REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 58 OF 2017

EASY COACH BUS SERVICES.....1ST APPELLANT

BENEDICTOR NYANGARESI OCHI.....2ND APPELLANT

VERSUS

HENRY CHARLES TSUMA.....1ST RESPONDENT

AMBROSE JUMBO LOKA.....2ND RESPONDENT

(suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – deceased)

(*Being an appeal from Judgement and Decree of Honourable B. Ochieng, Chief Magistrate in the Chief Magistrate's Court in Kakamega Civil Case Number 478 of 2015 read and delivered on 26th April 2017*)

JUDGEMENT

1. The appellant, being dissatisfied with the decision of the trial court lodged this appeal on 2nd June 2017, seeking, *inter alia*, that the appeal herein be allowed with costs and the judgment, awards and decree of the lower Court be set aside and this court revises or scales down the awards on loss of dependency and special damages based on the following grounds:

> *a) The learned trial magistrate erred in law and fact in awarding the respondents Kshs. 2,766,544. 00 for loss of dependency which award was so inordinately high, unmerited, unjustified, disproportionate, excessive and unreasonable;*
>
> *b) The learned trial magistrate applied the wrong and inaccurate multiplier and dependency ratio and failed to consider the correct factors and or applied or considered, erroneous, irrelevant and or extraneous factors in determining the loss of dependency and he erred by failing to consider or by dismissing out of hand the issues and or submissions raised by the appellants; and*
>
> *c) The learned trial magistrate erred by awarding special damages which had not been strictly proved and were unjustified and unmerited and his awards were unfair and indefensible and have resulted in a miscarriage of justice.*

2. The respondents had sought at the trial court compensation on account of injuries that they had sustained in a traffic accident that occurred on or about the 13th day of April, 2015, along the Kakamega-Mumias road, at the Joyland area, involving the deceased, who was a pillion passenger on motor cycle registration mark and number MCZ 440P and the 1st appellant's motor vehicle registration mark and number KBU 226W. The respondents claimed that the accident occurred when the 2nd appellant so negligently and without any due care and regard drove motor vehicle KBU 226W that he caused it to lose control and ran over the deceased who as a result sustained fatal injuries. The respondents relied on the doctrine of *res ipsa loquitor*, the Highway Code and the Traffic Act, and brought the action under the Fatal Accident Act (Cap 35) Laws of Kenya. They averred that the deceased had 4 dependants and that at the time of death, she was aged 33 years and working as a P1 teacher at Mwihomo Special School, and earning a basic salary of Kshs. 19,323.00 per month. The respondents stated that she that she was in good health and could have worked up to the mandatory retirement age of 65 years.

3. The appellants filed their statement of defence denying the contents of the plaint

4. In its judgment delivered on 26th April 2017, the trial court held in part that

> *' ... the parties conceded to the issue of liability and judgment on liability accordingly entered in favour of the plaintiff against the defendants at 70% to a ratio of 30%. The remaining task for this court is to assess the quantum of damages payable to the estate of the deceased.'*

5. On quantum, trial court entered judgment as follows:

> *'DAMAGES UNDER THE LAW REFORM ACT*
>
> *(a) Loss of expectation of life: - The conventional award range between Kshs. 60,000/- to Kshs. 100,000/- … I award the plaintiff Kshs. 80,000/- under this head*
>
> *(b) Pain and Suffering: - The deceased died on the spot and where death is immediate court awards have ranged between Kshs. 7,000/- and Kshs. 10,000/-……I award the plaintiff Kshs. 10,000/- under this head*
>
> *DAMAGES UNDER FATAL ACCIDENTS ACT*
>
> *(a) Loss of dependency: Death Certificate tendered in evidence show that the deceased was aged 33 years at the time of death and was working as a teacher earning net pay of Kshs. 15,719/- per month. I will apply dependency ratio of 2/3 which she probably spent on her family. The deceased was aged 33 years at the time of death had 27 more years of working before she reached the retirement age of 60 years. However, with the uncertainties and vagaries of life, there is no guarantee the deceased would have worked until retirement age. Consequently, I propose a multiplier of 22 years and calculate loss of dependency as follows: -*
>
> *15,719 x 22 x 2/3 = 2,766,544.00*
>
> *I award the plaintiff Kshs. 2,766,544.00/- for loss of dependency*
>
> *SPECIAL DAMAGES*
>
> *On special damages, the Plaintiff has proved the following: -*
>
> - *Post mortem 8,170*
> - *Coffin 12,000*
> - *Burial Clothes 9,000*
> - *Replacement of glass 285*
> - *Burial Programme 10,000*
> - *Food stuff 17,800*
> - *Death Announcement 2,910*
> - *Tent 1,500*
> - *Legal Fees 15,000*
>
> *76,665*
>
> *I award the Plaintiff Kshs. 76,665/- as special damages*
>
> *I will therefore make a total award as follows:*
>
> - *Loss of Expectation of life 80,000*
> - *Pain and suffering 10,000*
> - *Loss of dependency 2,766,544*
> - *Special damages 76,665*
>
> *2,933,209*
>
> - *Less damages under LRA 90,000*
> - *Balance 2,843,209/-*
>
> *In the result, judgment is hereby entered for the Plaintiff against the defendants jointly and severally and I do award the Plaintiff a total of Kshs. 2,843,209/- on 100% liability subject to 30% contribution.*
>
> *I further award the plaintiff costs with interest …'*

