



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 76 OF 2019

JMK.....1ST APPELLANT

BMM.....2ND APPELLANT

-VERSUS-

JMM.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J.D. Karani (RM) in Makindu SPMCC No. 44 of 2019 delivered on 13th September 2019)

JUDGMENT

1. The late **JNM** (*deceased*) died on 17th February 2019 but is still in the morgue because each of the rival parties herein is claiming entitlement to inter her remains. The 1st Appellant is her estranged husband and the 2nd Appellant her son. She was living with the Respondent as husband and wife at the time of her demise. The Appellants' case is that the deceased had not validly divorced the 1st Appellant under Kamba customary law and as such, it is the 1st Appellant who is entitled to inter her remains.

2. The Respondent entered appearance and filed his defence on 22/03/2019. The gist of the defence was that the deceased had validly divorced the 1st Appellant under Kamba customary law after which she was lawfully married to the Respondent under the same customs. Through a plaint dated 21/02/2019 and filed on the same day at Makindu law courts the Appellants

instituted a suit in the lower court against the Respondent seeking the following orders:

- *release of the deceased's remains for burial at their rural home.*
- *a declaration that they were entitled to fully participate in the deceased's funeral arrangements*
- *conduct of a postmortem*
- *cost of the suit.*

3. After the full trial the learned trial Magistrate dismissed the suit with no orders as to costs. She however allowed the 2nd Appellant and his siblings to participate fully in the funeral arrangements.

4. Aggrieved by the said judgment, the Appellants preferred this appeal and raised 7 grounds as follows;

a) **That**, the learned trial Magistrate erred in law and fact by failing to take into account the evidence adduced by the plaintiffs, their witnesses and submissions with regard to Kamba customary law which was adduced by experts.

b) **That**, the learned trial Magistrate erred in law and fact by holding that there was a valid divorce under Kamba Customary Law between the 1st Appellant and the deceased when evidence adduced was to the contrary.

c) **That**, the learned trial Magistrate erred in law and fact when he relied on extraneous and presumptuous matters

to arrive at her findings which matters could not negate the Kamba customary law on marriage and divorce.

d) **That**, the learned trial Magistrate erred in law and fact by arriving at her finding on the existence of a valid divorce when evidence on record by both Appellants' witnesses and Respondent's witnesses pointed to the fact that the necessary customary rites towards validating divorce were not performed.

e) **That**, the learned trial Magistrate erred in law and fact in holding that the deceased was married to the defendant/Respondent whilst evidence on record and her finding was to the effect that the necessary rites were not performed and that a subsequent marriage in Kamba traditions cannot be said to be valid unless there is a refund of dowry which according to the evidence was not returned.

f) **That**, the learned trial Magistrate misdirected herself on issues of law and fact when she based her judgment on irrelevant issues and irrelevant case law and further by relying on write ups which are not judicial precedents to give effect to the principle of stare decisis applied.

g) **That**, the learned trial Magistrate erred in law and fact when she failed to make a finding based on the Kamba customary law and decided the whole case against the weight of the evidence.

5. A summary of the case before the trial court will suffice.

6. **PW1 (BMM)**, is a son of the deceased and 1st Appellant. His evidence was that his mother deserted her matrimonial home in 2008 while his father was in Mombasa and briefly stayed with his uncle JK (*Dw1*). After about 3 days, his mother and 3 of his siblings moved in with the Respondent. His mother did not tell him that she had gotten married to the Respondent but he was aware that she bore children for him. He denied awareness on whether the Kamba rite of divorce was performed.

7. On cross examination, he described his father's homestead as having 4 houses i.e his parent's house, sisters' house, his grass thatched house and a 4th building which had the toilet and bathroom. He denied the existence of a building with a slope roof. That there was an acacia tree but no '*Kilului*' tree and it was about 40 min walk from their home to his maternal uncle's homestead. Further, he said that his paternal grandmother K and uncle N were alive.

8. He was not aware on whether his parents' marriage was dissolved but had information that there was a function at the Respondent's place on 16/02/2019. He was aware that his father was married to LM and the marriage started about 2009-2010. Further, he said that the Respondent was a stranger to him in terms of his mother's marriage and was not aware of the walking distance from his village to the Respondent's village.

