



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(NAIROBI LAW COURTS)**  
**Civil Case 468 of 2008**

**SHEM NAVADE ASULUDA.....PLINTIFF**

**VERSUS**

**PETER IRUNGU KAMAKIA.....DEFENDANT**

**JUDGEMENT**

The plaintiff herein Shem Navade Asuluda, moved to this court by way of a plaint, dated either 21<sup>st</sup> or 22<sup>nd</sup> October 2008, and filed on 24<sup>th</sup> October 2008 and was subsequently amended on the 4<sup>th</sup> day of November 2008 without leave of court as pleadings had not closed, and filed on 4<sup>th</sup> November 2008. The salient features of the same for purposes of the record are as follows:

- The action is brought against one Peter Irungu Kamakia
- The plaintiff is the biological father of one Ebby Kahai Irungu
- The mother of the said Eby Kahai is one Rose Ajema.
- The said Ebby Kahai is now deceased.
- The said deceased had 3 issues namely
  - (a). Winnie Salome Ajema
  - (b). Joan Wanjiku Irungu
  - (c). Karl Kamakia Irungu

The first two are adults while the last one is a minor.

- The said deceased was at the time of her death working with ICRAF Gigiri as an administrative officer.
- The source of grievance which has necessitated their coming to court is that the said deceased

(a) Was not married whether under statutory law or customary law to the defendant.

(b) The defendant was a mere friend.

(c) The mere friendship notwithstanding, it is averred that the said deceased had complained that the mere friend had caused her assault and abuse and had ceased to maintain and stay with the deceased in her house.

- That the plaintiff made efforts to trace the relationship of the deceased and the defendant and this tracing revealed that there was no marriage relationship between the two.
- That by reason of what is stated above, the defendant had failed to introduce himself to the plaintiff, as a husband, to the deceased, whether under customary or statutory law.
- The said deceased demised on the 17<sup>th</sup> day of September 2008, and upon that such demise the defendant acting as a husband to the said deceased, moved surreptitiously to obtain a burial permit on 18/9/2008, and commenced the making of arrangements with a view to burying the remains of the deceased at Juja, without the involvement of the plaintiff, who is the father of the deceased, and contrary to the wishes of the deceased.
- By reason of what, is stated above, it is averred, that unless restrained the defendant, who is a stranger to him, and his family and not a lawful husband of the deceased, was going to move and illegally obtain, bury and dispose off the deceaseds' body without the involvement and consent of the plaintiff who is the father to the deceased.
- It is the plaintiffs' assertion that as at the time of her death, the deceased had not recognized the defendant as her husband, and she was not living with him. By reason of this, the plaintiff asserts that the deceased was merely involved in a mere casual friendship with the deceased.

In the alternative, and without prejudice to the afore set out averments, the plaintiff pleaded in the alternative that:-

(i). By reason of physical assault, abuse and torture meted by the defendant to the deceased, the defendant be ordered to pay compensation to the plaintiff and his family, general damages for the assault, and abuse under African customary law. The same to be assessed by the Honourable court.

(ii). The defendant be ordered to pay general damages as compensation for siring (2) children with the deceased before formalizing the relationship.

(iii). By reason of the defendants, failure, and neglect to pay dowry, being heads of cattle, sums of money and gifts, then in event the honourable court, allows the defendant to bury the deceased body, the defendant be ordered to pay the required dowry under African customary law before participating in any burial of the deceased. The dowry be assessed by the court.

By reasons of the afore set out averments the plaintiff sought the following prayers:-

(i). *Permanent mandatory and temporary injunction restraining the defendant, his agents, servants, employees or whom so ever from removing, interfering with the body and remains of deceased, Ebby Kahai Irungu now lying at Mater Hospital Nairobi.*

(ii). *Declaration that the deceased Ebby Kahai Irungu is not a lawful wife to the defendant, as no lawful marriage exists between them whether under statutory and or customary laws, and the plaintiff as the father is therefore entitled to burry the body and remains of the deceased at his discretion and wishes of the deceased.*

(iii). *General damages and compensation as pleaded under paragraphs 13A of the plaint, for*

*physical assault, siring of two (2) children and dowry.*

(iv). *Cost of the suit.*

The initial plaint dated and filed on the 24<sup>th</sup> October 2008 had been filed simultaneously with an interim chamber summons also dated and filed the same date. It had been brought under section 3, 3A and 5 of the CPA, order XXXIX rule 2 and 9 of the CPR and all other enabling provisions of the law. It sought 5 prayers namely:-

1. *Spent*

*(2-3) That the defendant, his agents, servants, relatives and or whom so ever be restrained and injuncted from removing, collecting, receiving, interfering and or in whatsoever manner dealing with the body, burial and funeral arrangement, of Ebby Kahai Irungu (deceased) now lying at Mater Hospital Nairobi, pending the hearing and determination of this application (as per prayer 2) and pending the hearing and the disposal of the suit (as per prayer 3)*

*4. That such further orders and discretion do issue to preserve the body of the deceased Ebby Kahai Irungu pending the hearing and determination of this suit.*

*5. Costs of the application be provided for.*

The application has been supported by grounds in the body of the application, supporting affidavit and annextures.

Summons to enter appearance dated the same 24<sup>th</sup> day of October 2008, were taken out and served on to the defendant, who entered appearance on the 27<sup>th</sup> day of October 2008. Apparently no replying affidavit or grounds of opposition were filed to that application.

On the same 24/10/2008 the plaintiff/applicant appeared before the duty judge who made the following orders:-

- 1. Based on the reasons entered in the application dated 24/10/08 this matter is certified urgent.*
- 2. I grant a temporary restraining order for five days in terms of prayer 2 on condition that the plaintiff/applicant deposits 200,000/= in court as security by 3.p.m. today, failing which, this order shall lapse and be of no effect.*
- 3. Application to be served to day.*
- 4. Hearing interpartes 29/10/08.*

On 29/10/08 the parties appeared before this court, and recorded the following consent:-

- 1. By consent prayer 3 of the application dated 24/10/08 and filed on the same date be and is hereby allowed.*
- 2. The defendant to file their defence within 3 days from today.*
- 3. Reply to defence to be filed within 3 days from the date of service of the defendants defence.*
- 4. Discovery procedures as well as aggreing of issues to be complied with within 7 days from the close of pleadings.*
- 5. Mention on 12/11/2008 before the duty judge to give a nearer date in view of the urgency involved.*

The original defence filed by the defendant, has not been traced on the record, but from the content of the amended defendants statement of defence and counterclaim, one had been dated 30<sup>th</sup> October 2008 and filed on a date before the dating and filing of the amended one.

The amended defendants statement of defence and counterclaim is dated 17<sup>th</sup> November 2008 and filed on the same 17<sup>th</sup> November 2008. The salient features of the same are as follows:-

- Categorically states that the deceased Ebby Kahai Irungu was customarily married by the defendant under the Kikuyu customary law and the plaintiff is put to strict proof in the contrary.
- He was legally married to the deceased under the Kikuyu customary law. Out of the said marriage, the couple were blessed with two children, namely Joan Wanjiku Irungu, and Karl Kamakia Irungu, born on the 16<sup>th</sup> day of March 1990 and on 1<sup>st</sup> July 1996 respectively.
- That due to the said marriage, the deceased caused to change and adopt the defendant's sir name "Irungu."
- In the alternative, and without prejudice to the foregoing, the defendant contends that if ever the defendant was not married to the deceased, whether under statutory law, or customary law, as alleged by the plaintiff, in the amended plaint which allegation is denied by the defendant, then the defendant contends that there was presumption of marriage in the circumstances.
- Contends that the plaintiff has all along recognized the marriage between the deceased and the defendants and especially 2<sup>nd</sup> May 1993 when the plaintiff blessed the defendant and the deceased and the plaintiff is put to strict proof to the contrary.
- Contend that on 2<sup>nd</sup> May 1993, 19<sup>th</sup> – 20<sup>th</sup> April 2003 the defendant and his parents accompanied by an uncle and clan elders, visited the plaintiffs' homestead upon invitation by the plaintiff and spent over night, whereby dowry was discussed and a settlement agreement was reached and subsequently dowry of Kshs. 30,000.00 in lieu of 12 cows was agreed upon and paid, and the plaintiff is put to strict proof to the contrary.
- In addition to the foregoing, contends that, on divers dates the plaintiff being accompanied by his clan elders visited the defendants parents homestead whereby dowry, familiarization and marriage strengthening, and the socialization were held, concluded, and sealed hence the plaintiff is put to strict proof to the contrary.
- To confirm that the deceased was the defendants' lawful wife, there is proof that they did things together, such as taking insurance policies to cover one another, having joint bank accounts, and therefore the defendant averred that he should be given the right to bury and dispose the remains of the deceased.
- There is demonstration that the deceased Ebby Kahai Irungu, recognized the defendant as the husband, and was staying with the deceased till she passed away.
- Contends that the plaintiffs' assertion as contained in paragraphs 11, are mere concoctions well thought out, by the plaintiff, solely aimed at the vexing and annoying the defendant and without any reasonable cause.
- Denied physically assaulting, abusing and or torturing the deceased, and as such the issue of compensation should be dismissed.
- Contends that the two issues namely Joan Wanjiku Irungu, and Karl Kamakia Irungu, were born out of lawful married couples under the Kikuyu customary laws.
- Maintain that dowry was negotiated, agreed at 30,000.00/= in lieu of 12 cows between the plaintiff

and the defendants father, uncles and other elders, which dowry was promptly and immediately paid, and accepted by the plaintiff and the plaintiff blessed the defendant and the deceased in the presence of the defendants', father, uncle, and members of the two families at large.

- To them they maintain that the court, can not be asked to do the assessment of dowry and as such the plaintiff plea to the court, that it proceeds to assess the same is an abuse of the due process of the court.

The amended defence contains a counterclaim, whose salient features are as follows:-

- That the defendant claims a declaration that Ebby Kahai Irungu, was a lawful wife of the defendant, and there existed lawful marriage between the defendant, and the deceased and therefore the defendant is entitled to bury the body and remains of the deceased as to his discretion and wishes.
- An order should be issued directing the plaintiff to pay all mortuary fees up to the time of determination of this suit.
- Reiterates that he got married to the deceased in the year 1988 and thereafter their marriage was celebrated and solemnized under Kikuyu customary law.
- That since their marriage in 1988 the deceased and defendant have all along been living and cohabiting together as husband and wife till the demise of Ebby Kahai Irungu on the 17<sup>th</sup> September 2008.
- Reiterated the grounds of the defence that they visited the plaintiff homestead on 2<sup>nd</sup> May 1993 in the company of his father, brothers, uncles, aunts and other elders with a view to negotiate dowry of which they negotiated and agreed at Kshs. 30,000.00, in lieu of 12 cows, which was promptly paid and received by the plaintiff counsels and thereafter he blessed the marriage of the defendant and the deceased.
- In the year 1997, 2003, the defendant in the company of his relatives visited the plaintiffs homestead with a view to strengthening the relationship.
- In reciprocation and on several occasions, the plaintiff being accompanied by elders visited the defendants parents in Nairobi to further strengthen the marriage between the defendant and the deceased.
- Maintain that there existed a customary marriage between himself and the deceased.
- On several occasions, the defendant introduced himself to the plaintiff and the plaintiff accepted him as a son in law, and all throughout the plaintiff regarded the defendant as husband of the deceased.
- Reiterated the content of the defence that all through the plaintiff regarded the defendant as husband of the deceased, recognized their two issues Joan Wanjku Irungu, (adult) and Karl Kamakia Irungu (minor) as children the couple was blessed with.
- Also reiterates that the deceased recognized the defendant as a lawful husband by reason of the following acts of repute:-
  - (a) They were living together.
  - (b) Were running joint Bank account.
  - (c) Baptized their children together.
  - (d) Visited children in school together
  - (e) Celebrated the childrens birth days together

(f) Insured each other as spouse

(g) The deceased adopted the defendant's surname Viz- Irungu

(h) The deceased had always been known as Mrs. Irungu at her work place, in all places and by all people.

By reason of the afore set out averment in the defence, and counter claim, the defendant sought the following reliefs'.

(i). *A declaration that Ebby Kahai Irungu, was a lawful wife of the defendant and there existed lawful marriage between the defendant and the deceased, and therefore the defendant is entitled to bury the body and remains of the deceased Ebby Kahai Irungu, as to his discretion and wishes.*

(ii). *An order directing the plaintiff to pay all outstanding mortuary fees upto the time of determination of the suit.*

(iii). *Costs of the suit*

(iv). *Any other relief the honourable court, may deem fit and just to grant.*

The plaintiff put in a reply to amended defence, and counterclaim. In it he reiterated the averments in the amended plaint, and asserts that siring children, change of name, taking joint accounts, and insurance policies does not amount to any lawful and legal marriage and puts the defendant to strict proof.

- Maintains that the deceased relationship with the defendant was casual as the defendant was being maintained sustained and housed by the deceased.
- That the doctrine of presumption of marriage is not available and does not apply and or arise in the circumstances of this case in favour of the defendant as the same was terminated and ceased during the life time of the deceased.
- Maintains no dowry negotiation were concluded as the defendant failed and or neglected to pursue the same.
- Denied the entire counter claim and put the defendant to strict proof and all other aspects of the defence and counter claim which had not been admitted.
- Urge the court, to dismiss the defence and counterclaim and in lieu thereof allow the reliefs in the Amended as prayed with costs.

