



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**Civil Suit No. 178 of 1998**

**Between**

**NORBERT AMONGE.....PLAINTIFF**

**VERSUS**

**MOI UNIVERSITY.....DEFENDANT**

**JUDGMENT**

**NORBERT AMONGE** the Plaintiff herein filed the plaint dated 26<sup>th</sup> September 1998 in court on the 29<sup>th</sup> September, 1998 through his advocates M/s Machio and Company advocates. He pleaded therein that the Defendant admitted the Plaintiff in its Faculty of Science to pursue a course leading to the award of a degree of Bachelor of Science. That the Plaintiff pursued the said course and successfully completed his first and second years of study. During his third which was also the final year the Plaintiff undertook some sixteen courses of study and sat for an examination in all those sixteen courses. He pleaded further that after he completed his examinations the Defendant purported to expel the Plaintiff from the University allegedly due to contravening the common University Examinations Regulations in STA-414, a course in Non-parametric Methods and refused to release his examination results thereby denying him a chance to know if he qualified for the award of a degree or not in all the courses undertaken by him.

The Plaintiff pleaded further that due to the above he filed in this court Miscellaneous Civil Application number 76 of 1993 – (later changed to Miscellaneous Civil Application No. 246 of 1996,) and as a result of which an order of certiorari quashing the decision of the Defendant’s Senate expelling the Plaintiff from the university and an order of mandamus compelling the Defendant to release the Plaintiff’s results, save in STA-414 – Non parametric methods course issued. However the Defendant failed and neglected to release the said examination results.

The Plaintiff added in his pleadings that he fully satisfied the university requirements and regulations for the award of the degree of Bachelor of Science having scored a total of 87 course units in his second and third years of study and that the Defendant is wrong and negligent in contending that the “Plaintiff failed to fulfill the requirements for an award of a degree” and that such contention was in breach of the Moi University Act and all the University Regulations considered in their totality. That the Defendant

owed a duty of care to the Plaintiff and the breach of that duty has caused the Plaintiff harm. That the Defendant's conduct is unlawful and it has injured the Plaintiff's reputation and exposed him to hatred, contempt and ridicule by ordinary people considering him as one who had failed university examinations and he has thus suffered damage in his career trade and profession and considerable mental pain, anguish, loss, self esteem and loss of employment opportunities and for that he seeks damages. That plaintiff carried the particulars of negligence as the Defendant's failure to take into account the Plaintiff's performance in the 2<sup>nd</sup> and 3<sup>rd</sup> years of study which entitled him to the award of the degree of Bachelor of Science with honours, flouting court orders in HCCC Misc. 246/96 with arrant contempt and acting in utter breach and disregard of its statutory duties under the Moi University Act, Statutes and Regulations. The Plaintiff therefore prayed for judgment against the Defendant for a declaration that he had qualified under the Defendant's Examination Regulations for the award of the degree of Bachelor of Science with honours, an order compelling the Defendant to award him such degree and for general damages for economic loss, defamation and mental anguish and for the costs of the suit.

The Defendant entered its defence on 19<sup>th</sup> March 1999 denying that the Plaintiff sat the paper described as Com 314- computer programming and further that the Plaintiff had pursued courses known as MAT 320-Fourier Analysis; COM 310-computer programming and MAT 416- Functional analysis and which fact the Plaintiff did not plead in his plaint. The Defendant averred that indeed it obeyed the court orders of 9<sup>th</sup> December 1996 and released the Plaintiff's results and the Plaintiff was handed a transcript showing that he had failed to fulfil the requirements for an award of a degree because the results in STA 414 were unavailable. The Defendant therefore denied that the Plaintiff had successfully qualified for the degree he enrolled for and denied any loss and damage and put the Plaintiff to strict prove of the averments in the plaint that were denied by the Defendant.

In the Reply to defence the Plaintiff said that indeed he was examined in a paper entitled COM 310 and not 314 and in MAT 416 and not MAT 415. The Plaintiff took MAT 320 – Fourier Analysis as a voluntary extra which did not count towards his final results. He denied ever having cheated in the examinations.