9. **PW2 (JMK)**, is the deceased's estranged husband. He testified that he had married the deceased under Kamba customary law but was not living with her at the time of her demise as she had left his home in 2008. That they were not divorced under custom but had just separated. As such, she remained his wife until her death.

10. Upon cross examination, he described the steps he took to formalize his marriage to the deceased under Kamba customary law and said that the distance from his village to that of his in-laws is 1½ kms. Further, he said that there were 4 houses in his homestead i.e his house made of brick and iron sheet roof, his eldest son's house, a jiko kitchen and a toilet with a sloping roof. He said there was no grass thatched house and the tree in the compound was '*mwa*' and not '*kilului*'.

11. It was his evidence that he tried to reconcile with the deceased by involving his family, the deceased's family and chief's office but there was no success. He took his children from the deceased after being advised by the D.O. He said he had good relations with his in-laws but it all changed when the deceased died. He confirmed that after leaving in 2008 the deceased never returned to his home until her demise.

12. In cross examination, he denied receiving the *mbui ya ulee* or seeing the people who claimed to have returned it. According to him, the Kamba divorce proceedings are; *mbui ya ulee* is brought by elders and they plan for a sitting to conduct the proceedings for return of the other dowry. Further that a husband has the right to bury his former wife even where the '*mbui ya ulee*' has been returned and the dowry is still pending. He also said that customarily, a man with children cannot ask for refund of dowry as the woman is still the wife.

13. Further, he said that the *mbui ya ulee* should be given to the man personally but if he is absent, the elders should sit and conduct the divorce proceedings. That, he concentrated on raising his children hence his non-interference with the deceased's marriage to the Respondent. He said that the deceased would have returned to his homestead if she was alive in April 2019. He denied having another wife and said he did not know any Lucy Matheka.

14. **PW3 (TKK)** adopted his statement and said he was conversant with Kamba customs which dictate that divorce proceedings cannot be done without elders.

15. On cross examination, he said that he was an expert in Kamba customs which he learnt from his elders and had been an adviser for 33 years. Among the Kamba, marriage is complete upon payment of 3 goats of *ntheo* and *ntheo* can only be paid once for a woman. In case of marital problems, the woman returns to her parents' home and the man follows to confirm that she arrived safely after which he reports to his people and elders from his side visit the woman's elders to find out the position. He agreed that a woman cannot be forced to stay with a man.

16. He further said *mbui ya ulee* is a goat from the woman's father's *boma* which is taken by the woman and two elders and once it is handed personally to the man by the woman, the divorce is complete and the woman has freedom to get another husband. Where a woman gets a new husband, the woman's father counts the *ngasya*-dowry with the old husband and informs the new husband. A man cannot get a refund of dowry where he has children.

17. **PW4 (James Mutinda Kaveta)**, is a retired teacher. He testified that he was the chairman of the Amutei clan for 40 years and well conversant with the Kamba customs. He said that a woman cannot return *mbui ya ulee* before the parties have a meeting and as such, notice of the impending return should have been given to the Appellant to enable him prepare. He also said that before re-marriage, bride price ought to be returned to the former husband and on the date of return, elders have to be involved and a goat slaughtered.

18. Upon cross examination, he said that he retired in 1997 at 55 years and had inherited knowledge on Kamba customs from his fore fathers. That the 3 goats of *ntheo* signify marriage even without *ngasya*- the dowry payment. As for divorce rites, he said that the woman should first inform her parents that she has left the marriage and the parents inform the in-laws. Once all parties are in the know, the woman sends the goat of separation-*mbui ya ulee* in the company of 2 adult witnesses.

19. If the man accepts the *mbui ya ulee*, the divorce proceedings have started. If he refuses, the woman should return with the goat and elders informed of the reason for refusal. Before return of dowry, the woman is still married to the first husband but a husband cannot ask for refund of dowry if he has been left with the children.

20. A new husband cannot pay *ntheo* but only refunds the dowry under Kamba customs. A new marriage is not recognized if dowry is not refunded to the former husband under a ceremony called *maivano*. A woman cannot leave her parents' home until the former husband accepts the refund and in the absence of parents, the first born son steps in.

21. In re-examination, he said that if the man refuses to surrender the children or refuses the *mbui ya ulee* the significance is that he still remains married to the woman but if there are sufficient reasons, he can be forced to take the *mbui ya ulee* by elders.

