HL v DN & another (Civil Appeal E125 of 2022)
[2023] KEHC 2350 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E125 OF 2022

REA OUGO, J

MARCH 9, 2023

BETWEEN

HL ..... APPELLANT

AND

DN ..... 1ST RESPONDENT

ML ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. Dennis Ogal (SRM) delivered on 16/12/2022 in Kimilili PMCC No 224 of 2022)

JUDGMENT

1. This appeal challenges the decision of the trial magistrate made in regards to a burial dispute. The main issue before the subordinate court was who had the right to bury the deceased and the place of burial.

2. The appellant approached the lower court vide a plaint dated 29th November 2022 claiming that the appellant and the 1st respondent are the biological parents of LV ('the deceased'). The appellant claimed that he had married the 1st respondent they were blessed with 2 children. The deceased was their 2nd child. They then separated and the 1st respondent married the 2nd respondent, her current husband. The deceased passed away on 21st November 2022 in Somalia after an Alshabab attack and his body is at Defence Forces Memorial Hospital Mbagathi. The 2nd respondent presented himself as the father of the deceased and tried claiming the body of the deceased knowing too well that he was not the father. According to the appellant the respondents have no rights to bury the deceased at Kavaywa area.

3. The respondents in their statement of defence denied the allegation that the appellant was ever married to the 1st respondent. According to the respondents, the 1st respondent got pregnant with the appellant's child in 1992 while she was staying at her parent's home. The 1st respondent delivered the child while married to the 2nd respondent in 1993. It was the 1st respondent who took care of the

deceased. The deceased attended [Particulars Withheld] Primary School from 1997-2006 in Webuye Town and lived with his grandmother AM. During the weekends and school holiday, the deceased would stay with the 1st respondent at her Kaburengu/Kivaya home. It was the deceased's maternal uncles that took charge during the deceased's circumcision. In 2013, he was recruited to the Kenya Defence Force and named the 1st respondent as his next of kin. Immediately following his employment, he constructed a brick house for the 1st respondent and thereafter built his house next to his mother's house. The deceased is married to YPW with whom he had one child with.

4. The respondents averred that the appellant did not contribute anything to the deceased's life and has just popped up from nowhere claiming that he should bury the deceased in a strange land. The deceased never lived in Kimilili and the appellant is a total stranger to the deceased. The 2nd respondent averred that he had no claim in the body of the deceased and no problem if the deceased is buried next to his house that is near his mother's house. The respondents claim that the deceased's wished that he be interred at his homestead where he built his house.

5. The appellant relied on the evidence of 3 witnesses to prove its case while the respondent called 5 witnesses. The summary of the appellant's case was that he was the deceased's biological father and he should bury his son according to the Bukusu customary law. The respondents' case on the other hand was that the appellant was not in the deceased's life and that the deceased was close to his mother and maternal relatives who took care of him.

6. The trial magistrate after considering the evidence and submissions of the parties found that the appellant did not call an expert witness to guide the court on the applicable customary laws and traditions. He also found that the respondent did not pay the minor's maintenance and that the deceased was very close to the respondents as he had built his home within the respondent's home. The trial magistrate therefore dismissed the appellant's suit.

7. The appellant dissatisfied with the finding of the subordinate court filed his memorandum of appeal dated 19th December 2022 on the following grounds:

    1. That the learned magistrate erred in law and fact by descending to determine issues not pleaded and canvassed by parties at trial hence arriving at a wrong decision.

    2. That the learned magistrate erred in law and fact by failing to find and hold that it was the appellant who was entitled to inter the remains of the deceased as per the Bukusu customs and ethnic community the deceased belonged to and was affected by.

    3. That the learned magistrate erred in law and in fact by making a decision in favour of the respondents that exceeded the weight of the facts, evidence as adduced by the appellant hence arriving at a biased decision.

    4. That the learned magistrate analysis of the case, the finding and the decision was marred with the biasness, was full of assumptions and lacked legal facts and evidence in support of his decision.

    5. That the learned magistrate descended into raising and determining issues that were never raised or canvassed by the parties during trial hence occasioning an injustice to the appellant's case.

    6. The Learned Magistrate finding was against the weight of evidence on record.

    7. That the learned magistrate erred in law and in fact in finding that in cases of burial disputes the wishes of the deceased person, should be given effect.

8. That the learned magistrate erred in law and in fact in ruling against the appellant's suit.

8. The appeal was canvassed by way of written submissions and both parties have complied by filing their rival submissions. The appellant identified 2 issues for determination by this court: firstly, whether the deceased had expressed his wishes on where to be buried; and secondly, who would be responsible for the arrangements of the burial.

9. In regards to the first issue, it was submitted that the evidence of Pw5 was that the deceased had expressed that he should be buried at his place or his grandmother's. The appellant urged the court to consider the words 'his place' to refer to the deceased's ancestral home. They relied on the case of Apeli v Buluku Ksm CA No 12 of 1970 where the court found that the most important rule is that the wishes of the deceased though not binding must so far as possible be given effect to.

10. On the second issue, they contend that the strong familiar relationship with the 1st respondent cannot be relied upon to grant an advantage over the appellant to inter the body particularly to a place that he does not belong. The deceased being a Bukusu is entitled to be buried according to Bukusu Customary law. The trial magistrate therefore disregarded provisions of section 3 (2) of the *Judicature Act*.

11. The respondent in their submission argued that grounds 1 & 2 of the memorandum of appeal were not supported by any evidence and that the appellant was on a fishing expedition. The appellant did not prove the existence of custom and therefore the trial magistrate was not obligated to address the question of Bukusu Customary law when there was no evidence adduced on the customary law touching on the said subject. They relied on the case of Nyariba Nyankomba v Mary Bonareri Munge [2010] eKLR where the court stated:

> "In cases resting purely on customary law, it is absolutely necessary that experts versed in the custom be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claims remain unproved."

12. The trial magistrate cannot therefore be faulted for taking into account the right to bury by the party that was close to the deceased during his lifetime in the absence of evidence on customary law. The respondent relied on the cases of Samuel Onindo Wambi v COO & Another Kisumu Civil Ap No 13 of 2011 (2015) eKLR, SAN v GW [2020] eKLR and Morris Odawa v Samuel Ochieng Auma [2019] eKLR.

13. It was further submitted that the appellant being the deceased's father did not automatically give him rights to bury the deceased. They cited the case of George Ooko Okoth v Edith Apiyo Ochieng [2021] eKLR where the court stated:

> 72. The fact that the deceased was the appellant's son is not in dispute but that in itself does not give the appellant an automatic right to bury him even if Luo customary law dictates so, which custom he did not attempt to prove as required and to the required standard of balance of probabilities. The appellant did not tell the court why he kept off his son who was now over 18 years and could make decisions on his own whether to return to his father or not and why the appellant made no efforts to return the deceased to his ancestral home so that he could establish an abode. Simply put, the appellant had cut links with the deceased and never made efforts to bond with the deceased who was now an adult and could not simply be told by his mother not to associate with his biological father.
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> 73. For all the above reasons, I find and hold that the trial magistrate did not err when she allowed the respondent case, directing her to bury the body of the deceased Austine Otieno Ooko.

14. They also submitted that the appellant's submissions were misleading on the evidence of Pw5.

15. As the first appellate I have to re-evaluate the evidence before the trial court as well as the judgment and arrive at my own independent judgment bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand (see Selle & another v Associated Motor Boat Co. Ltd.& others1 [1968] EA 123).

16. The main issue that was raised by the appellant in his plaint was that the respondents want to bury the deceased in their Kivaya home contrary to Bukusu customs and beliefs. He also alleged that the respondents had no rights whatsoever to bury the deceased. Therefore, the first issue would be to consider any evidence presented by the appellant touching on the Bukusu customary law. Since the appellant's case rested on customary law, he was requiredto provide evidence to establish the customary law, just as he would demonstrate the relevant facts of his case. The court in Ernest Kinyanjui Kimani v Muira Gikanga [1965] E.A 735, the court held that:

> " As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case."

17. HL (Pw1) testified that if he allowed the respondents to take the deceased's body he will be haunted by spirits as it is acting against the Bukusu customs. NL (Pw2) the appellant's step mother, testified that the deceased's spirit will haunt the family if the deceased's s not buried according to the Bukusu customs and traditions. HWM (Pw3) who was the appellant's cousin testified that the deceased was a member of the Babulo clan and must be buried in their clan's land. His testimony was that the deceased cannot be buried in the 2nd respondent's land for reason that the 2nd respondent belongs to another clan and the spirits of the deceased will haunt them and their children.

