



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CIVIL APPEAL 2 OF 2014**

**NEEMA MULWA.....APPELLANT**

**VERSUS**

**JOYCE MWANGO.....RESPONDENT**

***(Appeal from the decision in the Senior Resident Magistrate's Court Mwingi in Civil Case No. 1 of 2014 – V. A. Otieno Ag. SRM)***

**JUDGMENT**

The respondent Joyce Mwango filed a plaint in the subordinate court. The suit was against the appellant Neema Mulwa. She claimed to be the wife of the later Gabriel Mulwa Mwikunyu and sought for a permanent injunction restraining the appellant from collecting the deceased's body from Mwingi funeral home. She also asked for orders that the said funeral home releases the body to her for burial at their matrimonial/ancestral home land parcel No. 1458 Mwingi. She further asked for the grant of any other relief by the court.

Defence was filed on 15<sup>th</sup> January 2014 by the appellant Neema Mulwa. She also claimed to be a wife of the deceased with five children. In the defence, it was averred that before he died the deceased told he appellant that he wanted to be buried at her compound.

After evidence was tendered on both sides at the trial, the court delivered its judgment on 12<sup>th</sup> March 2014. In the said judgment the court appreciated that the appellant had taken care of the deceased till death. The court found that the respondent was first wife under the Marriage Act but was estranged with deceased before he died. The court then ordered that the respondent bury the deceased because she was married to him under the Marriage Act.

Aggrieved by the above decision of the trial court, the appellant has now appealed to this court through her counsel C. k. Nzili & Company on seven (7) grounds as follows:-

1. The learned trial magistrate erred and misdirected himself in law and in fact in confining himself only to the issue of marriage in determining who ought to bury the deceased and where.
2. The learned trial magistrate erred and misdirected himself in law and in fact in holding that the law governing the burial dispute of the deceased is statutory as opposed to Kamba Customary Law.
3. The learned trial magistrate erred and misdirected himself in law and in fact in failing to consider and enforce the deceased's wishes on his burial site, place and circumstances.
4. The learned trial magistrate erred in law and in fact in failing to record, consider and evaluate evidence tendered by the appellant and her witnesses.

5. The learned magistrate erred in law and in fact in failing to make a finding as outcome to the appellant's counterclaim.
6. The learned trial magistrate erred in law and fact in engaging in unethical behavior moments before writing the delivery of the judgment hence compromising the suit in favour of the respondent.
7. The learned trial magistrate erred in law and in fact in holding that the respondent was first in line to bury the deceased despite her unbecoming conduct, demeanour, circumstances surrounding her relationship with the deceased and the available law as cited and quoted by the appellant which the court did not consider at all.

By consent the counsel for the parties that is C. K. Nzili & Co for the appellant and M/s. Mathenge Gitonga & Co for the respondent, the counsel filed written submissions. Counsel for the appellant filed their written submissions after the respondent's counsel filed theirs counsel for the appellant and filed further submissions.

Mr. Nzili for the appellant and Mr. Maina Mbuthia for the respondent highlighted the written submissions at the hearing of the appeal.

The facts of the case before the trial court in brief are as follows. The deceased purportedly married two wives. The respondent was first to be married under the African Christian Marriage and Divorce Act (Cap. 151) at Milimani in Nairobi. She already had children. She cohabited with the deceased till 2005 but they disagreed and started living separately.

The deceased then purportedly married another wife the appellant under Islamic Law. She also had children before marriage. The deceased lived with the appellant till he died. After death a dispute arose as to which wife would bury the deceased and where.

The appellant stated in her evidence that the deceased had orally informed her that he should be buried at the plot which he had bought before death, where she lives. The respondent on the other hand contended that the deceased should be buried by her at his ancestral home where she lives according to Kamba Customary Law.

Faced with the above situation, the trial court decided that the first wife, the respondent, had not been divorced by the deceased. The court applied the Marriage Act and Kamba customs and decided that the deceased be buried by the respondent. Thereupon arose the present appeal.

This is a first appeal. As a first appellate court, I am duty bound to reconsider the evidence on record and come to my own decision – See the case of **Selle Vs. Associated Boat Co Ltd [1968] EA 123**

I have reconsidered the evidence. Both parties called witnesses to support their position. The appellant called relatives of the deceased. The respondent called her own children to support her position.

This is a burial dispute. Courts have held that there is no property in a corpse, and that the statutory law has not created such proprietary interest. This is the common law position that has been consistently upheld in Kenya.

Courts have also held that a dead person is generally buried according to his/her customary practices - See case of **Otieno Vs. Ougo & Another (2008)e KLR.**

Courts have also held that a wife is a close person to a deceased husband and should be the one with priority to bury a deceased husband – See the case of **Lilian Waithera Mwangi Vs. Salome Mukami Mugo [2011]eKLR.**

Arguments have been put on both sides that the deceased was initially married under the African Christian Marriage and Divorce Act, and not having divorced the respondent, had no capacity to marry another wife under Islamic or any other system of marriage.

That is true. However, the deceased considered the appellant to be his wife, or at least mistress. The respondent knew this relationship and never complained. In addition the evidence on record, including that of the respondent, is that respondent actually abandoned the deceased because of reasons stated in the evidence by respondent. She never cared for him. She knew that the appellant cared for him till death.

In my view, marriage or lack of marriage cannot be the only issue to be considered where burial is in issue. A married person who has been abandoned by a spouse, has a right to choose whom to cater and care for him or her and who to bury his or her body. There only needs to be evidence that he or she has made that choice.

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. The issue will arise, which is this ancestral land? Secondly whether the so called ancestral land is free for such a burial function. Such land might not be free for such burial.

Coming to our case, the deceased bought land and put up a house and spent his later years exclusively on the land where the appellant lived. He appeared to have had no interest in going to the land of the respondent. In any case, the evidence is that the respondent would not allow him there. Since she abandoned him, how does the respondent become so close when the deceased died, while she had chosen to be so distant when he was alive and sick? That kind of conduct in my view can neither be supported under Kamba custom nor the statute law. The conduct of the respondent in my view, smacks of insincerity.

Having re-evaluated this matter, in my view, the facts are quite clear. The deceased was subject to Kamba customs. He was married under the African Christian Marriage and Divorce Act (Cap. 151) to the respondent. They were estranged with the respondent as they could not live together. The deceased elected to go and marry or cohabit with the appellant under Islamic Law. They lived openly for several years until death. Even if the two were not legally married, they were closely connected and related. They supported each other. There is no evidence that the respondent, at any time, wanted to live with the deceased as a husband and wife, nor that she had an interest in his welfare and well being.

The deceased also permanently lived in his own land, and did not at any time during his last years, come to live in his ancestral land even for a short period. In my view the natural conclusion from the uncontroverted facts is that the deceased acquired a residence of choice which should be respected. It was also natural for the deceased to tell the appellant where he wanted to be buried, and by whom.

I thus hold that the decision of the trial court was an error. It took into account irrelevant factors in determining the place of burial for the deceased. Burial matters are not determined by statute. I will set aside the decision of the trial court.

Consequently, I allow the appeal. I order that the deceased will be buried at his new home, and the burial will be led by the appellant. The respondent and her children will be at liberty to attend and participate in the funeral and burial. Each party will bear the costs of these proceedings. The costs of the mortuary will be borne equally between the appellant and the respondent.

**Dated and delivered at Garissa this 30<sup>th</sup> day of April, 2015.**

**GEORGE DULU**

**JUDGE**