Each side filed own issues for determination by this court. Those filed by the plaintiff are 10 in number and these are:-

1. *Was the deceased lawfully married to the defendant either under customary or statute law.?*
2. *In the alternative, was there a presumption of marriage or presumption of marriage may not be presumed in the circumstances?.*
3. *In any event, is there cogent evidence to rebut presumption of marriage ?*
4. *Is the defendant a lawful/husband to the deceased, or a mere relationship which did not materialize, in to a marriage?*
5. *What was the deceaseds' wishes as to burial?*

6. *Was dowry paid by the defendant and essential rites of customary law performed.?*
7. *Was the deceased living together with the defendant at the time of her demise as a husband?*
8. *Did the defendant cause physical assault, injuries and abuse to the deceased, therefore entitling the plaintiff to compensation in form of damages.*
9. *Is the plaintiff entitled to the prayers sought and prayed in the plaint as to the right to bury the deceased, and general damages set out for assaults, children and dowry?*
10. *Who bears the costs of the suit?*

The issues for the defence are dated 24<sup>th</sup> November 2008 and filed on 25<sup>th</sup> day of November 2008. They are 13 in number namely:-

1. *Was the defendant lawfully married to the deceased, either under customary or statutory law?*
2. *In the alternative, was there a presumption of marriage in the circumstances?*
3. *Did the plaintiff bless the marriage of the deceased and the defendants?*
4. *Were there any burial wishes by the deceased? In the alternative did the deceased convey any burial wishes to the plaintiff?*
5. *Was dowry of Kshs. 30,000.00 in lieu of 12 cows paid by the defendants parents to the plaintiff?*
6. *Was there marriage ceremonized customarily?*
7. *Did the defendants' parents visit the plaintiffs' homestead particularly on 2<sup>nd</sup> May 1993, 1997 and 19<sup>th</sup> -20<sup>th</sup> April 2003.*
8. *Were the clan elders involved in negotiations of dowry and performing customary marriage rights?*
9. *Did the deceased recognize the defendant as her lawful husband?*
10. *Between the plaintiff and defendant who has the right to bury the deceased?*
11. *Is the plaintiff entitled to the prayers sought and prayed in the amended plaint?*
12. *Is the defendant entitled to the prayers sought and prayed in the amended defence and counter claim?*
13. *Who bears the costs?*

Parties adduced evidenced through oral testimonies of witness and produced exhibits. The first witness to take the stand was PW1 the plaintiff. The salient features of his evidence are as follows:-

- The deceased was his 5<sup>th</sup> born child. At the time of death, she was working as an administrative officer with ICRAF. The deceased used to reside in South C. within Nairobi, with her 3 children, namely Winnie Salome Ajema, Joan Wanjiku Irungu and Karl Kamakia Irungu. In addition to the three, she also resided with two nieces Miriam Muhanja and Beatrice Ajema.
- The reason as to why he is in court, is because when he received information of the death of the deceased, which had occurred on the 17<sup>th</sup> day of September 2008, him PW1 left for Nairobi immediately to make arrangements for taking the body home for burial, and upon asking for the burial permit, from

Matter Hospital, is when he was informed that the defendant herein had taken the same claim to be the husband of the deceased.

- The plaintiff became aggrieved by that move, on the part of the defendant, because him PW1 and his family do not recognize the defendant as husband of the deceased, because he has never paid dowry. By reason of this, him PW1, instructed Winnie Ajema to draft a letter dated 19/9/2008 instructing the hospital administration not to release the body to the defendant, without their involvement.
- It is his testimony that he is not a total stranger to the defendant, because he recalls in the year 1993, the defendant came to PW1s' home accompanied by the defendant's parents, father and mother, one Mzee introduced as his uncle, and his wife. The purpose of the visit was that they were coming to introduce themselves as relatives of the defendant who had taken in the deceased as his wife and they had a daughter between them. They promised to call again later on for dowry discussion.
- According to PW1, they never came back again, forcing him PW1 to write a letter of inquiry dated 2/1/2000 exhibit 2, addressed to the defendant's father with a copy to the defendant.
- He received a response exhibit 3, whereby the father was advising the son to pay him 60,000/= and if he did not have any, then he should put PW1 off, till another time. He was later advised to put on hold, the issue vide exhibit 4. PW1 followed up by writing exhibit 5 and later received exhibit 6, not talking about dowry, but to come and discuss the future of their children.
- PW1 and his wife though invited to come to Nairobi, they did not travel to Nairobi. Instead the defendant, his parents, and other relatives in a total of about 20 went to PW1s home.
- PW1 was happy with the 2003 visit, hoping that they would discuss dowry. Instead PW1 was informed that the party had come to discuss the reconciliation of the defendant and the deceased as the two had allegedly disagreed, and were not staying together as the deceased had gone to court and the court, had separated them in 2001. They failed to reconcile them and PW1 advised them to go back to court.
- It is PW1s' evidence that after the 2003 meeting failed to reconcile the two, the deceased went back and continued residing in South C with her children, while the husband continued living on his own, because the deceased had made up her mind not to go back to the defendant. The reason for refusal to go back to the defendant as per information gathered from the deceased by PW1, was because, she complained of being seriously assaulted by the defendant and even produced photographs exhibit 7 evidencing injuries on her face and lips allegedly inflicted by the defendant.
- To confirm that the deceased was living on her own in South C, PW1 produced a lease agreement exhibit 9, bearing only the name of the deceased as the tenant, bundle of receipts for payment of rent also in her name exhibit 10.
- Further proof of the deceased staying on her own according to PW1 is evidenced by the court, proceedings exhibit 12 and 13 which documents to his understanding go to prove that the deceased and defendant were simply cohabiting and there was no marriage between them either statutory or customary.
- It is PW1s evidence that upon admission, he visited the deceased in hospital, and had a chat with her, and in the course of the conversation, is when the deceased informed PW1 that she blamed the defendant for all her health complications because of his assaults and expressed a wish that if ever she dies then PW1 should take her remains home for burial.
- Upon learning of the death of the deceased, and traveling to Nairobi for burial arrangements, and upon arrival at South C, he did not see the defendant, but found the children alone with the deceased's sister. He PW1 took up the issue of the missing burial permit, with the father of the defendant and made it clear to them that since they had not paid dowry, he had come to collect the deceased's remains, for burial in his home because dowry had not been paid. When the issue was raised with the father of the

defendant, he simply said that the defendant was in hospital and they would discuss that later. No discussion took place and when the burial permit was not forthcoming the plaintiff filed these proceedings seeking the following:-

- (a) Burial permit that had been unilaterally taken by the defendant.
- (b) If the defendant wanted to bury the remains of the deceased he was to pay the dowry in full.
- (c) Compensation for the assault occasioned to the deceased by the defendant.
- (d) If dowry was not paid then the defendant to pay compensation for siring of the two children with the deceased.

To fortify his case, PW1 produced exhibit 14 and 15 from the area chief confirming that the deceased resided with PW1, she was not married. The defendant's name did not feature in those documents because the deceased was not married to him.

When cross examined, PW1 responded thus:-

- The original names of the deceased were Ebby Kahai Asuluda, and him PW1 does not know when the deceased changed and started using the name Irungu as he came to learn of it after her death, and him PW1 does not know why she changed her names.
- He confirmed that the name Irungu belongs to the defendant.
- Confirmed that by the time him PW1 came to know the defendant, both the defendant and deceased were already residing together as husband and wife and they had a child between them.
- It is his evidence that the deceased went to live on her own in South C after they had separated and the deceased had gone to court seeking separation.
- Agreed that as per the records of employment of the deceased exhibited in court, the defendant had been documented as a spouse of the deceased, same to insurance documentations.
- He however asserts that the employment and insurance documentation showing the deceased and defendant as spouses of each other do not mean that dowry was paid.
- It is his testimony that when the defendant came with his parents in 1992-1993, they only came to know the home and it is his evidence that no dowry was discussed or paid.
- Agreed that gifts were given to him and his wife by the visiting party.
- Agreed that photographs were taken to commemorate the occasion and indeed one shows him receiving money from the father of the defendant, but says that it was only 2,000/= which cannot meet the required dowry.
- It is his evidence that those who were in the photographs were members of the defendant's entourage and no elders from PW1's side were present as no dowry was being discussed.
- It is his stand that had dowry been discussed and agreed upon an agreement to that effect would have been written down and signed by all present.
- He is a stranger to the allegation that the deceased and the defendant had celebrated a customary marriage, under Kikuyu customary law. His quarrel is that he should have been invited to be present to witness it or to send a relative to represent him.

- Agrees that it is correct that in exhibit 5, him PW1 referred to the two as married, because they were staying together as man and wife.
- It is his stand that in 1993 when they came, they only come to introduce themselves to his family and in 2003, they came for reconciliation.
- Agreed that the injuries for which PW1 claims damages were caused way back in 1998, but him PW1 never raised that issue when the party came for reconciliation in 2003.
- Agreed that he learned of the assault in the year 2000, when the deceased went to court, but at no time did he call elders to discuss the issue.
- He has no idea if the defendant also used to pay for rent as he will come to speak for himself.
- Maintains that the wish to be buried by PW1 was made one month before the deceased death.
- That he did not ask for compensation for the children in 1993 for the first child, and 2003 for both children because they were still to discuss the issue of dowry.
- Concedes that when he come to South C after the death of the deceased, he conceded the father of the defendant come with 3-4 elders and both discussed the issue of the burial permit, and burial but there was no agreement as he rejected their offer to bury the deceased at their place.
- Agrees in 2003, when the defendant and his party come for reconciliation, the elders from his side were present but did not discuss dowry.
- He denies that he occasioned the current proceedings.

When re-examined, he denied any knowledge of the defendants parents home in Muranga, as he has never been there. Maintained the gifts given to them in 1993 and 2003 were not dowry, and that the visit in 1993 was for introduction while that of 2003 was for reconciliation.

PW2 is sister of the deceased, and daughter of PW1. The sum total of her evidence is that, she came to know the defendant when the defendant and deceased were residing at Riruta in Nairobi. It is her evidence that their stay was not harmonious. There were quarrel's and assaults forcing the deceased to seek own alternative accommodation in an own rented house at South C. it is PW2s evidence that she came 3 days after the deceased had moved, leaving all her belongings including a motor vehicle at Riruta, and she had to start on a clean plate. There after the deceased was joined by the eldest daughter Winnie. For the Whole period from 2000 upto the time of her death, there is no time PW2 found the defendant in the south C home. PW2 recalls that when the deceased was taken ill and admitted, the defendant gave support, signed some of the papers which the deceased could not sign on her own. It is her evidence that, it was the deceaseds' wish that the deceased confided in her that should she die, then her remains should be handed over to her father, for burial at their home. She recalls that the deceased disappeared soon after she completed university, only to resurface in 1993 with a child and in the company of the defendant and his family. It is her evidence that on this occasion, no dowry was discussed, because women were present in the meeting, and according to Luhya customary law, women do not participate in dowry discussion. She is a stranger to the allegation that 30,000/= was paid as dowry on this day. She has no idea that the deceased and defendant used to meet in town and during school visits.

When cross –examined she stated that she first saw the defendant when he came home for family introduction, and the deceased introduced the defendant as the father of her child. Concedes that since she was busy cooking in the kitchen, she cannot tell what transpired in the sitting room, where the discussions were going on. He has no idea dowry was paid on this date. It is also PW2s' evidences that, the 2003 meeting was for purposes of reconciliation only and not for completion of the dowry. It is her evidence that the deceased under went three operations, she was in a coma for 2 weeks, but the 3<sup>rd</sup> week she regained consciousness, and that is when the two had a conversation regarding the place of burial of her

remains should she vitimately die. Adds that on a number of occasions, she witnessed quarrels and possible fights in the room where the deceased and defendant slept, and her suspicion used to be confirmed by the deceased on the next day, that indeed there had been fights or beatings.

In re examination PW2 confirmed that she is a stranger to the allegation of dowry, having been discussed on the two occasions the defendant and his family visited their home as she was not informed of the same by her father. According to her dowry discussion is not something secret and she sees no reasons to why her father could keep it to himself as a secret.

PW3 Winnie Salome Ajema is first born daughter of the deceased from another union. It is her testimony, that she joined her mother in Nairobi in 2002. Before then, she had been residing with her maternal grand parents among them PW1. She found the deceased living with two other siblings a brother and a sister, younger to her and later joined by two cousins.

It is her testimony that for the period she resided with her deceased mother, from 2002 – 2008, she has never seen the defendant, residing in that house, never maintained them in any way, fees and all their needs were met by their deceased mother. On a number of occasions, her deceased mother sent her to pay rent, she is a stranger to the allegations that the defendant resided with them in South C, or that he used to meet their sustenance in any way. She recalls meeting the defendant on school visiting days when she accompanied her deceased mother to visit Joan. She recalls when the mother fell sick, and was admitted at Mater, the defendant used to visit her, concedes to have written exhibit, 1 to stop the defendant taking the deceased's body for burial without their involvement.

When cross examined, PW3 maintained that she had only heard of the defendant but never met him before she came to Nairobi, she maintained, for the days when residing with her mother, during the school holidays, she never saw the defendant come or spent in the deceased house but could not tell what transpired in her absence while away at school. Denied the suggestion that the defendant secured a college place for her or paid any of her fees. What she knows is that, it is her late mother who met all her expenses, although she does not know where the source of the money was. She denied any suggestion that she and her late mother had been staying at the defendant Juja home at any one time.

Maintains one of the reasons why she wrote exhibit1 stopping the defendant from removing the remains of her late mother, was because him defendant had not been staying together with the deceased. Conceded the defendant, used to visit the deceased in hospital. Conceded since the hearing of the case started, they had been meeting and discussing the same but denied the suggestion that she had been couched by PW1 and her other relatives, on what to say in court. Regarding exhibit 7, which are photographs showing facial and mouth injuries on her late mother, she said, she did not witness the causing of the injuries but she learned, from her late mother that those injuries had been caused by the defendant.

