



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 18 OF 2014

GEOFFE & ASSOCIATESPLAINTIFF

VERSUS

FRED BLACK INSURANCE BROKERS LIMITED.....DEFENDANT

JUDGMENT

The plaintiff herein is an Accounting Firm engaged in the business of offering accounting services to its clients, including but not limited to auditing their books of accounts. The defendant is a Limited Liability Company engaged in the business of offering insurance brokerage services on behalf of Insurance Companies and it's subject to the regulations put in place by the Insurance Regulatory Authority.

The plaintiff has sued the defendant claiming general, aggravated and exemplary damages, a permanent injunction restraining the defendant and/or its agents from publishing or further publishing the words complained of, in the suit.

The cause of action against the defendant is premised on a letter under reference "Professional Misconduct Geoffe & Associates – Certified Public Accountants" addressed to ICPAK, by the defendant and dated the 17th day of April, 2013. In the said letter, the defendant wrote and published the following words of and concerning the plaintiff which the plaintiff contend were false and defamatory.

"DATE: 17TH April, 2013

Attn: The institute of Certified Public Accountants of Kenya

(ICPAK)

P. O. Box 59963 -00200

CPA Center, Ruaraka, Thika Road

Nairobi, Kenya

Re: Professional Misconduct

Geoffe & Associates Certified Public Accountants

Dear Ms. Chiggai.

I hope you are well. Thank you for granting us this appointment.

I would like to submit a complaint about a Kenya Auditing Company, Geoffe & Associates, in my capacity as a Director & Shareholder of Fred Black Insurance Brokers (Ltd).

We have been utilizing Geoffe & Associates over a period of many years as the officially appointed Auditors for our Annual Accounts. Please see attached copies of all documentation to support our claim.

We have now recently been informed by Geoffe & Associates that they now deny ever having been our Auditors and that all the documentation with their seal stamp and other documents are forgeries.

As you can imagine this has had a serious detrimental effect on obtaining all our necessary licenses for the 2013 period. Aside from having to re-audit everything from 2008 Geoffe & Associates action are now also proving an obstacle to Fred Black Insurance (Ltd) being granted its 2013 license.

As the governing body for all Certified Public Accountants for Kenya, I would like to submit a complaint and proof that Geoffe & Associates were our Accountants and their behavior is a disgrace to all Financial Service Providers in Kenya. We can only conclude that this particular Auditor has acted with Gross Professional Misconduct.

We are available for any questions or queries.

Yours sincerely

James Boorman – Director”

The Plaintiff avers that in the said letter, the defendant without any or any valid basis or evidence to substantiate the said allegations accused it of gross professional misconduct and implied that the plaintiff was a fraudster engaged in all manner of unethical practices.

The plaintiff contended that in their natural and ordinary meaning, the aforesaid words meant and were understood to mean that the Plaintiff was unprofessional, unscrupulous, lacked integrity, was not worthy of operating in the said profession, was ineffective and unreliable, had little or no regard for the rights of others, was hypocritical and was pre-disposed to fraud and/or criminal activities.

The Plaintiff stated that the publication was false and calculated at disparaging its reputation both professionally and in the social circles. That in publishing the impugned letter, the defendant was driven by malice and spite against the plaintiff. The particulars of malice are set out in paragraph 10 of the plaint.

That prior to the publication of the said defamatory words, the plaintiff had an excellent reputation as a professional, honest and respected member of the accounting profession. By the said publication, the plaintiff and its proprietors have been exposed to ridicule, hatred, mistrust, odium and contempt and their reputation has been lowered in the estimation of right thinking members of the society as a consequence of which, the Plaintiff has suffered and continues to suffer substantial injury to its credit and reputation.

That by reason of the publication the plaintiff has also suffered considerable distress and embarrassment and it claims damages for the said loss of reputation and distress.

In its statement of defence filed on the 26th day of March, 2014, the defendant stated that the letter in issue had no valid basis in that by a letter dated 14th August, 2010, and in the usual custom and practice between it and its sister companies, it appointed the plaintiff as its auditor. The defendant avers that the letter under reference arose because the plaintiff denied ever being appointed to audit the defendant's accounts yet the same were in fact done and upon completion, they were evidenced by the plaintiff's seal and stamp.

