

BURIAL DISPUTES IN KENYA:

A CASE FOR LEGISLATION

BY

NGARE SIMON NGUNJIRI

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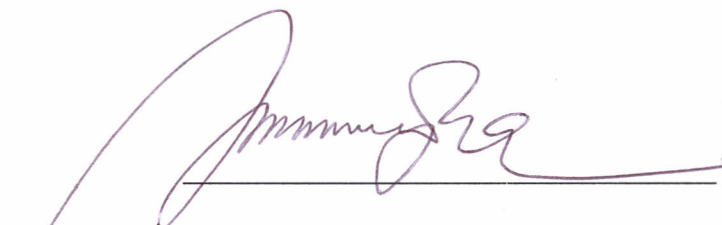
NOVEMBER 2006

I, **NGARE SIMON NGUNJIRI**, do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.



NGARE SIMON NGUNJIRI

This thesis has been submitted for examination with my approval as University supervisor.



WILLIAM M. MUSYOKA

ABSTRACT

This thesis offers a critical analysis of burial law in Kenya. There is no legislation on burial matters and the current law on the subject is uncertain and discriminatory especially against women.

There is no consistency in court decisions on burial cases. Courts apply different criteria in determining burial cases and there are no well settled legal principles to fall back to. Courts appear to apply different regimes of law randomly. They choose either customary law, common law or marriage law. The application of the different regimes of law on the same subject matter has given rise to conflicting court decisions and lack of a harmonious rationale of determining burial disputes. The application of the different regimes of Law also poses an 'internal conflict of laws' situation in the adjudication process.

Chapter One deals with general introduction and highlights the unsatisfactory nature of the current law on burial cases in Kenya, which includes uncertainty, discrimination against women and internal conflict of laws.

In Chapter Two a critical analysis of burial law in Kenya is examined by considering various selected cases. The divergent criteria applied by the courts in determining different burial cases are discussed.

In chapter Three the aspect of internal conflict of laws in burial cases is discussed. The sources of such conflicts are discussed.

In Chapter Four recommendations for a Burial Act is made. Some crucial issues which ought to be addressed by such a legislation are discussed. It is hoped that Kenya's Parliament will soon see the need of legislating on burial matters. Death causes grief especially to the surviving spouse and a legal battle over the dead body only serves to exacerbate the grief.

DEDICATION

To the entire Ngare family whose diligence, fortitude and unity are always a source of inspiration.

To Rahab Wachira and Rosalyne Ngunjiri whose sincere and deep friendship brought me this far.

To all my loving friends without whose care and affection I wouldn't be who I am.

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The extremely arduous task of typing this work was accomplished by Rahab W. Wachira with such skill and affection, which words are too poor to appreciate.

The Librarians of University of Nairobi, Parklands Campus Library, are not forgotten.

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ACK	Anglican Church of Kenya
AIDS	Acquired Immuno-Deficiency Syndrome
CEDAW	Elimination of All Forms of Discrimination Against Women
EHF	Ebola Hemorrhagic Fever
eKLR	Electronic Kenya Law Reports
HIV	Human Immuno-Deficiency Virus
KLR	Kenya Law Reports
NCWK	National Council of Women of Kenya
U. O. N.	University of Nairobi

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND

Burial disputes in Kenya have become a perennial subject of litigation involving a struggle between groups or sub-groups claiming and counter-claiming rights or duty to bury a deceased person to the exclusion of all other claimants. These disputes during the trial give graphic attestation of the conflicting norms espoused by the contesting parties.

A review of the cases decided by the High Court and the Court of Appeal reveals that the courts have failed to exhibit a philosophy of law that addresses the peculiar claims of the parties in general and the overall development of the law on burial disputes in particular. Most of the judgments are myopically tailored for the sole case before the judge at that specific moment. Rarely does a judgment provide any insight into the dynamics of the present Kenyan society or decipher the real underlying issues or provide juridical precedents that may offer guidance for the future development of the law in a constantly changing Kenyan society. The judiciary has failed to develop precedents that can easily be followed in future cases in order to develop sound legal principles and policy considerations against the background of bewildering claims in burial disputes.¹

Surprisingly, parliament is yet to make any legislation in this area. No wonder then that courts more often than not call upon parliament to legislate on burial disputes.² In the absence of any legislation in the area one may wish to ask whether our courts have a discretion to legislate and fill in the gap. Apart from case law which is inconsistent and underdeveloped, the courts are left with no guiding written rules of law in deciding burial disputes. Making a good decision and developing the law is left to the personal calibre,

¹ A. M. Abdullahi, *Burial Disputes in Modern Kenya: Customary Law in a Judicial Conundrum*, Faculty of Law, University of Nairobi (1999), 2.

² See for instance the Court of Appeal in the case of *Otieno v. Ougo & Another (No.4)*, (1987) KLR 407 at 426.

general knowledge, grasp of the issues and the good sense of the trial judge. This kind of dispute carries certain peculiar features, like the long period of the trial and the public policy issue of the corpse lying in the mortuary for a long period, and may, therefore, not after all be suitable for judicial litigation.³

Customary law has been held to be the applicable personal law regulating burial disputes.⁴ However, customary law exists in ethnic groups in Kenya which have a homogeneous value system and it varies from group to group.⁵ Since it is unwritten it remains uncertain until proved and accepted in court. Further, due to lack of uniformity it poses an internal conflict of law situation and there is no settled criteria of preferring one customary law as against the other.⁶ Customary law has also been criticized as lacking gender neutrality and for being discriminatory.⁷

The deceased's wishes and even those of his widow have little role to play. If they are inconsistent with custom this would be disregarded. However, this violates individual autonomy and his human rights. The rule of law would be served much better if all human actions were subject to law that is known to the subjects.⁸ Hence the need for a legislation governing burial matters. Towards that end a proposal for legislation on burial matters is made. Views have been offered on the key issues which ought to be addressed by such legislation and even on the manner in which they ought to be addressed.

³ A. M. Abdullahi, *Supra*, note 1 at 8.

⁴ *Otieno v. Ougo & Another (No.4)*, (1987) KLR 407 at 408.

⁵ J. W. Van Doren, "African Tradition and Western Common Law: A study in contradiction" in J. B. Ojwang and J. N. K. Mugambi, *The S. M. Otieno Case: Death and Burial in Modern Kenya* (Eds.), 127 (1989).

⁶ M. D. Okech-Owiti "Some socio-legal issues," in J. B. Ojwang and J. N. K. Mugambi (Eds.), *The S. M. Otieno case: Death and Burial in Modern Kenya* at 25 (1989); also see S. C. Wanjala, "Conflicts of Law and Burial", *Ibid*, at 102.

⁷ P. Kamari-Mbote, *Gender Considerations In Constitution-Making: Engendering Women's Rights in The Legal process*. <<http://www.kenyaconstitution.org/docs/09cd003.htm>> (Accessed on 23rd June 2006).

⁸ A. M. Abdullahi, *Supra* note 1 at 12.

1.2 STATEMENT OF THE PROBLEM

Lack of legislation in burial matters in Kenya has created uncertainty, unfairness and gaps in the law. This study is aimed at revealing the uncertainties, unfairness and gaps in the law governing burial matters and to offer a possible solution by way of making recommendations on the key issues which ought to be addressed by way of legislation.

1.3 OBJECTIVES OF THE STUDY

The objectives of the study are as follows:

- i) To illustrate the inconsistencies, inadequacies and the gaps apparent in the law governing burial disputes in Kenya.
- ii) To demonstrate the unsatisfactory nature of the jurisprudence developed by our courts in burial cases.
- iii) To advocate for legislation to govern matters relating to burials.

1.4 HYPOTHESES

It is intended to test the following hypotheses:

- i) The current law applicable in burial cases is inconsistent, inadequate and full of lacunae (gaps).
- ii) The current burial law is in some cases discriminatory, unfair and unjust.
- iii) There is need of legislation to govern burial matters.

1.5 RESEARCH QUESTIONS

The study is aimed at answering the following questions:

- i) Is the current Kenya burial law lacking in material aspects?
- ii) Is there need of making legislation to govern burial matters?

1.6 JUSTIFICATION OF THE STUDY

The law governing burial matters in Kenya is not codified. The courts, whilst determining burial disputes, normally encounter obstacles such as conflicting customary laws, conflict between the deceased's will or wish and the customary law of the society from where the deceased hails from, the difficulty of resolving who has a right to bury the deceased especially between the surviving spouse and the community which is usually represented by the clan and the problem of determining burial sites. In the absence of a codified law regulating burial matters, there exists a lacuna and uncertainty in the law. Court decisions lack consistency since there are no universally agreed guiding principles which the court must fall back to in adjudicating burial disputes. Although Kenya is a multi-cultural society, there is need of having a burial law which is certain and which can be applied expeditiously. Such a law would eliminate societal perceived bias of judicial decisions based largely on exercise of judges discretion. Although there have been numerous calls for legislation in burial matters, no attempts have been made to highlight the pertinent issues which legislation ought to address and which can then form a strong base of agitating for law reform. This study will finally fill up this gap.

1.7 THEORETICAL FRAMEWORK

Burial in African culture is viewed as a communal matter and hence societal custom is central in resolving any dispute which may arise therefrom. A society's culture is never static but keeps on changing and hence the genesis of uncertainty of defining the immanent ingredients of a particular culture.

A conflict is bound to arise between one's view of his individual autonomy and culture. Talcott Parsons observes:

A highly developed system of occupation roles...will tend to have certain relatively constant features. Perhaps the most important of these features... is its inherently 'individualistic' character. That is, the status of the individual must be determined on grounds essentially peculiar to himself, notably his own qualities, technical

competence, and his own decisions about his occupational career and with respect to which he is not identified with any solidarity group.⁹

In such circumstances, Parsons further observes:

Status and role allocation and the process of mobility from status to status are in terms of the individual as a unit and not of solidarity groups, like kinship groups, castes, village communities, etc¹⁰

However, Parsons further notes that to a substantial degree there remains, to this day, “the solidarity of the numbers of the kinship unit which precludes individualistic differentiation of fortune and status”.¹¹

A consideration of burial cases in Kenya portrays that the co-existence of urban life and rural life present only an irregular picture of the general response to the factor of change. It is also apparent that people are torn between the desired social values and the values coming with new institutions, new social milieux and new ways of life.

It is unlikely that a unified response to such new values could have as yet been obtained, given the cultures of manifold hues prevailing among the Kenyan tribes.

On a legal perspective Sir Henry Maine in his *Ancient Law*¹² referred to certain legal consequences that attend social change, as the traditional, rural and collective character gives way to a more nucleated, individual-set orientation. He observed that in such circumstances, “The individual is steadily substituted for the family as the unit of which civil laws take account.”¹³ The thrust of Maine’s observation is that so long as the

⁹ T. Parsons, “Social Classes and Class Conflict in the Light of Recent Sociological Theory” in K. Thomson and J. Tunstall (eds.) *Sociological Perspectives* (Harmondsworth, Penguin Books, 1971) 265, at 268.

