DANIEL MUTUNGA NZOKA.....APPELLANT

VERSUS

DUNCAN KISILU SINGI.....RESPONDENT

JUDGMENT

1. The Appellant herein, **Daniel Mutunga Nzoka**, was the original Defendant in Machakos CMCC No. 559 of 2006. In that case, he was sued by **Duncan Kisilu Singi,** the Respondent for defamation. In the lower Court, the Respondent sought both general and exemplary damages as well as costs of the suit.

2. The Respondent's case was that on or about **18/05/2004, 17/07/2004** and **23/07/2004** outside the Respondent's place of business to wit **Zombe Junior Supermarket** in the first two instances, and at **Plot No. 322** in the third instance, the Appellant uttered words which were defamatory to him.

3. The words the Appellant was alleged to have uttered were said in Kiswahili thus:

Duncan Kisilu Singi in Mchawi na anayo majini. Ameiba na kunyakua plot ambayo ingepaswa kujengwa kanisa. Hiyo plot imepeanwa kwa kanisa na mungu. Msinunue vitu kwa maduka yake kwa sababu ni mtu mwovu.

4. As rendered in English by the Respondent's counsel and not objected to by the Appellant at any point during the proceedings, the alleged utterance translates thus:

Duncan Kisingi Singi is a wizard and has got "jinis" (devilish spirits), has stolen and grabbed the plot which would have been used for building church. That plot has been given by God. Do not buy things in his shops because he is an evil person.

5. In addition to filing the civil suit, the Respondent made a criminal complaint when the Appellant allegedly persisted in defaming him even after institution of the suit. That criminal complaint translated into Kitui Principal Magistrate's Criminal Case No. 1413 of 2004 ("*Criminal Case*"). Ultimately, that case ended with the Appellant being convicted of offensive conduct contrary to **section 94(1)** of the **Penal Code.**

6. The Respondent prevailed in the civil case as well. Part of the evidence he tendered to persuade the Learned Magistrate to enter a verdict in his favor were the charge sheet, proceedings and judgment in the Criminal Case. The Learned Magistrate entered judgment for the Respondent and awarded general damages in the amount of **Kshs. 500,000/=.** She declined to award any exemplary damages.

7. The refusal to award exemplary damages did not placate the Appellant, however. He preferred this appeal on **11/11/2008** and listed three grounds of appeal. They are as follows:

a. The Learned Trial Magistrate erred in law and facts when she entered judgment in favour of the plaintiff against the weight of evidence.

b. The Learned Trial Magistrate erred in law and facts when she made findings and holding on malice and loss which were not based on the evidence on record.

c. The Learned Trial Magistrate erred in law and facts when she assessed and awarded the respondent general damages which were not proved in evidence or which were manifestly excessive.

8. By an order of *Justice Waweru* given on **02/12/2010,** the Appeal was argued by way of written submissions. The parties filed their respective submissions and on **04/05/2011**, they appeared before *Justice Kihara* when they highlighted their written submissions. Unfortunately, *Justice Kihara* left the station before he could deliver a judgment. The parties appeared before me on **25/11/2011** and agreed that I should craft the judgment based on the record as it existed on that day.

9. In his submissions, Learned Counsel for the Appellant, Mr. **Onesmus Makau** argued **grounds 1** and **2** in the Grounds of Appeal together. He labeled them "*weight of evidence."* In turn, under that heading, he made three separate arguments. I will enumerate them here.

10. First, **Mr. Makau** argued that the record does not support the Learned Magistrate's finding that the alleged defamatory words were uttered. His main argument in this regard is that the words alleged to have been uttered are captured differently in the charge sheet in the Criminal Case and in the Plaint. Also, he argued that the dates when the words were allegedly uttered are different in the charge sheet and the Plaint and evidence adduced at the civil trial. For that reason, **Mr. Makau's** position is that the documentary evidence produced (namely the charge sheet, proceedings and judgment in the Criminal Case) far from proving the Respondent's case, introduce significant doubts whether the defamatory words were, in fact, uttered. What about the direct evidence adduced by Respondent's witnesses at trial? These, **Mr. Makau** insisted, should be dismissed because they were not uttered by fellow business people, or customers, or former customers or church members. Instead, the evidence adduced was by employees of the Respondent who cannot be said to be independent.

11. Next, **Mr. Makau** argued that the words, even if uttered, were not defamatory. He got to that result by, first, arguing that the words were not malicious and they did not refer to the Respondent. The Appellant was merely talking of "*Zombe"* the place of witchcraft but was not specifically referring to the Respondent. Since the Respondent is not the only person who hails from **Zombe,** it cannot reasonably be said that the words even if uttered by the Appellant referred to the Respondent.

