



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 95 of 2011

EMMANUEL
OMENDA.....PLAINTIFF

-VERSUS-

SAFARICOM
LTD.....DEFENDANT

JUDGEMENT

The plaintiff, **Emmanuel Omenda**, instituted this suit by way of a plaint dated 17th March, 2011 in which he claims damages for defamation, damages on the foot of aggravated, exemplary and punitive damages, costs and interests. The plaintiff complains that on or about 30th September, 2010 when visited the defendant's retail shop situated at Village Market to procure mobile phones in the course of his employment as a procurement supervisor with United States (U.S.) Embassy at Nairobi, he was detained at the offices of the defendant for 2 hours and later arrested by security agents of the defendant and handed over to the police officers from Gigiri police station. In the course of the foregoing, he was handcuffed, frogmarched and bundled into the boot of the defendant's security van and taken to Gigiri police station. The plaintiff contends that the defendant's agents did not seek any explanation, identification or information before reporting to the police and avers that his arrest happened in the presence of many shoppers, diplomatic staff and business people, some of whom knew him as he was a regular shopper at the village market. According to the plaintiff, during his arrest one of the defendant's officer uttered the following words in Kiswahili:

“Sasa tumemshika mmoja wa wale wezi wa kadi. Ataona”

Hetranslates this to mean:

“We have now arrested one of the credit card thieves. He will suffer the consequences”

According to him, the said words uttered by the defendant's officer were understood by all and sounds to mean in the ordinary way or in the alternative by way of innuendo that:

- i) The plaintiff was a fraudster
- ii) The plaintiff was a member of a cartel of credit card thieves
- iii) The plaintiff was not fit for what he purported to be
- iv) The plaintiff had held himself as a procurement officer for the U.S. Embassy

- v) The plaintiff was a common thief
- vi) The plaintiff is a person of doubtful moral standard and probity.
- vii) The plaintiff was attempting to obtain goods by false pretence.

The said the authorship and publication of the said words by the defendant's officer, he says, were driven by malice, malevolence and spite. Whereas prior to the publication of the said words he enjoyed an excellent reputation in Nairobi and in the country, he has now been exposed to ridicule, odium and contempt by right thinking members of the society which has resulted to massive injury to his credit and reputation for which he claims damages.

The defendant filed a defence on 29th July, 2011 in which it stated that the plaintiff visited its retail shop at the Village Market on the material date and presented a local purchase order, issued by the U.S. Embassy for supply of several mobile phone handsets worth Kshs. 239,995/-. According to the defendant, since it was not normal for a corporate customer such as the U.S. Embassy to collect such a large order from the retail shop, it was incumbent upon its personnel at the shop to establish authenticity of the order from the defendant's corporate sales department as well as the credit control department and the procurement department of the U.S. Embassy. The defendant states that the usual contact person at the said Embassy, one **Mr. Matheka** said that he was not aware of the order and the contact person indicated on the order, one **Joseph Kamura** could not be reached on any of his telephone numbers.

The defendant further avers on contacting the Kenya Commercial Bank (KCB) Card Centre to obtain authority to use the credit card the plaintiff had presented to it, KCB declined to authorize the transaction and one **Mr. Edmund Kituri**, the KCB Fraud Officer requested the shop personnel to detain the card as it had been used on a transaction for Kshs. 205,000/- at Nakumatt Village Market the previous day which had been dishonoured. The defendant says that this raised its sales personnel suspicion regarding the *bona fides* of the entire transaction and consequently it contacted the Village Market Security Office who in turn contacted the Diplomatic Police who went to its shop and left with the plaintiff. The defendant denies that as a result of its actions the plaintiff was handcuffed or bundled into the boot of its security van and further denies that its staff uttered the slanderous words alleged by the plaintiff.

At the hearing the plaintiff, **Emmanuel Omenda**, who testified as PW1, reiterated the contents of the plaint and relied on his statement filed in Court on 17th March 2011. From his evidence, he is a Procurement Supervisor for the United States Embassy, at Gigiri Nairobi where he has been working for a period of 18 years. As part of his duties, he is issued with a Citibank NA Credit Card bearing all his names for the purposes of procurement and other businesses authorized by his employer. On 30th September 2010, he was instructed to procure mobile phones for his employer's staff worth Kshs. 240,000.00 and for the said purpose proceeded to the Safaricom Retail Outlet at Village Market in his official car. On his way he met two of his friends known as **George Okeyo** and **Sakimpa Meteor**. According to him, when doing the purchase, he normally presents his card and identifies himself using his identity card. He referred to his current purchasing card but clarified that that was not the same card he was using at the material time since that card had expired on 30th September 2010. He, however, testified that apart from the date of expiry and number the other particulars are the same. On reaching the said shop he gave the purchase order, his credit card and proper identification to enable them process his order. He was able to identify the lady he was dealing with in court. The said sales lady kept on going into the inner room. When after 10 minutes lapsed, he inquired why it was taking too long, was told to wait while the order was being processed. After waiting between half an hour and 40 minutes he saw 2 uniformed police officers and a Village Market security officer. On trying to find out what was happening he was told that his card was fraudulent. He gave out his employment card for confirmation that he was employed by the Embassy and requested for the purchase card to confirm with the City Bank but this request was refused. He then told them to verify and someone called his boss who talked with somebody at Safaricom and also to one **Lisa**. The defendant however, did not listen. Instead someone said '*Tumeshika Mwizi wa kadi*'. The shop according to him is situated on the upper ground floor opposite Nairobi Sports House where people do pass and there were people who could know him. He was arrested by the said security officers in presence of among others his said two friends as well as the defendant's

