



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J.)**

**CRIMINAL REVISION CASE NO. 763 OF 2007**

**MANAGER, NANAK CRANKSHAFT LTD. ....APPLICANT**

**-VERSUS-**

**REPUBLIC, Through**

**CITY COUNCIL OF NAIROBI.....RESPONDENT**

***(An application for revision of the Judgement of Principal Magistrate Ms. L.N. Mutende dated 18<sup>th</sup> January, 2007 in Criminal Case No. 5539(A) of 2005 at the City Court, Nairobi)***

**RULING ON REVISION**

The applicant moved the Court by the Chamber Summons dated 24<sup>th</sup> October, 2007 and filed on 29<sup>th</sup> October, 2007. The application was brought under ss.362 and 364 of the Criminal Procedure Code (Cap.75, Laws of Kenya). It was the applicant's prayer that the Court should call for and examine the trial Court record, for the purpose of satisfying itself as to the correctness, legality or propriety of the sentence passed. The applicant prayed that this Court should reverse the finding and sentence of the lower Court, and thereupon, acquit the applicant; and in the alternative, the applicant prayed that this Court do reduce the sentence imposed by the trial Court.

The general grounds founding the application were, firstly, that the fine imposed by the trial Court was manifestly excessive and was illegal; secondly, that the said fine had no basis of support in the evidence adduced; and thirdly, that the findings and the sentence were punitive, and were unjust.

Evidence in support of the application was contained in the affidavit of one **Joseph Kiarie Kiriko**, who described himself as the applicant; and to this affidavit there was a replying affidavit by **Dr. Daniel Nguku**, the respondent's Medical Officer of Health.

Learned counsel **Mr. Kisaka** who appeared for the applicant, stated that the applicant had been brought before the Subordinate Court, allegedly for non-compliance with a repainting and clean-up order by the respondent's Medical Officer of Health. The said order had been served upon the applicant on 22<sup>nd</sup> September, 2005; but prior to this service, on 23<sup>rd</sup> August, 2005 it was *the applicant* who had sought authority from the respondent to repair the very same building, the subject of the Medical Officer's orders; and the applicant was then seeking authority to repair the building. There was, however, no reply to the applicant's request; but when the order was now issued, the applicant was given only *fourteen*

days' notice to effect the repairs. In one set of circumstances, the applicant had sought authority on 23<sup>rd</sup> August, 2005; and the response came only on 5<sup>th</sup> October, 2005 – i.e. 14 days after the Medical Officer's order; so the respondent was replying to the repair-request when their notice period following the Medical Officer's order, had already lapsed.

After the respondent's response of 5<sup>th</sup> October, 2005 the applicant commenced the repair works; and he went on and completed on 6<sup>th</sup> January, 2006 after which he paid the respondent's inspection fees.

But, even as the applicant proceeded with the repairs, the respondent published a notice in the daily newspapers, conveying the information that the time for effecting repairs to buildings had been extended to March, 2006. It was urged that the respondent overlooked the aforesaid public notice, and visited the applicant's premises on 18<sup>th</sup> January, 2006; and on that occasion the respondent initiated prosecution against the applicant – without regard to the answer from the applicant that the Town Clerk of the respondent had granted a grace period for effecting repairs to buildings. The riposte from the Public Health Officer was that, indeed, *a grace period was in force*, but “only for those who had not defaulted.” So on 3<sup>rd</sup> February, 2006 the applicant was charged with the offence of not complying with the Public Health Officer's order.

The trial Court went out on a site visit, at the applicant's premises, after the charge was laid. The Public Health Officer confirmed to the Court that the applicant's repairs were indeed properly done, and he had paid the required inspection fees to the respondent.

After the prosecution closed its case, and in the course of time, on 14<sup>th</sup> August, 2006 counsel for the applicant made his submissions, the prosecutor asked for time, before he could reply. He did not reply on the adjourned date (31<sup>st</sup> August, 2006) as he was *not ready*; he was given a new date (20<sup>th</sup> September, 2006); and the date 27<sup>th</sup> October, 2006 was set for a ruling; on that date, the trial Court held that there was a case to answer; the applicant answered by stating his case on 7<sup>th</sup> December, 2006. On 17<sup>th</sup> January, 2007 the learned Magistrate rendered her judgment, finding the applicant guilty and convicting him.

