

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**HCCA NO. E014 OF 2026**

**LEONIDA ANYANGO  
MUGA.....APPELLANT**

**VERSUS**

**THOMAS OTIENO OKWACH.....1<sup>ST</sup>  
RESPONDENT**

**HOMEGROUND FUNERAL HOME.....2<sup>ND</sup>  
RESPONDENT**

***(Being an appeal from the judgment of Hon. J.P. Mkala  
(RM) in Siaya CMCC No. E038 of 2026 dated 16/3/2026)***

**BETWEEN**

**THOMAS OTIENO  
OKWACH.....PLAINTIFF**

**VERSUS**

**LEONIDA ANYANGO MUGA.....1<sup>ST</sup>  
DEFENDANT**

**HOMEGROUND FUNERAL HOME.....2<sup>ND</sup>  
DEFENDANT**

**JUDGMENT**

1. The appeal arises from the judgment of Honourable J. P. Mkala in Siaya CMCC No. E038 of 2026 dated 16/3/2026 wherein he dismissed the Appellant's suit and handed the body of Lilian Atieno Muga to the 1<sup>st</sup> Respondent for burial with leave for the extended family to participate in the burial. The Appellant was also ordered to surrender the burial permit, failing which the 2<sup>nd</sup> Respondent shall proceed to issue a fresh one to facilitate the burial.
  
2. The Appellant was aggrieved by the aforesaid decision and duly filed her Memorandum of Appeal dated 16/3/2026, wherein she raised the following grounds of appeal:
  - i) That the trial court erred in law and in fact and misdirected itself on the law regarding burial disputes;
  - ii) That the trial court erred in law and in fact by failing to consider clear evidence of spousal neglect and cruelty by the 1<sup>st</sup> Respondent towards the deceased;
  - iii) That the trial court erred in law and in fact by failing to hold that the 1<sup>st</sup> Respondent had conducted himself towards the deceased in a manner that divested him of the spousal right to bury his wife;

- iv) That the trial court erred in law and in fact by failing to hold that the 1<sup>st</sup> Respondent, though still lawfully married to the deceased at the time of her death, was divested of the spousal right to bury his wife by virtue of his conduct towards the deceased;
- v) That the trial court erred in law and in fact by determining a spousal burial dispute on the basis of child support rather than spousal support;
- vi) That the trial court erred in law and in fact by failing to hold that there were discernible and clear wishes of the deceased regarding her preferred place of burial;
- vii) That the trial court erred in law and in fact by failing to hold that there were no compelling reasons to disregard the clear wishes of the deceased regarding her preferred place of burial;
- viii) That the trial court erred in law and in fact by failing to uphold the clear wishes of the deceased regarding her preferred place of burial;
- ix) That the learned magistrate erred in fact and law in giving the 1<sup>st</sup> Respondent custody of the deceased's body for burial against the deceased's wishes, and despite the 1<sup>st</sup> Respondent's conduct towards the deceased which divested him of the right to bury the deceased;
- x) That the trial court erred in law and in fact by failing to consider documentary and oral evidence submitted by the Appellant; and
- xi) That the trial court erred in law and fact when he decided the whole case against the weight of the evidence.

The Appellant therefore prayed that the appeal be allowed and the orders of the trial court issued on 16/3/2026 be set aside and or vacated and that the costs of the appeal be borne by the Respondent.

3. This being the first appellate court, its duty is well cut out namely, to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to decide whether or nor to uphold the decision of the trial court. the court will have to contend with the fact that it neither saw nor heard the witnesses as they testified and must therefore provide due allowance for that. See **Selle Vs. Associated Motor Boat Co. Ltd [1968] EA 123.**

4. Vide the plaint dated 23/2/2026, the 1<sup>st</sup> Respondent sued the Appellant and sought several reliefs inter alia; that a declaration that the Plaintiff (1<sup>st</sup> Respondent) is entitled to inter the remains of his deceased wife Lilian Atieno Muga; a permanent injunction do issue restraining the 1<sup>st</sup> Defendant (Appellant) by herself, agents, family members, relatives or any person acting under instructions from removing and disposing the body of the deceased Lilian Atieno Muga from Home Ground Funeral Home; an order directing the Plaintiff (1<sup>st</sup> Respondent) to inter the remains of his deceased wife in their matrimonial home situate at Wich Lum, Nyaguda Sub Location Bondo Sub County and costs of the suit.

5. The 1<sup>st</sup> Defendant (Appellant) admitted the existence of a marriage between the Plaintiff and the deceased as pleaded in the Plaint save that for the entirety of the marriage, the Plaintiff subjected the deceased to a lot of suffering which forced her to seek shelter at her sister's place and at her parents' home together with her children. That the Plaintiff and deceased parted ways in 2019 and have never been together until her demise. That during the deceased illness, the Plaintiff did not come to her aid or the children. That the deceased had made her wish to be buried at her parents' home but not at her matrimonial home.
6. The case proceeded for hearing in earnest on 13/3/2026. Thomas Otieno Okwach (PW1) adopted his witness statement dated 10/3/2026 as his evidence in chief. He stated that the deceased was his legally married wife as they had solemnized their marriage under the Marriage Act 2014. That the deceased had been suffering from cancer and that at first, she used to live with her sister at Siaya town while pursuing her KMTTC studies and later at her mother's home. That he allowed his wife to be at her mother's place as he could not manage to be with her due to the short period of permission by his employer (TSC). That he had rented a house for his wife within Siaya town as she undertook her studies. That his employer insurance cover catered for his wife and children. That his brother and sister supported his spouse and children. That he has no dispute with his wife during her lifetime. That he seeks the courts to allow him buy the remains of his wife.

On cross examination, he stated inter alia; that he does not have evidence showing that he enrolled the deceased at KMTTC and also does not have receipts showing that he paid fees; that the deceased was staying with her mother at the time she was ailing; that he used to send money to the deceased for the children upkeep; that he did not have receipts showing rent payments.

7. **Charles Omondi Otiato (PW2)** adopted his statement dated 10/3/2026 as his evidence in chief. That he was not aware of any issues between the Plaintiff and the deceased. That he is also not aware of the wishes of the deceased on the issue of her burial.
8. **Cyprian Okwach Obonyo (PW3)** adopted his witness statement dated 10/3/2016 as his evidence in chief. He stated that he did not know if the Plaintiff had any issues with the deceased. That there was no wish made by the deceased regarding the place of her burial.
9. **Leonida Anyango Muga (DW1)** adopted her witness statement dated 6/3/2026 as her evidence in chief. That she had no agreement with the Plaintiff to take care of his children and his wife. That the deceased had informed her that she should not be taken back to her matrimonial home in Bondo because her in-laws had neglected her. That she decided to take back her daughter and her children because

the Plaintiff had neglected them. That the deceased informed her that she should not be taken to Bondo whether dead or alive.