6. It is the said judgment that forms the basis of the instant appeal.

7. Firstly, as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that the appellate court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. Section 78 of the Civil Procedure Act, Cap 21, Laws of

Kenya, which espouses the role of a first appellate court which is to *' … re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions*.' The position was buttressed by the Court of Appeal in *Peter M. Kariuki v Attorney-General* [2014] eKLR where court stated that -

> *'We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).'*

8. In *Ndung'u Dennis vs. Ann Wangari Ndirangu & another* (2018) eKLR the court quoted from the decision in *Selle & another vs. Associated Motor Boat Co Limited & others* (1968) EA 123 in stating the duty of the court in a first appeal as follows:

> *'I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955) 22 EACA 270).'*

9. In *Peters vs. Sunday Post Limited* [1958] EA 424**,** it was stated as follows -

> *'It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484. "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.'*

10. It is the appellant's case that the trial court applied the wrong principles in regard to the award, particularly on loss of dependency, by applying the wrong multiplier and the wrong dependency ratio.

11. The appellants submit that the trial court ought to have considered factors such as the vicissitudes of life like premature death from diseases, the fact that the 1st respondent was still in employment as a teacher, and fact of the deceased's dependants coming of age after about 10 years. The appellants further submitted that the appropriate and reasonable multiplier would have been at most 15 years. On the dependency ratio, the appellants submitted that the deceased was neither the head nor sole bread winner of the family, and that her income was supplemented by that of the 1st respondent. The appellants stated that a dependency ration of at most ½ should have been applied. They computed and assessed the loss of dependency at full liability as follows - Kshs. 15,719.00 x ½ x 12 x 15 years = Kshs. 1,414,710.00 subject to 30% liability which then comes to Kshs. 990,297.00

12. The respondents denied that the trial court applied the wrong principles in awarding the quantum. They further submitted that the fact that the 1st respondent was working did not affect the dependency ratio. They submitted that the applicable dependency ratio to a person who had died while married was 2/3 and not ½ as submitted by the appellants. In *Beatrice Wangui Thairu vs. Ezekiel Barngetuny & another* Nairobi HCC No. 1638 (unreported), cited in *James Mutuma Kirimi vs. P.C.E.A Kikuyu Hospital & another* [2017] eKLR, it was held, concerning a claim under Fatal Accident Act, that -

> *'The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years' purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature … I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case … Unfortunately,*

those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288.'

13. The court in *Leonard O. Ekisa & another vs. Major K. Birgen* (2005) eKLR, when addressing itself to income, said -

'… It is obvious from the above two cases, that the courts have been defining net income to mean gross income less tax element …'

14. Statutory deductions must be factored in when computing what is available to the dependants from the deceased. In *Simon Kiplimo Murey & 3 others vs. Kenya Bus Management Services Limited & 4 others* (2014) eKLR**,** it was stated -

' … When dealing with the issue of the nature of evidence to support a case under for dependency under the Fatal Accidents Act, the Court of Appeal in Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR observed *as follows;*

'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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.

