



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1049 of 2003**

**ELIJAH MWANGI .....PLAINTIFF**

**VERSUS**

**ROBERT JALLANG'O AKELLO ..... DEFENDANT**

**JUDGMENT**

On 13.10.03 the plaintiff filed through Macharia Kahonge & Company Advocates the present suit by way of plaint alleging libel and slander and praying for judgment against the defendant for:-

- a) Damages.
- b) An injunction restraining the defendant from publishing the aforesaid or similar libel of and concerning the plaintiff.
- c) Costs of this suit.
- d) Interest on (a) and (c) above at court rates.
- e) Any other further alternative relief as this court may deem fit to grant.

The defendant entered appearance on his own behalf on 03.11.03 but filed defence on 17.11.03 through Otieno – Odek & Company Advocates essentially denying the allegations contained in the plaint. He also pleaded that the suit was statutory time – barred. On 27.04.04 the defendant filed notice to act in person and continued to so act to the end except for one occasion, i.e. on 26.04.06, when Miss Dorothy Kiprono Advocate appeared and sought adjournment on the basis that she had been instructed by the defendant to inform the court that the defendant was out of the country and could not attend court.

Hearing of the case/suit started on 13.07.05 whereat the plaintiff was represented by learned counsel, Mr A. Karanja while the defendant appeared in person. Mr Karanja was subsequently replaced by Mr. P. Kahonge in representing the plaintiff while the defendant continued to act in person to the end, save for the one brief occasion recorded above.

For a variety of reasons, hearing was not concluded until 26.03.07 when the parties gave oral highlights of written submissions they had earlier filed, with the leave of the court.

The plaintiff sought to rely on 4 incidents during which he alleged the defendant had defamed him.

The first was an incident of 22.02.02 during which he alleged the defendant unlawfully, maliciously and falsely spoke and/or published insulting words against him/plaintiff. That incident is reported in the plaintiff's internal memo to the Vice-Chancellor, University of Nairobi dated 09.05.03. In this connection, attention is drawn to section 20 of the Defamation Act, Cap.36 which is to the effect that an action for libel or slander may not be brought after the end of 12 months from the date of libel or slander. As the words in question were allegedly uttered on 22.02.02 and the suit herein filed on 13.10.03, well after expiry of the 12 months period, the legal action based on the alleged slanderous words is statute – barred, as plaintiff's counsel conceded, and, accordingly, dismissed straightaway. The allegedly slanderous words alleged to have been uttered by the defendant against the plaintiff on 22.02.02 and evidence relating thereto are expunged from the court record.

The second incident is also reported in the plaintiff's above internal memo of 09.05.03 (Exhibit 3) and it is stated to have taken place on 08.05.03 when, according to the plaintiff, the defendant who occupied an office adjacent to the plaintiff's at the University of Nairobi shouted at and insulted the plaintiff. Relevant portions of the plaintiff's aforesaid internal memo to the Vice – Chancellor are reproduced below:

'SUBJECT: MISCONDUCT BY PROF. R.J. AKELLO

I wish to lodge a formal complaint on Prof. R.J. Akello of the Electrical & Electronic Engineering Department. I happen to occupy office AW 202 C which is next to his office AW 202 A and we have a common door AW 202. His office window opens to a narrow corridor on which my door is located.

When I reported for work yesterday, i.e. 8<sup>th</sup> May at about 8.15 a.m., he started shouting at me as well as insulting me. He seemed to be very drunk, I suppose on alcohol. Amongst his insults were the words "Yo Kikuyus are thieves", "am surrounded by thieves", and that "you thieves, you stole my computer." I left the office and reported the matter to Mr Wahome, the Chief Security Officer who advised me to put my complaint in writing. When, I later went back to the office at about 9.50 a.m. he insulted me again, calling me a thief! I then left for my 10 – 11 a.m. lecture. Again, at about noon he insulted me for a third time. It is after this third incident that I decided to report the matter to the Kenya Police. The matter has been entered in the central police station as OB/44/8/5/03. I also recorded a statement ---.

I have no idea why someone of Prof. Akello's seniority should stoop as low as insulting other members of staff. From his utterances, I am made to believe that he harbours deep hatred for the ethnic group that I belong to and that he is capable of inflicting physical injury on me. I no longer feel secure in my office ---.

I am today reporting similar misconduct, with the hope that Prof. Akello will be restrained in order to avoid a situation that may lead to physical confrontation.

By a copy of this memo, I am also requesting the chairman of Department to allocate me a suitable office far away from his.'

The plaintiff copied his memo to: Deputy Vice – Chancellor (Administration & Finance); Principal, CAE; Dean, Faculty of Engineering; Chairman, Electrical & Electronic Department; and Chief Security Officer. The plaintiff also stated in the same memo that he had reported an old similar incident in writing about the defendant to the Chairman of Department and the Dean but he (plaintiff) was not aware of any steps taken to restrain the defendant 'from misconduct'. It was the plaintiff's case that the utterances recorded in his internal memo of 09.05.03 and ascribed to the defendant are defamatory of him.

The third incident relied on by the plaintiff in support of his suit is a letter dated 28.05.03 also ascribed to the defendant. It is on the subject 'MISCONDUCT' and written to Prof. G.A.O. Magoha, Deputy Vice – Chancellor (Administration & Finance) on the subject of the defendant's conduct. The defendant's aforesaid letter, which alluded to what the defendant perceived, *inter alia*, as wrongdoings on the part of the plaintiff and others regarding goings – on in the Electrical & Electronic Engineering Department was put in evidence by the plaintiff as Exhibit 6. Relevant portions of the text of Exhibit 6 are reproduced

below:

‘The subject of my conduct opens up a need for further investigations of those who have accused me to the University Authorities. The cause of such conduct is internal and relate (sic) to the following:

1. VARSILEO – a company purportedly registered by senior personnel of the University to carry out trade with the same institution.
2. The five computers purchased at an inflated cost and procured from dubious companies by ... for the Electrical & Electronic Engineering Department.
3. The “grabbing” of two computers and printers by Drs Mwangi and ... to their offices unilaterally when they were chairmen, without approval at/reporting to the Departmental meeting.
4. Non-transparent distribution of Module II proceeds of the Department some money to doubtful persons.
5. Grabbing of the CCK Project.
6. Grabbing of the MSc Programme supported by Siemens.
7. Delay in provision of INTERNET facilities to my office.
8. Conditioning me to buy a UPS as a pre-requisite to getting a computer.
9. Expenses on Final Year Projects.
10. Theft of the computer allocated to my office in the American Wing.

The words and phrases non-transparent, abuse of office, grabbing, eating, stealing all mean the same thing relating to public funds and property. If funds and property are not used and supplied in a manner prescribed by stakeholders, these words will apply.

In Departments, any property or funds accruing from efforts of colleagues belong to all of them and must be shared transparently. If unilaterally taken by powers in office, may be termed as either misuse of office to the holder’s advantage, or stealing property belonging to colleagues.

As a senior member of the Department of Electrical and Electronic Engineering, I am duty – bound to state my feelings to the individuals concerned. This I have done in the periods stated in order to assert the gravity of the problem with a view of self – correction by the colleagues involved.

In the Department of Electrical and Electronic Engineering, we have had the following colleagues as Chairmen – Mwangi, ---, ---,---,---. Of these, Drs --- and Mwangi were the worst in terms of transparency, and got me on their ways.

Dr --- brought hope to the colleagues in matters relating to transparency and management of the Department. As he came to office, the funds disbursed to colleagues were circulated to all concerned and the figures rose, all over (sic) sudden. Issues to do with equipment procurement and duty allocation were openly discussed at Departmental Meetings. His approach changed the mood in the Department. It is unfortunate that he died before holding office for long.

Dr ---, while trying to follow the procedures laid by Dr ---, found himself in more problems. Some of these problems, as students pointed out, related to “tribal clustering” and for these, he had to be ejected from office.

The ---, on the other hand, took a queue (sic) from Drs Mwangi and ---. He was placed by these two as

the “distributor” of the Module II funds, a function he should have not performed, especially for the teaching staff. He could not take instructions from me in matters relating to repairs of the lock to my office, installation of the INTERNET services to my office and could not explain how he distributed Module II funds. To these issues, I called him “inefficient, non – transparent and rude”, words which I know describe him best. Subsequently, he took the issue with his lawyers, Ngugi Muhindi and Co. Advocates and Commissioners for Oath (sic) who I responded to accordingly on 9<sup>th</sup> May, 2002.

If the University investigates the concerns written herein, and still considers that my utterances to the colleagues were “of scandalous or disgraceful nature” and is a Good Cause “to render me unfit to hold my officer as is stipulated in Clause 23 (c) (iv) of the terms and conditions of service, I am ready to appear before the Disciplinary committee of the University of Nairobi Council for defence.’

It was the plaintiff’s case that the contents of the above letter (Exhibit 6) ascribed to the defendant are defamatory of him (plaintiff). The letter (Exhibit 6) was not copied to anybody.

The fourth and final incident relied on by the plaintiff in support of his suit is a letter dated 07.07.03 also written to Prof. G.O. Magoha, Deputy Vice – Chancellor (Administration & Finance) and ascribed to the defendant. The letter, which the plaintiff produced as Exhibit 5, like that of 28.05.03 (Exhibit 6) was likewise addressed to Prof. G.O. Magoha, Deputy Vice – Chancellor (Administration & Finance) and is also entitled ‘MISONDUCT’. Relevant parts of its text are reproduced below:

‘I am in receipt of your letter of July 3, 2003, a follow-up of that dated 21<sup>st</sup> May, 2003.