The learned Magistrate imposed a fine of Kshs.1,000/= per day as from the date the Public Health Officer's notice had been given; and this running to a total of 465 days, the learned Magistrate imposed a fine of Kshs.465,000/=.

Counsel submitted that the repairs to the building were completed even *before the charge was laid*, and the respondent had indeed conducted an inspection and satisfied itself, following the repairs; the Court also paid a site visit, and confirmed for itself the same.

Counsel urged that the Court had made a fundamental mistake in the computation of days elapsing since the Public Health Officer's order was notified, and running thereafter. Even when the Court itself was not sitting, it was urged, the applicant was for the period, still being subjected to penalty. Moreover, the period of waiver by the Town Clerk was not taken into account, in favour of the applicant.

The applicant was seeking that the Court should review the judgment, and order appropriate refunds. He sought, in the alternative, that only the period running from 14<sup>th</sup> October, 2005 to 3<sup>rd</sup> March, 2006 be considered as subject to fine-penalty; and that would be only 137 days.

Counsel also raised the legal issue as to whether a company, which is a corporate entity, could be charged with a criminal offence. He asked who, was the proper person to take plea, and who may be convicted? The charge sheet shows that the applicant had been charged in his capacity as manager of the company, and he had been called upon to take the plea. If an offence was indeed committed, then, counsel urged, the company itself would have been the offender. But counsel also submitted that the charge against the company was bad in law; and that the plea as taken was a nullity.

In *Stephen Obiro v. R.* [1962] E.A. 61 the High Court (*Farrell, J*) had to deal with a similar point of law, and a passage in that judgment (at p.63) may be set out here:

**“Even if some means can be found of bringing an unincorporated body before the Court, a further difficulty arises in deciding how it is to plead to the charge. In the instant case, a person named in the charge as the chairman of the union appeared and pleaded on behalf of the union. There is nothing in the record to show that the learned resident Magistrate made any inquiry to ascertain whether he was in fact authorized by the union to plead on its behalf, and in any case there is no provision in law enabling a representative to appear and plead on behalf of an unincorporated body. Under s.207 of the Criminal Procedure Code it is the accused person who must plead to the charge, and even an advocate is not ordinarily permitted to plead on his behalf: *R v. Hussein Mohamed Moti* (1953), 20 EACA 161. The same difficulty was considered in relation to the taking of plea from a corporate body in *M. S. Sondhi Ltd. v. R.* (1950) 17 EACA 143, where after referring to the provisions of s.96 of the Criminal Procedure Code the judgment proceeded (at p. 144):**

**“There would appear to be no provision in the Criminal Procedure Code governing the reception of a plea from a company in a criminal proceeding and in its absence *Mr. Kelly* suggests that a Court should follow the provisions of S. 33 of the U.K. Criminal Justice Act, 1925. We agree with *Mr. Kelly* to this extent that where a company is charged before any Court with a criminal offence the Court should satisfy itself before taking any plea from any person that he is a representative of the company for the purpose of answering the charge.”**

[.....]”

From the foregoing persuasive authority, and bearing in mind that the entity involved in the instant case is an *incorporated entity*, it appears that the applicant’s argument is only that the manager of Nanak Crankshaft Ltd was not the right person to plead to the charge, on behalf of his company. In counsel’s words: “It is the accused person who must plead to the charge”; and on that basis he urged that the applicant be acquitted; the sentence be set aside; and any fines already paid be refunded.

Learned counsel *Mr. Kenyatta* who represented the City Council (with the Attorney-General’s representative, *Mr. Makura* opting to take the position of *amicus*), submitted that the applicant had on 22<sup>nd</sup> September, 2005 been served with notice by the City Council’s Health Department to abate nuisance, to effect repainting, to scrub floors, to install safe lockers in changing rooms, to replace doors in the toilet, within fourteen days; but there was no compliance, as confirmed by a visit to the *locus in quo* on 14<sup>th</sup> October 2005; and so, charges were laid against the applicant, on 3<sup>rd</sup> February, 2006. Counsel submitted that since the Court had visited the scene on 28<sup>th</sup> February, 2006 and found the state of non-compliance still obtaining, it followed that the conviction entered against the applicant was lawful.

