REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 110 OF 2019

FLORENCE MAWEU.....1ST APPELLANT

STEPHEN MULINGE.....2ND APPELLANT

-VERSUS-

BERNARD MUTINDA MAWEU

REBECCA MAWEU

KIMANTHI MAWEU.....RESPONDENTS

(Being an Appeal from the judgement and decree of the Chief Magistrate's Court at Machakos (Hon. Kenei, RM) delivered on 15th August, 2019 in CMCC No. 399 of 2019)

BETWEEN

FLORENCE MAWEU.....1ST PLAINTIFF

STEPHEN MULINGE.....2ND PLAINTIFF

-VERSUS-

BERNARD MUTINDA MAWEU

REBECCA MAWEU

KIMANTHI MAWEU.....DEFENDANTS

JUDGEMENT

1. By a plaint dated 24th July, 2019, the Appellants herein instituted a suit against the Respondent herein in which they sought a permanent injunction against the Respondents prohibiting them from interfering with the burial of the late **Joseph Maweu Wambua** (the deceased) at Muuo Village, Kavutha Location in Makueni County.

2. According to the Appellants, the 1st Appellant is the 3rd wife while the 2nd Appellant is a son of the deceased who died on 20th June, 2019. The 1st and 3rd Respondents are also son of the deceased while the 2nd Respondent is the 1st wife of the deceased and the mother of the 1st and the 3rd Respondents.

3. It was pleaded that before his death the deceased had resided with the 1st Appellant in Muuo Village, Kavutha Location, a property which he had bought and had title documents after being neglected and chased away by the 2nd Plaintiff (sic) and the 2nd Wife. According to the plaint, the Appellants had at all times single-handedly taken care of the deceased and even paid all his medical bills and at no time had the Defendants cared to visit him at the hospital nor took care of his medical bills.

4. Following the death of the deceased, a burial permit was duly issued to the 1st Appellant's daughter, **Mary Kasiva Maweu**, on 21st June, 2019. Before his death, the deceased had expressed to the 1st Appellant his intention to be buried at his homestead where they had resided continuously for seven years in Muuo Village, Kavutha Location in Makueni County. The said wish was made and or communicated verbally on various instances to various persons when they visited the deceased at his home and at the hospital during the deceased's illness. It was averred that a meeting was subsequently held on 23rd June, 2019 attended by the larger family where it was agreed and recorded that the deceased would be buried at his desired place in Muuo Village, Kavutha Location on 29th June, 2019. In fulfilment of the deceased's wish and the said decision, the 1st Appellant made burial plans and set the burial for 29th June, 2019 at the deceased's proposed resting place. However, during the preparation of the program, the 1st Respondent, refused the inclusion of his name in the said program prompting the family chairman, **Harrison Muthoka Wambua**, to halt any further plans and postponed the burial date. It was pleaded that during the subsequent meeting, the Respondents intimated that the 2nd Respondent, being the deceased's first wife under the Kamba Culture ought to have the body of the deceased laid to rest at her homestead and not at the 1st Appellant's homestead. It was however the Appellants' contention that there is no such law under the Kamba Customs that bar a person from being buried where he expressly stated and that this is a blatant attempt to defeat the wishes of the deceased.

5. It was disclosed that a subsequent meeting was planned for 21st July, 2019 where the larger family unanimously decided to involve the clan elders in attempting to settle the dispute and have the deceased buried. However, save for the Plaintiff her and her family the rest boycotted the meeting. Notwithstanding that, the meeting resulted in the clan writing a letter to the Chief expressing its disappointment with the failure by the other two families to attend the meetings and transmitting its decision that the deceased be buried in Muuo Village on 27th July, 2019. However, before the burial, the Respondents vowed to waylay the cottage and bury the body of the deceased in their homestead contrary to his wishes thereby occasioning another postponement of the burial. The Appellants lamented that these unnecessary delays in the burial of the deceased have occasioned enormous economic loss to the Appellants who had at all times footed the bills which continue to accrue. It was these actions that provoked the suit.

6. In response to the suit, the Respondents filed a defence and counterclaim in which they denied the existence of any verbal wish by the deceased to be buried by the 1st Appellant as a ploy calculated to deny the Respondents the right to bury the deceased as per Kamba Customs being the 1st and 2nd wives having stayed with him since 1960s, residing in the matrimonial home established by the deceased where all deceased family members have been buried.

7. According to the Respondents, the Appellants reside on a plot in a market hence not suitable for the burial of the deceased and the Appellants refused to co-operate with the other family members (wives) in the burial arrangements. Instead they wanted to bar the other wives from participating in the burial and the prayers sought were meant to bar them from attending the burial.

8. It was averred that the deceased had three wives and the 1st Appellant was the 3rd wife. Further the deceased has a matrimonial home at Ngaku Village Mutyambua Location where all the family members of the deceased had been buried.

9. The Respondents therefore prayed that the Appellant's claim be dismissed with costs and that there be an order that the remains of the deceased **Joseph Maweu Wambua** be buried at his matrimonial home at Ngaku Village, Mutyambua Location, Makueni. They also sought the costs of the counterclaim.

10. The Appellants called 6 witnesses in support of their case.

11. According to PW1, **Florence Mwiki Muweu**, the 1st Appellant herein, she was the 3rd (last) of the deceased and got married to the deceased in 1978. Since 1997, she has been residing with the deceased at Kavutha, Muo Village. It was her evidence that the 1st Respondent is a son of deceased while the 2nd Respondent is one of the deceased's wife. Who resides at Mutyambua, Gakuu Village. According to her due to disturbances by the said Respondents, she was unable to stay at Gakuu Village as they would chase her when the deceased was away at work. Upon ceasing to work, the deceased returned home but due to the bad attitude towards him by the Respondents who would deny him food, the deceased decided to move from Mtyambua with the 1st Appellant though he would return there for family meetings. However, the other wives never visited him at Kavutha after they moved there in October, 2010.

11. It was the 1st Appellant's evidence that in 2009 while residing with her at Kavutha, the deceased fell ill and had ulcers and later developed hiccups and it was the 1st Appellant took care of him and paid for his medical bills. During the time of his illness, the deceased expressed his wish severally to the Appellant and to his son, the 2nd Appellant to be buried at Kavutha and eve identified his burial site. Since no one else took care of him, the deceased did not want anyone else to bury him.