PW4 is a niece to the deceased. The sum total of her testimony is that she moved to Nairobi in 2004, to reside with the deceased, while attending Nairobi university, Kikuyu campus, and resided so till 2008 when the deceased died. They resided at South C, with the deceaseds' 3 children and a niece and nephew of the deceased. For the whole of that period, it is the deceased who maintained them. The defendant was not residing with them, but used to meet him during school visits to Joan's school. She learned from the deceased that the deceased and the defendant used to reside together but they had parted ways.

When cross examined, she stated PW2 her aunt, used to frequent South C, agreed only came to South C during school holidays, and at times weekends and as such she does not know if the defendant used to stay at South C, in her absence. But confirmed that the defendant was father of the last 2 children of the deceased. Agreed the deceased, used the defendants name but she does not know how the deceased came or started using that name. Denied the suggestion, that the defendant resided with the deceased till her death.

PW5 a maternal aunt to the deceased, testified that, she visited the deceased and stayed at her place whenever she visited Nairobi. She recalled visiting the deceased in 1995 while the deceased was residing at Riruta satellite. She found her sick, and on inquiring about the nature of the sickness, she PW5 was

informed that she deceased, had been assaulted by the father of her children. She also had occasion to visit and stay with the deceased at South C, but never saw the defendant. She attended the 2003 meeting of the defendant and his people in the home of PW1. She was busy in the kitchen taking care of the food, but learned that the purpose of the visit was to reconcile the defendant and the deceased as the two had disagreed she is a stranger to the discussion and payment of dowry. It is her testimony that if dowry had been paid, she would have been told of the payments of the same and since none was paid him PW1 should be given the body for burial.

When cross examined, She stated that she came to know the defendant in 2003, when they came for reconciliation. She was aware that there was a meeting attended by some local elders, allegedly passers by, but she herself did not attend the deliberations, and she does not know what was discussed, she is aware money changed hands on this occasion of 2003, because the mother of Ebby came with the money and shared it out to the women who were assisting in the cooking. Conceded she did not witness the assault at Riruta, but was only told about it. Recall seeing the defendant in a tent during the funeral at South C, but never saw him residing in the house with them. Conceded the insurance and employment documents showed the two were spouses.

PW6 gave evidence as an elder of Basagala clan to which PW1 belongs. He had been an elder since 1999. Outlined the tradition of dowry payment in their clan, the nature and content of the dowry negotiations, items that comprise payment for dowry. These are in two categories, for the father and the mother. Items for the father comprise:-

- 13 heads of cattle one of which is meant for the maternal uncle, and 12 for the father.
- 2 goats for the aunts
- A hat
- Stick (Bakora)
- Gunn boots
- Kabuti (coat)

#### The mother gets

- 2 bed sheets
- 2 blankets
- 1 tin of paraffin
- 1 dozen pins
- Mothers' money is kshs. 30,000/= and the same is not negotiable. where as money for the father is commensurate to the level of the education of the girl, and it could be as much as 500,000.00.

It is his testimony that traditionally cows for dowry have to come home even if not all the 13. The husbands' people arrange to meet the wives' people at a market, buy a few heads of cattle and walk them to the girls' home, and the rest could be paid for in monetary terms.

Added that upon conclusion of the dowry negotiations, the terms are reduced into writing, and signed by both sides, and each keeps a copy. In the absence of dowry payments, the father of the girl is entitled to take the remains of his deceased daughter for burial.

Turning to situations where children are born to a couple who are not married, it is PW6s testimony that

compensation is paid by the father, of the children to the father of the girl being 3 heads of cattle for a boy and 2 heads of cattle for a girl. PW6 also confirmed that the father, is entitled to claim compensation for assault and injury to a deceased daughter.

Lastly defended his knowledge of the traditions, and cultural practices of the Basagala clan, because he had been sitting with the Basagala Elders since age 40 and he was now 55, and had received sufficient instructions to qualify to be an elder in that clan. He maintains that in the circumstances of this case, it is PW1 who should be given the remains of his daughter to go and bury as dowry was never paid.

When cross examined, PW6 responded thus in a summary form:-

- He is chairman of Basagala, clan, Bungoma branch.
- Maintains that he is conversant with the traditions and practices of the Basagala clan, and qualifies to be an expert. He narrated how one is made an elder in the Basagala clan, which process he went through and completed, and handed the fly whisk which is the symbol of authority. PW6 went on further to give an outline of how disputes are resolved; dowry negotiations, and funerals are conducted.

Concerning this case PW6, stated that he was never invited to attend any dowry discussion, between the disputants. But learned of the death and travelled to Nairobi, held discussions with the father, and other elders of the defendant. The clan of PW6 proposed the following conditions to be met by the defendant if the defendant was to be allowed to bury the deceased:-

- Pay 13 cows, 2 goats, mothers 30,000/= not negotiable, fathers money of 500,000.00 also not negotiable, a pair of gum boots, 2 lessos for the mother, 20 kilos of sugar, 5 kilos of salt, 1 dozen safety pin, Kabuti for father (coat), Bakora or stick for the father, 20 litres of paraffin, 2 pairs of dresses for the mother, 2 pairs of bed sheets, maintenance of the children for 8 years, from the date of separation to the time of death. It is PW6s' testimony that the offer was rejected, and that is why the parties are here in court. Maintained the demands put by them are the demands of the elders and are reasonable.

In his re-examination he defend his acquisition of the knowledge as an elder, acquired both through induction and observation. Added that money element and other items like cloths etc have been introduced into the dowry negotiations because of changing social norms.

Turning to the defence, the key testimony was given by the defendant. For purposes of the record a summary of his evidence is as follows:-

- The plaintiff in this case is his father in law.
- The deceased in this case Ebby Kahai Irungu, was his wife. They met in 1987 while him defendant was working in Bungoma. He was taken to the deceased home and introduced to her parents, brothers and sisters.
- They started cohabiting in 1988 when he moved to Meru where he was working with the Kenya Planters Cooperative Union. Before moving to Meru he used to frequent the deceaseds' home alone.
- They cohabited in BUNGOMA, Meru, Kisumu, Nairobi at Riruta satellite and then South C
- They have two children between them, namely Joan Irungu, (adult) and Karl Kamakia (minor)
- It is his testimony that, when he showed interest in the deceased, and informed PW1 of his intentions to marry the deceased, PW1 told him that him defendant had to show commitment, and on that account PW1 and 2 elders were invited to the defendants' Rural Muranga home on 31/3/88. They had 2 elders from their side, slaughtered a goat and then they left on 1/4/88. They took photographs most of which were taken from their house in South C, and the few that he managed to have in his possession showed the deceased with the defendants' grandmother and other relatives.

- During the Muranga visit, it was agreed that the next visit would be in the deceaseds' home. In 1993, which visit was undertaken as described.

- Those who accompanied him were his parents, uncle and an aunt on the other side they met the plaintiff, and 4 Wazees. They discussed dowry, agreed at 2,500.00 per cow, and the father paid 30,000.00 as dowry for 13 heads of cattle.

- The items paid as dowry were

(a) Kshs. 30,000.00

(b) KSHS. 4,000.00 cash to cover cost of gum boots, Bakora (walking stick) hat etc.

- Exhibit D4A is proof that the father handed over the 30,000.00 to the plaintiff in his presence, D4B his mother giving gifts to the mother in law, D4C his father paying money for a goat or sheep D4d showing his mother giving his mother in law, money for sodas, food, feeding bottle etc as shown in exhibit D4 e,f.

- To the defendant, there are certain acts of repute which tend to confirm the existence of the marriage namely:-

(i). In exhibit D4H and, I PW1 and his wife blessed both of them and gave them advise on how to live harmoniously in their marriage.

(ii). The deceased dropped the use of the name of her father PW1, and adapted the use of the defendants name, Irungu, as per copy of the ID card exhibit D1.

(iii). They had a joint account in standard chartered Bank west lands account number 0100134468300 in the joint names of Mr. and Mrs Irungu. It was opened in 1990 and it was operated till 2007 exhibit D 12A,B.

(iv). The deceaseds' employment identification card exhibit D2 indicated the defendant as the spouse. By reason of this, the defendant visited the deceaseds' work place as and when the situation warranted. They went out for lunch together and also attended official functions together.

(v). They had 2 children together Joan and Karl.

(vi). Both were present and his parents when their first child was baptized at minor Basilica in 1990, as shown in exhibits D13 (a) (b) (c) (d) and (e).

(vii). They resided together in South C, and threw birth day parties for their children with the last one having been held on 6/7/2008 as shown in exhibit D14A, b

(viii). Both visited their children on each school visiting day, as shown in exhibit D16.

He recalls there was another visit in to PW1s home in 2003. They were 18 of them. the party included his parents, brother, uncle, and aunt, and sister. To him the purpose of the visit was to clear the outstanding dowry, payments namely gifts for her mother in law, comprising a kitenge, shawl and hat. She wore the gifts the same day as shown in exhibit D5 (a bundle of 10 photographs). In addition to the motherss' gifts, they paid for food, sodas and the father in law was given 20,000/= cash, but does not know how much the mother in law was given.

- Him and his family attended the deceaseds' graduation as shown in exhibit D17.

- He is aware that during the subsistence of the marriage, there were correspondence that were exchanged between the two families.

- Concedes the deceased filed Milimnai CMCC separation cause No. 127/00, to which he filed a replying affidavit. According to him after he filed the replying affidavit, he never participated in the said proceedings, which he asserts was never concluded. But agrees that a ruling was given arising from the chamber summons, which had been filed therein. But nowhere in the said ruling does it mention that they were separated or that they were never married.
- Agrees that the deceased correctly averred in paragraph 5 of the plaint that they had cohabited in Meru and Nairobi and they had held themselves out as husband and wife, which was confirmed by paragraphs 3 of his replying affidavit to the effect that they had cohabited as man and wife though no marriage had been celebrated between them, either statutory or customary. He deponed so because they had not fully paid for the dowry as the gifts to the mother of the deceased were still outstanding.
- Asserts that when the deceased fell ill, he was living with her in South C, he took her to hospital, signed all the paper work authorizing the three operations that were carried out, on the deceased to alleviate the blood clots in the brain.
- It is his testimony that during the period of her hospitalization the deceased was very sick. Though she could recognize people, she could not talk save for mumbling.
- Recalls the time the plaintiff visited the deceased in hospital. It is his testimony that the deceased had tubes inserted into her mouth, and as such she could not talk and as such PW2 lied when he said that the deceased talked to her and told her where she wished to be buried if she died.
- Asserts both him, PW2, and others, took turns to nurse the deceased in and out of the hospital till she passed on.
- Denied the suggestion that he was responsible for the blood clots because if that had been the case, he could have been prosecuted for murder.
- He maintains he stayed with the deceased throughout in South C, with her and saw her at 4.00 p.m. on the day she passed on, in his presence.
- It is his testimony that medical bills was paid by both the insurance company of the deceased, and his own insurance company, which both insurance companies reflected details of either as a spouse.
- He ceased staying in South C, because he went there after he had been admitted in hospital for 5 days, after the death of the deceased and found the in laws and other people wailing and then he decided to take his two children to Juja. Later on when he went back, he found that the plaintiff had carried everything from the said house and since then, he does not know what became of the house.
- While commenting on the exhibits produced by the plaintiff, he stated:
  - (a) There was no dispute between the two families which could have compelled Winnie to write exhibit 1.
  - (b) He has no quarrel with the letters from the provincial administration in Bungoma, as they correctly stated that he was a daughter of PW1, and was the mother of the named children.
  - (c) Denied unilaterally placing a funeral arbutuary advert in the papers without the consent of the plaintiff. It is his testimony that both sides authorized him to place the advert for the arbitrary.
  - (d) PW1 lied when he denied payment of the dowry.
  - (e) All the supportive evidence of PW 3,4,5, were lies when they attempted to state that he was not residing in South C, with the deceased. Though he accepts the three visited South C, he denies that they frequented the place.

(f) Disputes allegation of assaulting the deceased and being a mere friend, because they visited Bungoma twice, and introduced themselves, and Bungoma people also visited their home in Muranga, and Nairobi. This has been ousted by the fact that the deceased included him in her medical insurance, and employment records.

(g) Disputes the allegation that he is required to pay more dowry as claimed by the plaintiff. Neither is he liable to pay compensation for the assault as the plaintiff has no letters of administration to claim the said claim.

When cross examined, the defendant reiterated the evidence in chief and then gave the following responses:-

- Him and the deceased move their last born child to St. Nicholas in the year 2002 to attend school as a day scholar.
- Either him or the deceased could pay fees. The fact of the receipts being in the name of the deceased, does not mean that she is the one who used to provide the fees.
- Agrees that although he was in employment, his daughters university fess was paid for by ICRAF.
- H emaintains Winnie Ajema, is his adopted daughter whom he came to know of her existence in 1993, and more specifically when she came to reside with them, when she joined form I in Kangundo high school and supported her through the mother.
- Commenting on the separation proceedings, he conceded they had been living together as man and wife, and accepts that he deponed that there was no marriage either statutory or customary, celebrated between them and that the two were not staying together as at that point in time.

(ii) Concedes that as at the time he deponed exhibit 13, they had separated but he cannot recall exactly when they had separated.

(iii) He concedes the last order in the separation proceedings, was that the deceased was no longer bound to cohabit with the respondent, who was him. He was also stopped from interfering with her life.

(iv) Conceded that he has never varied set aside or challenged the said order.

(v) Agreed that he never confronted Winnie in court, with the assertion that she was his adopted daughter.

(vi) Asserts that he never lost custody of the children of the union, as per the said order, and he has always had custody of the children throughout. By retaining their custody, despite the court order, he was not disobeying the court order.

