



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO. 614 OF 2007

DALMAS OTIENO.....PLAINTIFF

VERSUS

REV. DR. STEPHEN KANYARU M'IPWII..... DEFENDANT

JUDGMENT

1. The plaintiff by a plaint dated the 28/08/2007 is seeking both general and exemplary damages for libelous words published by defendant to a 3rd party against the Plaintiff. The plaintiff alleges that on or about the 12th April 2007 the defendant falsely and maliciously wrote and published 2 letters, which he alleges, were defamatory to him. The letter dated 12th April 2007 had the following words;

“RE: ILLEGAL ACQUISITION AND CONVERSION OF METHODIST CHURCH IN KENYA PROPERTY PLOT NO. 3/463 AT - MATHARE NORTH BY ADMINISTRATION INSPECTOR A.P. DALMAS OTIENO PERSONAL NUMBER 81061576.”

“The church will be happy if you your good office can investigate this man who has been involved in criminal activities of illegally converting the church property for his own use by employing a group of hired thugs. The same person is drawing two salaries one from the government of Kenya and the other from the Methodist church which includes the university.

At the moment, he has rented out the leased some part of the premises that was given to the church by Korean Missionaries in the year 2001 and where he remained employed till the year 2005 when he organized the take over.”

2. The second letter is also dated 12th April 2007 containing false and malicious matters concerning him to the effect, **“...May I take this opportunity to thank you and your good office for the audience and attention you gave us when we came to your office to claim over the interference by a senior police officer from CID Hqs in our criminal case No. 2240 of 2006 at law Courts Nairobi”**

He avers that the two letters were written to Head Civil Service and Secretary to the Cabinet of the Republic of Kenya Ambassador Muthaura.

3. That the defendant knew that the two letters would be opened and read by the addressee. He avers that the said words in their natural and ordinary meaning were meant and understood that the plaintiff is a fraudster who had perpetrated the illegal acquisition of plot no. 3/463 Mathare North together with unscrupulous members of society and that he was a criminal in the eyes of the law and had no regard to the due process of the law that the same was understood to mean that he is a deceitful person , a land grabber and a thief having stolen plot number 3/463 Mathare North from Methodist Church in Kenya.

4. He particularized the same as the words “**illegal acquisition of Methodist church in Kenya.... Administrator Inspector Dalmas Otieno** meant and generally portrayed that the plaintiff had secured the defendant’s church unlawfully for his use fraudulently and that he was a deceitful person who thrives through crooked means. That the words “.....**investigate this man who has been involved in criminal activities...**” meant that the plaintiff was a suspected criminal. That the words ‘.....**interference by a senior officer from CID Hqs in Cr. Case No. 2240 of 2006 at Law courts** meant to generally portray the plaintiff as a person who has no respect for the rule of law and the due process of the court and that he was a contemptuous person.

5. The plaintiff denies that he has never been involved in the alleged illegal acquisition of the said **Plot no. 3/463 Mathare North** belonging to African Rural Mission which runs Bethany Christian College, he further denies interfering either the court process or deploying any hired thugs to acquire and convert the property. He avers that due to the said words his reputation credit, character has been greatly injured and he was subjected to an embarrassing process of investigation and inquiry on his conduct before a panel which fortunately gave him a clean bill of health in its findings that the said claims were unsubstantiated reason whereof he claims exemplary damages. That as a result of the same he has suffered ridicule and contempt, distress and embarrassment reason whereof he claims as against the plaintiff general damages for libel, exemplary damages for libel and interest.

6. The defendant on his part though admits writing the said two letters denies that the same were defamatory adding that the plaintiff ought to refer to the whole letter for the context and meaning. He added that the said words in their natural and ordinary meaning were understood and that the same were true in substance. He sought to rely on the defence of justification which he particularized as follows;

That the plaintiff is dishonest as he joined government service in 1981 and while still in service between 1999 and the year 2005 whilst still in service also simultaneously served as an employee in two different church organizations thus drawing two salaries and hence was in breach of fiduciary duty which bars him from taking any other employment whilst still in government employment. That whilst a police administrator he also served as an administrative officer of Bethany United Methodist Church in its Kenyan project known as African Rural Mission which was headed by Rev. Sung Jin Kang between the year 2001 and 2005 when his employment was terminated by the Methodist Church of Kenya. That the said Rev. Sung Jin Kang mission was funded by Bethany United Methodist Church and it provided him with salaries and monies and other resources to advance his missionary works which included establishing churches in different parts of Kenya and training pastors and making purchases on its behalf. That it was on this basis that it purchased **L.R. No. 3/463 Mathare North** between 1997 and 1999 for putting up Bethany United Christian College. Between 2000 and 2001 the missionary wound up its mission in Kenya and transferred the said **L.R. No. 3/463 Mathare North** to the Methodist Church in Kenya which gave it exclusive ownership and possession of the same. However, between 2001 and 2005 Alfred Makongo, Luke Wamalwa Wanyama and other 100 hired thugs forcibly took possession of the Bethany Christian College from Methodist Church and started managing the same. That despite seeking protection from Muthaiga police station they denied them their constitutional right to protection. In 2005 the college required all employees of Methodist church to re-apply for employment and the plaintiff applied for post of administrator but his employment was rejected. That between June 2004 and February 2005, the plaintiff, the said Alfred Makongo and Luke Wamalwa Wanyama, falsely claiming to be the management of the African Rural Mission, devised and executed a plan of physically removing the Methodist Church in Kenya from possession of the said L.R. No. 3/463 and Bethany Christian College so that they might run it and convert revenue from it to their use; the components or the plan were employment of hiring of over 100 thugs to chase students and university academic and filing before this court HCC No. 133 of 2005, Alfred Makongo Luke Wamalwa Wanyama & Henry Kiringot vs. Zablon Nthaburi & Dr. Rev. Stephen Kanyaru M’Ipwii, through which they would seek maintenance of the status quo through an injunction. That between March 2005 and 2006 the plaintiff and Alfred Makongo and others committed trespass to land and chattels on the said L.R. No. 3/463 Mathare North and in 2006 having excluded Alfred Makongo and Luke Wamalwa the plaintiff remained as the sole beneficiary of the trespass and revenue derived from the said Bethany Christian College.

