



**Kiplagat v Kwambai & another (Civil Suit 5 of 2023)
[2025] KEHC 1856 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 5 OF 2023
RN NYAKUNDI, J
FEBRUARY 21, 2025**

BETWEEN

CHARITY JEROP KIPLAGAT PLAINTIFF

AND

DAVID KIPRUTO KWAMBAI 1ST DEFENDANT

KENYA FOREST SERVICES 2ND DEFENDANT

JUDGMENT

Background

1. The brief facts of this case are that on or about 28th November 2021 at Loliondo Camp, the 2nd Defendant issued a firearm make “SHE” S/NO. SV 58 and body No. 15905E to the 1st Defendant.
2. That on or about 28th November, 2021, the 1st Defendant shot the Plaintiff using the said firearm make SHE” S/NO. SV 58 and body No. 15905E at Strawbag area, Kapsengerut within Uasin Gishu County. That incident was reported at Naiberi Police Station within Eldoret town while the Plaintiff was rushed to Eldoret Hospital for treatment.
3. The Plaintiff filed a Plaint dated 3rd April 2023 praying for judgement against the Defendants jointly and severally for:
 - a. General damages
 - b. Special damages
 - c. Future medical expenses
 - d. Loss of future earnings
 - e. Costs of the suit and interest on (a)(b)(c) and (d) above.



4. The 2nd Defendant entered appearance through the Attorney General and filed a statement of defence denying liability for the actions of the 1st Defendant. The 1st Defendant despite being served with the pleadings herein did not enter appearance and or file a statement of defence. As a consequence, interlocutory judgement was entered against him in terms of liability.
5. The matter was set down for hearing and determination upon closure of the pleadings regarding the contested issues as to the Plaintiff and the 2nd Defendant.

Plaintiff's case Summary

6. The Plaintiff called 4 witnesses in support of her case. She PW1 testified that on 28th November 2021, she was shot by the 1st Defendant who was employed by the 2nd Defendant who was stationed at Loliondo Camp. She confirmed on cross examination that the 1st Defendant was his former boyfriend who had travelled from Loliondo Camp in Narok and tpo Uasin Gishu County where he shot the Plaintiff. He was arrested and subsequently charged with the offence of attempted murder contrary to section 202(a) of the [Penal Code](#).
7. PW1 claim against the 2nd Defendant was that it was negligent in issuing the 1st Defendant with the firearm used to commit the above offence and such it should be held directly and vicariously liable for the actions of the 1st Defendant.
8. PW2 Dr. Sokobe testified and produced the treatment of documents from Eldoret Hospital. He further prepared a medico-legal report to which he indicated that the Plaintiff sustained severe soft tissue injuries due to a gunshot, from which she had recovered. He further testified that the Plaintiff would require Kshs. 300,000/= for future medical treatment for psychological counselling and physiotherapy.
9. PW3 produced a copy of the police inquiry file and stated that upon completion of the investigations the police preferred charges of attempted murder against the 1st Defendant.
10. PW4, court administrator produced a court file and informed the court that the matter was still active in court.

Defendant's Case Summary

11. The 2nd Defendant called upon 2 witnesses to testify on its behalf. DW1 indicated that he is a forest ranger employed by the 2nd Defendant. It was his testimony that on the 28th November 2021 while on normal duty he issued a firearm She rifle S/NO 15905e to the 1st Defendant for purposes of camp security as it is the normal in the camp. It was his testimony that as rangers in the camp, they were entitled to a fire arm for performance of their duties not unless there were instructions specifically to the contrary. He further confirmed that he was the one in charge of the armory and he was not aware on whether the 1st Defendant had been transferred as he had not received any communication to the effect.
12. DW2 Sergeant Gideon Kiti, informed the court that he was a forest officer based at Maasai Mau operation sector one. He was stationed at Tendwet police station and in charge of Loliondo camp. He indicated that the 1st Defendant was one of the officers under his command and that on the 28th November 2021, he resumed his duties at the camp after coming from leave. That he was issued with a firearm as is the norm for camp security by DW1 but unfortunately went on his own frolic and committed an offence by shooting the Plaintiff outside the course of his duties. That as a result of his actions 1st Defendant was interdicted and charged with the offence of attempted murder. On Cross examination he confirmed that even though the 1st Defendant had indicated that he was to proceed on



transfer, as the camp commander he had not received formal communication to that effect that the 1st defendant had thus not been officially released to proceed on leave.