It has been my understanding that the meeting which you called on 3<sup>rd</sup> June 2003 and chaired in your office on 5<sup>th</sup> June 2003 (attended by the Principal CAE, the Dean of the Faculty of Engineering, the Chairman of the Electrical & Electronic Engineering Department and myself) was meant to bring this matter to rest.

Due to the fact that Prof. E. M. Mwangi did not attend, it was resolved that the Dean of the Faculty of Engineering convenes a reconciliation meeting. This meeting was called on 23<sup>rd</sup> June, 2003 and held on 27<sup>th</sup> June, 2003. Once again, Prof. Mwangi did not attend but sent a letter expressing the fact that the meeting was “not legal” and, as I understand, expressed the fact that “the other aggrieved parties also needed to be invited to participate.”

In this stalemate, I state that the reason for my calling the aggrieved parties ‘thieves’ relates to their misuse of office during varied periods when they acted either as Chairmen or Chief Technologist of the Electrical and Electronic Engineering. The proofs of this are the following.

1. Dr --- purchased five computers from a dubious company and at prices which were suspect (sic) to be inflated.
2. Drs Mwangi and ... and Mr ... “grabbed” three computers and printers to their offices without the approval at/reporting to the Departmental Meetings.
3. Non-transparent distribution of Module II proceeds of the Department ... with some money given to doubtful persons.
4. Grabbing of the CCK Project.
5. Grabbing of the MSc Programme which was to be supported by Siemens.
6. Connecting the INTERNET lines to their offices and delaying of those to the offices of other staff, including that to my office.
7. Non-transparent expenses on Final Year Projects.

8. Not reporting the cumulative “loss of Kshs.20 million (for the Department) over the past two years” as in the Departmental Minutes of 16<sup>th</sup> May, 2002.
9. Conditioning me to buy a UPS as a pre-requisite to getting a computer allocated to my office, and subjecting me to the security of the same.
10. Theft of a computer to my office in the American Wing.
11. VARSILEO – a Company purported to have senior members of the University, and their wives, as Directors.

In an institution such as a Department, any property or funds accruing from efforts of colleagues and students belong to all and must be shared transparently. If unilaterally taken by the powers in office to their advantage, that is grabbing. Some people will know it and not say, one may say and that one is myself.

It is common knowledge that the words and phrases “grabbing”, “eating” and “now – transparency” all tantamount to stealing of other peoples property and funds. If funds and property are not used and applied in a manner prescribed by stakeholders, the words will apply.

It is a consolation (sic) that due to what Prof. Mwangi termed “misconduct by myself” has brought a great improvement especially in the transparency of distribution of Module II funds in the Department. This started when Dr --- became Chairman. He brought hope to the colleagues in matters relating to transparency and management of the Department. As he came to office, the funds disbursed to colleagues were circulated to all and the figures suddenly rose. Issues to do with equipment and duty allocation were openly discussed at Departmental Meetings. His approach changed the mood in the Department.

It is unfortunate that while trying to follow the procedures laid by Dr ---, his successor, Dr --- found himself in more problems. These were caused by his reliance on Mwangi and --- for advice. As students of the Department pointed out during their demonstration, there was evidence of “tribal clustering” which led to fast deterioration in Departmental functions and their unfortunate rejection and ejection of ---.

Mr ---, The ---, took a queue (sic) from Mwangi and ----. During their tenures as Chairman, they placed him as the “distributor” of Module II funds, a function he should have not performed, especially for the teaching staff. He could not take instructions from any other person in matters relating to his main functions such as repairs. In the cases cited, where it is alleged that “ I abused him” on --- and ---, I invited him to my office with the view of requesting him to repair the lock to the office, complete the wiring of the INTERNET line, and clarify the figures in the Module II payment voucher. He became rude and I called him “inefficient, non-transparent and rude”, words which could describe him best. Subsequently, he took the issue with his lawyers, Ngugi Muhindi and Co. Advocates, who I responded to accordingly on ---. Prof. Mwangi, in his guilt conscience, has refused to attend the two meetings called on the issue, seems to be “acting advocate” by insisting that the other aggrieved parties to be brought on-board, and has indicated disrespect of the convenors of the meetings by stating that the meetings were “illegal”. All this reveals one’s character of arrogance, unlike humility. There must be reasons for such behaviour.

As a senior member in the Department, I have pointed out some issues which, in my view satisfy the “show cause why ---’ and require internal investigations of those accusing me for “misconduct”.

The above letter of 07.07.03 (Exhibit 5) was copied to the Vice – Chancellor; Deputy Vice – Chancellor (AA); Principal, College of Architecture and Engineering; Dean, Faculty of Engineering; and Chairman, Department of Electrical and Electronic Engineering to whom the letter of 03.07.03 (Exhibit 13) to which Exhibit 5 was responding had been copied by Prof. G.A.O. Magoha, Deputy Vice – Chancellor (Administration & Finance). It should also be noted that Prof. Magoha’s letter of 03.07.03 (Exhibit 13) was a follow up of his earlier letter to the defendant dated 21.05.03 (Exhibit 4) which had been copied to the Vice – Chancellor; Deputy Vice Chancellor (AA); Principal, College of Architecture & Engineering;

and Chairman, Department of Electrical and Electronic Engineering.

Prof. Magoha's letter of 21.05.03 (Exhibit 4) to the defendant calling on him to show cause why he should not be disciplined alluded to 2002 and 2003 incidents in which the defendant was accused of using abusive language and indulging in unbecoming behaviour towards his colleagues. I have already found with regard to 2002 incidents said to be defamatory of the plaintiff that such incidents are statute – barred by virtue of section 20 of the Defamation Act and I reiterate that position. The 2003 incidents recounted in Prof. Magoha's letter of 21.05.03. (Exhibit 4) to the defendant regarding his impugned conduct have essentially been captured in the plaintiff's internal memo of 09.05.03 (Exhibit 3) to the Vice – Chancellor, relevant portions of which have already been reproduced hereinabove. Based on the aforesaid accusations by the plaintiff and others against the defendant, Prof. Magoha, Deputy Vice – Chancellor (Administration & Finance) concluded his letter of 21.05.03 to the defendant as follows:

'The University views your above behaviour with serious concern as it amounts to "... conduct of a scandalous or disgraceful nature which Council shall deem to render you unfit to hold your office" as stipulated in Clause 23 (c) (iv) of your terms and conditions of service. You are therefore, required to show cause, within two weeks from the date of this letter, why disciplinary action should not be taken against you.'

This is the letter Prof. Magoha was vide his letter of 03.07.03 (Exhibit 13) drawing the defendant's attention to and reminding the defendant that he had not responded to it within the stipulated two weeks and calling on the defendant to respond soonest possible and in response to which the defendant wrote his letter of 07.07.03 (Exhibit 5).

On 10.09.03 the plaintiff wrote to the defendant the following letter (Exhibit 7):

'RE: DEFAMATION, SLANDER AND SCANDAL

I, Prof. Elijah Mwangi write to your as hereunder:- On or about the 28<sup>th</sup> May 2003, and on or about 7<sup>th</sup> July 2003, you wrote two letters to Prof. Magoha, the Deputy Vice-Chancellor of the University of Nairobi in charge of Finance and Administration. These letters were slanderous, defamatory and libelous as they *inter alia* called and labeled me "a thief", "a tribalist", "a misuser of office", and "a grabber of university property".

The contents and the tenor of the said letters being defamatory, my name, reputation and standing has been tarnished and scandalized as the words complained of would, in their ordinary meaning cast aspersions on my integrity both to my contemporaries in particular, and to the larger society in general. In addition, you copied and distributed to several other persons the letters complained of. The recipients are well known to you and your sole intention was to slander, defame and scandalize me. As a result I have suffered great loss and damage and hereby demand:

- (1) A withdrawal of the letters complained of.
- (2) A full and unqualified apology which should be approved by me.
- (3) A tendering of (1) and (2) above to me and all recipients of your above said letters.
- (4) An undertaking and/or guarantee that there will be no repetition of the defamation, slander and/or scandal complained of.
- (5) An admission of liability and an offer of damages to compensate me for the injury to my credit and standing occasioned by your said letters.

Take notice that unless I receive all the above within 10 days of the date hereof I may initiate legal action.'

The defendant responded by letter (Exhibit 8) to the plaintiff's above letter next day, i.e. 11.09.03, in the following terms:

'MY MISCONDUCT

I am in receipt of your letter dated 10<sup>th</sup> instant and sent on 9<sup>th</sup> instant through Securico Co.

My conduct is still in question by the University authorities who, I believe, are still assessing the contents of the letter you wrote about me, which prompted the response I gave. It is the response you have referred to as being "defamatory, slanderous and scandalous."

While it is my belief that you are the origin of the question of "my conduct", may I humbly suggest that for your ranking you re-direct energies to active rather than reactive activities.'

On 03.06.03 one L.S. Chesoni of the Office of the Deputy Vice – Chancellor (Administration & Finance) wrote an internal memo (Exhibit 9) inviting the Principal, CAE; Prof. R.J. Akello (defendant); Prof. E. Mwangi (plaintiff); Chairman, Department of Electrical & Electronic Engineering; and Dean, Faculty of Engineering inviting them to a meeting on 05.06.03 at 9.00 a.m. in the Deputy Vice – Chancellor's Conference Room 'to discuss matters relating to Prof. Akello's conduct'.