12. It was averred that after the deceased passed away on 20th June, 2019, on 23rd June 2019 a meeting was held at Mutyamba to discuss the deceased's wishes and as a family it was decided that the deceased be buried at Kavutha on an agreed date. However, following the stopping of the burial a meeting was held on 21st July, 2019 attended by the Appellants and other clam members and one **Stephen Kilonzo**, the vice chairman of the clan at which meeting it was agreed that since the deceased had expressed his wish regarding where he wanted to be buried, he should be buried there.

13. The 1st Appellant therefore prayed that she be allowed to bury the deceased in accordance with the deceased's wishes.

14. In cross-examination the 1st Appellant confirmed that she was the last wife and that the first two wives were alive. She further confirmed that all her children were born at Gakuu where the deceased's father, mother and child, **Kanini**, were buried in the presence of the deceased. It was the 1st Appellant's case that the deceased had 5 brothers and 1 sister to whom he expressed where he wanted to be buried though the said persons were not her witnesses in the cased. While the 1st appellant had 6 children, only the 2nd appellant was of the deceased's wishes.

15. PW2, Stephen Mulinge, the 2nd Appellant testified that he a son of the deceased and was born at Mutyambua but later relocated to Kavutha in 2010 due to disturbances by the other family members. It was his evidence that it was him who made the decision to move out and he called his mother and informed her and later the deceased who said that he would not be left behind as he wished to go since no one would take care of him. It was his evidence that the deceased did not have cordial relationship with the other members of the family and since their relocation, the other wives and children never visited the deceased even once. He testified that the deceased bought 1 and ½ acres at Kavutha where they built a house.

16.The 2nd appellant stated that he was very close to his father and he and his siblings visited the deceased when he was hospitalised. He testified that it was him and his mother who cared for the deceased when he was at the hospital suffering from ulcers and hiccups till be passed on on 20th June, 2019. According to him, **Harrison**, the deceased brother was called when the deceased passed away while **James Kisyula**, another of the deceased brothers was present when the deceased was rushed to the hospital. At that time the deceased was aged 81 years.

17. According to the 2nd Appellant upon being admitted to the Hospital on 18th February, 2019, the deceased said that he wished to be buried at Kavutha and reminded the 2nd Appellant of an incident when the other wives were called but did not respond. After that date the deceased kept reminding him and on 23rd June, 2019, there was a meeting with clan elders in the presence of all the wives and some children where the 2nd Appellant informed them of the deceased's wishes to be buried at Kavutha and though the elders agreed, the others disagreed.

18. On 24th June, 2019, the 2nd Appellant was informed to start planning for the burial by the clan chairman for 29th June, 2019 and a committee was formed for the purpose which came up with a program only later to be told that the 1st Appellant did not want his name in the programme and the burial was postponed. On 21st July, 2019, another meeting for the children of the deceased was held at which it was decided that the deceased be interred at Kavutha. The 2nd Appellant therefore prayed that he be allowed to inter the deceased as per his wishes.

19. In cross-examination, the 2nd Appellant stated that disclosed that he had no witness from the clan. He admitted that he was born at Mutyambua and that they have an ancestral home there where they cultivate their portion of land. In Kavutha, no one else resides apart from their family. According to him, the deceased informed him of his wishes verbally when they were alone. Later on the deceased called eight others as well as the 2nd appellant and expressed his wish where he wanted to be buried though he had informed each of them individually.

20. PW3, **Kanua Kitheko**, the deceased's cousin testified that he used to visit the deceased quite a lot and severally at the hospital. According to him, he met the deceased at his home three times and each time, the deceased told him that he wished to be buried at Kavutha. He also confirmed that the Respondents never visited the deceased at Kavutha or at the Hospital. It was his view that the court should direct that the body of the deceased be buried according to the deceased's wishes.

21. In cross-examination, PW3 the deceased was from the same clan as his mother's clan. According to him, he was summoned by the deceased when the deceased was nearing his death in the presence of the Appellants.

22. PW4, **Joseph Kinyanjui Sila**, PW5, **Benjamin Musyimi** and PW6, **Wambua Mwikya**, all testified that the deceased expressed his wishes to them that he wanted to be buried in Kavutha.

23. On their part the Respondents called 4 witnesses in support of their case.

24. DW1, **Rebecca Maweu**, the 1st Respondent adopted her statement in which she stated that she as the 1st wife to the deceased and that they got married in 1960 or thereabout after which the deceased established their matrimonial home in his ancestral land located in Mutyambua where his other relatives of many generations lived and were buried. In the 1960's the decease d married **Anna Maweu** and built a home for her within the same compound and they continued living as co-wives.

25. When the deceased was working in Meru, he married **Florence Mwiki Maweu**, the 1st Appellant in 1983 or thereabout, who was born and raised in Meru by Meru parents. The 1st Appellant was brought to the same compound to DW1's house where DW1 took care of her as her daughter since the 1st Appellant was younger than some of DW1's children. The 1st Appellant got her first and 2nd children while staying in DW1's house after which the deceased bought land in Kavutha and settled the 1st Appellant but used to visit and stay in the three homesteads as long as he wished.

26. According to DW1, the deceased retired from active service at the beginning of the year when he started ailing while living with the 1st Appellant and the 1st and 2nd wives used to visit him and console him. However, in mid-June, when the 1st and 2nd wives visited the deceased at the 1st Appellant's home, the 1st Appellant denied them access to the homestead and they did not see the deceased and they instead visited the deceased at the hospital where he was admitted. On 21st June, 2019, they received the news that the deceased had died.

27. It was DW's evidence that later the Appellants started making burial arrangements without consulting her, the deceased's brothers, the deceased's second wife or other members of the extended family. Upon being invited by the family chairman, **Harison Wambua Muthoka**, the deceased brother for a family meeting to resolve the differences, the 1st Appellant and her family declined to attend DW1's compound and the meeting was instead held at a neutral place in the presence of the Appellants where it was resolved that the deceased be buried at DW1's home as the 1st wife. However, the 1st Appellant refused to accept the resolution and instead maintained that she would proceed with burial arrangements and bury the deceased at her home without involving the others. A further meeting on 6th July, 2019 resolved that the deceased be buried in a piece of land which he had left for himself when he was distributing his land to his three wives which land was part of the ancestral land in Mutyambua but the decision was rejected by the 1st Appellant. A further meeting to resolve the issue was called for on 21st July, 2019 and all attended save for the 1st Appellant and the clan resolved that the deceased be buried at DW1's home in accordance

with Kamba Customary Law and practice dictates.

