



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. 12 OF 2017**

**RAYMOND KAMWANZA NDOLO**

**JANE MUNYIVA MUTISO.....APPELLANTS**

**-VERSUS-**

**CHRISTOPHER KIAMBA MAINGI.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. D. Karani (RM) in Makindu PMCC No. 374 of 2017 delivered on 17<sup>th</sup> January 2018)*

**JUDGEMENT**

**INTRODUCTION**

1. The late Ann Mbinya Kamwanza died in the process of bringing forth life on 7<sup>th</sup> December 2017. She was the appellants' daughter. The respondent claimed that she was married to him under the Kamba customary law.
2. Through a plaint dated 15<sup>th</sup> December 2017 and filed on the same day, the appellants instituted a suit in the lower Court against the respondent seeking a declaration that the deceased was not married to him under the Kamba customary law. According to them, he had no right to bury her. They also sought general damages for unlawful interference with the funeral arrangements of the deceased and costs of the suit.
3. The respondent filed his defence on 28<sup>th</sup> December 2017 and called upon the appellants to strictly prove their claims and after a full trial; the learned trial magistrate dismissed the suit but was gracious enough to order that the appellants be allowed to participate in the burial arrangements. The parties were also ordered to meet their own costs.
4. Aggrieved by the said judgment, the appellants preferred this appeal and raised 7 grounds as follows;
  - I. *The learned Magistrate erred in both law and fact when she held that there was a customary marriage between the respondent and the deceased after finding that 'ntheo' was not properly done.*
  - II. *The learned Magistrate erred in both law and fact when she relied on extraneous matters to arrive at her findings.*
  - III. *The learned Magistrate erred in both law and fact when she held that Kshs. 31,000 given as a gift to the appellants on 25<sup>th</sup> February 2017 amounted to dowry.*
  - IV. *The learned Magistrate erred in both law and fact when she failed to take into account the plaintiff's submissions.*
  - V. *The learned magistrate erred in both law and fact when she failed to make a finding on the law with regard to customary marriages.*
  - VI. *The learned magistrate erred in both law and fact when she proceeded to presume marriage in the absence of evidence and when no such party had sought such relief.*
  - VII. *The learned magistrate erred in both law and fact when she decided the whole case against the weight of the evidence.*
5. The appeal was slated for hearing on 20<sup>th</sup> March 2018 and parties were given the liberty to file and exchange written submissions.

6. When the appeal came up for hearing, the appellants were represented by learned Counsel Mr. Mulei and the respondent was represented by learned Counsel Mr. Ayieko.

7. Mr. Mulei decided to argue all the grounds together. He submitted that the trial Court's judgment was contradictory in that on pages 7 and 8, the finding was that there was no marriage yet the conclusion was that there was a marriage. He went on to fault the finding on cohabitation and submitted that the learned magistrate did not consider the evidence of PW2 who testified that there was acrimony between the deceased and respondent.

8. He stated that according to the provisions of the Marriage Act 2014, the marriage was supposed to be registered but the learned magistrate ignored that point.

9. He submitted that the ceremony which took place on 25<sup>th</sup> February 2017 (herein after 'the material day') was just preliminaries of making friendship and the Kshs. 31,000 was a gift to the deceased's mother. With regard to the issue of consent to perform surgery on the deceased, he submitted that the respondent went to the hospital and clandestinely gave the consent therefore, PW2, the deceased's mother did not waive her right.

10. He went on to say that the goat which was returned by the appellants could not constitute divorce because customarily, there was no marriage. What was terminated was friendship.

11. In opposing the appeal, Mr. Ayieko for the respondent highlighted his written submissions dated 19<sup>th</sup> March 2018. He submitted that *ntheo* is what symbolizes a Kamba marriage and that, on the material day, 5 goats among other things were taken to the deceased's father. According to him, all the rites required to meet the threshold of a Kamba customary marriage were performed.

