



REPUBLIC OF KENYA



KENYA LAW
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**Nzuki v Kamwanza & 2 others (Civil Case E057 of 2025)
[2025] KEMC 44 (KLR) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEMC 44 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E057 OF 2025
YA SHIKANDA, SPM
MARCH 17, 2025**

BETWEEN

EVANS KASANGA NZUKI PLAINTIFF

AND

PAULINE WAYUA KAMWANZA 1ST DEFENDANT

KWAME STANLEY NZUKI 2ND DEFENDANT

GREGORY MAKAU NZUKI 3RD DEFENDANT

JUDGMENT

Background

1. Who owns your body? The most obvious response is that you do. Why do we care what happens to dead bodies? Does it really matter whether corpses are cremated, buried, or tucked away in freezer chests? Does it matter who buries or where the body is buried? Nobody "owns" a dead body in any legal sense. By any utilitarian or rational calculus, the dead aren't using their bodies anyway. Property law does not seem to provide a well-defined interest in one's living body. It is a well-established principle of law that there is no 'property' in, nor 'ownership' right to, a dead body. However, certain people can have the right to possess the body following the person's death. For example, anyone who has a duty to bury a deceased person has the right to possess the body in order to bury it.
2. There are laws that govern disposal of bodies and crimes committed against dead bodies. Why is it so? Across history, cultures with almost no other rituals in common treat their dead with reverence. This conveys the idea that there is something more in burial than the disposal of a dead man's remains. The respect for corpses is so rooted that we even agree to deal gently with the bodies of our enemies. The dead sometimes deserve more respect than they earned while alive. It is our culture as Africans to ensure that the dead are interred in a dignified manner and by their loved ones. In most cases if proper burial



- rites are not observed, Africans believe that the deceased may become a wandering ghost, unable to exist in a proper manner after their death and are thus a menace to those whom they have left behind.
3. It has been argued that proper death rites are more of a guarantee of protection for the living than to secure a safe transitional phase for the dead. There is a witnessed incongruity of viewpoints to those who have recently passed, which tend to oscillate between both immovable respect and love for the deceased and a certain dread or despair on the other hand. This is predominantly because it is believed that those who have passed have some ardent power over those that are living. The rites of death in the African context as a custom are all important and help strengthen social, local and psychological bonds. The *Constitution* of Kenya under Article 11 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.
 4. Burial disputes are a common occurrence in our courts. The disputes usually manifest in family members of a deceased rushing to obtain a burial permit, apply for a death certificate, receive a body from the morgue, seeking injunctive orders against another member from burying a deceased, among other issues. What is the value of a dead body? Does it matter who takes a leading role and where a deceased is buried? These disputes arise partly because there is no statutory law on burial rights and perhaps from the misguided view that exercising any of the burial rights and rites affords one the right to control and inherit the deceased's property
 5. The term "rest in peace" in burial nomenclature connotes that once a deceased joins the afterlife, his or her remains are interred as soon as possible subject to religious and/or customary burial rites in the hope the soul of the departed finds peace after death. However, Janet Ndinda Kamwanza, the main character in this burial dispute, who died on 3/2/2025 has not enjoyed that peace. As soon as she died, two factions of her family could not agree on her place of burial and her body still lies in the mortuary. Janet Ndinda Kamwanza (hereinafter referred to as the deceased) breathed her last while undergoing treatment at Shalom hospital in Machakos. It is her death that has triggered these proceedings. The hearing of the dispute was hot and heavy. The dispute revolves around the twin question of who has the right to collect and inter the remains of the deceased and where, between the deceased's matrimonial and maternal home should be buried? This court is now called upon to resolve the dispute and render a decision on the issue. Unfortunately, the deceased cannot assist the court as "Dead men tell no tales."

The Claim

6. Evans Kasanga Nzuki (hereinafter referred to as the plaintiff) moved the court on 14/2/2025 vide a plaint dated the same day. He sued Pauline Wayua Kamwanza, Kwame Stanley Nzuki and Gregory Makau Nzuki (hereinafter referred to as the 1st, 2nd and 3rd defendants respectively) seeking certain reliefs. The 1st defendant is the mother to the deceased whereas the 2nd and 3rd defendants are brothers to the plaintiff. The plaintiff claims that he contracted a marriage with the deceased under Kamba Customary law and all rites and rituals were performed.
7. The plaintiff averred that on 4/2/2025 after the death of the deceased, the 1st defendant acting in cahoots with the other defendants disrupted a meeting at the plaintiff's home aimed at planning for the burial of the deceased, claiming that the deceased should be buried at her maternal home. That the defendants started holding funeral meetings at the deceased's maternal home without including the plaintiff. The plaintiff stated that he wished to bury the deceased at her matrimonial home as per Kamba customary law and as per the wishes of the deceased. The body of the deceased is currently preserved at Montezuma Monalisa Funeral Home in Machakos. The plaintiff now prays for judgment against the defendants for:



- a. A permanent injunction restraining the defendants or anyone acting on their behalf from interring the body of the deceased at her maternal home or any other place other than her matrimonial home, without the consent of the plaintiff;
- b. A declaration that the plaintiff is the lawful husband of the deceased and legally entitled to bury her body at their matrimonial home in Makueni as per the Kamba customary law;
- c. An order directing that the burial of the deceased be conducted at her matrimonial home in accordance with Kamba customary law;
- d. An order directing Montezuma Monalisa Funeral Home, Machakos to release the body of the deceased to the plaintiff for burial;
- e. Costs of the suit.
- f. Any other relief which the court may deem fit.

