REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Appeal 48 of 2010

SALINA SOOTE ROTICH ……. APPELLANT

VERSUS

CAROLINE CHEPTOO ……..…….. 1ST RESPONDENT
SAMWEL MUTAI ……..…… 2ND RESPONDENT
JESSE MACKENZIE ……..…… 3RD RESPONDENT

JUDGMENT

BENARD KIPROTICH (deceased) died on the 29th day of January 2010 after an illness at Mediheal Hospital Eldoret. His first born daughter Caroline Cheptoo had his body removed from the Moi Teaching and Referral hospital mortuary and caused it to be interred at Cheptil village of Nandi District. This was done without the participation, knowledge and consent of the mother of the deceased Salina Soote Rotich. The burial was on 05/02/2010 and on 09th February, 2010 the said mother filed suit before the Chief Magistrate's court at Eldoret Vide CMCC NO. 152 OF 2010 stating that such burial was contrary to the Keiyo burial customs and praying that she, the mother of the deceased, be allowed to inter the remains of her son at Kiboa village, Irong location, Keiyo District in accordance with Keiyo customary law. Simultaneously with the filing of the plaint the mother filed a Chamber Summons stated to be brought under section 3(2) of the Judicature Act Cap 8 of the Laws of Kenya section 9 of the Magistrate's Act Cap 10 of the Laws of Kenya and sections 3, 3A of the Civil Procedure Act and order 39 rules 1,2 and 3 of the Civil Procedure Rules praying for the exhumation of the body of the deceased from Cheptil Nandi and for it to be preserved at Moi Teaching and Referral mortuary until the determination of the suit. That order was granted and the body now lies at the said mortuary pending the determination of this appeal.

The trial magistrate heard the case at the end of which he ordered that the remains of the deceased be released to Andrew Kiprotich (father) and Caroline Cheptoo Kiprotich (daughter) for burial at Plot No. Nandi/Kabiyet/185 at Kapsiria next to his wife's remains and the plaintiff (mother) and other family members be involved in the burial arrangements if they so wished. The plaintiff was dissatisfied with that result hence this appeal which raises the grounds that the learned Senior Resident Magistrate erred in law and fact in dismissing the Appellant's suit without taking into consideration the entire evidence of the plaintiff and her witnesses and the exhibits produced, and in failing to appreciate the fact that the deceased being a Keiyo is governed by Keiyo (Elgeyo) customary law in respect to burial rites which fact had been established and proved on a balance of probability, and in arriving at the said decision by dwelling on irrelevancies and failing to put into consideration the plaintiff's pleadings which were purely based on customary law. The magistrate was blamed in the appeal for showing open bias against the appellant.

Submissions for the Appellant were that the trial court erred in not appreciating customary law yet the Judicature Act states that courts will be guided by custom unless that custom is repugnant to justice and morality or inconsistent with written law. That the constitution allows discrimination with regard to

burials and as Keiyo customary law concerning burials was pleaded and proved, it was wrong for the trial court not to uphold it. That those customs were not repugnant to Christianity which the daughter of the deceased professed and the deceased himself submitted himself to his customs and conducted a customary law marriage before going to take Christian marriage rites later. Counsel for the Appellant added that the Respondent had no *locus standi* as she was not the administrator of the estate of the deceased and under Keiyo custom she had no role to play in a burial. That the wish of the deceased to be buried away from the ancestral land was not proved and the court ignored the authorities quoted and erroneously gave the body to Andrew Kiprotich who was not a party to the case.

For the respondents it was submitted that the mother had no land of her own wherein to bury the deceased and the deceased's father had agreed to the deceased being buried in Nandi. Her Muslim son was buried according to Muslim rites and no curses befell the family. The deceased and his family were Christians and his wish was to be buried next to his wife. That the daughter was closer to the deceased than his mother and so she ranked higher than the mother. Respondent did not practice Keiyo custom and discrimination based on sex was outlawed by the constitution so the daughter should be allowed to bury her father. That the Appellant did not always practice custom and allowed her son Hassan to be buried away from home and that interruption of custom was fatal to her case. Conceding that the mother had a right to moan her son Counsel said this was subject to her not interfering with where he was to be buried.