On cross examination, she stated inter alia; that the deceased had been married to the Plaintiff who paid her dowry and alter had a church wedding ; that the deceased did not lodge any complaint to any Government agency over any dispute with the Plaintiff; that the deceased's school fees at KMTTC was paid by HELB; that the deceased indicated that she should not be taken to Bondo.

10. **Irene Muga (DW2)** adopted her witness statement dated 6//3/2026 as her evidence in chief. She stated that the deceased never lived in the Plaintiff's house as she used to live with her. that the deceased used to visit her matrimonial home but later stopped after a dispute arose.

On cross examination, she stated inter alia; that she is the one who took the body to the mortuary; that she is the one who gave instructions to the mortuary attendant not to allow any unauthorized person to view the body; that she is the one who lived with the deceased; that the Plaintiff's marriage with the deceased broke down in 2019; that the Plaintiff did not support her sister ; that she is aware that the Plaintiff use to send money to the deceased; that the Plaintiff never contributed money towards the deceased's medical bill.

11. **George Oluoch Muga (DW3)** adopted his statement dated 6/3/2026 as his evidence in chief. On cross examination, he stated inter alia; that the deceased was lawfully married to the deceased; that there was no written will made by the deceased but had spoken orally; that one Father Ben had been paying fees for one child but that there are no receipts to that effect; that the Plaintiff has not been in the picture since members of the church had been sponsoring the kids; that he had been with the deceased for three years after she came home.
12. The 2<sup>nd</sup> Defendant called Catherine Mulama (DW4) who adopted her statement dated 2/3/2026 as her evidence in chief. That the body of the deceased was brought to them on 14/2/2026 by Irene Muga (DW2) who directed that nobody would be allowed to view the body without her consent. That the mortuary fee at the time stood at Kshs 13,450/.
13. After closure of the respective cases, the trial court later considered the matter and arrived at the impugned judgment which precipitated the appeal herein.
14. The appeal was canvassed by way of written submissions. Both parties duly complied.

15. Vide submissions dated 7/4/2026, the Appellant's learned counsel started off by setting out the law governing burial disputes in Kenya, before turning to whether the trial court correctly applied the facts to the law in reaching the impugned decision.

***The law on the right to Burial in Kenya***

While a man or woman would have the primary right to bury their deceased spouse, courts have taken a very dim view of people who abandon their spouses for years, and only turn up to claim burial rights once the spouse is dead.

In **SAN Vs. GW, Civil Appeal No. 1 of 2020 [2020] eKLR**, the Court of Appeal (Ouko P) Gatembu & Murgor, JJ.A) laid down the law on burial disputes in a similar case thus:

***".... courts have also been unanimous as far as we can tell from decided cases that, both laws, common and customary, have one thin in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy.***

See **Apeli vs. Buluku (1980) Eklr and Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira [2014] eKLR.**

The wishes or will on how the deceased's remains will be disposed of upon death are not, as a general rule binding because in the first place, there is no property in a dead body and secondly, because a dead person cannot take part

in the decision of his or her own burial. There must however be compelling reasons for not heeding the expressed wishes of the deceased.

As was observed by the court in SM case, it is only through legislation that matters such as the deceased's wishes will be given a permanent place in law.

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.

The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in **Samuel Wambi Vs. COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR** expressed the following view:

***“....a person's conduct to a deceased person can extinguish the right o that person of burying the remains of the deceased. The Appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her Kibos there was no credible evidence to prove so(sic). The fact that he was the deceased's first-born son did not give him an automatic right to***

***bury her even if Luo customary law dictates so. the court has to consider all the circumstances of the case and the justice of the case. In this case, besides the fact that given the father and his family's treatment of the deceased he is not deserving of the right to bury the deceased's remains."***

16. The Appellant also relied on the decision of the High Court in Nakuru (Maraga J – as he then was) in ***Oliver Bonerari Omoi & 5 Others v. Joseph Baweti Orog*** (2010) eKLR, a dispute over burial rights of Mary Kemunto Basweti, a deceased woman from Kisii. The Respondent Joseph Bosweti Orog, claimed he married the deceased under Kisii Customary Law in 1960's by paying dowry (15 cows and 8 goats) and sired 8-9 children with her. the trial court found in his favour, granting the right to bury her in Kisii. However, the appellate court reversed this, holding that the deceased expressed wish to be buried in Njoro (her acquired home) and her 30 – year estrangement from the Respondent override his customary law right. In reaching its determination, the Court was guided by the deceased's final wishes and the nature of her relationship with her estranged husband both of which extinguished his reight as a widower to bury her.

Also, the Appellant relies on the decision of the Court of Appeal in ***Edwin Otieno Ombajo Vs. 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 underserving to bury the remains of his wife.

17. In reaching the conclusion, and taking away the husband's right to bury his wife, the Court of Appeal held as follows:

***“The facts of this matter are clear that the Respondent appears to have lost all interest in the deceased and their two children of the marriage as soon as the deceased left the matrimonial home. Although the Respondent stated in the superior court that the deceased used to visit him at his chambers, the surrounding circumstances suggest otherwise. If the deceased indeed, used to visit the Respondent as he alleged, and he used to give her some money, it is not clear why the Respondent was not regularly remitting to her the maintenance money. Nor is it clear to us why he was not meeting her medical bills and those of the children.*”**

Evidence was adduced in the superior court to the effect that the Respondent was so hostile to the deceased and the children of their marriage that sometime in 1992, when the deceased and the children of their marriage that sometimes in 1992, when the deceased wrote to him to

request for money for the medical expenses of the children, he refused to pay arguing that the children were not sick when she left the matrimonial home with them. That is how callous the Respondent was to the plight of the deceased and the children.

It is also, noteworthy that no specific efforts were made by the Respondent to urge the deceased to resume cohabitation.”

18. On the issue of whether the 1<sup>st</sup> Respondent has the right to bury his deceased wife in light of his conduct towards her, it was submitted that while it was never denied that the 1<sup>st</sup> Respondent was the deceased’s husband, the Appellant and her witnesses submitted uncontroverted evidence demonstrating neglect and abandonment of the deceased including in her final moments when she was facing death from cancer. As was held in the above cases, such conduct can extinguish a husband right to bury his wife.

19. Evidence presented on behalf of the Appellant showed that he deceased took off from the 1<sup>st</sup> Respondent in 2019 following abuse by the 1<sup>st</sup> Respondent, and went to live with one of her sisters in Siaya. While there, she was diagnosed with cancer. She later went to live with her mother, the Appellant in her home in Komenya. She took her kids to live with her after the Appellant neglected them too. The neglect was so bad that one of the children suffered a stroke due to

poor medication for sickle cell disease. At no point did Lilian return to the Appellant. more importantly, at no point did the Appellant visit her to inquire into her health and welfare, or to support her, including after her cancer diagnosis and in her terminal months.

20. In its impugned decision, the trial court did not consider this crucial evidence of neglect and abandonment that proved that the 1<sup>st</sup> Respondent never visited the deceased for seven years. That the Appellant also adduced evidence to show that the 1<sup>st</sup> Respondent did not support the deceased to enroll for her course at KMTC as he alleged in his plaint. Contrary to his allegations, that he provided rent and fees, the Appellant provided evidence showing that the deceased lived with her sister (DW2) in Siaya, and that her fees were paid partly by HELB and partly by the deceased and her siblings. In its impugned decision, the trial court held that Both PW1 and DW2 were unable to prove who between the two paid rent for and on behalf of the deceased. In reaching this conclusion, the trial court disregarded clear evidence adduced by DW2 who testified that she accommodated the deceased in her house in Siaya. The trial court erred in fact and in law by requiring DW2 to provide evidence that she paid rent for the deceased when her testimony was that she corroborated by DW1 and DW3, all who confirmed that the deceased used to live with her sister DW2 in DW2's house in Siaya. It is the 1<sup>st</sup> Respondent who was to adduce evidence that he paid rent for the deceased in Siaya which evidence was never produced.

21. The 1<sup>st</sup> Respondent's neglect of the deceased was further illustrated by the below evidence which was adduced by the Appellant.

i. **Failure to act as next of kin during illness** - when the deceased was diagnosed with cancer, it would ordinarily have been expected that her husband, the 1<sup>st</sup> Respondent was nowhere in Lilian's life from the moment she was diagnosed with cancer in early 2022 until her painful demise in February 2026. Hospital records indicate that the deceased's mother (DW1) was the one who signed the necessary documentation as next of kin during her treatment. This reflects the absence of the 1<sup>st</sup> Respondent in the matters concerning his wife's medical care and welfare, and he cannot just appear after Lilian's death to assert his rights to bury her as her husband. Where has he been during the five years Lilian battled with cancer? Was he not her husband during these years? Didn't that status come with responsibilities? Should this court allow him to claim his right as the husband when he never stepped up to take care of his responsibilities as the husband? The trial court disregarded all this in its impugned decision.

ii. **As regards the issue of being absent even at the time of death,** - it was submitted that by his

own admission, the 1<sup>st</sup> Respondent was not with the deceased when she died. he did not offer any plausible explanation before the trial court for why he was not by his wife's bedside in her final moments. Any right-thinking member of society would expect a man to be by his terminally ill wife in her final moments if he truly cares about her. upon the deceased's death, it was not her husband who signed the required documentation at the hospital. Instead, her sister Irene (DW2) assumed the responsibility and signed for the release and processing of the body as the next of kin. This further illustrated the continued absence of 1<sup>st</sup> Respondent in critical family responsibilities. A man who does not attend to his wife in sickness, and who was nowhere near her in her final moments on earth cannot be allowed to assert his status as the husband, complete with burial rights after the wife has died. the trial court disregarded this fact, too, in its impugned decision.

iii. **As regards removal of Lilian and the children from medical insurance**, it was submitted that the evidence presented by the Appellant showed that eh 1<sup>st</sup> Respondent removed the deceased and her children from his medical insurance cover. This is despite the fact that the deceased was battling cancer and one of their children lived with sickle cell

anaemia. This decision was made despite the fact that he had access to a comprehensive medical insurance policy through his employment, and despite the fact that including Lilian in his SHA cover would not have cost him an extra shilling. Evidence provided before the trial court showed that to-date, 1<sup>st</sup> Respondent remains without any registered dependants under his medical insurance cover, despite having children who required medical support. As a result of this conduct by the husband, the deceased was denied medical care that she would have accessed if the 1<sup>st</sup> Respondent had included her in his insurance cover. Consequently, the 1<sup>st</sup> Respondent contributed to Lilian's death by denying her medical care, and he cannot now return to claim the right to bury her simply because he is her husband. You cannot contribute to someone's death, then claim the right to bury them simply because you are the husband. Despite the clear evidence of neglect, the trial court concluded in its impugned decision that the 1<sup>st</sup> Respondent had not abandoned his wife. How does a court conclude that a man has not abandoned his wife when the man has not included his wife in his employment medical cover, particularly when it would not cost him an extra shilling to include the wife?

- iv. **As regards the issue of lack of support during cancer treatment**, the evidence presented by the

Appellant and her witnesses showed that during the period of her illness, the deceased attempted to involve the 1<sup>st</sup> Respondent in efforts to raise funds for her cancer treatment. She invited him to join a WhatsApp group that had been created to mobilize financial support for her medical expenses. However, the 1<sup>st</sup> Respondent declined to participate in this initiative. How is this a man who can be accorded the right to bury his deceased wife, and how can the trial court conclude that such a man has not abandoned his wife?

- v. **As regards the issue of financial support for Lilian and the children**, it was submitted that while the 1<sup>st</sup> Respondent provide Mpesa statement showing that he sent some money to the it is striking that he sent funds once a year on average. How does a salaried husband send his ailing wife money only once a year? And how come the amounts transacted are eerily the same (Kshs 40,000/=)? The answer lies in the evidence represented by the Appellant which revealed the true source of these funds. The evidence sows that he money was never from his pocket yet he had an income as a salaried teacher. Evidence adduced by the Appellant showed that het 1<sup>st</sup> Respondent used to receive educational grant funds intended for the deceased children but that he was inconsistent in forwarding these funds and in many instances did

not remit the full amount to support the children's education.

Again, WhatsApp messages submitted by the Appellant showed clearly that the limited financial assistance the 1<sup>st</sup> Respondent occasionally sent was sourced from church based educational grants facilitated through his sister, Marygorety, rather than from his personal income. The evidence showed clearly that the deceased would be asked to send photos of the children for onward transition to Marygorety, and that shortly after the photos were sent, the 1<sup>st</sup> Respondent would send money to the deceased. Even then, the deceased had to plead and beg for the money, and was forced to seek the intervention of the 1<sup>st</sup> Respondent's brother Father Ben for the funds to be released. This raises serious concern that despite being a salaried employee of the TSC the 1<sup>st</sup> Respondent did not consistently utilize his own earnings to support the welfare and needs of the deceased and his family. This shows a consistent pattern of neglect and abandonment.

