



IN THE REPUBLIC OF KENYA

HIGH COURT AT KISUMU

CIVIL APPEAL NO. 93 OF 1986

OWINO.....APPELLANT

VERSUS

MADOWO.....RESPONDENT

ORDER

“For reasons to be given later, the appeal is allowed, the judgment and the orders of the High Court set aside and the suit shall be remitted to the High court for hearing *de novo* before a different judge. Costs of the high Court to abide the decision of the High Court.”

In giving the reason for the court’s order, the relevant facts must be stated as concisely as possible.

The plaintiff who was the Ag Treasurer of the Municipality of Kisumu at the material time filed an action against the defendant a Municipal Councillor at the time, claiming that on or about the 21st day of July 1983 at Kisumu the defendant falsely and maliciously published of the plaintiff and of him as the Ag Treasurer the following words:

“3. On or about the 21st day of July 1983 at Kisumu the defendant issued a press release “to all Editors and Radio” and falsely and maliciously published of the plaintiff and of him as the Municipal council of Kisumu acting Treasurer and following words, *inter alia*:

“the actual truth was that the council awarded a Tender for Kshs 130,600 and before that work was started,

he the Ag Treasurer allowed a variation of Kshs 152,816 totalling to Kshs 282,816 without the knowledge of both the Council and the Town Clerk.

He even arranged for the payment to be made before this matter was brought and passed by the council. To prove this a cheque No 70009 dated 7th July 1983 and voucher No 37765 of the same date was written to the contractor and our internal Auditor refused to pass this cheque for payment and advised the town clerk of this irregularity. After observing this serious mistake while in the council meeting, I insisted that the Ag Town Treasurer be suspended for this obvious offence, but Councillor Oloo seriously defended the Ag Town Treasurer.

I would also like to repeat again that arrangements were made to pass this variation wrongly and that two councillors who are close to the Ag Treasurer have come out to defend the treasurer from being suspended. Councillor JB Oloo told me while in the meeting that he would move from his present word to

my word during the coming September 1983 election to ensure that I do not come back to the council because I am trying to chase the Chief Officers. But the fact still remains that the public money is being misappropriated by the officers of the council and we elected councillors must protect the public money. I do request the government to bring the external auditor quickly to check these irregularities to prove to the chief officers and all the people concerned that the council money is being misappropriated by the officers whom some other councillors are defending.”

The plaintiff complained that the words which were maliciously furnished to local newspapers for publication and also distributed by the defendant within and without Kisumu, were defamatory and calculated to disparage the plaintiff as the Ag Treasurer. According to the plaintiff the said words in their natural and ordinary meaning and in the circumstances meant that

- a. the plaintiff as Ag Treasurer misused or conspired to misuse Kshs 152,216 of the Municipal Council
- b. the plaintiff had been guilty of misappropriation
- c. the plaintiff was not a fit person to hold the office at Kisumu Municipality or elsewhere.
- d. The character, credit and reputation of the plaintiff had been brought into public scandal, odium and contempt.

The defendant admitted issuing the press release, but denied publishing concerning the plaintiff and denied that the contents of the press release were false or defamatory. It was further denied that in their natural and ordinary meaning the words, which were true in substance and in fact, bore the meaning suggested by the plaintiff. Alternatively, it was averred that it was fair and in the public interest to publish to members in Kenya who had an interest in the matter and therefore that the occasion was privileged, and the words were fair comment and said in good faith. The next step in this saga was the recording of the agreed issues on 4th September 1984, to be followed on 8th November 1984 by an adjournment to a date to be fixed.

The hearing was commenced on 5th February 1986; and adjourned as part heard to the 28th February 1986. There was a further adjournment to the 19th May 1986 on which day the trial Judge delivered a ruling on an application by the defendant’s counsel to introduce as evidence in the case the minutes of a meeting. Thereafter cross-examination of the plaintiff was proceeded with and defence counsel put the following question to the defendant:

“Is it correct that you are a violent man?”

The trial court disallowed the question as

“irrelevant”.

The record then reads,

“Ruling to be delivered at 2.30 pm”

However at the next sitting, the trial judge delivered his judgment and awarded the plaintiff a sum of Kshs 10,000 with costs.

It is plain that the judgment was wholly irregular because the case was still proceeding in the High Court. The plaintiff had not completed his case. The defendant had produced no evidence at all. There was not before the court the evidence for the plaintiff and in support of the defence. No cross-examination, no submissions by counsel on the evidence and on the relevant law and no reply. In the particular judgment the trial judge did not consider the issues which had been agreed upon. The judge clearly came to the conclusion that he did not have any more time for the case and erroneously assumed that he could prepare a judgment. *Black’s Law dictionary*, 5th edition at page 755 defined “judgment’ inter alia in these terms:

“The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law’s last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceedings.”

Order XVIII of the Civil Proceeding sets out the procedure and the necessary steps for a hearing. A Judge should go simply by what is therein provided. If a judge has not the time to conclude a hearing, he adjourns it to some other date. The procedure under the law does not allow for what was done in the case because manifestly justice was not done.

Dated and delivered at Kisumu this 13th Day of October, 1987

J.O NYARANGI

.....

JUDGE OF APPEAL

F.K. APALOO

.....

JUDGE OF APPEAL

J.R.O MASIME

.....

Ag JUDGE OF APPEAL