



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Ochola & 2 others (Civil Appeal 286 of 2019)  
[2025] KECA 331 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 331 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 286 OF 2019  
HA OMONDI, HM OKWENGU & JM NGUGI, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**MICHAEL JUMA OTIENO ..... APPLICANT**

**AND**

**MARTIN LUTHER OMONDI OCHOLA ..... 1<sup>ST</sup> RESPONDENT**

**NGOS COORDINATION BOARD ..... 2<sup>ND</sup> RESPONDENT**

**CHRISTINE AWUOR OTIRI ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal from the Judgement of the High Court of Kenya at Kisumu (F. Ochieng, J) Dated 8th August, 2019 in Kisumu Civil Suit No. 16 of 2011)*

**JUDGMENT**

1. On 8<sup>th</sup> August, 2019, the High Court, (F. Ochieng J.), delivered a judgment dismissing with costs, a suit that had been filed by the appellant, Michael Otieno Juma. The appellant had sued the Non-Governmental Organizations Coordination Board (herein the NGO Board), Martin Luther Omondi Ochola (Martin) and Christine Awuor Otiri (Christine), (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents) respectively, for general damages, and aggravated or exemplary damages, for libel.
2. In his plaint, the appellant stated that he is the Chairman of the Board of Directors of Center for Peace and Democracy (CEPAD), and was at the material time the interim secretary of the same organization. The NGO Board, on the other hand, is a statutory body under the Non-Governmental Organizations Coordination Board Act, charged with the responsibility of oversight, control and coordination of the non-governmental organizations in Kenya. Martin and Christine were, at the material time interim, chairman and interim treasurer respectively, of CEPAD.
3. The litigation was sparked off by a letter dated 5<sup>th</sup> October, 2010, written by the NGO Board in which the NGO Board ratified the change of officials of CEPAD that had been communicated to it



- through a letter purporting to replace the appellant as the secretary of the organization. The appellant was aggrieved, as he contended that the NGO Board knew that the purported replacement was not done in accordance with the regulations and Constitution of CEPAD, but was actuated by malice and falsehood.
4. The situation was aggravated further by an advertisement published in the Daily Nation of 15<sup>th</sup> October, 2010, at the instigation of Martin and Christine, stating in part, that the appellant had ceased to be secretary of CEPAD with effect from 1<sup>st</sup> May, 2010, as ratified by the NGO Board. Consequently, the appellant sued the respondents for libel maintaining that the advertisement was defamatory of him, as it portrayed him amongst other things, as a person who was not fit to be entrusted as a secretary of CEPAD or of any other organization, and that his activities were shrouded in deceit.
  5. The NGO Board filed a defence in which it admitted having amended its records following a change of official document received from CEPAD which appeared regular on its face; and that it was only after the appellant raised an objection, that the NGO Board discovered that the CEPAD Board resolution forwarded to it was invalid, reviewed its decision to ratify the removal, and amended its records accordingly.
  6. The NGO Board denied having published the advertisement or having caused it to be published. It also denied having defamed the appellant, and contended that the appellant had no reasonable cause of action against it, and that his suit was frivolous and bad in law.
  7. Martin and Christine filed a joint defence in which they maintained that the appellant was lawfully removed from his position as the secretary of CEPAD due to grave misconduct touching on integrity, insubordination, abuse of office and breach of trust. They maintained that they were mandated by CEPAD and duty bound to advertise the fact that the appellant had been removed by the CEPAD Board. They maintained that the facts in the advertisement were true in substance, were bereft of malice and did not constitute any libel against the appellant. They, therefore, denied the appellant's claim and added that the appellant's suit was an abuse of the court process as he had previously filed another suit.
  8. Hearing of the suit commenced on 6<sup>th</sup> April, 2017, before Maina, J. who heard the evidence of the appellant and his two witnesses, Jacob Oluoch Oteke (Oteke) and Paul Kyalo Ndunda (Ndunda). In brief, the appellant maintained that he was the secretary of CEPAD and had not been replaced through any legal means, nor was he served with any letter replacing him as secretary. He produced a copy of a letter dated 5<sup>th</sup> October, 2010, and a copy of an advert which appear in the Daily Nation for 15<sup>th</sup> October, 2010. The advert was to notify the general public and development partners, that he, that is the appellant, had ceased to be the secretary of CEPAD, and that he should not represent the organization. The appellant maintained that the meeting which purportedly removed him as secretary was not convened in accordance with *the Constitution* of CEPAD, and that after he objected to his removal, the NGO Board wrote a letter reversing its position accepting the appellant's removal. The appellant stated that the advert was done by Martin and Christine.
  9. The appellant stated that as a result of the advert, he lost an opportunity for employment with Bedrock Security as general manager, because the company saw the advert and changed its mind about employing him. He produced his letter of appointment from the company and a letter withdrawing the appointment. The appellant also stated that as a result of the advertisement, he lost income as consultancies which he was getting from other organizations ceased.
  10. Oteke, who works with Bedrocks Holdings Limited as a quality assurance manager, testified that the records of the company, showed that the company had offered the appellant an appointment as general manager but the offer was later rescinded. He explained that the change was based on an article that



