

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. E065 OF 2025

JOHN NDUNG'U WAINAINA.....1ST
APPELLANT

LUCY NJOKI MWAURA.....2ND
APPELLANT

VERSUS

ANDREW BULINGA MUSUNGU.....
RESPONDENT

(Being an appeal against the entire judgment of Hon Jakinda Renna Aketch in Kenol MCELC MISC E002 OF 2025 delivered on 12th June 2025)

JUDGEMENT

1. This Appeal arises from the judgement of the delivered in Kenol ELC Misc. Case number E001 of 2025. It is about a burial dispute emanating from a plaint lodged by the Respondent herein in the trial court. The Respondent had sought an injunction restraining the appellants from interring the remains of the late *Caroline Wanjiku Ndung'u* (the deceased) in Murang'a without his consent. The deceased passed on at while undergoing treatment at Kenyatta National Hospital and the body is currently preserved at Montezuma Monalisa Funeral Home (Kabati). The Respondent also sought that Montezuma Monalisa Funeral Home be compelled to release the deceased's body to him for interment. The Respondent contended that he was lawfully married to the deceased under Kikuyu customary law and was therefore the proper person to inter her remains.
2. The Appellants opposed the plaint denying the existence of any Kikuyu customary union between the Respondent

and the deceased. It was averred that the Respondent did not perform any of the required Kikuyu Customary Law dowry rights during the lifetime of the deceased.

3. The matter proceeded to full trial where the Respondent testified as PW1. It was his testimony that he was the husband to the deceased. He adopted his witness statement and testified that he was married to the deceased for thirteen years having contracted a Christian marriage in 2012. The Christian marriage was preceded by payment of dowry of Kshs. 20,000 which was handed over by his uncle Julius Oyindi Aoko. The marriage had three issues. He maintained that he was not consulted about the deceased's burial arrangements despite visiting the appellants severally.
4. PW2 Francis Musungu testified by adopting his witness statement. He maintained that the deceased and the Respondent had been married since 2012.
5. PW3 Julius Oyindi adopted his witness statement and confirmed that he accompanied the Respondent to pay dowry at the deceased's home where they paid dowry of Kshs. 20,000. He affirmed that the wedding between the deceased and the Respondent was never objected to by anyone, including the appellants or any other member of the deceased's family.
6. PW4 Tabitha Chimba also testified and corroborated the statement of PW3 regarding the dowry ceremony and the wedding between the deceased and the Respondent.
7. The 2nd Appellant testified that she was the mother to the deceased. She confirmed that the Respondent's family gave them Kshs. 20,000.00 but denied that the same was dowry. The deceased had threatened to die by suicide if she had not been allowed to marry the Respondent, hence

they allowed her to marry him. She reiterated that the deceased was married to the Respondent. However, she maintained that the Respondent did not marry the deceased as per Kikuyu culture.

8. The 1st Appellant adopted his witness statement and testified that there was no customary marriage between the deceased and the Respondent, therefore, it would be a curse for the Respondent to be permitted to bury the deceased. He alleged that the Respondent was violent to the deceased's first born as he was not his child. He further testified that the deceased and the Respondent never lived happily. He maintained that the money that the Respondent's gave was merely for food and not dowry as alleged. He confirmed that there was a Christian marriage between the deceased and the Respondent in 2012. He was present at the wedding and gave out the deceased to be married to the Respondent.
9. DW3's testimony was hinged on the fact that no Kikuyu customary marriage was celebrated between the deceased and the Respondent as the procedure for such a marriage was never followed.
10. DW4 testified that she never saw the deceased being beaten or abused in any way by the Respondent. She was present at the deceased's dowry ceremony where the Respondent and his family gave out Ksh. 20,000.
11. DW5 Samson Kinuthia testified that he was not present during the dowry ceremony but was told that dowry was paid.
12. During the trial, it was evident that whereas the Respondent did not fulfil all the dowry rights under Kikuyu Customary Law, the Respondent and the deceased were lawfully married in church and the Appellant' did not raise

any objection to the said marriage within the requisite statutory period.

