



REPUBLIC OF KENYA



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**Wangai v Tsimbiri & 10 others (Employment and Labour Relations Cause  
11 of 2020) [2023] KEELRC 827 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 827 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 11 OF 2020**

**HS WASILWA, J**

**APRIL 12, 2023**

**BETWEEN**

**PROF. KIAMA WANGAI ..... CLAIMANT**

**AND**

**DR. PAMELA TSIMBIRI ..... 1<sup>ST</sup> RESPONDENT**

**DR. TITUS NGANDA ..... 2<sup>ND</sup> RESPONDENT**

**DR. ELIZABETH MBUTHIA ..... 3<sup>RD</sup> RESPONDENT**

**DR. KENNETH MBAATI ..... 4<sup>TH</sup> RESPONDENT**

**DR. V.M KIPRONO ..... 5<sup>TH</sup> RESPONDENT**

**DR. CEASAR MUNGATANA ..... 6<sup>TH</sup> RESPONDENT**

**DR. KENEDDY GOGO ..... 7<sup>TH</sup> RESPONDENT**

**DR. S.O OBURE ..... 8<sup>TH</sup> RESPONDENT**

**DR. TK SEREM ..... 9<sup>TH</sup> RESPONDENT**

**JANET C BII ..... 10<sup>TH</sup> RESPONDENT**

**EGERTON UNIVERSITY ..... 11<sup>TH</sup> RESPONDENT**

*(Formerly High Court Case No. 304 A of 2012 as  
consolidated with High Court Case No. 14 of 2015)*

**JUDGMENT**

1. By a plaint dated August 10, 2012, filed against the 1<sup>st</sup> to 8<sup>th</sup> Respondents and the Plaint dated February 6, 2015, filed against the 9<sup>th</sup> to 11<sup>th</sup> Respondents herein in High Court Civil Suit number 304 A of



2012 and High Court Civil Suit No 14 of 2015 respectively, the claimant, then plaintiff, sued the Respondents for alleged defamation and seeking for compensation for the alleged defamation. The two suits were consolidated by consent of parties, on the January 24, 2017 with the High Court Civil case number 14 of 2015 marked as the lead file. This matter was later on transferred to this Court for the hearing and determination and serialized as ELRC cause number 11 of 2020 with the plaintiff being the claimant and the defendants being the Respondents.

2. In both suit the Claimant sought for the following reliefs as against the Respondents;
  - a. General damages.
  - b. The costs of this suit.
  - c. Interest in (a) & (b) above.
  - d. Certificate of service.
  - e. Any other relief that this Honourable Court may deem just to grant.

**Claimant's case.**

3. The claimant stated that he was employed by Egerton University by the letter of employment dated November 4, 2009, on permanent and pensionable terms.
4. That he worked diligently for the University and on the January 6, 2012, he received a letter from the office of the registrar (Administration) of Egerton University dated December 22, 2011, titled; 'Show cause for Gross misconduct'.
5. The Notice to show cause letter emanated from the reports made to the Registrar Administration on allegation that the claimant on diverse dates had been involved in behavior that amounts to gross misconduct which included interalia; insubordination, sexual impropriety and academic intimidation on students, which conduct was in violation of clause 16(i) of the CBA as read with section 44(4)(e) and(g) and part II (6) of the Employment Act. The University required a response to the allegation by January 12, 2012. He was then invited for a disciplinary hearing which was scheduled on the June 12, 2012.
6. It is the claimant's case that he later on learnt that the said malicious allegations were authored in a meeting convened on the September 22, 2011 which 1<sup>st</sup> to 8<sup>th</sup> respondents were in attendance and maliciously without any colour of right wrote, published material that portrayed, insinuated and referred the claimant in an extremely libelous and defamatory manner.
7. He stated that the printed words meant that he grossly lacked morals, is undisciplined to the extreme ends and not suitable to hold a public office. The words that were considered defamatory are as follows; Sexual harassment- offered students a hotel of their choice for the meetings. In class he numerously intimidated female students and the class that they would fail if they did not cooperate. On sexual harassment, there clearly appears to be a case against him. That doctor Kiama be referred for disciplinary action, pending gathering of additional evidence from the students.
8. He stated that this letter was widely copied and caused the claimant great distress, a move that was calculated to disparage him and bring his character into disrepute and expose him to public ridicule and hatred in the eyes of the right thinking members of the society and cause him injury and damage.
9. The claimant blames the 10<sup>th</sup> Respondent because she was aware of the meeting of September 22, 2011 that posted the defamatory findings and the show cause letter which was a follow up cause after the meeting, that he responded to on the January 7, 2012.



