



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. E035 OF 2021

GEORGE OOKO OKOTH.....APPELLANT

VERSUS

EDITH APIYO OCHIENG...RESPONDENT

(An appeal against the judgement and decree delivered by the Hon. S.W. Mathenge, Resident Magistrate on the 19th November 2021 in Bondo Principal Magistrate's Court Civil Case No. E128 of 2021)

JUDGMENT

1.This is an appeal against the whole judgement and decree delivered by the Hon. S.W. Mathenge on the 19th November 2021 in Bondo PM's Court Civil Case No. E128 of 2021.

2. The background to this matter is that the respondent /plaintiff herein **EDITH APIYO OCHIENG** is the biological mother to the deceased Austine Otieno Ooko. Vide an amended plaint dated the 22nd October 2021, the respondent who was the plaintiff in the lower court sought a permanent injunction restraining the appellant/defendant **GEORGE OOKO OKOTH** or his agents from interfering with and/or burying her deceased son Austine Otieno Ooko. The respondent averred that the appellant had abandoned her and her children in 2003 when the deceased was 5 years old and was thus only interested in the deceased as a result of the insurance compensation likely to be paid out as a result of the deceased's death.

3. The appellant filed a defence denying the averments by the respondent and stated that it was the respondent who left the matrimonial home and took away the children without his consent. The appellant further stated that he had been taking care of the children by sending them money, buying school items and paying school fees.

4. In her judgement which is impugned by this appeal, the trial court found that the respondent had proved her case on a balance of probabilities and proceeded to grant the respondent the orders sought, to bury the body of the deceased Austine Otieno Ooko. The Appellant herein was allowed to participate in the burial of the deceased.

5. The appellant was dissatisfied with the trial court's judgement and filed a memorandum of appeal dated 25th November 2021 setting out eight grounds as follows:

- a. That the learned magistrate erred in law and fact by failing to find and hold that the plaintiff did not prove her case as against the defendant to the required standard.
- b. That the learned magistrate erred in law and fact by descending to determine issues not pleaded and canvassed by parties at trial hence arriving at a wrong decision.
- c. That the learned magistrate erred in law and fact by failing to find and hold that it was the defendant who was entitled to inter the remains of the deceased as per the Luo customs and ethnic community the deceased belonged to and was affected by.
- d. That the learned magistrate erred in law and fact by making a decision in favour of the plaintiff that exceeded the weight of the facts, evidence as adduced by the plaintiff hence arriving at a biased decision.
- e. That the learned magistrate erred in law and fact by placing reliance on Luo Customary Law that were never proved at all by way of either evidence or expert opinion.
- f. That the learned magistrate analysis of the case, the finding and decision was marred with the biasness, was full of assumptions

and lacked sound legal facts and evidence in support of his decision.

g. That the learned magistrate descended into raising and determining issues of that were never raised or canvassed by parties during trial hence occasioning an injustice to the defendant's case.

h. The Learned Magistrate finding was against the weight of evidence on record.

6. In response to this appeal, the respondent acting in person unusually swore a replying affidavit on the 9th December 2021 and filed in court on the 10th December 2021. It was her case that both parties represented themselves before the trial court but that the appellant was now represented by an advocate who failed to seek leave to come on record nor filed a Notice of Appointment of Advocates and was thus on record irregularly.

7. The respondent admitted that she and the appellant lived together as husband and wife until 2003 when the appellant abandoned her and their children and stopped catering for the children's needs in any way.

8. She further averred that from the evidence adduced in court, it was clear that the appellant failed to formalize their marriage according to Luo customary law and could thus not claim to be married to the respondent. She further stated that the deceased died in a road accident on the 1st October 2021 at Kipkelion and his body was taken to Kericho County Hospital where post-mortem was carried out only for the appellant to sneak the body to Bondo sub-county hospital on the 8th October 2021 prompting the respondent to initiate the proceedings before the trial court.

