



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 539 OF 2012

ALFRED ALUVAALA.....PLAINTIFF

VERSUS

MOSES MUHIA.....1ST DEFENDANT

THOMAS OGOLA.....2ND DEFENDANT

JUDGMENT

By way of a plaint dated the 2nd November 2012, the plaintiff herein filed this suit against the defendants, praying for judgment on general, exemplary and aggravated damages pursuant to alleged defamatory statements in the letters dated 7th November, 2011 and 20th January, 2012 which were addressed to the chairman of the institute of quantity surveyors of Kenya and copied to individuals who are said to belong to the same profession or related profession and who know the plaintiff.

The plaintiff also prayed for injunctive orders restraining the defendants from writing or causing to be written, similar words.

The contents of the said letters dated 7th November, 2011, 20th January 2012, and 2nd April 2012 are reproduced here below as follows;

On or about 7th November 2011, the 1st & 2nd Defendants wrote a letter to the Chairman of the Institute of Quantity Surveyors of Kenya, and had the same copied to Charles Lubano, Q.S Mbugua and Eng. Sam Mambo which letter is set out herein below;

“It has come to our knowledge that your office released the cheque to Mr. Diru Eziano, the KFMB Chairman who together with your Council member, Q.S Alfred Aluvaala and KFMB Ag. Treasurer connived to fraudulently withdraw the same amount and converted it to their own use. This is despite having informed you that there were issues to be sorted out within the secretariat of KFMB.

Q.S Aluvaala had been a member of KFMB and a signatory to our account until he officially resigned on 28th September 2010 as per attached correspondence and his resignation was accepted and confirmed on 8th October 2010. His resignation was prompted by his criminal act of stealing and converting KFMB furniture and equipment from our office which were traced to his house and the offices he shares with the chairman of IQSK.

Our office suspects full knowledge of the said intended actions by the council member,

further boisted by the reactions of the Chairman and Treasurer of IQSK.

It appears that professional ethics and integrity at IQSK have been relegated to the back room.

That on or about 20th January 2012, the 1st Defendant wrote a libelous letter to the chairman of the Institute of Quantity Surveyors of Kenya, and the same was published and copied to Mr. Thomas Ogola, Q.S Alfred Aluvaala, Q.S Michael Mbugua, Mr. Charles Lubano and Moses Enziano as set out herein below;

“...you are also fully aware that Q.S Moses Muhia was hired, retained and remunerated by LGH but not by IQSK, as the project Director to oversee the successful implementation of the project sponsored by the European union, which is now the subject in question.

You, on your own, decided to work with Mr. Enziano in dubious circumstances where he and your partner, an IQSK Council member, connived to fraudulently embezzle KFMB members’ funds....”

Further, on 20th January 2012, the 1st Defendant wrote and had the same published and copied to the Permanent Secretary- Ministry of Public Works and the Chief Quantity Surveyor- Ministry of Public Works stating inter alia:-

“...I on behalf of Kenya Federation of Master Builders acknowledge receipt of your letter ref: IQSK/CHARM/12/2011 of 15th December 2011, copied to the Permanent Secretary and the Chief Quantity Surveyor Ministry of Public Works in response to ours of 7th November 2011.

There is no dispute as to the role that IQSK plays in the construction industry. KFMB recognized this role way back in 2004 before IQSK started the capacity building programme. It invited Council member Q.S Alfred Aluvaala to join KFMB as a Technical Director in order to link the two organizations for the purposes of much needed capacity building for the SME’s and local contractors.

We jointly held four successful workshops in Nairobi, Nyeri, Kisumu and Nakuru. You will appreciate that if the programmes are discussed and agreed upon by KFMB and IQSK, the two organizations stand to benefit. During the implementation of the LGH, E.U sponsored programme for capacitating IQSK, KFMB and ACEK secretariat we held discussions with you on the way forward.

