



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 15 OF 2015

ROWLAND AMULYOTO

AUSTIN AMULYOTO

BRENDA AMULYOTO PLAINTIFFS

VERSUS

ALFRED AMULYOTO DEFENDANT

JUDGMENT

BACKGROUND

1. This is a protracted burial dispute among children of one family who have a very acrimonious relationship which played itself in court during the hearing of this case. The animosity was almost palpable. It is a very unfortunate scenario. Cecilia Shilosyo Amulyoto, was the wife of the late John Amulyoto who died on 11th November, 2007. They had seven children namely, Geraldine Shivachi (DW2), Alfred Amulyoto (the defendant), Martina Musonyi (PW5), Austin Amulyoto (the 2nd plaintiff), Alex Amulyoto, Brenda Amulyoto (the 3rd plaintiff) and Rowland Amulyoto (the 1st plaintiff). Cecilia Shilosyo Amulyoto (the deceased) died on 23rd June, 2015 and her body was preserved at Aga Khan hospital mortuary, Kisumu, (Aga Khan mortuary, Kisumu). After her death, the plaintiffs filed an application by way of Notice of Motion, under a certificate of urgency on 17th July, 2015 seeking orders for a temporary injunction to restrain the defendant either by himself or through his agents, relatives, servants, assigns, personal representatives, or any other person acting on his behalf from burying the body of the deceased at any other place other than at her matrimonial home at LR. No. Idakho/Shisejeri/1302. There was a second prayer for the deceased's body to be transferred from Aga Khan mortuary, Kisumu to St. Elizabeth Hospital Mukumu, in Kakamega pending the outcome of this suit or in the alternative, for the defendant to bear the entire mortuary bill if he insisted on continued preservation of the deceased's body Aga Khan mortuary, Kisumu.

2. The Court granted the orders sought on 17th July, 2015. A Court Process Server by the name Victor Shigoli Ambia swore an affidavit on 20th July, 2015, stating that on the morning of 18th July, 2015 at 7.00 a.m., he proceeded to Magale village, Bulovi sub-location, Kambiri location in Ileho Division, Kakamega County. On arrival at the market centre, he was met by rowdy youth armed with rungas and pangas who were on the road heading to the entrance of the defendant's homestead. This forced him to seek security from the Administration Police Camp at Kambiri. He deposed at paragraph 5 of the said

affidavit that at around 11.15 a.m., with the assistance of Administration Police, he managed to serve the defendant with the court order.

3. On 21st July, 2015, the court was informed by counsel for the plaintiffs that the court orders issued on 17th July, 2015 were disobeyed. The Court however noted that the orders extracted were not in tandem with those that had been issued by the court. A perusal of the handwritten orders issued by the Judge on 17th July, 2015, were to the effect that the body of the deceased was to continue lying in state at Aga Khan mortuary, Kisumu and in the event that the said body had been removed either by the defendant or his agents, servants and/or upon his instructions, the same was to be returned forthwith to the said mortuary. The orders extracted were to the effect that the body of the deceased which was lying and preserved at Aga Khan hospital morgue - Kisumu be transferred to St. Elizabeth Hospital Mukumu in Kakamega County for preservation pending the outcome of the suit or in the alternative, the defendant bears the entire mortuary bill if he insists that the deceased's body continue (sic) to be preserved at Aga Khan hospital morgue - Kisumu and or on further orders of the Honourable court.

4. It turned out that by the time the court order of 17th July, 2015 was served on the defendant, the deceased had been buried early that morning.

THE PLAINTIFFS' CASE

5. PW1, Rowland Musonye Amulyoto, a farmer and business man from Eregi location, Shisejeri, Shijiko village, informed the court that the defendant, Alfred Amulyoto, is his elder brother. The deceased was their biological mother. He is her last born child whereas the other two (2) plaintiffs are the deceased's children. Their mother had a matrimonial home at Idakho/Shisejeri/1302 (Shisejeri) and that Christina, their father's 2nd wife had her matrimonial home at Kisa location. Although their father died at Kisa, he was buried at Shisejeri. He testified that they belong to the Abakhalekha clan of the Idakho of the Luhya tribe whose tradition is that if a husband dies, he is buried at the first (1st) wife's homestead. He further stated the deceased told him that they started living on their land at Shisejeri in the early 1950s. She died on 23rd June, 2015 in the defendant's wife's house at Kambiri. It was his evidence that on or around September or October, 2012, the deceased moved from her house to the defendant's homes where she alternated between Nairobi and Kambiri. He informed the court that he does not know why she did that. He further stated that the defendant's son had a problem and he bailed him out in the year 2012 and he moved to the deceased's home. The defendant at this juncture started to dislike PW1 and their relationship went sour.

6. PW1 further testified that his relationship with the deceased and his other siblings was very good. He lost his job at Kenya Breweries because of taking time off on Fridays to visit the deceased who was sick from the year 1992 and that he was providing for her medical needs. His siblings, including the defendant also used to assist the deceased financially. He testified that by the time their father died in the year 2007 he was taking care of the deceased's living expenses. He stated that he produced evidence to that effect in Kakamega High Court Succession Cause No. 550 of 2008 which was pending judgment. It was his evidence that in the year 2008, he sat with his brother Austin and the defendant who offered to provide transport for the deceased to church. The defendant bought a car for her to use and asked PW1 to look for a Driver, which he did. The defendant would provide fuel for the said car.

7. It was PW1's evidence that there was a house girl taking care of the deceased. His house was near that of the deceased. He testified that he did not disagree with the deceased. His other siblings had no problem with him staying with her. He informed the court that their father gave him the parcel of land with the homestead as it is their culture for last born sons to stay with their mothers in the same compound.

8. It was PW1's evidence that he was blocked by the defendant from visiting the deceased from the year 2012. He was being told that if he went to the defendant's homestead he would be arrested. Since then he saw the deceased on three (3) occasions. The 1st occasion was when there was a funeral in a neighbouring homestead, where he saw her in a crowd. The 2nd occasion was when the elders arranged a meeting to reconcile Geraldine (DW2), Martina (PW5) and him. The Chief and Austin picked up the deceased and PW1 drove her home. The last time was when she was in a coma and PW5 arranged for him to see her.

He stated that he had not succeeded in seeing her previously because the defendant had given a list of six (6) people who could visit her. He, Austin, Alex and Brenda were not on the list. The list had a disclaimer that whoever wanted to visit the deceased had to call the defendant. He managed to see her after talking to PW5 who told him that she had talked to the defendant. After he left, Austin called and told him that there was a scuffle in the hospital with the defendant because PW1 had been allowed to see the deceased yet he was too poor to contribute anything. He became depressed. Thereafter he received a letter from Anziya and Co. Advocates informing him that they were going to sell the land that he occupies. He also received summons to attend court.

9. He later learnt through the grapevine that their mother had died. He went to court and sought an injunction because their mother was dead yet he could not view her body at Aga Khan hospital mortuary or remove the body from the mortuary. Only the defendant, his wife and DW2 could view the body. He stated that he went to court to sort out the burial dispute. When this was ongoing, the lower court set aside the injunction on a technical basis as it had no jurisdiction. They got an injunction at the High Court in Kakamega but did not succeed to serve the defendant who collected the body and took it to his Kambiri home where he buried it. PW1, Brenda, PW5, Austin and Alex did not participate in the burial. Their paternal aunts, maternal uncle and paternal uncle also did not participate in the burial as they were not informed of the same. It was his view that the burial should have taken place at Shisejeri. There was no joint family meeting to discuss the burial arrangements. Austin sat with the old men in the village to try and intervene.

10. PW1 testified that in Luhya customs, the deceased would have been removed from the mortuary two (2) days before burial, the body would have been taken to church after the mortuary as the deceased was a staunch catholic. Her body would then have stayed home for a minimum of two (2) days and the grave would have been dug on the last night before burial. In this instance, the body was removed from the mortuary on a Friday and buried by Saturday morning thus she was not accorded burial rites. He testified that the deceased was supposed to be buried on the left side of their late father's grave in her matrimonial home but this did not happen. PW1 informed the court that an old lady of the deceased's age would have had her children, grandchildren, uncles, sisters, brothers, cousins, and the community at the funeral. It would have been a celebration; there would have been a programme and speeches. PW1 denied mistreating the deceased and asserted that he treated the deceased and his siblings well. He had keys to the deceased's house and denied stealing her eggs as the poultry was his. He denied chasing away the Driver and house help.

11. On cross examination, PW1 explained that he did not attend the deceased's burial because they had been in a court process in the burial dispute and they were to serve the defendant with the court order. The other members of the community were not invited although there is no written invitation for people to attend funerals. He stated that at the deceased's matrimonial home there is no grave that had been dug for her. Land reference No. Idakho/Shisejeri/1302 was allocated to him as the custodian of the family land being the last born son of the family. He informed the court that he testified in Succession Cause No. 550 of 2008 where he opposed the sale of a portion of that land because the deceased had a life interest in it and not because it was his land. The proposed sale was punitive. He indicated that his late father gave him and his brothers parcels of land but the defendant was trying to sell the entire parcel of land. He stated that his younger step-brothers have titles to their land but PW1 has no title to the land he occupies as it had not been transferred to him.

12. He informed the court that their grandfather whose name was Murenjekha was buried at Imakata at Kilindini. His grandfather had two wives. The eldest wife was buried at Shijiko near their home and the 2nd wife was buried at Kilingili next to her husband's grave. This was however not against Luhya customs for the reason that their first grandmother was dead but their second grandmother was alive. In the Luhya customs, a husband is buried in the homestead of a surviving wife so that she can tend to his grave.

13. He stated that he wrote messages to the defendant to allow him to see the deceased but he did not allow him to. On 29th September, 2012 there was a disagreement between his two sisters and his wife. He denied beating up his sisters. He admitted that DW2 is not his friend and that she blocked him from

seeing the deceased. He informed the court that his wife has never beaten the deceased, not even in the year 2001.

14. PW1 stated that on 30th September, 2012, the deceased was taken forcefully to Nairobi as there was no agreement between the family members on the said issue. He at the same time said that the deceased chose to go to Nairobi. After she returned home from Nairobi she was taken to one of the defendant's houses. Although he knew that she was being detained in the defendant's house he made no effort to release her through court orders. He informed the court that he knew that there was a bill at Aga Khan hospital, Kisumu (Aga Khan hospital) which they were willing to pay but they never sat down to discuss the bill. He at the same time said that he was not willing to pay the bill for the deceased's medical expenses. He added that the deceased died at the defendant's house and was taken to Aga Khan mortuary, Kisumu. They sent a letter to Aga Khan hospital asking for certified medical expenses but they did not respond.

15. On further cross - examination, PW1 told the court that his late father used to live with his step-mother most of the time but he was not buried at her homestead because it is against their customs to bury a dead husband in a younger wife's home when the elder wife is alive. If the deceased was to be buried in her matrimonial home she would be buried on the left hand side of her late husband. He stated that in Luhya customs, he has not heard of people expressing wishes of where they would like to be buried. He informed the court that he did not deny DW5 parking space for the deceased's car.

16. He indicated that after the year 2009 when the deceased was diagnosed with high blood pressure, she used to be taken care of by DW2 who is a nurse. He informed the court that he would like to bury the deceased's body without paying the hospital bill. He stated that he knows that she was buried at Kambiri. Her hospital bill was 3.2 Million. After he received a demand (letter) on the sale of their land, he sent Kshs. 20/= twice and Kshs.10/= once to the defendant for buying air time so that he could call him. The defendant sent PW1 a text message telling him never to call him or send him text messages.

17. On re-examination, PW1 told the court that the Counsel for the defendant was demanding Kshs.3.2 Million or they would sell his land. He was being given an ultimatum. He sent text messages to the defendant, his siblings and grandchildren to discuss the bill. The discussion did not take place as it was frustrated.

18. PW1 denied having chased away his sisters in the year 2012 and said that he asked them to leave. He recounted that when he married, a lady went to install three (3) stones for cooking but his wife did not agree to that as she felt that she was being chased away. At that time, DW2 removed her clothes as she wailed. They did not fight as he told them to leave, which they did. The deceased was surprised at what was happening and was not happy with it.