13. The 2nd Defendant also averred that from the pleadings and the totality of the evidence tendered the following issues are uncontested.
 - a. The Plaintiff sustained injuries due to a gun shot fired by the 1st Defendant.
 - b. The 1st Defendant was employed by the 2nd Defendant
 - c. The 1st Defendant was issued with a gun in the course of his duties
14. To this end, the respective Parties to this case filed submissions to canvass their issues.

Plaintiff's Written Submissions

15. The Plaintiff filed her submissions dated 10th July 2024 where she submitted as follows:
16. The injuries sustained by the Plaintiff were solely due to the negligence on the part of the 2nd Defendant and malice on the part of the 1st Defendant. The Plaintiff's counsel submitted that the Plaintiff sustained the following injuries:
 - a. Penetrating left lower abdominal gunshot wound entered from anterior and exited at the back.
 - b. Shattered left iliac crest bone (fracture).
17. The learned counsel also submitted that the Plaintiff was a promising athlete and the injuries sustained brought her career to abrupt end hence loss of earnings. Moreover, the Plaintiff as an athlete, had in fact received a scholarship "The Running Foundation Scholarship" to study at Essex County College in the United States and the program was to commence on 14th December 2021 and end on 10th January 2024. It was her submission that the Plaintiff had also received, "Athletic Scholarship" to study at Oklahoma Panhandle State University which program was to start on 10th January 2022 and end on 31st December 2025 hence her academic career was also shuttered by the Defendant's negligence and malice as her education pegged on her talent.
18. The learned counsel further submitted that PW2, Dr. Sokobe testified and produced a medical report dated 1/2/2023 which in his opinion and prognosis stated that: Charity Jerop sustained severe soft tissue injuries due to gunshot, from which she has recovered with the following complications:
 1. Post-traumatic stress disorder
 2. Weakness/numbness of the left lower limbShe thus requires further treatment i.e. psychological counselling and physiotherapy at an estimated cost of Kshs. 300,000/= (three hundred thousand)
19. Further to the above, learned counsel for the Plaintiff submitted that PW2 Dr. Sokobe testified that the Plaintiff cannot be able to run given the nature of the injuries sustained and he produced the medical report as Pexb No. 6(a) and Receipt for kshs. 6,000/= as Pexb No. 6(b). He also produced discharge summary/case sheet as Pexb No. 3 and interim bill as Pexb No. 7. Moreover, the learned counsel submitted that the Plaintiff, PW1 produced the receipts totaling to kshs. 245,000/= as Pexb No. 1, Demand letter Pexb No.4 and hospital attendance card as Pexb No.5. further, the police file was produced by PW3- the Investigating Officer while the court file in Eldoret CMC Criminal Case No. 3977 of 2021 was produced by the in charge Criminal Registry Eldoret.



20. Moreover, the learned counsel submitted that the 1st Defendant did not enter appearance nor file defence hence there is Interlocutory Judgement on record against him. She also stated that on the part of the 2nd Defendant, it filed its defence dated 16th May 2023 denied the Plaintiff's allegation as contained in the plaint and in the alternative stated that the actions of the 1st Defendant, if true, are purely criminal in nature and violates the provisions of section 63 of the Forest Conservation and Management Act No. 34 of 2016 on the use of firearms by the 2nd Defendant's officers by the 2nd Defendant's officers.
21. She further submitted that on the material day, the 1st Defendant was issued with a firearm with the sole purpose of performing his enforcement functions under the Joint Enforcement Unit (JEU) operations within Mau Forest Complex.
22. The learned counsel listed down 3 issues for determination as follows:
 - a. Whether there was malice on part of the 1st Defendant
 - b. Whether there was negligence on part of the 2nd Defendant
 - c. Quantum

Whether there was malice on part of the 1st Defendant

23. On this issue, the learned counsel for the Plaintiff submitted that from the evidence of PW-1 and DW-2 that the 1st Defendant requested to be given a firearm with ill motive and executed his malicious intentions by shooting the Plaintiff herein. Moreover, she stated that the 1st Defendant failed to defend this suit hence there is judgement against him.

