



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 16 OF 2019

PZG & 2 OTHERS.....APPELLANTS

VERSUS

TMT.....RESPONDENT

(Being an appeal from the Judgement/Decree of the S.P.M. Court at Malindi presided over

by Hon. Wewa dated 7th March, 2019 in Malindi Case No. 9 of 2019)

CORAM: Hon. Justice R. Nyakundi

Kilonzo & Aziz for the Appellants

Mr. Binyenya Benjamin for the Respondent

JUDGEMENT

The main question in this appeal to be asserted and considered from the judgement of the trial court is who had the ultimate authority over the funeral arrangements and burial rites of the deceased RM.

Procedural history

The respondent on diverse dates between 1980-1987 lived or cohabited with the 1st appellant as husband and wife from which they were blessed with two issues FTM and the deceased – RTM. The deceased died on the 20th January, 2019. The respondent filed a claim in court on 23rd January, 2019 seeking a permanent injunction restraining them, their agents, servants, agents, beneficiaries and assignees or anyone of their family jointly or severally from removing the body of the deceased from Star hospital mortuary and interring or burying the body or remains of the deceased at Matsangoni or anywhere else.

The trial court upon hearing evidence from both parties determined that the respondent be permitted to inter and bury the body of the deceased at Kwandomo Malindi Sub-County. In so doing, the magistrate made the following findings;

“From the evidence there is no dispute that the plaintiff and the 1st defendant cohabited and that the children listed were born to them during the union. The Plaintiff’s contention was that dowry was not paid as money which was taken to the 1st defendant’s home was declined. There is therefore no evidence that the 1st defendant got married in accordance with Giriama Customary Law. There is absolutely no reasons which can make me disbelieve the cogent evidence by both the plaintiff and his witness and the 1st defendant and her witness that no marriage existed between them.

In relation to the question of who as between the plaintiff and the defendant should bury the remains of the deceased; the issue must be decided in accordance to customary law. The assertion that the deceased was close to one parent over the other the court observes has not been proved sufficiently by both the plaintiff and the 1st defendant. The deceased was a child to both and he related to both during his childhood stages. The 1st defendant had care and custody as he was a minor and the 1st defendant did exercise her parental responsibility of caring and controlling the minor. Section 23 (1) of the Children’s Act, defines parental responsibility to mean all the duties, rights, powers, responsibilities and authorities which by law a parent of child has in relation to the child. This is applicable here.

The element of maintenance the plaintiff has also stated he maintained. He produced some documents to show. There is no reason to warrant the court to put a blind eye on the same. On the element of proximity, this cannot be an issue upon which I can be guided upon to determine who is to bury the deceased as this has not been proved by either party.

It was stated since the plaintiff did not pay dowry any child born out of the relationship is not his. This is applicable where no dowry has been paid as per Giriama Customary Law. The plaintiff stated that palm wine was paid and therefore this entitles the plaintiff to bury the son who is deceased. I do find that in this case because it rests purely on customary law, it's absolutely necessary that the experts vested in the customs be summoned to testify so as to assist the court. I do find that in this case there was a witness PW 2 he was conversant with the Giriama Customary Law. He addressed the marriage customs, it was said that once palm wine is paid the children born of the union are yours. Thus the father.

In this case palm wine was paid. So that child belongs to the father. That is per the Giriama customary law in marriage. The dowry paid is a gift to the parents of the girl and in this case this was not paid. I do find that the claim by the plaintiff is proved on a balance of probability. I do enter judgment in the plaintiff's favour. The plaintiff is entitled to have the remains of the son and have the same interred."

It is against these orders that the appellants appealed to this court among other grounds specified in the memorandum of appeal to be taken into account by this court crafted in the following manner:

- 1. That the learned trial magistrate erred in both law and in fact by relying on the uncorroborated evidence and/or facts which the respondent did not prove during trial to substantiate that he had indeed and in fact paid 'Kadzama' a requirement under the Giriama Law to bury the deceased yet the same had been rebutted by the appellants.**
- 2. That the learned trial magistrate erred in both law and in fact in failing to make a finding that the evidence by the respondent PW 1 that he had palm wine Kadzama was based on hearsay.**
- 3. That the learned trial magistrate erred in law and in fact in failing to find and/or make a finding that even with the payment of the customary palm wine the fact that the respondent completely did not pay the dowry and/or bride price for the mother of the deceased and which the respondent to any burial rights as of the deceased RGM.**
- 4. That the learned magistrate grossly erred both in fact and in law in arriving at her decision by relying on Giriama Customary Law and/or custom which is repugnant to justice and morality.**
- 5. That the learned magistrate grossly erred both in fact and in law by relying as evidence inadmissible documents produced by the respondent in the subordinate court.**
- 6. That the learned magistrate grossly erred in law and in fact by failing to take into account the evidence adduced by the appellants in the subordinate court that the deceased was close to the 1st appellants his mother which evidence ought to have been considered as a factor in deciding who between the appellants and respondent was to bury the deceased.**
- 7. That the learned trial magistrate erred in both fact and law by allowing the respondents claim in the subordinate court without considering in totality the evidence adduced by the appellants' which clearly contradicted the respondent's assertions thereof.**
- 8. That the learned trial magistrate erred in both fact and law by hearing and determining the matter in the subordinate court while she had no jurisdiction.**

The appeal was disposed of by way of written submissions filed by each counsel on behalf of the parties.

