



REPUBLIC OF KENYA



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**Opondo & 2 others v Amboka (Civil Appeal 37 of 2019)
[2023] KEHC 3531 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 37 OF 2019
AC MRIMA, J
APRIL 20, 2023**

BETWEEN

**CHARLES OPONDO 1ST APPELLANT
MARGARET SUWAI 2ND APPELLANT
THE BOARD OF MANAGEMENT AIC KAPSITWET SECONDARY
SCHOOL 3RD APPELLANT**

AND

JESCAH GATAKAA AMBOKA RESPONDENT

(Being an appeal arising out of the judgment and decree of Hon. M. Nyang'ara Osoo (Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 6 of 2017 delivered on 05/09/2018)

JUDGMENT

Introduction:

1. This judgment relates to the appeal lodged against the judgment of the trial Court that found the Appellants herein jointly and severally culpable of defaming the Respondent herein.
2. At all material times, the Respondent was a Deputy Headteacher at the AIC Kapsitwet Secondary School within the Trans Nzoia County in the Republic of Kenya (hereinafter referred to as 'the School') whereas the 1st Appellant was the Chair of the School's Parents Association and the 2nd Appellant was a Member of the Board of Management of the School. The 3rd Appellant is the School's Board of Management.
3. The matter was hotly contested both before the trial Court as well as on appeal.
4. This judgment, therefore, disposes the entire appeal.



The Appeal:

5. The Appellants were dissatisfied with the trial Court's judgment delivered on 5th September, 2018 in Kitale CMCC No. 6 of 2017; Jescah G. Amboka vs. Kennedy Onchiri, Charles Opondo, Margaret Suwai & The Board of Management, AIC Kapsitwet Secondary School (hereinafter referred to as 'the civil case').
6. The trial Court found the Appellants liable for the tort of defamation. It then awarded Kshs. 3,000,000.00 as general damages for defamation and Kshs. 1,000,000.00 as aggravated/punitive damages. The Respondent was further awarded costs of the suit. Interest on damages were ordered to accrue from the date of judgment.
7. In their Memorandum of Appeal dated 17th September, 2019 and filed the following day, the Appellants raised a prolix fifteen (15) grounds impugning the trial Court's findings. In summary, they observed that the Respondent had already been transferred to another school under the same capacity. They believed that the defamatory allegations, if any, could only be leveled against the 1st Defendant, who died during the currency of the civil case. They also pointed out that none of the defamatory averments as particularized in the Plaint explicated their role. They faulted the trial Court for failing to find that the meeting was a genuine Christian prayer with the interest of the School's tranquility.
8. They continued that the 3rd Appellant could not be found culpable since the prayer meeting was not a Board of Management meeting as there was no quorum of membership, the Chairperson made no address and the 3rd Appellant, in its capacity, was incapable of committing the tort of defamation.
9. They further grounded that the Education Office had found the Respondent culpable on certain allegations recommending that she be warned and transferred from the School. They continued that the absence of any written word or document signed by all Defendants could not sustain a defamatory action. As such, they posited that the suit ought to have been dismissed.
10. Finally, on damages, they faulted the trial Court for awarding a sum of Kshs. 4,000,000.00 that was grossly excessive and punitive as well as finding the 3rd Appellant, a public entity, liable to pay yet the Attorney General was not a party to the suit. In the circumstances, the Appellants prayed that the appeal be allowed, the judgment be set aside and costs of the Appeal and suit at trial be borne by the Respondent.
11. The 3rd Appellant filed the Record of Appeal dated 19th November, 2021. On directions of the Court, the appeal was to be disposed by way of written submissions. The 3rd Respondent filed its submissions dated 31st March, 2022. The 1st and 2nd Appellants did not file any submissions, but seemingly relied on the 3rd Appellant's submissions.
12. The Respondent also filed and relied on her written submissions in disposing off the appeal.

The 3rd Appellant's submissions:

13. The 3rd Appellant expostulated that since defamation was a tort in personam, such action could not lie against the 3rd Appellant. It cited several authorities supporting this argument.
14. Having perused the record, the 3rd Appellant submitted that at no point was it demonstrated that it had published the offending words against the Respondent. In its stead, it submitted that the liability, if any, could only be visited upon its co-Appellants and the deceased (1st Defendant in the civil case) and even so, in their individual capacities and not as holders of office.