28. While making funeral arrangement, it was learnt that the Appellants were making parallel arrangements to bury the deceased at Kavutha Location and she declined to surrender the burial permit

29. According to DW1, at no time did the deceased inform her or any other member of the family that he wished to be buried at a different place other than at her home as dictated by their culture. It was her evidence that had that been the case, she would have readily honoured his wishes. According to her since all the deceased's relatives who has pre-deceased him are buried at his ancestral home, it would be a dishonour to let his remains rest in a foreign and lonely land. He insisted that it would be a serious curse to the family were the deceased to be buried by the 3rd wife, the 1st Appellant and that the 2nd wife supports the burial of the deceased at the home of DW1.

30. DW2, **Harrison Wambua Muthoka**, the younger brother of the deceased testified that the deceased married DW1, the 1st wife in the 1960's and the 2nd wife after 15 years and took her to the same compound where DW1 was where he built a house for her. Later in mid-1980's while the deceased was working in Meru, he married the third wife, the 1st Appellant and stayed with her at Meru and later took her to his ancestral land where the 1st Appellant was housed in DW1's house. Later the deceased built a house for the 1st Appellant in the same homestead.

31. In 2014 the deceased bought a parcel of land in Kavutha Location where he built a home for the 1st Appellant and moved there. When the deceased started ailing in February, 2019, DW2 and other family members used to visit him and the deceased also used to visit his 1st and 2nd wives. DW2 also visited the deceased in hospitals where he was admitted. On 20th June, 2019n at around 9.00pm he was called by his younger brother, **James Kisyula**, and was informed that the condition of the deceased had deteriorated and while on his way to the Hospital was informed that the deceased passed away on reaching the Hospital. He then proceeded to obtain a permit for taking the body of the deceased to the mortuary, tried to get in touch with the 1st and 2nd wives of the deceased and upon failing to get them, decided to take the body to Kilome which was closer home and he was given a permit by the police to proceed and collect the body which they took to Kilome Mortuary. At the mortuary he was informed that only the police could only issue them with a burial permit and upon proceeding to the police they were informed that since the deceased passed away in a hospital they could not issue the permit. The following day, in the company of the Appellants they obtained a burial permit from the village headman. Later they agreed with the 2nd Appellant to transfer the body to from Kilome Mortuary to Machakos Mortuary and for that purpose, DW2 handed over the body to the Appellants and his brother James for that purpose.

32. According to DW2, on 23rd June, 2019 he summoned all his brothers and the family to start burial arrangements but the 1st Appellant declined to attend a meeting at the home of the 1st and 2nd wives of the deceased. They then decided to hold the meeting at the home of a cousin at which the 1st Appellant and her two sons attended as well as the 1st and 2nd wives with their sons. However, since the 1st and 2nd wives maintained that the deceased be buried in their home while the 1st Appellant wanted to bury him, the family failed to agree on the place of the burial. On 6th July, 2019, the whole family met and resolved that since the 3rd wife had decided to agree to the deceased being buried at the home of the 1st wife, he should be buried in some portion of the ancestral land which he had saved for himself when distributing his land. However, the 1st Appellant refused the proposal. On 21st July, 2019 the deceased's brothers requested all the three wives to allow them bury the deceased in a neutral place and the clan was called to assist. The clan resolved that the deceased be buried in the 1st wives' home in accordance with the Kamba Customary Law dictates.

33. According to DW2, during the burial of the deceased's daughter, **Kanini**, in May, 2019 at his home in Mutyambua, the deceased went from the 1st Appellant's home and while showing or pointing the burial site for the daughter pointed out to them where he and his wives ought to be buried in front of the 1st wife's house at Mutyambua where their father, mother and siblings are buried. It was his evidence that the deceased never stated a wish to be buried at the home of the 3rd wife.

34. According to his evidence, in accordance with Kamba Customary Law, the 1st wife is the leader and any other wife follows. It was his evidence the deceased was not only his brother but also his friend and as the Appellants' witnesses testified. He was present throughout the time when the deceased was unwell and visited him in hospital and at home. It was his evidence that the deceased informed him that the land he bought at Mutyambua be sold to settle the hospital bills. According to him the hospital bills were catered for by NHIF and it was untrue that the deceased abandoned his Mutyambua home but to the contrary he used to cultivate his land at Mutyambua and even ate at his 1st and 2nd wives' homes though he had divided portions of land to the three wives and left a portion in his name in any case of anything.

35. In cross-examination, DW2 insisted that the deceased used to visit all the three wives and died on his way to the hospital and was pronounced dead on arrival. It was his evidence that the deceased's burial permit was granted to Mary, the 1st Appellant's daughter. He stated that each wife has her own homestead. He reiterated that the clan resolved that the deceased be buried by the 1st wife in accordance with the Kamba Customary Law, which he was conversant with having served as a chief. It was his evidence that unless the deceased is buried by the 1st wife, the spirits will haunt the rest.

36. DW3, **Anne Munyiva**, also adopted her statement in which she stated that she was married to the deceased in 1968 by which time the deceased had the 1st wife, DW1. According to her, she built her house in the same compound as DW1 and has lived there since then. The deceased married a 3rd wife, the 1st Appellant from Meru when he was working there and brought her to live with DW1 in her house but later moved to Kavutha Location where the deceased bought land and built her a home.

37. It was her evidence that the deceased started ailing early 2019 and passed away on 20th June, 2019 and after his death a family dispute arose regarding his place of burial with the 1st Appellant insisting on burying him to the exclusion of the two other wives. As a result of failure by the family to agree, the larger family and the clan decided that he be buried in a separate land on the ancestral land which he had not given to any of his wives.

38. It was DW3's view that the deceased ought to be buried in the 1st wife's compound in accordance with the demands of the cultural practices. It was her evidence that the deceased had not moved away completely but used to go back and sleep and they used to visit him. However, their relationship with the 1st Appellant was not good and the 1st Appellant had left them out in the burial process.

39. In cross-examination, DW3 stated that the deceased had reserved land for himself but should be buried in the 1st wife's compound.