19. PW2, Joseph Andalo Shimoli, a farmer at Ishieywe village, in Madivini sub - location aged 83 years informed the court that he knows PW1, the defendant, Austin and Brenda Amulyoto as they are his grandchildren. The deceased was his daughter-in-law. Her late husband, John Amulyoto used to call him father as a sign of respect. He testified that his sub-clan is Abakhalekha, which is also the deceased's sub-clan and that he understands the customs of the Abakhalekha. He knew that the deceased who was an old lady died but he was not told when she was buried. In their customs, if a married woman dies before her husband, her body is taken to her husband's home (matrimonial home) for a minimum of two (2) days for overnight stay at the home. She is buried at her husband's homestead (mungo). If a woman's husband died earlier, on her death, she would be buried near her late husband's grave, to the left side of his grave. If a woman's husband dies, the sons are given the duty to take care of their mother, especially the last born son.

20. He informed the court that on the day of the funeral of a woman like the deceased, a church service is held and visitors and family go to her home to mourn and keep vigil. A programme is usually prepared and family members are given a chance to give speeches. He stated that he did not attend the deceased's funeral preparation as he was not told that she was being buried. He however used to visit her homestead when she was alive. He testified that the deceased was supposed to be buried in the homestead where her

late husband was buried, next to his grave.

21. PW2 testified that he never received any report that PW1 had beaten the deceased. She never reported to him that she was being mistreated by PW1. He would have known if she was being mistreated. He stated that it is against their customs for a son to take his deceased's mother's body and bury it like the defendant did. The consequences of such acts are that a son such as this can be possessed by evil spirits or bees can attack a homestead.

22. On cross-examination, he clarified that he wrote in his statement that unpredictable calamities can attack one who goes against burial customs and that the body of a deceased person is kept at home for a minimum of 2 days before burial. He reiterated that he used to visit the deceased, with the last visit being in the year 1996. He then said that he would not know if PW1 mistreated her. It was his opinion that the deceased could not have elected to be buried in the defendant's homestead and in their customs, he has not seen someone electing where to be buried. He did not know that there were problems in the family of the deceased among the children. He did not know if the deceased elected to be buried at the defendant's homestead.

23. On re-examination, PW2 informed the court that if the deceased had elected where she would like to be buried, he would have known.

24. PW3, Lawrence Asenahabi Murunga, a farmer from Isukha, Shinyalu sub - county stated that the plaintiffs and the defendant call him uncle. The deceased was his first born sister, he is the second born. The late John Amulyoto married the deceased in 1946 at a wedding which he attended. He built her a big house in her matrimonial home at Eregi. He stated that the deceased was his good friend and he used to visit her. She loved all her children and the children loved her. She used to live in her homestead with the last born child, PW1. PW3 never heard of anything negative about the relationship between PW1 and the deceased who was unwell for many years. The children would take care of her and the defendant gave out his car to be taking her to hospital. In his view, PW1 used to take good care of the deceased as he was living in the homestead. The deceased never told him that her life was in danger and that a grave had been dug for her. He would have known if a grave had been dug for her.

25. He indicated that he lastly visited the deceased some years back as the defendant took her to Nairobi for medical care. He visited her after she went to the defendant's house in Kambiri after she left Nairobi. He spoke with her but did not ask her many questions as she was unwell. He did not ask her why she was not in her homestead. He also visited the deceased at Aga Khan hospital but she was not talking. PW3 testified that he met the defendant whom he asked if he would take the deceased home if she died but he said that all he wanted was for her to recover. It was PW3's evidence that the deceased never told him that she wanted to be buried at the defendant's homestead. If she had said so, PW3 would have known as they were close. He later learnt that she had died. He went to her matrimonial home to find out when the burial would take place. He found other people there. He later heard that the deceased was buried at the defendant's homestead. He did not attend the funeral.

26. PW3 informed the court that according to their customs, the deceased should have been buried at her homestead. On leaving the mortuary, she would have been buried on the third day, after staying overnight for two (2) nights in her homestead. He told the court that he did not know if there was any meeting for preparation of the funeral as he was not informed of the same. PW3 testified that his presence would have been required as he would have given certain information and he would have been one of the speakers at the funeral. He stated that a woman can be buried elsewhere if she has no homestead and nowhere to be buried. Their customs however do not allow a husband and wife to be buried in different areas. He informed the court that three girls were born in their family and that he was their only son. He did not know if his sister attended the funeral.

27. On cross-examination, PW3 stated that the deceased's husband, John, paid dowry for the deceased. He later married another wife. He would live in the homesteads of his wives. He indicated that once a woman is married she is buried in her homestead after she dies. He informed the court that he would have assisted in funeral arrangements but he could not have directed the deceased's family on how to go about her

burial. He informed the court that his sister's name is Teresina whom he talks with when they meet but he does not visit her for she is much younger than him. She was the deceased's good friend as the two are women.

28. On further cross-examination, PW3 stated that on the death of the deceased, he got to know that there was a disagreement among her children. He explained that in the Idakho customs, he cannot elect where he will be buried as people are buried in their homesteads. If one decides to be buried somewhere else, he/she would have to disclose that information to others when he/she is still alive. A husband can be buried at the younger wife's homestead depending on certain circumstances in the customs. He explained that if he has a homestead, he would be buried there, but if he does not have one, he can be buried elsewhere. He informed the court that on two occasions he saw dead people being exhumed and buried elsewhere and he saw nothing wrong with the deceased being exhumed and her body being buried at her homestead. He indicated that he knew that there is a bill at Aga Khan hospital. He called the defendant to find out how the bill would be sorted out but he told him not to call him about that issue.

29. On re-examination, he informed the court that PW1 and his sibling will lack respectability in the Idakho community for burying the deceased in the wrong place. It was his view that the deceased's body should not remain at Kambiri and that he would like it to be exhumed to ascertain that she is the one. He informed the court that if a man has two wives, he can be buried at the second wife's homestead if the first wife is unfaithful. Ordinarily in the Idakho customs, a husband is buried at the first wife's homestead. If there is no farm or home, a married woman can be buried elsewhere. The deceased had a shamba (farm) and a house. Although he heard that she had returned from Nairobi, he did not visit her because he is weak. He clarified that it is easier for his younger sister Teresina to visit him as that is a sign of respect and that she visits him when she is able to. He stated that Teresina was the deceased's good friend and they could have shared secrets as women but the deceased would have told him where she would have wanted to be buried.

30. PW4, Athanas Lwangu Ongaya, a farmer at Shianjetso village testified that he knew the late John Amulyoto, who was like a father to him as he was much older than him. Clan-wise he was PW4's brother. He knew that the deceased was the wife of John Amulyoto. He also knew all their children. He used to visit the deceased at Eregi and Nairobi. He had known her since his childhood. He informed the court that she used to live at Lusiola village. Her late husband had constructed a permanent house for her. It is an old home where all the children were raised. The home is still there and the deceased's husband was buried in that homestead. PW4 stated that he and the deceased used to attend Eregi Catholic church. He informed the court that PW1 did not abandon the deceased.

31. PW4 gave evidence that PW1 at one time renovated the deceased's house by putting a ceiling in the house and by building a toilet indoors. The deceased's late husband was at that time staying with his second wife at Kisa village. PW4 testified that he knew the deceased very well and she never told him that she was being mistreated by her children. If her children were mistreating her, he would have been told by the clansmen. He once tried to visit her at the defendant's house at Lusiola but the watchman there told him that he was not allowed to see her. He tried to visit her at Aga Khan hospital, before her death, but the watchman told him to get clearance from the defendant.

32. In his view, the deceased was not chased away from her matrimonial home by PW1. He never heard that she had disagreed with PW1's wife. After the deceased's death, he visited her home with fellow clansmen to find out more about the death and how they could help. He in the company of others tried to reach out to the defendant so that the deceased's body could be taken home for funeral arrangements. The defendant did not join them. Through other people he learnt that the defendant was making burial arrangements. He and others sent people to the defendant to stop those arrangements to no avail. They went to court to seek assistance so that the body could be released to them. Aga Khan mortuary, Kisumu was ordered not to release the body to anyone unless there was clearance from the defendant. PW4 later learnt that the deceased was buried at Kambiri in the wee hours of the morning. He was not notified of the burial date and the other clansmen did not attend the burial. He did not know when the body was released from the morgue as it was secretive.

33. PW4 further stated the deceased being a staunch catholic deserved a decent burial. The church, the clansmen and other people ought to have removed her body from the mortuary to church and they would have gone to her homestead. The body would have stayed there for a minimum of two (2) days then it would have been buried. The clansmen, the deceased's children and the funeral committee would have planned the funeral. She should have been buried in her homestead where her husband was buried, in accordance with their customs. He informed the court that a woman can be buried elsewhere, if she has killed her husband, has committed adultery or has given birth to another man's child. If someone is not buried according to customs, calamities befall the family, some can go mad, get bad dreams at night or become infertile.

34. On cross-examination, PW4 stated that he is 78 years old and a Roman Catholic who likes his culture very much. The deceased was his first cousin. He informed the court that he knows Joseph Andalo (PW2), who is his uncle. He also knew Wikanakana whose wife was Risper. PW2 is a nephew to Wikanakana. Risper was buried at Kasavali village in the home of her second husband whereas Wikanakana was buried at Lusiola village. Wikanakana died first.

35. PW4 reiterated that he was prevented from seeing the deceased at the defendant's home. He did not raise the issue with the chief, Assistant chief or with the defendant. He did not call the defendant. The deceased stayed away from her matrimonial home from September, 2012. PW4 spoke to various people to intervene so that she could be taken to her home but he was told that she was undergoing treatment. He and his wife visited the deceased often. He stated that as an uncle to the deceased's children, he and other family members (chama) tried to approach the defendant to reconcile them. The defendant is the founder member of the chama. PW4 informed the court that he would like the children to reconcile.

36. PW4 on further cross-examination stated that he knew Mung'ao Shimoli who was buried at Ileho. His wife was buried elsewhere as Mung'ao sold the piece of land he initially had. Muhandia's grave is at Manyoni village as they were evicted from that land. They exhumed and reburied Muhandia's remains at Lusiola. In Catholicism, a catechist or priest conducts the burial. A luhya or Idakho man can make a wish on where to be buried but it will be contested as it is against the culture. If a person wishes to be buried elsewhere, family members can become cursed. It was PW4's view that it was not the deceased's wish to be buried at the defendant's home. He informed the court that the Abakhalekha is a big clan. He did not know which people attended the deceased's funeral as he was with his clansmen.

37. On re-examination, PW4 stated that Wikanakana's wife was buried elsewhere because she remarried after his death. He was aware that the defendant's son, Hans Amulyoto, was accommodated at the deceased's homestead. PW4 informed the court that PW1 also stays in that compound and that he knew that the defendant is not in good terms with his son, Hans.

38. PW5, Martina Lydia Musonye, a farmer from Mukhonje village in Kakamega County stated that she is a sister to the parties in this case and that the deceased who was their mother was very close to her and they were good friends. The relationship between the deceased and her children was good. She however loved Brenda and Austin very much. It was PW5's evidence that they used to live well and loved each other. Their father who used to live with their step-mother at Kisa died on 11th November, 2007. PW5 stated that she used to visit the deceased many times and her siblings used to take good care of her. They would provide toiletries and she would take food to her. The deceased used to live with PW1 together with workers whom PW5 would look for. She used to pay one of the workers. PW1 used to pay the workers and Alex also used to assist to pay the workers up to the year 2007.

39. PW5 testified that PW1 lost his job in the year 2007 and went back home. She does not know who started paying the workers then. She continued visiting the deceased who was happy and living well. She had food to eat and workers to take care of her. PW5 informed the court that the deceased never told her that she was being mistreated. She at one time found that the deceased's house had been renovated. The defendant, Alex and PW1 were claiming to have done it. She indicated that the deceased and PW1's wife, Judy, used to get along. In the year 2012, there was a problem between their sister DW2 and Judy. The latter sent DW2 a message to the effect that she had taken care of the deceased for a long time and that they should go for her.