- had appeared on the Daily Nation on 15<sup>th</sup> October, 2010. Under cross examination the witness was not able to state whether the vacancy that had been offered to the appellant was advertised, or how many people had applied for the position. He admitted that William Ololo, the Managing Director and CEO of Bedrock Holdings Limited is a relative of the appellant.
11. Ndunda who is an employee of Nation Media Group produced the original publication of the advertisement that appeared in the Daily Nation of 15<sup>th</sup> October, 2010. He could not, however, identify or state who put up the advertisement or paid for it.
  12. On 20<sup>th</sup> March, 2018, hearing continued with two witnesses testifying on behalf of the respondents. These were: Mercy Cheruto Soi (Mercy), a legal officer with the NGO Board and Martin. Mercy testified that the records of the NGO Board showed that there was an application for change of officials of CEPAD in May, 2010, she referred to a statement that had been signed by one Henry Ochilo, who was formerly employed by the NGO Board as Head of operations. Mercy asserted that the NGO Board did not cause a notice to be published in the newspaper. She maintained that the NGO Board is not concerned with the internal management of any non- governmental organizations.
  13. During cross examination, Mercy testified that the initial officials of CEPAD who were registered as at the date CEPAD was registered were: Martin, Christine and the appellant. She testified that initially the NGO Board had accepted the changes of the officials, but after receiving minutes of the CEPAD Board meeting, it was realized that the meeting was not properly convened, and that is when the NGO Board issued a letter to CEPAD pointing out the anomalies.
  14. On his part, Martin testified that he was chairman of CEPAD and that Christine, who is the treasurer, is his wife and had given him authority to testify on her on behalf. He stated that on 1<sup>st</sup> May, 2010, CEPAD Board of Directors convened a meeting to address challenges that were traceable to the appellant. The meeting addressed the unethical conduct of the appellant and resolved that he be removed from his position as secretary of CEPAD, and the resolution was effected and a letter dated 5<sup>th</sup> October, 2010 addressed to the NGO Board. The appellant continued writing letters purporting to be secretary to CEPAD and the CEPAD Board, therefore, decided to place an advertisement to notify the public that the appellant was no longer its secretary. Martin maintained that the advertisement was placed by the CEPAD Board and not Christine or himself, nor was the advertisement actuated by malice or ill will.
  15. Under cross examination, Martin maintained that the CEPAD Board meeting in which the appellant was suspended had proper quorum, and that Shem Odhiambo, who was present at the Board meeting, was not a stranger as he was recognized by the appellant as a Board member.
  16. Upon considering the evidence and the submissions that were duly filed by the contending parties, the learned Judge found that the defamation of the appellant is said to have occurred when the respondents published a falsehood about the appellant. The learned Judge noted that the appellant never asserted that the NGO Board had published any defamatory information concerning him, nor did he attribute the alleged defamatory publication to the NGO Board. The Judge, therefore, found that the appellant did not prove his case against the NGO Board.
  17. As for Martin and Christine, the learned Judge held that the evidence showed that they participated in a meeting which was held on 1<sup>st</sup> May, 2010, during which it was resolved that the appellant be replaced as secretary of CEPAD; and that there was evidence that Martin and Christine caused an advertisement to be published in the Daily Nation Newspaper of 15<sup>th</sup> October, 2010, indicating that the appellant had been replaced in CEPAD.



