



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CONSTITUTIONAL PETITION 1 OF 2006

EPHRAIM BOTTO WAHOME.....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT

RULING

This constitutional reference emanated from CMC Criminal Case 1291 of 2003. The Municipal Council of Nakuru (*hereinafter referred to as the respondent*) instituted the charge against the petitioner who was charged with offences against the Public Health Act. The offence as framed in the charge sheet reads as follows:

“Charge: Causing noise pollution so as to be a nuisance contrary to section 115 as read with section 118(1)(s) of the Public Health Act Cap 242, Laws of Kenya and Punishable under Section 121(1) of the same Act made under Section 201 of the Local Government Act Cap 265 Laws of Kenya.

The particulars of the offence stated that Ephraim Botto Wahome on diverse days between 28th February 2002 and 25th July 2003 being proprietor of Botto Solar Limited on Plot No. Block I/752 along Kanu Street within Nakuru Municipality you caused noise pollution from your Kanu Street workshop thereby causing annoyance, interference with concentration, communication, relaxation and sleep to your neighbour namely Peter Kinyanjui of Eros Hotel.”

The petitioner’s trial was conducted before Hon. Wekulo (SRM) The petitioner was found to have a case to answer and was placed on his defence. That is when counsel for the petitioner applied that the matter be referred to the High Court pursuant to the provisions of **Section 77 of the Constitution** for the determination of a Constitutional issue. The court thereafter framed the following issues which were referred to the High Court in the following terms;

- i) Competence of the proceedings
- ii) Frame and competence of charge
- iii) Accused Person’s Defence
- iv) Applicable Law

Counsel for the petitioner submitted that the proceedings which were instituted in the name of the

Municipal Council of Nakuru usurped the role of the Attorney General as the prosecutor on behalf of the Republic. The power to prosecute is vested under the provisions of the Constitution upon the Attorney General except where the matter is one of private prosecution. This was not a civil matter nor was it a private prosecution. It was a charge of a criminal offence which could not be instituted in the name of the respondent but in the name of the Republic.

Secondly the charge was incompetent due to the duplicity of the offences that the petitioner was charged with. The petitioner is charged with causing noise pollution so as to be a nuisance contrary to section 115 as read with **section 118 (s) of the Public Health Act (Cap 242) of the Laws of Kenya**. The charge as framed, failed to inform the petitioner the nature of the charge and the particulars of the offence. **Section 135(2) of the Civil Procedure Code** provides how a charge should be framed.

An accused person cannot be charged with more than one offence in one charge. Moreover the petitioner was charged under several enactments of the Law. There are no penalty provisions under **Section 201 of the Local Government Act**. Counsel also put forward several decided cases where the courts held that an accused person would be prejudiced if he was not able to know precisely what he is charged with. More fundamentally, if an accused person has been placed on his defence, the court must ensure that he understands how to conduct his own defence.

On the part of the State, the learned State Counsel Mr. Mugambi opposed this application. He submitted that the prosecutor who instituted the charge was duly gazetted as a prosecutor. The Attorney General is allowed under **section 85(2) of the Constitution** to delegate prosecutorial powers. The title of the case in the name of the respondent did not usurp the authority vested in the AG's office. Counsel further submitted that the two offences described in the charge sheet did not prejudice the petitioner because the offence is created under the **Public Health Act** and the **Local Government Act** is empowered to enforce the law within their jurisdiction. There was therefore no duplicity and no technical terms are used in the charge sheet. As regards the provisions of the NEMA Act the provisions only deal with the nuisance of noise in aviation sector. There is no conflict with the Public Health Act. He urged the court to dismiss the Constitutional Reference.

It is trite law as provided for under **section 135(2) of the criminal procedure code** that where an accused person is charged with more than one offence in one trial, each offence should be set out in a separate paragraph. This principle was reiterated in the case of **Nzioka v Republic (1987) KLR 613** where it was held that;

“It is a paramount requirement of justice that an accused person must know precisely what he is charged with and where a statutory provision creates more than one offence in a section, the proper and safe method of preferring a charge under such an enactment is under separate counts”

The charge that the petitioner faced creates the offence of causing noise which is conjoined with nuisance. The charge as framed offends the provisions of the **section 135 (2) of the CPC**. There is duplicity of offences; there should have been two offences of causing noise and nuisance. This is further compounded by the particulars which describe the several offences created such as **annoyance, interference with concentration, communication, relaxation and loss of sleep to a neighbour**. The prosecution should have made up their mind what offence was created. The petitioner cannot be left to assume the duplicity of offences and prepare for a defence.

The other problem with the charge sheet and the offences created is that they straddle across several enactment, namely **section 115** read together with **section 118(s) of the Public Health Act** of the laws of Kenya, and punishable under **section 121** of the same Act, made under **section 201 of the Local Government Act cap 265 of the laws of Kenya**. For an accused person to navigate through the several provisions of the law in order to answer to the charges would occasion failure of justice and a prejudice to an accused person.

Having found the charge defective I need not belabour the other issue of whether the respondent usurped the powers conferred upon the Attorney General to prosecute. Under **section 116** of the **Local**

Government Act, a local authority is empowered to take lawful, necessary and reasonable measures for remedy any nuisance, and to take proceedings at law against the person causing the nuisance. Counsel for the State submitted that the Prosecutor was gazetted and the Attorney General delegated the prosecutorial powers. It is for that reason I do not wish to get into a detailed discourse over that issue which perhaps would require even oral evidence to verify certain facts.

In the upshot, the petition is allowed, the charge against the petitioner in CMCC No 1291 of 2003, is hereby quashed and the petitioner is discharged.

Ruling read and signed on 23rd October, 2008

M. KOOME

JUDGE