REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E235 OF 2025

PATRICIA ALUOCH ODUOR.....1ST APPELLANT

ALFRED OKERO ODUOL.....2ND APPELLANT

PETER ODIPO ODUOL.....3RD APPELLANT

VERSUS

MICHAEL ABUNDE.....1ST RESPONDENT

JARAMOGI OGINGA ODINGA

TEACHING & REFERRAL HOSPITAL.....2ND RESPONDENT

*(Being an Appeal from the Judgement and Decree of **Hon. Jocelyn Kimetto, Principal Magistrate** delivered on 4th November, 2025 in Kombewa MCCC/E062/2025 Patricia Aluoch Oduor & 2 others v Michael Abunde & another.*

JUDGEMENT

1. The three Appellants herein have brought this appeal, being aggrieved by the decision of the trial court **Hon. Jocelyn Kimetto, Principal Magistrate** delivered on 4th November, 2025 in *Kombewa MCCC/E062/2025 Patricia Aluoch Oduor & 2 others v Michael Abunde & another.*

2. The Appellants have presented the following grounds of appeal vide the Memorandum of Appeal dated 6th November, 2025:

1. **THAT the learned trial Magistrate erred in law and fact and grossly misdirected herself in treating superficially the evidence and submissions on record, more so the Appellants', consequently arriving at a wrong conclusion.**

2. **THAT the learned trial Magistrate erred in law and fact by finding that there was a presumed marriage between the late Caroline Akoth Oduol and the Respondent herein, and as such, that the Respondent reserves the right to inter the remains of the late Caroline Akoth Oduol at his homestead.**

3. **THAT the learned trial Magistrate erred in law and fact by allowing the Respondent to inter the remains of the late Caroline Akoth Oduol at his homestead, yet the Luo Customs bar the Appellants and their families from attending the late Caroline Akoth Oduol's burial at the Respondent's homestead since the Respondent did not perform the Luo Customary rights of marriage.**

4. **THAT the learned trial Magistrate erred in law and fact by finding that the Respondent partly performed the Luo Customary rights of marriage.**

5. **THAT the learned trial Magistrate erred in law and fact by allowing the Respondent to inter the remains of the late Caroline Akoth Oduol at his homestead, yet the Respondent never visited the deceased's paternal home at Huluwuinu village, Kisa West in Mwaka Sublocation, Kakamega County.**

6. **THAT the learned trial Magistrate erred in law and fact by dismissing the Appellants' suit, yet the late Caroline Akoth**

Oduol was not legally married to the Respondent herein, since no dowry was ever paid by the Respondent for her hand in marriage.

7. **THAT the learned trial Magistrate erred in law and fact by dismissing the Appellants' suit, yet the late Caroline Akoth Oduol was not legally married to the Respondent herein and the late Caroline Akoth Oduol's four children are not the Respondent's biological children.**

8. **THAT the learned trial Magistrate erred in law and fact by dismissing the Appellants' suit, yet the Luo Customary rites were not performed and as such there was no marriage between the late Caroline Akoth Oduol and the Respondent herein.**

9. **THAT the learned trial Magistrate erred in law and fact by applying the wrong principles and misapprehending the evidence on record that she arrived at a wrong decision.**

10. **THAT the learned trial Magistrate erred in law and fact in not evaluating the evidence tendered judiciously.**

3. The Appellant proposes that the instant appeal be allowed and that the judgement of the trial court be set aside and that the Appellants be allowed to inter the remains of the late **Caroline Akoth Oduol.**

4. Although the 10 grounds above are listed distinctly, the manner of setting out grounds of appeal in a memorandum of appeal to the High Court is governed by *Order 42 Rule 1* of the *Civil*

Procedure Rules. The rule requires that every appeal be instituted by a memorandum of appeal which is signed like a pleading and which sets out concisely, under distinct heads, the grounds of objection to the decree or order appealed from.

5. The law further requires that the grounds be numbered consecutively and stated without argument, narrative, or evidentiary detail. Each ground should briefly identify the alleged error of law or fact made by the trial court, while the detailed reasoning and arguments in support of those grounds are reserved for written submissions or oral arguments at the hearing of the appeal.