Our associations started drifting apart when the Technical Director converted KFMB property and equipment for his personal use, an act that led to his resignation as a member of and director of KFMB. It accelerated when he and KFMB chairman connived to fraudulently withdraw KFMB members’ money from the bank with your full knowledge, a matter that is under investigations. KFMB chairman thereafter absconded from office and all attempts to recall him have failed. The workshops which were held later at Eldoret and Kisumu were done outside the realms of KFMB where the KFMB chairman and treasurer were allowed to recruit contractors to join KFMB and shared the proceeds from membership fees. They did not account for the funds.

This is the main reason KFMB has reason to believe the main objective of holding the workshops and hoodwinking the contractors that the workshops are held on behalf of Ministry of Public Works is to raise funds for IQSK and sharing the proceeds of recruitment of KFMB contractors between the chairman, Treasurer and some members of IQSK.

The Secretariat is ready at any time for arbitration by the permanent secretary, ministry of

Public Works, who we respect for the concerns he has for non performing contracts.

We hope this would help to re- establish a common approach to issue at hand....”

On or about the 2nd April 2012 the 1st & 2nd defendants also wrote a letter which is set out here below with the relevant offensive portions.

“You are aware that together with others fraudulently withdrew ksh 366,000 from our account at Equity Bank and converted the money to your own use.

By your admission as per the minutes held on 8th March 2012 at the Chief Quantity Surveyor’s office and confirmation at our follow up Executive Committee meeting held at the offices of KFMB on 15th March 2012 we hereby give you 14 days notice to refund the same failure to which we shall have no alternative, but to forward the above minutes to the Bank Fraud investigation department to follow up on the investigations already in their hands.

We hope that you will address the matter with the importance it deserves.”

The plaintiff avers that the words in the said letters as written by the 1st and 2nd defendants in their natural meaning meant or were understood to mean that; the plaintiff is dishonest and unscrupulous person, he is a corrupt person of low morals and integrity, he is involved in fraudulent activities and that he is a criminal.

He avers that he is a reputable and honest member of Kenya Federation of master Builders, he is not a criminal, he is a man of integrity and has never converted any property belonging to the Federation of master Builders for his own personal use, that he never fraudulently withdrew a sum of Ksh 366,000 or any amount from any account belonging to the Kenya Federation of master Builders (KFMB) and therefore the said letters in their ordinary and natural meaning and by innuendo are defamatory to his character.

He contended that the defamatory letters have injured his character and have lowered his reputation in the estimation of those people known to him, friends and the society at large and that they have brought him into public scandal and embarrassment considering his standing in the society. He avers that the defendants wrote the said letters out of malevolence or spite towards him when they knew the said words to be false and in the knowledge that they were libelous of him.

The defendants filed a joint statement of defence on the 14th day of December 2012 and averred that the suit is bad in law and an abuse of the court process and that it discloses no cause of action against them. They denied all the allegations of fact contained in the plaint.

The defendants admitted having written the letters alluded to, but avers that the same were written by them in their official capacity as elected officials of Kenya Federation of Master Builders, in furtherance and to safeguard the interests of the Federation. They further contended that as far as the Federation is concerned, the words complained of consists of statements of fact which are true in substance and in fact, the particulars whereof are set out in paragraph 6 of the plaint.

The defendants have denied that the letters referred to, are in any way defamatory or that they lower the plaintiff’s reputation in the estimation of the right thinking members of the society generally, in that the letters were written to specific officers for appropriate action and no publication was done to the plaintiff’s peers, friends or society at large as alleged.

They averred that they wrote the letters in their privileged capacities as the elected officials of the Federation, and in writing the letters, the Federation was not actuated by malice nor were the letters an attack of the plaintiff’s reputation as alleged.

In his evidence, the plaintiff told the court that he was the technical director of KFMB since 1998 which he joined at the invitation of the chairman, who told him they needed a technical person to assist the members on technical matters. That he helped the organization for some time and since it was voluntary, it reached a point he got busy in the office and he decided to resign on the 28/9/2010 vide a letter of even date which resignation was accepted vide a letter dated the 8/10/2010. The letter was accepted subject to him returning some items that belonged to the Federation which included mobile phones and some Microsoft windows. He denied having those items in his possession and averred that he had submitted them all.

