



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO.105 OF 2011

ALEX NANDWA SHARAMBA.....APPELLANT

V E R S U S

DAVID NDAGADWA INDECHE.....RESPONDENT

R U L I N G

The dispute between the appellant and the respondent relate to the burial of Judy Livoi Mmanule (deceased) who died on 12th July 2011. The respondent is the father of the deceased while the appellant is the husband of the deceased having married the deceased at the Registrar's office in Nairobi under the **Marriage Act** on 26th October 2010. Before she met her death, the deceased was admitted at Mukumu Mission Hospital for six days. The respondent's claim against the appellant in regard to the burial of the deceased is that before the deceased can be buried, the appellant must fulfil certain rites under Tiriki customary law. In particular, the respondent demands that the appellant pays dowry for the deceased before the respondent can grant him permission to bury the deceased. During the funeral preparations, it was apparent that the appellant and the respondent failed to agree on the necessity of fulfilment of the said customary rites before the burial of the deceased. According to the respondent, when the appellant realised that he would not bulge in his demand that the particular customary rite be performed, the appellant took the body of the deceased from the mortuary without the respondent's permission and buried the same at his farm.

This compelled the respondent to file suit before the Hamisi Senior Resident Magistrate's Court on 18th July 2011. In the plaint, the only prayer that the respondent sought was the following:

“An order of exhumation allowing the defendant (sic) (the respondent) to exhume the body of the deceased one JUDY LIVOI and preserve the body at Mbale District Hospital mortuary until final determination of the suit.”

Contemporaneous with filing suit, the respondent filed an application pursuant to the provisions of **Order 40 Rules 1, 2 and 3** and **Sections 63(c) & (e)** and **Section 3A** of the **Civil Procedure Rules** seeking the following orders of the court:

“2. THAT the Honourable court do issue an order of exhumation to exhume the remains of one JUDY

LIVOI which has been forcefully interred In the parcel of land of the defendant (the appellant) on 17th of July (2011) and that the same body be preserved at Mbale District Hospital mortuary until the final determination of the suit herein.

3. *THAT an order of forever (to) issue restraining orders (sic) on the respondent (appellant) from ever interring the said remains of JUDY LIVOI in full disrespect of her biological father ('s) wishes and Luhya customs."*

The grounds in support of the application were stated on the face of the application. The application was supported by the annexed affidavit of the respondent. The appellant opposed the application. He filed a replying affidavit in opposition to the application. The subordinate court heard the application and duly granted the respondent's application to exhume the body of the deceased from where the appellant had buried it. The body was duly exhumed pursuant to the said court order and is now lying at Mbale District Hospital mortuary.

The appellant was aggrieved by the decision of the subordinate court and has duly filed an appeal to this court. The appellant also moved this court by certificate of urgency under **Section 3A** of the **Civil Procedure Act** seeking the orders of this court to stay the order issued by the subordinate court pending the hearing and determination of the appeal. The application was filed on 25th July 2011. By the time the appellant moved the court, the respondent had already given effect to the orders of the subordinate court by securing the exhumation of the body of the deceased and having it taken to Mbale District Hospital mortuary for preservation pending the hearing and determination of the suit before the subordinate court. This court directed the appellant to serve the application upon the respondent. The court fixed the application for hearing on 28th July 2011.

During the hearing of the application, this court heard oral rival submissions made by Mr. Chitwa for the appellant and by Mr. Didi for the respondent. Having carefully considered the said submissions, and the pleadings filed in the subordinate court (which were annexed to the appellant's application), it was evident to the court that the dispute between the appellant and the respondent appears to be the slight that the respondent suffered when he was excluded from the burial arrangement and further by the fact that the appellant had not customarily got married to the deceased before getting statutorily married. Although the appellant the deceased were blessed with a daughter now aged six (6) years, it was evident that the respondent still considered the appellant to be "a stranger" (to use his words in his affidavit) because the appellant had not formally sought the deceased's hand in marriage under the Tiriki customary law. According to the respondent, even after the death of the deceased, the appellant was required to fulfil his customary obligations before he buried the deceased. On the other hand, it appeared that the appellant assumed the attitude that since he had statutorily married the deceased, he did not see the need nor necessity of fulfilling any customary rites regarding the marriage of the deceased, more so now that the deceased is dead.

From evaluation of the facts of this application, it was clear to the court that the respondent was required to respect the fact that his daughter, the deceased, had made a choice as an adult of sound mind to marry the appellant. The fact that the deceased decided to marry the appellant in a statutory marriage without consulting her parents, is an issue that appears to have riled the respondent. Whether the respondent was happy or not with the marriage of his daughter to the appellant is not an issue here. What this court is required to recognise is the fact the deceased was lawfully married to the appellant whether or not he had fulfilled any customary marital rites under Tiriki customary law. The deceased was therefore the lawful wife of the appellant up to the time of her death. The appellant was therefore entitled to bury the deceased. However, it appeared that the appellant failed to involve the respondent in the burial preparations. This was despite of the fact that the respondent had substantially contributed to the payment of the medical fees required when the deceased was hospitalised prior to her death. This court thinks that it is only human that the respondent, as the father of the deceased, together with members of his family, should have been allowed to fully participate in the burial arrangements and during the burial itself.

Due to the nature of this case, this court is of the considered opinion that it should render a decision that would promote reconciliation between the appellant and the respondent now that the deceased is no more. This court's decision has been influenced by the fact that the child who has been left behind by the deceased needs the appellant as her father, and also the respondent as her grandfather (together with her maternal grandparents' relatives). The orders that commends itself to this court are as follows:

- i) The appellant shall have the right to bury the deceased in his parcel of land.
- ii) The appellant shall make burial preparations and the actual burial in consultation with the respondent as the father of the deceased.
- iii) The appellant shall enter into negotiations with the respondent with a view to resolving any customary issues that are pending between the appellant and the respondent in relation to the marriage by the appellant of the deceased. Any agreement resulting from the negotiations, shall be recorded in writing and shall be binding.
- iv) The deceased shall be reburied not more than seven (7) days from today's date.
- v) There shall be no orders as to costs as this is a dispute between family members.

DATED AT KAKAMEGA THIS 28TH DAY OF JULY 2011

L. KIMARU

J U D G E