



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 113 OF 2013

DEEPAK PATEL APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 2399 of 2012 of the Chief Magistrate's Court at Mombasa – Hon. Gachie - RM)

JUDGMENT

DEEPAK PATEL hereinafter referred to as the Appellant was Convicted of the offence of erecting a hoarding or scaff hoarding without a permit contrary to by law 238 of the building code, Local Government (adoptive) by Laws, building order 1968.

The particulars being that:-

“On the 5th day of June, 2012 at about 11:00 a.m. at Miritini area Mombasa County, he was found having erected a hoarding or scaffhoarding on plot No. 1697/VI/MN without first obtaining a licence from the council to Ksh. 6,630,000/= to the City Council”.

Being dissatisfied with the Judgment and Conviction, the appellant has lodged this appeal.

The grounds are that;

- 1. The learned trial magistrate erred in law and in fact in finding that the appellant had contravened by law 238 of the Building code order 1968.**
- 2. That he erred in law and in fact in finding that the appellant had erected a hoarding or scaffolding for the period from April, 2011 to April, 2012 without the requisite permit and without any evidence to support such a finding.**
- 3. That he erred in law and in fact in holding that the Appellant was directly and specifically involved in the running and management of the yard without evidence to that effect.**
- 4. That he erred in law and in fact in failing to find that the Appellant was not the owner, developer or in any way the developer or person responsible for plot No. MN/VI/1697**
- 5. That the provisions of section 20 of the Penal Code were misconstrued.**
- 6. That the learned magistrate erred in law and in fact in failing to find that if any hoarding was erected on plot No. MN/VI/1697 then the same was licensed.**
- 7. That he erred in law and fact by failing to find that any and all the fees required by the council had been paid.**

8. **That he erred in law and in fact for failing to find that the invoice dated 9th May, 2012 was invalid and illegally raised.**

Section 238 (1) of the building code provides,

“If, required by the Council, a person, who erects or demolishes a building, shall erect and properly maintain through out the period of work an approved hoarding.

2. No person shall erect a hoarding or scaffolding on or any street without first obtaining a licence from the Council.”

The application for a licence shall be in writing and at the time of the application the applicant shall pay to the council the approved license fee set out in the tenth schedule to these by laws”.

A perusal of the evidence on record does indicate that PW 1 and PW 2 were of the view that the fees for the permit was Ksh. 6,630,000/=.

I am in agreement with the submissions by counsel for the applicant which is to the effect that the Accused was not charged with the failure to settle a fee note of Ksh. 6,630,000/= but was charged with erecting a hoarding or scaffolding without a permit contrary to by law 238 of the building code.

Its quite apparent that the charge was defective from the word go (**ab initio**). The trial magistrate proceeded on the assumption that the fees for the permit was Ksh. 6,630,000/=. The fees for the permit does not seem to have been specified.

Secondly, its not clear in what capacity the applicant was charged. Was he charged as a Director of Venus Metal corrugated Sheet Ltd. or as a person.

I find that the order of compliance requiring the applicant to pay Kss. 6,630, 000/= before Sentence which amount is not clearly shown how it was arrived at and which is not fees for the permit, would be greatly prejudicial to the appellant.

It is ordered that the Conviction of the applicant be and is hereby set aside and this matter to be heard afresh before a magistrate of competent jurisdiction.

Mention on **7th October, 2014** at the Municipal court.

Judgment delivered dated and signed this **23rd** day of **September, 2014**

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M. MUYA

JUDGE

23RD SEPTEMBER, 2014

In the presence of :-

Learned Counsel for the applicant Mr. Maundu

Learned Counsel for the Director of Public Prosecution Mr. Jami

Court clerk Musundi