It was his further evidence that at same point when the Federation was in rent arrears and auctioneers wanted to auction their goods, he took the items in his custody to save the Federation from distress for rent. That the Federation's letter dated 13/10/2010 confirmed to him that they had received back all the items that they were demanding from him and they thanked him for keeping them safely.

That he was one of the signatories to the bank account together with the chairman, the national co-ordinator and the treasurer and any three could sign. It was his evidence that after he had resigned he did not have powers to sign the cheques but on 14/10/2010, he received a letter from the chairman of the Federation asking him to withdraw his resignation. That on the 16/11/2010 he wrote back withdrawing his resignation and resumed his duties as the technical director which included his mandate as a signatory.

On his cause of action, he stated that from the year 2011, the two defendants started writing defamatory letters in which he was referred to as fraud and was accused of having taken money from the Federation. Referring to the letter dated 7/11/2011, he stated that the money he is alleged to have stolen was withdrawn by the chairman, treasurer and himself. He also denied having stolen any property belonging to the Federation as alleged in the aforesaid letter. He averred that he was not taken to court for stealing the money and that though the officers of the banking fraud asked him to write a statement, they cleared him of any wrong doing. It was his evidence that the money was withdrawn on 27/2/2011 after he had been re-appointed back by the chairman and the same was disbursed by the treasurer as required by the Federation. He said he did not know how the money was used.

In cross-examination, it was his evidence that his appointment as a technical director was verbal, that he was appointed as a signatory after one of the signatories died and that he resigned on his own volition as the Federation was getting busy and his resignation had nothing to do with the alleged stolen furniture which the Federation asked for.

He admitted that he was aware of a trip by KFMB members to Germany but he was not among those who travelled and he did not participate in the planning. He stated that he did not know whether the members who did not travel were entitled to a refund. That he did not enquire why the treasurer needed to withdraw the money but he was aware that for any expenditure to be approved there had to be a committee meeting authorizing the same. He said he could not remember whether he attended any meeting after he tendered his resignation. He could also not remember whether after the withdrawal of the money there was a committee meeting to discuss how the money was utilized and whether the money was used for the intended purpose.

In his further evidence, he stated that the letter dated 7/11/2011 was written to the institute of quantity surveyors and copied to several people but he could not tell whether the people it was copied to, indeed received those letters, but he could remember receiving a complaint from a Mr. Mbugua who was a member of the government Council.

In re- examination he averred that in the meeting that took place on 8/3/2012, he did not make any admission of having misappropriated any money belonging to the federation. He admitted that the letters dated 7/11/2011 and 20/11/2012 were written by the defendants on the letter head of the federation.

The plaintiff called one witness who testified as PW2. He was the National Chairman of KFMB between 1999- 2010 and he is the one who invited the plaintiff to the federation as the technical director. He told the court that the plaintiff had problems here and there and was forced to resign from the Federation but

he prevailed on him to stay on. Upon resignation, the plaintiff was to hand over the furniture to the Federation and the plaintiff told him that he was securing the furniture for the Federation. He collected it in the company of one Mr. Muhia the national coordinator and he did a letter dated 13/10/2013 informing the plaintiff that the Federation was able to get all the equipments that the plaintiff was holding.

He further told the court that the plaintiff agreed to withdraw his resignation vide a letter dated 16/11/2010 and he resumed his duties as the technical director which included being a bank signatory to one of the accounts of the Federation. That they were four signatories and any three could sign. He stated that for purposes of operating the account, it was not a must for them to meet but they used to consult. That the national treasurer was responsible for the funds to ensure it was used for the purposes for which it was withdrawn. He stated that the plaintiff never withdrew any monies at all for his personal use as alleged. He admitted that ksh 328,000 that was withdrawn and given to the treasurer had been collected from members for a trip that had been organized for contractors.