12. He submitted that considering the events of the material day, it could not be coincidental that the respondent gave out Kshs. 31,000/= as a gift. The only inference that could be made is that the money was part of the dowry.

13. He went on to submit that Kamba customary law obliges a man to pay dowry in the form of livestock and also in monetary terms. Therefore, the respondent having paid and the appellants having accepted Kshs. 31,000/= as part of the dowry, they were estopped from alleging that the deceased was not married to the respondent.

14. On the issue of the returned goat, Counsel for the respondent wondered how the appellants would seek to end a union that was non-existent in the first place. He urged the Court to dismiss the appeal.

15. The duty of a first appellate Court as was held in the cases of *Mwana Sokoni –vs- Kenya Bus Service Ltd (1985) KLR 931* and *Selle –vs- Associated Motor Boat company ltd (1968) EA 123* as 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.

16. Having looked at the proceedings and judgment of the trial Court, the grounds of appeal, the rival submissions and authorities cited therein, I find that the only issue for determination is whether there was a valid Kamba customary marriage between the deceased and the respondent.

17. **PW1**, Raymond Kamwanza Ndolo was the deceased's father. He had authority to act and swear/sign all the relevant documents on behalf of his co-plaintiff. He adopted his witness statement as evidence.

18. On cross examination, he confirmed that the respondent was known to him as he was the man who had asked for his daughter's hand in marriage. He testified that on the material day, approximately 10 people from the respondent's family visited his home to ask for his daughter's hand in marriage. He could recall the attendance of the respondent and his mother.

19. According to him, the ceremony on the material day was '*kutuma nduu*' i.e., the process of families getting to know each other. Before the material day, PW1 had seen the respondent once at his home on 15/02/2017 when he went with his mother to enquire about the requirements for the '*kutuma nduu*' function. The list given to the respondent comprised;

- 5 goats: 3 female, 2 male.
- Traditional brew; 20 litres.
- Modern beer; 2 crates.
- Soda; 6 crates.
- Banana (migomba miwili); one ripe and one raw.
- Sugar; 10 kgs.

20. They did not talk about money. He told them to return on the material day for *kutuma nduu*.

21. He testified that on the material day, a goat was slaughtered and there was a feast. The guests left on 26/02/2017 in the morning hours. He confirmed receipt of Kshs. 31,000/= from the respondent and said that its purpose was for the deceased's mother to appreciate that she had given birth to a daughter.

22. On 27/02/2017, the deceased left in the company of the respondent as he had now officially taken her from his (PW1) home. He went on to say that the deceased was survived by 2 children but he did not know their father.

