REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO E139 OF 2021

DREAMLINE EXPRESS ……………………………………………………… APPELLANT

=VERSUS=

JANET NAMUGGA (Suing as the Legal Representative & Administrator of the Estate of Juliet Nakan Kanwagi DCD) ……………………… RESPONDENT

*(Being an appeal from the judgment of the Honorable E. Kigen (SRM) delivered on 15th October, 2021 in Eldoret CMCC No. 776 of 2015)*_

Coram: Justice R. Nyakundi

M/s A.K. Chepkonga & Co. Advocates.

M/s Kimondo Gachoka & Co. Advocates

JUDGMENT

Background

1. The instant appeal is as a result of a suit lodged by the Respondent as against the Appellant at the trial court in which the Respondent in her amended Plaint dated 2nd November, 2019 alleged that on or about the 14th June, 2014, the deceased was a lawful fare paying passenger aboard motor vehicle Registration No. KBT 670G SCANIA BUS along Eldoret-Nakuru highway at Nabkoi area or thereabout, when the defendant/Appellant's agents, drivers, employees and or servants so negligently, carelessly and or recklessly drove and or controlled motor vehicles registration no. KBT 670G and KBT 804H/ZE 0887 M/BENZ AXOR permitting them to violently crash into each other and consequently the deceased JULIET NAKANWAGI was fatally injured.

2. The Appellant herein filed its Statement of Defence denying the allegations set out in the plaint by the Respondent herein. The matter was set for a full trial and judgment was entered as follows: -

Pain and Suffering – **Kshs. 30,000/=**

Loss of expectation of life – **Kshs. 80,000/=**

Loss of dependency - **Kshs. 1,500,000/=**

Special damages - **Kshs. 435,539/=**

Grand Total **Kshs. 2,045,539/=**

3. The appellant herein being aggrieved and dissatisfied with the judgment lodged the appeal citing the following grounds:

a. That the learned trial magistrate misdirected herself by failing to take into account/consider long established principles while making an award on general damages under the Fatal Accidents Act and the Law Reform Act thereby making an award of Kshs. 2,045,539/= which is manifestly excessive in the circumstances.

b. That the learned trial magistrate erred in law and in fact by ignoring the appellant's written submission on quantum and thereby arriving at an award on quantum which is erroneous and/or manifestly excessive in the circumstances.

c. That the learned trial magistrate erred in law and fact by ignoring recent authorities on quantum and thereby arriving at an award on quantum which is erroneous and/or manifestly excessive in the circumstances.

d. That the learned trial magistrate erred in law and in fact by making an award of Kshs. 30,000/= for pain and suffering whereas the deceased died shortly after the accident occurred.

e. That the learned trial magistrate erred in law and fact by awarding a global award of Kshs. 1,500,000/= for loss of dependency while failing to give the rationale, backing authorities and/or reasons giving rise to the said award and thereby deviating from the principle of stare decisis.

4. The Appellant sought the following prayers from its memorandum of appeal;

a. That the appeal be allowed.

b. That the judgment delivered on 15th October, 2021 be set aside and an order re-assessing the quantum downwards under the Fatal Accidents Act and the Law Reform Act be made.

c. That the Appellant be awarded the costs of the Appeal.

5. The Appeal was canvassed by way of written submissions.

Appellants' Written Submissions.

6. The appellant through learned counsel gave a brief background of the case and proceeded to submit on the question of quantum. Counsel submitted that an award of Kshs. 1,500,000/= for loss of dependency was inordinately high considering the deceased was 31 years old.

7. It is submitted for the appellant that the award of damages is a discretion vested on the courts in conformity with awarding of damages principles as highlighted in the case of **Loice Wanjiku Kagunda v. Julius Gachau Mwangi CA 142/2003 (UR)** which was cited in the case of **Francis Odhiambo Nyunja & 2 others v. Josephine Malala Owinyi (suing as the legal administrator of the estate of Kevin Osore Rapando (deceased) (2020) eKLR**.

8. According to counsel, it was prudent for the trial magistrate to adopt the global sum approach since the Respondents did not prove that the deceased was a gardener and therefore the multiplier approach was not warranted. On this, learned counsel relied on the case of **Stanwel**

Holdings Limited & Another v. Racheal Haluku Emmanuel & Another (2020) eKLR.