40. DW4, **Benjamin Muthoka**, in his statement stated that he was the Secretary of Ekuua-Mbaa Clan to which the deceased belonged. On 21st June, 2019, they called a clan meeting at the home of the 1st and 2nd wives of the deceased in order to resolve the burial dispute and all the deceased's wives apart from the 1st Appellant and her children attended. However, **Mutinda Maweu**, a son to the deceased as well as the deceased's brothers, **Harrison Wambua**, **Wilson Wambua** and **James Wambua** were present. The clan then resolved that since under Kamba Customary Law a polygamous man is normally buried at the home of the 1st wife, it was decided that the deceased be buried at DW1's home which she shares with the 2nd wife, DW3 as soon as possible to avoid unnecessary accumulation of mortuary charges.

41. In his evidence before court, DW4 stated that he was summoned by the clan chairman to call a committee to discuss issues relating to the deceased and he recorded the minutes of the meeting of 21st July, 2019 which he exhibited wherein it was resolved that under Kama Customary Law even if the 1st wife is dead, the deceased is to be buried in her compound. According to him, they never got any information regarding the wishes of the deceased.

42. According to him, he was not involved in burial plans but was only involved in holding a meeting to bring the wives together. He disclosed that the three wives cannot agree and cannot stay in the same place without security. The clan, he stated, gets involved in cases where the family cannot decide. Though he was not an expert in Kamba Customary Law, his testimony was based on his experience since his grandfather had 7 wives and he was buried at the 1st wife's compound despite the fact that the first two wives had died.

43. At the close of the case, the court having considered the submissions by the parties found in the judgement that though it was stated that the deceased made his wishes to be buried at Kavutha known on several dates at the Kavutha residence and at the Hospital, at Kilome, none of the witnesses to whom the same was made known recalled specific dates. Similarly, the circumstances surrounding the expression of the said wishes were not outlined by the witnesses particularly in light of the deceased's ill-health and lack of the evidence as to the deceased's mental state at the time. Accordingly, since the witnesses did not go into the specifics of how and when the wishes of the deceased were made, and before whom, the court found itself unable to believe that the deceased had made express wishes of his preferred place of burial.

44. The court also noted that though the said witnesses visited the deceased separately, their witness statements were the same yet the setting ought to have been different. The court was therefore not persuaded that the deceased made an oral will as to where he wished to be buried. The court also wondered why the deceased only chose to make wishes known to the Appellants maternal cousins and friends and not his brothers particularly DW2 whose closeness to the deceased was never challenged.

45. In light of the said evidence, the court found that Kamba Customary practices were applicable to the circumstances of the case and directed that the deceased be buried at his ancestral land at Ngaku Village, Mutyambua Location, Makueni.

46. Dissatisfied with the said decision, the Appellants appeal before this court on the following grounds:

> **1. <u>THAT</u> the learned Magistrate erred in law in entering judgement in favour of the Respondents against the Appellants without having due regard to the evidence before Court.**
>
> **2. <u>THAT</u> the Learned Magistrate erred in fact and in law in entering Judgement in favour of the Respondents against the Appellants in misconstruing Section 33 of the Evidence Act as far as dying declarations are concerned.**
>
> **3. <u>THAT</u> the Learned Magistrate erred by failing to appreciate that the Appellants had proved its case on a balance of probabilities which was uncontroverted by the Respondents.**
>
> **4. <u>THAT</u> consequently, the Learned Magistrate's decision occasioned a miscarriage of justice.**

48. For reasons whereof the Appellants pray for Orders that this appeal be and is hereby allowed and that the judgement of the Honourable Kenei (RM) delivered on 15th August 2019, delivered at Machakos Law Courts, Machakos in CMCC No. 399 of 2019 and all consequential Orders be and is hereby set aside and that the counter claim in CMCC No. 399 of 2019 be and is hereby dismissed. They also sought orders that the costs of this appeal be and are hereby awarded to the Appellants.

49. In this appeal, based on the Appellants relied on the decision of the Court of Appeal in **<u>Samuel Onindo Wambi –vs- COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR</u>** where it was held that:

> **"A deceased person's burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed…A person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. The appellant's claim to bury the deceased at Masaana is only being driven by custom. The fact that he was the deceased's first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case…In this case, besides the fact that given the father and his family's treatment of the deceased he is not deserving of the right to bury the deceased's remains, we find no good or compelling reason to go against the deceased's wishes. Consequently, we find no merit in this appeal and we**

accordingly dismiss it. We order that each party bears its own costs."

50. The Appellants also relied on **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another [2004] eKLR** where it was held that:

> **"In the social context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationship touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."**

51. Further reliance was placed on **Ernest Kinyanjui Kimani vs. Mulru Gikanga and Another [1965] EA 735** and **Nyariba Nyankomba vs. Mary Bonareri Munge [2010] eKLR** for the position that:

> **"Time and again it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs 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."**

52. It was submitted based on **Selle & another –vs- Associated Motor Boat Co. Ltd. & Others [1968] EA 123** that this being a first Appeal the duty of this Honourable court will be to look into the evidence afresh and re-evaluate the same and make its own findings.

53. It was submitted that during trial evidence was led in the form of sworn affidavits and orally during the hearing before the trial magistrate as to the wishes of the Deceased and of pertinence on his wish in relation to his place of his interment upon his death. In addition to the foregoing, the Appellants and four other witness being PW1 to PW6 all testified that indeed the aforesaid wishes were made known to them on diverse dates by the Deceased at his Kavutha Residence and at the hospital at Kilome. According to the Appellants, during trial, this evidence was not controverted by the Respondents during Cross-examination nor during submissions, a fact that can be ascertained by the proceedings that form part of the Record of Appeal, there was no evidence to controvert what the appellant testified concerning the mode in which the wishes were made known to the witness who appeared before the trial court. It was therefore submitted that the Appellants proved that the wishes were indeed made known to them on a balance of probability.

54. It was therefore contended that it is inconceivable for the trial magistrate to find that the evidence adduced by the Appellants as not sufficient as it did not go into specifics, such as date, time and setting, it is our submission that the witnesses who testified under oath as to the wish having made to them despite not having specifics of time and date, offered sufficient evidence that ought to have been controverted by the Respondents during trial, this was never done and as such the evidence adduced bears a lot of weight and ought to have been considered by the trial court. To the Appellants, the trial magistrate in arriving at the impugned decision failed to offer consideration to the foregoing and on that premise we urge this Honourable Court to find that the position taken by the trial magistrate in dismissing the suit was not warranted and consequentially reverse the trial court's determination and substitute with this court's determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to prayers that were sought in the amended plaint.