15. It accused the said parties of engaging on a frolic of their own and did not thus endorse their utterances. Speaking further to apportioning liability against the 1st and 2nd Appellants, the 3rd Appellant submitted that since they breached Section 14 and 15 to the Fourth Schedule of the Basic Education Act, the said Appellants had only themselves to blame for the defamatory words.
16. The 3rd Appellant accused the trial Court of failing to appreciate the import of the provisions set out Section 55, 56 (1) & (8), 59 and Section 7 and 8 to the Fourth Schedule of the Basic Education Act, 2013. When read holistically, it concluded that since the meeting lacked a statutory constituted quorum, was not to discuss affairs and business, organized by the deceased 1st Defendant and no evidence of the existence of the publication of offending words, the trial Court erred in finding it liable.
17. The 3rd Appellant scrutinized the Plaint and the Respondent's evidence and concluded that no particulars of defamation were disclosed. It noted that it was found liable by virtue of the fact that it did not conduct investigations to ascertain the veracity of the allegations tabled against the Respondent.
18. It countermanded the above holding by arguing that its mandate did not include initiating disciplinary proceedings as it wasn't the Respondent's employer. It added that such proceedings were under the preserve of the Teachers' Service Commission (hereinafter referred to as 'the TSC'). It cited Section 25 and the Third Schedule to the Teachers' Service Commission Act in support of that argument.
19. Be that as it may, the 3rd Appellant invited this Court to analyze the trial Court's proceedings that would ultimately lead the Court to conclude that the 3rd Appellant at all material times to the suit, acted bona fide, when it referred the allegations to the relevant entity. Additionally, it was TSC and not the 3rd Appellant that recommended the Respondent's transfer. As such, it could not in any way be held responsible for that decision.
20. Having deliberated as above, the 3rd Appellant urged that the award on general damages was unjustifiable and illegal. In the alternative and without prejudice to the foregoing, the 3rd Appellant complained that the award was excessive reproducing several authorities in justification. It further propounded that since the 3rd Appellant had engaged in mitigating the damage to the Respondent's reputation, the trial Court ought to have discounted the final award on damages. In that regard, they proposed that the sum of Kshs. 100,000/= was sufficient reparation to recompense the Respondent's alleged humiliation.

The Respondent's submissions:

21. The Respondent opposed the appeal. She filed her written submissions dated 27th May, 2022. Having probed the 3rd Appellant's submissions, she concluded that the 3rd Appellant failed to address whether a corporation as the 3rd Appellant was liable for defamation published by its servants or agents. Fortifying that a corporation was liable, she relied on two authorities to buttress that argument.
22. The Respondent further retorted that the 3rd Appellant introduced novel issues not canvassed at trial. Thus, they ought to be disregarded.
23. On the award of damages, the Respondent elucidated that they ought not to be disturbed since they were lawful. She urged this Court to dismiss the appeal with costs for lacking merit.
24. Having captured the appeal proceedings above, this Court will now deal with whether the appeal is merited.



Analysis:

25. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).
26. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
27. Before delving into the heart of the appeal, the Court will briefly look at the parties' cases in the civil case.

The Respondent's case (formerly the Plaintiff):

28. The Respondent was a Swahili and Christian Religious Education (C.R.E) Teacher at the School. She was posted therein in January 2015. She also deputized the School's Principal who for the purposes of this matter was sued as the 1st Defendant, one Dr. Kennedy Onchiri. The 1st Defendant, however, passed on during the pendency of the civil case. I shall hereinafter refer to Dr. Kennedy Onchiri as 'the Principal' or 'the deceased' or 'the 1st Defendant'.
29. In her early days, the Respondent described her relationship with her peers, students, parents, teachers and members of the local community as cordial.
30. The Respondent's case was contained in her Complaint and the vide the evidence she tendered in Court alongside the three witnesses she called at the trial. The Respondent's case can be deduced as under.
31. The Respondent's first salvo was on the deceased. She contended that sometimes in June 2016, the deceased uttered and wrote false and malicious material in her capacity as the Deputy Principal of the School to TSC's Trans-Nzoia County Director as follows: That, the words complained of had the following effect: -She was a devil worshipper;The students used a strange illuminati symbol to greet her;She caused students to remove shoes when entering her office;She did not relate well with members of the Board of Management parents and students;She used abusive and discouraging language;She did not keep professional documents; She had negative influence on parents leading to poor enrolment in the school;She indecently administered corporal punishment on students;She engaged in acts of carnal knowledge with male students.
32. It was further alluded that within the same period the deceased and the Appellants herein accused her of disseminating defamatory statements to students, teachers and parents of the School as well as other persons as follows: -
 - a. On 13/06/2016 the deceased resumed duties from sick leave that began on 10/03/2016;
 - b. On 15/06/2016 and 20/06/2016, the deceased held exclusive meetings that spiraled a lot of excitement from form 3 and 4 students;
 - c. Between 14/06/2021 and 17/06/2021, the deceased instructed her to assemble students. He then addressed them about resuming the "Monday reflection" which had died. He directed students not to attend church service at their local AIC Church till further notice and instead attend service in the school;



- d. On 20/06/2016, the deceased held a lengthy meeting with form 3 and 4 students inciting them to chase the Respondent out of the school;
- e. On 21/06/2016, the deceased called for an impromptu staff meeting. He addressed attendees as to his illness. He also accused the Respondent of crafting a blueprint to oust him from his role as school Principal. He further cited her for preaching to the school students that he was “mchafu and dying any time”. He then cursed the Respondent and her family;
- f. On 29/06/2016, the deceased impelled form three (3) students to “mfukuzeni huyo shetani”, making reference to the Respondent just before students broke for half term recess. She also discovered that some form 3 teacher had been asked to collect information about her dissatisfactory performance of in the discharge of her duties;
- g. Since a public holiday fell during the half term break, the students were informed to report on 08/07/2016 instead of 06/07/2016. This information was not communicated to the Respondent;
- h. On 09/07/2016, under the instructions of the 3rd Appellant’s chair DR. KIPCHUMBA, the Respondent did not report for duty on 11/07/2016 to pave way for investigations on allegations of her devil worshipping acts by members of the local community and for her security reasons;
- i. During her stay at home, the Respondent received several calls and got funny looks;
- j. On 10/07/2016, announcements were made by pastors warning congregants at the local A.I.C Church and Full Gospel Church that the Respondent was a devil worshipper thus poisonous to the subject school;
- k. On 11/07/2016, the deceased and 1st Appellant who was the chairman of the Parents Association (P.A) A.I.C Kapsitwet Secondary School, held prayers together with two (2) pastors and two (2) members of the 3rd Appellant (sued as overall managers) in the Respondent’s offices with a view to exorcise the devil. They believed that the Respondent was an illuminati ALIAS devil worshipper and the parents did not want her to serve in the school. Thereafter, they locked the said office preventing access;
- l. The deceased apprised the school students at school assemblies referring that the Respondent said, “shetani ameondoka sasa shule iko sawa” He warned students not to take sweets from anyone since they were initially hers;
- m. The deceased alleged that while she was on leave, the Respondent appeared to female students like an apparition and beat them. She was further accused of sending “majini kupiga watoto”;
- n. The 1st Appellant further announced to the congregation that the Respondent had tattoos on her tongue and body as well as a tongue piercing;
- o. The 2nd Appellant, who was a member of the 3rd Appellant relevantly, informed that she heard the Respondent was a devil worshipper. It is for this reason that she lost her son who was married to the Respondent’s sister. In her prayer, the 2nd Appellant, referring to the Respondent, chanted “tukemee shetani”;
- p. On 11/07/2016, the Appellants called teachers and students after school assembly to a prayer meeting in the school dining hall where the 1st Appellant said in reference to the Respondent: “lazima tumuondoshe shetani kwa hii shule... That devil was the cause of the principal’s illness



... Nataka vichwa vya watu kumi na nne". She was accused of killing a boy and draining his blood;

- q. The deceased told the students that they risked being sacrificed by the Respondent.
33. The Respondent contended that the deceased published the said words causing disparage to her and her profession as the Deputy headteacher and a School teacher. This negatively affected her chances to be considered for promotion. The said words, she also contended, had the effect of potentially formulating indecent assault charges under the *Sexual Offences Act*. The said words further formed the basis of gross misconduct proceedings before the TSC that ultimately had her removed from the teaching profession and/or from A.I.C Kapsitwet Secondary School.
34. In particularizing the above, the Respondent contended that: -
- a. By letter dated 18/04/2016, TSC indicated that she would be deployed as head teacher in due course;
 - b. The deceased surreptitiously coached students and recorded contrived statements which he handed over to the Kwanza Sub-County Director of Education on 08/07/2016 during his visit to interrogate the Respondents on the allegations complained of;
 - c. The deceased personally recorded a false statement implicating the Respondent in the matters complained of. He then handed over the recording to the Kwanza Sub-County and Trans Nzoia County Teachers Service Commission directors;
 - d. The deceased failed or refused to apprise the Respondent in the 1st and 2nd terms contrary to the code of regulations for teachers. This sabotaged the Respondent's prospects for a promotion interview to the position of Principal until 24/10/2016 when the deceased was compelled by the Trans Nzoia Teachers Service Commission County Director to apprise the Respondent for her interview on 25/10/2016;
35. According to the Respondent, the said words were interpreted to mean that the Respondent was guilty of criminal and dishonorable conduct of having carnal knowledge with male students and gross professional misconduct, unfit to associate with other respectable persons and remain a teaching practitioner, incompetent, an unchaste woman fornicating with male students, a member of devil worshippers, a witch and unfit to be trusted with an appointment to the position of a Principal of any School.
36. The complained utterances and words culminated to an interrogation of the Respondent by the Kwanza Sub-County TSC Director Mr. Wilfred Mosigisi and Mr. Naftali Tuwei and Mr. Kenneth Imo, who were Education officers on 8th July, 2016. She contended that was then asked to give a written explanation on charges verbally read to her as follows: -Improper administration of corporal punishment;Swearing by her name;Use of abusive and discouraging language to students;Comparing students with those at St. Monica;Discouraging parents from admitting their children to the school;Carnal knowledge with male students;Demanding shoe removal by students when visiting her offices;Devil worshipping – with a commentary that it could not be proved.
37. It was also alluded that on 12th July, 2016, the Respondent was verbally summoned before a panel chaired by Mr. Furaha Lusweti, the TSC's Trans-Nzoia County to answer to the charges read out to her on the 8th July, 2016. She accused that during those proceedings, students were coached by the deceased to implicate the Respondent as a devil worshipper, immoral and paint her in bad light. The Respondent contended that the deceased supplied his written statement together with those of



