REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 391 of 2005

HASSAN ALI OMIDO …………………………………. APPELLANT

VERSUS

REPUBLIC …………………………..……………….RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 655"A" of 2005 of the

Principal Magistrate's Court at City Hall Nairobi)

JUDGMENT

HASSAN ALI OMIDO, as Manager of premises known as **GARDEN AVENUE (6) PLOT NO. 37/366/6 NAIROBI WEST** was charged before the City of Nairobi Magistrate with the offence of 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) and contained in the Statute Law (Miscellaneous Amendments) Act (No. 2 of 2002) in respect of Public Health Act Cap. 242 penalties.

The particulars of the offence are given as follows:-

Manager – Plot 37/366/6 on the 14th day of September 2004 being the owner/occupier of plot No. L.R No. 37/366/6 along Gandhi Avenue situated in Nairobi area, upon where a nuisance exists defined under Section 118(1)(L&S) and having been served with a notice dated the 26th day of August 2004 under Section 119 of Public Health Act, and having been given a notice of 14 days failed to abate the said nuisance within such period namely:

1. *relay the paving slab to the smooth finish.*

2. *repair the leakages at the canopy.*

3. *repaint all the dirty walls ceiling both externally and internally.*

4. *relay the parmanet to a smooth finish.*

5. *relay the entire worn out floor to a smooth finish.*

6. *repaint the entire premises externally and internally with oil paint.*

7. *rectify signs of dampness at the canopy.*

8. *provide trestles to stuck all goods.*

9. *ensure the front windows are operating.*

After a full trial, the learned trial magistrate found that the appellant had failed to comply with two notices issued by failing to abate the nuisance within the time specified, convicted him and sentenced him to pay a fine of Kshs.346,500/= or serve 3 years imprisonment in default. The learned trial magistrate also, on request of the appellant gave the appellant one (1) month to abate the nuisance hence comply with the notice, and allowed him cash bail of Kshs.10,000/= upon payment of fine.

The appellant, being dissatisfied with the decision of the learned trial magistrate, filed this appeal against both the conviction and sentence. The appeal was filed on behalf of the appellant through his counsel M/s Amolo & Company Advocates and listed 8 grounds of appeal.

At the hearing of the appeal, learned counsel for the appellant, Mr. Amolo, submitted that the conviction was based on the evidence of one witness for the prosecution, who testified that two notices dated 8.3.2004 and 26.8.2004 had been given to the appellant. That witness, though a Public Health Officer, did not qualify to be an expert on the state of the building in question. That witness in his view, was not qualified to give evidence on the state of the subject building, and her evidence required corroboration.

Counsel for the appellant also submitted that the charge sheet was very clear on the matters complained of. It was therefore imperative for the prosecution to have produced evidence on the two notices and their service on the appellant. Also the notice dated 26.8.2004 had only four complaints, while the charge sheet had a total of 9 complaints, or incidences of nuisance. He contended that the evidence was designed to achieve a conviction of the appellant without disclosing the true position that the appellant had abated the nuisance pursuant to the first notice.

He further submitted that, in his defence, the appellant had stated on oath that he could not paint the building with oil paint as it would be difficult to control a fire, and that the trial court did not address this concern. Additionally, the trestles required by the Public Health Officer were not necessary as the Public Health Officer did not find any goods that required to be placed on the trestles. The Magistrate did not consider this. Further, the trial court did not consider the fact that the windows were luvre windows.

He further submitted that the complainant (PW1) was not an expert and no one came to testify in court about what was injurious or dangerous in the building as required under Section 118(1)(l) of the Public Health Act. He also argued that Section 120 of the Public Health Act sets out the procedure and process to be followed in cases of nuisance, which were not complied with in our present case. He contended that the subordinate court applied Section 121 instead of Section 120 of the Act, which was an error.

Learned State Counsel Mrs. Kagiri for the State opposed the appeal. She contended that the prosecution adduced sufficient evidence to prove the offence. She contended that PW1 testified that she visited the subject premises and gave notices which the appellant did not adhere to. The first notice had 10 complaints. There was also a second notice after subsequent visits by PW1. The witness (PW1) gave evidence of the chronology of her visits to the premises, which was corroborated by the written notices. The contents of the notices were not challenged by the defence at any time.

She further submitted that the prosecution witness (PW1) was a Public Health Officer and therefore an expert in the area of public health. She only gave evidence with regard to her area of training, and expertise.

She also submitted that the charge sheet was clear and the particulars of the charge were given as required by law. In case there was any omission, such omission was curable under Section 382 of the Criminal Procedure Code (Cap 75).

She further submitted that the defence of the appellant was considered by the court, and rejected, as the reasons given by the appellant in the defence were not relevant to the requirements of the notices.

She also submitted that the learned trial magistrate did not contravene the requirements of Section 120 of the Act. Section 120 of the Act was not a mandatory section to be complied with by the Magistrate. The notices were all valid notices as they were headed "**medical officer of health**" and PW1 was merely acting on the basis of delegated authority.

She submitted that, though the evidence of the prosecution was evidence of a single witness, that witness was truthful and credible and the conviction was safe and sentence lawful.

In a brief reply, learned counsel for the appellant, Mr. Amolo, submitted that they were not denying the service of the notices. He also stated that the prosecution had a discretion to choose the particulars of the charge. He contended, however, that the charge before the learned trial magistrate was prejudicial. He reiterated that the learned trial magistrate failed to comply with the requirements of Section 120 of the Act.

