



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 5 OF 2015

JAMES KISANGI EVERESO
PLAINTIFF

VERSUS

RICHARD MUL AMBA
DEFENDANT

JUDGEMENT

Background

1. The plaintiff instituted this suit against the defendant in relation to the burial of the late Sheilah Amaiza Amudavi, who passed away on 12th January 2015 in Koibarak Sub-location, Kemeloi Location.
2. The plaintiff avers that he was legally married to the deceased under Tiriki customary law and that they had four children together. He claims that the defendant, being a step-brother to the deceased, unlawfully removed the deceased's body and buried it at Cheptulu Sub-location without his consent, the required burial permit, or adherence to customary procedures.

3. The plaintiff seeks, among other reliefs, an order for exhumation of the deceased's body and its reburial at his rural home in Koibarak Sub-location.
4. He alleges emotional anguish, public ridicule by his clan, and breach of customary rights. The defendant, on the other hand, contends that the plaintiff failed to fulfill traditional dowry obligations and therefore lacked the right to bury the deceased.
5. In support of his case, the plaintiff called six witnesses. PW1 testified that he was the husband of the deceased, Sheilah Amaiza Amudavi, with whom he had cohabited since 1996.
6. They had four children together. He stated that the deceased died suddenly in her sleep on the night of 11th January 2015 at their matrimonial home in Kabose, Nandi County. Upon reporting the death, he obtained a burial permit and planned to bury her on 15th January 2015 at his home.
7. He stated that although initial burial preparations had commenced, the defendant who is the deceased's stepbrother took the body from the mortuary without his consent and buried it at Cheptulu on 18th January 2015.

8. He told the court that despite having paid part of the dowry, namely one cow and Kshs. 7,000, and later offering Kshs. 40,000 and two cows towards mortuary and burial expenses, the defendant remained hostile and made demeaning demands.
9. He denied any involvement in the death and stated that a medical examination confirmed the cause as natural.
10. On cross-examination, PW1 confirmed that full dowry had not been paid but insisted that the deceased's family had accepted him and acknowledged the marriage. He maintained that he had a valid burial permit and had lawfully made arrangements to bury his wife.
11. PW2 was Deina Muhonja Mugesani who testified that she had known the plaintiff since 1999 as a neighbour.
12. She stated that when the plaintiff and his wife, Sheillah Amaiza Amudavi, came to live in her neighbourhood in 1999, they were already cohabiting as husband and wife. Over the years, the couple sought her counsel on various domestic issues, as she was older and regarded as an elder in the community.

13. She testified that the deceased had a swelling on her breast and also suffered from high blood pressure. She died on the night of 11th January 2015 and burial arrangements were commenced by the plaintiff.
14. She stated that the burial did not take place as planned because the defendant came and took the body away. The defendant had sought to investigate the cause of death and involved the local sub-chief. After the body was taken, it never returned, and she never saw it again.
15. On cross-examination, she stated that both she and the plaintiff were Maragoli, though from different sub-tribes. She explained that under their customary law, marriage negotiations were conducted by elders from both sides, with dowry agreed upon and sometimes paid in instalments. She denied that dowry could be arranged or completed by children.
16. She added that there was no hostility when the body was taken. The plaintiff, elders, and the sub-chief were present, and there was no violent confrontation. She stated that part of the dowry had been paid namely one cow and Kshs. 7,000 delivered in Nandi. Those who

accompanied the plaintiff for the dowry payment included Mary (a neighbour and his niece), Joy Tom Kisangi (his brother's wife), and Elphas Kisangi (his brother).

17. PW3, Josephine Osagi was the Chief of Shaviringa Location and testified that she was informed by the plaintiff about the death of his wife and that his in-laws had demanded dowry before releasing the body. She convened a meeting where the in-laws requested three cows and Kshs. 5,000. The plaintiff brought two cows. Police officers were present, and the matter was later handled by the Assistant Chief.
18. On cross-examination, she confirmed that she was not present throughout the events. She wrote a letter dated 21st January 2015 to support the plaintiff's position, believing its contents to be true.
19. She stated she was unaware that a burial permit had been issued and stated that the plaintiff did not know that the deceased had been buried by the defendant. She believed the dowry was not fully paid, although she did not verify this with documents.

