



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(Coram: Gicheru, Kwach & Shah, J.J.A.)
CIVIL APPEAL NO. 150 OF 1997
BETWEEN

JAPHET NKUBITU COUNTY COUNCIL OF MERU.....APPELLANTS

AND

REGINA THIRINDI.....RESPONDENT

**(An appeal from the judgment/decree of the High Court of
Kenya at Meru (Etyang, J.) dated 20th March, 1997
in
H.C.C.C. NO. 198 OF 1994)**

JUDGMENT OF THE COURT:

Regina Thirindi, the respondent in this appeal, (hereinafter called "the plaintiff") sued Japhet Nkubitu (the first defendant) and the County Council of Meru (the second defendant) to recover damages on behalf of the estate and dependants of the late David Mwilaria (the deceased) who was fatally injured in an accident on 5th October, 1992 involving a tractor driven by the first defendant but owned by the second defendant. A defence was filed in which the plaintiff's claim was denied and it was averred that the in the presence of Mr. C. Kariuki for the plaintiff and Mr. Mithega for defendants and the following order was recorded by consent -

"By consent judgment be and is hereby entered for the plaintiff on liability apportioned at 40% against the plaintiff and 60% against the defendant. Case proceeds for assessment of damages."

On 12th February, 1997 the case was listed for assessment of damages before the learned Judge and once again Mr. Kariuki informed the Judge that they had a consent to record. And it was ordered by consent -

"Written submissions by the plaintiff on quantum be filed by the plaintiff within 2 weeks and served on the defendant's counsel, who will file written submissions thereafter within two weeks. Judgment on 20th March, 1997."

On the strength of this consent order the plaintiff's Advocate filed written submissions which also contained the evidence on which the court was supposed to rely in assessing damages. It covered the deceased's age at the date of his death and that he left a wife and seven children. Copies of the death certificate, police accident abstract, a certain affidavit, grant of letters of administration and of a letter from a Cooperative Society showing the deceased was a farmer in receipt of an income of Shs. 4000/-p.m. On the basis of these allegations, for they could not be anything more than allegations, the learned

Judge purported to assess damages and awarded the plaintiff Shs.167,100/- together with interest and costs. It is against this award that the defendants have now appealed on the ground that there was no evidence to support the award.

We are concerned that the learned Judge embarked on the exercise of assessing damages in vacuo and in the absence of any evidence as none was led. Submissions are not evidence and cannot take the place of evidence. We are told this practice is rampant at Meru but that is no excuse for a practice which is clearly illegal and contrary to law.

Even after judgment was entered by consent on liability, the plaintiff still had to lead evidence to prove the averments contained in paragraphs 6 and 7 of the plaint. Evidence must be led to prove that the widows and dependants actually exist and are entitled to benefit from any damages awarded.

The plaintiff must also prove the age of the deceased at the date of his death as well as his income and her claim that the deceased used to support his wives and children. These are not the sort of matters you can introduce by way of written submissions. Although the legal position is too plain to raise any difficulty in view of this novel practice at Meru we are constrained to restate and reinforce the mandatory provisions of section 107 of the Evidence Act (Cap 80) which provides -

"107(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."

In this case evidence was not produced and witnesses were never called. There was therefore no basis at all upon which an award of damages could have been made. Counsel for both parties misled the learned Judge but the Judge should not have allowed this to happen because a Judge is presumed to know the law. Although the defendants are complaining now obviously with the benefit of hindsight, they are equally to blame because their Advocate played an active part in what happened. It would be unjust to leave the plaintiff with the baby on her lap, so to speak.

For all these reasons, we allow this appeal, set aside the judgment and decree of Etyang J. and remit the case back to him to assess damages in accordance with settled principles and more specifically section 107 of the Evidence Act. We make no order as to costs of this appeal as well as costs of proceedings in the superior court upto the date of judgment for the reason that both counsel contributed to the state of affairs prevailing at the time of delivery of judgment in the superior court.

Dated and delivered at Nyeri this 30th day of October, 1998.

J.E. GICHERU

JUDGE OF APPEAL

R,O, KWACH

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