staff. He was handcuffed and held by the pants from the rear and pushed out of the shop with the guards in tow. He was taken to a security vehicle near the gate of the Village Market 25 metres away through a route within the shopping Mall during which time he saw several people working with various Diplomatic Missions staring at him. According to him the experience was very shameful. He was then bundled into the boot of the said vehicle and taken to the Gigiri Police Station from where he was informed that he was arrested for Credit Card Fraud. It was then that he explained that he was working for the embassy and was allowed to place a call to the Embassy after which officers from the said Embassy came and confirmed his identity. He was eventually released after one hour. The officer from the Embassy called Citibank from the Police Station but the Bank said they had not declined the Card. He was, however, unaware whether the defendant called the said Bank. He said that they were together with the retail lady. According to him he had no transaction with Kenya Commercial Bank since his card was issued by Citibank and therefore any verification should have been with Citibank. According to him, had he been afforded an opportunity to call Citibank the incident would not have occurred. According to him, whenever the card is declined he usually called and the same is reinstated as such occurrences have happened in the past. The whole ordeal embarrassed him and portrayed him as a shoplifter, a racketeer, and a fraudster. Although he gave his contacts and was assured that the matter would be investigated, no such investigations were, according to him, conducted prompting the filing of the present suit. In his view, the whole episode was an act of malice since the defendant did not bother to verify from him or his expressed employer yet the card was good for value and he had proper purchase order from the embassy and it would not have been difficult to verify hence his claim for damages. The plaintiff in support of his case produced as exhibit 1 the bundle of documents filed herein;

In cross examination by **Mr. Kuyo**, learned counsel for the defendant, the plaintiff said he had worked for the Embassy for 19 years as a Procurement Supervisor and dealing with purchase orders is part of his duties. He, however, admitted that he had not dealt with the defendant at the Village Market on purchase orders prior to this day. The procedure according to him is that once a Purchase Order is presented he is given a delivery which he signs and the invoice is then sent to the employer. However, with respect to the kind of order that he had the charges are levied against the Card and hence there is no necessity to send an invoice. Although the order is entitled a credit order, the witness said it was not an order on credit. According to him he was never told that the card had been rejected but was only told that the order was being processed. Further it is only when the purchases are being done through an LPO that the order is sent by the Embassy in advance. According to him there were between 30-40 people in the shop and the lady who shouted at him was the one in court but without telling him why he was being detained. He confirmed that the officers who arrested him were Diplomatic Police who handcuffed him. He further stated that the old card was expiring on 30th September 2010 after which date he would not have been able to transact business with the same. Although he was not sure whether the saleslady came with them in the same vehicle or followed in another vehicle, he said that she was present at the Police Station. He admitted that the card was eventually given back although he could not remember writing a statement at the police station and the goods were eventually collected.

In re-examination PW1 maintained that if an explanation had been sought the incident would have been avoided. He said that his colleagues usually shop at the Market.

The second witness for the plaintiff was **Meteur Sakimpa**, who testified as PW2. He similarly adopted the contents of his statement filed herein as part of his evidence in chief. According to him on 30th September 2010 he was at Village Market when he met the plaintiff with whom they chatted briefly after which he decided to wait for the plaintiff while the plaintiff went into the shop to purchase the ponies. In the meantime he decided to proceed to the nearby Nairobi Sports House. After 20 minutes he went back to the shop where he witnessed a commotion in which the plaintiff was arrested by policemen who handcuffed him on the ground that the plaintiff's credit card was fraudulent. His attempts to talk to the police did not yield any fruits and the guards and Safaricom Shop Staff were loudly saying that they had got a credit card thief. The plaintiff was bundled in the boot of a car and taken to Gigiri Police Station and he followed them. According to him the incident shocked him because he did not think the plaintiff was a thief and yet he was arrested like a common criminal.