The case for the appellants

Learned counsel Mr. Kilonzo for the appellant reiterated the evidence and issues which had been deliberated before the trial court to pitch tent on the appeal that the orders issued were against all odds and evidence adduced by the appellants. Therein he raised four main issues for determination as follows:

- 1. Which law is applicable in this matter.**
- 2. Whether the respondent proved his case on a balance of probabilities to warrant the subordinate court to allow his claim.**
- 3. Whether the respondent proved indeed that he had paid Kadzama (palm wine) as per the Giriama custom in order to be entitled to bury the deceased.**
- 4. Who should bear the cost of this appeal and the subordinate court.**

First it was learned counsels' submissions that on the evidence placed before the trial court the appellants had superior rights to bury the body of the deceased at a family land in place of the respondent. The learned counsel referred to the frost relationship the 1st appellant had with the respondent which saw one of them live separate lives despite the fact of them being blessed with two children including the deceased.

Secondly, it was learned counsel's argument that the cohabitation between the 1st appellant and the respondent never matured into a marriage either under a Giriama Customary Law or any other system known in law. Further, learned counsel submitted that the issue of their marriage was never resolved because the respondent failed to abide by fulfilling the customary rites validating the marriage in accordance with the Giriama customs and culture. Learned counsel went further to demonstrate that the law applicable in this appeal to establish place of burial is the Constitution read together with the Giriama Customary Law. That the fact of close proximity and relationship enjoyed between the 1st appellant and her family with the deceased should place them at the higher rank to dispose of the body instead of the respondent. Learned counsel's contention was for this court to apply customary law bearing in mind the provisions of Article 27 on non-discrimination rights of the Constitution. For this proposition he placed reliance on these cases **Martha Kimata & another v Doricas Wanjiru & another 2015 eKLR** and **Virginia Edith Wambui Otieno v Joash Ochieng Ougo and another 1987 eKLR**, **Josinda Kamau v Anna Ngendo 1998 eKLR**.

The question that counsel attempted to answer with these cases was that the learned trial magistrate applied customary law in her judgement to release the body to the respondent in contravention with Articles 2(4), 27 of the Constitution and Section 3(2) of the Judicature Act.

Thirdly, learned counsel submitted on grounds 1,2,3,4, 8, 9, and 11 of the memorandum of appeal by consolidating a number of issues touching on the impugned judgement. From what learned counsel submitted the respondent cause of action before the trial court was based on marriage union with the 1st appellant celebrated in accordance with the Giriama Customary Law. His objection on this ground was the overwhelming evidence and the facts as pleaded that indicated the respondent at all times never fulfilled the conditions as outlined under the customs to elevate the relationship with the 1st appellant into a valid customary marriage.

Learned counsel argued that respondent never pleaded any reliance on customs but the trial court went ahead to decide the dispute and settled it based on customary law. Learned counsel further submitted that despite all these undisputed facts from the pleadings and evidence learned magistrate continued to grant an injunction against the appellant from burying the body of the deceased at her home or place of their choice. Learned counsel further submitted by the court adopting this approach she denied the appellants their right to bury the deceased. In support of all these submissions learned counsel relied on the following cases (a) **Ernest K. Kimani v Muiru Gikanga 1965 E.A (b) Bake N. Bite Ltd v Rachel Nungare & 16 others 2015 eKLR IEBC & another v Stephen Mutinda, Muli & another C.A. No. 219 of 2013, David Ole Tukai v Francis Arap Muge CA No. 76 of 2014** and Sections 107, 108, 109 of the Evidence Act.

It was the position of the learned counsel that the respondent failed to provide or take care of the deceased during his lifetime. He further submitted that the parents separated over two decades ago and the deceased had ceased contact with the respondent. That certainly left the greater care and responsibility with the 1st appellant and her family as adoptive parents and guardians.

On inadmissibility of documents tendered by the respondent it was submitted, they hold no evidential value and ought not to have been considered by the trial court. The inadmissible documents adduced by the respondent which led to the trial court to make a finding that the respondent had produced documents to prove that he maintained the deceased. The documents produced do not prove that the respondent did maintain the deceased. The makers of the documents were not called as witnesses or the respondent tender any electronic certificates in relation to the some of the documents specifically the x rays and photographs contrary to Section 35 and 106 B of the Evidence Act.

On the payment of palm wine counsel submitted as follows; even though the respondent could have proved that he paid palm wine to the 1st appellants' parents to enable him bury the deceased that custom is repugnant to justice and morality. From the evidence adduced during trial it is clear that it is the 1st appellant who took care of the deceased hence it will be discriminatory for a parent who has carried all the burden of educating and taking care of his child not to bury his child when he or she dies because custom prohibits her.

The Giriama custom of paying Kadzama is discriminatory against a woman hence repugnant to justice and morality. It is the appellant's submissions that children should not be equated to a palm wine.

Drawing on the dicta in the case of **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge 2004 eKLR** learned counsel urged this court to find that the person most favored had better advantage to bury the deceased. According to learned counsel despite lifetime relationship the 1st appellant had with the deceased. The trial court went ahead to ignore that fact to give the body to the respondent. With regard to violations of Article 27 of the Constitution on discrimination and equal protection of the law, learned counsel submitted at length on how the judgement affected the 1st appellant's constitutional rights. Learned counsel further argued that learned trial magistrate failed to address her mind to the provisions of Article 27 of the Constitution.

Finally, learned counsel submitted that the trial court exceeded its jurisdiction in framing and defining the issues in the claim when her jurisdiction is ousted by virtue of section 7(3), of the Magistrate Act 2015.

It is the appellants' submission that the High Court is the proper forum to hear and determine issues relating to customary law while exercising its unlimited and original jurisdiction under Article 165 of the Constitution of Kenya, 2010. In the case of **Samuel Kamau Macharia and another vs Kenya Commercial Bank and 2 Others** wherein it was held that

“a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.” See also, **Owners of the Motor Vehicle Vessel Lillian S v Caltex Oil Kenya, Samwel Macharia & another v Kenya Commercial Bank Ltd & 2 others 2012 eKLR**. In his contention since jurisdiction flows from the Constitution and enabling statute it cannot be conferred by the parties or assumed by the court. In conclusion, counsel prays for this Honorable court to allow the appeal with costs to the appellants.

Submissions by the Respondent

Mr. Binyenya on behalf of the respondent focused his arguments on the factual reasons of the pleadings and evidence before the trial court.

Mr. Binyenya learned counsel for the respondent opposed the appeal and supported the impugned judgment through his written submissions dated 10th June 2019 and filed the same day. Therein counsel challenged the appellants' position that the trial court had jurisdiction to hear and determine burial disputes. This position was upheld and affirmed in the case of **Wilfred Mongare Orina vs Askah Mochache Momanyi 2019 eKLR**.

***“In the premises, it is my determination that the trial magistrate properly entertained the dispute and had jurisdiction to hear and determine the dispute that touched on the burial of the appellant’s mother*”**

Counsel submitted that the place of burial of a person in Kenya closely linked to three things; the person wishes, though not absolutely binding on his or her personal representatives, secondly the duty imposed on those closely related to the deceased during his/ her lifetime (e.g. spouses, children or parents) to bury the deceased, whether the deceased had established his/her own home and the custom to which the deceased is subjected to. It is trite law that where the issue of place of burial is to be decided by a court of law, the court relies on customary law to establish the place of burial. Reliance is placed in the cases of **Wilfred Mongare Orina vs Askah Mochache Momanyi** and **Martha Wanjiru Kimata and another vs Dorcas Wanjiru and another**.

The respondent pointed out that the appellant failed to line up expert witnesses to establish whether the respondent was obligated to bury his child whether or not such a child was born in wedlock or all where parents are divorced or where he parents have been living apart for a long time as in this case. PW2 was an expert witness who was conversant with the burial customs of the Giriama customary law, the evidence of an expert witness can only be challenged by evidence of another expert. It is their submissions that the appellants did not call any witness who is versed in Giriama customs and as such the evidence of PW 2 stood unchallenged. PW 2 testified that the marriage between the respondent and the 1st appellant was the kulazimishwa kuoa type, the respondent had paid kadzama it was the experts testimony that under Giriama customary law, the respondent should bury the deceased.

On the issue of maintenance of the deceased, it was counsel's submissions that the respondent participated in the upbringing of the deceased and that he was entitled to bury the deceased as per Giriama customary law. This was evidenced by the respondent's exhibits marked PEXB 6 -10 which served as proof that he participated in the upbringing of the deceased during his life time.