13. The trial court, relying on **Section 3 (1) of the Marriage Act Cap151 Laws of Kenya** found that the Respondent had proven that he was married to the deceased vide Marriage certificate number 67898, therefore, he had the legal proximity to inter the remains of the deceased. In making this finding, the court remarked that the marital union would be found to be the focus of the closest chain of relationships touching on the deceased.
14. Aggrieved and dissatisfied with the finding of the honourable court, the Appellants lodged the instant appeal on grounds that:
- i. *The learned magistrate erred in law and in fact by failing to find and hold that the Respondent did not prove his case against the Appellants to the required standard.*
 - ii. *The learned magistrate erred in law and fact by descending to determine issues not pleaded and canvassed by parties at trial hence arriving at a wrong decision*
 - iii. *The learned magistrate erred in law and fact by failing to find the appellants as the parents had superior over everybody when it came to who could bury the deceased since the Respondent had not married the deceased according to the Kikuyu customary laws.*
 - iv. *That the learned magistrate erred in law and fact by failing to find and hold that it was the appellants who was entitled to inter the remains of the deceased as per the Kikuyu customs and ethnic community the deceased belonged to the parents where the dowry was not paid.*

- v. *The learned magistrate erred in law and fact by making a decision un favour of the Respondent that exceeded the weight of the facts, evidence as adduced by the Respondent hence arriving at a biased decision.*
 - vi. *The learned trial magistrate erred in law and fat by placing reliance on Abaluhya customary law instead of Kukuyu customary law that were never proved at all by way of either evidence or expert opinion.*
 - vii. *The trial magistrate erred in law and fact by brazenly ignoring and disregarding the binding decisions of the superior courts on the position that the customary law of the deceased had the first right to bury her deceased and as a consequence arrived at a wrong decision.*
 - viii. *The learned trial magistrate analysis of the case the finding and decision was marred with the biasness, was full of assumptions and lacked sound legal facts and evidence in support of his decision.*
 - ix. *The learned magistrate descended into raising and determining issues that were never raised or canvassed by parties during trial hence occasioning an injustice to the Appellants case.*
 - x. *The finding of the learned trial magistrate was against the weight of evidence on record.*
15. Reasons wherefore the appellants prayed that the judgment of the trial court be set aside and the appellants be allowed to bury the deceased, *Caroline Wanjiku Ndung'u*.
16. The court directed that the appeal be canvassed through written submissions.
17. The Appellants submitted that the learned trial magistrate erred in law by finding that a marriage certificate is conclusive proof of proximity thus

disregarding clearly established principles of Kikuyu Customary Law regarding marriage. Relying on the **Judicature Act**, the appellant contended that customary law is the personal law of the deceased that ought to have been relied on while determining the dispute before the trial court. The Respondent could therefore not rely on a statutory document, the marriage certificate, to escape customary obligations of paying dowry.

18. Non-payment or incomplete payment of dowry under Kikuyu customary law barred a spouse from claiming the right to inter his wife. In that regard, it was submitted that the Respondent had no legitimate claim over the deceased's body having failed to perform the requisite customary law requirements. Reliance was placed on the case of **Salina Soote Rotich v Caroline Cheptoo & 2 others [2010] eKLR**.

19. Moreover, the appellants submitted that the trial court failed to evaluate the evidence adduced to demonstrate that the Respondent was violent, financially absent and had in fact neglected the deceased prior to her death. Failure to analyze this evidence adversely affected the outcome of the case in favour of the Respondent contrary to established principles of law.

20. The Respondent submitted that the judgment of the trial court was well founded in law and fact, correctly applied legal precedents on burial disputes and rightly determined that the Respondent was the lawful surviving spouse with the primary right to bury the deceased.

21. Since the deceased left no Will on how she would have preferred to be interred, the place and person responsible for the burial would be determined by existing law and precedent on burials. The doctrine of legal proximity relied

on by the trial court hence established a clear hierarchy of burial rights. Reliance was placed on the cases of **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another [2004] Eklr and Ontweka & 3 others v Ondieki (Civil Appeal E692 of 2023) [2024] KECA 11 (KLR)** which affirmed a spouse's right to bury a deceased spouse.

22. It was submitted that Customary law cannot therefore supersede the rights of a spouse where the spouse relationship is statutorily or judicially recognized. Granting a spouse the right to bury does not exclude the extended family from the burial, therefore, the appellants would still have an opportunity to participate in the deceased's burial regardless of whether the Respondent is allowed to proceed with the burial.