On 23.06.03 Dr G.C. Mulaku, Dean of the Faculty of Engineering wrote an internal memo (Exhibit 10) to Chairman, Department of Electrical & Electronic Engineering; Prof. R.J. Akello (defendant) of the same Department; Prof. E Mwangi (plaintiff) of the same Department; Prof. A.V. Otieno of the same Department; Dr M.K. Gakuru of the same Department; Mr B.K. Chomba of the same Department; Mr. P.C. Wakoli of the Department of Surveying; and Prof. J.K. Musuva of the Department of Mechanical Engineering as follows:

'SUBJECT: RECONCILIATION MEETING

Following several official complaints from staff members in the Department of Electrical and Electronic Engineering about the conduct of Prof. R.J. Akello of that department towards themselves, the Deputy Vice – Chancellor (A & F) mandated me on 5<sup>th</sup> June 2003 to, in the first instance, try and reconcile the parties concerned at the Faculty level.

I am therefore calling this meeting to try and achieve the same. The meeting will be held on Friday 27<sup>th</sup> June 2003 in the Dean's Conference Room at 2.30 p.m.

Please attend punctually.'

On 26.06.03 the plaintiff responded to the above invitation also by internal memo (Exhibit 11) as under:

'SUBJECT: MISCONDUCT BY PROF. R.J. AKELLO

I am in receipt of a letter from your office calling me for a meeting on 27.6.03 at 2.30 p.m, to discuss matters relating to Prof. Akello's conduct. I have also noted that a committee has also been convened and that you have asked Dr Gakuru and Mr Chomba to attend.

I wish to bring to your attention that the committee has no *locus standi*. I therefore wish to appeal once again that matters concerning my complaint on Prof. Akello be held in accordance with the established rules and procedures of the University of Nairobi. This is further to my letter to the DVC (A & F) of 6.6.03 which was copied to you.

Why has Prof. Akello failed to respond to the letter from the DVC (A & F), Ref. CN/7409/155 of 21/05/03? He was given 14 days to show cause why disciplinary action should not be taken against him. It is only fair that we follow the laid down procedures as is done for other errant members of staff. Prof. Akello is no exception.'

The plaintiff copied Exhibit 11 to the Vice – Chancellor; Deputy Vice – Chancellor (A & F); Dr Gakuru and Mr Chomba of the Electrical and Electronic Engineering Department.

The ‘Reconciliation Meeting’ called for 27.06.03 by the Dean of the Faculty of Engineering took place but the plaintiff declined to attend it on the basis that he considered the committee which was to oversee the deliberations not to have been convened in accordance with established rules and procedures of the University of Nairobi and that it (committee) had no *locus standi*. The plaintiff did not elaborate on the irregularity or irregularities he deemed to have afflicted the committee meeting. The following matters recorded in the Minutes of the Reconciliatory Meeting are noted:-

a) That the Dean called the Reconciliatory Meeting for all parties concerned, i.e. Prof. Akello (defendant), Prof. Mwangi (plaintiff), Dr Gakuru, Mr Chomba and Chairman of Electrical & Electronic Engineering Department. That the Dean also included ‘independent moderating voices’ in the form of Prof. A.V. Otieno (of Electrical & Electronic Engineering), Prof. Musuva and Mr Wakoli. The minutes, however, record:

‘That all the aggrieved, Prof. Mwangi, Dr Gakuru and Mr. Chomba were not present.’

b) The Minutes also record that Prof. Akello (defendant), who attended the Meeting reported as follows:-

Ø That Prof. Akello stated that it is true that he called the complainants thieves and he had evidence.

Ø That when Prof. Mwangi (plaintiff) and Dr Gakuru were Chairmen of Electrical & Electronic engineering Department, the Department was run down, a fact which even the students noticed particularly the tribal ganging. That this eventually resulted in the students rejecting the immediate former chairman Dr ---.

Ø That Prof. Akello reported that following a departmental meeting, he had decided to let by-gones be by-gones but that his request for further investigations on the allegations stands.

Ø That the irregular payments for Module II funds, irregular procurement procedures, the ganging up along tribal lines and the loss of huge sums of money (20 million) has damaged the Department and deprived individuals and the Department of their rights.

The Minutes of the Reconciliatory Meeting of 27.06.03 end as follows:

‘COMMITTEES DELIBERATIONS

Noted

- That the purpose of the meeting was to reconcile the two aggrieved parties.
- That there was only one party present.
- That Prof. Mwangi seemed to be fronting for all the aggrieved persons.
- That Dr Gakuru and Mr Chomba did not send any apology.
- It cannot be taken for granted that Prof. Mwangi’s letter received just before the start of the meeting covered the two absent members.
- That Prof. Mwangi seems not to be aware that Prof. Akello responded to the D.V.C. (A & F)’s letter.

CONCLUSION

· That the MATTER BE HANDED BACK TO THE D.V.C. (A & F) TO DECIDE ON THE WAY FORWARD.’

The Minutes were approved for circulation on 07.07.03.

The last but one bullet in the above extract of the Minutes of the Reconciliation Meeting of 27.06.03 observing that Prof. Mwangi (plaintiff) seemed not to be aware that Prof. Akello (defendant) had responded to the D.V.C. (A & f)’s letter seems to be an acknowledgement by the committee of the defendant’s letter of 28.05.03 (Exhibit 6) vide which the defendant challenged the University authorities, before whom he had been accused of misconduct, to undertake further investigations of those who had accused him. I note that in that letter (Exhibit 6) the defendant pinpointed areas of his accusers’ alleged activities which in his view called for probing.

So much for documentary evidence.

The plaintiff gave oral evidence before me during which he, *inter alia*, produced all documentary exhibits in this case. He called no other witness or evidence.

The defendant also gave oral evidence before me at the end of which he expressed his wish to call Prof. G.A.O. Magoha to give evidence in this case. Prof. Magoha was at the time the Deputy Vice – Chancellor (Administration & Finance) at the University of Nairobi where both the plaintiff and defendant were lecturing in the Electrical & Electronic Engineering Department. As at the time the defendant testified in this case, Prof. Magoha had risen to the position of Vice-Chancellor of the University of Nairobi. It was Prof. Magoha as Deputy Vice – Chancellor (Administration & Finance) who wrote the show cause letter of 21.05.03 (Exhibit 4) to the defendant and copied it to the then Vice – Chancellor; Deputy Vice – chancellor (A A); Principal, College of Architecture & Engineering; Dean, Faculty of Engineering; and Chairman, Department of Electrical & Electronic Engineering. I further note that when the defendant replied to Prof. Magoha’s show cause letter of 21.05.03 (Exhibit 5), he (defendant) also copied his reply to the aforesaid people or officials.

The defendant applied for witness summons to issue on Prof. G.A.O. Magoha, Vice – Chancellor of the University of Nairobi; the Court directed such witness summons to be issued; and fixed the case for further hearing on 13.12.06 and 19.12.06. On 13.12.06 the Court Registry erroneously omitted to put the case on the cause list. As plaintiff’s counsel turned up in Court despite the case not being listed, the Court mentioned the case. There was no appearance for the defendant. The Court confirmed 19.12.06 for further hearing of the case and directed plaintiff’s counsel to serve the defendant with notice of the confirmed further hearing on 19.12.06. On this latter date, 19.12.06, both parties appeared. The defendant informed the Court that he had spoken to Prof. Magoha the Vice – Chancellor of the University of Nairobi about the hearing and that the latter said he would send the University lawyer, one Mr Lutta to represent him. The defendant, however, said he had not seen the University lawyer and in the circumstances he (defendant) decided to close his case. It is important to note that hearing of the case started before me on 13.07.05 but for a variety of reasons it had not been possible for hearing to be concluded before 19.12.06 when the said hearing was expected to be concluded.

The parties filed written submissions of which they gave oral highlights on 26.03.07. I shall in due course advert to those submissions but for now I wish to give a brief account of the parties’ respective oral evidence.

Highlights of the plaintiff’s oral evidence-in-chief may be given as follows. He is aged 49 years and an Associate Professor in the Department of Electrical & Electronic Engineering at the University of Nairobi. He has been a consultant for Firestone East Africa Limited, Kenya Posts & Telecommunications corporation (now defunct), Kenya Ports Authority and Kenya Tea Development Authority. He believes he has a good record and cited invitations to be an external examiner as evidence of such record. He repeated the report he made vide his internal memo dated 09.05.03 (Exhibit 3) against the defendant. The plaintiff complained that the defendant did vide his letters to Prof. Magoha, Deputy Vice – Chancellor (Administration & Finance) of 28.05.03 (Exhibit 6) and of 07.07.03 (Exhibit 5) that the defendant called

him (plaintiff) a thief, corrupt and grabber of University property and that the letters mean that the plaintiff is untrustworthy to hold a position in society. It was the plaintiff's case that the letters are defamatory and scandalous of him; that he (plaintiff) wrote letter of 10.09.03 (Exhibit 7) to the defendant demanding an apology but that the defendant refused to tender any apology vide his letter of 11.09.03 (Exhibit 8) which the plaintiff described as being rude. The plaintiff told this Court that after getting the defendant's reply of 11.09.03 and seeing that the University did not discipline the defendant, he (plaintiff) felt he had no alternative but to come to Court, hence his filing of the present suit.