The Respondent's case

22. **Dw1 (JKK)**, is the deceased's brother. He knew M as the deceased's former husband. His parents are deceased and he received the deceased's *ntheo*. He said that during the marriage the deceased returned home severally due to marital problems and finally abandoned her matrimonial home in 2008.

23. She left with her 3 children and he gave her a place to farm. Later she informed him that she had found a new husband who then visited the family i.e. Dw1, Dw1's wife and Dw1's grandmother and after deliberations, they asked him to bring 9 goats. He then gave the deceased a white *mbui ya ulee* to take to the 1st Appellant's home.

24. Upon the deceased getting married, the 1st Appellant reported to the chief but he lost the case and the deceased returned to the Respondent. He however took his children and went to live with them in Mombasa. They had tabulated that in case the 1st Appellant returned the children and asked for dowry refund, they would give the refund from the 9 goats. The 1st Appellant never asked for a refund of the dowry.

25. In cross examination, he said that the deceased was the Respondent's wife at the time of her demise and that he had never seen the 1st Appellant at his home until his sister died. That it was his (*Dw1*) grandmother who decided on the 9 goats but the 1st Appellant had only paid the 3 goats of '*ntheo*'. He agreed that it was the 1st Appellant's right to demand a refund of *ntheo* and anything else he gave them hence the reason they asked for 9 goats in anticipation.

26. He also agreed that they did not give notice of the impending return of *mbui ya ulee* and that the deceased was accompanied by her nephews RK (*born in 1988*) and JK, who had finished form 4 in 2008. Further, he said that the woman should be escorted in returning the *mbui ya ulee* but there is no requirement that she be accompanied by elders. He however said that prior to the return of the goat they had called the 1st Appellant on phone to confirm if there was anyone at the homestead.

27. **Dw2 (JKJ)** is the deceased's nephew. He testified that the 2nd Appellant and his siblings (his cousins) would go to his (*Dw2*) father's house whenever they had problems in their home whereupon he would relocate to the maize gala to create room for them. He was 20 years old in 2008. He also adopted his witness statement in which he stated that in the year 2008, together with his cousin RKP, they received instructions from their respective fathers to accompany the deceased as she returned a single white she-goat to the 1st Appellant's home at [Particulars Withheld] village near Mbeteli market.

28. He said they walked all the way from Dw1's homestead to the 1st Appellant's home. In describing the home, he said there were two houses as one approached from the gate i.e. a big grass thatched mud house to the right and a small slope corrugated sheets thatched mud house to the left. In between the two houses and closer to the gate was a '*kilului tree*'. The 1st Appellant, his 2 children, mother and brother were present. The reception was hostile but the deceased bravely tethered the goat to the *kilului* tree inside the 1st Appellant's compound after which they left hurriedly.

29. Upon cross examination, he produced his identity card showing that he was born on 28/11/1988 hence aged 20 years in 2008. That he and his younger cousin Raphael accompanied the deceased to take *mbui ya ulee*. He admitted to not knowing what Kamba traditions depict on *mbui ya ulee*. He was adamant on the names of the people they met at the 1st Appellant's home when they took the goat.

30. He said the deceased spoke to the 1st Appellant and proceeded to tie the goat to the acacia tree close to the gate. Ngwili threatened them with a panga but they did not report to the police. The 1st Appellant and K were only shouting at them. There was

no elder at the 1st Appellant's homestead. He feared for his life and stood at a distance. The insult on him was that he had gone to school but could not use his head.

31. **Dw3 (MMM)**, aged 71 years is the deceased's aunt. She testified that she was conversant with Kamba customs which dictate that a Kamba marriage is valid upon 3 goats being given to parents and that upon separation, a Kamba girl gives her husband *mbui ya ulee* which symbolizes divorce and readiness to re-marry. In case of death before re-marriage, she should be buried by her father. If she remarries, the new husband returns dowry to her parents and the parents return it to the former husband.

32. Upon cross examination, she said that without return of dowry, the new husband cannot be said to be lawfully married to the girl. That dowry has to be tabulated by the family of the former husband and girl's family before refund and in this case, no meeting for such tabulation was held. She also said that in 2014, she assisted the deceased to change her identity card to include the Respondent's surname.