- Reiterates that it is true that, on 31/2/88 the deceaseds' parents visited their home in Muranga accompanied by two elders. They were entertained by the defendants' parents, grand parents, and himself and took photographs among them exhibit D10 (a) (b) On this occasion, both Ebby and her parents were introduced to the deceased parents. It is him defendant who picked the Bungoma party accompanied by the deceased. It is his testimony that the photographs, evidencing the visit where the deceased parents, his parents and himself appear because these were in the South C, home, and were carried away by PW1 and his party. He denied the suggestions that the photographs just show a friendship visit by Ebby to her Rural home.

- When referred to the plaintiffs' exhibits 2,3,4 and 5, he concedes PW1 was writing to his father wanting to come to Nairobi to discuss the issue of dowry, and his father also wrote back asking the issue of dowry to be postponed, to a later date, citing financial difficulties involving payment of school fees, contrary to his allegation and assertion that dowry had long been settled in 1993 and yet the issue was being raised in the year 2000.

- Concedes that no document has been produced signed by both sides evidencing payment of dowry both in 1993 and 2003.
- He is not aware that the mother in laws' gifts were also handed to her in the year 1993.
- Adds that the 20,000.00 paid in 2003, must have been partly for dowry and gifts, but the person in a better position to explain was his father.
- He explains that CRAF paid fees for all their children, and house rent for the South C, house because he was expanding his Juja house.
- He does not recall the care taker, neighbours, the firm providing security services and providing garbage collection, because there was no requirement for him to memorize them.
- He does not know if the reason why his name found its way into the medical insurance of ICRAF was because of facilitating the inclusion of their children under the said medical cover and does not know if Winnie was covered under the same medical cover.
- Agreed he was not in the photographs taken while the rest of the family was holidaying in Mombasa and Kisumu.
- Concedes he does not have proof to show who was operating the joint account.
- Signing of the lease does not mean that he was not with the deceased. He was simply somewhere else at that point in time, and when he come he approved what the deceased had done.
- He has no proof that UAP his insurance company, paid part of the medical bill for the deceased.
- Concedes the Doctors informed him, that brain clots were caused by an impact, but denies that impact was caused by him.
- Concedes non of the receipts produced for school fees, or rent bears his name but disputes that it is proof that he never made any payments.
- Proof that he had adopted Winnie traditionally is proof that he attended her baptism in Bungoma, and even used his name in KCPE certificate.
- It is her testimony that the separation suit was not proceeded with, because him and his wife continued living harmoniously as husband and wife as such the suit was overtaken by events.

DW2 is father of the defendant. The sum total of his evidence in a summary form is as follows:-

- He came to know PW1 in 1998, April, when the defendant and deceased brought him and other elders to DW2s home in Chui Murang'a to know the home, because the deceased had declared her friendship with the defendant, and PW1 came to know where the daughter was to be married. Him DW2 invited 2 elders and family members, a goat was slaughtered, and what was discussed was simply friendship.
- In 1993, he went to know the home of PW1, and also to pay dowry. After a lengthy discussion, they agreed to pay 30,000.00. In lieu of 12 heads of cattle, 1,000/= for a goat or seep, 4,000.00 for blankets, sheets, clothes, hat, stick, and for the mothers' dress, water tank. Also paid for food, soda, liquor for Wazees, food, feeding bottle etc.
- Photographs in exhibit D4, b, c, d, e, f, g, h and i all show DW2s party handing over money and gifts to PW1s party.
- According to him, all dowry was paid save for a suit and address for PW1 and his wife.

- In 2003, they paid a second visit and he paid 20,000/= just as a gift, 4,000.00, 2,000.00 for gifts and food, suit for the father, and a dress and shawl for the mother.
- Confirms he hosted PW1 when he was sick.
- To him he was not aware that the deceased and defendant had separated at any one time. They resided far from them, but both visited them regularly and he did not notice any disagreement.
- Confirmed the deceased and his son had 2 biological children, while the 3<sup>rd</sup> Winnie had been born earlier and he DW2 came to know her in 1993.
- Does not agree that the defendant used to assault the deceased because he had not been shown any P3 and court proceedings, and 2ndly he has never been invited to adjudicate or discuss assault of the deceased.

When cross examined he stated:

- There is no photograph showing Ebby being given a pot by his mother to go to the River, nor group photograph showing when PW1 visited Muranga.
- Agrees PW1 wrote in 2000 informing him that he would come to Nairobi to discuss dowry. Him in turn passed that information to his son the defendant. But neither of them wrote to PW1 passing on the message that the issue of Dowry had been settled way back in 1993. But denied that the letter to his son had any reflection about dowry. All that he wanted was for his son to come and discuss the issue of dowry with him DW2.
- He concedes there is no agreement on dowry because DW2 did not find it fit to write it down as he felt there was no need to write it down because they were in the process of making a relationship.
- He is a stranger to the assertion that dowry payment has to be written down. He has no idea if PW1s' has a right to claim dowry but according to him this was paid.
- It is his stand that when paying dowry in 1993 he used Kikuyu customary law and PW1 side agreed.
- Admits Ngurario goat was not slaughtered.
- He did not inform the party that under Kikuyu customary law, women do not participate in dowry discussion.
- It is his testimony that he did not complete payment of dowry in 2003.
- Denied the suggestion that in 2003 they went to reconcile Ebby and the defendant.
- Maintain he was never informed about the assault that led to the taking of the photograph marked as exhibit 9.
- It is his testimony that the defendant has never informed him that he had at any one time been separated from the deceased.
- Maintain he visited the defendant and deceased in South C, severally but does not know who met the household expenses.
- Concedes that on several occasions, he offered to pay 70,000.00 to PW1 to assist him in defraying expenses for traveling to Nairobi for the funeral but he declined the offer..
- Since his mother received Ebby, at their home, and they slaughtered a goat it can be termed Ngurario.

DW3 is daughter to the deceased with the defendant. The sum total of her evidence for purposes of the record is that:-

- They moved to South C, with both parents and resided as such till the mother passed away in 2008.
- To her, both parents took her to school and both parents met her maintenance and schooling expenses.
- She recalls Winnie join them in South C in 2003.
- She came across two documents, namely a baptismal card, dated 23/2/96 and a KCPE certificate in which her father the defendant had been indicated as the father.
- Termed lies, PW3s Winnie testimony, that the defendant never stayed in South C, and that they only met during school visits.
- Termed as lies PW2, 3 and 4s allegation that they were frequenters of the South C residence.
- Was firm that most weekends and holidays the whole family stayed at Juja.
- It is her testimony, that the relationship between her parents was cordial as she has never seen them arguing in front of them. If they ever did so it was done in their absence.
- At no time did her deceased mother, ever tell her that she had ever been assaulted by the father.
- Concedes all rent receipts bear her late mothers' name, but it is her testimony that the receipts bare the late mothers name, only because she is the one who had signed the lease, but money for rent came either from the father, who is the defendant, or the deceased mother, and any of the two or their agent could pay the same.
- She is a stranger to the said allegation in an affidavit that they were not living together with the deceased. To her, they moved to South C with their father in 2000, and have all along lived with him in South C till the death of their mother, when they relocate to Juja from South C.
- As far as she is concerned, their parents paid fees for all the three of them. she was not aware that the deceased mother exclusively made all their schooling expenses alone.
- It is her evidence that indeed her father, the defendant, is not in the pictures taken during the other family members holidaying in Mombasa and Kisumu, but explained that it is because he is a very busy person and had made financials arrangements for the family to travel on its own.
- Agrees that after the death of their mother, they were driven to the South C, residence, and they took away hers and her brothers belongings. They did not take any of her fathers belonging because the same had been locked in their mothers bedroom.
- Agrees that it is the mother and a taxi, who used to drop his brother to school and not the father, because of the traffic jam, on Thika road, if he did so he would get late for work.
- She recalls her father, dropping them where she was to attend college, gave out money, to her mother, and then told the mother to deposit money into the colleges' bank account, and then drove off to work.
- It is her view that her father is the proper person to bury the remains of her deceased mother, because once one is married, one belongs to the husband. It is her evidence that her late mother expressed that there would be no dispute over her burial and should any dispute arise then she preferred being buried at Langata.
- She does not agree with the evidence of PW1,2,3,4 and 5 that her father never resided with them.

DW4 is the mother of the defendant, and her testimony is simply to fortify the evidence of DW1 and DW2 to the effect that:-

-PW1 is their relation as father to her daughter in law.

Confirmed that PW1 and his group visited their home in Muranga where they slaughtered a goat and Ebby and Peter gave meat to each other to signify that they were man and wife.

This was followed by Ebby being given a pot by the defendants' grand mother to go and fetch water from a nearby stream, to signify that she was now the wife of the home. Existence of the relationship is confirmed by the fact that at one time when PW1 was sick he came to Nairobi and they hosted him while attending treatment. Confirmed the two trips to PW1s home in 1993 and 2003. She was present on both occasions and confirmed the testimony of DW1 and DW2as regards payments made.

It is her testimony that she is a stranger to allegations of assault of the deceased by DW1, the defendant. Neither is she aware of any separation of the two at any one particular time. She confined DW2s evidence that the two resided harmoniously with their children in South C. They visited the parents regularly, while they parents, visited them occasionally. There is no time Ebby ever complained of assault from the defendant.

Maintains that they fully paid the dowry.

When cross examined, she maintained her testimony in chief that they fully paid dues to PW1, never witnessed ay assaults or quarrels between the two. To her they lived harmoniously.

At the close of evidence of both sides, they filed written submissions. It is the stand of the plaintiffs' counsel that the court, is invited to note that it is now trite and settled law, that the trial court, has a duty to analyze, evaluate, consider and exhaustively scrutinize the entire evidence presented before the court, taking into account the demeanor and credibility of the witnesses particularly where the evidence appears to be conflicting. For this reason the court is invited to take note of the following points.

1. That the plaintiffs evidence has proved that PW1 is the father of the deceased, which deceased was residing in South C, alone, as a simple lady with her three children, nieces and nephew. But was aware that the deceased and defendant had a friendship which broke in 2000.
2. "PW1s evidence, that the deceased was living alone in South C, has been fortified by the lease agreement exhibit 9, which is solely in her name. Rent and school fees receipts exhibits P 10 and 11 bear her name. Presence of Milimani CMCC separation cause No. 127 of 2002 proves that indeed the two were not living together as demonstrated by the supporting affidavit of, the deceased, and replying affidavit of the defendant, and lastly by the evidence of PW2,3,4 and 5 which is credible and this court, has no reason to doubt the same, because PW2 and 5 were frequent visitors at South C, where as PW3 ad 4 resided with the deceased. Further proof comes from a demonstration that it is the deceased who signed university forms for her daughter DW3, and the gathering permit was issued in the name of PW1 as opposed to the defendant, the alleged husband. Had the defendant been a husband he would not have missed the family holidays in Mombasa and Kisumu.
3. It is their stand that presumption of marriage does not arise by reasons of what has been stated in number 1 and 2 above.
4. On payments of dowry, the court, is invited to believe the plaintiffs evidence as supported by that of his witnesses, that no dowry was paid to him in 1993 has been fortified by the deponement in the defendants'. Replying affidavit, when he deponed that no customary or statutory marriage existed between them. This is further demonstrated by the fact that when PW1 demanded dowry, from the defendant, the said defendant nor his father DW2 replied PW1, and told him that dowry had been paid way back in 1993. The court, is invited to reject the defendants', assertion that dowry had in fact been paid as the assertion has no written agreement back up and the witnesses evidence of DW1, 2 and 4 on

what was paid and not paid and during which visit is contradictory. The photographs also show that indeed if 30,000.00 in the highest denomination of 500/= notes had changed hands, the photographs exhibited would have revealed a huge bundle of notes changing hands between PW1 and DW2.

5. As regards the ceremony of handing over of a pot to the deceased in Muranga, the evidence to support the same is remote despite the evidence of a photograph depicting the deceased carrying a pot. That notwithstanding, such a ceremony even if performed in furtherance of a marriage, it alone cannot hold without proof of dowry having been paid. This points to the conclusion that it just shows a friendship visit by the deceased to the defendants home because, had there been a ceremony, there would have been no doubt that the photographs would have been taken in the homestead with others participating characters present. Assertion of further dowry payment in 2003 holds no water and does not oust the plaintiff evidence that it was simply a reconciliation meeting which reconciliation flopped.

6. On burial wishes, it is their stand that the court, has no reason to doubt the evidence of PW1 as supported by the evidence of PW2, that it was the deceaseds' wishes to be buried by her father in her ancestral home.

7. On Acts of repute, the court, is invited to hold that the change of name alone does not support existence of a marriage. It has to be considered in line of evidence of lack of payment of dowry, separation proceedings, which have never been challenged, staying alone in South C and when considered so, it rules out the existence of a marriage.

8. Turning to the relief sought, it is the stand of the plaintiff that damages for assault have been proved by production of exhibit P7 and 12 and D18 and as such the court, is urged to allow Kshs. 250,000/= under this head.

(b) Damages for siring children is not in dispute as it is a common ground that the two had two children between them for whose customary compensation is 5 heads of cattle which translates to 125,000.00

(C) Where as dowry claims of 13 heads of cattle which translates to Kshs. 325,000.00, in addition to cash of 2 million , 2(two) goats, 1, 200 and mothers money of 20,000/= has been supported by the evidence of PW6 an expert on Luhya customary law.

9. On the demeanor of witnesses, the court, is invited to hold that the demeanor of the defence witnesses did not withstand the test, of cross examination evidenced by contradictions in their cross-examination.

Turning to the defence submissions, the defence moved to answer the issues raised as follows.

1. Proof of existence of a Kikuyu customary law between the deceased and the defendant, has been demonstrated by the joint affidavit produced as exhibit D9, the evidence of DW1, 2 that a ceremony was conducted in April 1988 whereby a goat was slaughtered and the deceased and defendant fed meat to each other. The court, is urged to make findings that PW1s testimony that he was not invited to the ceremony and lack of photographs does not rule out the fact of the ceremony having been held.