22. In its decision aforesaid, the trial court found that these funds showed "a family effort" this finding cannot stand for two reasons: the obligation to support a wife rests on her husband and not the extended family. Consequently, in determining whether a husband has conducted himself towards his wife in a manner that divests him of the spousal

right of burial, the court should not wander into how the husband's extended family treated the deceased spouse, but should maintain laser focus on how the husband treated his wife.

23. Secondly, if anything, the dispute before court was whether the 1<sup>st</sup> Respondent as husband to the deceased was providing support to the deceased and not whether the children of the deceased were getting support. In its decision, the trial court confounded child support with spousal support. Child support is a totally different matter altogether, and donor funds meant for the education of the deceased's children cannot be equated to spousal support of determining whether the 1<sup>st</sup> Respondent was performing his husbandly duties towards the deceased.

24. The Appellant therefore submits that the trial court took into consideration extraneous matters in finding in favour of the 1<sup>st</sup> Respondent, and the decision should not stand. The trial court ignored and failed to analyze clear evidence which demonstrated a consistent and sustained pattern of neglect and abandonment by the 1<sup>st</sup> Respondent, Mr. Tom Okwach, towards his wife, Lilian. His absence during critical moments of Lilian's illness, the removal of his family from medical insurance despite serious health needs, the failure to assume responsibility as next of kin both during her treatment and at the time of her death, and the lack of financial support for his wife collectively point to a clear abdication of spousal

responsibility. Such conduct reflects a persistent failure to discharge the basic duties of care, protection and provision expected of a husband. In light of these circumstances, it was evident before the trial court that the burden of the deceased medical care, emotional and financial support was borne by the Appellant and her immediate family rather than by 1<sup>st</sup> Respondent. As stated by the Court of Appeal, the Appellant humbly submits that this pattern of conduct divested the 1<sup>st</sup> Respondent of the right he otherwise would have had to bury the deceased and the trial court erred in law and in fact in granting the 1<sup>st</sup> Respondent the burial rights.

25. On the issue of whether the deceased should be buried in accordance with her wishes, reliance was placed in **Oliver Bonerari Omoi & 5 Others v Joseph Basweti Orogó [2010] KEHC 1099, (KLR)**, the High Court held as follows regarding the wishes of the deceased:

***“although I concur with the Court of Appeal decision in the said case of Apeli Vs. Buluku, [2008] 1 KLR 873 that*** under English Law, there is no property in a dead body, it is, however, common knowledge that Africans treat their dead relatives differently. Africans highly respect their deceased relatives and reverently handle their burials. That is why they go into great expense and take a lot of time to arrange for their decent burial. With regard to where and/or who should bury the deceased, they invariably honour the deceased’s wishes.

See **Charles Onyango Oduke & Another vs. Samuel Anindo Wambi [2010] eKLR (Kisumu HCCC No. 143 of 2009)**.

Again, in **re Burial of Musa Magodo Keya (deceased) [2021] KEHC 5262 (KLR)**, the High Court (Achode J) held that “The place of burial of a person is 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.” Emphasis added.

And in **Jacinta Nduku Masai vs Leonida Mueni Mutua & 4 Others [2018] eKLR**, it was held that a burial wish of the deceased is paramount and supersedes all including customary law and legal proximity. The Court stated thus:

***“The main issues for consideration in a burial dispute is the wishes of the deceased if any had been expressed and the kind of relationship the contestants had with the deceased.***

**Those are more relevant to burial dispute than question for disposal of material assets and related claims and things. They rather than the succession regime should prevail in determining questions of burial.**

In **SAN VS. GW, Civil Appeal No. 1 of 2020 [2020] eKLR** the Court of Appeal (Ouko P) Gatembu & Murgor, JJA.) expressed itself thus:

***“....courts have also been unanimous as far as we can tell from decided cases that, both laws common and customary, have one thing in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy.***

See **Apeli vs. BUluku [1980] eKLR** and **Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira [2014] eKLR**.

**The wishes or a will on how the deceased’s remains will be disposed of upon death are not, as general rule binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must however, be compelling reasons for not heeding the expressed wishes of the deceased.**

**26.** The import of the above decision is that the wishes of a deceased person as to her preferred place of burial are paramount and can only be disregarded if there are

compelling reasons. In the present case, the trial court held that the wishes of the deceased were not clear. However, this finding was not supported by the evidence that was presented before court. the Appellant and her two witnesses all testified that the deceased expressed her wishes as to her place of burial with absolute certainty. The three testified that when it was clear she was at an end, the deceased informed them that she would like to be buried in Komenya because of the neglect and abandonment she had been subjected to by the 1<sup>st</sup> Respondent, who had not played any role in her life in her six final years. In the impugned decision, the trial court held that the wishes of the deceased as to her preferred place of burial were not certain simply because the 1<sup>st</sup> Respondent testified that the deceased did not tell him where she would wish to be buried. This decision cannot stand for two reasons. First, three witnesses who testified on behalf of the Appellant all confirmed that the deceased expressed clear wishes to be buried in her parents' home in Komenya. The trial court therefore erred in holding that the deceased wishes could not be ascertained yet three witnesses testified in unison as to these wishes. It is not to be forgotten that these three witnesses as the persons who spent considerable time with the deceased since they were with her final days. Secondly, it was frankly naïve for the trial court to expect the 1<sup>st</sup> Respondent to confess before court that the deceased told her that he is not to bury her in Bondo. The Appellant submits that there are no compelling reasons in this case for not heeding the clear

wishes of the deceased, and the trial court erred in not according those wishes due regard by dismissing the plaint and allowing the Appellant to bury her daughter in her home in Komenya. Burial of the deceased in Komenya would also allow her four children to participate fully in funeral. Evidence adduced by the Appellant showed that the deceased picked her children from the 1<sup>st</sup> Respondent and they have lived with the Appellant in Komenya since 2019. It would be extremely cruel to force them to return to the 1<sup>st</sup> Respondent's home for the burial of their mother, yet they had suffered immense neglect under the 1<sup>st</sup> Respondent.

