



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 94 OF 2010**

**JOSEPH MWANGI MACHERU IRUNGU.....1<sup>ST</sup> APPELLANT**

**RICHARD MACHERU IRUNGU (CHAIRMAN,**

**TUMUTUMU SCHOOL FOR THE DEAF.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**WAHOME GITHINJI.....1<sup>ST</sup> RESPONDENT**

**CATHERINE WANJIRU WAHOME (suing as the**

**Administrators of the estate of**

**Danson Macharia Wahome).....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

In a suit filed in the magistrates' court at Nyeri on 23<sup>rd</sup> June, 2009, the respondents sued the appellants for damages under the **Law Reform Act (Cap. 26)** and the **Fatal Accidents Act (Cap. 32)** respectively for the benefit of the estate and the dependants of Danson Macharia Wahome (deceased) who died three days after he was involved in a road traffic accident involving motor vehicle registration number KAK 591 C, Toyota pick-up (herein "the motor-vehicle"). The motor vehicle was said to belong to Tumutumu school for the deaf where the appellants were employees. The accident occurred along Karatina-Mukurweini road on 15<sup>th</sup> August, 2007 at around 7.00 p.m.

It was the respondents' case that the traffic accident was as a result of the negligence of the driver of the motor-vehicle, the 1<sup>st</sup> appellant, and therefore, the second appellant was vicariously liable.

The appellants disputed the respondents' claim and in their statement of defence filed in court on 10<sup>th</sup> July, 2009, they denied that the 1<sup>st</sup> appellant was an employee of Tumutumu school for the deaf either as a driver of the motor-vehicle or at all. Neither was the 2<sup>nd</sup> appellant the chairman of the board of governors of the school or at all. The defendants also denied the occurrence of the accident but alleged that if at all it occurred it was solely caused or substantially contributed to by the negligence of the deceased. On the whole, except for their description and their address, the appellants denied every allegation of fact in the respondents' plaint and put them to strict proof thereof.

At the conclusion of the suit, the learned magistrate found the accident occurred because the 1<sup>st</sup> appellant attempted to overtake the deceased who was then cycling in the same direction as the motor vehicle but on seeing an oncoming vehicle from the opposite direction he swerved back to his lane and knocked the deceased. According to the learned magistrate the 1<sup>st</sup> appellant was negligent and was to blame for the accident; despite this finding, the learned magistrate found that the deceased did nothing to avoid the accident and therefore he contributed to the accident. Liability was thus apportioned at the ratio of 80 to 20 with the 1<sup>st</sup> appellant bearing the larger share of liability.

As for quantum of damages, the learned magistrate awarded a total sum of Kshs.527, 100/= made up of loss of dependency pain and suffering and special damages; she also awarded the sum of Kshs.100, 000/= for loss of expectation of life under the law Reform Act but deducted the same amount from the award she made under the Fatal Accidents Act. When the gross figure was subjected to contribution the net award came to Kshs.341, 680/=. The learned magistrate also awarded the respondents costs of the suit and interest thereof.

The appellants were not satisfied with this decision and so, they appealed to this court raising thirteen grounds in their memorandum of appeal; in his submissions counsel for the appellants consolidated the first ten grounds under one single ground of lack of proof of liability while the rest of the grounds were subsumed under the head of quantum.

On liability, counsel for the appellants urged that the finding of the learned magistrate was not supported by evidence; he cited **section 62** of the **Evidence Act (Cap. 80)** which requires all facts, except for the contents of documents, to be proved by oral evidence. And where oral evidence is presented, under **section 63** of the same Act, it must be direct evidence meaning that the witness must have either seen, heard or perceived the fact in issue if it is a fact that could be established in either of these ways. If it is an opinion or grounds upon which that opinion is held, the evidence must be given by the person who holds that opinion or who holds the opinion upon those grounds.

Counsel also relied on **section 107** of the **Evidence Act** for the argument that a person relying on the existence of a fact or facts to prove his claim bears the burden to prove the existence of those fact; in other words, he who asserts must proof-the burden of proof is on him.

Counsel submitted that the learned magistrate either misapprehended or ignored these provisions of the law and consequently arrived at a wrong decision.