¹⁰ *Ibid.*

¹¹ *Ibid* at 269.

¹² H. Maine, *Ancient Law* (London, Dent, 1917), see pp 99-100.

¹³ H. Maine, “From Status to Contract,” in V. Aubert, *Sociology of Law* (Harmondsworth, Penguin Books, 1969), 30.

traditional insular social and cultural setting is exposed to fundamental change, the individualized, contractually-based social phenomenon will continue to win more ground and ultimately replace substantially the communitarian system of old.

The Lawyer's part in such fundamental change is similarly alluded to by Iredell Jenkins:

As human groups become sufficiently large, complex and diversified they suffer an erosion of the cohesion and stability that they formally had. Patterns of behaviour become uncertain and insecure. Men find themselves in novel situations and relationships that are covered by common usage.... In short... the cake of custom crumbles. As this occurs, the apparatus of positive Law is created....¹⁴

Sting Jorgensen sees a jurist as "an intermediary of culture" and the process of change, according to him, ought to be optimally reflected in the management of the character and functioning of the law, by lawyers, so as to create a "reasonance of legal ideas".¹⁵

In modern times recognition of individual autonomy is clearly discernible from national and international human rights law. The Constitution of Kenya recognizes certain civil and political rights which belong to an individual and which are inalienable, indivisible and inviolable¹⁶. Unfortunately, in the instant subject of burial the Kenyan Constitution does not either expressly or by necessary implication provide for the legal status of the individual wishes of a deceased person. Even worse it contains a proviso which permits discrimination with respect to personal laws, including burial¹⁷. As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the *Universal Declaration of Human Rights (1948)* and two international human rights covenants: the *Covenant on Economic Social and Cultural Rights* and the *Covenant on Civil and Political Rights*¹⁸. It has also ratified the Convention on the

¹⁴ I. Jenkins, *Social Order and the Limits of Law* (Princeton, OUP, 1980), 33.

¹⁵ S. Jorgensen, *Law and Society* (Akademis Boghandel, undated), 59.

¹⁶ See Chapter V of *The Constitution of Kenya*, Revised Edition 2001, (1998).

¹⁷ S. 82, *Constitution of Kenya*, Revised Edition 2001, (1998).

¹⁸ Both adopted by the UN General Assembly in 1966.

*Elimination of All Forms of Discrimination Against Women (CEDAW)*¹⁹. In African Context, Kenya subscribes to the *African Charter of Human and People' Rights*, otherwise known as the *Banjul Charter (1981)*²⁰. These international and regional (herein referring to Africa) instruments prohibit all forms of discrimination and reflect not only a national but also a global move towards recognizing and protecting individual autonomy together with individual's inherent human rights.

Customary Law, which is derived from the particular community's cultural values, is, in modern conditions antiquated. There is no legislation available to govern burial cases in Kenya and if the cake of custom crumbles as indicated by Jenkins then there ought to be a legislation in place to stand as the pillar for positive law. A case for legislation is fortified by Dworkin's conception of the law. According to Dworkin, law is a "seamless web in which there is a right answer.... There is no law beyond the law".²¹

1.8 RESEARCH METHODOLOGY

The study is qualitative in nature. Data will be gathered from both primary and secondary sources. The study will be undertaken through extensive and thorough literature review. The existing literature will be traced in Kenya's main libraries and in particular memorial library in main campus and Parklands Campus Library both of the University of Nairobi and the High Court of Kenya Library at Nairobi. Important local textbooks are available in the said libraries.²²

¹⁹ Ratified in 1984.

²⁰ Ratified in 1992.

²¹ M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, Seventh Edition (London Sweet & Maxwell Ltd (2001), 1391.

²² Some of the textbooks are: J. B. Ojwang and J. N. K. Mugambi (Eds.), *The S. M. Otieno Case: Death and Burial in Modern Kenya (1989)* and A. M. Abdullahi, *Burial Disputes in Modern Kenya: Customary law in a Judicial conundrum (1999)*.

Internet will also be consulted. What other countries have enacted can be found in the internet. It is also important to capture the dynamism of research. Unreported cases may be available in the internet.

A brief and critical analysis of relevant case law will be done.²³ Articles and Journals will also be consulted.²⁴ The only dissertation on this subject will also be consulted.²⁵

1.9.1. LIMITATION

The study will be done using the literature available. Libraries and bookshops in Kenya are poorly stocked and hence lack adequate materials. There is no single local masters or doctorate thesis available in the proposed area of study. The period within which to complete this study is also short.

1.9.2. LITERATURE REVIEW

Most of the burial disputes in Kenya are determined using Customary Law. As Masaji Chiba observes, Customary Law “is law which originates in the native culture of people”²⁶.

The social organisation of Africans recognizes communal responsibility and authority and individual autonomy is subject to the recognized social practices of the community or the tribe. While referring to African social organisations, E. Cotran observes:

²³ The following cases will be considered, viz: *Okanja v. Onyango & Another* (1987) KLR 628, *Gachege v. Wanjugu* [1991] KLR 147, *Njoroge v. Njoroge & Another* [2004] 1 KLR 611, *Otieno v. Ougo & Another* [1987] KLR 371 *Apeli v. Buluku* [1985] 777, *Maagu v. Waweru* [1982] 159, *Otieno v. & Another* (No.4) (1987) KLR, 407; *Kiplangat Korir v. Dennis Kipngeno Mutai* (2006) eKLR <www.kenyalawreports.or.ke>; *Augustino Mbai Gatuma v. George Gitau Gatuma* (2005) eKLR <www.kenyalawreports.or.ke>; *Eunice Moraa Mabeche & Another v. Grace Akinyi and Others*, HCCC No. 2777 OF 1994 (unreported) and *Githieya v. Gitau* (2004) 2KLR 309.

²⁴ For instance J. W. Van Doren, *African Tradition and Western Common Law: A study in contradiction*, The American Association for the comparative study of law Inc. (1988); G. K. Kuria, *Internal Conflict of Marriage Laws in English speaking African Countries*, U.O.N. (1978); Stephen Cretney, “Some problems in the marriage laws of Kenya,” *East African Law Journal*, Vol, 3 (March, 1967).

²⁵ James N. King’ara, *Burial Law in Kenya: Do we need a statute?*, LLB, UON (1988).

²⁶ M. Chiba, “The Identity Postulate of Indigenous law and its Function in Legal Transplantation in P. Sack and E. Minchin (eds.), *Legal Pluralism* (Canberra, 1986) 33, at 40.

Every individual is born into a certain status relative to all other members of his community. It is not a personal status, as it might be in an individualistic society, and does not imply rank, but reciprocal obligations and benefits which he incurs as a member of the community. All his conduct is conditioned by his status, which is not a permanent one but changes with his age and experience and may be affected by the decease of relatives and the inheritance of new responsibilities. The principle of substitution is correlative to status, since all of the same status in the community may at any time be called upon to act as a substitute for another member, a principle which is of considerable importance in African Legal Theory²⁷.

Until recently, in African context traditional ceremonies such as initiation, marriage, burial and other rituals were the responsibility of the clan. The clan comprised of council of elders who were men. Thus Bernardi commenting on Meru Customary Law observes:

Within the lineage there is one elder, a *Mugambi*, who is recognized as the head and leader of the lineage. He convenes the meetings of the elders, and must always take part in all social transactions of the lineage, initiations and other ritual ceremonies, marriage, trade or cattle exchanges.... The family is the next unit operating within the clan.... Within the family the authority of the father is paramount, but is limited by the authority of the elders of the clan-lineage in matters beyond the family's province²⁸.

Consolata Fathers observes:

Among the Meru ...it was a taboo to touch the dead. The hut in which somebody died had to be destroyed. Those who realised that a neighbour of theirs is going to die, would take him in the forest immediately and would shelter him in a little hut put up there, significantly called "hut of death". The deceased's name had not to be mentioned any more.²⁹

The role of the clan upon death of a person can be appreciated from a social context perspective. Max Gluckman thus writes:

...two things do in fact survive a man's death. The first is the body which has to be disposed off in some way. The second is the social personality, which is the total set of

²⁷ E. Cotran & N. N. Rubin, *Readings in African Law*, Volume 1 (Frank Cass & Co. Ltd, 1970), 164.

²⁸ B. Bernardi, *The Mugwe A Blessing Prophet: A Study of religious and public dignity of the Meru of Kenya* (2003), pp. 14-15.

²⁹ Consolata Fathers, *Meru*, Poligrafio Roggero & Tortia, Beinasco (Turin) – Italy.

the man's relationships with other members of the community – that is, his position as father to children, as son to father, as husband to wife, as subject to chief, and so on. After a man has died, these relationships continue to exist: his social personality survives. In the funeral rites these relationships are adjusted to accommodate them with the fact of his death... death is feared, not by the individual alone, but by society: it is an attack on the society of living men for it wrenches and dislocates their relationships with one another; and once it has gained a foothold, they fear it may not be content with a single victim³⁰.

Under Kikuyu burial custom Eugene Cotran succinctly summarizes the position as follows:

The responsibility for burial falls on the eldest son or, in his absence the brothers of the deceased.... Only close relatives are invited to the burial. A man who has no relatives at all is buried by a stranger, who is entitled to seven goats out of the estate of the deceased for his services³¹.

William Ochieng writes about the Gusii as follows:

At the time of their arrival in Kano Plains the Gusii belonged to one large clan. A clan is a group of people who are all descended from one forefather.... As with the neighbouring Luo, the Gusii did not recognize that death was natural. It was always blamed on witchcraft (*oborogi*). When a person died there was always crying, but the degree of public mourning varied according to whether the dead person had been important or not. An infant was usually buried in the floor of the house. There was only a little wailing and few people attended. When a wealthy man died in the prime of his life there was much more mourning. The corpse of an adult was buried just outside the house in which he lived; a man was buried on the right side of the house, and a woman left.³²

Further the said writer goes on:

The father was in most cases the ruler of his homestead. He made sure that his family lived in peace, and respected the laws and customs of the community. He taught his children these laws and customs³³.

³⁰ Max Gluckman, *Politics, Law and Ritual in Tribal Society*, (Basil Blackwell Oxford, 1965), pp. 7-8.

³¹ Eugene Cotran, *Restatement of African Law:2, Kenya 11, The law of Succession*. (London-Sweet & Maxwell, 1969), 9. See also Jomo Kenyatta, *Facing Mount Kenya: The Traditional Life of the Gikuyu*, Kenway Publications (1978).

³² William Ochieng, *People of the South-Western Highlands: Gusii, Kenya's People*, (Evans Brothers (Kenya) limited, 1986), 9, 16.

³³ *Ibid* at 22.

Similarly, in respect of the Kipsigis, the clan exercised authority over family issues which were considered to go beyond family boundaries such as initiation, marriage and burial.³⁴

For the El molo, George W. Mathu writes:

... death means going back to *Wacq* (God). Death comes from God. Adults are buried outside the village on the Lake Shore, and the mound is covered with stones. The whole village then, moves a few yards away³⁵.

