REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. E080 OF 2023

PHANICE YEKO .....1ST APPELLANT

WYCLIFFE CHEBONYA .....2ND APPELLANT

VERSUS

LEONARD CHESARMAT KRUMOJA..... RESPONDENT

(An appeal from the judgement and decree of Hon J.O Manasses R.M in Sirisia PMCC No. E076 of 2023 delivered on 13th July, 2023)

JUDGEMENT

1. Vide a plaint dated 8th May, 2023, the respondent sued the appellants seeking injunctive orders restraining the appellants from interfering with the burial of the remains of the deceased and or at all as well as an order that the body be given to the respondent for burial at Ngachi area.
2. The claim as can be gleaned from the plaint is that the respondent alleged that one Millicent Cherop Chebonya (deceased) was his

legal wife having married her in the year 2004 under the Sabaot traditions. He averred that after the demise of the said Millicent Cherop, the appellants were arranging for the deceased's burial yet as the husband, he is entitled to bury the body at their matrimonial home where they had been living.

3. The appellants duly entered appearance and filed their statement of defence. In their statement, the appellants denied the existence of any marriage between the respondent and the deceased. They insisted that being the deceased's closest relatives, they had every right to bury the deceased. In the said suit, the 1st appellant is the deceased's mother while the 2nd appellant is the deceased's maternal uncle.

4. The suit then proceeded to hearing wherein the respondent testified as PW-1. His evidence was that he married the deceased customarily in 2004 and that they were blessed with four children. That they had established their matrimonial home in Ngachi area of Cheptais. That they had lived together for 10 years without separating. That the deceased had introduced her to her family and that he met all the requirements of the dowry as required of him under the Sabaot customary practices.

5. That at the time the deceased was admitted in hospital, he took responsibility on a daily basis caring for her until her demise and was thereafter issued with a burial permit. That both families were represented in the burial arrangements and agreed to inter her remains at their matrimonial home in Cheptais.
6. PW-2 was Isaac Chebweek Chebonya, deceased's maternal uncle who stated that the deceased was married to the respondent in April, 2004 under the Sabaot customary law and that traditions and dowry were honoured. That under the Sabaot customs, if dowry has been paid, the husband is entitled to bury the wife when she dies.
7. PW-3 Isaiah Pkaram Krumoja, the respondent's brother stated that the respondent married the deceased and established their matrimonial home in Maringo area. That he was instructed by his father to take two animals as part of dowry to the deceased's family and handed them over to the deceased's brother and mother. That the dowry was handed over after the deceased's demise.
8. PW-4 Moses Chesarmat Kingoo, the respondent's cousin stated that after the deceased's demise, they sat as a family on 17/4/2023 at the respondent's initiative. That in the meeting, they agreed on

the dowry to be paid as 9 cows and Kshs 100,000/- in cash. That they promised to settle in a few days. That the 1st appellant was not in the meeting but that the 2nd was present. That they agreed to hand over the dowry on 24/4/2023 when the deceased's relatives came for them. That on the day appointed, they handed over seven cows as well as cash to the deceased's brother. He stated that under Sabaot customs, only the 1st appellant can be buried in her father's compound but not her children.

9. For the appellant's, Phanice Yeko testified as DW-1. Her evidence was that her daughter, the deceased, had five children with a man she had never seen as he had never visited her home. She stated that the deceased lived in Langata women's prison where she worked. She distanced herself from any dowry negotiations or receiving any dowry from the respondent whom she came to know of three days after her demise. She insisted that under Sabaot customs, dowry is paid when one is still alive. She stated that she lives in her father's home though she has land measuring 4½ acres near her father's home where she intended to bury the deceased.

10. DW-2 Wycliffe Chebonya stated that the deceased was his niece. That the deceased was not married as the alleged husband

had not come home to them. That he had visited the deceased while sick in Nairobi and that one of her colleagues was taking care of her. That he got to know of the father to the deceased's children after she had died. That under the Sabaot customs, marriage is commenced by informing the parties then negotiations follow. He denied that the respondent had brought dowry. He stated that dowry is paid when the person is still alive and when dead, the money paid is for the children. He insisted that the deceased should be buried by the 1st appellant as she has her own land.

11. DW-3 Benson Saima Ngona stated that he is an elder and well conversant with Sabaot customary practices when it comes to marriage. He stated that marriage starts with the man visiting the lady's home accompanied by three elders and members of his family. That during the visit, the man carries along some items. The second event is dowry negotiations which involves payment of 13 cows, Kshs 250,000/- and 2 goats. That unless dowry is paid, no marriage is recognized and that dowry cannot be paid after the demise of the lady.