2. On the payment of dowry, the defence counsel was urged the court to believe the evidence of DW1,2 and 4 which is consistent and as supported by the photographs exhibited, that there were two visits to PW1, hence one in 1993, when major payments were made, followed by the visit in 2003, when the funeral payment was accomplished. This is further confirmed by the fact that there were no demands for dowry after 2003.

3. If the court does not agree with the defences' assertion, that a customary law, marriage, was celebrated between the deceased and the defendant, then it is invited to find in the alternative that presumption of a marriage existed prior to the death of the deceased. Which presumption is supported by the following acts of repute:.

(a) The deceased and the defendant started cohabiting way back in 1988 and they continued so

cohabiting until the death of the deceased in the year 2008 giving rise to a period of cohabitation close to 21 years.

(b) Out of the said union the couple was blessed with two issues one of whom Joan Wanjiku Irungu testified in this court, and was firm that the deceased mother and her father who is the defendant cohabited and lived together as man and wife till the deceased died.

(c) It is the defences assertion that the evidence adduced on record by the defence go to demonstrate that the deceased and the defendant held themselves out as man and wife and did everything that a man and wife could possibly do which any reasonable individual or human being could reasonably and wisely conclude that they did so as man and wife and that they were indeed married.

(d) In the cause of their cohabitation, for the said period of close to 21 years, the deceased and the defendant cohabited at Meru Riruta satellite , Nairobi, South C Nairobi and Juja, they sired two children out of the said marriage namely Joan Wanjiku Irungu, and Karl Kamakia Irungu, they maintained, visited, educated and brought up their children together, they held a joint bank account at Standard Chattered Bank Westlands in the name of Mr and Mrs Irungu, they insured each other as man and wife as per exhibit 2 and 3, the deceased adopted the name Irungu in 2002, and abandoned the fathers name Asuluda as exhibit D1, they Baptised their kids together as shown by the photograph exhibits D13 (a-e) showing the Baptism of Joan Wanjiku, went to each others office function together , went to parties together, attended the deceaseds' university graduation together, as per exhibit D17, they visited their children in school together, a fact acknowledged by PW3 Winnie and DW3 Joan, they were recognized as spouses and or man and wife by one Dr. B Manda Ang'awa in his report dated 28<sup>th</sup> day of August 1998 exhibit 8, the replying affidavit of the defendant, to the separation proceedings, exhibit 7 referred to the deceased and defendant as man and wife, a fact acknowledged by the deceased herself in exhibit 14 when she said that they had been living and cohabiting together as man and wife since April 1988, the Receipts from ST. Nicholas being receipts for fees paid for Karl Kamakia one of the issues of the said union, read Ebby Irungu, with Irungu being adopted name of the deceased, in addition to this receipts, for garbage collection read the name of Ebby Irungu meaning wife of Irungu. In view of the afore set out, it is the stand of the defence that all these go to demonstrate existence of a marriage by presumption.

4. In addition to the afore set out acts of repute set out in number 3 above, the plaintiffs evidence also go to demonstrate in some aspects that a presumption of marriage existed between the two. This is evidenced by the facts that:-

(a) PW1 confirmed that the defendant and his family visited PW1s home in Bungoma, on 2 different occasions whose visits were not for strangers, but family members which visit was accompanied by marry- making, eating, socializing and taking of photographs in 1993, and 2003 fortified by PW1s evidence that the two came to his home in 1993 for introduction after they had stayed together for five years.

(b) PW1 admitted in his testimony, that he had written letters exhibit P2,4,5 and D7 and 8 and referred to the two as having been married. PW1 went further to explain that he had used the word married, in exhibit 5 when he said he wanted to come and discuss the dowry because the deceased and the defendant were living together as man and wife.

(c) Further supports is derived from the defence exhibit 8 separation cause number 127 of 2000, where in paragraph 5 the deceased had stated that she and the defendant had cohabited in Meru and Nairobi and had continuously held themselves out as husband and wife both to their relatives and friends who have regarded and deemed them as man and wife. The deceased went on in paragraph 9 to plead to the court, to find that a marriage existed between the plaintiff (deceased) and the defendant. This being the case, this court, is invited to rule that the entire evidence of PW1 and his witnesses went contrary to the wishes of the deceased whose sole intention was to hold herself out and to be held out by others as having married the defendant.

5. The court, is invited to make findings to the effect that DW1s evidence on the existence of marriage

between him and the deceased is sound failing which a presumption of marriage existed to be credible in that.

(i). He was not challenged in his testimony that he started cohabitation with the deceased in 1988 after the deceased had introduced him to her parents, brothers and sisters way back in 1987.

(ii). It confirmed the deceaseds' averments in the separation proceedings that him DW1 and deceased lived in Meru, Kisumu, Riruta satellite, South C, Nairobi and Juja-Thika.

(iii). Demonstrated by documentary exhibits that during the subsistence of the marriage they held a joint account.

(iv). Demonstrated by production of documentary proof that the deceased was known at her place of work at ICRAF as a married person. DW1s evidence that he used to visit the deceased at her place of work and they used to go out together and to attend social functions.

(v). His evidence that he stayed throughout with the deceased was supported by their daughter DW3 who was categorical that her parents lived together throughout during the life time of the deceased. She also confirmed joint participation of both parties in the Baptisms and birth days of their children and school visits , confirmed that both parents maintained their children together.

By reason of what has been stated above, the defendants' counsel asserted that there is no enough evidence by PW1 and his witnesses to disprove and or .dislodge the defence assertion that there existed a marriage between the two and in the alternative, that if the evidence does not prove a marriage, then there is sufficient material to support the existence of a presumption of a marriage.

6. In furtherance of what has been asserted above in numbers 1,2,3,4, and 5, the defence counsel asserted that the photographs taken in 1993 showing PW1s shaking hands with the defendant and then the deceased go to show that, what PW1 was doing was in effect blessing the couple in their marriage and handing over his daughter to DW1 to continue their marriage life despite the alleged conduct of disappearing from home for five years and then turning up with a child and a man whom she claimed to be her husband. This is sufficient proof that PW1 was not against the daughters marriage to DW1, and in fact supported it.

7. Concerning the evidence on the burial wishes, of the deceased, the defence counsel invited the court, to believe the evidence of DW1 that as at the time PW1 allegedly received the said burial wishes, from the deceased, the deceased was not in a stable mind as she had undergone three operations, was on strong drugs and had feeding tubes in her nostrils and mouth, there is evidence that she could only mumble and as such she was not in a position to make any meaningful judgement. Even if any wish was expressed, it should be disregarded. More so when there is inconsistency in the evidence of PW1, and PW2 as to the exact point in time, when the deceased offered the same. By reason of this inconsistency , it will be unsafe for the court, to rely on the same evidence in the absence of any independent evidence to support the same.

8. Concerning dowry payment, the defence counsel invited the court to go by the defence testimony as supported by the photographs, that indeed dowry, was negotiated and paid by DW2 and received by PW1. This evidence is further fortified by the fact that both sides acknowledge the two visits in 1993, and 2003 and although DW1 is the sole witness for the 1997, visit to attend a sister in laws funeral, the same is not remote.

9. On the existence of a valid Kikuyu customary law, the court, was invited to believe the evidence of DW1 and DW2 that indeed a goat was slaughtered in Muranga way back in 1998 signifying the solemnization of the same. The court, is also to hold that all prerequisites were performed evidenced by production of photographs depicting the deceased having been given a pot by the defendants grand mother and headed to the stream to fetch water signifying that she was now a member of that family

(ii) Besides PW1 and DW2, and the defendant, there were 2 elders from each side to witness the ceremony and they did witness the ceremony.

(iii) There were also elders from both sides during the ceremonies conducted in 1993 and 2003.

(iv) Both the deceased and the defendant deponed the affidavit exhibit D9, acknowledging each other as husband and wife.

(v) There after the deceased dropped the use of her fathers name Asuluda and adopted that of the defendant, Irungu.

10. As regards who of the two disputants PW1 and the defendant has a right to bury the deceased, the court, is invited by the defence to make findings to the effect that:

(i). Since dowry was fully paid, the deceased became the legal wife of the defendant who has the right to bury her.

(ii). The evidence of the deceased burial wishes, being contradictory as between PW1 and 2, the only reasonable conclusion is that the defendant is speaking the truth, when he says that the deceased was incapable of making such a wish. In view of the physical and mental condition she was in as at the point in time.

(iii). The plaintiffs' claim that he has merely been involved in a casual friendship with the deceased has been ousted by the evidence adduced.

11. Concerning the validity of the reliefs being sought out, by the plaintiff in the amended plaint, it is the stand of the defence that the same are not available to the plaintiff because:-

(i). The defendant has demonstrated and is supported by his witnesses that there is no time he ever physically assaulted, abused and or tortured the deceased. This being the reason, PW1s, prayer for compensation for assault has to fail.

(ii). The injuries shown in exhibit 7 were explained away by DW1 that they were sustained during the 1998 US Embassy Bomb blast and that assertion has not been dislodged.

(iii). The particulars of cruelty listed in the plaint exhibits D 18 filed in the separation proceedings remain a mere allegation, as they were not tested in cross-examination as no evidence was adduced therein. And no final judgement was given in respect of the same.

(iv). Evidence of an insider namely DW3, a daughter of the two should be believed when she says that she has never witnessed the assault and that her parents lived harmoniously.

(v). Evidence of PW2 does not hold as it was evidence of hearing arguments and not witnessing assaults.

(vi). Since the claims for compensation is a customary law claim, the plaintiff should have sought a remedy for it from the clan elders' first and only after exhausting the same would he have been justified to seek the same from a court of law.

(vii). There is no capacity to claim the said damages as the same is being claimed on account of injuries sustained by a deceased which claim can only lie if PW1 has a grant of representation to the estate of the deceased and as such the claim is a non starter.

(b) Concerning the claim for damages for siring 2 children with the deceased, the same does not lie as the dowry was paid for in full and the plaintiff has all along regarded the deceased and the defendant as being married.

12. Turning to the amended defence, it is the defences' stand that the defendant has ousted the plaintiff claim in the amended plaint, there is no alternative but for this court, to award him what he is seeking in the counter claim namely the burial of his late wife according to his wish because the deceased was his legal wife and for the plaintiff to meet the cost of the mortuary expenses as he is the one who necessitated these prolonged proceedings well knowing that he had no better claim than that of the defendant. The court, is also urged to award costs of the dismissed plaint and counterclaim as well as the allowed counter claim to the defendant.

On the law and case law, the plaintiffs' counsel referred the court to section 3 of the Judicature Act cap8 of the laws of Kenya which to the learned counsels' view enjoins the high court, and all subordinate courts, to be guided by African customary law in civil cases where one or more of the parties is subject to the customary law without any reference to technicalities such as want of letters of administration, as raised by the defence to the plaintiffs claim for compensation for assaults to the deceased. It is the counsels' stand that this being a claim under Luhya customary law, it cannot be subject to the requirements of the letters of administration which only applies to claims under the law reform Act.

Reference was made to the decision in the case of MARY NJOKI VERSUS JOHN KINYANJUI MUTHERU (1982-88) IKLR 711. This is a court of appeal decision, decided by the CA on the 25<sup>th</sup> February 1988. The brief facts of the case relevant to this judgement briefly are that, the deceased was an advocate who died intestate. The respondents to the appeal were his surviving brothers. They claimed the appellant had been erroneously included as a beneficiary allegedly as a widow although she was not married to him either under customary law or statute. No ceremony of marriage had been performed between Mary Njoki and the deceased and there was no issue. The appellant claimed to be entitled to a share in the deceased estate as though she was his widow by virtue of their long cohabitation, association, sexual intercourse between her and the deceased, they had lived together and been seen in public as husband and wife for the six years from 1969 to 1975, by reason of which a presumption of marriage arose from long cohabitation and repute that she was the deceased common law wife. It was held inter alia that

1. *“There was no customary, statutory or ecclesiastical marriage between the applicant and the deceased. There was no evidence that a common law marriage is recognized by the customary law of the Wakikuyu and it was neither notorious nor documented.*
2. *The existence of any custom must be established by the evidence before the court, by the party intending to rely on it.*
3. *There was nothing in the evidence upon which the trial judge could find that the notion of a common law, marriage or of a common law wife was applicable in Kenya under section 3 (c ) of the Judicature Act.”*

As per Madan JA (as he then was) dissenting

1. *The presumption of marriage was accepted and recognized in Yawe and Mbithis cases. In Yawes case, it was stated that there is nothing in the Kikuyu customary law which is opposed to the concept of presumption of marriage. Further the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary.*
2. *The presumption is nothing more than an assumption that the parties must be married irrespective of the nature of marriage actually contracted, and irrespective of marriage if one is not actually contracted.*
3. *The applicant had shown long cohabitation and repute in her favour that she was married to the deceased.*

On the basis of this authority, the plaintiffs' counsel urged the court to take note of the central theme in the said decision which is to the effect that:- *“ Before a presumption of marriage can arise, a party needs to establish evidence of long cohabitation, and acts showing general repute and prove that such long*

*cohabitation is not mere close friendship, between a man and a woman, that she is not a concubine but that, it is safe to presume that there is a marriage". It is their stand, that on the basis of the evidence and arguments presented, the defendants' case has failed that test.*

There is also the case of GITHONGO VERSUS MUNYA (2008) IKLR 1079 (GOF) decided by Mugo J on the July 14, 2005. The brief facts are that the plaintiff was the elder brother of the defendant. He sought to evict her from the land alleging that she has been married in 1948 but returned in 1952 and was only allowed to use part of the land, where as the defendant asserted that she had only been in brief relationship with a man whom she had hoped would marry her, but the relationship had broken down and as such she was entitled to a share of the land. It was held inter alia that:-

*(i). Two people can have children or even cohabit in circumstances, which when taken into account, may not give rise to a presumption of marriage in law. On the evidence adduced by the plaintiff, it had not been established that the defendant had been married under Kikuyu customary law or indeed cohabited long enough"*

The jurisprudential value that learned counsel wanted this court, to draw from that decision is that, the defence case falls into this category.

