REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 55 OF 2021

FRANCIS MUTHUSI MALOMBE.....1ST APPELLANT

JOYCE MWENDE MALOMBE.....2ND APPELLANT

SAMMY MWENDWA MALOMBE.....3RD APPELLANT

DOUGLAS MUNYALA MALOMBE.....4TH APPELLANT

PETER MUTUA MALOMBE (deceased).....5TH APPELLANT

MARGRET KAVINYA MALOMBE.....6TH APPELLANT

RUTH KAVATA MUTUA.....7TH APPELLANT

ANN MAKAU.....8TH APPELLANT

-VERSUS-

DANIEL KALOKI MALOMBE.....1ST RESPONDENT

DAVID KIOKO MALOMBE.....2ND RESPONDENT

ANTHONY MASILA MALOMBE.....3RD RESPONDENT

FLORENCE MUNANIE MAKINDI..... 4TH RESPONDENT

SUSAN KALEKYE MALOMBE.....5TH RESPONDENT

DOREEN KAMBUA IRERI..... 6TH RESPONDENT

MARY MUTHINI..... 7TH RESPONDENT

NICHOLUS WAMBUA.....8TH RESPONDENT

MIRIAM NDANU.....9TH RESPONDENT

JOHN MUSILI MALOMBE.....10TH RESPONDENT

(Being an appeal from the judgment delivered on 30/7/2021 delivered by Hon. S Mbungi (C.M) in Civil Suit No. E064 of 2021 at Kitui Law Courts)

-BETWEEN-

DANIEL KALOKI MALOMBE & 9 OTHERS.....PLAINTIFFS

-VERSUS-

FRANCIS MUTHUSI MALOMBE & 7 OTHERS.....DEFENDANTS

JUDGEMENT

1. This matter is a burial dispute revolving around the body of **Jonathan Malombe Munyala** (hereinafter referred to as the deceased), the father of the Appellants and the Respondents who died on 26th February, 2021. The deceased left behind two families. The Defendants, who are the Appellants herein, are from the 1st house (**Damaris Syevutha Malombe's** House) while the Respondents who were the Plaintiffs are from the 2nd house (**Hellen Mwikali Malombe's** House).

2. According to the Plaint, the deceased married his said 1st wife in mid-1940s and the 2nd wife in early 1950s and that the deceased lived with his two wives in Mulutu till 1967 when he decided to move to Kunguluni Village, Kyanika Location, 15 kilometres away, with his 2nd wife. According to the plaint, the marriage between the deceased and his first wife was blessed with nine children, the Appellants herein, with the exception of **Monicah Kamengele** while the 2nd wife's house had thirteen children, the Respondents herein, with the exception of Janet **Mammy Malombe** and **Eunice Kaswii**.

3. It was pleaded that upon his migration from Mulutu, the deceased established a permanent home at Kunguluni Village where he lived, tilled the land and established his life and was identified as a resident of Kunguluni, only occasionally, infrequently and inconsistently would he visit his relatives in Mulutu to see his relatives. In July, 2018 when his send wife, the Respondents' mother passed away, she was buried at Kunguluni while the 1st wife, the Appellant's mother, was buried in Mulutu when she died in October, 2018.

4. According to the plaint, after the death and burial of his first wife, the deceased never visited his relatives in Mulutu until 2020 during the burial of his son, **Peter Mutua**, but never spent the night there but returned to Kunguluni.

5. It was pleaded that the deceased was a respected, focused, deliberate and purposeful man who served in the military, as a laboratory technician and took all his children to school. It was pleaded that the deceased was in full control of his mental faculties up to the time of his death despite the fact that by then he was edging close to 100 years. It was pleaded that the deceased also embraced Christianity and was a church leader and that by word and deed, he had abandoned retrogressive Kamba traditions and did not live by strict Kamba Traditions in his lifetime.

6. It was pleaded that the deceased drew a Will in the presence of witnesses containing his wishes including his chosen place of burial at the second home in Kunguluni as well as the manner of disposal of his properties. He also stated how he wished his burial to be conducted.

7. It was pleaded that even after the death of his 2nd wife, the deceased never moved back to Mulutu from Kunguluni to live with the 1st wife who was still alive.

8. However, upon the death of the deceased, a dispute arose between the children of the two wives as to the place of burial and attempts to resolve the same through mediation fell through due to recalcitrance of the Appellants.

9. On 3rd March, 2021, both the Appellants and the Respondents received a mobile text message from the retired Senior Chief Samuel Mutavai, alerting them that the deceased had left a Will and inviting the families to attend the opening of the same. Despite one member of the Appellants' family acknowledging receipt of the message, the Appellants did not attend on 4th March, 2021 but escalated the burial plans at Mulutu. According to the Respondents, there is no rule of law or custom that directs in peremptory terms where a deceased person is to be buried and that where a deceased had two or more homes, he is to be buried either where he elects or where he spent most of his later years. According to the Respondents, since the deceased has no land in Mulutu, he ought to be buried on his own land. It was further pleaded that Kamba Custom does not allow an accomplished man to be buried on land belonging to his child, least of all, a female child.

10. The Respondents therefore sought an order of permanent injunction barring the appellants' from collecting for burial the deceased's body at Mulutu and an order directing Umash Funeral Home to issue a permit for burial and release the body of the deceased to the 1st Respondent, **Daniel Kaloki Malombe**, or any other Respondent for burial at Kyanika Location.

11. In their defence and counterclaim, the Appellants pleaded that since the cause of death of the deceased was agreed to have been due to his advanced age and long periods of sickness, both families agreed that a post mortem was not necessary.

12. It was pleaded that the deceased had two permanent homes for each of his two wives who predeceased him and that he lived in both homes and was identified as a person with two homes. According to the Appellants, the deceased did not did not write a Will before his death and that the documents referred to as a Will by the Respondents, did not meet the minimum requirements of a Will and was a forgery as the signature imposed as a forgery. According to the Appellants. The Respondents conspired with the alleged executors and witnesses to fake the deceased's Will.

13. The Appellants denied that the deceased always stayed at the home of the 1st Respondent and averred that he used to stay in his two homes at Mulutu Location and Kunguluni Village interchangeably as well as at the homes of **Janet Mammy** and **Miriam Ndanu** amongst

others.

14. It was their case that the deceased's body was embalmed on the orders of Umash Funeral Home after lying there for 7 days awaiting the raising of post mortem fees hence it was disrespectful to the deceased to demand for post mortem. According to the Appellants, the Respondents failed to conduct the post mortem after the Appellants insisted on being represented by a family member and a doctor and it later emerged that some of the Respondents' family members intended to steal some of the body organs to perform certain rituals.

15. According to the Appellants, the deceased was an ordinary member of the Akitondo Clan and a faithful of Africa Inland Church. According to them, the meeting that was chaired by **Justus Kalewa Ndolo** ended in an agreement that the deceased would be buried at his 1st wife's home hence it was untrue that the mediation fell through.

16. According to the Appellants, the deceased was not only subject to the Kamba Customs that dictate that a deceased man be buried in the 1st wife's home but was also affected by its traditions during his lifetime and after his death. It was pleaded that the deceased left several parcels of land in his name in the ancestral home at Mulutu including where the home of the 1st wife is situate where there is a graveyard set aside by the deceased.

17. The Appellants therefore insisted that the deceased ought to be buried at his Mulutu Home, the home of his 1st wife, **Syevutha Malombe**, in accordance with the customs of his people. According to the Appellants, the deceased designated his first born son from his first house, **Francis Muthusi Malombe**, to be the head of his two families in the event of his demise, a role the 1st Appellant assumed when the deceased started ailing. Further, that the deceased had designated the home of the said 1st wife to be the centre of his activities hence should be his final resting place. They therefore sought for a declaration that the deceased be buried at the home of his 1st wife at Mulutu Location in Kitui Central Sub-County in accordance with Kamba customs and that all the children of the deceased and their families be allowed to participate in the final rites of laying the deceased to rest.

Respondent/Plaintiffs' Case

18. The Respondents called 8 witnesses in support of their case. PW1, **Caroline Muvoye Kutu**, a daughter in law to the deceased and the wife of the later **Peter Mulwa Malombe**, adopted her statement and testified that since her marriage in July 2007, she found the deceased staying with his 2nd wife at Kalewa and that though the deceased used to visit his 1st wife at Mulutu where they were staying, he would do so during the day and return to Kalewa. Upon the death of the 1st wife in 2017 or 2018, the deceased returned back to Kalewa. Similarly, when PW1's husband passed away in July 2018, the deceased, who was staying at Kalewa did not spend the night at Mulutu after the burial. She however stated that whenever the deceased visited Mulutu, he would stay in her mother in law's house, a house which was later occupied by her sister in law but at the time of her evidence, the house was locked. After that the deceased would go to Mulutu whenever there was a function but would return back to Kalewa.

19. PW1 stated that she was **Peter Mutua's** 2nd wife and that Mukulu was the 1st wife but she died and that she was married after the death of the 1st wife. She admitted that after the death of her husband, she had problems with her brothers in law arising from an assault by her brothers in law. According to her, she would go home 4-5 times a month and would be briefed by one Mrs Sammy. She stated that **Susan Kalekye** who was mentally unwell was being taken care of by the deceased at Kalawa after her mother died. It was however her evidence that even before the death of the 2nd wife, the deceased was staying at Kalewa.

20. PW2, **Daniel Kaloki Malombe**, the 1st plaintiff, adopted his statement and testified that the deceased used to stay at Mulutu where the children of the 1st wife were born. According to him when his father built the home for the 2nd wife, in 1967, he was 5 years old and that they shifted at night. He stated that the deceased was staying with them at Kalawa where all the other children were born though he would occasionally go to Mulutu. According to him, after the deceased shifted to Kalawa the 1st wife did not bear any more children. It was his evidence that the deceased was a lab technician and a farmer though after he shifted he never farmed at Mulutu. He testified that the deceased had no specific days for visiting Mulutu where he used to visit **Margaret Kavinya** who had a stroke but he never used to sleep there as he would tell them to pick him. He stated that the deceased would stay for one day or two and return to Kalawa when the 1st wife was alive but after her death, he rarely went there.

