REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 6 OF 2017

BRIAN MUTUKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from the ruling of Hon. L. Kassan (SPM) on a case to answer in Mavoko SPMC M.C.G No. 673 of 2015 on 30th March, 2017)

RULING OF THE COURT

1. The applicant was charged with the offence of causing nuisance contrary to section 115 of the Public Health Act Cap 242 Laws of Kenya. Particulars being that the applicant on 10th December, 2015 at about 2:20 pm along Syokimau road within Mavoko sub-county in Machakos county area of jurisdiction being the caretaker of three sixty degrees apartments estate was found discharging waste water into the open causing nuisance and risk of disease outbreak to the public. The applicant pleaded not guilty to the charge. The prosecution witnesses were heard and the prosecution closed its case. A ruling on a case to answer was subsequently entered with the result that the applicant was found with a case to answer and was put on his defence.

2. The grounds for revision were that; the trial magistrate erred in law and in fact by failing to consider that the process required in instituting this case was fatally flawed in the first instance. That contrary to section 119 of the Public Health Act, a Statutory notice was not issued to the accused person prior to the institution of the case, that if there were any notices issued as alleged by the prosecution witness, there was no proof of such notices, that the complaint was not lodged by a Medical Health Officer to the magistrate as is spelt out under section 120 of the Public Health Act but were lodged by the prosecution witnesses who categorically stated that they were not health officers and that the summons were not issued by a magistrate as stipulated under section 120 of the Public Health Act; that the trial magistrate failed to establish whether the applicant was the culpable party if at all there was such nuisance as described in the charges. There is no evidence of commission of an offence, no site visit, no photographs, no chemical analysis of the sewage sample and that the trial magistrate was set on determining this matter by stating that the applicant has a case to answer on 2nd March, 2017, a day set for mention to confirm filing of submissions and not the ruling date. The applicant sought reliance in **Bhatt v. Republic (1957) E.A. 332**.

3. PW1, Zakayo Mutusi who claimed to be a Public Health Officer testified that he received a complaint on 10th December, 2015 that estate 360 was discharging sewage water to a water course. He went to the site and confirmed the allegation and the applicant was arrested. On cross examination he stated that on charging the applicant, reliance was placed on the first letter which he stated he could bring to court if given the chance. He stated that photos of the site were also taken.

4. PW2, Kioko Aaron Kioko who is also a Public Health Officer stated that they received the complaint and proceeded to the site where the complaint was confirmed. On cross examination, he stated that issuance of notice was not a mandatory requirement. He explained that the said issuance was dependent on the magnitude of the nuisance and stated that section 115 of the Public Health Act ('*the Act*') provided so.

5. PW3, William Matha Kagusu of County Government of Machakos Inspectorate Department reiterated what PW1 and 2 stated on receipt of report and site visitation. On cross examination he stated that his work was not to issue notices and that he recommended that the applicant be arrested since he was in charge of the treatment plant.

6. Section 119 and 120 of the Act provides:

Section 119

"The medical officer of health, if satisfied of the existence of a nuisance, shall serve a notice on the author of the nuisance or, if he cannot be found, on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to remove it within the time specified in the notice, and to execute such work and do such things as may be necessary for that purpose, and, if the medical officer of health think it desirable (but not otherwise), specifying any working to be executed to prevent a recurrence of the said nuisance." (Emphasis mine)

Section 120:

> ***"(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with is of the requirements thereof within the time specified medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring person on whom the notice was served to appear before the court…"***

7. It is clear from the said provisions that the issuance of a notice to remove a nuisance is mandatory. It seems the Respondent herein lodged a complaint with the Magistrate before issuance of the notice contrary to the clear provisions of Section 119 and 120 of the Public Health Act Cap 242 Laws of Kenya.

8. Section 362 and 364 of the Criminal Procedure Code gives revisionary powers to this court to call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

9. In the present revision it is quite clear that that the Respondent did not follow or adhere to the clear provisions of Section 119 and 120 of the Public Heath Act which provided for the procedure of dealing with complaints of nuisances. The Respondent was to first issue out a notice to the persons alleged to have caused the nuisance before moving to the magistrate's court in the event of non- compliance. However, it seems the Respondent neglected to follow the clear procedure provided and rushed to the Magistrate's Court and mounted the proceedings now complained of. The Respondent called three witnesses in support of its case whereupon the trial court proceeded to receive submissions and thereafter established that the Applicants had a case to answer. It was at that juncture that the Applicants moved to this court seeking for revisionary orders.

10. The Respondent in the first instance is noted to have failed to tender before the court a copy of the notices issued to the Applicants pursuant to Section 119 and 120 of the Public Health Act and which should have established non-compliance on the part of the Respondents. That being the position, it is the finding of this court that the Respondent cannot be said to have established a prima facie case against the Applicant. It then follows that the trial magistrate could not have reached a decision that the Applicant had a case to answer. Consequently such a finding by the trial magistrate was not properly arrived at.

11. In the result the trial Magistrate's ruling on a case to answer dated 30/03/2017 together with the entire proceedings are hereby quashed. The Applicant is ordered set at liberty forthwith unless otherwise lawfully held. The cash bail deposited in the sum of Kshs. 30,000/= be released to the depositor.

Orders accordingly.

Dated, signed and delivered at Machakos this 8th day of March, 2018.

D.K. KEMEI

JUDGE

In the presence of:-

Kaluu for Thuita - for the Applicant

Machogu - for the Respondent

Kituva - Court Assistant