Whether there was negligence on part of the 2nd Defendant

24. The learned Counsel submitted that the evidence before court and the testimony of PW1, DW1 and DW2 it can be seen that there was negligence on the part of the 2nd Defendant. She stated that the 2nd Defendant at paragraph 13 of its defence state as follows: "...on the material day, the 1st Defendant was issued with a firearm with sole purpose of performing his enforcement functions under Joint Enforcement Unit (JEU) Operations within the Mau Forest Complex.". Further, counsel submitted that DW2, Joseph Kipsgei Ruto in his testimony where he adopted his statement dated 29/11/2021 stated as follows: "I recall very well that on the 28th day of November, 2021 while at the camp and on normal duty I will issue a firearm make shee rifle s/no 15905e to No. 05598 FR David Kwambai for purposes of camp security duties. The rifle was loaded with 28 rounds of 7.62 x 39. This is norm at the camp."
25. The learned counsel submitted that upon cross examination DW1 admitted that he had known that the 1st Defendant was on transfer and leave, he could not have issued him with the firearm and that there was no proper communication to that effect. Moreover, she stated that he cannot issue a firearm to an officer who is on leave and on transfer and that he had not issued the 1st Defendant with the firearm, the Plaintiff could not have been shot by the 1st Defendant. She thus stated that from the foregoing it is clear that there was negligence on the part of the 2nd Defendant that led to the Plaintiff being shot hence sustaining the grievous injuries.
26. The learned counsel submitted that the negligence of the 2nd Defendant was attributed to DW1 negligence I issuing the firearm to the 1st Defendant without due regard to the procedure and without considering the fact that the 1st Defendant was on transfer despite the fact that DW2 acknowledged



that he was aware of the transfer and leave. With this, counsel made reference to the case of Onesmus Kinyua Muchudui Vs Mishi Kambi Charo & Another (2021) eKLR

27. Furthermore, the learned counsel submitted that in the current case, DW1 acted negligently on behalf of the 2nd Defendant and issued a firearm that was not supposed to be issued to the 1st Defendant who was also an officer of the 2nd Defendant and as a result the 1st Defendant shot and grievously injured the Plaintiff hence the 2nd Defendant must be held liable. She made reference to the case of Patel Vs Yafesi & Others 1972 E.A 28 at page 31 that: “A master is liable even for acts which he has not authorized provided that they are so connected with acts authorized provided they are so connected with acts which he was authorized that they may rightly be regarded as modes, although improper modes, of doing them. In other words, a master is responsible not duly for what he authorizes a servant to do, but also the way in which he does it.” She also stated that the Plaintiff had indeed proved that there was fault on the part of the 2nd Defendant which fault was acknowledged by both DW1 and DW2 hence the claim of negligence should be sustained. Moreover, the learned counsel made reference to the case of Alex Muthinji Njeke & Another Vs Attorney General (2017) eKLR

Quantum

i. Special damages

28. Counsel submitted that the Plaintiff pleaded special damages as follows:

- a. Future medical expenses- kshs. 300,000/=
- b. Medical expenses- kshs. 245,000/=
- c. Medical report- kshs. 6,000/=

She further stated that the total of special damages pleaded is kshs. 551,000/= and that the future medical expenses proved by the production of the medical report and testimony of PW-2 Dr. Sokobe, Receipts for medical report and medical expenses were equally produced hence the Plaintiff specifically proved the special damages hence should be awarded as prayers.