7. He contends that African Rural Mission was always a project of Bethany United Methodist Church

and the plaintiff was always a project of Bethany United Methodist Church, which the plaintiff was an employee. That the plaintiff was in breach of fiduciary duty by working for other people other than his employer as under the rule in *Reading –v- Attorney General (1951) AC*. The defendant further added that the said words were published to Ambassador Muthaura without malice and that as the chief executive he was under a moral and social duty to report to the government of Kenya the crimes and torts which the plaintiff was committing adding that as the Ambassador Muthaura had a corresponding interest in receiving a report of the criminal activities which the plaintiff was involved.

8. This matter was partly heard before Justice Sitati. Pw's 1 evidence was partly heard before this court took over the case.

9. PW1, Dalmas Otieno Ochally, testified that he was a Chief Inspector of Administration police and a chaplain the force being No. 81061576. He stated that while working at Kajiado he received a letter dated 27/04/2007 from the OP's office ordering him to go to Nairobi to face a panel of inquiry. The content of the letter was illegal acquisition of Methodist Church in Kenya property an allegation he denied. On the basis of the said letter he was subjected to a panel of inquiry for 3 months. He testified that the letters and reports forming basis of the said allegation had no direct link to him. The contents of the said letters implications touched on his integrity at his place of work and portrayed him as a criminal involved in criminal activities and illegally controlling the Methodist Church in Kenya property allegations he denied. He testified that though he applied to work at KEMU in 1994 he never worked there and denied having signed any documents or being in receipt of any cheque but he however, stated that there was a cheque he found deposited in his account for Kshs. 41,296/-. On cross examination by the court he avers that he followed up and inquired where the money came from and he was informed it came from KEMU.

10. He traced back the suit property to 1993 when he was a student at Pangani School of Theology. That in that year he working with a missionary, Reverend Giri Kang from Korea he assisted the missionary to apply for a plot 4/463 which was given out in the name of the church known as **NOMIYA FWENY MALER** – this is in Luo which means **I WAS GIVEN OF HOLY REVELATION** which the church maintains is still registered in the said name. In support of this he sought to adduce a duly signed lease agreement he had registered between the City Council of Nairobi and the Nomiya Fweny Maler and the same bore his signature just above the commissioning advocate's stamp. Further to this there was a letter dated 20/04/1994 written to Director of Housing – Nairobi City Council seeking to transfer the plot allocated to them by the City council of Nairobi via letter of allotment dated 10/9/1993 and addressed to Nomiya Fweny Maler Church to African Rural Mission which though were the same people needed to be done to give meaning to the missionaries.

11. On 19/6/2013 the plaintiff continued with his evidence before this court. He testified that the intention of the said letter dated the 12th of April 2007 was intent to destroy his service as a public servant. An inquiry was set up comprising of senior members of the administration police and it took upto 4 months. A report was given after the hearing. It stated that there was no evidence linking him to the alleged illegal acquisition and conversion of Methodist Church property. He denied being a party to the criminal case. He testified that he was tormented and isolated and was not allowed to do his normal work as an Administration Police. He was told to vacate his office until the result of my inquiry. The said inquiry went up to his church where he worships and they challenged his ability to pastor them as a criminal person. However when the report came out he was informed by his superior Mr. Arachi that after going through the report they found that the letters addressed to ambassador Muthaura were false and was asked to resume work. He avers that the said letter was written in bad faith with intentions to destroy his character. He seeks compensation for the destruction assassination of his character. The contents of the plaintiff written statement is similar to what he stated only that in his statement his rank is Superintendent.