27. In **SAN** case, the Court of Appeal concluded as follows:

***“We add that, it is highly unlikely that, after 26 years of absence from the Appellant and the Nyalenda home, the deceased would develop love for them and wish in his final days to go back but only for burial!***

***A part from the aforesaid 26 years of separation, the Appellant played no role in the deceased's life when he was bedridden, not even a visit to the deceased during the 2-year period when he was beset by illness.***

***In Samuel Onindo (supra) it was explained that a person conduct towards a deceased persons while alive could extinguish his or her right to bury the deceased. Since the Appellant did not show any***

***closeness towards the deceased after their separation and she did not show any sympathy towards him when he was ailing, it was only just that the deceased's wishes and choice of where he was to be buried were to be honoured.***

Judge Maraga then went on to hold as follows in determining the place of burial in the **Oliver Bonerari** case (supra)

***“For over thirty years the deceased was separated from the Respondent. For over 30 years the Respondent did not know where or how the deceased lived. He was not concerned with the deceased's sickness. How, in the circumstances, can such a man be allowed to take the deceased's body to Kisii for burial against her wishes just because he wants to avoid condemnation by his community? It would be immoral to allow such estranged husband to purport to love his wife in death. I have no hesitation in finding that, in the circumstances of this case, the deceased's wishes override the Respondent's customary law right to bury her body in his ancestral home in Kisii.***

28. The facts of this case are eerily similar to those in the **Edwin Otieno Ombajo, SAN** and the **Oliver Bonerari** cases where there was neglect and abandonment, including in times of illness, and where there were express wishes on the place of burial. Even if customary law were to be applied, the wishes on the place of burial. Even if customary

law were to be applied, the override any customary practices that would require the deceased to be buried by her husband. As determined by the Court of Appeal and the High Court, it is unlikely that having escaped from the 1<sup>st</sup> Respondent's home due to the suffering she went through while there, and having lived far from them for seven years, the deceased would love them enough to want to go back there for burial. The 1<sup>st</sup> Respondent neglected her in those years, including the five years she battled cancer. Though he was her husband, he was only a husband by law and not by deed. He did not show any closeness to the deceased and did not show any sympathy during the years she fought cancer. He was not with her when she was ill, and he was not with her when she died, yet he is her husband. In the circumstances, it is only just and fair that the deceased's wishes and choice as to her burial place be honoured, and that the court is urged to honour those wishes by allowing the appeal and allowing the Appellant to bury the deceased at the Appellant's home in Komenya.

29. Learned counsel for the 1<sup>st</sup> Respondent reiterated his earlier submissions before the trial court which were inter alia; whether there was a valid marriage between the Plaintiff and the Deceased within the Marriage Act of 2014; whether the parties to the marriage ever had a divorce or judicial separation as per the Marriage Act, whether the deceased had a will on where she wanted to be buried; who should bury the deceased.

30. Learned counsel therefore submitted that from the outset, it is now not in dispute that the 1<sup>st</sup> Respondent and the deceased were validly married and further that it is not in dispute that the 1<sup>st</sup> Respondent and the deceased had separated. Counsel thus went ahead to propose that his submissions will relate to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal.

31. As regards whether the trial magistrate erred in law and fact and misdirected itself on the law regarding burial disputes in his judgment, it was submitted that the learned trial magistrate gave the 1<sup>st</sup> Respondent spousal right to bury his deceased wife on the premises that they were lawfully wedded, did not divorce or judicially separate and that the Plaintiff had led evidence in supporting the wife through mpesa statements. That the trial court relied on the case of John Omondi Oleng & Another v Sue Flan Radal [2012] eKLR where Mabeya J held that “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 “it is trite that there is no property in a dead body. Further, apart from judicial pronouncements, Kenya has not legislated on the issue of disposing a dead body and this has been a controversial subject in Kenya since the colonial era. However, courts have found fortitude in African culture that

are not repugnant to justice and also religious practices in their determination on who is to bury a deceased.

32. It was submitted that the Constitution embraces our customs including the burial rights. In Kenya burial ceremonies are considered very important just like marriages and other social celebrations, thus the issue of where a person is buried has serious implications for families and their ownership or property in a dead body that can be transferred to another in a will. That the expressions in the will therefore remain just that, expression and that in case there is a dispute between the family members as to the disposal of a body parties can apply to the court for a determination on who should in those circumstances, bury the deceased. That in determining such issues, there are three main factors that the courts may consider in making their decision and which are *inter alia*; religion, where the deceased changed his religion; the will or wishes of the deceased person; the customs of the deceased person.

33. Given the foregoing, it was submitted that the deceased was a Christian and under Christian practices, husbands bury their wives. That she had a Christian wedding therefore there is the need to conform to Christian to Christian practices including burial. That the 1<sup>st</sup> Respondent and deceased conducted a Luo traditional marriage too where dowry was paid and this argument that they practiced Luo customs where wives are buried at their husband's homes/matrimonial homes and not by their mothers. That in

the absence of a will regarding preferred burial site, courts have upheld the traditions customs so long as these were not repugnant to justice and morality or to a written law. This was the case in **Kandie and 2 Others vs Cherogony [2002] eKLR**, where the court upheld Keiyo customary law that made it a taboo for a man to be buried at his -in-laws. It was therefore submitted that this court finds fortitude in the already developed jurisprudence that have guided that spouses are given the primary burial rights of their departed spouses.

34. It was submitted that the Appellant has woven her case around spousal neglect that the 1<sup>st</sup> Respondent neglected his wife, who at the time of her sickness and death was under the Appellant's care but which was not backed with evidence. It was submitted that on the contrary, the 1<sup>st</sup> Respondent in his plaint and application under certificate of Urgency robustly articulated circumstances which led to the deceased moving into her mother's home. He asserted that even though she allowed his wife to live with the mother for tender care during illness, he did so because he is a teacher who must attend government duty that would constrain him from affording his wife the tender care. Besides his employer would not give him an indefinite leave to take care of the wife. That the 1<sup>st</sup> Respondent led evidence of Mpressa statement clearly showing that he was sending his wife money through her number with the most recent transaction of Kshs40,000/= depicted on 13<sup>th</sup> January 2026 barely three weeks to her demise and that some monies were received in

cash by his said spouse and as such no receipts could be exhibited for that since spouses do not keep receipts of monies exchanged amongst themselves and that the court should take judicial notice of that fact. Further, it was submitted that given the Mpesa transactions indicating that the 1<sup>st</sup> Respondent has been sending the spouse funds, the claim for spousal neglect should therefore be rendered moot. Further, there was also support from the 1<sup>st</sup> Respondent's siblings two of whom are a priest and a nun.

35. It was submitted that the 1<sup>st</sup> Respondent allowed his wife and children to move in with the Appellant purely because of the unfortunate circumstance but not because of a strained relationship and that the fact that the deceased died in the company of the mother and sister is not justification of the 1<sup>st</sup> Respondent's neglect. Further, that not all spouses die in the arms of each other and the situation should not be sensationalized to deny the 1<sup>st</sup> Respondent the remains of his lawfully wedded wife. That the Appellant should not be allowed to conjure a case of neglect by the 1<sup>st</sup> Respondent on his spouse and succeed with such a creation before this Honourable Court.