The Defence

8. The defendants filed their initial joint statement of defence and counter-claim on 21/2/2025 but later filed an amended defence and counter-claim on 26/2/2025. The defendants denied that the plaintiff was the lawful husband to the deceased and alleged that the plaintiff and defendant separated in February, 2020 under customary law and the dowry paid by the plaintiff was returned. That the deceased returned a goat to the plaintiff on 5/10/2021. The defendants admitted that the plaintiff and the deceased were married at some point but contended that at the time of demise of the deceased, they had separated for over four years. That during that time, the plaintiff never checked on the deceased at all.
9. The defendants denied having disrupted a funeral meeting at the plaintiff's home and averred that the plaintiff was advised to return two goats to the 1st defendant so that the burial of the deceased would be done at the plaintiff's home but the latter declined. That the circumstances leading to the planning of the burial arrangements at the 1st defendant's home were contributed to by the plaintiff himself. The defendants averred that the delay in burying the deceased is as a result of non-co-operation by the plaintiff. The defendants prayed for dismissal of the plaintiff's suit with costs.
10. In the counter-claim, the defendants averred that dowry paid by the plaintiff was returned on 5/10/2021 and the deceased together with her children went to stay at her maternal home. That the plaintiff did not have any communication with the deceased after their separation and did not bother to know about her well-being. The defendants further averred that burying the deceased at the plaintiff's home would go against the wishes of the deceased and the net effect is to frustrate the 1st defendant and the plaintiff's children in pursuit of the deceased's succession. The defendants prayed for judgment against the plaintiff for:
 - a. An order for a permanent injunction to restrain the plaintiff or any other person claiming through him from collecting the body of the deceased from the funeral home for burial;
 - b. An order directing and compelling the plaintiff to return the burial permit issued to him in respect of the deceased to Shalom Community hospital for cancellation;
 - c. An order directing that the 1st defendant and the plaintiff's children proceed to bury the deceased's body at the 1st defendant's home as per the deceased's wishes;



- d. An order directing Shalom Community hospital to cancel the burial permit issued to the plaintiff and issue a fresh burial permit in respect of the deceased to the 1st defendant and/or the deceased's daughter Carolyne Syombua Kasanga;
- e. An order directing Montezuma Monalisa Funeral home in Machakos to release the body of the deceased to the 1st defendant and/or the deceased's daughter Carolyne Syombua Kasanga for interment;
- f. The OCS Emali police station to ensure compliance with the orders granted by the court;
- g. Costs and interest;
- h. Any other relief which this Honourable court may deem fit and just to grant.

The Evidence

The Plaintiff's Case

11. The plaintiff testified and called two other witnesses in support of his case. The plaintiff testified that he got married to the deceased under Kamba Customary law on 2/4/2012 after cohabiting for 16 years. That they stayed peacefully but the 1st defendant would trouble them as she was opposed to the marriage. It was the evidence of the plaintiff that in 2021, the deceased told him that she would join their daughters. The deceased left the matrimonial home and went to stay with their daughters. That they established a business. The plaintiff denied that the deceased went to stay at her maternal home. He denied knowledge of any divorce between him and the deceased. The plaintiff contended that he was in communication with the deceased and that sometimes they would meet in Makindu.
12. The plaintiff further testified that when the deceased was critically ill, she was rejected by the 1st defendant. The plaintiff then met elders from his family and that of the deceased whereupon it was agreed that the deceased would be released to the plaintiff so that he could take her to hospital. The plaintiff stated that he consulted with his daughters and they agreed to take the deceased to Shalom hospital in Machakos. The deceased later passed on while at Shalom hospital. The plaintiff was then issued with a burial permit. The body was then taken to Montezuma Monalisa funeral home.
13. Later, the plaintiff learnt that the 1st defendant had gone to the funeral home with a casket, with the intention of taking the deceased's body. The defendants started making burial arrangements at the 1st defendant's home. The plaintiff stated that the issue concerning return of a goat was a scheme. That according to Kamba customs, a meeting involving elders from both families would have been held first for the deceased to denounce the marriage. That the divorce proceedings ought to be recorded, just like marriage proceedings. The plaintiff stated that once a goat is returned to signify breakage of a marriage, the goat is taken away by the elders. The plaintiff's case is that he was never told by anybody, including the deceased that he had been divorced.
14. PW 2 Festus Kyalo alias Kasangi testified that he was the DJ at the wedding ceremony of the plaintiff on 2/4/2012. He did not have much to say. PW 3 Julius Muli Muasya testified on the Akamba customs and culture. The witness took the court through the procedure of a Kamba customary marriage as well as divorce initiated by a woman. According to PW 3, if a woman wishes to divorce her husband, she is supposed to personally return a goat to the husband's family. That the return of the goat is done in the presence of both family members. The witness further stated that if the woman re-marries, she is supposed to return dowry to her former husband.



