**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO. 134 OF 2017**

**M N.....1ST APPELLANT**

**N M N.....2ND APPELLANT**

**K M.....3RD APPELLANT**

**J M M.....4TH APPELLANT**

**-VERSUS-**

**M N M.....RESPONDENT**

***(Being an Appeal from the Judgment of Hon. C.O Nyawiri (SRM) in Makueni SRMC CC No. 188 of 2016 delivered on 7th June 2017)***

**JUDGEMENT**

**INTRODUCTION**

1. T M M *(herein after 'the deceased')* died on 20/08/2016 after a road accident along the Maai-Mahiu-Narok highway.

2. After the demise, the Respondent asserted her right to bury him by virtue of being his widow but there was resistance from the Appellants who are the parents and brothers of the deceased respectively.

3. Through a plaint dated 25/08/2016 and filed on the same day, the Respondent instituted a suit in the lower Court against the Appellants seeking *inter alia* a declaration that she was the right person to bury the deceased.

4. The Appellants filed their defence and a counter-claim and after a full trial; the Learned Trial Magistrate allowed the suit and dismissed the counter claim.

5. The deceased was eventually laid to rest and what the Appellants are seeking through this appeal is an exhumation of the body.

**THE APPEAL**

6. The Appellants have raised 20 grounds which were repetitive and unnecessarily wordy. I have therefore condensed them into the following grounds;

*a) The learned Magistrate erred in law and fact when he found that 'ntheo' ceremony was performed and failed to appreciate that there was no existence of custom marriage to find a right to bury the deceased.*

*b) The learned Magistrate erred in law and fact when he presumed marriage by virtue of children and long cohabitation while that presumption was rebuttable.*

*c) The learned Magistrate erred in law and fact when he failed to appreciate that wishes of the deceased need not to have been written so as to amount to a will.*

*d) The learned Magistrate erred in law and fact when he failed to consider the submissions and counter claim of the defendants.*

*e) The learned magistrate erred in law and fact when he decided the case without jurisdiction.*

*f) The learned magistrate misdirected himself on issues of law and fact when he based his judgment on irrelevant issues and irrelevant case law.*

*g) The learned magistrate appeared biased and pre-determined to make a decision against the Appellants at whatever cost.*

7. The Appellants were represented by learned Counsel Mr. Mutuku and the Respondent opposed the appeal through the representation of learned Counsel Mr. Mulei. Directions were given on 13/12/2017 that the appeal be canvassed by way of written submissions.

8. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

9. I have, very carefully, looked at the proceedings and judgment of the trial Court, the grounds of appeal, the rival submissions and authorities cited therein.

10. It is my considered opinion that this appeal turns on whether the *'ntheo'* ceremony was performed.

**THE *NTHEO* CEREMONY**

11. It was submitted on behalf of the Appellants that, from the collection of Eugene Contran on custom law , consent and slaughter of a ram are essential ingredients of a custommarriage. That from the evidence of M N (DW4) and K M (DW2), it is clear that consent of the Respondent's mother was categorically denied.

12. It was also submitted that the Respondent did not elaborate about when the *ntheo* was taken and by whom and that she did not call any of the witnesses who were present when the ceremony was performed. That DW2 in his clear evidence stated that *ntheo* ceremony was not performed. According to the Appellants, the evidence of DW2 should be believed because he is the Respondent's uncle hence reliable.

13. It was further submitted that the Respondent was not properly married under custom law and as such, she lost her right to bury the deceased.

14. On the other hand, it was submitted on behalf of the Respondent that *ntheo* was performed and as such, there existed a valid Kamba custom marriage between her and the deceased.

15. Further, it was submitted that the deceased received *ntheo* for his daughters without objection from the Appellants and this was a clear indication that he *(deceased)* had paid *ntheo* for the Respondent.

16. I will now analyze and re-evaluate the evidence of the witnesses with regard to the *ntheo* ceremony.

17. PW1 was the Respondent. In her testimony, she created a dim picture of her relationship with her in-laws. According to her, the Appellants really antagonized her and caused a lot of trouble for her and the deceased.