10. The claimant states the 10<sup>th</sup> Respondent, who is the legal officer of the 11<sup>th</sup> Respondent had been directed by the 9<sup>th</sup> Respondent to assist in preparing a response to the letter to show cause and a further letter was addressed to her dated January 25, 2012 asking her to study the letter and discuss an appropriate response which she failed. Nevertheless, that the meeting of June 12, 2012 established that the charges were not specific.
11. The claimant blames the 10<sup>th</sup> Respondent for circulating the said letter and reports containing the defamatory texts. He also blamed the 9<sup>th</sup> Respondent for issuing the claimant with a show cause letter dated July 31, 2012 whose contents are based on the defamatory allegation listed above and for issuing another notice to show cause on August 1, 2013 with similar allegations when a suit on defamation being HCC case number 304 A of 2012 had already been filed in Court. Also, that he swore an affidavit on August 19, 2013 which was based on more defaming words.
12. He stated that the 9<sup>th</sup> Respondent suspended the claimant from duty with effect from August 26, 2013 which he later lifted on the September 12, 2013, But on the March 6, 2014, he published and circulated the following information, which he considered defamatory and injurious to his character . These words included but not limited to 'sexual inappropriateness and intimidation of staff and students' which particulars were as follows; That you were involved in inappropriate sexual conduct with female students; a current 4<sup>th</sup> year and 5<sup>th</sup> year. That you often gave an example of a student of the University of Nairobi who did not please her lecturers and she had to spend another year in medical school. Thus intimidating the students into giving into your sexual proposals in exchange of assurance that they would not fail their exams. That you also showed the students your photographs with prominent people like the Chief justice to further intimidate them creating an impression that you are untouchable and well connected.
13. He contends that the aforesaid defamatory material which was copied widely was unwarranted, calculated to disparage and bring his character into disrepute, expose him to public ridicule and hatred in the eyes of right thinking members of the society. That the said publication has caused him great distress, injury and damage. Further that the plain meaning and innuendo of the written words is that the plaintiff grossly lacks morals, is undisciplined to the extreme and as such not suitable to hold a public office.
14. During hearing the claimant testified as CW-1 and adopted his statement dated March 6, 2015 and produced the document in the list of documents filed on August 9, 2012 and the further list of June 8, 2017. He stated that the case before court relate to defamation and injury of persona which the Respondents have published material on diverse dates between September 21, 2011 and July 6, 2016 on the meeting convened and attended by the Respondents herein. He stated that the defamatory statement related to sexual impropriety with students and fellow staff, which was aimed at dismissing him from employment, which eventually occurred and was dismissed on the May 22, 2016. He told the court that he protested the dismissal and filed a case in this Court serialized as Cause number 224 pf 2017, which judgement was rendered in his favour and the Court reinstated him back to employment and he now still works for the Respondent. He stated that the reason for filing this suit is to clear his name from the injurious utterances by the Respondent, him being a lawyer and a senior lecture at Egerton University.
15. Upon cross examination, he testified that the specific injurious words are in the Notice to show cause letter dated December 22, 2011, on 'sexual impropriety and academic intimidation to your student' which words were repeated throughout. He testified that the Notice to show cause was signed by Doctor Serem and admitted that a notice to show cause is the standard way of kick starting a disciplinary process. He denied any invitation for the meeting of September 21, 2011 and stated that he only



received an invite for the disciplinary meeting scheduled for June 12, 2012, which he attended though the minutes does not show that he attended. He testified that the charges against him were listed in the meeting by the 1<sup>st</sup> to 8<sup>th</sup> Respondents held on September 22, 2022 he told the Court that the allegation of sexual impropriety were allegedly received from affected students and staff who were not called to be cross examined in the disciplinary meeting. He admitted that one statement was by a student named Cynthia Odipo, whom he did not sue as one of the Respondents.