ii. Special damages

29. The learned counsel submitted an award of kshs. 30,000,000/=. She went ahead and stated that it will be reasonable compensation given the fact that the Plaintiff's career as a professional athlete was shuttered by the Defendant's negligence and malice. She also submitted that it did not end there as her education and/or pursuit of further education in the United states was also terminated.
30. The Plaintiff's counsel submitted that the Plaintiff testified and provided evidence to the effect that as an athlete, she had received a scholarship “The Running Foundation Scholarship” to study at Essex County College in the United States and the program was to commence on 14th December 2021 and end on 10th January 2024 and that this scholarship was pegged on her talent as an athlete.
31. Moreover, it was submitted that the Plaintiff had received “Athletic Scholarship” to study at Oklahoma Panhandle State University which program was to start on 10th January 2022 and end on 31st December 2025 and there is thus prove of shuttered academic career as well as loss of future earning as an athlete hence the general damages sought. Reference was made to the case of Butler Vs Butler (1984) KLR 225.
32. On the issue of costs, the Plaintiff's counsel submitted that costs must follow the event and the Plaintiff being a successful party should be awarded costs of the suit plus interest as provided for under section 27 of the *Civil Procedure Act*.



2nd Defendant's Written Submissions

33. The 2nd Defendant filed its submissions dated 15th July 2024 where it listed 3 issues for determination by the court as follows:
- i. Whether the 2nd Defendant was negligent.
 - ii. Whether the 2nd Defendant is vicariously liable for the actions of the 1st Defendant
 - iii. Whether the Plaintiff is entitled to damages

Whether the 2nd Defendant was negligent

34. The 2nd Defendant submitted on this issue that the Plaintiff's case is that the 2nd defendant was negligent in issuing the 1st defendant with the fire arm that was used to commit the above mentioned crime. He also stated that since the 1st Defendant was on transfer he ought not to have been issued with the fire arm for any purpose whether legal or not.
35. He submitted that the 2nd Defendant is authorized to issue fire arms to its officers by virtue of the provisions of the *Forest Conservation and Management Act* with the specific provision being section 63 of the Act.
36. He moreover submitted that DW1 indicated that he issued the above mentioned fire arm to the 1st Defendant for purposes of the camp security as is the norm and that camp security is part of the mandate of the officers of the 2nd defendant as provided by the *Forest Conservation and Management Act* and specifically section 2(a) of the Act. He went ahead and submitted that no evidence had been tendered by the Plaintiff and or her witnesses to show that the 1st defendant was impeded from performance of his duties in a way or was not in a position to handle the firearm.
37. The counsel for the 2nd Defendant also submitted that there was no evidence tendered to show that the 1st Defendant had not acquired the requisite paramilitary and skill at arms training, and was not authorized by the Chief Conservator forests, to be issued with a firearm. Further he submitted that the Plaintiff did not show in any way that the 1st Defendant was impeded from being issued with a firearm either by reason of being unsound mind or of intemperate habits.
38. Moreover, counsel submitted that the circumstances under which a police officer or a fire arm holder is impeded from possessing a firearm are provided for under section 7 of the Fire Arms Act. He stated that he who alleges the existence of some fact must prove the same to be required standard, in this case on a balance of probabilities. Reference was made in the case of Mumbi M'Nabea Vs David M. Wachira (2016) eKLR where the court of Appeal discussed the standard of proof in civil liability claims in our jurisdiction.
39. Furthermore, counsel submitted that in this case, the Plaintiff had the burden of proving on balance of probabilities that the 1st Defendant was unfit to be in the possession of a firearm and this burden we humbly submit it was not discharged at all. He stated that the only misgiving of the 2nd Defendant as brought out by the Plaintiff's assertions was that it was negligent in allowing the Plaintiff have possession of the firearms when he had been transferred to a different camp and no tangible evidence was placed before you to show that indeed the 1st Defendant had been transferred from his station. He further stated that DW2 indicated that even though there were rumors that the 1st Defendant was to proceed on transfer he had not yet received the formal communication to formally discharge the 1st Defendant from his command and its noteworthy that the official channels of communication within the government is always formal and in writing.



40. The learned Counsel also stated that DW1 was never charged with any offence as with regard to the issuance of the firearm and that had he issued the same unprocedural he would have been charged and/or disciplinary measures instituted against him. He opined that PW3 confirmed that after investigations by the police no improper conduct was established against DW1 to indicate that he did not follow the laid down procedures for the issuance of the firearm.

