



**Mwangi & another (Suing as the Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased) v Ngure & another (Civil Appeal 57 of 2020) [2023] KECA 448 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 448 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 57 OF 2020  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
APRIL 14, 2023**

**BETWEEN**

**VERONICA GATHONI MWANGI ..... 1<sup>ST</sup> APPELLANT  
SIMON NJUGUNA SEUR ..... 2<sup>ND</sup> APPELLANT  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
RICHARD MWANGI GATHONI DECEASED**

**AND**

**SAMUEL KAGWI NGURE ..... 1<sup>ST</sup> RESPONDENT  
BIRYA MWAKOMBE BIRYA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement of Lady Justice D. Chepkwony delivered on 14th May 2020 in Mombasa HCCA No 177 of 2016 being judgement on appeal against the decision of Hon. H. Nyakweba (SRM) delivered on 26th April 2016 in Mombasa CMCC No 1965 of 2012)*

**JUDGMENT**

1. This is a second appeal from the decision the High Court sitting in its appellate jurisdiction in Mombasa High Court Civil Appeal No. 177 of 2016. The said appeal arose from the decision of Mombasa Chief Magistrates Court Civil Suit No. 1965 of 2012 in which the Appellants herein sued the Respondents seeking damages under the *Law Reform Act* and the *Fatal Accidents Act* in respect of a road traffic accident which occurred on 24<sup>th</sup> February, 2010 and in which the deceased sustained fatal injuries.
2. The Appellants are the mother and brother respectively of the deceased. On 3<sup>rd</sup> August, 2015, the parties to the suit recorded a consent in which liability was apportioned at 50:50 between the Appellants and the Respondents.



3. At the hearing of the suit, the 2<sup>nd</sup> Appellant, Simon Njuguna Seur, the brother to the deceased, was the only witness who testified in support of the Appellants' case. His testimony, in so far as it is relevant to this appeal related to the funeral expenses and the business that the deceased was engaged in; that of selling mobile phone accessories and mobile phone repairs. He also testified that the deceased, who was single and the last born, used to assist their mother. He was, however, unable to tell exactly how much money the deceased used to send to her. It was his evidence that the deceased was earning approximately Kshs 20,000/-.
4. In his judgement the learned trial magistrate found that the grant of letters of administration *ad colligenda bona* was obtained on 4<sup>th</sup> October, 2010 while the suit was filed on 28<sup>th</sup> September, 2019. Based on section 2(3)(b) of the [Law Reform Act](#), as well as Section 9(2b) of the [Fatal Accidents Act](#), the Court found that the six months limitation period from the date of issuance of grant to the date of filing suit had lapsed hence the proceedings were unmaintainable. The learned trial magistrate, as he was expected to do, proceeded to assess the damages he would have awarded had the suit succeeded. In so doing, he found that the 2<sup>nd</sup> Appellant who was the only witness, was not a dependant of the deceased under section 4 of the [Fatal Accidents Act](#) and as the 1<sup>st</sup> Appellant, the mother, did not testify on how she depended on the deceased, there was no proof of dependency.
5. Aggrieved by the said decision, the Appellants appealed to the High Court vide Mombasa HCCA No. 177 of 2016. Upon hearing the parties, the learned Judge of the High Court, (Chepkwony, J) dismissed the appeal on 14<sup>th</sup> May, 2020. In arriving at her decision, the learned Judge found, based on this Court's decision in [Nyaga Cottolengo Francis v. Pius Mwaniki Karani](#) [2017] eKLR as read with sections 1A and 1B of the [Civil Procedure Act](#) and Order 15 rule 2 of the [Civil Procedure Rules](#) that the trial court had the right to exercise its discretion to frame its own issues from the contents of the documents produced by either party.
6. The learned Judge then agreed with the trial Court that the suit was filed nearly two years after the grant of representation was obtained and that that was long after the limitation period under the said provisions of the [Law Reform Act](#) and the [Fatal Accidents Act](#) had lapsed without seeking leave to do so. Accordingly, it was found that the suit was time barred. In addition, the learned Judge found that pursuant to Section 4(1) of the [Fatal Accidents Act](#), brothers of the deceased do not qualify to be dependants in their sibling's cause and if named as dependants, then the same ought to be proved and based on the decision in [Gerald Mbale Mwea v. Kariko Kihara & Anoter](#) [1997] KLR, it was found that the testimony of the brother was not enough to prove dependency since he was not a dependant. In her view, the loss of dependency ought to have been proved by the mother of the deceased who never testified.
7. At the virtual hearing of the appeal, both Mr Jengo, who held brief for Mr Kariuki for the Appellant and Mr Adede who appeared on behalf of the firm of CB Gor & Gor Advocates for the Respondents, relied wholly on their written submissions.
8. It was appreciated on behalf of both the Appellant and the Respondents that a second appeal is limited to findings of law as set out in [Kenya Breweries Ltd v Geoffrey Odoyo](#) (2010) eKLR and [Stephen Muriungi and another v. Republic](#) (1982-88) 1 KAR 360.
9. It was submitted that both the trial magistrate and the learned Judge misinterpreted and misapplied Sections 2(3) and 9(2) (b) of the [Law Reform Act](#) and [Fatal Accidents Act](#) respectively since the said provisions only apply to proceedings where the estate is sued unlike in the instant case where it was the estate suing. In any event, it was submitted, the Learned Magistrate and the Learned Judge ought to have been aware that only claims under the [Law Reform Act](#) require letters of administration while