The parties herein filed separate issues. The Defendant filed first on 14<sup>th</sup> September, 1999 and the issues, as the Defendant saw them are:- whether the Plaintiff also undertook studies in and was examined in COM 314 – Computer Programming; COM 310 – Computer Programming; MAT 320-Fourier Analysis and MAT 416 – Functional Analysis and whether any of the courses the Plaintiff undertook were compulsory or optional. Did an optional course become a prescribed course once registered for" Did optional and/or compulsory courses count towards the award of the degree of Bachelor of Science and when would they be said to so count" Whether failure by the Plaintiff to clear examinations in STA 414 affected the Plaintiff's qualifications for the award of the degree of Bachelor of Science. What were the University's requirements for the award of the degree of Bachelor of Science under the Moi University Act, Statutes and examination Regulations then applicable" What courses of study did the Plaintiff undertake during his second year of study" Did the Plaintiff pass his examination in the courses he undertook during his second year of study and did the results of the second year of study count towards the award of the degree of Bachelor of Science" Did the Plaintiff cheat or was he found with unauthorized material in examinations in any of the courses of study that he undertook during his third year and did the Defendant establish any such cheating, being in possession of unauthorized material or breach of examination regulations beyond reasonable doubt as laid down in the Statutes and Examination Regulations then applicable" Taking everything lawfully relevant to the issues herein into account did the Plaintiff in the circumstances qualify or not for the award of the degree of Bachelor of Science under the Moi University Act, Statutes and applicable Examination Regulations" In refusing to award the Plaintiff the degree of Bachelor of Science did the Defendant act lawfully or not" If the Defendant acted unlawfully in refusing to award him the degree is the Plaintiff then entitled to damages

and/or compensation" If the answer to the above is in the affirmative then to what measure of damages is he entitled" In the final analysis is the Plaintiff entitled or not to the prayers set out in the Plaintiff" Those then are the Defendant's issues for determination.

The Plaintiff on his part perceived the following to be the issues for determination:-

Did the Plaintiff in his third and final year at Moi University undertake to study the following courses to lead to the award of a degree of Bachelor of Science MAT 410 – Rings and Modules, MAT 411 Measure Theory, MAT 413 Field Theory, MAT 414 Differential Geometry, MAT 416 Functional Analysis, MAT 418 Partial Differential Equations, MAT 420 Numerical Analysis, STA 410 Test of Hypothesis, STA 411 Time Series Analysis and Forecasting, STA 412. Probability and Stochastic Process, 413 Statistical Methods and Econometrics , STA 415 Design and Analysis of Experiments, STA 417 Multivariate Analysis, COM 310 Computer Programming, STA 314 Quality Control and Acceptance, STA 414 Non Parametric Methods and MAT 320 Fourier Analysis" Which of the above courses were compulsory and which were optional" Did the compulsory courses count towards the award of the degree of Science" Did the optional courses count towards the award of the degree of Bachelor of Science" Did the Plaintiff pass or fail in any one of the said compulsory and/or optional courses" What were the University's requirements for the award of degree of Bachelor of Science under the Moi University Act, Statutes and Examination Regulations then applicable" What courses of study did the Plaintiff undertake during his second year of study" Did the Plaintiff pass his examination in the courses he undertook during his second year of study" Did the Plaintiff's examination results for the second year of study count towards the award of the degree of Bachelor of Science" Did the Plaintiff cheat or was he found with unauthorized material in examination in any one of the courses of study that he undertook during his third year" Did the Defendant establish any cheating, being in possession of unauthorized material or breach of examination regulations beyond reasonable doubt as laid down" What was the effect of the judgment of court in Eldoret High Court Miscellaneous Civil Suit No. 246 of 1996" Did the Defendant fully comply with the terms of that judgment" Can the Defendant question or amend or qualify the decision of the court in that case" Taking everything lawfully relevant to the issues herein into account did the Plaintiff in the circumstances qualify or not for the award of the degree of Bachelor of Science under Moi University Act, Statutes and applicable Examination Regulations" In refusing to award the Plaintiff the degree of Bachelor of Science did the Defendant act lawfully or not" If the Defendant acted unlawfully in refusing to award him the degree is the Plaintiff then entitled to damages and/or compensation and if he is entitled to damages to what extent" And finally is the Plaintiff entitled or not entitled to the prayers set out in the plaintiff"

At the hearing the Plaintiff gave evidence that he was admitted as a student in Moi University in September, 1989 and registered for a course in Bachelor of Science degree. He produced his admission letter in evidence as P.Exhibit No. 1. He commenced his studies in September 1989. In his first year he pursued a course in Bachelor of Science in Mathematics and Physics which were divided into 42 units all of which he undertook and graduated to his second year of study. A unit meant number of lessons per week. He produced as P.Exhibit 2 the academic transcript for the first year of study. In October 1990 the Plaintiff joined 2<sup>nd</sup> year. Examinations taken during 1<sup>st</sup> year were usually discounted. He dropped Physics during his 2<sup>nd</sup> year and specialized in 'Double Maths' which was broken into Mathematics and Statistics. He took a total of 39 units for the 2<sup>nd</sup> year. He passed them all and was recommended to proceed to 3<sup>rd</sup> year of study. He produced the academic transcript for 2<sup>nd</sup> year as P.Exhibit 3. The 2<sup>nd</sup> year examination results counted towards the attainment of the Bachelor of Science degree as those results would be added to whatever he would achieve during 3<sup>rd</sup> year and then consider the best 80 units. The university calendars contain what one would achieve before graduation. He took a total of 51 units during third year and he passed 48 of them. He produced the academic transcript for 3<sup>rd</sup> year as P.Exhibit No. 4. He said that this transcript was produced as a result of a court order and he produced

