



**Teacher Service Commission v Mwangi (Civil Appeal 27 of 2020)
[2023] KEELRC 140 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 140 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL 27 OF 2020
JK GAKERI, J
JANUARY 26, 2023**

BETWEEN

TEACHER SERVICE COMMISSION APPELLANT

AND

BENSON KURIA MWANGI RESPONDENT

(Being an appeal from the Judgement and Decree (Hon. T. Murigi Chief Magistrate) delivered on 19th December, 2018 in CMCC No. 223 of 2008)

JUDGMENT

1. This is an appeal from the Judgement and Decree (Hon. T. Murigi, Chief Magistrate), delivered on December 19, 2018. The Judgement was entered in favour of the Respondent for Kshs.600,000/= costs and interest till payment in full.
2. The decision aggrieved the Appellant who filed a Memorandum of Appeal dated April 15, 2020 and raised the following grounds of appeal, namely:
 1. The learned Magistrate acted without jurisdiction by presiding over an employment dispute which is the exclusive mandate of the Employment and Labour Relations Court under law.
 2. The learned Magistrate acted in excess of her jurisdiction when she awarded reliefs that were neither pleaded nor canvassed during trial thereby condemning the Appellant unheard.
 3. The learned Magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.



4. The learned Magistrate erred in law and fact when she awarded reliefs which are unknown to law in gross violation of the provisions of the [Employment Act](#).
 5. The learned Magistrate has not provided legal and/or reasoned justification on the awards made in favour of the (Claimant) incorrectly indicated as Respondent contrary to law.
 6. The judgement is inconsistent with the provisions of the [Defamation Act](#), principles of the law of defamation and the jurisprudence attendant thereto hence occasioned injustice to the Appellant.
 7. The learned Magistrate erred in law in failing to consider the Appellant's evidence adduced by its witnesses and presented through documents which raised substantial issues of law.
 8. In finding that the Appellant's regulations did not apply to the Respondent, the learned Magistrate seriously misdirected herself on the principles governing teacher/pupil relationships where the Respondent was expected to uphold the *loco parentis* doctrine.
 9. The learned Magistrate (incorrectly stated as judge) erred in arriving at the decision which was contrary to the evidence, law facts submissions and authorities tendered before court.
3. The Appellant prayed that the appeal be allowed with costs and the judgement of the court and all consequential orders be set aside.
 4. The Appeal was canvassed by way of by written submissions.
 5. Mr. Cavin Anyuor, learned counsel for the Appellant submitted on the various grounds of appeal as follows;
 6. As regards jurisdiction, counsel submitted that jurisdiction was the foundation of any suit and was thus essential. That the Employment and Labour Relations Court (ELRC) had exclusive jurisdiction on employment and labour matters.
 7. Reliance was made on the provisions of Section 12 of the [Labour Institutions Act](#), 2007 (now repealed) that the court's jurisdiction flowed from the [Constitution](#). Reliance was also made to the decision in [Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd](#) (1989) KLR as [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) (2012) eKLR and others.
 8. It was urged that the [Labour Institutions Act](#), 2007 gave exclusive jurisdiction to the court and the learned Magistrate had no jurisdiction to hear and determine the dispute and the issue could be raised *suo moto* by the court if none of the parties raised it and at any stage as was held in [Clifford Keya v Jackline Ingutiah and 5 others](#) (2022) eKLR.
 9. On reliefs, it was submitted that the damages awardable by the court under the repealed [Employment Act](#) was the period of notice of the contract of employment as explained in [Joseph Mwaura Njau v Barclay Bank Ltd](#) (2001) eKLR.
 10. It was further urged that since the learned Magistrate observed that damages for dismissal were based on the period of notice and had no basis to make an award. The court was persuaded to find that the award had no basis in law.