6. A perusal of the grounds as set out in the memorandum of appeal sets out in precis only three grounds of appeal, that are expounded by repetition to amplify them to ten. The identifiable grounds of appeal are:

    1. THAT the learned trial Magistrate erred in law and in fact by reaching the finding that there was a presumed marriage between the Respondent and the deceased.

    2. THAT the learned trial Magistrate erred in law and in fact by reaching the finding that the Respondent was entitled to bury or inter the remains of the deceased.

    3. THAT the learned trial Magistrate erred in law and in fact by failing to properly analyze and evaluate the evidence on

record and by applying wrong principles as a result of which she reached the wrong decision.

7. In setting out grounds of appeal, parties are advised to identify and isolate each specific error of law or fact alleged against the trial court and express it in a single, clear sentence per ground, avoiding explanations, background facts or justifications within the ground itself. Closely related complaints should be consolidated into one ground rather than split into multiple repetitive grounds and drafting should focus on what the court did wrong rather than why it was wrong, leaving the reasoning, authorities and analysis to the written submissions. This disciplined approach ensures compliance with *Order 42 Rule 1,* promotes clarity and prevents the grounds from becoming argumentative or duplicative.
8. This being the first appellate court, I am required under *Section 78* of the *Civil Procedure Act* and as was espoused in the case of ***Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123*** to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

9. In ***Selle***, **Sir Clement De Lestang** observed that:

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard***

witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

10. The matter before trial court, a burial dispute, was commenced by the Appellants (the Plaintiffs before the lower court) by way of a plaint dated 1st October, 2025 in which they sought the following reliefs:

a. **A declaration that the remains of the deceased Caroline Akoth Oduol, be buried at her paternal home at Huluwuinu village, Kisa West in Mwaka Sublocation, Kakamega County, since she was not legally married to the 1st Defendant.**

b. **An order of permanent injunction restraining the 1st Defendant whether by himself, agents, servants or assigns from removing or burying the remains of the deceased a any location other than the said deceased's paternal home Huluwuinu village, Kisa West in Mwaka Sublocation, Kakamega County.**

c. **An order directing the Officer Commanding Station to supervise and ensure compliance with the court's orders, including enforcement of the burial at Huluwuinu village, Kisa West in Mwaka Sublocation, Kakamega County.**

d. **The 1st Defendant to be compelled to hand over the original identity card of the late Caroline Akoth Oduol to the Plaintiff's herein.**

e. **Costs of the suit be borne by the Defendant.**

f. **Any other relief that this Honourable Court may deem just and expedient to grant in the interests of justice.**

11. The Appellants pleaded in the plaint that at the material time to the suit, the 1st Appellant was the sole caregiver and lawful mother of the deceased, who passed away on 9th September, 2025 at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) following a prolonged illness and that the 2nd and 3rd Appellants were also caregivers and lawful brothers of the deceased.

12. The Appellants further pleaded that the Respondent, without notice, consent or right, intended to inter the remains of the deceased at his homestead at Kabunde in Seme, Kisumu County, which location was not the deceased's residence and in stark defiance of her clear and consistent declarations on her preferred place of burial, and that such intentions by the

Respondent were unlawful and a manifest affront to the deceased's dignity.

13. The Respondents further pleaded that in furtherance of his intentions, the Respondent was issued with a burial permit by the area chief of West Kanyamware, Kombewa, Kisumu County, contrary to the wishes of the deceased and her family.

14. The Respondents further pleaded that the deceased was not married to the Respondent as no rites under African Customary Law were performed to that effect. They averred that the Respondent did not pay dowry for the deceased's hand in marriage and that the Respondent never at any one time visited the deceased's paternal home in Huluwuinu village, Kisa West in Mwaka Sublocation, Kakamega County. They pleaded that the deceased and the Respondent never had any children together. They pleaded that the deceased's four children were sired by another man who paid dowry for her in marriage.