9. To this end, it was submitted for the Appellant that this court should adopt the global sum approach and further propose that a sum of Kshs. 800,000/= be awarded under the head of loss of dependency. Counsel cited the cases of **Dorah Hellen Akinyi Aloo & Another (suing as the legal Representatives of the Estate of Jack Opiyo Gitau – deceased) v. Simon Gakahu Murimi & 2 others (2020) eKLR**, where the court applied a global sum approach and awarded Kshs. 1,200,000/= for loss of dependency for a 36-year male adult, the case of **Gilbert Kimatare Nairi & Another (suing as personal representative of the Estate of Jackline Sein Lemayian (deceased) v. Civiscope Limited (2021) eKLR**, in which the deceased was 31 years old and the court awarded a global sum of Kshs. 600,000/= for loss of dependency and equally cited the case of **John Macharia Mwangi v. Josephat Muriungi Muguongo & another (suing as the legal representative of the estate of Christine Nkirote Muriungi (deceased) (2020) eKLR** where the court awarded a global sum of Kshs. 1,000,000/= for loss of dependency where the deceased aged 31 years and survived by two school going children as well as supporting her father, and her income had not been proved.

10. Learned Counsel in concluding submitted that a sum of Kshs. 1,500,000/= under the head of loss of dependency was inordinately high and ought to be substituted with an award of Kshs. 800,000/=.

Respondent's submissions

11. Learned Counsel Mr. Chepkonga started by giving a background of the matter and reminded this court of its duty as a first appellate court. He emphasized that the duty of a first appellate court is to re-evaluate the evidence adduced in the trial court and subject it to a fresh and exhaustive scrutiny, re-assessing it and drawing its own conclusions while

bearing in mind that it did not have the opportunity to see or hear the witnesses testify. On this he cited the decision in **Selle & Another v. Associated Motor Boat Co. Ltd & others (1968) EA 123**, **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v. A.M Lubia and Olive Lubia (1987) KLR.**

12. On the question of pain and suffering, learned counsel submitted that the deceased endured pain since she did not die on the spot and that the appellant has not advanced sufficient reasons suggesting that the award of Kshs. 30,000/= on this head is high. On this, learned counsel cited the decision in **David Kahuruka Gitau & George Kuria v. Nancy Ann Wathithi Gitau & Mercy Wangui Ng'ang'a (2016) KEHC 6964 (KLR)**.

13. Regarding the head on loss of expectation of life, learned counsel submitted that there is no contention as to the awarded amount at the trial court of Kshs. 80,000/=.

14. Moving to the question of loss of dependency and special damages, it was submitted for the Respondent that the 1st Respondent at the trial court testified on account and proof of dependency. That she told the court that the deceased was her daughter and that she depended on her for sustenance. She further told the trial court that the deceased supported two children of her sister who were still school-going by paying their school fees and providing basic necessities. She adduced in evidence the letter from the Kigwanya local council 1 of Busega Parish, Rubaga Division of Kampala District forming this fact.

15. Mr. Chepkong'a submitted that both the appellant and the 1st Respondent agreed as indicated in their written submissions dated 30th September, 2021 and 1st October, 2021 respectively that the global sum method of assessment of damages was the most applicable in the circumstances for computation of the award payable to the estate of the deceased. On this

counsel cited the decision in **Mwanzia –vs- Ngalali Mutua Kenya Bus Ltd (2004)**.

16. From the foregoing, learned counsel submitted that the appeal should be dismissed with costs to the 1st Respondent.

Analysis and Determination

17. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. (see *Peters vs Sunday Post Limited* [1958] EA 424 and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).

18. From the grounds of appeal and submissions filed by both parties, the following issues arise for determination:

a) Whether the learned trial magistrate erred in awarding Kshs. 30,000/= for pain and suffering in circumstances where the deceased died shortly after the accident.

c) Whether the award of Kshs. 1,500,000/= for loss of dependency was inordinately high and lacked proper reasoning and supporting authorities.

19. The Court recognizes that appellate courts typically refrain from disturbing factual determinations made by trial courts, except in circumstances where such findings lack any evidentiary foundation, stem from a misunderstanding of the evidence, or result from the application of incorrect legal principles.

20. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in **Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27** as follows: -

> *"The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages."*

21. The principles which guide the court in the assessment of damages were laid in **In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** of damages in a personal injury case. The considerations include but not limited to; -

> *"1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.*
>
> *2. The award should be commensurable with the injuries sustained.*
>
> *3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.*
>
> *4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.*
>
> *5. The awards should not be inordinately low or high."*

22. According to the Court of Appeal in **Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR** : -

> *"An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some*

material respect and so arrived at a figure which was either inordinately high or low."