The Defence Case

15. The 1st defendant adopted her statement filed in court as part of her testimony. The 1st defendant stated that she was the deceased's biological mother. She admitted that the deceased was married to the plaintiff but contended that the two divorced after the deceased gave a goat to her brother, which goat was returned to the plaintiff's home. According to the 1st defendant, the marriage between the plaintiff and the deceased ended when the goat was returned. That she had been staying with the deceased ever since the latter separated from the plaintiff. She urged the court to dismiss the plaintiff's suit and enter judgment in favour of her counter-claim. The 2nd defendant also adopted his statement in evidence. He testified that the plaintiff was his brother. He also admitted that the plaintiff was married to the deceased but they later separated, where after the deceased went to live with the 1st defendant.
16. The 2nd defendant further testified that he knew that the deceased had returned a goat to the plaintiff. That the goat was returned by the deceased's brother and the plaintiff confirmed to him that the goat had been returned. The 2nd defendant stated that he had no objection to the deceased being buried at her maternal home. He prayed for dismissal of the plaintiff's suit and judgment be entered in favour of the counter-claim. The 3rd defendant adopted his statement in evidence. His evidence was similar to that of the 2nd defendant. DW 4 Charles Kamwanza adopted his statement in evidence. His testimony was that he was the brother to the deceased. He also admitted that the deceased was married to the plaintiff but stated that the two later separated where after the deceased went to stay at her maternal home.
17. DW 4 testified that he was the one who returned the goat to the plaintiff's home. That he tied the goat at the door to the plaintiff's house. DW 5 Isaac Kinyumu Kyuma testified that he was the family Chairman of the plaintiff's family and that he participated in all occasions involving the plaintiff and the deceased. The witness stated that he was present during dowry payment by the plaintiff and was also present when the plaintiff and defendant separated. DW 5 stated that on 18/1/2025 he called the plaintiff after receiving information that the deceased was unwell. That he advised the plaintiff to return two goats to the 1st defendant so that they could cleanse the separation of the plaintiff and the defendant but the plaintiff declined. DW 6 Carolyne Syombua Kasanga adopted her statement in evidence. She is the daughter of the plaintiff and the deceased. DW 6 stated that on 6/9/2020 the dowry that had been paid by the plaintiff was returned to him by DW 4. That since then, the deceased and her children have been staying at the 1st defendant's home. DW 6 supported the counter-claim.

Facts not in Dispute

18. From the evidence of both parties, the following facts are not in dispute:
 - a. The plaintiff and the deceased were married under Kamba customary law;
 - b. The deceased left her matrimonial home in 2021.

Main Issues for Determination

19. In my view, the main issues for determination are as follows:
 - i. Whether the marriage between the plaintiff and the deceased was dissolved prior to the demise of the deceased;
 - ii. Who has the right to bury the deceased?
 - iii. Who should bear the costs of this suit?



The Plaintiff's Submissions

20. At the close of the hearing, both parties filed written submissions in support of their cases. The plaintiff submitted that at the time of her demise, the deceased was his wife and no legal or customary divorce took place. The plaintiff further submitted that he had a superior right over the 1st defendant to bury the deceased at their matrimonial home. The plaintiff pointed out that from the evidence, there is an indication that the 1st defendant sold a grave site for the deceased to be buried. According to the plaintiff, such act by the 1st defendant confirms that she believed that the deceased was still married to the plaintiff and that is why she sold the grave site.
21. The plaintiff submitted that under Kamba customary law, divorce requires the return of “ntheo” (dowry) and formal dissolution rituals. That a separation does not constitute a customary divorce. The plaintiff argued that the defendants had not proven that dowry was returned or that the divorce rituals were conducted. That under Kamba customary law, it is the woman herself who gives back the goat, in the presence of elder, to show that she has divorced her husband and not anyone else. The plaintiff submitted that there is no evidence to show that elders from both families held a meeting over the divorce. The plaintiff pointed out that there was a contradiction on the part of the defence on when the divorce took place. That some witnesses stated it was 2018 whereas others stated it was 2021.
22. It was submitted by the plaintiff that under section 107 of the *Evidence Act*, the burden was on the defendants to prove that the marriage was dissolved. That the defendants had failed to do so. The plaintiff contended that being the spouse to the deceased, he had the primary right to bury her. That the allegation that the deceased wanted to be buried at her maternal home is not backed by a will or any evidence. The plaintiff relied on authorities whose copies were not annexed to the submissions and prayed that his claim be allowed.