12. On cross examination by Dr. Kuria he reiterated his examination in chief. He testified that in 1993 he applied for a job at KEMU and served as a liaison officer between 1999 and 2004 though he was not paid any salary. He testified that he had a job which as an administration police service and was attached to Bethany College as a coordinator and co-ordinated the activities but denied being employed by Methodist Church between 2002 to 2004 when it ran Bethany College. He acknowledged knowing Gamaliel Riungu

Mwita who was the accountant while he was attached there. He testified that though he was not paid a salary he was paid allowances for activities that took place at the college. He stated that he supported the case because he was a church member and after 6 years he was elected as a church official. That there were 2 churches claiming their church and police asked for the allotment of letters and their members provided while Methodist had no papers so the police told them to go to court where they obtained court orders which were used to evict Methodist Church and denied having urged the church to settle the matter. He denied being the master mind behind Methodist eviction adding that between 13/3/05 to 29/08/12 Methodist Church was out of the said premises. He testified that Bethany College stands on **plot No. 3/463 Mathare North**. He denied allegations that he let out the premises to tenants adding that the church was in control before he become a member and was only elected as treasurer in 2012. That at the time as a member of the church there was only one organization of Aids and they did not rent the place but were there to help the community around but it was rented later and the rent was paid yearly adding that he left Bethany in 2004. He denied working for the government and Bethany between 1999 and 2002.

13. On re-examination he testified that he was in Bethany for 3 years, having been posted by the Government to co-coordinate government employees from different forces of the police from military department, from prisons department and NYS who were being trained as chaplains and was not employed at Bethany. Stating that he was never paid a salary but was given a subsistence allowance. That the government did not bar him from applying for other jobs. He testified that the inquiry was on his conduct that he had used forceful methods to take over Methodist property in Mathare North. He stated he was not punished for working in both institutions neither was he taken to court for any criminal activity of any nature and that allegations made were false.

14. PW2 was Fredrick Juma Owuor Achuodho an employee with National Police Service Commission Administration Police Department. He sought to rely on his statement filed on the 27th May 2011. He testified that Dalmas was his work colleague and that he was one of the members of the panel that sat at the inquiry of alleged illegal activities pertaining to KEMU property at Mathare. That in their unanimous findings they did not get any connection of Dalmas Otieno with the illegal acquisition of Kenya Methodist Church property. That Dalmas had been portrayed to them by the authors of the letters dated the 12/4/2007 as a criminal who was misusing his office to subvert the cause of justice and fraudulently and illegally acquired property. That the panel interrogated him thoroughly since he was viewed as a senior officer tainting the image of the Administration Police force and if found guilty the panel would have recommended his sacking from the force and possible prosecution.

15. On cross-examination he stated that he could not recall if they had a witness by the name Mr. Otieno from Africa Rural Mission. He testified that though they did consultations with the then Human Resource on an employee being attached with the organizational needs, the Commission did not consider if the plaintiff was an employee of Bethany Christian College and it did not give much importance to the same. In his view he found there was nothing wrong with earning a subsistence allowance if attached to an institution adding that the Commission was tasked with verifying the illegal acquisition by Dalmas Otieno of Kenya Methodist property. He denied that the panel did act dishonestly.

16. In re-examination he sought to clarify that the main issues for determination by the commission was not whether plaintiff was a member of Africa Rural Mission but were to investigate Dalmas Otieno's alleged involvement in the illegal acquisition of Methodist Church in Kenya. That the panel consisted of eminent members of the force.

17. The defense called six (6) witnesses. DW1, **Gamaliel Riungu Mwitia**, testified that he was an accountant employed by Methodist Church in 2004. In his statement he stated that the plaintiff was amongst those employed by the church and that the plaintiff was the administrator in charge of the Armed Forces, Kenya Police, Police Administration Police and Prison trainees. That he prepared the plaintiff's cheque of Kshs. 41,096/-for terminal benefits from KEMU. He was aware of the case HCCC 133 of 2005 . That the plaintiff applied for a job but he was not successful. That later he saw the plaintiff with a group of about 40-50 people who were demonstrating in the college, the plaintiff was the one calling the shots. On cross-examination he testified that the church did not have a Human Resource Manager, though the Board used to employ people and the Principal was the custodian of documents relating to employment

though he could access the documents from the Principal's office to update the files. He testified that the plaintiff was an employee of the college but also worked partly with Kenya Administration Police. That all employees were paid via cheques and they generated pay slips including those belonging to the plaintiff. He stated that the cheque of Ksh. 41,096/- was paid to the plaintiff for his benefits before the college was taken over by Kenya Methodist University the same went through and the payee received the sum. He testified that the college and land **Plot No. 3/463/Mathare North** were two different things though the property was sitting on that land it was church property that was being handed over though he had nothing to support his statement. He however could not confirm if HCC 133/05 was struck out. He testified that the plaintiff was one of the people who took over the college. On re-examination he testified that he was employed by Kenya Methodist University on 1st March 2005 and was deployed to Bethany Christian College on the same date where he worked until KEMU took over. He stayed there for a year and was taken to the insurance firm owned by the church. That the plaintiff was below the principal as an administration manager, him and then the dean of students. He testified that Dalmas was in charge of the students' affairs as they had foreign students from Kenya, Ethiopia, South Sudan, Uganda Rwanda, DR Congo and Tanzania and also supervised the non-teaching staff was a bank agent and withdrew petty cash for the office. He testified that on 13th of March 2005, they found confusion in the college. There was a big group telling the staff to leave as they had taken over the college. He recalled that the plaintiff used a salon car from the college.