23. The Respondent maintained that the jurisprudence on burial rights has evolved since the **S.M Otieno case** as subsequent decisions have clarified that customary law has to be wholesomely applied in the context of the Constitution.

24. Affirming the decision of the trial court is in tandem with the provisions of **Article 45 of the Constitution** on the rights of the family. It was submitted that to allow parents to override a surviving spouse's burial rights would undermine the constitutional protection afforded to marriage and would effectively render the marital bond subordinate to birth family relationships contrary to established constitutional values.

25. The Respondent therefore prayed that the appeal be dismissed with costs.

26. This being the first appellate court I am duty bound to reconsider the evidence, re-evaluate it and reach my own

conclusion while bearing in mind that unlike the trial court, I neither heard or saw the witnesses testify wherefore I should take that into account in arriving at my decision. **(see Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] EA 123).**

27. This appeal was canvassed by way of written submissions. This court has duly re-evaluated the evidence tendered before the subordinate court and has considered the rival submissions of the parties, the cited legal provisions and authorities and the issues that emerge for determination are as follows:

- 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 or otherwise

28. 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.

29. 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.”

30. This burial dispute is between the deceased’s husband and her parents.

31. From the record, it is discernible that the deceased and the Respondent contracted a marriage under the now repealed **African Marriage and Divorce Act, CAP 151** and the parties remained married until the time of her death.

32. While the existence of a Christian marriage between the parties was not disputed, the existence of a valid customary marriage between the deceased and the Respondent was reasonably challenged.

33. The Court of Appeal in **Ontweka & 3 others v Ondieki (Civil Appeal E692 of 2023) [2024] KECA 11 (KLR) (25 January 2024) (Judgment)**

“...burial disputes are emotive, and the court is called upon to balance the clashing interests of parties who should ordinarily be involved in the burial in one way or another. Unlike many other civil disputes, burial issues concern people who are close to the deceased in one way or the other. Consequently, this court desires to find some sense of legal and constitutional harmony by overcoming the dichotomies that seem to make burial dispute jurisprudence disarrayed. As stated by Allan Kellehear in ‘Grief and Loss: Past, Present and Future’ (2002) 177 Medical Journal of Australia 177, physical, spiritual and intellectual experiences of grief and bereavement cannot be understood in isolation, but only in the

context of social norms, personal styles and cultural prescriptions.”

34. The court proceeded to state that:

“43. In burial disputes, we can only call our constitution a living constitution if it also considers the customs that communities regard as crucial in death rites but only to the extent that the death rites also promote constitutionalism. In the same breath, we can only call our customary practices progressive customs if they promote the burial wishes of the deceased that do not flout constitutional order.”

35. While it is trite that there is no property in a dead body, it is crucial that the wishes of the deceased as regards to the manner of interment ought to be considered. In this case, however, there is no indication that the deceased made any representation in this regard. Hence the need to turn on the interest of the parties claiming a right to inter the remains of the deceased.

36. I am aware that our legal system does not have a hierarchy of identifying who has the most ‘legitimate interest’ in a burial dispute. However, the courts have discerned the interests of the parties from their ‘legal proximity’. In **Ruth Wanjiru Njoroge v Jeremiah Njeri Njoroge & another (2004) eKLR**, the court expressed itself as such:

“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 the deceased in legal terms and as the marital union is the closest chain of relationship touching on the deceased therefore, it is only natural that the one who can prove this fundamental proximity to the

deceased, has the right of burial ahead of any other claimant...

37. An array of burial disputes in Kenya usually pits the closest relatives of the deceased against a spouse.

38. Religious and cultural practices of the deceased are also crucial when considering burial disputes. **Article 11 of the Constitution** recognizes culture as:

“... the foundation of the nation and as the cumulative civilization of the Kenyan people and nation...”

39. Further **article 32 of the Constitution** provides that every person has the right to freedom of conscience, religion, thought, belief, and opinion. The cultural and religious practices of the various communities and people in Kenya are therefore to be promoted if they are consonant with constitutional principles.

40. In the **Ontweka case supra**, the Court of Appeal further remarked thus:

“58. In instances where the customs and religious practices form part and parcel of the factual basis of a burial dispute, the same ought to be considered to the extent that they are not contrary to the Constitution and other laws. However, they do not automatically attain a higher place than the burial right of the person with the most proximate legal and familial bonds with the deceased.”