The argument by the learned counsel for the appellants was informed by the fact that none of the respondents or their witnesses witnessed the accident and therefore none of them could tell if the motor-vehicle in question was involved in the accident or whether the 1<sup>st</sup> appellant was indeed its driver at the material time or at all.

In the absence of direct evidence, so counsel argued, the learned magistrate's decision was influenced by hearsay evidence which is generally inadmissible and is also contrary to **section 63** of the **Evidence Act** which, as noted, requires that oral evidence must be direct.

In support of his arguments, the learned counsel for the appellant relied on the Court of Appeal decisions in **Wareham t/a A.F. Wareham & 2 Others versus Kenya Post Office Savings Bank (2004) 2 KLR** and **Mombasa Civil Appeal No. 67 of 1983, Abbay Abubakar Haji Patuma Ali Abdulla versus Freight Agencies Ltd.**

On quantum the learned counsel for the appellant raised two issues the first of which was that there was no basis for the learned magistrate adopting the sum of Kshs. 9,000/= as the multiplicand and secondly, the learned magistrate should have made a determination on whether the claim for loss of expectation of life under the Law Reform Act was statute barred by virtue of **section 2(3)** of that Act.

As for the multiplicand counsel argued that there was no proof of earnings, documentary or otherwise,

and therefore there was no basis of adopting the sum of Kshs.300/= as the daily income or Kshs. 900/= as the monthly income of the deceased; instead, the learned magistrate should have adopted the minimum wage applicable to the applicant in 2007 which, according to the Government wage guidelines, was Kshs. 2,771/=.

In the counsel's view, the claim under the **Law Reform Act** was statute barred because the suit was filed more than six months after the respondents had taken out representations and this contravened **section 2(3)** of the **Law Reform Act** which is to the effect that

*2(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—*

*(a) proceedings against him in respect of that cause of action were*

*pending at the date of his death; or*

*(b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.*

Counsel also argued that the 2<sup>nd</sup> appellant was non-suited and, being the chairman of the board of governors of Tumutumu school for the deaf, he was improperly joined to the respondents' suit; he urged this court to allow the appeal and dismiss the respondent's suit at the magistrates' court.

On his part, counsel for the respondents urged the court to uphold the learned magistrate's decision and dismiss this appeal because the claim against the appellants had been proved on a balance of probabilities. Counsel submitted that though the 1<sup>st</sup> appellant had been acquitted of the offence of causing death by dangerous driving as a result of the road traffic accident, it was only because the supposed eye witnesses had been compromised and had accordingly testified contrary to what the statements they recorded with the police. Counsel also submitted that the driver had confessed to committing the offence but had also retracted his statement.

It was also counsel's contention that the principal of Tumutumu school for the deaf had contributed an amount of Kshs. 10,000/= towards the deceased's medical expenses not on humanitarian grounds but out of a sense of guilt for what the 1<sup>st</sup> appellant had done.

Counsel refuted the appellant's counsel's argument that the claim under the Law Reform Act was statute barred because **section 2(3)** of that Act which was cited in support of this argument deals with actions against and not actions for the benefit of a deceased's person's estate.

As for the quantum of damages, counsel submitted that if the deceased person assisted his family with Kshs 200 to Kshs 300 per day, he must have been earning Kshs 300/= and therefore, in the absence of evidence of any documented earnings, the learned magistrate was correct in adopting the figure of Kshs 300/= as the deceased's daily earnings. Counsel relied on the decisions in **Mombasa High Court Civil Case No. 826 of 1990, Rashid Ali Rashid versus Abdulkarim A & Another**, **Nairobi High Court Civil Case No. 71 of 1991, Abdakla Owino versus Patrick Oluoch Nanda & Another** and **Mombasa High Court Civil Case No. 301 of 2002, Floice Adema Onami versus Kezia Muthoni Nguni & 2 Others** in support of his submissions.