20. She considered the burial permit irregular and said she did not intervene during the burial since the OCS was in charge.
21. PW4, Hilary David Serede, the Assistant Chief of Cheptulu Sub-Location, testified that he came to know the plaintiff after the death of the plaintiff's wife.
22. On or about 15th January 2015, the plaintiff informed him that his wife had died and that her body had been taken by her family to the mortuary, with intentions to bury her at her parental home.
23. Earlier, the deceased's family had reported to him that the plaintiff had chased them from his homestead. PW4 reached out to his administrative colleague in the Rift Valley region and later accompanied the plaintiff to the deceased's home, where a meeting was held.
24. The parties agreed that the plaintiff would reimburse the mortuary expenses of Kshs. 28,000 and was to pay the same through two cows. It was further agreed that if the amount was not paid by the next day, the in-laws would proceed with the burial.
25. PW4 stated that on 16th January 2015, the plaintiff informed him that the in-laws had rejected the cows and

- insisted on cash payment. PW4 reminded him that the original agreement required reimbursement in cash.
26. Subsequently, the in-laws transported the body to their home. PW4 and the plaintiff's relatives followed them for further discussions, after which the amount was revised to Kshs. 61,500, payable before the plaintiff could reclaim the body.
 27. PW4 stated that the plaintiff promised to consult his family and give feedback, but no further communication was received until he was summoned to testify.
 28. On cross-examination, PW4 confirmed that the deceased was the plaintiff's wife, and that the in-laws did not object to his presence at the deceased's home. He reiterated that the main dispute related to the burial expenses. He denied any knowledge of violent confrontation or hostility when the body was taken.
 29. PW5, Paul Kipkosgei Koech, an Assistant Chief of Koibarak Sub-Location in Nandi South, Nandi County, testified that he knew the plaintiff as he was his sub-chief. He confirmed that the plaintiff was married to the late Sheilah, with whom he lived in the area and had children.

30. On 12th January 2015, following the death of Sheilah, the plaintiff sought a burial permit, which PW5 issued as there was no dispute over the cause of death at the time.
31. However, the defendant later approached PW5, claiming the plaintiff had refused to involve them in burial arrangements. He also stated that the deceased had left behind a title and bank documents.
32. PW5 intervened and facilitated a meeting during which the plaintiff surrendered the documents, and it was agreed that a post-mortem be conducted at the defendant's expenses.
33. The body was released and taken to Kapsabet General Hospital. The plaintiff was advised to attend the post-mortem but did not. The defendant later reported that the cause of death was cardiac arrest. It had been agreed that the plaintiff would bury the body if no issue arose from the post-mortem, but instead, the defendant buried the body in Vihiga County. PW5 was surprised to learn that another burial permit had been issued by the hospital, despite him being the authorized officer in the area where the death occurred.

34. On cross-examination, PW5 confirmed serving as Assistant Chief for 21 years. He had not seen any dowry payment documents and only learned of the alleged payment during the dispute. While cattle movement requires chief's documentation, he was unaware whether this was done in 2002.
35. He stated that the plaintiff's son collected the documents and found the request for a post-mortem reasonable. He did not believe the body was stolen, as it remained in the mortuary for two days and a valid burial permit was issued. He referred the plaintiff to the area chief, but the plaintiff never followed up.
36. PW6 was Mary Muhonja Lusimba who testified that she accompanied the plaintiff to the deceased's home on 23rd October 2004 to deliver dowry, which included Kshs. 7,000 and a cow. She confirmed both parents of the deceased were present and accepted the dowry. A traditional marriage symbol (lusiola) was placed above the door, and they were served traditional food. She stated the plaintiff and deceased already had children and were considered married under Luhya customs.

37. On cross-examination, PW6 Mary confirmed the date of dowry delivery and that a cow movement letter was issued from the plaintiff's location. She did not recall the assistant chief's name but said the letter was stamped.
38. She delivered it to the deceased's father, who gave it to the village elder. She also delivered a confirmation letter from the deceased's assistant chief to the plaintiff. She was unaware of further dowry negotiations or any balance.

Defence Case

39. DW1 was Richard Mulamba Shiraho who testified that although the plaintiff claimed to have paid dowry for the deceased, no dowry was ever paid. He stated that he lived at home and personally witnessed the events surrounding the burial.
40. He and the plaintiff went to Assistant Chief Koech, who issued them a letter to take the deceased's body to the mortuary from the plaintiff's home. When they arrived, the plaintiff initially denied them access to the home. A meeting was held to deliberate on dowry, and although the plaintiff had promised to pay it the next day, he returned claiming that he had no money.

