

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Revision Case 1 of 2005

From Original Senior Principal Magistrate's Misc Cr 4 of 2005

MALIK MOHAMMED KIPSANGAPPLICANT

VS

REPUBLIC.....RESPONDENT

RULING ON REVISION

Mohamed Khalid, a tenant in premises situated at Bungoma Municipality/1368 prompted this court to exercise its revisional jurisdiction under Sections 362 and 364 of the criminal procedure Code with a view to alter, vary and or reverse the orders issued on 26th and 31st January 2005 by the Senior Resident Magistrate, in Bungoma S.P.M.C. Misc. Criminal Application No. 4 of 2005. In a letter dated 9th February 2005 Mr. Makali Advocate for the applicant urged me to call for the aforesaid file and make the appropriate orders. A directive to the Deputy Registrar was made on 10th February 2005 who subsequently placed the file in question before me.

After anxiously considering the matter I decided to exercise my discretion under section 365 criminal procedure code without hearing the parties. The main complaint raised in the letter is that the learned Senior Resident Magistrate issued an eviction order without affording the applicant and the other tenants a hearing.

The history of this matter can easily be deduced from the record presented to this court and from the original record. On 26.1.2005, one Albert Baraza Simiyu a public health prosecutor appeared before the Senior Resident Magistrate, Bungoma and applied under Section 120(1) (c) of the Public Health Act (cap 242 Laws of Kenya) to have the business premises situated in L.R.NO. Bungoma Municipality/1368 closed on the ground that the owner had failed to comply with the public health requirements. The record shows that the owner was represented in the aforesaid by one Malik Mohamed Kipsang an estate agent who pleaded for an order to vacate the premises to be issued against the tenants in L.R. NO. Bungoma Municipality /1368.

The learned Senior Resident Magistrate promptly granted the order for closure as prayed by the Public Health Prosecutor. On 31.1.2005, the same prosecutor appeared ex parte before the learned senior Resident Magistrate and applied under Section 121 of the Public Health Act for the 7 tenants occupying premises situated in Plot No. Bungoma Municipality/1368 to be served with a vacation notice to enable the Landlord carry out repairs as prescribed by the Public Health Officer. The S.R.M'S court granted the orders against the 7 tenants specified by Public Health prosecutor. The record further shows that the Senior Resident Magistrate on 8th February 2005, directed the O.C.S. Bungoma Police station to enforce the orders he granted on 31.1.2005. This must have obviously prompted the applicant move to this court.

This court exercises its revisionary powers as set out under sections 362, 364, 365 and 366 of the criminal procedure code. In exercising such powers this court may interfere with the decision sought to be revised to test the correctness, legality or even the propriety of any finding, sentence or order. In so doing, this court can exercise all the powers of an appellate court. It should be pointed out that this court can invoke this discretion either suo motu or on the prompting of any aggrieved litigant. It is a well established fact

that in exercising this discretion this court cannot convert a finding of acquittal into one of a conviction unlike the case in appeals. This court's discretion in revision cannot permit it to discuss the merits and the demerits of the case. The death of an accused does not make the Revision petition abate. The law and practice does not also permit this court while exercising its revisionary power to reduce a sentence below the one provided for under the law. The application for revision can be made by a complete stranger to the proceedings unlike in appeals. However, a party or his counsel who is in contempt of court cannot be heard by this court in criminal revision.

I have already set out the facts in this case and the scope of the revisionary jurisdiction. Let me state that I cannot claim to have exhaustively dealt with the later but I just gave the general guidelines. The main ground referred to this court is that an eviction order was granted by the learned Senior Resident Magistrate without hearing the tenants in occupation of the premises situate in plot number Bungoma Municipality/1368. The record shows that the learned magistrate only heard the Public Health Prosecutor and a representative of the landlord. Through the years revision has always been confined to questions of law. But in exceptional circumstances the High Court may also consider interfering with findings of facts where the interest of justice demands for example where there is a misconstruction or misreading of documentary evidence or where the case appeared to be doubtful against the accused and the benefit of doubt has not been given or where the evidence have been misstated by the lower court or where the onus of proof has been placed on the accused or where the lower court has approached the case from a wrong point of view and the evidence on record did not receive due consideration or where the lower court's finding on fact is not based on evidence on record or to prevent gross and palpable failure of justice. But the cardinal point is that this court has a very wide and unfettered discretion to enable it fairly exercise according to the exigencies of each case.

In this revision I will deal basically with the lower court's findings based on facts and on law. It is clear that the learned Senior Resident Magistrate granted the order to close premises situate in Plot No. Bungoma Municipality/1368 upon hearing the public Health Prosecutor and the landlord's representative or agent a Mr. Malik Mohammed Kipsang on 26th January 2005. The same magistrate issued an order on 31.1.2005 giving the tenants occupying the aforesaid property 7 days to vacate the premises upon the application of the Public Health Prosecutor and in the absence of the Landlord and the 7 tenants. The record further shows that the lower court directed on 8th February 2005, the officer in charge of Bungoma Police station to enforce the orders. All these orders were issued without hearing the tenants who were obviously affected by the order. The lower court failed to appreciate the fact that it had a duty to hear the tenants so as it can do justice and be seen to have done justice. A court of law must constantly remind itself that it must always in such circumstances like in this case hear the tenants and any other persons who are likely to be affected by the decision to close or evict. No reasons were advance to justify the denial of the right of hearing to the tenants. The rules of natural justice were breached in this matter. In a nutshell I have come to the conclusion that the failure to hear the tenants occasioned a miscarriage of justice. For that reason the decision made on 26th and 31st day of January 2005 must be set aside and the matter remitted back to the lower court before another magistrate with a directive that the tenants and or any other persons likely to be affected by an order for closure or eviction be given a chance to state his or her side of the story.

This court was faced with nearly a similar situation in the case of REPUBLIC KIGERA (1988) K.L.R. P. 819 and the court held inter alia

(i) *That a court had a duty not only to do justice but also to show that justice has been done. In this case, the court heard the landlord and the Public Health Officer, but not the tenants. There was no reason on record why the tenants were not heard. There was clearly a denial of justice.*

(ii) *That it was imperative for the court to hear the tenants or any other person who, in its judgment, was reasonably likely to be affected by the order of closure.*

I will adopt this decision in my ruling in this matter.

The upshot therefore is that the orders issued on 26th January 2005 and 31st January 2005 in Bungoma

S.P.M'S Misc Cr. Application No. 4 of 2005 are set aside and the miscellaneous application referred back to the Principal Magistrate's Court for retrial before another Magistrate of competent jurisdiction where all the parties who are likely to be affected by the order sought under sections 120 (1) (g) and 121 of the Public Health Act should be given an opportunity to be heard.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE