



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Appeal 52 of 2005**

**KIPLANGAT KORIR.....APPELLANT**

**VERSUS**

**DENNIS KIPNGENO MUTAI.....RESPONDENT**

**JUDGMENT**

On the 8<sup>th</sup> of September 2005, Ester Chepkemai Mokwony, according to the respondent also known as Korir died (*she will hereinafter be referred to as the deceased*). A dispute arose between the respondent Dennis Kipngeno Mutai and the appellant, Kiplangat Korir on where the body of the deceased was to be buried. The respondent wanted the appellant to bury the deceased by virtue of the fact that he (*the respondent*) alleged that the appellant had married the deceased under the Kipsigis Customary Law and therefore it was incumbent upon him (*the appellant*) to perform all the funeral rites and bury the deceased. The appellant however declined the request by the respondent for him to bury the deceased. The appellant insisted that although he had married the deceased more than thirty one years ago, the deceased had decided to run away from the matrimonial home after they had only lived together for less than a month. The appellant stated that their said marriage was not blessed with any children. According to the appellant, the deceased did not return back to her matrimonial home until her death. The appellant saw no reason why he should be compelled to perform the funeral rites and bury the deceased.

Upon the appellant refusing to bury the deceased, the respondent herein filed a suit before the Resident Magistrate's Court at Sotik seeking to have the orders of the said court to compel the appellant to bury the deceased under the Kipsigis Customary Law. The appellant filed a defence denying any responsibility under the Kipsigis custom to bury the deceased. The trial magistrate made an interim order preserving the body of the deceased at Kapkatet Hospital Mortuary pending the hearing and determination of the suit. The trial magistrate heard oral evidence adduced by both the respondent's and the appellant's witnesses. After a full trial, the trial magistrate found for the respondent. He compelled the appellant to bury the deceased at his farm at Soymet. The trial magistrate further ordered that in the event that the appellant would refuse to bury the deceased in his farm, then the respondent would be at liberty to bury the deceased at the said Soymet Farm owned by the appellant, at the appellants own expense. No orders as to cost were made.

The appellant was aggrieved by the decision of the trial magistrate. He appealed to this court. Pending the hearing and determination of this appeal, this court did on the 8<sup>th</sup> of December 2005 stay the execution of the said order of the trial magistrate pending the hearing and determination of the appeal herein. So that there would be no delay on the part of the appellant, this court admitted the appeal and ordered the appeal to be heard on priority basis within a period of one month. The appellant complied

with the orders of this court and the appeal was heard on the 7<sup>th</sup> of February 2006. In his memorandum of appeal, the appellant faulted the trial magistrate for finding in favour of the respondent. He raised thirteen grounds of appeal which may be summarised as thus; He was aggrieved that the trial magistrate had heard and determined a burial dispute whereas in law he lacked the requisite jurisdiction to hear such matters; He faulted the trial magistrate for considering extraneous factors in arriving at the said decision; He was aggrieved that the trial magistrate had found in favour of the respondent in the face of the preponderance of evidence which was in favour of the appellant and against the respondent; He was further aggrieved that the trial magistrate had failed to appreciate the Kipsigis Customary Law as relates to burials and therefore arrived at the said erroneous decision in favour of the respondent; The appellant faulted the trial magistrate for find in favour of the respondent after applying a Kipsigis Customary Law that was repugnant and contrary to morality; He was finally aggrieved that the trial magistrate had made an order compelling the appellant to bury the deceased on a parcel of land that did not belong to him. The appellant urged the court to allow the appeal, set aside the judgment of the trial magistrate and substitute with an order of this court dismissing the respondent's suit.

At the hearing of the appeal, I heard the rival arguments made by Mr Ongányi, Learned Counsel for the appellant and Mr Rono Learned Counsel for the respondent. Before addressing the issues raised in the said submissions, I will briefly set out the facts of this case, which are, on the major points, not in dispute. The appellant, Kiplangat Korir, was married to the deceased under the Kipsigis Customary Law in 1974. According to the appellant, (*which evidence was more or less corroborated by the evidence of the respondent's witnesses*) he paid six herd of cattle to the brothers of the deceased as dowry. Upon celebrating the said marriage, the appellant took the deceased to live with his mother, at his rural home as he made arrangements to construct a house for her.

It was the appellants testimony (*which evidence was corroborated by the witnesses called by the respondent*) that the deceased ran away from his rural home after about a month. Some witnesses availed by the respondent testified that the appellant and the deceased lived together for about one year. No matter. What is however not in dispute, is that the deceased ran away from her matrimonial home without conceiving a child. The deceased lived elsewhere and did not return to her matrimonial home until her death. During the period that she was separated from the appellant, the deceased conceived out of wedlock and gave birth to three sons. One of the deceased's son called Cheruiyot, died and was buried at his maternal uncle's parcel of land at a place called Kabajet. The other two sons are the respondent, who was born in 1984 and Kimutai, who was born in 1994. It is not disputed that the three children of the deceased were not sired by the appellant. It is further not disputed that, according to Kipsigis Customary Law, the appellant and the deceased were not divorced at the time of her death but were only separated.

It was the respondent's case that the appellant, having not formally divorced the deceased under the Kipsigis Customary Law, should bury the deceased. The respondent testified that it did not matter that the appellant had been separated from deceased for a period of over thirty years; as long as the appellant had not divorced the deceased under the Kipsigis Customary Law, then he was mandated under the said custom to bury the deceased.

On his part, the appellant's case was that, the deceased, having stayed away from her matrimonial home for a period of over thirty years, he (*the appellant*) was under no obligation either under the Kipsigis Customary Law or morally to bury the deceased. It was the appellant's case that the deceased ought to be buried at the parcel of land where she used to reside during her life time and where her first born son was buried. Both the appellant and the respondent called witnesses who gave conflicting testimony on their take on what they considered to be the applicable Kipsigis Customary Law in the circumstances of this case. That, in brief, is the summary of the facts of this case.

At the hearing of the appeal, two issues came to the fore for the determination of this court. The first issue was whether the trial magistrate had jurisdiction to hear matters relating to customary burial disputes. The second issue for determination was the interpretation and the applicability of the Kipsigis Customary Law to the circumstances of this case. Whereas the appellant made submission that the Kipsigis Customary Law could not be applied to compel him to bury the deceased, the respondent on the other hand submitted that the appellant ought to be ordered to bury the deceased, and before the said

burial, perform certain rites as required under the Kipsigis Customary Law.

This being a first appeal, this court is mandated in law to consider this appeal by way of re-hearing the evidence adduced before the trial magistrate both on matters of law and on matters of fact. As was held by the Court of Appeal of East Africa (*the predecessor to our Court of Appeal in Kenya*) in the case of **Peters –vs- Sunday Posts Ltd [1958]E.A. 424** at page 429;-

*“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion.”*

I will deal with the two issues raised, starting with the issue whether or not the trial resident magistrate had jurisdiction to hear and determine a customary burial dispute. According to Mr Ong’anyi, under Section 3(2) of the Judicature Act as read with Section 2 of the Magistrate’s Courts Act, the trial Resident Magistrate did not have jurisdiction to hear a dispute involving a burial dispute. According to him, this jurisdiction is exclusively reserved for the High Court. He urged this court to find that the said trial Resident Magistrate lacked jurisdiction to hear the matter in dispute and therefore, this court should allow the appeal and strike out the suit filed by the respondent. Mr Rono for the respondent however disagrees with the argument made by the appellant. He argued that the appellant had submitted himself to the jurisdiction of the trial Resident Magistrate, and indeed participated in the entire trial. According to Mr Rono, the appellant was estopped from raising the issue of jurisdiction at this stage of the trial. He urged this court to disallow this ground of appeal and proceed to hearing and determine the appeal on its merit. What does the two Acts mentioned provide as regard the courts which will hear and determine cases based on customary law?

Section 3(2) of the Judicature Act (*Cap 8 of the Laws of Kenya*) states that;

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

Section 2 of the Magistrates’ Court Act (Cap 10 Laws of Kenya) states that:

*“In this Act, unless the context otherwise requires –“claim under customary law” means a claim concerning any of the following matters under African Customary Law –*

- (a) Land held under customary tenure;*
- (b) Marriage, divorce, maintenance or dowry;*
- (c) Seduction or pregnancy of an unmarried woman or girl;*
- (d) Enticement of or adultery with a married woman;*
- (e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;*
- (f) Intestate Succession and administration of intestate estates so far as not governed by any written law.”*

Mr Ong’anyi submitted that customary burial is specifically excluded by Section 2 of the Magistrate’s Courts Act and therefore a Resident Magistrate’s Court lacked jurisdiction to hear disputes that relates to

customary burial. He submitted that the word “means” at the definitive part of the section excludes jurisdiction for a Resident Magistrate Court to deal with any matter not specifically provided for in Section 2 of the Magistrate’s Courts Act. In support of this submission the appellant relied on the case of In Re Potts Exparte Taylor [1893] QBD 648 at page 658 where Lord Esher M.R. stated as follows in regard to an interpretation of the word “means” in the English Bankruptcy Act, 1883:

*“But we must see what the term “secured creditor” means in sub-s.2. The interpretation clause, Section 168 says that “secured creditor, means” (it does not say “include” and therefore it confines the meaning of “secured creditor” in sub-s.2 to those things only which are mentioned in s. 168) “a person holding a mortgage, charge or lien on the property of a debtor”.”*

Having carefully considered the argument made on the issue whether the Resident Magistrate Courts have jurisdiction to hear customary disputes, I am inclined to agree with the appellant. A Resident Magistrate’s Court can only hear Customary Law Disputes as specified in Section 2 of the Magistrate’s Courts Act. A Resident Magistrate cannot extend jurisdiction and hear matters which are not specifically provided for in the said Section 2 of the Act. Such disputes, including in this case, a customary burial dispute, shall be heard by the High Court only (*See* Section 3(2) of the Judicature).

In this Appeal however, I am not prepared to determine this appeal on the issue of jurisdiction or lack thereof of the trial resident magistrate’s court. Although I have found that the trial Resident Magistrate lacked jurisdiction to hear and determine the dispute between the appellant and the respondent herein relating to a customary burial, I do agree with the respondent that the appellant is estopped from raising the issue of jurisdiction of the trial Resident Magistrate’s Court at this stage of the appeal. This court is aware that parties may not confer jurisdiction on courts. However in this case, it was incumbent upon the appellant to raise the issue of jurisdiction at the earliest possible opportunity so that the same could be disposed off forthwith. Broader issues of substantial justice precludes this court from determining this case on technicalities without considering its merits. (*See* Section 3(2) of the Judicature Act).

This court is of the opinion that the issue of jurisdiction was cleverly raised by the appellant in his attempt to scuttle the hearing and determination of this appeal on merits. As was held by the Nyarangi J. A. in the case of The owners of the Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1 at page 14

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there is no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ...”*

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*“... it is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of the court may not be heard to raise the issue after the matter is heard and determined. I see no ground why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further a do.”*

In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial Justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it is been called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal but be acting as a court of the first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate’s court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction.

This court will now deal with the second issue for determination, i.e. whether or not the Kipsigis Customary Law requires that the appellant bury the deceased, who was married but separated from him for thirty-one years prior to her death. Section 51 of the Evidence Act requires any person who asserts a custom to adduce evidence as to the existence of such custom. In this case, the respondent called PW2 Stephen Ngasura, PW3 John Kemei and PW5 Kiplangat Arap Rotich who testified as to the existence of a Kipsigis Custom that requires a man to bury a wife whom he had not divorced but whom they were separated for many years. On his part, the appellant called DW2 Gabriel Kiprono Arap Langat, DW3 Phillip Kipchirchir, DW4 Kipkirui arap Rono and DW6 Stephen Kibet Ngéno who testified to the effect that under Kipsigis Customary Law, the appellant was not compelled to bury the deceased who had deserted the matrimonial home for the length of time admitted in the suit.

After considering the evidence adduced by the above referred witnesses and the submission made by Counsel for the parties on this appeal, the following emerges to be the Kipsigis Customary Law as regard the issues in dispute. According to the Kipsigis Customary Law, once a man marries a woman, the woman is considered to be his wife until either he divorces her or until her death. It will not matter that the woman would be separated from the man and conceives children by other men. The children conceived out of wedlock would be considered to be the children of the “*husband*”. The only caveat to such children born out of an adulterous relationship being considered to be the children of the “*husband*” is that a special ceremony must be performed called “*keetuum saandet*”. According to a treatise called “The Kalenjin Heritage: Traditional Religious and Social Practices” by Burnette C. Fish & Gerald W. Fish, published by Davy Koech Foundation and the African Gospel Church, 1995 (2<sup>nd</sup> Print, 1996) at page 129, under the heading “*Keetuum Saandet*” the authors state as follows:-