9. The respondent further deposed that the appellant was before court with unclean hands seeking orders to bury the deceased whereas he had ignored the deceased's other siblings who he failed to claim and this pointed at the appellant's motive of getting compensation from the insurance as a result of the accident.

10. She further stated that given the body of the deceased Austine Otieno Ooko, she would bury it at her ancestral home in Bondo and not Suba as claimed. She further averred that the appellant had lost interest in the deceased for more than 18 years and that at the time the deceased reached 18 years, he made a decision to stay with the respondent and as such, the decision should be upheld by the court. It was her averments that she had spent a lot of money to arrange for the deceased's burial which the appellant should be ready to shoulder.

11. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

12. The appellant who was represented by Mr. Oduol Achar Advocate submitted that the trial court was biased in analysing the facts and issues, some of which were never litigated. He specifically quoted the trial court's analysis on the issue of dowry as between the appellant and the respondent and submitted that it was not in doubt that the respondent and the appellant were married for a long time and begot four children but separated and the Respondent got married elsewhere.

13. The appellant's counsel submitted that he was a man of modest means being a jua kali artisan as well as carrying out casual jobs and was thus constrained in putting up his family in Nairobi as desired by the respondent. The appellant submitted that he provided what he had for his family.

14. He further submitted that the respondent failed to adduce evidence of his bad character, irresponsibility, abuse or violence or negligence that would impeach him from burying his son when the mother had remarried elsewhere.

15. The appellant further submitted that in proceeding to determine issues of maintenance of the deceased and wishes of the deceased during his lifetime, the trial court was biased as these issues were never litigated upon and further were never backed by any reason.

16. It was submitted that there was never any assertion or evidence tendered by the respondent to show that the appellant had totally removed himself from his children and thus it was misleading for the trial court to arrive at a decision that the deceased was only close to his mother.

17. The appellant's counsel thus submitted that the analysis of the facts and evidence tendered by the trial court was against the weight of the decision of the court and as such occasioned hardship and injustice on the appellant.

18. The appellant relied on the case of **Morris Odawa v Samuel Ochieng Auma [2019] eKLR** where the court held that in applying customary laws, the court has to consider all the circumstances of the case and the justice of the case. With regard to the right to bury and the law regarding burial disputes, the appellant relied on the cases of **Michael Wambua Mulwa & Another v Jackson Muisoyi Mulwa & Another [2021] eKLR** and that of **In Re Burial of Musa Magodo Keya (Deceased) [2021] eKLR**.

The Respondent's Submissions

19. The respondent acting in person filed written submissions contending that the appellant abandoned her and their 4 children in 2003 when the deceased was 5 years old and never bothered to take up his parental obligations until when the deceased passed on in 2021 is when the appellant appeared claiming that he wanted to give the deceased a decent send off.

20. The respondent relied on the case of **GMI v DMK (2013) eKLR** where it was held that *when it comes to burial disputes, it is personal law that comes into play because there is no statute in Kenya that governs burials*. Reliance was further placed on the case of **PZG & 2**

Others v TMT (2019) eKLR where it was held that *any African child who during his lifetime had not established a home of his own or contracted a law for marriage upon his death his or her estate shall be administered according to the customs and culture of the community or ethnic to which he or she belonged by virtue of birth.*

21. The respondent further relied on the case of **Ruth Wanjiru Njoroge v Jeremiah Njeri Njoroge & Another (2004) eKLR** where it was stated *inter alia* that *in the social context 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 and as the marital union is the closest chain of relationship touching on the deceased therefor, it is only natural that the one who can prove this fundamental proximity to the deceased, has the right of burial ahead of any other claimant.*

22. The respondent urged the court to dismiss the instant appeal as the appellant had come to court with unclean hands, and asked the court to order for the release of the deceased's body to her for burial in Bondo.