as P.Exhibit No. 5 a copy of the Ruling in Misc. Civil Case No. 246/1996. He added that P.Exhibit No. 4 indicated “released under court order” which was not a normal thing as all it should have stated was whether he had passed or failed the exams. The 48 units passed during third year and the 39 units during the 2<sup>nd</sup> year meant that he had surpassed the required number of units by 7 – thereby over qualifying for the award of the degree. All the courses in 2<sup>nd</sup> and 3<sup>rd</sup> years of study were optional and he had a choice. But during second year the university offered less courses than was required as forty was the minimum, meaning that all courses in 2<sup>nd</sup> year became compulsory. In 3<sup>rd</sup> year 51 courses were offered and hence there were options upto 40 but a student could study more courses than the 40 required. If that was done and the course fell within the prescribed courses then in the event of a student taking more than the required courses, the university would take the best done courses. The Plaintiff tried to negotiate with the University for the release of his results and Mr Njoroge who was acting for the Chief Academic Officer was approached to release the Plaintiff’s results but the Plaintiff was kept waiting until September 1997 and he gave up the chase for his transcript. It was at that point that he decided to seek legal advice and so his advocates on record sent a letter dated 10/09/1997 to the University’s advocates M/s Nyairo & Company demanding the release of a proper transcript. He produced the letter as P.Exhibit No. 6. There was no reply and so the Plaintiff himself went and saw the University advocates who wrote him the letter dated 18/9/1997 which promised a proper transcript. It was produced in evidence as P.Exhibit No. 7. The Plaintiff took this letter and the copy for the Defendant and went to the University where a proper copy of the transcript was prepared and the earlier transcript whose results read “released under court order” was confiscated by the University – (see exhibit 4). He produced in evidence the new transcript forwarded vide a letter to him by the Defendant dated 9/10/1997 – P.exhibit No. 8. In that transcript the course STA 414 was shown as cancelled. He had taken 17 courses each carrying 3 units making a total of 51 units. He attained 48 units of the 17 courses. He could have selected 40 to 45 units. He did 48 units. None of the courses was compulsory. 40 was the minimum number of courses. He therefore attained 8 units above the minimum of 40 units and 3 above the maximum of 45 units. The Regulations did not require him to pass all the 17 courses. The result on the transcript read that he had failed to fulfil the requirements for an award of the degree of Bachelor of Science. He produced the University calendar covering the period 1988 – 1990 as P.Exhibit No. 9. In that calendar there was no clause XV within that calendar but at pages 175 to 177 the requirements for the Bachelor of Science were set out and the Plaintiff met those requirements and so he disputed any allegations that he did not meet those set minimum requirements. His further evidence was that he would have graduated from the University in 1992. He had attended interviews at Sunflag Textiles on 20.3.1997 and he was promised employment as soon as he produced his results. He did not obtain the results and therefore could not produce them. He produced as P.Exhibit No. 10 a letter from the said Sunflag Textiles. On 24/10/1997 he attended an interview at Teachers Service Commission after which he received their letter dated 14/08/1997 – P.Exhibit No. 11 – asking for proof that he had completed his degree course. He did not respond to the letter as he had no results. In September 1993 he was offered a job at Church Army Secondary School but he was fired and told to go and bring the results. He produced in evidence the letter dated 26/2/1997 given to him as a letter of service – P.exhibit No. 12. At this point his relatives in Nairobi chased him from their houses and he felt frustrated and moved to Eldoret in further search of jobs. He obtained a job at Immaculate Heart Juinate Secondary School. He was employed on a 3 month period pending the production of his results. When he obtained the 1<sup>st</sup> transcript which was released under a court order, his services were terminated on 30/7/1997 and he produced the letter of 30/7/1997 as P.Exhibit No. 13. In January 1998 he obtained a job at Abrar High School. He worked for one year after which his services were terminated for lack of results. He produced the dismissal letter as P.Exhibit No. 14. For a year he was out of a job and finally he moved to Kitale. He considered that the Defendant had denied him his rights and he sought damages and a declaration that he had duly qualified for the degree of Bachelor of Science and that the Defendant be compelled to award him the degree. The damages sought were to compensate for economic loss, mental suffering and anguish. He avoids going home, except for funerals, as his family wants to know whether his state is

what it means for one to be educated. He now sells fish in Kitale.

