



**REPUBLIC OF KENYA**

**HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL APPEAL 577 OF 2005**

**THE DIRECTOR WONDERLOAF BAKERY LTD.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From Original Conviction and Sentence in Criminal Case No. 151'A' of 2004 of the Principal Magistrate's Court at City Court)*

### **JUDGMENT**

**WONDERLOAF BAKERY LTD** the appellant was convicted by the subordinate court at City Hall Nairobi for 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 Statute Law (Miscellaneous Amendment Act No. 2 of 2002).

The particulars of the offence were that on 12<sup>th</sup> August, 2004 being the owner/occupier of plot No. L.R. 209/5572 along Nanyuki road 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 31<sup>st</sup> March 2004 under section 119 of the Public Health Act, and having been given notice of 21 days failed to abate the said nuisance within such period (twelve particulars of the said nuisance were given).

The appellant was said to have pleaded guilty to the charge, convicted and sentenced to pay a fine of Kshs.522,000/= for having defaulted to comply with the notice for 348 days.

Being dissatisfied with the learned trial magistrates decision, the appellant through their counsel K. Mwaura & Company advocates filed this appeal.

At the hearing of the appeal, Mrs. Waweru appeared for the appellant while Ms Gateru appeared for the State.

Counsel for the appellant, Mrs. Waweru, submitted that the appeal was on issues of law, and mainly on the legality of sentence. It was counsel's contention that the learned trial magistrate erred in the way he sentenced the appellant. It was counsel's contention that in accordance with the provisions of section 120 of the Act, when a person had been summoned before the court, the court was required to give him a time frame within which to comply with the notice. It may also impose a fine not exceeding Kshs.200/=.

Therefore, under Section 121, a fine of Kshs.1,000/= can be imposed for every day during the continuance of the nuisance.

Counsel contended that the learned trial magistrate should not have imposed the fine that he imposed at the time that he imposed the same. The learned trial magistrate should have given the accused a time within which to comply with the notice. Therefore the sentence was illegal. The sentence was also excessive as it was not determined on the basis of the existing written law under the Act. The sentence could only be legal if it was imposed from default to comply with the court's order, not default to comply with the Public Health Officer's notice. Though the learned trial magistrate made an order for compliance with the notice, she put the cart before the horse by imposing the fine and then making the order for compliance. Counsel also argued that there was no provision for a default sentence of imprisonment for three years.

Learned State Counsel, Mrs. Kagiri, conceded to the appeal. It was counsel's contention that the procedure laid down under the law was not complied with by the learned trial magistrate. The first step was for the medical officer of Health to issue a notice. Then, if there is non-compliance with the notice, a complaint was to be made to the learned trial magistrate under section 120 of the Act. If the court was satisfied with the complaint, the court had to issue a notice for compliance. The learned trial magistrate failed to comply with the mandatory provisions of section 120(2) of the Act. The proceedings were therefore a nullity. The sentence which followed a fatal omission was also illegal. Also Section 121 did not provide for a custodial sentence. Counsel submitted that the state would not ask for a retrial.

I have considered the appeal and the submissions of both counsel for the parties. I have perused the law as well.

In accordance with the provisions of section 120(1) of the Public Health Act if a person on whom a nuisance notice has been served by the medical officer of Health has failed to comply with the notice within the specified time, then the medical officer of Health can cause a complaint to be filed before a magistrate. Subsection (2) provides that, if the court is satisfied that the alleged nuisance exists, it shall make an order requiring the culprit to comply with all or any of the requirements of the notice. Subsection (2) provides that the court, at the point of making the order may impose a fine not exceeding Kshs.200/= and may also give directions as to payment of all costs incurred up to the time of the hearing or making of the order. Section 121(1) provides that the court may impose a fine per day of default, for anybody who fails to comply with the notice, after the order of the court.

In our present case, when the appellant through its director, appeared for the first time in court, they admitted the existence of the nuisance. A plea of guilty appears to have been entered. Facts were summarized and the appellant was convicted and, after mitigation, the appellant was fined to pay a fine of Kshs.522,000/= or three years imprisonment. The appellant was also given three (3) weeks to comply fully with the notice.

With due respect, the learned trial magistrate erred in treating this as an ordinary criminal case under the Criminal Procedure Code (Cap. 75). He should not have done so in light of the specific legal provisions under the Public Health Act on what the court is required to do.

The learned trial magistrate was bound under the Public Health Act, to consider the complaint and if satisfied that the complaint exists, he was required to give the appellant an order to comply, and could also impose a fine, but which would not exceed Kshs.200/=. It is only after the court order period has expired and the magistrate is satisfied on evidence that the accused has not complied with the notice, that the learned trial magistrate can impose a fine for the number of days on which there was default. The magistrate appears to have gone straight to the second stage. In doing so he failed to comply with mandatory requirements of the law under section 120(2) of the Act. That was fatal to the whole proceedings as well as fatal to the sentence imposed. I will quash the conviction and set aside the sentence.

I have been told that the Public Health Act does not provide for a fine, therefore the learned trial

magistrate could not impose a default sentence of imprisonment of 3 years. In my view, in an appropriate case the learned trial magistrate can impose a default sentence of imprisonment as provided for under Section 28(2) of the Penal Code (Cap. 63). For the fine imposed herein, the maximum default sentence of imprisonment would be 12 months. The sentence of 3 years imprisonment was also therefore unlawful, even assuming that the learned trial magistrate complied with the law, which he did not.

For the above reasons, I allow the appeal, quash the conviction set aside the sentence and order that any fine paid by the appellant be refunded to them/him

Dated at Nairobi this 4<sup>th</sup> day of July 2007.

George Dulu

Judge

In the presence of-

Ms Waweru for appellant

Mrs. Kagiri for State - absence

Eric – Court Clerk