23. Out of the 5 goats delivered by the respondent, one was slaughtered, he retained one and one was returned to the respondent's home one week after her demise. The goat was returned by PW1's sister-in-law one Sareh Peter.
24. According to PW1, returning of the goat symbolized the end of marriage. He asked that the goat be returned because his daughter had suffered in the hands of the respondent. According to him, he did not deserve her.
25. He testified that their efforts to contact the respondent in order to find a solution for the marriage were futile. They could only get through to his mother.
26. He confirmed knowing that the respondent was a Doctor but did not know his work station. He could not explain the procedures which follow *kutuma nduu* because they are usually done by the elders in the clan. He confirmed that the respondent had visited his home twice after the ceremony.
27. In re-examination, he stated that there was no list to confirm the items brought by the respondent.
28. **PW2**, Jane Munyiiva Mutiso was the deceased's mother. She testified that she was a retired nurse and the respondent's mother was a colleague at work. She had met the respondent in December 2016 when the deceased introduced him as the father of her (deceased) child.
29. She had an M-pesa statement to show that she was the one supporting the deceased. According to her, the customary marriage was not complete as there were to be subsequent ceremonies which did not happen. She also said that there was no marriage between the deceased and respondent as their union was marred with marital problems.
30. On cross examination, she agreed that the deceased was survived by 2 children and the respondent was their father. She stated that on the material day, she hosted between 10-15 people at her home. There were about 20 people from her family's side.
31. She confirmed that the respondent delivered 5 goats. One was slaughtered and one was returned to the respondent's home after the demise of her daughter. She said that there were marital problems between the deceased and respondent. She was aware that a burial permit was issued to the deceased but could not confirm how he got hold of it. She stated that the first visit by the respondent to her home was on 16/01/2017.
32. In re-examination, she stated that on the material day during the *kutuma nduu*, there was no mention of the respondent's second wife. She said that there was no other visit from the defendant's family after the material day.
33. According to her, *ntheo* involves slaughtering of a goat but it is only consumed by the girls' parents. The *ntheo* goats are 3 in number, any other goats are counted as part of the dowry.
34. She was aware of Mary Kithuku who was alleged to be married to the respondent, the respondent's son who lived with his maternal grandmother and the son's mother. They were all her neighbours.
35. According to her, a marriage crystallizes under Kamba customary law when a *ntheo* goat is slaughtered and customs followed.
36. **PW3**, Grace Kimae was an aunt to the deceased. She testified that the ceremony on the material day was *kutuma nduu*. They introduced each other and there was a feast. The respondent's family said that they intended to go back and pay dowry which is known as *ntheo* in Kamba culture.
37. The respondent's family was told that they could not perform *ntheo* before *kutuma nduu*. They took 5 goats to the deceased's home. According to her, the respondent did not marry the deceased under Kamba customary law.
38. According to her, a *ntheo* goat should be taken to the girl's homestead inside her parent's sitting room. The blood should pour in the house. Once slaughtered, the full goat is taken back to the girl's mother to accept. The girl's parents decide what happens to the goat.
39. On cross examination, she confirmed that on the material day, there was a ceremony at the deceased's home and there were groups of people from both sides.
40. She said that during *kutuma nduu*, the mandatory representation should be the parents of both parties plus the parties themselves, she denied being aware that there were prior arrangements to do *ntheo* and *kutuma nduu* under one ceremony.
41. In re-examination, she stated that according to customs, *kutuma nduu* and *ntheo* can't happen at the same time.
42. **PW4** John Kimani was a brother of the deceased's father. He met the respondent for the first time on the material day where he had been invited for a ceremony. He was told that the deceased's guest would be visiting the home. The guest arrived and they started knowing each other.
43. To him, the ceremony was *kutuma nduu*. He said that according to Kamba tradition, there was supposed to be another date for *ntheo* and then to be followed by another one for dowry counting. After the ceremony, the deceased was asked to go and live with her husband.
44. He said that as a family, they had agreed that *kutuma nduu* and *ntheo* should be done separately. The *ntheo* steps according to him are;

a) Giving 3 goats; one female and 2 male (*the male goat gets slaughtered*).

b) There is soda and beer.

c) There is food.

45. He proceeded to state that once the three goats are accepted, the one for slaughtering is chosen. Once slaughtered, the goat is cooked for all to eat.

46. He said that the goat slaughtered on the material day was not for *ntheo* but *kutuma nduu* and they told the respondent's family as much. All the items from the respondent's family including money were just friendly gifts.

47. On cross examination, he said that the information he got from the appellants was that the purpose of the visit by the respondent was 'kupiga report'. To him, *kutuma nduu* is for

a) The parents of the couple.

b) The couple.

c) Other relatives who might have been invited.

48. He denied that there was a fine asked for *kutuma nduu* not happening but agreed that there were so many items brought by the respondent. The ones he could recall were; rice, goats, wheat flour, traditional brew, beer and soda.

49. He saw the appellants receiving Kshs. 30,000/= but did not know why it was given. He did not see the Kshs. 1,000/= for *kutuma nduu*. He said that the deceased had requested that a goat be returned to the respondent's family.

50. He never met the respondent's family after the ceremony on the material day. To him, Kamba customs dictate that, if *ntheo* has not happened, then the goat can be returned. Anyone can return the goat but permission should come from the person who has been married.

