



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 80 of 2007

THOMAS JOSEPH ONYANGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Senior Resident

Magistrate's Court at Oyugis, Criminal Case No.394 of 2005

by Z. NYAKUNDI, R.M)

JUDGMENT

The appellant was charged with the offence of carrying out development of a building without a development permission contrary to **Section 30(1)** of the **Physical Planning Act 1996, Cap 286 Laws of Kenya** as read with **Section 33**. The particulars were that on 2/5/2005 at Madiaba village within Oyugis Township Rachuonyo District the appellant was found developing a permanent building without development permission by Oyugis Town Council Clerk. The appellant was convicted and sentenced to a fine of Kshs.20,000/= in default two years' imprisonment. He was aggrieved by the conviction and sentence and preferred an appeal to this court.

In the petition of appeal filed by M/S. W. Nyakongo Odongo & Co. Advocates on behalf of the appellant, 33 grounds of appeal were listed. Supplementary grounds of appeal, 10 in number, were subsequently filed. Further supplementary grounds of appeal, 7 in number, were filed by the appellant personally. That is not an elegant way of presenting an appeal.

During the hearing of the appeal, the grounds were condensed into four (4) or so by the appellant's counsel. I shall revert to the same shortly hereafter.

The evidence that was tendered before the trial court can briefly be summarized as hereunder;

The appellant is the registered proprietor of a parcel of land known as CENTRAL KASIPUL/KAMUMA/3093 hereinafter referred to as "**the plot**", measuring 0.03 hectares. He was so registered on 4th December, 1998. This is a freehold land. On 2nd May, 2005, **Janet Aska Awiti, PW1**, who works at Oyugis Town Council as an Administrative Officer, was going around Oyugis Town. She was looking for persons who were building within the town without approved building plans. She was with **Crispin Arwa, PW2** and **Police Constable Albert Micha, PW3**. They found the appellant and his

workers carrying on with a construction on the plot, which is at Madiaba area along Oyugis – Kisumu Road.

PW1 asked the appellant to produce an approved building plan but he was uncooperative. The appellant was thereafter arrested.

Before the material day, the appellant had gone to Oyugis Town Council Offices and reported that he wanted to put up a building within the local authority. He was required to pay Kshs.36, 000/=. He paid Kshs.5000/- and was to pay the balance of Kshs.31, 000/= later. He was issued with a receipt for the payment that he made.

PW2 and PW3 corroborated the evidence of PW1 in all material aspects.

Josephat M. Wanyua, PW5, a District Planning Officer also testified. He told the court that any development within the jurisdiction of a local authority required permission of the local authority. On 27th February, 2001 the appellant submitted his application for development of the plot. The same was recommended to Oyugis Town Council for approval. That act by the appellant clearly showed that he was aware that his property was within Oyugis Town Council and that he required the requisite development permission as stipulated under **section 30(1)** of the **Physical Planning Act**.

In his defence, the appellant testified that sometimes in 1998, shortly after he purchased the plot, some people working for Oyugis Town Council went to his property and harassed his workers and took away some working tools. At the time the appellant was away. When he went to inquire why they had done so, he was informed that the land in question was within Oyugis Town Council and any development thereon required the Council's approval. He paid some money and was issued with a receipt. He alleged that on 2nd March, 2005 PW1 and others went to the site and confiscated his working tools and some building materials. He was told to pay Kshs.37, 500/= before the said items could be released to him. On 2nd March, 2005 he paid Kshs.5000/= and promised to pay the balance later. On 19th April, 2005 PW1 and others went to his plot and demanded that he pays the balance of Kshs.32,500/=. When he failed to do so, they confiscated his building tools and materials. The appellant admitted that he was arrested on 2nd May, 2005 for building without an approved plan. He argued that his plot was a freehold land and the local authority was not supposed to have interfered with his development of the same. That notwithstanding, he contended that he had paid the required fees for approval, Kshs.6000/=. He said he was not given the exact amount that was required.

In cross-examination, the appellant admitted that after paying Kshs.5, 000/= he was told to pay another Kshs.32, 500/= which he did not pay.

Mr. Nyakongo submitted that the charge was defective because it did not state the plot number where the offence was committed. It was also defective because it indicated that the construction was being undertaken at Madiaba village whereas evidence showed that it was at Nyadendi area, he added.

Counsel further submitted that there was no evidence to show that the appellant was building within Oyugis Township. In his view, the appellant's construction was outside the jurisdiction of the local authority.

He also referred to **Section 38(1)** of the **Physical Planning Act**, which provides that a local authority may serve an enforcement notice on the owner, occupier or developer of a land if it comes to the knowledge of the local authority that land development has been or is being carried out without the required development permission. He said that there was no evidence of service of such a notice.

