REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, MWERA, & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO.468 OF 2007

BETWEEN

THE PAPER HOUSE OF KENYA LIMITED……....APPELLANT

AND

REPUBLIC.....…….. RESPONDENT

(Appeal from the Conviction and sentence of the High Court of Kenya at Nairobi (Makhandia, J.) dated 6th November, 2006

in

HC.CR.A. No.245 of 2006)

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JUDGMENT OF THE COURT

This appeal followed a decision of the High Court (***Makhandia, J***., as he then was) made on 6th November, 2006 upholding the conviction and sentence handed down by the Subordinate Court of the First Class Magistrate Court at City Hall, Nairobi (***Hon. L. Mutende , P.M***. as she then was).

The proceedings in the subordinate court commenced when the Public Health Department of the then City Council of Nairobi, now a County, issued a 21 - day notice to the appellant to provide for, observe or maintain on its business premises along Lunga Lunga Road Nairobi, conditions listed in the notice in the interest of public health. The notice dated 8th June, 2004 warned the appellant that failure to attend to the thirteen defects, otherwise said to be constituting a nuisance, could lead to its prosecution under the Public Health Act. The conditions to be rectified included repairs to the leaking kitchen roof, providing formica or stainless steel finish to the kitchen equipment, maintaining general hygiene, acquiring food hygiene licence, obtaining medical certificates for kitchen staff, dampness on the walls, changing room lockers, ventilation, blocked toilet, broken toilet cisterns, among others. It appears the appellant did the needful on some of the detailed defects but not all of them. The city authorities therefore laid a complaint against it by filing a charge sheet in the City Magistrate's Court – Cr.C.716A/2004. The case was heard by the learned magistrate who found that the notice to abate had not been complied with. The nuisance had existed on the premises for 591 days. The appellant was thus convicted and fined Sh.886,500/= or

one year imprisonment in default.

Being dissatisfied with the lower court's decision, the appellant went to the High Court on appeal, laying before that court nine grounds for determination namely, that there had never been any inspection of the subject premises and so the charges should not have been preferred; the lower court erred in finding that a nuisance existed; it was in error to convict the appellant and fine it as above; the learned trial magistrate erred when she imposed the fine before a report had been tabled by the Public Health Officer; the notice to abate had not been properly served; the learned trial magistrate erred by finding that the appellant was liable to remove nuisance of a structural nature; no charges were set out in the charge sheet; the burden of proof was shifted and the decision in the lower court was against the weight of the evidence adduced.

We have set out the grounds in the petition of appeal to the High Court because some of them were argued before us. The learned Judge, reminded himself of the duty imposed on the first appellate court in criminal appeals as stated in ***Okeno vs Republic [1972] EA 32,*** namely, re-evaluating the evidence tendered before the trial court and coming to its own conclusions.

The Judge agreed with the lower court that defects or aspects constituting nuisance that ought to have been abated had not been so abated. And so they formed the basis of the charges before the lower court. It was also noted by the Judge that the learned trial magistrate had visited the subject premises a year later and found that some aspects stated in the notice had remained unabated. As to whether the nuisance actually existed, the learned Judge found as the learned trial magistrate did, that the evidence of ***Tessie Wamatuba*** proved so. Regarding the fine imposed, ***Makhandia J*** said that it was in line with the finding the lower court made that the nuisance existed unabated for 591 days. As for the finding that there were structural defects which only the owner of the premises, not a tenant, should have been liable to rectify, the learned Judge noted that the Public Health Act (PHA) indeed provided so but then the appellant had gone ahead and rectified them anyway, without saying how it took on itself that responsibility. Acknowledging the partial compliance to abate the nuisance on the part of the appellant, the Judge noted that some defects remained unabated even as at the time of the proceedings in the lower court. And that the notice to abate was properly served and accepted by the appellant by the hand of ***Mr. Nganda***, its employee. The appellant had told the Judge that it was not valid for ***Tessie Wamatuba,*** a Public Health Officer, to serve the notice to abate because the Public Health Act talked of a Medical Officer of Health (MoH) as the authority to issue such notices or by a person specifically authorized by the MoH. But again the Judge agreed with the lower court that the notice was issued by ***Tessie Wamatuba*** on behalf of the MoH and validly so. Having considered all the grounds, the appellant's appeal was dismissed. Being further aggrieved by the High Court decision, the appellant has come before us on nine grounds which ***Mr. M. Mbaka,*** leaned counsel, condensed into two, namely whether in law, a nuisance actually existed and whether the procedure in convicting the appellant was proper.