During cross-examination by Mr Kuloba for the Defendant he stated that a calendar contains the original Regulations of the University. Those Regulations are made by the Senate and they are the subsidiary legislation of the Moi University Act. The calendar he showed covered the period 1988 – 1990 and he was not aware of any Regulations which were approved by Senate on 22/5/1991. He joined 3<sup>rd</sup> year in 1992. He admitted that he was a student leader and that it is the faculty that would determine whether a student had failed or passed an exam and then the Senate would approve or reject. That the Senate could exempt some faculties from the rules and also faculties could vary the rules with approval but he was not aware if there had been any variation of rules in the faculty of Science. He gave further evidence that a student could be examined in a course he did not register for and similarly could fail to take an examination in a registered course depending on one's interest and he could not remember whether he had registered for STA 414 during his 3<sup>rd</sup> year of study and therefore did not know how that course was entered into his transcript but recalled that the court Ruling was that that STA 414 should not appear in his transcript whether he had passed or failed in that course. It was a course outside the Mathematics course and therefore it was an unnecessary course. He admitted that court found that he had contravened the regulations of STA 414 but denied having cheated in the paper – he had sat the paper for fun. He added that although the court ordered the Defendant to release the results of the unaffected papers the Defendant had not complied with the court order. He said that although STA 414 course was not necessary for the award of a degree of Bachelor of Science, he resat the exam on 27/4/1998 with the permission of the Defendant and although his lecturer told him that he had passed it this time round, the Defendant refused to talk to him about it. He insisted that he had passed his 1992 exams and the 1998 resitting of the exam was not necessary but he only did it due to pressure from the Defendant and urged the court to find that he had been denied his degree unfairly. He admitted that none of his former employers referred to his lack of certificates as the reason for termination of services with them but he said that he was sent away for lack of papers. He did not take out contempt proceedings against the Defendant for defying the Ruling of the court in Misc. 246/96. He prayed as in his plaint.

The defence case consists of the evidence of 3 witnesses. Francis Komen who works with the Defendant as an administrator in the examinations department was the first defence witness. His evidence was that he had worked with the Defendant for 14 years. He had been authorized by the University to give evidence in this case. The University Senate regulates exams and those Regulations relate to all the faculties of the Defendant University. He referred to the Regulations in force between 1989 and 1992 which applied to all the then students including the Plaintiff. Those regulations are **“Common Regulations for Undergraduate students.”** The particular Regulations he referred to were applicable between 1988 and 1997. They had minor reruns in 1991. He produced those Regulations as D.Exhibit No. 1. He stated that students must register before they can take any exams at the university which begins with registering for a course at the commencement of the semester and at the end of the semester the student must then register for exams. Each student must take a minimum number of units which was 20 units per semester and one must pass in all the units registered for. No student would be allowed to progress to the following year course of study without first passing all the exams of the current year of study and similarly a candidate could not be awarded a degree unless he passed all his courses. One could take more than the 20 units if he so wished. A course was equivalent to 3 units. If the Plaintiff claims that he had taken 87 units then he had to pass in all those units before he could qualify. The Defendant considered a minimum of 40 units in an academic year for the classification of a degree. The Plaintiff did not qualify to graduate as he failed in STA 414 non parametric methods. His results were cancelled as he was involved in exam cheating. STA 414 was optional in the case of the Plaintiff but having taken it he had to pass in it and he could not proceed without passing it. Referring to exhibit produced by the Plaintiff as Regulations the witness said that it was the Science Brochure for

