



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1250 OF 2004

GEORGE ODINGA ORAROPLAINTIFF

VERSUS

ERIC GOR SUNGUHDEFENDANT

RULING

During the hearing of the Defence, vide the Ruling of 25th January, 2011, the Defendant was not permitted to produce a letter of 1st March, 2006 addressed to him as a Chairman of Parliamentary Select Committee by the Clerk of National Assembly.

Thereupon the Defendant applied for special leave as required under Sec. 19 of the National Assembly (Powers and Privileges) Act (Cap 6). The application deemed to have been made by the Defendant is not before the court. What is produced before the court is a letter dated 7th February, 2011 signed by the Speaker of National Assembly granting leave to the Defendant to produce the following documents in evidence which were thus filed on 24th February, 2011 in a bundle of documents.

“1. Letter dated 1st March, 2004 Ref. No. NA/SC/OUKO/CORP/2003/28, by the Clerk of the National Assembly to the Hon. Eric Gor Sungu, MP

2. Letter dated 5th March, 2004. Ref. No. CID/PS/SEC/6/11/A/21, from the Chairman, Parliamentary Select Committee on Ouko, Hon. Gor Eric Sungu to the Clerk of the National Assembly.

3. letter dated 10th May, 2004 from the Chairman, Parliamentary Select Committee on Ouko to the

Chairman, Parliamentary Select Commission.

4. Hansard reports on proceedings of the Parliamentary Select Committee meetings on the death of the late Dr. Robert Ouko for the following dates: 23rd March, 2003, 23rd September 2003, 25th February, 2004, 26th February, 2004, 27th February, 2004, 17th March, 2004, 26th March, 2004, 10th March, 2004, 25th March, 2004, 21st October, 2004, 5th November, 2004, 6th November, 2004, 7th December, 2004, 9th December, 2004, 14th December, 2004, 16th December, 2004, 21st February, 2005 and 8th March, 2005.

When the hearing resumed, the learned counsel for the Plaintiff, Mr. Kemboy raised objections to the said list of documents vide Notice dated 28th February, 2011.

Basing his submissions from the objections it was contended by Mr. Kemboy that the Defendant seems to have misapprehended the case of the Plaintiff and hence the list of documents. According to him, Paragraph 7 of the Plaintiff is the basis of the Plaintiff's case which in short is that the Defendant, as a person and not as a Chairman of Parliamentary Select Committee, outside the precincts of the Parliament uttered the words which were defamatory to the Plaintiff as particularized in paragraph 8 of the Plaintiff.

As against the said claim and pleadings, the Defendant has contended in his defence that:-

(1) The occasion was privileged. This contention, as per Mr. Abuga is not the main part of the Defendant's Defence.

(2) The words, even if uttered, were not meant to refer to the Plaintiff.

Mr. Abuga the learned counsel for the Defendant relied on the second Defence as well as the Defence that the evidence before the Committee was given 'extempore' and that the Plaintiff was given opportunity to defend. In the premises, I shall concentrate on those points of defence vis-à-vis the contentions made by the Plaintiff in opposing the production of the documents.

Mr. Abuga also conceded that the letter dated 4th March, 2004 addressed to The Speaker of National Assembly by one James Onyango Koyoo should be expunged from the list of documents and, I hereby do order that the said letter be expunged from the bundle of documents and the same not to be included in the record of the case. Objection IV thus is dealt with accordingly.

It was further conceded by Mr. Amuga that the Defendant shall produce the annexures to the Affidavit of Plaintiff (pages 43- 50) sworn on 8th November, 2004 and thereafter the affidavit shall be produced and allowed in evidence. Thus the objection (VIII) in the Notice is dealt with accordingly.

As regards the documents, except those containing Parliamentary Select Committee's proceedings, Mr. Kemboy contended that some of them are before or after the date of cause of action or are evidently in respect of different parties altogether or are referring to the operations of the Select Committee. Thus none of them is relevant to the fact in issue.

Mr. Kemboy relied on Sec. 5 of the Evidence Act (Cap 80) which stipulates:-

"5. Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provisions of this Act to be relevant."

As regards the record (Hansard) of Parliamentary Select Committee, Mr. Kemboy relied both on the

provisions of Sec. 5 and Sec. 34 of the Evidence Act. He stressed that the Plaintiff is only taking issue on the words uttered by the Plaintiff in his private capacity outside the precincts of the Parliament. Moreover, the Plaintiff has also given concession as to the admissions of facts in reliance of the Plaintiff's evidence before the committee. His submission that the copies of proceedings are uncertified cannot be sustained in view of the fact that they are in fact certified by the Clerk of the National Assembly.

I have carefully considered provisions of Sec. 34 of the Evidence Act and considering Sec. 34 (2) (a) thereof, I cannot agree to the propositions made by Mr. Abuga that the Parliamentary proceedings are not judicial proceedings. The said provisions clearly defines and includes the other proceedings which may not be termed strictly the court proceedings.

The stipulations of the said provisions are:-

“(2) for the purposes of this section –

(a) The expression “Judicial proceedings” shall be deemed to include any proceedings in which evidence is taken by a person authorized by law to take the evidence on oath; and”

The Defendant cannot deny that he was not authorized to take evidence under oath. Thus I shall have to find, which I hereby do, that the Parliamentary Select Committee chaired by the Defendant are the judicial proceedings so far as Sec. 34 of the Evidence Act is concerned. If so, all other stipulations/provisions made in Sec. 34 of the Evidence Act do apply.

Thus the reliance on and admissibility of the proceedings of the Select Committee shall be allowed in respect only of those portions which are in respect of the statements or evidence of the Plaintiff. Any adverse remarks made as against the Plaintiff, because he was not given an opportunity to cross examine against those remarks, cannot be admissible and I do find so.

Finally, I shall deal with documents on pages 8 – 13, 17-20, 21-24, 35-38, 39-41 and 42-44.

Mr. Abuga has stressed that the Defendant has raised a defence that the uttered words, if they were so uttered, did not refer to the Plaintiff and that they were generalized, that there were many other witnesses adversely mentioned before the committee who had complained publicly or through correspondence and that the alleged words could have been in reference to any of them and not necessarily the Plaintiff (see paragraph 7 of the Defence). The documents referred hereinbefore include such complaints from other parties and the Defendant's complaint to the effect that he had been hampered in proceedings with the committee work.

As per Mr. Amuga letters exchanged between the Defendant and the officials of the Parliament are produced to give the basis for the defendant's claim that he was hindered in his task by people within and outside the Parliament and which words are amongst the statement averred by the Plaintiff in paragraph 7 of the Plaintiff.

I have given careful thought over this contention and do tend to agree that those correspondence are relevant facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by such a fact as stipulated in Sec. 9 of the Evidence Act.

I thus find those correspondence produced on the aforesaid pages as relevant and I further find that they are admissible in evidence. The counsel then would cross-examine the Defendant on those documents and submit on the weight to be placed thereon.

Orders accordingly.

Dated, signed and delivered at Nairobi this 9th day of **March, 2011**

K. H. RAWAL

JUDGE

9.03.2011