16. Upon further cross examination, he testified that even though the handwritten statement emanated from students, the Respondents are the ones that reduced the offense into writing and accused him of sexual impropriety injuring is persona. He maintained that the said students were never called for cross-examination to justify the allegation in the said statement. He contends that the university, through a committee, ought to have carried out investigation into the allegation first before drafting the Show cause letter and reiterated that the faculty does not have powers to carry out such investigations. Therefore, that the alleged investigation carried out by the faculty was improper as per section 16 of the CBA. He testified that the Respondents who heard him in the disciplinary meeting came up with recommendation and supplied the said defamatory publication to management committee and others. He however, admitted that the minutes of the said meeting were not put in public forum but that the disciplinary committee in itself was a public forum. He also admitted that the defamatory publication was not published outside the University. He quickly added that apart from the disciplinary committee, the secretaries of the university who typed the Notice to Show cause and the security guard that delivered the letter to him knew about the contends therein because the letter was not in any envelope. He maintained that his reputation was injured in the way in which the Respondent's handled the issue.

### **Respondents Case.**

17. The 9<sup>th</sup> to 11<sup>th</sup> Respondents entered appearance on the March 18, 2015, while the 1<sup>st</sup> to 8<sup>th</sup> Respondent entered appearance on the August 30, 2015, both through the firm of Sheth Wathigo Advocates and filed separate defences.
18. The Respondents, stated that the issues which are before court are pending for determination before the University Disciplinary Body as such the jurisdiction of the Court has been prematurely invoked.
19. They stated that claimant is a members of staff of Egerton university at the faculty of Forensic Health Sciences. And being a member of staff, allegation had been raised against him with regard to insubordination, sexual harassment and students' intimidation.
20. Following these allegation, the faculty management committee sat to adjudicate on the issue in a meeting convened for September 22, 2011 and on the September 30, 2011, but on both days the claimant failed to attend despite being informed of the said meeting. After the meeting, the committee resolved to forward the issue to the University Management for further action.
21. Consequently, the claimant was afforded an opportunity to mount his defence as he was served with a show cause letter, listing all the charges against him and inviting him to disciplinary hearing which was scheduled for June 12, 2012.
22. On the date when the disciplinary hearing was to be heard, the same was deferred after the claimant raised issue of particulars of charges which the committee agreed and sourced for further particulars. Also that the claimant sought for some documents, informing the need to defer the meeting.