15. In the plaint, the Appellants stated that under the Luo Customary Law, the deceased's family members would not be in a position to bury her remains at the Respondent's homestead no union was formalized between the two under custom. That the Respondent's insistence on burying the deceased necessitated the suit before the trial court.

16. The Respondent (the 1st Defendant before the lower court) resisted the suit by filing a statement of defence dated 9th October, 2025 in which he generally denied the allegations of the Appellants as were set out in the plaint.

17. The Respondent pleaded in the defence that he was issued with the permit to bury the deceased and intended to do so at his homestead at Kabunde in Seme, Kisumu County, as the deceased was married to him by long cohabitation. He therefore denied the contention by the Appellants that the deceased was not his spouse.

18. The Respondent admitted that he did not bear any children with the deceased but added that he took the deceased's four children as his own and took custody and care of them. He admitted that the children were sired by another man who paid dowry for the deceased but that the said marriage stood terminated when the other man died, as a result of which the deceased had capacity to remarry.

19. The Respondent prayed that the Appellants' suit be dismissed with costs.

20. The 2nd Appellant and the 3rd Appellant testified before the trial court as PW1 and PW2 respectively. They both adopted the contents of their respective witness statements dated 1st

October, 2025. The two statements, which are a replica of each other, stated as follows:

> **"I am (the 1st/2nd Plaintiff herein) well conversant with the matter at hand.**
> **I restate and reinstate the facts as made in the plaint.**
> **I ask the court to grant me the orders sought in the plaint.**
> **That is all I have to say."**

21. PW1 was cross examined and told the trial court that the deceased was her biological sister and that she was married to one **Livingstone Arono,** who died in 2017. He stated that the deceased was a Luo by tribe and that under Luo Customs, a widow was allowed to remarry after the death of her husband. He however added that he was not aware if the deceased re-married after the death of her husband.

22. PW1 stated that she did not know that the deceased was ailing before she passed away as he was never informed of the same and that when he learnt of her demise, he went to the mortuary where he found the Respondent making arrangements to pay the hospital bills and had the intention of burying her.

23. PW1 explained that the deceased's two previous husbands had died and that each of the two had sired two children with her.

24. On his part, the 3rd Appellant (PW2) told the trial court upon being cross examined that the deceased was his sister and that he had no information that she was unwell, until she met her demise. He then went to the homestead where the Respondent wanted to bury the deceased and was shown a permanent stone house which he was informed was the deceased's house that the Respondent had built. He also saw the deceased's children at that homestead.

25. Upon being cross examined, PW2 stated that he did not want the Respondent to bury the deceased because he was not the biological father of the deceased's children.

26. The Respondent testified as DW1 and adopted the contents of his statement dated as his evidence in chief. In his statement, the Respondent stated that he was the lawful husband of the deceased under Luo Customary Law, which union was celebrated on 2nd May, 2009 and that the union was recognized by both his and the deceased's family. He stated that he paid dowry by sending two cows to the deceased's home and that what was remaining was finalization of the ceremony that would involve a feast for the two families. He stated that the cows were received by the deceased's mother – the 1st Appellant.

27. The Respondent stated that after celebrating the marriage, he resided with the deceased as husband and wife for two years and that although there were no serious matrimonial issues,

disputes or misunderstandings, the deceased left the matrimonial home and went to reside in Seme. The Respondent further stated in his statement that in the year 2019, the deceased voluntarily returned to him with four children and sought for reconciliation and that he accepted her back as his wife, together with her children, whom he fully embraced and fended for as his own. He stated that even at the time of testifying, he was paying the children's school fees.

28. The Respondent stated in his statement that from 2019 until her demise on 9th September, 2025, the deceased lived with him continuously, openly and peacefully as his spouse and that the community recognized the two as a couple.

29. The Respondent stated in his statement that the deceased was taken ill in 2019and that he solely cared and tended for her and provided for her children without any support from the deceased's relatives, whom he said never visited or contributed to her welfare and that they only emerged after her demise, demanding to bury her.

30. The Respondent produced the following documents in support of his case:

- Copy of TSC sick leave form dated 2nd April, 2019.
- Copy of in-patient bill dated 15th July, 2020 from Aga Khan Hospital.