40. PW5 indicated that at their home, one kitchen was being used by PW1's wife. It was an inbuilt meko (traditional cooker). They decided to build a meko for the deceased in her kitchen and got some people to construct the same. In the course of the visit, PW5 went to their neighbour's house but heard DW2 screaming that she was about to be beaten. She returned home and found Judy holding a stool, she put it down. PW5 further stated that PW1 then proceeded to where they were, while looking annoyed. He told her and DW2 to leave. The latter hid in the house. He told them to leave, which they did. They called the defendant and told him that PW1 had chased them away. The defendant told PW5 to spend the night at DW2's house. The house help also left because she got scared. On the material night, Teresa and Teresina spent the night with the deceased.

41. According to PW5, that was when the defendant decided to remove the deceased from her homestead for Nairobi. She was picked up the following morning as well as the deceased's house help, DW6, by the deceased's driver, DW5. PW5 testified that the deceased was not told that she was going to Nairobi but that she was being taken to the home of some girls who would give her cash and cake. When they were close to Nairobi, it dawned on her that she was being taken to the defendant's house. She was happy. In PW5's view, the deceased would not have agreed to go to Nairobi. PW5 spent three (3) nights in Nairobi and returned to her home. It was her evidence that she was at the defendant's home when the deceased went to his home at Lusiola. At that time she was comfortable as she found people she knew. Her memory was however fading. PW5 further stated that after some time, DW6 called and told her that the deceased wanted to go back to her home. PW5 went to see the deceased the following day and told her that if she went to her homestead, she would be unable to take care of her as she had been chased away. The deceased kept quiet. At one time the deceased tried to go through the fence and at another time she tried to walk out of the defendant's home but she fell outside the gate.

42. After some time, the defendant asked PW5 if it would be okay with her if he took the deceased to Kambiri and she said it would be, because it was nearer her home. PW5 visited the deceased many times after she was moved to the defendant's home at Kambiri. PW5 informed the court that she was closer to the deceased than the latter was to Teresina (the deceased's sister) and that the defendant came to love the deceased more when he started taking care of her. She did not hear of some people having been prevented from seeing the deceased at Kambiri. Alex, Austin and Brenda visited the deceased at Lusiola. PW5 did not see any of them visit her at Kambiri. At one time, DW2 told her that the deceased was asking about Brenda and Austin.

43. PW5 testified that she used to go to Aga Khan hospital daily but not all their family members were allowed to see her. She recounted of the day the defendant sent her a message that the deceased was admitted at the intensive care unit (ICU). She asked the defendant to call his siblings so that they could go to see the deceased but he said nothing. She therefore called her siblings. Austin and PW1 went to the hospital that night. The defendant could not have allowed his other siblings apart from DW2 and PW5 to see the deceased. He had given a list to the watchman at the gate of the persons who could see the deceased. The hospital recommended homecare for the deceased. She was taken to the defendant's home in Kambiri where she passed away. PW5 indicated that she did not know about the bill at Aga Khan hospital as what she knows is that the defendant would pay from time to time. The defendant did not discuss the bill with her. Although she does not work, her children were assisting. One of her daughters by the name Ebby would provide weekly provisions of food to the deceased. The defendant told her on two occasions that Ebby had sent him some money towards payment of the hospital bill. Ebby gave them her vehicle for two (2) months to use for travel to visit the deceased.

44. On 18th July, 2015 at 5.30 a.m., PW5 received a message from the defendant stating that the deceased's body arrived home the night before and the requiem mass would be at 10.30 a.m. She did not attend the mass because a clansman by the name Kizito Ikoneli called her at 7.00 a.m., and told her that the deceased had been buried at the defendant's home without the church community. She decided not to go to the defendant's home. The deceased passed away on 23rd June, 2015. They did not hold any funeral meeting or discuss where the deceased would be buried. However, when the deceased was alive, the defendant would say that he would bury her as she had been discarded like a dog. PW5 testified that the deceased's memory started fading in the year 2012. She would say that her mother or father had gone to see her yet they were dead. The deceased was living at the defendant's homestead but in a different house.

She used to refer to that home as Mary's home as she knew that it was not her home. In PW5's view, the deceased would not have wanted to be buried at Mary's home. If she had wanted to be buried there, she would have said so. At times she was not coherent. It was PW5's evidence that she picked a copy of the deceased's funeral programme at Kambiri market which she produced as Plaintiff exhibit 1 (plt.exh.1). She informed the court that Austin, Alex and Brenda could not have chased the deceased away from her homestead and that PW1 did not chase her away. He took very good care of the deceased until the time when he stopped working. The deceased never told her that PW1 was mistreating her.

45. On cross -examination, PW5 informed the court that PW1 stopped working in the year 2007 when he vied to be a Member of Parliament (MP). His wife has a shop while he has a Bar, thus he could afford to feed the deceased. PW5 stated that she is a christian who does not practice cultural rites. Judy told her to go home and pick up the deceased and never call her again. On the date they were chased away, they had gone to put a meko in the deceased's kitchen so that she could cook from there. PW5 denied that they destroyed PW1's wife's meko. PW1 was annoyed because of a negative interaction between Judy and DW2 but she did not beat them. PW1 shouted at PW5 and DW2 to leave. The deceased was not amused. She was hypertensive and would not have entertained noise. DW2 was screaming and crying because Judy wanted to beat her. They left the homestead, leaving the deceased alone. On 10th October, 2012 they reported the incident to Eregi Police Station as per the Occurrence book (OB) extract marked as defence MFI-1. PW1 told them that if the deceased was the one who was making them to go to her homestead, they should take her with them. PW5 indicated that she called the defendant on phone and told him that they had been chased away by PW1. She stated that the defendant did not forcefully remove the deceased from her homestead.

46. On further cross - examination, PW5 indicated that their clan is Abashikulu. She knew when the deceased left Nairobi and even welcomed her to the defendant's homestead. The distance between the deceased's and the defendant's homestead at Lusiola was 500 metres. PW5 stated that the deceased at one time went to her homestead but returned to the defendant's homestead at night. PW5 admitted knowing PW2 and his wife as well as Wikanakana who was PW2's uncle. She stated that Wikanakana was buried at Eshikulu, Lusiola but his wife was buried in a different place. PW5 informed the court that she used to visit the deceased when she was in the defendant's homestead but she could not remove her from the said house without the defendant's permission as she respects him. At times she would buy food for it to be taken to the deceased in Nairobi. At one time matatus were on strike she called DW5 to go for the food. Alex's wife deposited Ksh. 20,000/= in the deceased's account for her hospital bill. PW5 indicated that she did not visit the deceased's homestead after they were chased away. In late July 2015 after their mother died, she reconciled with PW1 at the deceased's homestead. There was a time that DW2 wanted to reconcile but the defendant and PW1 did not attend the meeting.

47. On further cross - examination, she indicated DW6 would tell her that she was not getting along with PW1. She admitted knowing Nathan Lwangu and Mung'ao. She knows that Risper was buried at Kasavai. Angote was buried at Eshikulu and his wife in a different village by the name Kisikiri. PW5 further stated that she never heard the deceased saying that she wanted to be buried at the defendant's homestead. Since the year 2013, the deceased would at times remember PW5 but at times she would not. PW5 added that she did not see the list that the defendant had given the hospital for those allowed to visit the deceased as the watchman would refer to his computer. The deceased was not talking by the time she was discharged from hospital.

48. On being cross - examined by the court, PW5 stated that the deceased went to Nairobi without a change of clothes or medication and that the defendant and his wife bought the said items for her. He gave his wife and PW5 money to buy clothes for her.

49. The next witness, Athanasi Shisanya Luchedizanga, testified as PW6. He informed the court that he lives in Kaluni sub-location at Makata village, Ikolomani sub - county where he works as a farmer. He was 84 years old and belongs to the Eshikulu clan and the Abakhalekha sub-clan. He informed the court that if a deceased wife is not buried next to her late husband, their children can run mad, become infertile or be haunted by the deceased person. This happens to the entire sub-clan that did not follow the customs. He further stated that if a person is a christian, the church carries out its religious rites by the priest

leading the ceremony and burying the deceased. Culturally, when a burial has taken place, the sub-clan is given money by the relatives of the deceased. In the case of the deceased, he is the one who should have been given the money (mukulukha). After burial, the deceased's grandchildren gather and move far from the grave with twigs and then go back to the grave where they throw the twigs and cash they have been given. They sing and chase away evil spirits. PW6 informed the court that he does not know where the deceased was buried and that he would not have agreed to be part of that funeral as it was against their customs for her to have been buried in the defendant's homestead. He added that the Abakhalekha sub-clan permits exhumation so that a person can be buried at their rightful grave and as such the deceased needs to be buried in a grave next her late husband. He explained that they had in the past exhumed the remains of Shumila Mukalo from Kisii and Mukhalia who was exhumed from Manyuli to Khalekha. He further stated that the late Lwangu was buried in the wrong place and his spirit haunted family members. He was exhumed and buried at Lusiola.

50. On cross - examination, he informed the court that no one born within the Abakhalekha can be buried outside their homestead and that Mukhalia was exhumed because of a court case which his family lost. If an Abakhalekha dies at war, the family members look for the body and if buried, they exhume the remains or if not found, they bury a banana stem. He testified that the deceased was his sister-in-law and that she left her homestead to seek medical treatment, assisted by the defendant. She used to live in her homestead which PW6 used to visit but he did not visit her at Aga Khan hospital or go to see her in the mortuary. He stated that he had not seen her for quite a while. He did not go to Kambiri or visit her in the defendant's home at Lusiola. He informed the court that an Abakhalekha can elect where to be buried. He knew that Wikanakana was buried in his homestead but his wife became married to another man and she was buried there. He stated that his father's grave is in his homestead and although he is not the last born, he tends to his father's grave. He further stated that Mukhalia's grave is at his shamba. His wife is also buried there. Angote Mukhalia was buried at Shijiko, his wife was buried at Emakata, in an Abakhalekha shamba. PW6 told the court that the problem with the Amulyoto family is that the deceased was buried in the defendant's homestead at Lurambi. In his view, the deceased's children were in good terms as they had not told him of any problems or disagreements amongst them. He explained that even if a family is poor, they still bury their dead without giving out money to their clan members.

51. On re -examination, he informed the court that if a person dies, the family sits down and discusses how to bury the dead. After the church is through with religious rites, family members gather around the deceased's grave. In the deceased's case, her children and cousins would have gathered around her grave and would have sung. They would have looked for an old person who would have blessed the children and prayed for the spirit of the deceased not to haunt them. The eldest of them is given money and they all leave the grave and go outside the gate without turning back. If money is not available, the eldest person is given chicken, a bunch of bananas or food. He explained that if he bought a piece of land, he cannot be buried there if he has a piece of land that he was given by his father.

52. PW6 informed the court that a married woman cannot choose where to be buried. He stated that he tends to his father's grave because their last born died. They buried him in his father's homestead. Their father could have been buried at his piece of land or at his last born son's homestead.

DEFENDANT'S CASE

53. DW1, Alfred Amulyoto, the defendant in this case informed the court that he lives in Nairobi where he works as a businessman. He stated that the plaintiffs are his siblings. Their mother died in the early morning of 23rd June, 2015, at Kambiri. She had been unwell for forty five (45) years. She had been admitted to Aga Khan hospital for about sixty (60) days before she died. She had come out of a coma and was on life support. When she was discharged he took her to his house in Kambiri where there was a nurse attending to her. He informed the court that he was very close to the deceased and she would tell him very personal things. She was also close to PW5 and DW2 but had a bad relationship with PW1. She would complain to the defendant about what PW1 and his wife had done to her. At one time she told him that the door to her house was broken by PW1. She also told him that she was beaten by PW1's wife in the year 2011 and he took the deceased to Nairobi to live with him for six (6) months. On three occasions, he received telephone calls from the deceased informing him that the main door to her house was broken.

The door was repaired by a carpenter. The defendant indicated that PW1 broke the door to have access to the house.