18. The learned Judge found that there was a stalemate between the appellant on the one hand, and Martin and Christine on the other, which needed to be resolved; that the three being the only Board members, a quorum of two provided a lawful meeting of the CEPAD Board; and the resolution to remove the appellant was lawful having been made at such a Board meeting. In addition, since the appellant thereafter continued holding himself as the secretary of CEPAD, and communicated with third parties as such, there was confusion and the action of Martin and Christine, in causing an advertisement to be published indicating that the appellant did not have authority to represent CEPAD, following his removal as secretary, was not defamatory. The learned Judge therefore dismissed the suit against Martin and Christine.
19. Being aggrieved by the judgment, the appellant filed a memorandum of appeal in which he raised sixteen grounds. In his submissions, the appellant reduced the sixteen grounds of appeal, into seven issues as follows:
  - i. Was the publication in the Daily Nation Newspaper on 15<sup>th</sup> October, 2010, authorized by CEPAD Board of Directors?
  - ii. Did the appellant really cease to be Center for Peace and Democracy (CEPAD) secretary on 1<sup>st</sup> May, 2010?
  - iii. Was there malice, falsehood and recklessness by the Martin and Christine in the publication?
  - iv. Was there malice, recklessness and culpability by the NGO Board?
  - v. Did the appellant suffer damages from the publication?
  - vi. Was the meeting of 1<sup>st</sup> May, 2010, legally and procedurally constituted?
  - vii. Who should pay costs of this appeal and High Court proceedings?
20. During the plenary hearing of the appeal, learned counsel Ms. Nyambeki appeared for the appellant while learned counsel, Mr. Ojuro, appeared for the NGO Board and Christine. The suit against Martin, who is deceased, had abated. Ms. Nyambeki relied on written submissions that had been filed on behalf of the appellant, which she briefly highlighted.
21. On the publication in the Daily Nation Newspaper of 15<sup>th</sup> October, 2010, counsel for the appellant noted that the publication had the appellant's picture, official name and identity number, and cautioned the general public and development partners that the appellant was not authorized to transact, enter into or represent CEPAD in any capacity as he had been replaced as secretary of CEPAD.
22. Counsel argued that CEPAD was not a party to the suit, and that the learned Judge rightly concluded in his judgment that it was Martin and Christine, and not the CEPAD Board of Directors, who caused the advertisement to be published in the Daily Nation Newspaper of 15<sup>th</sup> October, 2010.
23. Counsel argued that the Nation Newspaper publication misrepresented CEPAD Board of Directors as the person placing the advert, when Martin and Christine had placed the advert in their individual capacity; that Martin who testified on behalf of Christine failed to produce a resolution of the CEPAD Board authorizing publication of the advertisement; and that the minutes of the meeting of CEPAD Board which were produced in evidence, did not mention the placing of the advertisement in the newspaper, even though Martin and Christine purported to have placed the advert on behalf of the CEPAD Board of Directors.
24. Counsel pointed out that although the resolution to remove the appellant is purported to have been adopted on 1<sup>st</sup> May, 2010, the publication was done over five months later on 15<sup>th</sup> October, 2010,



which raised a doubt as to whether there was really a CEPAD Board resolution to publish the removal in the newspaper.