In respect of the Samburu Consolata Fathers observes:

Samburu Society is governed by a gerontocratic system. Power and community decisions are in the hands of the elders. Women have no particular value in society as they are not destined to remain in the clan.... Generally the dead are not buried except very elderly and renown people and for babies of few months old (these last are buried in the hut near the fire, the hut is then abandoned³⁶).

In respect of Turkana Consolata Fathers, observes:

The Cult of the Dead, if it can be properly called so, is given only to the father and mother and important persons. These only have a right to be buried in the ground on which their hut is built (the hut will then be pulled down). The eldest son inserts a piece of butter in the mouth of the dead person pronouncing this formula: "Sleep in the cool earth and do not be angry with us, who remain on this earth!". Passing near the mound, acquaintances and villagers will pay homage to the dead person throwing pinches of tobacco and mouthfuls of indigenous beer or milk. The other mortals do not have any right to a burial but are abandoned in the savannah to the hyenas and vultures³⁷.

In respect of the Pokot Consolata Fathers observes:

There are not a large number of Pokot who reach old age, mainly because of the hardships of life described above. Men who live to an advanced age receive special signs

³⁴ See Consolata Fathers, *Kipsigis* (Stamperia Artistica Nazionale – Italy).

³⁵ George W. Mathu, *El molo*, Stamperia Artistica Nazionale (Turin) Italy (1991).

³⁶ Consolata Fathers, *Samburu*, Stamperia Artistica Nazionale – Italy.

³⁷ Consolata fathers, *Turkana*, Stamperia Artistica Nazionale – Turin –Italy.

J. B. Ojwang observes that:

At the level of fundamental reality, culture (it's current state, its adaptability, its pace of change) is a vital dynamic.⁴¹

Eugene Cotran also observes:

Customary Law is in a fluid state and changes occur due to various factors such as education, the influence of religion, and social and economic advancement.⁴²

Due to the fact that culture is dynamic it follows then that court cases decided on customary law do not automatically have precedent value. Before such cases are applied as precedents in subsequent cases a litigant must satisfy the court that the same custom exists and applies in the same way as it was when the case a litigant seeks to rely on as a precedent was determined. This not only poses uncertainty in the law but also calls upon the courts to keep on determining societal customs now and then and hence costs of litigation, whether calculated in monetary terms or by way of time taken are increased unnecessary.

Application of Customary Law, therefore, means that the law cannot remain certain or settled once and for all. Yet certainty in the Law makes it possible to create precedents for easy determination of future cases. As Oliphant observes:

The doctrine of precedent makes the law applicable to future transactions certain and the future decisions of Judges predictable. It also gives us justice according to law and not according to the whims of men.⁴³

Kenya is a multi-ethnic country and where several customs are involved in a burial dispute there is no yardstick of determining which custom should override the other or in other words, which custom should be preferred as opposed to the other. M. D. Okech Owiti thus observes:

⁴¹ J. B. Ojwang and J. N. K. Mugambi, *The S. M. Otieno Case: Death and Burial in Modern Kenya*, Nairobi University Press (1989), 9.

⁴² E. Conran, *Restatement of African Law: 2, Kenya II, The Law of Succession*, London-Sweet & Maxwell (1969), xiv.

⁴³ Oliphant, "A return to Stare Decisis," *14 American Bar Association Journal*. 71, pp. 72-73 (1928).

In the context of Kenya, and countries with similar socio-economic formations, homogeneity of culture is a total myth. Persons belonging to different socio-economic categories, and, therefore, undergoing different experiences in the process of life, are unlikely to develop homogeneous cultures. The differences will manifest themselves in differing degrees in dissimilar attitudes with regard to death, and practices with regard to dead bodies and burials.⁴⁴

M. D. Okech-Owiti goes on to ask:

Can it be said that the Otieno⁴⁵ wrangle is partially a manifestation of different cultural practices and philosophies?. Can it be said that the case could not have arisen – at least in the present form, and other things being equal – if there was cultural harmony?⁴⁶

When Kenya Customary Laws come into conflict whilst adduced in burial disputes in Kenya there is a situation of “internal conflict of laws” as alluded to by S. C. Wanjala.⁴⁷

Internal conflict of laws within a unitary system:

Describes simply the conflict of laws in an internal situation, i.e. one involving no foreign elements.⁴⁸

Kenya is a unitary state but due to the cultural diversity of the inhabitants, their various personal laws are also diverse and this inherently implies that a conflict of laws situation might arise in the arena of personal laws.

Allot is of the view that the fact that the various sources of law within a country give different answers to the issue before the court leads to an internal conflict of laws situation.

He states:

⁴⁴ M. D. Okech-Owiti, “Some Socio-legal issues; in J. B. Ojwang and J. N. K. Mugambi (Eds.) *The S. M. Otieno Case: Death and Burial in Modern Kenya*, at 25, (1989).

⁴⁵ The writer is referring to the case of *Otieno v. Ougo & Another* [1987] KLR 371 which involved the wrangle between the widow of the deceased one Wambui Otieno (a Kikuyu) on one hand and the clan of the deceased (a Luo) on the other hand. The dispute was all about two issues namely who had the right to bury the deceased and the place of burial.

⁴⁶ M. D. Okech-Owiti, *Ibid*, note 25.

⁴⁷ S. C. Wanjala, “Conflicts of Law and Burial,” in J. B. Ojwang and J. N. K. Mugambi (Eds.) *The S. M. Otieno Case: Death and Burial in Modern Kenya*, at 102, (1989).

⁴⁸ G. F. A., Sawyerr, “Internal Conflict of Laws in East Africa” in G.F.A. Sawyerr (Ed.), *East African Law and Social Change*, 110 (1969).

We must start with the incontrovertible facts of the existence of a plurality of systems or bodies of law within a single country. Often such systems give the same answer to a given problem; sometimes they do not. Then conflict may arise, either in the sense that the party does not know where he stands... or that a court must consider which of the two systems to apply to the case before it.⁴⁹

Allot in defining what constitutes an “internal conflict” of laws situation within a unitary state like Kenya states that it applies:

... to cases where a judge is required to choose between two or more systems or bodies of law which are not territorially distinct, i.e. which apply concurrently and without spatial separation within a single territorial jurisdiction. In such an instance there is an overlap between one system of law and another, which cannot be removed merely by drawing a boundary on the ground.⁵⁰

A. M. Abdullahi is of the view that there is no “internal conflict” of law situation in Kenya.

He writes thus:

The law of this country [Kenya] being so clear and so well laid down, it is hard to envisage a scenario which leads to an internal conflict of laws situation. In our view there is none, for Section 3 [of the *Judicature Act*, Cap 8, Laws of Kenya] rules out the traditional role of a court in selecting a preferred law system in the arena of choice of laws. A closer look at Section 3 [of the *Judicature Act*] thus reveals quite clearly that what is popularly referred to as an “internal conflict” of laws situation within the Kenyan context is a great vestigial legal fiction. A legal analysis of the same shows that there is indeed no conflict of laws scenario envisaged by the section. What is called “internal conflict” is merely a situation of false conflict of laws in that at face value one may get the impression that the various laws indeed conflict.⁵¹

However, this opinion fails to appreciate that the body of law referred to as the African Customary Law in the *Judicature Act*⁵² lacks uniformity and the customs of the various

⁴⁹ Antony Allot, *New Essays in African Law*, 112 (1970).

⁵⁰ *Ibid.*

³² A. M. Abdullahi, *Burial Disputes in Modern Kenya: Customary Law In A Judicial Conundrum* Faculty of Law, University of Nairobi (1999), 197.

⁵² Cap. 8, Laws of Kenya.

Kenyan ethnic groups are at times at crossroads and hence pose an “internal conflict” of law situation.⁵³

To resolve such conflicts legislation in that field is necessary. A. Okoth-Owiro observes that:

One of the by-products of the so-called S. M. Otieno ‘burial saga’ has been a proliferation of calls for legislation on matters relating to burial in Kenya.⁵⁴

The first such call came in January 1987, when the Chairman of the National Council of Women of Kenya called for the introduction of “a law that defines the rights of surviving spouses and the next of kin with regard to burials”.⁵⁵ And in their judgment at the conclusion of the epic legal battle over S. M. Otieno’s burial place, the Court of Appeal expressed a wish for legislation in the following terms:

It does appear to us that in the course of time parliament, may have to consider legislating separately for burial matters covering a deceased’s wishes and the position of his widow and so enabling courts to deal with cases related to burials expeditiously.⁵⁶

Further, an important stream of calls for legislation came from sections of the legislature. Dr. J. N. Karanja, the then Member of Parliament for Mathare said:

As soon as parliament resumes, I am going to put the burial matter on the order paper again. It is quite clear that the laws as applied now are discriminatory to widows. I think we ought to have laws governing the disposition of people’s remains so as to indicate, wherever possible who should be responsible for the burial of a spouse and also to include the rights of both widows and widowers. It is upon legislators to seek a rational method of solving this problem as a means of avoiding the kind of lengthy and vexatious trial we have just experienced.⁵⁷

⁵³ See, for instance G. K. Kuria, *Internal conflict of Marriage Laws in English Speaking African countries*, U.O.N. (1978), where the writer analysis internal conflict of Marriage Laws in Kenya and also in other African countries.

⁵⁴ A. Okoth-Owiro, “The Burial Law of Kenya: Do We Need a Statute?” in J. B. Ojwang and J. N. K. Mugambi (Eds.), *The S. M. Otieno Case: Death and Burial in Modern Kenya* (1989), 116.

⁵⁵ *Daily Nation*, 17th January 1987, 24.

⁵⁶ *Otieno v. Ougo & Another* (No. 4) 410 at 426.

⁵⁷ *Weekly Review*, 22 May 1987, 25.

These calls for legislation emerge due to the unsatisfactory state of Kenya law relating to burials. First, the constitution, which otherwise prohibits discriminatory laws, contains a proviso which permits ‘discrimination’ with respect to personal laws, including burial.⁵⁸ Secondly, no other written law provides for matters of burial, either expressly, or by necessary implication.

Thirdly, the applicable law on burials must be sought by reference to Kenya’s choice of law statute, the *Judicature Act*.⁵⁹

Finally, through the application of the provisions of the Judicature Act, the applicable law is African Customary Law and the Common Law of England.⁶⁰

⁵⁸ S. 82, *Constitution of Kenya*; See Also P. Kameri-Mbote, *Supra*, note 7.

⁵⁹ Cap. 8, Laws of Kenya. The operative section of the Act provides as follows:
3(1) The Jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with

- (a) the Constitution;
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the schedule to this Act, modified in accordance with Part II of that schedule;
- (c) Subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general applications in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

It further provides as follows:

- (2) 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 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.

⁶⁰ Of this, the Court of Appeal has said:

The place of customary law as the Personal Law of the People of Kenya is complimentary to the relevant written laws. The Place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary law and the common law in a matter of a personal law. First of all, if there is clear customary law on this kind of matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality, and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way, these two great bodies of law, for that is what

Okoth-Owiro identifies four problems posed by application of the current law of burial in Kenya.⁶¹ First, the present law does not offer guidance on the law to be applied in internal conflict situations. The term ‘customary law’ refers to several systems of local customary law operating within the same territorial jurisdiction. Choice of law problems sometimes emerge between one system of customary law and another. A ruling that customary law applies is therefore an inadequate basis for resolving internal conflicts.