funding students and did not form part of the University Regulations. On the award of degrees the witness said that there was an indication of a maximum of 80 units but that one had to pass in all units, including the extra ones as all of them counted. There were amendments in the Regulations by the Senate during 1991 and those were minor ones. He produced the minutes leading to those amendments as D.Exhibit No. 2. Those minutes were confirmed in the meeting of 26/06/1991 and the minutes of 26/06/1991 were produced in evidence as D.Exhibit No. 3. His further evidence was that the Defendant had complied with the court order and released the Plaintiff's results and hence the production of the 3<sup>rd</sup> year transcript where the Plaintiff had passed all but one unit. The Defendant Senate had made a final decision on the matter of the Plaintiff sitting a supplementary exam. Any faculty regulations had to be passed by the Senate and must be compliant with the main university Regulations and the witness was not aware of any faculty regulations that contravened the main university regulations. It was this witness who maintained the Defendant's regulations on examinations, student results and certificates and processed those exam results before they were released to the students. He knew that there was no bad blood between the Plaintiff and the Defendant. He gave further evidence that the Defendant had the original dated Moi University Common Examinations Regulations (D.Exhibit 1) although he only produced a copy of the same in evidence. The Plaintiff was admitted to the university in the 1989-1990 academic year and he was in third year in 1991/1992 academic year and sat his exams during 1992. Shown P.Exhibit NO. 9 he said that the exhibit was relevant for the period 1988 upto 1990 but it continued in use until 1997. It carried the Moi University Act and all Regulations including the laying down the Regulations regarding the Faculty of Science and the examinations leading to the degree of Bachelor of Science. He said that during the time the Plaintiff sat his examination there was another regulation regarding examinations. That the Plaintiff passed in 39 units during his 2<sup>nd</sup> year and 51 units in 3<sup>rd</sup> year making a total of 90 units and the pass to the award of a degree is a minimum of 80 units.

In cross-examination by Mr Machio for the Plaintiff the witness stated that the Regulations govern the conduct and discipline of students and it is a codification of everything touching on the University (P.Exhibit No. 9). Overall weighted mean was the average mark of the 2<sup>nd</sup> and 3<sup>rd</sup> year courses. 1<sup>st</sup> year results did not count for an award of a degree and the same are ignored. He said that the transcript reading 1989/1990 as the 2<sup>nd</sup> year was an error as it referred to 1<sup>st</sup> and 2<sup>nd</sup> years. The 1991/1992 academic year was the Plaintiff's third year and the controversial result. The problem with the result was that the Plaintiff had failed in STA 414, a course in non parametric methods. The Plaintiff was said to have cheated in that unit. That paper results were withheld and marked as cancelled. Plaintiff qualified in 48 not 51 units in his third year and these units counted in the determination whether or not he qualified for the award of a degree in Bachelor of Science. He stated further that the Defendant issued two transcripts for the third year, the first one written "issued under a court order" and a new one when the Plaintiff complained and this one indicated the results and that he had failed to fulfil the requirement for an award of a degree.

DW2 was Peter Kimanus Torongei a lecturer in the Department of Physics and the Dean of the School of Science. He had lectured for over 18 years at the time of giving evidence and been a Dean for 8 years. His evidence was as follows. The school of Science was previously known as the faculty of science. He was familiar with examination regulations as he implemented them in his capacity as Dean. Now there were 4 departments in the school but previously there were 5. As of 1992 there were the 5 departments. The curriculum describes what a student is to do year by year. Those Regulations are contained in the University Calendar produced as PExhibit No. 9 and he said the relevant parts of the faculty of science were pages 175 to 251 of PExhibit No. 9. Each department was in charge of its degree. The Plaintiff studied mathematics in the department of Mathematics – regulations in pages 192 to 195 of P.Exhibit No. 9. A student in 1<sup>st</sup> year of study would do mathematics and supporting courses in relevant subjects like Physics and Chemistry. There were compulsory subjects in the first year of study and various optional subjects where a student had to take one. Those subjects were specified in the

calendar. If a student failed to do those courses or failed to pass the exam then they had not satisfied the award. A first fail in a subject entitled a student to a resist and a fail in the resist was a general fail for the entire year course. During 2<sup>nd</sup> year of study there were three areas of specialization namely, Pure Mathematics, Applied Mathematics and Statistics and a student would have to choose one of those three specializations. Each specialization had specified compulsory subjects which had to be passed at the first sitting or at a resist. In third year the compulsory subjects in the Plaintiff's chosen field of study of statistics included STA 414 – non parametric method. A student could also choose two courses from Pure Mathematics. A student must then pass in all the subjects to qualify for an award for the degree. A Bachelor of Science degree in 1992 took a period of 3 years to complete. The witness explained that units are figures assigned to a course indicating the number of hours a lecturer has conducted with a student. A conduct hour is 14 weeks which is 3 hours in each week, therefore one conduct hour was one unit. He described a course as the description of content to be covered in certain hours which in the case of the Plaintiff would have been 3 hours times 14 weeks making the total of three units. The Plaintiff's chosen area of specialization was statistics. He was required to cover all the courses in third year. In the 2<sup>nd</sup> year of study he should have covered 42 units. He did not. He only covered 39 units and did not cover the compulsory courses. He said that there were variances in titles of courses in P.Exhibit Nos. 3 and 9, for MAT 314 was shown in P.Exhibit 3 as Ordinary Differential Equations while in P.Exhibit No. 9 it was shown as Algebra. In P.Exhibit No. 3 MAT 311 is called Complex Analysis while in P.Exhibit No. 9 it is called Real Analysis which are two different things.