In cross-examination by **Mr. Kuyo**, PW2 stated that he was looking for a camping mattress although he

did not get the same. He said the shop had a number of people between 10-15 since it was a busy shop. According to him the person who was talking was a lady. The police officers who arrested the plaintiff, according to him, were two. Although he did not accompany the plaintiff, he followed them in his vehicle and did not record a statement.

The last witness for the plaintiff was **George Odhiambo Okeyo** as PW3. He, similarly adopted his statement filed herein as part of his evidence in chief. According to him, on 30th September 2010 at about 11.00 am he was doing his routine consultancy work at the Village Market when he decided to visit Safaricom Retail Outlet Shop to procure some services. While there he met the plaintiff, a member of the same welfare club as the witness and chatted with him and the plaintiff explained to him his mission in the shop. After a while the plaintiff went to talk with the saleslady. Suddenly he saw a security officer of the premises together with some two police officers walk in and heard the lady claiming they had arrested a credit card thief. The plaintiff was arrested, handcuffed and bundled out of the shop with one of the police officers holding him by his trousers and was pushed all the way to the gate. His attempt to obtain more information from the plaintiff became difficult but later came to know that the person being referred to as the thief was the plaintiff. His endeavour to get more information from the police were similarly unfruitful since they informed him it was a security matter. The incident according to him shocked him since a member of the welfare club was being referred to as a thief in presence of many customers. Although he knew the plaintiff was working for the Embassy he did not know him that well and thought that maybe he was also involved in other activities. He accordingly called some members of the welfare and informed them of what had happened. According to him the plaintiff was pushed all the way to a vehicle which was next to the gate 25-40 metres away in the full view of several people.

In cross-examination, PW3 stated that he was unable to purchase the phone due to the commotion. While saying that the police officers were 2 he was not sure about the number of the security officers from the Village Market. According to the witness only the police officers and the security officer walked out with the plaintiff who was handcuffed in front and bundled into the back of the van. At about 1.00 pm the plaintiff told him that he had been released. He confirmed that the plaintiff told him he worked for the embassy. The witness however said he did not know the Sakimpas.

On the part of the defence, the first witness to testify was **Patricia Ngovi**, who was at the material time a retail agent with the defendant, who also recorded a statement which was filed herein and relied thereon as part of her evidence in chief. According to her on 30th September 2010 at about 11.00 am the plaintiff went into the defendant's shop at Village Market with a Local Purchase Order containing a list of phones which the plaintiff wanted to purchase on behalf of the American Embassy. Since the witness had not handled such a transaction before and did not know what to do with it, she handed over the document to her supervisor **Adeline Wa-Mwenje** in the back office who in turn handed over the same to the internal analyst, **Lucy Gitonga** for internal verification exercise. In her evidence all corporate clients have accounts and do not use LPOs and hence the same do not pass through the service desk. In her testimony, **Lucy Gitonga** similarly informed her that she had not experienced such a procedure and checked whether there was an advanced request. **Ms. Gitonga** then told her she would check with Credit Manager who according to information given to the witness by **Ms. Gitonga** did not want to commit himself. According to the witness the LPO was not in the usual form and it was peculiar that the plaintiff wanted to pay using a personal credit card from Citibank. The witness in meantime informed the plaintiff that they were processing the order. According to the witness when the plaintiff was informed of this he offered to pay using his credit card but the witness doubted the propriety of this since purchases in excess of Kshs. 200,000.00 are normally not paid with a Card as opposed to cheques of instalments. On running the card by the Cashier on the Kenya Commercial Bank Scanner, the same was declined and on contacting Kenya Commercial Bank, they were instructed to detain the card by Anti Fraud Team who said that they were on their way. The witness was then instructed to transmit this information to the plaintiff and he accordingly informed the plaintiff that they had a problem with his card. The plaintiff was, however, not amused and started making calls and demanded his card back. The witness then called **Adeline** who informed the plaintiff the position. However, the plaintiff became annoyed and started shouting and continued making calls despite attempts by the Senior Manager, **Lilian Abongo**, to calm him down. A security guard from the market then came and talked to the supervisor although the witness did not know who called the guard. The guard left and came back with two police officers. When the plaintiff appeared

the three told him to accompany them and they left together, according to this witness. The witness, while unaware of the person who called the police denied that the plaintiff was roughed up. Later Anti-Banking Fraud Officers came and were informed of what had transpired.