After considering the learned counsel's submissions and the record of proceedings in the trial court, it is not in dispute that the deceased died as a result of a road traffic accident which occurred on 15<sup>th</sup> August, 2007 along Karatina-Mukurweini road. What is in dispute and what in my view, this appeal turns is how the accident happened and whether motor vehicle registration number KAK 591 C was involved in the accident and if so whether its driver was negligent as to cause the accident; if the answers to the last two questions are in the affirmative, then the question of quantum of damages would logically follow. Conversely, if the answers are in the negative, it would be unnecessary to delve into the issue of damages

payable or the extent thereof for there would be no basis for a cause of action against the appellants either jointly or severally.

Since they are questions of fact, one needs look no further than the evidence on record to find the answers; it is only after the facts have been established that the correct law can then be applied.

The record shows three witnesses including the 1<sup>st</sup> respondent testified in support of the respondents' case; of the three witnesses, none of them witnessed the accident. The 1<sup>st</sup> respondent testified that he was at his home when he was called by one Ndiritu who told him that his son, the deceased, had been hit by a vehicle registration number **KAK 891 C** belonging to Tumutumu school for the deaf. Since it was at night, he opted to take up the matter the following day. He went to the hospital where, according to his evidence, the 1<sup>st</sup> appellant, paid Kshs 10,000/= for his son's head scan.

In his answers during cross-examination, he testified that Ndiritu who was also called Kabora called him because he saw the deceased being hit. He also said the amount of Kshs 10,000/= he referred to was given by the principal of the school; according to his evidence, this principal gave the money to one Simon Mwangi (PW2) who counted it and gave it to him. He also told the court that the eye witnesses were compromised and declined to testify in accordance with the statements they recorded with the police in the criminal case against the 1<sup>st</sup> appellant.

**Simon Mwangi (PW2)** testified he went to the hospital with the 1<sup>st</sup> respondent and that it was while on 17<sup>th</sup>, presumably of August, 2008, that the principal whom he referred to as Macharia, gave him Kshs. 10,000/= which he counted and "handed over".

The police officer who booked the accident report and investigated the case was constable **David Kirubi (PW3)**; he testified that he received the accident report from the deceased's father (**PW1**). He also took statements from two eye witnesses whom he named as Boniface Mwangi Githinji and Joseph Nderitu Kabora and that he was taken to the scene of the accident on 17<sup>th</sup> August, 2007 by the driver of the vehicle that caused the accident. He learned from the driver, the 1<sup>st</sup> appellant, that the left side mirror of the vehicle had been damaged but at the time he seized the vehicle, it had been replaced.

In his evidence, the 1<sup>st</sup> appellant denied having caused the accident though he was arrested and charged for causing death by dangerous driving and for failure to stop after the accident; he produced the proceedings in the criminal court to demonstrate that he was acquitted of the charges. He also denied seeing any money paid to cater for the deceased's medical expenses. The witness told the court that he initially pleaded guilty to the offence because he did not understand the charges against him. He admitted having driven the motor vehicle from Karatina on 15<sup>th</sup> August, 2008 at around 6.p.m. The witness testified that the broken side mirror of the motor vehicle had been hit by a stone. Though in cross-examination he said that he took the police officers to the scene of the accident, he changed his testimony in re-examination and said that it is in fact the police who took him to the scene of the accident.

One of the exhibits produced by the appellants to demonstrate that the 1<sup>st</sup> appellant was neither involved in the traffic accident nor was negligent, in any event, was a copy of the proceedings together with the ruling of the court in **Karatina Senior Resident Magistrate's Court Criminal Case No. 3 of 2007**. As noted earlier, the 1<sup>st</sup> appellant had been charged with offences related to the traffic accident in question but was acquitted because, as the learned magistrate in that case held, the prosecution had not made out a prima facie case against the appellant.

