

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NYERI**

**CIVIL APPEAL NO E045 OF 2025**

**STRABAG INTERNATIONAL GMBH KENYA BRANCH.....APPELLANT**

**VS**

**KENNEDY MAINA MUCHIRI.....RESPONDENT**

*(Appeal from the judgment of Hon. Cheruto C. Kipkorir, PM delivered on 1<sup>st</sup> March 2023 in  
Kerugoya CMCC No. E002 of 2020)*

**JUDGMENT**

1. This appeal was initially filed at the High Court in Kerugoya as *Civil Appeal No E026 of 2023*.
2. The file was placed before **Andayi J** on 12<sup>th</sup> August 2025, who formed the opinion that the High Court did not have jurisdiction as the cause of action leading to the appeal, arose in the course of employment. The High Court Judge therefore directed that the appeal be transferred to this Court for hearing and disposal.
3. The appeal arises from the judgment of **Hon. Cheruto C. Kipkorir, PM** delivered on 1<sup>st</sup> March 2023 in *Kerugoya CMCC No. E002 of 2020*.
4. In his plaint dated 3<sup>rd</sup> September 2020, filed in the trial court, the Respondent who at the material time, was an employee of the Appellant, claimed to have been racially abused and physically assaulted by his supervisor, one Hinteregger Jurgen. The Appellant further claimed that the assault caused him injury to the head, chest and lower limbs.

5. The Respondent's complaint against his employer, the Appellant in this appeal, was that no action was taken against Jurgen, despite a report having been made. According to the Respondent, the subject incident was part of a continued and systemic racial, physical and emotional abuse enabled by the Appellant in the work place.

6. The Respondent indicted the Appellant for neglect and failure to provide a safe working environment, resulting to breach of duty. In this regard, the Respondent cited the following particulars:

- a) Failing to protect the safety and emotional well-being of employees;
- b) Creating an environment of racial discrimination and physical mistreatment of employees;
- c) Failing to support the Respondent in taking criminal action against Hinteregger Jurgen for assault;
- d) Failing to involve the Respondent in taking primary proceedings against Hinteregger Jurgen for assault.

7. The Respondent listed the following as particulars of loss and damage:

- a) Actual bodily harm;
- b) Emotional distress, loss of dignity and self-worth;
- c) Loss of employment as a result of pertinent discrimination by the Appellant;
- d) Loss of source of livelihood causing great anguish to the Respondent and his family.

8. In its Statement of Defence dated 29<sup>th</sup> October 2020, the Appellant while admitting having employed the Respondent as a Heavy Plant Mechanic from 21<sup>st</sup> May 2019 to 21<sup>st</sup> August 2019, denied all the allegations contained in the claim.
9. The Appellant averred that the Respondent's employment contract was lawfully terminated under the terms contained therein.
10. With regard to the allegations of racial discrimination and mistreatment, the Respondent denied having enabled racial, physical or emotional abuse at the work place. The Appellant countered the allegation that it had assisted Jurgen to escape from the criminal justice system.
11. The trial court awarded the Respondent Kshs. 500,000 in general damages plus costs and interest from the time of filing suit, thus triggering this appeal.
12. In its Memorandum of Appeal dated 23<sup>rd</sup> March 2023, the Appellant raises the following grounds of appeal:
  - a) That the learned Trial Magistrate erred in law and fact by giving a contradictory judgment in holding that there was no evidence of assault and racial abuse yet proceeded to award judgment in favour of the Respondent on the basis of the alleged assault;
  - b) That the learned Trial Magistrate erred in law and in fact in awarding the Respondent damages which was not corroborated by any evidence and was not pleaded, as required in claims of tortious

liability based on negligence and could not therefore have formed a basis for the said judgment;

- c) That the learned Trial Magistrate erred in law and in fact in misinterpreting the law on vicarious liability and failing to apply the principles established therein, by holding the Appellant liable for alleged assault committed by the Appellant's employee, yet the alleged assault was never authorised by the Appellant and neither was the use of any violence or assault a mode of carrying out duties assigned to the said employee;
- d) That the learned Trial Magistrate erred in law and in fact in failing to hold that the employer does not warrant or guarantee the safety of its employees' working conditions, save for reasonable care against risks of injuries caused by events reasonably foreseeable or which would have been prevented by taking reasonable precautions and in the circumstances of this case, it was not foreseeable that employees in any working environment would engage in a fight, but which is denied, during the course of duty;
- e) That the learned Trial Magistrate erred in law and in fact in failing to appreciate the evidence that was placed before her and in taking into account extraneous issues hence arrived at a decision that was erroneous and against the evidence that was placed before her;
- f) That the judgment of the Trial Magistrate as a whole, is characterised by a lack of appreciation of evidence tendered and misapplication of the law, which has occasioned a great miscarriage

of justice, condemning the Appellant to pay a colossal sum of Kshs. 500,000 together with costs and interest, from the date of filing suit yet such omnibus award lacks a legal basis.