- Copy of discharge summary and invoices dated 4th June, 2025 from JOOTRH.
- Copy of patient release paper dated 4th June, 2025.
- Copy of discharge summary and invoices dated 30th June, 2025 from JOOTRH.
- Copy of haematology report and biochemistry report dated 15th July, 2025 from Aga Khan Hospital.
- Copy of in-patient bill dated 20th July, 2025 from Aga Khan Hospital.
- Copy of discharge summary dated 15th August, 2025 from Aga Khan Hospital.
- Copy of in-patient bill dated 15th August, 2025 from Aga Khan Hospital.
- Copy of invoice dated 15th September, 2025 from JOOTRH.
- Copy of burial permit dated 26th September, 2025.
- Copy of Minet Insurance claim form dated 23rd September, 2025.
- Copy of chief's letter dated 1st October, 2025.
- Photographs depicting the house that the Respondent said he built for the deceased in his homestead.

31. The Respondent sought that the trial court recognizes the existence of a presumed marriage between him and the deceased and that he be allowed to inter her remains.

32. On being cross examined, the Respondent stated that he started residing with the deceased in the year 2019 and that

there was even a time he secured her release after she had been arrested and that it was PW1 who paid Ksh.10,000/- to the police.

33. The Respondent stated that the deceased gave her the documents that he produced on 7th September, 2025 while at the hospital. He stated that he ran several projects with the deceased which included farming.

34. The Respondent stated that the 1st Appellant never visited the deceased at his home, even during the time that she was ailing.

35. The Respondent called **Nelson Meyo Obiny** as his witness (DW2). The witness adopted his statement dated 9th October, 2025 as his testimony. In his statement, DW2 stated that the Respondent was his cousin and that he knew the deceased during her lifetime as the Respondent's spouse as the two lived together as man and wife.

36. The witness told the trial court that the Respondent took the deceased's children as his own and provided for them, raising them as his own.

37. DW2 explained that upon the demise of the deceased, the Respondent embarked on making burial arrangements and requested DW2 to accompany him to the deceased's parental home in Luanda to formally engage her relatives as per Luo customs but upon arrival, they were blocked and turned away by

the 2nd Appellant and some of his relatives, who demanded that they first produce the deceased's identity card.

38. On being cross examined, DW2 told the trial court that he did not know if the Respondent ever visited the deceased's parents' home during her lifetime. He stated that the 3rd Appellant visited the Respondent on at least one occasion and that the deceased stayed with the Respondent for 4 to 5 years.

39. DW3 was **Fredrick Ochieng Otogo,** the Assistant Chief Kanyadwera sublocation, Seme Subcounty. The witness told the trial court that he knew the Respondent and the deceased to be man and wife and wrote a letter on 1st October, 2025 to that effect. He told the court that the two resided together from 2019 and that they built a house on the Respondent's house.

40. Upon cross examination, the witness told the trial court that the deceased and the respondent's home was about 1.5km from his home. He stated that he did not know if the deceased's four children were the Respondent's biological issues, but that he knew that the children were residing with the deceased and the Respondent.

41. The trial court considered the record and set out the issues for determination as follows:

    a. **Whether or not the Plaintiffs are entitled to their claim for permanent injunction against the Defendant from burying**

the deceased on the ground that they were not legally married.

b. Who should bury the deceased and the issue of release of the deceased's national identity card to the Plaintiffs.

c. Who should bear costs.

d. Whether or not the Plaintiffs are entitled to their claim for permanent injunction against the Defendant from burying the deceased.

42. In its determination, the learned trial Magistrate reached the findings that there was a presumption of marriage between the Respondent and the deceased and that the deceased's wishes were to be with her family as the Respondent's wife, and hence that the Respondent had the right to inter her remains.

43. The learned trial Magistrate rendered herself as follows:

> ***"The reasons cited by the Plaintiffs for the above claim is that dowry was not paid despite their cohabitation and the four children are not the Defendant's biological children.***
>
> ***The court has considered the entire evidence and is of the opinion that the Defendant cohabited with the deceased as a husband and wife for a duration of six years. There is enough evidence that was adduced in court by the Defendant and his witnesses supported by the documentary evidence (documents and photographs)***

proving this fact. The same was not rebutted by the Plaintiffs.