The plaintiff acknowledged that the University attempted reconciliation between him and the defendant twice:-

- a) By inviting both parties vide internal memo of 03.06.03 (Exhibit 9) to a meeting in the Deputy Vice – Chancellor's (A & F) Conference on 05.06.03 to discuss the controversy, which meeting the plaintiff said he did not attend because the memo reached him after 05.06.03.
- b) By inviting both parties vide internal memo dated 23.06.03 (Exhibit 10) to a reconciliation meeting on 27.06.03, which the plaintiff said he declined to attend since he considered the proposed reconciliation meeting a non-starter as in his view such a meeting did not constitute the apology he had demanded of the defendant. The plaintiff also deemed the reconciliation committee which the university had set up to preside over the reconciliation deliberations not to have been constituted as per the procedures and regulations of the University of Nairobi. [The plaintiff did not elaborate on the irregularity or irregularities he considered to have been attendant upon the committee.]

It was the plaintiff's case that he rushed to Court for fear of being statute –barred if he did not resort to Court action at the time he did. He also told the Court that the defendant resigned from the University of Nairobi, so he was no longer under the jurisdiction of the University. The plaintiff acknowledged learning from the University Chief Security Officer that a computer was stolen from the defendant's office. The plaintiff said he was not aware of any action taken by the University authorities following his complaints against the defendant. The plaintiff said that he considered the impugned letters ascribed to the defendant as a blot on his clean record in the University of Nairobi; that the letters are in his personal files and in files concerning thefts and complaints which in his view would affect him because anybody sourcing information about him from the University of Nairobi would be reluctant to hire him because of such letters.

The plaintiff reiterated the prayers in his plaint.

The plaintiff's evidence in cross-examination by the defendant may be summarized as under. He (plaintiff) told the Court that although he did not record the insults he said the defendant uttered against him the same day, i.e. 08.05.03, they were still fresh in his memory when he cited them in his internal memo of 09.05.03 to the Vice – Chancellor (Exhibit 3), which he (plaintiff) copied to the Deputy Vice – Chancellor (Administration & Finance); Principal, CAE; Dean, Faculty of Engineering; Chairman, Electrical & Electronic Department; and Chief Security Officer.

The plaintiff told the Court that he and the defendant taught at the same University of Nairobi since around 1987 and that the defendant was his head of department for a short while around 1987.

The plaintiff said being called a thief caused him mental anguish because a thief is not held in high esteem in society. Asked what he meant by 'society', the plaintiff said by 'society' he was alluding to anybody who may have been in the corridors near his office while he (plaintiff) was being abused by the defendant on 08.05.03. Asked if there was anybody in the corridors, the plaintiff said he did not know if there was anybody but only pointed out that the University is a big place.

Regarding the defendant's letter of 28.05.03 (Exhibit 6) to Prof. Magoha, the plaintiff said he did not know why the defendant wrote it to Prof. Magoha and that in the plaintiff's view it was just motivated by malice and was not in response to his internal memo of 09.05.03 to the Vice – Chancellor, which was copied, *inter alia*, to the Deputy Vice – Chancellor (Administration & Finance), who happened to be Prof.

Magoha at the time.

The plaintiff said he believed he has not been able to have upward mobility in the University of Nairobi as a result of the defendant's allegations against him. In this regard the plaintiff said the University had recently appointed a Dean for the Faculty of Engineering who was less experienced than him although he (plaintiff) had expected to be appointed to the Deanship. The plaintiff added that there have been positions of Deputy Vice-Chancellors advertised in the Press which he could not apply for before clearing his name in the University of Nairobi. He acknowledged, though, that Deans are elected, not appointed, which would imply that one had to offer oneself. The plaintiff also acknowledged that to qualify as a Dean, one has to have been a Chairman of a Department.

The plaintiff acknowledged that the defendant was once his teacher at the University of Nairobi; that while he (plaintiff) was doing his Ph.D in a U.K. University between 1983 – 1987, he saw the defendant there; and that the defendant was Chairman of Department, may be for a year or two, during the period he (plaintiff) was doing his Ph.D.

Asked whether his internal memo of 09.05.03 (Exhibit 3) to the Vice – Chancellor was the one which prompted the Vice – Chancellor to call the meeting of 05.06.03 the plaintiff acknowledged he thought it was his said memo which prompted the calling of the meeting of 05.06.03 which he said he did not attend because he got the invitation late.

The plaintiff acknowledged that his internal memo of 09.05.03 (Exhibit 3) to the Vice – Chancellor bears handwritten endorsements including an instruction for a show cause letter to be drafted and addressed to the defendant. The plaintiff acknowledged that the impugned letters were between officers working in the same organization; and that all the letters and meetings arising therefrom related to the defendant's 'misconduct'. It was the plaintiff's contention that on 08.05.03 when he said the defendant called him a thief, e.t.c; on 28.05.03 when the defendant wrote Exhibit 6 casting aspersions about him; and on 07.07.03 when the defendant wrote Exhibit 5 more or less repeating the earlier aspersions against him, he (plaintiff) was already an Associate Professor and implied that he has remained so because of the aforesaid letters.

The plaintiff was challenged next on paragraphs 6, 7 and 8 in his plaint. The purport of paragraphs 6 and 8 is that the description given of the plaintiff by the defendant in his impugned letters painted of him the image of being unfit to hold any appointment in the University of Nairobi or at any other University, place or organization. The purport of paragraph 7 is that the defendant unlawfully, falsely and maliciously wrote and published his impugned letters to Prof. Magoha, Deputy Vice – Chancellor (Administration & Finance); Vice – Chancellor, University of Nairobi; Deputy Vice – Chancellor (Academic Affairs); Principal, College of Architecture and Engineering; Dean, Faculty of Engineering; and Chairman, Department of Electrical and Electronic Engineering. Answering questions regarding the aforesaid paragraphs, the plaintiff acknowledged being a member of the Institution of Electrical and Electrical Engineers, also being a member of the Institution of Engineers of Kenya

that he has not been de-registered from either. He added, however, that the question of his de-registration has not arisen and that he came to Court to clear his name so that nobody would write to those institutions and say he (plaintiff) is a thief. The plaintiff said he has been Chairman of the Department of Electrical & Electronic Engineering at the University of Nairobi for two terms of three years each and that during his chairmanship he has seen several committees instituted against students but not against staff despite there being a disciplinary committee for staff.

The plaintiff was referred to the defendant's letter of 28.05.03 (Exhibit 6) vide which the defendant called for further investigations of those who had accused him of misconduct to the University authorities and asked whether he (plaintiff) was aware if the University has concluded its investigations into the defendant's impugned conduct. The plaintiff answered that he was not aware if the University has concluded its investigations into the defendant's conduct.

Highlights of plaintiff's evidence upon being re-examined by his counsel may be given as under. He

said his cause of action is based on the written word. Regarding the letter of 28.05.03 (Exhibit 6), he said it was not signed neither was it copied to him but that all copies were put in his pigeon hole and under his office door. He added that it was the subject of discussion at the meeting of 27.06.03 (which he had declined to attend) and that it was published to whoever typed it and to those who attended the meeting. The plaintiff reiterated his contention that he suffered in upward mobility arising from aspersions cast upon him by the impugned letters ascribed to the defendant and that the letters were not confidential.

Highlights of defendant's evidence-in-chief may be given as under. He based his case on his filed defence.

The defendant pointed out that he was accused of misconduct by the plaintiff in writing to the Vice-Chancellor vide plaintiff's internal memo of 09.05.03 (Exhibit 3). In response, the Vice – Chancellor instructed the Deputy Vice – Chancellor (Administration and Finance) to write to the defendant to show cause why he should not appear before the Disciplinary Committee. The Deputy Vice – Chancellor (Administration & Finance) wrote the letter of 21.05.03 (Exhibit 4) containing several accusations by various people against the defendant. The plaintiff was among the accusers. The defendant told the Court that in response he wrote the letter of 28.05.03 (Exhibit 6) which he said was a letter for defence relating to the accusations regarding his conduct. He said the letter from the Deputy Vice – Chancellor (Administration & Finance) was a letter from a senior officer in a public institution to a junior officer (defendant) in the same institution. The defendant said he took the accusations to be besmirching his image before senior University officials. It was the defendant's evidence that the accusations contained in the plaintiff's letter, or internal memo, of 09.05.03 (Exhibit 3) talked of behaviour unknown to him since he joined the University of Nairobi in 1977. The defendant confirmed that he taught the plaintiff in his final year at the University of Nairobi.

The defendant told the Court that the statements in his letter of 28.05.03 (Exhibit 6) point out some anomalies which have occurred mainly in the Electrical & Electronic Engineering Department of the University of Nairobi and that after his accusers, including the plaintiff, levelled the subject accusations against him, the defendant thought of pointing out the anomalies to the University administration. He pointed out that no words 'Mwangi is a thief' appear in his letter of 28.05.03 and that the matter was till in the hands of the University authorities when the plaintiff came to Court. It was the defendant's evidence that procedures regarding discipline and investigations at the university of Nairobi take a long time; that the University Statute under clause 23 (c) (iv) spells out the disciplinary procedures for staff; and that he believes the University authorities are holding up the disciplinary case awaiting the outcome of the present Court case. It was the defendant's evidence that the plaintiff progressed through academic ranks at the University of Nairobi while the defendant was there as his senior and that the defendant being the plaintiff's teacher, it would be unethical for the defendant to stop his progress. The defendant said he believed the plaintiff did not apply for the advertised posts because he had snubbed both the Dean and the then Deputy Vice – Chancellor, Prof. Magoha who later became the Vice – Chancellor of the University. The defendant added that under University of Nairobi Statute 23, Deans are elected by the Faculty, not appointed. He added that posts of Deputy Vice – Chancellor are normally filled by Professors who have been College Principals; and that he believed the plaintiff could not have applied for the post of Deputy Vice – Chancellor without having held the post of Dean and University College Principal.