Mr. Mbaka submitted that the criminal charges the appellant faced in the lower court followed the notice to abate a nuisance dated 8th June, 2004. He cited Section 118(1)(b) of the Public Health Act (PHA) which describes a nuisance. And that the ***Republic vs Kisanga & Others [2006] 1 KLR [E&L) 137*** stated that to be actionable, the nuisance complained of must be injurious to health in the sense of a threat of disease, vermin or the like. That it must be a nuisance affecting not only the persons occupying the premises. And that the local authority is not concerned at all even where there is a nuisance alleged, unless there is danger to health in the sense of a threat of disease.

Counsel then proceeded to argue that a *nuisance* could exist in given premises but if that does affect outsiders and adjacent buildings, for instance an effluence, it cannot constitute a *public nuisance* to be abated, if not, prosecuted. That the appellant, running a paper factory on the subject plot did not fail to abate a nuisance because there were no effluences from these premises spreading to and constituting a danger to health in nearby premises or to passers-by. That all the thirteen defects, constituting nuisance to be abated as stated in the chargesheet, actually happened inside the appellant's building. Accordingly, so ***Mr. Mbaka*** continued, both courts below misdirected themselves on the point.

Further, we heard that rectifying structural defects on a given building was the responsibility of the landlord/owner of that building as provided for in Section 119 of the Public Health Act, and not a tenant

that the appellant was. That the appellant told the two courts below that it was only a tenant and yet both courts shifted the burden on it. That defects like those touching on latrines, the darkroom had been attended to.

Moving to the ground of procedure, ***Mr. Mbaka*** submitted that Sections 119, 120 of Public Health Act empowered only the Medical Officer of Health to serve notices to abate a nuisance – not anybody else unless that other had been specifically authorized by the Medical Officer of Health under Section 163 of the Public Health Act. That ***Tessie Wamatuba***, a Public Health Officer (PW1) who issued the notice herein, did not show evidence of her authority from the Medical Officer of Health to carry out inspection of the building and issue such notices. In this connection the case of ***Republic vs District Health Officer, Kisii & Another Ex parte Mageto & Others (2006) 1KLR (ERL) 1*** was cited. In that case it was held that under Section 119 and Section 120 of the Public Health Act (Cap 242) only the Medical Officer of Health has the power to issue a notice to remove a nuisance. If another officer takes the action of issuing a notice to remove a nuisance, it should be on behalf of the Medical Officer of Health and that must be clearly shown. Such authority must be proved – not assumed. To this end, the case of ***Barclays Bank of Kenya vs City Council of Nairobi [2006] 1KLR (E&L) 635*** was placed before us. In that case it was stated that the respondent had failed to demonstrate that the officer who started the proceedings was an authorized officer as per the law. Therefore it was found that that officer, Public Health Officer who issued the notice acted *ultra vires* her powers. Mr. Mbaka urged us to find that that was the case in the present matter. And so we should dismiss the appeal.

Mrs. F. Njeru, Senior Prosecution Counsel, on behalf of the respondent, did not agree with the appellant. She told us that aspects of nuisance existed in the subject building as set out in the notice to abate. These included blocked toilets, open drainage, and leaking places. These could not only be a danger to the health of the workers there, the occupants of adjacent buildings, passers-by and even customers to the appellant's premises. The appellant acknowledged that danger and even made to carry out repairs to abate the nuisance. It did not fully abate the nuisance, hence the charges it faced in court. And that when the court visited the premises about a year later, there were still aspects of unabated nuisance. Counsel conceded that the law required that the landlord be responsible to rectify the structural defaults constituting nuisance, but then the appellant had rectified some of these, even as it claimed to be a tenant.

On the ground of the procedure by which the charges were laid against the appellant, we heard that ***Tessie Wamatuba***, a Public Health Officer, did inspect the premises and she issued the notice to abate on behalf of the Medical Officer of Health. When there was no compliance, the appellant was charged in court as provided for by the Public Health Act.

In reply ***Mr. Mbaka*** submitted that the appellant raised a statutory defence under Section 121 of Public Health Act which provides for penalty respecting nuisances.

This being the second appeal, we are enjoined by statute and case law only to confine ourselves to points of law raised. We are bound by the concurrent findings of fact arrived at by both the trial court and the High Court, unless it is demonstrated that all or any finding of fact was not supported by evidence. (See ***Section 361(1) of the Criminal Procedure Code*** and ***Njoroge vs Republic [1982] KLR 388***).

Beginning with whether there was a nuisance to be abated or not, we are satisfied, as the two lower courts did, that there was indeed a nuisance in terms of Section 118(1) of Public Health Act under which the notice to abate was issued. Then charges were laid before the lower court following failure to comply. The provision of law reads, in the pertinent parts:

"118 (I) The following shall be deemed to be nuisances liable to be dealt with in the manner provided in this part –

a. ***--- (k) ---***

(l) any public or other building which is so situated, constructed, used or kept as to be unsafe, or injurious or dangerous to health;

(m) --- (r)---

(s) any act or omission which is, or may be, dangerous or injurious to health."