- those under *Fatal Accidents Act* do not, as was held in *Trouistik Union International & Another v Jane Mbevu & Another* (1993) eKLR.
10. The Appellants relied on the case of *Town Council of Awendo v Nelson Oduor Onyango & 13 Others* (2013) eKLR and *Housing Finance Company of Kenya v J. N. Wafubwa* (2014) eKLR and submitted that in the instant case the issue of limitation was never pleaded nor canvassed during the hearing nor submissions before the magistrate and just came up in the judgement. The issue cannot thus be said to have met the exceptions to the general rule on pleadings as set out in *Odd Jobs v Mubia* (1970) EA 476, and the courts below misdirected themselves.
  11. According to the Appellants, siblings as dependants could make claims for Lost years, Special damages, Loss of expectation of life and Pain and suffering under the *Law Reform Act*. While appreciating that the courts below correctly held that under Section 4 (1) of the *Fatal Accidents Act* the siblings of the deceased did not qualify as dependants, it was submitted that they, however, overlooked the provisions of the *Law Reform Act* which allowed them to claim as such. In this case, reliance was placed on *Kenya Ports Authority v. Beryl Bertha Malowa Were & Another* C. A. No. 244 of 2011 and this court was urged to assess damages for lost years and loss of dependency which the courts below did not assess contrary to this court's decision in the case of *Andrew Mworia Kasava v Kenya Bus Services* (2016) eKLR.
  12. It was submitted that though the deceased was said to have been a 30 year old businessman with neither a fixed income nor documents to support it, there was a duty on the court to still award damages, based on the decisions in *Trouistik Union International* (ibid), Kenya Ports Authority (ibid), *Isaack Kimani Kanyingi & Another (Suing as the legal representatives of the estate of Loise Gathoni Mugo (Deceased) v Hellena Waniiru Rukanga* (2020) eKLR.
  13. On what amounts to "earnings", the Appellants relied on Section 2 of the *Insurance Motor Vehicle Third Party Risks Amendment Act* No. 50 of 2013 and based on the case of Kenya Ports Authority (*supra*) the Court was urged to adopt a multiplier of 30. We were urged to rely on the *Regulation of Wages (General) (Amendment) Order* 2010 and adopt Kshs. 3,597/= as the monthly earnings in addition to house allowance and to adopt 2/3 as the dependency ratio.
  14. It was urged that the court can then sustain the Kshs. 130,850/=, Kshs. 100,000/= and the Kshs. 15,000/= that the magistrate proposed for special damages, loss of expectation and pain and suffering.
  15. It was submitted that the uncontroverted evidence was that the mother of the deceased was a dependant and the standard of proof being on a balance of probability the issue was proved. This position, it was submitted, was supported by the holding in *Mitchell Cotts (K) Ltd v Musa Freighters* (2011) eKLR. In the Appellants' view, there is no law that says that the evidence of a person who is not a dependant cannot prove dependency and that as long as it is direct admissible evidence and not hearsay by anyone, it is sufficient to prove an issue. In any event, it was contended, it is now settled jurisprudence in Kenya that there is a presumption that children assist their parents. In support of this position, the Appellants relied on *Kenya Breweries Ltd v Saro* (1997) eKLR and *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457.
  16. It was contended that from Kenya Ports Authority Case (*supra*), the manner of calculation of lost years is the same as that of loss of dependency.
  17. It was urged that the appeal herein be allowed with costs and the Order dismissing the appellant suit by Honorable Nyakweba delivered on the 26<sup>th</sup> April 2016 in Mombasa CMCC No. 1965 of 2010 and the Order by Honorable Lady Justice D. Chepkwony dismissing the appellant's appeal in Mombasa High Court Civil Appeal No. 177 of 2016 be set aside; that judgement be entered for the appellant against