The Luo customary rites of marriage were partly fulfilled by payment of dowry of two cows save for feasting, which I noted could be accomplished any time upon payment of dowry. I also note that the four children as admitted by both PW1 and PW2 have been living with their mother since 2019 at the Defendant's homestead to date. The Defendant was close to the deceased and took good care of her as she ailed as a spouse would, even as the Plaintiffs admitted that they knew nothing about her health condition.

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Subsequently, having found that there was a presumption of marriage owing to long cohabitation, mutual intention, consent and repute as recognized by friends, members of the community as well as the local administrators, which form the ingredients of the strict parameters outlined by the Supreme Court in the recent case of MNK v POM Petition No. 9 of 2021 [2023] KESC 2 (KLR) on the issue of presumption of marriage, it also follows that since dowry had been paid in part performance of the Luo customary marital rites save for feasting rite that remained, I do not see a reason to divorce a couple that intended to remain united during their lifetime, at death. If the Plaintiffs never bothered about her well being during her lifetime, it will not make any difference to claim her body in death. The deceased's wish was to be with her beloved family her last known place of abode.

Nevertheless, all parties including the Plaintiffs have a right to attend and take part in the burial as far as the deceased's soul is laid to rest where her heart/wish and treasure lied during her lifetime."

44. With that, the trial court reached the finding that the Respondent had the right to bury or inter the deceased's remains.

45. The present appeal proceeded by way of written submissions, which I have had the occasion to peruse and consider.

46. I have revisited the entire record before the trial court, the pleadings, the evidence tendered, the impugned judgment and the submissions filed on appeal. As this is a first appeal, as I have said, this Court is under a duty to re-evaluate, re-analyze and re-assess the evidence afresh and arrive at its own independent conclusions, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. This duty is anchored in *Section 78* of the *Civil Procedure Act.*

47. From the grounds of appeal as properly condensed, the pleadings and the evidence on record, three broad issues arise for determination.

48. The first is whether the learned trial Magistrate erred in law and fact in finding that there existed a presumed marriage between the deceased, **Caroline Akoth Oduol** and the Respondent.

49. The second issue is whether, upon such finding, the learned trial Magistrate erred in holding that the Respondent was entitled to inter the remains of the deceased at his homestead.

50. The third issue is whether the learned trial Magistrate properly evaluated the evidence on record, particularly in light of the Appellants' witness statements which merely adopted the contents of the plaint.

51. The doctrine of presumed marriage is not a novel concept in our jurisdiction. It is a judicially developed principle grounded in social reality and long-standing practice and it has been consistently applied by Kenyan courts where justice and equity demand it.

52. In ***Hortensiah Wanjiku Yawe v Public Trustee [1976] eKLR,*** the Court of Appeal held that long cohabitation as husband and wife, coupled with general reputation in the community, raises a rebuttable presumption of marriage, even where no formal proof of a customary or statutory marriage is available. The court emphasized that the presumption is one of

fact, to be inferred from the conduct of the parties and how they held themselves out to society.

53. The court laid down the foundational principles governing presumed marriage in Kenyan law. The court held that where a man and a woman have lived together for a long period of time as husband and wife and have acquired the reputation of being married among their relatives, friends and the wider community, the law will presume that they are married, even if there is no direct proof that the formal rites of marriage, whether statutory or customary, were performed.

54. The presumption is one of fact, arising from cohabitation and public repute and notoriety and it is intended to reflect social reality and prevent injustice, particularly to women who may otherwise be left unprotected.

55. The court further emphasized that such a presumption is rebuttable, meaning it can be displaced by clear and cogent evidence showing that no marriage was intended or could legally exist.

56. However, where long cohabitation and general reputation are proved, the burden shifts to the person denying the marriage to rebut the presumption.

57. Importantly, the court made it clear that strict proof of customary rites is not always necessary where the surrounding

circumstances point irresistibly to the existence of a marital union. In essence, the decision affirmed that courts will look beyond formalities to the substance of the relationship, guided by justice, equity and common sense.