23. The Respondents herein stated that they are not the authors of the allegation but that they received all these allegations from members of staff, students and committees at the Egerton University and merely reduced them to writing in making the Notice to Show cause.
24. The Respondents stated that, it issued the claimant with a show cause letter in order to protect his interest and give him time to respond to the said allegations but instead of appearing for the meeting held on the 22<sup>nd</sup> and September 30, 2011, the claimant rushed to this Court and filed a suit on defamation when the substance of the said allegation was yet to be verified.
25. The Respondent aver that the show cause letter was contained in a confidential letter that was addressed to the claimant only and meant to source for answers on the allegation as such the said information was not communicated to any other person save for the claimant. Therefore, the allegation of publication for the said information is false.
26. They maintained that the alleged defamatory words are complains which they received from its staff and committee of the University which are protected by absolute privilege.
27. That they were under an obligation to disclose the allegation to the claimant in order to seek answers and get a response from him, which he instead chose to file this suit and complain of defamation when none can be construed from the actions of the Respondents.
28. During hearing the Respondents' called Ten (10) witness in support of their case.
29. The first witness was Janet Bii, the University's legal officer and the 10<sup>th</sup> Respondent herein. She adopted her witness statement and stated that the allegation raised against the claimant emanated from the faculty board who received complaints from two students; Wonder and Cynthia. She testified that minutes typed from any meeting are confidential and only shared with committee members that were present in the meeting. She stated that there was no publication of the Notice to show cause and the minutes of the said meeting at any forum. She told this Court that the initial meeting was adjourned because the claimant sought for particular of the offense, which was included in the subsequent Notice to show cause. She maintained that no one apart from the faculty board was copied of the minutes of the disciplinary hearing, therefore the claim herein is without merit. She reiterated that the information was kept confidential and infact that the claimant still works for the university and there is no frost relationship between him and other members of staff.
30. Upon cross examination, she testified that she received the complaints from the faculty, which sought her advice on the way forward and after perusal, she advised for the matter to be escalated to the Registrar, Dr Serem for further advice and action. She stated she relied on the investigation report prepared by faculty board in escalating the issue to the Registrar. She admitted that the students who had written complaints were not summoned during the disciplinary hearing. She testified that the recommendation arrived at by the disciplinary committee was for dismissal based on intimidation of student and nothing on sexual impropriety but that sexual impropriety is reflected in the dismissal letter. She maintained that the complaints came from student, whom she interrogated and reiterated that no defamatory publication were made against the claimant.
31. RW-2 was Dr Thomas Serem, the former University Registrar-Human Capital and Administration. He adopted his statement dated October 25, 2021 and testified that he was the one that wrote the Notice to show cause letter which he based it on complaints against the claimant on insubordination, intimidation and sexual impropriety. That the said letter was sealed in an envelope and delivered personally to doctor Kiama in a delivery book. He maintained that the letter and the minutes were not shared in any forum to suggest any defamation on the claimant's persona. He stated further that the complaints came from student and they followed the correct procedure in addressing the issue raised



- against the claimant who was given an opportunity to defend himself. He maintained that the claimant was not defamed but that the disciplinary hearing was done in accordance with section 16 of UASU's CBA.
32. Upon cross examination, he testified that the Notice to show cause indicated that it has been reported, because the complaints which were made by students were investigated by the faculty board and they board relied on the report and the statement of the students' in writing the Notice to show cause. He confirmed that the investigations relied on are those by the faculty board and no further investigations were carried out. He told the Court that the Notice to Show cause letter was indeed delivered through a security guard as is the norm but the same was in an envelope and the guard was not in any position to know the contents therein.
  33. RW-3 was Dr Samson Obura, a senior lecture at Egerton University and the former chairman of the department of medical physiology and the Dean of Health Science. He adopted his statement of March 13, 2013 and testified that the claimant was not defamed in any way and avers that the meeting which kicked started the disciplinary proceedings was carried out in the department of Health Sciences, which meeting he was invited to attend together with other two who were exonerated. He stated that he was not present in the initial meeting as he was away in Nairobi for their official duties.
  34. Upon cross examination, he testified that even though he is a pathologist, he was a member of the management team and was involved in the complaints raised against the claimant. He stated that he participated in the disciplinary process in this matter which committee in the final meeting unanimously resolved to dismiss the claimant. That the communication of the finding of the committee were through a sealed envelope.
  35. RW-4 was Vincent Kiprono, a lecturing in the nursing department at Egerton University, he adopted his statement of March 15, 2013 and stated that he attended the meeting of September 22, 2011 on receiving an invite from the department dean. He told this Court that the meeting was convened after the department received complained from student on alleged sexual harassment from 3 of its members. That they were all invited for hearing and 2 attended the meeting but the claimant declined invite. He stated that they did not defame the claimant.
  36. Upon cross examination, he testified that he was invited by the dean to the meeting but Dr Obure was not present and send his apologies. He testified that he learned of the purpose of the meeting on arrival at the venue. He testified that the recommendation from the preliminary meeting was for the matter to be heard in another meeting and in the meantime further investigation be carried out from the students. He added that after these further investigations, the committee resolves to escalate the matter to the senate for disciplinary.
  37. RW-5 was Dr Mungatana, a lecture in the department of surgery at Egerton University. He adopted his statement of March 14, 2013 and stated that the allegation that led to the disciplinary hearing was based on complaints received from students on 3 staff members including the claimant. The students complained on sexual harassment and they carried out investigation on that particular complaint. He maintained that the information was held in confidence and the claimant was not defamed at any point.
  38. Upon cross examination, the witness testified that he became aware of the issue through one of the complainant, a student whom he was an academic advisor to. He stated that the meeting of September 22, 2011 was chaired by the dean of the department and no students were present only the report from the department which included the complaints by the students.
  39. RW-6 was Dr Kennedy Mbatia, a lecture at Egerton University and former Chairperson of department of Human Anatomy. He also adopted his statement of March 12, 2013 and stated that some student