21. According to PW2, his mother died the same year that the 1st wife died and after the death of his mother, the deceased did not leave their home to return to Mulutu but stayed alone and that they employed one Rachel to take care of the deceased and a sister who was mentally challenged. Though his home was 1 km away, he would go to visit the deceased everyday hence he knew whenever the deceased went to Mulutu as he was a friend of the deceased and he was nursing him as well

22. According to PW2 the 1st family was not concerned about the health of the deceased even when he was ailing despite the 1st Appellant being made aware of the same as the 1st Appellant was not in good relationship with the deceased. It was his evidence that the deceased was a Christian and not a traditionalist and stated that he be buried at his 2nd home. According to him, they received a message from **Sammy Mutava**, the deceased's friend informing them of the deceased's Will and inviting them for a meeting to read the Will. While the 2nd house attended, the 1st house did not and after reading the Will a copy was sent to the 1st family but the 1st born insisted that the deceased could not be buried at Kalawa but at the 1st wife's home in accordance with Kamba traditions. Though attempts were made to agree they were not able to agree and burial preparations started

23. According to PW2, the deceased had two parcels of land Kunguluni and had built his home on one of them. The deceased informed him that he had given his land at Mulutu to the 1st wife's children but he might not have legally transferred the same. Though there was a transfer form from the deceased to **Sammy Mwendwa Malombe**, the land was still in the deceased's name. It was his evidence, that before the case, he was not aware that the deceased had any land in Mulutu.

24. Though he said that he was aware of Kamba traditions, he had never heard that a man with more than one wives should be buried in the 1st wife's home since before the advent of Christianity the dead would be thrown in the bush. He insisted that his father ought to be buried where he stayed.

25. In cross-examination, PW2 stated that **Susan Kalekye** the 5th Respondent was of unsound mind and the deceased used to stay with her all the time. He admitted that the deceased used to go to Mulutu and stay for three days but after the death of his wives he stopped going there as he also started ailing with blood pressure. He admitted that during the deceased's first admission at Coptic, he paid the bill while the 1st family paid the bill for the second admission and the 2nd family paid for the third admission. He admitted that the deceased loved both families equally and never discriminated any family. It was his evidence that he was the one having the custody of the deceased's ID Card and that the 1st family participated in the burial of his mother but denied that the deceased appointed the 1st Appellant as the family leader though he introduced him as the first son. He admitted that the deceased informed him that he went with the 1st wife to marry the second wife.

26. Asked about **Monica Malombe**, he stated that he did not know why she was not part of the defendants but stated that the 5th Defendant was dead. He admitted that the 1st Appellant paid the bill at Jordan Hospital, Neema and Nairobi South Hospital. He admitted that in 2005, the deceased and his 1st wife went to America on invitation of the 2nd Appellant but could not tell how long they stayed there. He admitted that most of their relatives stay at Mulutu.

27. He admitted that after the death of the deceased, he involved senior citizens including **Ndoto**, a former Government Minister and it was agreed that the deceased had not left a Will and ought to be buried at Mulutu and they agreed. He however admitted that when they were to have the last meeting at his father's home in Mulutu, his family members chose not to attend. It was his evidence that though he was willing to pay for the post mortem, the 1st Appellant embalmed the body without informing them.

28. PW2 stated that the deceased's land at Mululu was not the same land that was transferred to Sammy and that the land where the deceased's homestead is, in the name of the deceased and that the deceased told him that he had no land in Mulutu. Though he admitted that the deceased called Kalawa Ndoto when he was sick, the same person did not go. He however admitted that at Kyanika they did not have relatives from the father's side and whenever the deceased had a clan meeting, he would call them from his Mulutu home. He cited one such example in 1999 or 1997 when the deceased had a rift with the 1st Appellant.

29. While he insisted that the deceased was not a traditionalist, he stated that there was nothing wrong with the deceased being buried in his 1st wife's homestead and his mother's homestead but insisted that the deceased stated that he should be buried at his mother's home. According to PW1 had the deceased been staying at Mulutu he would not be in court. He clarified that the deceased wanted to go to America with both his wives but the 1st family refused. In his evidence the Will came after the meeting Ndoto. It was his evidence that should the court order that the deceased be buried at Mulutu, he would be buried on his daughter's land since the deceased told him that he had given the land to his wife's children.

30. PW3, **Cyrus Mukula Mbuvi**, the chairman of Ithike Kuthike Self Help Group, adopted his statement and testified that the deceased was a member of the said group. According to him, the welfare members only came from Kunguluni and stated that they wanted to bury their member at his home in Kunguluni. He however admitted that he knew that the deceased had another family and had aa first family at Mulutu but did not know the deceased's history since he found the deceased in Kunguluni. He could not tell if the deceased was a member of another welfare group in Mulutu but he had never seen any other welfare group go to Kunguluni.

31. PW4, **Samuel Mutava Mbuvi**, a retired Senior Chief, adopted his statement and stated that he knew the deceased in 1981 when they were working at DC's office, Kitui and that the deceased was his subject. One day in July 2019, the deceased sent for him and gave him a document which the deceased told him to read. The deceased also called three other people and they signed the Will which was also signed by the deceased before them. The deceased then put the documents in a sealed envelope and gave it to PW4. According to him, there was no one else in the homestead and they were only 5 people.

32. Upon learning of the death of the deceased, he called the 1st Appellant and informed him that there was something he wanted to share about their father but the 1st Appellant told him he was busy preparing for the burial of the deceased and could not attend. He then decided to send short message to which some responded and the 2nd family agreed to meet at the Chief's office where he read the Will to them. In his evidence, there is no Kamba Law that says one has to be buried in his first wife's home if he has more than one wife.

33. In cross-examination, PW4 stated that he could not recall the day of the week the deceased called them. He however read the Will before signing it. It was his evidence that the deceased did not have Identity Card and he could not tell whether the decease knew his identity card number since it is a public knowledge. He stated that it was the 1st Respondent who gave him the phone numbers of the 1st family's children and that not all the children of the first family turned up for the reading of the Will. According to him, he was given the Will as the executor but the same was not stamped by any lawyer.

34. According to PW4, according to Kamba customs, one is buried at the place where he stays in case he has several wives if he has not stated where he wants to be buried. He admitted that he knew that the deceased had another home but did not know the children of the first family.

35. PW6, **Benard Mwema Kilonzi**, who was the Assistant Chief for Mwembe Tayari sub location, adopted his statement and stated that he knew the deceased for 30 years and that he went to school with some of his children. He knew the deceased had two families, one at Kunguluni and the other at Mulutu but his residence was Kunguluni since he used to attend to the deceased in his office and used to visit the deceased's home regularly to resolve his domestic issues including the one revolving around the caution placed on his land by the deceased's daughter, Mummy

36. In his evidence he was present when PW5 read the deceased's Will to the children who were present. It was his evidence that he read the Will and that the witnesses had signed against their names and ID Card numbers. It was his testimony that the deceased had two families and would go to Mulutu home and sleep there.

37. PW7, **Rachel Mwende Munyu**, a housegirl at the deceased's home in Nguguluni, adopted her statement and stated that her salary was being paid by the 2nd family. According to her, her work was to take care of the deceased and Susan and to check the *shamba*. According to her, the deceased started being sickly when one Janet went and prepared a meal for him.

38. According to her, since her employment, the deceased never went to Mulutu. She however confirmed that PW2 used to go and see the deceased every morning and evening.

39. She however admitted that before her employment she did not know how the family lived. She however denied that at one time she was sent away having been found stealing the deceased's food.

40. PW8, **Jonah Vundi Daniel**, a pastor at Bible Celebration Church, stated that he knew the deceased through his sons. After adopting his statement as evidence he stated that the 2nd family were church people and the deceased was a devoted Christian though many times Janet would interfere with prayers at the deceased's home. It was his expectation that the deceased would be buried in a Christian way and not in accordance with Kamba tradition. It was his testimony that the deceased would not have wished to be buried according to Kamba traditions. While stating that the deceased used to live in Kunguluni most of the days, the deceased told him that he had another home at Mulutu and did not tell him that he preferred one family to the other.

41. Though he accompanied the deceased to Mulutu during the burial of his 1st wife, he did not hear him say that Muthusi was he head of his family. He however, stated that there is nothing wrong with one wishing to be buried where the ancestors are buried. While admitting that he took the box containing the clothes of the deceased's 2nd wife after the death of the deceased, he stated that he did so on instructions of the deceased but declined to disclose where he took them. He stated that he signed the Will in July, 2019 after being called by the deceased. According to him, he read the Will before signing but he did not know who prepared it. He denied that he forged the Will or that it was manufactured. It was his evidence that he came to know that **Dominic Killu** was a lawyer when the Will was read to the children.

42. Though the Will had several pages, he stated that at page 5 it was stated that the deceased wished to be buried at his Kunguluni home. It was his evidence that 4 other people were present at the time of the signing of the Will.

Appellant/Defendants' Case

43. The Appellants, on their part called 6 witnesses. According to DW1, **Mumbe Wa Mathitu**, the deceased's younger sister, who adopted her statement, she was the only living child of their parents. She confirmed that the deceased had two wives, the eldest of whom was staying at Mulutu while the younger one was staying at Kalawa. She testified that according to Kamba customs, if one who has more than one wife dies, he is buried at his first wife's home. According to her, if the deceased wanted to be buried at Kalawa, he would have informed her.

44. In cross-examination, DW1 stated that when the deceased was unwell before he died she went to see him at his Kalawa home. In her evidence, she would ask his son to call the deceased to tell him where he was whether at Kalawa or Mulutu then she would go and see him. It was her evidence that before the decease died he was staying at Mulutu and upon his getting well, he went to Kalawa but did not take one week before falling sick. It was her testimony that the deceased had a home in his Mulutu home which was renovated by his daughter **Mwende** and locked. At Mulutu, she stated, the deceased used to stay with his daughter, **Kavinya**, on the land she was given by the deceased and where she had put up a house though she initially used to live with the deceased before moving out recently but before the deceased died.