12. DW-4 Esther Chepkorir Masai stated that she worked with the deceased. That she had known the deceased for about 8 years and also lived in the same block. That she took care of the deceased while sick for 2 weeks and 4 days. That in their conversations, the deceased did not inform her that she was married and that no man claiming to be her husband ever visited her in hospital.

13. After considering the matter, the trial magistrate found in favour of the respondent as the person to decide on the place for the deceased's burial and ordered the Chiromo mortuary to release the body to the respondent.

14. Aggrieved, the appellants moved this court by way of appeal raising the following grounds of appeal;

   i. ***The learned trial magistrate erred by making a finding that there was presumption of marriage between the deceased and the respondent yet there was no cogent evidence adduced by the respondent to establish the said presumption as required by law.***
   ii. ***The learned trial magistrate erred in his judgement by concluding that that the respondent took the animals and cash to the appellants against the weight of evidence to the contrary.***

iii. ***The learned trial magistrate erred in his judgement by ignoring the evidence of DW-4 on the general repute of the deceased as an unmarried single parent for the entire period that she knew her.***

iv. ***The learned trial magistrate erred in his judgement by failing to consider the respondent's conduct towards the deceased when she was sick and vulnerable, her point of need.***

v. ***The learned trial magistrate erred by failing to consider the uncontroverted evidence of the wishes expressed by the deceased on her preferred place of burial.***

vi. ***The learned trial magistrate erred by relying on alleged affidavit of marriage yet the same was never produced in evidence by the respondent.***

vii. ***The learned trial magistrate erred by failing to totally address his mind on the submissions and authorities filed by the respondent.***

15. By directions of this court, the appeal was canvassed by way of written submissions. Both parties complied.

16. The appellants on their part raised the following issues for determination namely;

i. Whether from the evidence adduced, there existed a presumption of marriage between the respondent and the deceased.

ii. Whether the respondent's conduct towards the deceased before her demise disentitled him from burying her.

iii. Whether the trial court erred in failing to consider the deceased's wishes in deciding who between the parties could inter her remains.

iv. Who should bear the costs of this appeal and the mortuary charges?

17. On the first issue, Mr. Khaemba, learned counsel for the appellants submits that the evidence of DW-4 who lived with the deceased corroborated DW-1's evidence that she used to visit the deceased annually and didn't find the respondent. That DW-4 who cared for the deceased in hospital did not see the respondent either in hospital or deceased's house which facts go to establish that there was no general repute of a couple between the deceased and the respondent. Reliance is placed on ***ASA V NA & Another (2020) eKLR***. That the fact that the deceased did not inform the respondent when she fell sick shows that there was no spousal relationship between the two. That the respondent's conduct towards the deceased at her point of need disentitles him

from claiming rights to bury her. Counsel cites ***COO & Another V SOW (2013) eKLR***.

18. Counsel further submits that the trial court relied on an affidavit of marriage that was never produced into evidence but marked for identification.

19. That the alleged payment of dowry is doubtful as there were serious contradictions in the evidence of PW-1, PW-2 and PW-3 as to what was exactly paid and or how the same was paid as well as the recipient of the dowry. On the issue, counsel cites ***Phylis Njoki Karanja & 2 others Vs Rosemary Mueni karanja & Another (2009) eKLR***.

20. On the second issue, counsel submits that even if the court was to presume marriage, the evidence of DW-4 shows that the respondent abandoned the deceased during her point of need and only showed up to collect the body. That such conduct disentitles him from claiming the body as was observed in ***Samuel Onindo Wambi V COO & Another (2015) eKLR***.

21. On the third issue, counsel asserts that there was evidence that the deceased had expressed her wishes of being buried by the appellants. That the respondent did not cross examine the

appellants on the issue. Counsel relies on the authority in **Jacinta *Nduku Masai V Leonida Mueni Mutua & 4 Others (2018) eKLR*** and ***Apeli V Buluku (1985) KLR 77***.

22. On the last issue, it is argued that since it is the respondent who occasioned the suit, he should meet mortuary expenses and costs of the suit and also refund the appellants the sum of Kshs 200,000/- paid as mortuary fees.

23. For the respondent, it is submitted that given the period of cohabitation between the deceased and appellant and the existence of children, a marriage is discernible.

24. That the respondent proved his case on a balance of probabilities as the witnesses called on behalf of the appellants made no impact. That the witnesses do not meet the test of being closest to the deceased.

25. He submits that the two families held several meetings and agreed on the burial place and that there is no reason to interfere with the decision of the learned trial magistrate who exercised his discretion properly.

26. In these, the respondent cites the decision in **GOA V. JOO Civil appeal 16 of 2017.**

Analysis and determination.

