

R. v. HACHOKO.  
R. v. MWANABANYAMA.

CRIMINAL REVIEW CASES NOS. 213 AND 214 OF 1940.

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*Imputing witchcraft—compensation—words which could not form the subject of a charge for criminal defamation—words defamatory by native custom.*

In both of these cases the accused spoke certain words which imputed witchcraft to the complainant and the Subordinate Court awarded compensation. These words could not have formed the subject of a charge for criminal defamation but it is submitted that they could have formed the basis of a civil suit. The words were such that by native custom compensation would have been payable. The High Court held that in these circumstances the Subordinate Court which tried the cases was not entitled to award compensation to the complainants under section 164 (b) of the Criminal Procedure Code as this section does not apply to matters which are essentially civil in their nature.

But see *R. v. Balenje* 4 N.R.L.R. 1 where it was held that compensation could be awarded under section 164 of the Criminal Procedure Code for a tortious act other than one involving material loss or physical injury.

The "extremely interesting judgment on the Witchcraft Ordinance" referred in the judgment hereunder is that of MACDONNELL, J. in *R. v. Musunki and Namusaka* 4 N.R.L.R. 193. The reference to section 3 of the Witchcraft Ordinance appears at page 198 of the report.

Law, C.J.: Both these cases relate to charges under section 3 (2) Cap. 31. With regard to case 83 the Magistrate remarks:

"Although accused has committed a criminal offence I consider the matter is essentially civil and domestic (the parties being husband and wife) and that substantial compensation would be obtainable by civil action for slander."

As regards case 89 the Magistrate says:

"Complainant would be entitled to substantial compensation under native customary law."

In an extremely interesting judgment on the Witchcraft Ordinance (pp. 38 to 48 *Instructions to Magistrates*) the learned Judge (at pp. 43 and 44) points out that the offences specified in section 3 are a species of criminal libel. Such utterances, however, which are spoken words, could not form the subject of a charge for defamation under Chapter XVIII Penal Code. This being so it does not seem proper that native customary

law should be invoked in a criminal case for purposes of compensation for slander if no criminal charge could be laid in respect of that slander. Also I cannot regard section 164 (b) Criminal Procedure Code as having any application to matters which are essentially civil in their nature, particularly where no actual loss or injury can be shown to have been suffered in consequence of the alleged offence. For the foregoing reasons I am unable to agree that it was competent for the Magistrate to make the Compensation Orders in question. Accordingly I set aside these orders.