Whether the 2nd Defendant is vicariously liable for the actions of the 1st Defendant

41. The learned counsel submitted that it is imperative for a party who wishes to rely on the doctrine of vicarious liability to specifically plead and prove the same in evidence and this is because parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. Reference was made to the cases of David Sironga Ole Tukai Vs Francis Arap Muge & 2 Others Civil Appeal No. 76 of 2014 (2014) eKLR;

Vincent Okello Vs Attorney General Gulu HCCS No. 4 of 1992 (1995) III KALR

Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinde Mule & 3 Others (2014) eKLR.

42. Counsel moreover submitted that the issue of vicarious liability of the 2nd Defendant was never pleaded in the Complaint and it only arose at the Plaintiffs written submissions where the Plaintiff's counsel sought for the 2nd Defendant to be held vicariously liable for the actions of the 1st defendant. He stated that the circumstances under which an employer may be held liable for a wrongful conduct of his employee in terms of the principle of vicarious liability were defined in the case of Mkiye Vs Martens (1914) AD 382
43. The 2nd defendant's counsel also submitted that in Kenya the courts have always relied on the 'Salmon test' which was prevailed for almost a century as the yardstick for determining acts committed in the 'course of employment'. Reference was made to the case of Teachers Service Commission Vs WJ & 5 Others [2020] eKLR
44. Furthermore, counsel submitted that in the South African Case of Minister of Police Vs Rabie 1986 (1) SA 117, cited with the approval of the case of A.K.S obo O.K.S and Another Vs Minister of Police (2003) ZAGPPHC 1490; 27010/2018 (5th June 2023) the law underpinning the application of the principle of vicarious liability, the court set out the two sets necessary in an inquiry to determine whether an employer is vicariously liable for the conduct of its employees.
45. Counsel further submitted that in the matter K Vs Minister of Safety and Security 2005 (3) SA 179 (SCA), the court determined that the connection or proximity of the employer's mandate/function to the actions was a factor of consideration in the determination whether the actions were taken by the employee during his execution of his mandate.
46. It was the counsel's submission that DW1 further stated that the 1st Defendant was issued with a gun for the purposes of camp security and he resorted to engage in domestic violence which was a criminal act to serve his own interest outside the mandate of his employment. He also stated that his scope of duty did not involve travelling with the firearm from the camp and this was a clear deviation from the scope of his duties.

Quantum

47. The Learned Counsel submitted that PW2 testified that after the incident the Plaintiff sustained penetrating injuries to the left lower abdomen and the medical report prepared by Dr. Sokobe indicated that the Plaintiff sustained severe soft tissue injuries due to a gunshot from which she had recovered.



48. It was counsel's submission that taking into account the nature of the injuries sustained and comparable court decisions over similar injuries a sum of kshs. 500,000/= shall suffice as adequate compensation in terms of general damages. Reference was made to the case of Paul Muriuki Mwitari Vs Kenya Breweries Ltd (2009) eKLR
49. The counsel also submitted the claim for future earnings ought to fail since the same was never specifically pleaded and proved and that other than the offer letters to study in the USA there was no evidence that in did the Plaintiff was an athlete and also that nothing has been tabled before the court to show that the Plaintiff ever participated in any race in the country and was thus a promising athlete. Moreover, he stated that the offer letters are not conclusive proof that the Plaintiff was an upcoming athlete.

Analysis and Determination

50. This case examines the serious consequences when professional responsibility intersects with personal conflict. On 28th November, 2021, in Strawbag area, Kapsengerut, Uasin Gishu County, the Plaintiff, Ms. Charity Jerop Kiplagat, suffered severe injuries when shot by the 1st Defendant, Mr. David Kipruto Kwambai, using a firearm provided by his employer.
51. The facts reveal troubling circumstances. The 1st Defendant, a forest ranger employed by Kenya Forest Services (the 2nd Defendant), traveled from his post at Loliondo Camp in Narok to Uasin Gishu County where he shot the Plaintiff, who was his former girlfriend. The firearm—a "SHE" rifle S/NO. SV 58—had been issued to him that same day ostensibly for camp security duties.
52. The incident raises important legal questions about responsibility and accountability. The Court must determine whether an employer bears responsibility when an employee misuses equipment provided for work purposes. I must also consider the appropriate compensation for a young athlete, if any, whose promising career has been significantly impacted by her injuries.
53. The Plaintiff had secured two scholarships to study in the United States—"The Running Foundation Scholarship" at Essex County College and an "Athletic Scholarship" at Oklahoma Panhandle State University. These opportunities depended on her athletic abilities, which have now been compromised by her injuries.
54. The 1st Defendant has not participated in these proceedings despite being properly served, resulting in an interlocutory judgment against him regarding liability. The 2nd Defendant denies responsibility, arguing that the 1st Defendant's actions were criminal, outside his employment duties, and violated regulations governing firearm use.
55. The tort of battery is defined in Blacks Laws Dictionary 9th Edition as-

