



**RM & 3 others v EAO (Civil Appeal E100 of 2021)
[2022] KEHC 12074 (KLR) (Family) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 12074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E100 OF 2021**

MA ODERO, J

MAY 20, 2022

BETWEEN

RM 1ST APPELLANT

BD 2ND APPELLANT

FK 3RD APPELLANT

RI 4TH APPELLANT

AND

EAO RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 13th September 2021 in which the Appellants Reuben Mbaisi, Benson Dasi, Fredrick Kagoni and Rhoda Indwasi challenge the judgment delivered on 10th September 2021 by Hon A.N. Ogonda Senior Resident Magistrate.
2. The Respondent Elca Adisa Onzele opposed the appeal. The appeal was canvassed by way of written submissions. The Appellants filed the written submissions dated 12th April 2022 whilst the Respondent relied upon her written submissions dated 25th April 2022.

Background*

3. The Deceased herein Adamba Bernard Chahilupassed away in Nairobi on 14th August 2021. Following his demise the body was moved to the Mama Lucy Kibaki Hospital Mortuary where it still remains to date. This matter is a burial dispute pitting the Respondent who claims to be the wife of the Deceased and who plans to inter the remains of the Deceased in Soy Village Kakamega County, where she claims the couple had set up their matrimonial home.



4. On the other side are the Appellants who are the brothers, son and alleged wife of the Deceased who wish to have the remains of the Deceased buried at Igunga village in Vihiga County.
5. The dispute was heard inter partes in the lower court and on 10th September 2021 the learned trial magistrate found in favour of the Respondent and made inter alia the following orders:-
 - “(i) That the Respondent was entitled to inter the remains of the Deceased, Adamba Bernard Chahilu.
 - (ii) That the Deceased remains were to be interred at Soy Village which was found to be the matrimonial home of the Deceased and the Respondent.
 - (iii) That the four Appellants who were relatives of the Deceased should not be excluded in the burial arrangements and ceremony.”
6. By this judgment the court directed that the body of the Deceased was to be handed over to the Respondent for burial at their Soy village home which was found to be the couples matrimonial home.
7. Being aggrieved by the judgment of the trial court the Appellants filed a Memorandum of Appeal before the High court and vide a Ruling delivered on 15th October 2021 this court granted a stay of execution of the judgment delivered by the lower court pending the hearing and determination of this appeal.
8. In the Memorandum of Appeal dated 13th September 2021, the Appellants raised the following grounds of Appeal-
 - “1. That the learned magistrate erred in fact in failing to consider the personal wishes of the deceased to be buried at his ancestral home in Igunga village in Vihiga County.
 2. That the learned magistrate erred in fact and in law when he failed to consider that the 2nd and 4th Appellants were the closest people to the deceased before his demise and hence had priority to bury the deceased.
 3. That the learned magistrate erred in law and fact in failing to consider that the deceased wanted to be buried in his ancestral home in accordance with Luhya Customs.
 4. That the learned magistrate erred in law and fact in failing to consider that the deceased's first born wished for him to be buried at their ancestral home in Igunga Village, Vihiga County.
 5. That the learned magistrate erred in law and fact in failing to find that the Respondent was not a widow to the deceased as she admitted in her witness statement and during trial.
 6. That the learned magistrate erred in law and fact in failing to find that the deceased did not have a wife before his demise in accordance with Luhya customs but had 5 concubines, of which none of them had any rights to bury the deceased both in law and as per Luhya Customary Laws.
 7. That the learned magistrate erred in law and fact in failing to adhere to stare decisis.



