



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 98 OF 2017

ROBERT KAMAU KAMITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was presented before the Chief Magistrate's Court in Thika facing eight counts of various offences related to the construction, inspection and occupation of two houses in Ruiru within Kiambu County.

2. After a fully-fledged trial, the Learned B.J. Bartoo, Resident Magistrate, convicted the Appellant of the first two counts. Those two counts were as follows:

Count 1: Carrying out a development without approved plan contrary to section 30(1) as read [together] with section 30(2) of the Physical Planning Act.

The particulars of the charge are that the Appellant, on 27th day of January, 2016 at about 4:00pm at Plot No. LR No. Ruiru East Block 2 Dorkami House situated at Kimbo estate in Juja Sub-County within Kiambu County was found to have constructed a residential flat without authority from Kiambu County Government.

Count 2: Carrying out a development without approved plan contrary to section 30(1) as read [together] with section 30(2) of the Physical Planning Act.

The particulars of the charge are that the Appellant, on 27th day of January, 2016 at about 4:00pm at Plot No. LR No. Ruiru East Block 2/8813 Neighbour Height situated at Kimbo estate in Juja Sub-County within Kiambu County was found to have constructed a residential flat without authority from Kiambu County Government.

3. The Learned Trial Magistrate sentenced the Appellant to pay a fine of Kshs. 50,000/- for each offence, or, in default, to serve two consecutive sentences of eight months. In addition, the Court gave the following order: "The Accused Person to bring to its original standard, the plots being Block 2/8813 and LR Number Ruiru East Block 2 Dorkami House within 90 days from today. In default, the County Governor (sic) of Kiambu to bring to court (sic) original state both parcels of land where Dorkami House and Neighbours Height are structured. The County Government to give notice to that effect."

4. The Appellant is aggrieved by the conviction, sentence and the orders given by the Learned Trial Magistrate. The Petition of Appeal listed thirteen grounds of Appeal as follows:

5. However, in the Appellant's Counsel's written submissions and his oral submissions, the Appellant condensed the grounds into three issues which I will address shortly.

6. First, it is important to recall the standard of review in criminal appeals to this Court. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

7. The evidence that emerged from the trial was as follows.

8. Alice Kabura testified as PW1. She owns the plot adjacent to Neighbour Heights. She testified to hearing commotion in that building on 21/02/2016. When she came out of her gate, she found tenants from the building fleeing. She went into the building and noticed wide cracks. The force of the near-collapse of Neighbour Heights, testified Alice, caused damage to her house as well.

9. George Githinji is the County Development Officer for Juja Sub-County. He testified as PW2. He testified about receiving news about a building that had developed dangerous cracks in the Kimbo area. This was on 15/01/2016. It turned out that the building was Dorkami House owned by the Appellant and the subject of Count 1. He visited it with other Government officials and after examining it, issued a notice to the tenants to vacate. He testified that he witnessed big cracks on the walls and floors of the building and concluded that it was not structurally sound. Upon checking the county records, Mr. Githinji testified that he discovered that no approval had even been given for the construction of that house,

10. Again on 26/01/2016, Mr. Githinji received another call about another building that had developed major cracks. It turned out that the building was Neighbour Heights – another building owned by the Appellant which is the subject of Count 2. For this building, he found that the owner had approved plans. However, he formed the opinion that the building had not been constructed in accordance with the approved plan and had, therefore, lost its structural integrity. In particular, he found that an underground water tank had been build contrary to the approved plan. Mr. Githinji formed the ultimate opinion that the structure posed serious danger to the public and neighbours.

11. Mr. Githinji also testified that when he later checked in the office, he confirmed that the Plan for Neighbour Heights was issued but that the other processes required by the County Physical Rules and Regulations such as obtaining an occupation permit and the registering of the Plan in the Master Register had not happened. Other steps required which Mr. Githinji said were not undertaken included getting inspection done after the foundation; obtaining the signature of the Engineer before commencement of construction and issuance of structural stability report before an occupation permit is issued.

12. Mr. John Kuria Kamau testified as PW4. He is the former Municipal Engineer for Ruiru. He was called to establish that he had not signed and issued the Plan for Dorkami House as claimed by the Appellant. His testimony was that the alleged signature on that document is a forgery. He persisted in that position even under intense cross-examination.

13. Mr. Kamau's assertion that the allegedly approved Plan for Dorkami House was a forgery was bolstered by the testimony of a handwriting expert, Mr. Daniel Kutu, who testified as PW3. He concluded after due analysis that the signature on the alleged Approved Plan for Dorkami house was a forgery.

14. The Prosecution's case was rounded off by the evidence of two experts: Christopher Njogu Njoga, the County Structural Engineer and Samuel Njagi Charagu, the Chief Structural Engineer in the Ministry of Lands and Infrastructure. Mr. Njoga testified that he inspected both Dorkami House and Neighbour Heights and came to the conclusion that both buildings do not meet set structural requirements and that both had serious structural failures. He issued reports on both buildings recommending that they be condemned and demolished as they pose grave danger to the public.

15. Mr. Charagu's report and testimony was much to the same effect: that the buildings' structural integrity was questionable and that the structural elements are inadequate to carry the structures.

16. Based on this evidence, the Learned Trial Magistrate found that the Appellant had a case to answer with respect to Counts 1, 2, 7 and 8. He acquitted the Appellant of Counts 3, 4, 5 and 6.

17. Put on his defence, the Appellant elected to give an unsworn statement. His testimony was basically that he paid for, and obtained approvals with respect to both buildings. He produced a receipt dated 02/01/2009 which he said it was payment of the approved plan for Dorkami House. He testified that it went through inspection in November, 2008. He also testified that he had original approved plan for Neighbour Heights but that he had lost the original document for Dorkami House. He denied that the signature on the Plan for Dorkami House is a forgery.