Secondly, the present law is unclear on the consequences of declaring a customary law rule to be repugnant to justice and morality, and therefore unenforceable. In such a case the court should revert back to, or at least resort to the common law. However, on the specific matter of burial law, the common law is not a fully developed legal regime. The common law on burial is built around the theory that there is no property in a dead body.⁶² Thus there can be no rights regarding burial. The common law thus holds that there is, at most, a duty to dispose of the dead body. As a general rule, this duty is placed on the personal representative, and in the case of a dead wife, on the husband. At common law the wife does not have a duty to bury her dead husband.

The common law cannot be used to resolve disputes based on competing claims of ‘right’ to bury the deceased. Okoth-Owiro hence submits that common law cannot complement customary law because it leaves a lacuna in its own provisions.

Thirdly, the present law makes no provision for a Kenyan who is not subject to customary law. Customary law may be resorted to as a guide in “civil cases in which one or more of the parties is subject to it or is affected by it.”⁶³ Otherwise, customary law will not apply.

they truly are, compliment each other. They may be different but the way to operate them is to use them as complimentary to each other without conflict as laid down in Section 3 of the Judicature Act (Cap. 8) *Otieno v. Ougo & Another* (No. 4) [1987] KLR 407 at 418.

⁶¹ A. Okoth-Owiro, “The Burial Law of Kenya: Do We Need a Statute?” in J. B. Ojwang and J. N. K. Mugambi (Eds.), *The S. M. Otieno Case: Death and Burial in Modern Kenya* (1989), 116 at pp. 120-123.

⁶² Williams on *Executors and Administrators* (14th Ed.) Volume 1 (London, Stevens and Sons Ltd., 1960), 438.

⁶³ S. 3(2) of *Judicature Act* Cap 8, Laws of Kenya.

There are Kenyans who do not have a system of customary law to fall back on. These are not just the non-indigenous Kenyans; this category includes urban Kenyans born and bred outside the operation of any known system of customary law. There not being a recognized regime of urban customary law or common law of Kenya, such Kenyans are left out of the operation of existing law on burials.

Fourthly, customary law is the residual and the applicable law on burial because it is the personal law of Kenyans of African Origin. But the problem here is that there is no general legal theory or body of legal principles which exists in the municipal law of Kenya for determining what the personal law of a Kenyan is, or ought to be. It is therefore not easy to accept the *a priori* approach of the courts in this matter.

The last problem is the troublesome status of the wishes of the deceased. In life, the individual is free to change many aspects of his personal law through an expression of his wishes. But in death, the common law position is that the wishes of the deceased, though deserving of respect, do not carry the force of law.⁶⁴ A number of customary law regimes take similar positions.⁶⁵ But in situations of conflict, respect for the wishes of deceased can solve at least some of those conflicts. It is also contradictory to allow the individual to change his personal law in life, but deny him a similar freedom in death. The legal status of the wishes of the deceased requires clarification.

A. M. Abdullahi gives the wishes of the deceased a constitutional status. He states thus:

In our view, both oral wishes and the written will should be protected constitutionally by the courts. Of the two, the preferred position is where the deceased had left a written will. In this regard, if the deceased declares emphatically where he should be buried, then such a constitutional right should not be derogated from. A will and an oral wish expressing or selecting a preferred place of burial is an exercise of a constitutional right that must be enforced by the courts...it is only a constitutional validation of the deceased's right to select his/her preferred burial site that can once and for all make legal sense and create some judicial harmony in burial disputes cases....That is why we

⁶⁴ William and Mortimer, *Executors, Administrators and Probate* (London, Stevens and Sons, 1970), 55.

⁶⁵ E.g. Luo Customary Law.

strongly feel that it is unnecessary to enact burial legislation in the country. The solutions to such disputes are fully provided for in the constitution.⁶⁶

He indicates that the constitutional rights of the individual which are provided for under Chapter V of the constitution ought to provide the guiding principles in the dispute.⁶⁷ However, this opinion assumes the existence of a literate society which readily makes wills or oral wishes before death, which is not the case in Kenya. What if there is no will or oral wish of the deceased? In such circumstances there would be no constitutional provisions to rely on. Moreover, no constitutional provisions exists in Kenya which safeguards wills or the wishes of a deceased person. Freedom of expression of an individual as laid down in the constitution⁶⁸ cannot be said to cover wills or wishes of the deceased. Chapter V of the constitution deals with protection of fundamental rights and freedoms of an individual. An individual must mean a living person but not a dead body. Human rights hence applies to living persons and not otherwise.

A will is defined under the Law of Succession Act “as the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.”⁶⁹ This section refers to disposition of property after death and it would appear to support the English position that there is no property in a corpse capable of being disposed of by way of a will.

The various scholars’ divergent views on the interpretation of section 3 of the Judicature Act portray a situation of lack of clarity and certainty in the applicable law. The numerous calls for legislation on burial matters mean that Kenya legal system is incomplete in some material aspects. In adjudication process, the courts lack specific provisions of law to allude to and there are no well settled legal principles governing burial matters which the courts can apply. Consequently, and not surprisingly, the courts have applied different and varying

⁶⁶ A. M. Abudullahi, *Supra* note 1 at pp. 198-199.

⁶⁷ *Ibid* at 198.

⁶⁸ S. 79 of *Constitution of Kenya*.

⁶⁹ S. 3 of *The Law of Succession Act*, Cap. 160, Laws of Kenya.

tests in deciding burial disputes arising out of similar circumstances. These various tests are the subject of the next chapter.

1.9.3. CHAPTER BREAKDOWN

Chapter One deals with general introduction. In this chapter the unsatisfactory nature of the current law on burial in Kenya is revealed. The salient features of the current Kenya Law on burial which make it unsatisfactory includes uncertainty, discrimination against women or lack of gender neutrality and internal conflict of laws.

In Chapter Two a critical analysis of burial law in Kenya is examined by considering various selected cases. The chapter opens up by laying down the philosophical and juridical basis of legal disputes in Kenya. The various, and at times conflicting, tests applied by the High Court and Court of Appeal in deciding burial disputes are critically analysed.

In Chapter Three the aspect of internal conflict of laws in burial cases is discussed. The sources of such conflicts in burial cases are discussed.

Chapter Four contains recommendations and conclusions. A recommendation for a Burial Act is made. Some crucial issues which ought to be addressed by such legislation are highlighted.

CHAPTER TWO

A CRITIQUE OF KENYA CASE LAW IN BURIAL DISPUTES

2.1 INTRODUCTION

Death, often defined simplistically as the absence of life, has always been viewed with mystery, superstition, and fascination by man.¹ That definition is faulty, for it presents a negative: death is not life. What it is, however, can only be conjectured. It is the supreme puzzle of poets, the concern only of humankind, and the inevitable fate of all things living.²

Man knows that things die. He witnesses their deaths and sometimes even executes them. These traumatic deaths are easy to understand. A complex system is quickly and radically destroyed, and it ceases functioning. Natural death, is much more difficult to grasp.³ Perhaps when man first discovered that certain slumbers were irreversible, he questioned the difference between that profound sleep and the daily slumbers he experiences. Manifest in ritual, symbol, and philosophical perspective are countless efforts throughout history to rationalize this final reality, the philosophical “why” of which still defies explanation, but the biomedical “how” of which is yielding to investigation.⁴

2.1.1 HUMAN DEATH

Primitive man lived in a world beset by death, to the degree that fertility and other life symbols often were the focal point of his worship⁵. He did not deny death’s reality but interpreted death as a transition from one phase of life to another. Burial, then, became a rite of passage similar to puberty, from one mode of participation in life to another. The

¹ Elisabeth Kubler-Ross, “Death,” in *The new Encyclopedia Britannica, Macropaedia, Volume 5, Knowledge in Depth*, Helen Hemingway Benton (1973-1974), 526.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

contents of early tombs bear witness to this view of death among prehistoric cultures.⁶ In later times, the afterlife was envisioned in more ethereal and spiritual terms, as exemplified in early religions. The Judeo-Christian tradition distinguishes itself from others in terms of its historicity, emphasizing the entrance of God's revelation as events (e.g., Passover, Crucifixion, Resurrection) that at one and the same time establish temporarily and future possibility.⁷

Much serious misunderstanding exists relative to the biblical understanding of death and resurrection, upon which much of the view of Christianity is said to rest, and with which modern natural science ostensibly is said to be in conflict. The most obvious misunderstanding is the notion of physical resurrection of the body, or belief in the physical conquest of death. Theologians have sought to reinterpret the concept of resurrection in language that simultaneously affirms and denies the exclusiveness of flesh or spirit as the biblical understanding of resurrection. Saint Paul, in the earliest writings on resurrection, uses the Greek term *sōma* (body), which would correspond much more closely to modern terms such as identity, ego, or even gestalt than to either flesh or spirit. The biblical witness stresses, therefore, a real but not a physical conquest over death. Later, as theology developed historically and particularly as folk religion struggled to come to terms with the agnostic and Eastern religions, the emphasis often shifted to either a purely physical phase change or a total spiritualizing of the death event. Contemporary theology seems to be developing a more profound yet realistic conception of death as the foreclosure of life, a point at which God calls man into the future. Thereby hope becomes the alternative to unempirical despair.⁸

No doubt, the missionaries in Kenya and British colonization eroded the native culture and instead supplanted Christianity to a large extent. In the traditional societies, although there was a believe of life after death, the burial rites as practiced today of interring the remains of a deceased body or by way of cremation were unknown. The usual practice was to perform

⁶ *Ibid*, 527.

⁷ *Ibid*.

⁸ *Ibid*.

certain ceremonies and then throw dead bodies in the forests.⁹ However, Western Culture hastened transformation of indigenous cultures and even statutory enactment on the basis of public health made burial compulsory.¹⁰ Jens Finke, writes on Turkana burial as follows:

The burial of the deceased was rare until relatively recently, when the government made it law that every corpse should be buried. Prior to this, only important people such as *emuron* (diviners) and respected elders were buried, their resting places marked by stone cairns.¹¹

Similarly, according to Kikuyu Custom, there used to be no burial until recently. Eugene Cotran making observations on the death and funeral rites of the Kikuyu writes:

The responsibility for burial falls on the eldest son or, in his absence, on the brothers of the deceased.... A poor man is normally buried in a special family graveyard away from his house, or in the past, simply thrown into the bush.... A man who has no relatives at all is buried by a stranger, who is entitled to seven goats out of the estate of the deceased for his services.¹²

Apart from the belief, (whether based on culture or religion) of life after death (whether in bodily or spiritual form), scientific advances have unearthed new benefits which can be derived from a dead body. For instance, an exact time of death is sometimes necessary in order to ensure that an organ is being removed from a donor who is clinically dead. Aside from these medical implications, an unambiguous moment of death is often important to establish for legal purposes. It may be important to know the exact time of death in civil and criminal liability as well as in inheritance of property, insurance, or survivors benefits.¹³ A hospital must be careful before disconnecting a life sustaining machine such as a respirator

⁹ See Burnette C. Fish & Gerald W. Fish, *The Kalenjin Heritage: Traditional Religious and Social Practices*, David Koech Foundation and the African Gospel Church, 1995 (2nd Print, 1996).