8. That the learned magistrate erred in fact and law giving the Respondents custody of the deceased's body for burial at Soy Village against the deceased's wishes.
9. That the learned magistrate erred in law and fact in failing to find that the deceased did not establish a home in Soy Village when he was alive hence he ought to be buried in Igunga Village where he had established a home with his first lover in accordance with Luhya customs.
10. That the learned magistrate erred in law and fact in failing to find that the deceased's children, biological brother, family, friends and elders of the Luhya Community will not attend the send off should he be buried at Soy Village as it is contrary to the Luhya Customs.
11. That the learned magistrate erred in law and fact in failing to find that the wishes of all the closest members of the deceased's safe for the Respondent are in agreement that he ought to be buried in his ancestral home at Igunga Village, Vihiga County, in accordance with his last wishes and the Luhya Customary Laws.
12. That the learned magistrate erred in law and fact in failing to find when she failed to make a finding that the Appellant had proved their case against the Respondent.
13. That the learned magistrate erred in law and fact when she took into account extraneous matters and imaginary facts of the case to reach at her decision.
14. That the learned magistrate erred in law and fact by failing to consider an admission by the Respondent that where dowry was not paid and the woman's lover dies the man ought to be buried at his family home like was her first lover Anthony with whom they had two children.
15. That the learned magistrate erred in law and fact when she failed to give sufficient reasons for her judgment.
16. That the learned magistrate erred in law and fact in finding that the Respondent had acquired property with the deceased, which is not true and was not proven during trial.
17. That the learned magistrate erred in law and fact and precedents when she failed to take into account the existing statues and case law applicable to the circumstances of the case before her.
18. That the learned magistrate erred in law and fact when she decided the whole case against the weight of the evidence".

9. Accordingly, the Appellants prayed That-

- "1. The entire judgment of the Honourable A.N. Ogonda (Ms) Senior Resident Magistrate given on 10th September 2021 in Nairobi Civil Case NO. E1137 OF 2021 be dismissed.



2. The Appellants be allowed to bury the deceased (Adamba Bernard Chahilu) as per Luhya Customs and his last wishes.”

10. As stated earlier the appeal was opposed.

Analysis and determination

11. I have carefully perused the record of the trial before the lower court, I have considered the Memorandum of Appeal dated 13th September 2021 and the grounds thereto and I have also considered the written submissions filed by both parties.

12. This being a first appeal this court is obliged to re-examine and re-evaluate the evidence adduced before the trial court but bearing in mind the fact that it did not see or hear the witnesses testify. In *Peters vs Sunday Posts Ltd*[1958] E.A. the Court of Appeal stated as follows:-

“It is a strong thing for an appellant court to differ from the finding, on a question of fact, of the judge who tried the case, and who 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.”

13. From this appeal two (2) main issues arise for determination:-

- (a) Whether there existed a marriage between the Respondent and the Deceased.
- (b) Where the remains of the deceased ought to be interred.
 - (a) Existence of a marriage

14. The Respondents evidence before the lower court was that she got married to the Deceased on or about December 2006 under Luhya Customary Law. She alleges that the Deceased visited her parents for introduction and made a token payment of Kshs 20,000/-.

15. The Respondent stated that she cohabitated with the Deceased as man and wife in the Embakasi area of Nairobi and that they later set up their matrimonial home in Soy Village, Likuyani Location, Kakamega County. That the union resulted in the birth of two (2) children namely;

- (i) Precious Salome Adamba born on 10th September 2008
- (ii) Ivan Bernard Chahilu born on 9th July 2010

16. The Respondent told the court that the Deceased had other children from previous unions namely Hillary Misango Adamba and Ian Lwangu. She states that she resided in Kakamega with her two biological children as well as with Ian Lwangu, her stepson.

17. The Respondent testified that although she was aware of the Deceased’s illness she had been assured by the 2nd Appellant that the Deceased was being taken care of. Upon receiving news of the death of the Deceased, the Respondent stated that she travelled to Nairobi and went to Mama Lucy Kibaki Hospital on 17th August 2021 and made an attempt to view his body. However, the Hospital Administration barred her from accessing the body upon the instructions of the Appellants. The Respondent then filed the suit in the lower court seeking that the body of Deceased be released to her for burial. The trial court delivered judgment in her favor on 10th September 2021. The Respondent urges the court to dismiss this appeal in its entirety.