54. Their father passed on in the year 2007. He used to stay in Kisa with their step-mother Teresina. He was buried at Lusiola in Eregi location. The deceased lived at Eregi until 30th September, 2012 when she called and told him that she wanted to go to Nairobi. She told him that DW2 and PW5 had been beaten by PW1 in her presence and that she could not bear it anymore. He asked DW5, whom he had employed as a Driver for the deceased to drive her to Nairobi. The defendant asked PW5 and DW6 to accompany the deceased to Nairobi where they arrived at about 4.00 p.m. The deceased had not carried her medicine and he asked a Doctor at Kisumu to send him a prescription after which he collected medicine from the Karen hospital, Nairobi. He stayed with the deceased for two (2) weeks but he felt that she was not comfortable in Nairobi as her friends were at Eregi. He told her that he would take her back home but she said that she would not go back there. It was the defendant's testimony that he convinced her that he would take her to his home at Eregi which she agreed to. When she went there she found PW5, DW2 and church members.

55. He further informed the court that between the years 2005-2012 his brothers and sisters were in gainful employment but they took no interest in the deceased. DW2 and PW5 were carrying out businesses, Brenda was working at Chemelil Sugar Company, Austin was working in the United Kingdom, PW1 was working for a Non - governmental organization (NGO) in Western Kenya and Alex was working with the United Nations High Commission for Refugees (UNHCR). He informed the court that the deceased's house was leaking and he undertook the repairs. In late October, 2012, DW6 told him that Austin and PW1 had gone to his house at Lusiola where they picked up the deceased whom they took to her to her home in Kambiri but she returned to the defendant's house where she continued staying until May, 2013 when she had a stroke. She was admitted to Aga Khan hospital and discharged thereafter. He settled the hospital bill of Ksh. 374,000.00. Three (3) months later she had a stroke and was admitted to the said hospital, he settled her bill of Ksh. 300,000/= . She left hospital in September, 2013 and went to his house. None of his siblings assisted to settle the bill.

56. It was the defendant's testimony that he had given the deceased a car for her use. In early 2012, PW1 told him to remove the car from the deceased's compound and take it to his compound. The deceased was affected by the removal of the car. She kept on insisting that the car should be taken back to her compound. He informed the court that he relocated her in May, 2014 as he was selling the property at Eregi and there was no objection from his siblings on his taking the deceased to Kambiri. He testified that he took the deceased to the Aga Khan hospital in April, 2015 when she suffered another stroke. The bill came to Ksh. 2.3 Million out of which he paid Ksh. 300,000/= . PW1 contributed Ksh. 50 in three (3) batches of Ksh. 20, Ksh. 20 and Ksh. 10. As no one else contributed, the defendant undertook to pay the balance. He produced the hospital bill as defence exhibit 1 (D.exh.2). At Kambiri, PW5 would visit after 2 days, DW2 would visit after every two (2) weeks. He was not aware if the others visited. The deceased passed away on 23rd June, 2015 at the defendant's farm at Kambiri in the house he had given her. DW2, PW5, the deceased's sister Teresina, DW6 and a nurse were present. PW5 and DW6 remained at home while the others went to Aga Khan hospital where the deceased was certified dead.

57. The court was told by the defendant that the deceased had told him on several occasions that she wanted to be buried at his farm at Kambiri. She would point to a location near a sisal plant. She would tell this to DW2, Boaz Kutoto who is the defendant's neighbour at Kambiri and Samuel Anjesia. On the morning of 23rd June, 2015, he proceeded to Kakamega High Court to attend to their late father's succession cause. Alex was not there but the others got to know about the deceased's death. On 25th June, 2015, the defendant was served with orders for an injunction barring him from burying the deceased at Kambiri. They went for the hearing of the application for injunction in CMCC No. 251 of 2015 on 15th July, 2015 where his Advocate raised a preliminary objection on the jurisdiction of the Chief Magistrate to hear the suit. On 17th July, 2015, the Magistrate ruled that he had no jurisdiction to hear the matter. The defendant testified that he left court with a copy of the ruling and pleaded with the Aga Khan mortuary to give him the deceased's body and they released it to him. At that time he was with his wife Alice, DW2, his cousin Tom and his friend Julius. The defendant further testified that he took the body to Kambiri and buried it at 10.30 a.m., on 18th July, 2015 in a service celebrated by Father Bahati of Mukomari Catholic Parish. DW2 was the only sibling present. Father Bahati had told them that the body

was thawing and it needed to be buried before the service could be done. At 11.30 a.m., a police land rover went to the scene and he was served with orders for an injunction directing that the deceased's body should not be moved to Mukumu Mission hospital mortuary. He acknowledged receipt of the same but by then the deceased's body had been buried. The defendant informed the court that he did not see any problem with him burying the deceased.

58. Like some of the other witnesses, the defendant in his evidence in chief gave examples of several families that had buried their parents in places other than their ancestral land. It was the defendant's view that Bashikulu can be buried anywhere according to their culture thus it does not follow that a Bashikulu must be buried at Eshikulu. He added that he has not been haunted as a result of burying the deceased in his land. The defendant prayed for the plaintiffs' case be dismissed as it has been filed in bad faith. It was his view that PW1 should have apologized and asked the deceased to go back home after she sought refuge in the defendant's home.

59. On cross-examination, the defendant informed the court that he has four (4) wives and ten (10) children and that he has not disowned any or discriminated against any of his children. He admitted that he earns good money that he mostly spends it on his father's family although his brothers are currently wealthier than him by far. The deceased was using a taxi when their father was alive. PW1 recommended a driver by the name Vitalis for the car that the defendant gave to the deceased. PW1 would not take her to hospital and that is why she would use a bodaboda (bicycle) save for the very first time that she was taken from Mukumu hospital to Aga Khan hospital. The defendant further stated that he would send money to Kakamega Nursing home and Aga Khan hospital. Alex sent Ksh. 20,000/= to the hospital account, which he repaid. He agreed that in his statement he recorded that *"Alex deposited Ksh. 20,000/= and he said that was all he could afford. I returned the money to him as I knew he has money"*. The defendant in his evidence in court indicated that he refunded Alex the money because Alex requested for it. When the deceased passed on at Kambiri, she was taken to hospital using PW5's daughter's vehicle. He denied that PW5's daughter contributed towards the deceased's hospital bill. He added that he was the one who mostly paid the house helps since the year 1980, even when PW1 had employed them.

60. The defendant expressed the view that the deceased loved him a lot unlike his other siblings whose homes she did not go to when she sought refuge. She had lived in the same compound with PW1 until the year 2012. He stated that he did not know about the mental status of the deceased but she is the one who told DW5 to take her to the defendant's house in Nairobi after she had attended a church service. As far as he knew, she did not suffer from memory lapse. He denied that she ever attempted to go to her house in Kambiri after he took her to his house in the same locality or that she ever attempted to run away by jumping over the fence and getting hurt in the process. The defendant recounted that PW1, Austin and an uncle by the name Gideon Ngaira took the deceased back to her home in Kambiri which led him to report at Shisejeri Police Post that they had taken her from his home without medicine. The police accompanied him to his home at Lusiola. He denied having reported that she had been abducted. The police volunteered to escort him and the defendant took the deceased to his home at Kambiri. He denied restricting his siblings from visiting her at his home and at the hospital. According to him, there is nothing in the Luhya customs that requires a body to be kept at home for two (2) days and to be buried on the third day. Their father's body stayed in the mortuary for a day, before the funeral. He stated that they have never had a funeral committee in their family and denied having told the court in Kakamega High Court Succession Cause No. 550 of 2008 that he was the chairman of their late father's funeral committee. He told the court that he did not inform his other siblings save for DW2 about the deceased's funeral. He then told the court that he sent text messages to PW1, DW2, Alex, Austin and Brenda at midnight of 17th July, 2015, informing them of the funeral. Although he did not inform them that the deceased had died, PW5 called her siblings to inform them. In his view, it was only fair that he should take the deceased to the Aga Khan hospital mortuary as she was treated at the Aga Khan hospital when she was alive.

61. The defendant told the court that his siblings were aware of the hospital bill. He told Alex and PW1 about it. They did not learn about it when he filed an application for PW1's parcel of land to be sold to offset the bill. He stated that he did not consult his siblings about taking the deceased to Aga Khan hospital when she was unwell. He explained that Mukumu hospital did not have the facility to cater for

her illness and that was the reason why he took her to the Aga Khan hospital as she had received treatment in the said hospital in the year 2004. He denied that PW1 sent him Mpesa of Ksh. 50 for him to buy airtime. Although he asked his siblings to contribute towards the deceased's hospital bill, they were not cooperative. He stated that two (2) of his children attended the funeral and about twenty (20) members of the Abakhalekha family attended. Members of the Abashikulu clan were very many at the funeral. He explained that the deceased's body was embalmed at the Aga Khan mortuary but it was thawing at home and that is why it was buried before the service. The defendant indicated that he, DW5 and DW6 were very close to the deceased. PW5 and DW2 would attend to her at Kambiri. He admitted that PW5 was closer to the deceased than Boaz Kutoto and Samuel Injesia who were his neighbours.

62. On further cross - examination, the defendant stated that the deceased told PW5, Kutoto and Samuel where she wanted be buried. He said that there were no funeral disputes in the families of the deceased persons whom he recounted having been buried elsewhere other than in their ancestral land. The defendant was categorical that his relationship with PW1 did not deteriorate when he tried to introduce Calvin and Terrence who were alleged to be the defendant's children. He denied having buried the deceased at his home at Kambiri in order to punish PW1 or to show his financial muscle. He stated that there is no custom in the Abakhalekha family that a husband must be buried next to his wife or vice versa.

63. On re - examination, the defendant stated that the deceased had left her home at Kambiri and there was no other place to bury her other than in his farm. He added that PW1 and Austin invited him and the deceased to her home to attend a meeting which was being chaired by Joseph. He went there but an exchange of bad words occurred between Austin, PW1 and himself.

64. On being cross - examined by the court for clarity, the defendant clarified that he was told by Joseph, the Chief of Eregi that the above meeting was held in order to find a way of reconciling DW2, PW5 and PW1. One Mwashe and some villagers also attended. He said that as the elder brother, he tried to call his siblings for meetings to reconcile them but not all would attend. He talked to various elders who were their uncles such as Athanas Lwangu, Athanasi Shisanya, Chivingo who would talk to his siblings, who would in turn inform them that there was no need to meet.

65. DW2, Geraldine Khaukani Shivasi a resident of Shikumu location, Turumbini village informed the court that she is a farmer. The deceased was her mother. She recounted how she went to the deceased's house at Shijiko, Lusiola village on 29th September, 2012 to clean her as she used to do on a weekly basis. She found PW1 but he did not greet her. She also found DW6 and PW5. She told DW6 to warm some water for cleaning the deceased and to prepare food for her. DW2 cleaned the deceased and while shaving her hair, Judy went to where they were. She greeted DW2 who responded. She then went to her house and on getting out proceeded to where DW2 was. Judy attempted to hit her with a stool. The deceased was seated between them. DW2 said that she held the stool which broke as they struggled. Judy went to call PW1 as DW2 continued to shave the deceased. PW1 went to where they were and started making noise by ordering her to leave. She stated that he took a walking stick and told her that he would beat her if she did not leave, kill her, put her in a sack and call her husband. He then started beating her. The deceased told her to run away and locked DW2 in her house. PW1 tried to break the door by kicking it but she was holding it from the inside. He ordered her to get out of the compound and to leave with "*that thing*" if it is the one which was taking her home. He was referring to their late mother as "*that thing*". She cried and left home with PW5 as PW1 had ordered both of them to leave. DW6 was left with the deceased. DW2 explained that the cause of the problem was that at an earlier date, she had taken the deceased to hospital and when they returned home, She and PW5 decided to prepare a cooking place (meko) for the deceased in her kitchen but Judy told them that they were behaving badly as there was another meko in PW1's house. DW2 testified that on the same day the defendant called her and told her that PW1 had chased away DW6 as well and that the deceased had been left alone.

66. On 30th September, 2012 in the evening at 8.00 p.m., the defendant called her and told her that the deceased had reached Nairobi. After some time, she went to stay in the defendant's house at Lusiola. DW2 used to visit the deceased twice a week to ascertain that she was being cleaned, fed and that she was taking her medicine. At a later date, DW6 told her that Austin had taken the deceased from the defendant's house to her home after she was told that DW2 had fainted at the deceased's home. DW2 went

to the defendant's house and while there, the deceased found her there after walking from her home. She told DW2 that she was tired as she had not taken any food or medicine. DW2 further stated that on 24th December, 2014 she called her sisters and brothers for a meeting at their home with an agenda for reconciliation. Alex, Brenda, PW5 and Austin attended. She told them that PW1 should have attended as he was the cause of the friction and that they should stop sending hurtful messages to each other. Those who attended were in agreement.