Counsel submitted that the appellants are judicially stopped from asserting that Giriama customary law was not applicable in the trial court. Judicial estoppel demands that where a party assumes a certain position in a legal proceeding and succeeds in attaining that position, she or he may not thereafter simply because his/her interests have changed assume a contrary position, especially if the new position is prejudicial to an opponent. Learned counsel buttressed his arguments and submissions by citing the following authorities; **John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR, the owners of motor vessel “Lilian S”(Supra), James Odhiambo Nyawade v Philip Otieno & Another [2017]eKLR, Kiplagat Korir v Denis Kipngeno Mutai HCCC Kericho App. 52/2005, Martha Wanjiru Kimatta & Another (Supra), Kiplagat Korir v Mutai HCC App No. 52 of 2005 at Kericho, Beatrice Wanjugu Mwaniki v Josephine Wanjiku Mwaniki [2015]eKLR, Virginia Edith Wambui Otieno (Supra), Josinda Katumba Kamau (Supra), Nyaribo Nyankomba v Mary Bonareri Munge [2010] eKLR, Dick Omondi Ndiewo T/A Ditech Engineering Service v Cell Care Electronics [2015] eKLR**

In conclusion, counsel prays for the honorable court to affirm the decision of the trial court as the appeal is totally lacking in merit and should be dismissed with costs to the respondent.

The Law, Analysis and Determination

The primary function of this court is in keeping the principles at hand and expressly articulated in the case of **Selle & another v Associate Motor Boat Co. Ltd 1968 EA 123**. In light of this case the whole of the evidence before the trial court must be examined, and subjected to a fresh scrutiny with this court drawing its own inferences and conclusions on the matter.

The submissions placed before this court by both counsels revolve around various issues directed at the impugned judgement of the trial court. I would endeavor to make an attempt in answering them in a cluster format.

Issues arising for determination

- 1. Whether the respondent has a right to bury the deceased.***
- 2. Whether the Trial Magistrate court had jurisdiction to determine burial disputes in relation to African customary law.***
- 3. Which Law is applicable in this matter.***
- 4. Whether the legal proximity elevates ones right to bury the deceased.***
- 5. Whether the marriage by presumption is a factor in this appeal.***

Analysis

Whether the respondent has a right to bury the deceased

It has been commonly held both in Common Law and African Customary Law that there is no property in a body. As observed by Higgins J in the case **Doodeward vs Spence: 6 CLR 406**,

“From first to last, I can find no instance of any Court asserting any property in a corpse except in favour of persons who wanted it for purposes of burial, and who by virtue of their close relationship with the deceased might be regarded as under a duty to give the corpse decent interment. I confess that I am unable to see how we can ignore such definite decisions and pronouncements as to the law.”

Burial disputes are of general public importance and some of the substance why families fight over their kin body remains unanswered. The matters raised for determination in this appeal transcends beyond competing interest of the appellant and respondent. Referring to the persuasive case in **Finlay and Another v Kutoane 1993 (4) SA 675 (W)**, it was held that:

“Also in deciding between competing persons, the law should ideally mirror what the community regards as proper and as fair. That perception will be partly the result of views on social structures, mainly of family relationships and marriage and on the vesting of authority and the finality of decisions. There may be views about the impropriety of not complying with requests of the deceased. Religious views, cultural values and traditions may play a role.”

The short venture into the history of African Customary Law illustrates the wishes of the immediate families sometimes influences the burial and disposal of their kin but cannot be said to create any legal right to comply with speedy act to respect and accord the deceased a decent burial.

I would however add that if any African child who during his lifetime had not established a home of his own or contracted a law for marriage upon his death his or her estate shall be administered according to the customs and culture of the community or ethnic to which he or she belonged by virtue of birth.

The appellants and respondents herein, wish to dispose of the body of the deceased. In a perfect scenario parties would reach an amicable agreement on where to bury the deceased within a reasonable time but due to lack of resolution between the deceased’s next of kin the court has to intervene and come up with a resolution. Burial dispute are emotive in nature and lack of comprehensive legislation in this country results in a quagmire leading to lack of uniformity and consistency in court’s decisions on this subject matter.

I will associate myself with the case of **Calma vs Sesar 1992 106 FLR 446/452** wherein the court expressed itself as follows on resolving burial disputes, ***“The conscience of the community would regard fights over the disposal of human remains such as this as unseemly. It requires that the court resolves the argument in a practical way paying due regard to the need to have a dead body disposed of without reasonable delay, but with all proper respect and decency.”***

There is lack of comprehensive legislation on burial disputes or the procedure of handling, disposing or settling the disputes relating to dead bodies or their remains thereof. Section 137 of the Penal Code touches on hindering burial of a dead body but does not stipulate on who should bury the dead, and provides as follows,

“Whoever unlawfully hinders the burial of the dead body of any person, or without lawful authority in that behalf disinters, dissects or harms the dead body of any person, or, being under a duty to cause the dead body of any person to be buried, fails to perform that duty, is guilty of a misdemeanor.”

The constitution recognizes the customs and culture of the Kenyan people, in its preamble it states that we the Kenyan people are ***proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity***, further Article 2 (4) and Article 11 (1), provides as follows;

Article 2 (4) provides; ***“Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”*** Article 11 (1) stipulates: ***“This constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.”***

The law of Succession Act is ambiguous on matters in relation to burial especially if the deceased died intestate. The law of Succession Act provides for the disposal of the deceased property and it abides to the Common Law principles which states there is no property in a dead body. In the book entitled Law of Succession Act page 13 -14, the learned author W. Musyoka states as follows in respect to the said principle;

“A will may also be used to give directions regarding the disposal of the dead person’s body. This could be in terms of the precise method by which their body is to be disposed of (i.e. burial where and how, cremation etc) or they may wish that their body or part of it donated to medical education, research or treatment of patients. Such provisions or directions have no binding legal effect as the law recognize no property in the dead body of a human being. This could mean that the testator cannot by will dispose of his dead body. Such provisions amount to a mere request to executors to comply with the testator’s wishes.”

Kwach J. stated in Pauline Ndete Kinyota Maingi vs Rael Kinyota Maingi Nairobi CACA No. 66 of 1984, there is no property in a corpse which a testator can validly dispose of by his will, the executor’s obligation is to give effect to the deceased wishes in relation to the disposition of his corpse as far as practicable. The executor is not bound to give effect to those wishes or in conflict with the personal law of the deceased.

Uncertainty and ambiguity of the above provisions of law have led to the courts to be bombarded with litigation on whether the deceased should be buried under Customary Law, Common Law based on a system of marriage contracted by the parents or vide a written Will of the deceased. This application of various laws leads to inconsistency in court decision and lack of harmonious rationale of determining burial disputes.

In our present case the deceased died intestate he left no testamentary instructions on handling or disposing of his body or where he wanted to be buried, he had no permanent established home nor was he married and he also had no heirs. These issue rules out application of the Marriage Act and Law of Succession Act. The appellants are in agreement with the trial court's decision that there was no existence of a customary marriage between the parents, this leaves us in a situation where parents of the deceased are in conflict on who is entitled to bury the deceased. However, it was also found the deceased was born and brought up as a Giriama and he remained until his death. From the evidence adduced palm wine is not disputed. That therefore signifies despite the 1st appellant and the respondent not fulfilling fully customary rites as to marriage the application of the Giriama customs did not cease to bind them when it comes to matters of culture.

In the absence of a valid will of the deceased regarding his burial wishes this court will place reliance on traditional customs of his decent. For instance, in the case of **GMI v DMK [2013] eKLR Mutuku J:** - the court held:

“When it comes to burial disputes, it is personal law that comes into play. This is because there is no statute in Kenya that governs burials.”

If the deceased left a Will or last testamentary there will be clear directions on how to inter his body. See the case of (**Jacinta Nduku Masaai v Leonida Mueni Mutua & 4 Others**). In the instant case, the deceased left no Will and the two parents have a legal and moral duty to dispose of the body in line with the Giriama customs and culture.

I pause the question, is Giriama customs and culture repugnant to justice and morality?

Customary law is seen as fluid, flexible and dynamic these qualities make it prone to manipulation as it is not reduced to writing. In the case of **Eliud Maina Mwangi vs Margaret Wanjiru Gachangi (2013)**

“Customary law is certainly not static like all other human inventions, it is dynamic and keeps evolving from generation to generation.”

Furthermore, customary law should be proved as it was held in the case of **Ngoka vs Madzomba** which states that,

“customary existing in any particular era and area should be proved.”

In the case of **Dr. Mbatha vs Dr. Mukita** the court held that,

“it is unlikely in the normal course of events he would have contemplated death and expressed wishes to where he wished to be buried. That is a matter to be proved in this case where there are no written instructions, customary law is a matter of fact and must await trial of action.”

The issue as whether Customary law is subject to the repugnancy clause as envisaged in Article 2 (4) of the Constitution which provides that: - ***“Any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid”***. Is a trier question to be proved on a balance of probabilities by a party who alleges and seeks to obtain Judgment in his or her favor. Further under Section 3 (2) of the Judicature Act Cap 8, it states,

“The High Court, Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties are 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.”

Customary law should not discriminate against any person in respect to their gender and it should take cognizance that women and men should be subject to equal treatment as stipulated in Article 27 (3) and (4) of the Constitution 2010 which provides that,

“(3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

It is undisputed that both parents of the deceased belong to the Giriama Tribe. The trial magistrate took cognizance of the Giriama Customary Law on burial disputes and relied on the evidence of PW 2 an elder and expert on Giriama customs who testified that once Kadzama, palm wine or (**Pombe Ya Mtoto**) is paid the children both of the union belong to the father. The trial magistrate concluded that palm wine was paid hence the child, the deceased herein, belonged to the father.

