



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 158 of 2008

*(Appeal from original conviction and sentence of CM's Court Kisumu*

*in CR. Case No. 438 of 2007.*

**ANDREW NYARINDO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**Coram:**

**Mwera Judge**

**Ms. Oundo for State**

**Appellant in person present**

**CC. Diang'a.**

**R U L I N G**

In this appeal one Andrew Nyarindo was an investigating officer in a certain KSU CM CR. C. 438/07 wherein two people Agnes Awinja Okongo and Joshua Okongo were jointly charged with procuring registration over plot no. KSU/PANDPIERI/1032 which belonged to the late Barrack Olonde Ogembo. The two also faced joint charges of fraudulent disposal of the property above contrary to S. 327 (1) P.C and Agnes Awinja Okong'o fraudulently mortgaging the same contrary to S. 318 P.C. Joshua Okongo was an employee with the Customs Office (KSU) and when investigations in connection with the above alleged offences were being conducted by the appellant, on 21.11.2007 he wrote a letter to the suspect's senior office, titled Senior Deputy Commissioner (Western Region) to the effect that his staff jointly with another had been arraigned in court on 14.8.2007 and so:

**“ --- I am obliged to bring to your attention of the action taken against the employee for your necessary action as per rules and conduct governing KRA Act on employees.”**

The prosecution had closed its case with the appellant herein as PW7 – the last witness. It may not be quite clear as to how the learned trial magistrate got about this, but she directed before either side submitted whether there was a prima facie case or not that

**“Orders: Mention on 25/6/2008 for submissions. Investigating officer to write and withdraw the letter of 21<sup>st</sup> November 2007. Copy to court and to accused 2.”**

The letter had been produced by PW7 (the appellant) as Exh 10. No side indicated in cross – examination or re-examination anything to do with the letter dated 21.11.2007 (Exh. 10). Then Mr. P. J. Otieno, Advocate submitted that there was no case to answer by his two clients. I.P. Wangatia was granted a week to reply – on 2.7.2008.

Then the record has it that Mr. Otieno complained that the letter to withdraw/apologize had not been written by the appellant. Counsel took this as disobeying a court order and asked the learned trial magistrate to require I.P. Nyarindo (the appellant) to appear and show cause why he was in contempt.

So summons went out to the appellant. On 3.7.2008 he appeared in court. He had written a letter dated 13.6.2008. Mr. Otieno argued that I.P. Nyarindo had written this letter, but it was not an apology to Joshua Okong’o (accused 2) and the KRA Code of Regulations he brought to court could not shield him. The appellant explained that he did not attend court on 25.6.2008 and his letter of 13.6.2008 did not retract or tender apology in connection with the letter of 21.11.2007 he wrote to the Senior Assistant Commissioner of Customs. After hearing all the above, the learned trial magistrate concluded that the appellant was in contempt of court orders regarding retracting the letter of 21.11.2007 as earlier directed. He was ordered to do just that and to pay Ksh 10,000/= fine in default to serve 3 months in jail. The fine was paid and this appeal lodged. As it was pending hearing on 27.4.2009, it was eventually heard on 25.5.2009. The appellant had on 18/3/2009 written a letter to the court desiring that the lower court order on contempt made on 3.7.2008 be reviewed. Under the CPC only a revision, not a review is provided for and the learned Senior State Counsel, Ms. Oundo considered that the matter before court be entertained as one of revision and not an appeal because being a matter of contempt in the face of the court, no charges or proceedings were available.

She had gone over all the above. In her opinion the appellant/applicant acted within the Code of Conduct of Kenya Revenue Authority (KRA) and the Force Standing Orders, to report to the Customs Department local head that his employee Joshua Okongo was being investigated on suspicion of committing a crime. So the order of 3.7.2008 warrants to be revised. The documents from KRA and the Police were tendered and perused.

Having all the above in mind and the circumstances of the case, it is repeated and firmly so that the law and practice relating to contempt of court is not intended to protect any individual judicial officer. The fundamental principle by ensuring that no party commits contempt of court, is to see that the course of justice itself is not muddied. And that the institution administering justice is not ridiculed by having its orders defied. That is never good for the law and order in the State. For disobedience of judicial orders whether, legal, wrong or whatever, gives an impression that the court issuing them has no authority and thus it becomes a laughing stock. Such state of things can lead to anarchy because the citizenry may be misled to think that if court orders are not obeyed, nothing will happen to them. That cannot be allowed. It constitutes impunity. So every order issued by the court whether wrong etc must be obeyed until it is reviewed, varied or set aside on appeal. Failure to obey must of necessity result in a penalty by the court to the disobeying party.

In this matter the learned trial magistrate directed that the subject (I. P Nyarindo) do withdraw a letter dated 21.11.2007 aforesaid. Whether or not he agreed with that order or he thought he had acted within the KRA Code of Conduct and the Force Standing Orders, the court’s orders stood to be obeyed. It was noted by the learned trial magistrate that I. P. Nyarindo did not withdraw that letter or that his letter of 13.6.2008 did not amount to the withdrawal as directed. So all in all it can be said that the order to withdraw was not complied with. That was what led to the order of fine of 3.7.2007. It was a proper order whether I. P. Nyarindo had reasons to show that he was justified and obliged to write the letter of 21.11.2007. The order to withdraw it had not been varied, reviewed or set aside.

However having the whole matter in regard perhaps the learned trial magistrate should have issued a stern warning to I. P. Nyarindo first requiring him to comply and in default suffer the penalty. But I. P

Nyarindo being a police officer, should not have gone that far. He knows better. Nonetheless, the order of 3.7.2008 is set aside. The paid fine may be refunded. It looks like the trial in CR. C. NO. 438/07 is still on.

Orders accordingly,

Delivered on 15.6.2009.

**J. W. MWERA**

**JUDGE**

*JWM/hao*