67. DW2 testified that the deceased's relationship with PW1 was not good and that although the deceased loved him, he was problematic and liked quarrelling the deceased who told her that she feared PW1. According to DW2, PW1 did not assist the deceased with any food. She kept on telling her that PW1 had chased her from her home and that she would never go back there. The deceased lived in Lusiola for almost one and a half years and then left for Ileho in the year 2014 where DW2 would visit her. She informed the court that while at Ileho, the deceased told her that she could see that her days were coming to an end and when she died, she should be buried there. The place that she pointed out for her burial was at the defendant's compound and that is where she was buried. She stated that the deceased loved the defendant. She explained that before the deceased died, a grave had been dug for her by Alex. Their father had been buried on the left side and the deceased was to be buried on the right hand side. She was not happy that her grave had been dug as early as the year 2007. DW2 stated that she has never heard of any evil spirits haunting family members because of the deceased being buried at Ileho. She informed the court that Abakhalekha is a family whereas Abashikulu is a clan and that clan members can be buried outside their family land. She gave the example of a man by the name Mung'ao who was buried at Ileho, Vihiga.

68. On being cross-examined, DW2 stated that on 29th September, 2012 they agreed to prepare a meko for the deceased. PW5 was there and when she saw the confrontation between PW1 and her, she ran to the kitchen. She explained that although in her statement she wrote that the deceased was paralyzed and was using a wheelchair it was one leg that was paralyzed thus she could walk by dragging the paralyzed leg. She stated that her relationship with PW1 was okay and she was surprised when he threatened to kill her. She reiterated what the defendant said in his evidence that during their late father's funeral, there was no funeral committee and that Alex went home with people from Nairobi who dug the grave. She denied having undressed at the deceased's home and that she threatened to curse PW1's children. DW2 then said that PW5 ran away to their neighbour's home and that she was beaten by PW1 after PW5 locked herself in the house. She informed the court that PW1 was the deceased's last born and that she loved him. Although PW1 had a vehicle, the deceased used to use a boda boda. She recounted that the deceased was taken to Mukumu hospital by PW1 but she was not improving thus the defendant took her to Aga Khan hospital. According to DW2, PW1 would visit the deceased in hospital. She informed the court that the deceased is the one who opted to stay in the defendant's house.

69. It was DW2's evidence that she was with the deceased at the time she died. PW5 informed their brothers and sisters about her death. DW2 stated that she called PW5 and sent her a text message but she said that she would not attend the funeral. DW2 indicated that she did not inform her other siblings about the funeral. They removed the deceased's body from Aga Khan mortuary on 17th July, 2015 at 6.00 p.m., and it was buried on 18th July, 2015 at 10.30 a.m. The burial took place about ten (10) hours after they had removed the body from the mortuary. She informed the court that they buried it fast as it had stayed long in the mortuary. DW2 informed the court that she and the defendant are the ones who went to remove the deceased's body from the mortuary. In her view, that does not show that they hate and discriminate against their siblings. She stated that DW2's four (4) children, the deceased's seven (7) grandchildren and some of the defendant's children attended the funeral. DW2 confirmed that the defendant's son, Hans aged 45 years, lives with PW1 but she does not know how the defendant relates with his son. DW2 said that she does not know if the conflict/friction between the defendant and PW1 is as a result of Hans living with PW1. Although she had tried to reconcile their family, she had not been able to.

70. On being cross-examined by the court for clarity, DW2 stated that when the deceased pointed out the area where she said she wanted to be buried, she was alone with her at the defendant's home at Ileho, Kambiri. There is a sisal plant at the area where she pointed out. DW2 reiterated that she only invited

PW5 for the funeral but not the others. According to her, PW1 used to be a good person until the year 2012 when he changed. He would assist the deceased with food. She stated that the defendant bought medicine for the deceased from the year 1982.

71. DW3 by the name of Arthur Oxan Shivachi, a seventy four (74) year old man informed the court that he hails from Eguhu, Ivonda village, where he works as a farmer and that he is a retired sub-chief. He is a member of the Bashimuli clan, of the Idakho sub-tribe. He knows the parties to this suit as well as the deceased in this case. Her Aunt was married to his grandfather as the 6th wife. He informed the court that he knows that the deceased was buried at the defendant's home and there is no problem with him burying her at his homestead. He recounted that his late father William Shivachi was buried at his second wife's homestead whereas according to the Bashimuli clan, he should have been buried at the elder wife's home. He however wanted to be buried at the younger wife's homestead to safeguard his farm which had cases. He gave examples of other deceased persons who were not buried in their ancestral land. He explained that none of their family members have been haunted by evil spirits for burying people in different places. He indicated that his cultural belief is that if the deceased's body is exhumed from where it is buried, it will lead to members of her family being haunted as it would be against her wishes. According to him, it is not a must in their culture for a wife to be buried next to her late husband's grave.

72. On cross-examination, DW3 informed the court that he is from the Bashimuli clan and the parties hereto are of the Eshikulu clan. His area of jurisdiction did not extend to the areas of residence of the parties hereto. He indicated that the culture of Bashimuli, Bashikulu, Bamukhali, Bamusali and Bamasaha are almost similar with a few differences when it comes to funeral rites. Culturally, a deceased's body lies in state at his/her homestead for one or two days before being buried. He stated that he attended the deceased's funeral but on reaching there at 11.00 a.m., he found that she had been buried. The funeral mass was ongoing. He informed the court that his grandmother wanted to be buried where she was laid to rest. DW3 stated that he has known the Amulyoto family since the year 1952 but did not know when the conflict/friction amongst the children started. He did not know that the deceased was not in good terms with some of her children. He added that the deceased did not tell him where she wanted to be buried.

73. On re - examination, DW3 indicated that the culture of the Luhya sub-tribes are different but people of the same sub-tribe observe the same culture. The culture of Bashimuli and Bashikulu is however similar with regard to funeral rites.

74. Samwel Omwore Anjessia a 72 year old man adduced evidence as DW4. He is a resident of Kambiri location in Ileho Division, Shinyalu sub-county, Kakamega County where he works as a farmer. He belongs to the Amasakha clan. He informed the court that he has known the defendant since the year 1964 and the deceased since May, 2014. He later moved to Makale village, Kambiri location which is close to the defendant's home. The deceased was a catholic and so is he. He and the deceased used to fellowship at Mukomari parish. Their group fellowship was known as St. Veronica. He stated that when the deceased left Eregi for Kambiri, she was not very strong and they would at times go to her home for fellowship. He informed the court that in March, 2015, they had a group fellowship at the defendant's home. After service, the deceased told them that she was becoming weak and when she died, she would not like to be buried at Eregi but at the defendant's homestead. She showed them where she wanted to be buried near a sisal plant and they went to the place she had shown them. In April, 2015, the deceased appeared to be very ill. They prayed for her and her son took her to a hospital in Kisumu. Later on they were informed that she had passed on. She was buried at Magare village, Kambiri location at the defendant's home. DW4 attended the funeral where the parish priest Father Bahati officiated the ceremony.

75. DW4 told the court that he is an Idakho and that among them, a wife is buried on the left hand side of her late husband who is buried on the right side. If the parties are not living in harmony, a party can state where they would like to be buried. One does not have to be buried outside the house. In his evidence in chief, the witness gave examples of persons that were not buried in their ancestral land for various reasons. DW4 informed the court that the defendant's family are Idakhos of the Bashikulu clan. Idakho's culture is uniform throughout. If the deceased had been buried against her wishes, the defendant would have suffered. This is a belief of the Idakhos. He would be haunted by the deceased's spirit if he had gone

against her wishes.

76. On cross - examination, DW4 told the court that during the transfer of the deceased to another parish, DW2, the defendant and PW5 were present. The other children were absent. He explained that in Luhya customs, a deceased's body is supposed to stay at their homestead for three (3) days before burial. He was present when the deceased's body was taken to the defendant's home on 17th April, 2015 at 4.00 p.m., and buried on 18th July, 2015. Peter Shisanya and Joel Muguze from Eregi were present at the funeral. He indicated that he knows three (3) of the deceased's children, namely, PW5, DW2 and the defendant. PW5 did not attend the funeral. He stated that he did not know the deceased's family well.

77. DW4 admitted that he knew the late Shamalla who was buried elsewhere as his brothers wanted to inherit the ancestral land. He left his wife behind after he relocated. His wife later lost the land to Shamalla's brothers. He knows that Peter Shiuka buried his mother in Kitale after a disagreement between her and her husband. The deceased did not mention if she had been in good terms with her late husband. In Catholicism, the community arranges the funeral, the priest follows the programme prepared by the family members. After the speeches, the priest gives the word of God and the deceased is then buried. The deceased had a mass held in her honour on the day of the funeral after she had been buried because of the condition of her body, which was starting to smell. She had stayed for sixty two (62) days at the mortuary. The mass started at 10.30 a.m. to 11.30 a.m. DW4 explained that when the deceased showed them where she wanted to be buried, DW2 and PW5 were not present. The defendant was present and the group fellowship members. He reiterated that if the defendant had gone against the deceased's wishes, he would have been haunted by her spirits.

78. On re -examination, DW4 indicated that it is not a must for a deceased's body to stay for three (3) days before burial as a body can lie in state at the homestead for even a week depending on the condition of the body or it can be buried after an hour of arrival from the mortuary. It varies from home to home

79. DW5, by the name of Vitalis Murenjekha Imbuga from Shanjeso sub-location, Eregi location, Kakamega County informed the court that he is a Driver cum businessman and that he knows the parties to this suit. He also knew the deceased. He was employed as her driver in February, 2011 by the defendant who had bought her a vehicle to use. He was employed to take the deceased to various places. He recounted how on 30th September, 2012 he went to the deceased's home to collect her to take her to church. He found Teresa and the deceased's sister. They all went to Eregi Catholic Church. He later picked them up and took them home. The deceased told him that she wanted to go and see the defendant. He ignored her request. She insisted that she wanted to go and see the defendant. He told her that the defendant does not stay at Kambiri but in Nairobi. She told him that she wanted to go where he was. The other two ladies said they did not want to go to Nairobi. DW5 called the defendant over the issue and told him about the deceased's wishes and that there was no sufficient fuel in the vehicle. The defendant sent DW5 money for fuel through Mpesa and told him that the deceased would be accompanied by DW6 and PW5 to Nairobi. He picked up PW5 at Chavakali and DW6 from her home at Khayega. DW5 informed the court that the deceased was anxious to reach Nairobi, she was not comfortable and kept on complaining but was comforted by PW5 and DW6. They reached Nairobi at 5.00 p.m.

80. DW5 further informed the court that he worked for the deceased for three (3) years. Although PW1 used to live in the deceased's homestead, each had a house of their own which were about 50 metres apart. He stated that the car he had, used to be parked at the deceased's compound but this changed when PW1 told him to remove it from the parking shed. He thus took the vehicle to the defendant's home. He said that his relationship with PW1 became sour when DW5 asked him to assist to jump start the vehicle and he told him that was not his business. He informed the court that after the visit to Nairobi, they returned to the defendant's home in the village after two (2) weeks. The deceased was not happy to be told to go back to the village but the defendant told her that she would go to his home. They found PW5, DW2 and other neighbours at the defendant's home.

81. He further testified that the deceased stayed at the defendant's house for some time. He recounted of a day when he and the defendant had gone to Kakamega and DW6 called them and said that PW1 had taken the deceased to her matrimonial home. They drove there and when the deceased saw them she asked if

they had gone for her and asked where the vehicle was. DW5 informed the court that the defendant and PW1 quarreled and neighbours who had gone to visit the deceased told the defendant to leave the matter as it was for the deceased to remain in her homestead. He stated that he and the defendant went to his home and at 9.00 p.m., and the deceased returned there. He recalled a time when on the instructions of the defendant, he took the deceased accompanied by DW6 and DW2 to the his home at Kambiri where they found him, his wife and others present. He reiterated that the deceased was not forced by anyone to travel to the defendant's house in Nairobi as she made the decision on her own.