Analysis & Determination

23. I have carefully considered the appeal herein, the pleadings and evidence presented before the trial court and the submissions filed by both parties. as a first appellate court, the duty of this court is first to comply with the requirements under section 78 of the Civil Procedure Act. It is long established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR** and in **Peter M. Kariuki –vs- Attorney General [2014] eKLR** where the court held *inter alia* as follows:

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI -vs- REPUBLIC [1984] KLR 729 and SUSAN MUNYI -vs- KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported).”

24. The above holding captures the locus classicus decision in the case of **Selle v Associated Motor Boat Co. [1968] EA 123** where it was held that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

25. The evidence before the trial court was as follows: The respondent testified as PW1, it was her testimony that she used to live with the appellant in 2003 in Eldoret where the appellant worked as a watchman. She testified that on one specific day, the appellant went to work and never returned home and that upon inquiring at his workplace, she was informed that the appellant was involved in a burglary at his workplace.

26. The respondent testified that she later met the appellant and quarrelled him for leaving her and the children. She stated that since then, the appellant disappeared and she was left to take care of their children with the aid of her parents. The respondent further testified that on the 1st October 2021, her son the deceased was heading to Ugenya when he was involved in a fatal road traffic accident and his body was moved to the mortuary. She testified that she went to the hospital the next day where she identified the deceased's body then returned to Nairobi and that on the 5th October 2021, her brother witnessed the deceased's post-mortem.

27. It was her testimony that on the 8.10.2021, she received information from the deceased's workmates that the deceased's body had been removed from the mortuary and that her brother Andrew informed her that the appellant had stolen the body. She stated that the appellant never consulted her before taking the deceased's body.

28. The respondent testified that she had been a single mother since the deceased was 5 years old when the appellant abandoned them. She stated that she stayed with the deceased till he finished primary school after which she enrolled the deceased in secondary school at Blessed Theresa Calcutta School where the deceased finished his form 4 with a D+. She stated that she helped the deceased join jua kali work. It was her testimony that the appellant has never asked for the deceased since he abandoned them. The respondent produced 5 receipts for fees from Blessed Teresa of Calcutta as PEx 1 and the deceased's identification card as PEx 2.

29. In cross-examination, the respondent denied calling the appellant on the date the deceased passed on. She admitted that the appellant was the deceased's biological father and that her sister had given him work in Embu, However, she stated that when she went to Embu she realized that the appellant had married another wife. The respondent further stated that she tried to ask the appellant to come back home but he refused. The respondent denied that the appellant paid her dowry in 2016 as she was already married to another man. She further stated that she was not present on the day the appellant alleges he took dowry and further that her father never received any dowry.

30. PW2 Andrew Omamo, the deceased's uncle testified that the deceased died in an accident and that he witnessed his post-mortem after which the deceased's body was stolen from the mortuary at Kericho. He testified that he later found out that the appellant had moved the deceased's body to Bondo mortuary.

31. It was his testimony that the deceased had been with the respondent's family since he was young and that he knew the deceased when he

was 3 years old. He further stated that the respondent took care of the deceased's needs throughout and that she did not know that the body had been taken away. He testified that when the deceased died, the appellant called him and told him he was going to the mortuary. PW2 testified that the appellant only took the deceased's body after post-mortem after the tag had been placed on him as he could not identify him without it. He stated that the respondent had singlehandedly raised the deceased until the time of his demise.

32. In cross-examination, PW2 denied calling the appellant on the 4th or giving him the number of a nurse at Kericho Mortuary. He however admitted denying the appellant the respondent's number.

33. PW3 Fredrick Obade from Usire testified that the respondent was his younger sister. He stated that the appellant left the appellant in 2003 forcing her to move back home. He testified that the respondent's children grew up in their (PW3's) home and that their elder sister later took the respondent and her children to Nairobi. He testified that the appellant only learnt of the deceased's passing after which he went and took his body from Kericho to Bondo. He stated that the deceased did not know the appellant and the appellant did not know which body was the deceased's.