18. DW2 **Felix Gitonga Mwambia**, testified that he started as a Business Administrator of Kenya Methodist University in 2000. Between 2003 and 2004 the board discussed and the owner of Bethany College resolved that it be given to Kenya Methodist University. The board was to form an adhoc committee comprising members from both institutions to resolve the transfer. There was a hand over ceremony presided over by top management of the university. After the said hand over Kenya Methodist invited the plaintiff to apply for employment which he did via letter dated 16th January 2002 however his application was unsuccessful as the CV showed he was both an employee with the government and with Bethany College. On 13th March 2005 the college was invaded by unknown people and they complained to the PS Internal Security. That by 7th December, 2004 Bethany Christian College had become a constituent of Kenya Methodist University. He added that Mr. Makongo and Mr. Wanyama the plaintiff's supporters filed in court HCCC No. 133 of 2005.

19. On cross-examination he stated that he was an employee of Kenya Methodist University (KEMU) which is sponsored by Methodist Church of Kenya. The management held a meeting and gave a resolution of handing over Bethany Christian College to the University. An ad-hoc committee was constituted to discuss the strategy to transfer Bethany Christian College to the University. The handover of the facility was to include the plot. That the handing over was in form of minutes but no terms of reference were stated and the transfer was done on 7th December 2004. However, shortly after school was invaded and this prompted the Vice Chancellor (VC) Prof. Mugambi to write to the Permanent Secretary Internal Security complaining about the invasion and citing the plaintiff as the invader and facilitator. Later, a report was made to the police by Prof. Mwaniki and Reverend Nguku and Mr. Otieno was not arrested after the report was made.

20. On re-examination he stated that the incident was reported at Muthaiga Police Station and the 3 Administration Police Officers they sent did not assist in sending away the evictors. He stated that the University remained in possession from 7th December 2004 to 13th March 2005 when the invasion took place and the college has now been secured by the University and the Methodist church. He referred the court to a letter dated 22nd May 2005 from the Vice Chancellor giving a breakdown of the final dues to Dalmas Otieno as Ksh. 51,480/-.

21. Dw3 **Rev. William Nguku** testified that on 11th January 2005 he was posted to Bethany Christian College as a chaplain as a dean of students the plaintiff was introduced to him as the administrator. That students complained that they could not utilize the chapel as the surrounding communities used to go there. Together with the plaintiff they organized a duty roster. That on 13th March 2005 the plaintiff had organized a meeting with the neighboring communities who worshiped in the chapel. They attended the service and the said meeting began at 12 and as the members were introducing themselves Alfred

Makongo and Luke Wanyama followed by a mob stormed of about 100 or so people claiming to be the owners of the chapel and demanded that they leave both the church and the compound and in the way mishandled the gate man. That they went to report the matter at Muthaiga Police station but the plaintiff did not accompany them. That at the time he came to know that Alfred Makongo and Luke Wanyama had filed HCCC 133 of 2005. That at the police station they were given 3 police officers to accompany them but that the plaintiff appeared unmoved. That it appeared to him that the plaintiff was working with the mob.

22. On cross examination he testified that he was posted to a college and it was within the suit plot. He requested the plaintiff to introduce him to the people who worship there. He adhered to his request and arranged that he meet with the leaders of the neighboring committee. At the time he didn't tell him that he interest to take over the **plot No. 3/463/Mathare North** while waiting to meet them a mob of about 100 people claiming to be owners of the place. He admitted that he did not hear the plaintiff asking the people to move neither did he see him manhandle the gate man. That police investigated the case and made arrest of suspects. He added that he was not aware that the court issued an injunction in HCC 133/05. He stated that the documents showed that ARM were the allottees of the said plot i.e. African Rural Mission and the college was situated at the plot. With the assignees being Prof. Bishop Zablon Nthamburi and Dr. Rev. Stephen Kanyaru M'Impwii. He however admitted that he did not understand what assignment meant and could not comment on the said document but claimed he became aware that money was paid to the council over the suit plot. He admitted that Mr. Otieno was subjected to an inquiry and was absolved of all wrong doing.

23. On re-examination, he stated that the invasion took place on 13th March and though he had a cordial relationship with Mr. Otieno his problem with him arose when we were invaded and he did not escort them to the police which made him conclude that he was with the group that invaded them but opted to remain behind with the police. That the invasion led them to file the case in court.

24. DW4, **Henry Ole Kirrinkol Ngairaga**, Konee testified that he met the plaintiff in 1993 at Pangani School of Theology. That the school was run by Bethany United Church, USA through its missionaries. That he met with the two missionaries Reverend Sung Jin Kang and Ison and they invited him to the first class of theology in 1993 and they were the pioneers of the school and in 1996 they held their first graduation at Nairobi west Administration Police Post. After the graduation they went separate ways. In 2001he learnt that the college had been given to KEMU. That he met the defendant in 2004 when he visited Lukuny Primary School which had been built by the missionaries. That late 2004 he met with Luke Wanyama who told him that they planned to take over the Bethany Christian College from Methodist Church and in preparation they had prepared minutes under the African Rural Mission with him as treasurer. He stated that the meeting was a forgery as he was not a member of the said organization and was surprised to learn that there was a suit in court with him as a plaintiff and he withdrew as the said missionary never gave them the church. That later on he learnt that the church was physically removed from the said premises.