It was the defendant's contention that his letter of 28.05.02 (Exhibit 6) was a whistle blow to the University authorities; that since the letters are from officer to officer, they should enjoy absolute privilege. The defendant contended, apparently in the alternative, that since he was defending his character and conduct after being accused by the plaintiff to the University authorities, each subject communication should enjoy qualified privilege.

The defendant told the Court that he had no guilty mind (malice); and he has privately and confidentially defended the plaintiff about his profession, e.g. regarding professional clubs and societies.

The defendant was cross-examined by plaintiffs counsel at length. Highlights of the defendant's evidence during cross-examination may be given as under. The defendant first knew the plaintiff when the plaintiff was a student at the University of Nairobi when the defendant was already a teacher there.

Later the defendant knew the plaintiff as a fellow teacher and colleague at the same University. The plaintiff graduated with a First Class Honours Degree and the defendant and his colleagues decided to retain him for staff development.

The defendant said he knows the plaintiff's professional side fairly well as a hard worker and achiever. As for the plaintiff's personal side, the defendant described the plaintiff as very argumentative and that he does not get on very well with colleagues as illustrated by the plaintiff's inability to produce even a single witness to testify on the incidents of misconduct the plaintiff alleged against him. The defendant clarified that when he said of the plaintiff that he does not get on well with colleagues this was his (defendant's) later impression of the plaintiff.

The defendant acknowledged that he was not aware if the plaintiff has been convicted of a criminal offence.

Regarding departmental headships, the defendant acknowledged being aware that the plaintiff served as Head of Department for two terms and that the plaintiff's headship was under the defendant's recommendation. The defendant also acknowledged that he himself served as chairman of Department for 1 year and 8 months and that he did not complete two years because:-

- a) He was engaged heavily in lightning protection and research for the Government of Kenya as a Professor of Electrical & Communications Engineering.
- b) The University of Nairobi was going in a transition to the 8:4:4 programme which lay a lot of demands in terms of need for space and equipment.
- c) Staff recruitment programme was slow and that when he (defendant) expressed these issues to the then Vice-Chancellor, Prof. Mbithi, he agreed that the defendant relinquishes his chairmanship of department owing to heavy workload, lack funds, etc.

The defendant acknowledged he was not aware if the plaintiff has been subjected to the University's disciplinary mechanism except on regular internal queries regarding procurement. Asked whether he had brought such queries the defendant replied that he had not brought them but said they are in departmental minutes (defendant appeared to check something from a bundle of papers he had). At that juncture plaintiff's counsel objected to production of such queries even if the defendant had them among the documents in his possession, not having put such queries in evidence while he was testifying in chief. I upheld plaintiff's counsel's objection, which ended further pursuit of the issue of the procurement queries alluded to. Asked whether he himself has been subjected to disciplinary proceedings at the university of Nairobi, the defendant said he has not and that he is held in high esteem. The defendant acknowledged that the letter of 21.05.03 (Exhibit 4) called on him to show cause why disciplinary action should not be taken against him and that was why he responded vide his letter of 28.05.03 (Exhibit 6) in self – defence against the allegations and that as a result a committee was formed to clarify the allegations made by the plaintiff against him.

The defendant was referred to the Minutes of the Reconciliation Committee Meeting held on 27.06.03 (Exhibit 12) and he confirmed that both the plaintiff and himself were invited to the meeting to clarify allegations in their respective letters in preparation for a disciplinary committee meeting to be held. The Minutes show that the defendant attended the meeting but the plaintiff declined to attend it. The defendant acknowledged being the author of the letter of 28.05.03 (Exhibit 6) whose copy produced by the plaintiff in these proceedings is unsigned.

As far as the meeting of 27.06.03 was concerned, the defendant said he understood its purpose to be to reconcile the contents of the letters of accusations and counter-accusations but not to reconcile the parties themselves. The defendant also said his letter of 28.05.03 (Exhibit 6) was not a subject of discussion at the meeting of 27.06.03 and it was not summarized as the other parties were not there. The defendant also acknowledged being the author of the letter of 07.07.03 (Exhibit 5). He said he copied it to the various persons or officials shown thereon as the letter of 03.07.03 from the Deputy Vice-Chancellor

(Administration & Finance) to which he was partly replying had been copied to those people.

The defendant acknowledged describing the plaintiff as not being transparent. The defendant also acknowledged accusing the plaintiff of being a grabber and that that was the truth and the University of Nairobi was aware of it. To the defendant's mind, while grabbing and stealing are not synonymous, they are tantamount to stealing of others' properties and funds. He said he was defending himself from the accusations of misconduct the plaintiff had levelled against him. The defendant acknowledged that he had not reported what he had described as theft or stealing to the police and that the University is still investigating the anomalies he had reported and that the plaintiff may be charged.

Based on the foregoing evidence, the parties made submissions which may be summarized as under.

Plaintiff's counsel submitted that the plaintiff has proved his case on balance of probability. He relied on the two letters ascribed to and acknowledged by the defendant, i.e the letter of 28.05.03 (Exhibit 6) to Prof. Magoha then Deputy Vice-Chancellor (Administration & Finance) and the letter of 07.07.03 (Exhibit 5) to the same Deputy Vice-Chancellor (Administration & Finance) in which the words 'non-transparent', 'grabbing', 'stealing' and 'eating' appear in reference, *inter alia*, to the plaintiff. Plaintiff's counsel contended that those words are defamatory of the plaintiff in that they were understood to mean the plaintiff was a thief, corrupt, untrustworthy and generally unfit to hold any appointment in the University of Nairobi and that publication of the words amounted to libel which in his view is actionable *per se* and no proof of damage is required. He referred to section 8 of the Defamation Act in this regard. Plaintiff's counsel added, however, that the plaintiff had nevertheless adduced evidence that he was shunned by friends and colleagues and that the position of Associate Professor he held in 2003 when the letters in question were written about him is the same position he held at the time of hearing of his suit. Plaintiff's counsel acknowledged that the plaintiff did not apply for vacancies, e.g. that of Deputy Vice-Chancellor which the plaintiff did not apply for, despite being qualified for them and that his not applying for such vacancies was premised on the matters now before court.

With regard to the defendant's submissions, plaintiff's counsel said that save for the defence of statutory bar to the publications of 22.02.02, the other defences had no merit. Plaintiff's counsel pointed out that one defence raised was that the impugned publications were between officers of state which the defendant maintained should enjoy absolute privilege. In this connection, plaintiff's counsel referred to the definition of the phrase 'state officer' in Black's Law Dictionary, 8<sup>th</sup> Edition, to wit:

'state officer. 1. A person whose authority or jurisdiction extends to the general public or state as a whole, as distinguished from an officer whose authority and jurisdiction are confined to the limits of a particular political division ..... 2. An officer exercising authority under a stake – rather than the federal-government.'

Plaintiff's counsel submitted that the phrase 'officer of state' does not apply to the impugned correspondence in the present case.

As regards the defence of qualified privilege, plaintiff's counsel submitted that such defence is not available to the defendant as the publications in question were made maliciously and that this defeats such defence. It was plaintiff's counsel's contention that the defendant did not care about the truth; that he made the questioned accusations recklessly; that he admitted he had no evidence of the plaintiff's conviction for theft; and that he did not bring to court audited accounts evidence to support the allegations of non-transparency he made against the plaintiff.

On the issue of remedies, plaintiff's counsel referred, *inter alia*, to the under mentioned precedents:-

a) Defamation Law, Procedure & Practice

(by David Price) which lists the following factors as relevant in assessing the size of award: the gravity of the allegation; the size and influence of the circulation; the effect of the publication; the extent and nature of the plaintiff's reputation; the behaviour of the defendant; and the behaviour of the plaintiff.

b) Oyaro –vs- Alwaka t/a Weekly Citizen & 2 Others [2003] KLR 575.

This was a case where the Weekly Citizen in its publication for the period 29<sup>th</sup> October – 4<sup>th</sup> November, 2001 published of the plaintiff that he was involved in the supply of goods and services to the Kenya Ports Authority (KPA) where he was employed as procurement manager and that he teamed up with a number of Asians and purported to supply goods costing the KPA millions of shillings while in reality no goods were supplied.

The defendants, though served with summons and the plaint, failed to enter appearance or file defence. The matter proceeded by way of formal proof where the plaintiff called three witnesses to prove injury to his reputation. Evidence adduced was basically that the plaintiff was honest, honourable, incorruptible and competent. Evidence was also led by two witnesses that following the publication, they believed that the plaintiff was dishonest and corrupt. One witness concluded that after reading the publication, he knew the plaintiff as an unfit person, not only to hold his present job but to lead any social and professional societies that now he led due to the man he really was from the information printed and published by the Weekly Citizen. The High Court (Onyancha, J) awarded damages of Kshs. 3 million with costs to the plaintiff and also granted a permanent injunction restraining the defendants or their agents from printing, publishing and/or distributing any defamatory words, etc in respect of the plaintiff.

c) Section 16A of the Defamation Act, Cap 36

Plaintiff's counsel acknowledged that the above legal provision imposes limits on quantum of damages. He pointed out that the libel the plaintiff seeks to rely on is that his client was described as a thief; that the offence of theft if proved attracts up to 3 years imprisonment; and that the lower limit in terms of damages is Kshs.400,000/= . Plaintiff's counsel said the plaintiff was demanding damages of Kshs. 2 million.

d) Zoccoli –vs- Hoser & Anor [2000] VSC 152 (18 April 2000)

This case from the Supreme Court of Victoria, Australia had been cited by the defendant. Plaintiff's counsel termed it as immaterial since it addressed the issue of interlocutory injunction pending hearing and determination of the case which revolved around alleged defamation of the plaintiff. The Supreme Court of Victoria considered, *inter alia*, the strength of the plaintiff's case, which at the interlocutory stage seemed strong; affidavit evidence by the defendant to the effect that in writing the impugned book, he had consulted many sources and would call evidence at the trial about such consultations; delay on the part of the plaintiff in seeking the interlocutory injunction; near impossibility in the circumstances of the case for the court to police a mandatory injunction; the fact that damages appeared to be an adequate compensation if the plaintiff eventually succeeded in his suit for damages for defamation; etc. The court refused to grant the interlocutory injunction sought.