In cross-examination by **Mr. Mogeni**, the witness admitted that she did not understand the transaction since she had never dealt with the same. The document was not a Local Purchase Order but a Credit Card Order. Such transactions, according to the witness are normally operated through account managers. Although that was not suspicious what was suspicious was that the Company was purchasing through the plaintiff's Credit Card. She, however, admitted that the Card tallied with the Identity Card and the plaintiff had his Staff Card though the witness did not take it. According to the witness the first time the plaintiff did not present the Credit Card with the order. She, however, did not notice the caption "Credit Card Order". Asked about the slip confirming that the card had been declined, the witness said she did not have the same since the Card was being run at the back in the absence of the plaintiff though the normal procedure is that you run the Card in the presence of the customer. The witness confessed that she was neither sure what the customer wanted nor did she ask him to explain what it was all about although she was the one in possession of the Card and the plaintiff assumed that she knew what the order was. She however, informed him that they were processing the Card to appease him. She admitted that they do have walk-in and walk-out customers all the time although the Village Market is comparatively a small shop. While denying that there are several shops, the witness said there is a Diplomatic Shop on the left side. While admitting that the security officer came because there was a complaint and the bank instructed that the customer be detained, she did not know who called him. The message was "do not honour" although the supervisor, **Adeline**, explained to the plaintiff that the card was fraudulent at the floor of the shop at the service desk at which time there were no customers due to slow traffic. Despite the small size of the shop, the witness said no-one could have heard the utterance. The witness, however, denied uttering the words to the effect that the plaintiff was a thief or following them. Since nobody informed her what became of the card the witness still believed the card was bad.

In re-examination, the plaintiff said that the procedure is to call the issuing bank. In this instance, they called Kenya Commercial Bank. This transaction, according to the witness was not a normal one since no-one knew about it. She reiterated that the customers were few and could have been less than 10.

The second witness for the defence was **Adeline Lorraine Wa-Mwenje**, who testified as PW2.

According to her she is the defendant's Retail Centre Manager at the Retail Centre. On 30th September 2010 the plaintiff came to the Retail Centre claiming he was from the United States of America Embassy and wanted to make a large purchase of handsets on the strength of a card which was expiring. According to her DW1, **Patricia Ngovi**, told her to call PDQ Bank, Kenya Commercial Bank, the issuer of the machines, as the card had given "Do not Honour" response on being swiped. On calling the Bank she was informed that the Card was suspicious and told to detain both the Card and the Customer since the Card had a declined transaction the previous day at Nakumatt. She then informed the plaintiff who was in the company of someone who was not a Kenyan who pleaded with her to release the plaintiff but she said it was the Bank's instructions. She then went back to the back office and when she came back she saw the plaintiff walking out with two diplomatic police officers who also took the Card. According to her the usual procedure in such cases is to inform the Village Market Security Guards who were later joined by Diplomatic Police although the witness was not aware of who called the police. She, however, admitted that the plaintiff put her through to a person who the plaintiff purported was his boss from the said Embassy who confirmed that the Card was genuine. She, however, informed the person that they had detained the Plaintiff and the Card on instructions of Kenya Commercial Bank. Thereafter the plaintiff walked out with the police and the guards. To the witness the Centre is not a busy one and all through the transaction they did not have two or more customers. At any given time, the Centre has between 3 or 4 customers according to the witness but not more than 5. The witness, however, denied any knowledge of the plaintiff being called a thief. Subsequently, she was informed that the matter was an internal wrangle and that was the reason the plaintiff was set free. The plaintiff, however, was not aware whether the transaction was later completed. According to the witness, they have never handled such an order since normally the Purchase Order come in advance. She further testified that the card was suspicious since it was expiring the same day.

On cross-examination by **Mr. Mogeni**, she stated that there was no Purchase Order as the plaintiff only came with the Card. According to her the card had a dishonour message though there was no printout. She admitted that the Card was not issued by KCB but Citibank. According to her Citibank said they don't deal with purchase orders and were unable to give information. They however, neither confirmed nor rejected the card. She however, confirmed having talked to someone who claimed to be the plaintiff's boss from the embassy who confirmed that the plaintiff was authorised to use the card. However, they do not deal with the Embassy directly and she did not call the Embassy. While denying calling the police, the witness however insisted that she was present when they were called. She confirmed that the information that was relayed to them was that there was a person with a fraudulent card who the defendant wanted detained. According to the witness the plaintiff was informed that he was being detained because the defendant was suspicious of the activities of the card. In her evidence the counter area is not an open area and the plaintiff was alone therein. While not being aware where the vehicle was, the witness admitted the possibility that they could have passed through traffic.

The next witness called by the defence as PW3 was **Lilian Atieno Abongo**, the defendant's Retail Supervisor. She similarly wrote a statement which was filed herein and which was relied upon as part of the examination in chief. According to her, on 30th September 2010, she noticed the presence of the plaintiff who was seated at the service desk unattended. On inquiry she was informed by DW1 that the plaintiff wanted some phones but his credit card had been rejected. In the meantime dW2 was on phone talking to the Bank. Later when the plaintiff attempted to settle the same by way of a Credit Card the Card declined and on instructions from the Bank they were advised to detain both the plaintiff and the Card. According to her DW2 called the Village Market Security guards in order to comply with the said instructions. According to her there were not many customers present. According to her Village Market Shop is a very slow shop and in a day they can serve up to 40 customers since most of their customers are from the United Nations and the Embassy. On this particular day, there were between 5 and 10 customers. On being informed of what was going on the plaintiff became irate and refused to leave without the card whereupon the guards and diplomatic police came and walked away with the plaintiff. According to the witness who admitted that she did not deal with the plaintiff directly, the plaintiff was not manhandled.