- students, but did not serve her. She frowned that she was additionally not given an opportunity to cross examine the makers of those statements.
38. The verdict of the hearing asked the Respondent to forgive what had transpired, the issues were resolved, the Respondent be deployed to another School in the same capacity and that she was at liberty to apply for special compassionate leave pending the decision of her destination of transfer.
 39. The Respondent was on 5th August, 2016 transferred to Wamuini Secondary School. She averred that she was received by the School Principal with hostility and continues to be treated as such. She complained that she was kept in the store which was a dusty room.
 40. As a result of the defamatory words, the Respondent testified that she was brought into public hatred, scandal, ridicule and contempt losing companionship. Furthermore, colleagues have withdrawn from her and ceased to be hospitable and friendly towards her. This has greatly diminished her chances of being promoted to Principal.
 41. The Respondent additionally lamented that the defamatory words prejudiced her business operations. She had set up a kiosk at Namanjalala. Following the allegations, her employees and customers grew apprehensive that she would conduct devil worship acts on them and were thus resistant to it altogether.
 42. The Respondent's claim was for general damages, injunction restraining the Appellants or their agents from further publication of the said or similar words or innuendoes in any form, costs of the suit and interest.
 43. Justifying the claim for defamation, the Plaintiff called Gabriel Mukhinde, who testified as PW2, Reuben Chimbanga as PW3 and Davis Ochode as PW4.
 44. PW2 testified that he was the father to one Bernard Mukhinde and Sophie Mukhinde, who were Form 2 and 3 students in the School. He alleged that on 11th July, 2016, he went to seek bursary funds from the deceased for his child. On arrival he found the deceased in a prayer meeting at the School hall. Also, in attendance were the 1st Appellant, some members of the Board of Management, teachers, students and other persons to the exclusion of the Plaintiff.
 45. That PW2 was asked to wait outside his Principal's office. While waiting, PW2 witnessed the Respondent's office locked with two padlocks. PW2 grew impatient. He then walked to the hall where he overheard the 1st Appellant's address uttering words including mashetani, devil worshipper and kufanya urafiki na vijana wa shule. Thereafter the deceased said "Hivyo mmeskia ndivyo ilikuwa si hayo ndiyo yalikuwa yakitendeka wakati sikuwa."
 46. It was PW2's further testimony that the deceased made the remarks, he then noticed PW2's presence. He sent a student to inform PW2 to return back to his office and wait for him from there. He was given bursary forms by the Secretary who advised that the forms needed not be stamped by the Principal.
 47. In the evening, PW2 asked his children to expound further on the transpirations of the meeting witnessed. He was informed that the students were told that the Respondent was a devil worshipper, had relationships with boys and that "Ni yeye amefanya Principal kugonjeka kwa hivyo Principal na Opondo hawamtaki kwa hiyo shule, ndiyo wakamfungia mlango asirudi hiyo shule." PW2's children informed him that those allegations were fabricated.
 48. Concerned with those allegations, PW2 discussed those issues with other parents. They were disheartened that the deceased used students to chase away the Respondent. Following those



- revelations, PW2 elected to follow up on the issue to unearth the truth. However as at that time, the Respondent had already been transferred.
49. Explaining that he did not sign in the School's Visitor's book, PW2 stated that he was rightfully in the School's premises as a parent. He observed that the deceased and 1st Appellant also did not sign in the Visitor's book on 11th July, 2016.
 50. PW3 testified that he was the father to one Joseph Wafula, a Form 1 student at the School. He was informed by his son, about a week before 11th July, 2016, that the Respondent had a tattoo on her tongue and that the School was demon and jinni possessed.
 51. Upon coming home after 11th July, 2016, his son narrated that long prayers were held to exorcise demons. Before the prayers commenced, the 1st Appellant locked up the Respondent's office. The students were addressed by Pastors, the 1st Appellant, the 1st Appellant's proponent and the deceased who all supported the 1st Appellant's oration. His son informed that all was well until the deceased fell ill. He accused the Plaintiff of bewitching him with a view to taking over the running affairs of the School.
 52. PW4 was a student at all material times to the suit having been assigned admission number 0749. As at the time of his testimony, PW4 had since transferred to Namanjalala Secondary School.
 53. He recollected that the deceased fell ill between March and June 2016 during which period he was away on sick leave. Upon his return on 20th June, 2016, the Principal held a meeting with Form 2, 3 and 4 students to discuss any matters arising while he was away. The meeting lasted for more than 6 lessons in the absence of their teachers.
 54. The meeting kept the students very excited. They cheered him on during his speech. He promised to chase away the Respondent by calling the Director. In his words; "*Tutafukuza huyo shetani and together we will excel.*" He further warned the students to "*msikubali maneno yenye anasema na mmujibu vile mnataka.*"
 55. PW4 continued that Phelian, a Form 2 student mentioned that the Respondent had tattoos on her tongue. She then stirred up other students to strike after their mid-term break to chase her away.
 56. He further testified that on 8th July, 2016, the TSC Sub-County Director accompanied by other officers came to the School. It was calm. The Director intended to speak to the students who intended to stage a strike but they were not in school on that day. They were thus called on phone. PW4 further testified that on Monday 11th July, 2016 at 0700hours, the 1st Appellant, witnessed by 5 – 8 people, locking the Respondent's office door with a padlock.
 57. PW4 also testified that on the very Monday, there was the School's assembly and upon its conclusion, all students were ushered to the School hall for a prayer meeting. They were joined by teachers, the 1st Appellant, the 2nd Appellant, the Board Chairman, 2 Pastors and an elderly man.
 58. According to PW4, the 1st Appellant led the meeting and made the following remarks: -
 - i. He was very shocked that the deceased's sickness was caused by the Respondent. He expressed remorse to the deceased;
 - ii. "*Huyo mama si mtu wa utu*" referring to the Respondent wanting fourteen (14) heads as follows "*nataka vichwa kumi na nne vya wanafunzi Kapsitwet and the A.I.C. Kapsitwet Secondary school community.*" He then said "*hiyo ishindwe*". In response, the students said; "*Amen! Ishindwe*";