11. It was further submitted that the Claimant did not prove that his reputation was lowered and the claim had not been specifically pleaded, particularized and proved.
12. Counsel submitted that the trial court framed an issue from matters that were not pleaded.
13. Further reliance was made on the decisions in *Caltex Oil (Kenya) Ltd v Rono Ltd* (2016) eKLR as well as *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR and others to urge that the court, like the parties was bound by the pleadings before it.
14. On the ground that the decision was arrived at was contrary to the evidence, facts and submissions, it was submitted that the Claimant/Respondent attended the disciplinary hearing and 6 witnesses were interviewed. That the *Employment Act*, Cap 226 (now repealed) enabled an employer to dismiss an employee at will and without causes and the law did not require reasons for termination, provided the employer gave notice or salary in lieu of notice.
15. It was urged that termination of the claimant's employment was lawful.
16. Reliance was made on the decision in *Rift Valley Textiles Ltd v Edward Onyango Oganda* (1994) eKLR where court explained the law on termination of employment by either of the parties.
17. The court was urged to find that the judgement had no legal foundation.
18. As regards the *Defamation Act*, law of defamation and jurisprudence generally, counsel relied on Order 2 Rule 7 of the *Civil Procedure Rules, 2010* on the need for particulars of facts and matters to be relied upon. It was submitted that the Respondent did not isolate the defamatory words or specifically plead defamation and the trial court had no power to find that the Respondent was defamed.
19. That the alleged defamatory words, publication or evidence were conveyed by 3rd parties.
20. Reliance was made on the decision in *Joseph Njogu Kamunge v Charles Muriuki Gachari* (2016) eKLR to urge that the requirements for defamation were not met.
21. Counsel submitted that for a claim of defamation to succeed, the same had to be pleaded, particularized and evidence adduced to show that the statement was published and the affected party suffered loss.
22. It was the Appellant's case that the award for defamation was irregular.
23. Counsel for the Respondent submitted on jurisdiction of the trial court, reliefs, defamation, consideration of evidence by the trial court and whether the appeal ought to be allowed.
24. On jurisdiction, reliance was made on the decision in *Phoenix of EA Assurance Co. Ltd v S.M. Thiga t/ a Newspaper Service* (2016) eKLR as well as *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & others* (*supra*) on the essence of jurisdiction and its source.
25. Counsel urged that the *Employment Act*, Cap 226 (now repealed) gave Labour Officers and Magistrates jurisdiction to preside over employment and labour matters, specifically section 40(1) of the *Act*.
26. It was submitted that the award of Kshs.200,000/= for loss of earnings and Kshs.600,000/= general damages for loss of reputation was justifiable as the trial court acted within its jurisdiction.
27. It was further submitted that the issues for determination generally flowed from the pleadings as expressed in *Samuel Otieno Omoro v Tom Mboya Ochura* (2019) eKLR.
28. The Respondent's counsel submitted that the amended plaint dated 16th June, 2014 raised two issues on payment of lost earnings and damages for defamation and mental torture.



29. Counsel faulted the Appellant's contention that the Respondent had not pleaded defamation and relies on the amended plaint to urge that defamation was pleaded.
30. As regards the reliefs being unknown to law and violation of the Employment Act, the Respondent's counsel submitted that the Appellant's averments were baseless in light of section 40(b)(ii) of the Employment Act (repealed) which gave the Magistrate discretion to make such directions as may be necessary to meet the ends of justice.
31. Reliance was made on the decision in Barclays Bank of Kenya Ltd v Joseph Mwaura Njau (2006) on assessment of damages for unlawful dismissal based on notice period, if any.
32. Decisions in James Orengo v Attorney General and Mildred Amagove v Ultimate Manpower & General Supplies Ltd (2021) eKLR were relied upon to exemplify instances in which the court made global awards.
33. As regards defamation, reliance was made on the decision in Joseph Njogu Kamunge v Charles Muriuki Gachari (*supra*) to underline the ingredients of defamation.
34. It was submitted that the statement that the Respondent befriended, impregnated and married a standard 7 school girl, one Joyce Waithira Mwangi was defamatory as it was false and was published in court.
35. It was urged that the Respondent was subjected to hatred, ridicule, odium or contempt at 32 years old. That the trial courts judgement was consistent with the provisions of the Defamation Act.
36. As regards consideration of the Appellant's evidence, it was submitted that he who alleges must prove as provided by section 107 of the Evidence Act.
37. Reliance was also made on the decision in Mbuthia Macharia v Annah Mutua & another (2017) eKLR buttress the submission.
38. It was urged that the Appellant did not discharge the burden of proof.
39. Counsel submitted that there was no complainant in this case and no investigations were carried out as provided by the Regulation 23(2) of the Teachers Service Commission Code of Conduct and Ethics Teachers Regulations, 2015.
40. Reliance was also made on Regulation 145 of the Regulations, 2015.
41. It was further submitted that the evidence of the PW1 and PW2 was clear that they married in March 2004 and were blessed with a child in 2006 and was not then a school girl.
42. The Respondent's counsel urged the court to dismiss the appeal.
43. I have considered the appeal, submission by the parties and the authorities relied upon. As this is a first appeal, the court is duty bound to reconsider and re-evaluate the evidence a fresh and arrive at its own decision.
Put in the alternative, a first appeal is by way of a retrial.
44. In Gitobu Imanyara & 2 others v Attorney General (2016) eKLR, the Court of Appeal stated;

An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though



it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

45. Similar sentiments were expressed in *Peters v Sunday Post Ltd* (1958) EA 424 and [*Abok James Odera t/ a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*](#) (2013) eKLR.
46. Three witnesses testified at the trial.
47. The Respondent testified that he was a P1 teacher having graduated in 1997 and was 42 years old and an employee of the Appellant. That he started teaching at Gituro Primary School and was later transferred to Kariua Primary School in 2000 and married one Joyce Waithira Mwangi in February 2004 who was 20 years then. That he received a letter dated 2nd February, 2004 intimating that he had impregnated a school girl and married her and was interdicted but explained the circumstances to the employer in writing. It was his testimony that he was invited for a hearing on 3rd June, 2004. Also invited was his wife and mother in law and all testified that the Respondent had married Joyce Waithira under Kikuyu customs. That at the meeting, he was shown the complaint which he was promised would be dispatched to him by post.
48. He testified that after one (1) month he received the dismissal letter and attempts to be reinstated fell through.
49. Joyce Waithira Mwangi testified that the Respondent was her husband and had been her Mathematics teacher at Kariua Primary School and had no relationship with him while she was in school.
50. On cross-examination, the Respondent testified that Joyce Waithira completed school in 2003 and he married her in 2004. He admitted that he had written that he was forced to marry Joyce Waithira. It was his testimony that Joyce's mother approached him to marry her.
51. The witness could not recall when he met his wife Joyce Waithira but admitted she was a pupil at Kariua Primary School.
52. The respondent confirmed that his parents entered into an agreement that he marries Joyce. That he knew her when she was taking a tailoring course in 2004 and had applied for a transfer from the school.
53. That he attended the disciplinary hearing although he was not given an opportunity to speak.
54. Joyce Waithira Mwangi testified that she did not proceed to secondary school because she was a slow learner having repeated several classes.
55. That she started tailoring business at Kagundu-ini plots and started dating the Respondent.
56. It was her testimony that she had her first pregnancy in 2005 after completing the tailoring course.
57. She testified that her marriage with the Respondent was consensual.
58. On cross-examination, the witness confirmed that she completed school in 2003 and married in 2004. It was her testimony that she knew the Respondent in 2002 while in class 7 and started their relationship in 2004. She testified that she had no relationship with the Head Teacher as alleged by her husband. That the Respondent approached her for marriage.
59. The witness contradicted herself on the reason why she did not proceed to High school. She testified that it was because her parents could not afford having also stated that it was because she was a slow learner. That she had not given birth before 2006.