In cross-examination, the witness said the defendant's main customers are the Diplomatic Corps and the United Nations. She admitted that generally there are people available. He admitted that the plaintiff was informed the delay was in packaging and sorting out the phones which she admitted was not the correct information since the card had been rejected. She admitted she did not call the Citibank and agreed that the plaintiff was not irate but was just walking up and down talking loudly on the phone. She said that they have one KCB PDQ machine and that this particular card was not a KCB Card but a Citibank Card which Bank the witness said they did not call. According to her it is KCB that was under the obligation to pay the defendant. She confirmed that it was indicated on the Card that the plaintiff was working for the United States Embassy. She reiterated that on a busy day they would serve 40 customers.

On re-examination she said the plaintiff was kept waiting but was informed. She said on being informed that the card had been rejected the plaintiff became irate. She said normally if there is a problem they do not make a customer look fraudulent but they verify the card. According to her at most the people in the shop could have been 10 and the plaintiff was there between 30-40 minutes.

The last witness for the defence as DW4 was **Lucy Gitonga**. She relied on her statement filed herein as part of her examination in chief. According to her she is employed by the defendant as a Support Analyst. According to her she was with DW2 when the latter was approached by DW1 regarding an LPO and Credit Card from the American Embassy. She was handed the LPO to verify and she obtained the go ahead from **Maurice Jaboma** of the Defendant's Accounts Business Team who told her to scan and send the LPO to him which she did. On further seeking instructions whether she could process the transaction she was told by him that he was still seeking verification from the Embassy which he failed to get. She latter learned that the plaintiff who was the bearer of the LPO tried to pay for the transaction using a Credit Card something the witness found irregular. The plaintiff was later taken away by the security guards and Diplomatic Police. She did not meet the plaintiff since she sits at the back and her role was limited to confirming that the LPO was genuine.

In cross examination, she said the LPO was different and that it was a Credit Card Order which she had not dealt with before though it looked similar. At that point she had not noticed that she was dealing with a Credit Card Order. Had it been an LPO it would have been brought previously. She confirmed that it was **Jaboma** who was dealing with the Embassy and that by the time the police came she was yet to receive the verification. She only dealt with the order as the Card was not brought to her. According to her ordinarily there is a slip to show that a Card is rejected. She confirmed that there was no communication between the defendant and the Embassy. Since she was at the back she was not aware of the plaintiff's arrest.

In re-examination the witness said her duties were more of administration and they were dealing with the Embassy by way of LPO and not Credit Orders. Subsequently there has never been a similar transaction as far as the witness is concerned.

At the close of the case both parties filed written submissions. According to the plaintiff the defendants did not seem to understand the process and instead of engaging the plaintiff in a positive attempt to solve the impasse of ignorance chose to grope in the dark resulting in the unfortunate utterances and incidents. It is further submitted that there was no evidence to show that the Card was rejected. It is the plaintiff's submissions that there was no threat to the defendant as the plaintiff was just a shopper with a Credit Card. As the defendants uttered untrue and defamatory words of the character of the plaintiff leading to the plaintiff's arrest, the plaintiff suffered both loss of liberty and damage to reputation which resulted into his being shunned by colleagues and business associates. The publication, it is submitted, implied that the plaintiff was involved in a criminal act punishable by imprisonment for a period of more than 3 years which under section 3 of the Defamation Act is actionable *per se*. According to the submissions, the allegations by the Defendant led to the arrest and detention of the Plaintiff, was published at a place where the plaintiff enjoyed high regard amongst the members of the diplomatic corps and caused the plaintiff untold suffering. The defendants published the same by calling the Embassy and KCB and even later on did not bother to follow up but insisted that the action was justified. Citing **Awiti vs. Attorney General [1981] KLR 264**; **John Joseph Kamoth & 4 Others vs. Nation Media Group & Others [2005] eKLR**; and **Kudwoli vs. Eureka Educational [1993] eKLR**, it is submitted that a master is liable for unauthorised acts (proper or improper) as long as they were connected with duty and other authorised acts. According to the plaintiff the Court ought to award him Kshs. 2,000,000.00 for slander, Kshs. 1,000,000.00 for malicious arrest and false imprisonment; Kshs. 1,500,000.00 for violation of his right to freedom and security of the person.