18. On their part the Appellants insists that the Deceased was not married to the Respondent though they do concede that the couple cohabited and bore two (2) children together. The Appellants assert that the Deceased had separated from the Respondent several years prior to his demise. The 4th Appellant Rhoda Indwasi told the court that she got married to the Deceased in the year 2018 and that they bore a child together. That it was she together with Benson Dasi (a brother to the Deceased) who took care of him during his illness and paid all his medical bills.
19. The Appellants assert that the Deceased during his lifetime expressed a wish to be buried at his parent's rural home in Igunga Village Vihiga County next to the graves of his late parents.
20. The Appellants confirm that they filed a statement of defence dated 31st August 2021 in which they prayed that the suit filed by the Respondent in the lower court be struck out with costs. They confirm that the trial court delivered a judgment in favour of the Respondent on 10th September 2021. That being dissatisfied with that judgment they filed this present appeal seeking to have the judgment of the lower court overturned and that the body be released to the Appellants for burial in the home of Deceased's parents in Vihiga County.
21. On the question of the marriage between herself and the Deceased, the Respondents evidence was that she and the Deceased began to cohabit as man and wife in the year 2006. She stated that initially they lived in the home of Deceased's parents at Igunga Village but after five (5) years they moved to Soy Village where they established their matrimonial home and where they continued to cohabit for seven (7) years. Therefore the evidence of the Respondent is that she cohabited with the Deceased for a total of twelve (12) years and that they bore two (2) children together.
22. The Respondent asserted that she did not know the 4th Appellant 'Rhoda' at all and had no knowledge that the Deceased was cohabiting with the said 'Rhoda' in Nairobi.
23. Ordinarily, the existence of a marriage under customary law will be proved by adducing evidence to show that the cultural norms of that particular community regarding marriage were carried out – in the Luhya Community it is required that dowry be paid as part of the culture.
24. Although the Respondent stated that a token payment of Kshs 20,000/- was made to her parents by the Deceased she admits that no dowry was paid. Likewise, there was no evidence that the Deceased ever married the Respondent under statutory law. Therefore there is no evidence to prove that the Deceased entered into a marriage with the Respondent under Luhya Customary Law.
25. That being said the question that would then arise is whether it can be said that a 'presumption of marriage' existed between the Deceased and the Respondent. The fact that no customary marriage has been proved does not preclude the court from finding that based on the parties period of cohabitation and the manner in which they conducted themselves a marriage could be 'presumed' to exist between the two.
26. In *Hortensiah Wanjiku Yawe v Public Trustee* CA Civil Appeal No. 13 of 1976 (UR), the Court of Appeal for East Africa held as follows:-
 - i. The onus of proving customary law marriage is generally on the party who claims it;
 - ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;
 - iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard: (cf *Mwagiru v Mumbi*, [1967] EA 639, 642)



- iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
 - v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate*, [1937] 3 All ER
 - vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.” (own emphasis)
27. In the case of *Re Estate of George Owino Onyango* [2009] eKLR Hon Justice Majanja stated that -
- “Even if a customary marriage is not established, he courts may well find that the parties cohabited for a period of time and conduct themselves in such a manner that a marriage could be presumed.”
28. Similarly in *BCC V JMG* [2018] eKLR, it was held:-
- “..... the fact that there no customary marriage between the deceased and respondent does not preclude the court from finding that parties cohabited for a period of time and conducted themselves in such a manner that a marriage could be presumed. This principle has been upheld in several cases from our courts.”
29. Further in the case of *SO v CMM & another* [2016] eKLR, it was held as follows:-
- “Back to the facts of this case. I find that there was long cohabitation between the appellant and the deceased in which there was a child and the people they dealt with considered them as husband and wife. These facts gave rise to a presumption of marriage in favour of the appellant. I find that, on this basis, the appellant and the deceased were married. It follows that the lower court fell into error when it found that there was no valid marriage. I further find that the appellant was the one entitled to bury the remains of the deceased who was his wife.”
30. The Respondent stated that she and the Deceased had cohabited as man and wife both at his parents rural home in Vihiga County and later at Soy village for an aggregate period of twelve (12) years. Their cohabitation resulted in the birth of two (2) children born in 2008 and 2010.
31. None of the above facts has been disputed by any of the Appellants. All that the Appellants state is that the Deceased had separated from the Respondent prior to his death. However, none of the witnesses was able to state specifically when the Deceased and the Respondent separated.
32. On her part the Respondent denies that she and the Deceased ever separated. She testified that the Deceased left her with their children in their rural home in Kakamega when he came to work in Nairobi. It is common practice in many Kenyan families for the wife to remain to look after the rural home while the husband travels to the city for work. The fact that the Deceased and the Respondent resided in different parts of the Country does not mean that they were separated.
33. The Respondent told the court that the Deceased brought his children borne of other women to live with her in the rural home. This again is indicative of the existence of a marriage between the two. Why else would the Deceased collect all his children and bring them to live with the Respondent – it is clear that he considered the Respondent as his wife.