13. In its first ground of appeal, the Appellant faults the learned trial Magistrate for making an award in general damages, in favour of the Respondent, while having found that there was no evidence of assault and racial abuse.

14. In its judgment dated 1<sup>st</sup> March 2023, the trial court found that the Respondent had failed to prove the claim of physical assault but affirmed the one on racially motivated emotional abuse. In this regard, the learned Magistrate drew the following conclusion:

***“The plaintiff did not adduce any evidence to show that he sustained any injury as pleaded. He filed medical documents and even a medical report. The defence insisted on the maker of the same to be called, none was. The plaintiff has pleaded as per his plaint in addition to the assault he suffered emotional abuse as well that resulted from racially motivated abuse meted by Mr. Jurgen.”***

15. The trial court then went on to fault the Appellant for failing to resolve the Respondent's grievance at the shop floor, and assisting the aggressor to escape from jurisdiction. The learned Magistrate then returned the following verdict:

***“I do find merit in the plea of breach of duty...in particular as pleaded in paragraph 6 of plaint...That finding ties in as there is an allegation of racial abuse and the resultant emotional distress loss of dignity and self-worth...The plaintiff in specific indicates he was called a moron and a bushman.”***

16. After a summary of what the trial court considered as instances and effect of racial abuse, the learned trial Magistrate, quite surprisingly, introduced a spanner by stating:

***“This evidence was however not well corroborated. The plaintiff worked for them for two months after the incident. I do not see how he personally made a report to the defendant on the racial abuse...The plaintiff had an obligation to make a formal report. The defendant in their evidence indicate none was made. The defendant could only deal with the issue if it was brought to its attention. I can find fault if they did not address it as required. I also agree with the defendant that there was no evidence that was led to show that the plaintiff was let go because of this case. He served his contractual period, at the time he was on probation, and the defendant had no obligation to renew the same. I would understand why the plaintiff would assume, but I cannot presume.”***

17. In yet another surprising twist, the learned trial Magistrate shifted gears and stated:

***“I have already made a finding that they have breached their duty. None of the parties gave a specific amount to be awarded. The authorities cited were not a very concise guide in this aspect either...In such cases, courts have been known to make an omnibus award where there is no specific guide. I will award the plaintiff Kes. 500,000 as general damages for breach of duty by the defendant. He is also awarded the costs of the suit. Interest will accrue from the date the suit was filed.”***

18. In its submissions dated 17<sup>th</sup> July 2024, the Appellant cited the decision in ***CNK (Suing on behalf of PKN (Minor) v Emily Kulola & 4 others [2022] eKLR*** where it was held that a claim for liability must be supported by factual evidence.

19. The foregoing analysis of the judgment by the trial court leads to only one conclusion; that the award by the learned Magistrate ran contrary to the evidence and findings thereon.

20. The second ground of appeal attacks the impugned judgment on account of lack of particularity as required in claims of tortious liability. In his plaint, the Respondent pleaded bodily harm, emotional distress, loss of dignity and self-worth as particulars of loss and damage. He however did not provide any details to support his claim and this Court could not tell the parameters employed by the learned trial Magistrate to assess and quantify damages.

21. As held in *David Githuu Kuria v Equity Bank (Kenya) Limited & 2 others [2019] eKLR* a party alleging that they have suffered injury, must specify and particularise the said injury in order to allow the adverse party to respond with specificity.

22. In its third ground of appeal, the Appellant faults the learned trial Magistrate for misconstruing the law on vicarious liability. Simply put, the principle of vicarious liability assigns a wrong committed by a servant on their master.

23. *Clerk & Lindsell on Torts, 18<sup>th</sup> Edition (Sweet & Maxwell, 2000)* states as follows:

***“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 a discretion vested on the employee.”***

24. The beacons of vicarious liability were established in *Salmond on the Law of Torts (17<sup>th</sup> Edition) at page 466* as follows:

***“A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master’s business, it must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it.”***

25. In *Joel Mutemi Kirangu v Saiko Lekeresie & another* [2012] eKLR Emukule J affirmed that a master is not responsible for a wrongful act done by his servant unless it is done in the course of employment, meaning that it is either a wrongful act authorised by the master or, a wrongful mode of doing some act authorised by the master.

26. If the Court were to believe the Respondent’s allegation that Jurgen assaulted him, whether physically or verbally, there was no evidence adduced before the trial court linking the actions of Jurgen to the Appellant. In my view, this finding dispenses with ground four on reasonable care and foreseeability as well as ground five on consideration of extraneous matters.

27. On the whole and pursuant to the foregoing findings and conclusions, this appeal succeeds and is allowed.

28. The consequence is that the judgment of **Hon. Cheruto C. Kipkorir, PM** delivered on 1<sup>st</sup> March 2023 in *Kerugoya CMCC No. E002 of 2020* is set aside and is replaced with an order dismissing the Respondent’s claim.

29. The Appellant will have the costs of this appeal and of the proceedings in the court below.

**DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY NOVEMBER 2025**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wafula for the Appellant

Mr. Kibathi for the Respondent

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