27. The duty of the first appellate was stated in ***Peters V Sunday Post Limited (1958) EA 424*** as follows:

> ***''It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.''***

28. From the foregoing observations, the main issue for determination is whether the deceased was married to the respondent. Upon finding on the fist issue, the next issue for determination is in regard to the party who is best suited to inter the deceased's remains.

29. From the evidence adduced in the trial court, it was clear that according to the NHIF records, the deceased and the respondent had each indicated the other as the spouse. The children's birth certificate produced also showed the respondent as the father.

30. The point of departure in this matter is whether the deceased and the respondent were customarily married under the Sabaot

traditions. The appellants distanced themselves from the negotiations relied on by the respondent. The respondent asserted that they married and paid dowry while the appellants asserted that they have never been party to any such negotiations if any was entered into.

31. From the evidence on record, the respondent asserted that he got married to the deceased in the year 2004 after being introduced to the Chebonya family, the deceased's maternal uncles and started off by; sending a letter to the Chebonya family, took 2 cows to the deceased's mother and when the deceased passed on, he paid 7 cows to the family and cash in the sum of Kshs 100,000/-. In support, he produced an agreement dated 24/5/2023 as constituting the dowry agreement.

32. He stated that during the dowry negotiations, the deceased's family was represented by Betty, Kelvin Kibet, Simon as well as the 1st appellant. That according to their customs, the deceased's mother is not allowed to receive dowry. In cross examination, he stated that he took the cows to his brother in law Kelvin Kibet through his brother Isaiah Krumoja (PW-3). He stated that he paid two cows before negotiations and seven after the deceased's death.

He however admitted that according to the agreement, 8 cows were to be paid. He also stated that the two cows were given to the deceased's brother and mother.

33. Pw-2 on his part stated that dowry was paid on 24/4/2023 and that the money is till available as the 1st appellant refused to receive and which was given to kelvin Kibet. That the money was paid from Maringo, the respondent's home where they also received eight cows and twenty two goats. He also confirmed that dowry can be paid when the lady is either alive or dead.

34. PW-3 on his part stated that he took two cows to the deceased's brother on 13/5/2019 and others were given after the deceased's death.

35. PW-4 on his part stated that after the deceased's demise, the two families held a meeting and agreed on dowry which was Kshs 100,000/- and nine cows. That the dowry was collected from their home on 24/4/2023 and that the money sent to kelvin Kibet via mobile money transfer. That they also gave seven cows on that day and that the agreement was drawn and signed on that day. On cross examination, he stated that dowry negotiations are done in the lady's home. That he had never seen the deceased but had

heard about her. He stated that the seven cows were given to Isaac Chebonya (PW-2).

36. All the above assertions by the respondent were denied by the appellants who maintain that there has never been any dowry paid to them.

37. From the above, the question then is whether dowry paid after someone's death is dowry in the proper sense of the term and the cultural connotations associated with it.

38. In finding whether a marriage indeed existed, I will revert to section 43 of the marriage Act which states;

> ***43 (1) a marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.***
> ***(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.***

39. The other issue is the standard of proof required of a party asserting the very existence of the marriage. In this, I am guided by the sentiments expressed by Wendoh J in ***ASA v NA & another [2020] eKLR*** where the learned judge stated;

The biggest contention in this case revolves around the issue as to whether the ceremony for the payment of dowry took place. In

considering the probability of the occurrence of the said ceremony, this court will consider the evidence tendered. The standard of proof in civil cases was discussed in the Court of Appeal decision in Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others [2017] EKLR. The Court while referring to Lord Nicholls observed as follows;

12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. In H (Minors) [1966] AC 563 at pg 586, Lord Nicholls explained that the test on the balance of probabilities was flexible. Said he,

"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.....

..Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be considered when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

40. As in this appeal, the main issue revolves around the payment of dowry by the respondent. From the record, there cannot be any doubt that there are inconsistencies in the witness

account of how the dowry was paid, the point in time when the same was paid, the recipient of the dowry and the person who paid the same. The witnesses could not agree on when the same was paid. There are witnesses who asserted that the same was paid during the deceased's lifetime and there are those who stated that the same was paid after the deceased's death. There was no consensus on the issue and having perused the trial court's finding on the same, I associate myself with the statutory underpinning under section 107 and 109 of the Evidence Act that he who alleges bears the duty of proof.

41. The above was stated in ***Kimani v Gikanga [1965] EA 735***. It was observed that;

> ***"To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that***

customary law, as would prove the relevant facts of his case."

42. The evidence of PW-4 who claimed to be a Sabaot elder and clan elder comes in handy on the issue. According to him, dowry was paid on 24/4/2023 at the respondent's home yet ideally, dowry negotiations take place in the lady's home but that the conduct in this matter is not fatal.