On the question whether the applicant herein was the proper person to plead to a criminal charge, on behalf of the corporate body, counsel urged that this was indeed **the** case. He made reference to s.165 of the Public Health Act (Cap. 242, Laws of Kenya), which stipulates:

**“Where a contravention of any of the provisions of this Act is committed by any company of corporation, the secretary or manager thereof may be summoned and shall be held liable for such contravention and the consequences thereof”.**

On the basis of the foregoing statutory provision, it is the manager who had been served with the Public Health notice; and it is the manager who had been charged with the offence. Counsel urged that the case *Stephen Obiro* would only have relevance where no statutory provision existed, unlike in this case which is regulated by s.165 of the Public Health Act. Counsel urged that the fine imposed against the applicant, in the sum of Kshs.1,000/= per day, was lawful in the light of s.121 of the Act; and he submitted that the application lacked merit and should be dismissed.

It is quite clear to me that the applicant’s argument founded on the case of *Stephen Obiro* is inapplicable,

in the light of the terms of s.165 of the Public Health Act.

That being the case, this matter must be resolved exclusively on the basis of facts. And which facts are to be believed, those coming from the applicant, or those coming from the respondent?

The respondent's position is simply that a notice to "clean up" was served upon the applicant on 22<sup>nd</sup> September, 2007, but *three weeks later* there had been no compliance; and this is the reason why the charge was brought against the applicant.

In the replying affidavit it is stated that a "clean up" notice was issued on 22<sup>nd</sup> September, 2005; and then the applicant was charged on 18<sup>th</sup> January, 2006. It is deponed that the trial Court visited the *locus in quo* on 28<sup>th</sup> February, 2006 and found that the applicant had not complied with the notice of 22<sup>nd</sup> January, 2006.

It is significant that the *replying* affidavit (which is dated 5<sup>th</sup> March, 2008) makes no reference to certain material statements in the *supporting affidavit* (which is dated 24<sup>th</sup> October, 2007): no reference is made to the statement that it was the applicant, who on 23<sup>rd</sup> August, 2005 had sought authority from the respondent to effect repairs to the premises in question; to the statement that the respondent had made *no response*; to the statement that the applicant had made a follow-up on 30<sup>th</sup> September, 2005; to the averment that, as early as 30<sup>th</sup> September, 2005 the respondent had already issued a *fourteen-day notice* to owners of premises to effect repairs; to the statement that, on 5<sup>th</sup> October, 2005 the applicant now obtained *consent* of the respondent to effect repairs to his premises; to the averment that the said authority of the respondent was the basis for seeking quotations by the applicant, and the applicant partly did the repairs on 30<sup>th</sup> November 2005, and completed the repainting on 6<sup>th</sup> January 2006.

The deponent of the replying affidavit does not contest the averment in the supporting affidavit (para. 8) that the respondent, through its Town Clerk, had in January 2006 "put [up] a notice in the local dailies that the notice requiring owners of premises to repaint had been extended to sometime in March, 2006".

The replying affidavit is the only evidentiary statement coming from the respondent. Taken together with the averment in the supporting affidavit, the replying affidavit leaves it *as a fact* on record that up to March, 2006, any failure to comply with the "clean-up" notice would have been excused.

The respondent had also not explained its delay in authorizing repair and clean-up works when the same were requested by the applicant; and this makes it improper in law that the respondent should bring any criminal charge against the applicant. There does not, with respect, exist any factual basis upon which the applicant could have been successfully prosecuted at the behest of the respondent, in the circumstances.

I find, therefore, that correctness, legality and propriety were all wanting in the proceedings of the lower Court, in Criminal Case No.5539(A) of 2005.

Accordingly I now make these orders *reversing* the finding and sentence of the lower Court; and I hereby acquit the applicant of the offence of failing to comply with a notice contrary to section 115 as read with ss.118 and 119 of the Public Health Act (Cap.242, Laws of Kenya). If any fines have been paid by virtue of the conviction now quashed, the same shall be refunded within 14 days of the date hereof.

**Orders accordingly.**

**DATED and DELIVERED at Nairobi this 13<sup>th</sup> day of October, 2008.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Applicant: Mr. Kisaka**

**For the Respondent: Mr. Kenyatta**