- the respondent under the [Law Reform Act](#) and The [Fatal Accident Act](#), being damages for pain & suffering, loss of expectation of life, loss of dependency, lost years, funeral expenses and special damages; that the Appellant do have interest on special damages from date of filing suit in the subordinate court and on general damages from date of judgment in subordinate court at court rates; and that the Appellant do have costs of the suit in the subordinate court, the appeal in the high court and the costs of this appeal.
18. On behalf of the Respondents, it was submitted that the aforesaid provisions of the [Law Reform Act](#) and the [Fatal Accidents Act](#) were properly articulated and applied by the trial magistrate and the appellate judge since it is evident that the drafters of the provisions intended to create a limitation of actions in respect to causes of action in tort (as is the case herein) in order for proceedings to be taken not later than six months after (an executor or administrator) takes representation. In this regard, the Respondents relied on the case of [Roman Karl Hintz v Mwang'ombe Mwakima](#) (19841 eKLR and insisted that the Appellants' claim was statute barred.
  19. As regards the raising of the issue of limitation suo moto, it was submitted that limitation is a jurisdictional issue that goes to the very heart of a matter that is before a court, and without jurisdiction a court acts in vain. The Court was urged to be guided by the case of [Anaclet Kalia Musau v Attorney General & 2 Others](#) [20201 eKLR and [Iga v Makerere University](#) (1972) E.A 62, and it was submitted that the issue of jurisdiction can be raised at any stage of the proceedings and that this was the case in this matter where it was taken suo moto by the learned trial magistrate in his judgment.
  20. On the issue whether the brother was dependant, the Respondents relied on Section 4(1) of the [Fatal Accidents Act](#) for the submissions that only a wife, husband, child or parent qualify to be a dependent. Accordingly, it was submitted, the trial magistrate court as well as the appellate court did not misdirect themselves in finding that the 2<sup>nd</sup> Appellant who was the deceased's brother was not a dependant.
  21. As for the dependency of the deceased's mother, it was submitted that according to the Respondents, dependency is a matter of fact and must be proved before the court can make any award on the same. It was submitted that it must be demonstrated that persons for whose benefit the proceedings are brought under the [Fatal Accidents Act](#) were depending on the deceased prior to his death. In this appeal it was submitted that the Appellants who were duty bound to prove dependency failed to discharge this duty as PW 1 who testified for the Appellants failed to prove how much (if any) the deceased used to send to support their mother, the 1<sup>st</sup> Appellant herein, who, on her part never testified in support of her dependency on the deceased.
  22. It was submitted that the issue of lost years was not canvassed before the trial magistrate court or the appellate court since it was neither pleaded nor submitted on before both courts hence this Court cannot fault them. Reliance was placed on [Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others](#) [20141 eKLR.
  23. It was urged that as the Appellants have failed to demonstrate that the Learned trial magistrate as well as the Learned Appellate Judge erred in law while determining the Appellants' suit, accordingly, this court cannot interfere with their findings that the Appellants' suit is not maintainable and that dependency was not proved. This court was urged to dismiss this appeal with costs to the Respondents.