- reported complaints of sexual harassment by the claimant. Investigation were carried out and a meeting held in the department level, which procedure was done in confidence. He prayed for the case to be dismissed and on cross examination, he reiterated that he was in the meeting of September 22, 2011.
40. RW-7 was Dr Titus Nzou Nganda, a former lecture at Egerton University, Medical department. He adopted his statement of March 18, 2013 and stated that the issue in this case arose from complaint raised from two students in the medical department with regard to sexual harassment by some of the lecturers including the claimant. That the other two lectures admitted to handling the student as adults and apologized then promised to change. The claimant on the other hand did not attend the meeting called by the department head and the committee did not delve into his case in details but instead escalated the same to the higher office. He maintained that no information relating the issues at hand were ever published to suggest any defamation of the claimant.
  41. Upon cross examination he testified that the complaints emanated from the students and since the claimant did not attend the meeting, adverse comments were not made against him.
  42. RW-8 was Dr Keneddy Owure, a senior lecture at Egerton University. He adopted his witness statement dated March 13, 2013 and stated that he was part of the disciplinary team as he was the head of department of internal medicine. He stated that all heads of department were present in the meeting of September 22, 2011. That the meeting was to discuss the complains raised by the students against three of its lectures including the claimant but the claimant did not attend. He maintained that the meeting was carried out in accordance with the guidelines of the university and everything was done with confidentiality.
  43. Upon cross examination, he testified that he did not know of the agenda of the meeting before the said date. He added that they were directed by the VC to give a report of the finding of the said meeting which they did.
  44. RW-9 was Dr Pamela Timbiri Fedha, a lecture at Egerton University. She adopted her statement of March 14, 2013 that reiterated the testimonies of her colleagues and in addition stated that the disciplinary proceedings and any of the documentation was not put on social media or any other public forum. Upon cross examination, she testified that she was the one that convened the meeting of September 22, 2011 and that the agenda was not send to the invitees before the meeting. She testified that the department investigated the complaints raised against the accused lectures. It is her case that she delivered a report of the meeting to the VC and even appeared as a witness in the final disciplinary hearing.
  45. RW-10 was Elizabeth Kamau Mbuthia, a lecture at Egerton University in the department of Health Nutrition. She equally adopted her statement of February 13, 2013 and stated that the complains of sexual harassment was raised against the claimant as the head of department. That she was present in the meeting as one of the members of the Departmental Board. She maintained that the information in relations to this matter was not published elsewhere thus the claimant was not defamed as alleged. On cross-examination, she reiterated that she was present in the meeting of September 22, 2011.

### **Claimant's Submissions.**

46. The claimant submitted that the claim herein is on defamation of his persona which arose from the meeting held by the Respondent on September 22, 2011 from which the following words were published; That the claimant sexually harassed his students and offered the students hotel of their choice for the meetings, numerously intimidated female students and the class that they would fail if they do not cooperate. The committee concluded that on the issue of sexual harassment he had a case to answer and set him up for further disciplinary action. He argued that the Show cause letter and the



outcome of the meeting was widely circulated to disparage him and bring his character into disrepute, exposing him to public ridicule and hatred in the eyes of right thinking members of the society. He argued that the offenses raised were fabricated by the Respondents in collaboration with some of the students that had failed exams and wanted to be allowed a pass, an issue that he resisted leading to the defamatory allegations against him. Also that the allegations were made by a non-existent faculty management committee and also that the students who were alleged sexually harassed by the claimant were not summoned in the disciplinary meeting for cross examination, neither did the dean of faculty medicine appear before the committee to give evidence. He submitted that he was not an employer or representative of the employer as envisaged under Part ii(6) of the *Employment Act* and has never requested any favors from the employees of the Respondent.