25. On whether the appellant ceased to be secretary for CEPAD on 1<sup>st</sup> May, 2010, counsel argued that the learned Judge went on a fishing expedition, and erroneously held that the appellant no longer held the position of secretary to CEPAD as at 1<sup>st</sup> May, 2010. Counsel argued that the judgment of the High Court would have far reaching effects on the leadership of non-governmental organizations in Kenya, as it would imply that ratification of changes of officials could apply even where there is no communication to the replaced person, and this would be illogical and erroneous. Moreover, it was argued that the appellant could not have been legally and procedurally replaced in the meeting that was alleged to have taken place on 1<sup>st</sup> May, 2010, as an irregular meeting could not transact any legal business on behalf of CEPAD Board including the alleged replacement of the appellant as CEPAD secretary. In this regard, counsel cited *Republic -vs- Registration of Society & 5 others Exparte Uhuru Kenyatta & 6 others*.
26. On whether there was malice, falsehood and recklessness by Martin and Christine, in the publication, counsel reiterated that it was Martin and Christine and not the CEPAD Board of Directors, who caused the advertisement to be published in the Daily Nation Newspaper of 15<sup>th</sup> October, 2010. Counsel pointed out that malice, falsehood and recklessness were evident in the misrepresentation to the public that the publication was done on behalf of the CEPAD Board, when the CEPAD Board had not authorized the appellant's replacement. Secondly, the position of Martin and Christine that the appellant had been replaced as CEPAD secretary was contradicted by letters that Martin wrote to the appellant, inviting him to meetings of CEPAD's Board of Directors, between August, 2010 and January, 2011. This meant that Martin and Christine knew that the appellant was CEPAD's secretary even after 1<sup>st</sup> May, 2010 but deliberately chose to claim in the newspaper publication that the appellant had been replaced. The Court was urged to find that the publication in the Daily Newspaper was utterly false, untrue, reckless and malicious. Counsel pointed out that the appellant was not informed of the purported removal, but the information was actually sent to third parties such as government officials, donor and international organizations, and the appellant was embarrassed and shunned by professional colleagues and friends who knew that he was CEPAD's secretary, and this caused the appellant undue, mental and psychological distress.
27. Counsel argued that because the NGO Board knowingly and deliberately released several contradictory letters and emails to CEPAD in regard to the position of the appellant, the NGO Board was aware of the attempts by Martin and Christine to replace the appellant as CEPAD secretary, but did not endorse the applications due to illegalities in the process. However, due to some unknown malicious reasons, the NGO Board released the contradictory letter stating that the appellant was replaced as secretary. This letter formed a critical part of the publication that was made on 15<sup>th</sup> October, 2010, by Martin and Christine in the Daily Nation Newspapers. The NGO Board declined to apologize to the appellant for its commission or omissions, and the learned Judge was, therefore, wrong in exonerating the NGO Board from acting with falsehood and malice.
28. On the issue of damages it was submitted that the appellant lost a job opportunity with Bedrock Holdings Limited, as general manager, as a result of the impugned publication. This was not considered by the learned Judge in holding that the publication was not defamatory. Counsel faulted the learned Judge for relying entirely on the evidence of Martin and Christine and totally ignoring the evidence of the appellant and the NGO Board. Counsel submitted that the CEPAD Constitution specifically provides that the responsibility for convening meetings of the CEPAD Board is the duty of the secretary.