The Defendants' Submissions

23. The defendants submitted that the marriage between the plaintiff and the deceased was dissolved under Kamba customary law. They relied on their testimonies and those of their witnesses as well as photographs filed in court. The defendants argued that since the deceased was not married at the time of her demise, the court should consider other factors such as the deceased's wishes and the proximity with the plaintiff. The defendants contended that the deceased was living with the 1st defendant and the deceased's children who took care of her during her time of illness. That the plaintiff never bothered to check on her. The defendants urged the court to take into consideration the conduct of the plaintiff towards the deceased. That the plaintiff was cruel to the deceased and abandoned her. The defendants also relied on authorities whose copies were not annexed to their submissions. They urged the court to dismiss the plaintiff's claim and enter judgment in favour of their counter-claim.

Analysis and Determination

24. When the plaintiff filed this suit, he did so simultaneously with an application seeking temporary injunctive orders against the defendants. By consent of the parties, the application was compromised to pave way for hearing of the main suit. Owing to the urgency of the matter, pre-trial directions were waived. The record shows that the plaintiff did not file a defence to the counter-claim. After the close of the defence case, the plaintiff sought leave to file a counter-claim. Owing to the circumstances of the case, the court was of the opinion that allowing the plaintiff to file a counter-claim would delay the matter. That even without the defence to the counter-claim, the court would still be able to adequately resolve the issues since the plaintiff's claim and the defendants' counter-claim revolved around the same issues.



25. I have considered the evidence on record and given due regard to the submissions filed by the parties. The parties correctly identified the main issues for determination. At the very outset, I must admit that it has not been easy for this court to reach a decision. The difficulty in reaching a decision has been occasioned by the fact that no real expert was called to testify on the Kamba customary law as regards marriage and divorce. The parties called people who claimed to be familiar with the Akamba customs but who were not really identified as experts. Each one of them supported the contradictory positions of the parties calling them.
26. There is no codified law that governs burial disputes in Kenya. In the authority of *James Odhiambo Nyawade v Philip Otieno & another* [2017] KEHC 8177 (KLR), the court held that the law applicable in burial disputes is customary law. The same position prevailed in the case of *Martha Wanjiru Kimata & another v Dorcas Wanjiru & another* [2015] KEHC 7090 (KLR). African customary law has legal backing under section 3(2) of the *Judicature Act* which stipulates that:
- “The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court 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.”
27. Section 16 of the Magistrates’ Court Act provides that a magistrate’s court may call for and hear evidence of the customary law applicable to any case before it. In the authority of *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* [1987] KECA 63 (KLR), the Court of Appeal held that the wishes of the deceased though not binding, must so far as is possible, be given effect to. In the case of *Samuel Onindo Wambi v C O O & another* [2015] KECA 620 (KLR), the Court of Appeal held that a deceased person’s burial wishes are akin to a will. That save for a compelling reason, they supersede customary law and should be followed.
28. I now turn to the issue of whether the plaintiff and deceased were still married at the time of her death. As already indicated, the parties agree that the plaintiff and the deceased were once husband and wife. The plaintiff maintains that the deceased was his wife to the point of her demise. On the other hand, the defendants contend that the plaintiff and the deceased had divorced under customary law. That the deceased had caused a goat to be returned to the plaintiff, thereby severing the matrimonial bond. The parties belong to the Akamba tribe and from the evidence on record, it is evident that they all subscribe to the Akamba traditions and customs.
29. From the evidence on record, it is agreed by all that return of a goat by the wife, known as Mbui ya ulee (Goat of rejection/refusal) signifies end of a marriage. The parties however disagreed on the procedure to be followed in initiating a divorce by the wife. According to the plaintiff, the first step that the deceased would have taken was to move to her maternal home and inform her family that the marriage had broken down. That a meeting is then held involving members of both families and if no compromise is reached, the wife may denounce the marriage. A goat would then be returned to the husband. The plaintiff argued that the divorce proceedings ought to be recorded, just like marriage proceedings. That the goat must be returned by the wife personally and that a brother cannot return the goat on behalf of his sister.
30. PW 3 who claimed to be an expert in Kamba customs stated that if a woman wishes to divorce her husband, she has to personally return the goat to the husband’s family in the presence of members from both families. DW 2 testified that he was partially familiar with Akamba customs regarding marriage



and divorce. According to DW 2, if a woman wishes to divorce the husband, she leaves the matrimonial home and goes to her parents' home. That she stays at her parents' home for a duration of time to enable her think about the marriage. The woman is supposed to explain to her parents why she has left the matrimonial home. The parents will then give her a goat to take to the husband's home if she decides to divorce. The woman then hands over the goat to any responsible person to return.