*“Sometimes a wife would be unfaithful to her husband and would become pregnant by another man. When unfaithfulness was discovered there might be angry words, and her husband would send her away. Normally she would go to home of her parents. A practice had to be performed before her husband would be allowed to take her back. This was called “Keetuum Saandet”. It would be the husband who would bring the accusation against his wife (No case would be brought against a husband who has committed adultery). The village elders would meet with the adulterous wife present. After the elders had met and the woman had admitted her guilt, a heifer was paid to the husband of the adulteress by her family. The father of the guilty woman would send another village elder to the husband to arrange for the delivery of the heifer. Members of the family of the guilty wife would drive the heifer to the home of the wronged husband. If the woman had brothers, her parents would take it. If the heifer died later, it did not have to be replaced. The heifer could be delivered either before or after the birth of the baby, depending on when arrangements were completed. The child belonged to the husband of the wife – not the natural father; the child became a part of a reunited family (underlining mine).”*

*Sometimes a wife would leave her husband for several years and as a result of her adultery she would have given birth to a child fathered by another man. After “keetuum saandet”, that child would belong to the husband of the adulterous wife. “Keetuum saandet” was done to make peace so that the adulterous wife could come back to her husband and live with him again. She could be forgiven once for this offence. If she had committed adultery but there had been no words about the incident, there was no need to pay the heifer” (emphasis mine).*

“*Keetuum Saandet*” ceremony was meant to reconcile a couple who had separated but were willing to be reconciled. The ceremony could not be imposed on an unwilling party. For instance, the family of a woman could not force a woman return to her husband if she did not wish to. Similarly, a husband could not be ridden roughshod to accept back an adulterous wife. As stated by the authors of the treatise referred to hereinabove, “*keetuum saandet*” ceremony could only be performed once where an adulterous wife could be accepted back by her husband. The ceremony was not intended for the purposes of reconciling an adulterous wife who had conceive several children out of wedlock. Further the “*keetuum saandet*” ceremony could only be performed for a wife who had been separated from her husband for a short period of time and not where the wife had literally gone for the matrimonial home never to return. The ceremony presupposed that both parties were willing to be reconciled.

In this appeal, the deceased left the appellant’s rural home before the appellant had built a house for her.

She was childless. She left the homestead of the appellant in 1974. She gave birth to three sons, the youngest of whom was born in 1994. The respondent, her other living son, was born in 1984. No suggestion has been made that the appellant sired the three sons of the deceased. Indeed the respondent concedes that the appellant was not his biological father. The respondent however testified that since the appellant was married to the deceased under the Kipsigis Customary Law and since the appellant had not divorced the respondent in a ceremony under the Kipsigis Customary Law called “*Keepet-lool*” or “*Kiilgee*”, then for all intents and purposes, the respondent and his younger brother were the sons of the appellant – and that is the reason, it was adduced in evidence by the respondent, why the respondent and his younger brother named themselves after the appellant upon undergoing the traditional circumcision ceremony. They both assumed the names “*Arap Mutai*” which belongs to the appellant.

The respondent however concedes the deceased made no effort to return to her matrimonial home until a few weeks before her death. Evidence was adduced by the respondent how the appellant spurned all efforts to be reconciled with the deceased before her death. No “*keetuum saandet*” ceremony was therefore performed. The ceremony of “*keetuum saandet*” could not be performed once one party involved has died. The ceremony could only be performed during the lifetime of the two people concerned. Upon the death of one party, then the situation would remain the way it was immediately prior to the death of the party concerned.

Having re-evaluated the evidence adduced in this case, it is clear that the deceased during her lifetime never considered herself to be the wife of the appellant. She left the home of the appellant in 1974 never to return. When she took her identity card she called herself “*Ester Chepkemoi Mokwony*”. She did not call herself “*Korir*”. “*Mokwony*” is her father’s name. She therefore chose to be called by her maiden name. The deceased took her identity card after leaving the appellant’s home. She had the choice of referring herself by the name “*Korir*”. But she did not. She made no effort to be reconciled with the appellant. Even when her first born son Cheruiyot – died, she did not raise any hustles by insisting that the appellant buries her said son. She buried her son in the parcel of land where she was residing. Upon re-evaluating the evidence, it is clear that the respondent and his maternal uncles egged the deceased to be reconciled with the appellant when he realised that the deceased was on her deathbed. This reconciliation effort bore no fruit. The appellant was not in a position to be reconciled with the deceased. No “*keetuum saandet*” ceremony could therefore be performed.