33. She added that a divorce goat is given to a girl by her parents and they can refuse to give it if the reasons for divorce are not satisfactory. She also said that a girl can get someone to take the *mbui ya ulee* due to the animosity in divorce. Further, she said that a notice was not necessary in this case since there was no parent alive.

34. **Dw4 (Ardenson Kimuyu)**, aged 70 years testified that he was conversant with the Kamba traditions which dictate that marriage is confirmed by 3 *ntheo* goats and upon separation, the girl gives *mbui ya ulee* to the husband to signify the end of marriage. *Mbui ya ulee* is taken by the girl herself or any other member of the family and a man who has been left with children cannot claim his dowry back.

35. Upon cross examination, he said since a man who is left with children cannot go for his dowry, the wife belongs to him. A woman who has children without a husband owns the children. However, if one has not remarried she can still be buried by her former husband.

36. If a man does not want his wife, he returns her to her father. *Mbui ya ulee* comes in only when it is the woman who does not want the man. According to custom, if one takes the *mbui ya ulee* alone and leaves it at the compound, the divorce is defined. Thereafter, the woman stays at their home and waits for the man to come and settle the issue. A girl can divorce her husband at any time as long as she takes the *mbui ya ulee*.

37. The Respondent testified as Dw5. He acknowledged that the deceased was initially married to the 1st Appellant. He said he taught the 2nd Appellant from class 6-8 at [Particulars Withheld] primary school and confirmed that the deceased was a committee member at the school. When he married the deceased, the 1st Appellant took away his 3 children and left the deceased with him (Respondent).

38. He never heard anything from him (1st Appellant) again and they never spoke for 10 years. That they visited the chief 2 weeks after their marriage where the deceased and her brothers were called as the 1st Appellant was the complainant. He was never questioned about the marriage for the 10 years that he lived with deceased yet he was being questioned upon her death. He produced the deceased's identity card (*Dexh1*), the post mortem report (*Dexh2*) and birth certificates for his children with deceased (*Dexh a,b*).

39. Upon cross examination, he said that he started co-habiting with the deceased in 2008, about one month after she left the 1st Appellant's home. He denied going to either the chief's or D. O's office or being summoned by anyone. He also denied any sexual relationship with the deceased while she was still married to the 1st Appellant. That he never received any *mbui ya ulee* from his first wife and was therefore still his wife. He took the deceased to the home he lived with his 1st wife and lived with her there until her demise.

40. Further, he said that it was the deceased who raised the children he had with the 1st wife. That he refunded the 1st Appellant's dowry by taking 9 goats to her parents' home and there was a 10th one which was slaughtered. He was told that the 1st Appellant had only paid the 3 *ntheo* goats for the deceased. In re-examination, he said that if he had not abided by the Kamba custom when marrying the deceased, his in laws would be the ones demanding to bury her, and not the Appellants.

41. The appeal was canvassed orally on 01/11/2019 and learned Counsel Mr. Mbindyo and Mr. Mathuva appeared for the Appellants and Respondent respectively.

The Appellants' submissions

42. Mr. Mbindyo argued grounds 1-4 & 7 together. He submitted that in reaching its judgment, the trial court did not address itself to the evidence of the witnesses and especially Pw1's right to bury his mother. He submitted that there was no dispute as to the existence of a customary marriage between the 1st Appellant and deceased. It is the customary divorce that was disputed since the 1st Appellant testified that he did not receive the goat and did not see anyone at his homestead. It was also his submission that notice of the intended return of the goat was never given to the 1st Appellant as customarily required.

43. He further submitted that dowry was never refunded to the 1st Appellant and he (*1st Appellant*) was never invited to discuss the refund of the dowry. That according to the Kamba expert (*Pw3*), elders from both families participate in both marriage and divorce. That the goat of divorce should be given to the husband personally and in the presence of elders from both families. That if a woman dies like in this case, the 1st and 2nd husbands must have met at the time of dowry refund and if she dies before such refund, the 1st husband shall bury.

44. He submitted that Dw1 acknowledged the 1st Appellant's entitlement to dowry refund and that notice of the return of the goats was never issued. That according to DW3, a 2nd marriage cannot be recognized if dowry is not refunded. That according to Dw4, if a girl dies

before return of the goat, the 1st husband buries. He contended that the defence witnesses supported the 1st Appellant's case. He faulted some authorities and write ups relied upon by the learned trial magistrate for being irrelevant.