The Defendant admitted making a complaint about the plaintiff to ICPAK but it avers that the same was done following the Plaintiff's denial that it audited the defendant's accounts, yet there was evidence of the same. That in the circumstances the defendant had no option but to complain.

The defendant denies at any time stating or implying in the said letter that the plaintiff is a fraudster as alluded to, in paragraph 6 of the plaint. That the defendant rather to the best of its knowledge was reporting to ICPAK on indiscretion on the part of the Plaintiff which had ramifications with regard to the Defendant's ability to renew its license and thus, the Defendant sought ICPAK's intervention by the said letter.

Further, the Defendant denies the particulars of malice and put the Plaintiff to strict proof. In the alternative, it states that its letter was a statement of facts and matters of concern to the defendant as the plaintiff who had audited its accounts had denied having audited the same. It avers that its letter was one any organization in such a situation would have reasonably made, granted the fact that the Defendant's licence was pending renewal.

The Defendant contends that in writing to ICPAK on the issues at hand, it was subject to the notion of absolute privilege, ICPAK being a body receiving complaints and from which the defendant sought recourse. In the alternative, it relied on the letter being subject to the notion of qualified privilege, it having a duty of a legal nature to relay the contents of the letter to ICPAK.

In a reply to defence filed on 14th May, 2014, the Plaintiff joins issue with the defendant in its defence in its entirety save where the same consists of admissions. It avers that the only purported appointment by the defendant which was by a letter dated 11th August, 2010 was not accepted by the Plaintiff and therefore no relationship whatsoever existed between the Plaintiff and the Defendant.

The Plaintiff denies that the letter was subject to absolute or any other privilege as envisaged under the Defamation Act and/or Common Law. It has urged the court to dismiss the statement of defence and judgment be entered in its favour.

At the hearing, Geoffrey Kamau testified as PW1 on behalf of the Plaintiff. He is one of the Managing Partners of the Plaintiff. He adopted his witness statement filed in court on 30th January, 2014, as part of his evidence in chief. He admitted having known the Defendant herein with whom he first interacted in July 2010 after it was introduced to the Plaintiff by one Neil Jones who used to be the defendant's accountant. It was his evidence that they reached out to the defendant who gave them a formal letter of appointment dated the 11th day of August 2010 but their business relationship with the defendant was not formalized because they could not agree on some issues, the main one

being the fees, for the audit work to be undertaken by the Plaintiff.

He stated that shortly thereafter, they got information that the Criminal Investigation Department Officers were looking for them seeking a confirmation as to whether they were indeed the Auditors of the Defendants. That the officers wanted a confirmation that the inter-balances confirmation letter was from Geoffe & Associates. It was his evidence that at no time did the Plaintiff prepare the inter-balances for the Defendant and that any such documents purporting to have been prepared by the Plaintiff were forgeries as the same had not been sanctioned by the plaintiff.

He stated that the Plaintiff audited accounts for other companies associated with the Defendant namely; Academy of Dance, Kipoori Limited and Geo Grid East Africa Limited. That on 20th March, 2013, the Plaintiff resigned as auditors of the above companies on account of ethical issues because the Directors of those companies had integrity issues and they were the same directors of the Defendant. That it was after the said resignation that the Defendant wrote the letter dated 17th April, 2013 to ICPAK complaining that the Plaintiff had engaged in professional misconduct.

He stated that the complaint in that letter is not true in that the Plaintiff's plan to engage with the Defendant was taking place in January, 2013 but the letter was written in April, 2013. He averred that the letter was malicious and only intended to tarnish the plaintiff's reputation with an objective of making the Plaintiff loss business. That the intention by the Defendant was to brand the partners of the Plaintiff as dishonest and people who lack integrity.

He further stated that after the Plaintiff responded to the defendant's letter to ICPAK, the defendant withdrew their complaint and the CID officers did not take any action against the partners of the Plaintiff.

