

(From the original Criminal Case No. 20 of 2006 of the Principal Magistrate's Court at City Hall)

KARAN SINGH BHACHUAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

The appellant was charged with two counts being advertising contrary to section 30(1) with reference to section 3 of the Physical Planning Act Cap 286 and punishable under section 30(20) of the same Act. In count 2 he was charged with obstructing council officers while executing their duties.

The brief facts are that on 14th December 2006 three officers from the City Council of Nairobi purported to enter premises where the appellant was employed. It is alleged that the appellant requested the officers to identify themselves but they refused to show their badges of identification to the appellant and the other persons employed in the premises where the council workers tried to gain entry. When the officers refused to identify themselves the appellant called police who arrived and later established that the three officers were actually council employees. The appellant was then served with an enforcement notice giving him 48 hours to comply but instead of waiting for the period to pass the officers arrested and took the appellant to court where he was charged with two counts. The prosecution then called three witnesses who gave evidence and on 19th September 2007 the trial court after considering the evidence adduced by the prosecution and submissions by the learned defence counsel found that indeed the prosecution had established a prima facie case and proceeded to place the appellant on his defence. The appellant is aggrieved by that decision on the grounds that there is no evidence that was adduced by the three witnesses to confirm that they had complied with section 259 of the Local Government Act that deals with powers of arrest. Secondly that the three witnesses never produced any authenticated document showing their authority to enter the premises where the appellant was employed as envisaged in the section 265(1) of the Local Government Act. And thirdly after having served the enforcement notice they were required to comply with section 267 of the Local Government Act. The grievances of the appellant is that the learned trial magistrate erred in law and in fact in holding that the appellant had a prima facie case to the charge preferred against him. It is also the position of the appellant that the trial court erred in law and in fact by failing to consider the evidence on record was insufficient to make a decision that the appellant had a prima facie case and was obliged to give his defence.

The appellant through his advocate Mr. Allen Gichuhi made substantive written submissions questioning the decision of the court and its failure to consider the provisions of the Local Government Act before placing the appellant on his defence.

I have considered the submissions by the learned counsel which greatly addressed the factual and the evidential matters that were canvassed before the trial court. Having done so, it is my decision that there is no error or misdirection that was committed by the trial court. In doing so I am alive to the fact that the matter has not been concluded before the trial court and it is outside my jurisdiction to go into the arena preserved for the trial court. It is not within my powers to evaluate and determine whether there is sufficient evidence to conclude that the appellant was rightly or wrongly placed on his defence. By venturing into that area the possibility of trespassing on the jurisdiction of the trial court is imminent. The matter has not been determined fully by the trial court and in placing the appellant on his defence the trial court was persuaded by the evidence tendered by the prosecution. The law is very clear that a person placed on his defence has the option not to give any evidence and the fact that he does not offer any evidence would not automatically result in a conviction. It is also my position that the fact that the appellant was placed on his defence on account of prima facie case tendered by the prosecution does not

in the eyes of the trial court mean that the evidence would sustain or would result in a conviction. It is therefore my decision that the issues raised by the appellant are premature and is an attempt for this court to address an issue which has not fallen for its determination. In that regard it is my decision that the appeal has no merit and it is hereby dismissed. I direct the trial court to immediately proceed with the defence hearing so that the matter can be concluded on merit. I direct the appellant to appear before the trial court for purposes of fixing a defence hearing date on 6th November, 2009.

Dated, signed and delivered at Nairobi this 29th day of October, 2009.

M. WARSAME

JUDGE