36. On whether the learned magistrate disregarded the deceased's wishes, it was contended that no evidence to that effect was tendered and thus the claim now stands on rickety stilts and should be rejected. It was further

contended that it is unheard of for a married woman who naturally would be buried in her matrimonial home to make such wishes without a will to justify or back up such averments. It was also contended that whereas recent judicial pronouncement have clearly stated that wills and wishes should be given weight in burial disputes, such wishes and wills should be documented and not mere suggestions. Reliance was placed on Section 107 of the Evidence Act which is clear beyond peradventure that the burden of proof rests on the party who desires the court to give judgment as to any legal right or liability dependent on the existence of facts which they assert. Essentially, the person who makes an allegation must prove it. That as it stands, there is no evidence that there was such a wish or will.

37. On whether the evidence/list and bundle of documents filed by the Appellant after the full hearing is admissible in this Appeal without leave? The hearing of this suit was conducted in the morning of 13<sup>th</sup> March 2026, and by noon it had ended with directions that parties file written submissions. Whereas she alluded to relying on 8 exhibits, none were on record during the hearing at 8.44 pm, the Appellant was filing a list and submissions. Unfortunately, at at 8.44 pm, the Appellant was filing a list and bundle of documents to fill gaps in her case that had arisen during her cross examination. Whereas she alluded to relying on 8 exhibits, none were on the record during the hearing. However, that evening, the CTS indicates that the Appellant

sneaked in a bundle of over 50 pages bearing documents, which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not appreciate during the hearing, to subject the said documents to cross examination. Learned counsel strongly submitted that the said documents and witness statements filed at night of 13th March 2026 at 8.44 pm must be struck out as they might occasion a mistrial because they were not subject to cross examination and that no leave was sought for their late filing. It was pointed out that the Appellant has equally placed heavy reliance on them in this appeal yet other parties with emphasis to the 1<sup>st</sup> Respondent cannot submit on them because they did not form part of the record during the hearing.

38. It was finally submitted that in the absence of any justification at all by the Appellant that the 1<sup>st</sup> Respondent and the deceased had acrimonious relationship, it was contended that the burial rites and right should be given to the 1<sup>st</sup> Respondent who has demonstrated that he was in his wife's life until death did them part. That the circumstances that led to their separate living is clearly justified and that should not be weaponized by the wife's relatives against the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent had married the deceased under Luo customary law and later solemnized the marriage in accordance with the Marriage Act 2014, wherein they were issued with a marriage certificate. It is also not in dispute that the 1<sup>st</sup> Respondent and the deceased had

separated in 2019 and had stayed apart of the record during the hearing.

39. It was finally submitted that in the absence of any justification at all by the Appellant that the 1<sup>st</sup> Respondent and the deceased had an acrimonious relationship, it was contented that the burial rites should be given to the 1<sup>st</sup> Respondent who has demonstrated that he was in his wife's life until death did them part. That the circumstances that led to their separate living is clearly justified and that should not be weaponized by the wife's relatives against the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent and the deceased had not divorced. That the deceased equally left no will, thus her burial rights should conform to the Christian faith as well as the Luo Customary Practices, which are in fact not repugnant to justice.

40. I have considered the record of appeal and the rival submissions tendered. It is not in dispute that the 1<sup>st</sup> Respondent had married the deceased under Luo customary law and later solemnized the marriage in accordance with the Marriage Act 2014, wherein they were issued with a marriage certificate. It is also not in dispute that the 1<sup>st</sup> Respondent and the deceased had separated in 2019 and had stayed apart until the demise of the deceased recently. I find the issue for determination is whether the appeal has merit.

41. This being a burial dispute, it must be taken into consideration that the said disputes have plagued the courts in Kenya. Indeed, a codified law on burial dispute is yet to be enacted. It is common ground that the ideal situation is where a surviving spouse is allowed to bury the deceased spouse. However, courts have taken a very dim view of people who abandon their spouses for years, and only turn up to claim burial rights once the spouse is dead. In **SAN Vs. GW, Civil Appeal NO. 1 of 2020 [2020] eKLR** the Court of Appeal (Ouko (P), Gatembu & Murgor JJA.) the Court laid down the law on burial disputes as follows:

***“..courts have also been unanimously as far as e can tell from decided cases that, both laws, common, in so far as burial is concerned , that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy. See Apeli vs. Buluku [1980] eKLR and Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira [2014] eKLR.***

Indeed, the wishes or a will on how the deceased's remains will be disputed of upon death are not, as a general rule, binding because in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must, however, be compelling reasons for

not heeding the expressed wishes of the deceased. The Appellant herein maintains that the deceased had expressed her wish to be buried at her parents' home while on the other hand, the 1<sup>st</sup> Respondent contends that as the deceased's husband, he should be allowed to inter her remains.

As was observed by the Court in the SM case, it is only through legislation that matters such as the deceased's wishes will be given a permanent place in law. However, in view of the fact no such law has been enacted, then the court will determine the matter based on evidence tendered by the parties. One of the factors to be factored into account is that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased and they include spouse, children, parents and siblings, in that order. The other consideration is that the person claiming the right to bury the deceased must be one who is shown to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in **Samuel Anindo Wambi vs COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR** expressed the following view.

***“A person conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The Appellant did not show any family***

***closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. (sic)***

***The fact that he was the deceased's first born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case..... in this case, besides the fact that given the father and his family's treatment of the deceased, he is not deserving the right to bury the deceased's remains."***

42. The rival contentions herein appear to bear resemblance with those in a Nakuru High Court decision in **Oliver Bonareri Omoi & 5 Others vs. Joseph Baweti Orog**o (2010) eKLR where Maraga J, (as he then was) while handling a dispute over a burial right of **Mary Kemunto Basweti**, a deceased woman from Kisii. The Respondent, Joseph Basweti Orog, claimed he married the deceased under Kisii Customary Law in 1960 by paying dowry (15 cows and 8 goats) and sired 8-9 children with her. The trial court found in his favour, granting him the right to bury her in Kisii.

However, the Appellate court reversed this, holding that the deceased's expressed wish to be buried in Njoro (her acquired home) and her 30 -year estrangement from the Respondent override his customary right. In reaching its determination, the court was guided by deceased's final wishes and the nature of a relationship with her estranged husband both of which extinguished his rights as a widower to bury her.