On its part, the defendant submits on the authority of **Calystus Makhoha vs. Hussein Osore Munyifwa HCCCA No. 56 of 1999** that there was no proof of publication since none of the plaintiff's witnesses pointed out the defendant's officials having uttered the words complained of. It is also submitted that the defendant's witnesses denied having uttered the same. Although the words proved may not accord exactly to the words pleaded, it is submitted based on **Tournier vs. National Provincial & Union Bank of England Ltd [1923] All ER 550**, there must be proof of the alleged slanderous words at the trial. It is further submitted on the authority of **Freer vs. Zeb [2008] EWHC 212 QB** that in an action for slander the claimant must as far as possible set the precise words and the names of the persons to whom the words were spoken. This requirement, it is submitted, the plaintiff has not fulfilled. It is the defendant's position that the detention of the plaintiff was not malicious as it was as per the defendant's internal procedures of verifying the transaction and the plaintiff was informed accordingly. Since no special damage has been proved as required under sections 3, 4 and 5 of the Defamation Act, even if the plaintiff were to succeed in proving publication of the alleged slanderous words by the Defendant's employees, it would not suffice to sustain a tort for defamation. Based on the same submissions and as the defendant is a private institution, it is submitted that the award of aggravated, exemplary and punitive damages is not merited. For this contention the defendants rely on **Obongo & Another vs. Municipal Council of Kisumu [1971] EA 91**; **Rookes vs. Banard & Others [1964] AC 1129**; **Francis Xavier Ole Kaparo vs. The Standard & 3 Others HCCC No. 1230 of 2004**. In the defendant's opinion the plaintiff's case ought to fail. Nevertheless, it is submitted that the slander complained of, if at all, was only limited to a few customers within the shop and appropriate apologies were made thus there were exculpatory factors which should go towards the mitigation of damages awardable to the plaintiff.

From the pleadings and the evidence adduced, the following, in my considered view, are the issues for determination:

- 1. Whether defendant's employees published slanderous utterances.**
- 2. Whether the said publication referred to the plaintiff.**
- 3. Whether the said publication was malicious.**
- 4. Whether the plaintiff was injured as a result of the said publication.**
- 5. Whether any damage has been occasioned to the plaintiff as a result thereof.**
- 6. Whether the pleadings satisfy the legal requirements for slander.**
- 7. What damages if any the plaintiff is entitled to**
- 8. Who should bear the costs of the suit.**

On the issue whether the defendant's employees published slanderous utterances the plaintiff and his witnesses testified that the utterances made by the defendant's employees to the effect that the plaintiff was a Credit Card thief. The plaintiff was able to point out that the said words were uttered by DW1 who he was able to recognise in Court. According to PW2, although he did not mention a particular person he testified that the defendant's Staff were loudly saying that they had got a credit card thief and the person they were referring to turned out to be the plaintiff. The presence of this witness in the shop is confirmed by the evidence of DW2 who stated that the plaintiff was in the company of someone who was not a Kenyan who pleaded with her to release the plaintiff. PW3 on the other hand testified that he heard DW1 claiming they had arrested a credit card thief. Although the defence witnesses denied that such utterances were made DW2 confirmed that plaintiff was informed that he was being detained because the defendant was suspicious of the activities of the card and that the information that was relayed to the police was that "there was a person with a fraudulent card who the defendant wanted detained". DW1 on the other hand testified that DW2 "explained to the plaintiff that the card was fraudulent at the floor of the shop at the service desk". It is therefore clear from the evidence that the defendant's staff were clear in their minds that the plaintiff was involved in fraudulent activities. This information they relayed to the police. In fact up to the time of the trial DW1 still believed the card was fraudulent. It is admitted that there was some commotion within the shop and that the plaintiff was irate. Taking into account the evidence in its totality, it is more likely than not that the plaintiff was annoyed by being referred to as a Credit Card thief. Accordingly I find the defendant was referred to as Credit Card thief by the defendant's staff hence this issue is in the affirmative.

On the issue whether the said publication referred to the plaintiff, there is no doubt at all that the person whose activities were deemed to be suspicious was the plaintiff and the said words could not have referred to any one else but the plaintiff. This issue is similarly answered in the affirmative.

On whether the said publication was malicious, malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See

J P Machira vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.