25. On cross examination he stated that he did not know that Mr. Otieno would be present at the meeting as he had not met with him and was surprised when he was made treasurer as he had not attended any election and was even shocked that that had even appended my signature which he claims was forged on the said documents. He however, stated that he did not report the matter to the police. He denied being part of the plot to take over the college adding that as per his view the plaintiff was involved in an illegality.

26. On re-examination he stated that he first met the plaintiff in 1993 at Pangani School of Theology later renamed Bethany Christian College as did Luke Wanyama 1993 and Alfred Makanya who were also students at the said school. He stated that they did the initial ground work before the college was set up and attended a graduation ceremony in 2001.He stated that he was annoyed that his name was used without him being consulted.

27. DW5, **Pastor Joseph Amwayi** testified that he was an employee of KEMU and African Rural Mission (ARM). He worked in the catering department. He joined the church committee in 1993 and

they started Pangani School of Theology. The plaintiff joined the institution as a student as they were getting people from the government and training them free with the help of monies from Bethany United Methodist Church. That Pangani school moved to plot no.3/463 in 1999 and in 2001 Rev Sung who was managing the school handed it over to Bethany Christian College to Kenya Methodist Church. The plaintiff was then incorporated by the church to be the college administrator, all this time he was an administration police officer. The plaintiff worked for Methodist Church from 2001 to March 2005. In December 2004 Methodist Church decided to hand over Bethany Christian College to KEMU as its sponsor and the plaintiff was present at the said function. KEMU conducted fresh interviews for staff and the plaintiff was dropped due to conflict of interest. He was not present when the college was invaded on the 13th of March 2005. On his return to the compound he found the plaintiff, Alfred Makongo, Luke Wanyama and other persons in the compound wielding twigs and demonstrating. On that day the plaintiff became the boss of the college. He remained in the compound as a member of ARM even though the plaintiff wanted to sack him. After a month the plaintiff sent youth to his house who tried to force him to testify in HCCC No.133 of 2005 or else he leaves the house. He visited the lawyer office after talking with Dr. Stephen Kanyaru and its then that he realized that there was a forgery on the papers that were used to file the suit. He told the plaintiff he would not move out, he testified for the church who won the case. A week thereafter the plaintiff hired youth to evict him from the house, he was beaten, was badly injured, the matter was reported to the police but he did not get much help. Later he was transferred to KEMU's main Campus in Meru.

28. On cross-examination he stated that he worked for KEMU for almost ten (10) years and 14 years for African Rural Mission (ARM) having joined KEMU in 2001 and ARM in 1992 when he joined the college at Pangani and trained as a Pastor. He stated that the church Africa Rural Mission was set up by a United States of America church for Africa as they trained people from outside Kenya. That Africa Rural Mission was an organization of the Methodist Church in the USA. That then they acquired a plot No. 3/463 and changed from Africa Rural Mission to Bethany Christian college. That the said Plot No. 3/463 was registered in the name of Africa Rural Mission and the plaintiff Dalmas Otieno was not a part of Africa Rural Mission. He stated that he participated in Africa Rural Mission as treasurer but the filing of returns was done by the Missionaries. That in 2001, the college was handed to Kenya Methodist Church MCK and in 2004 it was handed to KEMU University.

29. On re-examination he stated that after chasing the Methodist University, Dalmas Otieno took over the office and stopped him from working saying he did not trust him. That when he went to his house which was in the compound he found a person with a pistol who later on left. He stayed for one month and left and never went back again.

30. DW6, **Rev. Stephen Kanyaru M'ipwii** a trustee of the church and former presiding Bishop at Methodist Church. He stated that the CEO of the church was Joseph Ntombura Mwaine. That Plot No. 3/463 Mathare North was not in occupation by the plaintiff. He sought to stand by the statement of the said letter dated the 12/4/07 which stated that the plaintiff was an employee of Methodist University. He referred the court to the latter dated 3/2/04 which was a letter from the plaintiff accepting the offer of employment. He stated that from 2002 to 2005 they had a problem in running the collage which had been donated to them in 2001 by a Korean Missionary. That the church handed the college to the Kenya Methodist University on 7th December 2004 as they wanted it to be operating with the university. That in 2005 Rev. Nguku was the chaplain, Prof. Mugambi was the Vice Chancellor of KEMU and when Nguku was evicted Dalmas Otieno occupied the seat. That from 13/5/2005 the university rented the university but took over in 2012. He admitted to writing the letter dated 12/4/2007 raising complaints about the said officer adding that the averments therein are true. He faulted the report's findings claiming that the same were not true in that he was a member of the church. This was his evidence in court. In his statement which he adopted as his evidence he stated that the plaintiff suit arises from letters he wrote to Ambassador Mathaura to intervene as the plaintiff had violently taken from and kept the church's property plot no. 3/ 463 Mathare North in March 2005. That the plaintiff still keeps the church property even after the court discharged an injunction which the plaintiff's supporters Alfred Makongo and Luke Wanyama obtained on the 18/7/2005 in HCCno.133 of 2005. That the letters complained of point out the fact that the plaintiff who was a public servant evicted the church from its property in March 2005 with impunity. That the plaintiff took up other jobs whilst working in the government. That between 1999 and