60. The Appellant's witness, one Lawrence Kigen testified that he was the Assistant Deputy Director in Teachers Discipline at the Appellant. That the Respondent was interdicted by the District Education Officer for 21 days to write his statement which he did and he appeared for the disciplinary hearing attended by Joyce Waithira, Area Education Officer, Mr. Kimathi, the Head Teacher of the School, Mr. Hesbon Mungere, Stephen Mwangi (Joyce's father), Samuel Kuria (Respondent father) and Elder Kariuki Nyinge and the committee found the Respondent guilty of the allegations made and was dismissed and was notified in writing.
61. That the Respondent was accorded a fair hearing.
62. On cross-examination, the witness confirmed that he was not a member of the committee. It was his testimony that there was nothing wrong about a teacher having an affair with an adult. That the disciplinary committee does not consider issues of pregnancy but the professional aspects as to whether there was an affair or not.
63. That the complainant was the Head Master and no other teacher testified.
64. It was his testimony that the allegation of the affair was never investigated and the disciplinary committee minutes were not provided.
65. After a review of the evidence and application of the law, the trial court found in favour of the Respondent and awarded him Kshs.200,000/= for lost earnings and Kshs.600,000/= for defamation.
66. Contrary to the learned Magistrates opening statement that the suit was filed vide an amended plaint dated 16th June, 2014, the suit was actually filed on 13th March, 2008 vide a plaint dated 6th March, 2008. The amendment took place after a change of the Respondent's advocate.
67. I will address the issue of the evidence on record first.
68. One of the essential issues for determination was whether indeed the Respondent had an affair with Joyce Waithira when she was a student at Kariua Primary School.
69. The Respondent and Joyce Waithira testified that no relationship existed. However, the evidence on record reveal that the witnesses do not appear to have disclosed the truth. First, the Respondent refused to disclose when he knew Joyce Waithira yet she confirmed that she knew him from 2002.
70. Second, although both witnesses testified that they started dating in 2004, that is not borne by facts as the marriage agreement was concluded in February 2004 in the absence of the Respondent. Joyce Waithira testified that the Respondent asked for her hand in marriage but no time frame was given. The Respondent admitted on cross-examination that he had written that he was forced to marry Joyce Waithira and confirmed that it was Joyce's mother who approached him to marry Joyce Waithira.
71. Third, the alleged dowry of Kshs.2,000/= was paid by the Respondent's father.
72. Fourth, the speed at which the marriage was concluded is puzzling. According to the two, they met, started dating in January 2004 and married in early February 2004.
73. Finally, the Respondent did not disclose that he had applied for a transfer from the school in late January 2004 because he wanted to marry a former pupil. The Head Master recommended the transfer on the ground that

" . . . the teacher cannot work peacefully anymore in this station."



74. The question that comes to mind is why if he and Joyce Waithira were planning to marry and Joyce was not a school going person and was she was learning tailoring. Could it be that the Respondent was compelled to marry Joyce and had no option.
75. Instructively, the Respondent had another wife with children.
76. From the totality of the evidence before the court, it is decipherable and does appear that the Respondent and Joyce Waithira started having a relationship when she was a student at Kariua Primary School.
77. The alleged relationship between Joyce Waithira and the Head Teacher, which she denied was a red herring by the Respondent.
78. The relationship was referred to by the letter to the District Education Officer, Maragua District dated 12th January, 2004. The respondent did not controvert the contents of the letter.
79. The letter from the Area Education Officer to the District Education Officer, Maragua dated February 19, 2004 made similar allegations including pregnancy.
80. However, the Respondent and Joyce denied the allegation about pregnancy and no evidence was adduced to controvert their evidence.
81. Perhaps more poignantly is the fact that neither the Head Master of the school, or the Area Education Officer or the District Education Officer conducted an investigation to establish the real state of affairs and confront the Respondent with the findings to controvert. This was essential as the Respondent's livelihood was at stake.
82. It was incumbent upon the Respondent to lay the facts bare. It did not but terminated the respondent's employment, the processes notwithstanding.
83. Puzzlingly, the Appellant had the evidence to demonstrate what had transpired, more plainly than it did. It is unclear to the court why the Head Master of the school did not testify in court or any other teacher.
84. The court is satisfied that termination of the Respondent's employment was unlawful.
85. On the award of the global sum of Kshs.200,000/=, the learned trial Magistrate relied on the decision in *Barclays Bank of Kenya Ltd v Joseph Mwaura Njau* (*supra*) where the court alluded to the essence of the notice period in determining the quantum of damages and if none reasonable notice period was implied. The Respondent cited other decisions in support of the award.
86. In this case and as correctly observed by the trial Magistrate, the Respondent did not provide a copy of the employment contract or adduce evidence on the notice period or his monthly income and there was nothing to compare with, the court still awarded Kshs.200,000/=.
87. The basis on which the learned Magistrate exercised her discretion is unclear from the judgement. Without such a foundation, the sum of Kshs.200,000/= though sanctioned by section 40(2)(b)(1) of the *Employment Act* Cap 226, the court has jurisdiction to interfere with the award.
88. Having found that the Respondent had brought his professionalism as a teacher into question, and notwithstanding that the Appellant did not conduct thorough investigation, the evidence on record suggested culpability on his part and the award of Kshs.200,000 is reduced to Kshs.100,000/=. This disposes of grounds 7, 8 and 9 of the Memorandum of Appeal.



