



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 51 OF 2011

MICHAEL O.

WECHE.....PLAINTIFF

VERSUS

**DR. FREDRIC N. MVUMBI O.P.....1ST
DEFENDANT**

**DEPUTY VICE CHANCELLOR ACADEMIC, CATHOLIC UNIVERSITY OF EASTERN
AFRICA)...2ND DEFENDANT**

**THE BOARD OF TRUSTEES, CATHOLIC UNIVERSITY OF EASTERN
AFRICA).....3RD DEFENDANT**

**COUNCIL OF CATHOLIC UNIVERSITY OF EASTERN
AFRICA.....4TH DEFENDANT**

JUDGMENT

1. The Plaintiff **MICHAEL O. WECHÉ** claims against the four Defendants that on or about 23rd November, 2010 the 1st Defendant **DR. FREDRIC N. MVUMBI O.P** under instructions of and with the supervision of the 2nd Defendant **CATHOLIC UNIVERSITY OF EASTERN AFRICA** and in the course of employment as an agent of the 3rd and 4th Defendants institution maliciously and without any justifiable cause authored, published or caused to be published a defamatory letter dated 23rd November, 2010 concerning the plaintiff and caused the said letter to be circulated. He prayed for aggravated and exemplary damages, an injunction restraining the Defendants and each of themselves, their servants or agents or otherwise howsoever from further publishing or causing to be published words defamatory of the Plaintiff, costs of the suit and interest at court rates.

2. The letter that is said to be defamatory of the plaintiff reads as follows:-

"RE: Concerning Dr. Michael O. Weche

Department of English

Hi DVC/Academic

I sincerely acknowledge that I have received many complaints about Dr. Oyoo and these are of different types. First, students have complained that his marking style, either CATS

or Exams, is so selective. They said that he favours some. Secondly, they complained that he terrorizes them and that he is so arrogant in class while teaching that many of them do not find a conducive environment that allows free and fair learning. I confronted him in his office two weeks ago and I asked him to show me their CATS Marks.

These were indeed, terrifying...

Here is another absurd category: some of his favoured students have his two exams. So while some struggle to study, some others review the exam questions he had given them...I thought of saving both the lecturer and the students in whatever I might take as a decision. So I called three students around 5.30 p.m., questioned them for 40 minutes in order to get their feelings. DVC, I felt sorry for our students because they are so in fear, terrible fear. Although they confirmed these allegations, they could not agree to let him know their objections.

...Again, since we are already in doubt of the authenticity of Dr. Oyoo's exams I propose that the two exams be set today by another lecturer and marked by the one who will compose them..."

3. It was the Plaintiff's argument that the letter in its natural and ordinary meaning or by imputations and innuendos meant and was understood to mean that; he is unprofessional and is not a competent academic; that he is incapable of setting any or any serious exams; that he is guilty of exam fraud; that he is incompetent to hold an office as a lecturer, head of department or any other serious department, academic or otherwise in the institution; that he practices favouritism in academic papers, lectures and exams; that he is violent and irrational; that he is insensitive to students and student needs; that he has failed to create free and fair learning environment for his students; that he does not respect the set syllabus and exams ethics and that he is guilty of several other undisclosed and unspecified malpractices and offences academic or otherwise.

4. The plaintiff averred that the 3rd and 4th Defendants authorized the said letter to be printed, published and be distributed or caused it to be written, printed, published and be distributed while knowing fully that the allegations therein concerning him were untrue. He asserted that before the said publication, he had enjoyed extremely high esteem and respect from his peers, students, friends, family and his academic colleagues. That he is a lecturer of good repute and has moral standing in the society and the right thinking members of the public as a lecturer in the Catholic University of Eastern Africa, part time lecturer in Marist International Centre, supervisor of undergraduate projects in the Catholic University of Eastern Africa and a freelancer reviewer/editor of Longhorn Publisher (K) Ltd.

5. The plaintiff further stated that the Defendants published the said letter out of malevolence and spite and without justifiable cause thereby discrediting his reputation. He lamented that the said publication had injured his character and reputation as a consequence he has been brought into public ridicule, scandal, odium and contempt in the eyes of right thinking members of the society.

6. Particulars of malice against the Defendants were that; they knew and or ought to have known that the said publication and or the words were untrue; that they knew or ought to have known that the publication complained of would injure and or disparage him; that the publication was published in a sensational manner and the Defendants knew and or ought to have known that the allegations were untrue; that they knew or ought to have known that the publication of the said letter would result to defamation proceedings; that the Defendants jointly and severally failed to take any remedial measures or to establish the circumstances surrounding the allegations or at all and that Defendants published the letter with knowledge that it was libellous and or with a reckless disregard as to whether or not or it was libellous and having established that the prospect of material advantage to the Defendants by reason of such publication outweighed the prospects of material loss.

7. The plaintiff lamented that despite giving the Defendants notice of intention to sue and demanding a written and unequivocal apology, a total and unconditional admission of liability from which assessment

of damages would ensue, a right of reply under the Defamation Act as to the factual inaccuracies and falsehoods published by the Defendants which had injured his profession, character, reputation and good standing in academia and immediate cessation of the malicious vilification of the Plaintiff, the Defendants had failed to make good his demands.

8. By a statement of defence dated 5th April, 2011, the 1st Defendant admitted to writing the letter dated 23rd November, 2010 to the 2nd Defendant. He however stated that he was in the said letter informing the 2nd Defendant of his proposed actions on two exams Lit 400 and Lit 401 being set by the Plaintiff. It was denied that the letter was defamatory, written maliciously and or that it bore the meanings alleged by the Plaintiff. It was denied that the defendants had any intentions to further publish words complained of and or that the Plaintiff is therefore entitled to pray for an injunction against them. It was further contended by the defendants that the said letter was meant to acquaint the 2nd Defendant of the status of the situation and not in any way intended to undermine the professionalism and capability of the Plaintiff. It was further denied that the Plaintiff enjoyed high esteem or respect from students, friends, family, peers and academic colleagues.

9. Parties filed agreed issues as follows:-

- i. *Was the letter written on 23rd November, 2010 defamatory?*
- ii. *Whether the Plaintiff is guilty of the allegations contained in the letter dated 23rd November, 2010.*
- iii. *Did the Plaintiff compromise the integrity of exams? If so how?*
- iv. *What are the natural, ordinary meanings and innuendos imputed on the statements contained in the letter dated 23rd November, 2010?*
- v. *Whether the Plaintiff has suffered any loss as a consequence of the said letter.*
- vi. *Whether the Plaintiff is entitled to damages as prayed in the plaint*
- vii. *Who bears the costs of the suit.*

10. At the hearing, the Plaintiff (PW1) gave his background as follows: that he was the Head of Department of English and other foreign languages at Mt. Kenya University and that he was in charge of other campuses; 15 in Kenya, 2 in Rwanda and Somaliland; he is also a writer; an associate lecturer at Masai Mara University, Kisii University; he teaches Literature at Chuka University and the University of Nairobi on a part time basis; He was a Literature lecturer with a BA in Literature and was awarded scholarship by Kenyatta University; he graduated with Master of Arts in Literature and did his PhD in Literature in the year 2009 at University of Cape town; he was appointed by the Commission for University Education as a peer reviewer of programmes therefore he belongs to the quality assurance team and he was employed at Catholic University in August, 2001 as a tutorial fellow and had risen to the rank of a lecturer.

11. He testified that he discovered that the 1st Defendant had published the impugned letter and that students became aware of it because it was made public to them and his colleagues. That the dean cancelled examinations, Lit 400, which he was teaching and students wrote a letter of protest of cancellation of examination. That the fourth year students were aggrieved by the said cancellation saying they had never had any complaint against him. He stated that the class representatives also protested and wrote letters to the 2nd Defendant and the Chancellor. He stated that as a result of the publication he suffered psychologically. That he had been shunned and estranged from the academia. That he was even isolated by family, friends, relatives and colleagues. He contended that he was never given audience by the 2nd Defendant on what had transpired. He stated that he remained in employment for 1 1/2 years with Catholic University of Eastern Africa but left in August, 2012 because of the tension. That he was dismissed thereafter and his employment terminated on 21st August, 2012. He stated that the matter was never discussed or resolved.

12. On cross examination, the plaintiff responded that the letter complained of was published within the University to the 2nd Defendant and copied to others including the Registrar and examinations officer. He confirmed that the letter was not copied to the students but that they learnt of it when the examinations

were cancelled. He stated that he was teaching 5 units and had no difficulty with the two whose examinations were cancelled. He stated that he continued teaching 4 units in January, 2011 and thereafter set 12 examinations. He confirmed that he remained in the department even after the incident and conceded that he had nothing to show that he had stagnated in academia.