51. **PW5**, Mutua Munyao was an elderly man. He gave his opinion of what constitutes a marriage under Kamba customary law.

52. On cross examination, he said that marriage is symbolized by *ntheo* and *ngasya*. That after the *ngasya* is when one can say that a girl is married. He said that during *ntheo*, the slaughtering of a goat is not mandatory but traditional brew is mandatory. He went on to say that according to Kamba customs, a marriage is dissolved by returning a goat. Upon the demise of a girl, if she was living alone, the parents can return the goat.

53. **PW6**, Peter Kituma Ndolo testified that he was 71 years old and a brother to the plaintiff. He said that *kutuma nduu* and *ntheo* cannot happen at the same time. To him, the ceremony on the material day was *kutuma nduu*. They agreed that the goats should be left at the deceased's home until the respondents were ready to go back for *ntheo*.

54. On cross examination, he agreed that the respondent was a doctor working in Mtito Andei but living in Nairobi. The deceased was living in Mombasa. He said he was not informed of any ceremony prior to 25/02/2017.

55. He agreed that he was not well versed with Kamba customary law. He was however aware that during *ntheo*, there should be three goats, one is slaughtered and part of it given to the boy's family. The rest is given to the girl's family.

56. He confirmed that on the material day, he was at the deceased's home. A goat was slaughtered by the respondent's family, people drank beer, there were presents, the deceased's parents received Kshs. 31,000/= then people left at their own pleasure but the deceased and respondent remained.

57. He said that he was aware of the deceased's matrimonial problems and also, that a goat was returned after a claim from the respondent's side that *ntheo* had happened.

58. The respondent called six witnesses. **DW1** was the respondent, Christopher Kiamba Maingi. He testified that he was a doctor at Kenyatta National Hospital. The deceased was his wife and they were blessed with 2 children. He had visited the deceased's home several times and his first visit was when he was in high school.

59. He went to the deceased's home in 2016 when they started dating. He later went with his mother in mid 2016 upon learning that the deceased was expectant. They could not do the *ntheo* when she was expectant. They agreed to do it immediately after delivery. She delivered on 11/02/2016. She was living in Mombasa and he visited her there.

60. On 11/02/2017, he was accompanied by his mother and brother to the deceased's home. He went to *kutuma nduu*. That is when the *ntheo* was scheduled for the material day.

61. On the material day, he went to the deceased's home for *ntheo*. He was accompanied by relatives and friends. They were served a meal and then he stated his intention. They were asked whether they had done *kutuma nduu* and they responded in the affirmative. According to

DW1, they symbolically did *kutuma nduu* again by giving Kshs. 1,000/= and a kiondo of food stuffs because the extended family was not present on 11/02/2017.

62. After that, they did the *ntheo*. A large he-goat was slaughtered. The breast, liver and some meat pieces for the chest were roasted under the instructions of the wazee. After feeding on the roast pieces, they proceeded to take the traditional beer. PW5 tasted it and then served DW1's uncle. He then declared that they had taken the oath of marriage under Kamba customary law. He gave Kshs. 40,000/= to the appellants.

63. He was present at the hospital when the deceased passed on. He was given the burial permit which he then gave to PW2. He testified that they had initially been permitted to bury the deceased but it was later halted by the appellants.

64. On cross examination, he said that he talked to the deceased but did not have proof of communication. He was not aware that she used to ask for financial assistance from her parents. He said he used to send her money but did not have records. He had stayed with the deceased as man and wife from July/August 2016.

65. He said the list of requirements was given to him by his father in law. He was aware that consent was a pre-requisite for doing *ntheo* and that the consent was given at around mid- night. He said that PW4 was lying by saying there was no consent because he is the one who gave the consent.

66. In re-examination, he said that the items which they presented at the deceased's home were not rejected. According to him, the communal affair was *ntheo* and dowry payment.

67. He has always been told that dowry is a communal affair. The only person who could dissolve the marriage was the deceased and she could only do it while alive.