18. It was also her evidence that they did not love their own son *(deceased).* With regard to *ntheo*, she said that three goats were taken to her parents' home and that was a sign that she was now married under Kamba custom law .

19. On cross examination, she said that two (2) he-goats were slaughtered and five (5) were left. From the slaughtered goats, one was for pouring blood on the ground and the other one was for eating together.

20. The ones that were left were for purposes of sale in case her parents got a problem. She proceeded to say that all people were invited for the ceremony, the neighbours, the church and family members.

21. PW3, P M N testified that his son was married to the Respondent's daughter and that in the year 2014; they were received by the Respondent and deceased when his son took *ntheo* and dowry. According to him, this means that the deceased had taken *ntheo* to the Respondent's home.

22. PW4, Nyamayi Kisiang'a testified that he was 73 years old, was well conversant with the Kamba customs and had been a village elder for 10 years. He said that once *ntheo (three goats)* is paid, marriage is said to be in existence.

23. It was also his evidence that where a woman's *ntheo* was not paid, she cannot receive *ntheo* for her daughter. Further, he said that where a marriage is broken, the woman returns one goat to the husband's home.

24. On cross-examination, he said that he was present when *ntheo* was taken to the deceased and that according to Kamba customs, one cannot receive *ntheo* if he did not pay *ntheo*.

25. PW5 was the Respondent's daughter, T M. She supported her mother's evidence about the tribulations they went through at the instance of their in-laws.

26. She said that there was no peace between her nuclear family and that of her grandfather. That her grandfather's family mistreated them and their lives were very difficult.

27. When their turn came, the Appellants called four witnesses. DW1 was the deceased's mother, the 2nd Appellant herein. She testified that she was supposed to travel with her husband and the Respondent for the *ntheo* but did not manage because she was unwell.

28. That when her husband returned, he informed her that *ntheo* was not performed because the Respondent refused to alight from the vehicle at her parent's house. That the Respondent's mother also refused to let the ceremony happen.

29. She went on to say that when the Respondent's daughter *(PW5)* was getting married, she was not invited. Further, she said that *ntheo* is the most important step and that it signifies marriage.

30. On cross examination, she said that the *ntheo* was witnessed by people from both families. That she didn't know what happened at the *ntheo* and only received a report. That apart from PW5, there is another daughter of the deceased that was married at their home.

31. DW2 was the Respondent's uncle, Josephat Kisenga Mwaningwa. He stated as follows;

***"Ntheo was done in the marriage between M and M. I witnessed the same. This was to happen at Machakos. Myself and N left for Machakos….ntheo did not take place because N refused. She refused to participate in the ntheo. She said she wanted a different goat to be slaughtered for ntheo. Her mother asked her to allow the goat to be slaughtered and she allowed for the same. At the ntheo, the goats were three in number. They were bought by M. M was present at the ntheo. The goat was not slaughtered. Mutisya said that once he is in agreement with M, Wanza and N , he would call M …"***

32. He went on to testify that once *ntheo* is paid, the woman becomes a wife of the groom. He went on to state as follows;

***"Yes, N refused that the goats should be cooked because we did not go with the women who were to cook. According to Kamba***

***custom, the married woman cannot cook the food for ntheo. N was right. The ntheo goat was later returned to the home of M. Ntheo was not done. We did not even drink water. We were given a place to sleep, we slept but ntheo was not done…"***

33. On cross-examination, he agreed that it was the 1st Appellant who asked him to do a statement with regard to the case. He also agreed that the relationship between the Respondent and Appellants was strained.

34. He also said that where *ntheo* has not been paid, a husband in a marriage is buried at his paternal father's home.

35. DW3, J M M talked about a meeting which was at the home of the Appellants in the year 2003. The meeting was called for purposes of discussing disagreements between the Respondents and her parent's in law.

36. It was resolved that the Respondent should be dealt with like a stranger. His evidence with regard to *ntheo* was hearsay and therefore irrelevant.

37. On cross examination, he said that the goats which they ate at the meeting were the ones that had been returned by the Respondent's father.

38. DW4, M N was the deceased's father. He testified that he took *ntheo* to the Respondent's home but it was refused. That the Respondent's father was present but her mother was absent.