This being a first appeal I am bound to evaluate the evidence on record and come to my own inferences and conclusions.

The facts of the case are that PW1, a Public Health Officer of the City Council of Nairobi visited the subject premises, a provision store, in Nairobi West on 8.3.2004. She found the appellant and inspected the premises. She found the building wanting in various aspects. She therefore served the appellant with a notice requiring the applicant to rectify the various wanting aspects of the building within 21 days. On a visit on 30.2.2004 after the lapse of 21 days, PW1 found that no work had been done in compliance with the notice. PW1 therefore, gave the appellant more time. However, when PW1 went to inspect the building in August 2004, very little work had been done. Therefore she gave the appellant another notice dated 26.8.2004 of 14 days to rectify the various defects. When PW1 visited the premises on 4.9.2004, no satisfactory work was done thus the charge that was filed in court.

In his sworn defence, the appellant stated that he was the Manager of the subject Western provision store. He stated that the court visited the premises and the canopy was clean and tidy and walls painted. He could not paint the premises with oil paint as that could lead to fast spread of fire. He testified that the trestles were not necessary as there were no goods to be put in the trestles. That the floor was done and that he did what he could possibly do, under the current difficult economic conditions. It was his defence that he had complied with, if not all, most of the requirements that were stipulated in the notices.

The first complaint by counsel for the appellant is that the only prosecution witness, who was PW1, was not competent to state the defects in the building, as she was not an expert. I have considered the evidence on record. There is no dispute that the witness (PW1) was a Public Health Officer, with experience of about 8 years. In my view, it is a fallacious for counsel for the appellant to say that the Public Health Officer could not notice the defects in the premises and require them to be rectified. Therefore, in my view, the argument by counsel for the appellant on the competence of (PW1) who was a Public Health Officer cannot succeed. PW1 was competent to notice and testify on the defects that she noted.

The counsel for the appellant also contended that the total complaints in the first notice were nine, while in the second notice there were four complaints. Therefore the appellant was prejudiced in that the prosecution did not state that the appellant had abated some of the items of nuisance.

Though it is true that the complaints in the charge sheet were nine, the evidence of PW1 was that in fact some of the items of nuisance had been addressed. PW1 stated in her evidence –

"The pavement cracks, they have tried to patch them up using concrete. The portions done are not satisfactory to date. The canopy had been repaired but there are evident signs of dampness/leakages…… The front has been repainted to my satisfaction….."

It is clear that it is the prosecution position that some part compliance with the notices had been done. PW1 clearly stated what had not been done to her satisfaction, or to the satisfaction of the Medical Officer of Health. In my view, no prejudice was visited on the appellant arising from the particulars in the charge sheet. His defence is also quite clear that he knew what he was charged with and, what he had complied with and what he had not complied with and also the reasons why he could not comply.

On the argument that the learned Magistrate should have complied with the provisions of Section 120 of the Act, I agree with learned counsel for the appellant. Section 120(2) of the Act provides –

“**120(2) If the court is satisfied that the alleged nuisance exists, the court shall make an order on the author thereof, or of the occupier or owner of the dwelling or premises, as the case maybe, requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose”.**

The above section of the law is mandatory. It meant that the learned Magistrate was bound to determine which items of the notices had not been complied with and make specific orders on each of them as required by the law. The learned trial magistrate did not do so. Instead, in the judgment, the learned trial magistrate stated thus –

“I find the prosecution having proved beyond any reasonable doubt that the accused herein failed to comply with the two (2) notices is shed by failing to abate the nuisance within the time specified. He is hence guilty and is convicted for the same accordingly”.

The learned trial magistrate went ahead to fine the appellant Kshs.346,500/= or in default 3 years imprisonment, which was an invocation of the provisions of Section 121 of the Act.

This was a fatal error on the part of the magistrate. Firstly, the magistrate was required under Section 120(2) of the Act to determine which of the acts of nuisance that the appellant had not complied with. That would mean considering each item of complaint in its own to come a requisite finding. The learned Magistrate did not do so and ended up globally condemning the appellant. Secondly, the learned magistrate’s finding that the appellant did not comply with the requirements of both two notices is not even borne by the evidence of PW1, who testified that some work was done following the notices.

Thirdly, the magistrate was required to make an order requiring the appellant to comply with all or any of the requirements in the notice. Instead, the learned trial magistrate went ahead to impose a sentence of a fine of Kshs.346,500/= or in default 3 years imprisonment, which was an illegal sentence. The learned trial magistrate went further after sentencing, to give the appellant one month to abate the nuisance and also imposed a cash bail of Kshs.10,000/= without indicating the section of the law under which he made those orders after sentence. That consequential order by the learned trial magistrate, in my view, was an illegality.

In my view, the learned trial magistrate committed substantive errors in the law, and, as a consequence, both the conviction, and the sentence, as well as the subsequent orders cannot stand. I will therefore have to allow the appeal, quash the conviction and set aside the sentence as well on the consequential orders.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence and the consequential orders. Any fine or cash bail paid by the appellant should be refunded to him. As nuisance could continue or recur I leave it to the discretion of the Medical Officer of Health Nairobi City Council to inspect the premises, and take any necessary action.

Dated at Nairobi this 23rd day of April 2007.

George Dulu

Judge

Read and Delivered in the presence of –

Appellant

Mr. Amolo for the appellant - absent

Ms Nyamosi for the State - absent

Eric – Court Clerk

George Dulu

Judge