41. The family then agreed to proceed with burial arrangements. The plaintiff later returned with the chief and police, but they were informed that the burial would proceed in the absence of dowry payment. The defendant opposed the reliefs sought in the plaint.
42. On cross-examination, he stated he arrived at the plaintiff's house at 7am with his wife and that the body was removed on a Tuesday. They attempted to discuss dowry on Wednesday but were repulsed by the plaintiff and his mother.
43. He reiterated that they jointly took the body to the mortuary and removed it together. His family paid the mortuary expenses as the plaintiff claimed that he had no money. He confirmed that the deceased, Sheila, had children and had died, and that he was given the post-mortem report.
44. DW2 was Jackson Asonya Amudavi who adopted his witness statement dated 17th February 2015 as his testimony. He stated that the defendant is his brother and the deceased was his sister.
45. On cross-examination by the plaintiff, DW2 stated he did not recognize the plaintiff.

46. DW3, Ben Asenga Imbunya adopted his witness statement dated 17th February 2015. He stated that the deceased, Sheila, was his niece and DW1 is the son of his brother.
47. On cross-examination, DW3 stated he only knew the plaintiff because of the case. He alleged that the plaintiff chased them away when they went to view the deceased's body and appeared with others armed with crude weapons.
48. He confirmed they took and buried the body without involving the sub-chief. He denied knowledge of any dowry payment or cohabitation between the plaintiff and the deceased. He told the court that the plaintiff was denied burial rights for failing to return and agree on dowry.

Plaintiff's Submissions

49. The plaintiff submitted that the dispute ought to be determined in accordance with customary law, which governs burial rights in the absence of written instructions by the deceased. He invoked Section 3(2) of the Judicature Act, arguing that customary law is applicable so long as it is not repugnant to justice and

morality. He maintained that under Tiriki customs, the spouse is the one primarily entitled to bury the deceased, and he proved a customary marriage through evidence of prolonged cohabitation, partial dowry payment, and recognition by the community and administration.

50. The plaintiff placed reliance on **SAN v GW [2020] eKLR**, where the Court of Appeal held that disputes over burial must be resolved using the applicable customary law of the deceased. He also relied on **Apeli v Buluku [1980] eKLR**, where the Court held that although no person owns a corpse, the right to bury it lies with the person most closely related under the applicable customary norms. The plaintiff submitted that, in line with these principles, he had the superior right to bury the deceased.

51. The plaintiff further argued that the burial was illegal and irregular. He submitted that the defendant obtained a burial permit that was later revoked, and the interment was carried out without lawful authority.

52. To support the prayer for exhumation, he cited **Jacinta Nduku Masai v Leonida Mueni Mutua & 4 Others**

[2018] eKLR. The plaintiff contended that a *prima facie* case had been established through oral and documentary evidence confirming marriage, children, and cohabitation. He submitted that unless the body was exhumed and reburied in the parcel of land known as L.R. No. Nandi/Koibarak 'A'/325, he and the children would suffer irreparable harm.

53. He urged the court to find that the balance of convenience favoured the orders sought, and requested the court to allow the exhumation and reburial, with police assistance from the Officer Commanding Station (OCS), Serem Police Station.
54. The defendant did not file any submissions.

Analysis and Determination

55. The issues for determination are:
- i. *Whether the deceased was in a valid customary marriage with the plaintiff.*
 - ii. *Whether the plaintiff had a right to bury the deceased under customary law.*
 - iii. *Whether an order for exhumation and reburial should be granted.*

56. The general principle is that under common law and Kenyan jurisprudence, the person with the strongest legal or customary relationship to the deceased is entitled to control burial arrangements.

57. The resolution of burial disputes in Kenya is governed by a combination of customary law, common law, and statutory provisions, with African customary law playing a pivotal role as provided under Section 3(2) of the Judicature Act, Cap 8, which states:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

58. Section 51 of the Evidence Act (Cap 80 Laws of Kenya) provides that custom must be proved as a matter of fact, and the party alleging the existence of a particular

custom bears the burden to demonstrate that it is a recognized, consistent, and binding practice in a specific community.