Can the appellant therefore be compelled to bury the deceased in the absence of “*keetuum saandet*” ceremony? After carefully reconsidering the evidence adduced in this case, I do not think so. Although no divorce ceremony was performed under the Kipsigis Customary Law, the appellant and the deceased were practically divorced. If the appellant were to file a divorce cause during the lifetime of the deceased, such a divorce would have been granted by any court of law on the ground of desertion. By filing this case, the respondent wants to bestow upon the deceased and the appellant a marital status that had ceased to exist. All the children born to the deceased were sired by other men. The deceased expressed her desire not to be reconciled with the appellant by her action. She made no effort to return to her matrimonial home. She did not wish to return to the appellant as his wife.

Having found that the customary marriage between the appellant and the deceased had ceased to exist by virtue of their thirty one (31) years separation, where should the deceased’s body then be buried? The witnesses who testified in this case on the Kipsigis Customary Law acknowledged the fact that the burial of the dead is a recent phenomenon under the Kipsigis Customary Law. Prior thereto, the dead used to be thrown in the bush to be devoured by wild animals. The burial of the dead among the Kipsigis evolved due to the influence of Christianity. The witnesses agreed that the Kipsigis Customary Law was, and has never been, static. The Kipsigis Customary Law evolved, and still evolves, to address situations which were not anticipated or which had not arisen at the time the said custom became an accepted norm. Similarly certain customary practices were discarded when the Kipsigis in general embraced Christianity.

According to the evidence adduced before the trial Resident Magistrate’s Court, the deceased did not express a wish where she would have liked to be buried. She cannot be buried at the farm of the appellant because no house had been erected for her by the appellant before she deserted the said matrimonial home. The duty to bury the deceased will therefore fall to her person representatives. As was held by

Lakha J. A. in Sakina Sote & Anor –vs- Mary Wamaitha C.A. Civil Appeal No. 108 of 1995 (Nairobi) (unreported) at page 3 of his judgment:

*“The first and foremost question for consideration, in my judgment, is the question of whom does the duty to bury the deceased fall? More than fifteen years ago in the case of James Apeli and Enoka Olasi – vs- Prisca Buluku Civil Appeal No. 12 of 1979 (unreported) this court considered the law applicable. In his judgment Sir Eric Law at p. 6 stated:-*

*“The English Law on the subject is succinctly summarised at p. 57 of Williams & Mortimer on executors administrators and probate (London, Stevens and Sons, 1970) as follows:-*

*“The Corpse*

*There can be no property in a dead body. A person cannot dispose of his body by will. After death the custody of the body belong to the executors until it is buried ... (emphasis supplied)*

*Directions as to burial*

*If the deceased has left directions as to the disposal of his body, though these are not legally binding on his personal representative, effect should be given to his wishes as far as this is possible .. The duty of disposing of the body falls primary on the executor (emphasis supplied)”*

*Later at p. 6 in his judgment, he continued:-*

*“Are these principles which can be applied in Kenya? In my judgment yes, though of course, they have to be modified to suit local conditions”.*”

In this case it is clear that that duty and responsibility is not the appellant’s. The duty and responsibility belongs to the respondent. The appellant was a stranger to the deceased at the time of her death. Their marriage had ceased to exist. Both the appellant and the deceased moved in with their lives. The appellant got married and had children. Similarly the respondent had children with other male partners. Even if I were to find that the appellant’s Kipsigis Customary Law Marriage with the deceased still subsisted at the time of the deceased’s death, I think to uphold the argument by the respondent that the Kipsigis Customary Law compels the appellant to bury the deceased, would be retrenching a Customary Practice which is repugnant to this courts sense of Justice and morality. The appellant cannot be compelled to take responsibility of a person whom he was separated from for over thirty one (31) years. The respondent should bury the deceased where he deems fit. He should not include the appellant in the equation relating to the deceased’s last place of abode.

The upshot of the reasons stated hereinabove is that the appeal is allowed. The judgment and decree of the trial resident magistrate delivered on the 1<sup>st</sup> of November 2005 is hereby set aside and substituted by an order of this court dismissing the respondent’s suit with costs. The appellant shall have the costs of this appeal. The sum of Kshs 40,000/= that the appellant had deposited in court shall be refunded to him.

DATED at NAKURU this 22<sup>nd</sup> day of February 2006.

L. KIMARU

JUDGE