31. DW 2 further testified that custom did not require any communication between the woman's family and the husband's family before the goat is returned. That the goat should be returned upon confirming presence of the husband in the homestead or within reach of the homestead. Further, there is no requirement that the goat has to be handed over to the husband or anybody physically. Before delving further into the discrepancies in the evidence from both parties regarding the procedure for returning the bridal goat, I wish to determine whether there is sufficient evidence to prove that indeed, the goat was returned to the plaintiff. DW 4 who happens to be the brother to the deceased testified that he was the one who was sent to return the goat. According to his statement which he adopted in his testimony, there is no indication on when he returned the goat.
32. However, when he was cross-examined by the plaintiff, DW 4 stated that he returned the goat on 5/10/2021. When DW 4 was examined by the court, he stated that he was with the deceased and their mother when he was given the goat to return. That it was the deceased who handed over the goat to him. The defendants relied on certain photographs which were filed together with the pleadings. It is worth noting that the photographs were not produced in evidence. In the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR, the Court of Appeal held as follows:

“The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record”.
33. Similarly, in *Des Raj Sharma v Reginam* [1953] 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa v The State* [1994] 7-8 SCNJ 144, it was held by the Supreme Court that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence. The photographs were not even marked for identification by the defence witnesses. No application was made to have them produced in evidence. In the circumstances, I will disregard them.
34. Even assuming that the photographs are part of the evidence, their authenticity is in question. No evidence was adduced to indicate who took the photographs, where and when they were taken. The defence filed a certificate by DW 4 indicating that the photos were taken using his mobile phone Techno Spark 7p C8. That the photographs were taken on 6/9/2020 by himself. In his testimony, DW 4 stated that he returned the goat on 5/10/2021 yet the certificate indicates that the photos were taken on 6/9/2020. This implies that DW 4 received the goat of rejection and waited for one year before returning it to the plaintiff. It does not make sense to me at all. Furthermore, if the photos were taken



by DW 4 himself, how come his image appears in the photos? There is no way he would take the photos and appear in them unless he was taking selfies. It is either the images he claimed to be his in the photos belong to a different person or some other person took the photos.

35. DW 4 claimed that he was handed over the goat by the deceased but quite surprisingly, the deceased's image does not appear anywhere in the photos. There is a photo which DW 4 claimed was taken at the plaintiff's house showing a person believed to be a man and a goat tethered at a door. How did DW 4 take a photo of himself in that manner? Somebody else must have taken that photo. The defence witnesses in their statements which were adopted in evidence claimed that they knew of their own knowledge that the goat was returned to the plaintiff. However, when they were cross-examined by the plaintiff, they stated that they never saw the goat and could not even tell when the goat was returned to the plaintiff. Clearly, the defence witnesses were not being candid.
36. Not even the 2nd and 3rd defendants who are the plaintiff's brothers could confirm that the image of a goat tethered at a door depicted the plaintiff's house. I agree with the plaintiff that having alleged that the marriage between the plaintiff and the deceased had been dissolved at the time of her death, the defendants had a duty to prove the fact on a balance of probabilities. In the authority of *Esther Mbatha Ngumbi V Mbithi Muloli & 2 others* [1997] KECA 73 (KLR), the Court of Appeal observed thus:
- “There never was any dispute that the appellant had first been legitimately married under the Kamba customary law to Peter Musyoki Mati whom she subsequently left and returned to her parents. According to her, she thereafter got married to the late Ngumbi Mutie. For her to have been legitimately married to the latter she had to have her first marriage to Peter Musyoki Mati dissolved. According to the Kamba customary law, this could only have been effected by the return of dowry to her first husband by her father and thereafter a goat "Mbui ya Ulee" ("Maleo") slaughtered and eaten to signify that the two were no longer husband and wife. On this, there was no quarrel.”
37. If the evidence of the defence is anything to go by, it would mean that the goat was returned in secrecy since no member of the plaintiff's family seemed to know about it. It would also mean that DW 4 was unaccompanied when he allegedly returned the goat. I am not an expert in Akamba customs but I highly doubt that custom would allow such an important exercise to be done in secrecy. In the case of *JMK & another v JMM* [2019] KEHC 1555 (KLR), the court interrogated the procedure of returning Mbui ya ulee. From the interrogation of the procedure as outlined in the authority, what stands out is that whoever returns the goat ought to be accompanied by adult members of their community. It is not mandatory that the woman must personally return the goat.
38. In my view, the rationale of having other persons accompanying the person returning the goat is for purposes of witnessing the divorce. It could also be for purposes of security since divorce can be acrimonious. The other issue is that the husband or members of his family ought to be made aware in some way that the goat has been returned as a signal for divorce. It cannot be returned in secrecy. How else will the husband or his family know that he has been divorced? Divorce whether customary or otherwise cannot be a subject of assumptions. The wife or her family may not issue a notice prior to the return but it is important that at the time of return, the husband's family is made aware.
39. I do not think the “Commando style” is acceptable. In all fairness, a party to a marriage must know that they are being divorced. After the goat was allegedly taken to the plaintiff's home, no further action was taken by either the deceased or her family to show that the plaintiff and the deceased had separated. In this era, it is advisable to reduce transactions into writing for purposes of clarity and evidence. Nothing would have been easier than putting in writing the instructions that were allegedly given by the deceased concerning the return of the goat.