The ***Kisanga*** case (Supra) repeats that an actionable nuisance must be injurious to health in the sense of a threat of disease, vermin or the like. When that occurs, then the local authority must be concerned. In the notice to abate dated 8th June, 2004 it was stated that not enough ventilation was provided in the dark room; metal grills were required to cover open drains; the blocked toilets were to be unblocked and repairs done to the cisterns. Provision of formica or stainless steel finishes in the kitchen where food was prepared was necessary.

Considering the evidence by the prosecution that the conditions found in the premises were unsafe and dangerous to health and/or life, the learned trial magistrate appreciated, for instance, that blocked toilets would result in causation of diseases like typhoid, cholera and food poisoning. Open drains were a danger and a dirty kitchen also posed a danger on health. Workers not medically examined could transmit diseases to other people, if at all they were infected and the cisterns that did not flash would cause diseases. The learned trial magistrate then did refer to some rectification done as at the time she visited the premises and observed that that did not cover all the aspects above. She concluded that therefore the notice to abate the nuisance was not complied with. And also that the appellant did not deny that the nuisance existed on the premises. The magistrate also noted that the appellant had in fact began or tried to rectify the stated aspects of nuisance.

As for the learned Judge, he had this to say:

"The evidence of PW1 leaves no doubt at all that there existed a nuisance on the premises of the appellant which required to be abated. The nuisances were enumerated in the notice which was issued and served on the appellant. The said Notice was tendered in evidence as an exhibit. Indeed even in its defence, the appellant conceded to the existence of the nuisance and which it had endeavoured to abate before the charges were laid against it. In my judgment the appellant's assertion that there was no nuisance on the premises is clearly without merit."

From the foregoing, both the lower court and the High Court made concurrent findings that nuisance existed on the premises. Accordingly there was nuisance on the premises. Due notice was issued; it was not wholly complied with. The appellant was then charged in the Magistrate's Court under the relevant Section 118 of the Public Health Act. In our view, it was convicted on proper evidence and duly sentenced.

Mr. Mbaka submitted before us on what he termed "*a public nuisance*" and that it was not proved that whatever nuisance existed inside the appellant's premises was danger to the health of outsiders or neighbors. With respect, counsel argued the wrong and inapplicable concept.

Section 118 provides for: ***"…any <u>public</u> or other building…",*** which is so situated, constructed, <u>used</u> or <u>kept</u> as to be unsafe, or injurious or dangerous to health. We agree that the nuisances stated, namely, broken or open toilets, a dirty kitchen, definitely were dangerous to health existing in the building used or kept by the appellant. Diseases could start or spread from there; smells or odours too could issue from there. All in all the nuisances existed on the premises occupied by the appellant. The charge was not that a ***public nuisance*** existed on the appellant's premises as ***Mr. Mbaka*** argued before us. That is not the charge that his client faced. The charge was failure to abate a nuisance in a building.

It is not in dispute that structural nuisances must be addressed by the owner of the premises. Both the learned trial magistrate and the High Court were not oblivious of this (Section 119 proviso of Public Health Act.) ***Mr. Mbaka*** urged us to find that the appellant was a tenant in the premises. There was no evidence of a tenancy agreement or lease placed before the lower court. All that is there is a mere claim by ***Philip Munyoki Nganda*** (DW1) in cross-examination.

"My premises is rented."

With no documentary evidence to support that claim the lower court or the High Court cannot be faulted for not excusing the appellant as regards structural defects which it had even began to set right. This ground must fail and we dismiss it.

The next ground was that the notice to abate was not issued by the Medical Officer of Health or his/her specifically authorized person, contrary to Section 163(1) of Public Health Act. ***The Barclays case*** remarked on this aspect but the ***District Health Officer Kisii case*** is more specific. It states that the Medical Officer of Health has power to issue notice to remove a nuisance:

"…If any other officer takes the action of issuing a notice to remove a nuisance it would be on behalf of the Medical Officer and this must be shown."

Both the learned trial Magistrate and the Judge were satisfied that the notice in issue here was issued by ***T. Wamatuba:***

"*For Medical Officer of Health*." That is what the notice reads. That was not challenged or contradicted even as she gave evidence, where she described herself as a Public Health Officer. But the fact remains that she did not issue the notice to abate by herself as a Public Health Officer. She did so on behalf of the Medical Officer of Health. If the appellant doubted that, the time ***Tessie Wamatuba*** was testifying is when her authority could have been challenged. And the law does not require written authority of the MOH. It was sufficient that ***Tesie*** issued the notice on behalf of the MOH and that appeared on the notice. That finding cannot be disturbed. This ground too, is dismissed.

In sum this appeal is dismissed in its entirety. The conviction and sentence as pronounced by the lower court and confirmed by the High Court will remain.

Dated and Delivered at Nairobi this 21st day of March, 2014

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

/jkc