68. **DW2**, Rose Nthungu Kiulu was the respondent's mother. She reiterated what the respondent had said. She went on to say that they were forced to repeat the *kutuma nduu* ceremony because the appellant's brother complained. According to her, *kutuma nduu* and *ntheo* can happen at the same time.

69. On cross examination, she agreed that it is not mandatory to conduct *ntheo* at night as she had suggested. She was present at *kutuma nduu* together with the respondent, the deceased and the appellants. They had a kiondo of less than Kshs. 5,000/=. The list for *ntheo* was given by PW4 in the presence of the appellants.

70. Before the material day, the respondent and deceased were living together but in different towns. She said that 3 goats are mandatory in *ntheo* but she went with 5 because she wanted to do good. To her, they weren't allowed to slaughter a goat for just friendship.

71. In re-examination, she said that lack of dowry payment does not invalidate a Kamba marriage.

72. **DW3**, Peter Mutua was the respondent's friend. He accompanied him to the deceased's home on the material day for *ntheo*. To him, it was *ntheo* because;

- a) A goat was slaughtered at the plaintiff's home on the verandah.
- b) The elders present were given traditional brew.
- c) The liver was roasted and the elders ate.
- d) Kshs. 40,000/= was given.

73. He said that he was in the house when the negotiations were done and he witnessed all the activities of the day. The couple served the meat. To him, *kutuma nduu* and *ntheo* can happen at the same time.

74. In re-examination, he confirmed that the ceremony was *ntheo*. The respondent told him that *kutuma nduu* had already been done.

75. **DW4**, Phylis Mbeke Mutuku was the respondent's aunt. She adopted her statement in evidence.

76. On cross examination, she said that they went to the deceased's home on the material day for *ntheo*. The respondent's mother told her that *kutuma nduu* had already been done. She said that *kutuma nduu* is not an affair for many people. It is only for the couple's parents. She knew it was *ntheo* because;

- a) There were 3 goats. The other 2 were to accompany.
- b) The special meat pieces were shared among the family members.

77. In re-examination she said that there is no goat at *kutuma nduu*.

78. **DW5**, Joseph Mwanzui Ndundu was a neighbor to the respondent.

79. On cross examination, he said that he was from the same clan with the respondent. On the material day, he was at the meeting of elders where negotiations were done.

80. The elders who were the deceased's uncle asked for a fine of Kshs. 1,000/= because they had not attended the *kutuma nduu*. They did not prevent them from doing the *ntheo*; they only insisted that the *kutuma nduu* be done.

81. He said that the *ntheo* goat came after negotiating and agreeing. It was white. He was the one in charge of the goat. It was slaughtered. He got instructions on what to do with the goat from PW4. He split it into two. One was eaten and the other one taken home.

82. They also roasted the kikonde. He cut the kikonde and asked the boys to roast it.

83. In re-examination, he said that it was the deceased's parents who asked for *kutuma nduu*. They had gone for *ntheo*.

84. I have looked at several judicial proceedings where witnesses gave evidence on the issue of marriage under Kamba customary law. I will sample a few.

85. In **Andrew Manunzyu Musyoka (deceased) [2005] eKLR**,

*Steven Mututu Mutisya (DW2) testified as an expert on Kamba customary law. He said that a marriage is contracted when goats of "Ntheo" are paid to the girl's parents and that even if dowry is not paid "Ntheo" has to be paid and concludes a marriage. He said that if a woman leaves the husband's home with children and one dies the body has to be taken back to the man's home for burial. Similarly, if the woman dies when at her parents' home, the body has to be taken back to the husband's home if "Ntheo" had been paid. A lady can only inherit from her father's estate if she divorces her spouse by returning "Mbui sya ulee" – where goats are returned to the husband by the woman.*