On its part, the Defendant called two witnesses in support of its case, one Pernille Duckworth who described herself as the CEO of the Defendant testified as PW1. It was her evidence that the Plaintiff had been auditing the Defendants accounts since the year 2008, and that the letter dated 11th August, 2010 was just a formality. That, though the Plaintiff declined the offer to audit the Defendant's accounts, they had been auditing their accounts even before then. That in addition to auditing the Defendants accounts, the Plaintiff reconfirmed its loan and capitalization which resulted in the Managing Director of the Defendant one Thomas Kariuki's shares being diminished because he did not contribute the amount needed to keep the shares.

It was her evidence that the defendant made the complaint vide the letter dated 17th April, 2013 to ICPAK because the Plaintiff denied being its auditors which according to her, was unprofessional. That the complaint at the CID was made by the said Thomas Kariuki who complained that the accounts were falsified. She stated that the defendant wrote the letter dated the 17th April, 2013 to clear its name. She told the court that the Defendant withdrew the complaint because it got its certificate and did not wish the Plaintiff any harm. She averred that the complaint was written to ICPAK and was not copied to any other body/person.

Peter Kamau Kiarie testified as DW2. He was an employee of the Defendant as a messenger/driver having been so employed in the year 2008. It was his evidence that he used to deliver documents to the plaintiff who in the year 2009, had their physical address in Kimathi house but later moved to Kalson Towers in Parklands. Among the documents he used to deliver were from accounts and cheques and upon delivery of the documents, they could be received and stamped by a receptionist at the Plaintiff's offices and he could take back copies to the Defendant's Director one Thomas Kariuki who used to send him. That one of the people he dealt with at the defendant's offices was a Mr. Mbugua.

In cross examination, he stated that he used a delivery book to show that the documents were delivered but he could not remember the floor or the room in Kimathi House or Kalson Towers where he used to deliver the documents.

After the hearing, parties filed written submissions in support of their respective cases, which this court has taken due consideration of. Parties did not file a list of agreed issues but in its submissions, the Plaintiff set out issues for determination, which this court will rephrase as follows:

1. Whether the contents of the letter dated 17th April, 2013 written by the Defendants are defamatory.
2. Whether the words in the said letter refers to the Plaintiff.
3. Whether the words complained of were true.
4. Whether the publication of the letter dated 17th April, 2013 was done on an occasion of both absolute and qualified privileges.
5. Whether there was malice on the part of the defendant in publishing the letter aforesaid.
6. Whether the Plaintiff's entitled to general, exemplary and punitive damages and if so, the quantum thereof.
7. Which party should bear the costs of the suit.

The court has carefully considered the pleadings herein, the evidence on record, both oral and documentary and the rival submissions by both parties, supported by the list of authorities relied on.

From the pleadings and the evidence on record, the cause of action herein is that of defamation. The tort of defamation is defined variously with not one agreed single definition that fits all but just to sample a few;

In the English case of Scott vs. Sampson (1882)QBD 491 at page 503, dare, J, Defined the word “defamation as “A false statement about a man to his discredit”.

The leading English Monograph of Gatley on the subject of defamation defines it as thus:

“Any imputation which may tend to lower the Plaintiff in the estimation of the right thinking members of the society generally.”

The definition of what a defamatory statement is was also given by the Court of Appeal in the case of Musikari Kombo vs. Royal Media Services Limited (2018) eKLR, in which the court referring to its own decision in SMW vs. ZWM (2015) eKLR stated as follows:-

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

The test whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but what a reasonable person reading the statement would perceive. In Halsbury’s Law of England 4th Edition Vol. 28 at Page 23, the author opined;

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense”.

The Common Law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person. The same protection is also anchored in the Constitution under Article 33 (1)(a) as read with clause (3) thereof of the Constitution, which provides:

33(1)(a) Every person has a right to freedom of expression, which include freedom to seek, receive or impart information or idea.

Clause (3) provides

‘In exercise of the right to freedom of expression, every person shall respect the rights and reputation of others’

The elements of the tort of defamation were well laid out in the case of J. Kudwoli vs. Eureka Education and Teaching Consultants & 2 others HCCC No. 126 of 1990 as;

- a. The matters to which the Plaintiff complains about were published by the Defendant.
- b. The publication concerned or referred to the Plaintiff.
- c. That it is Defamatory in character.
- d. That it was published maliciously.
- e. That in slander/subject to certain exceptions, that the Plaintiff has thereby suffered special damage. The same elements have been espoused in the case of Wycliffe A. Swanya vs. Toyota East Africa Limited and Francis Masai (Nairobi No. 70 of 2008).

The essence of a defamatory statement is its tendency to injure the reputation of another person. It’s however upon the Plaintiff to show or establish how he was exposed to public hatred, contempt or ridicule or that the words had caused him to be shunned or avoided by certain people. The Plaintiff has also to prove the actual words complained of and it is not sufficient to show that Defendant made a defamatory statement see Gatley on Libel and Slander (8th edition)

After having set out the evidence and the law regarding the tort of defamation, I now proceed to consider the issues as reframed. The Plaintiff has complained about the contents of the letter dated 17th April, 2013 by the Defendant to ICPK which it contends are defamatory. The subject of the said letter is “professional misconduct”. The same was written by James Boorman who is one of the Directors of the Defendant and in the introductory part of it, he states, he would like to submit a complaint about the Plaintiff.

According to DW1, the letter was necessitated by the Plaintiff’s denial of ever having been Auditors of the Defendant. On the part of the Defendant, it is contended that they had utilized the services of the Plaintiff for over a period of many years as their officially appointed Auditors for their annual accounts. The defendant further contended that the said denial by the Plaintiff has had a serious detrimental effect on obtaining all their necessary licenses for the 2013 period, aside from having to re-audit all their accounts from the year 2008 which actions were proving an obstacle to the Defendant. The Plaintiff maintained that they did not audit the accounts in issue.

On whether the letter was defamatory or not the plaintiff submitted that in their natural and ordinary meaning and by innuendo, the words are reasonably understood to mean that the Plaintiff is unprofessional, unscrupulous, lacked integrity and was not worthy practicing as Auditors. The Plaintiff further submitted that the words complained of, would clearly tend to lower it in the estimation of the right thinking members of the society generally and would expose it to ridicule amongst its professional colleagues and cause it to be shunned or avoided by any member of the public or entity seeking audit services.

Further the Plaintiff submitted that no reasonable person would want to seek audit services or engage on audit firm which has engaged in professional misconduct and is a disgrace to all financial service providers and particularly where an audit firm conducts an audit, prepares an audit report and later disown it.

The defendant submits that the letter was not defamatory at all and

has pleaded the defence of qualified privilege.

The Defendant urged that it lodged a bonafide complaint against the Plaintiff to ICPAK which is the regulatory body of the Plaintiff. They have relied on the defence of justification and qualified privilege. For the Defendant to succeed in the defence of justification it has to prove that the contents of the subject letter were true. It is trite law that a defamatory statement is presumed to be false, unless the Defendant can prove its truth and the law puts the burden of proving the truth of alleged defamatory statement on the Defendant, rather than the Plaintiff. The Defendant also raised the defence of "qualified privilege". The essence of this defence is that the person making a statement has a duty to do so and that the person who hears or reads the statement has a corresponding interest in doing so. This defence is by no means limited to the publication of stories by the media, but it is in that context that the idea of publication in the public interest is at its most pronounced.

In support of the defence of qualified privilege, the Defendant relied on the provisions of the Accountant's Act and more particularly Sections 30 and 31 of the same. Section 31 sets up a Disciplinary Committee of ICPAK to inquire, consider and adjudicate over disputes relating to alleged professional misconduct of its members(accountants) while Section (30 lists what constitutes professional misconduct and avers that the Plaintiff was under an obligation to observe professional standards required of him by ICPAK.

The defendant has a legal duty to ensure professionalism, receive complaints against its members. The defendant quoted an extract from Halsbury's Law of England, 4th edition vol. 28 as follows:

On grounds of Public Policy the Law affords protection on certain occasion to a person acting in good faith and without any improper motive who makes statement about another person even when that statement is infact untrue and defamatory. Such occasions are called occasion of qualified privileges. The principal categories of qualified privilege are:

1. Limited communication between person having a common and corresponding duty or interest to make and receive the communication.
2. Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.
3. Air and accurate reports, published generally, of the proceedings of specified persons and bodies.

To defeat this defence, the Plaintiff must prove that the Defendant in publishing the words complained of was actuated by express malice". See the case of *Simon Kimanzi vs. Kambua Kamwila (2015) eKLR*.

The letter dated the 17th April 2013, which is the subject of this suit is a complaint letter by the defendant against the plaintiff to ICPAK. The same was done by the Defendant after the Plaintiff denied having audited the Defendant's accounts. The evidence on record will reveal that the Plaintiff and the Defendant were known to each other in that the Plaintiff expressly admitted having audited accounts for sister company's to the defendant but denied having audited those of the defendant.

Among the exhibits produced by the Plaintiff is a letter dated 11th August, 2010 (exhibit 4) which was the appointment letter of the Plaintiff by the Defendant as its Auditors which appointment the Plaintiff declined vide its letter dated 11th March, 2013. the letter dated 11th March, 2013 was done almost three years after the appointment letter. The court however, notes that no reason was given by the plaintiff for declining the appointment. It is also not clear why the plaintiff took too long to decline the said appointment. In between the appointment and the declining of the same, parties herein had entered into negotiations regarding auditing of the defendant's Accounts for the years 2009 – 2012. Such communication is evidenced by the letter dated 24th January, 2013. It would however appear that they were not able to agree on the professional fees to be charged for the said audit. The quotation is contained in the letter dated 24th January, 2013 at Kshs. 230,000/- for each year but before this engagement could materialize a report was made by the Defendant to the CID.

The Defendant contends that the Plaintiff audited its accounts. The audit reports which were produced in evidence were marked as exhibits 8, they are for years ended 30th September, 2009, 2010, 2011 and 2012. The reasons given by the Plaintiff for their denial to having audited the Defendant's accounts for the aforesaid period were that according to them, they did not have an employee by the name Joseph Robert Mbugua. In the letter dated 23rd January, 2013 the name used is different from theirs in that the name appearing there is Geoffe and not Geoffe. They also took issue with the physical address used on that letter which is for their previous office in Kimathi street contending that by the time the letter was written they had moved to Kalson Towers and they had informed ICPAK of the change of address vide their letter dated 30th July, 2012 which change had also been reflected in their letterheads.

Before I can make my finding on whether the aforesaid letter was defamatory of the plaintiff, it is important for this court to point out that the plaintiff made allegations that the audited accounts relied on by the defendants were forgery. It will be recalled that the Defendant withdraw its complaint to ICPAK and also to the CID and therefore, the allegation of forgery, being criminal in nature, this court cannot make a conclusive find on it as that can only be done through a criminal process after the police have carried out thorough investigations and after having subjected the signatures to examination by a document examiner. The most this court can do with the evidence and the material before it, is to weigh the evidence adduced by both parties and determine whether the Plaintiff's case has succeeded on a balance of probability.

The court cannot also make a finding as to whether the Plaintiff committed professional misconduct as alleged as the only body mandated to do so is ICPAK. The Defendant having withdrawn its complaint against the Plaintiff did not give ICPAK a chance to hear the complaint and come up with its findings.

From the evidence on record, this court can safely conclude that the Plaintiff had audited books of accounts for the sister companies to the Defendant until the year 2013, when the engagement ceased.

With regard to the relationship between the Plaintiff and the Defendant itself, the letter dated 11th August, 2010 is very material. This is the letter by the Defendant appointing the Plaintiff as its auditors. Paragraph 2, thereof gives the Plaintiff the liberty to contact the previous auditors of the Defendant in seeking professional clearance. On its part, the defendant contends that the 2nd paragraph was included as a formality and it's just a standard procedure when engaging the services of an auditor. The plaintiff did not tell the court whether there were previous auditors and whether they sought professional clearance from them. It therefore remains unclear whether there were previous auditors.