13. On being re-examined the plaintiff stated that he was affected by the publication because he lost self esteem and respect of his friends and colleagues yet he was innocent. He stated that the students were communicated to verbally followed by a communication vide a notice.

14. **Oscar Olaroi Kibiwott (PW2)** who was a student to the Plaintiff at the Catholic University of Eastern Africa between the year 2007 and 2011 testified that he had known the Plaintiff as a man of integrity and had never heard of him engaging in examination malpractices until the subject incident. He stated that he was the class representative for Literature 400 and denied that there was leakage. The witness stated that students only learnt of the leakage from a notice which was on the notice board. He denied being consulted by the Dean of the Faculty concerning the leakage and that neither was he summoned to give any evidence on any disciplinary measures against the Plaintiff. On being cross-examined, the witness stated that the notice cancelling examinations did not give reasons for the cancellation of the exams. He stated that they did not sit another examination but got his marks. He stated that his first reaction on seeing the notice cancelling the exam was that the University was against the Plaintiff.

15. The defence called two witnesses. The first defendant **Father Fredrick N. Mvumbi (DW1)** under whom the Plaintiff served in the Faculty of English gave an account of the procedure for setting exams. He testified that exams were set by a lecturer and moderated by the Department Board and through the Dean the exam would go to his office. He testified that the exams that gave rise to this case went through those procedures. That he received rumours and allegations that the said exams were leaked. That he took measures by meeting a Head of Department of English. That Dr. Selive, Sister Lucy Nabukonde and all other members were present in the meeting and it was resolved that the exam should go on but that marking should not be done by the Plaintiff. That they later decided to safeguard the integrity of the exam by cancelling it and he directed the Department to set a new exam which was done. He stated that the Plaintiff continued lecturing in the University and setting exams and that there were no other incidences involving the Plaintiff.

16. On cross examination, DW1 acknowledged directing that a notice for cancellation of the exams be pinned on the University Notice Board. He denied that any issues were raised concerning the re-set exams. He acknowledged having written the impugned letter to the 2nd Defendant and copying it to the Registrar and Examinations Officer. He however stated that he did not have the names of the students that were favoured or terrorised by the plaintiff. He stated that students complained to him and he spoke to them directly but that he did not have their names. He stated that protocol required that he gives instructions to the Head of Department to deal with the matter. He stated that no student was disciplined over the Plaintiff's matter. He denied that he wrote the letter to get rid of the Plaintiff who was to take over his position as the Dean. He stated that he acted due to the rumours and allegations made against the Plaintiff. He stated that he indicated that there was no evidence as there was doubt after informally interrogating several people. He however stated that he had to neutralise the situation whether he had evidence or not.

17. On re-examination, DW1 stated that the students put the leaked exams in his mail box. That it would have been disastrous if he disclosed the names of the students who gave him information since they would have been victimised.

18. **Professor Justus Githare Mbae (DW2)** who is the 2nd Defendant's Deputy Vice Chancellor Academic Affairs stated on oath that he did not deal with the Plaintiff directly but knew that there was a risk if the exams were not cancelled. That when there is an allegation of leakage even without evidence, the integrity of the exams must be protected. On cross examination, DW2 admitted that he received a letter by the students saying that they were not aware of the leakage of exams by the Plaintiff. He stated that the impugned letter against the Plaintiff was an information background notifying him of the

situation. He stated that there were allegations and suspicions which they acted upon.

19. Both parties' advocates filed written submissions and cited precedents in proposition of their respective positions.

20. In his submissions, the Plaintiff faulted the Defendants' witnesses' failure to verify the authenticity of the information and whether they took any remedial action in favour of the Plaintiff. It was pointed out that the Defendants did not offer an apology even after conducting investigations. That no disciplinary process was followed even after the serious allegations were made. That due to the foregoing, the defamatory and derogative statements remained intact. It was stated that publication of the statements to the students was not denied. That students were informed that the exams were cancelled because of alleged leakage and fraud.