40. Furthermore, the Marriage Act which came into force on 20/5/2014 provides for dissolution of customary marriages. My view is that for a customary divorce to be valid, a party seeking divorce needs to file a petition in court. My view is buttressed by section 16 of the Marriage Act which provides:

“ 16. Duration of marriage

A marriage registered under this Act subsists until it is determined by—

- (a) the death of a spouse;
- (b) a decree declaring the presumption of the death of a spouse;
- (c) a decree of annulment;
- (d) a decree of divorce; or
- (e) a decree of divorce or annulment obtained in a foreign country and recognized in Kenya under this Act.”

41. It may be argued that the marriage between the plaintiff and the deceased was not registered under the Marriage Act. That may be so. However, section 98 (1) of the Marriage Act provides that a subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of the Act is valid for the purposes of the Act. Section 96(3) of the same Act provides that parties to a customary marriage shall register such a marriage within three years of the coming to force of the Act. According to section 12(e) of the Act, a marriage is voidable if it is not registered. Voidable means a transaction or agreement that is initially valid but can be annulled or set aside by one of the parties involved.

42. The online legal dictionary available at <http://legal-dictionary.thefreedictionary.com> states as follows with regard to voidable marriages:

“ A voidable marriage is a marriage that is valid when entered into and remains completely valid until a party obtains a court order nullifying the relationship. The parties may ratify a voidable marriage upon removal of the impediment preventing a lawful marriage, thus making the union valid. Living together as husband and wife following the removal of the impediment typically constitutes a ratification. A voidable marriage can only be attacked by a direct action brought by one of the parties against the other and therefore cannot be attacked after the death of a spouse.” (Emphasis mine)

43. Therefore, unless annulled, the marriage between the plaintiff and deceased was valid and subject to the provisions of the Marriage Act. According to section 3 of the Judicature Act, written law takes precedence over customary law and courts may be guided by customary law provided it is not inconsistent with written law. Moreover, Article 159(3) (c) of the Constitution of Kenya provides that traditional dispute resolution mechanisms shall not be used in a way that is inconsistent with the Constitution or any written law. Written law provides that a divorce arising from a marriage of whatever nature ought to be initiated by a petition filed in court. There can be no divorce unless and until the court pronounces a decree for divorce. My interpretation of section 3 of the Judicature Act is that customary law is a mere guide and not binding on the court particularly where it is inconsistent with the Constitution or written law.

44. I am not trying to belittle customs. My point is that parties to a customary marriage who wish to divorce may perform all the rites as dictated by custom but for the divorce to be valid or legally recognized,



the party seeking divorce ought to file a petition in court so as to seal the divorce. Just like marriage, divorce cannot be done in jest. Even if I were to consider customary divorce only, there is no sufficient evidence to prove that the deceased had divorced the plaintiff prior to her death. The evidence of the defence witnesses on the purported divorce was contradictory and scanty. The upshot of the above considerations is that the deceased was still married to the plaintiff prior to her death.

45. This brings me to the key issue for determination. Who between the plaintiff and the 1st defendant has a right to bury the deceased? The plaintiff stated that when he visited the deceased in hospital, the deceased informed him that she wished to be buried at their matrimonial home. On the other hand, the 1st defendant stated that the deceased informed her that she wished to be buried at her maternal home. The evidence reveals that the 1st defendant even sold a grave site for the deceased to be buried. There is no further evidence to corroborate the testimonies of the plaintiff and the 1st defendant. I am unable to tell who between the two told the truth. Furthermore, as already indicated, there is no sufficient evidence to show or prove that indeed, the deceased expressed her wishes with regard to where she wanted to be buried. Faced with a similar situation, the court in *Johnstone Kassim Mumbo & 2 others v Mwinzi Muumbo & another* [2018] KEHC 4587 (KLR) had this to say:

“The totality of the evidence is that it is one’s word against the other on the diverse statements that the deceased is alleged to have said with regard to his wishes and place of burial. Since this Court cannot conclusively determine what the deceased said to who about his wishes, the Court shall rely on Kamba customary law.”