18. There is no dispute that the appellant is the biological father of the deceased. According to the evidence by Pw1, Pw2 and Pw3 the deceased being a member of the Babulo clan must be buried according to Bukusu customs and traditions for fears that they would be haunted by spirits. I have considered that Pw1 was the biological father of the deceased and his expression to bury his son. However, it was not clear whether the appellant's 2 relatives, Pw1 and Pw2, they were experts on Bukusu customs on burial rites. There was also no evidence led by the appellant to show that the deceased in his lifetime had observed any of the Bukusu customary laws in the cause of his life. In any evident, other than customary law a person claiming a right to bury must also demonstrate to the court that he was close to the deceased person during his or her lifetime. The Court of Appeal in Muumbo & another v Muumbo & 2 others (Civil Appeal 373 of 2018) [2022] KECA 568 (KLR) (28 April 2022) (Judgment) stated:

> " .... Our take on the Virginia Edith Wamboi Otieno case [supra], is that customary law only recognizes persons who are closest to the deceased as having the right to bury a deceased person namely, a spouse, children, parents, siblings either alone or in collaboration with each other. The above right is however not automatic. Case law assessed herein demonstrates clearly that a person claiming a right to bury a deceased person must be one who has

demonstrated to the satisfaction of the court to have been close to the deceased person during his or her lifetime."

19. Pw1 testified during cross examination that he parted ways with the 1st respondent in 1993 and did not know the nursery or primary schools attended by the deceased. He only went to the deceased's school once in 2007 to check on him. Pw2 testified that the deceased did not build a house in Temba Temba and studied where his mother and maternal uncles were. Pw3 testified that since 1987 he has only seen the deceased 5 times.

20. The respondents on the other hand established that they took care of the deceased and were close. DN (Dw1) testified that the deceased did not have a relationship with his father. The deceased growing up lived with her, his maternal grandmother and uncles. She testified that she struggled to have the deceased get an education and secure his job while the appellant remained a deadbeat father and offered no support. The deceased built his permanent house in Kivaywa where Dw1's home is situated. ML (Dw2) testified that he would support Dw1 in regards to where she wanted to bury the deceased. He testified that all the burial arrangement were being made by the deceased's mother and would support her in her decision regarding place of burial. AM (Dw3) testified that she is the deceased's maternal grandmother. She lived with Dw1 when she was pregnant and when she got married. Dw1 lived with her son up until he was of the school going age. The deceased attended [Particulars Withheld] primary school in Webuye and lived with Dw3. The deceased attended secondary school at [Particulars Withheld], Webuye. Dw3 was surprised to learn of the suit instituted by the appellant claiming burial rights yet he has never made any contributions towards the deceased in his lifetime.

21. CN (Dw4) testified that she married the deceased in 2015 and he took her to the respondents' home and told her that that was his home. YPW (Dw5) testified that she is the deceased's wife and was living with him in Nakuru. The deceased told her that although the appellant was his father, he was raised by the 2nd respondent. She recalled that the deceased had indicated to her that he should be buried at his place or his grandmother's.

22. The appellant has urged the court to consider the testimony of Dw5 to mean the ancestral home. However, this is not the case as the deceased had built his place or house next to his mother's home. Dw4 testified that when she married the deceased, he took her to the home in Kivaywa. The evidence led by the respondents reveal that the deceased was not raised up practicing the customs of his clan (Babulo clan). On the contrary, the deceased was abandoned by his father who cut him off.

23. The deceased elected to build his home where his mother had been married as opposed to his ancestral land or as per any requirements of Babulo clan. The reason for this is clear; he was not close with his father. In fact, Pw1 and Pw2 testified that the deceased was born in 1989 while Pw3 testified that he was born in 1987. They did not know the schools he attended and did not interact with him much. Pw1 had kept hands off approach towards the raising of the deceased in every aspect of his life. He allowed the deceased to be raised by the respondents and maternal relatives who were not members of the Babulo clan without any issues. The appellant's concern to have the deceased observe the cultures of the Bukusu's comes late in the day.

24. The deceased was close to the respondents and had built his house on the respondents' land. There is no evidence that he wished to be buried in his home in Kivaywa or at his maternal grandmother's home. The trial magistrate cannot therefore be faulted for finding that in the circumstance of the case, the burial rights rests with the persons that were close to the deceased, that is, the respondents.

25. In conclusion, having considered the evidence that was before the trial magistrate as well as the submissions of the parties, I find that the appeal is unmeritorious and is consequently dismissed.

26. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 9TH DAY OF MARCH 2023.

R.E. OUGO

JUDGE

In the presence of:

Mr. Akenga For the Appellant

Mr. Nabiba For the Respondent

Wilkister C/A