47. He also submitted that the meeting by the disciplinary committee held on the May 11, 2016 and Council meeting of May 26, 2016 did not find the claimant guilty of sexual impropriety and intimidation of student.
48. On the offense of insubordination, the claimant submitted that the chairman in the department of pathology, where the claimant works, has never complained against him, when he is the one whom he is answerable to as captured in his letter of appointment dated November 4, 2011. He added that the only time he was found out of order was in the meeting of September 22, 2011, where Dr Obure raised an issue that the claimant was not in agreement and gave a different opinion, which issue does not hold water in light of the fact that the claimant has a right to speak in such meetings and gives his views even when they are contrary to his chairperson. He argued that the claimant was not found guilty in accordance with Clause 16(ii) of the CBA to warrant the action taken by the University.
49. On the procedure followed by the University, pursuant to the offenses raised, the claimant submitted that as per clause 16 of the CBA, the Union, ought to have been present in the disciplinary meeting which was not the case and also that the said Union ought to have been notified of the disciplinary outcome, as such, he argued that the entire disciplinary process was flawed. He added that the commencement of the disciplinary proceedings in the first meeting held on September 22, 2011 was without sufficient notice, when the CBA gives at least 10 days' notice period before any disciplinary meeting is called for. Further, that the committee that convened the meeting was non-existent, thus any action taken was null and void.
50. It was submitted that according to section 63 of the *Universities Act*, disciplinary proceedings ought to be done in an expedient manner, within 6 months, which was not the case herein because, the proceedings commenced on September 22, 2011 till August 14, 2013, about 22 months, ostensibly that the charges against him ought to have extinguished on lapse of the 6 months' period.
51. It is the claimants' submissions that the Dr TK Serem, Janet Bii and Dr S Obure, had interest in the matter because, the trio are the ones that authored the letter, with Dr Obure being the complainant in the offense of insubordination, and therefore violated Section 63(3) of the *Universities Act* by sitting in a disciplinary meeting and arriving at the decision against the claimant, when they are the complainants in the said case.
52. On the offense of negligence of duty, the claimant submitted that this offense was not raised in the disciplinary committee meeting held on May 11, 2016, neither was it captured in the Notice to Show cause derived at the meeting of September 22, 2011. In any event that the alleged offense occurred on the period for supervision of students' exams, which claimant was not at work, having taken annual leave which was approved by the University.
53. The claimant submitted that the minutes from the meeting of September 22, 2011 printed defamatory words, which has injured his character. Also that the replying affidavit by Janet Bii sworn on July



- 23, 2015 together with the dismissal letter authored by the 11<sup>th</sup> Respondent on July 6, 2016 was defamatory in the contents it was published in there on sexual harassment and intimidation of student, insubordination and negligence of duty. He argued that such publication lowered how the right thinking members of society now view him.
54. On damages that ought to be awarded, the claimant cited the case of *Jones V Pollard (1997) EMLR 233* and the case of *Biwott V Ian West and Another, Nairobi HCC 1067 of 1999* and suggested a figure of Kshs 15,000,000 as compensation for damage of his character.
55. In his further submissions, the claimant argued that the burden of proving justification of the published words lies with the Respondents which they failed as held by this court in ELRC Cause number 224 of 2017. They should therefore be condemned to pay damages for the defamation against him.