23. Simply put, having a different view on what amount should have been awarded is not grounds for this court to intervene. The authority to substitute my own assessment requires more than mere disagreement with the trial court's determination. Rather, I must identify either a fundamental error in the approach taken or an assessment that is clearly and significantly wrong.

24. In the case of **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

25. On this head, the Court of Appeal in **Chunibhai J. Patel and Another vs. P. F. Hayes and Others [1957] EA 748, 749**, stated the law on assessment of damages under the ***Fatal Accidents Act*** and held as follows:

"*The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to*

arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."

26. In **Jacob Ayiga Maruja & Anor vs.Simeon Obayo[2005]eKLR,** this Court dealing with a similar situation in which a plaintiff had no documentary proof of the deceased's earning, stated as follows:

"In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

32. We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.

33. ….

34. We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin because the deceased being a business lady carrying out a timber and furniture business, she must at least have

employed a carpenter for the business and was unlikely to earn less than the carpenter. In our view given the evidence before the trial Judge including the bank statement showing monies going into and out of the deceased's account, a sum of Kshs 30,000/= would have been appropriate as the net monthly income of the deceased."

27. In **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR**, it was held as follows-

> "*It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."*

28. Similarly, in **Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR**, where the court made the following observation:

> "*The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do*."

Whether the trial court erred in awarding Kshs. 30,000/= for pain and suffering.

29. The Appellant contends that an award of Kshs. 30,000/= for pain and suffering was erroneous given that the deceased died shortly after the accident occurred. The Respondent on the other hand maintained that the deceased endured pain since she did not die on the spot, and that the Appellant has failed to advance sufficient reasons to justify disturbing this award.

30. The legal position on awards for pain and suffering in fatal accident cases is well established. In **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR**, the court observed that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of injuries sustained in the period before death. The generally accepted principle is that very nominal damages will be awarded on these two heads if death followed immediately after the accident. Conversely, higher damages are warranted where the pain and suffering was prolonged before death.

31. Similarly, in **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR**, the Court emphasized that awards for pain and suffering range from Kshs. 10,000/= to Kshs. 100,000/=, with the quantum determined by the duration and intensity of suffering experienced between the accident and death.

32. Examining the evidence before the trial court, I note that the pleadings indicate the deceased sustained fatal injuries in the accident and subsequently died. While the Appellant argues that death occurred shortly after the accident, there is insufficient evidence on record to establish that death was instantaneous at the scene. The Respondent's testimony suggests that the deceased survived the initial impact and endured injury-related suffering before succumbing to her injuries. In the absence of clear evidence establishing immediate death at the accident scene, the trial

court was entitled to infer that some degree of pain and suffering occurred during the interval between injury and death.

33. The question then becomes whether Kshs. 30,000/= represents an appropriate quantum given these circumstances. Considering that the evidence does not establish prolonged suffering over days or weeks, but rather indicates death following relatively soon after the accident, I find that an award of Kshs. 30,000/= falls within the acceptable range for such cases. It is neither inordinately high nor does it suggest any misapprehension of the evidence or misapplication of legal principles. The trial magistrate exercised her discretion judiciously in making this assessment. I therefore find no grounds to interfere with this award.

Whether the award of Kshs. 1,500,000/= for loss of dependency was inordinately high

34. This forms the crux of the appeal. The Appellant argues that the trial magistrate failed to provide adequate reasoning, supporting authorities, or rationale for the global sum of Kshs. 1,500,000/= awarded under loss of dependency. The Appellant contends that considering the deceased was 31 years old and her income was not proved, an award of Kshs. 800,000/= would be more appropriate. The Respondent maintains that the award was justified given the evidence of dependency and urges this court to uphold the trial court's determination.

35. The record reveals that while dependency was established through oral testimony and documentary evidence, there was no proof of the deceased's specific income or earning capacity through payslips, tax returns, or business records. The evidence before the trial court, as recounted in the submissions, was that PW1 testified that the deceased was her daughter upon whom she depended for sustenance. PW1 further testified that the deceased supported two children of her sister who were school-going, paying their school fees and providing basic necessities. This testimony was corroborated by a letter from the Kigwanya Local Council 1

of Busega Parish, Rubaga Division of Kampala District. The existence and extent of the dependency relationship was therefore established on a balance of probabilities.

36. The difficulty, however, lay in quantifying the deceased's income with precision. No employment records, business registration documents, or financial statements were produced to demonstrate her earning capacity. In such circumstances, the trial court appropriately turned to the global sum approach rather than attempting to apply the multiplier-multiplicand formula.