“the non-consequential touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact. In tort battery is defined as an intentional and offensive touching of another without lawful justification.

Under the Criminal justice in Kenya, the *Penal Code*, Cap 163 Section 4 defines grievous harm as any harm which amounts to a maim or dangerous harm, or serious or permanent injuries---

Section 9(1) thereof provides: - “Subject to the provisions of this code relating to negligent act and omissions, a person is not criminally responsible for any act or omission which occurs independently of the exercise of his will or for the event which occurs by accident.”



56. The question on focus is whether the 2nd defendant is vicariously liable for the negligence of the 1st defendant.
57. For a litigant to succeed under the doctrine of vicarious liability of an employer by an employee, the plaintiff must prove a causal link between the employees' negligence and his injuries and further adduce evidence from which on a balance of probability a connection between the two may be drawn as stated in Stratpack Industries case (supra).
58. A reading of Salmond's book on Torts 6th Edition, 1924. It is emphatic that a wrong or criminal act authorized by the master, the master will be held liable, but a wrongful and unauthorized mode of doing some act otherwise by the master the master will not be held liable. The above principles were tested and applied in 2020 in the UK cases Barclays Bank PLC V Various CSC [2020] (supra) and W. M. Marison Supermarkets PLC V. Various Claimants [2020] (supra) where the court's held that for the master or employer to be held liable for wrongdoing of their employees there must be close connection and circumstances that makes it fair and just that the employer to be held liable. In addition, there must be close connection between the wrong act and what the employee had been authorized to do for the employer to be held vicariously liable.
59. The general principle in the law of Torts as stated in Clerk & Lindsell on Torts and cited in Evans Okuku Khaduli V. Daross Security Firm [2018] eKLR is that: -
- “it is in general, the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of discretion vested in the employee---” The duty of an employer as enumerated in numerous decisions is to take reasonable care for the safety of patrons in a hotel establishment.
60. I have carefully considered the evidence presented by both parties. It is undisputed that the 1st Defendant was employed by the 2nd Defendant as a forest ranger and that a firearm was issued to him on the material day. However, the critical question is whether the 2nd Defendant should be held vicariously liable for the 1st Defendant's actions when he shot the Plaintiff.
61. The evidence presented shows that the 1st Defendant was issued with the firearm for the purpose of performing camp security duties at Loliondo Camp. DW1 testified that he issued the firearm as part of normal duty procedures. However, instead of remaining at the camp for security purposes, the 1st Defendant traveled from Narok County to Uasin Gishu County to confront the Plaintiff, who was his former girlfriend. This represents a significant deviation from his authorized duties.
62. In Joel Mutemi Karangu V Saiko Lekeresie & Another [2012] eKLR, the court held that:
- “A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either –
- (a) A wrongful act authorized by the master; or
- (b) A wrongful act and unauthorized mode of doing some acts authorized by the master”.
- Further, in Salmond's book on the law of Torts to at page 90, cited above in the topic under discussion, it was held;
- “-----if the authorized and wrongful act----- is not so connected with the authorized act as to be a mode of doing it, but is an independent act the master



is not responsible for in such a case, the servant is not acting in the course of his employment, but has gone outside it”.

In Pollard vs. John Parr and Sons [1927] IKB 243 it was held:-

“To make an employer liable for the act of a person alleged to be his servant, the act must be one of a class of acts which the person was authorized to do. If the act is one of that class, the employer is liable, though the act is one negligently, or in some cases even if it is done with excessive violence. But the excess may be so great that as to take the act out of the class of acts which the person is authorized or employed to do”.