The appellants contend that the respondent did not prove payment of Kadzama to the 1st appellant's parents to entitle him bury the deceased. Further, appellants contend that the Giriama custom of paying palm wine is discriminatory against women and repugnant to justice and morality.

Customary law has to be proved in any particular era and the burden of proof was on the respondent to persuade the trial court, as he did that he paid Kadzama to the 1st appellant's family. The respondent discharged his burden by testifying to court that palm wine was taken to the

1st appellant's family by his father and they accepted the same. The respondent on the other hand refuted this assertion and claimed palm wine was not paid.

Under Article 27 (3) and (4) of the constitution gives both women and men the right to equal opportunities in cultural and social spheres and also provides that there should be no discrimination any person on any ground. The mother and father have equal rights to bury the deceased remains and therefore there should be no discrimination on the mother brought upon by any cultural practices.

PW 2, the expert witness testified that once palm wine is paid the child belongs to the father. Question is does it extinguish the rights of the mother? In my view this does not extinguish the rights of the mother but it is a sign that the father is taking responsibility of the child and affirming that he is the father. In my opinion payment of Kadzama or palm wine does not discriminate against the mother hence it's not in contravention of Article 27 of the Constitution; moreover, it is not inconsistent to the constitution or repugnant to justice and morality. African customs and culture can only be held to be unjust, immoral or unreasonable if they are inconsistent with the general principles of the constitution that lie at the root of our legal system or are contrary with the national values and principles of governance under Article 10 of the constitution. In cases where there is a dispute as to burial as it was the case in the instant appeal and the deceased is of Giriama decent the decision would be made by his parents or the immediate family members. Their right is to make funeral arrangements, determine the method and place of final disposal of the deceased.

However, the trial court considered the case and took the approach that it was not feasible in the circumstances of the dispute because the appellant was not open to negotiations to agree on a joint burial with the respondent. In her position part of the customary law on marriage was not fulfilled and therefore the respondent had no legal authority to bury the deceased. Who has the legal control over the disposition of the remains of the deceased where both parents are alive? To me the answer is found in Article 45 (1) & (3) of the Constitution. Although the first appellant vehemently opposed existence of a customary marriage with the respondent one cannot absolutely rule out marriage by presumption. The respondent and the 1st appellant were both entitled to bury the body and the remains of the deceased at their discretion or as per the wishes of the deceased. In the same context the first appellant as the mother had a right to participate in all of the funeral rites for the interment of the deceased.

In addition to customary law, the court should consider other circumstances surrounding the death and life of the deceased and the relationship of the claimants to the deceased.

While analyzing the chain of relationships between the deceased and claimants among other factors, the court needs to ascertain the legal proximity of the claimants to the deceased. This was stated by Justice Ojwang in the case of **Njoroge and Njoroge vs Another**, wherein he held as follows:

“As I have stated earlier on, the person in social context prevailing in this county, who is in the 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. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased and therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased has the colour of right of burial, ahead of any other claimant.”

In the case of **JMK vs DMK (2013) eKLR** the court held that:

“Without a spouse, the first person(s) in line of duty in relation to the burial of the deceased and the closest person (s) are the children, followed by her parents and brothers.....”

In the English case of **Hartshore vs Gardener**

“the deceased died intestate. His divorced parents wished to have him cremated and the father wished to have him buried at some distance from the mother's home but close to where the son had lived. The mother but close to where the son had lived. The mother maintained that it would be difficult for her to visit the grave because of its distance from her home. The court held that both parents have equal rights but chose to exercise its discretion in favour of the father because he had a close relationship with the deceased than the mother.”

In the case of **Fessi vs Whitmore (1999) 1 FLR 767** the court considered the place with which the deceased had the closest connection as the relevant ultimate resting place. It went on to hold that the deceased, a 12 year old boy's ashes should be scattered in Nuneaton where his family had always lived, not interred in Wales where he had recently moved with his father and been killed in accident.

In the premises, the deceased herein had no permanent established home where he could have been buried. Both parents of the deceased claim that they had a close relationship with the deceased; the mother claimed that she had care and custody of the deceased throughout his life and catered to his basic needs, she alluded in her testimony that the father psychologically tortured the deceased and his brother. She went on to state that the deceased lived in a rental house in Matsangoni as he vied for an MCA seat in Sabaki. She wants to bury the deceased in Matsangoni Kilifi County. On the other hand, the father claimed that he maintained the deceased by paying school fees from primary school to secondary school, he admitted that the mother had primary care and custody of the deceased though out of his life time. He wants to bury the deceased at Kwa Mdomo Malindi Township.