In 3<sup>rd</sup> year the Plaintiff undertook 51 units. STA 414 – non parametric methods was cancelled. That was a compulsory course. The effect of that cancellation was that the candidate (Plaintiff) did not pass the third year exam and therefore he did not satisfy the third year requirements. The witness added further that the minimum requirements must be met and STA 414 was a compulsory subject. All units undertaken in each year must be passed in examinations. It was not so much the number of units undertaken over and above the minimum, those units must be from the relevant area of study and each year's exams have to be passed and no one could be processed for the Award of a degree unless they had passed the third year examinations. In this case the witness stated that the Plaintiff did not satisfy the third year requirements.

In cross examination the witness said that he was an associate professor of Physics and the acting Dean of Aerospace Sciences at the Moi University. He has lectured since 1989. In 1992 he was a lecturer in the department of Physics under the Faculty of Science and was not involved in administration. Mathematics fell under the faculty of science. Student records are kept in the office of Head of Department and in the Dean's office while the Chief Academic Officer keeps the records of all the students in the university. A dean would produce a provisional transcript but the final transcript could only be obtained from the Chief Academic Officer. He explained that the purpose of the Common Examination Regulations for Undergraduate Students (P.Exhibit No. 9) is to regulate procedures for examinations. Faculty of Science (Page 175 of P.Exhibit 9) Regulations – showed that year 1 of study was not considered for the final degree. The curriculum spells out what subjects are to be undertaken and in third year it was 40 units in the majors and plus 5 supporting subjects. Majors were described as the main subjects. That students do not take the same number of units but the minimum was 42. The witness, when shown a transcript of one Onyango Vincent Ochola said that he did not know if the same was from Moi University as in this era of advanced technology the same could have been manufactured. It did not bear the signature of the Chief Academic Officer – and it was not similar to the Plaintiff's as the Plaintiff took 17 courses of 51 units while Onyango took 15 courses of 45 units. The witness said that as he was not asked to verify the transcript of Onyango he could not vouch for its authenticity.

DW2 was Duncan Njogu Njoroge the Principal Administrative officer at Moi University working as the

quality assurance officer in the academic division. He wrote P.Exhibit No. 8, the letter dated 09/10/1997 in response to the Plaintiff's letter on his results. The witness was conveying, in that exhibit, the information on the Plaintiff's examination results, that under Section 3 clause 15 of the Moi University Common Examination Regulations the Plaintiff had not qualified. He said that that letter of 09/10/1997 was written in error as those regulations did not apply during the period 1989 – 1992 as the Regulations had been revised.

Both counsel made written submissions on which they relied entirely in support of their respective party's cases. I have dutifully addressed myself to the pleadings evidence and submissions and do summarise the issues for my determination as being whether or not the Plaintiff qualified for an award of a degree of Bachelor of Science from the Defendant University and whether or not the prayers sought in the plaint have been supported by evidence and may therefore be granted as sought. In my considered view all the other issues as drawn by counsel for the plaintiff and Defendant revolve around those two issues as summarized above and go to support the court's version of them.

The Plaintiff's evidence as to the fact that he qualified for a Bachelor of Science degree but was unfairly denied graduation by the Defendant was that no course was compulsory in the third year of study and that out of the 51 units he undertook he passed 48 of them thereby over qualifying. His further evidence was that he could not remember if he had registered for STA 414 in third year. However he recalled resitting that same paper – STA 414 on 27/4/1998. The question that I must then answer is why the Plaintiff would find it necessary to resist a paper that firstly he could not remember registering for and secondly one that was not compulsory and which he did not need for him to qualify. The answer has got to be that the Plaintiff appreciated the importance of passing in STA 414.