By a letter dated 11th March, 2013 the Plaintiff declined the said appointment. Of interest is the quotation contained in the letter dated 24/01/2013. Up to this point, it is clear that parties could not agree on the professional fees and therefore the audit for those years was not undertaken. The question then that begs is; who prepared the audit accounts marked as defence exhibit number 8? Why would the Defendant wish to engage the Plaintiff in 2013 when the audit for the same period that they were seeking the Plaintiff to audit their accounts had been done? The genuineness of the accounts exhibited by the Defendant leaves alot to be desired. All the copies of those accounts are purportedly signed and dated before the year 2013 when parties were negotiating on the fees for auditing of accounts for those years.

It is the Defendant who wishes the court to believe those reports were genuinely prepared by the Plaintiff. It did not tender any evidence before this court to prove that indeed the said services were paid for and the instructions letter to the Plaintiff to carry out the audit. It is therefore my considered view that it is more likely than not that the Plaintiff did not audit the Defendant's accounts for that period in dispute.

With regard to the letter dated 23rd January, 2013 relied on by the Defendant, the court is persuaded by the contents of the letter dated 6th May, 2013 which shows the partners of the Plaintiff as Robert Kamau Mbugua and Kamau Geoffrey with their membership numbers as 8639 and 3877 respectively. The Plaintiff denied having an employee by name Joseph Robert Mbugua as at that time. No evidence was adduced by the Defendant to the contrary.

The physical address in the said letter is also worth noting. The evidence by PW1 is that the Plaintiff had changed its physical address from Kimathi House to Kalson Towers and it communicated the change to ICPAK vide a letter dated 30th July 2012. Though the court was not told exactly when the Plaintiff moved to Kalson Towers, it is evident that by 30th July 2012 they had moved. Any reasonable person would have expected the Defendant to have known of the Plaintiff's new physical address considering that the Plaintiff was acting for Defendant's sister companies who shared directors with the Defendant. In view of the above, it's my considered opinion that the letter did not originate from the Plaintiff.

From the above analysis, I have no hesitation in finding that the letter dated the 17th April, 2013 was defamatory as the contents were not true. In those circumstances the defence of justification is not available to the Defendant.

On whether there was malice on the part of the Defendant, the court in the case of *Phineas Nyaga vs Gitobu Imanyara (2013) eKLR* stated that:

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice.....”

Malice may also be inferred from the relations between the parties.....”

The court has taken time to peruse the letter in issue. Though the Defendant avers that it is a complaint against the Plaintiff, this court takes great exception to the contents of the last paragraph of that letter and I quote;

“As the governing body for all Certified Public Accountants for Kenya, I would like to submit a complaint and proof that Geoffee & Associates were our accountants and their behaviour is a disgrace to all financial services providers in Kenya. We can only conclude that this particular Auditor has acted with Gross Professional Misconduct”.

I would like to note that the language used in that paragraph denotes malice on the part of the Defendant as it imputes professional misconduct on the part of the Plaintiff. The contents of that paragraph have some relevance to the Defendant's defence of qualified privilege in that from the said paragraph the Defendant went beyond making a formal complaint and made its own conclusion about the Plaintiff's professionalism. The language used was utterly beyond or disproportionate to the acts which leads t an inference of malice.

The court having made a finding that the contents of that letter are defamatory and having commented on the contents thereof, the defence of qualified privilege cannot stand. I therefore dismiss the same as well. The language used was not bonafide.

On general damages, I have considered the submissions by both parties and the authorities cited. I remind myself that award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure.

In the case of *Johnson Evan Gicheru vs. Andrew Morton & Another*, the court had this to say on assessment of damages

“In actions for libel the trial court in assessing damages is entitled to look at the whole conduct of the Defendant from the time the libel was published down to the time the verdict was given. It may consider what his conduct has been before action, after action and in court during the trial”.