89. As regards jurisdiction, the parties, as discernible from their submissions have adopted opposing positions. While the Appellant urges that the learned Magistrate had no jurisdiction, the Respondent maintains that the court had the requisite jurisdiction and acted within its mandate.
90. Needless to emphasize, jurisdiction is the cornerstone of administration of justice by courts of law and tribunals. It is indeed everything to paraphrase the sentiments of Nyarangi JA in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (*supra*).
91. As emphasized by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd and 2 others* (*supra*);
- “A court’s jurisdiction flows either from the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law . . .”
92. Was the trial court clothed with the requisite jurisdiction and did it act within its powers? Contrary to the Appellant’s submission that the learned trial Magistrate had no jurisdiction, the court is persuaded that the learned Magistrate had jurisdiction and acted within it.
93. Section 12(1) of the *Labour Institutions Act, 2007* (now repealed) had no application to the instant case as it was filed on March 13, 2008 and the *Labour Institutions Act, 2007* came into operations on June 2, 2008. The suit predated the statute and had no retrospectivity clause.
94. The relevant statutes then on employment law were *inter alia*, the *Trade Disputes Act*, Cap 234, the *Employment Act* Cap 226 and the *Regulation of Wages and Conditions of Employment* Cap 229.
95. Section 14(1) of the *Trade Disputes Act* gave the President power to establish an Industrial Court consisting of –
- i. at least two judges
 - ii. 8 other members appointed by the Minister after consultation with COTU and the FKE for a term of not less than three years.
96. Section 7 of the *Act* provided that;
- The court shall, upon application being made to it in writing jointly by the parties to a trade dispute or upon a dispute being referred to it by the Minister under Part V or Part VI, take cognizance of such dispute and proceed as soon as practicable to inquire into the dispute and make an award thereon and every award so made shall be notified by the court to the parties to the dispute and to the Minister.
97. Under section 17(1) of the *Act*, the award or decision of the Industrial Court was final.
98. As discernible, the provisions of the *Trade Disputes Act* did not cloth the Industrial Court with exclusive jurisdiction in employment and labour matters as submitted by the Claimant.
99. Closer home, section 40(1) of the *Employment Act*, Cap 226 (repealed) provided that;
- Whenever an employer or employee neglects or refuses to fulfil a contract of service or whenever any question difference or dispute arises as to the rights or liability of either party, or touching any misconduct, neglect or ill-treatment, or either party or any injury to the person or property of either party under any contract of service, the party feeling aggrieved



may make a complaint either to a Labour Officer or to a Magistrate empowered to hold a Magistrate's court of the first or second class.

100. In addition, section 40(2) provided that;
- (b) to a Magistrate, the Magistrate shall have jurisdiction (notwithstanding anything contained in any written law respecting the jurisdiction of the Magistrate to the contrary) in all cases arising in his area of jurisdiction, in addition to any jurisdiction he might have exercised if this Act had not been enacted . . .
101. As correctly submitted by the Respondent, the provisions of section 40(2)(b) empowered the Magistrates court to award such reliefs as may be justified by the circumstances of the case.
102. In sum, the inescapable conclusion is that the learned trial Magistrate had jurisdiction to hear and determine the dispute and the court acted within its jurisdiction.
103. Disconcertingly, this file was handled by no less than 8 Magistrates in its long journey from March 2008 to July 2018. The foregoing disposes grounds 1 and 2, 3 and 4 of the appeal.
104. The learned trial Magistrate was faulted on the ground that her decision was inconsistent with the provisions of the Defamation Act, principles of defamation and the attendant jurisprudence.
105. The Appellant did not cite the relevant provisions of the Defamation Act or any provisions but relied on Order 2 Rule 7 of the Civil Procedure Rules, 2010 on how an action based on defamation should be framed and urged that the Respondent did not point out what words were offensive.
106. It was the Appellant's case that the Respondent neither pleaded or particularised nor adduced evidence of the alleged defamatory statements.
107. According to Black's Law Dictionary, defamation is
- " the act of harming the reputation of another by making a false statement to a 3rd person."
108. Winfield on Tort defines defamation as
- " the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them sham or avoid that person."
109. According to Street on Torts defamation is
- " the publication of a representation which exposes a person to hatred, ridicule or contempt."
110. As explained in Gatley & Lindsell on Slander and Libel at page 197;
- "An action for defamation is purely personal action. The proper person to sue as a Claimant is the person defamed and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of Libel or Slander against B for words defamatory of C . . ."