86. In **Re estate of James Simu Nthiwa [2005] eKLR** there was a contestation as to whether the deceased was married.

*The objector was the deceased's mother, She averred that he was not married as he had never informed her of it nor had any dowry been paid in accordance with kamba customary law where goats called "Mbui sya ntheo" are taken to the girl's parents and one is slaughtered. She also denied that there were any negotiations with the parents of any girl with a view to marriage. She visited him once in 1977 at his place of work and did not see any woman living with the deceased.*

87. I have also looked at the views of Judicial officers with regard to this issue.

88. In **Re Estate of Stephen Kimuyu Ngeki (1998) eKLR**

*J.W Mwera, J. (as he then was) stated that Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.*

89. In his book; *Marriage and Divorce, 1<sup>st</sup> edn, (1968) 28 Dr. Cotran* summarizes the essentials of a valid Kamba customary marriage as follows:-

(a) *Capacity.*

(b) *Consent.*

(c) *Slaughter of a billy goat.*

(d) *Marriage consideration.*

(e) *Cohabitation.*

90. From the foregoing, I am satisfied that the most important element of a Kamba customary marriage is the payment of 3 goats (*mbui sya ntheo*) by the groom.

91. From the evidence on record, the following aspects about the ceremony on the material day are clear;

a) The respondent delivered 5 goats to the appellants. One was slaughtered in the appellants' compound.

b) There was traditional beer.

c) There were guests from the deceased's and respondent's families.

d) The feast continued throughout the night.

e) Assorted items i.e. rice, soda and wheat flour were delivered.

f) Some money was given to the deceased's parents.

92. PW1 did not come across as a credible witness. He claimed not to know that the deceased's children were sired by the respondent yet his wife (PW2) was aware of this fact.

93. On the other hand, I am convinced that DWI had visited the deceased's home on a prior date with his immediate family members and the purpose of the visit was *kutuma nduu*.

94. I am further convinced that out of the 5 goats delivered by the respondent, 3 were *mbui sya ntheo*. Infact, PW4, the appellant's spokesperson was categorical in his evidence that a goat can only be returned where *ntheo* has happened.

95. It is normal and common for a bride's relatives to make demands during the visit by the groom. It was therefore logical and believable that indeed, the deceased's relatives insisted that *kutuma nduu* had not been done and they wanted it to be repeated.

96. As much as *kutuma nduu* is the customary rite for establishing friendship between the two families, it is evident that there was a relationship between the deceased and respondent prior to the material day and as rightly submitted by the respondent, two people cannot have lived together and given birth to a one year old child without a relationship.

97. As for the contradiction alluded to by Mr. Mulei, the learned trial magistrate listed certain aspects which were evident from the ceremony on the material day and proceeded to say that they were not sufficient to presume marriage.

98. In my view, the question of presumption should come up where parties allege longevity of cohabitation coupled with repute. In my view, it is possible for parties to be presumed married in instances where no single customary rite has been performed or they do not meet the threshold of a customary marriage rite.

99. On the other hand, where a party claims to have gone through a customary marriage, it is up to the Court to look at the evidence tendered and decide whether it meets the threshold of the customs of a particular community on a balance of probability. The learned magistrate should have used the aspects which she found to be evident from the ceremony to make a determination as to whether the threshold of the Kamba customary marriage had been met.

100. The principle of presumption of marriage was enunciated in case of **Mary Njoki John Kinyanjui CA NO. 71 of 1984** and the case of **Hotensia Wanjiku Yawe –vs- Public Trustees CA 13 of 1976 Nrb**. Justice Madan had this to say of the concept of Presumption of a marriage.