It was his testimony that the decision to withdraw the money was made by himself and plaintiff on behalf of the Federation. He said he did not know whether the plaintiff was given some of the money. According to him, the money was to be used to pay the secretary and the Auditor and the balance was to be used to travel to Kisumu and Eldoret. That the plaintiff and himself were cleared of any wrong doing by the Banking fraud and the matter ended there. He stated that the letters dated 20/1/2012 and that of 7/11/2011 were written by the defendants without his authority as the chairman of the Federation. He denied knowledge of the minutes dated 15/3/2012 and it was his evidence that he did not attend the said meeting and the signature appended thereon is not his. According to him, the allegations affected the character of the plaintiff because they were false.

In cross- examination, he stated that it was the work of the secretary General to keep records of the organization and he is also charged with the duty of writing letters. He stated that, he saw the letter dated 7/11/2011 in court for the first time. He denied that the cheque in issue was a refund but rather it was income to the Federation. He said he attended a meeting on 15/3/2012 whose agenda was to reconcile the members but no resolution was reached. He admitted that when he wrote the letter dated 13/10/2010 he did not consult the first defendant. According to him, the plaintiff by keeping the equipment was doing them a favour. That there was a meeting following which the letter dated 14/10/2010 was written. He could not recall if there were minutes but the defendants were not there but he informed them via phone that the plaintiff was back. He could not recall how the ksh.328,000 was utilized.

In his further evidence, he stated that the Federation borrowed money to pay the auditor and that the executive committee was informed how the said amount of money was spent. He denied having withdrawn the money from the Federation for his personal use but admitted that the letters that were done by the defendants were done on behalf of the Federation and they did so, in their official capacities.

The defendants called one witness in support of their defence, the first defendant, who testified as DW1. In his evidence he said he knew the plaintiff as they served together at KFMB in the executive committee and the plaintiff was supposed to report through his office. It was his evidence that a cheque of ksh. 328,000 which money was to be refunded to members who did not travel to Germany was released to the plaintiff, PW1 and the treasurer and the money had been paid to the three of them. By that time the plaintiff had already resigned on 28/9/2010 but the withdrawal was done on the 9/8/2011. A further sum of ksh. 38,000 had been withdrawn on the 30/8/2011 by the same people. According to him, the plaintiff was not recalled by the Federation. He stated that he saw the letter dated 14/10 2010 when he was served with the plaint and it surprised him.

He denied that there was a meeting that took place on 12/10/2010. It was his evidence that the Federation's constitution allows re-calling of a person after he has resigned but such a resolution could only be made during an A.G.M and there was no A.G.M until 2012. He stated that he saw the letter dated 16/11/2010 when he was served with the plaint in this matter as the same was not copied to him. After he discovered that the cheque had been released, he lodged a complaint with the banking fraud and by this time, he was not aware of the letters dated 14/10/2010 and 16/11/2010. He told the court that he does not know how the money was spent. It was his evidence that the money was for members of KFMB and it

was supposed to be refunded back to those who did not travel to Germany, which was never done, and to date they are still demanding their money back. He refuted the assertion that the money was used to pay the secretary and the Auditor as the Federation did not have a secretary at the material time and it was using his secretary. That there was no record that the auditor was paid and though they had an invoice from the Auditor, he cleared the balance on behalf of the Federation using the funds that he advanced to the Federation.

He confirmed that there was a meeting on 8/3/2012 between the officials of KFMB and those of the institute of quantity surveyors of Kenya (IQSK) in which the plaintiff and PW2 were in attendance and that during that meeting it was resolved that the officials who had misappropriated money should pay back. He referred to another meeting which was chaired by PW2 whose agenda was the financial irregularities of KFMB during which, the chairman indicated that those who withdrew the money were willing to pay back and though the plaintiff was not there, he was to be contacted so that he could refund the money that he had used. He told the court that the plaintiff carried away furniture belonging to the Federation from their office without permission. That it was only after he had insisted, that the plaintiff admitted that he had them and when DW1 and the chairman went for them from the plaintiff's office, they found the items were being used at the reception and even then, some items were missing but they later collected them from the plaintiff's house.