21. On damages, the Plaintiff was of the view that damages awarded in defamation cases are at the sole discretion of the court. It was urged that it was not necessary to prove that the slanderous words were uttered with the principal's authority and that it was not enough to show that the servant uttered the words in the course of employment. The Plaintiff cited **University of Nairobi v. Mbutia (1985) KLR 821** where the Court of Appeal was of the opinion that the court in assessing damages, takes into account whether or not the libel was of gross and offensive character and submitted that nothing could be more gross and offensive to a lecturer than unfounded accusations of exam fraud and student favouritism. The plaintiff's counsel further cited **Associated Newspapers Limited v. Dingle (1964) AC 371** where it was held that injured feelings are as much as a matter of consideration in assessing damages for defamation as injured reputation. The Plaintiff relied on this court's decision in **Gideon Onchwati v. Standard Group and Nation Media Group & Kenol Kobil [2015]eKLR** where on being found liable for publishing that the Plaintiff was a wanted man, this court awarded the plaintiff KShs. 15 million. That the Plaintiff therein who was a former employee of Kenol Kobil was awarded KShs. 3,000,000/= as general damages, KShs. 12,000,000/= in exemplary damages and KShs. 500,000/= as damages in lieu of an apology and urged that in the instant case he be awarded KShs. 3,000,000/= as general damages, KShs. 10,000,000/= as exemplary damages and KShs. 1,500,000/= in lieu of an apology. The Plaintiff cited vast authority to support his proposal to the award of KShs. 14,500,000/= which authorities emphasised the need for a successful plaintiff to be appropriately compensated i.e. **John v. MGN Limited (1996) 2 ALL ER and Cassel & Co. Ltd v. Broome (1972) ALL ER 80.**

22. The Defendants addressed three issues in their submissions. First, whether the impugned letter was defamatory. It was argued that there was no intention to further publish the letter made by the 1st Defendant and that the letter was in no way undermining the professionalism and capability of the Plaintiff. That for the claim of defamation to stand, the Plaintiff must prove that the words are defamatory to him, the words must refer to him and the words must be maliciously published. It was argued that the Plaintiff failed to prove malice on the part of the 1st Defendant and only expressed isolated incidences of suffering isolation from academic colleagues as a result of the letter. That the Plaintiff's scope of work as stated in his evidence did not show that he suffered ridicule. The second issue as framed by the Defendants was the integrity of the examination vis a vis that of the Plaintiff. It was argued that the 1st Defendant's intention expressed in the letter to be the need to save and respect both the students and the lecturer. That although the exams were cancelled, it is the Plaintiff's syllabus that was used to re-set the exam. It was further argued that the 1st Defendant's letter was made on a privileged occasion since the communication was made in the course of discharge of his duty. The Defendant on this point cited **Adam v. Ward [1917] A.C. 309 at 339** where it was held that:-

"A privileged occasion is in reference to qualified privilege, an occasion where a person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

And the defendants argued that it was in the interest of the 1st Defendant to address the issues presented to him as he was in the same Department as the Plaintiff.

23. On whether the Plaintiff is entitled to the claim for damages, it was submitted that should the court find in favour of the Plaintiff, the claim of aggravated and exemplary damages will be unfounded since the Plaintiff failed to prove malice. In support thereto the Defendant cited **Mason v. Associates Newspapers Ltd (1965) 2ALL E.R. 945 at 960** where it was held that:-

"Exemplary damages are exceptional and only in rare cases are they awarded. It behoves that you give the most earnest consideration to the matter before deciding that it is a case of exemplary damages at all. There must be evidence that directly point to the publication having been made with cynical disregard for consequences or a publication made simply with a view of some benefit to be acquired thereby by the defendants. Exemplary damages cannot be awarded unless after giving it such consideration one is satisfied that the only inference to be drawn is that the publication was made with a view to profit or benefit in the form of scoring a match on the competing newspapers and in the knowledge that the damages payable would be insufficiently large to make the publication an unprofitable step in the interests of the defendants, but if there is likelihood that there was a little over enthusiasm on the part of some reporter...if it was one of those things which happen occasionally and was not an act of deliberate policy, then exemplary damages must not be awarded."

24. Having considered all the pleadings, evidence on record as adduced by both parties and the submissions and authorities relied on by the parties' advocates, in my view, the main issues to be decided are whether the letter as authored by the 1st defendant to the Deputy Vice Chancellor Academics and copied to the Registrar and the Examinations Officer was written in the course of the 1st defendant's employment and therefore privileged communication and or whether the notice cancelling exams set by the plaintiff was defamatory of the Plaintiff. The other question would be what damages if any is the plaintiff entitled to.

25. To prove the tort of defamation, the Plaintiff must establish that the publication concerned him and was made and circulated by the Defendants; that the words were untrue in substance; that they were not published in privilege and that the said publication was actuated by malice.