The Plaintiff's subjective evidence becomes clearly understandable when contrasted with that of the defence that the Plaintiff's results in STA 414 were cancelled for the reason that the Plaintiff cheated in the exam. The Plaintiff's counsel's submission that the unit of STA 414 was not a science unit and the Plaintiff's contention that it was not a compulsory subject are discredited by the defence evidence that STA 414 was a compulsory unit for the Plaintiff's chosen course of study and further by the Plaintiff's own exhibit marked as P.Exhibit No. 9 – the examination regulations and which clearly showed not only that STA 414 was a compulsory subject but that it fell within the Plaintiff's course of study. Evidence led by defence was that STA stood for Statistics and the Plaintiff himself gave evidence that from his second year of study he chose to specialize in "Double Mathematics" for his Bachelor of Science degree and that that "Double Mathematics" was broken into Mathematics (hence MAT) and Statistics (hence STA). The Plaintiff and his Counsel can now not be heard to deny that statistics was part of his course. The issue of whether or not STA 414 was a compulsory subject was further confirmed to have been such a compulsory subject by the 22/5/1991 amendments to the Examination Regulations evidence of which was produced in court as D.Exhibit Nos. 2 and 3.

DW3 misquoting the relevant regulation in his communication to the Plaintiff in P.Exhibit No. 8 did not and could not make the Plaintiff otherwise qualify for the degree course he undertook when he otherwise had not qualified due to the cancellation of the result of STA 414. The evidence by the defence regarding P.Exhibit No. 9 that all courses registered for had to be passed for one to qualify was not contested by the Plaintiff. Further the defence evidence that there were different examination regulations for 8-4-4 students (P.Exhibit No. 1) and for A Level students of whom the Plaintiff was one (P.Exhibit No. 9) was not contradicted by the Plaintiff.

The Plaintiff showed the court a transcript of one Onyango Vincent Ochola whom he said was a contemporary of his, with a view to proving that Ochola qualified and so he the Plaintiff should also have qualified. That contention was successfully, in my considered view, countered by the evidence of DW2



who could not vouch for the authenticity of the transcript, in this era of advanced technology, which was unsigned and not stamped with the stamp of the Defendant. Further the said Ochola had, if he was indeed a student of the Defendant, undertaken fewer units than the Plaintiff and had passed them all. The court accepts that explanation as sound. On my part I have this to say, if the said Onyango Vincent Ochola was a real person and the transcript shown to court was in respect of him, why was he not called as a witness. And equally importantly why did the Plaintiff not give the said transcript to the Defendant university so that its authenticity could be verified before trial. It is the Plaintiff to prove his case on a balance of probability. He has not, and that is my considered finding. The strong evidence adduced by DW2 that the defendant university considered 40 units in the 2<sup>nd</sup> and 3<sup>rd</sup> years of study for the sole purpose of classification of a degree remained intact. The Plaintiff's attraction to mere numbers of course units undertaken by him without corresponding reference to passing in core units has no relevance in the face of the evidence adduced by the defence and which the Plaintiff himself supported in material particulars.

The Plaintiff placed huge reliance on the outcome of HCCC No. 246/96 but I fail to see how that aids him in the circumstances of this case. All that the prerogative orders issued in that case did was to quash the Plaintiff's expulsion from the Defendant University by the Senate and to order the release of examination results except in the troubled STA 414. The court there said nothing about the Plaintiff having qualified for the award of the degree of Bachelor of Science and the court could not have said any such thing in light of the available evidence and further because firstly, that is not a judicial function and secondly no material was placed before the court to prove that the Plaintiff had passed his exams. The court noted that the paper had been cancelled and could not change that. And whether the STA 414 was cancelled for having been failed or because the Plaintiff cheated in the exam, the end result is the same – that it was cancelled.

All the above analysis of the adduced evidence brings me to the inescapable conclusion that, on a balance of probability the Plaintiff fails in his claim that he passed his 3<sup>rd</sup> year exams at the Defendant University.

The claim that the Defendant did not release the Plaintiff's examination results is not supported by evidence. There was evidence by the Plaintiff himself that a transcript with the remarks "Released on court order" was given to him. When he did not like that one yet another was released to him without the offending words "released on court order." Both clearly indicates that STA 414 had been cancelled. The court in HCCC 246/96 did not prescribe a particular format of the transcript to be released. The second of the transcripts – produced in evidence as P.Exhibit No. 8 was released on 9/10/1997 – long before the filing of this suit and hence the Plaintiff ought not to have carried that claim of the Defendant refusing to release the Plaintiff's exam results. Such claim is in any event found to be unmeritorious in light of the Plaintiff's own clear evidence disapproving the allegation of non-release of the results. He admits having received not one, but two transcripts. The claim on non-release of examination results fails for lack of evidence.