I am satisfied that both parents were close to the deceased and cared for him accordingly. This is an acrimonious case where there are no winners or losers. The 2nd and 3rd appellants chipped in to help the 1st appellant take care of the deceased, which is an honorable gesture but this does not accord them superior rights to the respondent who is the father of the deceased.

Whether the deceased severed the relation with the respondent during his lifetime is not a question to be determined in this appeal. It is quite apparent the relationship between the 1st appellant and the respondent had experienced misunderstandings which played out during the burial

of their son. It is true the 1st appellant pleads close proximity with the deceased but I find no yardstick to apportion either of them the higher score under this parameter. The deceased appears to have maintained regular contact with the respondent which made him even seek to be a member of the county assembly in 2017.

What is abundantly clear is that the deceased and his parents subscribed to the Giriama customs and rites on burial. On principle the position preferred by this court is that the appellant has not demonstrated that the customs and traditions of the Giriama tribe are in contravention of Section 3(2) of the Judicature Act or Article 2 (4) of the Constitution.

From the evidence on record it is clear that the respondent has a permanent home constructed by the deceased brother at Kwa Mdomo, Malindi Township whereas the 1st appellant has not established whether she has established the homestead at Matsangoni, Kilifi County which belongs to her father, the deceased grandfather. In my view by virtue of the respondent being estranged from the 1st appellant should not relieve him of his responsibility to assert his legal right that is to dispose of the body according to Giriama customs. Relying on the above stated reasons, I concur with the trial magistrate's decision that the respondent should have the remains of the deceased and have the same interred.

Whether the Trial Magistrate court had jurisdiction to determine burial disputes in relation to African customary law

The appellants contend in ground 10 of their amended memorandum of appeal that the trial court had no jurisdiction to hear the present matter. It was submitted that by hearing this matter the trial court arrogated itself jurisdiction by determining burial disputes in relation to African Customary Law which amounted to expanding their jurisdiction through judicial craft which is legally untenable. The respondents refuted this position and submitted that the trial magistrate had jurisdiction to hear and determine burial disputes.

I fail to understand why the appellants did not raise the question of jurisdiction at the earliest opportunity possible at the trial magistrate's court; it comes across as an afterthought. However, I agree with the appellants that the issue of jurisdiction can be raised on appeal. As rightfully put by both parties, Section 7 (3) of the Magistrate's Courts Act, 2015 provides for the jurisdiction of the magistrate's court in terms of proceedings of a civil nature concerning matters under African

Customary law:

(a). Land held under customary tenure;

(b). Marriage, divorce, maintenance or dowry;

(c). Seduction or pregnancy of an unmarried woman or girl;

(d). Enticement of, or adultery with a married person;

(e). Matters affecting status and in particular the status of widows and children including guardianship, custody, adoption and legitimacy and

(f). Intestate succession and administration of intestate estates, so far as they are not governed by any written law.

Section 3 (2) of the Judicature Act provides that subordinate courts are to be guided by customary law in civil cases, it states as follows:

“The High Court, Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties are 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.”

I am persuaded by the respondent's submissions and the cited case laws therein pertaining to the jurisdiction of the Magistrate's court in determining burial disputes.

The courts have come to a consensus in the cases of: **Wilfred Mongare vs Askah Mocheche Momanyi (2019) eKLR**, **James Odhiambo Nyawade vs Philip Otieno and Another, Beatrice Wanjugu vs Josephine Wanjiku [2015] eKLR**, **Martha Wanjiru & Another vs Dorcas Wanjiru & Another (2015) eKLR**. The appellants' counsel submitted that this court should vacate the impugned judgement and allow the appeal between the parties. From the standpoint of the appellants the governing provisions of the law under Section 7(3) of the Magistrates Act 2015 oust the jurisdiction of a Senior Principal Magistrate entertaining burial disputes.

The respondent's counsel referring to the same provisions vehemently opposed that line of submissions on want of jurisdiction. Cases in this category which have ignited the debate on whether the magistrate courts have jurisdiction on burial disputes all are to the dicta in **Kiplangat Korir v Dennis Kipngeno Mutai [2006]** by Kimaru J who held that in terms of Section 2 of the repealed Magistrate Act, the Resident Magistrate or any other ranked judicial officers lacked the jurisdiction to adjudicate over burial matters.

On the second category the High Court being presided over by Mutungi J in **Wilfred Mongare Orina v Askah Mocheche Momanyi [2019] eKLR** disputed the notion that Section 7(3) of the Act manifestly excludes burial claims from the province of magistrates' court. In doing so the learned judge affirmed the principle that has been applied to the cases of **James Odhiambo Nyawade v Philip Otieno & another [2017] eKLR** that an action on a burial dispute is not limited as a subject matter jurisdiction or waived in terms of Section 7(3) of the Act.