***“The concept of Presumption of marriage is an appreciation of the needs of the parties in life when a man and a woman cohabit for a long period without solemnizing their Union by going through a recognized form of marriage. That if a woman is left stranded either by being cast away by her husband or because he dies, occurrences which do happen, the law subject to the requisite proof, bestow the status of wife upon the woman to enable her to qualify for maintenance or share in the estate of the deceased husband”.***

101. In the matter of the estate of **Samuel Kiarie Kirimire (deceased) 1999 eKLR E.M Githinji, J. (as he then was)** held that;

***“Such evidence of reputation is essential when court is being asked to presume a marriage from long cohabitation and repute, Monica's case is different. She claims to have been married by deceased under Kikuyu Customary Law. She is not asking the court to presume a marriage from long cohabitation and reputation. Even if that was the case, there is no sufficient evidence of long cohabitation. The fact that she was included as wife of the deceased in the Eulogy and the fact that she laid a wreath as wife of the deceased or was photographed with the family of the deceased, do not, on their own prove a customary marriage.”***

102. Similarly in the current case, the Court was not being asked to presume marriage. The appellant's case was that the deceased was not married to the respondent under the Kamba Customary law. To that extent, it is my considered view that the learned trial magistrate fell into error.

103. Is the error sufficient to overturn the decision? The answer is in the negative because my own analysis of the evidence on record shows that the essentials of a valid Kamba customary marriage were proved on a balance of probabilities. As rightly submitted by the respondent, a ceremony of such magnitude could not have been conducted on a first visit.

104. The appellants testified that there were marital problems between the deceased and respondent. Firstly, I do not think there can be marital problems where a marriage is non-existent. Secondly and as harsh as it sounds, such problems are an integral part of such unions. Where living together is no longer tenable, there are procedures and appropriate forums for canvassing the same. The Court was not told that that the couple had initiated any process to sever their relationship.

105. It is a fact that both the respondent and deceased were living in different towns. Evidence was led to show that their workstations were in the towns where they lived. I am convinced that they lived separately not because of the alleged marital problems but due to their workstations.

106. Finally, the appellant's Counsel raised an issue about the non-registration of the marriage.

107. Section 96 of the **Marriage Act No. 4 of 2014** provides as follows;

*(2) Parties to a marriage contracted under customary law, the Hindu Marriage and Divorce Act (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act.*

*(3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.*

*(4) The Cabinet Secretary may extend the registration period under this section by notice in the Gazette.*

108. The law on registration of customary marriages came into force on 1<sup>st</sup> August 2017.

109. I will reproduce the said **Gazette Notice**;

**GAZETTE NOTICE NO. 5345**

**THE MARRIAGE ACT**

**(No. 4 of 2014)**

**CUSTOMARY MARRIAGE**

***IT IS notified for public information that following the commencement of the Marriage (Customary Marriage) Rules, 2017, and in furtherance of section 96 of the Marriage Act, 2014:***

***(a) The Registrar of Marriages wishes to inform all parties married under African customary law that they are required to register their marriage starting 1<sup>st</sup> of August, 2017.***

***(b) Parties who wish to contract customary marriage from the operative date herein must obtain prior authorization from the Office of the Registrar of Marriages.***

***(c) Marriage certificates shall be issued to parties upon successful application.***

***(d) The operative date has been fixed for 1<sup>st</sup> of August, 2017.***

***The address for the Registrar of Marriages is listed as: The Registrar of Marriages, Ground Floor, Sheria House, Tel. +254-020-2227461, Ext. 37514/515. Available weekdays from 8.00 a.m. to 5.00 p.m.***

***Dated the 2nd June, 2017.***

***GITHU MUIGAI,***

***Attorney-General.***

110. In the current case, the marriage between the deceased and the respondent came into existence on the material day as per the Kamba Customs. Having regard to Section 96 of the Marriage Act and the reproduced gazette notice, my interpretation is that the three year period within which the marriage should have been registered started running on 01/08/2017. Consequently, the argument about non-registration does not hold.

## **CONCLUSION**

111. The totality of the foregoing is that there was a valid Kamba Customary Marriage between the deceased and the respondent.

112. Thus the court makes the following orders;

**i. The body of the deceased shall be released to the respondent for burial as directed by the trial court.**

**ii. The parties shall share mortuary charges equally.**

**iii. Parties to bear their own costs.**

**SIGNED, DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF APRIL, 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

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