45. It was her evidence that Masila, her grandfather had two wives just like DW1's brother, Muvinga, who had two wives but was buried in the first wife's homestead. According to her, Masila's wife's used to share the same compound but when he died, he was preserved in his 1st wife's house and was buried on the side of the 1st wife. Though she admitted that he did not know all the Kamba customs, she knew that if someone died, the family would shift to another place to avoid bad omen. According to her, if the 1st wife dies, the husband moves together with the children but upon his death, he is returned to be buried where the 1st wife was buried. She admitted that the issue of the graves was introduced by the white men and that prior to that bodies would be thrown into the bush to be eaten by animals. However, at the time she was born, she found bodes being buried in graves.

46. DW1 confirmed that the deceased's Mulutu home is big with many rooms for people to sleep in. She stated that when her son was studying in Nzambani which is near Kalawa, she used to stay in the deceased's home who used to pay fees for him.

47. DW2, **Douglas Munyalo Malombe**, the deceased's son from the 1st wife, the late **Damaris Syevutha**, fully relied on his statement in which he stated that the deceased had a second wife **Hellen Mwikali**, but who was popularly known as **Irene**. It was his evidence that the 2nd wife was married to the deceased through his mother in accordance with the Kamba traditions hence both wives of the deceased were friends and usually talked of this fact with a sense of pride and respect for each other. According to him, all the Children of the deceased were brought up with a sense of responsibility and respect for each other and were taught from an early age to respect their two mothers.

48. It was his evidence that during the lifetime of their late father, he had appointed **Francis Muthusi Malombe** as the designate head of his family, a fact he emphasized in the presence of many witnesses in public and in the presence of relatives, clan members, senior Civil Servants, Politicians and clergymen, and was not a secret to any child of the deceased from both homes. He stated that the deceased was not a secretive person and kept all his affairs open and if at all he wanted to make a Will, he would have told them so, and even confided in their relatives and clan members.

49. Upon the death of the deceased, he stated, both families met in Nairobi under the chairmanship of former permanent Secretary **Justus**

Kalewa Ndotto and agreed that the deceased would be buried at his Mulutu Home on 13th March 2021, a ceremony that was to be presided over by retired Anglican Archbishop of Kenya **Emeritus Benjamin Nzimbi**, in honour of the deceased for having donated the land where ACK St. Michael's Church, Mulutu is situate. They were, however, shocked as a family when after the said agreement, the 1st, 2nd and 4th plaintiffs and the husband of the 4th Plaintiff called them and said that the deceased would not be buried as agreed, but that they would bury him at Kunguluni because he had left behind a Will to that effect. The said persons then distributed soft copies of the said disputed will to their phones, which on close scrutiny was clearly a forgery because the signature appended thereto did not belong to the deceased when compared with the known and available signatures he had left behind. They even consulted experts in law about the purported will and two anomalies were immediately identified which are not included in a will namely the named executors and administrators are strangers to his family and therefore could not be so appointed and the alleged executors had also signed the will, which is not the practice. DW2 disclosed that the deceased had previously consulted lawyers in his dealings and in the event he wanted to make a Will, he would have appeared before a lawyer to do so for him.

50. Upon this discovery, he engaged some of their step brothers and step-sisters named as plaintiffs herein, and especially **Nicholas Wambua**, **Anthony Masila** and **Janet Mammy Omboga** and who informed him that the deceased did not make any will, and that the disputed Will was manufactured under the craftsmanship of **Daniel Kaloki Malombe, David Kioko Malombe** and **Dr. Florence Munanie Makindi** with their collaborators named in the Will, and that such Will was certainly drafted while the deceased's body was lying in the mortuary.

51. According to DW2, during the lifetime of the deceased, he lived in both homes whereby, he would stay at the home of the 2nd wife from Sunday to Wednesday, and then move to the home of the first wife from Thursday to Saturday, a routine he kept until his death except when he was sick and in hospital. Accordingly, the deceased was identified with both homes, and participated in the Clan activities at Mulutu besides being a member of the Mulutu welfare association concerned with burials of its members.

52. It was his evidence that in 2008, the deceased and his first wife, travelled to the United States of America and stayed there for 3 weeks under the invitation and care of his sister **Joyce Mwende Malombe** hence it is the epitome of dishonesty for the plaintiffs to portray the deceased as a man who had abandoned his first wife's home in preference for his 2nd wife's home. he stated that in accordance with the Kamba Customs which the deceased espoused throughout his life, he should be buried at his Mulutu home, where his first wife is also buried.

53. In cross-examination, he stated that he was given a portion of land by the deceased whose title he had but sold it with the deceased's consent. According to him the deceased was also a friend and he was not aware whether the others were similarly given but the deceased had 23 children. According to him the Mulutu land was in the deceased's name. He admitted that he left his work at KNH for allegedly stealing a dead body but he was vindicated by the Court.

54. According to him, his sister, **Kavinya** was the one taking care of the Mulutu home and that workers were staying there whose salaries they shared. It was his evidence that after the death of the deceased, the children of the 2nd wife left the burial preparations to him and Muthusi but before the deceased died, he was staying at Kunguluni, Kalawa. It was his evidence that it was the 1st Appellant who organised for the removal of the deceased from Kalawa Home to the Hospital upon being called by the deceased. While admitting that the deceased was a Christian, he stated that the deceased did not tell him where he wanted to be buried ad though admitting that the deceased should be buried in a Christian manner, it was his evidence that customs rhyme with Christianity to some extent.

55. It was his evidence that the deceased ought to be buried at his 1st wife's home and that does not mean he is not a Christian.

56. DW3, **Robert Mboya Muthuwii**, the chairman of Nagkuni Welfare Association, testified that the deceased was a member of the said Association. He knew the deceased as having two wives, Damaris and Irene and while Damaris lived in Mulutu home, the second home was in Kalawa. According to DW3, the deceased was a faithful contributor of all monies required for membership and other dues for our association up to 9th November 2018 when he was retired from contributions due to his advanced age. However, upon retirement the deceased remained their member up to the time of his death when the committee joined the family in preparing for his burial on 13th March 2021, until it was stopped by the court. It was his evidence that the deceased deserves to be buried at the home of his first wife at Mulutu in accordance with Kamba customs which dictate that if the deceased had more than one wife, he should be buried in the 1st wife's homestead, a responsibility they are ready to discharge.

57. He testified that the deceased had a house in Mulutu and he would see him come there carrying one kilo of meat and 2 kilos of *unga* when he was working at Kitui District Hospital.

58. In cross-examination, he stated that the deceased's home was occupied by two servants but since he used not to go there, he did not know whether the homestead had animals or whether any of the deceased's children stay there as he could not recall the last time he visited the home when the deceased was alive but went there after the deceased died. He stated that though his family stay in Mulutu, he was working in Kajiado. He could not recall the date when the deceased died or the date when their meetings started. It was his evidence that while the 1st wife was a member and the deceased used to pay for her, the 2nd wife was not their member. He stated that during the burial of the 1st wife, the 2nd family brought the public address system.

59. DW4, **Mwova Kyondo Muvinga**, a cousin to the deceased stated that besides being cousins, they were bosom friends and that it was the deceased who introduced and courted his wife for him, and their families also remained friends. It was his evidence that he was doing business in Mombasa up to the year 1993 when I relocated to my Kitui Town base, and every time he went home the would routinely visit each other at their respective homes at Mulutu. However, from 1993 to the late 2018 when the deceased started ailing, they used to meet at his Mulutu home whenever he visited the home of his first wife **Syevutha** on weekly basis.

60. It was his evidence that the deceased married his two wives while at Mulutu home, and that both wives shared the same house for a very

long period before the 2nd wife was moved to Kunguluni Village in Kalawa. By that time, she had 8 children, and therefore they all know Mulutu to be their first home. Upon his retirement from the Ministry of Health the deceased was also employed by **Dr. Dawood** who was operating a private clinic in Kitui town, and they continued to interact as DW4 was also doing business in Kitui Town. However, due to advancement in age, the deceased left the contractual employment at **Dr. Dawood's** and continued with his retirement observing his regular routines of staying interchangeably in the two homes and that even after moving his second wife to Kalawa, he continued to attend Church services at ACK St. Michaels Church Mulutu where he had donated land for the church, but as age caught up with him he moved to A.I.C Kyanika near the home of his 2nd wife.

61. It was his evidence that the deceased was very close to him and they attended many functions together at Mulutu up to the year 2018. However, from the year 2019, the deceased started ailing and he was in and out of hospital, thereby impacting on his movements substantially. He however used to stay for weeks at the home of his first wife's daughter's house in Kitui Town by the name **Monica Kamengele Malombe** where DW4 would also occasionally visit him. The deceased would also go to his business premises and chat for many hours whenever he visited Kitui Town, up to the time he died in 2021.

62. According to DW4, the deceased remained an active member of their Mulutu burial welfare association known as Ngakuni Welfare Association in which he was also a member. In his evidence, the deceased respected the customs of his people the Kamba, and should be buried at the home of his first wife **Syevutha** in accordance with the Kamba customary law and rites. He disclosed that for over 20 years, the deceased remained the chairman of their extended family at Mulutu until the year 2005 when he was replaced by **Mwandikwa Masila** at his request.

63. Upon learning of his death, the Mulutu community met and arranged for his peaceful send-off, only to be frustrated by the instant wrangles which, according to him, are very unfortunate because both homes sincerely know in their minds that the deceased should be buried at his Mulutu home, where he started the two families.

