REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 4873 OF 1986

VIRGINIA EDITH WAMBOI OTIENO..............................PLAINTIFF

VERSUS

JOASH OCHIENG OUGO

OMOLO SIRANGA .... DEFENDANTS

JUDGMENT

This case has had a long and twirling history. A prominent Nairobi criminal lawyer, Silvano Melea Otieno, popularly known in legal circles as S M Otieno (under the deceased), died on or about 20th December, 1986, either upon arrival at the Nairobi Hospital or, on the way to that hospital. What is clear is that upon arrival at the hospital he was pronounced dead by a medical doctor.

A post-mortem examination conducted on his body revealed that he died of "acute myocardial infarct. Acute coronary occlusion. Coronary heart disease." His body was thereafter placed at the City Mortuary, Nairobi, and had been lying there awaiting burial.

Soon after his death a dispute arose between his only widow, Virginia Edith Wambui Otieno (the plaintiff) on the one hand, and the deceased's younger brother, Joash Ochieng Ougo (1st defendant) with a clan member and distant nephew of the deceased, Omolo Siranga (2nd defendant), concerning who had the legal right to bury the remains of the deceased and as to his place of burial.

The plaintiff wanted to bury the deceased's body at Upper Matasia, in Kajiado District (under Matasia) while the defendants wanted to bury the body at Nyamira Village, Nyalgunga Sub-location, Central Alego Location, Siaya District (under Nyalugunga). They could not agree and hence this suit.

The suit was filed on 30th December, 1986, by the plaintiff against the both defendants seeking a declaration that she is the person entitled to claim the body of the deceased and to perform a burial ceremony at Matasia, where the deceased owned a farm, in preference to the both defendants or any other person claiming through or under them. She also prayed for an injunction to restrain the defendants by themselves or their servants or agents from claiming and burying the deceased's remains at Nyalgunga; and costs.

Filed with the suit was an application by way of chamber summons, which was expressed to be brought under 0. 39 r. 1 and 2 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act, also, section 3 of the High Court and Procedure Rules, made under the Judicature Act, Cap 8 Laws of Kenya.

Her prayer in that application was that the both defendants and the medical officer of health in charge of the City Mortuary be restrained by injunction from either removing the deceased's body or disposing of it

until the final determination of this suit.

That application was heard and granted, *ex parte*, by Shields J., on the same day it was filed viz, 30th December, 1986.

It would appear that the copies of the plaint and chamber summons were served on the defendants on the same day they were filed, because on the next day the both defendants, through their advocates on record, Messrs Ndungu, Njoroge and Kwach, did file a defence and counterclaim, together with a chamber summons, expressed to be brought under 0.39 rules 1 and 4 , I believe of the Civil Procedure Rules, as the law under which it was brought is not stated.

Among the prayers sought in the chamber summons, was an order to discharge, vary or set aside the *ex parte* order made on 30th December 1986 in favour of the plaintiff; an injunction directed at the plaintiff, her servants or agents or otherwise howsoever, from burying the deceased anywhere other than Nyalgunga, until the hearing of this suit or further orders of the court, and; costs.

The application was heard on the same day it was filed also by Shields J, who dismissed it with costs to the plaintiff, then as respondent.

The effect of the dismissal was that the *ex parte* order made on 30th December, 1986, was affirmed, and the plaintiff could proceed with arrangements to bury her deceased husband at Matasia.

The defendants were dissatisfied; so they filed a notice and petition of appeal to the Court of Appeal challenging the decision of Shields J. Their appeal was allowed.

That court then proceeded to order that the suit be heard by a judge, other than Shields. It also made orders in terms of the prayers in the defendants' chamber summons, filed on 31st December 1986, and which had been dismissed as aforesaid.

Thereafter, the plaintiff must have become apprehensive that the defendants would go to the City Mortuary, to claim the deceased's body because she brought an *ex parte* chamber summons praying for an injunction to restrain the defendants by themselves, their agents or servants or otherwise howsoever, from removing the body of the deceased from the Nairobi City Mortuary until final determination of this suit or until further orders of this court.

That application must have come to the notice of the defendants because the prayers in the application were granted by consent of the parties to it. The parties, by consent, also agreed to dispense with summons for directions. The hearing of the case was set to commence on 21st January, 1987, on a day to day basis until completion. That is what did happen.

The deceased was one of at least five sons of the late Jairo Ougo Oyugi (Jairo), who died in 1978, survived by a widow, Magdalina Akumu Ougo (Magdalina), four sons and, at least three daughters.

The sons were Simon Odhiambo, who died in 1985, the deceased, the 1st defendant, and John Omondi the only son of Jairo by Magdalina. The plaintiff did talk of another son, by the name Isiah Ougo, but there was a dispute as to whether or not he did exist or whether or not he died in Mwanza, Tanzania.

I wish to point out from the outset that, Magdalina, was only a step-mother of the deceased, his mother having died in 1941, before Magdalina was remarried by Jairo. Magdalina's first husband, predeceased her, and she was thereafter remarried by Jairo in 1944. Her marriage to Jairo appears to have been a levirate union.

The evidence before me shows that the deceased's father had several parcels of land; some at Ujwanga, which together with parcel no Central Alego/Nyalgunga/1603, were inherited and registered in the name of John Omondi, while parcel no Central /Nyalgunga/1983, which at the time of his death had not been devolved to any of his sons, was allegedly left for the deceased and the 1st defendant, the only sons to

whom no plots had been given *inter vivos*. At the time of the deceased's death no transfer of that parcel of land had been effected into his name jointly with that of the 1st defendant.

The deceased, a Luo, was born and grew up at Nyalgunga. He attended Simenyo Primary School, C M S Maseno High School, before he proceeded to Bombay University, in India, in 1953, to study law, after a brief employment as a clerical officer. He returned to Kenya in or about 1960 and set up legal practice in Nairobi. He met the plaintiff in Nairobi, in March 1961, and after cohabiting with her as his wife for at least two years, they entered into a statutory marriage, under the Marriage Act, cap 150 Laws of Kenya, on 17th August 1963.

The plaintiff, a Kikuyu from a well known Kikuyu family, the Waiyakis, was allegedly born on 21st June, 1936. There was a dispute as to her exact or proximate age because she testified that she was 50 years old when in fact her marriage certificate indicates that by August 1963 she was 24 years old. By computation her age in 1987, would be 48 years.