From the above the issues that command themselves to me for determination, as I see them, are whether Keiyo customary law with regard to burial was pleaded and proved and whether the deceased was subject to such custom. Those two issues once resolved will determine this appeal. I will consider the relevance or otherwise of ownership of land by a deceased person seeing that the matter was raised variously by both sides in this appeal and in the court below.

That the appellant had pleaded custom before the magistrate's court is evident from the plaint and hence the contention by the Respondents that custom was not pleaded is not borne out by those pleadings. That evidence on custom was led before the trial magistrate, was appreciated by that court when it noted the evidence of PW3 Cheruiyot Arap Chebii and PW4 Henry Kiptallam Tirop describing those witnesses as experts in Keiyo and Nandi customs respectively. By the evidence of PW3 the court was told that a Keiyo man who dies must be buried among his people by the family clan elders and neighbours. That Keiyo daughters have no role to play in the burial of their parents. And that recently Keiyo men may be buried on their own land and not always on the ancestral lands. Cheruiyot was emphatic that a Keiyo man cannot be buried by his in laws at their land. This last aspect of the Keiyo custom is similar to that of the Nandi as confirmed by PW4. He also stated that among the Nandi a wife belongs with her husband. Both witnesses stated that failure to perform those customs resulted in a curse and spirits haunting those relatives left behind. That was their custom which they believed in and practised.

What then did the trial court do with that evidence? Regretfully very little. His only reference to that evidence in his Judgment was, ***"The plaintiff and her witnesses testified that under Keiyo customary law, a child belongs to the father. Who is the deceased father! It is DW2. His version was that the land in Keiyo has not been sub-divided and that he has no objection to the deceased being buried on the land that he bought"***

Any wonder then that the appellant argued that that judgment was bare and without any juridical value and had no reasons for the decision reached? The trial court totally misconceived the evidence and misdirected himself. The issue was that a child, meaning the Respondent herein belonged to the deceased and as such she could not bury her father least of all bury him away from his ancestral land contrary to Keiyo custom. He further misdirected himself in handing over the body to Andrew Kiprotich as he was not a party to the proceedings, his being the father of the deceased being totally immaterial in that regard.

The custom that the trial court ought to have considered was whether the deceased, a Keiyo, could be buried away in Nandi even if that land was his. Whether the customs of the Keiyo as concerns burial were repugnant to justice and morality or whether they were inconsistent with written law. The evidence led was, as stated earlier, that a Keiyo is buried among his people in the land of his forefathers, he lays in

his house overnight, close relatives dig the grave, burial is conducted during daytime at around 2.00 p.m. brothers of the deceased lower the body into the grave, two to three days later hair of the relatives is shaved and after some time stocktaking of deceased property is taken. Where custom is not followed then curses befall relatives and the spirits of the dead haunt those relatives.

What is repugnant to justice and morality with the above Keiyo customs? That is the guiding factor in the application of custom as ordained by S.3 (2) of the Judicature Act Cap.8 of the Laws of Kenya which states;-

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

The issue as to the repugnancy or otherwise of the Keiyo burial custom was not considered by the trial court and hence the failure by that court to decide one way or the other on the same. Nothing was called to controvert that evidence therefore it stands as true since there cannot be any basis to come to any other conclusion. I then on my part come to the considered conclusion that that custom is not repugnant to justice and morality. Fear of supernatural consequences such as curses and being haunted by the spirits of the dead by those who are governed by such custom cannot by itself be repugnant to justice and morality. And to borrow the words of NYARANGI JA (as he then was) in the case of ***SHEIKH MUSHTAG HASSAN –VERSUS- NATHAN MWANGI KAMAU TRANSPORTERS AND 5 OTHERS C/A 123/685 – " There is always a purpose for the practice of a custom."*** It then becomes irrelevant for the first Respondent to state that she does not know Keiyo customs and does not subscribe to them, irrelevant because the first Respondent does not have to know or subscribe to Keiyo customs for such customs to exist. As for the deceased whom the court was told had practised Christianity, it was in evidence that when he was ready to marry the first Respondent's mother, he performed the Keiyo customary engagement rites. It matters not that later he performed a Christian marriage under the African Christian Marriage and Divorce Act Cap.151. When he was discharged from hospital still sick and weak and needing care and attention he did not go to Kapsiria where it was alleged he had a home, it is to his mother at Kiboa Keiyo that he went to be cared for by his mother and brothers. This goes to prove that ***"An African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal" –*** see ***OTIENO –VERSUS- OUGO AND ANOTHER, CA NO. 31 OF 1987*** and that ***" A different formal education and urban life style cannot affect one's adherence to his personal law."*** When dowry was not paid for the deceased wife, the deceased was not allowed to bury her and she was buried by her own parents. That was pursuant to custom. As I now find the deceased did not preclude himself from the operation of Keiyo customs.

As already stated the trial court did not subject the evidence to any assessment whatsoever for had it done so it would have dealt with the alleged wish of the deceased to be buried next to his wife. That wish was allegedly told to the deceased's father by the deceased. Where that was done or why it was being done was not stated. It was on record that the father and mother of the deceased separated during the year 2000 and he went ahead to take another wife with whom he lived at Kamaring. No evidence was led that deceased used to visit his father at Kamaring or that they remained close even after he had left his mother for another woman. On the contrary the evidence led was that deceased made occasional visits to his ancestral land at Kiboa yet he never expressed that wish to his mother and brothers. That alleged wish, though not proved as stated above, was used by the trial court in addition to the fact that the father of the deceased was not opposed to his son being buried at Kapsiria as the basis for handing over the body of the deceased for burial at the said Kapsiria. The Court ought to have warned itself of the possibility of the deceased's father lying about the deceased alleged wish as the father may have wanted to built his estranged wife's position of wanting to bury her son. However, even if there was any such wish, which I

find there was not, and even if the father of the deceased was not opposed to Kapsiria being his son's burial place those two factors by themselves do not change Keiyo customary law with regard to burial and they are contrary to those customs.

The land in Kapsiria appeared to be all that the trial court was concerned with. And he called it the deceased's land. That never came from evidence. What was in evidence was that the deceased's wife had bought some 0.2 acres of a town plot at Cheptil, Kapsiria. The sale agreement produced in court was in her name. The seller of that plot gave evidence that he sold the plot to the deceased's wife and contrary to evidence from some witnesses for the defence, he said there stood a two-roomed house on that plot which housed a posho mill and there was no home there. There was evidence that the said plot stood a short distance from the deceased's in laws home, that is in Nandi and not in Keiyo. The plot was bought by deceased's wife. She died during 2003. The deceased herein, her husband, had not taken a Grant of representation over her estate by the time of his death in the year 2010. He had not built a home there. He did not own that land. I find that the trial magistrate further misconceived the evidence and misdirected himself as ownership of land was not a relevant factor in determining the burial place. And the deceased's father whilst stating that he had not sub-divided the ancestral land in Kiboa Keiyo he had shown each of his sons their portions and they had put up their homes there. Those sons include the deceased who also had his house in the homestead where the Appellant here lived. That land was handed down from the deceased's grandfather.

The deceased, alongside his brothers did not own that land as a matter of a legal right but pursuant to custom passing down from their grandfather their father and then to themselves. The deceased here held that land pursuant to that custom showing once again that he had not removed himself from the operation of the customs of his tribe.

