REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION 21 OF 1938

MUNI……..APPLICANT

VERSUS

REX THRO' MEDICAL OFFICER OF HEALTH, KIAMBU…RESPONDENT

RULING

The applicant applies for revision of the judgment, finding and sentence of the Second Class Magistrate, Kiambu, passed on the 24th day of February, 1938, on various grounds which we need not enumerate as they are set fourth in some detail under thirteen heads in the grounds of revision dated 11th March, 1938.

The facts are that the Medical Officer of Health, by three notices dated 24th November, 1937, in which he stated that he was satisfied of the existence of a nuisance at the three sets of premises owned by the applicant and situate at the Wangigi Market in the Kiambu district, and that the said premises were of such construction and in such a state and so dirty as to be injurious or dangerous to health, thereupon required the applicant within one month from the date of services of the Notices to abate and prevent recurrence of the said nuisance, and for that purpose to entirely demolish the said premises, remove all materials and cleanse the site.

Now, these Notices purported to have been given under the provisions of section 119 of the Public Health Ordinance, cap 124. This section empowers the Medical Officer of Health, if satisfied of existence of a nuisance, to serve notice on the author of a nuisance requiring him to remove it, and to execute such work as may be necessary for that purpose.

By section 120(1) if the person on whom the notice to remove a nuisance is served does not comply with any of the requirements thereof within the time specified, the Medical Officer of Health shall cause a complaint to be made before a magistrate and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his Court. By sub-section 2 of section 120, if the Court is satisfied that the alleged nuisance exists the Court shall make an order on the author thereof requiring him to comply with the requirements of the notice and by sub-section 3 may impose a fine. The applicant did not comply with the notice referred to and thereupon on a complaint dated 29-1-38 a summons dated the 3rd February, 1938, was issued calling upon the applicant to answer a charge of failing to comply with the requirements of sanitary notices within the time specified in the notices contrary to section 120(1), cap 124. The complaint came before the magistrate at Kiambu on

the 23rd February, 1938. Here it may be mentioned that it was agreed that the three charges should all be heard together. The magistrate heard evidence from the Sanitary Inspector as to the existence of a nuisance and also evidence for the defendant that no nuisance in fact existed. The magistrate delivered judgment to the effect that the nuisance existed and that the only way to cure it was to demolish the buildings and that temporary measures would not be of any avail. He ordered the defendant to pay a fine of Shs 20 on each charge and gave him fourteen days in which to demolish the buildings. Now section 124 of the Public Health Ordinance empowers the Court, where a nuisance is proved to exist with respect to a dwelling, and the Court is satisfied that such dwelling is so dilapidated and so defectively constructed that repairs to or alterations are not likely to remove the nuisance and make such dwelling fit for human habitation, to order the owner thereof to commence to demolish the dwelling on or before a specified date, being at least one month from the day of issuing an order, and to complete the demolition and to remove the

materials from the site before another specified date.

Of the three sets of premises one was a shop having living quarters attached, the second was a butcher's shop, and the third was a small building used as living quarters. The first and third sets of premises therefore come within the category of dwellings while the second does not. There would appear to be a distinction in the Ordinance between the demolition of a dwelling and that of another class of building. A different procedure has to be adopted in the case of a dwelling which it is sought to have pulled down by reason of a nuisance, to that which is necessary in the case of a building of another kind.

In this case the Medical Officer of Health himself issued the notice to demolish all three sets of premises acting under section 119. In regard to the butcher's shop, while it is nowhere laid down in the Ordinance that Medical Officer of Health has specific powers to order the demolition of a building which is other than a dwelling, we hold not without some hesitation that the order to demolish appears to have been within the powers under section 119 enabling the Medical Officer of Health to order the removal of nuisance.

The subsequent steps taken in regard to these premises (the butcher's shop) namely the filing of a complaint, the issue of summons, the hearing of the charge by the magistrate, and the ultimate decision of the magistrate that a nuisance existed in respect of these premises and his order that they be demolished, and a fine be paid, appear to be without objection.

As regard the two dwellings the position is somewhat different. Section 124 provides for the necessary procedure to be followed when power is sought to order demolition of a dwelling. The Public Health Ordinance being a penal enactment its provisions must be construed strictly. The section says in effect that when it is sought to demolish a dwelling, in order to cure a nuisance which can only be cured by such demolition, the Court is the proper authority to make the order. This by implication, in our opinion deprives a Local Authority or Medical Officer of Health of the power of ordering the demolition of a dwelling. The words in section 119: "Requiring him to remove it within the time specified in the notice and to execute such work and do such things as may be necessary", cannot be taken to include the power to order demolition of a dwelling when special provision is made elsewhere, ie in section 124. In other words, the Medical Officer of Health in this instance had no power by notice to order the demolition of the two dwellings in order to secure the removal of the nuisance in respect of them. His action in doing so was ultra vires. His complaints and the summonses issued by the court were based on the wrong section. In our opinion this invalidated the whole

proceedings in the lower court, including the convictions and sentences, in respect to the two dwellings. The whole procedure was wrong and the proceedings were a nullity. The Medical Officer of Health's proper course we consider would have been to have sworn a complaint before the Court and to have moved the Court to issue a summons calling upon the owner to show cause why he should not be

ordered to demolish under section 124. We do not think that the respondent ought to be allowed to call in aid

section 88(2) or section 367 Criminal Procedure Code. These provisions were not intended to validate proceedings based on wrong premises from the start.

In our opinion the legislature, in cases where in order to remove a nuisance the demolition of a building is considered necessary, intended to discriminate between a dwelling and a building other than a dwelling. In the case of a dwelling there might clearly be a number of residents who would require time to look for other quarters. Hardship might be involved if the local authority or Medical Officer of Health had powers to order demolition within a given period. It was for this reason that special procedure is laid down.

Section 124 first requires the Court to be satisfied by evidence that demolition is necessary; secondly, it gives power to the

Court to order the owner to begin demolition on a date not less than a month from the date of the order and to complete it within a specified date; and thirdly it requires the Court to give notice to occupiers to vacate. For these reasons the convictions sentence, and orders in regard to the two dwellings are set aside. The conviction, sentence and order in respect of the butcher's shop are to stand.

Ruling-First we hold that Dr Bell, the Medical Officer of Health, Kiambu, instituted this case on behalf of the Crown and prosecuted it as a public prosecutor. He derived his authority as public prosecutor from section 166 (4), Criminal Procedure Code. Therefore it was a crown prosecution. Secondly, at common law the crown neither receives nor pays costs. No statutory provision exists by virtue either of the Criminal Procedure Code or of the Public Health Ordinance (cap 124) creating an exception to this principle.

No case has therefore been made out for the ordering of costs against the Crown in this revision case.

Dated and delivered this 28 day of May 1938.

Thacker

JUDGE

Lane Ag

JUDGE