58. The principle was further elaborated in ***Phyllis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR***, where the Court of Appeal reiterated that proof of customary rites is not mandatory where evidence of long cohabitation and public repute is established.

59. In that case, the court clearly articulated the test for when a marriage may be presumed from the conduct of the parties. The court held that for a presumption of marriage to arise, the party asserting it must establish two essential elements: long cohabitation and acts of general repute. This means that the couple must have lived together for a prolonged period in a relationship that goes beyond mere friendship or casual association, and importantly, they must have held themselves out to family, friends and the community as husband and wife.

60. The court emphasized that the long cohabitation must have crystallized into a marriage in practice, not merely room-mates or companions, such that it would be safe for the court to presume the existence of a marriage. Simple co-residence or occasional association is not enough; there must be evidence that

the relationship was akin to marriage in substance, evidenced by how the parties conducted themselves.

61. The court further stated that because the presumption is an assumption of fact, it is not imperative that formal customary rites be performed before drawing the presumption. In other words, failure to perform statutory or customary rites does not, by itself, defeat the presumption where the factual matrix otherwise points clearly to a marital union.

62. More recently, the Supreme Court in ***MNK v POM Petition No. 9 of 2021; [2023] KESC 2 (KLR)*** reaffirmed the place of presumed marriage in law, while cautioning that courts must apply the doctrine carefully and strictly, guided by evidence of long cohabitation, mutual intention, exclusivity, stability of the union and public repute.

63. The court emphasized that long cohabitation and public perception alone are not sufficient, by themselves, to create a presumption of marriage. For a court to properly presume a marriage, there must be clear, cogent evidence not only of long cohabitation but also of additional factors demonstrating a marital relationship such as intention, consent and public holding out as spouses. This reflects a move away from the older approach where cohabitation and repute could more readily support a presumption.

64. The court set out strict parameters that must be satisfied before a court can safely draw an inference of marriage by presumption. Those parameters include that: the parties must have lived together for a long period of time; they must have had legal capacity to marry; there must be evidence of intention to marry; there must be mutual consent; the parties must have held themselves out to the community as married; the burden of proof rests on the party asserting the presumption; evidence rebutting the presumption must be strong, distinct, satisfactory and conclusive; and the standard of proof is on a balance of probabilities.

65. Applying those principles to the present case, the evidence on record amply supports the finding reached by the trial court. The Respondent testified, and his evidence was consistent and coherent, that the deceased lived with him continuously from 2019 until her demise in September, 2025.

66. The Respondent demonstrated, through documentary evidence, that he took full responsibility for her welfare during prolonged illness, including hospital admissions at Aga Khan Hospital and JOOTRH, payment of medical bills, insurance claims and post-illness care. This evidence was not peripheral; it went to the very heart of marital life and mutual responsibility.

67. The Respondent's testimony was corroborated by DW2, a close relative, who testified that the Respondent and the

deceased lived together openly as husband and wife and that the Respondent accepted and raised the deceased's children as his own.

68. The Respondent's testimony was further corroborated by DW3, an Assistant Chief, who confirmed that the deceased and the Respondent cohabited as a couple, were recognized as such by the local community and even built a home together. The evidence of a local administrator, while not conclusive, is persuasive on issues of residence and community repute.

69. Crucially, the Appellants' own witnesses did not dislodge this evidence. PW1 and PW2 admitted under cross-examination that they were largely absent from the deceased's life, were unaware of her illness and only became actively involved after her death.

70. PW2 conceded that he visited the Respondent's homestead, saw a permanent house built for the deceased and found her children residing there. Their objection was not grounded on absence of cohabitation, but on the alleged non-payment of dowry and lack of biological paternity of the deceased's children. Those factors, standing alone, are insufficient in law to rebut a presumption of marriage.

71. The learned trial Magistrate therefore properly directed herself in law in finding that a presumed marriage existed.

Partial performance or even non-performance of customary rites does not negate a presumed marriage once the factual foundation of cohabitation and public repute is established. Dowry, important as it is culturally, is not a *sine qua non* of marriage for purposes of the doctrine of presumption. I find no misdirection on the part of the learned trial Magistrate on this issue.