82. On being cross - examined, he stated that he found the motor vehicle at the deceased's compound. He did not know if the deceased was using PW1's vehicle before. He denied that PW1 was the one that linked him to the defendant to get the work of driving the deceased. He denied lying to the deceased that he was taking her to her friends' house who had gifts for her. He told the court that after they left Nairobi with the deceased they took her to the defendant's home at Lusiola and that it was her decision which she told them on Thursday before they left Nairobi on Friday. DW5 reiterated that it was DW6 who called the defendant to tell him that PW1 had taken the deceased away from Lusiola. He and the defendant then went to the deceased's home. He could not remember having gone to collect the police and reporting that the deceased had been abducted or if the police accompanied them. From his observation the deceased's family was getting on well.

83. He attended the deceased's funeral on a Saturday, whose date he could not recall. The body was taken to the defendant's home at between 10.00 p.m. and 11.00 p.m., the previous night. He left at 6.00 a.m. the following morning to collect mourners from Kakamega and to run errands. He did not know if by 6.00 a.m. the deceased had been buried. In the morning there were few people in the compound. He went back to the deceased's home at 10.00 a.m. and did not know if the deceased had been buried then.

84. On being cross -examined by the court, DW5 maintained that the deceased is the one who told them that she wanted to be taken to the defendant's home at Lusiola after leaving Nairobi. She said this in his presence, the defendant and his wife Alice, DW6 and two of the defendant's children, namely, John and Shirley. He also maintained that he could not remember that police officers were called to the deceased's homestead after the defendant complained that the deceased had been abducted from his homestead by PW1. If police officers were there, he did not know, unless they were in plain clothes.

85. DW6 was Faith Khasoha from Lusomo village, Shinyalu sub-county. She told the court that she was working at the defendant's home at Kambiri as a house help. She previously worked as a house help for the deceased from the year 2011. They were living at her home at Shijiko village where she would clean her and do household chores for her, as she was sick. She stayed with her at Shijiko for a year. The deceased's son, PW1 was living in her homestead. Each had his/her own house. She informed the court that deceased left after PW1 found PW5 and DW2 shaving the deceased's hair and told them to leave his homestead. DW2 told him that it was the deceased that had made her visit the homestead. PW1 then pointed to the deceased and told her "*if it was that thing that had made her go there she should remove it from there.*" DW6 went back to the kitchen but shortly thereafter heard DW2 crying saying that PW1 had beaten her. DW2 and PW5 left the compound saying that they had been beaten by PW1. DW6 stated that she stopped cooking, took her child and left for their home at Shinyalu as she feared that she would be beaten. She left the deceased on her own. The following morning the defendant called her and told her that the deceased wanted to go to Nairobi and requested DW6 to accompany her. DW5 picked her up at Khayega and they left for Nairobi where they stayed for about three (3) weeks at the defendant's home. Thereafter they went to stay at the defendant's house at Lusiola which is near the deceased's homestead.

86. She testified that the relationship between the deceased and PW1 and between her and PW1 was not good for the reason that he was quarrelsome. He would threaten to beat her and at one time chased her away from the homestead. PW1 would take about a week before going to see the deceased although they were living in the same homestead. He never took provisions to the deceased who would ask him why he was not checking on her. He would quarrel DW6 in the presence of the deceased but he never quarreled the latter. Brenda, Alex, and Austin would visit the deceased from time to time. She indicated that they stayed at Lusiola for one year where Alex visited the deceased once. She added that no one prevented them from visiting. She added that on the date that PW1 beat his sisters, his wife was present. The

deceased saw what was going on.

87. On being cross - examined, DW6 informed the court that the deceased would use a walking stick and that she was a little bit forgetful. Her memory was not so good. The forgetfulness started before she left her homestead for Nairobi. She would however remember how to go back home from church. She was in her eighties. In the year 2013 the deceased went into a coma and would at times not identify her children but with time she would remember and identify them. She could not remember the identities of those that lived afar. She would decide where she wanted to go. She would say that she wanted her children to visit her at Kambiri and they would visit her. The defendant did not visit Kambiri. PW5 would take care of the deceased when DW6 was off duty. DW6 stated that she told the defendant that she could not go back to Shijiko and he decided that they would go to Lusiola. He told the deceased that she would go to Lusiola. Only the watchman was living at the homestead. She said that the defendant not Alex, is the one who used to pay her salary. When she started working for the deceased, there was no electricity but PW1 arranged for electricity to be connected to her house.

88. She indicated that the defendant, the deceased's sister Teresina and DW2 were present at the deceased's funeral. Eregi Catholic parishioners were absent, one neighbour of the deceased's from Shijiko attended the funeral. In reference to the day that PW1 beat DW2 and PW5, PW1 and Austin took the deceased to Mukumu Mission hospital where she was admitted. DW2 and PW5 went to the said hospital. She told the court that Judy threatened to beat DW2 while holding a stool but she did not see PW1 beating PW5 and DW2.

89. John Jetty Liyai Shiperu, 85 years of age, testified as DW7. He stated that he lives at Kambiri location, Evakale sub - location in Musembe village where he works as a farmer. He knows the defendant as well as PW1. DW7 stated that he and PW1 used to work as members of the Liquor Licensing Board, Kakamega. He informed the court that he came to know the deceased either in the year 1986 or 1987 and that was when PW1 told him to tell the defendant to go and pick up the deceased and live with her. He told the same to the defendant who picked her up. He stated that he used to visit the deceased at Kambiri but could not recall the last time he saw her. He indicated that he was a Maragoli who bought a shamba in Kambiri. His mother died a long time ago and he buried her in his parcel of land but his father was buried elsewhere. He stated that his mother was living with him and he was taking care of her. She had said that he should bury her after she died. He saw nothing wrong in burying his late mother. He stated that he knew that the deceased used to tell the defendant to bury her when she died but he did not expound on how he got to know the foregoing information. He said that he does not believe in evil spirits.

90. On being cross - examined, he stated that he moved to Kambiri from Maragoli when he was fourteen (14) years old. His father bought a shamba at Kambiri and he too bought one in the year 1962. He was born in 1936. He indicated that his land is No. Kambiri/Isukha/847 and that is where he buried his late mother who moved to his home in the year 1966 after his father died, so that he could take care of her. He lived with her for about fifteen (15) years. She would at times visit her other children and go back to his home as he is the first born. She had said that she wanted to be buried in his piece of land. He told the court that he never visited the deceased at Shisejeri. He became her friend when she moved to the defendant's house at Kambiri. The last time he saw her was when she got sick and was admitted to hospital. He would visit her at the defendant's house at Kambiri. He stated that he worked with PW1 at the Liquor Licensing Board for many years. He did not know if he was in school in the year 1987. PW1 left the Liquor Licensing Board in the year 2007 to join politics as politicians were not allowed to sit in the Liquor Licensing Board.

ISSUES, ANALYSIS AND DETERMINATION

The issues for determination are:-

- (1) If the plaintiffs were cruel to the deceased;
- (2) Whether the deceased left a wish on her preferred place of burial; and

(3) If the deceased was bound by the burial customs and practices of the Abakhlekha clan of the Luhya tribe;

Were the plaintiffs cruel to the deceased?

91. The evidence adduced by the plaintiffs and some of their witnesses and the defendant and his witnesses leaves no doubt that there were sharp divisions amongst the deceased's children which had not been reconciled by the time the deceased passed away. Prior to moving to the defendant's homestead, the deceased was living in the same homestead with PW1 as it is their culture for last born sons to stay with their mothers in the same compound. Their late father had given his sons parcels of land in the said homestead. It was uncontroverted that while working at Kenya Breweries Limited, PW1 provided for the deceased's medical needs as well as her living expenses. He saw to it that electricity was connected to her house and he arranged for an indoor toilet to be constructed for her. He stated that he installed a ceiling in her house. PW1 testified that his other siblings including the defendant also used to assist the deceased financially. This position seems to have changed in the course of time with the defendant taking up the greater burden of providing for the financial and medical needs of the deceased. This was after PW1 left employment and tried his hand in politics but was not successful.

92. DW2 testified that the deceased's relationship with PW1 was not good as he was problematic and liked quarrelling the deceased who told her that she feared him. The foregoing evidence is inconsistent with that of DW6, the house help who lived in the same house with the deceased and in the same compound with PW1. DW6 stated that PW1 would quarrel and threaten to beat her but he never quarreled the deceased. She however stated that PW1 would take about a week before going to see the deceased although they were living in the same homestead. He never took provisions to the deceased who would ask him why he was not checking on her. The evidence adduced shows that things came to a head on 29th September, 2012 when PW5 and DW2 went to the deceased's house to visit her. Judy who was angry about an earlier incident where PW5 and DW3 wanted to construct a meko at the deceased's house, confronted DW2. Although DW2 testified that PW1 beat her as well as PW5 and threatened to kill her, neither PW5 nor DW6 witnessed the beating or heard PW1 issuing the said threats. PW5 stated that she was not beaten by PW1 but they were chased away. It is however worth noting that DW2 did not report the incident to the police until the 10th of October, 2012, which was ten (10) days after the alleged incident. DW2 testified that in the course of the altercation, PW1 got entangled in the disagreement after Judy had threatened to beat DW2 with a stool. In the course of exchanging words, DW2 told PW1 that it was the deceased who had made her visit the homestead. PW1 then pointed a finger to the deceased and told her if it was "*that thing*" that had taken her home, she should leave with it. The foregoing was supported by the evidence of DW6. After PW5 and DW2 were chased away by PW1, DW6 also left the said homestead out of fear of being beaten by PW1. PW5 informed the defendant about the incident and he arranged for the deceased's sister Teresina, and another woman by the name Teresa to spend the night with the deceased. On the following day, DW5 drove the deceased to the defendant's house in Nairobi while accompanied by PW5 and DW6 who were picked along the way on the instructions of the defendant.

93. Although DW5 testified that it was the deceased who insisted on going to Nairobi, PW5 on the other hand testified that the deceased was told that she was being taken to the home of some girls who would give her cash and cake. According to PW5, it was only when they were close to Nairobi that the deceased realized that she was being taken to the defendant's house and she was happy. After two to three weeks, the deceased was taken to the defendant's house at Lusiola. DW6 testified that she told the defendant that she would not be able to take care of the deceased if she was taken to her home at Shijiko. It was DW5's and DW6's evidence that it was the defendant who told the deceased that she would be taken to his home at Lusiola. On being cross-examined, DW5 told the court that it is the deceased who told them that she wanted to be taken to the defendant's home at Lusiola. PW5 testified that the deceased would insist on going back to her matrimonial home but she would tell her that she would not be able to take care of her if she went to her homestead. DW5 and DW6 narrated of an incident where PW1 and his brother Austin picked up the deceased from the defendant's home and took her to her home. According to DW5, when the defendant went to the deceased's home to pick her up, the visitors who were present told him that it was up to the deceased to stay at her home. They left her behind but at 9.00 p.m. that night, she returned

to the defendant's homestead at Lusiola. The defendant testified that he went to Shisejeri police station to report that his mother had been taken away from his house without her medicine and that he was accompanied by the police to his home. When cross-examined on the issue, DW5 who accompanied the defendant to the said police station was evasive and said he could not remember being accompanied by the police to the defendant's home. The court noted that DW5 appeared to be lying on the said issue. He also appeared to be lying on the fact that it was PW1 who connected him to the defendant so that he could be employed as a Driver. Although DW5 denied the foregoing issue, PW1 and the defendant were emphatic about it.

94. Mr. Anziya, learned counsel for defendant urged the court to look at the conduct and attitude of the plaintiffs towards the deceased as they were not friendly to her at the time she met her death. He relied on the case of **Edwin Otieno Ombajo vs Martin Odera Okumu** [1996] eKLR, where the Court of Appeal cited the provisions of section 3(2) of the Judicature Act, Cap. 8 laws of Kenya which provide as follows-

"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."