In this case, it is clear that the real cause of the incident was the failure by the defendant's staff to appreciate the nature of the transaction that the plaintiff was making. It is admitted by most of the defence witnesses that they did not realize that they were dealing with a Credit Card Order and presumed that they were dealing with a Local Purchase Order and treated it as such. It also clear that the plaintiff was never asked to explain the nature of the transaction in question. The defendant's staff's suspicion was aroused by the fact that the plaintiff wanted to pay for the handsets meant for the embassy through his personal credit card. Instead of seeking clarification from the plaintiff, the defendant groped in the dark as it were

and made conclusions not based on factual material. Although, the defendant is a mobile telephone provider of no mean repute and was no doubt in a better position to contact the United States Embassy and confirm whether or not what the plaintiff was saying was correct, it simply ignored what seemed to be the best approach to the matter. The confirmation that the plaintiff was authorized by the Embassy to transact the business was similarly and I dare say contemptuously brushed aside. From the conduct of the defendant's staff, one cannot help but conclude that they were keen on "cracking" the Credit Card fraud syndicate than discovering the truth. Whereas the Card was admittedly issued by Citibank, no serious attempts were made to obtain the correct information from that Bank but instead the defendant opted to seek instruction from a non-issuer of the Card – Kenya Commercial Bank Ltd after swiping the card, unprocedurally in the absence of the plaintiff and without showing the plaintiff the alleged printout indicating the rejection of the card. I am therefore satisfied that the attitude of the defendant's staff can properly be classified as being malicious on the strength of the decision in **J P Machira vs. Wangethi Mwangi and Nation Newspapers** (supra) and I so find.

With respect to whether the plaintiff was injured as a result of the said publication, it is not in doubt that the plaintiff was arrested and taken to Gigiri Police Station. Although most of the defence witnesses denied knowledge of who called the police, DW2 admitted that she was present when the police were called. It is, however, admitted that the defendant called the Village Market guards as is customary in such incidents. The defendant failed to call the police to give evidence on the circumstances under which they found themselves arresting the plaintiff. In the absence of that evidence the Court would be entitled to, which I hereby do, draw adverse inference on the failure by the defence to so do and find that the said evidence if adduced would most probably have been adverse to the defence case. The defendant's witnesses downplayed the manner in which the plaintiff was arrested. However, whereas there was an admission that the plaintiff may have passed through the traffic at the market on their way to the vehicle none of the defence witnesses admitted to having left the shop and therefore was in no position to testify as to what actually happened when the plaintiff was being whisked away by the police and whether he was in fact placed into the boot of the vehicle as the plaintiff contended. Mere arrest, even assuming the plaintiff was not mishandled, in my view, if wrongful would cause injury to the victim. Accordingly I find this issue in the affirmative.

The next issue that falls for determination is whether any damage has been occasioned to the plaintiff as a result thereof. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Since defamation is not about publication of falsehoods against a person, it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. Save in cases where defamation is said to be actionable *per se*, i.e without proof of actual damage, unless the plaintiff is able to prove damage, no such damage may be awarded or only nominal damages may be awarded. Libel as opposed to slander is actionable *per se*. Under the Defamation Act Cap 36 of the Laws of Kenya circumstances under which slander is actionable *per se* are for instance where the slander is calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him; (section 3); or (ii) imputation of unchastely to any woman or girl (section 4). The defendant's case is that even if the publication was done it was done within a small shop with very few people and an apology was subsequently relayed. It was admitted by the defence that the shop was capable of serving 40 customers a day and that at any given time not more than 10 people are in the shop. On this day there were no more than 5 people in the shop. According to the plaintiff's case there were between 10 to 15 people in the shop. Even assuming there were 10 people in the shop it

was not clear how many of the said 10 persons actually knew the plaintiff. The mere fact that the plaintiff was working for the Embassy does not necessarily mean that everyone who was in the shop knew him. Accordingly I agree that the publication in this case was to a small number of people since both witnesses for the plaintiff were people who were inside the shop at the time of the incident. However, it cannot be gainsaid that the plaintiff lost face as a result of the said incident since one of the witnesses was a member of his welfare club who did not know him that well.

The defendants however, contend that the pleadings do not satisfy the legal requirements for slander. The defendant's contention is that the plaint did not identify the persons to whom the defamatory matter was published as required in such claims. I am not convinced that the failure to plead the names of the persons to whom defamatory matter is published is necessarily fatal to the suit. In our case the particulars that are mandatorily required to be pleaded are specified in Order 2 rule 7 of the Civil Procedure Rules and the names of the recipients of the defamatory matter is not indicated as one of the particulars to be pleaded. Further a Court may base its decision on unpleaded issue if it appears from the course followed at the trial that the issue was left to the Court for decision. See **Odd Jobs vs. Lubia [1970] EA 476.**

Under Order 3 rule 2 of the Civil Procedure Rules, 2010, it is now a requirement that the pleadings in a suit be filed together with list and statements of the intended witnesses. In my view, the need to plead the names of the recipients of the defamatory matter, would be informed by the principles that require disclosure of the relevant issues in order to avoid trial by ambush. Where, as our rules of procedure provide, parties are required to disclose the nature of their evidence upfront, it is my considered view that the failure to disclose the names of the recipients of the defamatory matter is not fatal to the suit.