Mr. Nyakongo further submitted that the appellant, having made the initial payment for the development permission, whatever balance remained was like a civil debt which ought to have been claimed from him rather than arresting him. He termed the appellant's arrest as arbitrary and contrary to the law.

Mr. Kemo, Principal State Counsel, did not agree that the charge was defective. It contained all the necessary particulars and details and if it had an error, such error was curable under **Section 382** of the **Criminal Procedure Code**, he stated. He added that the issue of the alleged defect was not raised before the trial court.

As regards the approval for the development, Mr. Kemo submitted that there was undisputed evidence that the appellant had not obtained the same, having made only part payment of the requisite fees.

Counsel added that the appellant's land was within the boundaries of the local authority and that was why he had presented his application for approval by the local authority.

He urged the court to dismiss the appeal.

This being the first appellate court, it has to carefully consider and re-evaluate all the evidence that was tendered before the trial court and reach its own conclusion; see **OKENO VS REPUBLIC** [1972] E.A. 32.

I have carefully studied the record of appeal. I have also taken into consideration the submissions that were made by the appellant's counsel and the State Counsel. The first thing I wish to consider is whether the charge that was preferred against the appellant was proper. Mr. Nyakongo submitted that it was defective and he gave reasons for that.

Section 137 of the Criminal Procedure Code sets out the rules for framing of charges and informations. The purpose of a charge is to inform an accused person the nature and particulars of the offence with which he is charged so as to enable him prepare for his defence, see **ABDULRASUL G. SABUR VS REPUBLIC** [1958] E.A. 126. If the particulars of the offence are adequate to inform an accused of the offence charged with, there is no failure of justice. Besides, **Section 382** of the **Criminal Procedure Code** provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during a trial; unless any of the above occasioned a failure of justice.

In this case, failure to state the plot number did not in any way prejudice the appellant. The place where the appellant was building is known as Madiaba, according to PW1, PW2 & PW3. It is PW4 who said that the general area is known as Nyadendi. I do not therefore agree that the charge was defective.

Was the appellant's property within Oyugis Town Council? The appellant himself testified that it was. In his defence he stated as follows:

"Sometimes on May, 1998 when I had bought a land parcel No. Central Kasipul/Kamuma/3093, some people working for Oyugis town council came to the land and harassed the workers and took working tools while I was away on duty. When I went to inquire from them, I was told that the land in question was part of Oyugis town council and I was required to pay for application, consent fees before the tools could be given back."

That being the case, he was under an obligation to obtain development permission from the local authority and thus he had to pay the requisite fees for the same in terms of the provisions of **Section 30(1)** of the **Physical Planning Act**. Such fees is payable irrespective of whether the private land is a leasehold or freehold.

Regarding the enforcement notice provided for under **Section 38(1)** of the **Act**, a local authority **may** serve the same upon a person who is carrying land development without the required development permission. However, from the wording of the subsection, such service is not mandatory.

The appellant herein had not obtained any development permission from Oyugis town council simply because he had not made full payment for the same. He submitted his application and building plans and

made only partial payment. From 1998 to May 2005, he did not complete the required fees yet he continued to develop his property. The conviction was proper and the trial court cannot be faulted at all. The sentence that was passed was also lawful and not harsh at all, considering that the maximum sentence for an offence as the one that was committed by the appellant is Kshs.100, 000/= or an imprisonment for a period not exceeding five years or both.

I find the appeal lacking in merits and dismiss the same.

Having finalized with the substantive issues of the appeal, I wish to comment on the entry into the appellant's premises and seizure of his property by PW1 and the other people on the material day.

Section 46(1) and (2) of the **Physical Planning Act** permit only persons **authorized in writing** by the Director of Physical Planning or a local authority to enter upon any land or premises at all reasonable times with such men, vehicles, materials and instruments and to do all such acts thereon as are necessary for or incidental to the exercise of the powers conferred or performance of the duties specified by the Act.

However, such an authorized person has to give notice of entry for a period of not less than forty-eight hours.

It was not specified that PW1 and PW2, being workers of Oyugis town council, had been authorized in writing to enter the appellant's premises. It was also not clear whether they had given the requisite notice. But whether they had complied with the provisions of Section 46(1) and (2) or not, that does not change the fact that the appellant had committed an offence contrary to the provisions of **Section 30(1)** of the **Act**.

DATED, SIGNED and DELIVERED at **KISII** this 29th of April, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of **Mr. Odongo for the appellant.**

Mr. Kemo for the State.

D. MUSINGA

JUDGE