63. Further, in Salmond's book on the law of Torts at page 90, it was held:

“-----if the authorized and wrongful act----- is not so connected with the authorized act as to be a mode of doing it, but is an independent act the master is not responsible for in such a case, the servant is not acting in the course of his employment, but has gone outside it”.

64. The 1st Defendant's actions in this case were clearly outside the scope of his employment. He was assigned to provide security at Loliondo Camp but instead traveled a significant distance to confront the Plaintiff for personal reasons. DW2 confirmed in his testimony that the 1st Defendant "went on his own frolic and committed an offence by shooting the Plaintiff outside the course of his duties."

65. In the case of Vincent Okello V. Attorney General Gulu HCCS No. 4 of 1992 (1995) III KALR, it was held that where an employee commits a crime outside the normal course of duty and without authority of the employer, liability cannot be passed over to the company.

66. While the Plaintiff argues that the 2nd Defendant was negligent in issuing the firearm to the 1st Defendant, the evidence does not substantiate this claim. DW1 testified that he was unaware of any transfer or reason not to issue the firearm to the 1st Defendant as part of normal camp security procedures. Although there may have been rumors or informal communications about a transfer, DW2 confirmed that as the camp commander, he had not received any formal communication about the 1st Defendant's transfer.

67. Moreover, as noted in Pollard vs. John Parr and Sons [1927] IKB 243:

“ To make an employer liable for the act of a person alleged to be his servant, the act must be one of a class of acts which the person was authorized to do. If the act is one of that class, the employer is liable, though the act is one negligently, or in some cases even if it is done with excessive violence. But the excess may be so great that as to take the act out of the class of acts which the person is authorized or employed to do”.

68. In this case, shooting a former girlfriend is clearly not within the class of acts that the 1st Defendant was authorized to do as a forest ranger. The evidence presented does not establish that the 2nd Defendant authorized or could have reasonably foreseen such conduct.

69. As stated in Stratpack Industries V. James Mbithi Munyao HCCA. No 152 of 2013, the Plaintiff must prove a causal link between someone's negligence and his injuries and must adduce evidence from which on a balance of probabilities, a connection between the two may be drawn. The mere fact of injury is not sufficient to establish negligence or vicarious liability.



70. Furthermore, the 2nd Defendant cannot be held liable for personal vendettas or criminal acts committed by employees outside the scope of their employment. I am of the view that an employer is not liable for assaults committed by employees unless done in the wrongful exercise of discretion vested in the employee.
71. Based on the totality of the evidence, I find that the 2nd Defendant cannot be held vicariously liable for the 1st Defendant's actions. The 1st Defendant was clearly acting outside the scope of his employment when he traveled to Uasin Gishu County and shot the Plaintiff. His actions were motivated by personal reasons rather than any aspect of his duties as a forest ranger.
72. Having established that the 1st Defendant is solely liable for the Plaintiff's injuries, I now turn to the assessment of damages. Interlocutory judgment has already been entered against the 1st Defendant in terms of liability.
73. The Plaintiff claims the following damages:
- a) General damages
 - b) Special damages of Kshs. 245,000/= (medical expenses)
 - c) Future medical expenses of Kshs. 300,000/=
 - d) Loss of future earnings
 - e) Costs of the suit and interest
74. Special Damages: The Plaintiff has provided receipts totaling Kshs. 245,000/= for medical expenses incurred as a result of the shooting. These have been properly documented and proved. Additionally, the medical report fee of Kshs. 6,000/= has been supported by a receipt. Therefore, I award special damages of Kshs. 251,000/=.
75. Future Medical Expenses: Dr. Sokobe has testified and provided a medical report indicating that the Plaintiff requires psychological counseling and physiotherapy at an estimated cost of Kshs. 300,000/= . This has been properly substantiated through expert medical testimony. I therefore award Kshs. 300,000/= for future medical expenses.
76. General Damages: In assessing general damages for pain and suffering, I must consider the nature and extent of the injuries sustained. According to the medical evidence, the Plaintiff sustained: a) Penetrating left lower abdominal gunshot wound entered from anterior and exited at the back b) Shattered left iliac crest bone (fracture) c) Post-traumatic stress disorder d) Weakness/numbness of the left lower limb.
77. This was a penetrating missile in the form of a bullet fired by the defendant and from the medical evidence, it transferred destructive energy to the surrounding tissues of this victim. The impact of a bullet imparts a temporary pressure waves to its path accelerating the tissue damage on what can be described as the forwards and the sideways of the targeted parts of the body. The pain and the stress waves which are directly related to the velocity of the missiles destroy and push aside structures on the bullet track. The velocity of the ammunition as it struck the target is the main determinant of the wounding capacity established by the medical doctor in his opinion that the Plaintiff sustained severe soft issue injuries due to gunshot, from which she has recovered with the following complications:
- a. Post-traumatic stress disorder
 - b. Weakness/numbness of the left lower limb.