26. There is no contention that the 1st defendant authored the impugned letter concerning the Plaintiff, addressed to the DVC Academic Affairs the 2nd Defendant and copied to the Registrar and Examinations Officer who are officers of the 3rd and 4th Defendants University. The impugned letter was in a rather strong language and mentioned the Plaintiff as having allegedly been involved in exam leakage to some students and that he practiced favouritism in marking examinations. In the said letter, the 1st Defendant confirms having received many complaints on the Plaintiff from the students. The complaints are said to be selective marking of exams and Continuous Assessment Tests (CATS); arrogance to students and leaking two of his examinations to his favourite students. The said allegations are mentioned in the letter but the 1st Defendant further states that he interrogated three (3) students who feared being mentioned. The Defendants in admitting the authorship of the impugned letter however contended that the said publication was privileged since the 1st Defendant was discharging his duty as the Dean of the Faculty. He in the letter mentioned that he confronted the Plaintiff on the said mentioned issues.

27. While it is true that the actions of the Plaintiff or any other lecturer if at all they were true in substance were a concern of the Defendants and it was and is indeed their duty to address such issues, the duty to deal with those issues does not include making accusations such as the ones made in the impugned letter without giving the plaintiff a chance to respond to the allegations and or clarification from the Plaintiff. The mere fact that the 1st Defendant confronted the Plaintiff as he alleged in the letter but which he did not establish in evidence is not enough to justify writing such a letter making very serious allegations against the plaintiff lecturer and failing to give him an opportunity to respond thereto. In human resource management and practice, had such letter been used to discipline the plaintiff without giving him show cause, then the plaintiff would no doubt be entitled to seek appropriate remedies for having been condemned unheard. It is noteworthy that the Defendants never furnished evidence to prove that the said information was gotten from students or that it was true in substance. It was merely stated that quoting the students would put them in danger. Having made such a serious allegation against the Plaintiff, it was prudent upon the Defendants to prove them and that included revealing the source otherwise they will not have established the truth of their statement.

28. It is also clear from the record that the 2nd Defendant received the letter but never acted prudently on it by first verifying the correctness of the allegations therein before even deciding to cancel the two scheduled exams. The said action before carrying out credible investigations into those serious allegations against the plaintiff were irrational and without justification. See the decision in **Awili v. AG (1981) KLR 265**.

29. However, there is the mainstay of defamation, that of the defence of qualified privilege as raised by the defendants in their statement of defence. The defendants admit writing the letter but contend that it was a communication to persons who had an interest in the matter. Secondly, that there was no evidence that the letter was circulated to the students and or even a copy thereof given to the plaintiff and therefore published leading to the students protesting. The plaintiff's own evidence was that students learnt of the letter when the examinations were cancelled. There was no evidence that the students saw the letter in question or that its contents were made known to them verbally as alleged by the plaintiff. The plaintiff's own witness PW2 who was the student representative of the class whose examinations were cancelled as a result of which the students wrote a protest letter to the University administration testified and never stated that he ever saw the defamatory letter. Neither did he confirm what the plaintiff stated that students were communicated to verbally followed by a communication vide a notice. PW2 himself clearly stated that the students learnt of the allegations about examination leakage from the notice Board. In other words, this court is unable to find that the impugned letter was published to any other person other than the Deputy Vice Chancellor, the Registrar and the Examinations Officer. The next question is whether the above named persons as communicated to by the 1st defendant received the letter in the course of their work with the 1st defendant and therefore whether the communication was privileged.

30. In **Bildad Abiud Mbutia v University of Nairobi [1978] KLR 27** in which the plaintiff claimed damages for defamation but whose facts are somewhat different from the present suit, the High Court (Harris, J – as he then was) had occasion to acknowledge the rule relating to the defence of privilege as stated in **Gatley on Libel** as being that:

'Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest, the occasion is privileged.'

31. The learned Judge also noted that the same principle had been stated somewhat differently by **Lord Atkinson** in the House of Lords in **Adam v Ward [1917] AC 309** where, at page 334, he said:

"... that privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

32. The same principle was reaffirmed by the Court of Appeal in **University of Nairobi v Mbutia [1985] KLR 821** which held that in so far as publication of the impugned letter in that case to the secretary who typed the letter was concerned it was covered by qualified privilege, but not the publication to the other officers to whom the court held ***the defendant had no duty to copy the letter and that the officers had no corresponding duty to receive it, i.e. the two parties had no common interest or reciprocity in the matter.(emphasis added)***.