12. **Mr. Makau** also contended that the words uttered could not, in any event, be defamatory because they led to no loss. As I understand it, **Mr. Makau's** position is that there could be no defamation without loss, and since going by the Respondent's own admission his business did not suffer as a result of the defamation and that his business actually expanded, no defamation was, in fact, proved.

13. I will pause here first to deal with the issues raised by **Mr. Makau** regarding sufficiency of evidence to sustain a verdict of defamation on a preponderance of evidence.

14. Let us begin with the law. As **Mr. Makau** writes in his written submissions, quoting the authoritative *Winfield & Jolowicz on Tort* (16th edition) at p. 140, to succeed on a cause of action in defamation, a plaintiff must prove the following five elements:

a. First, the words complained of must actually refer to the Plaintiff;

b. Second, the words must be defamatory i.e. the words must tend to lower or actually lower the character or reputation of the Plaintiff in the eyes of right-thinking members of the society;

c. Third, the words must be published to a third party;

d. Fourth, the words must be false i.e. truth is an absolute defence to an action in defamation;

e. Fifth, for slander (which is the cause of action here), there must be proof of resultant damage.

15. As to the fifth element of slander, as **Mr. Makau** concedes, there are exceptions. Four such exceptions are known to our law on defamation in Kenya. They are:

a. First, if the words complained of impute a crime for which the plaintiff can be made to suffer physically by way of punishment;

b. Two, if the words impute that the Plaintiff has a contagious or infectious disease;

c. Three, where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business. This exception is codified in section three of the Defamation Act;

d. Four, if the words impute adultery or unchastity to a woman or girl.

16. From this concise re-statement of the law, we can quickly proceed to resolve certain issues raised on appeal.

17. First, it is my view that if the Respondent in fact proved the alleged words were uttered and that they were defamatory, he would not have needed to prove special damages. To this extend, I disagree with **Mr. Makau's** position that the Respondent does not fit within any of the exceptions carved out for slander which are actionable *per se.* In fact, the Respondent comfortably fits into two of the exceptions. First, the Respondent fits into the first category where slander is actionable *per se* if the uttered words imputed that the person defamed is a criminal for which he can be made to suffer physically by way of punishment. Practicing witchcraft constitutes a crime under the laws of Kenya. See **section 5** of the **Witchcraft Act**, **Chapter 67** of the **Laws of Kenya.**

18.Second, the words, if uttered and found to be defamatory, were calculated to injure the Respondent's trade or business. On the facts of this case, I do not accept the distinction the Appellant sought to draw between disparagement of the Respondent in his personal capacity and disparagement of his business. One need only cite the last sentence of the offending words: "*Do not buy things in his shops because he is an evil person."* If proved to have been in fact uttered, there is no question those words target the Respondent's business.

19. On two separate grounds, therefore, I hold that there was no requirement to prove any special damages in this case. All the Respondent had to prove were the first four elements in the tort of defamation as outlined in **paragraph 14** above.

20. So were the words uttered? As adumbrated above, **Mr. Makau** complains that it cannot be said that the Respondent proved on a balance of probabilities that the alleged words were, in fact, uttered. I disagree. I am of the opinion that the Learned Magistrate was perfectly entitled to reach the conclusion that the words complained of were uttered.

21. I will first deal with **Mr. Makau's** complaint that the words captured in the charge sheet produced as evidence in the civil suit differ from the words captured in the Plaint. As outlined in **paragraph 4,** above, in the Plaint the words which were allegedly uttered are:

Duncan Kisingi Singi is a wizard and has got "*jinis*" (devilish spirits), has stolen and grabbed the plot which would have been used for building church. That plot has been given by God. Do not buy things in his shops because he is an evil person.

22.On the other hand, the (un-amended) charge sheet reads:

On the 9th June 2004 at Kitui township in Kitui District within the Eastern Province, at a public place namely outside Kitui Bus Park near Zombe Supermarket, used threatening, or abusive or insulting words that one Duncan Kisilu Singi is a wizard and owns devilish spirits (Majini) with intent to provoke a breach of peace.

23. Looking closely at the two renderings of the utterances, I am not persuaded they are different enough to have disentitled the Learned Magistrate from her view that the Respondent had established on a preponderance of evidence that the Appellant uttered the words complained of. It is clear from the charge sheet as read together with the proceedings of the Criminal Case that the words complained of are rendered in versions which are quite close. One can explain the slight differences to the different natures of the two proceedings which lead to different emphasis. In any event, the constant part of the alleged utterance is that the Respondent *"is a wizard and owns devilish spirits"* which, as I have held above, is actionable *per se*.

24. **Mr. Makau** probably has a stronger argument on the apparent discrepancy in the dates: The un-amended charge sheet talks on **9/06/2004** while the Plaint talks of **18/05/2004, 17/07/2004** and **23/07/2004. Mr. Makundi**, Learned Counsel for the Respondent, in my view, adequately responded to that point by making two arguments. First, he points out that the charge sheet was, in fact, amended although the Respondent did not produce the amended charge sheet in the court below and instead produced the un-amended one. To buttress his point, **Mr. Makundi** refers to the Record of Appeal at **P. 56** and **p. 68.**

25. At **p. 56** of the Record of Appeal, the proceedings from the Criminal Case contain the following entry for **13/01/05:**

Court: Prosecutor would like to make some amendment on the charge sheet on the date.

Makundi: No objection.

Court: Amendment allowed.

Amendment charge is read to the accused.

Accused: Not true.

Accused: Ready to proceed.

26. The judgment in the Criminal Case begins at **p. 68** cited by **Mr. Makundi**. At **paragraph 2** it reads:

The particulars of the charges are that on the diverse dates between 18th May 2004 and 22nd July 2004, at Kitui township in Kitui Dsitrict within Eastern Province at a public place namely outside Kitue Bus Park near Zombe Supermarket, used threatening or abusive or insulting words that one Duncan Kisilu Singi is a wizard and owns devilish sprits (Majini) with intent to provoke a breach of peace.

27. **Mr. Makundi** is right. As read together, these two documents which make part of the record before the Learned Magistrate in the court below are unmistakable that the charge sheet was, at some point during the Criminal Case, amended. That amendment to the dates is captured in the judgment in the Criminal Case. The import of this holding is that, therefore, the apparent discrepancy in the dates, occasioned by the failure of the Respondent's counsel in the court below to put in the amended charge sheet in evidence, is not fatal to the Respondent's case. In my view, it does not raise sufficient doubts to have disentitled the Learned Magistrate from reaching the conclusion that the words complained of were, in fact, uttered.

28. In considering this position, one must remember that **sections 46** and **47A** of the **Evidence Act** elevates the claims of the Respondent, even while acknowledging that the exact words uttered are not taken as conclusively established by virtue of the fact that they are contained in the judgment. However, the judgment in the Criminal Case establishes conclusively that the Appellant was convicted of the offence charged.

29. On the same issue of whether the utterance was proved to have been made, **Mr. Makau** also complained that the evidence of the words uttered was not adduced by independent witnesses but

employees of the Respondent. The suggestion is that, therefore, the Learned Magistrate was in error to accept such evidence at face value. All I can say here is that the Learned Magistrate who had an opportunity to see and hear the witnesses, elected to believe the Respondent's witnesses and accorded weight to their testimony. There is nothing in the Record of the lower Court that suggests to me that she was not entitled to do so.

30. In the end, therefore, I have come to the conclusion that the Learned Magistrate was not in error in making a finding that there was, indeed, an utterance in the form captured in the Plaint.

31. The next question we must attend to, then, is whether that utterance was defamatory. The Appellant says it was not. As outlined above, the Appellant makes two arguments in this regard. First, he says that he was not referring to the Respondent but to "*Zombe"* the place. I can easily dismiss this argument since I have already concluded above that the words uttered included a clear reference to the Respondent.

32. The more weighty argument by the Appellant in this regard is that the words uttered cannot, by definition, be defamatory if no loss is reported or shown. The innovative argument by **Mr. Makau** here is that for words to be defamatory, they must be shown to have affected the reputation of the person complaining of defamation. This would usually be measured by the degree to which members of the public, for example, shun the defamed person. Here, however, the Respondent, in his own testimony, averred that his business has not, in fact, suffered as a result of the allegedly defamatory words. If his customers did not shun his business because of the words, how then could the Learned Magistrate have concluded that the uttered words were reputation-lowering?

33. That is a good question. However, I think **Mr. Makau** is conflating two aspects of the tort of defamation. The first aspect is concerned with the question whether the reputation or esteem of the Plaintiff has been lowered. The second aspect is concerned with the question whether one can or needs to prove actual damage resulting from the lowered reputation. The measure of the first can be but need not be loss to the business or reduction in the volume of the business of the Plaintiff. It can be proved by other means such as, for example, direct evidence of witnesses who testify that they know of their own knowledge that the reputation of the Plaintiff was, in fact, lowered in the eyes of right-thinking members of the society.