¹⁰ *Public Health Act*, Cap 242, Laws of Kenya.

¹¹ Jens Finke, *Turkana burial mound – Traditional Music & Cultures of Kenya*. <<http://www.bluegecko.org/Kenya/tribes/turkana/images/turk24.htm>> (Accessed on 23rd June 2006).

¹² E. Cotran, *Restatement of African Law: 2, Kenya II, The Law of Succession*, (London, Sweet & Maxwell) 1969, 9. Generally in olden days Africans never buried the dead but just threw them to the forest.

¹³ Samuel G. F. Brandon, "Death Rites and Customs" in *The New Encyclopaedia Britannica, Macropaedia, Volume 5, Knowledge in Depth*, Helen Hemmingway Benton, (1973-1974), 529.

in order to avoid possible future legal entanglements such a suit based on euthanasia or ‘mercy killing’. A patient can also bequeath his body to a medical school, but such provisions are not binding on the family.¹⁴

In many countries a person legally can be presumed dead after an unexplained absence of seven years.¹⁵ In every age and in every culture, disposition of human remains complies with prevailing public interest, moral values and cultural tradition.¹⁶

2.1.2 DEATH RITES AND CUSTOMS

Man is the only creature known to bury his dead.¹⁷ The fact is of fundamental significance. For the practice was not originally motivated by hygienic considerations but by ideas entertained by primitive peoples concerning human nature and destiny. This conclusion is clearly evident from the fact that the disposal of the dead from the earliest times was of a ritual kind. The Paleolithic peoples not only buried their dead but they provided them with food and other equipment, thereby implying a belief that the dead still needed such things in the grave. In such provision for the dead, Paleolithic man had been anticipated, inevitably in a cruder manner, by his predecessor, the so-called Neanderthal or Mousterian man, so that this very significant practice can be traced back to an even greater antiquity, possibly to about 50,000 BC.¹⁸

The belief that human beings survive death in some form has profoundly influenced the thoughts, emotions, and actions of mankind. The belief occurs in all religions, past and present, and decisively conditions their evaluations of man and his place in the universe.

¹⁴ *Ibid.*

¹⁵ See for instance, S 118A of *The Kenya Evidence Act*, Cap 80, Laws of Kenya, which provides that where it is proved that a person has not been heard for seven years by those who might be expected to have heard of him if he were alive, there shall be a reputable presumption that he is dead.

¹⁶ Samuel G. F. Brandon, *Ibid* note 13.

¹⁷ *Ibid*, 533.

¹⁸ *Ibid.*

Mortuary rituals and funerary customs reflect these evaluations; they represent also the practical measures taken to assist the dead to achieve their destiny and sometimes to save the living from the dreaded molestation of those whom death had transformed into a different state of being.

Many ancient Mesopotamian divinatory texts reveal a belief that disease and other misfortunes could be caused by dead persons deprived of proper burial.¹⁹

It is significant that in few religions death has been regarded as a natural event. Generally, it has been viewed as resulting from the attack of some demonic power or death god: in Etruscan sepulchral art a fearsome being called Charun strikes the deathblow, and medieval Christian art depicted the skeletal figure of Death with a dart. In many mythologies death is represented as resulting from some primordial mischance. According to Christian theology, death entered the world through the original sin committed by Adam and Eve, the progenitors of mankind.²⁰

2.1.3 MODES OF DISPOSAL OF THE CORPSE AND ATTENDANT RITES

The form of the disposal of the dead most generally used throughout the world in both the past and present has been burial in the ground.²¹ The practice of inhumation (burial) started in the Paleolithic era, doubtless as the most natural and simplest way of disposal.²² Whether it was then prompted by any esoteric motive, such as the return to the womb of Mother Earth, as has been suggested, cannot be proved.²³ Among some later peoples, who have believed that primordial man was formed out of earth, it may have been deemed appropriate that the dead should be buried – the idea found classical expression in the divine pronouncement to Adam, recorded in Genesis 3:19; “You are dust, and to dust you shall

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, 535.

²² *Ibid.*

²³ *Ibid.*

return”.²⁴ There is evidence that in ancient Crete the dead were believed to serve a great goddess, who was the source of fertility and life in the world above and who nourished and protected the dead in the earth beneath.²⁵

In the ancient Near East, the construction of stone tombs began in the 3rd Millennium BC and inaugurated a tradition of funerary architecture that has produced such diverse monuments as the pyramids of Egypt, the Taj Mahal, and the Mausoleum of Lenin in Red Square, Moscow.²⁶ The tomb was originally intended to house and protect the dead.²⁷ Among many peoples, the belief that the dead actually dwelt in their tombs has caused the tombs of certain holy persons to become shrines, which thousands visit to seek for miracles of healing or to earn religious merit; notable examples of such centres of pilgrimage are the tombs of St. Peter in Rome, of Muhammed at Medinah, and, in ancient times, the tomb of Imhotep at Saqqārah, in Egypt.²⁸

The alternative use of inhumation or cremation for the disposal of the corpse cannot be interpreted as generally denoting a difference of view about the fate of the dead.²⁹ In India, cremation was indeed connected with the fire god Agni, but cremation does not necessarily indicate that the soul was thus freed to ascend to the sky. Burial has been the more general practice, whether the abode of the dead be located under the earth or in the heavens.³⁰

In many religions periodic commemorations of the dead have been kept. The Christian All Souls Day, on November 2, which follows directly after All Saints Day, commemorates all

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, 536.

³⁰ *Ibid.*

the ordinary dead: requiem masses are celebrated for their repose, and in many catholic countries relatives visit the graves and place lighted candles on them.³¹

2.1.4 PSYCHOLOGICAL AND SOCIOLOGICAL ASPECTS OF DEATH

The Paleolithic burials reveal that the pattern of man's reaction to the fact and phenomena of death has been set from the dawn of culture.³² Unlike the other animals, man has been unable to ignore the mysterious cessation of activity and lapse of consciousness that cause his body to decay and befall members of his own kind. Death has, accordingly, constituted a problem for man, and he has felt impelled to take special action to cope with it. The pattern of his reaction has been twofold: confronted with the deaths of his companions, he has recognized an obligation to attend to their needs as he has conceived them, believing that they continue to exist in some form, either in the grave or in an underworld to which the grave gave access.³³

It is in his religion that man's reaction to death finds its most significant expression. All religion is concerned with post-mortem security – with linking mortals to an eternal realm – whether through ritual magic, divine assistance, or mystic enlightenment.³⁴

The philosophical basis of burial disputes in modern day rests on the deep feeling of an obligation to attend to the needs of the dead, who in any event deserve to be treated with dignity since in theological terms there is life after death. Perhaps, it is submitted, this believe of life after death, which is truly a matter of personal conscience, should be the cornerstone of application of human rights in burial disputes.

Apart from the theological reasoning or belief of life after death, which is a reflection of modern thinking associated with Christianity, there exists traditional cultural beliefs which

³¹ *Ibid*, 537.

³² *Ibid*, 538.

³³ *Ibid*.

³⁴ *Ibid*.

hold that failure to accord a dead body a dignified burial would attract severe punishment in different forms from the spirits of the dead or ancestral spirits. Hence the majority of burial disputes arises as a result of conflict between traditional culture and modernity.

No wonder, Joyce Mulama, remarks:

Cultural activities reckon that Kenyans lead two lives with one foot at their urban setting and the other at their ancestral homes, such that when they die, their relatives do what it takes to perform cultural rites.³⁵

2.1.5 KENYA'S LEGAL FRAMEWORK GOVERNING ISSUES ARISING UPON DEATH

There is no written law governing burial matters in Kenya. However, apart from customary law parties in a dispute usually invoke Marriage Law³⁶ and the Law of Succession³⁷.

Customary Law is inadequate in dealing with the issues that arise in burial disputes since it suffers from the following handicaps: First, Customary Law is only applicable if it is not inconsistent with any written law and not repugnant to justice and morality³⁸. Second, it lacks homogeneity and hence P. Kameri-Mbote observes:

... there [are] as many customary laws as there are tribal communities and despite general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify³⁹.

³⁵ Joyce Mulama, "Cultural-Kenya: the last stand against Modernity", in *Inter Press Service News Agency* <<http://www.ipsnews.net/africa/interna.asp?idnews=20393>> (Accessed on 5th August 2006).

³⁶ *The Marriage Act*, Cap 150, Laws of Kenya, *African Marriage and Divorce Act*, Cap 151, Laws of Kenya, and *Mohammedan Marriage Divorce and Succession Act*, Cap 156 Laws of Kenya.

³⁷ Cap 160, Laws of Kenya.

³⁸ See S. 3(1) of *The Judicature Act*, Cap 8, Laws of Kenya.

³⁹ P. Kameri-Mbote, *Gender Dimensions of Law, Colonialism and Inheritance in East Africa* (2002) <<http://www.ierc.org/content/a0205.pdf>> (Accessed on 10th September 2006).

Third customary law is not written and a litigant has to establish and prove its existence in Court through evidence. Moreover, customary law is in a fluid state and keeps on changing as peoples culture changes.

Lastly, customary law is discriminatory from a gender perspective. P. Kamari-Mbote observes:

The hallmark of African Customary Law is the dominance of older male members over property and lives of women and their juniors. Allied to this is the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendant and descendants and more than one wife in polygamous unions. An outsider looking at these societies structures may aver that women have no rights under Customary Law⁴⁰.

The Marriage Law regime and the Succession Law regime do not address the central issues in a burial dispute, namely, who has a right to bury a corpse and where a corpse should be buried. Parties to a burial dispute ground their *locus standi* on relationship with the deceased such as marital relationship, parental relationship and other kinship relationships. Yet there is no specific law either in the Marriage Law or Succession Law regimes which stipulates who has *locus standi* to bury a deceased person.

The unsatisfactory state of the Kenya law on burial is made even worse by the Constitution which allows discrimination with respect to personal laws, including burial⁴¹. Moreover there is no specific statutory provision protecting the wishes of a deceased person in so far as they direct the deceased's wish as to who should take burial responsibility, the mode of burial and the place of burial.

While *The Public Health Act*⁴² makes provisions requiring the dead to be buried in appointed cemeteries or in any authorised cemetery or burial ground or other place⁴³ it is completely silent on who has a legal duty to bury the dead.

⁴⁰ *Ibid.*

⁴¹ S. 82, *Constitution of Kenya*, Revised Edition 2001, (1998).

⁴² Cap. 242, Laws of Kenya.

⁴³ SS. 144, 145 and 156 of Cap 242, Laws of Kenya.