It is presumed that the proceedings and the ruling in trial against the appellant were genuine and any statements made by the witnesses were true; these presumptions are consistent with **section 84** of the **Evidence Act** which provides as follows:-

#### ***84. Records of evidence***

*Whenever any document is produced before any court, purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorized by law to take such evidence, and purporting to be signed by a judge or magistrate or any such officer as aforesaid, the court shall presume—*

*(a) that the document is genuine;*

*(b) that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and*

*(c) that such evidence was duly taken.*

From the record of the proceedings, it is clear that two of the prosecution witnesses in the trial against the 1<sup>st</sup> appellant were eyewitnesses who saw a motor-vehicle hit the deceased. According to their evidence, they were on a bicycle riding about twenty meters behind the deceased who was also cycling on the left side of Karatina-Mukurweini road. Sometime between 6.30 and 7 p.m. a motor-vehicle whose side had been emblazoned with the words “school van” by-passed them and hit the deceased but drove on without stopping. The two witnesses rushed the deceased, who was seriously injured, to the hospital at Karatina and since they knew his father they informed him of the accident.

In the same proceedings, police constable **David Kirubi (PW3)**, testified that he got the number of the registration of the vehicle that hit the deceased from the deceased’s father who in turn got it from the two eye-witnesses; with this information, he hunted down the vehicle and located it on Karatina-Sagana Road on 16<sup>th</sup> August, 2007 and together with the 1<sup>st</sup> appellant, who was its driver, they drove to the police station where it was detained for inspection. Since it was late, the 1<sup>st</sup> appellant was asked to come back to the station the following day and that it was then that 1<sup>st</sup> appellant led the officer to the scene of the accident. He took the sketch plan of the scene and also took the 1<sup>st</sup> appellant’s statement. He later took the eye witnesses’ statements and upon conclusion of his investigations, he formed the opinion that the 1<sup>st</sup> appellant was responsible for the accident. He charged him accordingly.

Taken in its totality, it is apparent from the evidence presented at the trial that motor vehicle registration number **KAK 891 C** was being driven on Karatina-Mukurweini road at the time or around the time the traffic accident occurred; this is clear from the evidence of the 1<sup>st</sup> appellant himself. It is also clear from this witness’ evidence that this vehicle’s side mirror was broken but was replaced, though according to him, the mirror was broken by a stone and not as a result of the road traffic accident.

It is also clear to me that the first time the police officer who took the sketch plan of the accident went to the scene of the accident was when he was accompanied by the 1<sup>st</sup> appellant; though he changed his testimony in re-examination, the 1<sup>st</sup> appellant himself admitted in evidence in cross-examination that he in fact took the police to the scene of the accident. He did not offer any reason, and it is not clear from his testimony, why he varied his evidence in re-examination.

Again, the evidence of the two eyewitnesses that they saw the motor-vehicle which hit the deceased and that the vehicle was emblazoned with the words “school van” was not controverted.

The other aspect of the respondents’ evidence that is worth considering is the dispute surrounding the payment of the Kshs. 10,000/= allegedly by the principal of Tumutumu school of the deaf towards the deceased’s medical expenses. The deceased’s father testified that the principal gave the money to **Simon Mwangi (PW2)** who counted the money and gave it to him. Simon Mwangi corroborated this evidence and said that indeed the principal gave him the money which he transmitted to the deceased’s father after he had counted it. The only denial that this sum of money was ever paid was from the 1<sup>st</sup> appellant who said that he never saw any money being paid. The principal himself did not testify and controvert the allegations against him; in the absence of his testimony, one can only infer that had he testified his evidence would have been unfavourable to the appellants’ case. In these circumstances, it is probable that the principal paid the disputed sum of Kshs.10, 000/=.

The next question that would follow is, why would the principal of the school take his time, come to the hospital where the deceased was and make payments towards his medical expenses? The plausible answer appears to me to be that he was aware that the school vehicle caused the traffic accident in which the deceased was injured; I would agree with the respondents' counsel's submission that the principal's gesture was not out of charity. He must have thought that he had an obligation to mitigate the damage that had ensued from the traffic accident.

When all these facts are pieced together, the resultant picture would only lead to one probable conclusion—that the traffic accident was not only caused by the 1<sup>st</sup> appellant but that he was solely to blame for it; he solely to blame because no other possible explanation why he could not stop after hitting the deceased. The respondents did not, however, file any cross-appeal against the learned magistrate's apportionment of liability between the 1<sup>st</sup> appellant and the deceased; I will, for that reason, not interfere with the learned magistrate's finding on this question and uphold her finding on liability at the ratio of 80:20.