45. On ground (e), he submitted that longevity of cohabitation and repute, referred to by the learned trial magistrate, were irrelevant in light of Kamba customary rites. It was his contention that the deceased and Respondent were not lawfully married and as such, the 1st Appellant is entitled to bury the deceased. He relied on **C/A Civil Appeal No. 207 of 1995; Esther Mbatha Ngumbi –vs- Mbithi Muloli & 2 others (1997) eKLR** which he submitted had similar circumstances to the current case and was binding on this court.

The Respondent's submissions

46. On the complaint that the learned trial magistrate did not follow the evidence adduced, Mr. Mathuva submitted that a court does not need to follow but to consider the evidence and the judgment shows that all the evidence was considered. He submitted that the real issue for determination is '*who has the right to bury the deceased*' hence making the deceased's marital status at the time of her death cardinal.

47. It was his submission that there is enough evidence on record to rebut the Appellant's position that the goat was never returned. That the evidence of Dw1 and Dw2 was explicit on the issue. That there were other details such as the colour and gender of the goat, the people who escorted the deceased, the time it took to reach the home, the people found at the 1st Appellant's home and the kind of reception received.

48. He contends that the Appellants did not call the people who were found at the homestead, as witnesses, despite their names having been given. He also contends that those people were readily available and had even attended the trial court.

49. He submitted that returning the goat signifies that the divorce is complete as per the evidence of the expert witness (Pw3). That the effect of returning the goat was also reiterated by the Respondent's witnesses. He relied *inter alia* on **Machakos HCPA 303 of 1998; Andrew Manunzyu Musyoka (deceased) (2005) eKLR, Makueni HCCA 12 of 2017; Raymond Kamwanza Ndolo & Anor –vs- Christopher Kiamba Maingi (2018) eKLR and Nairobi HCPA 436 of 2008; In Re Estate of Joseph Muoki Ndivo (deceased) (2019) eKLR**.

50. He submitted that the 1st Appellant's conduct betrayed him and wondered why he (1st Appellant) was not claiming the children born by the deceased and Respondent if indeed the deceased was still his wife.

51. It was also his submission that failure to refund the dowry would not affect the deceased's marriage to the Respondent. That there is evidence of refund of dowry to deceased's family by Respondent and the 1st Appellant is entitled to seek the refund but not the deceased as she is no longer his wife.

52. On the person entitled to bury the deceased, the Respondent relied *inter alia* on **Nairobi HCCC 525 of 2008; Christopher Muthini Mbatha –vs- Florence Mukii Mukita (2008) eKLR** where Hatari Waweru J. held that the deceased was to be buried by the spouse and not children.

53. In rejoinder, Mr. Mbindyo submitted that all the authorities referred to by the Respondent's Counsel were persuasive only but the one he cited was binding. He went on to say that no goat was slaughtered and eaten to signify divorce. That the 2nd Appellant is the deceased's son hence emotionally attached to her.

54. He submitted that Dw1 and Dw2 who supposedly returned the goat were youths and not elders. That the 1st Appellant denied receiving any goat and that return of the goat confirms commencement of divorce proceedings. He wondered whether the 1st Appellant would have gone to the chief/D.O if the goat had been delivered.

Analysis and determination

55. This is a first appeal and this court has a duty to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor. –vs- associated Motor Boat & Co. Ltd & Others (1968) E.A 123**.

56. Having considered the proceedings and judgment of the trial court, the grounds of appeal, the rival submissions and authorities cited therein, it is my considered view that the only issue for determination is whether there was a valid Kamba customary divorce between the deceased and M 1st Appellant. Determination of this issue has a direct bearing on the person entitled to bury the deceased.

57. For questions about divorce to even arise, there must have been a marriage in the first place. The fact of the deceased's marriage to the 1st Appellant under Kamba customary law is not in dispute.