Be that as it may, it was common ground that no dowry was paid, nor was any demanded by her parents. The plaintiff attributed that to the fact that her parents were rich and practicing Christians who did not espouse customary laws and traditions relating to marriage or at all. The payment of dowry or bride price as is often referred to in the Western World, is a basic requirement in most if not all customary law marriages.

Up to the time Jairo died the deceased had not built a *simba* (boy's hut) or a home in Nyalgunga. He was until then living in rented premises.

In 1979, however, he bought the property at Langata where the house he lived in before his death, stands. The property was referred to as L.R. 10039.

According to the plaintiff, the deceased established his matrimonial home there. He subsequently bought other properties in and around Nairobi notably the Matasia property which comprises three separate plots, but which are adjacent to each other, together measuring six acres. One of the three plots is registered in the name of the deceased, while the remaining two are registered in the joint names of the deceased and the plaintiff.

On one of the two plots jointly owned stands a two-bedroomed wooden house, which was bought with the property. The plaintiff described it as an extension of their Langata home. It is not clear what that means. I believe she meant that they had two homes, one in Nairobi and another at Matasia. Tirus Waiyaki Otieno (Tirus), one of the deceased's sons lived in the Matasia house with his wife and child. The deceased also bought another property measuring 3 acres, at Lower Matasia, at a place called Kiserian. The same was registered and remains registered in the deceased's name alone.

It was the plaintiff's contention and her counsel's submission that the deceased left Nyalgunga before 1953, and had ever since not lived there. His whole life, thereafter was spent either in India where he went to study law, or in Nairobi and Kisumu where he was working and; except for occasional visits to his home, which according to the plaintiff did not exceed six, he had severed his connection with his home people. She urged this court to find that the deceased had since marrying her lived as a Christian and practiced Christianity, and that customs and traditions of his clan, or at all, were irrelevant. Further that their lifestyle, habits were cosmopolitan and metropolitan to the extent that their children have become completely alien to the customs and traditions the defendants and their witnesses religiously cherish. Also that it was for that reason that the deceased seldom visited Nyalgunga.

In short the deceased had ceased to be a traditional man and had adopted a lifestyle, and manners grossly influenced by urban life and Western civilizations. She implied that the people at Nyalgunga were still primitive and lagged behind in matters appertaining to modernity.

It was the plaintiff's case that a man of the deceased's standing and lifestyle could not and did not espouse the Luo customs and traditions, which in her view, were immoral, as to have expressed the wish

and desire to be buried in accordance with them.

It was also her case that the deceased had expressed the wish that in the event of his death he would be buried either in Nairobi, if and when Presidential assent was obtained, or at Matasia where according to her, he had established a home. She called many witnesses, whose evidence I shall deal with at a later stage, to say that the deceased had indeed expressed to them such a wish.

It was also her case that she is the sole person together with her children, who are, by law, entitled to the custody and the right to dispose of the remains of the deceased at Matasia in preference or in priority to all other persons.

It was also her case that the deceased had specifically declined to put his wish in writing for fear that if he did so the will would be contested by the Umira Kager people. She explained that the deceased had suggested to her that in the event of the Umira Kager people raising any resistance to his burial at Matasia, she would seek to restrain them by a court injunction. The plaintiff said this, apparently, to explain why she filed this suit.

The case for both the defendants was that the deceased died before establishing a home in accordance with the Luo customs and traditions. It was their contention, and also the submission by Mr Kwach, learned counsel for the defendants, that in absence of such a home the deceased cannot possibly be buried at either Nairobi or Matasia. Doing so, they said, will be contrary to Luo customs and traditions, which the deceased, according to them, greatly respected and adhered to.

It was their contention that the plaintiff had consistently prodded the deceased in vain to express in writing a wish that he be buried at (Matasia) and often times thwarted attempts by him to build a house at Nyalgunga.

I earlier stated that the deceased did not establish a home in the Luo traditional sense. The defendants called evidence to highlight what constitutes a home in the Luo traditional sense.

According to that evidence, a Luo home is sanctioned by a father or in his absence, by his brother on his behalf. The way to go about it was explained thus. A father or an uncle, as the case may be, of a man who wishes to establish a home, rises early in the morning accompanied by the man and that man's eldest son (under grandson). The grandson carries an axe, while the man carries a cock and some fire. They then proceed to the place where the man's father desires that his son makes a home. At that spot the man ties the cock, covers it with a basket and leaves it there over-night.

On the next day the three people return to that spot. If for some reason the cock is not found there, the site is considered unsuitable for the establishment of a home and they must then look for a new site. If, however, the cock is found still there, the site would be considered suitable for a home.

The man then sets up a fire and starts building a house. He may call upon other people to assist him in building the house. When the house is completed the man and his son are by custom supposed to sleep in the house alone on the first night. His wife may not sleep with him in the house on that first night. Thereafter, the man starts building another house, which was referred to as "the wife's house". If he is polygamous, he must build as many houses as there are wives.

Upon completion of all the desired houses, the place is considered to be a home. Before such a home is established a man lives in a house which was referred to as "*Simba*" (boy's hut). A house will be referred to as "*simba*" even if a man has married and lives in it with a wife and children. It is not necessary in this judgment to explain the significance of the axe, the cock and the fire, suffice it to say that the Luos regard the ceremony of setting up a home as a ritual which sends away a man from his mother's house to head a smaller family within a wider one.

It was common ground that the deceased neither built a "*simba*" nor established a home at Nyalgunga or anywhere else, viewing them from the Luo traditional sense. The plaintiff was, however, emphatic and

repeatedly stressed that neither her husband the deceased nor herself and their children were governed by the custom pertaining either to the establishment of a home or at all.

It was her contention, and also the submission, of her counsel, Mr Khaminwa, that the deceased had established a matrimonial home at Langata, in Nairobi with an extension of it at Matasia. She was, no doubt, basing her contention on the English concept of a matrimonial home, which is, that a husband carries the matrimonial home on his back save when he is a sojourner. That concept does not necessarily imply a permanent dwelling place.

Mr Khaminwa cited the case of *Commissioner of Income Tax-v-Nuran* (1969) EA 685 at page 689 E, to support the plaintiff's view of a home. Viewing a matrimonial home from the common law concept of it the deceased's matrimonial home at the time of his death was at Langata.

In my view the deceased did not establish a matrimonial home at Matasia. The common law concept of a matriominal home substantially differs from the Luo concept of it. I got the impression that even though a Luo man may have established a home in the Luo concept of a home, it does not necessarily follow that in the event of his death he will be buried there.

Determination of where a person is to be buried also depends on whether or not he has been survived by his father. If a man predeceases his father, he must, under custom, be buried next to his father's house even though he has established his own home according to custom. That aspect appears to be based on the idea or concept that a father is the overall head of all his family, in a wider sense.

The decision as to where and how an adult Luo will be buried rests with the clan from which he hails. Even if a man may have, in his lifetime, expressed a wish as to his place of burial, it is in evidence that the wish will be subject to the customs and traditions of his clan. The clan sages are not, necessarily, bound to comply with those wishes if they do not conform with the customs and traditions of that clan. Those customs are that an adult Luo must be buried next to his father's house at a spot to be determined by elders, if he dies before establishing a home. Also if he dies after establishing a home, but survived by his father. That is also true if a man dies a bachelor or before he gets a son.

It should be noted that a man who does not have a son may not establish a home. That is so because a son is required to carry an axe during the home making ceremony. In other cases an adult Luo must be buried next to his house within his homestead. All witnesses called by the defence were unanimous and emphatic that in cities and towns Luo men have "houses", not "homes".

They also were unanimous and emphatic that all adult Luos must upon death, be transported to their ancestral land for burial, unless they had migrated to areas away from their clan land and established recognisable homes, in accordance with the clan customs and traditions.

It was the defendant's case that the deceased's residential premises at Langata was not a home, nor was the house at Matasia. If anything, so they contended, the Matasia house is the home of Tirus who lives there with his wife and child.

There was an attempt by the plaintiff to rebut the contention by the defendants and their witnesses that all adult Luos, except in well defined circumstances, have hitherto been transported to their respective ancestral lands for burial in accordance with Luo customs and traditions. The plaintiff called the Nairobi City Mortuary Superintendent, Charles Machina Ngari (Ngari) who produced a register of people who died and were buried at the Langata Cemetery during the period between 1959 and 2nd September 1986. He extracted a list of names from it of people he believed were of Luo origin, who died within that period and were buried at Langata Cemetry. The register does not however, indicate the tribes the people whose names have been entered therein. It only shows their nationalities.

The defendants countered that the names shown on the extracted list, were either of non-Luos or Luos who were below twelve years. I was unable to find one way or the other because evidence was insufficient. It was the duty of the plaintiff to establish on a balance of probabilities that those were names

of Luos. Since she did not adduce sufficient evidence on it, she cannot avail herself of that testimony in support of her contention.

The plaintiff also testified that one of the deceased's brothers by the name Isiah Ougo, died at and was buried at Mwanza, Tanzania. The 1st defendant admitted he had heard of him and that he had died as alleged but, denied he had known or seen him. Albert Ongango (Ong'ang'o) testified as much. Idalia Awino Odongo (Idalia), however, vehemently denied having heard of Isiah Ougo. It was unbelievable and inconceivable that she had not heard of her elder brother who had died probably before she was born or when she was young.

Be that as it may, the plaintiff did succeed in showing that at least one Luo from the Umira Kager clan, and particularly an elder brother of the deceased, had died and was buried away from the ancestral land. The defendants did, however, counter that there are times when it may not be practicable to comply with the customs and they singled Isiah'Ougo's case as being such.

The right of the clan to claim and bury the body of a clan member proceeds from, so the defendants and their witnesses contended, sanctions which flow from the Luo customs and traditions, compliance with which is ensured by the fear of supernatural or psychological forces (*chira*).

All the defence witnesses testified that calamities will befall them in the event of them not burying the deceased in accordance with the widely accepted, so they said, Luo customs and traditions. None of those witnesses, however, had, hitherto suffered any calamity arising from the failure on the part of any clan member to adhere to a burial custom.

Some of them, however, like Johanes Mayamba (Mayamba) testified that he had seen, and actually treated people who had been taken ill or had suffered a curse which had descended on them for failure to comply with the burial customs and traditions.

It was also contended that it was not so much that a deceased person was himself an adherent of the customs and traditions of the clan or tribe from which he came, but whether or not the surviving members of his clan comply with the requirements of those customs and traditions. This is so, said the witnesses, because the surviving members of the clan are the most likely to be affected by the curse if and when it descends.

The agreed issues are:

1. Did the deceased express his wishes or give direction as to where he should be buried?
2. If so, (a) to whom? (b) when? (c) where?
3. Did the meeting of 4th May 1981 discuss the question of burial of the deceased at plot no Central Alego/ Nyalgunga/1983?
4. (a) Do the defendants, jointly and severally have a cause of action against the plaintiff? (b) If they have, what is the cause of action?
5. What, if any, is the Luo customary law in regard to the burial of the deceased?
6. Was the deceased subject to the Luo customary law?
7. What law applied to the deceased in regard to the burial of his body?
8. Where did the deceased and the plaintiff establish their matrimonial home?
9. Who is entitled to bury the body of the deceased? In other words to whom does the duty of burying or disposing of the body of the deceased fall?
10. Is the plaintiff entitled to the prayers in her plaint?
11. Are the defendants entitled to the prayers in their counterclaim?
12. Who is to bear the costs of this suit?
13. Did the plaintiff and the deceased establish a matrimonial home at Upper Matasia in Ngong?
14. By reason of the fact that the deceased lived away from his ancestral home for a considerable period of time did he thereby cease to be governed by or subject to the Luo customary law?
15. Whether Luo customary law relating to burial generally is repugnant to justice and morality or inconsistent with any written law.

It is pertinent to observe here that Kenya has not enacted any law with regard to burial of deceased persons. Nor is there is a statute of general application, in England, in that regard which was in force by 12th August 1897, which would by dint of section 3(1) of the Judicature Act, cap 8 Laws of Kenya, be applied to Kenya.

Mr Khaminwa submitted that the provisions of section 66 of the Law of Succession Act cap 160 Laws of Kenya, read with section 146(2) of the Public Health Act, and the provisions of section 82 of the Constitution adequately deal with the matters at hand.

To that I say this: The Court of Appeal in an appeal concerning these same parties, viz, Civil Appeal No 3 of 1987, held that there was no basis in this matter for invoking section 146 of the Public Health Act, or the Law of Succession Act as the issues in this case do not touch either on succession or public health. That being a superior court and their adjudication having been based on the facts of this case, I am bound by their holding and say no more on that. I agree with Mr Kwach that the provisions of the Marriage Act, cap 150 Laws of Kenya, which Mr Khaminwa said exclude customary law from this matter, are inapplicable to the facts of this case. The issues which arise in this suit concern burial. The provisions of the Marriage Act deal with marriage and not burial. They do not therefore avail the plaintiff.

Regarding the submission based on excerpts from the *Encyclopaedia of Forms and Precedents* 4th Edition, Vol 4 at pages 4 and 5, and also *Business Encyclopaedia and Legal Advice*, Vol 1 page 399, to support the view that the duty of disposing of the deadlines with the executor of a will or the person in whose premises the person dies or the next of kin, the excerpts are based on English law, which, to my mind is not applicable to Kenya, and is based on administration of estates.

There is no issue in this case touching on the administration of the deceased’s estate. Even if that were so, there is the Law of Succession Act, which has exhaustive provisions for that purpose.

I researched on English authorities based on the common law, and which deal with burial, but was unable to find any nor were any referred to me. Those I could find are based on the English law with regard to administration of estates which are irrelevant to this case. That then leaves us with personal law which in this case, is the customary law.

I had earlier set out what the defendants said is the Luo customary law and tradition on burials. No evidence was called to challenge or contradict them on that score. I have no basis for finding otherwise. I accept as true what the defendants and their witnesses set out as the Luo customs and tradition with regard to burial. That then answers the fifth issue on the list of agreed issues.

The next issue which I must grapple with is whether the deceased was subject to Luo customary law.

It was the plaintiff’s contention and her counsel’s submission, that he was not subject to Luo customs having chosen to marry under the Marriage Act, and having lived away from his ancestral land for a considerable length of time and also, because he had chosen a lifestyle and behaviour which were in consonant with Christianity and western civilization.

The plaintiff, however, seemed to contradict herself, because she admitted that the deceased was member No 18 in a clan association whose aims and objectives have been and still are to help in the transportation and organisation of funerals of members of the Umira Kager clan. A person totally divorced from the customs and traditions of his clan or tribe will be slow if not totally opposed to becoming a member of an association whose aims and objectives totally conflict with his beliefs.

Furthermore, the deceased did attend at least three funeral ceremonies, at his ancestral home. The first one was that of his father, in which he observed the four days of mourning required by custom, within which time he abstained from coming into contact with his wife, as required by custom. He also spent four nights outside, as required by custom.

The second funeral was that of his nephew, George Michael Oyugi (Oyugi), which took place in 1983.

The third one was that of his elder brother, Simon Odhiambo, in 1985.

The plaintiff admitted that the deceased was immensely involved in all those funerals, which was in line with the Luo custom. As rightly pointed out by Mr Kwach, he assumed the role of head of the wider family, after Simon's death. It is in evidence that he sent money to Simon's two widows to help in repairing the roofs of their respective houses. That is in line with the Luo custom that as head of the family, the deceased was under a duty to help those widows.

There is one other aspect. The plaintiff admitted she typed the minutes of a meeting held in the deceased's office on 4th May 1981 (exhibit 17). In the document one of the matters agreed upon, between the deceased, his late brother Simon and the first defendant was that the deceased and the first defendant would inherit from their father, Jairo, then deceased, parcel No Central Alego/Nyalgunga/1983. Neither the deceased nor the first defendant had the legal right, except under Luo customary law, to claim an interest in that parcel of land. The deceased's claim over that land was based on custom.

It was quite clear from the evidence that the establishment of a home was tied together with devolution of land, which to my mind, appeared to have been intended for the benefit of the grandchildren of the man establishing a home. That would perhaps explain why men who never had a son or sons were not capable of establishing a home in the traditional sense. By the deceased showing interest in inheriting part of his late father's land, he must have, at least at that time, been contemplating of establishing a home there.

Finally, as recently as November, 1985, the deceased did pay dowry for his son's wife. Upon what basis was dowry paid? The deceased was complying with an age long custom that dowry must be paid to cement the relationship between the family of the bride and that of the bridegroom. The plaintiff did argue that because dowry was not paid by the deceased to her parents, then he did not consider himself to be bound by Luo customs. The deceased may have not paid dowry, but the fact that he did not do so did not, of itself without more, preclude him from being subject to other customs, like those with regard to burial.

As has been shown above, the deceased did demonstrate that he did espouse certain Luo customs pertaining to matters other than his marriage with the plaintiff. I will therefore, answer the sixth issue in the affirmative.

The theme of submissions by Mr Khaminwa, learned counsel for the plaintiff concerning Luo customs and traditions and customs and traditions in general is that they are outmoded, obsolete and out of step with Christianity and civilization. It was his view, and that of his client that they were unacceptable to the plaintiff, for among other reasons, that she had come from a different tribe. Also that she had adopted a lifestyle which was incompatible with those customs and traditions.

To that I say this: The plaintiff, a Kikuyu by birth, chose to be married by a man who was not of her tribe. She knew she was marrying a Luo. He at no time, at least according to the evidence renounced his tribe or declared that, apart from marriage, he would not be bound or be subject to customary law where its application is permissible, and is not in conflict with a written law or repugnant to justice and morality. No condition has been shown to have attached to their contract that apart from their marriage, he would not be subject to his customary laws and traditions. She chose to be married by the deceased, a Luo by birth, knowing him to be such. She had seen him participate in burial ceremonies which were customary or potentially customary in nature, although evidence was led that the ceremonies were a blend of Christian and customary rites. She cannot now complain that the Umira Kager people are uncivilized or have a lifestyle quite different from her concept of civilization, because they did not, at all, force her to be married into their clan.

Even in Western countries, which Mr Khaminwa and his client considered to be civilized, the position has been, and still is, that where for instance, an English woman domiciled in England marries a man of a polygamous race in his homeland

> "knowing that she is entering into a marriage that is potentially polygamous (the) validity

> of that marriage depends on the personal law of the husband and not on the personal law of the wife… If he in his own country takes to himself another wife, the English wife cannot complain"

(*Kenward v Kenward* (1950) 2 All ER 295 at p 310– Per Denning, J).

The case I have cited above deals with conflict of laws in marriages but does illustrate the point I am trying to make that, it is the plaintiff who made the choice. She should not complain when she finds that certain customs upon which certain rights and duties are based are incompatible with her concept of civilised living. She can only complain if the customs do not meet the test under S. 3(2) of the Judicature Act, which reads:

> "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 cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

I wish also to observe here that we are not concerned in this case with whether or not the customs and traditions of the Luo are acceptable to the plaintiff. Rather, the issue is whether or not the deceased was subject to them. It is immaterial what the plaintiff thinks about them if they do satisfy the test in S. 3(2) of the Judicature Act (quoted above). To borrow the words of Nyarangi JA in the case of *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters and 5 Others*, Civil Appeal No 123 of 1985 (CA), that "there is always a purpose for the practice of a custom". The Luo have a purpose for the custom which, to my understanding of it, is intended to unify the people in a family.

The issue which I must now grapple with is whether the Luo customs and traditions, set out earlier, with regard to burial are repugnant to justice and morality or public policy.

As indicated earlier in this judgment, no law has been enacted in this country to deal with burials. Nor is there common law with regard to burials, that I could find. I find nothing in those customs and traditions which is repugnant to justice or morality. I also find no law to which they are inconsistent.

In those circumstances I have no basis for excluding them with regard to this case. There was an attempt by the plaintiff to enunciate what she believed to be the Luo customs pertaining to burial, with a view to demonstrating that the customs were immoral. She testified that a widow is compelled to sleep overnight in the same room with the body of her deceased husband together with a *Janeko* (lunatic or drug addict, as she described him). She would then, thereafter, be compelled to shave her head and also the heads of the children of her marriage with her deceased husband.

She further said that the widow would also be compelled to enter into a levirate union with a man chosen by the clan. She did, however, confirm that she has not seen that happened more particularly in the ancestral home of the deceased.

The defendants and their witnesses admitted that, if a widow is still of child bearing age and does desire to have more children, she may elect to enter into a levirate union with a man of her choice. There is no compulsion involved.

Support was rendered to their contention by the fact that the widows of Simon Odhiambo, the elder brother of the deceased have not to date entered into a levirate union, even though they may be still of child bearing age. It is in evidence, also that there is no requirement by the custom that a widow sleeps in a room with the body of her deceased husband together with a *"Janeko*."

It is also in evidence that the shaving of hair is not obligatory.

I find no law with which the customs conflict and find nothing to make me hold that they are repugnant to

morality. The fear of supernatural consequences, by those governed by them will not *per se* make the customs repugnant to justice and morality. Nor can that be said about the observance to *"tero buru"* (ceremony of running with animals a day after a burial ceremony, symbolic of sending away evil spirits); or sitting around *"magenga"* (funeral fire) during the four or three days of mourning. It was stated that it is customary during the period of mourning for men to spend the nights outside warming round *magenga*. It is logical to have a fire because nights, from what we know can be cold.

Mr Khaminwa put forward a formidable argument in support of equal rights and opportunities for women and he often times expressed support for feministic causes. It was his view that by the Luo customs excluding women from decision making forums as to where their deceased husbands would be buried amounts to discrimination against sex, and that offends the provisions of S. 82 of the Constitution of Kenya.

With due respect to learned counsel, S. 82(4) of the Constitution of Kenya exempts personal laws with regard to burial, from the provisions of S. 82(1) of the Constitution of Kenya; which reads:

> "82(1) Subject to subjection (4), (5) and (8) no law shall make any provision that is discriminatory either of itself or in its effect."

S. 82(4) reads in pertinent part as follows:

> "Subsection (1) shall not apply to any law so far as that law makes provision (a) ... (b) With respect to adoption, marriage, divorce, <u>burial,</u> devolution of property on death or other matters of personal law; (c) ... (d) ..." (underlining mine).

Mr Khaminwa's argument on that score does not, therefore, avail the plaintiff. Also the authorities which he cited, viz. *Re Kibiego* (1972) EA 179; *I-v-I* (1971) EA 278; *Karanja v Karanja* (1976) KLR 307. They have no application to the facts of this case and, therefore, do not avail the plaintiff. They deal with property. A corpse does not fall into the category of property. For the foregoing reasons, I hold that the Luo customs pertaining to burial are neither repugnant to justice and morality, nor are they discriminatory as alleged.

As stated earlier it is the plaintiff's case that the deceased expressed his wish to herself, their children and friends, regarding his burial place. In her evidence she said that the deceased oft-times talked to her, personally, first in 1979, soon after the death of his father Jairo, concerning his wish to be buried in Nairobi. He repeated that wish to her, in 1980, after the death of a friend of his called Hillary Ocholla; and again in 1983, soon after he bought the Matasia property.

On that last occasion he changed his wish. He is alleged to have indicated that he wanted to be buried at Matasia, in the event of his death, because there would be no necessity for prior Presidential assent as in the case of Nairobi. It is also in evidence that the deceased did on numerous other occasions, thereafter, repeat to her of his wish to be buried at Matasia. The deceased is also alleged to have told several other people of his wish to be buried at Matasia. Some of those were called as witnesses.

Rahab Wambui Muhuni (Muhuni), the deceased's family friend who, in 1964, deserted her white American husband, then resident in New York, USA, testified that the deceased did on two occasions tell her that it was his wish that he be buried at either Nairobi or Matasia.

She testified that the deceased showed her where he wanted his grave to be dug in the event of his death. He did that on two occasions. On the first occasion, she said, he pointed out a place on his Langata property and indicated that he desired to be buried there upon death. It appears this was before he bought the Matasia property.

The second occasion he showed her a spot at the Matasia property which he had set aside as a family graveyard. To emphasise her closeness to the deceased, she indicated that the deceased, on a date she could not remember, called her to arbitrate in a disagreement between him and the plaintiff. The dispute

concerned a refusal by the plaintiff to uproot bananas which she had planted on the ground the deceased had allegedly set aside as a family graveyard.

The plaintiff neither mentioned that the deceased had set aside a ground for a graveyard nor that he had had any disagreement with her with regard to her alleged refusal to uproot bananas from it. Muhuni also testified that the deceased spoke to her about his burial wish in 1980 and 1984. She did not mention 7th December, 1986, when the plaintiff said, the deceased talked to her (Muhuni), and her son Kenneth Mwangi, concerning his burial wish.

