPs cannot be overstated since they are not subjected to safety tests.

#### **6.4. Economic Loss**

CEPs result in economic loss for consumers, businesses and the government.<sup>228</sup> Governments lose billions of money due to CEPs and Tanzania is not an exception.<sup>229</sup> The government loses revenue since counterfeiters do not pay taxes given the fact that, dealing with CEPs is illegal.<sup>230</sup> Due to this reason, those dealing with CEPs do not pay the required fees as they pass through illegal entries and directly head into the markets.<sup>231</sup> It was also confirmed by the TRA officials when they said they could not impose a tax on CEPs since they are destructive to the economy.<sup>232</sup>

Consumers who purchase CEPs spend more money than required.<sup>233</sup> This can be evidenced by what occurred when the TCRA disconnected

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225 Ibid.

226 The Medical Practitioner, Hospital, Interview by the Author (17 June 2021, Rabininsia Memorial Hospital, Dar es Salaam).

227 Ibid.

228 Yager, L., *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, DIANE Publishing, 2011, at pp. 9-10.

229 Confederation of Tanzania Industries (CTI), *The State of Counterfeit Goods in Tanzania*,” above note 16, at p.81.

230 Yager, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, above note 228, at p. 10.

231 Ibid.

232 TRA Officials, Interview by the Author (24 June 2021, TRA, Dodoma).

Kisyombe, “Competition and Consumer Protection Policy: A Tanzanian Perspective,” UNACTAD Ad-Hoc Expert Group Meeting on the Interface between Competition Policy and Consumer Welfare, Geneva, 12-13 July 2012, at p.12.

counterfeit mobile phones from network services.<sup>234</sup> During interviews, participants stated that “consumers who were affected by the disconnections had to purchase new and genuine mobile phones to facilitate communication.”<sup>235</sup> Also, given that CEPs are not durable, users are compelled to continuously buy other electronic products to replace the counterfeit ones,<sup>236</sup> as a result, they face financial loss.

## 7.0. CONCLUSIONS AND RECOMMENDATIONS

This article concludes that the law related to consumer protection against CEPs is of utmost importance. The consumer protection provisions are scattered in various legislation. Also, the laws that protect businesses' interests partly protect consumers' interests hence complicating the situation. Currently, there is no comprehensive law dedicated to handling consumer protection matters to ensure consumers' right to safety. Apart from that, the CURT does not provide consumer protection including the consumers' right to safety. However, the court has been extending the interpretation of article 14 to include the right to safety, which is not sufficient.

Additionally, the FCA does not expressly provide for consumer rights throughout its provisions. However, the analysis shows that effective protection of consumers' interests, requires the law concerned to expressly provide for consumer rights. Also, although the counterfeiting of electronic products is a criminal offence, its prosecution is limited to a period of five years only. On the contrary, there are long-term effects of CEPs on consumers which can surface after the expiry of five years.

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234 Lamtey, G., “Africa: Hazards of Fake Phones Exposed,” above note 31.

235 Ruaha Catholic University (RUCU) Student, Interview by Author (15 July 2021, RUCU, Iringa); University of Dodoma Student, Interview by Author (17 August 2021, UDOM, Dodoma).

236 Ibid.

Therefore, the article considers that consumers' right to safety against CEPs is partially guaranteed under the current legal framework.

Subsequently, the article recommends the amendment of the CURT to incorporate the protection of consumer rights including consumers' right to safety; and the amendment of section 17 of the MMA to delete the limitation period for prosecution of counterfeit offences. Also, regulation 50 of the Merchandise Marks Regulations on the discretionary power of the Chief Inspector on the prosecution of counterfeit offences should be deleted to ensure consumers' right to safety. The article further recommends the enactment of a single comprehensive consumer protection law to consolidate consumer protection provisions which are currently scattered in various laws. Furthermore, to complement the provisions of the Constitution, the newly enacted consumer protection law should expressly provide for consumer rights to ensure recognition and effective protection of consumer rights. Also, the said consumer protection law should establish a special consumer protection authority and a Special Consumer Court with exclusive jurisdiction to hear and determine consumer cases.