58. With regard to the rites which constitute a valid Kamba customary divorce, the 1st Appellant referred this court to the Court of Appeal decision in the **Esther Mbatha Ngumbi case (supra)** where the following extracts were highlighted;

“...PMM who said that in 1950 he was working with [Particulars Withheld] and knew how to read and write claimed that the Appellant ceased to be his wife under the Kamba Customary Law in 1958 when on 8th October of the same year his dowry to the

Appellant's father comprising of 5 heads of cattle, 10 goats and kshs 503/50 was returned to him at the home of her father in the presence of elders representing him, the Appellant's father and subsequent husband, the late NM. The latter had paid to the Appellant's father the dowry being returned to her first husband, PMM. Thereafter, a 'Mbui ya Ulee' ('Maleo') was slaughtered to signify that PMM and Appellant were no longer husband and

wife and thereby sealing the dissolution of their marriage.....

There never was any dispute that the Appellant had first been legitimately married under the Kamba Customary Law to PMM whom she subsequently left and returned to her parents. According to her, she thereafter got married to the late NM. For her to have been legitimately married to the latter, she had to have her first marriage to PMM dissolved. According to Kamba Customary Law, this could only have been effected by the return of dowry to her first husband by her father and thereafter a goat 'Mbui ya Ulee' ('Maleo') slaughtered and eaten to signify that the two were no longer husband and wife. On this, there was no quarrel."

59. The Appellants' position in light of the above authority and the evidence of their witnesses is that for a Kamba customary divorce to be valid, the following must be fulfilled;

- a) The goat of separation-mbui ya ulee, must be returned by the woman in the company of elders and must be handed to the husband personally.*
- b) There must be prior notice of the impending return of mbui ya ulee.*
- c) A meeting to discuss the dowry refundable should be held and attended by the first husband, his elders, the woman's parents and elders from the woman's side.*
- d) The dowry to be refunded as agreed must be refunded by the 2nd husband through the woman's parents.*
- e) The mbui ya ulee must be slaughtered and eaten to signify dissolution of the marriage.*

60. According to the 1st Appellant, none of the above was done and as such, the deceased never divorced him validly under custom. On the other hand, the Respondent's position is that divorce is complete once the *mbui ya ulee* is returned to the husband by the woman. From the totality of the evidence and all the authorities relied upon by the parties, return of the *mbui ya ulee* has been given a lot of prominence and I will therefore interrogate it before delving into the other requirements.

61. It is not in dispute that the deceased and the 1st Appellant separated way back in 2008. The deceased's brother (*Dw1*) testified that he hosted the deceased after the separation but shortly thereafter, she got together with the Respondent. *Dw1* gave her a white *mbui ya ulee* which she returned to the 1st Appellant's home in the company of her nephews.

62. *Dw2* was one of the nephews who accompanied the deceased to return the *mbui ya ulee*. He was very detailed about all the steps they took, described the 1st Appellant's homestead and even gave the names of the people they found there. In my view, *Dw2* was a very credible witness.

63. It was interesting to note that *Pw1* and *Pw2* contradicted each other on the contents of their own homestead! On one hand, *Pw1* denied the existence of a building with a slope roof but *Pw2* testified that there was a toilet with a sloping roof. On the other hand, *Pw1* said that one of the buildings was his grass thatched house but *Pw2* denied the existence of a grass thatched house in his compound. *Pw1* also said that their gate has an acacia tree while *Pw2* said it was a "Mwaa" tree while *Dw2* said it was "Kilului and/or acacia in cross examination.

64. Facts can be really stubborn and the attempts by *Pw1* and *Pw2* to discredit the description given by *Dw2* worked against them and enhanced *Dw2*'s credibility. Further and as rightly submitted by the Respondent's counsel, the people found at the homestead were mentioned but the Appellant's did not bother to call any of them to controvert *Dw2*'s evidence.

65. I am therefore convinced and agree with the learned trial magistrate that indeed the deceased took the *mbui ya ulee* to Matheka in the company of her nephews and the same was tied on the tree near the gate.

66. As for the requirement that prior notice must be given, the evidence is clear that no such notice was given and *Dw1* admitted as much. He however said the 1st Appellant was called and asked to confirm if somebody was at home. Divorce, whether customary or otherwise is often an acrimonious affair and the question in my mind is; what if the estranged husband refuses to cooperate, becomes perpetually unavailable and frustrates the whole process?