### **Analysis and Determination**

24. We have considered the written and oral submissions by counsel and the authorities cited.



25. As appreciated by the parties in their submissions, this is a second appeal and as was held in [Kenya Breweries Ltd v Geoffrey Oduyo](#) (2010) eKLR:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Stephen Muriungi and another v Republic* (1982-88) 1 KAR 360, Chesoni, Acting JA (as he then was) said at page 366:-

“We would agree with the view expressed in the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law...”

26. The first and the most crucial issue for determination before is whether the suit was time barred. This finding was based on sections Section 2(3) and Section 9(2) of the [Law Reform Act](#) and [Fatal Accidents Act](#) respectively. Section 2(3) of the [Law Reform Act](#) provides that:

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.

27. Section 9(2) of the [Fatal Accidents Act](#), on the other hand, provides that:

- (2) No proceedings shall be maintainable in respect of a cause of action which by virtue of the provisions 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 personal representative took out representation.

28. It is therefore clear that the two provisions are in pari materia with each other. It is important to note that whereas section 2(1) of the [Law Reform Act](#) talks of “all causes of action subsisting against or vested” in a deceased person “shall survive against, or, as the case may be, for the benefit of, his estate”, section 2(3) deliberately omits to deal with causes of action vested in and surviving for the benefit of deceased persons and restricts itself to actions surviving against the estate of a deceased. In addition, the marginal notes to section 9 of the [Law Reform Act](#) read: “In the event of death, action maintainable against estate”.

29. While marginal notes do not form part of a statute, it has been held that some help can be derived from the side note to show what the section is dealing with, where provisions of the law are obscure. In that event, marginal notes may be used in aid of interpretation of the said provisions. This, it has been held,



is due to the fact that marginal notes give concise indicators of the contents of a section and the purpose of the Act is to be taken into account. See *Abdi S Rahman Shire v. Thabiti Finance Co. Ltd.* Civil Appeal No. 76 of 2000. [2002] 1 EA 279; *Commissioner of Lands & Another v. Coastal Acquaculture Ltd.* Civil Appeal No. 252 of 1996; *Shah v. Attorney-General (NO. 2)* [1970] EA 523; *Raichura Ltd v. Sondhi* [1967] EA 624; *In The Estate of Shamji Visram and Kurji Karsan v. Shankerprasad Maganlal Bhatt and Others* [1965] EA 789; *Visram v. Bhatt* [1965] EA 789; and *Busbell v. Hammond* [1904] 2 KB 563.

30. It is clear from the marginal notes to section 9 of the *Fatal Accidents Act*, that the section only applies to actions against the estate in the event of death. The case before us was an action in favour of a deceased's estate hence distinguishable.
31. In our view a holistic consideration of both provisions lead us to the conclusion that the provisions only apply to situations where the action is against the estate of a deceased person other than actions by the estates of deceased persons. The rationale for this is not difficult to come by. Personal representatives of estates of deceased persons are trustees and under the *Law of Succession Act*, there are timelines within which the personal representatives are to administer and distribute the estates. It would therefore be unfair to have litigation hanging over the heads of such persons indefinitely hence the need to have timelines within which liability may attach against them after grant of representations are obtained.
32. We find that the case of Carl Hintz Case relied upon by the Respondents as holding otherwise must be distinguished from the present appeal. First, in Trouistik Case this Court found that Carl Hintz was never good law and secondly, in that case the Court was not called upon to determine the application of the said provisions.
33. In the premises we find that both the Learned Trial Magistrate and the Learned Judge of the High Court erred in applying the said provisions to Appellant's case. We find that the Appellants' case was not time barred by reason of Section 2(3) of the *Law Reform Act* and Section 9(2)(b) of the *Fatal Accidents Act*.
34. As regards the failure to expressly plead limitation, Order 2 rule 4(1) of the *Civil Procedure Rules* provides as hereunder:

A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

  - a. which he alleges makes any claim or defence of the opposite party not maintainable;
  - b. which, if not specifically pleaded, might take the opposite party by surprise; or
  - c. which raises issues of fact not arising out of the preceding pleading.
35. It is therefore clear that the defence of limitation ought to be specifically pleaded by a party relying on it. Pleadings, do operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. See *Dakianga Distributors (K) Ltd v. Kenya Seed Company Limited* [2015] eKLR.



36. In *Independent Electoral and Boundaries Commission & another v. Stephen Mutinda Mule & 3 others* [2014] eKLR this court cited an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*" and was stated that:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

37. The law, as we understand it is that to condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. See *Eso Petroleum Co. Ltd v. Southport Corporation* [1956] AC 218 at 238 and *Mumo Matemu-v-Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

38. In this case, limitation is expressly identified under Order 2 rule 4(1) of the *Civil Procedure Rules* as a defence that must be pleaded. Even if that defence was not expressly set out in that rule, the rule requires that any fact showing illegality which makes any claim or defence of the opposite party not maintainable; or which, if not specifically pleaded, might take the opposite party by surprise; or which raises issues of fact not arising out of the preceding pleading must be pleaded.

39. It must be noted that limitation is a defence, which a party may waive by making an acknowledgement of the debt, unlike other defences where the Court is absolutely and expressly barred from dealing with a matter hence lacking jurisdiction. Section 23(3) of the *Limitation of Actions Act*, provides that:

Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.

40. A right to action which would otherwise be barred on account of limitation, can therefore be revived upon its acknowledgement by the person liable therein. Therefore, to raise a defence of limitation at the tail end of the hearing and in submissions would have the effect of depriving the Appellants of the opportunity of adducing evidence, assuming they had it, of showing that there were facts that revived the cause of action or excepted the case from being statute barred. It is also wrong for the Court on its own motion to raise the matter in the judgement without affording an opportunity to the parties to address it on the matter.



41. The issue was dealt with by this Court in *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR where this Court held that Order 6 Rule 4(1) and (2) [now Order 2 rule 4(1)] of the *Civil Procedure Rules* requires a person relying on the provision of a statute such as limitation to specifically plead the statute on whose provisions he relies to defeat the claim and that a plaintiff is not bound to plead in his plaint issues which would negate possible defences such as limitation, fraud, mistake long before such issues are raised. The Court further held that a party who has not specifically pleaded limitation is not entitled to rely on that issue and base his preliminary objection on it; nor is he entitled to rely on that defence during the trial as cases must be decided on the issues pleaded since a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.
42. The effect of taking up the defence in the judgement had the effect of denying the Respondent an opportunity of justifying its position that the matter was not caught up by limitation of actions. It follows that it was not open to the trial court to raise such an important issue in the manner it did. We therefore find that the High Court was in error in upholding that finding.
43. The next issue is whether the 2<sup>nd</sup> Appellant was a dependant of the deceased under section 4 of the *Fatal Accidents Act* and whether he could testify as to the dependency of the 1<sup>st</sup> Appellant, the mother of the deceased. Section 4(1) of the *Fatal Accidents Act* provides that:
- Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
- Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.
44. It is therefore clear that it is only in respect of claims brought for the benefit of the wife, husband, parent and child of a deceased under the *Fatal Accident Act* that ought to be brought in the name of the executor or administrator of the person deceased. Loss of dependency falls under Fatal Accident Act. Accordingly, the 2<sup>nd</sup> Appellant could not make a claim under the said Act for loss of dependency as he was not a dependant.
45. Before we deal with the next issue, it is important to distinguish between damages forming the subject of *Fatal Accidents Act* and those under the *Law Reform Act*. When the victim of a personal injury action has died prior to trial, two distinct claims are possible. A claim can be brought for the benefit of the deceased's estate under the *Law Reform Act* or on behalf of the dependants of the deceased under the *Fatal Accidents Act*. While these claims can be pursued separately, they are often brought together. When a claim is brought for the benefit of the deceased's estate, this is founded on a continuation of the cause of action to which the deceased was entitled the instant before they died. On the other hand, when a claim is brought on behalf of the dependants, a fresh cause of action is created, although the claim will only succeed if it can be shown that the deceased would have recovered damages if they were still alive. Therefore, a claim under the *Law Reform Act* on behalf of the deceased's estate must be brought by the administrator or executor of the estate.