43. The agreement drawn on 24/4/2023 does not meet the standards of a dowry negotiation model in that parents were not involved but siblings. PW-4 indeed in his evidence confirmed that the actual minutes carrying the deliberation on the matter were with the secretary thus could not be produced as he was not called to testify.

44. DW-3 also claimed to be an expert in Sabaot customary laws and he stated that it is wrong for dowry to be paid after the lady's death. That if any is paid at that time, the same is being paid on behalf of the children.

45. From the divergent views on the propriety or otherwise of the dowry allegedly paid and the standard of proof stated in Kimani case (supra), I am inclined to find that there was no dowry

paid as the respondent failed to establish on a balance of probability that the same was actually paid on account of inconsistencies noted in his evidence and those of his witnesses before the trial court. It is instructive that the respondent did not see the need to call crucial witnesses such as the 1st appellant's son one Kelvin Kibet who is said to have received the dowry payments. This is quite telling and suggests that had he been called to testify then his evidence would have been adverse to the respondent. Again, the secretary who took the minutes was not called to testify and avail the proper minutes. Further, it was quite unusual that dowry negotiations could be conducted at the home of the alleged husband instead of the deceased's home as is the custom. The conduct of the respondent in arranging to wrap up the dowry negotiations at his home instead of the deceased's home was against the customs and raised doubts as to the authenticity of his claims against the appellants. On the whole, iam satisfied that the respondent, upon the demise of the deceased, assembled a motley of villagers and hurriedly purported to pay dowry in the most unusual manner. The dowry payment was reduced into writing at the home of the respondent but that the secretary was not called to

testify and produce it. The previous dowry payment was also not documented thereby lending credence that it is doubtful if a proper marriage had been conducted between the respondent and the deceased. Even though the respondent claims to have sired children with the deceased, this did not absolve him from proving that a customary marriage existed. It would seem that the respondent and deceased had some loose relationship which had not been properly cemented via customary formalities. It is only after the demise of the deceased that he came out forcefully and attempted to formalize the union albeit late in the day and un-procedurally at that. The evidence of the appellants' witness (DW4) is that the deceased lived on the third floor while the respondent lived on the fourth floor which is a clear indication that the respondent and deceased did not live together. It is highly likely that the respondent and deceased did not reside together in Cheptais area as none of their neighbours came forward to confirm the same. The respondent's witness (PW20 who lived about three kilometers away stated that he had not even met the deceased all his life. That being the position, it is in bad taste that the respondent can now purport to profess his love for the deceased in

death by hurriedly organizing for a dowry engagement that was conducted in his homestead rather than the deceased's home contrary to known Sabaot customary laws. It is also noted that the respondent did not even plead a presumption of marriage as a fall back plan. At best, I find that the claims by the respondent were not proved on a preponderance of probabilities and hence the finding by the trial court was in error and must be interfered with.

46. From the record, the trial magistrate found that the facts presented supported a finding of presumption of marriage as opposed to a customary marriage. I agree with him on the issue. However, the learned trial magistrate could not make such a finding in view of the fact that the respondent did not plead the same. I have carefully reviewed the evidence and indeed find that the main issue before the trial magistrate was whether the parties married under Sabaot customary practices as the evidence and the testimony all leaned on the issue. In fact, the plaintiff (respondent in this appeal) pleaded that he was customarily married to the deceased and a finding based on presumption of marriage was a deviation from the pleadings since a party is bound by his/her pleadings. The issue of a presumption of marriage had not been

pleaded by the respondent and hence the finding thereon by the learned trial magistrate was therefore in error and must be interfered with. Indeed, the learned trial magistrate had correctly found that the respondent had not proved marriage to the deceased but then deviated and sought to rescue him via a presumption of marriage. It is clear that the learned trial magistrate considered an irrelevant factor and thus arrived at an erroneous decision.

47. My finding on the above is conclusive and by implication determines the second issue, that is; who is entitled to inter the deceased's remains. My finding that there was no customary marriage leaves me with the inevitable conclusion that the appellants are the rightful parties to decide on the deceased's burial site.

48. In the result, it is my finding that the appellants' appeal has merit. The same is hereby allowed. The judgement of the trial court dated 13/7/2023 is hereby set aside and substituted with an order dismissing the respondent's suit in the lower court. The appellants shall have the right to bury the deceased at a place of their choice. The respondent is however at liberty to attend and

participate in the burial arrangements and ceremony. Each party to bear their own costs of this appeal and in the lower court.

Orders accordingly.

Delivered, dated and **signed** at **Bungoma** this 31ST day of

OCTOBER,2023.

D.Kemei

Judge

In the presence of;

Khaemba **for Appellants**

Leonard Chesamai Kenga **for Respondent**

K Rita **Court assistant.**