In *Broom V. Cassel* the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even more highly subjective element. Such actions involve a money award which may put the Plaintiff in a purely financial sense in a much stronger position than he was before the wrong. That merely can be to recover the estimated sum of his past and future losses, but in case the libel, driven, underground emerges from its lurking place at some future date, he must be able to point to a sum awarded by a sum sufficient to convince a bystander of the baselessness of the charges.

In awarding damages, the court draws considerable support from the guidelines in the case of *Jones V. Poland (1997/EMLR 233 -243* where a checklist of compensatable factors in libel actions were enumerated as follows;

1. *The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it was published, and any repetition*
2. *The subjective effect on the plaintiff's feelings not only from the provinces itself, but from the defendant's conduct thereafter both upto to and including the trial itself.*
3. *Matters tending to mitigate damages, such as the publication of an apology*
4. *Matters tending to reduce damages*
5. *Vindication of the plaintiff's reputation past and future.*

On general damages, the plaintiff has urged the court to award Kshs. 15 million and has relied on the case of *Alnasir Visram Vs. Standard Limited (2016) eKLR Samuel Ndung'u Mukunya vs. Nation Media Group Limited & Another (2015) eKLR* and that of *Miguna Miguna Vs. Standard Group Limited & 4 others* where Kshs. 18, 15 and 5 million were awarded respectively.

On aggravated damages, the Plaintiff cited the case of *Samuel Mukinya (supra), CAM vs. Royal Media Services Limited (2013) eKLR* and that of *Kalya & Another vs. Standard Limited (2002) 2KLR* where Kshs. 3, 500,000/-, 1,500,000/- and 2,000,000/- were awarded respectively.

On exemplary damages, the Plaintiff asked the court to award Kshs. 5 million citing the cases of *Samuel Ndung'u Mukunya and CAM (Supra)* and that of *Francis Xavier Ole Kaparo Vs. Standard Limited & 3 others (20101) eKLR* where Kshs. 12, 000,000/- 1,500,000/- and 2,000,000/- were awarded respectively.

On damages for failure to issue an apology the Plaintiff urged the court to award Kshs. 1,500,000/- relying on the cases of *Gideon Mose Onchwati Vs. Kenya Oil Co. Limited & another (2015) eKLR* and that of *Samuel Mukunya (Supra)* where Kshs. 500,000/- and Kshs. 1,500,000/- respectively were awarded.

The Defendant did not address the court on the quantum of damages.

Being guided by the principles as espoused in the case of *Jones Vs. Poland* the court notes that the letter was written to only one body that is ICPAK and it was not copied to anybody else and therefore the scope of circulation was minimal. I also note that the defendant withdrew its complaint both with ICPAK and with the Criminal Investigation Department which was a positive aspect towards reduction of damages and which has a direct bearing on aggravated and exemplary damages.

Having addressed my mind to the above, it is my considered view that the Plaintiff is not entitled to exemplary and aggravated damages as no evidence has been adduced in this court to prove any aggravating factors.

With regard to the general damages, the court has taken note of the authorities cited, all considered, I find that a sum of Kshs. 500,000/- is reasonable in the circumstances of this case. The court also makes an award of Kshs. 200,000 for failure to apologize on the part of the Defendant even after it withdrew its complaint to ICPAK.

Before I conclude, the Defendant raised the issue of the Plaintiff's capacity to sue in this matter. Though the issue was raised in the final submissions, being a point of law, its only fair that the court addresses its mind to it.

The Defendant has contended that the suit is fatally defective as the Plaintiff is incapable of suing and or sustaining the present suit under its own name. In response, the Plaintiff relied on Section 30(1) of the Civil Procedure Act which provides that a partnership may institute a suit in its own name or in the names of the partners.

In this regard, the court takes note of defendants exhibit number 15 which is a letter dated 6th May, 2013 from ICPAK which confirms that the plaintiff is a partnership.

I am persuaded by the submissions by the Plaintiff that under Section 30(1) of the CPA, a partnership may institute a suit in its own name and therefore the suit is properly before the court. The Plaintiff shall also get the costs of the suit.

Dated, Signed and Delivered at NAIROBI this 20TH Day of JUNE 2019.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Plaintiff

..... For the Defendant