64. In cross-examination, DW4 stated that the deceased used to stay 3 days at Kunguluni and 3 days at Mulutu. While he could name all the children of the deceased from his 1st wife, he did not know the children from the 2nd wife but knew that the deceased had 23 children in total. According to him, the 2nd wife had 6 children when they moved to Kunguluni. According to him, after the death of his two wives, the deceased would stay in either of his homes. However, after he started ailing, he could not walk long distances but was not permanently staying at Kunguluni since he used to stay for weeks at the house of his daughter Kamengele's house in Kitui Town. He stated that the deceased was at Kunguluni when his son Muthusi sent for him to take him to Hospital. He insisted that Africans who have married more than one wife in case of death are buried in the 1st wife's home but can be buried at the new home in case he sells land where the 1st wife was buried. He however stated that the deceased had a big land in Mulutu and did not know why he took the 2nd wife to Kunguluni. Since the deceased was a Christian it was his wish that the deceased be buried in a Christian way. He however insisted that it was not un-Christian for one to be buried at his 1st wife's home and that the deceased was not chased from Mulutu by his 1st wife. According to DW4, his 1st wife stays in Mulutu while his 2nd wife is in Kunguluni. It was his evidence that the deceased's 2nd wife was married through the 1st wife.

65. DW5, **Janet Mammy Malombe Ombongwa**, the first child of the deceased and the 2nd wife, a retired civil servant, adopted her statement and denied that she was not in good terms with the deceased. To the contrary, it was her evidence that the deceased had a lot of faith in her and whenever he fell ill, he would send for her till the time he died when she was with him. According to her, whenever the deceased was discharged, she would stay with him in her mother's home where the house help lived. She agreed that there was a time she fed him on cassava and he got sick but by then the deceased was unwell but liked cassava. It was her evidence that many items got lost when the househelp was employed and she was not trained in hygiene hence the reason the deceased fell sick

66. She confirmed that one time when the deceased fell sick she found him with Mwende who was not taking good care of him and through the intervention of Muthusi, they took him to Jordan Hospital where most of her brothers and sisters visited the deceased after which the deceased requested to be taken to Kamengele's house which was close to the Hospital.

67. It was her evidence that when the Respondent suggested a post mortem, she insisted that Muthusi be present so as to avoid the body being treated to rituals as was the case with her mother. It was her evidence that the deceased was not comfortable with PW1 after he was found with her mother's clothes. It was her evidence that the decease did not leave a Will and that the deceased's relatives lived in Mulutu were he was a clan elder and if he had a Will he would have disclosed it to the people like elders Kalwe wa Ndolo. It was her position that the deceased ought to be buried by Muthusi at Mulutu who the deceased respected and kept on talking about.

68. In cross-examination, DW5 insisted that the deceased loved all the children and she could not remember a time she had a case with the deceased. She denied that she was summoned at the Chief's office. According to her the D.O. summoned them with her brothers. She stated that Muthusi had a case with the deceased over a pick up. She also revealed that at one point the deceased sold a plot to her but was never transferred because of the Bishop, Reverend and Dr Munanie and the deceased gave her another plot an Miambani.

69. DW6, **Francis Muthusi Malombe**, the first born son of the deceased by his 1st wife, **Damaris Syevutha**, adopted his statement in which he stated that the deceased had a 2nd wife, **Hellen Mwikali**, also deceased. According to him, the two wives of the deceased died simultaneously following each other in July 2018 and October 2018, the 2nd wife preceding the first. According to him, both wives of the deceased were friends and both brought up their children together with the deceased with a sense of responsibility and respect for each other, **Mulutu** being the undisputed home of the deceased because he married his two wives at Mulutu and both resided in the same house for many years until he bought land at Kunguluni, Kalawa area and moved his 2nd wife with her children.

70. According to DW6, by the time the 2nd wife was moving from Mulutu to Kunguluni, she had eight children, 7 of them born at the Mulutu home, and the first born Mary Muthini born before her mother was formally married by the deceased. However, the deceased loved all his children and treated them without discrimination or special favours. It was stated that during the lifetime of the deceased, he lived in both homes whereby he kept as very strict routine of staying at the home of his 2nd wife from Sunday to Wednesday, and at the home of his first

wife from Thursday to Saturday, a routine he kept until 2018 when he started ailing besides being advanced in age because by then he was aged 90 years. It was stated that during his lifetime, and in the presence of all family members from his two wives, the deceased duly appointed DW6 to be the head of his family and told him to give leadership to both houses, a role he started playing from 2018.

71. DW6 stated that for a long time, the deceased was a member of ACK St. Michaels Church, Mulutu**,** where he donated land for the church to be built and to demonstrate the leadership bestowed upon DW6, DW6 stood his ground against the widow of **Peter Mutua**, **Caroline Muvoye Kutu**, when she attempted to disinherit the child of Peter Mutua's first wife, **Irene Mukulu** (deceased), and ensured that his estate should be shared amongst his beneficiaries from the two houses of **Peter Mutua**.

72. According to DW6, the deceased was not a secretive person and kept all his affairs open to his family, and if at all he wanted to make a Will upon the death of his 2 wives, he would have first consulted DW6 before any other person. Consequently, he was sure that the "disputed Will" introduced by the 1st, 2nd and 4th plaintiffs herein is a forgery and was manufactured while the deceased's body was lying in the mortuary. He disclosed that upon the deceased's death, a meeting was requested for by **Daniel Kaloki** and **David Kioko** so that they could agree on the modalities of laying the deceased to rest at his Mulutu Home or elsewhere as they would agree, a request conceded to. The said request was also accompanied by a rider that they should invite a respected elder and member of their clan to witness the family agreement after which DW6 gave them the mandate to choose on anyone of their father's friends or relatives from their clan and they settled on **Hon. George Mutua Ndotto**, the current Speaker of the County Assembly of Kitui; or **Justus Kalewa Ndotto**, a retired former Permanent Secretary in the Government of Kenya. They immediately reached both on phone and **Hon. George Mutua Ndotto** requested them to meet with his brother **Justus Kalewa Ndotto** in Nairobi as he was engaged, but would later meet them as circumstances demanded. It was agreed that each of the two houses would nominate 2 representatives to meet with **Justus Kalewa Ndotto** and while the 1st wife's house was to be represented by **Francis Muthusi Malombe** and **Douglas Munyala Malombe**, the 2nd wife's house was to be represented by **Daniel Kaloki Malombe** and **David Kioko Malombe.**

73. According to DW6**,** during the meeting with **Justus Kalewa Ndotto**, the plaintiffs' representatives went with other persons including the husband to their sister **Florence Munanie Makindi**, all of whom were agreed should participate because all of them were a family. During the meeting, it was agreed that the deceased had not left a will; that the deceased would be buried at the home of his first wife at Mulutu which was also the first home of the plaintiffs because most of them were born there; and that the burial date would be 13th of March 2021, but before the burial, a final meeting was to be held at the deceased's Mulutu Home chaired by either **George Ndotto** or **Justus Ndotto** in the presence of all family members when the final communication would be made. However, as they were dispersing, the husband to **Florence Munanie Makindi** posed a question of what would happen if a will of the deceased emerged directing that he be buried at Kunguluni which question irked **Douglas Munyala Malombe** who told him that he had been alerted that **Daniel Kaloki**, **David Malombe** and Makindi's wife **Florence Munanie** had consulted some fraudster by the name **Dennis Makau Kiilu** to help them craft a forged will, but before the matter became acrimonious, **Justus Kalewa Ndotto** immediately intervened and told them that if such a will emerged it will be subjected to the tests laid down in law before being acted upon. An agreement was reached that they have the final family meeting on 5th March 2021 under the chairmanship of **Hon. George Mutua Ndotto**. On that day when the meeting was about to start, the 1st and 2nd plaintiffs called DW6 and informed him that they would not attend the meeting, but they would disclose their reasons later.

74. At that meeting, they resolved all the issues on the burial arrangements for 13.3.2021 and then DW6 went to meet the two step brothers at Parkside Villa Hotel in Kitui town, after which they said they had discovered a Will of the deceased and so were not agreeable to his burial at Mulutu as had been first agreed. The said Plaintiffs shared a copy of the "Will" with DW6, and which was in DW6's opinion, an outright forgery because the signature purported to of the deceased was obviously a forgery from the many signatures that had been seen by DW6. According to DW6, he cautioned his two step-brothers against playing such games against their father whose body was lying in the mortuary, but they left, and then instituted the present case.

75. According to DW6, he was all along, a confidant of his late father and he usually shared the frustrations he occasionally faced from the first and 2nd plaintiffs who abandoned him when he started ailing in 2018, and after he had transferred various parcels of land to them, even at times, using trickery on him for instance in 2018, they took the deceased to Coptic Hospital where he was admitted but upon his discharge, they abandoned him and was detained over a huge hospital bill of over Kshs. 400,000.00 which DW6 personally cleared and had him released. He also settled other Hospital bills for the deceased when the plaintiffs refused and/or failed to do so and took it upon himself to do ensure the deceased got the best treatment he could by paying all his bills.

76. Upon the deceased's passing on, DW6 stated, they consulted as members of his two houses and agreed to take his body to Umash Funeral Home for preservation as they organized for his burial which they did. However, soon after taking the body to Umash Funeral Services, the 1st, 2nd and 4th plaintiffs called DW6 and said that they needed a Post-Mortem done to the body a request which he conceded to although majority of the family members were of the view that the same was not necessary. The 1st and 2nd plaintiffs however told him that they wanted to have their private doctor do the Post-Mortem at Umash Funeral Home, and not any other doctor, a request he also conceded to and shared with the rest of the family members. However, he immediately received a cautionary message from **Janet Mammy Omboga** that he should have his doctor present when the Post-Mortem of our father's body was being done, and if possible to have some other family members present, lest something sinister happened based on what allegedly happened to the body of their mother. When he insisted on being present besides having his private doctor in attendance, the 1st and 2nd plaintiff started being hostile to him and kept on postponing the Post-Mortem exercise for 7 more days, until the funeral home management told him that the body would rot if not embalmed, and sought for permission to embalm the body or else they remove it to another facility. Since the 1st and 2nd plaintiffs were not keen on the post-mortem, he okayed the embalming of the body by Umash Funeral Home on 3rd March 2021.