### **Respondents' Submissions.**

56. The Respondents submitted on whether the ingredients of defamation have been proved. It was argued that the contents of the Notice to show cause cause wrote in the meeting of September 22, 2011 arose from the complaints received from students that had complained of being sexually harassed by the claimant and other lecturers. It is stated that the invitation letter was sent to the claimant to secure his attendance to the meeting in order to allow him address the committee and shed light on the issue raise, but the said claimant absconded the meeting. The procedure used by the Respondents is the same that is normally used in all disciplinary issues for all other staff members for all offenses.
57. It was submitted that the ingredients of defamation were highlighted in the case of *John Ward V Standard Limited [2006] eKLR* where the Court held that;
- A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:
- (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.'
58. On that basis, it was submitted that the issue that caused the filling of this case arose from complaints received against lecturers including the claimant. The university through the claimant's faculty convened a meeting and invited the claimant who failed to attend. Nevertheless, that the committee members interrogated the complaints and handled it against the other lecturers who attended save for the claimant who was not in attendance with not excuse having been served. The Respondent argued that all the witnesses that testified in this case and attended meetings held by the disciplinary committee and Council confirmed that the said information was not published in public forums such as university website, newspaper, social media among others. He added that the allegation that the said disciplinary action was published in Daily nation newspaper of 2013 is not true as no such evidence was tabled before this Court, neither have the Respondents been served with the said newspaper cutout.
59. On the allegations that the Replying affidavit sworn by the 10<sup>th</sup> Respondent was defamatory, it was submitted that the said response was in reply to the notice of motion filed by the claimant as such the 10<sup>th</sup> Respondent, being the legal officer of the University, was duty bound to make a response



with proper particulars of issue, which cannot be used to allege that the said Respondent defamed the claimant. Additionally, that the 10<sup>th</sup> Respondent enjoyed absolute privilege in this matter because she undertakes swearing in of documents as the nature of her work requires. To support the defence of absolute privilege, the Respondent cited the case of *Amos KC Kale & Another V Rebecca Gesora & Another [2017] eKLR* where the Court held that:-

' In Westlaw Canadian Encyclopedic Digest, under Defamation (2010): states that: No action of libel or slander lies, whether against judges, counsel, witness or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. Those statements are absolutely privileged, the immunity resting upon grounds of public policy and convenience, with the object of securing the free and fearless discharge of high public duty in the administration of justice.

In MJ vs DV, Justice Jackson on the Saskatchewan court of appeal stated. absolute privilege exists not to protect persons who have made malicious statements, but to protect those involved in the justice system from necessity of having to weight their words for fear of an action in defamation, it is designed to encourage freedom of speech and communication in judicial proceedings, and its need is born out, at last in part by necessity'

60. It was submitted that the claimant merely blamed the Respondents for publishing the defamatory words but failed to prove that any of the Respondents published the said defamatory material against him. Furthermore, that he complained against the Procedure in which the disciplinary hearing was handled and failed to submit on the specific areas the Respondents failed to follow such procedure. He argued also that the fact that a messenger handed him the invitation letter cannot amount to publication for the purposes of defamation. In this they relied on the case of *Selina Patani & Another C Dhiranji V. Patani [2019] eKLR* where the Court relied on the case of *Pullman -v- Walter Hill & Co (1891) 1 QB 524*, where the English Court of Appeal explained what constitute publication as follows:

' What is the meaning of publication. The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, I have shown it to you and to no one else. I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it'

61. Accordingly, that since the claimant failed to adduce evidence to confirm that the security guard that delivered the letter to him published it, his claim remains unsubstantiated on that basis. Furthermore, that even if the said letter was not in an envelope, the ingredients of publication were not put to play as held in the case of *Selina Patani & Another C Dhiranji V Patani (Supra)*, where the Court cited the case of *Huth -v- Huth(1915) 3KB 32* which found that:-

' The defendant, Captain Huth, sent an allegedly defamatory letter in an unclosed envelope through the post to his four children. The letter contained an implication that the children were illegitimate. The letter was taken out of the envelope and read by a butler in breach of his duties and out of curiosity. At trial, the claim was dismissed on the basis that there



was no evidence of publication of the libelous information. On appeal, it was held that it is not right to treat a letter in an ‘ungummed’ envelope as though it were an open letter. Such a letter required some act by a person before they could be read and the Court could not presume that such letters would be opened in the ordinary course of business. Therefore, the defendant could not be taken to have known that the letter would have been taken out of the envelope and there was accordingly no evidence of publication of the libel in the case.’