Turning to the defence, it is on record that they too referred the court to the case of NJOKI VERSUS MUTHERU already cited by the plaintiff. The jurisprudential value that the defence wanted the court to derive from this discussion was that it supports the defence case herein because:-

(i) Long cohabitation between the deceased and the defendant is an undisputed fact. They moved in together in 1988 and lived as such till 2008 when the deceased died.

(ii) The acts showing general repute are numerous, which go to show that the deceased and the defendant were not mere friends, as alleged by the plaintiff, but a husband and wife who not only held themselves out in that manner but also intended to be viewed as husband and wife.

Reference was also made to the case of YAWEH HORTENSIAH WANJIKU VERSUS PUBLIC TRUSTEE CIVIL APPEAL NO. 13 OF 1976, whose copy was not on record for the courts' perusal. However that non enclosure of a copy of the same does not bar the court, from fishing it out. It has been extensively quoted in the NJOKI VERSUS MUTHERU CASE (SUPRA) at page 296 paragraphs 10-42. The principles of law enunciated in Yawe's case are the same ones extolled by Madan JA (as he then was) in his dissenting decision in the Njoki case (supra). They are already set out on the record herein.

The court was also referred to the case of PHYLLIS NJOKI KARANJA AND PETER MWAURA KARANJA suing as administrators of the estates of MARGARET WAMBUI KARANJA (DECEASED) AND LOICE NJOKI NGUGI AS APPELLANTS VERSUS ROSEMARY MWENI KARANJA AND PHILIS NJOKI MWAURA NAIROBI CA NO. 313 OF 2001 decided by the CA on the 20<sup>th</sup> day of February 2009.

The brief facts are that Rosemary Mweni Karanja had claimed also to be a widow of the deceased, having married to him in the year 1986 under Kikuyu customary law, she had 3 children with him, and that at the time of his death, she was living with the deceased at his matrimonial home at Athi River, where he was working at the East African Portland Cement Factory, and had lived as co-wives with the deceased wife of the deceased at the deceased's work place from 1990-1992, when the deceased wife deserted the matrimonial home with one of the children, leaving the deceased husband and the rest of the children with Mweni.

At page 7 of the judgement line 4 from the bottom an observation is made to the effect that: "This appeal is actually against the learned judges' order for the presumption of marriage between the deceased and the first respondent"

At page 8 of the said judgement there is quoted with approval the decision of Madan JA (as he then

was ) in the case of NJOKI VERSUS MUTHERU SUPRA thus:

*“ This presumption arises from long cohabitation and repute, between the man and the woman who have capacity to marry and have consented to do so- see Yaweh (SUPRA)”*

At page 9 of the same judgement line 3 from the top, the CA, went on to observe thus:-

*“ Before a presumption of marriage can arise, a party needs to establish long cohabitation and acts of repute, that long cohabitation is not mere friendship or that the woman, is not a mere concubine but that the long cohabitation has crystalized into a marriage, and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed. SEE GACHEGE VERSUS WANJUGU (1991) KLR 147”*

In addition to the above, this court, would like to add its own decision in the case of DANIEL SAM KIMORI NYAKUNDI VERSUS DOUGLAS KOMBO MBOGA NAIROBI HCCC NO. 586 OF 2008, decided by this court on the 19<sup>th</sup> day of December 2008. Case law on the subject is discussed from page 12 line 7 from the top up to page 21.

At page 14 there is cited with approval the case of GACHEGE VERSUS WANJUGU (1991) KLR 147 decided by Abdallah J as h then was. The brief facts are that the plaintiff sought the remains of his unmarried daughter for burial claiming that as a father of an unmarried daughter he was entitled to bury her. The defendant on the other hand claimed that the deceased was his wife and therefore had the right to burry her. The couple however never had any children. The defendant had testified that he had married the deceased in 1973, and brought her to Nairobi where he lived with her. He alleged to have sent money to his parents to buy goats and beer to be taken to plaintiffs home. They had lived together as husband and wife for 17 years until she died, taking care of her. He claimed that he paid Ruracio “dowry” to the plaintiff on two occasions, although he had no written records of the same. During the life time of the deceased both used to visit the plaintiff and used to leave some money with him. Bought for the plaintiff a wedding dress so that him and his wife could solemnize their marriage. He later settled the medical bills of the plaintiff wife’s when the latter had fallen ill.

The plaintiff on the other hand testified that he never knew the defendant before, until he saw him in court, and that all the evidence adduced in court, with regard to payment of dowry on two occasions were false. The plaintiff set out the requirement of the Kikuyu customary marriage which he claims were never performed by the defendant at all.

In his judgement the learned judge as he then was held inter lia that:

1. *The essential of Kikuyu marriage are:-*

*(a) Capacity*

*(b) Consent*

*(c) Ngurario*

*(d) Ruracio and commencement of cohabitation.*

2. *The various documents produced in court, tend to show that the defendant and the deceased treated each other as husband and wife.*

3. *The mere fact that there was no child of the marriage did not negate the presumption of marriage, if there is established long cohabitation and acts showing general repute.*

At page 19, there is quoted with approval the case of NJOROGE VERSUS NJOROGE AND ANOTHER

(2004) IKLR 611 decided by Ojwang J. The brief facts are that the applicant had made an application seeking a temporary injunction, seeking restraining the respondent from burying the deceased pending the determination of the suit. The claim was based on the allegation that the applicant was the second wife of the deceased, married under customary law, that she had cohabited with the deceased for ten years up to the time of his death, and that the deceased had made an oral will confirming that he should be buried at the matrimonial home which he shared with the applicant.

The Respondent who were the first wife and the brother of the deceased objected to the application, arguing inter alia that “*the applicants was not a wife of the deceased....*”. The learned judge held inter alia that

1. *“In the social context prevailing in this country, the person who is the first in line to duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. Therefore who ever can prove this fundamental proximity in law to the deceased has the claim of right of burial a head of other claimants”*

On the courts assessment’ of the facts herein, it is clear that the dispute herein centres on who has the right to bury the deceased. Is it PW1 in his own right as:-

- The biological father of the deceased.
- By reason of there having been no dowry paid to form a customary marriage.
- There being absence of ingredients that go to support the existence of a presumed marriage. This assertion has to be weighed against the rival and equal competing right of the defendant who claims to avail himself of that right by reason of:-
- There being an alleged proper customary law marriage between him and the deceased.
- Him having fully paid dowry for the deceased.
- And in the alternative, there being demonstrated through the evidence on the record, acts of general repute necessary to support presumption of marriage.

The length of the assessment of both the evidence and submissions of each side, is sufficient proof to show that, the dispute has been hotly contested and the court, would have done great disservice not only to the litigants and their witnesses, but the lawyering skill of the participating counsels namely Mr. Nyende and Mr. Osoro who strove to be thorough both in their examination in chief of their witnesses, and cross examination of their opponents witnesses, as well as a thorough analysis of the evidence in their submissions, and the applicable principles of law. This made it necessary for the court, to enlarge space in this judgement so as to bring to the fore all the views of all participating in the process, of application of the principles of law, and case law, cited, to the court, and justify them in finally determining the issues herein.

The applicable principles of law, that this court, has been invited to apply is section 3 of the Judicature Act, cap 8 laws, of Kenya and the principles, of case law on the subject, emanating from the court of appeal and as dutifully followed by the superior courts.

Section 3(2) of the Judicature Act cap 8 laws of Kenya reads:-

*“The high court, the court of appeal and all subordinates 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, in so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written laws and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”*

It is on record that it is the plaintiffs' counsel who has invoked this provision, by which provision. The court is invited to disregard the objection raised by the defence against the plaintiffs' claim for damages for assault allegedly caused by the defendant to the deceased before her death, stretching up to the period as early as 1998 when exhibit 7 were taken. The court, has been urged to disregard the technicalities of the requirement of obtaining a grant of letters of administration before seeking the said claim..

This court, has given due consideration to that argument, and applied the provision of law cited to it, and the court, finds that the central command is that section 3 (2) of cap 8 is that:-

(i) The technicalities ousted are the technicalities relating to procedures and not law. Herein the technicality raised by the defence is one of law and not procedure.

(ii) The application of the said customary law should not be inconsistent with any written law. The written law governing an estate of a deceased person is the law of succession, whose principles this court, has judicial notice of the same, one of which is to the effect that, where a cause of action survives a deceased person, the beneficiary is entitled to pursue the same on behalf of the deceased's estate and defendants if any. But in order to do so, one must have letters of administration empowering him or her to do so.

Counsel qualified that, by saying that the requirement applies only to the law reform claims. In this court's opinion, no authority was cited by the said counsel, for saying so, and in the absence of such authority, the well known principles of the law of succession Act, on the subject have not been ousted. It therefore follows that so long as the plaintiff is not the one who was assaulted but the deceased, in order to claim these damages for his benefit but on account of the estate of the deceased, he needed a grant of the letters' of administration to access the same.

The foregoing findings notwithstanding it is necessary for purposes of the record, also to establish that the claim had been properly laid under the mentioned customary law. Indeed PW1 called the evidence of PW6 who gave evidence as a chairman of the Abasagala clan, Bungoma branch, in whose jurisdiction the plaintiff resides. He said he is conversant with the customs and traditions of the Abasagala clan to which the plaintiff belongs. It is his testimony that the claim laid by the plaintiff on this aspect is proper and maintainable. He however provided no documentary proof of the same citing his knowledge's of the same as having arisen from oral impartment of knowledge, to him, by the senior elders of the clan, among them his own late father, as well as through observation.

This court, has however judicial notice of the fact that there exists one documentation of these traditions and customs which documentation is respected in this jurisdiction and is often referred to by courts of this jurisdiction. This is the literature titled "Restatement of African customary law volume 1, on marriage and Divorce, Sweet and Maxwell 1968. The Maragoli whose sub clan is Abasagala falls under the Luhya cluster, catered for under chapter 5 of the said literature. The documentation on the same runs from page 45 to 59 of the said book. This court has scribed through the same and at page 54 paragraph 6 is found documentation on Chestisement and it reads:-

*" 6 Chestisement. The husband may chastise his wife for her misconduct but unjustified or excessive beating by the husband would be sufficient cause to return to her family. Such conduct might in addition constitute an offence against the statutory law and is a ground for divorce".*

At page 56 under paragraph 3 on grounds of divorce cruelty is cited as 3(f) It reads:-

*" 3 (f) Physical cruelty which must be excessive especially when alleged against a husband who has a right to chestise his wife reasonably"*

No where in the said documentation is it stated cruelty to a spouse gives rise to compensation to the father, in the event the daughter later dies before lodging the claim. Since it was the plaintiff asserting its existence, he was obligated to bring himself within the ambit of the principle laid down by the court of

appeal of Eastern Africa in the case of ERNEST KINYANJUI KIMANI VERSUS MULRU GIKANGA AND ANOTHER (1965) EA 735, where it was held inter alia that:-

(i) *Where African customary law is neither notorious nor documented it must be established for the courts guidance by the party intending to rely on it.*

(ii) *As a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinion called by the parties.*

In this courts' opinion, in the absence of known practice evidenced by really divided cases, may be showing modern trend, the evidence adduced by the plaintiff and his expert witness PW6, does not oust the documented information from the now respected text, that such a behaviour would entitle the victim wife to go back to her people, and cite it as a ground for divorce as opposed to seeking compensation. It is also observed that the assault could also form a basis for an offence under the statute law which may eventually lead to a claim for damages for assault should a prosecution result in favour of the victim. For the reasons given, the said claim by PW1 has been ousted, firstly, by operation of the cardinal principle of law, found in section 3 (2) of the judicature Act, that written law has supremacy over customary law, in the first instance. And in the second instance, it has not been established by the evidence of PW1 and PW6 that the custom, is one of Public notoriety. This court, has no doubt that if it had been, it could have found itself documented in the text cited. 3rdly if it is a recent trend, then actual instances where such compensation has been actually paid by courts, of law of this land, should have been tendered as testimony to fortify the plaintiffs assertion.

Turning to the other issues raised, it is clear that each side filed issues, although the issues have some common semblance. The first question to be determined in so far as those issues are concerned is first of all a determination of the applicable principles of law that this court, is to apply in determining the dispute. These are construed from the case law decided by both the superior courts' and the court of appeal on the subject and these are:-

1. They go to show that indeed courts' of this jurisdiction both superior and the court of appeal, recognize an institution called marriage by reputation or presumption of marriage.
2. They also show that a material component of marriage by presumption is proof of existence of acts of repute.
3. They also show that existence or non existence of acts of repute have to be proved by adduction of evidence, where by parties are interrogated on the acts of repute and the evidence ruled either to have withstood the test or not to have withstood the test.
4. They also demonstrate that issues of burial disputes have to be distinguished from those of inheritance. Meaning that a court, seized of a burial dispute like in this case, it has to divorce itself from dealing with issues of inheritance.
5. They demonstrate that in a burial dispute, the lot of the right to bury should fall on the person the law recognizes to be the closest, related to the deceased. In the circumstances where a marriage is found to exist, the person closest to a spouse is a fellow spouse.
6. Where existence of marriage is dispute, then the right of spouse hood, can only arise after evidence has been given relating to acts of repute and long cohabitation with the deceased and if upheld is when the right to spouse hood crystallizes followed by the right to bury the spouse.
7. Where the right to spouse hood does not pass the test of there being existence of a marriage, and in the alternative to existence of a marriage by presumption, then the right to bury slips back on to the parents and other near relatives of the deceased.