On 16th December, 1986, the deceased allegedly, organised a get-together dinner to welcome home his son Frederick Otieno, who arrived on that same day from Britain. Several guests were invited for the dinner, among them Mr and Mrs Musa Muna.

The deceased is alleged to have expressed his wish to be buried at Matasia to the guests invited to that dinner. Musa Muna (Muna) testified to that effect.

That may well have been so. However, Muna did not say that the deceased did express that wish to him or to another person, in his presence, any other time. I say so because Harry Mugo (Mugo) testified that on 25th December, 1985, the deceased in the presence of Muna did tell him that he wished to be buried at Matasia in the event of his death. That discrepancy raises a doubt as to whether or not the deceased ever told the two witnesses where he wished to be buried.

That can also be said about Godwin Wachira (Wachira). Wachira, a freelance journalist by profession, testified that on 9th November 1986, in the house of Dr Kiano the deceased told him he wished to be buried in Nairobi, in the event of his death. It should be remembered that by that time the deceased’s wishes, according to the plaintiff, were that he be buried at Matasia. Wachira’s evidence does not, therefore, fit in with the wishes of the deceased as at that time.

James Ligia Ole Tameno (Tameno), like Muhuni, testified that the deceased pointed out to him a place at Matasia where he desired that his family members and himself would be buried upon death. As in the case of Muhuni, the plaintiff was silent on that score. It cannot be said the matter was not within her knowledge, because she called Tameno as witness. That was a fact of crucial importance to her case which, with all due respect to her, she would not have forgotten. That she made no mention of it tells it all about her credibility as a witness.

Miriam Murekera alias Mama Koko, a food vendor at a *kiosk* in Kibera, Laini Saba, testified that she among others, accompanied the deceased and his wife, the plaintiff in this case, to his ancestral home at Nyalgunga, on two occasions, to attend the funerals of Oyugi and Simon.

She testified about a quarrel in which the first defendant, allegedly, rushed into a certain house and came out shortly later armed with a long knife which he used to threaten to cut the plaintiff. He was separated from the plaintiff by clan elders who were present.

Jane Njeri Muchina (Jane), who was apparently called to corroborate Mama Koko concerning that quarrel gave evidence which was materially at variance with that of Mama Koko, Jane, a vegetable vendor at Wakulima Market, Nairobi, testified that the first defendant did not at all threaten the plaintiff, but the deceased, who in turn dashed into his car and returned with a sword, presumably to ward himself against the first defendant’s attack.

That discrepancy aside, the plaintiff who said she was present at Oyugi’s funeral made no mention of that incident which, to my mind, was of crucial importance to her case.

I say so because Mama Koko, testified that in that quarrel the first defendant called the plaintiff *“Malaya”* (Swahili for prostitute).

That angered the plaintiff who then remarked that such behaviour as was allegedly displayed by the first

defendant had made him not wish to build any house at Nyalgunga. To my mind the quarrel was conjured up to add weight to the testimonies of Mama Koko and Jane, who may not have been present during that funeral.

Jairus Michael Ougo Otieno (Jairus), a student at William Patterson College, New Jersey, in the United States of America, and his younger brother Patrick Louis Wilkinson Oyugi Otieno (Patrick), formerly a student at Greenstead School, in the Rift Valley of Kenya, both testified to the effect that their father, the deceased in this case, had on more than one occasion expressed to them respectively, and at different times, the wish that in the event of his death he be buried at either Langata or Matasia.

The two witnesses were themselves opposed to the deceased being taken to Nyalgunga for burial. With some degree of arrogance and contempt for the Umira Kager people they stated respectively that they are different from them, and referred to them as being lazy, primitive and, people who had a lifestyle of uncivilized people.

They also said that they speak a different language and were totally unknown to them. Like their mother who testified before them, and Mr Khaminwa, her counsel, they appeared to believe that if the deceased is taken to Nyalgunga for burial, the plaintiff and all her children would be required to live there. There was no indication made or suggestion given that the plaintiff and her children will at all be compelled to live at Nyalgunga. To the contrary the both defendants and witnesses called by them clearly stated that the plaintiff and her children are at liberty to live where they choose.

In his final submission Mr Kwach, learned counsel for the both defendants, expressed disgust, rightly so in my view, at the stand taken during the hearing of this case, by the plaintiff, Jairus and Patrick. They all unashamedly declared that should this court direct that the deceased be taken to Nyalgunga for burial they will not at all, attend the funeral. The plaintiff appears to have influenced her two sons, because they said they had held a meeting as a family and together resolved to boycott the deceased's funeral if it is declared that he be taken to Nyalgunga for burial.

That clearly demonstrated how far the plaintiff is prepared to go to ensure that things happen in "my way or never". How did she expect me to believe her and her two sons upon their adoption of such a stand? To my mind a litigant is only required to call evidence in support of his case and leave the matter to the court to decide in his favour or otherwise. Utterances which amount to implied threats are uncalled for, irrelevant and border on contempt of the court. They offer no assistance to any litigant.

A Nairobi advocate, Timan Njugi (Njugi), testified that the deceased, in the presence of two of his learned brothers, Onyango Otieno and Lee Muthoga, both who did not testify, told him that he had bought land at Kiserian, in Lower Matasia, where he intended to practice farming.

The witness stated that the deceased, apparently having been angered by a remark by Onyango-Otieno, that it mattered not how much land he had bought in Masailand he would eventually be buried in Siaya, remarked:

> "I shall be buried at Kiserian. I have made it clear to all parties that will be interested in my funeral."

The witness was absolutely certain that the deceased never made any mention of upper Matasia. Had the deceased wished to be buried at Matasia, he would not have mentioned "Kiserian". It cannot be said it was a slip of the tongue because it is in evidence that the deceased has land registered in his name at Kiserian.

Jutta Johanna Quade, a German national, like her husband Alfred Adema, a Maragoli from Bugina Village, in Kamakega District, testified that the deceased talked to them (herself and her husband), on two occasions, first at Dambustars Club near Wilson Airport and, also, at his office on a later date, with regard to his wish in establishing a home in Nairobi, where he hoped to retire to and upon death be buried there. He told them this, so they said, in 1983 and 1985.

