REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Revision 32 of 2008

PETER NGANGA KARIUKI…….....…..……..…..APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(From the original conviction and sentence in Criminal Case No. 109A of 2008 of the 1st Class Magistrate's Court at City Hall by

L. Nyambura – (SRM)

R U L I N G

PETER NGANGA KARIUKI is the applicant in this matter. His counsel Mr Kariuki wrote a letter dated 24th April 2008 seeking that the court exercises its revisionary powers to call for and examine the trial record of the Principal Magistrate Court Case No. 109A of 2008 for purposes of satisfying itself as to the correctness, legality or propriety of the order made on 17th April, 2008. It was his contention that the trial magistrate adopted an illegal course of procedure in convicting the applicant.

The applicant was charged with failing to comply with a notice contrary to section 115 as read with section 118 and 119 and punishable under section 120 and 121 of the Public Health Act Cap 242 Laws of Kenya as contend in the Statute Law (Miscellaneous Amendments) (No. 2 of 2002) in respect of Public Health Act Penalties. The applicant was referred to as being the manager of LR 1-6 Mathare North, had been given a notice of 7 days regarding continuance of a nuisance. He was accused of failing to abate that nuisance within the said period of notice which involved to:-

1. ***Stop discharging waste water to the service lane behind the plot.***

2. ***Stop dumping refuse, garbage in the said lane.***

3. ***Remove the heaped garbage on the same.***

4. ***Clean the entire premises and paint.***

Upon being taken to court, appellant pleaded guilty and the facts were read to him which facts he confirmed as correct and the learned trial magistrate recorded:-

"***Convicted on his own plea of guilty***."

The prosecution informed court that applicant was a first offender and in mitigation applicant said he had wanted to remove the nuisance but was affected by the post election crisis.

The court then stated:-

"***Notice was issued in August 2007, four months before post election crisis. The court has considered the provisions of section 121 of the Public Health Act, which provides for a fine of Kshs 1500/- each day the nuisance remains unabated….. there are 202 days herein. The court will use its discretion and take a fine of Kshs 1,000 each day the nuisance remained unabated. Consequently accused person is fined Kshs 202,000/- in default to serve 12 months imprisonment. Compliance within a period of fourteen(14) days. Further mention on 2nd May, 2008 for compliance report."***

It is the procedure adopted by the court, which Mr Kariuki (Counsel for applicant) takes issue with. In his letter to the court he pointed out that Section 120 of the Public Health Act Cap 242 provides that:-

"***If the person upon whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon ISSUE A SUMMONS requiring the person on whom the notice was served, to appear before his(her) court."***

Section 120(2) provides that if the court is satisfied that an alleged nuisance exists, the court shall make an order on the author thereof or occupier or owner of the dwelling or premises, as the case may be requiring him, to comply with all or any of the requirements of the notice or otherwise remove the nuisance within a specified time in the order.

Mr Kariuki submitted that it is the Medical Officer of Health who is mandated under the Public Health Act, to serve the notice on an accused person who is suspected to be the author of the nuisance yet in this instance, the same was served by one Raymond Kirui who is a representative of City Council of Nairobi and NOT a medical officer of health.

The learned State Counsel Mr. Makura was in total agreement. The provisions of the Act are clear, the decision in ***Barclays Bank of Kenya versus City Council of Nairobi High Court Misc. Application 1261 of 2005*** is a useful guide with regard to the jurisdiction of the Nairobi City Council and whether one Mr Raymond Kirui had capacity to serve the notice.

The authority is conferred to the medical officer by section 119 of the Public Health Act and Mr Raymond Kirui described himself in the statement of complainant as a Public Health Officer working with City Council of Nairobi – NOT a medical officer of Health; and that he is the one who had issued the notice to the applicant. Section 167 provides that a health authority may specifically authorize any of its officers in ***writing*** to ***prosecute*** any offence - that to my mind would include issuing the notice. However there is no evidence whatsoever to show that Raymond Kirui had been authorized in writing by the Medical Officer, to take the action he did. Certainly then the respondent failed to demonstrate that the officer who started these proceedings by way of issuing a notice was an authorized officer as per the Act and I find that his action was ultra vires the Public Health Act.

A second limb of that complainant is that the sentence imposed was excessive considering that applicant was merely a manager/caretaker of the subject property and not the owner. Mr Kariuki's submissions on this limb is that once the nuisance alleged is confirmed to exist, then the court orders for the author of the nuisance to comply with that notice and the magistrate can penalize the accused upto a maximum of Kshs 200/- for the offence. Mr Kariuki stated that the court just looked at the provisions of Section 121 and imposed a fine yet section 121 is only to be invoked once the accused fails to comply with the court order issued under section 120. Mr Kariuki laments that applicant has now lost his liberty due to an omission by the trial magistrate. Again the learned State Counsel was in agreement with these submissions. With

all due respect to both Mr Kariuki and Mr Makura, they are out of step with regard to the penalty under section 121 of the Act which was amended by Statute Amendment No. 2 of 2002 to provide for as follows:-

"***Any person who fails to obey an order to comply with the instructions of the Medical Officer of health or otherwise to remove the nuisance, shall unless he satisfies the court that he has used all diligence to carry out such order, be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings for every day, during which the defendant continues…..***"

The upshot then is that the procedure adopted by the trial court was improper and must be declared a nullity, which I hereby do. The proper procedure is as specifically provided under section 120 – it was for the court to ensure strict adherence to those provisions. In any event that notice was abinitio null and void as it was issued by an unauthorized person.

This is a genuine ground for the exercise of the court's revision jurisdiction.

I now order as follows:-

(a) The proceedings were a nullity and founded on improper procedure and the same are quashed.

(b) The orders made by Hon. Senior Resident Magistrate M/s L. Nyambura on 17th April 2008 in terms of sentence were also not founded on the right procedure and so the sentence is a nullity and is set aside and vacated.

(c) The applicant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 13th day of June, 2008.

H.A. OMONDI

JUDGE