



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: TUNOI, SHAH & PALL, J.J.A.)**  
**CIVIL APPEAL NO. 128 OF 1997**

**BETWEEN**

**MULE NDETI.....APPELLANT**

**AND**

**NGONYO SILA.....RESPONDENT**

**(Being an Appeal against the judgment of the High Court of  
Kenya at Machakos (Justice Mwera) dated 18th April, 1997**

**in**

**H.C.C.C. NO. 75 OF 1996)**

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**JUDGMENT OF THE COURT**

This is a second appeal, being an appeal from the decision of the High Court of Kenya at Machakos (Mwera, J.) given on an appeal from a judgment of the Resident Magistrate, Yatta.

This unfortunate, protracted; and, in our view largely unnecessary litigation arose as follows. In or about 1969, Ngonyo Sila, a woman now over 70 years old, and the respondent in this appeal contracted a Kamba customary law woman-to-woman marriage variously known as IWETO or KAWETO with Mbenya, a younger woman, and now deceased. The respondent as mandated by custom paid dowry in full to the deceased's father, Mule Ndeti, the appellant in this appeal. In 1973 Mbenya gave birth to a son, Musili Sila. Not long thereafter, precisely in 1976, the respondent and the deceased had a domestic quarrel which resulted in Mbenya leaving the matrimonial home. As fate would have it, she never returned until her death. During the period of her desertion she cohabited with one Ithau at Thika. Apparently she also carried on other relations with other men at various places. In 1982 the respondent filed a dispute against the deceased before the Chief of Masinga Location. The elders unanimously resolved that the respondent was to keep the child of the marriage, Musili Sila, until the appellant or another person repaid her all her dowry. However, this ruling was not obeyed in that soon thereafter Mbenya snatched her son from the respondent and retained him until her demise. It transpired that Mbenya died on 20th August, 1996 at the appellant's home after a prolonged illness. The respondent was sent for to go and collect the body but she declined. All attempts to resolve the issue relating to burial were in vain.

The appellant averred that as long as the respondent lives he cannot bury the deceased because under Kamba customary law, which the respondent is affected by and is subject to, the surviving spouse has a duty and an obligation to dispose off the body. Mr. Mutua, counsel for the appellant, did not, however, cite any authority for that proposition save for generalised passages in Cotran's *The Restatement of African Customary Law*, Vol. 2 at pg. 31.

Fearing that the body of Mbenya was decomposing the appellant moved it to a private mortuary and swiftly moved the Resident Magistrate's Court for:-

(a)an order directing the respondent to pay all mortuary expenses and to collect and bury the deceased; and

(b)for special damages (to be specified)

The Resident Magistrate found for the appellant holding that no divorce had been effected and that Mbenya was until her death the customary law wife of the respondent; and, consequently, the respondent was duty bound to take care of her burial. We may point out that this proposition is consonant with the common law and equity position before the enactment of the Married Women's Property Act, 1882, where it was the ancient duty of the husband to bury his wife if she died covert. However, the very foundation of that duty, which gave rise to the common law doctrine, has completely gone under by legislation in England. The wife's estate was now liable for that which had previously been an obligation imposed on the husband, who had, by the marriage, acquired his wife's personality. See *Rees v. Hughes* [1946] 2 ALL E.R. 47. However, as we were not asked to determine who was her personal representative under the Law of Succession Act we will rest the matter there.

On appeal, the learned judge deduced on the facts proved before the Resident Magistrate that divorce had been granted on 19th August, 1982 and as the appellant was not a man of means, had failed to refund the dowry and for the next 14 years, he lived with both Mbenya and her son. The learned judge observed that had the appellant refunded the dowry, the final rite of slaughtering a goat to signify the completion of divorce rested in abeyance. In that regard, he found that it would be manifestly unjust to uphold the Resident Magistrate's decision. He upset it.

This appeal, as we have already pointed out is a second appeal and lies only on a question of law. Counsel for the appellant has submitted that the learned judge erred in holding that the respondent had divorced the deceased in accordance with the Kamba customary law. It is clear from the record that the incidents and the norms relied upon by the Resident Magistrate to create a valid customary law divorce were generalised common practices which had no bearing to the issues before him. They were neither based on positively proved facts nor were they shown that they are facts of which we could take judicial notice.

In *Ernest Kinyanjui Kimani v. Muiro Gikanga and Another* [1965] E.A. 735 it was held that:-  
"..... where African customary law is neither notorious nor documented it must be established for the courts guidance by the party intending to rely on it."

The appellant did not lay the foundation for his case and neither did he call sufficient evidence to prove it. On the facts proved the learned judge came to the correct decision and cannot be faulted.

We cannot fail to point out that moral considerations aside, this case is based on economic expectations. If the appellant buries Mbenya he will have to return the dowry as he will have given a stamp of approval for divorce as he will have recalled his daughter. If the respondent carries out the exercise she will forfeit the dowry.

The appellant voluntarily imposed upon himself an onerous obligation. Whatever payments he made or will make were voluntary and irrecoverable from the respondent. They could not legally fall upon the respondent. The appellant is a mere volunteer, probably motivated by parental love, undertaking some moral task under a mistake, not of fact but of law; and, in such circumstances liability does not lie against

the respondent.

There is yet another aspect of this litigation which is that neither party is willing to bury the mortal remains of Mbenya. The courts cannot force parties to bury human bodies against their will. All other cases that have come to court were between parties willing to inter the bodies and insisting on burials.

In the final result, therefore, the appeal fails, and it is hereby ordered dismissed with costs.

Dated and delivered at Nairobi this 9th day of October, 1997.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**G.S. PALL**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR