REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 67 of 2005

PETER MARANGA NYANG'AU ……..…… APPELLANT

VERSUS

WILLIAM NYAMWEYA ……..…… RESPONDENT

JUDGMENT

The respondent filed a suit against the appellant and stated that on 11th December, 2003, the appellant uttered words which were defamatory of him. The words complained of were in Kiswahili language and were as follows:

"Huyu Ndiye chambazi aliyetusi mimi."

The said words interpreted into English language mean:

"This is the thug who abused me."

The respondent alleged that the said words were interpreted by the hearers of the same to mean that he is a thug and he abuses people. He alleged that the words were uttered at Metamaywa market where he was with his friends. As a result he had been injured in his

reputation and he claimed general damages for defamation.

The appellant filed a statement of defence and denied having ever uttered the alleged defamatory words. He urged the court to dismiss the suit with costs to him.

During the hearing the respondent, who was a Deputy Headmaster at Tinderet Primary School, testified that on 11th December, 2003, at about 1.00 p.m. he was at Metamaywa market, having visited the office of the Education Officer, Nyansiongo. He was with committee members of the school and a fellow teacher known as Samuel Abuga Isanda. While there, the appellant appeared with two police officers and pointed at him saying:

"Huyu ndiye jambazi aliyenitusi."

The police officers arrested and took him to Keroka police station. He was held there for some time but was later released without any charges having been preferred against him. The respondent complained that his reputation had been damaged and particularly so in the eyes of those who were with him and in the school community where he was teaching.

In cross examination, the respondent denied having abused the appellant. He reiterated that the alleged defamatory words were uttered in the presence of several people who included Samuel Abuga Isanda, one Mr. Mogita and one Mr. Enock.

Samuel Isanda, PW2, corroborated the evidence of the respondent in all material aspects. He added that at the material time there were many people at Metamanywa market since it was a market day.

In his defence, the appellant denied having uttered the alleged defamatory words. He said that he was a chairman of a Tea Buying Centre and he had previously dealt with the respondent in that capacity. He said that in the year 2001 the respondent wanted to sell his tea leaves at the buying centre but he had not contributed to the construction of the centre. He refused the respondent from selling his tea at that Tea Buying centre. He further stated that on 5th May, 2003 he met the respondent and he was abusive. He reported him to the area chief. He also made a complaint to the area District Officer. The respondent was summoned by the Chief and the District Officer but he failed to show up. Thereafter he received a letter from M/s Nyamwange Advocates telling him to stop intimidating the respondent.

The appellant reported the matter to Keroka Police station. On 11th December, 2003, he went to the said police station and took with him two police officers. They proceeded to arrest the respondent. He alleged that the respondent was alone at the time of the arrest. In his view, the respondent had filed the suit against him because of the earlier disagreement that existed between them.

The appellant called **Police Constable Zablon Oguttu, DW2**, who was then attached to Keroka police station. He testified that sometimes in December, 2003, the appellant went to the station and reported that the respondent wanted to assault him over a disagreement regarding sale of tea leaves. On 11th December, 2003, the appellant returned to the station and reported that he had seen the respondent. They went together to Metamaywa trading centre where the appellant identified the respondent and they proceeded to arrest him. At the time the respondent was alone and the appellant did not utter any word at him, DW2 stated.

In cross examination, DW2 said that the arrest was effected at around 5.00 p.m. The respondent had some books with him which he gave to his wife. The witness could not recall whether the arrest took place on a market day.

The learned trial magistrate was satisfied that the respondent had proved his case on a balance of probabilities and awarded him general damages in the sum of Kshs. 20,000/=. Being aggrieved by the said judgment, the appellant preferred this appeal. The grounds of appeal were as follows:

"1. The learned trial magistrate erred in law and in fact when he made a finding that the respondent had proved his case on a balance of probabilities notwithstanding the overwhelming evidence of the appellant.

2. The learned trial magistrate erred in law and in fact by holding that the word "chambazi" was actionable *per se*.

3. The learned trial magistrate misdirected his mind on the ordinarily meaning of "chambazi" when infact such word does not exist in any Kiswahili vocabulary.

4. The learned trial magistrate failed to properly or at all evaluate the appellant's submissions vis-à-vis the law relating to slander and thus arrived at a wrong finding.

5. The learned trial magistrate failed to consider the evidence of the appellant and his witnesses and thus arrived at a wrong decision.

6. The learned trial magistrate misdirected himself as to the principle rule of pleadings vis-à-vis:
Parties are bound by their pleadings and provision of particulars in defamation suits. (sic)

7. The learned trial magistrate erred in law and in fact when he inferred a meaning to a non-existent word in Kiswahili language."

The appellant asked the court to allow the appeal and set aside the trial court judgment.

When this appeal came up for hearing on 25th May, 2010, the advocates for the parties agreed by consent that the appeal be canvassed by way of written submissions. They proceeded to file the submissions and I have perused the same.