2.2 CRITICAL ANALYSIS OF BURIAL LAW IN KENYA

There is no written law that governs burial matters in Kenya. In deciding burial disputes courts have to decide on whether to apply customary law or the common law. However, although for a long time marriage law was deemed irrelevant and inapplicable in deciding burial disputes, it has been recently applied consistently and to that extent it may be argued that the law on burial matters is actually written but it is inadequate and not consolidated in any single statute.

The role of courts is that of interpreting the law. If the law is not put by the legislature in certain terms it consequently follows that the courts would be impaired in making solid decisions since they are forced to operate under uncertain law and their decisions can hardly be consistent in those circumstances. Positive law has the advantage of providing the parameters for interpretation and application and hence there is little room, if any, for exercise of discretion. In such circumstances, where positive law exists, harmony in courts decision making would inevitably follow. It is lack of positive law governing burial disputes which is the cause of the numerous inconsistencies in burial matters in Kenya. On this point it is difficult to agree with A. M. Abdullahi, when he writes:

Kenyans take their burial disputes to the courts as final arbitrators.... But the past judgments of the High Court and the Court of Appeal on burial disputes have never been well articulated legally or explicitly enunciated from a public policy point of view and have in total failed to contribute positively to the growth of jurisprudence in this area. Indeed it can be argued that the judgments of both courts have not only inhibited the growth of jurisprudence on burial disputes but have encouraged litigation in this area by sustaining a state of unsettled law.⁴⁴

In the absence of positive law, the courts are bound to exercise discretion in determining disputes and exercise of discretion is bound to give inconsistent results even in similar cases.

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A. M. Abdullahi, *Burial Disputes in Modern Kenya: Customary Law in a Judicial Conundrum*, Faculty of Law, U.O.N (1999).

Furthermore, as Dworkin writes, Judges should not act as “deputy legislators”.⁴⁵ The application and choice of various regimes of law, i.e., the customary law, the common law, marriage law, land law (in a limited sense) and human rights law inevitably creates a fertile ground for points of departure in the adjudication process. Rather than blaming the judiciary for the inconsistencies in their decisions in regard to burial matters, we think, the main culprit and source of the problem is the legislature which has failed to enact a specific legislation in the field of burial matters.

A critical analysis of the case law dealing with burial disputes reveals that there is no specific and static criterion which forms the basis of adjudication. The litmus test keeps on changing from one case to another. The tests to be applied have also not been agreed upon.

The various tests which have been applied may be summarized as follows:

- (i) Customary law is applied where it is not inconsistent with written law or repugnant to justice and morality.
- (ii) Where customary law is inapplicable, then common law has been applied.
- (iii) In some cases, neither customary law nor common law is applied but rather the wishes of the deceased have been regarded as paramount.
- (iv) While in some cases the law relating to marriage has been held to be irrelevant or inapplicable, in other cases marital status has been used as a basis for determining the dispute.
- (v) While discrimination in burial matters is allowed by the *Constitution*,⁴⁶ some cases have been determined on the basis of gender equity.
- (vi) Proprietary rights over the proposed burial site has also been used as a criterion for determining burial disputes.
- (vii) Extralegal considerations, and particularly, a belief in that it is not good to keep a corpse lying in the mortuary for a long time appear to have played a role in determining burial disputes. The high cost of keeping the body in the mortuary

⁴⁵ M. D. A. Freeman, *Llyod's Introduction to Jurisprudence*, Seventh Edition, London, Sweet & Maxwell Ltd 2001, 1391.

⁴⁶ S. 82, *Constitution of Kenya*.

also influences court decisions in that the courts ignore legal technicalities such as issues of *locus standi*.

In order to appreciate the problem posed by application of these various tests it is necessary to critically analyze various court decisions based on the respective criterions.

The landmark decision in burial disputes in Kenya was, and still remains, the Court of Appeal decision in the case of *Otieno v. Ougo & Another (No. 4)*⁴⁷. The court of Appeal approved all the findings of the High Court and hence it is necessary to set out the findings of the High Court.

In this case the deceased, by tribe, was a Luo of the *Umira Kager* clan. Soon after his death, a dispute arose between his widow, (the plaintiff), who was of Kikuyu origin, on the one hand, and his younger brother (the 1st defendant) and a clan member who was also the deceased's distant nephew (2nd defendant) on the other hand. The dispute concerned who had the legal right to bury the remains of the deceased and where the burial was to take place.

The defendants wanted the deceased to be buried in his father's homestead in Nyalgunga in accordance with Luo customary law while the plaintiff wanted the burial to be at Upper Matasia in Kajiado District where the deceased owned a farm.

The plaintiff argued, among other things, that the deceased had married her under the *Marriage Act*⁴⁸ and having lived away from his ancestral land for a considerable length of time and having chosen a lifestyle in consonant with Christianity and western civilization, he was not subject to the customs of the Luo.

In the High Court it was held *inter alia* that:

1. The issue of the burial of the deceased was not governed by any Kenyan Statute, English Common Law or any English Statute of general application in force as

⁴⁷ (1987) KLR 407.

⁴⁸ Cap 150, Laws of Kenya.

at August 12, 1987. The court was therefore left with the personal law of the deceased, which was Luo Customary Law.

2. According to Luo Customary Law, in the absence of exceptional circumstances, a man has to be buried in his father's homestead, at a place to be determined by the clan elders, if he had not at the time of his death established a home in accordance with customs and traditions.
3. The argument that Luo customs violated the constitution in being discriminatory against women could not stand since the constitution in Section 82(4) allowed for discriminatory rules in matters of personal law, including burial.
4. Both the plaintiff and the first defendant had the right under Luo customary law to bury the deceased and to decide where the burial was to take place, but as they were in disagreement over that issue, the justice of the case demanded that the court makes a direction as to the place of burial.
5. The court's order then would be that the deceased's body be handed over to the first defendant and the plaintiff jointly or to any of them for burial at Nyamila village, Nyalgunga Sub-Location, Siaya District.
6. (Orbiter) ... (c) hange is inevitable, but that must be gradual. Times will come and are soon coming when circumstances will dictate that the Luo customs with regard to burial be abandoned. Until then courts will have to give effect to them in so far as they are applicable....⁴⁹

The court was of the view that the wishes of the deceased were subject to the customs and traditions of the clan.⁵⁰ This was maintained by the court notwithstanding the overwhelming evidence led by the plaintiff on the wishes of the deceased to be buried either at Langata or Matasia. The children of the deceased were also emphatic on the wishes of the deceased to be buried at Langata or Matasia.⁵¹

The court was also of the view that the customary law applicable was that of the deceased husband and not that of the widow.⁵²

⁴⁹ *Otieno v. Ougo & Another* (1987) KLR 371 at 372.

⁵⁰ *Ibid*, 380.

⁵¹ *Ibid*, pp. 391-392.

⁵² *Ibid*, 386.

The court of appeal upheld the decision of the High Court and even went further to hold that:

An African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal. The deceased having been born and bred a Luo, he remained a member of the Luo tribe and subject to the customary law of the Luo people, which was patrilineal.... Generally, the personal law of Kenyans is, their customary laws. The common law is resorted to if the customary law fails, as where customary law is repugnant to justice and morality.⁵³

Obviously, this holding fails to recognize that there are Kenyans who are not subject to customary law such as non-indigenous Kenyans and 'urban' Kenyans born and bred outside the operation of any known system of customary law. Moreover, as Okoth-Owiro observes:

... it must be accepted that an African citizen of Kenya has an inherent right to change at least some aspects of his personal law – even if that includes divesting himself of the association with the tribe of his father.⁵⁴

Commenting on the mixed marriage i.e. Kikuyu (for the widow) and Luo (for the deceased) the Appeal Court, like the High Court, opted to adopt the customary law of the deceased and held:

The appellant as the deceased's wife has to be considered in the context of all wives married by Luo men irrespective of their life-style who become subject to their customary laws. The fact that her marriage was a mixed one would not confer on her any special status under the Luo Customary Law.⁵⁵

From a jurisprudential point of view this decision raises various issues which negates its judicial respectability. On the onset one is bound to ask whether justice can be served through application of discriminatory laws? The constitution, unfortunately, as already pointed out, truly allows application of discriminatory laws. However, Kenya has signed

⁵³ *Otieno v. Ougo & Another (No. 4)* (1987) KLR 407 at 408.

⁵⁴ A. Okoth-Owiro, "The Burial Law of Kenya: Do We Need a Statute?", in J. B. Ojwang and J. N. K. Mugambi (Eds.), *The S. M. Otieno Case: Death and Burial in Modern Kenya* (1989), 116 at 122.

⁵⁵ *Otieno v. Ougo & Another (No.4)* (1987) KLR 407 at 424.

and ratified various international Human Rights Instruments⁵⁶ which prevents all forms of discrimination.

There was no rationale of adopting and applying the customary law of the deceased rather than that of the widow.

The obvious psychological effects that are caused by death and the feelings of the closest next of kin, which in this case was the wife and the sons of the deceased, and of which is a matter of judicial notice was not taken into account. Hence the court hastily outlawed the application of the Marriage Law and even the wishes of the deceased.

The court was of the view that common law is resorted to if customary law fails as where it is repugnant to justice and morality? A question then arises – what if common law also fails, for instance, where there is no executor or administrator – to bury the deceased?

In the case of *Kiplangat Korir v. Dennis Kipengeno Mutai*⁵⁷ the High Court declared Kipsigis Customary Law to have been repugnant to justice and morality and went ahead to declare that the duty to bury the deceased rested on the personal legal representative under common law. The parties arguments rested on who had the right to bury the deceased all based on marital status of the deceased prior to her death. None of the parties had sued in the capacity of a legal representative and none had claimed a right as an administrator or executor.

This was a burial dispute in which the respondent alleged that the appellant was duty bound to bury his (appellants) deceased wife under Kipsigis Customary Law. Even though the deceased had deserted the appellant for over thirty years and had no children with the appellant but with other men, it was alleged that the marriage between the deceased and the appellant was still in force since no divorce had been done under Kipsigis customary law.

⁵⁶ For instance Kenya has ratified the convention on the *Elimination of ALL Forms of Discrimination Against Women (CEDAW)*, (Ratified in 1984).

⁵⁷ Kericho H.C.C.A. No. 52 of 2005, (2006) eKLR
<www.kenyalawreports.or.ke> (Accessed on 10th July 2006).

Although the court was of the view that according to Kipsigis customary law the deceased was until her death, married to the appellant, it nonetheless went ahead to hold that the appellant was not liable to bury the deceased on three main grounds, namely:

- (i) Desertion which in courts view had extinguished the customary marriage.
- (ii) Customary law was repugnant to justice and morality in the courts view.
- (iii) Duty to bury the deceased rested on the personal legal representative under common law following the judgment of Lakha J. A. (as he then was) in *Sakina Sote & Another v. Mary Wamaitha*, C.A. Civil Appeal No. 108 of 1995 (Nairobi) (unreported).⁵⁸

This decision may have opened yet another legal battle as to who ought to have been granted letters of administration as between the same parties, but at least, the court having declared that the customary marriage between the deceased and the appellant had been extinguished by reason of desertion, the respondent was on safe grounds.