By 1985 the deceased, according to the plaintiff, had changed his mind with regard to his wish of being buried in Nairobi. The testimony of these two witnesses is not, therefore, of any assistance to the plaintiff as it contradicts the deceased's alleged avowed wish.

Regarding the evidence of Edward Muni, I agree with the sentiments expressed by Mr Kwach, that a man of the deceased's standing could not conceivably have bent so low as to discuss his private matters with his law clerk. The plaintiff by calling this witness and the several other to testify that the deceased expressed the wish to be buried at Matasia, portrays the deceased as a hypochondriac, and a man who almost spoke nothing else, save his burial wish. He is depicted as a man whose mental state had been relegated to almost the lowest level. It is not conceivable that the deceased had just prior to his death reached such a state as to have been speaking about his death to all and sundry.

The both defendants' case is also that the deceased had expressed a wish to be buried at Nyalgunga upon his death. The first defendant testified that on 4th May, 1981 long after their father, Jairo, had died, the deceased, Simon, and himself, met at the office of the deceased and discussed among other things, the distribution of land Jairo had left behind.

They also, allegedly discussed about a graveyard which their father had allegedly shown the first defendant in January 1978, just before his death.

According to the first defendant, Jairo had indicated to him that he wanted all his family members to be buried there. In the meeting of 4th May, 1981, the deceased expressed his wish to be buried in that graveyard upon his death, so said the first defendant. He further testified that Simon was buried there and also his son Oyugi.

Albert Onyango, a mason in Siaya District and a cousin of the deceased, also testified that the deceased did intimate to him that he wished to be buried next to or near his father's grave. Ong'ang'o was at the time cementing the grave of the deceased's elder brother, Simon, who was then awaiting burial. The witness testified that the deceased expressed his wish in the following words or words to that effect:

> "Albert, Albert, you have now prepared your brother Simon's grave. In case I die prepare a grave for me next to that of my father".

Those words were spoken to the witness, so he said, when he was inside the grave which was under construction. The court moved to Westlands Cottage Hospital, where the witness was admitted having had a prostate operation, to receive his evidence. He testified as he lay on his back in his hospital bed. In spite of being in that condition he had no difficulty expressing himself. He impressed me a lot. He appeared candid and truthful. I had no reason to doubt his testimony.

Japheth Yahuma (Yahuma), a bishop of the Africa Israel Church, in Nyanza Province, corroborated the testimony of Ong'ang'o. He is the only one among the defence witnesses who stated that the deceased also told his wish that he be buried at Nyalgunga, during the cementing of Jairo's grave. He was not examined or cross-examined as to where, within Jairo's homestead, those wishes were expressed and it is not therefore, possible to determine whether or not the witness told the truth. However, considering his general demeanour as a witness, I have no reason to hold that what he said was not true.

With regard to the evidence of the first defendant concerning the meeting held in the deceased's office on 4th May, 1981, the wishes of the deceased as to his burial place do not appear on the minutes of that meeting (ext 17).

The first defendant explained that they were deliberately omitted because the deceased feared that if his wife, the plaintiff, knew of it she would become greatly distressed and annoyed with him. That may have been so but there was no indication given in that document with regard to burial of Simon and the first defendant, either. I am not inclined to believe that the deceased did express his wish to be buried at Nyalgunga, during that meeting.

Considering all the evidence in its totality I will answer the first three issues as follows: The deceased did express his wishes as to where he should be buried, and he did so at Nyamila Village, Nyalgunga Sublocation, Central Alego Location, Siaya District, to Albert Ong'ang'o, on the day the grave of Simon Odhiambo was being cemented.

The meeting of 4th May 1981, did not in my view discuss the question with regard to the burial of the deceased at plot No Central Alego/ Nyalgunga/1983, or at all. Exhibit 17, which contains the minutes of that meeting speaks for itself. It contains what was discussed. We ought not and should not go behind the clear minutes of that meeting. The position would, perhaps, have been different had minutes of that meeting not been produced.

Several cases were cited decided by the High Court and the Court of Appeal, with regard to questions of burial. I propose to deal with a few of them in this judgment. In the case of *James Apeli & Another vs Prisca Buluku* (Mrs) Civil Appeal No 12 of 1979 (CA), the question for determination was whether the body of the respondent's husband which had already been buried could be exhumed. There is no question with regard to exhumation in this case. Furthermore, in that case it was common ground that the deceased had expressed the wish to be buried in Bungoma as opposed to his father's homestead in Bunyore.

We also don't know what the customary law, which both sides agreed applied to that case, was. The decision is of no assistance to either party in this case.

In the case of *Carmelina Ngami Mburu v Mary Nduta and two others,* High Court Civil Case No 3209 of 1981 (which was consolidated with another case), the dispute was essentially between the widows of the deceased in that case, John Godhard Mburu. The facts of that case are dissimilar to those in this case and, to my mind, it was referred to support the view which Mr Khaminwa urged before me, that courts have no jurisdiction to direct that a body be buried at a particular place. I will advert to that issue at a later stage. The decision is inapplicable to this case.

The next case I wish to specifically refer to is, *Dominic Peter Waudi v Jemima and another* High Court Civil Case No 283 of 1983. In that case the questions for determination and the facts of the case, as could be gathered from the affidavits upon which the ruling in the case was based, were more or less similar to the facts of the present case. Muli J ruled against the widow of the deceased Pascal Ooko Waudi, but did not assign reasons for his ruling. He said in that ruling that he proposed to give his reasons fully in writing at a later date. As rightly pointed out by Mr Khaminwa, we do not know upon what basis that decision was arrived at. The decision is of no assistance in determining the issues in this case. In the course of this judgment I have made specific findings of fact, firstly that the personal law of the deceased, viz, Luo Customary Law, is applicable with regard to his burial.

Secondly, that according to Luo Customary Law, in absence of exceptional circumstances, a man has to be buried in his father's homestead, at a place to be determined by the clan elders, if he had not at the time of his death established a home in accordance with customs and traditions of Luos.

Thirdly, that although the deceased had established a matrimonial home, in the Common Law sense, at Lang'ata, in Nairobi he had expressed a wish to Ong'ang'o to be buried at Nyalgunga.

Fourthly, that Luo Customary Laws with regard to burial, as propounded to me, were not repugnant to justice and morality and do not conflict with any written law.

Fifthly, that the deceased was subject to Luo Customary Law at the time of his death. The only other question which, apart from costs, I must now deal with and which forms the crux of the remaining issues, is, to whom does the duty of burying the body of the deceased lie? Witness after another called by the defence contended that the Umira Kager clan has the duty of burying the deceased. They added a rider that even though a deceased person has expressed a wish to be buried at a given place, that is subject to the Luo Customary Law and the wishes of the clan sages.

It is pertinent at this stage to consider whom within the clan has that basic right, first of determining

where the burial is to take place and, secondly, what ceremonies are to be performed and, other related matters. The Umira Kager clan comprises a large number of people . Even if I were to accept what Professor Henry Odera Oruka said, that the clan sages take the decision, who is to decide that a particular person should be called upon to give direction with regard to burial as required.

To my mind it will be idle to say that the clan takes a decision as to where and how a deceased person is to be buried. A line must be drawn somewhere to show who are involved in making the crucial decisions with regard to burial.

On reading the evidence I formed the following impression. In each family there is a person who is regarded as the head of that family. He takes the major decisions and may call upon certain elders to help him in resolving certain complicated issues. He decides whom to call and on what matters the persons he calls will be of assistance to him. That appears to be what happened during the burials of Jairo, Simon and Oyugi. *Tero buru* was not performed. It could be it was because most of Jairo’s family members were Christians that that ceremony was not held.

Evidence was adduced, which I accept, that several aspects of the Luo burial customs have changed or been abandoned. There is, for example, the shaving of hair. These days only a few hairs may be cut, or not at all. Shaving of hair appears to be considered not to be a crucial aspect of the custom. It may be ignored without doing violence to the custom.

All I am trying to demonstrate is that the decision as to the place and manner of burial is essentially taken by the head of a family with the assistance of other responsible family members. The other members of their clan become involved in matters of detail.

With that in mind the decision as to where the deceased in this case would be buried, to my mind, was a matter for the 1st defendant, the plaintiff, and other responsible members of Jairo’s family. After the death of the deceased, by custom, the 1st defendant took over the captainship of his father’s ship and became the shepherd of his flock, which included the plaintiff and her children.

It is an undeniable fact which both the defendants, the plaintiff and witnesses called to testify in this case must accept, that change is inevitable, but that it must be gradual . Times will come and are soon coming when circumstances will dictate that the Luo Customs with regard to burial be abandoned. Until then courts will have to give effect to them in so far as they are applicable, as in this case, and are not repugnant to justice and morality or inconsistent with any written law.

Throughout this case and in the course of writing this judgment, I have borne in mind the cardinal principle in civil law that he who avers must prove if the court is to exercise its judicial mind in his favour.

Considering all the evidence on record I am not satisfied that the plaintiff did discharge the burden which was upon her to prove on balance of probabilities that, firstly, she had the legal right to the exclusion of all other people, of deciding where to bury her husband and, secondly, that the deceased had expressed the wish to her and witnesses called by her, that he desired to be buried either in Nairobi or at Upper Matasia.

I am, however, satisfied on a balance of probabilities that the deceased did express a wish to Albert Ong’ang’o that he desired to be buried next to his father’s grave at Nyamila Village, Nyalgunga Sub-location, Siaya District.

I am also satisfied, and find as fact, that the question with regard to the place a deceased person is to be buried is a matter for the family of the deceased who, if need be, may involve other members of their clan.

I am also satisfied that the deceased’s family members were unable to agree concerning the place of burial of the deceased and accordingly, some of the clan members had to be called to assist in resolving

the dispute which arose between them. Otherwise the clan would not have had a basis or any proper basis for coming into this matter.

I am further satisfied on a balance of probabilities that Luo Customary laws relating to burial do not expressly exclude women on matters pertaining to decisions as to the place of burial of a deceased person, particularly if they have distinguished themselves either in the respective families from which they come or in the clan generally.

The evidence on record clearly shows that the plaintiff had involved herself in matters affecting Jairo’s family and the nation as a whole, that it was desirable and, to my mind, imperative for her to participate in discussions with regard to the place of burial of her deceased husband. However, because of the negative attitude she adopted towards the 1st defendant and other members from the deceased’s ancestral home, soon after the death of her husband meaningful discussions were rendered impossible. I should point out here that the plaintiff was not prepared and still is not prepared to accommodate any other person’s views with regard to the place of burial of the deceased.

I wish to state here and counsel her that it is not only her who has been bereft of her husband, the deceased in this case. There is his step-mother Magdalina, his bothers and sisters who may also have depended on him in one way or another. There are, above all, his children.

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

Mr Khaminwa submitted that a court has no jurisdiction to direct where a deceased person is to be buried. He did not support his submission with any authorities. There is no legal rule that I know of which bars a court from giving directions with regard to the place a deceased person is to be buried. A court exercises jurisdiction in customary law matters following the guideline given under section 3(2) of the Judicature Act, Cap 8 Laws of Kenya, which in pertinent part reads:

> “The High Court, the Court of Appeal… shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”.

The justice of this case demands that this court directs as to where the deceased, Silvano Melea Otieno, is to be buried. Having regard to the Luo Customary Law relating to burial, which as indicated earlier is the law applicable in this matter and, considering the finding I earlier made that the deceased had expressed the wish that upon his death he be buried at Nyalgunga, I hereby direct and order that the deceased’s body be handed over to Joash Ochieng’ Ougo and Virginia Edith Wambui Otieno jointly or to any one of them for burial at Nyamila Village, Nyalgunga Sub- Locaton, Siaya District. That is, however, subject to them obtaining any necessary permits to transport and to bury the body.

As regards costs, this having been essentially, a dispute between family members, it will not be appropriate to condemn any one party to meet all the costs of this suit. I accordingly, order that each bear own costs. Orders accordingly.

Finally, I must express my gratitude and appreciation to both counsel who appeared in this matter, Messrs Khaminwa and Kwach, who conducted this case with dignity, keenness and resourcefulness. Although there were occasional flare-ups in tempers that is expected, as life is full of ups and downs, and that was merely a reflection in miniature form what the world is like.

I must also take this opportunity to pay tribute to the deceased for services he rendered to this court and the country at large during his lifetime. His wealth of legal knowledge will be sadly missed by reason of his untimely demise.

Dated and Delivered at Nairobi this 13th February, 1987

S.E.O BOSIRE

....

JUDGE