34. In cross-examination, PW3 reiterated that the appellant did not know the deceased and that he left the deceased in 2003. He further stated that the appellant did not have proof that he supported the deceased. He stated that the appellant went to see the respondent's father when he was sick although he admitted that he did not know if the appellant gave the deceased's mother any money. He stated that when the appellant told them that he wanted to bury the deceased, they did not agree with him.

35. The appellant testified before the trial court as DW1. It was his testimony that he married the deceased's mother in 1991 and they were blessed with 4 children. He further testified that they lived in Eldoret in 2003 where he worked as a watchman and charcoal seller. It was his testimony that in the same year, he told the respondent to return home with the children as he wanted to go look for work in Nairobi but the respondent opted to go back to her parent's home.

36. The appellant testified that he left for Nairobi but was not successful in securing work until the respondent's brother in law directed him to Embu where he managed to get work. He testified that he asked the respondent to move to Embu but she refused and opted to stay in Nairobi. It was his testimony that he occasionally sent the respondent money. The appellant testified that when the respondent refused to join him in Embu, he went to her parents thrice who told him to pay dowry as they knew the children were his. He further stated that after the deceased finished KCPE, he secured a spot for him at Upanda Secondary School but the respondent took the deceased to Nairobi saying that the appellant was poor and that she did not want the children close to him.

37. The appellant testified that the deceased used to communicate with him through the phone and even asked for his details when applying for his identification card. He stated that his 4 children were to visit him in December. He further stated that he took dowry as instructed by the respondent's father who even told him that the respondent had not been married.

38. The appellant further testified that he did not steal the deceased's body from Kericho mortuary but that after he learnt of the deceased's demise, the respondent's brother Andrew PW2 told him to cater for burial expenses so he went and got the details of the accident from Kipkelion Police Station and was to pay for the post-mortem only to learn that the same had been done. He stated that he paid the mortuary bill and took the body to Bondo mortuary on the 9th October 2021. He further testified that on the same day, the respondent's family members from Sakwa went and told him to plan everything.

39. It was the appellant's testimony that the respondent never allowed the children to get close to him. He reiterated that the respondent was his legal wife as they had never divorced. The appellant produced a letter from the chief as DEx 1, a receipt for Kshs. 450 as DEx 2, an Akamba consignment note as DEx 3 and A receipt for Kshs. 880 as DEx 4.

40. In cross-examination, the appellant admitted that he did not know the school the deceased did his KCPE. He reiterated that he would give cash as support whenever he visited the children in Sakwa. He further stated that he gave cash for the deceased to go to him but was informed that the respondent had taken him. He stated that he did not report this as the respondent was the deceased's mother.

41. The appellant further stated that the respondent refused to attend the dowry ceremony. He denied leaving home and never returning saying that he went to look for work. He stated that he gave the respondent Kshs. 5000 to go to their home. The appellant admitted that he had no other prove other than the Kshs. 450 to show that he supported Betty.

42. It was his testimony in cross-examination that the children did not want the respondent to find out that they were talking to him. He further stated that he did not file a custody case after the respondent left as he used to talk with the children. He stated that the respondent's brothers refused to give him her number. The appellant testified that the respondent was not present when he spoke with her parents but that her brothers and some elders were present.

43. DW2 Isaac Otieno, the appellant's nephew testified that he used to stay with the appellant when he worked in Eldoret as the deceased stayed in Ugenya. It was his testimony that the appellant wanted to transfer the deceased to Upande Secondary School and left for Ugenya but on his return, the appellant informed him that the deceased's mother had taken him to Nairobi.

44. He further testified that he finished school and moved to Nairobi where he worked as a boda-boda rider. He stated that while living in Kariobangi, he met the deceased who informed him that he wanted to apply for his identification card and that his mother refused him from speaking with the appellant. He testified that the deceased subsequently revealed to him that he had spoken with the appellant who sent him his identification card.