77. According to DW6, from the time, the 1st and 2nd plaintiffs learned that the deceased's body had been embalmed, they became very hostile and the instant case is an extension of that hostility because they were blocked from taking body parts from the body of the deceased for the rituals they intended to perform. The said hostilities comprised of crafting a forged will with their collaborators while knowing that the deceased had not made a will; falsely alleging that the deceased had no land registered in his names in Mulutu while knowing that his Mulutu home is on land title number Kyangwithya/Mulutu/2342 still in the names of the deceased; and deliberately reneging on the mediation brokered by family and clan members on the peaceful interment of the deceased.

78. It was therefore his position that the deceased should be buried in accordance with the Kamba Customary law which the deceased espoused up to the time of his death and more specifically, at the home of his first wife on land title number Kyangwithya/Tungutu/2342 and on the graveyard the deceased set aside during his life time.

79. In his oral testimony, he identified a copy of the title deed for Kyangwitha/Tungutu/2342 which stated was in the deceased's name where he had a permanent home in Mulutu with a 4 bedroomed house, sitting room, shower and toilet where the deceased used to live with his two wives and where 7 of them were born. It was his evidence that if a polygamous Kamba man dies, he should be buried in his first wife's home.

80. In cross-examination, DW6 stated that Joyce was given the matrimonial home by the deceased but he was not aware if she had transferred it. According to him the deceased was a Christian and that is why the two wives stayed in one house but he could not say that he was a liberated person. According to him, had his mother moved with the deceased he would have agreed that the deceased be buried where she was or was buried but this had to be considered alongside the ancestral consideration. He however admitted that a Will is not disclosed to the beneficiaries. He denied that there was a dispute between him and the deceased over a pick up. DW6 stated that he did not know the Chief who had the fake Will and who called him to go to Kitui within 5 hours which was not possible and a copy of the alleged Will was sent to him by WhatsApp.

81. DW6 was then shown a clip in which he recognised the deceased's voice saying he had given all his land in Mulutu and that he had also given out all his land in Mulutu save for 3 acres which he left for himself and his mentally ill daughter.

82. In re-examination, DW6 stated that the deceased had designated ½ acre of his land in Mulutu for his burial. According to him, the alleged Will was made in 2019 and that by then Kyangwitha/Tungutu/1774 did not exist and that there was no land in Zombe belonging to the deceased measuring 10 acres. He clarified that in the clip played to him, the deceased was being interviewed by Kaloki and the deceased stated that he had given out all his land to his children both in Ngunguluni and Mulutu. In his evidence a man normally moved from his ancestral home with his younger wife. He did not mind which clergy buried the deceased as long as he was buried at Mulutu.

83. After the testimony of DW6, the parties agreed that the Document Examiner do appear and testify as a witness called by the Court. On that basis, **IP James Mutuma**, a forensic Document Examiner, testified that upon comparing the known signatures of the deceased with the certified copy of the alleged Will, he formed the opinion that they were made by different authors. He explained in details how he arrived at his conclusion.

The Trial Judge's Judgement

84. In his judgement, the learned trial magistrate found that there was no law in Kenya decreeing how a dead person should be buried and who should bury a dead person and where. As a result, courts resort to customary law governing burials and related laws like Common Law, Marriage Law, Succession law and Human Rights Law. He found that to prove a custom, evidence of its existence must be called t provide juridical and philosophical basis and also consider the wishes of the deceased though not binding. According the deceased's wishes on how his remains are to be disposed of upon death are not, generally binding but there must be compelling reasons not to heed the expressed wishes of the deceased. Another consideration, the court found, is who is the closes person to the deceased such as the spouse, children, parents and siblings in that order. The court also found that the conduct of the person claiming towards the deceased during the deceased's lifetime is also a consideration.

85. In this case the Court found that since the claimants were all the children of the deceased none of them had a better right to the other. After analysing the evidence, the learned trial magistrate found that none of the children had major differences with the deceased that would deprive them of the right to bury the deceased. He therefore declared that each of the children had equal rights to participate in the burial of the deceased. The court found that the deceased being a Kamba, his personal law was Kamba customary law but formed the view that it was incumbent upon the Defendants to prove on a balance of probability that there existed a Kamba Custom saying that a polygamous man when he dies should be buried at the 1st wife's home. Based on the evidence the court found that the defendants failed to discharge their burden of establishing the alleged custom by failing to call experts.

86. As regards the alleged Will, the Court's view that these proceedings not being succession proceedings, he could not determine its validity. However, the Court found that since the deceased kept a helper at Kunguluni home where his personal effects were and maintained a piece of land in his own name after sharing out the rest while he had none legally in his name at Mulutu, the deceased ordinarily resided at Kunguluni home with occasional visits to his Mulutu home. The court therefore found that from his conduct, the deceased's heart and soul was in Kunguluni more than Mulutu as he never went back to Mulutu even after his 2nd wife died. He found that it was only fair that the deceased's remains rest in Kunguluni home.

Grounds of Appeal

87. Aggrieved by these findings, the Appellants have preferred this appeal citing the following grounds:

> **1. THAT the Learned Trial Magistrate erred in Law and in fact in failing to appreciate the evidence before him and especially the uncontroverted Kamba Customary Law of burying a deceased polygamous man in the homestead and compound of the deceased's first wife.**
>
> **2. THAT the Learned Trial Magistrate erred in Law and in fact in distorting the evidence of the witnesses that the deceased had been living at the home of the 2nd wife when there was overwhelming evidence that the deceased kept a balanced schedule of living in both households of the two wives.**
>
> **3. THAT the Learned Trial Magistrate erred and misdirected himself on the law and the fact when he erroneously attempted**

to determine the wishes of the deceased on his preferred place of burial by relying on irrelevant considerations and on an alleged "will" when such "will" had been determined by the forensic documents examiners to be a forgery.

4. <u>THAT</u> the Learned Trial Magistrate erred and misdirected himself on the law and the facts in holding that the late JONATHAN MALOMBE MUNYALA (the deceased) had expressed his wishes as to his preferred place of burial despite the clear evidence from the Respondents and the Appellants and their witnesses that such a wish had not been made by the deceased to anybody.

5. <u>THAT</u> the Learned Trial Magistrate erred and misdirected himself on the law and the facts when after finding that the deceased was governed and subject to Kamba Customary Law at the time of his death, proceeded to determine his place of burial contrary to the said Kamba Customary Law and rites.

6. <u>THAT</u> the Learned Trial Magistrate erred and misdirected himself on the law and the facts in holding that the existence of Kamba Customary Law relating to the place of burial of a polygamous man had not been proved when on the contrary the Appellants had called credible and competent witnesses who established the existence of the said Customary Law.

7. **<u>THAT</u> the Learned Trial Magistrate further erred and misdirected himself on the law and the facts when he eventually based his decision on the payment of mortuary charges when such expenses were not an issue for trial in the case before him.**

88. It was sought by the appellant that the appeal be allowed, the Subordinate Court's judgment and orders dated 30th July 2021 be set aside and the same be substituted with an order dismissing the plaintiffs suit and allowing the defendants counter claim.

<u>Appellant's Submissions</u>

89. On behalf of the Appellant, it was submitted that whereas the court stated that the practice had not been proved by any of the appellants' witnesses, such practice was clearly proved by **DW1 (Mumbe Mathitu),** a sister to the deceased who, both in her written statement filed with court as well as in her evidence before the court, maintained that according to Kamba customary law relating to burial, if one with more than one wife dies, he is buried at his first wife's home and gave examples of her own grandfather **Masila** and that of his younger brother **Muvinga,** both of whom followed the custom to the letter, although it is not written down. It was further submitted that **DW4 (Mwova Kyondo Muvinga)** a cousin of the deceased testified that a deceased polygamous man should be buried at the home of his first wife in accordance with the Kamba customary law relating to burial. It was therefore submitted that the two elderly witnesses therefore proved the existence of the said Kamba customary law relating to the burial of a polygamous man.

90. According to the Appellants, the finding that the deceased was living at the home of his second wife was not backed by the evidence before him as all the witnesses were generally agreed that the deceased used to ply between his two wives' homes interchangeably as was confirmed by the 1st Respondent **(PW2) Daniel Kaloki Malombe** of the 2nd house who testified that when the step mother was alive, the deceased had no specific days when he was to visit the home at Mulutu and that he would stay for one or two days and go back to Kalawa but after death of his wives, he stopped going to Mulutu and also started ailing from December 2020. It was submitted that this evidence of the fist born son of the 2nd family corroborated the evidence of the appellants that their deceased father used to share his time between his two families and therefore could not be said that he preferred one to the other. PW2 confirmed this in cross-examination when he stated that the deceased loved both families equally and never discriminated any family while the first respondent confirmed that the deceased disclosed to him that he went with the 1st wife to marry off his mother.

91. According to the appellants, the foregoing excerpts from the Respondents' lead witness confirms that the deceased used to live in both homes, and that he had no preference over one to the other. The deceased's movements were however curtailed by old age and sickness in 2020 and he passed away **on 26th February 2021.** There was therefore no basis for the trial court to hold that the deceased lived at his Kunguluni home to exclusion of his Mulutu home and that was proof of his preferred place of burial.

92. It was further submitted that there was no evidence that the deceased had expressed his wish to be buried at the home of his second wife. After his death, both families sat under the chairmanship of their uncles **Hon. George Ndotto** and **Justus Kalewa Ndotto**, and it was agreed that since the deceased had not made a will to contradict the custom as to his place of burial, he would then be buried in accordance with Kamba customary law and at the home of his first wife where all his ancestors are also buried.

93. It was submitted that the evidence placed before the Trial Magistrate by the appellants clearly confirmed that the deceased was governed by Kamba customary law. Having married two wives in accordance with the custom, where the first wife sought the 2nd wife for him clearly demonstrates a man who adored the customs of his people. His life ought to be dictated according to the customs which he cherished. DW1 and DW4 clearly proved this custom. They further demonstrated that it was at Mulutu where the deceased had relatives and also where his ancestors were buried. Even the 1st plaintiff **(PW2) Daniel Kaloki Malombe** acknowledged as much during cross-examination when he stated that they did not have relatives from his father's side and that when his father had meeting of the clan, he would call them at his Mulutu home.It was therefore submitted that the court fell into an error when it held that the deceased though governed by Kamba customary law the custom had not been proved and was not applicable.