While the 1<sup>st</sup> appellant may have been acquitted in the criminal case against him, that in itself does not mean he could not have caused the accident for the simple reason that the threshold of proof in civil cases is lower than the standard of proof required in criminal cases. In civil cases, what is considered as probable is always deemed to be certain; the concept of proof on a balance of probabilities is nothing more than that. In a judgment delivered in March, 2011, the Supreme Court of England, in **Knowesly Metropolitan Borough Council versus Willmore and Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) versus Grief UK Ltd (2011) UKSC 10, (2011)2AC 229** cited with approval Lord Prosser's speech in **Dingley versus The Chief Constable, Stratdye Police 1998 SC 548 at page 603** where he made reference to the standard of proof in civil cases; the learned judge said:-

***“In ordinary (non-lawyer’s) language, to say that one regards something as ‘probable’ is by no means to say that one regards it as ‘established’ or ‘proved’. Yet in the civil courts, where we say that a pursuer must prove his case on a balance of probabilities, what is held to be probable is treated as ‘proved’. I do not suggest that any lawyer will be confused by this rather special meaning of the word ‘proved’. But speaking very generally, I think that the civil requirement of a pursuer—that he satisfy the court that upon the evidence his case is probably sound— would in ordinary language be regarded as very different from, and less stringent than, a requirement that his case be established or proved.”***

The next question raised by the learned counsel for the appellants was the question of joinder and misjoinder of the parties. Although he raised it as the last question in his submissions, it is appropriate to consider it at this stage before delving into the question of quantum of damages.

Counsel for the appellants submitted that the second appellant was non-suited because he was only the chairman of the board of Governors of Tumutumu school for the deaf and by virtue of **rule 10 of the Education (Board of Governors) Order** he was insulated from personal liability for anything done or omitted to be done by the school. This argument must have been based on the averment made in paragraph 14 of the defence filed on behalf of the appellants in which it was stated that:-

***“The defendants aver that the suit herein is bad in law and fatally defective and should be struck out with costs. The defendants shall at the appropriate time raise a preliminary objection on a point of law to strike out the suit with costs.”***

I would agree with the appellants that if there was a question of misjoinder or non-joinder, it ought to have been determined as a preliminary point; however, the record shows that the case proceeded to hearing upon the consent of both the counsel for the appellants and the respondents and by the time it was concluded, no objection, of whatever nature, had been taken by the appellants or any of them. In the absence of any objection, it would be assumed that if the misjoinder of the 2<sup>nd</sup> appellant was a valid or a legitimate question, the appellant must have waived his right to pursue it and instead acquiesced to proceeding with the suit in the manner in which it was instituted. In such circumstances, I would suppose that it would be too late in the day for the appellants to pick up the issue at the appellate stage.

In any event, under **Order 1 rule 9 of the Civil Procedure Rules**, a suit cannot be defeated merely by reason of the misjoinder or non-joinder of the parties as long as the court can deal with the matter in controversy and resolve the rights and the interests of the parties actually before it; in the face of this rule, it would have been difficult for the appellants to persuade the trial court to strike out the respondents' suit merely because the 2<sup>nd</sup> appellant was deemed an improper party.

The final question is on the quantum of damages payable. The learned counsel for the appellants faulted the learned magistrate's decision on this issue on two fronts; first, he submitted that it was wrong for the learned magistrate to apply the multiplicand of Kshs. 9,000/= and second, the learned magistrate should have considered whether a claim under the Law Reform Act was valid.

The principles upon which an appellate court can interfere with an assessment of damages by the trial court in personal injury claims have been reiterated in several court decisions whenever this question has arisen; in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** the Court of Appeal said:-

***“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 was either inordinately high or low.”***

Taking cue from this decision I am of the view that when the learned magistrate to have adopted the multiplicand of Kshs. 9,000/= without any cogent evidence that the deceased was earning or was likely to earn this sum on monthly basis, she thereby proceeded as was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan (ibid)** that the learned magistrate 'on wrong principles or that she misapprehended the evidence in some material' respect and therefore arrived at a wrong figure.