2001 the plaintiff served as an employee of both the government and Methodist Church in Kenya. That with the benefit of hindsight the church can tell that the plaintiff arranged for the eviction with the assistance of some officers in Muthaiga Police Station who declined to give the church protection when asked to repel about 100 thugs who invaded the college on the 13th of March 2005. That after the eviction the plaintiff's supports obtained an injunction in HCCC 133 of 2005 which was later on discharged, but they have sought an injunction in the Court of Appeal. That the plaintiff worked for Bethany College as a business manager between 1999 and December 2004 and also a chaplain, and he failed to secure employment when the university took over the college. He stated that the plaintiff is a dishonest man who worked for the government and two different church organizations from which he drew salaries every month in breach of the duty of fidelity he owes the Kenya government, that the plaintiff and his two supporters staged a coup on the management of the College, that the plaintiff and others have continued to commit trespass to land and chattels and also committed criminal offences. That in early 2006 the plaintiff excluded Alfred Makongo and Luke Wamalwa Wanyama from the illegal management of Bethany College and remaining as the sole beneficiary of the trespass committed and revenue derived from the said college, hence his 2 letters dated the 12/4/2007. That the words contained in paragraphs 3,4, and 9 of the plaint are not defamatory of the plaintiff and that the same were published under conditions entitling him to qualify privilege in that the same were published to Ambassador Muthaura without malice and he as the executive of Methodist Church in Kenya was under a moral and social duty to report to the government of Kenya the crimes and torts the plaintiff its employee was and is committing and that Ambassador Muthaura as the Head of Public Service had a corresponding interest in receiving the report on the plaintiff acts and breach of the duty of fidelity in which the plaintiff a government servant was involved in.

31. On cross-examination he confirmed that the properties of the church are registered in the Kenya Trustee Registrar adding that the documents transferring the same to the church were available. He stated that his name was in the documents over plot no. 3/463. That they are representing the Methodist church in Kenya they have the power of attorney under the trustee deed. That he wanted the plaintiff investigated as he organized the thugs. That the plaintiff used the college vehicle and rented the place out. That he did write the letters to tarnish the plaintiff's name. That he was not there when the plaintiff took over. That the plaintiff evicted the staff under him and that abuse of office is a criminal offence. That the tribunal's findings were not correct.

32. In re-examination he retreated his evidence and added that the defense witnesses who testified indicate their position in the matter.

33. Parties filed written submissions which I have read and considered. It was the plaintiff's case that he has proved his case that the words published to the Ambassdor Muthaura in the letter dated the 12th of April 2007 portrayed the plaintiff as a criminal and a land grabber and that despite being in the police force the plaintiff associated himself with thugs, that this is damaging to his integrity as a law enforcement officer. That the said letter is riddled with malice and spite on the part of the defendant. It was submitted that the defendant failed to show that he had reported the actions he purported to have complained of to the police, that the defendant did not exhibit the lease agreement between the plaintiff and the 3rd parties its alleged the plaintiff leased the property to. That the due to the defendants allegations the plaintiff was subjected to an enquiry, that the defendant had set out to have the plaintiff sacked from his employment by making the wild allegations exhibited in the 2 letters but the inquiry found the plaintiff not guilty. That the defense evidence lacked truth in it. The plaintiff relied on the case of **Keah vs. Mburu 1982 klr 131** where the court held that *a letter had been published to the person to whom it was copied and the letter was clearly defamatory. That the letter must have lowered the plaintiff's estimation in the eyes of his employers.* The plaintiff also relied on the case of **Khasakhala vs. Aura & others [1995-1998] 1EA 112 (H.C.K)** where the Court of Appeal held that the report published by the defendants was defamatory in that it tended to injure the reputation of the plaintiff lower him in the estimation of right-thinking members of the society and cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The plaintiff also relied on the case **Machira t/a Machira & Company Advocates vs. East African Standard [2001] klr 638** where the court held that to plead justification it should be clear that the allegations he made and are complained off are true in fact and substantially so. That in this case the evidence adduced by the defendant against the plaintiff was never

established as true in the allegations in the letters complained of. On the award for damages it was submitted that the plaintiff was defamed in his professional capacity and that the court should be guided by the case of **Khasakhala** in awarding the appropriate damages.