- iii. *“Kile kilinifanya niamini madam deputy anasababisha ugonjwa wa Principal is when I come to school to inquire from her how the school was doing. She just answered me that the school was OK but the principal anapumzika. Hii ilinifanya nifikirie sana vile alisema anapumzika”;*
 - iv. He heard some student saying that the Respondent has a tattoo on her tongue;
 - v. *“Kwa hivyo yeye ni devil worshipper and that why he had to lock her office ili aende kabisa; asionekane kwa hii shule na kama angekuja leo tungemdburu.”*
59. The Principal was then invited to speak. He endorsed the 1st Appellant’s comments urging that was the reason he had called the School for a prayer meeting. He then said “So we have chased the devil who was interfering with the school and together we excel.” He encouraged students to confess and be prayerful and urged students to treat her with impertinence. Many students came forward seeking prayers.
60. PW4 also stated that the 2nd Appellant when called to speak stated: “When I heard that madam Deputy is a devil worshipper, that’s when I knew that’s true.” She concluded that it is for that reason that her son, married to the Plaintiff’s sister, passed on; that she caused his death. She prayed referring to the Plaintiff “nakemea shetani...”
61. PW4 also testified that after the meeting, inevitably many students believed that the Respondent was a devil worshipper. One of the students stated that he was convinced as much because he once came to her office and in his view, mysteriously left the office in haste. He believed that contrary to her statement that she had left to teach, she avoided him for fear of exposure.
62. PW4 later transferred from the School because of distraction, teacher transfers and lack of focus.

The Appellants’ case:

63. The Appellants were, alongside the Principal, sued as the Defendants in the civil case. In their defence, the Appellants filed a Joint Statement of Defence dated 1st February, 2017 through Messrs. Katama Ngeiywa & Co. Advocates and, further, the Principal filed a Statement of Defence dated 30th January, 2017 through Oyucho Timon Advocate.
64. In buttressing their defence, the 1st and 2nd Appellants’ testified in the civil case. As said, the Principal did not live to testify.
65. The 1st Appellant, posited that he was the Chair of the Parents Association at the School since 2017. That, he was summoned to the School on 11th July, 2016. On arrival at the gate, he was welcomed by rowdy and shirtless students who informed him that, donned with a padlock, the Respondent was a persona non grata.
66. Sensing danger, the 1st Appellant called the 3rd Appellant’s Chair and asked him to request the Respondent not to report to work. Having been kidnapped by the students, being commanded to lock the Respondent’s office and with a view to avoid any physical harm on himself, he obliged and proceeded to lock the Respondent’s office.
67. The 1st Appellant stated that although rowdy, the students were not disciplined for rioting. He asked the students to calm down and to put in writing the complaints they had with the Respondent.
68. He admitted that while he was called when the chaos arose, he did not come across the Teacher on duty who also ought to have been called. He also noted that other parents were also not called.
69. The 1st Appellant testified that the Principal was appraised of what had happened when he reported back a week later. The Principal then summoned the Teachers and the students for further update. He



then had a conversation with the Respondent and wrote to TSC. Whereas the 1st Appellant admitted that the approach by the Principal was unprocedural, he nevertheless, clarified that the 3rd Appellant ratified the decision to refer the matter to TSC.

70. In his testimony, the 1st Appellant affirmed that TSC undertook investigations on the matter by summoning several people including the Respondent, some students and himself. The outcome of the findings by TSC recommended that the Respondent be warned and then she be transferred to another School.
71. The evidence of PW2 was impugned by 1st Appellant's contention that PW2 did not have children at the School. He, however, admitted that the wife of PW2 was the active parent at the School. He also confirmed that prayers were held but denied the allegations concerning what he allegedly was said to have been stated by him.
72. The 1st Appellant confirmed that during the prayer meeting, some students complained that they didn't want the Respondent due to her relationship with them including her conduct.
73. He affirmed that at no time did the 3rd Appellant summon the Respondent to face her accusers as the matter was taken over by TSC. He added that he did not hear anyone blamed for the deceased's illness.
74. The 2nd Appellant, the School's Board member testified as DW2. She stated that prayers were held in July 2016 at the School. She attended the prayer meeting in the presence of students, teachers, the deceased, the 1st Appellant and Pastors. She stated that she had earlier on received a call from the Respondent that she had been accused of devil worshipping. She testified that the Pastor did not talk about devil worshipping but student's behavior.
75. DW2 denied the allegations levelled against her. She denied being related to the Respondent through her son. She denied having attended any meeting of the 3rd Appellant to discuss the Respondent. Irrespective of the foregoing, the 2nd Appellant acknowledged that all indiscipline issues are usually addressed by 3rd Appellant.
76. Based on the foregoing evidence, judgment was accordingly entered and the Respondent was awarded damages.
77. The tort of defamation is a common law civil wrong requiring the aggrieved party to establish that the words complained of injured or damaged his, her or its reputation. It must be established that the utterances or written words lowered the repute of the Claimant in the eyes of ordinary right-thinking members of the society.
78. Halsbury Law of England describes a defamatory statement as one which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.
79. Its description was enunciated in the British Columbia Court of Appeal in *Murphy vs. LA Marsh* (1970) 73 W.W.R 114 as follows: -

“(Defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule.



The more modern definition (of defamation) is words tending to lower the plaintiff in the estimation of right-thinking members of society generally."

80. Back home, the Court of Appeal in *Selina Patani & another vs. Dhiranji V. Patani* [2019] eKLR had this to say: -

The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: Defamation protects a person's reputation; that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation.

81. In order to succeed in an action for defamation, the Claimant must establish the following ingredients conjunctively as stated in *John Ward vs. Standard Limited* [2006] eKLR thus:

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 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.