For his part, the defendant submitted that his letters complained of by the plaintiff who had accused him of misconduct enjoyed both absolute and qualified privilege in law. He adopted his written submissions. According to the defendant, the plaintiff was not defamed. The defendant complained that the plaintiff attacked his conduct or character before the University authorities and that the letters he (defendant) wrote to the same authorities were in his defence. He referred to the following precedents:-

a) Elements of Public Law (by CF. Padfield at page 288):

On the issue of absolute privilege the defendant cited the following statement found at item 6 on page 288 of the above book as qualifying for absolute privilege, namely:

‘Any statement made by an officer of State to another in the course of his official duty.’

The defendant said both himself and the plaintiff were employees of the University of Nairobi, a public institution whose Chancellor was the Head of State. The defendant contended that both he and the plaintiff were officers of state and enjoyed absolute privilege and that his letter of 28.05.03 (Exhibit 6)

which he said was his response to the accusations against him contained in the plaintiff's letter/internal memo of 09.05.03 (Exhibit 3) to the Vice-Chancellor enjoyed absolute privilege on account of coming from him as an officer of State and in defence of his conduct or character which was under attack by the plaintiff. The defendant also sought refuge under the qualified privilege portion on the same page 288 where, at item 2, qualified privilege is deemed to include:

'2. Statements in his own defence by a man whose character or conduct has been attacked.'

The defendant contended that it is the plaintiff who was malicious in writing Exhibit 3 and that the plaintiff's intention was for the University Council to render him (defendant) unfit to hold office. In the latter connection the defendant referred to the letter of 21.05.03 (Exhibit 4) written to him by Prof. Magoha, Deputy Vice-Chancellor (Administration and Finance) calling upon him to show cause why disciplinary action should not be taken against him. The defendant pointed out that his impugned letters were not published to the Press. With regard to his impugned letters of 28.05.03 (Exhibit 6) and of 07.07.03 (Exhibit 5), the defendant pointed out that through them he was whistle blowing and drawing the attention of the University authorities to the need to investigate the anomalies enumerated therein some ascribed to the plaintiff. It was the defendant's contention that as a senior member of staff of the University, he had a duty to bring to light the anomalies he alluded to.

As regards the defamation complained of by the plaintiff, the defendant maintained that the plaintiff had not been exposed to hatred, ridicule or contempt, neither had the plaintiff been shunned by anybody or discredited in his profession. It was the defendant's assessment that the plaintiff had not been generally lowered in the eyes of right-thinking members of society. The defendant pointed out that the plaintiff still delivers lectures at the same University; that he still enjoys membership of social clubs, e.g the Senior Common Room at the University and that he has not been shunned by anybody.

On the issue of getting to higher posts, the defendant pointed out with regard to Deanship that Deans are elected by the Faculty upon rigorous campaigns and that the plaintiff neither declared interest nor campaigned for such elective post.

As regards Deputy Vice-Chancellorship, the defendant pointed out that one has to apply and that the plaintiff never did; that one has to have been a College Principal and that the plaintiff never was.

With regard to the restraint sought against him from publishing libel against the plaintiff, the defendant informed the court that he has retired from the University of Nairobi and is now serving under contract at Masinde Muliro University in Kakamega and does not see any occasion for him to engage in further correspondence on the issues he raised concerning the plaintiff in the letters in question.

Regarding the plaintiff's complaint that he (defendant) never apologized as demanded by the plaintiff, the defendant said he could not apologize while the investigations he had called upon the University authorities to undertake into the anomalies he partly ascribed to the plaintiff had not been concluded.

b) University of Nairobi Terms of Service for Academic, Senior Library and Administrative Staff

The defendant drew attention to clause 23 relating to removal of a member of staff for good cause. The clause authorizes the Vice-Chancellor to suspend the appointment of a member of staff for good cause and refer his case to a committee appointed by the University Council with powers to terminate the services of such member of staff. The defendant particularly drew attention to clause 23 (c)(iv) which provides:

'23. (c) For purposes of these rules, "good cause" means;

(iv) conduct of a scandalous or disgraceful nature which Council shall deem to render a person unfit to hold office.'

I understood the defendant's case to be that if the conduct the plaintiff accused him of before the

University authorities were to be proved, he (defendant) would have been liable to have his services with the University of Nairobi terminated, which he took as a serious threat.

c) Zoccoli -Vs- Hoser & Anor [2000] VSC 15 (18 April 2000). I have already recorded hereinabove that plaintiff's counsel distinguished, correctly, this Supreme Court of Victoria case from the present case on the basis that the case concerned an interlocutory injunction before trial while the present case is already at full trial stage.

The defendant prayed that the plaintiff's suit be dismissed with costs.

I have given due consideration to the parties' respective cases and the rival submissions made thereon.

I must state at the outset that I have derived hardly any pleasure from presiding over this case, involving as it does distinguished academics, for whom I have a lot of respect. I have endeavoured to capture as fully as possible the evidence relied on by the parties as well as the precedents cited in support of the parties' respective and rival cases. That obviates the need for me to go into deep analysis of the parties' respective cases, which are a matter of record. In this concluding part of the Judgment, I shall confine myself to broad issues I consider necessary for purposes of giving context to the conclusions I draw from the material on record.

As a starting point, I note from the court file that on 30.06.05 there was what was described a statement of agreed issues. The statement is dated 29.06.05 but it is signed only by plaintiff's Advocates. The issues are listed as under:-

1. Whether the words published in paragraph 3 of the plaint herein had any specific reference to the plaintiff.
2. Whether the words uttered by the defendant did injure the character of the plaintiff as alleged in paragraph 4 of the plaint herein.
3. Whether there was any publication of the words as reproduced in paragraph 3 of the plaint.
4. Whether the words published by the defendant in paragraphs 5, 6 and 7 of the plaint constituted defamation.
5. Whether the suit herein is statutorily time-barred.
6. Is the plaintiff entitled to damages?
7. Who should pay the costs of the suit?

I think the identified issues are the issues of central concern in this suit. I adopt them as the ones calling for the court's determination.

With regard to Issue No. 5, i.e. whether the suit herein is statutorily time-barred, I have already found the incident alleged to have occurred on 22.02.02 to be statute-barred and dismissed the legal of action based on. I do, however, find that the incident alleged to have occurred on 08.05.03, which was alluded to in the plaintiff's internal memo of 09.05.03 (Exhibit 3) vis-à-vis the defendant's impugned letters of 28.05.03 (Exhibit 6) and of 07.07.03 (Exhibit 5), was made the subject of this defamation suit within the prescribed time and that the legal action based thereon is not statute barred.

I answer Issue No. 5 partly in the affirmative and partly in the negative accordingly and dispose of it at this juncture.

As for the rest of the Issues, I shall address them in the order in which they were listed.

Issue No. 1: Whether the words cited in paragraph 3 of the plaint had specific reference to the plaintiff.

As regards issue No. 1, the words

‘... You Kikuyus are thieves ... I am surrounded by thieves, You stole my computer ...’

stated by the plaintiff to have been addressed to him by the defendant on 08.05.03 and recorded in the plaintiff’s internal memo of 09.05.03 (Exhibit 3) to the Vice-Chancellor and copied to the Deputy Vice-Chancellor (Administration & Finance; Principal, College of Architecture & Engineering; Dean, Faculty of Engineering; Chairman, Electrical & Electronic Engineering Department; and Chief Security Officer, if uttered by the defendant as alleged, would appear to have been a general epithet ascribed to the ethnic group known as the Kikuyu. The said words, if uttered, do not seem to have made specific reference to the plaintiff. I note from the plaintiff’s own evidence that he had been made aware by the University Chief Security Officer that a computer had indeed been stolen from the defendant’s office. It is noted, however, that apart from acknowledging making general reference to “thieves” the defendant denied the elaborate formulations cited in the above quotation.

One of the concerns raised by the defendant in his impugned letters was that the Department of Electrical & Electronic Engineering had been run down due to mismanagement by some Chairmen who according to him included the plaintiff. In the latter connection, it should be noted that in the defendant’s impugned letter of 07.07.03 (Exhibit 5), he lamented as follows:

‘It is unfortunate that while trying to follow the procedures laid by Dr. - - -, his successor, Dr. - - - found himself in more trouble. These were caused by his reliance on Mwangi (plaintiff) and - - - for advice. As students of the Department pointed out during their administration, there was evidence of “tribal clustering” which led to fast deterioration in the Departmental functions and their unfortunate rejection of - - -.’

According to the plaintiff, he believed that the defendant harboured hatred for his (plaintiff’s) ethnic group. If that be so, it would appear that the remarks contained in paragraph 3 of the plaint if indeed uttered, were not specific to the plaintiff but a general tantrum thrown at the people the defendant had identified as having misused their official positions at the University as an entity through the medium of the plaintiff who the defendant perceived to be a member of the group. I answer Issue No. 1, as formulated, in the negative.

Issue No. 2: Whether the words cited in paragraph 4 of the plaint injured the plaintiff’s character.

According to the plaintiff he was already an Associate Professor when the impugned words were published about him. He has remained in that position up to the time he testified in these proceedings. He surmised that he remained in the same position because of the impugned words. He called nobody to support his conclusion. It is not, of course, the law in this country that a fact in issue must be proved by the evidence of more than one witnesses (although the Bible seems to prefer such approach – see for instance Mathew 18:16). But in a controversial and sensitive case like the present, it is prudent to call supporting or corroborative evidence if one has it. That is what the plaintiff did in the Oyaro –vs- Alwaka case (supra) which the plaintiff himself cited in aid of his case. It is not understood why the plaintiff in the present case called no supporting evidence. The defendant maintained that the plaintiff suffered no injury to his reputation or career progression prospects in his profession or socially. The defendant ascribed the plaintiff’s remaining in the grade he said he remained in because he never applied for higher posts, a fact admitted by the plaintiff himself who said he did not apply for higher posts because of pending investigations and this case. On the other hand, the defendant surmised that the plaintiff never applied for higher positions because he had snubbed the very University authorities in whose hands apparently lay the power to hire him on the higher posts when those authorities called reconciliatory meetings to resolve the matters in controversy between him and the defendant. Such conclusion is not without merit. The defendant also testified that the plaintiff has not been shunned by anybody and gave the example that the plaintiff still enjoys membership of social clubs, e.g. the Senior Common Room at the University of Nairobi. This evidence was not controverted. Apart from his own statement, the

plaintiff adduced no supporting evidence of injury to his reputation or career progression prospects. The Court is left with the plaintiff's word against that of the defendant. The plaintiff had the onus of proving the injury he pleaded. He has not done so to the satisfaction of the court. I answer Issue No. 2 also in the negative.

Issue No. 3: Whether there was publication of the words cited in paragraph 3 of the plaint.

The impugned words cited in paragraph 3 of the plaint do not appear as such in the two impugned letters of 28.05.03 and 07.07.03. Rather, the defendant alludes to some of them, e.g. 'thieves' to their citation by the plaintiff in his internal memo of 09.05.03 to the Vice-Chancellor. There is no evidence that when the plaintiff first complained about the impugned words vide Exhibit 3, the defendant had published them to third parties. In the defendant's memo of 07.07.03 (Exhibit 5), he explains that his understanding of the purpose of the meeting called for 05.06.03 vide internal memo of 03.06.03 (Exhibit 9) by the Office of the Deputy Vice-Chancellor (Administration & Finance) is that it was meant, *inter alia*, to bring the controversy between him and the plaintiff to rest. That when the plaintiff failed to attend the meeting, it was resolved that the Dean of the Faculty of Engineering should convene a reconciliation meeting, which was called for 27.06.03. That the plaintiff declined to attend the latter meeting, describing it as "not legal" and that "the other aggrieved parties also needed to be invited to participate". The defendant went on to state in his letter of 07.07.03 as under:

"In this statement, I state that the reason for my calling the aggrieved parties "thieves" relates to their misuse of office during varied periods when they acted either as Chairmen or Chief Technologies of the Electrical and Electronic Engineering ... Drs Mwangi (plaintiff) and - - - "grabbed" three computers and printers to their offices without the approval/reporting to the Departmental Meetings - - - In an institution such as a Department, any property or funds accruing from efforts of colleagues and students belong to all and must be shared transparently. If unilaterally taken by the powers in office to their advantage, that is grabbing. Some people will know it and not say, one may say that one is myself - - - It is common knowledge that the words and phrases "grabbing", "eating" and "non-transparency" all tantamount to stealing of other people's property and funds. If funds and property are not used and applied in a manner prescribed by stakeholders, the words will apply - - -. Prof. Mwangi (plaintiff), in his guilty conscience, has refused to attend the two meetings called on the issue, seems to be "acting advocate" by insisting that the other aggrieved parties to be brought on board, and has indicated disrespect of the convenors of the meetings by stating that the meetings were "illegal". All this reveals one's character of arrogance, unlike humility. There must be reasons for such behaviour - - -. As a senior member in the Department, I have pointed out some issues which, in my view satisfy the "show cause why ..." and require internal investigations of those accusing me of "misconduct".

To the extent that the defendant's letter of 07.07.03 (Exhibit 5) was written to Prof. Magoha, Deputy Vice-Chancellor (Administration & Finance) and copied to the Vice-Chancellor; Deputy Vice-Chancellor (Academic Affairs); Principal, College of Architecture & Engineering; Dean, Faculty of Engineering; and Chairman, Department of Electrical & Electronic Engineering, the word "thieves" appearing in the letter and in the plaintiff's memo of 09.05.93 was published to the persons to whom it was addressed and copied. Early note must be made, though, that the defendant's impugned letter was partly in reply to the show cause letter of 21.05.03 addressed to the defendant and copied to the people the defendant copied his reply to; and that the show cause letter seems to have had its origin, at least in part, in the plaintiff's internal memo of 09.05.03 to the Vice-Chancellor and copied to the Deputy Vice-Chancellor (Administration & Finance); Principal, College of Architecture & Engineering; Dean, Faculty of Engineering; Chairman, Electrical & Electronic Department; and Chief Security Officer, which is generally the same cluster of people or officials the defendant sent or copied his impugned letter to.

I answer Issue No. 3 in the affirmative.

Issue No. 4: Whether the words cited in paragraphs 5,6 and 7 of the plaint constituted defamation

It is my finding that the words complained of are, in the circumstances of this case, capable of also referring to the plaintiff and that they are, *prima facie*, defamatory of the plaintiff. The only issue

remaining to be addressed is whether there is any defence to them. In this regard, I note from the statement of defence filed on 17.11.03 by Otieno-Odek & Company Advocates on behalf of the defendant that the words complained of were meant to be whistle blowing and cannot be a cause of action that the plaintiff and defendant shared the same employer, that the matter was an internal one and was being sorted out internally; and that the defendant denied the allegations in paragraph 7 of the plaint that he wrote his impugned letter of 07.07.03 to the addressees unlawfully, falsely and maliciously. I also note that on 21.04.04 the defendant filed notice to act in person and thereafter did act in person and that in defending himself before this court he concentrated on the defence of privilege. Plaintiff's counsel contended that such defence did not apply to this case. I note, though, that paragraphs 7 and 8 of the filed statement of defence were coined in the following terms:

'7. The Defendant avers that the words complained of were meant to be whistle blowing and cannot be a course (sic) of action.

8. The Defendant avers that the Plaintiff and himself share the same employer and the matter is an internal one and is being sorted out internally.'

These two paragraphs taken alongside the defendant's complaint about anomalies in the management of the affairs, especially financial affairs of the Department of Electrical & Electronic Engineering seem to import the defence of justification. It is to be recalled in this regard that the defendant complained that by his internal memo of 09.05.03 (Exhibit 3) to the Vice-Chancellor and copied to a number of other University officials, the plaintiff had besmirched his (defendant's) image. The essence of the defendant's case was that he not only denied the misconduct levelled against him by the plaintiff but also felt duty-bound to report to the University authorities certain anomalies he believed the plaintiff to have been involved in as far as management of the affairs of the Department of Electrical & Electronic Engineering was concerned. The defendant seems to have seen the accusations levelled by the plaintiff against him, if proved, as a threat to his employment rendering him liable to have his employment terminated under clause 23 (c) (iv) of the University of Nairobi Terms of Service for Academic, Senior Library and Administrative Staff. In this regard, it is to be recalled that the plaintiff's internal memo of 09.05.03 to the Vice-Chancellor, *inter alia*, reported about the defendant as under:

"When I reported for work yesterday, i.e. 8<sup>th</sup> May at about 8.15 a.m., he (defendant) started shouting at me as well as insulting me. He seemed to be very drunk, I suppose on alcohol - - -."

In this connection, attention is drawn to section 17(b) of the Employment Act, Cap. 226 which makes going to work intoxicated or being intoxicated during working hours a gross misconduct justifying summary dismissal. The accusation was, therefore, serious and it would be understandable for an employee like the defendant to regard it as a threat to his means of livelihood. That seems to have provoked the defendant to also report the anomalies alluded to in his two impugned letters to the same University authorities and challenging them to investigate them. The challenge the defendant threw at the University authorities took the following form contained in the last paragraph of his letter of 28.05.03 (Exhibit 6):

'If the University investigates the concerns written herein, and still considers that my utterances to the colleagues were "of scandalous or disgraceful nature" and is Good Cause "to render me unfit to hold my office" as stipulated in Clause 23 (c) (iv) of the terms and conditions of service, I am ready to appear before the Disciplinary Committee of the University of Nairobi Council for defence.'

According to the defendant the University was still investigating the matter when the plaintiff rushed to file the present suit in court, which action the defendant seems to consider premature. We end up in a situation where the University authorities are put in the ironical position where both the plaintiff and defendant have lodged complaints against each other with the same University authorities for investigation and action without any visible action by the said University authorities on either series of complaints! That must be very awkward for the University administration. A possible window of opportunity for the University authorities to explain their position was about to present itself when the defendant applied for, and was allowed to take out, a witness summons for Prof. G.A.O. Magoha who

was at the material time the Deputy Vice-Chancellor (Administration & Finance) who had been assigned the task of carrying out or causing to be carried out requisite investigations into the rival complaints by the antagonists herein and who is the current Vice-Chancellor of the University. However, Prof. Magoha did not turn up in court on 19.12.06. The defendant told this court on that date that he had spoken to Prof. Magoha about the day's hearing and that he had said he would send the University lawyer, one Mr. Lutta to court, for some unspecified purpose. There is no evidence before court that the University lawyer appeared either and the court has been left in the dark as to whether the University took any action on either series of complaints by the antagonists. This is unfortunate.