34. The evidence of the Respondent was supported by PW2 Ian Lwangu who was a son of the Deceased by a different woman. He told the court that he knew the Respondent as his Father's wife. PW2 confirmed that he lived with the Respondent and his stepsiblings in the rural home in Soy Village whilst the Deceased was based in Nairobi where he used to work. PW2 further told the court that his Father and stepmother lived in harmony and at no time did they ever separate. He confirmed that the Deceased regularly travelled to Soy to visit his wife and children.
35. It is clear from the evidence that the Deceased and the Respondent cohabited for several years as man and wife, the Deceased entrusted his children borne of other women to the Respondent to look after and the couple presented themselves to other people including their Pastor as man and wife. Even PW1 Hillary Adambawho was the eldest son of the Deceased confirmed under cross-examination that he knew the Respondent – that she lived in their rural home in Soy Village with his stepsiblings. In the circumstances, a presumption of marriage would clearly arise.
36. The evidence of the Respondent regarding her union with the Deceased is further supported by the testimony of PW3 ELI Magaka Mugundawho was a Pastor at Mwamito PAG Church. He told the court that he knew both the Deceased and the Respondent very well as they were worshippers at his church. PW3 testified that he knew the Respondent as the Deceased's wife and he too insisted that the couple had never separated.
37. The Appellants alleged that the Deceased had separated from the Respondent and had married PW4 Rhoda Indwasi. However, there is no evidence to prove that the Deceased married the said 'Rhoda' under any system of law. More damningly PW3 the Pastor told the court that he knew 'Rhoda' as the wife of one Jairus Amukondo. When faced with this revelation 'Rhoda' admitted that she was once married but had left her husband. There was no evidence to show that the marriage of Rhoda to 'Amukondo' had ever been dissolved. Indeed, it is uncertain whether the said 'Rhoda' even had the legal capacity to marry the Deceased.
38. It is telling that although the 4th Appellant claims that she got married to the Deceased in 2018, Hillary Adamba the eldest son of the Deceased told the court that he only met 'Rhoda' in January of 2021. Moreover, 'Adamba' stated that although he had seen the 3 year old child allegedly sired by his Father he did not meet the child until after the death of the Deceased.
39. The learned trial magistrate noted that 'Rhoda' had failed and/or declined to avail a copy of her identify card to the court leading the court to presume that her identify card bore the name of her real husband. In her judgment, the learned trial magistrate observed that the 4th Appellant did not strike her as an honest witness. This was the observation of the magistrate who saw and heard the witness testify.
40. The 4th Appellant claimed that she married the Deceased in the year 2018 and bore him a daughter in 2021. However, unlike the Respondent who was able to produce the birth certificates for her two children in which the Deceased was named as Father (see Birth Certificates Serial No 045000 and 047999) the 4th Appellant was not able to produce the birth certificate of this child which she claims had been sired by the Deceased. All in all I find that there is no evidence to prove the allegation that the Deceased had married 'Rhoda' at all.
41. The 2nd Appellant who is a brother to the Deceased stated that the Respondent was invited by the elders to attend a family meeting after the death of deceased. Why would the elders call the Respondent to participate in a family meeting to discuss burial arrangements if they did not consider her as family. The fact that she was included is evidence that the family regarded the Respondent as the wife of the Deceased.