82. In order to ascertain whether the above threshold was attained in this matter, there is need to consider the following main issues: -

- a. The effect of the death of the Principal to the civil case.
- b. The issue of burden and standard of proof.
- c. Whether the tort of defamation was established as against the Appellants.

83. The Court will deal with the issues in seriatim and as under.

- i. The effect of the death of the Principal to the civil case:

84. The trial Court, rightfully so, addressed the legal position in respect of the death of the Principal in a suit based on defamation. Guided by Section 2 of the *Law Reform Act*, Cap. 28 of the laws of Kenya, the Court found that the Respondent's cause of action against the Principal did not survive. The Court then found the Principal not liable.

85. With such a finding, it meant that all the allegations against the Principal had, unsuccessfully so, come to an end.

86. A look at the Complaint dated 12th January, 2017 reveals that the main contention and alleged genesis of the civil case were the various impugned actions of the Principal. With the Principal out of the case, it remained the position that such allegations against him would not properly continue to be part of the Complaint. It, therefore, called upon the Respondent to either amend the Complaint or the Court was not to make any subsequent findings on the basis of the allegations against the Principal.

87. From the proceedings of 12th July, 2018, Mr. Oyicho, Learned Counsel for the Principal, informed the Court of the demise of his client. He pointed out that the cause of action did not survive and



asked for the deceased to be discharged. Mr. Ngeiywa, Learned Counsel pointed out the need for the Respondent to amend her pleadings. Leaned Counsel, Mr. Kraido, for the Respondent, sought for time to respond on whether the Principal ought to be discharged.

88. The Court adjourned the matter to 9th August, 2018.
89. On the subsequent scheduled date, the Respondent's Counsel conceded that the Respondent's suit against the Principal had abated. Counsel did not, however, respond to the issue of amendment, but opted to proceed on with the matter as it was. The Court allowed the case to proceed further.
90. As the Plaint was not amended, it then meant that, as a result of the death of the Principal, several parts of the Plaint were rendered ineffective. They included paragraphs 11, 12 (a, b, c, g and h inclusive) and 13. Such parts could not be considered by the Court for a basis of any finding.
91. Going forward, therefore, the 'new-look-Plaint' was comprised of only those parts that related to the rest of the then Defendants who are the instant Appellants herein.
92. That being the position, a look at the burden and standard of proof follows.
 - ii. Burden and standard of proof:
93. The two legal doctrines (the burden and standard of proof) have been subjected to a lot of legal discourse such that it may not be necessary to replicate the same in this judgment. However, briefly put, the burden of proof is a legal doctrine which principally deals with the duty of a party or parties to adduce evidence in a matter in proof of a certain fact. The standard of proof relates to the evidential threshold required for a claim to be considered as having been proved.
94. The issue of the burden of proof has two facets. There are the legal burden of proof and the evidential burden of proof.
95. Sections 107(1), (2) and 109 of the [Evidence Act](#), Cap. 80 of the Laws of Kenya deals with the burden of proof. It states as under: -
 - Sections 107(1) and (2):
 1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 - and
 - Section 109:
Proof of particular fact
The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
98. The foregoing provision brings out what is referred to as the legal burden of proof. That burden remains on the Claimant throughout the case.



99. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. IEBC & 2 Others (2018) eKLR as under: -
26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
27. The principle of 'evidential burden of proof' is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in *Singh vs. Mota Singh & Another* (2008) 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of *Jeet Mohinder Singh vs. Harminder Singh Jassi*, AIR 2000 SC 258 the Supreme Court of India stated that 'the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law....'.
28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....
29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.
101. The Court will now deal with the standard of proof in ordinary civil claims including defamation claims.
102. The Black's Law Dictionary, (9th Edition, 2009) at page 1535 defines 'the standard of proof' as
- [t]he degree or level of proof demanded in a specific case in order for a party to succeed.



103. In many jurisdictions and decisions world over three main categories of the standard of proof emerge. They are the criminal standard of proof of ‘beyond reasonable doubt’, the application of civil case standard of ‘balance of probabilities’ and the application of an intermediate standard of proof.
104. The Supreme Court in Presidential Petition No. 1 of 2017 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR discussed the applicable standard of proof in election petitions. In that decision, the Apex Court declined the invitation to find that election petitions were just like the normal conventional Petitions and that the standard of proof ought to be that applicable in constitutional petitions which was ‘on the balance of probabilities. The Court found that the applicable standard of proof electoral matters was the intermediate one, that is ‘beyond balance of probabilities, but below proof beyond reasonable doubt’.
105. This is how the Supreme Court, rightly so, argued: -
- (152) We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.
- (153) We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.
107. Returning to the matter at hand, this Court hereby settles that the Respondent bore the legal and evidential burden of proof unless the evidential burden of proof shifted to the Appellants.
108. The Court also settles that the applicable standard of proof in this matter, just like in any other civil matters, shall be on a balance of probabilities.
109. Having said so, the next issue is for consideration.
- iii. Whether the tort of defamation was established as against the Appellants:
112. The threshold for the tort of defamation to stand has already been discussed above. As a recap, the ingredients are 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.
113. This Court will, henceforth, discuss the above parameters only to the extent of the claims made against the Appellants. It will consider each of them accordingly.

Whether the statements were defamatory:

114. According to the Plaint, the statements attributed to the 1st Appellant herein, Charles Opondo, are in paragraphs 12(f) and 12(j).