33. In my humble view, the issue of examinations fraud and therefore the integrity of examinations is a serious issue within an institution of higher learning as the Catholic University of Eastern Africa (CUEA). It is not an issue that would only concern the Dean of faculty. Cancellation of examinations that have been set and dates given to the students is such a drastic measure that has to involve high level consultations and therefore writing a letter to DVC Academic and copying it to the Registrar and Examinations Officer had, in my view, to be done that being a consultative process involving persons and officers that had an interest in the examination administration for them to arrive at a collective decision. The 1st defendant had a duty to also copy the letter to those two officers and the said officers had corresponding duty to receive it, i.e. they had a common interest or reciprocity in the matter to enable

them decide whether or not the examinations could be administered in view of the serious integrity issues raised against the lecturer and the already set examinations.

34. But even if I am to be found wrong on the above assessment, it is noteworthy that although there was notice given to the students that they would not sit the said examinations and they later got to suspect the reason attached to the said decision as being an alleged leakage of examination, there was absolutely no evidence that the communication in the impugned letter was circulated among the students. In addition, although the Defendants have not established the truth of the allegations in the published letter that the 1st Defendant received the leaked papers in his mail box and or that the students had confided in him of the terror unleashed on them by the plaintiff or that he had favourite students in that class, and secondly, although the students who were allegedly interrogated and who are said to have revealed the information of the examinations leakage were not brought to court to testify, this court has not throughout the trial of this case been told how and from whom the plaintiff obtained the copy of the alleged defamatory letter. This court cannot base its decision on the basis of evidence whose source was not disclosed by the plaintiff. The plaintiff may have had his own insiders who may have photocopied for him the impugned letter but there is as I have stated absolutely no evidence to show that the letter was copied to the plaintiff and he never disclosed how he got it. In addition, the Notice of Cancellation of examinations as placed on the Notice Board from which the students had to seek answers as to why the examinations were cancelled was, in my view, not defamatory at all and the same could not in any way have formed a basis for this suit in the absence of any other evidence. The Notice read:

35.

“N O T I C E

TO: ALL ENGLISH DEPARTMENT STUDENTS

THE FOLLOWING EXAMS HAVE BEEN CANCELLED UNTIL FURTHER NOTICE:

- 1. LIT 401: AFRICAN LITERATURE**
- 2. LIT 400: LITERARY AESTHETICS**

HoD: English Department”

36. In my humble view, cancellation of examinations *per se* is not defamatory and looking at the above notice, no reasons were given for such cancellation. PW2 the student in the said class did not tell the court how he got information and from whom, that the examinations were cancelled because it was leaked, since he did not testify that he had seen the impugned letter. Further, the letter of protest dated 25th November 2010 by the English Literature Finalist students stated that “*the feeble information given to us was that the class had notified the Dean-Faculty of Arts and Social Sciences that the two papers were already in circulation.....*” the students never stated that they had read the alleged defamatory letter written by the 1st defendant.

37. The other interesting angle to this case is that whereas it is very clear that the impugned letter was written by the 1st defendant and sent to the DVC Academic and copied to the Registrar and the Examinations Officer, there is no evidence that the said letter was written by the 1st defendant under the supervision and or with the initial blessings of the other three recipients, or the rest of the University administration. The tone of the letter is indicative of a complaint being received by the 1st defendant who was under a duty to communicate that information to the relevant authorities for appropriate action to be taken since he could not unilaterally take a final decision on the matter at hand. There was also no evidence that the impugned letter was published in the University website for all and sundry to read. And in as much as it appears that the act of cancellation of the suspect examinations was a collective administrative decision following the revelations in the letter that warned of the exams leakage, it was not proved that the Notice cancelling the examinations was in any way *per se* defamatory of the plaintiff. In

my view, stretching liability in defamation cases to attach to the recipients of the alleged defamatory matter would be too remote a finding.

38. The Plaintiff was at the material time not only a lecturer in the Department at the University but other Universities in Kenya and beyond Kenyan borders. An allegation of leakage of exams and terrorising of students was indeed a serious allegation against the plaintiff but it was a communication to persons who had an interest in the matter and in the course of business at the University. The letter was never placed on the Notice Board for all to read and neither was it sent to all the University staff that had no interest in the matter. I am therefore not satisfied that the plaintiff has proved his case against the defendants jointly and or severally on a balance of probabilities that the letter was published other than in a privileged situation and or that it lowered the personal and professional reputation of the Plaintiff in the eyes of his professional colleagues, students and reasonable members of the public generally. Whereas cancellation of examinations may have been demeaning to the plaintiff as an experienced lecturer, but this court does not find that the Plaintiff was injured in his character and reputation by reason of the 1st defendant writing a letter of complaint however untrue, concerning him or that he was brought into ridicule, contempt, hatred and public odium as a result of the publication complained of.