I am minded that, it is not in every case that earnings for purposes of calculation of damages under the Fatal Accidents Act can and should be proved by way of documentary evidence. In **Jacob Ayiga Maruja & Another v Simeon Obayo, Civil Appeal No. 167 of 2002 [2005] eKLR** the Court of Appeal observed that:-

***“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.”***

Of course where a person is employed yet his salary is not determinable, his or her income may be determined by reference to the government wage guidelines issued from time to time but it is not always necessary that a particular figure must be adopted as the multiplicand particularly if where such a figure cannot be ascertained with precision. While referring to this question in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** which was quoted with approval in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** Justice Ringera was of the following view:-

***“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.”***

This principle was adopted in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where Nambuye J., stated that:-

***“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”***

It has already been noted that the government wage guidelines issued from time to time may be resorted to whenever a person is employed yet his wage cannot be ascertained; in this particular case, evidence was led by the 1<sup>st</sup> respondent that the deceased was some sort of a porter, operating a handcart. Much as this evidence was not controverted, counsel for the appellants submitted that such a person was likely to be earning a minimum wage which as per the government guidelines in force at the material time was Kshs. 2,771/=; to this end, counsel referred to the **Regulation of Wages General Amendment Order 2006** in which the basic minimum wage of a worker of the deceased’s calibre was indicated. The appropriate multiplicand, according to counsel should have been Kshs. 2,771/=.

The learned magistrate did not give any reason as to why she rejected the appellants’ counsel’s proposal; in the absence of any contrary evidence, and in the absence of any concrete evidence of the deceased’s earning, I am of the opinion that the figure proposed by the appellants’ counsel was the most appropriate in the circumstances.

Counsel for the appellant had no issue with the multiplier of eleven years and a dependency ratio of two thirds; the final sum under the head of loss of dependency would therefore have been:-

Kshs (2,771 x 12 x 11 x 2/3) = Kshs 243,848/=

Subject to contribution, the net award should have been as follows:

Pain & Suffering	Kshs. 10,000.00
Loss of expectation of life	Kshs. 100,000.00
Loss of dependency	Kshs. 243,848.00
Special damages	<u>Kshs. 21,000.00</u>
<b>Total</b>	Kshs. 374,848.00
Less the award under the Law Reform Act	<u>Kshs. 100,000.00</u>
<b>Total</b>	Kshs. 274,848.00
Less 20% contribution	<u>Kshs. 54,969.60</u>
<b>Net total</b>	<u>Kshs. 219,898.40</u>

On the award under the Law Reform Act, counsel for the appellant contended that this sum should not have been awarded because the suit was filed six months after the grant of representations had been obtained; in the counsel’s view, this contravened **section 2 (3) (b)** of the **Law Reform Act**; the pertinent part of this section of the law provides:-

## ***2. Effect of death on certain causes of action***

***(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:***

***Provided that this subsection shall not apply to causes of action for defamation or seduction or***

*for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.*

*(2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—*

*(a) shall not include any exemplary damages;*

*(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and*

*(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.*

*(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—*

*(a) proceedings against him in respect of that cause of action were pending at the date of his death; or*

*(b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.*

It is apparent that, under **section 2(3)(b)** of the Act, proceedings which may not be taken six months after representations have been taken out relate to those proceedings against the estate and not for the benefit of the estate; counsel's submissions against the award under the head of the Law Reform Act is thus misconceived. In any event, considering the total award was reduced by an amount equivalent to the award made under the Law Reform Act, there would be no difference in the net award irrespective of whether or not an award was made under the Law Reform Act.

I would allow the appeal only to the extent of the variation of the sum awarded under the head of loss of dependency. For avoidance of doubt, I would set aside the award made by the learned magistrate and substitute it with the net award of Kshs. Kshs. 219,878.40. Except for this variation, the appeal is dismissed. Parties shall bear their respective costs in this appeal; however, costs in the subordinate court, together with interest thereof, which shall accrue from the date of the judgment in the subordinate court are awarded to the respondents. It is so ordered.

**Signed, dated and delivered in open court this 2<sup>nd</sup> day of February, 2015**

Ngaah Jairus

**JUDGE**