94. It was submitted that the court tended to rely on the "fake will" that was proved to be a forgery because it had not been signed by the deceased after it was subjected to forensic examination alongside the known writings and signatures of the deceased. Having failed to succeed on the basis of will the court further fell into a serious flaw by stating that the appellants were not willing to foot the mortuary expenses and as such the body of the deceased would be released to the Respondents. To debunk this error, it is incumbent to state first that payment of mortuary charges was never an issue during the trial. There is nowhere in the evidence of the plaintiffs (respondents) that they expressly stated that they were willing to pay the mortuary expenses. If anything the issue was raised at the tail-end of the trial during the cross-examination of the 1st defendant (Appellant). It was submitted that the issue of the payment of the bill was therefore an irrelevant factor for consideration in determining the issues before him.

95. This Court was therefore urged to set aside such findings of the trial Magistrate by allowing the instant appeal as prayed. It was not disputed that the deceased had a permanent home at Mulutu, where his late mother, first wife and all his ancestors are buried since DW6 **Francis Muthusi Malombe** clearly testified that his father's homestead at Mulutu is built on land title number **Kyangwithya/Tungutu/2342,** and not on land title number **Kyangwithya/Tungutu/2344** which was transferred to **Sammy Mwendwa Malombe.** His evidence that the deceased had set aside half an acre of land title number **Kyangwithya/Tungutu/2342** as his burial ground was also not challenged.

96. According to the Appellants, all the parties in the case being Kambas were not only subject to the customs of the Kamba people, but also affected by said custom and reliance was placed on the holding of the Court of Appeal in **Virginia Edith Wambui Otieno –vs- Joash Ochieng Ougo & Another [1987] eKLR,**

97. The Court was therefore urged to allow the appeal as prayed and direct that the body of the late **Jonathan Malombe Munyala**, be released to **Francis Muthusi Malombe** for burial at the deceased's Mulutu home on land title number **Kyangwithya/Tungutu/2342** with the liberty of all the issues of the deceased to attend and participate in the burial without hindrances.

Respondent's Submissions

98. It was submitted on behalf of the Respondents that the court should evaluate the evidence and reach its own conclusion. But even with the divergence between the parties on that question, the Appellants in their submissions agree that the deceased appeared to spend more time at his second wife's home. Evidence tendered by the witnesses indicated that even after his second wife died in July, 2018, the deceased did not move to permanently live with his first wife in Mulutu. He continued to ordinarily reside in Kunguluni, Kyanika location, at the home of his now deceased second wife.

99. According to the Respondents, the question which the parties placed before the court for determination was where the remains of the deceased should be buried. The choice the parties gave the court was not an either "either or" choice. The Appellants told the trial court that the deceased ought to be buried at Mulutu, where his first wife was buried, and where they believed was the ancestral home. The Respondents on the other hand told the court that the deceased should be buried at Kunguluni, where he ordinarily lived before his death, and where in his lifetime he had established himself. The Respondents also told the court that the deceased had left behind a written will in which he expressed his wish to be buried at Kunguluni, Kyanika location of Kitui County.

100. It was submitted that the question was never which wife should bury the deceased. By the time the deceased died, his two wives had already died. Any burial, therefore, would have to be undertaken by the deceased's children. The deceased's children, who are now fighting bury their father, rank equally. None had a superior entitlement. None has priority over the other. It would have been a different case, perhaps, if there was a surviving wife fighting to bury her own husband. According to the Respondents, the trial court, after hearing the parties, observing the demeanour of all the witnesses and evaluating the evidence, came to the conclusion that the balance of probabilities tilted in favour of the deceased being buried at his home in Kunguluni, Kyanika location.

101. It was submitted that it is not disputed that the deceased had two homes. If he is buried in any of these homes, he will still have been buried by his own children. He will not have been thrown away. He will not have been buried in a cemetery. The court is, therefore, called upon to determine which of the two houses should bury their father. It was always expected that one house would feel disgruntled if the other house was allowed to bury the remains of their father. But then, there was no middle ground. The court had to determine the matter one way or the other, and someone was bound to be unhappy, whichever way the court determined the dispute. It was a classic case of damned if you do, and damned if you don't. After a delicate balancing act, the trial court correctly found that the deceased should be buried at Kyanika Location, with the children of both houses co-operating and participating in the burial arrangements.

102. According to the Respondents, the case before this Court is not that any party has been barred from participating in the burial arrangements or attending the burial. This is about which party should get the bragging rights of having "won" the court case. That is not the purpose of this Court. The role of this court is to evaluate the evidence and determine whether the trial court fell into an error in its judgment. The Court was therefore urged to exercise the highest caution while answering the question whether or not to change to the place of burial ordered by the trial court. Since no additional evidence has been taken by this Court, that evaluation can only be done on the basis of the evidence taken by trial court. However, in evaluating the evidence afresh, this court, as a first appellate court, suffers from one critical disadvantage: the fact that this court has not seen and observed the demeanour of the witnesses. That is a unique advantage the trial court enjoys.

103. It was submitted that proof of existence of customs is a question of fact and evidence. It must be proved. A person who alleges the existence of a certain custom must present before the court evidence of the existence of such a custom. He must call experts in that custom to establish its existence. Expertise in customary law is not just a question of age, as the Appellants appear to suggest. The elderly may be expected to understand custom, but that is a presumption. Anyone who appears in court to testify about the existence of a certain custom must be well versed in that custom. In this regard reliance was placed on the case of **SAN v GW [2020] eKLR and Nyariba Nyankomba vs. Mary Bonareri Munge [2010] eKLR**.

104. In this case it was however submitted that the Appellants did not call experts in Kamba customary law since DW1 and DW4 were not independent witnesses but came to court to testify to the effect that the body of the deceased should be given to the children of the first wife. According to the Respondents, anyone who comes to court as an expert needs to manifest a certain level of detachment to the dispute at hand and should manifest neutrality. In this case DW1, a sister to the deceased, admitted that she did not know all the Kamba customs when it comes to burial. DW 4, only vaguely testified about African customary law and did not demonstrate any specific knowledge of Kamba Customary law, detached from his emotions as a friend of the deceased and a witness for the Appellants. In this regard reliance was placed on the case of **Kimani v Gikanga, (1965) EA 735**.

105. It was therefore submitted that the trial court correctly held that, the two witnesses, DW 1 and DW 4, were not experts in Kamba Customary Law and that the Appellants had failed to call experts to establish the existence of the custom, as required by law. Once the

Appellants failed to call experts to prove their allegations, the court could not help them and this court cannot also help them since this court is not an expert in customary law.

106. It was further submitted that the Trial Magistrate's decision to hold that the Deceased had been living at the home of the 2nd wife at Kunguluni village and not at Mulutu, was backed by the overwhelming evidence adduced by PW 1 that on the date when the deceased's son and her husband, **Peter Mutua Malombe**, was buried, the Deceased went back to Kunguluni on the same day and the Deceased used to stay at Kunguluni and would only visit Mulutu whenever there was a function. PW 2 testified that, the Respondents had hired a house help to take care of the deceased when his health condition deteriorated and would visit him at his home in Kunguluni on a daily basis to ensure that he took medication and food. He also testified that the Deceased would only visit Mulutu on special occasions. PW 3 testified that, the Deceased joined the burial welfare group known as *Ithike Nguthike* which plans and facilitates burials for residents of Kunguluni, Kyanika location when he was young and had retired at the age of 80 years and that he was still a beneficiary of the group for purposes of burial. PW 4 testified that, he had worked closely with the Deceased in matters of development and more particularly, in the establishment of Kunguluni Primary School. PW 5 testified that, he knew that the Deceased's home was at Kunguluni village. PW 7 testified that, the Deceased was a devoted member of the Bible Celebration Church, Kunguluni and would not miss church on Sundays. He would also occasionally host prayers at his Kunguluni home as well as men's retreats.

107. According to the Respondents, DW 1 confirmed that, the Deceased used to live at Kunguluni village and not Mulutu and that she would visit him at Kunguluni village while DW 6 testified that at the time when the Deceased was taken to the hospital for the last time, he was picked from his second home at Kunguluni and that when his clothes were required in the hospital, they were collected from his home in Kunguluni.

108. From the foregoing, it was submitted that the Learned Trial Magistrate held correctly that, the Respondents had established, on a balance of probabilities, why the Deceased ought to be buried at his Kunguluni home and not in Mulutu. Further, the Appellants failed to adduce any evidence to prove that the Deceased would visit Mulutu on a weekly basis or that he was involved in any community activities in the area. In fact, it was **DW 6** testimony that the Deceased had given out all his land at Mulutu to his children.

109. Based on S*ection 109 and 112 of the **Evidence Act,** and* the case of **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** it was submitted that the Learned Trial Magistrate held correctly when he found that the heart and soul of the Deceased was in Kunguluni more than in Mulutu.

110. It was submitted that the considerations taken by the Trial Magistrate in determining the Deceased's place of burial were not at all, irrelevant since the Trial Magistrate did not rely on the will adduced by the Respondents to make his determination as to the place of the Deceased's burial. Reliance was placed on the decision of Court of Appeal in Civil Appeal No.68 of 2015 between **Anne Nyathira and Samuel Mungai Mucheru & Others** and it was submitted that where a will exists and it has not been invalidated using the correct procedure, its contents remain in force and should be implemented. There is no reason for disregarding the contents of the will, on the question of the place of burial. They urged this court in arriving at its own conclusion, to consider the contents of the will. According to the Respondents, the Deceased not only expressed his wishes as to his preferred place of burial in his Will but also by his conduct of establishing his entire life at Kunguluni village and even **constructing a permanent home there and not at Mulutu. Further, at the time of his death, the Deceased had no land at his ancestral home as he had given them all out to his children. Reliance was placed on the case of M'imanene M'rutere vs. Lewis Kirimi & 2 others, Civil Appeal No. 20 of 2018 [2018] eKLR where the court held that:**

> **"The place of burial of a person is closely linked to three things: the person's wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home."**

111. It was submitted that the actions of the Deceased in establishing a permanent home at Kunguluni village constitute an implied expression of where he wished to have been buried and reliance was placed on Article 33(1) of the Constitution of Kenya that provides for the right to freedom of expression as well as the case of **SAN vs. GW, Civil Appeal No. 1 of 2020 [2020] eKLR** where the Court of Appeal expressed itself thus:

> **"…courts have also been unanimous as far as we can tell from decided cases that, both laws, common and customary, have one thing in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect…"**

112. **It was submitted further that,** the land at Kunguluni has no dispute and is free for burial and reliance was on **re Burial of Musa Magodo Keya (Deceased) [2021] eKLR,** where the court held that:

> **"It is trite that the burial of a deceased person must be at a place where not only all parties are free to attend, but also where the ownership of the land is undisputed."**

113. DW 6 testified that whereas the Deceased transferred to him a piece of land at Mulutu, he has never registered it because he had a dispute with his brother Sammy over the size of that land.

114. As to whether the deceased was bound by Kamba Customs, it was submitted that the deceased was a Christian and had abandoned retrogressive Kamba traditions and chosen to be bound by Christian norms and values. The Deceased was not only a devoted Christian but also took part in the establishment of churches at Kunguluni village. Reliance was placed on the case of **Neema Mulwa vs. Joyce Mwango [2015] eKLR.**

115. According to the Respondents, the principle established in the case of **Virginia Edith Wambui Otieno versus Joash Ochieng Ougo & Another [1987] eKLR** is bad law and they relied on **re Burial of Musa Magodo Keya (Deceased) [2021] eKLR** where the court held that:

"The Court in the *SM Otieno Case* deliberated upon this and observed that there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. While this court is cognizant of this holding, it is noteworthy that Article 32(4) of the Constitution is categorical that a person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion. While this court is duty bound to apply the landmark decision in the *SM Otieno Case* as precedent, it is also obligated to uphold the provisions of the Constitution 2010 which is the supreme law of the land and which was promulgated long after the decision in the *SM Otieno Case*. This obligation is in tandem with the transformative character of the 2010 Constitution. It is my considered opinion therefore, that where one chooses to exercise their freedom of conscience, religion, belief and opinion and thereby adopt different practices, the court should uphold their opinions and beliefs as to do otherwise would amount to a violation of an enumerated constitutional right."

116. It was submitted that, the Learned Trial Magistrate held correctly in upholding the wishes, beliefs and opinions of the Deceased and it was contended that the Appellants failed to avail any expert witness to testify on the existence of the customs relating to burial of polygamous Kamba men. Therefore, the Learned Magistrate held correctly that the Appellants failed to discharge with their burden of proof to the required standard in law.

117. Regarding the payment of mortuary fees, it was submitted that the Learned Magistrate did not base his entire decision on the payment of mortuary charges. The conduct of the Appellants however, and especially that of DW 6 portrayed the Appellants' lack of ability and unwillingness to bury the Deceased. They cited the case of **Samuel Onindo Wambi vs. COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR** where the Court 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 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."

118. The Respondents maintained that the Learned Magistrate held correctly in issuing orders as to the payment of mortuary charges since the Appellants were unwilling to cater for them.

119. Regarding the existence of the land in Mulutu ancestral land, it was submitted that the Appellants failed to call any evidence in support of this allegation and that in any event, it is not clear what ancestral land is.

120. It was therefore the Respondents' position that the Appellants have failed to establish a case warranting interference with the judgement of the trial court and this Court was urged to uphold the decision of the trial court, and to issue specific orders that take care of the costs, and settlement of mortuary charges, in terms of the amended plaint.

Determination

121. I have considered the issues raised in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** 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."

122. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

123. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial

Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

124. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

125. In this case, the Learned Trial Magistrate's exposition of the law relating to burial in this country cannot be faulted. He succinctly set out the same and appropriately dealt with the legal principles guiding burial disputes based on the authorities that have been handed down by the courts. In the end however, his decision was based on two findings. Firstly, he found that the Appellants had failed to prove that there existed Kamba custom to the effect that where a Kamba man marries more than one wife, in the event of his death he is to be buried in the home of the first wife. The learned trial magistrate having not considered the disputed Will proceeded to determine the case on the basis of the deceased's conduct and found that based thereon he had chosen his place of burial to be Kalawa and not Mulutu.

126. I must point out that as long as a custom or customary law is not legally objectionable, there is nothing inherently wrong in relying the same in order to reach a just determination. It is not in doubt that customary law is one of the sources of law in this country and as was held in **Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others High Court Civil Appeal No. 14 of 2017 [2017] eKLR**:

"In the absence of a will regarding preferred burial site courts have upheld the traditional customs so long as these were not repugnant to justice and morality or contrary to written law."

127. Similarly, in **Morris Odawa vs. Samuel Ochieng Auma [2019] eKLR** citing Court of Appeal decision in **Edwin Otieno Obanjo vs. Martin Ondera Okumu Civil Appeal No. 2009 of 1996 [1996] eKLR** where it was held that:

"…if African customary law is not caught up by the qualifications under section 3(2) of the Judicature Act then it must be given effect by the courts and must be applied in deciding cases before it but according to 'Substantial justice'."

128. It would therefore, be unfair to dismiss the role of culture and customs offhand since Article 11 of the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and obliges the state to promote the same. As was appreciate in the South African Constitutional case of **Shilubana vs. Nwamitwa** [2008] ZACC 9; 2009 (2) SA 66 **(CC),** 2008 (9) BCLR 914 **(CC) at para 45:**

"It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated."

129. The same Court in **Bhe vs. Khayelitsha Magistrate (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission vs. President of the Republic of South Africa [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC)** held that:

"[41] Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution…It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[45] The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution."

130. I agree with the same Court in **Sigcau and Another vs. Minister of Cooperative Governance and Traditional Affairs and Others (CCT167/17) [2018] ZACC 28** that:

"[76] If we are serious about giving customary law its rightful place under the Constitution, it would be prudent to allow it to develop in its own intrinsic way in accordance with the fundamental values and rights protected in the Constitution."

131. This appeal principally revolves around these two findings. According to the Learned Trial Magistrate the said customary law was not proved. How then does one prove the existence of a custom or customary law? The Court of Appeal in **Wambugi W/O Gatimu vs. Stephen Nyaga Kimani [1988-92] 2 KAR 292** while citing with approval the decision in **Kimani vs. Gikanga [1965] EA 735** held that:

"Where African customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it and as a matter of practice and convenience in civil cases the relevant customary law, if incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties."

132. In other words, a custom that is neither notorious nor documented must be established for the court's guidance by the party intending to rely on it. That was the position in **Ernest Kinyanjui Kimani vs. Muiru Gikanga and Another [1965] EA 735** where it was held by a majority that:

"Customary law is a part of the law in Kenya. The parties in this case are Africans and therefore the court will take judicial notice of such African Customary laws as may be applicable but subject to the provision of the law. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law is set out in a book or document of reference, but usually in the High Court or in a Magistrate's Court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses, called by the party relying on that particular law in support of his case. The court's power to call in the aid of assessors is a discretionary power of the court and whilst it may be of great value and assistance to the court in cases dealing with customary law, yet this does not cast the burden of proof in establishing the customary law on the court and not on the litigant himself. Custom as referred to in sections 13 and 51 of the Evidence Act would include African customary laws and the onus of proof to establish a particular customary law rests on the party who relies on it in support of his case. Where a party relies on a local custom then that local custom must be proved by witnesses called by that party, and it would be incorrect for the Judge to act only on the opinions of the assessors. While witnesses as to the local custom could have their evidence tested by cross-examination and the other party would also have the opportunity of calling evidence to controvert their opinion, opinions of assessors would, in normal be given at the end of the case when the parties would have no opportunity to test their opinions by cross-examination, or be able to call evidence to contradict these opinions…This is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the apparent lack in Kenya of authoritative text books on the subject, or any other relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law, as he would prove the relevant facts of his case."

133. Similarly, **Sakina Sote Kaittany & Ano. vs. Mary Wamaitha [1995] eKLR** the Court of Appeal held that: -

"The Parties in this case are Africans and therefore the court will take judicial notice of such African Customary Law as may be applicable but subject to the provisions of reg. 4 as set out above. The difficulty remains how are these customary laws to be established as facts before the court. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of previous judicial decision or where the Customary Law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court or in a Magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case."

134. The learned trial magistrate found, a finding which as not been challenged in this appeal, that the deceased being a Kamba, his personal law was Kamba customary law.

135. In this case, it was the Appellant's case that the said custom was proved by the evidence of DW1 **(Mumbe Mathitu),** a sister to the deceased and **DW4 (Mwova Kyondo Muvinga)** a cousin of the deceased, the two elderly witnesses who proved the existence of the said Kamba customary law relating to the burial of a polygamous man.

136. The Respondents contend that the said witnesses, being witnesses for the Appellant could not be relied upon to prove the existence of the customs. With due respect, I disagree with this position. As the above cited case states, it is upon the party relying on the custom to call witnesses to prove the existence of the same. That such a witness is called by a party does not lessen the veracity of his evidence. Where the other party disagrees with his or her view, nothing bars him from calling his own witnesses to rebut the same. Accordingly, there was nothing wrong in the Appellants calling the said witnesses to testify.

137. The Respondents however contended that **DW1,** admitted that she did not know all the Kamba customs when it comes to burial while **DW4**, only vaguely testified about African customary law and did not demonstrate any specific knowledge of Kamba Customary law, detached from his emotions as a friend of the deceased and a witness for the Appellants. As was held in **Nyariba Nyankomba vs. Mary Bonareri Munge [2010] eKLR**:

"Time and again it has been stated 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 claims remain unproved."