Again, in the case of **Edwin Otieno Ombajo vs. Martin Odera Okumu [1996] eKLR**, the Court of Appeal held that the husband's right to bury his deceased wife's behavior renders him underserving to bury the remains of his deceased wife's body may be superseded by the deceased wishes if the husband's behavior renders him underserving to bury the remains of his wife. In reaching this conclusion, and taking away the husband's right to bury his wife, the Court of Appeal held as follows:

***“The facts of this matter are clear that the Respondent appears to have lost all interest in the deceased and their two children of the marriage as soon as the deceased left the matrimonial home. Although the Respondent stated in the superior court that the deceased used to visit him at his chambers, the surrounding circumstances suggest otherwise. If***

***the deceased indeed, used to visit the Respondent as he alleged, and he used to give her some money, it is not clear why the Respondent was regularly remitting to her the maintenance money. Nor is it clear to us why he was not meeting her medical bills and those of the children. Evidence was adduced in the superior court to the effect that the Respondent was so hostile to the deceased and the children of their marriage that sometime in 1992, when the deceased wrote to him to request for money for the medical expenses of the children, he refused to pay arguing that the children were not sick when she left the matrimonial home with them. That is how callous the Respondent was to the plight of the deceased and the children.***

It is also, noteworthy that no specific efforts were made by the Respondent to urge the deceased to resume cohabitation.”

43. On whether the 1<sup>st</sup> Respondent has the right to bury his deceased wife in light of his conduct towards heir, it was submitted that the 1<sup>st</sup> Respondent and his witnesses maintained that the deceased was not neglected as alleged

by the Appellant and went ahead to avail some Mpesa transaction showing that he sent money to the deceased for the upkeep of the children. The 1<sup>st</sup> Respondent also claimed that he had a brother who is a priest and a sister who is a nun who had organized for funds. The Appellant on the other hand maintained that the 1<sup>st</sup> Respondent abandoned the deceased whom he separated with in 2019 and that she has and to shoulder her children upkeep as well as the deceased and the medical bill. The Appellant therefore urged this court to find that the 1<sup>st</sup> Respondent's conduct should extinguish the deceased's husband, the Appellant and her witnesses his right to bury the deceased.

44. The 1<sup>st</sup> Respondent has confirmed that he and the deceased separated in 2019 and that the deceased went to live with one of her sisters in Siaya. The 1<sup>st</sup> Respondent stated that he later rented a house for her in Siaya town as she pursued her studies at KMTC and that he used to pay the rent. However, the 1<sup>st</sup> Respondent did not present credible evidence of having rented a house for the deceased as there was no consistent evidence of receipt of payment to the landlord or an agreement with the land lord. The 1<sup>st</sup> Respondent also confirmed that when the deceased was diagnosed with cancer, she went to live with her mother, the Appellant, in her home in Komenya. The Appellant stated that the a deceased took her kids to live with her after the Appellant neglected them and that he neglects was so bad that one of the children suffered a stroke due to poor

medication for sickle cell disease and that the deceased did not return to her matrimonial home. The 1<sup>st</sup> Respondent did not avail evidence as to whether he visited the deceased to inquire into her health and welfare, or to support her, including after her cancer diagnosis and in her terminal months. The 1<sup>st</sup> Respondent gave the explanation that due to the fact he was a TSC teacher, he could not be given permission for long to go and look after the deceased and that he risked losing his job. Even though the circumstances were tight, the 1<sup>st</sup> Respondent could as well have utilized weekends for that purpose. The Appellant stated that the 1<sup>st</sup> Respondent was nowhere and only showed up following the demise of the deceased. It transpired from the trial proceedings the trial court did not consider this crucial evidence of neglect and abandonment that showed that the 1<sup>st</sup> Respondent never visited the deceased for many years after they had separated in 2019. The Appellant presented evidence showing that the 1<sup>st</sup> Respondent did not support the deceased to enroll for her course at KMTC as he alleged in his plaint and that his allegations that he provided rent and fees was watered down by the Appellant who provided evidence showing that the deceased lived with her sister (DW2) is Siaya, and that he fees were paid partly by HELB and partly by the deceased and her siblings. The trial court appears to have missed this crucial evidence when it held that “both PW1 and DW2 were unable to prove who between the tow paid rent for the deceased when her testimony was that she accommodated the deceased in her house and thus

the issue of renting a house did not arise at all. This testimony by DW2 was corroborated by DW1 and DW3, all who confirmed that the deceased used to live with her sister (DW2) in her house in Siaya. The burden of proof was upon the 1<sup>st</sup> Respondent to adduce evidence that he paid rent for the deceased in Siaya which evidence was never produced and hence the version of DW2 must be believed.

45. The evidence that was tendered showed that right from their separation in 2019, the 1<sup>st</sup> Respondent was never close to the deceased in the real sense of the word. This can be seen from the fact that he was nowhere near the deceased in her last moments on earth. Even though the 1<sup>st</sup> Respondent claims to have spoken with her on phone around January or February 2026, the same does not mean anything meaningful as compared to a situation where he could have been physically near his wife especially from the time she was diagnosed with cancer. There is no evidence that he ever visited her in laws to check on the progress of his wife. By his own admission, the 1<sup>st</sup> Respondent was not with the deceased when she died. He did not offer any plausible explanation before the trial court for why he was not by his wife's bedside in her final moments. Any right-thinking member of society would expect a man to be by his terminally ill wife in her final moment if he truly cares about her. Upon the deceased's death, it was not her husband who signed the required documentation at the hospital. Instead, her sister Irene (DW2) assumed the responsibility and signed

for the release and processing of the body as the next of kin. This further illustrated the continued absence of 1<sup>st</sup> Respondent in critical family responsibilities. A man who does not attend to his wife in sickness, and who was nowhere near her in her final moments on earth cannot be allowed to assert his status as the husband, complete with burial rights, after the wife, it is noted from the evidence of the 1<sup>st</sup> Respondent that his employer's medical cover through AON Minet was available to cover all his Dependants, including the deceased. However, he was unable to provide proof of the same as well as the payment of the medical bill incurred by the deceased. It is in my view that the 1<sup>st</sup> Respondent had lost touch with his wife and children right from the time he separated with his wife. Hence, his claim to bury the deceased just because she was his wife must be declined. The first Respondent's reliance on customary law is also not helpful as the deceased had decided not to have anything to do with him from the date of their separation in 2019 and informed her family that she should not be buried at her parents' home. The Appellant's evidence also reinforced this position when she stated that during the period of her illness, the deceased attempted to involve the 1<sup>st</sup> Respondent in efforts to raise funds for her cancer treatment and invited him to join a whatsapp group that had been created to mobilize financial support for her medical expenses but which the 1<sup>st</sup> Respondent declined to participate in the initiative. I find that this was clear evidence that the 1<sup>st</sup> Respondent was not interested with the

deceased and that it is now ironic that he wants to bury the deceased just because she had been his wife.