45. It was his testimony that on learning that the deceased had passed on, he and the appellant went to the mortuary where the appellant spoke to the respondent's brother who told them to plan the burial and after learning that the post-mortem had been done, they asked for the body to be transferred closer home and took it to Bondo mortuary. He stated that the next day, the deceased's uncles came and sat with their

family and told them to process the burial and inform them of the date.

46. In cross-examination, DW2 told the trial court that he knew the deceased when he was a 4-year-old while he, DW2 was 5 years old. He admitted that he did not visit the deceased in Ugenya but stated that he met the deceased in Nairobi where the deceased called him by his nickname. He stated that it was the appellant who told him about the deceased's death.

47. He further testified that the respondent called the appellant's sister and told her to tell the appellant to stop bothering about a child he did not care about. He reiterated that the respondent's people went to their home although the respondent was not present.

48. DW3 Dorcas Ochieng testified that the appellant should bury the deceased as he was his father and that the appellant supported the deceased in school in Ugenya. She further stated that the deceased used to communicate with the appellant and that the deceased was to go to school in Upande and when the appellant went to pick the deceased, he learned that he had gone to Nairobi.

49. In cross-examination DW3 stated that the deceased was in Ugenya Primary as the respondent had hid the children from the appellant. He further denied that the appellant picked the deceased's leaving certificate from Ugenya in preparation for taking him to secondary school. She stated that the respondent's sister used to live with the deceased while he was in primary school.

50. DW4 Margaret Atieno, the appellant's younger sister testified that the respondent was the appellant's wife and that they had 4 children. It was her testimony that when the respondent's mother died they attended the burial where they saw the deceased and Achieng. She testified that though the respondent welcomed them, the respondent later asked them why they had come for the funeral as the families had issues. She testified that the respondent told them that she had already been married in Suba and that she did not want the appellant to attend the funeral. She further testified that the respondent's brother told them that they did not want Alego people at the funeral.

51. It was her testimony that the appellant ought to bury the deceased as he was the father to the deceased. She stated that the appellant would visit the deceased in Ugenya and that the appellant wanted the deceased to join Upanda Secondary School but he was informed that the deceased had left for Sakwa.

52. In cross-examination, DW4 stated that the respondent was with the deceased in his younger days. She admitted not knowing the school in Ugenya or having any proof in support of the appellant. On questioning by the court of the time the respondent's mother was buried, she responded that it was 3 years ago.

53. Having considered the evidence before the trial court, the grounds of appeal, submissions by both parties, I find that the issue between the parties herein is a burial dispute and therefore this court is tasked to determine the question of **who is entitled to bury the deceased, Austine Otieno Ooko.**

54. The Court of Appeal in the case of **SAN v GW [2020] eKLR** stated *inter alia* that in Kenya, to resolve burial disputes, the courts have variously resorted to customary law, common law, marriage law, succession law, human rights law, land law and other bodies of personal law. The Court stated as follows in its introductory statement:

“In burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial. Customary law has been held to be the applicable personal law regulating burial disputes in Kenya. See Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another No.4, (1987) KLR 407 (the SM case) and Kandie & 2 others vs. Beatrice Jepkemoi Cherogony (2002) 2 KLR 613. But since customary law exists in almost all ethnic groups in Kenya with a homogeneous value system and the customs vary from one ethnic group to another means that the resolution of burial disputes will depend largely on the peculiar circumstances of each case.”

55. Customary law is applied by dint of **Section 3 (2) of the Judicature Act** which stipulates that:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

56. Article 44 (1) of the Constitution provides that every person has a right to participate in the cultural life of their choices. In **Johnstone Kassim Mumbo & 2 Others v. Mwinzi Muumbo & Another** the Court held that:

“Custom is not mandatory where the wishes of the deceased are clear.”