That now leads me to the issue of the damages the plaintiff is entitled to. The rationale behind awarding of damages in defamation actions is to restore or give back to the party injured what he lost save in exceptional circumstances where punitive or exemplary damages may be awarded. The Court of Appeal in **Johnson Evan Gicheru –vs- Andrew Morton and Michael O'mara Books Ltd[2005] 2 KLR 332**, held:

“In actions of defamation and in any other actions where damages for loss of reputation are involved the principle of restitution in integrum has necessarily in even marvel highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much strange position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel driven underground emerges from its looking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by stander of the be sellers loss of the charges”. (Emphasis mine).

According to the plaintiff since the allegations made against him imputed a commission of a criminal offence punishable by imprisonment of more than 3 years under section 3 of the Defamation Act the Court ought to award him Kshs. 2,000,000.00 in general damages for slander. The proviso to section 16A (1) provides that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings. In my view the offence for which the plaintiff would have been properly charged fell under section 316 of the Penal Code whose punishment is imprisonment for one year. In this case what is complained of is not even libel but slander. There is no possibility that the slander was driven underground and that it would emerge from its looking place at some future date. The law is that mild defamation cannot attract a large sum in compensation. See **Ojiambo vs. Standard Limited & 2 Others [2004] 1 KLR 496.**

In **Kenya Tea Development Agency Ltd vs. Benson Ondimu Masese T/A B O Masese & Co. Advocates Civil Appeal No. 95 of 2006** the Court of appeal on 11th July 2008, reduced the award from Kshs. 10,000,000.00 to Kshs. 1,500,000.00. In that case the plaintiff was an advocate of the High Court of Kenya and the defamation complained was libel.

In **Bernard Kyeli Mutula vs. Anthony Kitonga Kamundi & Another Machakos HCCC No. 26 of**

2004, Onyancha, J awarded the plaintiff Kshs. 500,000.00 in general damages.

In the premises it is my considered view that an award of Kshs. 500,000.00 is adequate compensation to the plaintiff in the circumstances of this case.

With respect to the claims for malicious arrest and false imprisonment and violation of the plaintiff's right to freedom and security of the person, there was no specific prayer to that effect in the body of the plaint.

Accordingly, the Court is unable to grant awards in respect of damages which were not specifically sought. In fact in my considered view these claims seem to have come as an afterthought.

With respect to exemplary in **Obongo & Another –vs- Municipal Council of Kisumu [1971] EA 91**, the court held that punitive or exemplary damages are only awardable where there is oppressive, arbitrary or unconstitutional action by the servants of the government and where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.

In **Mikidadi –vs- Khaigan and Another [2004] eKLR 496 Ochieng, J** held *inter alia* that:

“Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

In **Francis Xavier Ole Kaparo –vs- The Standard & 3 Others, HCCC No.1230 of 2004 (unreported)** the Court expressed itself thus:

“Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors. The plaintiff, who behaves badly, as for example by provoking the defendant or defaming him in retaliation, will be viewed less favourably; a defendant who behaved well e.g. by properly apologizing, will be treated with favour. Damages will be aggravated by the defendant's improper motive i.e. where it is actuated; repetition of the libel; failure to contradict it; insistence on a flimsy defence of justification; and a non-apologetic cross-examination are matters that will aggravate damages.”

Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not and decided to publish it because the prospects of material advantages outweighed the prospects of material loss; i.e. the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty. I am not satisfied that the publication of the article complained of was done with such a motive.

Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances.

In this case the defendant's staff with due respect exhibited an extremely nonchalant attitude right up to the time of the trial. After causing the damage they admitted that no follow up was made on the case. As far as they were concerned they had “nabbed” a Credit Card thief and that was the end of the matter.

Whereas it is true that in the email dated 1st October 2010, there was an indication of remorse on the part of the defendant, the attitude of the defendant's witness when they gave evidence in this Court left a lot to be desired. None of them showed any genuine remorse for the incident and in fact DW1 still believed the card was fraudulent. In deciding whether to award such damages the conduct of the defendant prior to

trial, at the trial and after the trial, his conduct of the case, and his state of mind are all matters which the plaintiff may rely on as aggravating the damages. See **Abraham Kipsang Kiptanui –vs- Francis Mwaniki and 4 Others Nairobi HCCC No. 42 of 1997.**

In the premises I am satisfied that the plaintiff is entitled to an award in the form of aggravated damages which I hereby assess in the sum of Kshs. 100,000.00.

Accordingly, judgement is hereby entered for the plaintiff in the sum of Kshs. 500,000/- general damages and Kshs. 100,000/- aggravated damages with interest at court rates from the date of this judgement till payment in full and costs.

Dated at Nairobi this 10th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of Mr. Kuyo for the Defendant