The 1st Respondent's position that she wished to bury her father next to her mother requires some comment. Firstly there was no wish shown to exist by both deceased parents of that Respondent that they wished to be buried next to each other which wish this Court could endeavour to enforce. Secondly, there is no marriage after death, the words (promise) pronounced by those marrying in church used to be ***"until death do us part"*** and I think those words (promise) do still persist to date. There is no law or religion at least as known to me and none was brought to my attention by both Counsel appearing herein that states that spouses must be buried next to each other. And as I have said there was no wish either by Benard the deceased herein or by Eliseba his wife who predeceased him to the effect that they should be buried next to each other so that the 1st Respondent can purport to execute in respect of her late parents.

The ground taken by the Respondents that Keiyo customs discriminate against women also needs some comment. It is true the Court below and this Court were told that a daughter has no role to play in her father's funeral as per Keiyo Custom. That is clearly discriminatory of women. However, that has to be looked at against the provisions of the constitution the relevant ones being section 82 (1) which states:-

"Subject to sub sections (4), (5) and (8) no law shall make any provision that is discriminatory either by itself or in its effects."

Discrimination is defined as follows in Section 82 (3)

"In this section the expression "discrimination" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex (emphasis mine) whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject are accorded privileges or advantages which are not accorded to persons of another such description."

Burial is removed from the operation of subsection (1) above in subsection (4) which provides:-
"Subsection (1) shall not apply to any law so far as that law makes provision
(a) ……..

(b) with respect to adoption, marriage, divorce, <u>burial</u> (*emphasis mine*), devolution of property on death or other matters of personal law."

Therein then lies the position. The apparent discrimination in Keiyo burial customs is allowed by the Constitution, the supreme law of the land. The case of **<u>RONO –VS- RONO CA. 66/02</u>** is in the circumstances irrelevant and must await the succession proceedings.

The clear impression created by the Respondents and submissions by their Counsel is that the issue of burial has some relation to succession. Nothing could be further from the truth. Burial and succession have no correlation in law. There is no property in a corpse. The issue raised that the daughter of the deceased ranks higher than the mother of the deceased as to who should bury the deceased is totally misplaced. Ranks are relevant in succession and this is burial.

The point taken that the Appellant has no land of her own where she could bury the deceased must fail as it is not material. She does not have to have her own land to be allowed to bury her departed son. There is the ancestral land at Kiboa Village part of which was allocated to the deceased by his father and where the deceased has a house. That Hassan, the Appellant's other son was buried under Islamic rites cannot be a bar to the Appellant burying Benard in Kiboa Keiyo under their Keiyo customs. She now wishes to bury Benard at Kiboa to avoid the taboo of having him buried among the Nandi, he being a Keiyo. The trial court was told that it was taboo to bury a Keiyo at his in-laws' place – away in Nandi. The trial Court failed to consider that issue.

For the above reasons I come to the conclusion that the deceased Benard Kiprotich was a Keiyo who subjected himself to the customs of his father and forefathers and who became incapable of divesting himself from the customs of his people. He was for all practical purposes bound by those customs. I find that Keiyo customs with regard to burial are not repugnant to justice and morality and they are not inconsistent with any written law. I am satisfied that a Keiyo man must be buried by his people and cannot be buried at his in-laws as that is taboo for the Keiyo. Having regard to the above therefore I hereby direct and order that the remains of Benard Kiprotich be released to Salina Soote Rotich for burial at Kiboa Village, Irong Location Keiyo District in accordance with Keiyo Customary Law and may the soul of the departed Benard Kiprotich rest in peace. As regards costs I make the following observation. This was a struggle for the body of the deceased between his daughter who has just turned eighteen (18) years and his mother. The mother obtained an order for exhumation of the body and had it preserved at Moi Teaching and Referral Hospital. I therefore order that the mother will meet the cost of keeping that body at the said mortuary. And each party will bear her own costs of the case. No party is barred from the burial arrangements and the actual burial.

Those are the orders of the Court.