The resultant position is that I have to decide this case on the basis of the sole evidence of the plaintiff vis-à-vis the sole evidence of the defendant. Each has levelled accusations of impropriety against the other but adduced no independent supporting evidence. Each gave evidence on oath. It is one oath against another. As between the two, the evidence on record establishes that a meeting was called for 05.06.03 by the University authorities to discuss the rival complaints between the parties. The plaintiff said he failed to attend the meeting of 05.06.03 because the invitation reached him late. The defendant attended the meeting but no meaningful deliberations could take place with only one of the parties in attendance. A reconciliation meeting was called for 27.06.03. Evidence on record establishes that both the plaintiff and the defendant got the invitation in time. The defendant duly attended the meeting but the plaintiff declined to attend the meeting on the basis that in his view the committee to preside over its deliberations had no *locus standi* and that the meeting was not being held in accordance with the established rules of the University of Nairobi. He did not specify the irregularity or irregularities he deemed to have afflicted the meeting and the court has been left in the dark about the alleged irregularities. We in the legal fraternity would ordinarily attend such adjudicatory meeting, if not for anything else, as a matter of courtesy even if we challenge the jurisdiction of the adjudicatory body and would raise the challenge at the outset of the meeting. The plaintiff may wish to borrow such leaf.

The defendant explained vide his letter of 07.07.03 the circumstances which prompted him to resort to making references to 'thieves' and the context in which he equated the term to 'grabbing', 'eating' and 'non-transparency'. He said he was whistle blowing to prompt the University authorities to investigate the concerns he had raised. He dared the University authorities to investigate the said concerns and essentially told the University authorities that if they investigated the concerns but found them baseless, he was ready to face the University Disciplinary Committee. The University authorities were well placed to investigate the rival sets of complaints from the antagonists. There is no evidence before court from the University authorities of any investigations undertaken by such authorities. I understood the defendant to say that he likened the plaintiff with one living in a glass house and that such a person should not throw stones; that the plaintiff besmirched his image while the defendant had reason to believe that he (plaintiff) had skeletons in his cupboard and the defendant considered that time had come to ask the University authorities to investigate his accusers, including the plaintiff. It is the plaintiff who started accusing the defendant of improper conduct. As I understand it, the defendant denied the accusations levelled against him and also accused the plaintiff of improper conduct. Each asked the University authorities to investigate the other. This was apparently not done at all or the University authorities dragged their feet over the rival accusations. Both parties appear to have been frustrated by lack of action or timely action by the University administration on their respective rival complaints. The plaintiff decided to take the defendant to court. The defendant's answer is basically that he was discharging his duty as a senior member of the University which is a public institution and that if the institution failed, or delayed to pursue the matter which was internal, the blame for inaction or delay should not be laid at his feet. I am of the view that the concerns the defendant drew to the attention of the University authorities about apparent mismanagement of some affairs of the University run at public expense were a matter of public interest warranting investigation and action and that the defendant was provoked by the plaintiff to raise those concerns. This seems to be one instance where the public interest and individual interest have clashed. I am of the view that the public interest should prevail.

In Bildad Abiud Mbutia –vs- 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.’

The Judge also noted that the same principle had been stated somewhat differently by Lord Alkinson in the House of Lords in Adam –vs- 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.’

The same principle was reaffirmed by the Court of Appeal in University of Nairobi –vs- Mbuthia [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.

In the present case the series of accusations and counter-accusations was started by the plaintiff himself by writing his internal memo of 09.05.03 (Exhibit 3) to the Vice-Chancellor, University of Nairobi accusing the defendant, *inter alia*, of misconduct, including going to the office drunk or being drunk during working hours. The plaintiff copied Exhibit 3 to the Deputy Vice-Chancellor (Administration & Finance); Principal, College of Architecture & Engineering; Chairman, Electrical & Electronic Department; and Chief Security Officer. The defendant not only denied the accusations but apparently also took offence on the basis that he perceived the plaintiff and the other accusers as themselves not being clean. He cited specific anomalies he perceived the plaintiff and other accusers to have been involved in during their tenure as office holders in the University and challenged the University authorities or administration to undertake requisite investigations and take appropriate action. I understood it to be the defendant’s case that if the University administration carried out the necessary investigations and found no substance in his defence and reported concerns, he was ready to face the University disciplinary committee. The defendant did not copy his letter of 28.05.03 (Exhibit 6), which he said was in response to the accusations leveled against him, *inter alia*, by the plaintiff to anybody. The plaintiff maintained that the defendant’s aforesaid letter was not in response to the plaintiff’s internal memo of 09.05.03 (Exhibit 3). I note that the Exhibit 6 by the defendant was on the subject of his ‘MISCONDUCT’, which was also the subject matter of the plaintiff’s Exhibit 3. I accept the defendant’s testimony that vide Exhibit 6 he was, *inter alia*, responding to the plaintiff’s Exhibit 3. The plaintiff essentially contended that since that document was not marked confidential, it should be deemed to have been published to persons who had no business reading it. With respect, that presumes that which required to be proved. There was no such proof.

With regard to the defendant’s letter of 07.07.03 (Exhibit 5), I note that the defendant addressed it to Prof. G.A.O Magoha, the Deputy Vice-Chancellor (Administrative & Finance) who had written the show cause letter dated 21.05.03 (Exhibit 4) and was now demanding response. That letter by Prof. Magoha was copied by him to the Vice-Chancellor; Deputy Vice-Chancellor (Academic Affairs); Principal, College of Architecture & Engineering; Dean, Faculty of Engineering; and Chairman, Department of Electrical & Electronic Engineering. The defendant copied his reply letter of 07.07.03 (Exhibit 5) to the same cluster of officials. I find no fault in the defendant’s action of copying Exhibit 5 to the said University officers as they in fact constituted the majority of the officers to whom the plaintiff had copied his accusing internal memo of 09.05.03 (Exhibit 3).

The defendant equated himself to an officer of State and claimed absolute privilege for his letters of 28.05.03 (Exhibit 6) and 07.07.03 (Exhibit 5). The only law dictionary around to define the expression ‘state officer’ seems to be Blacks Law Dictionary, Eight Edition. That definition, which has been reproduced hereinabove, does not in my view cover either the defendant or the plaintiff herein. I find that the defence of absolute privilege does not cover the defendant.

The defendant testified that he had no guilty mind, i.e. malice in writing his letter of 28.05.03 (Exhibit 6)

and of 07.07.03 (Exhibit 5). The defendant raised specific concerns, i.e. the accusations levelled against him, *inter alia*, by the plaintiff as well as specific concerns about apparent anomalies relating to the management of some University affairs by some officers of the University including the plaintiff. The defendant called for requisite investigations either to vindicate him or prove he was in the wrong. I think the defendant had a public duty to raise the concerns with the University officers to whom he had been accused by the plaintiff for appropriate investigation and action. If the University administration failed or delayed to act, I think it would be wrong as a matter of public policy to lay the blame on the defendant.

I accept the defendant's evidence that he had no guilty mind or malice in writing his impugned letters of 28.05.03 (Exhibit 6) and of 07.07.03 (Exhibit 5) and find the said letters to be covered by qualified privilege.

In answering Issue No. 4, I hold that the words 'thieves' and associated expressions cited in paragraphs 5,6 and 7 of the plaint defamatory of the plaintiff BUT that the defamation is covered by qualified privilege and, therefore, not actionable by the plaintiff.

#### Issue No. 6: Whether the plaintiff is entitled to damages

In view of my finding on Issue No. 4, I answer Issue No. 6 in the negative.

#### Issue No. 7: Who should pay the costs of the suit?

The answer to Issue No. 7 has, of necessity, to await the final verdict and orders in this suit.

Having regard to all the foregoing, my final verdict is that the plaintiff has not proved his case to the required standard and the suit is hereby dismissed. As costs normally follow the event, the defendant is awarded the costs of the suit.

Orders accordingly.

In case I am wrong in the verdict I have pronounced, let me briefly address the issue of damages I would have awarded the plaintiff had I entered a verdict in his favour. In this regard, I am of the persuasion, as I indicated in High Civil Case No. 833 of 2000, Joseph Rading Wasambo –vs- 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. In the latter regard I adopted in the Wasambo case which I also adopt in this case as a good guide the following observations found in Thompson –vs- Commissioner of Police of the Metropolis and HSU -vs- Commissioner of Police of the Metropolis [1997]2 AII 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 ....” “

The plaintiff complained that he was categorized by the defendant among “thieves”. Theft/stealing is 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.'

Evidence adduced in the present case is to the effect that publication of the defendant's impugned two

letters was to a small cluster of University officials where the plaintiff and defendant both worked. I would in such circumstances, had I found in favour of the plaintiff, have awarded only the mandatory statutory minimum of Kshs.400,000/= as stipulated by section 16 A(1) of the Defamation Act. I would also have awarded costs to the plaintiff.

Delivered at Nairobi this 4<sup>th</sup> day of June 2007.

**B.P. KUBO**

**JUDGE**