37. The jurisprudential basis for the global sum approach has been firmly established. As observed in **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [Supra]**, where it is not possible to ascertain the multiplicand accurately, courts should not be overly obsessed with mathematical calculations. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which is always subject to the circumstances of each particular case. This principle was reiterated in **Mwanzia vs Ngalali Mutua Kenya Bus Ltd**, where the court emphasized that the multiplier approach is merely a method of assessing damages, not a principle of law or dogma, and must be abandoned where facts do not facilitate its application.

38. Having established that the global sum approach was appropriately adopted, the question becomes whether Kshs. 1,500,000/= represents a reasonable estimate of the dependency loss suffered by the Respondent and the two children who were under the deceased's care. In making this assessment, I must consider relevant precedents while remaining mindful that each case must be determined on its own facts.

39. The Appellant has cited several authorities in support of its contention that Kshs. 800,000/= would be more appropriate. In **Gilbert Kimatare Nairi & Another v Civiscope Limited (2021) eKLR**, the deceased was 31 years

old and the court awarded a global sum of Kshs. 600,000/= for loss of dependency. In **John Macharia Mwangi v Josephat Muriungi Muguongo & another (2020) eKLR**, the deceased aged 31 years survived by two school-going children and supporting her father, and without proof of income, the court awarded Kshs. 1,000,000/=. In **Dorah Hellen Akinyi Aloo & Another v Simon Gakahu Murimi & 2 others (2020) eKLR**, the court applied a global sum approach and awarded Kshs. 1,200,000/= for a 36-year-old male adult.

40. These authorities demonstrate a range of awards depending on the specific circumstances of dependency. What distinguishes the present case is that the deceased supported not only her mother but also assumed financial responsibility for two school-going children of her late sister. This created a dependency situation involving multiple beneficiaries across different generations; an aging parent requiring sustenance and two children requiring school fees and basic necessities throughout their formative years.

41. The trial magistrate, having heard the witnesses and assessed their credibility, was in a superior position to evaluate the extent and nature of the dependency relationship. While the judgment would have benefited from more detailed reasoning on how the figure of Kshs. 1,500,000/= was arrived at, the absence of elaborate explanation does not automatically render the award erroneous. The court must consider whether the amount itself, viewed against comparable authorities and the specific facts of this case, represents an entirely erroneous estimate.

42. Balancing the circumstances of this case against the cited authorities, I find that while Kshs. 1,500,000/= sits at the upper end of awards for similar cases, it is not so inordinately high as to constitute an entirely erroneous estimate warranting appellate interference. The deceased was 31 years old with potentially three decades of earning capacity remaining. She supported three dependents, her mother and two school-going

children, creating financial obligations that would extend for many years, particularly regarding the children's education and welfare until they reached self-sufficiency. When viewed through this lens, the award of Kshs. 1,500,000/= reflects a reasonable global assessment factoring in the question of inflation.

43. I am mindful that the Appellant's suggested figure of Kshs. 800,000/= finds support in some authorities. However, as emphasized in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete (supra)**, my disagreement with the quantum alone does not provide sufficient grounds for interference. I must be satisfied that the trial court applied wrong principles, misapprehended the evidence, or arrived at a figure so inordinately high as to represent an entirely erroneous estimate. Having carefully reviewed the evidence and circumstances, I am not so satisfied. The trial court exercised its discretion within permissible bounds, and I decline to substitute my own assessment merely because I might have arrived at a different figure had I tried the case at first instance.

44. In summary, having subjected the trial court's judgment to fresh and exhaustive review, I find that the trial magistrate properly exercised her discretion in assessing damages. The awards for pain and suffering, loss of expectation of life, loss of dependency, and special damages all fall within acceptable ranges given the evidence and circumstances of this case. While reasonable minds might differ on the precise quantum, particularly regarding loss of dependency, such differences do not constitute grounds for appellate interference absent a demonstration that the awards are so inordinately high as to represent entirely erroneous estimates.

45. The trial magistrate applied correct legal principles, considered relevant authorities, and arrived at quantum assessments that, while perhaps generous, do not cross the threshold of being manifestly excessive or demonstrating judicial error. The appeal therefore fails.

46. In the result, the appeal is dismissed. The judgment and decree of the trial court delivered on 15th October, 2021 is hereby upheld in its entirety. The Appellant shall bear the costs of this appeal to the Respondent.

47. It is so ordered.

DATED AND SIGNED AND SEND VIS CTS AND E-MAIL AT ELDORET THIS 6TH DAY OF JANUARY, 2026

....

R. NYAKUNDI

JUDGE