It was his evidence that when he lodged a complaint with the banking fraud, he was not aware of the withdrawal of ksh. 366,000 as the same was withdrawn later.

In cross examination, he stated that the chairman had the mandate to reply to correspondences depending on the contents of the letter. That the executive committee would discuss the issue but the letter would be replied to by the technical committee. The chairman did not have express permission to respond to the letters on behalf of the executive committee but the committee could sit and decide who was to write letters on behalf. It was his evidence that after the plaintiff resigned, the committee did not meet again. It was his evidence that he drafted all the letters on behalf of the executive committee but they could be signed by the chairman. He further stated that even after the executive committee accepted the plaintiff's resignation they never changed the signatories to the bank account and he remained one. That though he complained to the banking fraud about the ksh. 386,000, no official report has ever been given to the Federation on the investigations. He insisted that the contents of the letters complained of are true and that the letters were copied to the people who were dealing with the project

The court has carefully considered the evidence on record and the submissions by the respective parties. In my view, the following are the issues for determination.

- a) Whether the publication was defamatory?
- b) Was the same false and malicious?
- c) Was the publication written by the defendants and does it refer to the plaintiff?
- d) Was the publication written by the defendants in their official capacity?
- e) Is the plaintiff entitled to damages for defamation?
- f) Who is to bear the costs of the suit?

The tort of defamation consists in publication of a false and defamatory statement concerning another person without any lawful justification. In the **case of Ondonkara Vs Astles (1970) E.A 374**, a defamatory statement was described as follows:

A statement is defamatory of a person of whom it is published if, it is calculated to lower him in the estimation of ordinary, just and reasonable men;

The elements of the tort of defamation are well set out in the **case of J Kudwoli Vs Eureka Educational and Teaching consultants & 2 others Hcc No. 126/1990** which are;

1. The matter of which the plaintiff complains was published by the defendant.
2. The publication concerned or referred to the plaintiff.
3. That it was defamatory in character.
4. That it was published maliciously and;
5. That in slander, subject to certain exceptions the plaintiff has suffered special damages.

These principles were repeated in the **case of Wycliffe A. Swanya Vs Toyota East Africa Limited and Francis Massai Nairobi CA. No 70/2008.**

Applying the above principles, it is not in dispute that the letters complained of were written by the defendants and that they referred to the plaintiff.

Were the letters defamatory?

The plaintiff alleged that the defendants wrote several letters which were defamatory of him. The said letters are dated 7/11/2011, 20/1/2012 and were written to the chairman, institute of quantity surveyors of Kenya and copied to modernising construction and marked to the attention of Charles Lubano, Q.S Mbugua, Engineer Sam Mambo, Thomas Michael Ogola, the plaintiff, Charles Lubano and Moses Enziano respectively. The one dated 2/4/2012 was written to the plaintiff.

In the two letters written to the chairman of institute of quantity surveyors of Kenya the subject matter was **“refund of a cheque to KFMB”**. The evidence on record is that the cheque refund of 328,759 was for KFMB members who did not travel to cologne for USETEC Trade fare. The IQSK secretary had notified the KFMB that the cheque was ready for collection and KMFMB had advised IQSK that the cheque should be deposited into KFMB account as per their letter dated 1/8/2011.

That contrary to the said instructions, the cheque was released to Mr. Diru Enziano, the plaintiff herein who was the acting treasurer, and the chairman of KFMB who testified as PW2. The three of them colluded, and withdrew the money.

It is clear from the evidence on record that the people to whom the cheque was released, the plaintiff being one of them, knew at all material times that the money was to be refunded to the people who did not travel to cologne for the trade fair, yet, after they withdrew the money, they did not refund the money to them. They received the cheque contrary to the instructions that KFMB had given to IQSK to deposit the money into its account.