39. I must also now consider whether the publication complained of was prompted by malice. There was no attempt by the 1st Defendant to verify the truthfulness of the allegation made in respect to the Plaintiff before writing the letter to the DVC Academic. No attempt was made to contact him for his comments in regard to the allegations of his dereliction of duty after the complaints were allegedly made to the 1st defendant and neither was an apology rendered, which indeed would make this court to infer that the 1st defendant may have acted maliciously. However, as I have stated before, the letter was published in privilege to persons within the employment circles which persons had an interest in the matter and who had a corresponding duty to receive the communication touching on the integrity of examinations administration within the University and who were in authority to take decisions on the matter complained of. They had an interest in the matter in issue and therefore the communication was not libellous of the plaintiff.

40. Accordingly, I find that the plaintiff has not proved on a balance of probabilities that the impugned letter authored by the 1st defendant to the 2nd defendant and copied to the Registrar and Examinations Officer of the CUEA was defamatory or at all and therefore the defendants are not found to be liable in the alleged defamation against the plaintiff.

41. In the event that I am found to be wrong in the finding I have made on proof and liability of the defendants, the law obliges me to assess damages I would have awarded the plaintiff had I entered a verdict in his favour. In this regard, and as was stated in **High Court Civil Case No. 833 of 2000, Joseph Rading Wasambo v The Standard Limited**, that in the assessment of damages, the legal process must for its own credibility, strike a proper balance between the demands by litigants and what is fair and reasonable in given circumstances. I also adopt a good guide from the following observations found in **Thompson v Commissioner of Police of the Metropolis and HSU v Commissioner of Police of the Metropolis** [1997]2 All ER 762 (at page 771):

"Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little - - - - No other result can be accepted as just But it serves no public purpose to encourage the plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike"

42. The plaintiff complained that he was shunned and ridiculed by his students and colleagues and family members due to the allegations that he leaked examinations to some students and that he favoured some and that he terrorised students in class. Leaking of examinations could be a serious professional misconduct that can lead to dismissal of a lecturer from employment and exam fraud is akin to a criminal offence under the Penal Code attracting up to 3 years imprisonment. Section 16A(1) of the Defamation Act provides, *inter alia*, as follows:

"16 A (1) in any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that 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."

43. Evidence adduced in the present case is to the effect that publication of the defendant's impugned letter was to a small cluster of University administrative Officials where the plaintiff and 1st defendant both worked. The principles governing the award of damages in libel cases were discussed at length in the **Biwott v. Clays (2000) 2 EA 334** and **Machira v Mwangi (2001) EA 110**. The Court of Appeal in **Johnson Evan Gicheru v Andrew Morton (C A No. 314 of 2000, Nairobi)** the Court of Appeal awarded KShs.6 million where the offending publication was in a book with international coverage. The Court of Appeal in that case **Johnson Evan Gicheru** (supra) applied the guidelines given in **Jones v Pollard (1997) EMLR 233** regarding the quantum of damages in libel cases, as follows:-

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

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

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

4. Matters tending to reduce damages.

5. Vindication of the plaintiff's reputation past and future."

44. Applying those principles, and based on the evidence before the court, and taking into account all the surrounding circumstances, including the fact that this was a one-time publication only, an all inclusive figure of Kshs.3,000,000.00 would suffice. However, as the plaintiff failed to prove his case against the defendants, I award him nothing.

45. In the end, I dismiss the plaintiff's case against all the defendants.

46. On costs, albeit costs follow the event, but in this case, I would exercise my discretion and order that each party bear their own costs in view of the conduct of the 1st defendant complaining against the plaintiff to higher authorities without giving him an opportunity to explain himself on the allegations received from anonymous students. I am also alive to my finding that in as much as the publication would have been highly defamatory, it was published in privilege and therefore it would not be fair and just to punish the plaintiff who sought to be vindicated.

Dated, signed and delivered in open court at Nairobi this 16th day of December, 2015.

R.E.ABURILI

JUDGE