42. Indeed under cross-examination the 2nd Appellant confirmed that the Respondent was his sister-in-law. He further confirmed that the Respondent had cohabitated with the Deceased in Nairobi before they moved to Soy where they established a home. The witness also confirmed that nothing in Luhya Customs would prevent a man from leaving his ancestral home and settling with his family elsewhere. The 2nd Appellant confirms that no dowry was paid for ‘Rhoda’.
43. More pertinently the Respondent produced as evidence during the trial a letter dated 18th August 2021 authored by the chief of Likuyani Location confirming that the Deceased and the Respondents resided within his location and he had known the two as a married couple for over 12 years.
44. Based on the evidence adduced before this court I am satisfied that it has been shown that a marriage existed between the Respondent and the Deceased. The two had cohabited for a long period to time, had born children together and had set up a home in Soy Village. They presented themselves to all as a married couple. A presumption of marriage exists. I find no evidence to prove that the couple had ever separated. Indeed when the Deceased passed away, the information was immediately relayed to the Respondent who was his wife.

(b) Where should the Deceased be buried?

45. The Appellants claim that the Deceased during his lifetime expressed a desire to be buried next to his parents at their home in Vihiga County. The only person who appears to have heard the Deceased express this desire was the 2nd Appellant who was a brother to the Deceased. DW1 the Deceaseds son admitted under cross-examination that he did not personally hear the Deceased express a preference on burial place. He stated that he was only told by his uncle what the Deceased is supposed to have said.
46. In their submissions the Appellants made much of the fact that the Deceased was living with ‘Rhoda’ in Nairobi and that she and the 2nd Appellant care of the Deceased during his illness. This does not give the two rights to bury the Deceased. ‘Rhoda’ may have been cohabiting with the Deceased as a girlfriend or concubine, but she was not his wife. As for the 2nd Appellant as a brother to Deceased living in Nairobi it would be expected that he would be in the forefront of caring for his late brother.
47. The Appellant allege that the Deceased was not in good terms with the Respondent at the time of his death. No evidence has been tendered as proof of this allegation. As I have stated earlier the fact that couple resided in different parts of the country is no proof of strained relations between the two. If the Deceased had a problem with the Respondent he would not have left his son Ian Lwangu to continue to reside with the Respondent.
48. The Respondent on the other hand states that she wishes to have the remains of her husband interred at the rural home in Soy Village. In the case of *Ruth Wanjiru Njoroge – vs - Jemimah Njeri Njoroge* [2004] eKLR Hon Justice Ojwang (Retired) held that-

“In social context prevailing in this Country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms.”

49. Further in *John Omondi Oleng’o another v Sueflan Radal* [2012 Hon Justice Mabeya held as follows: -

“...when it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exist. When they fail to agree and approach the court for solution, the court has no option but to step in” (own emphasis)



50. The court has already found that the Respondent was the wife of the deceased. The Appellants claim that the family of Deceased did not know his Soy Village home and had never been there. This is not entirely true. PW2 Ian Lwangu a son of the Deceased confirmed that he and the other children of the Deceased lived with their mother in Soy Village. Even the eldest son of the Deceased Hillary Adamba admitted that her father had a home in Soy Village and that he regularly used to stay there.
51. In the premises I find that the wishes of the wife of Deceased regarding place of burial should prevail. Accordingly, I find no merit in this Appeal. The same is dismissed in its entirety. This court upholds the decision of the lower court and reiterates the orders made by the trial court as follows:-
1. The Respondent herein Elcah Adisa Onzele is entitled to inter the remains of the Deceased Adamba Bernard Chahilu.
 2. The Deceased's remains are to be interred at the matrimonial home at Soy Village Likuyani Location, Kakamega County.
 3. All the relatives of the Deceased are to be allowed to participate in arrangements and to attend the burial.
 4. The mortuary costs up to the date of this judgment shall be met by the Appellants.
 5. This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 20TH DAY OF MAY 2022.

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MAUREEN A. ODERO

JUDGE