Allow me to say this. Whilst appreciating the role Christianity has played in affecting customs to the extent that some customs have indeed been disregarded, some modified and others changed, Christianity has not totally eradicted customs and it is unlikely to do that any time soon, if ever. There are good customs and "**there is always a purpose for the practice of a custom"** as earlier quoted.

There is the issue of jurisdiction which although not raised by either party to these proceedings either in the court below or before this court, I feel duty bound to consider and it is this, was the subordinate court possessed of the requisite jurisdiction to hear and determine a customary law burial dispute? Do the provisions of section 3(2) of the Judicature Act Cap 8 as read with those of section 2 of the Magistrate's courts Act Cap 10 donate such jurisdiction to

sub-ordinate courts?

These are the provisions of section 3(2) of the Judicature Act;-

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

of Procedure and without undue delay".

And
Section 2 of the Magistrates Court Act provides;-

"In this Act unless the context otherwise requires- " a claim under customary law" means a claim concerning any of the following matters under African customary law-

(a) Land held under customary tenure,
(b) Marriage, divorce, maintenance or dowry,
(c) Seduction or pregnancy of an unmarried woman or girl,
(d) Enticement of or adultery with a married woman,

(e) Matters affecting status, and in particular the status of women widows and children, including guardianship, custody, adoption and legitimacy.

(f) Intestate succession and administration of intestate estates so far as not governed by any written law"

Those provisions clearly exclude customary burials from matters that the subordinate court has jurisdiction to hear and determine. I say so because the word "means" appearing at the definition part of section 2 of cap 10 is inclusive and excludes all matters not therein mentioned. I draw that position from support derived from the case of ***IN RE POTTS EXPARTE TAYLOR (1893) QBD 648 at page 658.*** There, Lord Esher M.R interpreting the word "means" in the English Bankruptcy Act, 1883 said ***" But we must see what the term "secured creditor" means in sub.s.2. The interpretation clause, section 168 says that "secured creditor" means (it does not say "include" and therefore it confines the meaning "secured creditor" in sub section 2 to those things only which are mentioned in section (68) " a person holding a mortgage, charge or lien on the property of a debtor"***

It therefore follows that Mr. Nathan Shiundu Senior Resident Magistrate Eldoret did not have jurisdiction to hear and determine the case. Such jurisdiction rests with this court which has unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the constitution or any other law ***see section 60 of the constitution.*** I am alive to the fact that neither parties nor pleadings may confer jurisdiction on a court that has none. However having come this far in these proceedings what then happens? I shall fall back to the provisions of section 3 (2) of the Judicature Act and shall consider that all that was done was in an endeavor to "***decide all such cases according to substantial justice….."***

The trial court appears to have accorded this case a very casual approach and treated it without any amount of seriousness at all. While the magistrate stated in his Judgment that he had read all the authorities referred to him and had found them "not on all fours" with the present case, with profound respect that cannot be true. Had he even given them a flip through he would have realised that the ***OTIENO V. OUGO AND ANOTHER AND NGAMI MBURU V NDUTA & 2 OTHERS AND NDUTA MBURU –VS- MWAURA & ANOTHER*** *cases*were materially similar tothis case and the cases of ***SAKINA SOTE KAITANNY AND MUSTAFA KIBET KAITAINY –VS- MARY WAMAITHA AND KANDIE & 2 OTHERS –VS- CHEROGONY*** had a canny resemblance to the present one. I carefully read all the authorities and that is what I found. He would have found out that ***RONO –VRS- RONO*** concerns itself with inheritance and not burials.

It now is urgent and opportune, in my humble view, that Parliament does consider it a matter of priority to legislate a law governing burials in this country, a law applicable to all the people of Kenya. This, once done, will bring uniformity in burials amongst the people of Kenya and ease the work of the courts. May that time come soon.

DATED SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JULY, 2010

P.M. MWILU
JUDGE.

In the presence of
Mr. Nabasenge – Advocate for Appellant
Mr. Omusundi Advocate for Respondent
Andrew Omwenga Court Clerk.