34. In this case, the Plaintiff himself testified that members of the church started shunning him. They would spit at him and say he is a person "*wa majini"* and "*uchawi*." Similarly, **PW3**, **Mwema Kinunu** testified that:

When I heard Pastor [Appellant] talk of Duncan Singi as possessed by evil spirits I started fearing Duncan. I did not view him as good man.

35. The Learned Magistrate was entitled to consider such direct evidence and conclude that the Respondent's reputation had been lowered. There was no need to measurably demonstrate the lowering of reputation with business losses as the Appellant suggests. The fallacy of holding that it is a requirement to prove loss in order to succeed in showing loss of reputation in defamation cause of action is that such an approach would have the effect of effectively erasing the classes of defamation which are actionable per se i.e. without proving special damages.

36. At this point, only one thing is left to deal with. This is the issue of quantum. Were the damages awarded to the Respondent manifestly excessive? To correctly answer that question, we should state the applicable legal principle. The principles upon which an Appellate Court will interfere with quantum are well settled in Kenya. The leading authority is *Butt v Khan* (1977) KAR 1 where Law JA held:

An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which as either inordinately high or low.

37. In defamation cases, this legal principle applies in even greater force as the Court of Appeal reminded appellate courts in the case of *Johnson Evan Gicheru v Andrew Morton & Another* (Civ. Appeal No. NAI 314 OF 2000). In that case, Justice P.K. Tunoi said:

The latitude in awarding damages in an action for libel is very wide, and the one thing a court of appeal must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded by the judge [or magistrate] below.

38. After reminding trial courts that in assessing damages they should look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given, Justice Tunoi, drawing from the English case of *Jones v Pollard* [1997] EMLR 233-243 proceeded to provide a checklist of factors courts should consider in assessing compensation in defamation cases:

a. The objective features of the libel itself such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.

b. The subjective effect on the plaintiff's feeling not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself;

c. Matters tending to mitigate damages, such as the publication of an apology;

d. Matters tending to reduce damages.

e. Vindication of the plaintiff's reputation past and future

39. The Learned Magistrate awarded a sum of ***Kshs. 500,000/=*** as general damages and refused to award exemplary damages. While the Learned Magistrate did not enumerate all the factors she considered in reaching the sum of **Kshs. 500,000/=,** she had concluded that:

a. The Appellant had acted with malice in repeatedly uttering the defamatory words;

b. The Respondent had suffered damage to his reputation which led to his being shunned by right-thinking members of the society; and

c. While the Respondent's business was in the upswing, he must have suffered loss of business over a period of time before the words of the Appellant were proven to be untrue.

40. The Learned Magistrate should have translated her findings into the schema provided by our case law in deciding what damages to award in defamation cases. If she had done that, she would have taken into consideration the following factors which are apparent in her findings;

a. The conclusion, amply supported by evidence, that the Appellant acted with malice;

b. The fact that the Appellant remained singularly unrepentant throughout the trial and, indeed, continued in the defamation even after the Respondent had filed suit;

c. The fact that the Appellant aimed to publish the offending words to the widest possible group of people by use of a Public Address system;

d. The fact that, at times, the Appellant strategically published the offending utterances right outside the Respondent's place of business so as to have maximum effect;

e. The fact that the Appellant steadfastly refused to offer any apology; and

f. The distress, hurt and humiliation caused to the Respondent especially considering the effect of the offending words among the general population. For example, the Respondent testified (and his testimony

was uncontested) about the effect the defamation had on him personally and on his children.

41. After due consideration of these factors, I cannot say that the amount the Learned Magistrate awarded is in any way so high as to be a completely erroneous estimate of the compensation due to the Respondent. In particular, it is obvious that the Appellant conducted himself in a particularly egregious way and persisted in doing so until he was convicted of a criminal offence. Evidence shows he acted with malice; and evidence shows that he advertently aimed to reach the largest number of people possible. He also repeated the offending words many times without apology or proof. It is no answer to say that there has been no measurable loss to the Respondent's business. There is a reason why some categories of defamation are actionable *per se*.

42. In the circumstances, the appeal herein must fail. It is hereby dismissed with costs.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **27TH** day of **FEBRUARY 2012**.

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J.M. NGUGI
JUDGE