67. Does it mean that the woman will forever be attached to such a man and cannot move on with her life? Where is the justice in that? Two people can never be forced to live as husband and wife against their wishes. My considered view is that such a requirement is repugnant to justice and should not be countenanced. I am guided by the provisions of section 3(2) of the Judicature Act which provides 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 is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay"

Article 159(3) of the Constitution provides:

Traditional dispute resolution mechanisms shall not be used in a way that –

a) *contravenes the Bills of Rights*

b) *is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*

c) *is inconsistent with this Constitution or any written law.*

I find that it's good to follow customs but we should avoid those that cause an injustice to any party.

68. On the issue of refund of dowry, Pw3 and Pw4 were called as experts in Kamba customary law and were in agreement that dowry is not refunded where the husband is left with the children. Pw2 and Dw4 agreed with this proposition but went on to say that the non refund of dowry in such instances means that the woman continues to belong to the man. If indeed that is the position under Kamba customary law, it is my considered view that the same is also repugnant to justice. It is akin to having your cake and eating it! I find the position stated by Pw3 and 4 to be more reasonable.

69. The deceased went with her 3 children when she left the 1st Appellant's home. It is however clear from the evidence that the 1st Appellant went for the children (only) on learning that the deceased had moved in with the Respondent and as such, the 1st Appellant remained with all the children of that marriage. He should therefore not be heard to be insisting

about refund of dowry yet custom bars him from getting the refund. On the flipside, the evidence shows that the Respondent already gave 9 goats to the deceased's brother to serve as refund of dowry if circumstances called for it.

70. About the requirement that a meeting should have been called to discuss the dowry refund, I have already opined that dowry was not refundable in this case thus rendering such a meeting unnecessary.

71. On the requirement that the deceased should have been accompanied by elders to return the *mbui ya ulee*, Dw1 testified that it is not a must that the people escorting the woman be elders and I agree with him. It should be enough if the woman manages to tether the *mbui ya ulee* in the man's homestead in the presence of adults as happened in this case.

72. I say '*manage*' because entering an estranged husband's homestead is a risk to life and limb in itself as the possibility of being attacked cannot be ruled out. In fact, the evidence of Dw2 was that the 1st Appellant and his people were very hostile to them when they returned the goat. He was forced to keep a distance.

73. The **Esther Mbatha Ngumbi** case (supra) stresses that the Kamba customs of divorce must be adhered to before one remarries. In present day Kenya and with the onset of the new Constitution it may not be easy to comply with the minute details of issuing notices, having meetings/elders and slaughtering goats and feasting when taking the *mbui ya ulee*.

The most important thing is the taking of the goat as that is what signifies one's intention.

74. When all is said and done, I am of the considered view that the most important thing in this case is the intention of the deceased and the same was captured very well by the learned trial magistrate. The deceased's actions of separating from the 1st Appellant, returning the *mbui ya ulee*, cohabiting with the Respondent for 10 years, siring children for the Respondent and even changing her identity card details to include the Respondent's name are clear indicators that she was totally done with the 1st Appellant.

75. In any case, the evidence is that apart from going for his children, the 1st Appellant did not make any effort to reconcile with the deceased when they separated and for the whole time that she was with the Respondent. It therefore beats logic that he is putting up such a spirited fight to bury her. His own son (2nd Appellant) said he (1st Appellant) remarried Lucy Matheka soon after the deceased left, yet the 1st Appellant denies it why? He moved on with his life after the deceased left just as the deceased did.

76. It is nowhere recorded that even the 2nd Appellant and siblings at any one time were in touch with their deceased mother, or even visited her. I agree with Justice Waweru Hatari in the case of **Ruth Wanjiru Njoroge –vs- Jemimah Njeri Njoroge & Anor 2004 eKLR** where he stated:

***“The person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. 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.*”**

In this case the Respondent has proved to be 'this person'.

77. The upshot is that the deceased had validly divorced the 1st Appellant under Kamba customary law. Further, the evidence was that under Kamba customs, *ntheo* cannot be paid twice for a woman and all that is required upon remarriage is for the new husband to refund dowry. As much as the 1st Appellant was not entitled to dowry refund in this case, the Respondent had already taken 9 goats to the deceased's family in

anticipation. It is therefore my considered view that the deceased had validly gotten married to the Respondent and the Respondent has the right to bury her.

78. I therefore find that the appeal lacks merit and is dismissed. The judgment of the lower court is confirmed. There shall be no order as to costs.

Delivered, signed & dated this 9th day of December 2019, in open court at Makueni.

.....

H. I. Ong'udi

Judge