It is also worth noting that the recipients of the cheque could not account for money. According to the plaintiff and PW2 (who were among the people who were paid the cheque) the money was used to pay the secretary and the Auditor. They did not tell the court how much money was paid to each, if at all. It was also the evidence of DW1 that, at the material time, the association did not have a secretary and it was using his secretary. It is not therefore true that part of the money was used to pay the secretary. In short, they did not account for that money. In his evidence, the first defendant told the court that he lent money to KFMB to pay the Auditor, a fact which was confirmed by the PW2. In view of that evidence, it is therefore true that the plaintiff and PW1 misappropriated the Ksh. 328,759 as they could not account for it.

It is on record that the first defendant lodged a formal complaint to the banking fraud unit against the plaintiff who was accused of misappropriating KFMB's money. Though the plaintiff contended that he was cleared after the investigations were carried out, he did not produce any evidence to that effect, and

in any event, the evidence by the first defendant is that the police did not tell them the outcome of the investigations.

In the letter dated 7/11/2011, the plaintiff is alleged to have converted KFMB furniture and equipment which were traced in his house and the office, as per the evidence on record. Both the plaintiff and the first defendant were in agreement that the furniture and the office equipment were traced in the plaintiff's office. The question that begs is, how did those items get there? The plaintiff on his part stated that he removed them from KFMB offices to save them from attachment by the landlord after the organization had failed to pay rent and it was in arrears. But what is of interest is that the plaintiff did not notify the officials of KFMB that he had taken away the said furniture for safe keeping as alleged, until they discovered on their own and even then, he had denied the fact that they were in his possession, until they insisted after the landlord disclosed to them that it was the plaintiff who took them away. One would wonder why he had failed to disclose.

It is also noted that the office equipment that were traced in his office were being used at the reception, a fact which the plaintiff did not deny. If indeed, he had taken the equipment for safe keeping he ought not to have used them for his own benefit without permission from the organization. From the foregoing, the plaintiff's intentions were not good and there was no good faith on his part. It is also noted that at the time of filing the suit the plaintiff had not yet returned all the property belonging to KFMB that was in his possession.

Among the documents produced by the first defendant, is the constitution and the Rules of KFMB. Clause 17, (c) of the said constitution provides;

“ No payments shall be made out of bank accounts without a resolution of the Executive committee authorizing such payments and all cheques on such bank accounts shall be signed by the National Treasurer, the General Secretary and either the chairman or the national coordinator”

The plaintiff did not produce any resolution by the executive committee authorizing the withdrawal of the money.

The first defendant also produced minutes of KFMB for the meeting held on the 21/12/2010. In attendance were the first defendant, PW2 and Thomas Ogola. Under Min 02/12/20120, on matters arising, it was noted that the plaintiff had not responded to the demand by KFMB for the remaining equipment. The chairman was to follow up the matter and report back progress in the next meeting.

The minutes of the meeting held on 8/3/2012 between the officials of KFMB and those of IQSK were also produced as an exhibit.

The said meeting had been called by the Chief Quantity Surveyor after it was realized that there was a dispute between KFMB officials and the Chief Quantity Surveyor. During the deliberations, it came out that the dispute arose from monies that had been paid to the KFMB by IQSK being refund for KFMB members who were scheduled to travel to Germany but they did not. It was resolved that the officials who mishandled the money repay it so that it could be forwarded to the intended beneficiaries.

It is noted that the plaintiff was in that meeting and there is nothing on record to show that he raised any queries and/or denied having mishandled the money.