62. In conclusion, the Respondents submitted that the claimant has failed to prove any of the ingredients required in a case of defamation and urged this Court to dismiss this Suit with costs to the Respondents.
63. I have examined all the evidence and submissions of the parties herein. The claimant herein seeks to be paid damages for being defamed by the respondents herein. He contends that the respondents published some defamatory messages against him purporting that he was a man of immoral behavior who sexually harassed students and intimidated them with failure in exams if they failed to cooperate with him. The claimant contends that these defamatory words were authored in a meeting convened on September 22, 2011 in which 1<sup>st</sup> to 8<sup>th</sup> respondents were in attendance.
64. The claimant blamed the respondent for issuing him with a show cause letter dated July 31, 2012. It is the claimant’s contention that the injurious words were contained in a NTSC letter dated December 22, 2011 signed by Dr Serem the 9<sup>th</sup> respondent herein. He also avers that the complainant against him were never called as witnesses in the disciplinary hearing.
65. In order to understand whether the claim for defamation was committed or not I will determine the following issues;
  1. Whether the words allegedly indicated as defamatory were actually published.
  2. If yes whether the claimant is entitled to the remedies sought.

#### **ISSUE NO 1**

66. As indicated above the claimant contends that he was defamed through words written in the show cause letter addressed to him dated January 22, 2011. The show cause letter referred to breach of items 16(ii) of the CBA Section 44(4) (e) & (g) and part II (6) of the [Employment Act](#).
67. Despite the claimant indicating that the show cause breached provision of the CBA, no copy of the alleged CBA was exhibited before court. It was therefore impossible for this court to ascertain the truthfulness or otherwise of the allegation.
68. That having been said and done the respondents have all averred that some students reported cases of sexual harassment and intimidation from the claimant. It was therefore necessary that the university through its known mechanism of handling complaints address the same.
69. From the evidence of the respondents, the respondents were constituted into a faculty management committee to investigate allegations levelled against the complainant. As part of the process, the claimant was summoned to appear before the committee with others and he declined to do so.
70. It is then that the committee decided to escalate the complaint to the Senate. The claimant has not demonstrated any other known legal method through which the complaint would have been processed.



71. From the evidence on record the complainant avers that, the committee had no powers to carry out investigations. He does however demonstrate who was to do the investigations. He referred to Section 16 of the CBA which CBA is also not before court.
72. The claimant was indeed served with a show cause letter which in my view was a good place to start investigations and require him to answer to allegations against him. He didn't respond but instead chose to file suit before court.
73. Having indicated as above, the next issue to determine is whether the words allegedly sent to complainant in the show cause letter were indeed published.
74. The complainant averred that they were published through the security guard who delivered the letter to him. He avers that the letter was open. The respondents denied this and the complainant didn't call any evidence or even the security guard to prove that the letter was indeed open when served upon him.
75. There is also no indication that the NTSC was published in any other forum as such social media, whatsapp groups, Email or any print media. Infact in cross-examination, the complainant agreed that NTSC was the best way of kick-starting a disciplinary process. He also admitted that after the management committee sat, the minutes of the committee were not put in public forum or outside the university.
76. It is indeed apparent that the alleged defamatory words were never publicized in any forum outside the committee or the university.
77. In the cases cited herein – see Amos KC Kale and Another VS Rebecca Gesora & Another (2017) eKLR the court held that;-
- ' No action of libel or slander lies whether against Judges, counsel, witnesses or parties for words written or spoken the ordinary course of any proceedings before any court or tribunal recognized by law. These statements are absolutely privileged'
78. The committee meeting complained of comprised of the 1<sup>st</sup> to 8<sup>th</sup> respondents herein who sat in ordinary course of business as faculty members and their deliberation or findings cannot be said to be defamatory.
79. The words having not been published and there being no evidence to the contrary, I agree with the respondents herein as held by the Court of Appeal in Pullman Vs Walter Hill & Co (1891) IQB 524 that there was no defamation as the words as statements made were not taken out of the committee which was a privileged forum and there is no indication that they were addressed to a third person beyond the committee sittings.
80. I conclude therefore that the claim for defamation against the respondents cannot lie and the remedies sought cannot be granted.
81. The entire cause is found without merit and is therefore dismissed accordingly with costs to the respondents.

Dated, signed and delivered in open Court this 12<sup>TH</sup> day of **APRIL, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**



Oteyo for Respondent – present

Claimant – absent

Court Assistant - Fred

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