Grounds 1, 4 and 5

The appellant's counsel submitted that at the time of the arrest the appellant did not utter a word directed against the respondent. He referred to the evidence of the appellant and DW2. He added that the respondent was alone at the time of the arrest. However, according to DW2 the respondent with his

wife. The respondent had said that he was with PW2 and other committee members. The learned trial magistrate considered the evidence from both sides and chose to believe that of the respondent.

Ground 6

The appellant's counsel submitted that the respondent's pleadings were fatally defective for failure to provide the particulars of slander and the inference of the ordinary and natural meaning of the words complained of and how they affected his reputation in the society.

Grounds 2, 3 and 7

Counsel submitted thatthe word "chambazi" does not exist in Kiswahili dictionary. It cannot therefore be defamatory if it is non-existent.

On the other hand the respondent's counsel submitted that the learned trial magistrate was right in holding that the appellant had uttered the alleged defamatory words and in his award of general damages. He further submitted that the word "chambazi" was clearly understood to mean a "thug." It mattered not whether it had been misspelt, it's meaning was clear. He added that the respondent complied with the requirements of **order VI rule 6 A (1)** by providing all the necessary particulars as required. This rule provides as hereunder:

> **"Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense".**

The respondent's plaint did not contain any particulars as required. It did not therefore comply with the mandatory provisions of the law as cited herein above.

Did the appellant utter the alleged defamatory words?

The appellant denied having ever uttered the words complained of. He however stated that on 5th May, 2003 the respondent had abused him. As a result he had reported him to various authorities including the police. DW2 supported his evidence. The learned trial magistrate who had the benefit of seeing the parties and their witnesses and observing their demeanour as they testified believed that the appellant uttered the words complained of. I have no reason to hold otherwise. It is unlikely that the appellant quietly pointed out the respondent to the police without uttering a word about him. In my view therefore the appellant uttered the alleged words.

The next issue for determination is whether the words complained of were defamatory. The essence of a defamatory statement is tendency to injure the reputation of the person against whom the statement is made. It is generally accepted that a statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.

According to Halsury's Laws of England 4th Edition Volume 28 at Page 23;

> **"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense".**

In determining the meaning of words for purposes of defamation the court does not employ legal construction, it will consider the layman's understanding of the same.

The words that were uttered by the appellant were – **"Huyu ndiye chambazi aliyetusi mimi,"** While I agree that there is no word like **"chambazi"** in Kiswahili language, the meaning of that word to an ordinary man in the context it was said is quite clear. The correct word is **"Jambazi"** meaning a **"thug".** A thug is a tough and violent man, a criminal or a member of a gang of robbers. I would therefore agree that the above quoted words translated into English language mean – **"This is the thug who abused me".** Those words in their ordinary meaning are defamatory.

The next issue to consider is whether the defamatory words aforesaid can found a cause of action for slander. At common law slander is not actionable ***per se***, proof of special damage is necessary except in certain instances where:

(a) the words impute a crime for which the plaintiff can be made to suffer physically by way of punishment,

(b) the words impute to the plaintiff a contagious or infectious disease,

(c) the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business.

(d) The words impute adultery or unchastity to a woman or girl.

See **GATLEY ON LIBEL AND SLANDER, 9th Edition Pg 104.**

Our own law also categorises slander into two broad categories, that which is actionable ***per se*** and that which requires proof of special damage. See **sections 3, 4** and **5** of the **Defamation Act Cap 36 Laws of Kenya**.

Words can be defamatory but not actionable ***per se***. Given the nature of the defamatory words that were uttered by the appellant, the respondent was under a legal obligation to prove special damages in order to succeed in his claim.

What constitutes special damage for purposes of such an action? It is **"some actual temporal loss – the loss of some material or temporal advantage which is pecuniary or capable of being estimated in money".** See **GATLEY ON LIBEL AND SLANDER** (supra) Pg 119. Did the respondent prove such damage? The simple answer is no, he did not. He merely stated as follows:

> **"My reputation has been damaged in the community and more so in the school where I teach. I pray for general damages for defamation and costs of the suit."**

That being the case, the learned trial magistrate erred in law in finding for the respondent. The slander was not actionable ***per se*** and special damage was not proved, see **WYCLIFFE A. SWANYA –VS- TOYOTA EAST AFRICA LTD. & FRANCIS MASSAI**, Civil Appeal No. 70 of 2008 at Nairobi (unreported).

For these reasons, this appeal must be allowed. I set aside the judgment entered for the respondent before the trial court and substitute therefor an order dismissing the respondent's case. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF JULY, 2010.

D. MUSINGA
JUDGE.

9/7/2010
Before D. Musinga, J.
Mobisa – cc
Mr. Nyambati HB for Mr. Ogari for the appellant
Mr. Anyona HB for Mr. Rogito for the Respondent
Court: Ruling delivered in open court.

D. MUSINGA
JUDGE.