111. According to the Court of Appeal in *Musikari Kombo v Royal Medial Services Ltd* (2018) eKLR;

“It follows that a Claimant in a defamation suit ought to principally establish in no particular order;

- i. The existence of a defamatory statement;
- ii. The defendant has published or caused the publication of the defamatory statement;
- iii. The publication refers to the Claimant.

See this court’s decision in *Nation Media Group & another v Hon. Chirau Mwakwere* Civil Appel No. 224 of 2010 (unreported)”

112. Similarly, in the words of Lord Atkin in *Knupffer v London Express Newspaper Ltd* (1944) 1 ALLER 495,

“The only relevant rule is that in order to be actionable, the defamatory words must be understood to be published of and concerning the Plaintiff.”

113. In *Musikari Kombo v Royal Media Services Ltd* (*supra*), the Court of Appeal stated that;

“The law of defamation is concerned with the protection of a person’s reputation.” Patrick O’ Callaghan in the *Common Law Series: The law of Tort* at paragraph 25.1 expressed himself in the following manner,

“The law of defamation or, more accurately, the law of Libel and Slander is concerned with the protection of reputation ‘As a general rule English law gives effect to the 9th commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction . . . 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 . . .”

114. I will now proceed to apply the foregoing propositions of law to the facts of the instant case.

115. The Respondent submitted that the information on pages 11, 12 and 16 of the Record of Appeal was defamatory.

116. The documents in question are two (2) confidential letters addressed to the Respondent dated March 2, 2004 and May 26, 2004. The documents were the Notice of Interdiction and summons to appear before the Commission.

117. The last letter dated June 3, 2004 addressed to the Respondent is the dismissal letter.

118. First, the court is in agreement with the Appellant’s submission that the alleged defamatory representation statement must be pleaded, particularised and proved by the party allegedly defamed.

119. In this case, the pleadings made no reference to the alleged defamatory words, statements nor the particulars of the alleged defamation and when it took place.

120. As submitted by the Respondent, parties are bound by their pleadings. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (*supra*). In addition, it is trite law that submissions are not pleadings.



121. Whereas the statement on impregnating a school girl may have been untrue, the befriending was not as was the subsequent marriage in February 2004.
122. Relatedly, neither the Respondent nor the statement of Joyce Waithira make reference to the alleged defamatory statements.
123. Finally on publication, the Respondent led no evidence of how the Appellant published the three letters on record or caused their publication.
124. According to *Black's Law Dictionary* 10th Edition, Publication means

" Generally, the act of declaring or announcing to the Public."

In law, Public includes a section thereof and for purposes of defamation, one other person suffices.

125. The Respondent did not adduce evidence on the other persons to whom the Teachers Service Commission published the letters or whether the letters reached him while unsealed having been confidential.
126. In the absence of evidential proof that the Appellant disclosed the contents of the letters to 3rd parties, it is the finding of the court that the alleged defamatory words were not published as required by law for defamation to be actionable.
127. For the foregoing reasons and finding, the court is satisfied and finds that the tort of defamation was not proven by evidence and the court has reason to interfere with the assessment of damages at Kshs.600,000/= awarded for defamation.
128. The trial court was persuaded by the holding of W. Karanja J. in *Benaiah Sisungu v Tom Alwaka t/a Weekly Citizen & another* (2007) eKLR where the learned judge awarded Kshs.600,000/= as general/compensatory damages for libel.
129. In that case, the alleged defamatory words were published by the Respondent in his Newspaper issue of 17th/23rd January, 2005 and the Respondent offered no defense.
130. In the circumstances, the court is satisfied that it has reason to interfere with the learned Magistrate's assessment by setting it aside in totality.
- This takes care of grounds 5 and 6.
131. Accordingly, the appeal herein is partially successful and is allowed to the extent that the sum of Kshs.600,000/= awarded for defamation is set aside and the sum of Kshs.200,000/= awarded for loss of earnings is reduced to Kshs.100,000/=.
132. Parties to bear own costs.
133. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF JANUARY 2023

DR. JACOB GAKERI

JUDGE

Order



In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