78. The term pain and suffering damages is widely used in our legal system to denote damages awarded to compensate for the pain, fear anxiety, suffering, anguish and emotional distress experienced with a physical injury from either a road accident or negligent acts from a third party like the holder of a firearm being the 1st defendant in this case. the court is also enjoined to compensate for the loss of enjoyment of life which is commonly referred to as loss of amenity which accrues from the injuries suffered by the victim of the tort of negligence. It is a fact that primarily the impact of the injury to the health condition itself to an individual has far reaching consequences to the quality of life of an individual which should also form the basic element in evaluating the level of awards under the limb of general damages. In my view, the quality of adjusted life due to the accident or injuries sustained ought to be addressed by the trial court as an element to convey both the severity and saturation of a health impairment of a claimant or plaintiff whose life has been negatively impacted as a consequence of the personal injuries.
79. In the Lindal case (1981) 2 SCR 629 at Page 634, the Canadian Supreme court observed as follows:
- “Anything having a money value which the Plaintiff has lost should be made good by the defendant. If the Plaintiff is unable to work, then the defendant should compensate him for his/her lost earnings. If the Plaintiff has to pay for expensive medical or nursing attention, then this cost should be borne by the defendant. These costs are “losses” to the Plaintiff, in the sense that they are expenses which he (he/she) would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant’s pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. This first and controlling principle is that the victim must be compensated for his/her loss.”
80. In *George Otieno V Attorney General & Another* [2006] eKLR, the plaintiff sustained a gunshot wounds through his neck. The bullet went through his ears and affected C4-C5; C3 bone of the spinal code and was found with quadriplegia injuries due to gunshots to his neck and all his limbs were weak. Angawa J awarded him Kshs. 900,000 general damages for pain, suffering, and loss of amenities on 14th February 2006.
81. The injuries were severe and have had significant impact on the Plaintiff’s life and career. Considering the c and accounting for inflation, I award Kshs. 1,000,000/= as general damages for pain, suffering, and loss of amenities.
82. Loss of Future Earnings: The Plaintiff has claimed loss of future earnings due to the impact of the injuries on her athletic career. Evidence has been presented showing that the Plaintiff had received two scholarships for studies in the United States that were contingent on her athletic abilities. These were: a) “The Running Foundation Scholarship” to study at Essex County College (14 December 2021 to 10 January 2024) b) “Athletic Scholarship” to study at Oklahoma Panhandle State University (10 January 2022 to 31 December 2025)
83. Dr. Sokobe has testified that due to the nature of her injuries, the Plaintiff cannot run professionally. This has effectively ended her athletic career and the educational opportunities that were dependent on it. While it is difficult to quantify the exact monetary loss with precision, there is sufficient evidence to establish that the Plaintiff has suffered substantial loss of opportunity.
84. In summary, I enter judgment against the 1st Defendant for:
- a) Special damages of Kshs. 251,000/=



- b) Future medical expenses of Kshs. 300,000/=
 - c) General damages of Kshs. 1,000,000/=
85. On costs, for special damages, the interest shall accrue from the time they were incurred i.e. as at 3rd December, 2021 while the rest of the award, the interest shall accrue from the date of judgement until payment in full.
86. The Plaintiff shall have the costs of the suit.
87. It is so ordered.

DATED AND DELIVERED VIA CTS AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

.....

R. NYAKUNDI

JUDGE

Representation

M/S Reece Mwani & Co. Advocates

Hon. Attorney General

