**Republic v Kiambu Dandora Farmers Ltd and another**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 15 January 1974

**Case Number:** 46/1973 (23/74)

**Before:** Trevelyan and Kneller JJ

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*[1] Criminal Practice and Procedure – Charge – Failure to file annual return – Not laid within twelve months – Whether charge maintainable – Criminal Procedure Code, s.* 219 (*K.*), *Companies Act* (*Cap.* 486), *ss.* 127, 395 (*K.*).

**JUDGMENT**

The considered judgment of the court was read by **Trevelyan J:** The Kiambu Dandora Farmers Co. Ltd. and nine men (including Mr. Keingati Waiharo) said to be its officers were charged (*inter alia*) with failing, contra ss. 127 and 395 of the Companies Act (Cap. 486), within 42 days of the company’s first or only general meeting for the year 1970, to file a copy of its annual return for that year as s. 125 of the Act demands. The trial proceeded in the ordinary way and, in due course, was adjourned so that the trial magistrate might prepare his judgment. At about this time, it occurred to the magistrate that the charge was not timeously laid, for when he read his judgment he expressed himself thus in a passage which we feel we should now reproduce: “. . . In the absence of evidence and the necessary proof that accused 2, 4, 5, 6, 7, 8, 9 and 10 are in fact officers of the Kiambu Dandora Farmers Company Ltd. I find each of them not guilty . . . and acquit them. This leaves the company and accused 3 [Mr. Keingati Waiharo] . . . [who] are charged with failing to deliver an Annual Return to the Registrar of Companies by 23 March 1971 in respect of the year 1970 in contravention of s. 127 (1) of the Companies Act punishable by s. 395 of the Act. This particular section is subject to s. 219 of the Criminal Procedure Code since the section carries no punishment of imprisonment and the maximum fine is only Shs. 100/- although cumulative. I hold however that the court must act on the basic fine and disregard the licence given to it under the term ‘default fine’. This intention is clear when reference is made to s. 397 (2) of the Companies Act wherein the Registrar may file proceedings out of time provided a certificate is lodged with the trial court indicating the date on which the offence first became apparent to him. No such certificate has been lodged and the date of the offence is given as 23 March 1971. The court record indicates that the case was filed on the 11 June 1973 and the charge sheet signed by the Registrar on 7 June 1973. It is clear from this that the case was time expired . . . when laid before the court and in the circumstances should not have been accepted. I find myself in a difficult position holding the view that the trial is a nullity . . . and I make no order in respect of the company or the accused.” When the magistrate’s decision was conveyed to the Registrar of Companies, the finding as to limitation disturbed him and he asked whether this court would, in the exercise of the power conferred by s. 362 of the Criminal Procedure Code, consider its correctness. The single judge, having satisfied himself that the proceedings in the court below were in the nature of a criminal cause or matter: see *R. v. Tyler*, [1891] 2 Q.B. 588, called for the record, being of the opinion that the point was a novel one, of importance in company law, and no opportunity had been afforded, as should have been done, for it to be argued in the trial court. Let us now consider the validity of the Registrar’s complaint, and, as three particular statutory provisions must be consulted, let us first set them out. S. 219 of the Criminal Procedure Code provides: “Except where a longer time is specially allowed by law, no offence the maximum punishment for which does not exceed imprisonment for six months or a fine of one thousand shillings or both such imprisonment and such fine shall be triable by a subordinate court, unless the charge or complaint relating to it is laid within twelve months from the time when the matter of such charge or complaint arose.” S. 127 of the Companies Act insofar as we need set it out says: “(1) The annual return shall be completed within forty-two days after the annual general meeting for the year . . . and the company shall within such period deliver to the registrar a copy signed both by a director and by the secretary of the company. (2) (*a*) If the company fails to comply with this section, the company and every officer of the company who is in default shall be liable to a default fine.” And s. 395 (1) of this same Act reads: “Where, by any section of the Act, it is provided that a company and every officer of the company who is in default shall be liable to a default fine, the company and every officer shall, for every day during which the default refusal or contravention continues be liable to a fine not exceeding such amount as is specified in such section, or, if the amount of the fine is not so specified to a fine not exceeding one hundred shillings.” S. 219 is simply and clearly worded. It applies, and can only apply (subject to the stated exception) where there is a maximum punishment by way of fine – we are not now concerned with imprisonment – of Shs. 1,000/-. For its part, s. 127 (2) (*a*) admits of no ambiguity either. It says, and says simply enough, that the punishment which it provides is a default fine. It is, in relation to s. 127 (1) its punishment section. So far as we are here concerned, what s. 395 does is to make provision, as its marginal note declares, “with respect to default fines . . .” i.e. to provide how such fines should be arrived at. As s. 127 (2) (*a*) provides for no maximum punishment it is not, to use the magistrate’s expression, “subject to” s. 219. Nor can s. 397 (2) be prayed in aid of the magistrate’s view. It provides that: “(2) Proceedings in respect of any offence under the Act may, notwithstanding anything to the contrary contained in the Criminal Procedure Code be taken by the Attorney-General or by the registrar at any time within twelve months from the date on which evidence sufficient in the opinion of the Attorney-General or the registrar, as the case may be, to justify the proceedings comes to the knowledge of the Attorney-General or the registrar as the case may be . . .” It does no more than to recognise that there are offences which might not readily attract official attention, such as s. 110 which concerns itself with publications made by companies concerning their share capital, and so, because of the maximum punishment set might otherwise, as a result of s. 219 go unpunished. It has no relevance to a charge such as that with which we are now concerned. We have no doubt that the proceedings in the court below were lodged in due time and that we must alter or reverse the order or orders which the magistrate made. But what order or orders did he make? It will be recalled that in the judgment, the magistrate acquitted eight of the nine alleged officers of the company before he declared the proceedings to be a nullity. But if the proceedings were a nullity the men were never in jeopardy and acquittals were unnecessary. On the other hand, if the proceedings were not a nullity, and they were not, even if the charge laid before the court stood no chance of success, the company and Mr. Waiharo should either have been convicted or acquitted. One cannot leave proceedings in vacuo. The magistrate says that he did nothing concerning the company and Mr. Waiharo, i.e. that he made no orders against them, but he nonetheless did make an order, or must be taken to have made an order, belatedly, to reject the charge, presumably in exercise of the power conferred by s. 89 (5) of the Criminal Procedure Code on the ground that it should never have been admitted in the first place, and then the further order that the two accused be discharged. It is at least doubtful if the subsection could so properly be used for it provides for “an order refusing to admit such complaint or formal charge” and the charge had been admitted, but assuming the power to reject to have been there, it was not, upon the law, for exercising. We reverse the magistrate’s orders. He is now required to make such order or orders as are conformable with our decision. *Order accordingly.*

For the applicant:

*MAA Dourado* (State Counsel)

The respondents were absent and unrepresented.