There then follows the claim for economic loss, defamation, mental suffering and anguish. The claim for economic loss is brought on the grounds that since the Defendant did not release the results to the Plaintiff he was denied a chance to know if he qualified for the award of a degree or not. It is imperative, in the court's view, to quote the relevant paragraphs of the plaint:-

**“8. THAT after the Plaintiff had completed his examinations the Defendant purported to expel him from the University allegedly for contravening the Common University Examinations Regulations in STA 414 course in Non-Parametric Methods and refused to release his Examination results thus denying him a chance to know if he qualified for the award of a degree**

or not in all the aforesaid courses”

“11. **THAT** since the delivery of the said Ruling the Defendant has failed and neglected to release the examination results of the Plaintiff indicating whether he qualified for the award of the degree of Bachelor of Science or not.”

“12. **THAT** the Plaintiff avers that he fully satisfied the University requirements and regulations for the award of the degree of Bachelor of Science having scored a total of 87 course units in his second and third years of study and the Defendant has been wrong and negligent in contenting that the Plaintiff “failed to fulfil the Requirements for an award of a degree.” That the contention of the Defendant is in breach of the Moi University Act and all the University Regulations considered in their totality and the Plaintiff who was owed a duty of care by the Defendant has sustained harm from the said breach of duty.”

The question that the court must answer is whether those pleadings are supported by evidence. The Plaintiff’s own evidence was that he was never turned away by any prospective employer for lack of a degree certificate. The letters he produced in evidence from his employers did not give the reason for his services being terminated as being his lack of a university degree. That evidence is crucial, clearing, as it does the issue of whether or not the Defendant’s conduct caused the Plaintiff harm and/or economic loss. Earlier in this judgment the Defendant has been found to have fully complied with the prerogative orders of the court in HCCC 246/96 and released two transcripts. And now that the Plaintiff admits not to have lacked employment for lack of a university degree, then the court finds that any such claim is not sustainable. Perhaps the Plaintiff did not get the kind of job a university graduate would have obtained. But that he did not plead. He also never seems to have kept any of the many jobs he got. However lack of a degree certificate was not the reason given for the loss of those jobs. In any event it will always be remembered that he had failed in STA 414 and/or that the result in that paper was cancelled meaning that he could not graduate as he did not qualify. The inescapable conclusion the court comes to, for the reason of lack of proof, if there was any loss, and the court was not shown any, the same cannot be attributable to the Defendant in the circumstances of this case.

“13. **THAT** the Defendant’s unlawful conduct aforesaid has injured the Plaintiff’s reputation and exposed him to hatred, contempt and ridicule according to the attitudes of ordinary men and women who consider him to have failed his University Examinations and he has thus suffered considerable mental pain, anguish, loss of self esteem and loss of employment opportunities on the job market for which he seeks damages.”

The above is what is pleaded in paragraph 13 of the plaint. What then was offered in evidence in proof of the above" No ordinary man and woman were called to give support to the Plaintiff’s claim that they had treated him with contempt and showed hatred to him and ridiculed him as one who would not pass his examinations. More importantly, even if that had indeed been so, the court has already found as a fact that the Plaintiff had had his results in STA -414 cancelled and therefore did not qualify to graduate. Further, the Plaintiff led no evidence whatsoever on the publication of what he called defamation, such failure is so fatal that even if there indeed had been defamation, and in this case I find there was none, unless such defamatory action/words were published, then of course the law has always been that there is no defamation unless there is publication of the same. It follows therefore that any mental suffering and anguish that the Plaintiff allegedly suffered was not proved to have been caused by the Defendant.

This case has been in the courts for a long time and has been handled by various Judicial Officers over time. A delay in finalizing a case affects all parties in the case, albeit differently. I am acutely aware

that costs follow the event. Here are two parties admittedly of very different financial status. The Plaintiff must have thought all along that he had legitimate claims against the Defendant. However, if indeed he so thought, he failed to prove his claims to the legal standard allowable in law. Despite such failure and due to the length of time the case has taken to be finalized and considering the diverse financial status of the parties herein and even acknowledging that the Defendant is in no way the cause of the Plaintiff's financial status, it is ordered that each party will bear its own costs.

For the avoidance of doubt it is hereby ordered that the plaint is dismissed in its entirety for the reason that on a balance of probability the same was not proved.

Orders accordingly.

DATED AND SIGNED IN NAIROBI THIS 14<sup>TH</sup> DAY OF **SEPTEMBER, 2012.**

**P.M. MWILU**

**JUDGE**

DELIVERED AT ELDORET ONB 27<sup>TH</sup> SEPTEMBER 2012 BY A.MSHILA, JUDGE.

In the presence of:-

..... Advocate for Plaintiff

..... Advocate for Defendant

..... Court Clerk

**A.MSHILA**

**JUDGE**



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