72. Turning to the second issue, burial disputes in Kenya have been consistently resolved by reference to personal law, particularly customary law, as applied and interpreted by the courts.

73. In ***Otieno v Ougo & Another [1987] KLR 364*****,** (popularly referred to as the ***SM Otieno*** case) the Court of Appeal held that the burial of a deceased African person is governed by the customary law applicable to that person and that where a woman is married, her burial ordinarily lies with her husband at her matrimonial home. This position has been reiterated in numerous decisions of the superior courts.

74. Once the trial court properly found that the deceased was married to the Respondent by presumption, it followed as a matter of law that the right and duty to inter her remains vested in him as the surviving spouse.

75. The Appellants' argument that Luo customs would bar them from attending the burial cannot override the legal consequences of a marital relationship recognized by law. Custom cannot be invoked selectively to defeat rights that flow from a marriage which the court has found to exist.

76. I now address the third issue concerning the nature and probative value of the Appellants' witness statements. Under *Order 7 Rule 5* and *Order 11* of the *Civil Procedure Rules,* witness statements constitute the evidence that the witness intends to adduce and must therefore contain factual matters within the personal knowledge of the witness. A witness statement that merely states that the witness "restates and reinstates the facts as pleaded in the plaint" is, in substance, no evidence at all.

77. It is elementary and settled law that pleadings are not evidence and must be proved by evidence. In ***CMC Aviation Ltd v Crusair Ltd [2014] eKLR,*** the Court of Appeal emphatically stated that pleadings, however detailed, do not amount to evidence and cannot be relied upon by a court unless supported by admissible evidence.

78. Similarly, in ***Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 Others [2014] eKLR,*** the court reiterated that parties are bound by their pleadings, but pleadings themselves do not prove facts.

79. In the present case, the Appellants' written witness statements were plainly deficient, as they disclosed no factual narrative capable of proving the pleaded claims. While PW1 and PW2 did give oral testimony during cross-examination, that testimony did not support the Appellants' case. Instead, it confirmed material aspects of the Respondent's evidence, including cohabitation, residence and care. The learned trial Magistrate was therefore entitled to find that the Respondent's evidence stood largely unrebutted.

80. Importantly, a careful reading of the judgment shows that the learned trial Magistrate did not elevate the plaint into evidence. The decision was grounded on oral testimony, documentary exhibits, corroborative witnesses and admissions made under cross-examination.

81. Upon my own independent and exhaustive re-evaluation of the entire evidence, I am satisfied that the learned trial Magistrate properly analyzed the material before her, applied the correct legal principles on presumed marriage and burial rights and arrived at a conclusion that was supported by the evidence. No error of law or fact has been demonstrated to warrant interference by this court.

82. In the end, I find that the appeal lacks merit. The finding that there existed a presumed marriage between the deceased

and the Respondent was sound in law and fact and the consequent determination that the Respondent was entitled to inter the remains of the deceased was legally justified. The appeal is accordingly dismissed.

83. As for costs of the appeal, *Section 27* of the *Civil Procedure Act* dictates that the same ought to follow the event. The Appellants will therefore bear the Respondent's costs of the appeal, which I assess at Ksh.30,000/-.

84. Finally, let me be clear that although the findings that I have reached (and even those of the trial court) have legal consequences for succession, the same do not by themselves finally determine succession rights. That task lies with the probate court.

85. This file is hereby closed.

DELIVERED (virtually), DATED & SIGNED this 19th day of December, 2025.

JOE M. OMIDO

JUDGE

FOR THE APPELLANT: **Mr. Jonyo.**

FOR THE RESPONDENTS: **Ms. Raburu** for **Mr. Omondi.**

COURT ASSISTANTS: **Mr. Ngoge** & **Mr. Juma.**

Mr. Jonyo: We will still pursue the application for contempt.

Court: The matter to be mentioned on 12th February, 2026 for directions on the application for contempt of court.

JOE M. OMIDO

JUDGE