



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 556(A) of 2007**

**LOISE NYAMBURA MURUGA .....APPELLANT**

**- AND -**

**REPUBLIC .....RESPONDENT**

***(An Appeal from sentence imposed by Senior Resident Magistrate Ms. L. Nyambura dated 25<sup>th</sup> September, 2007 in Criminal Case No. 982 (A) of 2007 at the Subordinate Court of the First Class Magistrate, at City Hall, Nairobi)***

**JUDGMENT**

The record for 25<sup>th</sup> September, 2007 shows that the substance of the charge and every element thereof was stated by the Court to the accused person (appellant herein), and when she was asked whether she admitted or denied the truth of every element of the charge, she answered: “True”. A plea of guilty was entered; and thereupon, the facts of the case were read out by the prosecution: on 6<sup>th</sup> June, 2007 two Public Health Officers, *Mr. Charles Kibue* and *Mr. Mohammed Yunis* were on routine duties, and they visited Cafè Afric on Plot No. 209/1085 in Nairobi. There was a cafeteria on the premises, selling food for human consumption. The two Public Health Officers observed conditions which, in the interest of public health, required rectification:

- (i) the walls were dirty;
- (ii) there were no separate toilets for males and females;
- (iii) there were no urinals for the use of males;
- (iv) the floors were pot-holed;
- (v) the kitchen had no chimney for the extraction of smoke;
- (vi) there were no changing rooms;
- (vii) employees had no medical certificates;
- (viii) the premises were generally dirty.

The said Medical Officers addressed a notice to the manager ? Notice No. 5080 of 6<sup>th</sup> June, 2007, which required compliance within fourteen days. The notice was signed by a medical officer of Health; and it was received by *Sarah Ponda*, who was the supervisor.

Upon expiry of the said notice, the medical officer returned to the said premises, and carried out an inspection. He found that the earlier conditions, in respect of which a rectification notice had been given, still remained unremedied; and this was the reason for the prosecution of the matter now coming up on appeal.

The appellant acknowledged the facts to be true; and she was then convicted on her own plea of guilty. After the learned Magistrate considered the statement in mitigation, she noted that, by s. 121 (1) of the Public Health Act, a fine could be imposed at the rate of Kshs.1,500/= for each day that the nuisance remained in existence. The relevant number of days was assessed at 97; and it was noted that the nuisance still existed. The Court imposed a fine of Kshs.145,000/= and, in default, a prison term of six months.

In the petition of appeal filed by M/s C. N. Kihara & Co. Advocates, it was contended that the plea had been equivocal, and so a plea of guilty should not have been entered; that the appellant was not the person referred to in the charge-sheet; that it had not been shown that the appellant understood the charges; that the sentence was “excessive, unfair, and beyond [the appellant’s] ability [to pay], ending with her serving a jail sentence, for an offence facing another person ...”

The foregoing points were the basis of submissions by learned counsel *Mr. Kamau*, on behalf of the appellant.

In his submissions, *Mr. Kamau* urged that it was wrong for the trial Court to enter a conviction against the appellant, because there had been no compliance with the terms of the Public Health Act (Cap. 242, Laws of Kenya); and s. 120 (1) of the Act provided that a person upon whom the notice to remove nuisance is served, is the one to be brought before the Court. The Act, counsel urged, required service of notice to be made upon: an *owner* of the premises; a *proprietor*; a *manager*; or a *supervisor*. The person who was charged, counsel urged, was not in that category, and was just an ordinary employee.

Counsel submitted that the record fails to show, in relation to plea-taking, the *language* that was used; and yet a record showing language was mandatory, by virtue of ss. 197 and 198 of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

Learned counsel submitted that arraignment of the appellant before the Court came before issuance of summons to the supervisor ? and the appellant went ahead to plead; it was submitted that this was an irregularity, in point of law.

Learned counsel *Mrs. Gakobo* conceded this appeal, on the basis that the trial was irregular. Compliance with s. 120 of the Public Health Act (Cap. 242) required, counsel urged, that the trial Court should make an order defining a period within which the nuisance was to be removed.

The notice of the public officer should have been served upon the occupier; and counsel urged that the notice in this case was not served upon a proper person.

I have considered the points made by counsel; and I have noted that since the public health notice had not been served upon the proper person, there was no legal basis for trial. For this and for the other reasons already considered, I hereby declare the proceedings to have been a nullity. I set aside the conviction and sentence, and order that any fine that may have been paid by the appellant should be refunded.

**Orders according.**

**DATED and DELIVERED** at Nairobi this 16<sup>th</sup> day of February, 2009

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Huka**

**For the Appellant: Mrs. Kamau**

**For the Respondent: Mrs. Gakobo**