57. The same position was taken in the case of **Jacinta Nduku Masai v. Leonida Mueni Mutua & 4 others (2018) eKLR** where the Court held that:

“The wishes of the deceased if established to have been expressed during his lifetime would take precedence over consideration.”

58. Section 51 of the Evidence Act provides that:

“in proving a custom, evidence of its existence must be called to provide the juridical and philosophical basis.”

59. In the case of *Nyariba Nyankomba v Mary Bonareri Munge* [2010] eKLR the Court stated *inter alia* that:

“In cases resting purely on customary law, it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claim remains unproved.”

60. In *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 Others* [2018] eKLR it was held, reiterating what the Court of Appeal stated in *Apeli v Buluku* [1980] eKLR that:

“It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy.”

61. See also *M’imanene M’rutere v Lewis Kirimi & 2 others* [2018] e KLR.

62. The evidence on record is undisputed that the deceased was born and lived with the appellant and the respondent, his biological parents until when he was about 5 years old when his parents separated and they have never come back together. He was an adult when he died on 1st October, 2021 in a tragic road traffic accident, aged 23 years. There was no evidence that for all those many years of his childhood and youth, he ever related with his father the appellant herein. There was also no evidence that the appellant made efforts to contact the deceased with a view to establishing a relationship of father and son. There is however no evidence that the deceased expressed his wishes before his death, on where he wished to be buried upon his death.

63. The other consideration is that the person claiming the right to bury the *deceased must be one who is demonstrated to have been close to him or her during his or her lifetime*. On this last limb, the Court of Appeal in *Samuel Onindo Wambi v COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR* expressed the following view:

“...A person’s conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos, there was no credible evidence to prove so. (sic). The fact that he was the deceased’s first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case...In this case, besides the fact that given the father and his family’s treatment of the deceased, he is not deserving of the right to bury the deceased’s remains.”

64. The above decision was cited at length in *SAN v GW* [2020] eKLR that:

“In *Samuel Onindo* (supra) it was explained that a person’s conduct towards a deceased person while alive could extinguish his or her right to bury the deceased. Since the appellant did not show any closeness towards the deceased after their separation and she did not show any sympathy towards him when he was ailing, it was only just that the deceased’s wishes and choice of where he was to be buried were to be honoured.”

65. Applying the case law cited herein above and the evidence adduced in the court, it is not in doubt that the appellant and the respondent are the parents of the deceased. That much is admitted by both parties. This court thus has to analyse, from the evidence herein, as to who was close enough to the deceased to warrant the orders to bury him as was held by the Court of Appeal in the case of *Samuel Onindo Wambi* (supra).

66. The evidence adduced herein is that after living together for some time as husband and wife but with no formalization of their union, the parties herein separated in 2003. By that time, they had four issues. The deceased was aged about 5 years then. The appellant testified that he went to look for work in Nairobi but the respondent refused to follow him and instead opted to go back to her home. On her part, the respondent averred that the appellant left for work normally but never to return home only for her to later learn that he had committed a burglary and vanished. Later, her sibling got him a job in Embu and when she visited him there, she found that he had married a wife.

67. The respondent further avers that she single-handedly took care of the deceased since the appellant left when the deceased at age 5 years, until the deceased’s demise is when he went and stole his body from the morgue at Kericho where he had died after a road traffic accident. She further stated that she helped the deceased get into his trade within the jua kali industry. It was her case that the appellant offered no support to the deceased and his other three siblings. The respondent annexed receipts of school fees that she paid for the deceased while he was in secondary school as well as his identification card as evidence of this.

68. On his part, the appellant contended that he supported the deceased and annexed some documents. In support of his allegation that he was married to the appellant, he annexed DEx 1, a letter from the chief dated 14.1.2016 permitting him to move animals as he went to pay dowry. I however note that the issue of marriage between the parties herein is not one of the issues for determination. In any case, the evidence of both the appellant and respondent was that the respondent was not present during this alleged dowry ceremony. The question that arises therefore is whether dowry can be accepted where the woman who is to be married is missing in action. I say no more.