59. The provision mandates that custom must be established, through credible testimony, especially from persons familiar with the custom in question, such as elders, community leaders, or experts in customary law.

60. This is as pronounced by the Court of appeal in **SAN v GW [2020] KECA 46 (KLR)**, in affirmation of **Nyariba Nyankomba vs. Mary Bonareri Munge [2010] eKLR** where it was held that:

“Time and again, it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions”.

61. Section 43 of the Marriage Act, No.4 of 2014 provides that:

“43 (1) a marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the

intended marriage. (2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

62. With the applicable legal principles now firmly laid out, I proceed to apply them to the facts of the present dispute.
63. This court must now examine whether, in light of the evidence adduced and the legal standards identified, the plaintiff has sufficiently demonstrated the existence of a valid customary marriage between him and the deceased. The factual assertions and testimonies before this court will now be tested against the legal framework earlier discussed.
64. Whereas the plaintiff, asserts he was married to the deceased, Sheilah Amaiza Amudavi, under Tiriki customary law, having cohabited since 1996, raised four children, and paid partial dowry (one cow and Kshs. 7,000), the defendant disputes the marriage, contending that

no dowry was paid, thus invalidating the plaintiff's claim to burial rights.

65. The evidence establishes that the plaintiff and the deceased cohabited as husband and wife in Kabose, Nandi County, since 1996, for 19 years until her death on 12th January 2015.
66. PW2 (Deina Muhonja Mugesani), a Maragoli elder, testified that the couple was recognized as married by the community, sought her counsel on domestic matters, and lived together with their four children.
67. PW6 (Mary Muhonja Lusimba) confirmed that on 23rd October 2004, she accompanied the plaintiff to the deceased's parental home, where partial dowry (one cow and Kshs. 7,000) was delivered and accepted by the deceased's parents, marked by a traditional marriage symbol (lusiola).
68. Under Tiriki customary law as explained by PW2, dowry negotiations are conducted by elders, and payment may be made in installments without invalidating the marriage.
69. The acceptance of partial dowry by the deceased's parents, coupled with the couple's prolonged

cohabitation, four children, and community recognition, satisfies the requirements for a valid customary marriage.

70. DW1's claim that no dowry was paid is contradicted by PW6's testimony and lacks supporting evidence, as DW2 and DW3 admitted limited knowledge of the plaintiff's relationship with the deceased.
71. Administrative recognition further bolsters the plaintiff's case. PW5 (Paul Kipkosgei Koech), the Assistant Chief of Koibarak Sub-location, issued a burial permit to the plaintiff a sign acknowledging him as the deceased's spouse responsible for burial arrangements.
72. In view of the evidence I find that plaintiff has proven, on a balance of probabilities, that he was married to the deceased under Tiriki customary law.
73. This is as held by the court of Appeal in **Nding'uri v Nding'uri & 4 others (Civil Appeal E429 of 2024) [2025] KECA 971 (KLR) (23 May 2025) (Judgment)** the court stated as follows:-

“In HOTTENSIAH WANJIKU YAWE Vs. PUBLIC TRUSTEE (supra), the Court established the

standard of proof of a customary law marriage to be on a balance of probabilities.”

74. I now turn to consider the second issue for determination. The Court of Appeal has outlined the hierarchy and principles governing burial rights in Kenya.

75. This was explicitly enunciated by the court in **SAN v GW [2020] (supra):-**

“The third aspect of this dispute is 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.”

76. As the deceased's spouse, the plaintiff claims the primary right to bury her at their matrimonial home in Koibarak Sub-location, Nandi County. The defendant contends that the plaintiff's failure to complete dowry payments and alleged hostility toward the deceased's family extinguished his burial rights, justifying their burial of the deceased in Cheptulu Sub-location, Vihiga County.