39. That he had travelled with the Respondent for the ceremony but when they got to Wambua stage, she refused to alight and instead proceeded to Nairobi to her mother.

40. That later on, the plaintiff returned without her mother. That it was the Respondent who said that the ceremony should be adjourned.

41. That he left the three goats, flour and *'karubu' (traditional liquor)* at the Respondent's home. That the three goats were later returned by the Respondent's father.

42. That he called a clan meeting in 2003 to solve issues whereupon it was decided that the Respondent could not continue living with them because *ntheo* had not been performed.

43. He went on to say that his wife *(2nd Appellant)* did not attend the *ntheo* but was represented by her sister.

44. He proceeded to state as follows;

***"Before ntheo is performed, the son belongs to his father and mother but once ntheo is performed, he still belongs to the father. If ntheo is not performed, the plaintiff N belongs to her father. I want to bury the deceased in my land because he is my son. Customs do not permit that he be buried elsewhere because ntheo was not performed…there is a child called T, her other name is M, she does not respect me. She has ever bought me even just a sweet. She is my granddaughter. She did not even invite me in her ceremony during her marriage…"***

45. On cross-examination, he said that the Respondent was married in his home in 1979 and that he took *ntheo* when the Respondent and deceased had already been blessed with one child.

46. That after the clan meeting, the Respondent and deceased destroyed their house which was on his land and proceeded to buy another land. He didn't know where the deceased worked for a living. He agreed that according to Kamba customs, it is the bride who returns the goats, not her father.

47. He went on to say that he never visited the home which was built by the Respondent and deceased. He agreed that the Respondent and deceased built a home about two kms from his home.

**ANALYSIS**

48. It is clear from the evidence of all the witnesses that the most essential step in a Kamba custom marriage is the *ntheo.* That once the *ntheo* ceremony has been performed, there exists a valid Kamba custom marriage.

49. I have looked at several judicial proceedings where witnesses gave evidence on the issue of marriage under Kamba custom law . I will sample a few.

50. In **Re Andrew Manunzyu Musyoka (deceased) [2005] eKLR**, Steven Mututu Mutisya (DW2) testified as an expert on Kamba custom law . He said that a marriage is contracted when goats of "Ntheo" are paid to the girl's parents and that even if dowry is not paid "Ntheo" has to be paid and concludes a marriage.

51. He said that if a woman leaves the husbands home with children and one dies the body has to be taken back to the man's home for burial. Similarly, if the woman dies when at her parents' home, the body has to be taken back to the husband's home if *"Ntheo"* had been paid. A lady can only inherit from her father's estate if she divorces her spouse by returning *"Mbui sya ulee"* – where goats are returned to the husband by the woman.

52. In **Re estate of James Simu Nthiwa [2005] eKLR** there was a contestation as to whether the deceased was married. The objector was the deceased's mother, she averred that he was not married as he had never informed her of it nor had any dowry been paid in accordance with Kamba custom lawwhere goats called "*Mbui sya ntheo"* are taken to the girl's parents and one is slaughtered.

53. She also denied that there were any negotiations with the parents of any girl with a view to marriage. She visited him once in 1977 at his place of work and did not see any woman living with the deceased.

54. I have also looked at the views of Judicial Officers with regard to this issue. In **Re Estate of Stephen Kimuyu Ngeki (1998) eKLR,** J.W Mwera, J. (as he then was) stated that Akamba custom marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.

55. There is also no doubt in my mind that where *ntheo* has been performed and one of the parties to a marriage dies, the right to bury the deceased is with the surviving spouse. In case of a polygamous set up and the husband dies, he is to be buried at the home of the 1st wife.

56. In fact, the Appellants submitted that; unless *ntheo* is performed, the wife has no right to either choose the place of burial or bury the deceased. So, was *ntheo* performed for the Respondent"

57. The evidence on record shows that the *ntheo* ceremony had been pre-planned with the consent of both families. The evidence also shows that on the day of the ceremony, the important ingredients *to wit*, the three goats were available.

58. The point of departure comes where the Appellants contend that the actual *ntheo* ceremony did not happen. DW2 and DW4 were present on the day of the *ntheo* but they gave conflicting accounts of why the *ntheo* ceremony did not happen. In my view, it was imperative for their accounts to tally.