55. It was submitted that since in the present case the deceased had three (3) wives and one would generally conclude that all three have a close chain of relationship to the deceased, it is important for the Court to approach this issue based on the relationship between the deceased and the three wives to establish whom he was closest to. To the Appellants, on the premise that although marital union forms the closest chain of relationship in relation to the interment rights, the relationship between the Deceased and the wife should be considered as a critical cornerstone in determining the issue closeness. It was submitted that during the course of trial, the Appellants led evidence that the relationship between the deceased and the Respondents and their children had completely deteriorated, it is the said hostility that made the Appellants to move away from Mutyambua and the deceased opting to follow and relocate with them permanently living with the appellants for 9 years up to the time he met his death with episodes of intermittent visits to the other wives. This was further augmented by the fact that when the deceased fell sick, only the Appellants had taken care of him at home and in the hospital and only other few relatives would visit them and none of the Respondents and or the witnesses called upon to give evidence on the Respondents behalf adduced evidence on their presence during this trying times. It is the Appellants who cared for the Deceased and footed the bills up until his untimely demise.

56. In this regard the Appellants relied on **R.L.A vs. F.O & another [2015] eKLR** wherein the Court held as follows: -

> **"This court's conclusion is that the deceased and the Plaintiff were close friends. Their relationship bore LL. However, during the time of need, it is deceased's mother and siblings who were closest to her. This is why she called DW 2 to collect her from under a tree after visiting the Coptic Hospital. It is also the reason why when she fell seriously sick, she called her mother who provided help by sending her sister DW 3 to nurse her at the hour of her most need. During her final moments in this world, 28th – 31st May, 2015 it is DW 2 and DW 3 who were beside her. The Plaintiff was away in Eldoret doing business. The Plaintiff must have had his own house where he was living with his two (2) other sons and would be visiting the deceased as and when he felt the need to. There was no marriage by cohabitation. It was a relationship or friendship of convenience. This court saw all the witnesses testify. The testimonies for DW 1, DW 2 and DW 3 were not only consistent but also firm and unshaken. The court believed them."**

57. It was therefore submitted that the closeness between the deceased and the Appellants can clearly be seen vide the actions of the deceased, as during his time of need, he placed his complete and unfettered reliance on the Appellants and this evident as the Appellants were the ones present during his final moments. Dumbfoundingly, despite the Respondents' having knowledge that the deceased was ailing, they were unbothered to even visit the deceased and/or contribute to his treatment, this explains why the deceased never even made his wishes known to them.

58. It was therefore submitted that the trial magistrate failed to consider the conduct of the Respondents which clearly depicts that they were not close to the Deceased. Had the trial magistrate considered this uncontroverted fact she would have arrived at a different finding.

59. According to the Appellant, by dint of the fact that none of the Respondents and or the witnesses called upon to give evidence by the Respondents gave contrary evidence as to who took care of the deceased during his sickness and who paid the medical bills in hospital. To this end, the court was urged to find that the Appellants had proved to be of fundamental proximity to the deceased and therefore have the colour of right of burial ahead of any other party and the Respondents lost the onus to claim the right to bury the deceased. In this regard the Appellants cited the case of **Edwin Otieno Ombajo-v- Martin Odera Okumu [1996] eKLR**, wherein it was held that :-

> **"the husband's right to bury his deceased wife's body may be superseded by the deceased's wishes if the husband's behavior renders him undeserving to bury the remains of his wife."**

60. It was contended that patently in light of the foregoing, it is blatantly evident that the trial Magistrate did not consider the evidence as she was required to do. That is why her judgment is at variance with the evidence tendered and should not be upheld.

61. As regards the evidence on applicability of the Kamba Customary Law, it was submitted that the Respondents' case is hinged on notion that under Kamba Customary Law, a deceased man is buried at his ancestral home. It is not in question that the Deceased belonged to the Kamba Community and a member of the Mbaa Ivia-Ekava Clan, and that Kamba Customary Law would be generally applicable when it came to issues of interment of the deceased, it is also not in dispute that the deceased had three wives. These are not issues for determination. The point of contention and that necessitates the present appeal is the fact that, it is trite law that any party seeking to rely on customary law is ostensibly mandated to aid the Court in ascertaining its existence, as the trial court is presumed not to be vast in the field, and in doing so the party asserting its existence is required to establish its veracity by adducing evidence and or calling upon expert witnesses to offer guidance. Since it was the Respondents asserting its existence, they were obligated to bring themselves within the ambit of the principle laid down by the court of appeal of Eastern Africa in the case of **Ernest Kinyanjui Kimani vs. Mulru Gikanga and Another (1965) EA 735**. It follows therefore that, such assertions that such Kamba Customary Law exists in our view and that of the Court should be considered as suspect, wherefore its force and rationality have to be proven by he who alleges. That custom must be proved; and so it is for the defendants to prove the existence of such law by calling experts in those customs or otherwise show the existence of the practice, absent which this court should disregard that allegation.

62. According to the Appellants, whereas **the Respondents claimed the right to bury the Deceased is espoused under Kamba customary law and during trial the 1st and 2nd wives gave their reasons for wanting to bury the deceased, none of them gave reasons related to Kamba Customary Law. The other two witnesses appeared to contradict themselves. Even though they claimed the right under Kamba Customary Law, DW-2 stated that he had been shown a place where the deceased had pointed out that he wanted to be buried. He did not specify whether this is the same 1st wife's homestead. On the other hand, DW-4 stated that the deceased should be buried at the 1st wife's homestead because that had been the practice since a long time ago. He later confirmed that if his own father wished to be buried at a different place, he would honour his wishes. It was therefore submitted that the Respondents did not provide any such evidence and or avail an expert in court to ascertain that which they asserted as being Kamba Customs.**

No oral evidence was adduced and as such, there was no expert witness called to explain the various customs which the parties herein depended upon in making their submissions to the trial court.