'I now turn to the issue of the net income. The learned magistrate correctly pointed out that plaintiff was bound by the pleadings which showed that the deceased's salary was Kshs 20,000/- although the proved salary was Kshs 40,000/-. Although the statutory deductions were not disclosed, the court could readily ascertain these from the relevant law. I would estimate that statutory deductions such as income tax, NSSF and NHIF would amount to about one third of the gross salary leaving a net income of about Kshs 26,000/- less a reasonable sum the deceased would spend on himself. The appellant, in the pleadings and submissions, accepted that the amount pleaded and proved is Kshs 20,000/- and the same should have been awarded as the net income. I therefore find and hold that the multiplicand is Kshs 20,000.00." '

15. The High Court in the case of *James Gikonyo Mwangi* (supra) cited the case of *Ephantus Mwangi & Geoffrey Nguyo Ngatia vs. Dancun Mwangi Wambugu* [1982-88] KAR 278 where a principle was laid that a court on appeal will not normally interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles. The principles for assessment of damages that were set out by the Court of Appeal for East Africa, and subsequently adopted by the Court of Appeal, were restated and applied in *Kanga vs. Manyoka* [1961] EA 705, *Lukenya Ranching and Farming Co-op. Society Ltd vs Kavoloto* [1979] EA 414, *Kemfro Africa t/a Meru Express & Anor. vs. AM Lubia & Anor* [1982-88] I KAR 727 and *Zablon Mangu vs Morris W. Musila* C.A. No.66 of 1982 (unreported). From the above decisions, it emerges that the appellate court will interfere with the exercise of discretion by the trial court when assessing damages only if the trial court took into account an irrelevant fact or left out of account a relevant fact or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

16. Ordinarily, an award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable awards made in the past for comparable injuries. In *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR the Court of Appeal observed that -

'The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.'

In *Rosemary Mwasya vs. Steve Tito Mwasya & another* [2018] eKLR**,** the Court of *Appeal held that -*

'With regard to the choice of a multiplier, and a multiplicand, the trial court was guided by the holding in Haniel Mugo Muriuki versus Marris Min Njeramba HCCC No. 24 of 2005 referred to by the respondent wherein the deceased was a university student aged 24 years old and in which the court therein assessed damages for lost years using a multiplier of 25 years; Betty Ngatia versus Samwel Kinuthia Thuita HCCC No. 339 of 1998 relied upon by the appellant wherein, the deceased was aged 19 years and pursuing a secretarial course. Also referred to was the case of Hassan versus Nathan Mwangi Kamau Transporters & 4 others [1986] KLR 457 for the holding that loss of earnings to be considered in the assessment of damages should be loss of earnings for the profession the deceased was pursuing or would have pursued had death not occurred. In the light of the above, the learned Judge made findings as follows: - "It is now an established principle that the estate of the deceased is entitled to lost years, for the income that would have been earned by the deceased, less the living expenses, assuming that one lived and worked up to the age of retirement. It has been suggested that a salary of Kshs. 123,750 per month be used with multiplicand of 30 years less living expenses of 1/3. The plaintiff did not tender any documentary evidence to established this point. However, the plaintiff has presented documents showing that the deceased undertook studies leaning towards the study of accountancy or finance. I think the appropriate salary to use is that of an accountant or finance officer from the extract of the salary survey of Kenya presented by the plaintiff where such employees earn an appropriate monthly salary of Kshs. 118,546/=. The deceased was aged 19 at the time of her death. I will presume that had she begun to work at -the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the deceased and the defendant agree that the dependency ratio should be 1/3. On the head of lost years, I make the award as follows: 118,564X30X1/3X12=14,227,680. As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand.'

17. In the celebrated case of *Butt vs. Khan* (1977) KAR 1, Law JA stated the principle that governs an appellate court in considering a request to review an award of general damages:

> *'An appellate court will not disturb an award of 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 as either inordinately high or low*.'

18. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney-General* [2016] eKLR, cited the case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. AM Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730 where Kneller JA said: -

> *'The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, 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 the damage. See Ilango vs. Manyoka* [1961] E.A. 705, 709, 713; *Lukenya Ranching and Farming Co-Operatives Society Ltd vs. Kavoloto* [1970] E.A., 414, 418, 419. *This Court follows the same principles.'*

The Court further makes reference to the case of *Gicheru vs. Morton and Another* (2005) 2 KLR 333 where it was stated –

> *'In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.'* See also *Major General Peter M. Kariuki v Attorney General* Civil Appeal No. 79 of 2012 (unreported).