77. Under customary law, as supported by **Apeli vs. Buluku [1980] eKLR** and **SAN vs. GW [2020] eKLR**, the spouse has the primary right to bury the deceased, unless there is evidence of the deceased's contrary wishes or conduct by the spouse that negates this right. No evidence was adduced to show that the deceased expressed a wish to be buried in Cheptulu, nor was there evidence of negating conduct on the part of the plaintiff that would lead to the plaintiff losing the right to bury his wife.
78. The plaintiff's evidence, supported by PW2, PW5, and PW6, demonstrates that he initiated burial preparations at Koibarak, secured a valid burial permit, and co-operated with the deceased's family by attending meetings and offering contribution. He had a legitimate expectation that he would be allowed to inter the remains of his wife and the mother of his children in the place they call home as is the norm in our society.
79. The Court of Appeal in the case **Samuel Onindo Wambi v C O O & another [2015] KECA 620 (KLR)** cited with affirmation of the decision in **Edwin Otieno**

Ombajo-v- Martin Odera Okumu [1996] eKLR,

where it was held that:-

“The husband’s right to bury his deceased wife’s body may be superseded by the deceased’s wishes if the husband’s behavior renders him undeserving to bury the remains of his wife.”

Here, the plaintiff’s 19-year cohabitation, raising four children, and active involvement in burial arrangements demonstrate significant closeness, unlike the defendant, brother, who ranks lower in the hierarchy of entitled persons.

80. The defendant’s unilateral removal of the body from the mortuary, violated the plaintiff’s rights as the spouse.
81. The defendant’s reliance on unpaid dowry does not override the plaintiff’s rights, as the marriage was valid despite partial payment. The deceased left her home 19 years ago and established a home with the plaintiff where they were blessed with children. The defendant’s only claim in the body is founded solely on the non-payment of dowry and not on their close relationship with the deceased.

82. On the final issue, had the circumstances been different, this Court would have exercised great hesitation in granting an order for the exhumation of the deceased's remains. This is because, as a matter of human dignity and cultural consciousness, there exists a profound and universally shared sentiment that once a person has been laid to rest decently and respectfully, their grave should remain undisturbed.
83. The finality of burial is, to most people, not merely a physical interment but a sacred rite deserving of protection from disturbance, save for the most compelling and exceptional reasons sanctioned by law.
84. I echo the words of Onyancha J in the case of **HCK v EJK [2008] KEHC 3895 (KLR)**, where he stated that:-
- “29. From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions, however arise when unforeseeable circumstances make it desirable or**

imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so. This, in my view, is the tenor of the case of Re Matheson (deceased) [1958]1 All E.R, 202.”

85. The status of the plaintiff as spouse after 19 years of cohabitation, four children, and partial dowry payment vests in him the right to primary burial, which rights were unlawfully violated by the defendant. The plaintiff and his children have been subjected to emotional distress and turmoil and reburial at Koibarak will give closure in line with custom.
86. Had the deceased been decently buried with the plaintiff's consent, this Court would have been reluctant

to interfere with the grave, having acknowledged that burial is a sacred rite and deserves dignity and finality.

87. In breach of both statutory and customary law and given the injuries suffered by the plaintiff, there are beyond exceptional circumstances justifying exhumation and reburial at Koibarak under Tiriki rites to restore dignity.

Final Orders

- i. The plaintiff, James Kisangi Evereso, was lawfully married to the deceased, Sheilah Amaiza Amudavi, under Tiriki customary law and is entitled to bury her remains at their matrimonial home in Koibarak Sub-location, Nandi County.
- ii. The burial of the deceased's body in Cheptulu Sub-location, Vihiga County, on 18th January 2015 was unlawful and irregular.
- iii. An order is hereby issued for the exhumation of the remains of Sheilah Amaiza Amudavi from Cheptulu Sub-location, Vihiga County, and their reburial at the plaintiff's rural home in Koibarak Sub-location, Nandi County, on land parcel No. Nandi/Koibarak 'A'/325, subject to a permit granted by the Minister under Section 146(3) of the Public Health Act, Cap 242.

- iv. The exhumation and reburial shall be conducted in accordance with Tiriki customary law, with the involvement of community elders and appropriate rituals to ensure cultural respect and the dignity of the deceased.
- v. The Officer Commanding Station (OCS), Serem Police Station, shall provide necessary security and assistance during the exhumation and reburial process.
- vi. The defendant, Richard Mulamba, shall bear the costs of the exhumation and reburial, given the unlawful nature of the initial burial.
- vii. The plaintiff shall settle any unpaid dowry in accordance with the custom within 60 days and in default the defendant shall be at liberty to file suit for recovery.
- viii. There shall be no order as to costs of this suit as this is a family matter.

Dated, signed and delivered at Kakamega this 23rd day of October 2025.

A. C. BETT

JUDGE

In the presence of:

Plaintiff in person

Defendant in person

Court Assistant: Polycap

COPY