29. On whether the meeting of 1<sup>st</sup> May, 2010 was legally and procedurally constituted, it was maintained that the appellant could not have been legally and procedurally replaced in the meeting that was alleged to have taken place on 1<sup>st</sup> May, 2010, as an irregular Board meeting, could not transact any legal business on behalf of CEPAD Board, including the alleged replacement of the appellant as CEPAD's secretary. In support of this proposition, Republic -vs- Registration of Societies & 5 others, Exparte Uhuru Kenyatta & 6 others [2007] eKLR, was relied upon.
30. Ms. Nyambeki submitted that there was no request by the respondents to the appellant, as the CEPAD secretary, to call the Board of Directors meeting on 1<sup>st</sup> May, 2010, as such no legally binding business could be transacted. In addition, the alleged meeting lacked an agenda for discussion and quorum, as the quorum for the CEPAD Board of Directors meeting is three-quarters. Counsel cited Johnson Otieno Adera & 3 Others vs Anti-Counterfeit Agency & 3 Others [2015] eKLR, in support of these submissions, arguing that for the superior court to disregard *the Constitution* of an organization, is not only bad in law but a bad precedent that is a recipe for, anarchy in management of NGOs in Kenya.
31. The respondents also filed written submissions responding to the issues that were raised by the appellant. The respondents maintained that the publication was authorized by Martin and Christine, as Board members of CEPAD. This was not only admitted by Martin and Christine, but was also apparent on the advertisement.
32. As to whether the appellant ceased to be secretary of CEPAD on 1<sup>st</sup> May, 2010, it was submitted that the CEPAD meeting was properly constituted and had the required quorum, when it was resolved that the appellant be removed. That the position taken by the NGO Board was because of communications received from Directors of CEPAD.
33. On whether there was malice, falsehood and recklessness in the publication, the respondents submitted that the publication was factual as the appellant had actually been removed on the 1<sup>st</sup> May, 2010, from the Board of CEPAD, and the subsequent publication was just to notify the public. It was argued that the publication was done in good faith and was not intended to lower the reputation of the appellant. In addition, as officials of CEPAD, Martin and Christine had an obligation to notify the general public.
34. As for the NGO Board, it was submitted that it acted according to the information availed to it, as per its mandate under the statute, and that the NGO Board was a victim of confusion caused by division among the Directors of CEPAD.
35. On general damages, the advocate for the respondents submitted that the appellant did not suffer any damages and that the learned Judge was correct in finding that he would not have been entitled to aggravated or exemplary damages, assuming he had proved the defamation. It was maintained that the CEPAD Board meeting for 1<sup>st</sup> May, 2010, was in accordance with the CEPAD Constitution which allowed for a meeting to be called in consultation with the Chairman and the Board committee, and therefore even in the absence of the secretary, the chairman could call the CEPAD Board meeting. Counsel argued that the quorum of three-quarter of the Board members would mean that the CEPAD Board meeting had to be attended by 2.2 people which was illogical, and therefore the presence of two members out of the maximum of three was sufficient.
36. Finally on costs, the Court was urged that costs follow the events and therefore the same should be awarded to the respondents and the appeal be dismissed.
37. This being a first appeal, the court's mandate as a first appellate court is as stipulated in Rule 31(1) of the Court of Appeal Rules, namely, to re-appraise, re-evaluate and re-analyze the record, in light of the rival submissions, and draw its own conclusions thereon and give reasons either way. In *Selle*



& Another vs. Associated Motor Boat Company Limited & 2 others [1968] EA 123, at P. 126 Sir Clement De Lestang, VP, delineated this mandate as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally.”

38. Having considered the record, the submissions by the respective counsel, the authorities cited, and the law, the main issue that we discern for determination in this appeal is whether the respondents published or caused to be published an advertisement which was libelous of the appellant, and whether the appellant was entitled to any damages.

39. In *Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another* [2009] eKLR, this Court (Tunoi, Waki & Aganyanya JJA) stated as follows:

“To decide a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation, the plaintiff must prove:

- i. That the matter of which the plaintiff complains is defamatory in character.
- ii. That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- iii. That it was published maliciously. In slander, subject to certain exceptions, that the plaintiff has suffered special damage.

40. In *S M W vs. Z W M* [2015] eKLR this Court explained as follows:

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

41. In *Musikari Kombo v Royal Media Services Limited* [2018] KECA 801 (KLR) this Court (Visram, Karanja & Koome JJA) explained further that:

“24. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halsbury’s Laws of England* 4th Edition Vol. 28 page 23 the authors opined: ‘In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.’”



42. Similarly, in *Selina Patani & another v Dhiranji V Patani* [2019] eKLR this Court (Karanja, Odek & Kantai JJ A) approved the ingredients of defamation as summarized in the case of *John Ward v Standard Ltd*, HCCC 1062 of 2005 as follows:

- “(i) The statement must be defamatory
- ii. The statement must refer to the plaintiff.
- iii. The statement must be published by the defendant.
- iv. The statement must be false.”