The applicability of marriage law was also outlawed in the case of *Maagu v. Waweru*.⁵⁹ In this case the only issue under determination was, who, under the Kikuyu customary law, buries a deceased married woman whose marriage was subsisting when her husband predeceased her and who never remarried?

In this case the deceased husband had predeceased her but she never remarried. A dispute erupted as to who had the right to bury the deceased between the deceased's father and the family of her father in law. The deceased and her deceased husband had celebrated a marriage under *African Christian Marriage and Divorce Act*.⁶⁰

⁵⁸ *Ibid.*

⁵⁹ (1982) KLR 159.

⁶⁰ Cap 151, Laws of Kenya.

The Court outlawed the application of the law relating to marriage and rather opted to apply the Kikuyu customary law on burial and allowed the deceased to be buried at her husband's home by his next of kin. The court held *inter alia*:

The burial of a deceased female person is a matter of the social custom of her people and does not depend on the law under which she was married. When a Kikuyu woman dies and her marriage was never terminated by divorce, or, if her husband predeceased her during their marriage and she did not remarry, or if the affinity relationship was not terminated by return of the dowry (*ruracio*), she is buried at her husband's home by his kin.⁶¹

The court observed that although death terminated a marriage for it brings about the physical separation of the spouses there are other relationships which are created by marriage and which death does not automatically determine.⁶²

From the foregoing one may be tempted to conclude that the issue of marital status has been outlawed as inapplicable and irrelevant in adjudicating burial disputes. However, that is a misconception. Indeed in recent decisions marital relationship with the deceased appear to have overtaken customary law.

In the case of *Okanja v. Onyango & Another*⁶³ the issue of marriage was central in the court's decision. The court had to determine who, between the plaintiff and the first defendant, was the lawful husband of the deceased.

In this case the issue for determination was who, among two contending husbands, had the right to bury the deceased under Luo customary law. The issue of marriage was central in the courts decision since the court had to determine who, between the plaintiff and the defendant, was the lawful husband of the deceased. The court held that the marriage of the deceased to the first defendant complied with Luo custom in the matter of consent, payment

⁶¹ *Maagu v. Waweru* (1982) KLR 159 at 160.

⁶² *Ibid.*

⁶³ (1987) KLR 628.

of agreement money and payment of the bride and hence he had the right to bury the deceased.⁶⁴

This decision departs from the other court decisions which declares marriage law irrelevant and inapplicable in determining burial disputes. Similarly, in the case of *Gachege v. Wanjugu*⁶⁵ the court had to adjudicate on the issue of marriage as a condition precedent to determining who had the right to bury the deceased.

In this case the plaintiff sought remains of his daughter for burial claiming that as a father of an unmarried daughter he is entitled to bury her. The defendant on the other hand claimed that the deceased was his wife and he therefore had the right to bury her.

The main issue in the dispute was whether the deceased was married to the defendant in accordance with the Kikuyu Customary Law.

The court relied on the common law presumption of marriage through long cohabitation and repute and held that the defendant, as the husband of the deceased, was entitled to bury the deceased.⁶⁶

Perhaps the most illuminating decision on the new discourse is to be found in the case of *Njoroge v. Njoroge & Another*.⁶⁷

The applicant in this case sought a temporary injunction restraining the respondents from burying the deceased pending the determination of the suit. The applicant supported her claim arguing that she was the second wife of the deceased for ten years up to the time of his death and that the deceased had made an oral will confirming that he should be buried at the matrimonial home which he shared with the applicant.

⁶⁴ *Ibid.*

⁶⁵ (1991) KLR 147.

⁶⁶ *Ibid.*, 166.

⁶⁷ (2004) 1 KLR 611.

The respondents, who were the first wife and the brother of the deceased objected to the application arguing *inter alia* that the applicant was not a wife of the deceased, that the deceased did not own the property the applicant wanted to bury him on and that even under customary law women were not involved in burials. The first respondent was the first wife of the deceased and they had celebrated a marriage under African Christian Marriage and Divorce Act and the Marriage Act.

Instead of applying the Kikuyu Customary Law in resolving the dispute the court laid a new test as follows:

In the social context prevailing in this country, the person who is 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. Therefore whoever can prove this fundamental proximity in law to the deceased has the colour of right of burial, ahead of any other claimant.⁶⁸

In this case the applicable Kikuyu customary law was not in dispute and it would have precluded both widows from having locus standi of burying the deceased. According to Kikuyu customary law the responsibility for burial rests on the eldest son or in his absence, on the brothers of the deceased. Women do not take part except carrying flowers.⁶⁹ Although the court did not declare the custom as being repugnant to justice and morality, it nonetheless opted for other avenues of deciding the case. Remarking on the custom the learned judge said:

I would prefer ultimately to found the outcome of this case, even if it is in favour of custom, on slightly different grounds.... This is in particular because, such a stark differentiation of gender roles no longer approximates to reality in all cases, quite apart from the valid objection on grounds of gender equity which may jolly well be raised.⁷⁰

⁶⁸ *Njoroge v. Njoroge & Another* (2004) 1 KLR 611 at 612.

⁶⁹ *Eugene Contran's casebook on Kenya Customary Laws*, at 238 in *Njoroge v. Njoroge & Another* (2004) 1 KLR 611 at 627.

⁷⁰ *Njoroge v. Njoroge & Another* (2004) 1 KLR 611 at 627.

Although under *The Marriage Act*⁷¹ a marriage is supposed to be monogamous, the *Law of Succession Act*⁷² recognizes the validity of a polygamous marriage. Since one of the widows of the deceased had been married under customary law after a monogamous marriage of the other widow under the Marriage Act, the learned judge had to determine who, amongst the widows, was closest to the deceased in legal terms. In this regard the court held:

Even though the applicant had associations with the deceased, Section 37 of the Marriage Act provided an unchallenged protection to the 1st respondent's monogamous marriage. It is the marriage regime rather than the succession regime that should prevail in determining questions of burial. The applicants claim to the body of the deceased is therefore not as strong and authentic as the claim such as should be made by the respondents.⁷³

In this case the court made a clarion call for enactment of a local statute on burials.⁷⁴

No doubt this was a revolutionary decision and the court was determined to do justice in its widest sense. The court was not prepared to use customary law to sanction gender inequality.

Unlike in the other decisions cited hereinbefore the court in this case did lay a homogeneous test for determining burial disputes in Kenya. Rather than alluding to custom the test is to be found in terms of proximity in relation to the deceased. Marital status was seen as the first step of establishing such proximity. In the absence of marital status then, following this test, one has to look at blood relationships.

On the face value the decision appears to resolve, the problems attendant in burial disputes but a keen reflection on it reveals otherwise. It was easy to determine this particular dispute on the basis of marital status using the Marriage Act which protects a monogamous marriage

⁷¹ Cap 150 Laws of Kenya.

⁷² Cap 160 Laws of Kenya.

⁷³ *Njoroge v. Njoroge & Another* (2004) 1 KLR 611 at 612.

⁷⁴ *Ibid*, 626.

and hence the widow who had been married under statute had an overriding right over the one married under customary law. However, what would have been the verdict if both widows had been married under customary law? It would appear the test applied cannot resolve the dispute in such circumstances. One may also question – what if the deceased had expressed a wish to be buried by the widow who had been married under Customary Law? The legal test applied cannot apply with the generality in which it was expressed by the court.

A consideration as to whether the deceased had proprietary rights over a proposed burial site presents yet another criteria of determining burial disputes. In the case of *Augustino Mbai Gatuma v. George Gitau Gatuma*⁷⁵ the issue of ownership of land was central in determining whether or not to allow the plaintiff to bury his deceased daughter in the proposed place of burial.

In this case the plaintiff and the defendant were step brothers. The defendant sought to restrain the plaintiff from burying his deceased daughter on land parcel known as L. R. No. Dagoretti/Uthiru/281. The said parcel of land was registered in the name of the defendant. However, the plaintiff claimed that the defendant held the said land in trust of all members of the family. The issue of ownership of land was central in determining whether or not to allow the plaintiff to bury his deceased daughter in the desired place of burial. The court was persuaded on a balance of probability that the defendant, although was the sole registered owner of the suit land, he held the land in trust for the entire family and hence the plaintiff had the right to bury his daughter in the proposed site.

Viewed from this perspective the application of customary law in deciding burial disputes can present immense problems. Customary Law presumes family or communal ownership of land. In modern legal terms there is no such thing as “family land”.

⁷⁵ Nairobi HCCC No. 113 of 2005, (2005) eKLR, <www.kenyalawreports.or.ke> (Accessed on 10th July 2006).

We also have the wishes of the deceased as a criterion of determining burial disputes. As has already been observed, the general rule appear to be that the wishes of the deceased are subject to the customs and traditions of the deceased tribe.⁷⁶

However, in the case of *Apeli v. Buluku*⁷⁷ the court unhesitatingly followed the wishes of the deceased in determining the place of burial.

In this case the widow of the deceased sought to be allowed to remove the remains of her late husband which had been interred at his place of birth/ancestral home in Ebosiroli village of East Bunyore and they be re-interred according to the deceased's wish in Bungoma District. The widow's suit was opposed by the deceased's two brothers.

The High Court held *inter alia* that:

In cases such as this, the most important rule is that the wishes of the deceased person, though not binding, must, so far as possible, be given effect to. On the basis of this case, it is clear that the intention of the deceased was to be buried in Bungoma District. Where the wishes of a deceased person are not contrary to custom nor contrary to the general law or public policy or safety, as it was in this case, the High Court has a general discretion to order the removal of the remains of the deceased from one place to another subject however, to the grant of a permit by the Minister in charge of health.⁷⁸

Similarly and even with greater clarity the court in the case of *Eunice Moraa Mabeche & Another v. Grace Akinyi and Others*⁷⁹ followed the wishes of the deceased which had been reduced into a will in determining the place of deceased's burial. A. M. Abdullahi⁸⁰ strongly supports this criterion of adjudication since he argues that a deceased's wish or will is a constitutional fundamental right which is inalienable. A. M. Abdullahi thus writes:

The making of a will or oral expressions are the result of an express constitutional right of the individual to choose and select one's burial place according to his wishes. It finds

⁷⁶ See *Otieno v. Ougo & Another (No.4)*, (1987) KLR 407.

⁷⁷ (1985) KLR 777.

⁷⁸ *Ibid.*

⁷⁹ *High Court Civil Case No. 2777 of 1994* (unreported).