In the case Edwin Otieno Ombajo (supra) the Court of Appeal held as follows:-

"We wish to observe here that customary law, like all other laws, is dynamic. Because it is not codified, its application is left to the good sense of the Judge or Judges who are called upon to apply it. That is why, as we stated earlier, S.3(2), above, is worded the way it is to allow for the consideration of individual circumstances of each case. So the conduct of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here...." (emphasis added).

95. Although in the case of **Edwin Otieno Ombajo (supra)** the respondent Martin Odera Okumu was challenging the appellant's right to bury his deceased daughter who was the respondent's estranged wife, I am of the considered view that the holding of the Court of Appeal Judges that the conduct of the respondent to the deceased mattered in the said case does apply in the converse to this case with regard to conduct of the plaintiffs to the deceased. It is apparent that PW1 had for a long time taken good care of the deceased until the day when he slipped and referred to her as "*that thing*" and ordered his sisters PW5 and DW2 out of the deceased's homestead. As the deceased's last born son and in accordance with the customs of the Abakhalekha clan, PW1 was supposed to take care of the deceased who was living at her matrimonial home at LR. No. Idakho/Shisejeri/1302 by virtue of the life interest she legally had on the said land, after the death of her husband. The foregoing must at the same time be looked at in the backdrop of the circumstances surrounding this case. It is clear that when there was a confrontation between DW2 and Judy, PW1 stepped in to quell the disagreement but in the process, he chased away PW5 and DW2. It is evident that Judy was unhappy with the intention of PW5 and DW2 to build a meko in the deceased's house as it signified that she was not wanted in the said homestead. Apart from the altercation that occurred above, PW2's, PW3's, PW4's and PW5's evidence was to the effect that PW1 took good care of the deceased. According to PW5, PW1 did not chase the deceased away from her matrimonial home. He took very good care of her until the time when he left employment. The deceased never told her that PW1 was mistreating her. DW2 in her evidence stated that PW1 used to be a good person until the year 2012 when he changed. He would assist the deceased with food. The 2nd and 3rd plaintiffs played a marginal role in taking care of the deceased but nothing untoward was said about their conduct towards her. There is no doubt in my mind that for the better part of their co-existence in the same homestead, PW1 treated the deceased well save for the above incident which was a one-off. There is therefore no evidence to show that the plaintiffs perpetrated cruelty on the deceased. I am therefore in agreement with Ms Rauto, learned counsel for the plaintiffs that they were not cruel to the deceased.

Did the deceased leave a wish on her preferred place of burial?

96. The defendant's evidence was that the deceased had told him on several occasions that she wanted to be buried at his farm at Kambiri. She would point to a location near a sisal plant to show her preferred place of burial. According to him, she told this to DW2, Boaz Kutoto who is the defendant's neighbour at Kambiri and DW4. This witness recounted that in March, 2015, they had a church group fellowship at the defendant's home. After service, the deceased told them that she was becoming weak and when she died, she wanted to be buried at the defendant's homestead at Eregi. She showed them where she wanted to be buried near a sisal plant and they went to the place. On the same issue, DW2's evidence was that the deceased lived at the defendant's homestead at Lusiola for almost one and a half years and then left for Ileho in the year 2014 where DW2 would visit her. It was while at Ileho that the deceased told her that she could see her days were coming to an end and when she died, she should be buried there. The deceased pointed out her preferred place of burial at the defendant's compound and that is where she was buried.

97. Mr. Anziya referred to the case of **Apeli and Enoka Olasi vs Prisca Buluku**, Civil Appeal No.12 of 1979 (unreported), to emphasize on the point that the deceased had left a wish on her preferred place of burial which this court should uphold. In the said case, the Court of Appeal considered the applicable law and in his judgment, Sir Eric Law at p.6 stated thus:-

"The English law on the subject is succinctly summarized at p.57 of Williams and Mortimer on Executors and Administrators and Probate (London, Stevens and sons), 1970) as follows:-

"The corpse

There can be no property in a dead body. A person cannot dispose of his body at will. After death the custody and possession of the body belong to the executors until it is buried.....

Directions as to burial

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

98. In this case, the deceased died intestate, thus left no will on her preferred place of burial. The responsibility of how she was to be buried therefore fell on her immediate family members. The defendant, DW2 and DW4 asserted that the deceased pointed out the place where she wanted to be buried. Apart from the defendant and DW2, the deceased had five other children and from the evidence adduced by PW1, the defendant and DW2, she was especially close to her daughter PW5. According to the defendant's testimony, PW5 would visit her mother after every two days whereas DW2 would visit her once in a fortnight. It is highly improbable that the deceased told the defendant and two of his witnesses, DW2 and DW4 where she wanted to be buried but failed to make the same utterances in the presence of the rest of her children, her sister Teresina, her brother PW3, her father-in-law PW2, her brother-in-law PW6, some of her family friends such as PW4 and members of her clan. As noted earlier, the deceased was very close to PW5 who spent a lot of time at the defendants' homestead taking care of her and ascertaining that she was comfortable, cleaned, was being fed and that she was taking her medicine. When the deceased was admitted to Aga Khan hospital, PW5 would visit her on a daily basis using a motor vehicle which her daughter, Ebby had given out for that purpose. There is no doubt whatsoever that PW5 dedicated a lot of her time and attention to the deceased when she was alive. It is unmistakable that of all her daughters, PW5 was the closest to the deceased. It therefore follows that in the natural order of things, it would have been expected that in the course of the many interactions that she had with PW5, the deceased would have also showed her the place that she wanted to be buried in the deceased's homestead.

99. The assertion that the deceased only told two of her seven children where she wanted to be buried appears to be a fabricated piece of evidence more so considering that the deceased's other children were oblivious of the said wish. It is my finding that if indeed the deceased would have talked about her preferred place of burial, the defendant, DW2 and DW4 would not have kept this kind of information

secret until after the deceased's death. They would have shared the information with the other family members to give them an opportunity to verify the same with the deceased before her death and the present dispute would not have arisen. PW3 who was the deceased's younger brother gave evidence that the deceased never told him that she wanted to be buried at the defendant's home. If she had said so, PW3 would have known as they were close. DW4 had known the defendant since the year 1964, he was however not well known to the deceased as he got to know her in May 2014 when she moved to the defendant's home in Kambiri and she joined the church fellowship group he was in. According to DW4, It was after one such group meeting in March, 2015 at the defendant's homestead that the deceased allegedly told them that when she died she wanted to be buried in the defendant's homestead. I find the foregoing evidence by DW4 unbelievable in that he was neither a family member to the deceased or a clan member or the deceased's friend to such an extent that she would have confided in him such sensitive information.

100. This court had the opportunity of observing the demeanour of DW2 as she testified, she came across as dutifully loyal to her elder brother, the defendant, and she would have bent over backwards to support whatever he wanted her to put forth to the court. The defendant from the evidence he adduced in court did not come across as candid. His evidence was geared towards showing that he was the only one who took care of the deceased's medical and financial needs. He forgot to mention that PW1 had for many years before losing his job shouldered the same burden without complaint.

101. In the case of **Apeli vs Buluku** (supra), the Court of Appeal was of the view that the wishes of a deceased person as regards disposal of his body though not legally binding should be given effect. In this case, after listening to all the witnesses that testified, I have no doubt in my mind that the deceased did not leave a wish on her preferred place of burial. In so stating I have juxtaposed the evidence of the defendant, DW2 and DW4 against PW5's evidence to the effect that while the deceased was alive, the defendant would state that he would bury her when she died because she had been discarded like a dog. PW5 was a truthful and straight forward witness who was consistent throughout her evidence even during the rigours of cross - examination.

102. It is apparent that the defendant was at loggerheads with PW1 to the extent that he even tried to sell the entire family land including the portion of land that PW1 was occupying so as to offset the deceased's medical bill at the Aga Khan hospital. DW2 took sides with the defendant while PW5 would straddle in between. The other siblings were on PW1's side. PW5 testified that the deceased would refer to the deceased's home as Mary's home and she was of the opinion that the deceased would not have liked to be buried at the said home. After analyzing the foregoing facts, it is my finding that the deceased did not inform anyone of her preferred place of burial. It is clear that the defendant took it upon himself the task of burying the deceased not because she had stated that she wanted to be buried at his homestead, but because he felt a sense of entitlement as she was living with him before she died and he was meeting her living and medical expenses.

Whether the deceased was bound by the burial customs of the Abakhalekha clan

103. Some witnesses referred to the deceased's clan as the Abakhalekha clan whereas others referred to it as the Abashikulu clan and stated that Abakhalekha was the sub - clan, while the defendant referred to Abakhalekha as a family. For ease of clarity, I will go with the majority of the witnesses who referred to the deceased's clan by the name **Abakhalekha**. PW1 testified that their family belonged to the Abakhalekha clan of the Idakho of the Luhya tribe. In accordance with their customs, the deceased's body would have stayed in her home for a minimum of two (2) days and the grave would have been dug on the last night before burial. PW1, PW2, PW3, PW4 and DW4 were in agreement that in accordance with their customs, the deceased's body should have stayed at her homestead for two to three (2-3) days before she was buried. In the present case, the deceased's body was removed from the mortuary on a Friday and buried the following morning thus she was not accorded burial rites. PW1 testified that she was supposed to have been buried on the left side of their late father's grave in her matrimonial home but this did not happen. Family members who testified agreed that there was no joint family meeting to discuss the deceased's burial arrangements. PW1, PW2, PW3, PW4, PW5, PW6 and DW2 were in agreement that the defendant did not involve his siblings in the funeral arrangements for the deceased. It was also evident

that his siblings save for PW5 and DW2 were prohibited from visiting the deceased at his home in Lusiola and at the Aga Khan hospital. The watchman at the gate of the hospital had been given a list of six people by the defendant who were authorized to visit the deceased when she was undergoing treatment at the said facility. PW4 was turned away at the gate of the defendant's home when he went to see her. He was also turned away at Aga Khan hospital, and told to get clearance from the defendant so as to be allowed to visit the deceased in the said hospital. After the deceased passed away, the defendant did not inform his siblings about her death. It was PW5 who called and told them. The defendant forbid his siblings save for PW5 and DW2 from viewing the deceased's body at the Aga Khan mortuary.

104. On the night before the burial, DW2 called PW5 and sent her a text message to inform her that the deceased's funeral was planned for the following day but she said that she would not attend. DW2 did not inform her other siblings about the funeral. It was DW2's testimony that they removed the deceased's body from Aga Khan mortuary on 17th July, 2015 at 6.00 p.m., and it was buried on 18th July, 2015 at 10.30 a.m., which was about ten (10) hours after removal of the body from the mortuary. She gave the explanation that they buried the deceased's body fast as it had stayed long in the mortuary. DW2's four (4) children, the deceased's seven (7) grandchildren and some of the defendant's children attended the funeral. It was the defendant's evidence, that there was a funeral service for the deceased that was celebrated by Father Bahati of Mukomari Catholic Parish and that he told them that the body was thawing and it needed to be buried before the service could take place. According to the defendant, there is nothing in the Luhya customs that requires a body to be kept at home for two (2) days and to be buried on the third day. He recounted that their late father's body stayed in the mortuary for a day, before the funeral. He stated that they have never had a funeral committee in their family and denied having told the court in Kakamega High Court Succession Cause No. 550 of 2008 that he was the Chairman of their late father's funeral committee. He told the court that he did not inform his other siblings save for DW2 about the deceased's funeral. He then retracted the foregoing and said that he sent text messages to PW1, DW2, Alex, Austin and Brenda at midnight of 17th July, 2015, informing them of the funeral. DW2 was however the only sibling present at the funeral. PW5 stated that she received a text message from the defendant at 5:30 a.m., on the day of the funeral informing her of the same.