59. DW2 was blowing hot and cold in his evidence. On one hand, he was categorical that the ceremony actually happened. On the other hand, he said that it did not happen. The Appellants described this witness as reliable and urged the Court to believe him in finding that the *ntheo* ceremony did not happen.

60. Fortunately, this Court is not in the business of selective re-evaluation of evidence. The witness proceeds to say that they did not even drink water, hence trying to paint an acrimonious picture of the situation and then concludes by saying that they were given a place to sleep.

61. I find that intriguing because that is not how normal human beings behave when confronted by unfriendly situations. If the Appellants evidence is anything to go by, the reception at the Respondent's home was anything but friendly, however, the hostility

notwithstanding, they were offered a place to sleep and they accepted.

62. It is my considered view that this particular witness was desperately trying to conceal the truth but the truth can be stubborn and it kept unsettling him.

63. With regard to the Appellants' contention that the Respondent's mother withheld her consent, it is trite that when talking about the essentials of a valid marriage, the consent required is that of the bride.

64. Of course there are situations involving minors where the parent's consent is required however that is not what we are dealing with. In our case, the Respondent's consent was not in issue.

65. There was also evidence to show that PW5, the Respondent's daughter had been married under the Kamba custom law and *ntheo* had been taken to her parent's home.

66. DW1 and DW4 lamented about not being invited to the said marriage ceremony which clearly indicates that it was within their knowledge. There is nothing to show that they raised any objection with regard to the marriage.

67. I am inclined to agree with the evidence of PW 4 who said that if a woman's *ntheo* has not been paid, she cannot receive *ntheo* for her daughter. This position is further buttressed by the fact that some goats were returned to the Appellants, albeit by the Respondent's father.

68. If no goats had been taken in the first place, there would have been none to return.

69. Further, it was the evidence of PW4 that for a marriage to be broken, a goat should be returned by the bride and not anyone else.

70. At this juncture, I believe it is imperative to re state the burden of proof in civil matters.

71. Lord Denning J. in **Miller –Vs- Minister of Pensions (1947)** discussing that burden of proof had this to say-

***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.***

***Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

72. The upshot of the foregoing is that from the evidence on record, the burden of proof with regard to the ntheo ceremony was actually discharged.

73. Before exiting the custom stage, there is one more issue that was raised by the Appellants. They contended that the burial site was on a land which customarily did not belong to the deceased because it was purchased by his in-laws.

74. According to them, the deceased ought to be buried on his own land or that of his father and not that of his wife.

75. The evidence on record shows that indeed the land was purchased through the efforts of the Respondent's brother, one Mr. M and PW5, the Respondent's daughter. It is clear from the record that the deceased was not a man of means.

76. It was the evidence of PW5 that after the death of her uncle *(M)*, she paid the balance of the purchase price because her father was poor.

77. It is also not in dispute that the Respondent and her family were chased away from the Appellants' home after the clan meeting of 2003.

78. Further, from the evidence of the deceased's parents, there is an acknowledgement that indeed the deceased and Respondent owned a home.

79. The following extracts from DW4's evidence are illustrative.

***"After the clan meeting, N left my home. M and N (plaintiff) came back and destroyed their house which was in my land. They destroyed it when they left to go and buy land…they did not come back and build another house in my home, he never came back…I did not visit the home which was built by M and the plaintiff. I will never go to their home…M and his wife, the plaintiff built a home about 2 kms from my home…"***

80. From the extract, it is actually discernible that the deceased collaborated with the Respondent and stuck with her throughout the tribulations. It is in my view, unfathomable, that a widow should be denied the rights to bury her husband on the land where they have built a home just because the land was not bought with the husband's resources.

81. Where does that leave poor men like the deceased in this case" If a couple decides to stay together and live their lives despite financial challenges, I don't see why anyone else should have an opinion about their affairs.

82. I have certainly not come across a requirement under Kamba custom law that bars a widow from burying her husband on a land which he did not purchase.