41. The main question flowing from the above is that who then has the right to bury the deceased and where ought the burial place be?

42. It is admitted that the deceased and the 1st Respondent were married under the **African Christian Marriage and Divorce Act (repealed)**. The appellants admitted that they both conceded to the marriage after the deceased threatened to kill herself if she was not allowed to marry the 1st Respondent.
43. It was the appellants' own admission that they obliged the marriage of the deceased to the 1st Respondent knowing too well that the Kikuyu customary rites regarding marriage had not been concluded. Following the Christian marriage, the deceased and the 1st Respondent lived together for a period of thirteen (13) years before her demise.
44. It can be inferred from the deceased's conduct in her lifetime that she desired to be governed by the rules under the **African Christian Marriage and Divorce Act**, so much so that, for the entire duration of her marriage to the 1st Respondent, there was no documented attempt to cause the 1st Respondent to abide by the customs and practices of the appellants regarding marriage.
45. Although Kenya has a plurality of marriage systems, no system of marriage ranks higher than the other. A spouse married within any system of marriage recognized under the **Marriage Act, CAP 151** enjoys the rights and benefits that attend to such marriage. In the instant case, the fact that the 1st Respondent was married to the deceased under the **African Christian Marriage and Divorce Act** and not under the Kikuyu Customary law does not make him any less of a spouse to the deceased.
46. Without any evidence of incapacity on the 1st Respondent's part, it is my finding, as did the trial court, that the Respondent has the right to bury the deceased

based on the doctrine of close proximity. The allegations of violence against the deceased's 1st child made by the appellants are not material in a burial dispute, the same are better raised in a custody cause.

47. The place of burial has been discussed by the persuasive decision of the High Court sitting in Uganda in **Namusoke Annet Kiwanuka v Eva Amuge and two others Miscellaneous Cause No 004 of 2023** as that which is:

“To be closely linked to three things: the person’s wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home. Additionally, the custom to which the deceased is subject comes into play.”

48. I agree with the High Court that the interest of the nuclear family ought to be respected but I disapprove of customary edicts that supersede the natural and paramount unit of society, safeguarded under **article 45 of the Constitution**. Without family, there cannot be customs and social norms. No wonder the Constitution regards the family as the natural and fundamental unit of society. It is only when the deceased is a known cultural leader that the decision on the place of burial can be deferred from the family to the cultural society as it was in the **SM Otieno case**.

49. In this context therefore, customary law cannot be used to oust the validity of a marriage duly recognized by the Constitution. To allow customary law practices to supersede clearly defined legal provisions in both the Constitution and statute would be against public policy. In

fact, it would amount to sanctioning anarchy within the smallest and fundamental unit of the society.

50. Undeniably, customary law is applicable where one or more of the parties is subject to or affected by it. In this instant however, it is admitted that the deceased herself refused to submit to customary law in her lifetime. When her parents opposed her marriage to the 1st Respondent, she threatened to kill herself. Thus, causing the parents to sanction the marriage. It would therefore be unconscionable to hide behind customary law to sanction that which the deceased in her lifetime had found objectionable and clearly departed away from.

51. I therefore disagree with the appellants assertion that the trial court disregarded customary law. I find that the court rightly considered the evidence on customary law but excluded it on the basis that the 1st Respondent had proven his right to bury the deceased to the required standard under the doctrine of close proximity. He produced a certificate of marriage whose validity remains unchallenged.

52. In the circumstances, and upon a consideration of the arguments presented by the parties it is my finding that the judgment of the trial court is sound, and I agree with it wholly.

53. ***The upshot of the matter is that the Respondent reserves the right to bury the deceased while the appellants, as parents of the deceased, have the right to participate in the burial.***

54. ***The appeal herein dismissed and judgement of the trial court delivered on 12th June 2025 upheld.***

55. I make no order as to costs since this is a family matter.

56. Stay of execution for 21 days is granted to the Respondents for purposes of filing an appeal on condition that the Respondent henceforth meets the expenses of the preservation of the body at the morgue from the date hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF FEBRUARY, 2026.

**HON. T. W. Ouya
JUDGE**

**For Applicant.....Andati
For Respondent.....Gatundu
COURT ASSISTANT.....Brian**