Turning back to the issues put forward by each side, it is clear that same are common to each other. In this courts' opinion they have been comprehensively covered by the evidence adduced by both sides, as well as the submissions of both counsels. It is therefore necessary for this court, to set out the undisputed aspects of the case which in this courts' opinion will not require a decision on the same, on the one hand, and the disputed aspects of the case in which a decision of the court is called for.

The undisputed aspects or common grounds of the case not requiring a determination are as follows:-

1. That the deceased is the biological daughter of the plaintiff PW1 and his wife Rose Ajema.
2. That the deceased had one issue Winnie Ajema before teaming up with the defendant.
3. It appears the existence of Winnie was not disclosed to the defendant till 1993 as per his own testimony.
4. There are two recorded visits by the defendant, his parents and other relatives to the home of PW1, one undertaken in 1993 and another undertaken in 2003.
5. There were no other visits to PW1s home by the defendant and his group after 2004.
6. Apparently prior to 1993, the deceased had visited the defendants rural home in Muranga where she was photographed with the defendant's grand mother and other relatives. She was also photographed with a pot of water either going to the river to fetch water or from the river having fetched water and heading home.
7. The issue of Winnie being an adoptive daughter of the defendant was not raised in the defences' pleadings. It was not also put to PW3 Winnie in the cross-examination. It was only raised during the testimony in chief as well as cross- examination of the defendant.
8. There is no dispute that there are two acknowledged children as issues between the deceased and the defendant, namely, Joan Wanjiku Irungu, and Karl Kamakia Irungu.
9. There is no dispute that DW2 and DW4 are the parents of the defendant. It is common ground that they and other family members were in the party of those who visited PW1s home both in 1993 and 2003.
10. There is no dispute that the deceased had initially been using his fathers name Asuluda and later on changed her sir name to read Irungu. But as per evidence on the record, nobody not even the defendant knows when the said name was changed after the document which the defence had sought to use to prove when the change was effected was rejected.
11. It is common ground that on the basis of documentation exhibited both the deceased and the defendant appear in each others insurance medical cover policies.
12. There is no dispute that at one time PW1, fell sick and traveled to Nairobi for treatment and during the period of his stay, he was hosted by the DW2 and his wife DW4.
13. There is no dispute that the said visit and hosting of PW1 by DW2 and DW4 was on the basis of the then relationship between the deceased and the defendant.
14. There is no dispute that at one time, the deceased and defendant with their children used to reside at Riruta satellite before moving to South C.
15. There is no dispute that the lease agreement produced as well as school fees and rent payment receipts read the name of the deceased and non have been exhibited where those bearing the name of the defendant have been produced.

16. No dispute that PW1 and his witnesses have stated categorically that at no time did the defendant reside in Nairobi South C with the deceased.
17. There no dispute that photographs showing the deceased and the children holidaying both in Mombasa and Kisumu do not include the defendant who conceded that he did not accompany the family on these two trips. Although he himself gave no reason for his absence, save that he said that it was not necessary to accompany them, his daughter DW3 gave an explanation that the defendant was not part of the holiday party because of busy schedule but he arranged for everything, financed the trips and dropped the family at the bus stage to board buses to the said destination.
18. No dispute that some of the photographs produced taken on school visits do not show the presence of both parents at any one time, although it was common ground from PW3,4 and DW3 and DW1 that he defendant used to attend school visits.
19. There is no dispute that shortly after the death of the deceased, the defendant moved, DW3 and the brother Karl Kamakia together with all their belongings from South C.
20. It is not deputed that although the defendant alleges that all his property that he had with the deceased in South C, were carted away by PW1 and his group, him defendant has not enumerated these items to court, neither has he counterclaimed for their return.
21. There is no dispute that when the deceased fell sick, she was admitted at Matter hospital and underwent three operations and thereafter she succumbed to death.
22. It is common ground, that operation papers were signed by the deceased herself, and when she was incapable of doing so, some were signed by the defendant.
23. There is no dispute that indeed a disagreement arose as between the defendant and PW1 as to who should have the right to take the burial permit in order to make arrangements for the burial of the deceased.
24. There is no dispute that a disagreement arose between the defendant and his family on the one hand, and PW1 and his people on the other hand as regards who has the right to make arrangements for the burial of the deceased and where to bury the deceased.
25. There is no dispute that on obituary advert exhibited for the death of the deceased was undertaken by the defendant, and although he alleges that both parties authorized him to do so, he has not produced a gathering permit authorizing the gathering which authorized him to do so.
26. There is also no dispute that a sum of Kshs. 70,000.00 has featured prominently in the evidence of PW1 and DW2. PW1 asserted that it was an offer for payment of dowry, which was turned down by PW1 and his team. Whereas DW2 concedes offering the sum but says that it was meant to aid PW1 to cover funeral expenses for himself and the people who had accompanied him but this was not pleaded.
27. There is no dispute that a disagreement arose between the two camps over who has a right to bury the deceased and where to bury her which led to the current proceedings.
28. There is no dispute that the only burial or funeral gathering permit exhibited was that which had been issued to the plaintiff PW1.
29. There is no dispute that during the 1993 and 2003 visits by the defendant and his people to PW1s home, money and other gifts changed hands.
30. There is no dispute that the deceased's body is still lying at Matter Hospital in pursuance to a consent order reached by the parties at the on set of the proceedings.

31. No dispute that the storage of the said body at the said hospital is accumulating storage charges.
32. No dispute that each side is blaming the other for the initiation of the current proceedings.
33. There is no dispute that either side have urged the court to rule in their favour.
34. There is no dispute that in the year 2000 PW1 wrote to DW2 asking audience for the two sides to meet and discuss the issue of dowry which had been outstanding.
35. There is no dispute that upon receipt of the said communication from PW1, DW2 immediately got in touch with the defendant and asked him to let PW1 and his party come to discuss the issue of dowry if he could raise 60,000/= failing which he was advised to inform PW1 to defer the visit.
36. There is no dispute that at no time as conceded by DW2, did DW2 write back to PW1 and inform him that he was mistaken, since the issue of dowry had been settled in 1993.
37. There is no dispute that in the year 2000, the deceased filed a separation cause 127 of 2000 simultaneously with a chamber summons in respect of which an order was given restraining the defendant, from whatsoever and in whatsoever manner interfering with the life of the deceased.
38. There is no dispute that both sides mentioned in their papers for and against the separation proceedings that, they had been cohabiting with each other as man and wife and that they had two children between them.
39. There is no dispute that indeed in the affidavit in reply to the chamber summons in the separation cause proceedings deponed by the defendant indicated that as at that point in time, the two were not living together.
40. There is no dispute that it is not known whether the said proceedings were pursued to its finality. But one thing which is clear is that the interim orders do not appear to have been upset.

Turning to the disputed issues which are to be discussed and findings made on them, the court will proceed to identify and discuss them and then proceed to make a final pronouncement on the same.

1. The first one is whether the defendant had been taken to the home of PW1 in 1987 for introduction by the deceased. This court's findings on this is that, this is not pleaded by the defendant. In fact it arose in the defence evidence only when DW1 the defendant gave evidence. It was not put to PW1 and PW2 in cross examination. This court, doubts whether the defendant could have been taken to the home of PW1 for introduction as a future husband of the deceased, and then turn round and say, and claim in their evidence that the deceased disappeared after her graduation for five years, only to resurface with a child and the defendant and his family who came to introduce themselves. It is therefore the finding of this court, that, the defendant alleged introduction to the deceased's family in 1987 has no basis, as it is not evidenced in the first instance. In the second instance if that had been the correct position then the evidence of both sides should have stated that the defendant had taken his family for introduction but not that the whole family went for introduction to the plaintiff family.

2. As to whether PW3 Winnie Ajema was an adopted daughter of the defendant having been adopted in 1993, this has been ousted because of the following reasons:-

(i). It was not put to PW1, 2 and 3 in cross examination. Had it been so, then the defendant would have deponed so in his replying affidavit to the interim application in the separation proceedings exhibit P13. In paragraph 4 of the said replying affidavit states: "4 That we have two issues of our cohabitation described in paragraph 3(a) (b) of the complainants supporting affidavit" The defendant went on in paragraph 13 there of reads: "13 that has another child outside our union, which she has neglected to take care of as she has indeed dumped the said child in her rural area" The said affidavit was deponed

almost 8-9 years after the alleged adoption. This court's finding is that had it been that the defendant adopted Winnie, he could have deposed so in exhibit 13. This assertion and or allegation has been ousted.

3. The dispute touches on the joint affidavit exhibit D19 which goes to demonstrate existence of a traditional marriage under Kikuyu customary law. The first to be considered is the evidential value of this joint affidavit. There is no dispute that it is indeed a joint affidavit having been deposed by the deceased and the defendant.

Being an affidavit, it has to pass the validity test under order 18 CPR which governs deposing of affidavits. This court, had an occasion to deal with the issue of deposing a joint affidavit in its ruling delivered on the 27<sup>th</sup> July 2007. In the case of MESHACK RIAGA OGALO AND 7 OTHERS SUING IN THEIR CAPACITY AS OFFICIALS OF THE LUO COUNCIL OF ELDERS VERSUS HENRY MICHAEL OCHIENG AND 4 OTHERS NAIROBI ELC 30 OF 2007. In this case, an application had been brought seeking to transfer a high court suit to another high court. The supporting affidavit had purportedly been deposed by 4 defendants but endorsed by only two of them. at page 11-12 of the said ruling, this court, construed the provisions of order 18 rule 3(1) and 4 thereof. Observation was made by this court, to the effect that the operative words in the said rules are "deponent"

"By reason of this, this court, ruled that there is no provision for a joint affidavit under order 18 CPR. It means that where there is more than one deponent each was to swear own affidavit. This court, still holds the same view that a joint affidavit is not provided for under order 18 rule 3,4, CPR and as such it is an illegality. Being an illegality, it can not demonstrate existence of any customary law marriage between the deceased and the defendant.

Having discounted the affidavit exhibit D19, an issue arises as to whether there is any other evidence on the record to support existence of the Kikuyu customary law. This evidence is contained in the assertion of D1 and DW2, that indeed some ceremony took place in Muranga in 1988 April. The photographs exhibited do not show the presence of PW1 and DW2 and other accompanying elders and the slaughtering of the goat. It therefore follows that in order for DW1 and DW2s evidence on the celebration of Kikuyu customary law marriage to stand, it must demonstrate the ingredients enumerated on the restatement of African law on marriage and divorce (supra) page 11-12. These are:-

- *Identification of the girl to be married*
- *Conveying of the intention to marry to the girl*
- *If request is positive then the girls' parents are invited to the boys home for a bear drinking ceremony*
- *Rurario is dispatched to the girls home in installments*
- *When sufficient Rurario is paid then*
- *A day is fixed for the Ngurario ceremony where Aram is sent to the girls home from the boys home, and the same is slaughtered in the girls home where the girl is given kidneys to eat. This signifies the consent to be married and then the rest of the meat shared out amongst the two families.*
- *The Ngurario ceremony is followed by the ceremony of Guthinja Ngoima. During this ceremony a sheep is slaughtered from the boys family shared by the clan of both sides, shared in the merry making and thereafter both sides exchange gifts.*

Applying this sequence of what is to be done in order to conclude a Kikuyu customary marriage to the evidence on the record, on the subject, the court, makes a finding that none of what has been described by DW1 and DW2 fits the ingredients set out above. This being the case the court is safe in making a finding that no Kikuyu customary law marriage was concluded between the deceased and the defendant to warrant the courts protection.

Having discounted the existence of a Kikuyu customary law marriage, the question that follows is whether there was a Luhya or Abasagala customary marriage in place, one that can be protected by the court. In the same text Restatement of African law, at page 45, the ingredients are set out starting page 45. These are:

- *Consent of both parents and the intending spouses is necessary and has to be obtained before any other steps is taken in the matter starting with that of the intending boy spouse.*
- *After consent of the intending boy spouse is obtained,*
- *The boy selects his bride and after the boys father has promised to furnish him with dowry (bukhwi) an emissary is sent to put the proposal before the parents of the girl.*
- *Among the maragoli, Idakho, Isukha, Tiriki and Nyore, there is no beer feast. The negotiations are held at the home of the girls' father without formality. No sticks are used and there is no preliminary inspection of the bukhwi cattle. Here again the agreement may provide for payment of bukhwi by installments.*
- *At page 50, it is observed that modern trend shows that either the celebrated ceremonies are omitted altogether or performed in a modified or abbreviated form. Their non performance does not invalidate a marriage."*

Applying the above to the evidence on record, it is clear that none of the sequence of events leading to the girl or bride moving to the boys home to become a wife were performed, but as the note on modern trend, it shows that the non performance of these ceremonies does not invalidate a marriage. It is the finding of this court, that failure to perform all of the required ceremonies does not operate to invalidate the validity of the marriage herein between the deceased and the defendant if one existed.

If the none performance of the traditional ceremonies does not invalidate a marriage, then what cures that failure to perform all the ceremonies? The answer to this is found at page 50-51 of the said text, under marriage consideration it reads:-

“ Bukhwi is a payment or payments of cattle, other lives stock or other property rendered by or on behalf of the bride, groom, to the father or other guardian of the bride which is necessary for the validity of the marriage and to establish the efficiation or legal control of the issues of the union repayable in whole or in part on the dissolution of the marriage. It is further added and or noted that Bukhwi must be distinguished from other collateral payments and gifts made at the time of marriage.

From the above assesment, although the court, has made a finding that not all the traditions, and ceremonies pertaining to the formation of marriage were performed herein, it is evident that if established that dowry or Bukhwi was paid, then the payment of Bukhwi operates to validate the marriage. It is further found that the payment of Bukhwi may be in whole or through installments and that such payments have to be distinguished from payment of other collateral gifts and payments.