83. If indeed there is such a requirement, my simple view is that it is repugnant to justice and morality hence not applicable. In reaching that conclusion, I am guided by the provisions of section 3(2) of the Judicature Act which provides as follows;

***"The High Court, the Court of Appeal and all subordinate courts shall be guided by African custom law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."***

84. Having opined that the *ntheo* ceremony was performed, it is not necessary to belabor the other grounds of appeal. I will however make brief comments about them.

**PRESUMPTION OF MARRIAGE**

85. The Appellants submitted that the learned magistrate failed to know and appreciate that burial considerations are not entirely dependent on whether one is a wife or not, a child or not. That they are purely dependent on whether the custom practices and customs permit such a burial in the manner intended.

86. On page 26 of the record of appeal, it is very clear that the learned Trial Magistrate had already made a finding that the Respondent and deceased were married under Kamba custom law. His sentiments with regard to presumption of marriage are what I would refer to as *'obiter dictum'*.

87. In any case, the trial Court was not being asked to presume marriage. The Respondent's case was that she had a right to bury the deceased by virtue of having been married to him under custom law.

88. Be that as it may, the learned trial magistrate was well within his right to give an *obiter dictum*. It has not in any way affected the conclusion that indeed the Respondent and deceased were married under Kamba custom law.

**WISHES OF THE DECEASED**

89. According to the Appellants, the wishes of the deceased did not have to be written for them to amount to a will. It was their

submission that there need not be a million witnesses.

90. The wishes were allegedly communicated to the 1st and 2nd Appellants *(deceased's parents).* This is what ideally would amount to an oral will.

91. I have gone through the entire judgment and there is nowhere that the learned trial magistrate made a finding that the wishes needed to be written.

92. What can be discerned from his finding is that the alleged wishes did not meet the threshold of an oral will, which I entirely agree with.

93. Of course there is no need for a million witnesses but the law prescribes certain requirements which must be fulfilled before an oral will can be said to exist.

94. In this case, there is absolutely no evidence to reach such a conclusion.

**SUBMISSIONS AND COUNTER CLAIM**

95. Having looked at the Appellants' submissions before the trial Court as well as the trial Court's judgment, there is really no basis to say that the submissions were disregarded. The counter claim was also addressed in detail.

96. It raised issues about the Respondent being a concubine, the custom marriage and the deceased's wishes. These issues were clearly addressed in the judgment. This ground lacks merit.

**JURISDICTION**

97. The simple answer to this contestation lies in section 7(3)(b) of the Magistrate's Court Act No. 26 of 2015 which provides that;

***"A Magistrate's Court shall have jurisdiction in proceedings of a Civil nature concerning any of the following matters under African Custom law s;***

***a) Land….***

***b) Marriage, divorce, maintenance & dowry***

***c) Seduction…***

***d) ….***

***e) ….***

***f) ….***

98. Determining whether the Respondent and deceased were married under Kamba Custom law was key to determining who had the right to bury the deceased.

99. The case was filed in 2016 after the enactment of the aforesaid Act hence putting the matter squarely within the jurisdiction of magistrates Courts.

100. The pre-2015 authorities cited by the Appellants in their submissions before the trial Court were irrelevant.

**BIAS**

101. It was the Appellant's submission that the learned magistrate messed the case a great deal. That the recorded evidence by the Appellant's witnesses was different from what the parties actually said in their testimonies and statements.

102. I looked at the statements written by the Appellants' witnesses *vis a vis* the evidence on record. Most of them adopted their witness statements and proceeded to testify further which essentially means that they added information that was not in their statements.

103. At some point in the proceedings, the Appellants' Counsel complained that one of his witnesses was threatened by the Respondent's son. It is on record that the learned trial magistrate issued a warning against such conduct.

104. I did not find any indication of bias on record. As for the allegation that what was said in Court is not what was recorded, I am at a loss on how this Court is expected to verify the same.

**CONCLUSION**

105. The appeal lacks merit it is for dismissal, however since the parties compromised the appeal, the consent order herein recorded in settlement of the matter prevails.

**SIGNED, DATED AND DELIVERED THIS 31ST DAY OF JULY 2018, IN OPEN COURT.**

**…….**

**C. KARIUKI**

**JUDGE**