

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Revision 1 of 2005

[Revision on both conviction and sentence of the Senior Resident Magistrate's Court

Mumias in Misc. Criminal Application No.1 of 2005] {P.K. SULTANI, SRM}.

PUBLIC HEALTHAPPLICANT

V E R S U S

DR. MICHAEL MASHEREACCUSED

REVISION

On 28.1.2005, the Attorney General through the Provincial State Counsel, Western Province, Mrs. A. N. Kithaka, applied to this court under section 361 (1) (b) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya seeking revision of the orders dated 27.1.2005 made by the Senior Resident Magistrate at Mumias, miss P.K. Sultan in Mumias R.M. Misc. Application No.01/2005 in which one Michael A. Mashere was summoned by the Magistrate Court to appear in court following a complaint filed by the Medical Officer of Health pursuant to section 120 of the Public Health Act, Chapter 242 of the Laws of Kenya relating to existence of nuisance caused by the said Michael A. Mashere by reason of dilapidated building that had been gutted down by fire that was alleged to be in danger of collapsing and injuring the public and its occupants.

This court is entitled under section 362 of the Criminal Procedure Code, Cap 75, to examine the said orders for the purpose of satisfying itself as to their correctness, legality and propriety and under section 364 (1)(b) of the said Act to alter or reverse the orders where appropriate.

When Michael Mashere was served with summons pursuant to section 120(1) of the Public Health Act, he appeared in court as did the Public Health Officer, one Arthur Shikanda who informed the court that he had in December, 2004 seen the house of Michael A. Mashere and that it had been gutted down by fire. He told the court that he had checked it in his capacity as the District Public Health Officer and found the house with cracks following which Michael A. Mashere was served with a statutory Notice to the effect that the building constituted a nuisance within the meaning of section 118(1)© of the Public Health Act. The Statutory Notice concluded-

“This office therefore to limit risks to you and other members of the public, recommends that you immediately demolish the structure, obtain an approved plan and implement it. Failure to comply will necessitate a legal action being taken against you”.

Michael A. Mashere confirmed to the trial magistrate that he had received the notice and submitted that he had received from the Ministry of Works a report and sketch map signed by one Engineer J. Z. Ruwa on how the reconstruction of the damaged structure was to be carried out. The said Engineer was not called to produce the report and sketch or to illuminate the court on the nature and extent of the damage to the building. The report was contested by the Public Health Officer who cast doubt as to its authenticity.

The makers of the report and the sketch ought to have produced these documents in accordance with the provision of the Evidence Act, Cap.80. However, the trial court after disregarding the provisions of the Evidence Act lifted her earlier orders that had stopped the works and ordered that the renovations to be carried out and checked regularly by the office of Public Works.

The trial court was satisfied that the alleged nuisance existed. Under section 120(2) of the Public Health Act, the trial court was enjoined to make an order requiring the owner, Michael A. Mashere, to comply with the requirements of the Notice or otherwise to remove the nuisance within a time specified in the order and to carry out any works necessary for that purpose. The trial magistrate could under section 120(8) of the Public Health Act also before making the order have adjourned the hearing of the summons until an investigation or analysis in respect of the nuisance alleged had been made by some competent person. Subsection (9) of section 120 clearly stipulates that where the nuisance proved to exist is such as to render a dwelling house unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until, in its judgment, the dwelling is fit for that purpose.

Having found that the nuisance existed the trial court ought to have made and it erred in failing to make a finding whether in its judgment the premises were unfit for human habitation and if so to issue a closing order. The sketch plan and report ought to have been produced by their makers who would have had the expertise to comment on the damage and the nature and extent of repairs required. Instead, the author of the nuisance purported to produce the report and the sketch plan. The trial magistrate also failed to have regard to the Statutory Notice by the Ministry of Works whose drastic recommendation was demolition of the building and procurement of approved plans.

The orders by the trial court also appear to have failed to appreciate that the Public Health Act was intended to secure and maintain health and safety of the public and that the rights of the individual must be balanced against this. It was therefore wrong for the trial court to order further renovations on the basis of a report and sketch plan that were not proved to be authentic for the simple reason that there was potential danger of the nuisance recurring if the works were not approved and sanctioned by a competent authority. The court orders were not made on the basis of proper evidence. The object of the exercise should have been to remove the nuisance and, hence, the danger posed to the public and not to punish the owner. The trial magistrate's orders were unlikely to achieve this for the simple reason that the orders alienated the Ministry of Health in the renovation exercise and relegated the role of the Ministry of Public Works to that of a powerless observer required to merely check the works!

So as to safeguard public safety and to avoid unnecessary burden on the owner, I alter the orders made by the trial magistrate and order instead that Michael A. Mashere shall submit to the Ministry of Public Works the report dated 31/12/04 and the sketch plan within 14 days and the Ministry of Public Works shall either sanction the report and the sketch plan or prepare a new report and sketch plan within 45 days but if more time shall be required for that exercise the trial court may on application grant enlargement of such time.

The renovations on the building so far carried out shall be examined by the Ministry of Public Works and the Ministry of Health before they either sanction the report and the sketch plan. In the meantime, no further renovations shall be carried out. Each party shall have liberty to apply to the trial magistrate

Dated at Kakamega this 22nd day of April, 2005.

G. B. M. KARIUKI

JUDGE