46. As regards the claim for dependency by the 1<sup>st</sup> Appellant, the mother, we find no authority for the holding that the 2<sup>nd</sup> Appellant was not competent to adduce evidence regarding her dependency. If the 2<sup>nd</sup> Appellant was in possession of such evidence as would assist the court in arriving at the said decision, there was nothing objectionable in the 2<sup>nd</sup> Appellant adducing the said evidence. As to whether dependency was proved is another matter altogether. This Court has pronounced itself on when to make an award of loss of dependency. In *Jane Chelagat Bor v. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990- 1994] EA 47, Hancox, CJ held that:

“There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss...“Dependency” or “dependency” is the relation of a person to that by which he is supported...The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation.”

47. That decision was followed in *Chumo v. Messrs Kapsimatwo Express* [1992] KLR 77, where Muli, JA opined that:

“Dependency is a matter of fact and must be determined on the existing facts at the date of the death...The long list of decisions indicate that the 1/3<sup>rd</sup>, 2/3<sup>rd</sup> proportion for personal expenses and dependency respectively has been applied under the assumption that it is the rule of law. It is not. The same practice, although has been applied for a long time now it is not a rule of law. Dependency and ascertainment of personal expenses are matters of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss. The fact that in many of these cases the trial Judge thought that the dependency rate should be two-thirds, in the case of a married man with children means simply that his or her assessment of the pecuniary loss suffered by the dependants because of their father’s death and not that there was any rule to that effect.”

48. The two lower courts found that there was no evidence to support the claim for loss of dependency. As a second appellate Court we cannot interfere with the concurrent finding of fact by the two courts. This court in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] 1 KLR 176 while citing *Stephen Muriungi and Another v. Republic* [1982-88] 1 KAR 360 expressed itself as follows:

“In a second appeal...the court has to resist the temptation of delving into matters of facts. The court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or looking at the entire decision, it is perverse. Where a right of appeal is confined to matters of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

49. The Appellants took a calculated risk of relying only on the evidence of PW1, himself not a dependant and that evidence fell short of the threshold required to prove dependency. As regards the issue of lost years we agree with the Respondents that the issue was not addressed before the two courts below and we cannot take it up for the first time in this appeal.



50. In the premises we allow the appeal as regards the issue of limitation and set aside the dismissal of the suit on that ground. Having so done and in light of our findings hereinabove, we enter judgement along the lines suggested by the Learned Trial Magistrate. Accordingly, we award Kshs 15,000/- under the head of pain and suffering, Kshs 100,000.00 loss of expectation of life and Kshs 115,600/- special damages.
51. While the general damages will accrue interest from the date of judgement of the trial court, the special damages will accrue interest from the date of filing of the suit.
52. As the appellant has only partly succeeded in this appeal, we award the Appellant half the costs before the two lower courts as well as the costs of this appeal.
53. Judgement accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF APRIL 2023.**

**S. GATEMBU KAIRU (FCI Arb.)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