63. Although there is no doubt that under section 3(1) of the ***Judicature Act*** the Subordinate Courts have jurisdiction to hear and determine issues that arise from African Customary Law, the Respondents having failed to fulfil their obligation and having not tendered any evidence augmenting their Customary Law assertions, none of the evidence adduced at the hearing was good or proper evidence. According to the Appellants, for the trial court to have had a proper appreciation of the customary law relating to any customs of a certain community, there is need for expert evidence to be called to that effect. Without such evidence, and though the trial court made reference to guiding authorities, the trial court could not effectively interrogate the issues at hand as each case is unique on its own merits. However, the Magistrate ignored the inability of the Respondents to establish the existence of the Custom, despite trial court having offered cognizance to the fact that customary law is not found in statutes and that court have to rely on evidence of experts to ascertain certain customs and or practices, and the holding in the case of **Sakina Sote Kaittany & Ano. vs. Mary Wamaitha (1995) eKLR**.

64. It was therefore the Appellants' case that the trial magistrate in arriving at the impugned decision failed to offer consideration to the foregoing and on that premise this Court should find that the position taken by the trial magistrate in dismissing the suit was not warranted and consequentially reverse the trial court's determination and substitute with this court's determination, that the Respondents did not prove the existence of the pleaded customs and that Judgement ought not to have been issued in their favour.

65. It was contended that the Appellants' case is hinged on desires expressly stated by the deceased during his lifetime and shortly before he passed on. The Appellants were witnesses to this oral expression together with the other four witnesses who were called upon to testify during the trial. The question therefore that the Trial Court was tasked with was the determining whether the deceased expressed such a wish and not the circumstances surrounding the expression of the wishes by the Deceased. To the Appellants, the wishes of the deceased as to where he is to be buried upon is death can be categorized as an oral will. In this regard the Appellants relied on section 9 of the ***Law of Succession Act.***

66. In this regard the Appellants relied on the decision of **Musyoka, J** in **Re Estate of Evanson Mbugua Thong'ote (Deceased) Succession Cause 2519 of 1998 [2016] eKLR** which stated that:-

> **"An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will…The other consideration is that the utterance ought to be made in the presence of two or more persons."**

67. In light of the evidence adduced, it was submitted that there was an oral expression where the deceased stated that he would desire to be buried in Kavutha upon his death. The oral wishes of the deceased were further expressed during his lifetime and during his sickness, that is

in the period between February and June, 2019. No evidence was adduced of the existence of any written will made before or after the making of the oral will and which is in conflict with the oral will and further that the deceased died shortly after making his wishes known to the Appellants and the witnesses PW-3 to PW-6. In support, the Appellants cited R***e Rufus Ngethe Munyua (deceased) Public Trustee -vs- Wambui (1977) KLR 137*** and ***Beth Wambui and Another -vs- Gikonyo and others (1988) KLR 445*** for the holding inter alia that: -

> **"if the witnesses present during the making of an oral will make a record of the terms of the oral will, so long as it meet the requirements of Section 9, of being made in the presence of two or more competent witnesses and the maker dies within three months, then that oral will would be considered valid."**

68. According to the Appellants, the Respondents do not per se deny the existence of such a wish but state that they never heard the deceased express it, the Respondent never raised the issue of the capacity of the deceased to make a will at the time he is alleged to have stated his will, no evidence was adduced to support this proposition. In the absence of any such evidence, it was submitted that the trial court had no option but to take recourse to the presumption under Section 5(3) of the ***Law of Succession Act***.

69. To the Appellants, the trial court improperly impugned judgment *suo moto* and in complete disregard to the fact that the existence of such a wish has not be controverted and misconstruing the provisions of Section 5(3) of the law of Succession Act, holds that given the Deceased between January 2019 till his death on 20th June 2019 had been unwell on and off necessitating at times he be rushed to hospital and without witnesses stating the circumstances surrounding the Deceased's making his wishes, the court is unable to determine what the mental state of the Deceased was. To them, it is uncontroverted that the Deceased was suffering from ulcers and hiccups, whereof it is inconceivable for the trial magistrate to impugn the mental state of the Deceased as this are illnesses that don't necessarily inhibit the Deceased's testamentary capacity. The testamentary capacity of the deceased having not been challenged and having not been an issue for determination by the trial court, it follows that the trial court misdirected itself in addressing the said issue based on section 10 of the Act.

70. It was therefore contended that it was improper for the trial magistrate to categorize the wishes of the deceased as a dying declaration under Section 33 of the **Evidence Act** and castigate the Appellants of having not explained the circumstances surrounding the expression of the wishes by the Deceased, yet the wishes of the deceased were expressed in the form of an Oral Will and the said wishes had met all the prerequisites as outlined by the ***Law of Succession Act***.

71. It was therefore the appellants'' case that from the foregoing submissions, they have demonstrated the merits in the appeal and prayed that the appeal be allowed with costs.

72. The Respondents on the other hand relied on **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others [2018] eKLR**, **Johnstone Kassim Mumbo& 2 Others – vs- Mwinzi Mumbo & Another HCCA No 7 of 2016 [2018] eKLR**, **Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others High Court Civil Appeal No. 14 of 2017(2017) eKLR** and the holding of **Bosire, J** in **Virginia Edith Wamboi Otieno vs. Joash Ochieng Ouko & Another Civil Case No. 4873 of 1986 (1987) eKLR**.

73. According to the Respondents, it is undeniable that this being a first appeal the court has the power to look at the evidence a fresh and re-evaluate it and to make its own conclusions but should take account of the fact that it has neither seen nor heard the witnesses and should make due allowances in this respect. They however, submitted that the evidence tendered on the deceased's wishes regarding the place of his interment were divergent and therefore the court could not clearly ascertain which of the parties were to be believed. The trial magistrate was therefore right when after evaluating the divergent and contradictory evidence by both sides held that the deceased wishes on the place of his burial could not be ascertained. The evidence of the Appellants consisted of statements signed on the same date with the amended plaint a clear indication that the Appellants witnesses disregarded their original statements to accommodate the arrangements whose effect was to wrongly portray the Respondents as having had a bad relationship with the deceased.

74. It was contended that the evidence tendered by the Appellant's witnesses was from distant relatives while the Respondents called close relatives including the deceased's own brother **DW 2**.

75. It was submitted that the Appellants submission on the issue of closeness is a clear misapprehension of law as closeness to the deceased was clearly defined in **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another [2004] eKLR.**

76. To the Respondents, the closeness defined above is in legal terms and not physical closeness. In this case all the three wives were lawfully married to the deceased and therefore had equal right to bury the deceased.