46. I will proceed on the premise that no such wishes were expressed by the deceased. In the case of *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & Another* [2004] eKLR, Ojwang J (as he then was) held thus:

“In the social context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to 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. ”

47. Similarly, in *John Omondi Oleng & Another v Sueflan Radal* [2012] eKLR, Mabeya J had this to say:

“...When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in...”

48. The foregoing illustrates that the position at law is that where a married person dies with the spouse surviving him/her, the spouse would have the primary right to bury the deceased as opposed to any other person. In *Johnstone Kassim Mumbo* (supra), the court observed that Akamba customary law prescribes that a deceased man is buried in his ancestral home and woman at her matrimonial home unless, all family members agree to the alternative site where one bought land and lived. That although custom is not mandatory, if the wish of the deceased is not clear or known then the closest person(s) shall bury the deceased and it may be on ancestral land or his land as the family agrees.

49. It is not in doubt that the closest person entitled to bury the deceased in this case would be the plaintiff. Other than the proximity brought about by marriage, case law confirms that the court ought



to consider other factors. It is agreed by the parties that the deceased left her matrimonial home in 2021. According to the plaintiff, the deceased informed him that she was going to stay with their daughters. From the plaintiff's testimony, it is not clear whether or not the deceased left while they were in good terms. According to the 1st defendant, the plaintiff sent away the deceased from their matrimonial home. According to DW 6 who is the daughter to the plaintiff and the deceased, the plaintiff used to cause them trouble and that is why they moved out of the matrimonial home.

50. It is not clear why the deceased moved out of the matrimonial home. Be that as it may, the evidence indicates that the plaintiff and the deceased lived in separation from 2021. The plaintiff stated that he used to be in communication with the deceased and would sometimes meet her in Makindu. However, from the evidence of both parties, it is clear that the deceased never returned to her matrimonial home ever since she left in 2021. This implies that the plaintiff and the deceased had lived in separation for four years prior to her death. There is no evidence to show that while in separation, the plaintiff and the deceased were in good terms and in communication. The defence indicates that ever since the deceased left the matrimonial home, the plaintiff never bothered to check on her. That even when she fell ill, the plaintiff did not bother.
51. Although the plaintiff claimed that the deceased stayed with their daughters, he stated in his testimony that the daughters used to give money to the 1st defendant for purposes of treatment of the deceased but the 1st defendant would convert the money to other use. This confirms that the deceased was staying at her maternal home. The plaintiff did not adduce evidence to show or even allege that he ever took care of the deceased during their time of separation. The evidence from both sides shows the plaintiff purported to step in at the last minute shortly before the deceased was taken to Shalom hospital. There is absolutely no evidence to show that the plaintiff paid any medical bills for the deceased.
52. In the case of Michael Wambua Mulwa & another v Jackson Muisyo Mulwa & another [2021] KEHC 5738 (KLR), the Court observed that the appellants had not been in good talking terms with the deceased and they did not even visit him at his home or hospital while he was ailing and hence, the appellants' new interest in the deceased seemed to be not out of genuine sympathy towards him as their father. In Edwin Otieno Ombajo v Martin Odera Okumu [1996] KECA 158 (KLR), the Court of Appeal observed:

“If African Customary Law is not caught up by the qualifications under S.3 (2), above, then it must be given effect by the courts and must be applied in deciding cases before it but according to "substantial justice." We are, also, of the view that the manner in which S.3(2), of The *Judicature Act*, is worded gives flexibility to the administration of justice, as courts are thus empowered to weigh all the circumstances of a case before coming to a decision, without whittling down the place of customary law in the administration of justice in Kenya. So the discretion the courts have is not whether to apply customary law or not, but the discretion is to consider whether to enforce a right, which under that law vests in a particular person, or not.”

53. In the above case, the court held that the right to bury a married woman vests in her husband but such right is not absolute. That the court has discretion under section 3(2) of the *Judicature Act* to consider whether the circumstances of each particular case would warrant the court to order that a person other than the one with the right could bury the deceased. The court in Edwin Otieno (supra) further held:

“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. The matters the appellant raised against the respondent should not have been viewed as intended to show that no marriage existed between the deceased and the respondent, but to show that, although he was the deceased's husband, he was undeserving to bury her.” (Underlining mine)