43. From the above decisions, it is clear that, in order to succeed in an action for libel, a plaintiff has to prove not only that the defendant published the impugned article, but that the article published referred to him and contained false statements about him; that in the natural and ordinary meaning of the words, the impugned article injured his reputation by lowering his estimation in the eyes of right-thinking members of the society; and that the impugned article was made without justification and maliciously.

44. In order to address the issue at hand, it is important to reproduce the impugned notice published on 15<sup>th</sup> October, 2010. This is what the notice stated:

“This is to bring to the attention of the General Public, Development Sector & our Constituents, that the person whose photograph appears here, Mr. Michael Juma Otieno, holder of Kenyan ID Card No. 10546956 ceased to be the secretary of Centre for Peace and Democracy (CEPAD) effective 1st of May 2010 as ratified by the NGO’S Coordination Board vide letter referenced NGO/218/051/2003/010(49) and is consequently not authorized to transact, conduct, enter into, and or represent CEPAD in any capacity whatsoever. Further, be informed that CEPAD is not in any way related to an outfit calling itself Community Action for Change in Kenya (CACK) and will not take responsibility for its action.

Board of Directors

Centre for Peace & Democracy P.O Box 536-006100”

45. It was the appellant’s case that the published information was not true as it was not a true reflection of the facts; that it was published maliciously and had a negative impact on his reputation; that the respondents were actuated by malice because the purported meeting of the CEPAD Board lacked quorum and was therefore an illegitimate meeting which could not transact any legal business of CEPAD including the alleged replacement of the appellant as the organization’s secretary. On the other hand, the respondents pleaded the defence of justification contending that they were simply reporting facts made in public interest.

46. In his determination, the learned judge stated as follows:

“In my considered view, the plaintiff has not proved the innuendo he alluded to, that the advertisement implied that he was not a fit person to be dealt with in the capacity of CEPAD’s Secretary.

If a person no longer holds a particular position in an organization, he would be without authority to carry out the functions bestowed upon the holder of that position. Therefore, when the 2<sup>nd</sup> and 3<sup>rd</sup> defendants caused an advertisement to be published in which it was



indicated that the plaintiff did not have authority to represent CEPAD, following the resolution to remove him as Secretary, that statement was not defamatory.”

47. It is trite law that he who alleges must prove. That is the purport of Section 107 of the *Evidence Act*. The appellant who claimed that the publication was untrue and that the respondents were actuated by malice, had the burden of establishing these allegations. On the other hand, the respondents who claimed that they were justified in making the impugned notice as it was a true reflection of the facts had to prove the truth of the allegations, as the onus was on them to prove the truth of the words in their ordinary and natural meaning.
48. In the instant appeal, the respondents claimed that the appellant had been removed as secretary of CEPAD. It is not disputed that Communication was made by Martin to the NGO Board, to the effect that the appellant had been removed from his position as secretary of CEPAD. The NGO Board relying on that communication confirmed effecting the change through its letter dated 5<sup>th</sup> October, 2010.
49. The question is whether the information that the appellant had been removed from his position as CEPAD secretary was true. The correspondences which were attached to the affidavit of Henry Otieno Ochido, who was the head of operations compliance and research for the NGO Board, and the affidavit of Martin, showed that there was a CEPAD meeting which took place on 1<sup>st</sup> May, 2010, following which Martin forwarded the minutes and copies of forms for change of officials to the NGO Board, contending that the CEPAD Board had met and resolved that the appellant be removed as secretary. Martin did not deny having forwarded these documents to the NGO Board. It is evident that initially the NGO Board did not act on the minutes but by its letter dated 5<sup>th</sup> October, 2010, addressed to CEPAD the NGO Board acknowledged receipt of the minutes and indicated that it was amending its records accordingly.
50. The impugned notice which was published on 15<sup>th</sup> October, 2010, reflected the position as it was as at that date. This being, that the appellant had been removed as secretary of the CEPAD Board and was no longer authorized to transact any business on behalf of the CEPAD Board. The letter written by the NGO Board was addressed to CEPAD. Therefore, as far as the NGO Board was concerned, it did not publish any false information but merely acted on the information presented to it by CEPAD which information on the face of it appeared true.
51. The appellant referred to a bundle of letters that were exchanged between him, Martin and the NGO Board, before the impugned notice was published. These letters reveal that there was apparent animosity between the appellant and the two other board members of CEPAD which made it difficult for CEPAD to transact its activities. Even after Christine and Martin purported to have met as the CEPAD Board and removed the appellant, he continued to address letters to Martin and the NGO Board, presenting himself as the secretary of CEPAD. Under those circumstances, the impugned notice was not false but was reflecting the true position on the ground.
52. Moreover, the NGO Board did not publish the information but merely informed CEPAD of its implementation. It is true that the NGO Board reviewed its position noting that the meeting of CEPAD that was held on 1<sup>st</sup> May, 2010, was not proper. Nevertheless, that did not make its adoption of the information malicious.
53. We find that there was no evidence that the NGO Board published the impugned article on 15<sup>th</sup> October, 2010, and although the publication was done on the instructions of Martin and Christine, there was no evidence that the information was untruthful or that they did so with any malice. There was a meeting that was held by Martin and Christine who were members of the CEPAD Board, save that the meeting was vitiated by lack of a proper agenda.