18. At the conclusion of the case, as pointed out above, the Learned Trial Magistrate convicted the Appellant of Counts 1 and 2 and acquitted him of Counts 7 and 8.

19. In material part, the Learned Trial Magistrate reasoned thus:

The Court is to make a determination on the suitability of the two buildings in contention as to whether they have met the structural requirements for occupation and if the [Appellant] has demonstrated a reason as to why such findings can't (sic) be made. The witness[es] testified in this case [and] the Court visited the buildings. From the findings, the Court noted that the house[s] had numerous cracks....The [Appellant] produced approval plans of Neighbour's Height however (sic) the structural designer having found the building having inadequacy and his documents having not been registered. I find that the Prosecution has established its case on count a balance of convenience (sic) on counts 1 and 2. There will be no finding on counts 7 and 8. Thus the Court finds the Accused guilty on Counts 1 and 2 and is subsequently convicted.

20. The first salvo unleashed by the Appellant on appeal is that the Learned Trial Magistrate utilized the wrong standard of proof: she used balance of convenience – the standard utilized in civil actions – as opposed to the beyond reasonable doubt standard which is required in criminal law. The State argues that it is only the referencing that is unfortunate but that the Learned Magistrate actually used the correct standard in application.

21. The Appellant is obviously right that the correct standard of proof used in criminal cases is beyond reasonable doubt standard: The prosecution must prove the guilt of the Accused beyond reasonable doubt as held in [**Sawe v R Court of Appeal at Nairobi Criminal Appeal No. 2 of 2002**](#) and ***DPP v Woolmington [1935] AC 462***. It was, therefore, an error for the Learned Trial Magistrate to reference and apply a lower standard.

22. The question that arises, then, is whether the evidence presented would have sustained a conviction under the more burdensome standard of proof of beyond reasonable doubt.

23. It is important to recall the charges the Appellant was facing and was convicted of. The two Counts he was convicted of was violation of section 30(1) as read together with section 30(2) of the Physical Planning Act. That section reads as follows:

30(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both.

24. Section 33 provides for the procedure in applying for the Development Permission or Approval.

25. The charges facing the Appellant were carrying out a development without approval contrary to section 30(1) as read together with section 30(2) of the Act. The offence created under section 30(2) is an offence of strict liability: no mens rea is required. The Prosecution is only required to prove the actus reus: that the Accused Person carried out a development without a development permit. Under the County Governments Act, “local authority” in the Physical Planning Act now refers to the County Government. The only question to ask, then, is whether the Appellant had a development permission from the County Government of Kiambu.

26. This straight question readily invites two disparate answers with respect to the two buildings. With respect to Neighbour Heights, there is no question that the Appellant had an approved Plan or a development permission. Mr. Githinji and Mr. Kamau did concede as much. The issue with that building had nothing to do with failure to obtain development permission within the meaning of section 30(1) or section 33 of the Physical Planning Act. Instead, the issue is about the structural integrity of the building and whether the approved Plan was adhered to in construction. Those are legitimate and valid concerns – but they are not regulated by section 30(1) as read together with section 30(2) of the Act; and neither were they the breaches of the law over which the Appellant was charged and convicted in Count 2 of the Charge Sheet. To this extent, therefore, the conviction in Count 2 is unsupported by the bare facts and evidence.

27. What about Count 1? The evidence here was that the copy of the Plan which the Appellant produced as evidence of approval was a forgery. The Prosecution called the person who allegedly signed the Plan – Mr. John Kamau – who disowned the signature. A forensic handwriting expert agreed with Mr. Kamau that that was not his signature. Additionally, the Appellant could not produce the original document – producing only a photocopy of the original. Based on all these, in my view Count 1 was established beyond reasonable doubt. The fact that the Appellant had paid for the approval process and obtained a receipt for the payment does not translate into a development permission under the statutory scheme. To this extent, therefore, the conviction over Count 1 was proper and safe. The same is hereby affirmed.

28. As for the technical objection raised by the Appellant that the County Prosecutor who prosecuted the case was not a gazetted prosecutor, nothing comes out of the complaint. As the State argues, the Constitution permits Parliament to donate powers to prosecute to other persons other than the DPP. It also allows the DPP to delegate his powers directly or by subordinate officers acting in accordance with general or specific instructions. The State is correct that any gazetting of prosecutors done prior to passage of the Constitution remains valid and in force unless specifically revoked by the DPP by virtue of section 57(3) of the Office of Director of Public Prosecutions Act of 2013.

29. Finally, I will address the consequential orders made by the Learned Trial Magistrate after the conviction and sentencing. In a word, she ordered the two buildings demolished. As the State concedes, with respect, the Court did not have the jurisdiction to order the demolition. The procedure to be followed where a demolition is intended by the County Government is outlined under section 30(4) of the Physical Planning Act or through an Enforcement Notice under section 38 of the same Act. In either cases, jurisdiction lies, in the first instance, with the County Government and not the Court. It, therefore, follows that the demolition orders given by the Court exceeded its jurisdiction and are improper.

30. The upshot is the following:

a. Conviction in Count 1 with respect to carrying out a development on Dorkami House without a development permission contrary to section 30(1) as read together with section 30(2) is affirmed as is the sentence imposed.

b. Conviction with respect to Count 2 is hereby quashed and the sentence imposed set aside.

c. The orders for demolition of the buildings the subject matter of this case are hereby set aside.

31. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

.....

JOEL NGUGI

JUDGE