105. The above evidence is in sharp conflict with that of PW1, PW2, PW4 and PW6 who stated that in a funeral of an old lady like the deceased, her family, church members, clansmen and the community would attend the funeral. It would have been a celebration; there would have been a programme prepared, speeches delivered and burial rites would be undertaken. On the issue of burial customs, PW1's evidence was in consonance with that of PW2, and DW4 that if a woman's husband dies earlier, his wife upon death would be buried next to her late husband's grave, to the left side of his grave. DW2's evidence was in conflict with that of the said witnesses for she stated that according to their customs, the deceased would have been buried on the right hand of her late husband who was buried on the left. It is worth noting that PW2 was an 83 year old man who in the court's opinion was well versed with the customs of the Abakhalekha clan. PW3, PW4 and PW6 stated that the deceased should have been buried in her homestead where her husband was buried. It emerged from the evidence that when a woman's husband dies, the sons are given the duty to take care of their mother, especially the last born son. PW2 stated that it was against their customs for a son to take his deceased mother's body and bury it like the defendant did. PW4 shed light that a woman can be buried elsewhere is if she has killed her husband, has committed adultery or has given birth to another man's child. DW4 testified that a deceased wife is buried on the left hand side of her late husband but if the parties are not living in harmony, any party can state where he or she would like to be buried. PW3 indicated that a woman can be buried elsewhere if she has no homestead or somewhere to be buried.

106. In the present case, the deceased's husband died long before her, she did not remarry or desert her matrimonial home to live elsewhere until the day after her daughters PW5 and DW2 were chased away from her homestead by PW1. Unlike the other persons mentioned in the evidence of various witnesses for the plaintiffs and defendant who were buried out of their matrimonial homes for different reasons, the deceased herein remained truthful to her late husband's customs. Evidence was adduced by PW5 that on two occasions the deceased attempted to leave the defendant's home for her matrimonial home but did not succeed. At one time DW6 called her and told her that the deceased wanted to go back to her home. It is my finding that circumstances forced the deceased to live in the defendant's homestead but by so doing,

she did not denounce the customs of the Abakhalekha clan. The apathy that the PW5 and DW6 had in going back to the deceased's homestead after the altercation between PW1, PW5 and DW2 made it difficult for the deceased to return and stay there as PW5 and DW6 had indicated that they were not willing to take care of the deceased in her homestead. The fact that the deceased attempted to go back to her home on two occasions is indicative of the fact she had a sentimental attachment to her home.

107. In the case of **Nyariba Nyankomba vs Mary Bonareri Munge** [2010] eKLR, Makhandia J. (as he then was), stated thus:

"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....."

Taking into account the the above decision, I am of the considered view that in the present case, there was no shortage of elderly male witnesses who were conversant with the burial customs of the Abakhalekha clan. PW2, PW3, PW4, PW6 and DW4 were all knowledgeable on the subject and illuminated to this court about the same.

108. Article 2(4) of the Constitution of Kenya provides as follows:-

"Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

109. PW6 an 84 year old man who came across as being well versed with the customs of the deceased's clan informed the court that a married woman cannot choose where to be buried. It is my finding that the well-established and respected burial customs of the observed by the Abakhalekha clan for a deceased wife to be buried next to the grave of her late husband is neither in conflict with the Constitution of Kenya nor is it repugnant to justice and morality. Independent witnesses PW2, PW3, PW4 and PW6 left this court in no doubt as to what entails the burial customs of the said clan. PW4 knew the deceased's husband, the late John Amulyoto who was like a father to him as he was much older than him. He stated that clan-wise, he was PW4's brother. After the deceased's death, he visited her home with fellow clansmen to find out more about the death and how they could help. He in the company of others tried to reach out to the defendant so that the deceased's body could be taken home for funeral arrangements. The defendant did not join them. Through other people he learnt that the defendant was making burial arrangements. He and others sent people to the defendant to stop those arrangements to no avail. They went to court to seek assistance so that the body could be released to them. The Aga Khan mortuary was ordered not to release the body to anyone unless there was clearance from the defendant. PW4 later learnt that the deceased was buried at Kambiri in the wee hours of the morning. He was not notified of the burial date and the other clansmen did not attend the burial. He did not know when the body was released from the morgue as it was secretive. As regards PW3, on receiving information that the deceased had passed on, he went to her matrimonial home to find out when the burial would take place. He found other people there. He later heard that the deceased was buried at the defendant's homestead. He did not attend the funeral.

110. I am in agreement with Ms Rauto that the law is now well settled that where the issue of burial is to be determined by a court, it relies on customary law to decide on where a deceased should be buried. She cited the case of **Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & another** [1987] eKLR, the court stated that:-

"the deceased was born and bred a Luo and as such under Luo customary law his wife on marriage became part and parcel of her husband's clan. Their children are also Luo as well as members of their deceased father's clan. On the death of a married Luo man the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family. Under the Luo custom to which as we have said she is bound, she has no right to bury her husband and she does not become the head of the family upon the death of her husband. As with other African communities a man cannot change his tribal origin...."

111. Similarly, in the case of **Josinda Katumba Kamau vs Annah Ngendo** [1988] eKLR, the court held that:

".....It is important to recognize that in the Otieno case customary law is what was used as a guide in deciding the case. The principle outlined above can also be outlined here, namely that the wife becomes part of the husband's clan. A man cannot change his tribal origin. If we apply these principles to this case, we find that the deceased was born and bred a Kikuyu by tribe. His wife by marriage according to DW4 becomes part of the clan member. It thus means that the deceased clan is known and were in control of his affairs as burial is concerned."

Although the Wambui Otieno case (supra) dwelt on Luo customary laws where the widow was a Kikuyu who had been married to a Luo man, in the instant case, both the deceased and her late husband ascribed to and practiced Luhya customary laws. The single and continuous thread that runs across the Wambui Otieno case and the current one is that on marriage, women are bound by the customs of their husbands.

112. In the case of **Ruth Wanjiru Njoroge vs Jemimah Njeri Njoroge & another** [2004] eKLR, Ojwang J. (as he then was) held as follows:-

"In the social context prevailing in this country the person who is the first in the line of duty in relation to the burial of the 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."

113. Witnesses in the present case gave evidence that the making of burial arrangements was not a one man affair but a task that befell the deceased's immediate family, members of her clan, the community she hailed from and church members. This court was informed that the defendant was the first son of the deceased and the late John Amulyoto, as such he held a position of responsibility in that family. According to the evidence adduced in so far as the burial of the deceased was concerned, that position included giving leadership to the deceased's family through consultation after her demise, bringing the family, the clan and the community together to discuss the deceased's burial plans but the defendant spurned all requests for meetings thus leaving the deceased's family fragmented up to the date of her burial. PW6 testified that when a person dies, the family sits down and discusses how to bury the dead. After the church is through with religious rites, family members gather around the deceased's grave. In the deceased's case, her children and cousins would have gathered around her grave and would have sung. They would have looked for an old person who would have blessed the children and prayed for the spirit of the deceased not to haunt them. He informed the court that he does not know where the deceased was buried and that he would not have agreed to be part of that funeral as it was against their customs for her to have been buried in the defendant's homestead. Although the defendant testified that Amulyoto's family did not constitute a funeral committee when the deceased died because no such committee was formed after the death of their late father, he was reminded during cross-examination by the counsel for the plaintiffs that during their late father's succession case in the High court at Kakamega, he indicated that he was the Chairman of the funeral committee.

114. Although DW5 stated that it was the deceased who told him that she wanted to go to the defendant's home in Nairobi. I doubt that assertion as the deceased did not take any change of clothing with her or her medicine. Clothes were bought for her in Nairobi by the defendant's wife and PW5 using money they were given by the defendant. He testified that he called a Doctor at Aga Khan hospital prescribed the medicine to buy for the deceased which he did at Karen hospital. The foregoing facts are not consistent with the conduct of a sickly woman who called the defendant to tell him that she wanted to go to Nairobi. A woman who has prepared to go on a journey would ordinarily not travel without taking any change of clothing with her. Due to her illness, the deceased would have been expected to have taken her medicine with her. DW5 testified that before she left for Nairobi, the deceased was in the company of two other women. It therefore follows that if the deceased had not in a position to pack some clothes due to her illness, she had other persons who could have assisted to pack a few clothing items for her as well as her

medicine. The circumstances surrounding the deceased's journey to Nairobi is more consistent with the evidence of PW5 who testified that the deceased did not know that she was being taken to Nairobi. Thereafter, the defendant took the deceased to his home at Lusiola and afterwards to Kambiri. The defendant made no effort to bring his siblings together for reconciliation so as to facilitate the return of the deceased to her homestead. When asked by PW3 if he would take the deceased to her home if she died, the defendant avoided giving a response and stated that all he wanted was for her to recover.

115. It was the defendant's view that Bashikulu can be buried anywhere according to their culture thus it does not follow that a Bashikulu must be buried at Eshikulu. He gave examples of many families which had buried their parents elsewhere. The defendant expressed the view that the deceased loved him a lot unlike his other siblings whose homes she did not go to when she sought refuge. This court has discerned from the evidence adduced that the defendant had a negative attitude towards his siblings save for DW2 and PW5, which is evident from the manner in which he gave instructions to the watchman at his homestead at Kambiri and at the Aga Khan hospital, Kisumu on the persons who were authorized to visit the deceased. His instructions restricting his siblings to access the deceased continued to drive a wedge in his relationship with them.

116 This exacerbated the bad blood amongst them by denying his siblings the right to visit the deceased, in his homestead at Kambiri and at the Aga Khan hospital, save for PW5 and DW2. The defendant kept his other siblings and the Abakhalekha clan members in the dark and single handedly abrogated unto himself the responsibility of preparing the deceased's funeral, yet that was a responsibility that befell not only himself but also his siblings, the deceased's extended family, members of the community and congregants of the church that the deceased used to attend. A perusal of plt. exh. 1 reveals that it is an eulogy of the deceased but not a funeral programme. It is therefore not surprising that due to failure to involve other people in the said preparations, his siblings and the deceased's brother and members of the community at large, did not attend the deceased's funeral. It was the evidence of PW5 that she was informed by Kizito Ikoneli that the deceased was buried at 7.00 a.m. DW3 went to the deceased's funeral at 11.00 a.m., but found that her body had been buried but the funeral mass was ongoing. As a result of the foregoing and the evidence adduced by the defendant and DW2 who were present during the deceased's funeral, there is no doubt that the Abakhalekha burial rites that were explained to the court by PW2 and PW6 were not followed.

117. In conclusion, although the actions of the defendant in meeting the deceased's living and medical expenses are commendable, financial capability to cater for the said needs did not however give the defendant an upper hand to bury the deceased in his homestead. The defendant informed the court that he did not see any problem with him burying the deceased. After weighing all the circumstances of this case and taking into consideration the special place that customary law occupies in the administration of justice and enforcements of rights, I find that the plaintiffs have established their case on a balance of probability as required. In this case there was no merger of customs as both the deceased and her late husband were of the Luhya tribe. Even if there had been a merger of customs, being a married woman the deceased was bound by the customs of her late husband. This court has the powers to make just that which is unjust which means that the deceased's remains should be buried in her matrimonial home where her children can visit her grave if they so wish. PW6's evidence was that the Abakhalekha permit exhumation so that a person can be buried at his/her rightful grave. As such, the deceased's remains shall be buried on the left hand side of her late husband's grave in accordance with the Abakhalekha customs. In arriving at this judgment, I have duly considered the submissions tendered by both counsel for the parties herein and the authorities they relied upon. I enter judgment for the plaintiffs as against the defendant and make the following orders:-

(i) That the plaintiffs herein shall forthwith obtain an exhumation permit pursuant to the provisions of section 146(1) of the Public Health Act, Cap 242 Laws of Kenya, from the Minister (Cabinet Secretary) for Health, for the exhumation of the remains of the deceased Cecilia Shilosyo Amulyoto, from the defendant's homestead at Kambiri;

(ii) That the remains of the deceased shall be buried at her matrimonial home at LR. No. Idakho/Shisejери/1302 in accordance with her customs;

(iii) The Officer Commanding Kakamega Police Station (OCS) is hereby ordered to provide security to the plaintiffs during the exhumation and burial processes;

(iv) The plaintiffs shall bear the cost of exhumation; and

(v) This being a family dispute, each party shall bear his/her own cost of the suit herein.

It is so ordered.

DATED and SIGNED at MOMBASA on this 28th day of February, 2017.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and SIGNED at KAKAMEGA on this 21st day of March, 2017.

R. N. SITATI

JUDGE

In the presence of:

.....**for the plaintiffs**

.....**for the defendant**

.....**Court Assistant**