54. Further, the appellant did not adduce any evidence to prove that the impugned notice subjected him to ridicule or lowered his estimation in the eyes of right-thinking members of the society. The only evidence in this regard was the purported loss of a job opportunity from Bedrock Holdings, but there was no evidence to link the withdrawal of the job opportunity to the impugned publication. The appellant relied on the evidence of Oteke who apparently works with Bedrock Holding Limited as a Quality Assurance Manager. This witness referred to the records of the company, but did not produce any. Even though he contended that the withdrawal of the offer was based on the impugned article, there was nothing to confirm that assertion. Nor did Oteke give any reasons why the human resource manager who would have been the person dealing with the employment, was not called to testify. He admitted that the appellant was a relative of the Managing Director and CEO of Bedrocks Holding which raised a possibility of the letter of appointment having been written merely to help the appellant. In the circumstances, we find that the impugned article was neither false nor defamatory of the appellant, nor did the appellant establish that his reputation was lowered in the eyes of right-thinking members of the public.
55. As regards the issue of damages, assessment of damages is a discretionary exercise that an appellate court can only interfere with, if satisfied that the amount awarded is either too excessive or too low as to represent an erroneous estimate or that the trial judge proceeded on wrong principles. In *Butt vs Khan*, [1981] KLR 349 at
- p. 356, Law, J.A, expressed this principle as follows:
- “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
56. Similarly, in *Butler v Butler* [1984] KLR 225, this Court, (Kneller JA, Chesoni & Nyarangi, Ag. JJA), cautioned that:
- “The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong”
57. Further, the following holding from *John -vs- MGN Limited* [1969] 1 All ER 35, is instructive.
- “In assessing the appropriate damages for injury to reputation, the most important fact is the gravity of libel, the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, carriage, and loyalty, the more serious it is likely to be.”
58. Although Martin and Christine published the notice complained of, and identified the appellant by name, it is evident that there was some justification in the contention that the appellant had been removed as secretary and therefore had no authority to transact business on behalf of CEPAD. Consequently, the gravity of a libel if any, was minimal. The learned Judge taking note of the circumstances, found that the appellant would be entitled to no more than nominal damages of two hundred thousand. We agree with the learned Judge. The appellant made it difficult for CEPAD to function or his position to be discussed. In the circumstances, if the appellant was entitled to any damages, we would not have interfered with the amount of Kshs.200,000/. However, the appellant having failed to prove the libel, his suit was properly dismissed.



59. Accordingly, we uphold the judgment of the High Court and dismiss this appeal with costs.  
Those shall be the orders of the Court.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

**H.A. OMONDI**

**JUDGE OF APPEAL**

**JOEL NGUGI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

Deputy Registrar