54. The decision in the above case was affirmed by the Court of Appeal, differently constituted in Samuel Onindo Wambi v C O O & another [2015] KECA 620 (KLR). The evidence on record indicates that all was not well between the plaintiff and the deceased. If indeed they loved each other and were in good terms, why would they stay in separation for four years? The facts of this matter are clear that the plaintiff appears to have lost all interest in the deceased and their children as soon as the deceased left the matrimonial home. Although the Plaintiff stated that he used to be in communication with the deceased and would meet her in Makindu, the surrounding circumstances suggest otherwise. If the deceased indeed, used to communicate and meet the plaintiff as he alleged, why did the plaintiff never meet her medical bills? Why is there no evidence or even an allegation that the plaintiff used to maintain the deceased? Why are the plaintiff's children of minority age not staying with the plaintiff?
55. Evidence was adduced to the effect that the plaintiff was so hostile to the deceased and the children of their marriage and that is why the deceased and the children left the matrimonial home. I have no reason to doubt the allegations. If all was well and peaceful at the matrimonial home, why would the deceased and her children leave and stay away for all those years? It is, also, noteworthy that no specific efforts were made by the plaintiff to urge the deceased to resume cohabitation. In my view, a husband is not just a noun or title. A husband is a verb. A husband should take care of his wife and be there for her. The plaintiff and the deceased lived in separation for four years. The plaintiff did not seem to be bothered by the separation. He never took care of the deceased when she was ailing. His sudden interest in the body of the deceased does not seem to be genuine.
56. In the authority of Ontweka & 3 others v Ondieki [2024] KECA 11 (KLR), the Court of Appeal while affirming the decision of an earlier case reiterated that:
- “... the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order.”
57. Owing to the conduct of the plaintiff towards the deceased, I find him underserving of burying her or taking a leading role in her burial. The plaintiff had an estranged relationship with the deceased for four years until her demise. I find it dishonest for a man to neglect his wife for four years and when she dies, he is up in arms brandishing his right to bury the deceased wife. As already observed, marriage is about actions and not just titles. Rights come with corresponding duties and one cannot seek enforcement of one's right without subscribing to and performing the duties that come with the right.
58. The next in line in terms of legal proximity are the deceased's children. The evidence indicates that the deceased's children left their parents' home and went to live with the 1st defendant. DW 6 testified that the children had no objection to burying the deceased on the 1st defendant's land. In any event, it is alleged that the children stay with the 1st defendant. Given the circumstances, I find that the plaintiff's case is one for dismissal. I proceed to dismiss it. In their counter-claim, the defendants urged the court to order the release of the deceased's body to either the 1st defendant or DW 6, who is the daughter of the deceased.



Disposition

59. In view of the foregoing, I find that the plaintiff has failed to prove his case against the defendants on a balance of probabilities. On the other hand, the defendants have partially proven their counter-claim against the plaintiff. Consequently, I make the following orders:
1. The body of the deceased herein Janet Ndinda Kamwanza currently preserved at Montenzuma and Monalisa funeral home in Machakos be released to the 1st defendant Pauline Wayua Kamwanza and the deceased's children for burial;
 2. The 1st defendant and the children of the deceased to spearhead funeral or burial arrangements for the deceased but to allow the participation of the plaintiff and/or his extended family. It is my hope and prayer that the two families will co-operate for the sake of giving the deceased a worthy and dignified send off without further delay;
 3. The two families to make arrangements for payment of the mortuary charges at the funeral home;
 4. The plaintiff to surrender the burial permit to the 1st defendant through her counsel forthwith or as soon as possible but not later than 24 hours from now. The burial permit shall then be returned to Shalom Community hospital in Machakos for purposes of cancellation. If the plaintiff fails to surrender the burial permit as directed, Shalom hospital shall cancel the permit notwithstanding that the original will not have been surrendered;
 5. Shalom Community hospital in Machakos is hereby directed to issue a fresh burial permit to the 1st defendant Pauline Wayua Kamwanza or Carolyne Syombua Kasanga as may be agreed for purposes of facilitating the burial of the deceased Janet Ndinda Kamwanza;
 6. The 1st defendant Pauline Wayua Kamwanza and the adult children of the deceased shall decide where the deceased will be buried;
 7. Given the close relationship between the parties and the nature of the dispute, no party shall be condemned to pay costs.
60. I am unable to grant the prayer directing the OCS Emali police station to ensure compliance of the orders of the court. I see no role to be played by the OCS at this stage. However, if the defendants anticipate a breach of the peace or threat of a breach of the peace, they will be at liberty to report any such incidents to the police. No court order is required at this stage.
61. In conclusion, I wish to acknowledge with gratitude, the efforts by the parties herein. I am particularly impressed by the way the parties were able to observe the strict timelines despite their busy schedules. I further wish to sincerely thank the parties and their entire families for their patience during the pendency of these proceedings. It is not easy to act normal when your loved one is lying at the morgue. It is my hope and prayer that despite this judgment, the two families will come together to ensure that the deceased gets a befitting send off. To the deceased Janet Ndinda Kamwanza, I dedicate to you the Book of Revelation Chapter 14 verse 13 which states that:
62. Then I heard a voice from heaven say, 'write this: Blessed are the dead who die in the Lord from now on.' 'Yes,' says the Spirit, 'they will rest from their labour, for their deeds will follow them.'
63. May Janet's soul find eternal peace.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 17TH DAY OF MARCH, 2025.



Y.A SHIKANDA
SENIOR PRINCIPAL MAGISTRATE.

