



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL REVISION NO 13 OF 1991

JOHN OPIYO ARUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

REVISION

This is an application for a revision under sections 362, 364, 365 and 367 of the Criminal Procedure Code.

The application has been filed by M/s Gumba Onywera & Company Advocates for the applicant John Opiyo Arunga and it arises out of a Miscellaneous Criminal Application No 12 of 1991 of the Principal Magistrate's Court Kisumu.

What happened was that on the 19th November 1991, Police Inspector Dominic Mwaniki attached to Divisional CID Headquarters Kisumu swore an affidavit and had it filed in the Principal Magistrate's Court making certain allegations against John Opiyo Arunga and asking the Court to make an order for the said John Opiyo Arunga and to execute a bond to keep peace.

On the same 19th November 1991, Inspector Mwaniki and John Opiyo Arunga appeared before the Principal Magistrate. Inspector Mwaniki briefly addressed the Court alleging that John Opiyo Arunga, the applicant now before me, had been inciting people in Kisumu to join a party called FORD and that because of that Inspector Mwaniki believed a breach of the peace. That was all.

The learned magistrate called upon John Opiyo Arunga to show cause why he should not execute a bond. John Opiyo Arunga replied that he had no knowledge of the allegations.

Instead of the learned magistrate giving John Opiyo Arunga a copy of the affidavit of Inspector Mwaniki to see the allegations or instead of the magistrate allowing John Opiyo Arunga to read or to be told the contents of that affidavit and thereafter calling upon Inspector Mwaniki to adduce evidence in support of his allegations and to allow John Opiyo Arunga to defend himself against the allegations before the magistrate could come to a decision, the learned magistrate overlooked all those requirements and went ahead to order John Opiyo Arunga to execute a bond of Shs 20,000/= with a surety to keep the peace for six months.

There was no evidence that by John Opiyo Arunga, the applicant, persuading people to join a party called FORD on an unknown date, if what Inspector Mwaniki said is true, he John Opiyo Arunga was likely to commit a breach of the peace.

I think the term "inciting" was wrongly used in the matter where, if what Inspector Mwaniki told the

Court was true, John Opiyo Arunga was merely wooing people to join a party called FORD.

There was no evidence that that party was illegal, and Inspector Mwaniki did not prove before the learned Principal Magistrate that by wooing people to join FORD the applicant John Opiyo Arunga was thereby inciting people to violence or to disobedience of the law contrary to section 96 (c) of the Penal Code as the Inspector claimed in his affidavit.

In short sections 47, 48, 52, 53 and 54 of the Criminal Procedure Code were not complied with.

The learned Principal Magistrate does not seem to have realized that the applicant had denied knowledge of the allegations made by Inspector Mwaniki. Clearly the applicant was condemned unheard.

It follows therefore that the order made by the learned magistrate against John Opiyo Arunga on 19th November 1991 requiring the said John Opiyo Arunga to execute a bond of Shs 20,000/- with a surety to keep peace for six months was not only against the rule of natural justice but was also unlawful.

Consequently that order is hereby set aside under section 3, 64 (1) (b) of the Criminal Procedure Code and that applicant discharged from the bond together with his surety.

Dated and delivered at Kisumu this 9th day of January 1992.

J.M KHAMONI

JUDGE