On whether or not the plaintiff was working for the federation at the material time when the money was withdrawn, it is not in doubt that he tendered his resignation letter dated the 28th September 2010. The said letter indicates that he resigned both as a technical director and a member of KFMB. His resignation was accepted by the National chairman of KFMB Vide a letter dated 8th October 2010 and though it was subject to some conditions, it is not clear if the said conditions were met. However, in a letter dated 13/10/2010, the chairman of the Federation informed the plaintiff that they had received all the items but when the chairman testified in court, he told the court that he did not inform the defendants when he

wrote that letter and the first defendant saw it for the first time when the case was filed. On their part, the defendants maintain that the plaintiff did not return all the items that he had carried away from the Federations premises.

Considering the fact that the plaintiff and the chairman (who testified as PW2) had together cashed the cheque which forms the basis of this claim, I would treat his evidence cautiously and attach very little weight to it. I find the evidence by the first defendant more credible.

The first defendant testified that he did not attend the meeting said to have been held on 12/10/2010 during which the plaintiff was re-called to continue serving the Federation. Indeed, PW2 himself admitted that both the defendants were not in that meeting. The first defendant in his testimony stated that he saw that letter when the case was filed. It is noted that the plaintiff did not produce the minutes for the meeting held on 12/10/2010 that resolved that he should withdraw his resignation. The evidence by the first defendant is that though a member can be re-called after his resignation, that can only be done in an AGM but the Federation did not hold any AGM until 2012. This evidence was not contravened by the plaintiff. In the premises I find that the plaintiff was not legally working for the Federation when he withdrew the money.

Among the defences that the defendants have raised is that the publication contains statements of facts, they are true in substance and that they wrote the said letters in their official capacities as the elected officials of KFMB with the authorization or approval and on behalf of the Federation.

On the defence of Justification, the provisions of section 24 of the Defamation Act are helpful in this case. The section provides;

“In any action for Libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.”

Still on the defence of justification, I would like to quote an extract from Carter Ruck on Libel and Slander 6th edition where the writer has noted the following;

“ In order to succeed upon a plea of justification, the onus is upon the defendant to prove that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn, from them are substantially true..... On the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted, it is sufficient if the substance of the Libelous statement is justified. As much must be justified as meets the sting of the charge, and if anything be contained in the charge which does not add to its sting that need not be justified”

In view of the foregoing I find and hold that the letters were not defamatory and the defendants did not have any malice when they wrote the said letters. The facts contained in the letters are true and the people that they were copied to, were either members of IQSK who were privy to the information that was contained in the said letters and in any event, no evidence was tendered before the court to proof that the people to whom the letters were copied, received them.

The other defence raised by the defendants was that the letters were written by the defendants in their official capacity and are therefore not liable in their personal capacities. I have perused the two letters and the following are noted.

- a) They are both done on the letter heads of KFMB.
- b) The defendants have signed the letters as official of the Federation.
- c) The contents of the letters touches and concerns the KFMB.

In seeking to determine this issue, I wish to borrow some wisdom from Mutuku J in the case of **Mohamed Nasoro Dima Vs Mohamed Omar Soba [2013] eKLR, High Court at Garissa Civil Appeal 1 of 2012** where in dealing with a similar situation, the Judge held that one cannot be held liable when he writes a letter on behalf of a company or a legal entity. I have the same view and hold that even if the contents of the letters were defamatory, which they are not, the defendants cannot be held liable in their personal capacities.

Having been of that view, I find that the plaintiff did not proof his case against the defendants. I therefore dismiss the same with costs.

The law, however, enjoins this court to assess the damages it would have awarded to the plaintiff had he been successful. The court has considered the submissions on quantum of damages. The plaintiff has urged the court to award damages as follows:

- a) General damages- ksh 1.5 million
- b) Aggravated damages – ksh Nil
- c) Exemplary damages – ksh Nil

The defendant did not submit on quantum. In my considered opinion a sum of ksh. 1.5 million Would have been reasonable in the circumstances of this case. I would not have made any award for aggravated and exemplary damages.

Dated, Signed and Delivered at Nairobi this 27th Day of **November, 2017.**

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Plaintiff

..... For the 1st Defendant

..... For the 2nd Defendant