115. For ease of this discussion, this Court will reproduce verbatim the said parts of the Plaint as follows: -

Paragraph 12(f):

Further on diverse dates in the month of June, 2016, the defendants jointly and severally, by way of dissemination of the said defamatory statements falsely and maliciously spoke and published to the students, teachers and parents of A.I.C Kapsitwet Secondary School, some of them being Davies Ochode, Reuben Chimbanga, Gabriel Mukhinde, Dominic Etoot, John Mang'oli Wekesa, Samson, (teachers) Madam Mary Wamboi, Madam Laura, Mr Wekesa, Madam Phillis Bosire, Mr Kemboi, Mr Cyrus Mosoi, Mr Daniel Kiprotich, and various other persons whose names are presently unknown to the plaintiff of and concerning the plaintiff and of her in the way of her aforesaid profession, the aforesaid words:-

- f. On the 11.7.2016 the 1st and 2nd defendants accompanied by two Pastors and two members of the 4th defendant held prayers in the plaintiff's office to exorcise the devil because according to them the plaintiff who occupied the same was an illuminati (devil worshipper) and subsequently locked up the said plaintiff's office thereby preventing the plaintiff from accessing her said office.

Paragraph 12(j):

- j. On the 11.7.2016 after school assembly, the defendants called teachers and students to a prayer meeting in the school hall during which the 2nd defendant addressed those in attendance saying:-
 - i. "*Lazima tumuondoe shetani kwa hi shule*", thereby referring to the plaintiff.
 - ii. "That devil was the cause of the principal's illness' the innuendo thereby referring to the plaintiff as having cast an evil spell or caused the 1st defendant's illness by some magical powers.
 - iii. She had sworn that "nataka vichwa vya watu kumi na nane" the innuendo thereby referring to the plaintiff as a person who engaged in human sacrifice.

116. The statements attributed to the 2nd Appellant herein, Margaret Suwai, are in paragraph 12(i) as follows: -

Paragraph 12(i):

Further on diverse dates in the month of June, 2016, the defendants jointly and severally, by way of dissemination of the said defamatory statements falsely and maliciously spoke and published to the students, teachers and parents of A.I.C Kapsitwet Secondary School, some of them being Davies Ochode, Reuben Chimbanga, Gabriel Mukhinde, Dominic Etoot, John Mang'oli Wekesa, Samson, (teachers) Madam Mary Wamboi, Madam Laura, Mr Wekesa, Madam Phillis Bosire, Mr Kemboi, Mr Cyrus Mosoi, Mr Daniel Kiprotich, and various other persons whose names are presently unknown to the plaintiff of and concerning the plaintiff and of her in the way of her aforesaid profession, the aforesaid words:-

- i. The 3rd Defendant insisted that she heard that the plaintiff is a devil worshipper, and it is the reason why she lost her son who was married to the plaintiff's sister as she prayed, and chanted "tukemee shetani".



117. In respect to the 3rd Appellant herein, the Board of Management, AIC Kapsitwet Secondary School, and on a careful perusal of the Complaint, it seems that there were no particular words, whether written or otherwise, alleged to have been published by the 3rd Appellant. From the evidence, it appears that the 3rd Appellant was blamed on the basis of the doctrine of vicarious liability and for alleged failing to deal with the Respondent's issue when it arose and instead leaving it unto the TSC.
118. Drawing from the above, it follows that the general meaning of the statements allegedly made by the 1st and 2nd Appellants, regardless of whom the words referred to, was that such words brought the concerned person into hatred, contempt or ridicule. The words tended to lower the reputation of the person referred to in the estimation of right-thinking members of society generally.
119. Such words were, hence, defamatory.

Whether the statements referred to the Respondent:

120. A cursory consideration of the Respondent's testimony regarding the impugned statements by the 1st and 2nd Appellants yield the position that the statements, if truly published and untrue, referred to the Respondent.

Whether the statements were published by the Appellants:

121. This is the aspect that deals with the evidential burden of proof.
122. It is, hence, imperative to note that the Complaint, as well as the Respondent's testimony, do not aver that any of the impugned statements were made in the presence of the Respondent. The basis of the Respondent's claim was what she heard and learnt of the statements as having variously originated from the Appellants.
123. Therefore, the Respondent's evidence, without more, is purely hearsay. It is inadmissible evidence in law. Such evidence will not even cause the evidential burden of proof to shift to the Appellants.
124. The above scenario then calls for a careful scrutiny of the evidence of PW2, PW3 and PW4 with a view to ascertain if such evidence aided the evidential burden to move from the Respondent to the Appellants.
125. PW2 claimed that he went to the School on 11th July, 2016, an allegation which was vehemently opposed by the Appellants. I have carefully scrutinized the PW2's statement and the viva-voce evidence.
126. There is no doubt that PW2 did not avail any evidence of having been at the School as alleged. He never gave any satisfactory explanation as to why he did not sign the visitors book. He also did not call any other person to corroborate his said averment.
127. Even if it is to be taken that indeed PW2 was at the School as alleged, still it is disturbing that he went near the door of the School hall and heard (not seeing) the Principal and the 1st Appellant addressing the meeting. However, he mentioned in his written statement that the meeting was attended by the Principal, the 1st Appellant, some members of the 3rd Appellant, teachers, all students and other persons.
128. The inevitable question is how PW2 was able to certainly see or rather know and confirm all those in attendance in the meeting if he never went into the meeting hall, but only stood near the door. The precision in which PW2 was emphatic on those who attended the meeting can only point to a possibility that he may have been so informed by a third party.