138. In my view, in cases such as these where a witness is called to testify as to his or her knowledge of a particular custom or customary law, one ought to be guided by what is stated in ***Evidence for Magistrates by Philip Durand Part I at 123-123,*** that as a rule of practice, a witness should always be qualified in court before giving his evidence by asking questions to determine his educational background, and where the qualification is on the grounds of practical experience, on background in this regard; areas in his field where he took extra courses or degrees to qualify himself further; and work experience including places, times, length of experience conditions under which he worked *et cetera.* In this case no attempt at all was made to determine the knowledge of DW1 and DW4 regarding Kamba customary law. DW1 admitted that she did not know all the Kamba customs relating to burial hence her evidence could not conclusively be relied upon as proving the existence of the same. As for DW4, I agree that his evidence was too general to be relied upon as proving the said custom or customary law.

139. Was that therefore the end of the matter? As appreciated in **Kimani vs. Gikanga** (supra), the court has a wide discretion as to how custom or customary law should be proved and while the onus is on the party who putting it forward, proof can be by reference to a book or document of reference including a judicial decision. The trial court should have therefore gone ahead to find out even if parties had not so done, whether there existed judicial decisions in that aspect. **Kariuki, J** has had occasion to expressed himself on that issue in **Munyao Ndolo & 3 Others vs. Mary Nduku Mutisya [2018] eKLR** where he held at para 55 that:

> **"There is also no doubt in my mind that where *ntheo* has been performed and one of the parties to a marriage dies, the right to bury the deceased is with the surviving spouse. In case of a polygamous set up and the husband dies, he is to be buried at the home of the 1st wife."**

140. From the evidence adduced on behalf of the Respondents, and in particular PW2, at Kyanika they did not have relatives from the father's side and whenever the deceased had a clan meeting, he would call them from his Mulutu home and he cited one such example in 1999 or 1997 when the deceased had a rift with the 1st Appellant. Clearly, therefore the deceased still recognised the role played by his Mulutu clan. It cannot therefore be said that he was completely divorced from his Mulutu ancestral roots. The importance of such roots was appreciated in **Johnstone Kassim Mumbo & 2 Others vs. Mwinzi Muumbo & Another [2018] eKLR** where it was held that

> **"The totality of the evidence is that Akamba customary law prescribes that deceased is buried in his ancestral home and woman at her matrimonial home unless, all family members agree to the alternative site where one bought land and lived. Although custom is not mandatory, if the wish of the deceased is not clear or known then the closest person(s) shall bury the deceased and it may be on ancestral land or his land as the family agrees. The relationship with the deceased's wives though relevant is not the predominant factor."**

141. In the said case the court expressed itself as hereunder:

> **"This Court concurs with Trial Court, that there is no statutory law on burial; however there is case-law and by virtue of the principle of *stare decisis* ought to persuade or bind this Court on determination. By virtue of Article 2(4) Constitution 2010 and Section 3(2) Judicature Act Cap 8 Laws of Kenya they recognize application of customary law where relevant and not repugnant to the Constitution. The deceased was of Kamba origin from Akitutu Clan and he practiced Kamba customary law. At some point he was patron of the clan. During his life the Akitutu clan was engaged in reconciliation efforts between the deceased and his family. It is settled law that a dead person is generally buried according to his/her customary practices."**

142. I agree with the decision in **Neema Mulwa vs. Joyce Mwango [2015] eKLR,** where the court held that:

> **"Much was said about Kamba Customary Law. Customs and customary law apply to every person. Customs apply everywhere in the world, unless taken away by statute. However, such customs apply to somebody when his or her conduct cherished or respected that custom, and where he/she has not made a will that departs from the said practices of that custom…Thus where somebody has willingly decided not to be bound by customs, he cannot be forced to be so bound. In my view, from the evidence on record, it is evident that it is not mandatory for a person from the Kamba community to be buried in his/her ancestral land…."**

143. However, where it is found as was the case herein that the deceased's personal law was his customary law, the burden shifts on the people contending that he should not be subject to the customs of his customary law to prove that he willingly decided not to be bound by customs.

144. These being a judicial pronouncement, the learned trial magistrate ought to have been guided by them. He might not have been aware of their existence but that does not mean that the decisions did not exist. While it may well be that in the matter before him, the evidence did not prove that where a polygamous Kamba man dies he is to be buried in the first wife's home, judicial authority existed attesting to that fact. Accordingly, to the extent that the learned trial magistrate found that such a custom was not proved, it is clear, on judicial authority, that the custom existed.

145. It was therefore held by the Court of Appeal in **Michael Musau Kitivo vs. Maurice Ndambuki Kitivo Civil Appeal No. 233 of 2007 [2008] KLR 119** that:

> **"Section 82 of the Constitution of Kenya clearly permits the application of customary laws relating to burials, among other matters and in the absence of any other provisions relating to burial, the Kamba Customary Law was the relevant applicable law. The learned Judge erred by declining to consider the Kamba Customary Law."**

146. The second crucial determination made by the learned trial magistrate was that since the deceased kept a helper at Kunguluni home

where his personal effects were; maintained a piece of land in his own name after sharing out the rest while he had none legally in his name at Mulutu; ordinarily resided at Kunguluni home with occasional visits to his Mulutu home; were indications that the deceased's heart and soul was in Kunguluni more than Mulutu as he never went back to Mulutu even after his 2nd wife died. However, the learned trial magistrate failed to consider the evidence that the said helper was not only helping the deceased but was also taking care of **Susan Kalekye**, his mentally unwell daughter. There was evidence on record that the deceased decided to stay there in order to take care of the said daughter. Accordingly, from the evidence on record, there was a plausible reason why the deceased stayed at Kunguluni even after the death of the 2nd wife.

147. There was evidence from both sides of the divide that the deceased loved both families equally and never discriminated any family. In fact, it was disclosed from the Respondents' witness that deceased went with the 1st wife to marry off his mother. As regards the sale of the land at Mulutu, DW6 **Francis Muthusi Malombe** testified that his father's homestead at Mulutu is built on land title number **Kyangwithya/Tungutu/2342,** and not on land title number **Kyangwithya/Tungutu/2344** which was transferred to **Sammy Mwendwa Malombe.** A title deed for land title number **Kyangwithya/Tungutu/2342** appears at page 140 of the record and the said parcel is in the name of the deceased.

148. It is therefore my view and I find that the conclusion by the learned trial magistrate that the deceased's heart and soul was in Kunguluni more than Mulutu. The allegation that the deceased never spent the night at Mulutu was itself contradicted by PW2, the eldest son in the 2nd House who testified that the deceased used to go to Mulutu and stay for three days but after the death of his wives he stopped going there as he also started ailing with blood pressure. In fact, according to him, after the death of the deceased, he involved senior citizens including **Ndoto**, a former Government Minister and it was agreed by everybody since that the deceased had not left a Will, he ought to be buried at Mulutu. It would seem that it was the discovery of the said Will that change the course of events and that had the Will not surfaced, this litigation may well have not been provoked.

149. Although it has been submitted on behalf of the Respondents that where a Will exists and it has not been invalidated using the correct procedure, its contents remain in force and should be implemented, it is clear from the learned trial magistrate's judgement that his decision was not influenced by the existence or otherwise of the Will. In this case it is important to note that the said Will was formally introduced into these proceedings by a witness who the parties agreed was a neutral party called by the Court. Without him being called the said Will would not have found its way into the record of these proceedings, at least not as an exhibit. However, that very witness who introduced the document discredited it as having not been made by the hand of the deceased. While the validity of the documents cannot be determined with finality in these proceedings, having been discredited in these proceedings by its introducer, as far as these proceedings are concerned that document is worthless and the learned trial magistrate did well in giving it no attention.

150. This Court cannot therefore attach much any weight to the same since its validity may well be the subject of other proceedings. It is in this sense that I understand the decision in **Anne Nyathira and Samuel Mungai Mucheru & Others,** Court of Appeal in Civil Appeal No.68 of 2015 where it was held that:

> **"The judge declined to deal with the issue of the validity of the deceased's will which had been challenged by Sakina and Mustafa Kibet. He held that that this is a matter which should be decided by the judge hearing the probate cause filed by Wamaitha. There can be no doubt that in taking this view, the judge was right. The Law of Succession Act (Cap 160) provides a special procedure for applications for grant of probate and for dealing with any challenges to such an application. It is therefore not open to any party to mount such a challenge otherwise than in accordance with the statutory procedure."**

151. In this case it has not been contended that the Kamba Customary Law in so far as it provides that in case of the death of a deceased person who had more than one wife, he ought to be buried in the home of the 1st wife, is repugnant to justice and morality. The fact of burial at one's ancestral place does not necessarily derogate from his Christian beliefs. Nothing stops the deceased from being buried at his ancestral place in accordance with Christian protocol.

152. As I have noted above, this litigation may not have been provoked had the alleged Will not been "discovered" as everybody had agreed to inter the deceased at Mulutu.

153. I have said enough to show that this appeal is merited. The decision of the learned trial magistrate delivered on 30th July, 2021 in Kitui Chief Magistrate's Civil Suit No. E064 of 2021 is hereby set aside. I hereby direct that the body of the late **Jonathan Malombe Munyala**, be released to **Francis Muthusi Malombe** and **Daniel Kaloki Malombe** either jointly or to any one of them for burial at the deceased's Mulutu home on land title number **Kyangwithya/Tungutu/2342.** All the issues of the deceased are at liberty to attend and participate in the burial without hindrances.

154. As regards the funeral expenses including the accrued mortuary expenses, I direct that the same be shared equally between the two houses and the process to be coordinated jointly by **Francis Muthusi Malombe** and **Daniel Kaloki Malombe**.

155. In the circumstances of this case, and considering the relationship between the parties herein, there will be no order as to costs. In other words, each party will bear own costs.

156. Liberty to apply granted.

157. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF DECEMBER, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Mwalimu for the Appellants

Mr Kimuli for the Respondents

CA Susan