46. The 1<sup>st</sup> Respondent has hinged his claim on the basis that the deceased had been his wife and that he had not divorced her to the time of her demise and further that the Luo customs require that the husband is the one to bury the remains of his wife. Whereas that position could be true, the court must take into consideration the fact since the separation in 2019, the 1<sup>st</sup> Respondent has never bothered about the deceased and her children who have been staying with his in-laws. It transpired from the evidence that when the deceased sought to pursue her studies at Siaya KMTC, she had to seek shelter from her sister (DW2) yet the 1<sup>st</sup> Respondent as husband did nothing at all and that his claims that he rented a house for her were not believable as there was no evidence to back them up. It is clear that the deceased and her children were on their own. Such circumstances would drive any person in such circumstances to make hard decisions. It is in that regard that I must agree with the Appellant's version that the deceased had made up her mind not to rejoin the 1<sup>st</sup> Respondent and that the wishes of the deceased that she should not be buried at her matrimonial home must be respected. It is also my considered view that burial of the deceased at her parents' home is not repugnant to justice and morality. There is no prejudice suffered by the 1<sup>st</sup> Respondent since his status as husband to the deceased has not been challenged and that

he still has the right to institute a succession cause in her estate if need be.

47. Even though the 1<sup>st</sup> Respondent has challenged the Appellant regarding the issue of the wishes made by the deceased regarding the place of her burial, it is not disputed that he deceased had separated with the 1<sup>st</sup> Respondent as from 2019 and that all this time she had been staying with her sister and parents and that her children also stayed with her parents. It is this period of absence from her matrimonial home which bolster the Appellant's claim that the deceased had made a wish that she should be buried at her parents' home. The 1<sup>st</sup> Respondent has vociferously challenged the issue of the deceased having made a wish on the place of her burial. The authorities presented by the Appellant are quite relevant and touch on the conduct of a spouse seeking to bury the remains of a deceased spouse.

In **Olive Bonareri Omoi & 5 Others, v Joseph Basweti Orog [2010] KEHC 1099 (KLR)**, the High Court held as follows regarding the wishes of the deceased:

***“Although I concur with the Court of Appeal decision in the said case of Apeli vs. Buluku, [2008] 1 KLR 873 that under English law, there is no property in a dead body, it is however, common knowledge that Africans treat their dead relatives differently. African highly respect their deceased relatives and reverently***

***handle their burials. That is why they go into great expense and take a lot of time to arrange for their decent burials. With regard to where and/or who should bury the deceased, they invariably honour the deceased's wishes.***

**“For over 30 years the deceased lived. He was not concerned with the deceased sickness. How, in the circumstances can such a man be allowed to take the deceased's body to Kisii for burial for burial against her wishes just because he wants to avoid condemnation by his community? It would be immoral to a low such estranged husband to purport to love his wife in death. I have no hesitation in finding that, in the circumstances of this case, the deceased's wishes override the Respondent's customary law right to bury her in his ancestral home in Kisii.”**

See **Charles Onyango Oduke & Another vs. Samuel Onindo Wambi, [2010]eKLR**, it was held that a burial wish of the deceased is paramount and supersedes all including customary law and legal proximity. The court stated thus:

***“The main issues for consideration in a burial dispute is the wishes of the deceased if any had been expressed and the kind of relationship the contestants had with the deceased....Those are more relevant to burial***

***than question for disposal of material assets and related claims and things. They, rather than the succession regime should prevail in determining questions of burial.***

In **SAN Vs. GW, Civil Appeal No. 1 of 2020 [2020] eKLR**, the Court of Appeal (Ouko P) Gatembu & Murgor, JJ. A) laid down the law on burial disputes in a similar case thus:

***“... courts have also been unanimous as far as we can tell from decided cases that, both laws, common and customary, have one thing in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy.”***

***“We add that it is highly unlikely that, after 26 years of absence from the Appellant and the Nyalenda home, the deceased would suddenly develop love for them and wish in his final days to go back but only for burial.***

**Apart from the aforesaid 26 years of separation, the Appellant played no role in the deceased’s life when he was bedridden, not even a visit to the deceased during the 2-year period when he was beset by illness.**

48. See **Apeli vs. Buluku (1980) eKLR** and **Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira [2014] eKLR**.

The wishes or a will on how the deceased's remains will be disposed of upon death are not, as a general rule binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must however, be compelling reasons for not heeding the expressed wishes of the deceased."

49. The import of the above decision is that the wishes of a deceased person as to her preferred place of burial are paramount and can only be disregarded if there are compelling reasons. In the present case, the trial court held that the wishes of the deceased were not clear. However, this finding was not supported by the evidence that was clear she was at the end of her life, the deceased informed them that she would like to be buried in Komenya because of the neglect and abandonment she had been subjected to by the 1<sup>st</sup> Respondent, who had not played any role in her life in her six final years. In the impugned decision, the trial court held that the wishes of the deceased as to her preferred place of burial were not certain simply because the 1<sup>st</sup> Respondent testified that he deceased did not tell him where she would wish to be buried. It would appear that the trial

court believed the 1<sup>st</sup> Respondent and not the Appellant and her witnesses. There was no heard and fast rule that a deceased person should only make wishes of the deceased as to her preferred place of burial were not certain simply because the 1<sup>st</sup> Respondent testified that the deceased did not tell him where she would wish to be buried. It would appear that the trial court believed the Respondent and not the Appellant and her witnesses. There was no hard and fast rule that a deceased person should only make wishes to his or her spouse and not any other person. I find that he 1<sup>st</sup> Respondent despite being husband of the deceased did not have the last word on her life. The trial court therefore erred in holding that the deceased's wishes could not be ascertained yet three witnesses as the persons who spent considerable time with the deceased since they were with her in her final days. I find that a person's conduct towards a deceased person while alive could extinguish his or her right to bury the deceased. Since the 1<sup>st</sup> Defendant did not show any closeness towards the deceased after their separation and did not show any sympathy towards her when she was ailing, it was only just that the deceased's wishes and choice of where she was to be buried were to be honoured. I find that there were compelling reasons in this case for heeding the clear wishes of the deceased and to allow the Appellant to bury her daughter in her home in Komenya.

50. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgement of the trial

court dated 16/3/2026 is hereby set aside and substituted with an order dismissing the 1<sup>st</sup> Respondent's suit with no order as to costs. Each party to bear their own costs of the appeal.

**Dated and delivered at Siaya, this 23<sup>rd</sup> day of April 2026.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**M/s Ngeresa.....for Appellant.**

**Lawi Ogutu.....for 1<sup>st</sup> Respondent.**

**N/A.....for 2<sup>nd</sup> Respondent.**

**M/s Mourine.....Court Assistant.**

SIAYA HCCA NO. E014 OF 2026 - JUDGMENT