129. The upshot is that there was no evidence that PW2 was at the School as he alleged, but even if he was, still his testimony is highly doubtful and carries very little probative value, if any.
130. PW3's evidence did not support the Respondent's case in any way. I say so because PW3 in cross-examination by Mr. Ngeiywa confirmed that the alleged events of 11th July, 2016 were availed to him by his child who was then a student and who allegedly attended the meeting.
131. Being purely hearsay evidence, such is for rejection on account of being hearsay.
132. The evidence of PW4 was majorly on the Principal. It also dealt with the 1st and 2nd Appellants.
133. The statement by PW4 at page 2 attributed some words which were allegedly spoken by the 1st Appellant in the meeting of 11th July, 2016. The said words were quoted verbatim in the statement. However, the said words were not part of the Plaintiff. There was no explanation given as to why such words were not part of the Plaintiff. It is also the position that the statement was recorded on 26th March, 2018 long after PW4 had transferred to another School.
134. The alleged words were at the heart of the civil case. They needed to be specifically pleaded given that PW4 positively testified on them. The statement is not part of the Plaintiff, but it is evidence.
135. At the risk of repetition, this Court has severally taken the legal position that in an adversarial system of litigation any evidence which does not support the pleadings is for rejection. That position was affirmed by the Court of Appeal in Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Sylvester Umaru Onu, JSC stated that: -
- It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it
- It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.'
136. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -
-it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
- ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.
137. The Supreme Court of Kenya also added its voice on the above legal position in a ruling in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.
138. With the above prevailing legal position, it follows that since the verbatim words allegedly said by the 1st Appellant as appearing in the statement are not part of the Plaintiff, then such are to be disregarded.
139. Similarly, the words quoted by PW4 in his statement allegedly said by the 2nd Appellant herein suffer the same fate as those allegedly said by the 1st Appellant. The reason is simple, they were quoted as verbatim, but were not part of the Plaintiff.



140. PW4's evidence at the trial was based on the statement which he adopted. He only expounded on the same at the hearing.
141. Without considering the words which were allegedly spoken verbatim by the 1st and 2nd Appellants, and as appearing in the statement, and by taking into account the period taken to record the statement, then PW4's testimony is rendered doubtful and becomes so hollow with very little probative value, if any.
142. This Court believes that it would have been a game changer had the Respondent at least called any other person to corroborate the evidence of PW4. An example at hand would have been any of the children of PW3 going by the evidence of PW3 or any other person who attended the said meeting. Otherwise, the evidence of PW4 even if its to be believed remains uncorroborated and as such is outweighed by the combined evidence by the Appellants denying uttering the alleged words.
143. Be that as it may, there is consensus in the evidence that the issues surrounding the Respondent were investigated upon by TSC. The officers interrogated and recorded statements from many people including the children who allegedly had encounters with the Respondent. A final report was prepared which made two key recommendations being that the Respondent be warned of her conduct and that she be transferred from the School.
144. Deriving from the above discussion, this Court finds and hold that the cumulative effect of the evidence of the Respondent, PW2, PW3 and PW4 coupled with the fact that the Principal was missing in action and the Plaint was not accordingly amended to bring it into consonance with the witness statements, then there was no credible evidence to support the fact that the Appellants published the alleged defamatory statements.
145. The Respondent ought to have concretized her case by adducing further admissible evidence to support that the defamatory statements were made by the Appellants herein. As said, the evidence on record fell short thereof.
146. In other words, the evidence in support of the Respondent's case was so weak such that the evidential burden of proof did not pass from the Respondent to the Appellants. The allegation that the impugned statements were made by the Appellants largely remained unproved.
147. Consequently, with the finding that there is no sufficient evidence to prove that the impugned statements were published by the Appellants, then the matter should come to an end. I say so because any further analysis will be academic and will not aid the Respondent in any way whatsoever.
148. The upshot is that the tort of defamation was not sufficiently proved against any of the Appellants herein.
149. As I come to the end of this issue, I must point out, and so respectfully, that the trial Court erred principally in not addressing the ingredients of the tort of defamation. The Court only gave a definition of the tort of defamation and that was all.
150. The trial Court was under a duty to deal with the four ingredients of the tort and to answer each of them in favour of the Respondent before finding the Appellants and any of them culpable. Respectfully, the trial Court failed to discharge that duty. Had the Court acted as expected, it would have had a good opportunity to express itself on all the issues and to scrutinize the evidence on record with a legal touch.
151. Having said as much, I reiterate the finding that there was no sufficient evidence that the defamatory statements were made by the Appellants herein.



Disposition:

152. The foregoing renders the appeal successful. That also renders the civil case not able to stand on account of failure of proof.
153. Consequently, the following final orders do hereby issue: -
- a. The appeal hereby wholly succeeds.
 - b. The judgment and decree in Kitale Chief Magistrates Court Civil Case No. 6 of 2017 are hereby set-aside and substituted with a finding that the said case be and is hereby dismissed for want of proof.
 - c. The Respondent shall shoulder the costs of the appeal as well as the costs of the civil case.
 - d. Any sums of money deposited in any Bank account(s) or in Court pursuant to any earlier orders of this Court shall be released to the Depositors.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF APRIL, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for the 1st and 2nd Appellants.

Mr. Odongo, Learned Counsel for the 3rd Appellant.

Mr. Kraido, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