4. The question then that flows from the above is whether dowry or Bukhwi was paid herein, which is also a necessary component in the formation of the marriage under the Kikuyu tribe as well. It is on record that there is disagreement on this with the plaintiffs' side asserting non payment, where as the defendantss side asserting payment.

Due consideration has been made by this court, regarding the said rival arguments and non payment of the same, and considered the same in the light of the evidence on the record and the court, makes a finding that the dowry was not paid either under kikuyu or Maragoli customary law for the following reasons:-

(i). There is no agreement in writing evidencing the same although this does not appear to be a requirement even under modern trends.

(ii). Had the same been paid exhibit P2,3 and five (5) could not have been written in the manner written.

(iii). Since the payment is alleged by the defence that it was made way back in 1993, any prudent mind would have expected DW1 and DW2, who are the defendant and his father who alleges that the content of the letter regarding PW1's request to come and discuss dowry to be a mistake, to have responded to the same and bring the mistake to the attention of PW1. Their failure to so respond, in the opinion of this court, is proof that none had been paid.

(iv). Indeed the text sampled above demonstrates that besides dowry, there are collateral payments and gifts. The court, is satisfied with the evidence of both sides that on both occasions, when the visits were undertaken to the home of PW1 in 1993 and 2003 payments and exchanges of gifts were made, and this court, has no doubt that these were regarded as other payments or collateral gifts. The reason for saying so is that had these payments not been treated as such by the parties exhibits P2,3, and 5 would have been unnecessary. This finding is fortified by the fact that DW2 and DW1 conceded that they did not write back to PW1 telling him that he is mistaken as dowry had been paid earlier.

(v). In addition to what has been stated above, it is not disputed that during the funeral DW1 raised the issue of payment of dowry, if the defendant and his family wanted to bury the remains of the deceased. PW1 maintains he was offered 70,000.00 in full and final payment of the same. While he declined. DW2 concedes offering the amount to PW1 but said it was to assist PW1 defray funeral expenses. It is on record that indeed meetings took place but these yielded no resolution. PW1 as supported by PW6 confirm that such demands were made. Despite the demand being made there is no communication from the defence to the plaintiff, to the effect that the dowry they were demanding had in fact been paid long time ago. It is therefore the finding of this court, that the events outlined herein all go to show that no dowry, was paid and what was exchanged between the parties was nothing but collateral payments and gifts.

5. Having dis-housed payment of dowry, it follows that in order for either side to succeed the defence must prove the existence of a presumption of marriage and the plaintiffs, none existence of the same. It is on record from the principles of case law cited as well as the submissions of both counsels all go to show that "presumption of marriage has now crystallized in the jurisprudence of the courts, of this jurisdiction. It is now notorious and not only accepted but also enforceable by the same courts. It is on the record that the criteria for establishing the same is nothing but enumeration of acts of repute. It is on record that these have been enumerated on the record on the record and there is no need to re-enumerate them here. What is to be brought out is that although the plaintiffs side does not dispute the existence of these alleged acts of repute, they assert these are acts of mere friendship. Whereas the side of the defence says that indeed these were for cementing the marriage.

Due consideration has been made by this court of the same and considered them in the light of the principles derived from the case law on how courts should determine the same and this court, makes a finding that indeed the acts go to confirm the existence of a marriage by reputation between the parties more particularly the following:

(i). Long stay between the parties from 1988 to 1993 then up to 2000.

(ii). Reference of the marriage of the two short of the payments of dowry as asserted as being married by both sides by the plaintiff side.

(iii). Appearing in the medical insurance covers of both sides.

(iv). Siring of children between them.

8. Having established existence of a marriage, the court, has to determine its legal nature, using the content of the very text book that the court has used to demonstrate the existence and non existence of a valid customary marriage, to determine the legal nature of the presumed marriage whether it is

permanent and pensionable. At page 19-21 under the Kikuyu, there is provision for divorce. Where as under the Luhya community it is provided for at pages 56-58. A perusal of both sections reveal that there are set grounds for divorce among them physical cruelty, which must be excessive especially when alleged against a husband who has a right to chastise his wife reasonably.

Although there is no allegation of divorce, there is allegation of separation and one of the major reasons cited for his separation is cruelty on the part of the defendant arising from frequent assault. Indeed the evidence on the extent of the same is cruelty. Reliance has been placed on the photographs exhibit 7, and the separation cause documentation. Each side has attempted to establish and or oust the said allegation of cruelty and this is on record. Due consideration has been made of the said argument in the light of the evidence of both sides on the record and the court makes a finding that:

Although evidence do not carry much weight, as they allegedly heard a commotion from inside the bedroom of the deceased and the defendant, followed by complaints from the deceased the next day, that she had been assaulted, the filing of the separation cause, anchored on allegation of cruelty and physical assault, assertion that by reason of the same the deceased sought separation and pending determination of the same a non interfering, protective order and confirmation having come from a deponement of the defendant that as at that point in time the two were not living together under one roof, is sufficient proof that separation took place between the two. This court, makes a finding that the content of this documents go to show that indeed parties separated and by reason of that separation, it is only logical that the deceased would be forced to flee from the matrimonial home and relocate elsewhere.

It is on record and conceded by both sides, that she was in gainful employment, and the possibility of her turning to her own earnings to seek alternative accommodation cannot be ruled out. This is further fortified by the fact that exhibit D18 the plaint filed in the separation cause did not even seek maintenance for herself and the two issues.

In addition to the above, there is a copy of the lease agreement rent payment receipts and school fees receipts, all bearing the deceaseds' name. Indeed it is on record that the defence asserted that these documents were selectively produced by the plaintiff who had the advantage of carting away all that was in the deceased house, including those where the defendants' names appears, and only producing those favourable to them. In this courts' view, the defendant could have ousted this by simply obtaining a letter or calling of witnesses from these institutions as well as the land lord or his/her agent to confirm that he is not a stranger to the transactions subject of these payments, not even a neighbour of the location of the residence.

The foregoing being the case, it is the finding of this court, that the separation order in exhibit 12 came after physical separation had taken place earlier. The order was explicit that the separation was to last until the case is finally heard and determined. It is common ground that the final outcome of the said proceedings are not before this court. The assumption is that the same is still pending. The legal effects of that pendency is that it means that as at the time of the deceased's death, the couple was still separated. In order to oust that legal effect, it is necessary to establish facts that go to negative, it and demonstrate that it only existed on paper and what was left was merely for steps to be taken to set aside the same.

It is on record that neither side took steps to bring that order to an end. The question is whether they did so by their conduct. Due consideration has been made of this fact by this court, and the court, makes findings that the separation order still counts and still stood and was operational as at the death of the deceased because:-

(i). The law requires it to be set aside to prevent its operation.

(ii). The assertion of the plaintiff and his witnesses that the two were still separated as at the time of the deceaseds' death has not been ousted by reason of the following:

(a) DW3s' evidence that she had never witnessed any quarrels or physical confrontation between her parents and that they lived together throughout was ousted by the defendant fathers' own affidavit in the

separation proceedings.

(b) DW3s' assertion that the absence of the defendant from the holiday photographs was because he was busy at work, and that this was covered up by him meeting the expenses of the holiday trips, were ousted by the defendants own evidence which while conceding that he did not accompany his family for the holidays, he never mentioned financing them.

(c) Bluntly refused to name any neighbour and service providers in his neighbourhood.

(d) Conceded to have evacuated the children from the south C home immediately upon the death of the deceased.

(e) Although he alleges it to have been his official residence and the assumption being that he must have had his personal effects and other property in the same house, which property he alleges was carted away by the plaintiff, him defendant has not enumerated these properties, either in his evidence or proceedings. Neither has he counter claimed for the same. This failure to enumerate and counter claim for own property he may have had in the South C house negates not only his assertion of having resided there, but that of his daughter DW3 and his parents DW2 and 4.

(f) The negating of the defendants stay at the South C house in the manner demonstrated above, goes to confirm the plaintiffs assertion that the 2003 visits to PW1s home was for reconciliation which failed.

(g) Indeed there is evidence on record that the defendant went out of his way to assist the deceased during her last illness before demise. The question is whether this acts of humanity operate to oust the separation order, and the ouster of his and that of his witnesses assertion that no separation ever took place, or that they had patched up. In this courts' opinion the acts of humanity, were expected of him in time of need, in the last moments of life of the mother of his children. It was imperative of him to act prudently so that the death of the deceased does not leave scars on the minds of his children namely the scar of the traumatic loss of a loved mother in the first instance and,

(b) The scar of having been brought into this world by parents who could not see eye to eye to each other up to the death of one of them.

(h) Indeed as mentioned, the two had covered each other in their medical insurance covers, and the defendant even had a pass to the deceaseds' employment station. As mentioned by the plaintiff, it is only the employer of the two and the deceased who can confirm the evidence of the defendant that these show non separation. That notwithstanding the assertion by the plaintiff that these documentations as well as change of name could have been effected for purposes of securing the welfare of the two issues of the union, is not remote and as such it cannot be ruled out.

10. Having ruled that the separation of the deceased, and the defendant both legal and physical by reason of what has been stated above was still in place as at the time of her death, a question arises as to which of the competing interests is to have the right to bury the remains of the deceased. In this courts' opinion, in view of the guiding principle of law in the case law cited to this court, once the right of the spouse has been dislodged, then the right of the parents crystallizes. Meaning tat the plaintiff has the right to take the remains of the deceased daughter for burial. This is because upon upholding of the legal and physical separation by this court means that the deceased family ties titled more to the fathers right than the husbands right.

Indeed there was allegation of a death bed wish having been a legally allegedly made by the deceased expressing a wish to be buried by the plaintiff. It is on record that it is common ground from both sides, that indeed the deceased was very sick, she had relapsed into a prolonged coma, had also undergone three brain surgeries. There is a possibility that all these happenings may have had a serious effect on her reasoning capability and judgment even if this death bed wish is removed and or discounted, the scale of justice still tilts in favour of the plaintiff. The reason being:-

(i). Existence of a customary law marriage and payment of dowry under either Luhya or Kikuyu customary law has been ousted.

(ii). Indeed presumption of marriage was established, but this has been ousted by the existence of the evidence demonstrating that the presumption of marriage has been ousted by the existence of both legal and physical separation.

(iii). By reason of the said ouster of the continuance in existence of the presumed marriage then the deceased was deemed to have gone back to her people and as such they are now the closest relatives who can be mandated with the duty to bury her remains.

11. The issues of the marriage having been disposed off, it leaves the issues of children namely Joan and Karl. It is common ground that they belong to the deceased and defendant. The marriage Vail over their birth having been removed by the findings of this court, as demonstrated above, their birth status is relegated to the status of children born to an unmarried girl. It is common ground under both systems of law as shown at page 18 under the Kikuyu customary law and page 55 under the Luhya customary in the Restatement of African law (supra), herein since the defendant has taken them, he is obligated to pay compensation to the plaintiff.

It should be noted that objection to payment of compensation, by the defence was based on the assertion that dowry had been paid. Now that the court has ruled that dowry had not been paid, it follows that the issue of compensation is ushered in. The amount of compensation claimed is not also disputed by the defence, save that the objection was based on the same grounds that dowry had been paid. That having been ousted, the plaintiff right to seek compensation for the children is ushered in.

The last to be dealt with is the issue of who is to pay the costs and mortuary charges. In this courts' opinion the party who necessitated the proceedings is the party to be pinned down to pay the costs' and mortuary charges. In this courts' opinion this party is the defendant. The reason for saying so is because, from the evidence documented herein, the defendant was aware that dowry had not been paid, and that there had been both legal and physical separation between the two, and yet they went ahead to oppose the proceedings, after the defendant fathers' offer of payment of Kshs. 70,000.00 as marriage consideration or dowry was turned down.

For the reasons given in the assessment the court proceeds to make the following orders:-

1. The plaintiffs claim for compensation on account of an assault committed by the defendant as against the deceased has been ousted and the same is declined and dismissed for the following reasons:-

(i). It has not been proved by adduction of evidence that it is a notorious custom which is not only enforceable in law but has infact been recognized and enforced by courts of this jurisdiction.

(ii). In so far as it purports to oust the operation of the statute law which requires such claim to be championed only by those with a grant of letters of administration, it cannot stand as in upholding it, will amount to a customary law to have supremacy over statute law.

2. It is the finding of this court, that neither Kikuyu or Luhya customary law marriage was established by the evidence on the record, by reason of failure to comply with all the pre requisites for the establishing of the same under both customary law.

3. The court found sufficient evidence on record to establish the existence of presumption of marriage between the defendant and the deceased upto the year 2000.

4. The court, also found that the life of the said presumed marriage was interrupted by both legal and physical separation which lasted upto the death of the deceased.

5. The effect of the operation of the said legal and physical separation ousted the right of the defendant

as the presumed spouse to bury his wife thus ushering in the right of the plaintiff as the nearest relative.

6. The ushering in of the right of the plaintiff as the nearest relative, ushers in the right of the plaintiff to bury the deceased and he is accordingly ordered to be the one mandated to remove the remains of the deceased for burial as he wishes..

7. Having removed the veil of existence of customary marriage, and payment of dowry, from the children, their status is relegated to the status of children born to an un married woman and since the father has custody of the same, he is liable to pay compensation to their late mother father.

8. For the reasons given in the assessment, the compensation sought by the plaintiff is the one payable.

9. From the evidence adduced, the party who necessitated the proceedings is the defendant and he is ordered to pay costs and mortuary charges.

10. In the alternative, the plaintiff to pay the same to facilitate the burial and then execute for the same herein or commence another civil suit for the recovery of the same.

11. For the reasons given in the assessment the defendants' defence and counterclaim stand dismissed with costs to the plaintiff.

12. There will be liberty to apply granted to either party is need be.

DATED, READ AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2009

**R.N. NAMBUYE**

**JUDGE**