34. The defendant submissions were that the defendant defense of justification and qualified privilege is valid. For the defense of justification the defendant cited the words of Professor Salmond at pages 157 to 192, that **“no action will lie for publication of a defamatory statement if the defendant pleads and proves that it is true. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. This is so even though the defendant is proved to have been actuated by malicious or improper motives”**. The defendant submitted that the two letters contained the truth about the plaintiff which was brought through their defense witnesses and their documents. The defendant also cited what Professor Salmond states on qualified privilege that **“when an occasion of qualified privilege exists a person.... Is entitled to make a defamatory statements about another. The right of freedom of speech prevails over the right of reputation but only to a limited extent....The principle is that the statement is protected if fairly made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in matters whether his interest is concernedNo complete list of each occasion is possible or desirable but it is generally agreed that the chief instances of qualified privilege are of the following:**

i. Statements made in the performance of a duty

ii. Statement made in the protection of an interest

35. That the defendant explained why what he wrote enjoys a qualified privilege that; the same was published to Ambassador Muthaura without malice, the defendant as the CEO of the Methodist Church in Kenya was under a moral and social duty to report to the Government of Kenya crimes and torts which the plaintiff its employee was and is committing and that Ambassador Muthaura as the Head of Public Service in which the plaintiff served had a corresponding interest in receiving a report of the criminal activities and torts which the plaintiff was committing and also the breach of the duty of fidelity in which the plaintiff a government official was and is involved. The defendant relied on **section 24** of the **Defamation Act Cap 36** for its defense of justification. It was argued that the true charges the defendant made against the plaintiff are that the plaintiff was a dishonest public servant who breached the employee's duty of fidelity which forbids him for working for two or more employer's without the contest of the employer between 1999 and early 2005 that the plaintiff worked for and drew salaries from both the government of Kenya and Bethany College between 1999 and 2001 and from Methodist Church and Methodist University. The rest of the defendant's submissions analyzed the evidence adduced pointing out why their defence of justification and qualified privilege should be upheld.

36. Issues for determinations.

- i. Whether the words in the said two letters are malicious and/or defamatory?
- ii. Whether the defence of justification and privilege information is available to the defendant?
- iii. Whether the plaintiff has proved his case on a balance of probability?
- iv. Whether the plaintiff is entitled to general and exemplary damages sought?

37. The plaintiff alleges that the defendant sent defamatory letters to his employer and the same were falsely and maliciously and were aimed to portray him as a thief land grabber and a person who has no regard to due process of law. The defendant on his part admits to writing the said letters but denies that the same were malicious or defamatory and seeks to rely on defence of justification and privilege information. The alleged defamatory words are contained in two letters dated 12th April 2007 which in essence the plaintiff alleges the said words used therein were libelous. A libel is a defamatory statement **made in writing or printing or some other permanent form**" A party alleging that words

used regarding him are rebellious must prove the elements of the tort of defamation which are; that the words must be defamatory, that the words must refer to the plaintiff and the words must be malicious, the words must be defamatory in that they must tend to lower the plaintiff's reputation in the eyes of right-minded persons, or must tend to cause him to be shunned or avoided. The burden of proof is upon the person alleging that the said words to be defamatory to show that a reasonable man would have understood them as such.

38. The plaintiff refers to various excerpts from the two letters dated 12th April 2005. The letters which he alleges are defamatory, ***“RE: ILLEGAL ACQUISITION AND CONVERSION OF METHODIST CHURCH IN KENYA PROPERTY PLOT NO. 3/463 AT - MATHARE NORTH BY ADMINISTRATION INSPECTOR A.P. DALMAS OTIENO PERSONAL NUMBER 81061576.”***

“The church will be happy if you your good office can investigate this man who has been involved in criminal activities of illegally converting the church property for his own use by employing a group of hired thugs. The same person is drawing two salaries one from the government of Kenya and the other from the Methodist church which includes the university.

At the moment, he has rented out the leased some part of the premises that was given to the church by Korean Missionaries in the year 2001 and where he remained employed till the year 2005 when he organized the takeover.”

There is an issue that arose as to whether the plaintiff was an employee of Methodist University? As per the said letter, the defendant wrote that “The same person is drawing two salaries one from the government of Kenya and the other from the Methodist church which includes the university.” Gamaliel Riungu Mwitia in his testimony stated that the plaintiff worked at the University and also for Kenya Administration Police. That whilst at the college he was in charge of students affairs and used to be paid with a cheque and they would generate pay slips for him. He however, testified that the principal was the custodian of all documents relating to employment.

39. The defendant in support of the said allegations relied on a job application dated 26/9/2002 for position of Manager at Bethany Christian College. As per the letter dated 3/2/2004 Bethany Christian College offered the plaintiff employment and backdated the commencement date of his employment to 1st June 2013. The plaintiff in accepting the terms as per the said letter appended his signature on the same on 9th February 2004. Subsequent to this it appears the plaintiff was called to attend an interview on 15th January 2005 by the Kenyan Methodist University and later via the letter dated 22nd February 2005 he was declared redundant. They tabulated the dues owed to him as 3 months' salary Kshs. 39,600/- and Kshs. 11,880/- for 27 days leave entitled to the defendant. It is on the basis of this that they issued him with a cheque for Kshs. 41,906/-. From the evidence tendered before this court it appears to me there was some sort of employment relationship between the plaintiff and defendant. In this regards I find that the defendant has proven in a balance of probability that the plaintiff was an employee of Bethany Christian college. On this aspect, I find that the statement regarding the plaintiff's employment was true.

40. The defendant in his letter stated that ...“At the moment, he has rented out the leased some part of the premises that was given to the church by Korean Missionaries in the year 2001 and where he remained employed till the year 2005 when he organized the takeover.” The plaintiff in his testimony denied these allegations and the defendant in his testimony testified that the university had a problem running the school between 2002 and 2005 and as from 13th May 2005 the University rented out the school and only took it back in 2012. The defendants did not adduce any evidence to support this allegation.