77. Although the Appellant strenuously attempted to paint a negative picture of the deceased relationship with the Respondents it was admitted by the Appellants that the deceased had lived with the Appellants at his ancestral land from the time he married the 2nd and 3rd Appellants until he settled the 3rd Appellants until he bought a piece of land where he settled the 1st Appellant. Indeed, it was admitted that the deceased upon moving to the 3rd wives matrimonial land he continued to visit his other wives and to cultivate the ancestral land. No evidence was tendered that the 2nd and 3rd Respondents were undeserving to bury the deceased.

78. It was submitted that the trial magistrate having rightly found that there was no sufficient evidence to clearly ascertain the deceased wish on where by whom he was to be buried he proceeded to rely on Kamba customary law based on the decision in **Dinah Adhiambo Oyier vs.Hellen Achieng & 3 Others [2017] eKLR** . They also relied on **Morris Odawa –vs- Samuel Ochieng Auma (2019) eKLR** citing Court of Appeal decision in **Edwin Otieno Obanjo –vs- Martin Ondera Okumu Civil Appeal No. 2009 of 1996 [1996] eKLR**.

79. According to the Respondents, the assertion by the Appellants in their submission that Kamba customary law must be proved by an expert witness currently lacks legal basis and this submission was based on ***Johnstone Kassim Mumbo Case***.

80. In the present case all the wives had equal right to bury the deceased and the 2nd and 3rd Appellants lived in the matrimonial home at

Ngaku Village Mutyambua location Makueni which is the deceased's matrimonial home and where the deceased's other close relatives live. All other deceased close relatives are buried there as testified by both the Appellants and the Respondents.

81. It was submitted that **DW 2** did testify and stated that as a retired chief he was old enough to be an expert in Kamba customary law. His testimony regarding the burial place of a polygamous Kamba man is clearly supported by the judgment in **Johnstone Kassim Mumbo case** above.

82. Considering the foregoing submission, the Court was urged to uphold the findings and judgment of the Honourable Trial Magistrates and dismiss this appeal with costs.

Determination

83. I have considered the submissions of the parties in this appeal.

84. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

85. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

86. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

87. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

88. In this case, the learned trial magistrate found that though it was stated that the deceased made his wishes to be buried at Kavutha known on several dates at the Kavutha residence and at the Hospital, at Kilome, none of the witnesses to whom the same was made known recalled specific dates. Similarly, the circumstances surrounding the expression of the said wishes were not outlined by the witnesses particularly in light of the deceased's ill-health and lack of the evidence as to the deceased's mental state at the time. Accordingly, since the witnesses did not go into the specifics of how and when the wishes of the deceased were made, and before whom, the court found itself unable to believe that the deceased had made express wishes of his preferred place of burial.

89. The court also noted that though the said witnesses visited the deceased separately, their witness statements were the same yet the setting ought to have been different. The court was therefore not persuaded that the deceased made an oral will as to where he wished to be buried. The court also wondered why the deceased only chose to make wishes known to the Appellants maternal cousins and friends and not his brothers particularly DW2 whose closeness to the deceased was never challenged.

90. These were all findings of fact by the learned trial magistrate. Based on the evidence adduced before the Court the Learned Trial Magistrate was entitled to make findings of fact based on the material before her and her observation of the witnesses who testified before her. In **Sheldon Shadora vs. Stanley S. Shadora Civil Appeal No. 210 of 1995**, the Court of Appeal held that:

> **"Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him…A Court of Appeal will not normally interfere with the finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did…An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him."**

91. In my view, based on the evidence that was adduced before the Learned Trial Magistrate, she was entitled to arrive at the findings of fact in the manner he did. Whereas it was the Appellant's case that the deceased was neglected and chased away by the other two wives forcing him to move out, the evidence of the 2nd Appellant was that it was in fact him who made a decision to move out of the ancestral home due to what the appellants termed as disturbances by the other two wives of the deceased. Going by that evidence, it is clear that the decision to vacate the ancestral home originated from the 2nd Appellant and not the deceased. That therefore casts doubt on the Appellants' case that the idea to move out of the ancestral home was the deceased's.

92. Consequently, the factual findings by the learned trial magistrate, based as they were, on the evidence adduced before her, cannot be interfered with in this appeal. Nothing has been placed before me in this appeal to convince me that the said findings of fact were based on no evidence or misapprehension of evidence or that the Learned Trial Magistrate demonstrably acted on wrong principles in reaching the findings she did. There is therefore no justification to warrant interfering with the Learned Magistrate's findings on fact and I decline to do so.

93. As was held by the Court of Appeal in **Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; Vol. 1 KAR 982; [1986-1989] EA 183:**

> **"Unless it is shown that the learned Judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts."**

94. Having found the evidence of the appellants' unsatisfactory to prove the deceased's wishes, the matter became akin to what the court dealt with in **Johnstone Kassim Mumbo & 2 Others – vs- Mwinzi Mumbo & Another HCCA No 7 of 2016 (2018) eKLR** where it was held that:

> **"The totality of the evidence is that it is one's word against the other on the diverse statements that the deceased is alleged to have said with regard to his wishes and place of burial. Since this court cannot conclusively determine what the deceased said to who about his wishes the court shall rely on Kamba Customary law…This court cannot rely on the will as it is contested nor can it rely on verbal statement of the deceased's family members and elders, they are diverse wishes which this court is unable to confirm or verify."**

95. In light of the said findings, the learned trial magistrate proceeded to find that in those circumstances Kamba Customary practices were applicable to the circumstances of the case and directed that the deceased be buried at his ancestral land at Ngaku Village, Mutyambua Location.

96. In **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others (2018) eKLR** the court held that:

> **"The main issues for consideration in a burial dispute is the wishes of the deceased if any had been expressed and the kind of relationship the contestants had with the deceased…Those are more relevant to burial dispute than question for disposal of material assets and related claims and things. They, rather than the succession regime should prevail in determining questions of burial…In an article LEGAL APPROACHES TO THE BURIAL RIGHTS OF A SURVIVING WIFE BY DR REMIGIUS N. NWABUEZE Amicus Curiae Issue 73 Spring 2008 it is opined that;**
>
> > **"Most western legal systems recognize the right of a surviving wife to control the disposition of the remains of her deceased husband. In the USA, the surviving wife is the appropriate person to determine the time, manner and place of burial of her deceased husband. Although she is expected to take the wishes of other members of the family into consideration, her own sepulchral wishes are controlling and paramount in the event of a conflict.**
> >
> > **In this way the prioritization of a widow's right to bury her deceased husband reinforces her pre-eminent status as the closest person to the deceased (at least formally). It also gives acute expression to the binding character of marriage and the precedence that it attracts in family relations. But the American widow is not given priority at all cost and in all circumstances. For instance, a widow's priority is subject to the burial wishes of her deceased husband. If the decedent's sepulchral wishes are ascertainable and clear, American courts will enforce them. Accordingly, the widow's priority is**

lost where the deceased husband gave particular directions regarding the disposition of his remains. Whether these mortuary directions were actually given and 2what their contents are would always remain questions of fact and the answer would depend on the surrounding circumstances of each case."

97. Although the Appellants heavily relied on the ***Law of Succession Act***, in **James Apeli & Enoka Olasi vs. Priscilla Buluku Civil Appeal No. 12 of 1979 [1985] KLR 777,** it was held by the Court of Appeal that:

> **"There can be no property in a dead body. A person cannot dispose of his body by will. After death the custody and possession of the body belong to the executors until it is buried… If the deceased had 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 that is possible."**

98. That was the same position in **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others [2018] eKLR** where it was held that:

> "**It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy**."

99. It follows that the cases arising from succession disputes relied upon by the appellants were irrelevant to the mater that was before the learned trial magistrate since the succession regime is not necessarily the same was the burial regime. That was the position of the Court of Appeal in **Ougo & Another vs. Otieno [1987] KLR 364,** where it was held that:

> **"Section 66 of the Law of Succession Act, Cap 160, Laws of Kenya deals in its essentials with succession while the issue here is not to whom a grant of letters of administration should be made."**

100. Accordingly, what the court has to consider is whether the deceased left directions as to the disposal of his body but such directions are not legally binding on his personal representatives. In this case there was no evidence that there is a person who is a personal representative of the deceased. In those circumstances as was held in **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another (2004) eKLR** thus**:**

> "**In the social context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationship touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.**"

101. In this case the deceased had three wives. The 1st Appellant was the 3rd wife while the 1st wife is the 2nd Respondent. As the 1st Appellant, the 2nd Respondent and the 2nd wife rank together they are deemed to be legally closest to the deceased. However, where it is shown that one of those persons had fundamental proximity in law to the deceased, that person would have the colour of right to bury the deceased. In the absence of concrete evidence that the deceased was closer to the 1st Appellant than the other wives, I agree with **Cherere, J** in **Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others High Court Civil Appeal No. 14 of 2017 [2017] eKLR** that where the people who are legally closest to the deceased:

> **"have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this case, for this court to intervene and direct as to the deceased's place of burial."**

102. That was also **Bosire, J's** view (as he then was) in **Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another Civil Case No. 4873 of 1986 [1987] eKLR** where he held that:

> "**It is my judgment and so declare that the 1st defendant and also the plaintiff have the right under Luo custom, to bury the deceased and to decide where the burial is to take place. However, because the two have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this case, for this court to intervene and direct as to the deceased's place of burial**."

103. It is not in doubt that customary law is one of the sources of law in this country and as was held in **Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others High Court Civil Appeal No. 14 of 2017 [2017] eKLR**:

> "**In the absence of a will regarding preferred burial site courts have upheld the traditional customs so long as these were not repugnant to justice and morality or contrary to written law."**

104. Similarly, in **Morris Odawa vs. Samuel Ochieng Auma [2019] eKLR** citing Court of Appeal decision in **Edwin Otieno Obanjo vs. Martin Ondera Okumu Civil Appeal No. 2009 of 1996 [1996] eKLR** where it was held

> "**…if African customary law is not caught up by the qualifications under section 3(2) of the Judicature Act then it must be given effect by the courts and must be applied in deciding cases before it but according to 'Substantial justice'**."**"**

105. Although the Appellants submitted that there was no proof of the Kamba Customary Law, in **Sakina Sote Kaittany & Ano. vs. Mary Wamaitha [1995] eKLR** the Court of Appeal held that: -

> **"The Parties in this case are Africans and therefore the court will take judicial notice of such African Customary Law as may be applicable but subject to the provisions of reg. 4 as set out above. The difficulty remains how are these customary laws to be established as facts before the court. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of previous judicial decision or where the Customary Law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court or in a Magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case."**

106. It follows that where a finding has been made by a court as to the existence of a particular customary law, that finding may be relied upon in subsequent cases. The Kamba Customary Law in this case has been codified in case law in **Johnstone Kassim Mumbo& 2 Others – vs- Mwinzi Mumbo & Another HCCA No 7 of 2016 [2018] eKLR** where it was held that:

> **"This court concurs with trial court, that there is no statutory law on burial; however, there is case –law and by virtue of the principle of stare decisis ought to persuade or bind this court on determination…The totality of the evidence is that the Akamba customary law prescribes ancestral home and woman at her matrimonial home unless, all families members agree to the alternative site where one bought land and lived."**

107. It was therefore held by the Court of Appeal in **Michael Musau Kitivo vs. Maurice Ndambuki Kitivo Civil Appeal No. 233 of 2007 [2008] KLR 119** that:

> **"Section 82 of the Constitution of Kenya clearly permits the application of customary laws relating to burials, among other matters and in the absence of any other provisions relating to burial, the Kamba Customary Law was the relevant applicable law. The learned Judge erred by declining to consider the Kamba Customary Law."**

108. In this case it has not been contended that Kamba Customary Law relating to burial is repugnant to justice and morality.

109. In this case, the learned trial magistrate directed that the deceased be buried at his ancestral land at Ngaku Village, Mutyambua Location, Makueni. She however, did not direct who is to bury the deceased. Consequently, while I dismiss the appeal, I hereby direct that the body of the deceased, **Joseph Maweu**, be released to the 2nd Respondent, **Rebecca Mueni Maweu**, **Anna Maweu** and **Florence Maweu**, the 1st Appellant herein either jointly or to any one of them for burial at Ngaku Village, Mutyambua Location, Makueni. In order to ensure that the same proceeds peacefully, I direct the Officer in Charge of the local police station to ensure that peace prevails during the said ceremony.

110. In the circumstances of this case, and considering the relationship between the parties herein, there will be no order as to costs of this appeal. In other words, each party will bear own costs.

111. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 9th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Mukuha for the Appellant

Mr J. M. Kimeu for Mr Tamata for the Respondent

CA Geoffrey