69. Turning back to the issue of the right to burial and who was closest to the deceased, the evidence by way of receipts produced by the appellant do not in any way relate to the deceased. The receipts as produced by the appellant as DEx 4 relate to one Betty Achieng Ooko. Similarly, there’s another receipt dated 17.2.2010 on record for Kshs. 285 for an oxford set and staedtler pencil. Both receipts do not show the deceased’s name anywhere and neither does the receipt for 17/2/2010 for 1 skirt, 1 shirt and 1 socks issued to matera sec demonstrate or show any nexus with the deceased or the respondent herein. The appellant further averred that he sent the respondent money through

Akamba. However, the consignment note produced as DEx 3 is for Erick Ogada and not the respondent or the deceased.

70. Conversely, the respondent produced school fees receipts for the deceased while in high school at Blessed Teresa of Calcutta Secondary School. Her testimony was also well corroborated by her witnesses and it was not controverted by any other evidence.

71. Accordingly, taking the totality of the evidence adduced and relying on the authorities of the superior court cited herein, I find that the deceased was closer to the respondent when he was alive than he was to the appellant.

72. The fact that the deceased was the appellant's son is not in dispute but that in itself does not give the appellant an automatic right to bury him even if Luo customary law dictates so, which custom he did not attempt to prove as required and to the required standard of balance of probabilities. The appellant did not tell the court why he kept off his son who was now over 18 years and could make decisions on his own whether to return to his father or not and why the appellant made no efforts to return the deceased to his ancestral home so that he could establish an abode. Simply put, the appellant had cut links with the deceased and never made efforts to bond with the deceased who was now an adult and could not simply be told by his mother not to associate with his biological father.

73. For all the above reasons, I find and hold that the trial magistrate did not err when she allowed the respondent case, directing her to bury the body of the deceased Austine Otieno Ooko.

74. I find this appeal devoid of merit, I dismiss it with costs to the respondent. The appellant shall also pay the charges for preserving the body of the deceased at Bondo mortuary from the date it was placed in the said mortuary to date. The respondent to collect the body of the deceased Austine Otieno Ooko from the mortuary at Bondo and inter him at a place of her choice as earlier decreed by the trial court. The appellant is at liberty to participate in the burial ceremony of the deceased but he must keep peace without any disruption of any nature from him or his agents.

75. I must further observe that this appeal had to fail for the reason that despite this court granting a conditional stay of execution of the judgment and decree in Bondo PM's Court Civil Suit No. E128 of 2021 and maintaining status quo pending the hearing and determination of this appeal on condition that the appellant deposits security for costs of the appeal and the mortuary charges for preservation of the body of the deceased to the tune of kshs 80,000 within 14 days of 29th November, 2021, the appellant has to date and as at the time of delivering this judgment, not settled the said costs which he was to deposit into this court. The conditional stay order was in very clear terms that:

“Should the appellant fail to meet the conditions for stay as given above, the stay shall lapse and the respondent shall be at liberty to collect the deceased's body of Austine Otieno for burial at her place of choice.”

76. The above conditional orders of stay lapsed on 13th December 2021 which was a public holiday hence the appellant could still have paid the costs into court on 14th December 2021 or sought for enlargement of time within which to comply with the orders, which he did not. Accordingly, the stay orders having lapsed, the respondent was at liberty from the 15th December 2021 to collect the body of the deceased Austine Otieno Ooko from the morgue for interment at her place of choice such that she did not have to wait until this judgment is delivered on its merits for her to enforce the orders of the Court.

77. This file is now closed. The lower court file to be returned to Bondo PM's Court forthwith. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE

In the presence of:

The appellant personally

His counsel Mr. Oduol Achar absent

The Respondent acting in person

CA: Modestar