41. The next statement was that“The church will be happy if you your good office can investigate this man who has been involved in criminal activities of illegally converting the church property for his own use by employing a group of hired thugs.” This statement imputes on the plaintiff as a person who engages in criminal activities. Did the plaintiff take part in the said invasion of the school? Felix Gitonga Mwambia in his testimony stated that shortly after the school was invaded the Vice Chancellor (VC) Prof. Mugambi wrote to the Permanent Secretary Internal Security complaining

about the invasion and citing the plaintiff as the invader and facilitator and a report was made to the police by Prof. Mwaniki and Reverend Nguku however Mr. Otieno was not arrested. Rev. William Nguku in his testimony stated that the plaintiff arranged for him to meet the neighboring committee and it was while he was waiting to meet them that the invasion took place. In his testimony he stated that during the said invasion the plaintiff never asked people to neither move nor mishandle the gate man and only suspected that he was involved in the said invasion because he did not accompany them to the police station to report the incidence. In the case of ***Machira t/a Machira & Co. Advocates v East African Standard KLR [2001]*** Justice Kuloba observed, “that what is complained of are not comments but statements of alleged facts nor are they inferences of facts from other facts referred to. Again, there was no actual basis for a comment. A comment must be objectively fair in the sense that an honest or fair minded–minded person could hold that view. Comments must be based on true facts which warrant comments.”

42. The defendant in his defence argues that the two letters that he wrote enjoyed a qualified privilege since the same was published to Ambassador Muthaura without malice and at the time he as the Chief Executive Officer he was under a moral and social duty to report to the government of Kenya crimes and torts which were being committed by its employee. I find that there was no justification for the defendant to have made such allegations without first investigating the same. The defense of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held see the case of ***Machira t/a Machira & Co. advocates v East African Standard [2001] KLR***. “The burden is on the defendant to prove facts and circumstances which establish the occasion was privileged.” (see **Halsbury Laws of England, Vol 24 section 3 on libel and slander**). I find that the defendant has not proved on a balance of probability that he was justified to write the two damning letters to Ambassador Muthaura and as such his defence fails. Having assessed the evidence tendered before this court, I find there the letters as published by the defendant were defamatory. It is also not in doubt as to whom the said statements refer to as the letter referred to the plaintiff by name and even went ahead to give service number. I find based on the evidence placed before this court that the various allegations levied against the plaintiff were malicious and injurious to his character I agree with the sentiments expressed in the case of ***Odonkara v Astles 1970 EA 374***. In describing when a statement is said to be defamatory, “*and a statement is defamatory of a person of whom it is published if it is calculated to lower him in estimation of ordinary just and reasonable men.*”

43. From the reading of the said defamatory letters the plaintiff’s career in the force and the imputation of his personal integrity will discredit him before right thinking members of public as a person not to be trusted. The words used in the said letters out rightly refer the plaintiff as a criminal engaged in criminal activities whilst in the force. Due to the said allegations, investigations and inquiry the plaintiff testified that he could not serve his church and as a result was humiliated and shunned. The letters dated 12th April 2007 were about the plaintiff as they referred to the plaintiff by name and the libelous letters were published to former Ambassador Muthaura. The defendant did so even without having verified the allegations. The said letter in my view lowered the plaintiff’s estimation in the eyes of his employers. It was also subject to the said letter that the plaintiff was subjected to an inquiry. I find that there was no justification for the defendant to have sent such a damning letter without first substantiating the said allegations. On this am guided by the case of ***Godwin Wachira vs. Okoth [1977] KLR 24***; where it was held that, “*malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts; that may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice.....the failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false, will be evidence of malice.*”

44. This now takes me to analyze the award in damages as sought by the plaintiff. I note that neither the plaintiff nor defendant submitted on an actual sum for damages. Section 16A of the Defamation Act Cap 36 Laws of Kenya provides: “*In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just: In the case of **Khasakhala v Aurah and others E.A.L.R. [1995-1997] 1 E.A. 112** where it was held that, “*though a person’s reputation has no actual value the**

sum to be awarded in damages was at large and the court was free to form its own estimate of the harm taking into account all the circumstances. An individual has a right to his good name, character and reputation and the law must protect him/her.” In this case, taking into consideration the plaintiff’s status in society as an Administration Police called to serve the people of the Republic of Kenya I find that he is entitled to an award of general damages of **Kshs. 1,000,000/-**.

45. On exemplary damages I find that the publication by the plaintiff this publication by the defendant was careless. The defendant ought to have at least investigated before sending such a damning letter to the plaintiff’s employer. The defendant despite the findings of the inquiry never made efforts to make amends and as such I find that the plaintiff is entitled to exemplary damages and award him exemplary damages of **Kshs. 500,000/-** I enter judgment for the plaintiff as against the defendant for the sum of **Kshs. 1,500,000/** together with costs and interest from the date of this judgment until the same is paid in full. The plaintiff shall also have cost of this suit. It is so ordered.

Dated, signed and delivered this **29th** day of July 2016.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff**

.....**For the Defendant**

Ms. Charity Court Clerk