19. On the difficulties that confront a court in assessment of general damages in the context of personal injuries claims it was said in *Ugenya Bus Service V Gachiki* (1976-1985) EA 575, at page *579:*

> *'General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.'*

20. In *Chunibhai J Patel and Another vs. PF Hayes and Others* (1957) EA 748, 749 where the Court of Appeal stated in the manner of assessment of damages under the Fatal Accident's *Act that* -

> *'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 dependant, the net earnings power of the deceased i.e. his income and 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 a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the defendants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants … It has also been submitted by the defendant that the deceased would retire at age 55 and that there was no guarantee that he would remain in active employment in the private sector. It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire.' In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life … In Benedita Wanjiku Kimani (supra) Emukule J awarded a multiplier of 16 years to+ a deceased aged 44 years at the time of his death. In Simon Kiplimo Murey & 3 Others vs. Kenya Bus Service Management Services Ltd & 4 Others (2014) e KLR where the deceased died aged 28 years working for Kenya Power and Lighting Co. Ltd and earning Kshs 40,000/- per month the court awarded a multiplier of 25 years.'*

21. in *Gicheru* (supra) it was said that '*In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See also Jabane vs. Olenja (1986) KLR 1. In Mohamed Juma vs. Kenya Glass Works Ltd, CA NO. 1 OF 1986(unreported) Madan, JA again, aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same judgment, he addressed an argument similar to the one before us, tying the quantum of damages to an appellant's station in life:*

> *"It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons."'*

22. On the issue of whether an estate can benefit from both the Law Reform Act and the Fatal Accidents Act, recent precedents have held in

the affirmative. In the case of *Pleasant View School Limited vs. Rose Mutheu Kithoi & another* [2017] eKLR Kamau J held as follows:

> *'This court carefully considered the submissions by both the Appellant and the Respondents on the issue of how awards under both the Fatal Accidents Act and the Law Reform Act were to be treated and found itself in agreement with the latter's submissions.*
>
> *20. Any damages under the Law Reform Act in respect of loss of expectation of life and pain and suffering are benefits to the deceased's estate. Section 2(5) of the Law Reform Act Cap 26 (Laws of Kenya) is clear that the rights conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act. This court could not see any other interpretation of that provision as the same was not ambiguous.*
>
> *21. This court was fully aware that there seems to be two (2) schools of thought on this issue. However, this court therefore associated itself fully with the holdings of Emukule J, Karanja J and Mativo J in the cases of Benedeta Wanjiku Kimani vs Changwon Cheboi & Another[2013] eKLR, Richard Omeyo Omino vs. Christine A. Onyango [2009] eKLR and David Kahuruka Gitau & another vs. Nancy Ann Wathithi Gitau & another [2016] eKLR respectively where the said learned judges were emphatic that damages awarded under the Law Reform Act are not to be deducted from the damages that are awarded under the Fatal Accidents Act but merely need to be taken into account.*
>
> *22. This court thus wholly concurred with the holding of Emukule J (as he then was) in the case of Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another (Supra) where he rendered himself as follows: -*
>
> > **"…***These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above…"'*
> >
> > *'107.Burden of proof*
> >
> > > *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
> > >
> > > *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
> >
> > *108. Incidence of burden*
>
> *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

23. Section 107,108 and 109 of the Evidence Act provides as follows:

> *109. Proof of particular fact*
>
> *The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'*

24. Having analyzed the records of appeal and submissions by both parties this court I am not persuaded that the trial court fell into any serious error in the manner it assessed damages under the Law Reform Act and the Fatal Accident Act. On the ratio of 2/3 used by the trial court, I see no reason to disturb the same as it is not unreasonable in the circumstances. The deceased was survived by three minors and a widower and thus the ratio applied by the learned magistrate is proper.

25. Overall, I am not persuaded that the appellants have established a case for me to interfere with the judgement of the trial court in their favour. I shall accordingly dismiss the appeal herein. Each party shall bear their own costs.

DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019

W MUSYOKA

JUDGE