It is well settled that a magistrate court has jurisdiction to hear customary law claims and disputes arising or as so specified under Section 7(3) of the Act. that the magistrate court and in this instance the senior principal magistrate court has jurisdiction to hear and determine burial disputes in relation to African customary law. Applying in the above test a magistrate's court has the jurisdiction and powers under Section 7 (3) of the Act to entertain proceedings of a Civil nature concerning a claim on burial dispute. This disposes the 10th ground of appeal.

Whether customary law was applicable to resolve the dispute between the parties. The appellants and the respondents in their pleadings, discovery and evidence revealed the following:

The 1st appellant a Giriama by subtribe at one time specified to cover in between 1981-1987 had cohabited with the respondent as husband and wife. During the marriage both were blessed with three children who included the deceased in this appeal.

From the extent of the evidence there were genuine responses as to payment of dowry by the respondent to the family of the appellant as a condition precedent to a valid Giriama customary marriages.

As the appellant stated and his brother PW2 corroborated that the respondent failed to establish an effective recognized marriage disentitles him of any claim to inter the body of the deceased.

On the one hand DW1 and DW2 are in agreement that the interrelationship of substantial nature existed between DW1 – the 1st appellant and respondent that gave birth to the two issues of the marriage.

Much as the court sympathizes with the 1st appellant from the evidence and pleadings their relationship can easily be equated to that of marriage by presumption.

First, the parties' contention ignored to delve into the framework and existence of a system of marriage by presumption.

As was observed by Bosire JA the case of **Mary Wanjiku Githaru v Esther Wanjiru Kiarie [2010] eKLR** the determination on this issue was stated as follows:

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be preserved is a question of facts. It is not dependent on any system of law except where by reason of a written law, it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

In the same breadth of jurisprudence on this issue in the case of **Phylis N. Karanja & 2 others v Rosemary Mutei Karanja & another NRB CA 313 of 2001 C [2009] eKLR** held that:

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that the long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.

We are of the view that since the presumption is in the realm of an assumption, it is not imperative that certain customary rites be performed.”

The presumption is more significant in order to protect the legitimacy of the children born out of the long cohabitation.

In **Fowler 290 S.W. Bowman v Little 61 A 223** the court held that:

“After it has been shown that there was an actual marriage, solemnized in the material which the law prescribes, and followed by birth of issue, every information is included in support of its validity and against an alleged antecedent marriage, because the presumption of the law, are always in favour of innocence and legitimacy.”

Based upon this view I have examined the evidence as adduced before the trial court on the issue of the existence of a marriage between the 1st appellant and respondent. In this case the 1st appellant contested the validity of the Giriama customary marriage but one thing is clear that presumption marriage cannot be ruled out. It is for this reason the 1st appellant remains to be considered a legal wife until either of them formally annuls or dissolves the marriage.

In this matter the dispute was in respect of competing interest between the 1st appellant family and the respondent as to who has a right to possession and control of the deceased body to arrange for his funeral and burial. I have no doubt having reviewed the evidence and the strong divergent views expressed before the trial court the issue of place of burial was properly decided. A burial at the 1st appellant's family home would not have been consistent with the customs and culture which governed both the appellant and the respondent.

Sadly, the issue before court was not on intestate succession but who was to be responsible for the arrangement of the last funeral and burial rites of the deceased. The deceased was entitled to be buried according to Giriama Customary Law. In **GMI (Supra)** determine a similar burial dispute which required a consideration of the cultural, customs and religious beliefs of the claimants. It has also been established that

where the deceased had no Will or last testamentary the surviving parents have equal rights to determine the place of burial.

In this case, the strong familial relationship by the deceased with the 1st appellant cannot be relied upon to grant an advantage over the respondent to inter the body. With greatest respect I must confess the claim by the 1st appellant based on the sole fact that she was the one who lived, cared and enjoyed close relationship with the deceased during his lifetime by itself cannot entitle her in exclusion of the respondent to bury the deceased. I don't think for a moment under African Customary Law ones a body is buried there is need to disturb the soul unless under the doctrine of necessity. For this reasons considering all the evidence on record I am not satisfied that the appellants have discharged a burden of prove on a balance of probabilities that they have a right to bury the deceased at their family home or elsewhere. There was no indication both at the trial court and before me that the 1st appellant has a Certificate of Title or lease to land free from any encumbrances to be the ultimate place of burial to inter the body of the deceased. In sum, I reject that Giriama customs and culture on burial is discriminatory to the 1st appellant under Article 27 (1) (2) (3) and (4) of the Constitution. In the upshot I dismiss this appeal which I hereby do save that each party bears their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER 2019.

R. NYAKUNDI

JUDGE