⁸⁰ A. M. Abdullahi, *Supra*, note 36 at pp133-134.

its philosophical basis in individual autonomy, in that one makes a conscious choice and elects a certain mode of burial basing it on certain self-regulating values in his system as an individual whose rights are protected under the constitution.... The writing of a will is part of the individual's inviolability which is grounded upon justice and which, "even the welfare of society as a whole cannot override". The courts should abandon their two-tiered approach of impeaching wills written in line with the constitutional right of freedom of expression, on the grounds that the wills are either in conflict with customs of the deceased's tribe or are not allowed by common law, and should respect the constitutional provisions and validate this kind of wills.⁸¹

Upon this basis A. M. Abdullahi finally concludes:

It is only a constitutional validation of the deceased's right to select his/her preferred burial site that can once and for all make legal sense and create some judicial harmony in burial dispute cases. Common law concepts and African customary law can never provide the legal foundation for the long term solutions of such disputes. Due to the evolving nature of human being as a social being and constant social changes in the world, unique legal disputes will arise, and the best solution in this regard can be found in a constitutional framework if the dispute had relevance to the constitution. That is why we strongly feel that it is unnecessary to enact burial legislation in the country. The solutions to such disputes are fully provided for in the constitution.⁸²

This conclusion is obviously disturbing in various respects. The very basic challenge is who has the right to enforce the wishes of a deceased? The fundamental rights in the constitution presumes a human being who can then have *locus standi* to enforce his/her rights. Consequently a dead person cannot be said to enjoy human rights. It seems that human rights cease at the point when a human being ceases to be a human being. Death transforms a person from a human being to a corpse or a dead body. Wills are the expression of the wishes of a living person, not the rights of a dead person. Of course laws which exists in order to enforce wills and the like are designed to provide assurance to the living person that his/her wishes will be carried out (within stated limits) after his/her death. In Kenya the Law of Succession Act and Islamic Law on inheritance govern the making of wills and the law envisages wills limited to how property would devolve upon death. The Law of

⁸¹ *Ibid*, 134.

⁸² *Ibid*, 199.

succession in Kenya do not cover the issue of burial of a dead body. Even assuming the wishes or will of a deceased person is constitutionally protected there is yet another problem. So many people die without having either expressed any wish or written any will touching on the nature of disposition of their remains, the place of such disposal and by whom. It is imperative to put the law relating to burial matters in certain terms through specific legislation in this country.

In deciding burial disputes the court's tend to be influenced by extra-legal factors. Shadrack B. O. Gutto,⁸³ commenting on the verdict in the *Otieno case*⁸⁴ observes that this was an instance of "political manipulation of ordinary courts to decree that women do not even have the right in the so called 'traditional' culture to bury their dead husbands' bodies".

When a party or parties move a court without the requisite *locus standi* the suit is said to be incompetent *ab initio*. However, in burial disputes the courts usually do not strike out such suits but rather look for every possible reason to enable it to determine the dispute on its merits. It seems that the court's considers, as a matter of policy, that the dead body ought to be disposed off as fast as possible and hence disregard issues of *locus standi*. An illustrative case is the case of *Githieya v. Gitau*⁸⁵.

This was a dispute between daughter and step-mother as to the mode of disposal of the remains of the deceased – whether by way of cremation or burial. Under Kikuyu customary law, the court noted, that both the plaintiff and defendant had no *locus standi* since women were barred by Kikuyu custom from deciding on burial matters. The burden or responsibility for burial under Kikuyu custom fell on the eldest son or in his absence, on the brothers of the deceased.⁸⁶

⁸³ Shadrack B. O. Gutto, "The Rule of Law and Human Rights: Whither Africa?", 3 *East African Journal of Peace and Human Rights*, 135 (1996).

⁸⁴ *Otieno v. Ougo & Another (No. 4)*, *Supra* note 68.

⁸⁵ (2004) 2 KLR 309.

⁸⁶ *Ibid*, 317.

Surprisingly, instead of striking out the suit on that point and at that juncture, the court nonetheless used an affidavit sworn by the eldest son of the deceased to circumvent the issue of *locus standi*. The eldest son was not party to the dispute and his affidavit was meant to support the defendants intended act of cremating the deceased body. The clan had also not been sued and yet the court alluded to the cremation arrangements being made by the clan.

Extra-legal considerations appear to have influenced the court in determining the dispute. The issue of a body lying in a morgue until a suit is determined is an extra-legal consideration which appear to have influenced the court in determining the matter. It is not only unethical but it is also expensive. In a recent case the corpse had been lying in a mortuary for one and half years and after the court judgment the losing party had to pay about three hundred thousand shillings in mortuary charges.⁸⁷

Although the court in *Otieno Case*⁸⁸ held that a person cannot change his personal law, other decisions hold otherwise. In *Wangila Case*⁸⁹ and in *Kaittany Case*⁹⁰ the courts held that one can change his/her personal law through religious conversion.

2.3 CONCLUSION

The various rationales of deciding burial disputes in Kenya has led to inconsistencies in judicial decisions. The law has remained muddled with uncertainty. In a burial dispute it is difficult and certainly impossible to predict with certainty the outcome of the courts

⁸⁷ *Saturday Nation*, "Woman Wins battle over son's burial," Nairobi: *Saturday Nation*, 30th September, 2006, 3.

⁸⁸ *Otieno v. Ougo & Another (No. 4)*, *Supra*, note 68.

⁸⁹ *Eunice Moraa Mabeche, John Mabeche and Karani Kanyimbo v. Grace Akinyi & 4 Others*, H.C.C.C No. 2777 of 1994 (unreported).

⁹⁰ *Sakina Sote Kaittany & Mustafa Kibet Kaittany v. Mary Wamaitha*, Court of Appeal, Civil Appeal No. 108 of 1995 (unreported).

decision. The choice of applicable law, whether customary law, common law, marriage law, succession law, human rights law or land law appear to be made at random perhaps to serve expediency and convenience bearing in mind the peculiar and particular dispute at hand and without any regard to any set legal principles. There is much emphasis on customary law and yet, considering the diversity of the cultures of Kenyan tribes, conflicts between the various customs are bound to arise and hence pose an internal conflict of law situation. The next chapter focuses on the problem of “internal conflict” of laws.

CHAPTER THREE

INTERNAL CONFLICT OF LAWS

3.1 INTRODUCTION

Conflict of laws is the study of the rules determining which rules a court should apply in cases in which the rules of multiple legal systems potentially interested in the case are different and might lead to different results.

Jean Gabriel Castel defines conflict of laws as follows:

Conflict of laws is the branch of jurisprudence that addresses the questions that arise because of differences in the laws and legal systems of different sovereigns.¹

This body of law applies to avoid or resolve conflicts between the laws, jurisdiction, and judgments of different sovereigns whose interests are implicated in a particular dispute.² This is the definition of conflict of laws as understood under private international law. However, this is not our concern here. The concern of this chapter is to highlight the different competing legal regimes that apply in burial disputes and which force Kenya courts to engage in an exercise of choice of law within Kenya unitary legal system. Some scholars term this situation as constituting ‘internal conflict of laws’.

Internal conflict of laws situation might develop in the same country with a plural legal system that regulates different sectors of its citizenry. Internal conflict of laws within a unitary system “describes simply the conflict of laws in an internal situation, i.e. one involving no foreign elements”.³

However, on whether there exists an internal conflict of law situation in Kenya scholars are not in agreement.

¹ Jean Gabriel Castel, *Introduction to Conflict of Laws*, <<http://www.law2.byu.edu/vvardle/conflict/chapter1.html>> (Accessed on 10th September 2006).

² *Ibid.*

³ G. F. A. Sawyerr, “Internal Conflict of Laws in East Africa,” in G. F. A. Sawyerr (Ed), *East African Law and Social Change*, 110 (1969)

Allot is of the view that the fact that the various sources of law within a country give different answers to the issue before the court leads to an internal conflict of laws situation.

He states:

We must start with the incontrovertible fact of the existence of a plurality of systems or bodies of law within a single country. Often such systems give the same answer to a given problem; sometimes they do not. Then conflict may arise, either in the sense that the party does not know where he stands... or that a court must consider which of the two systems to apply to the case before it.⁴

Scholars have argued that conflicts of law arise in Kenya and the same has been referred to as “internal conflict of laws” situation. The proponents of this school of thought argue that within a unitary state, a statute may exist that regulates a conflict of laws situation.⁵ In their view even though Kenya does not have such a statute, the Judicature Act comes close for it addresses an internal conflict of laws situation and sets out the laws to be applied.

Abdullahi argues that there is no internal conflict of laws in Kenya. He follows Allot and writes:

According to Allot for an internal conflict of laws to arise the following three factors must be present in one jurisdiction. First, the court must have the right to choose between two or more bodies of law to determine the dispute before it. Second, those competing laws must apply concurrently to the dispute within that Jurisdiction. Third, the above two factors must apply to a single territorial unit. Applying the above test to the Kenya situation, it is obvious that the Kenya legal situation does not fall within the parameters set out by Allot. For the various laws in this country cannot apply concurrently to a given situation and the court’s are not allowed to select the preferred law out of the list in Section 3 of the Judicature Act. Both instances are ruled out by the Act.⁶

⁴ Antony Allot, *New Essays in African Law*, 112 (1970).

⁵ See, M. D. Okech – Owiti, “some socio-Legal Issues”, 11-29; S. C. Wanjala, “Conflicts of Law and Burial”, 101-115, in J. B. Ojwang and J. N. K. Mugambi (Eds.) *The S. M. Otiemo Case: Death and Burial in Modern Kenya* (1989).

⁶ A. M. Abdullahi, *Burial Disputes in Modern Kenya: Customary Law in a Judicial Conundrum*, U.O.N (1999), 194.

According to Section 3 of *The Judicature Act*⁷ the hierarchy of Kenyan laws are set out in the following order of superiority, the most superior being the Constitution, then written Laws (Acts of Parliament), common law, doctrines of equity and statutes of general application and lastly African customary law. However, in personal law matters, customary law has been held by the court of appeal to rank higher than the common law.

In determining the applicable law in burial disputes the court of appeal has laid an ambiguous test and one that gives the court discretion to apply either customary law or common law. In *Otieno v. Ougo & Another (No. 4)* the court of appeal stated:

The place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and the common law in a matter of personal law. First of all, if there is clear customary law on this kind of matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality, and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way these two great bodies of law, for that is what they truly are, complement each other.⁸

In personal law matters customary law thus ranks higher than the common law. Yet both customary law and common law are applicable in personal law matters and hence the court of appeal, cognizant of this fact, laid a test that involves application of law by way of 'elimination method'. In the event customary law does not apply due to being repugnant to justice and morality then common law is applied. In this scenario a litigant cannot know which law applies before court's determination. To use Sawyerr's words "a party does not know where he stands...."⁹

⁷ Cap 8, Laws of Kenya.

⁸ [1987] KLR 407 at 418.

⁹ G. F. A. Sawyerr, *Supra* note 3.

In determining whether a custom is repugnant or not, so that it can decide whether or not to result to common law, the court in our view is actually exercising a choice of which law to apply.

Internal conflict of laws in Kenya is in fact a reality. In a case where ordinary statutes apply in the same case and can lead to different results, the Judicature Act would be of no assistance in resolving the dispute since both Acts rank at par in terms of superiority. Hence in the case of *Njoroge v. Njoroge & Anor.*¹⁰ the learned judge had to choose which law to apply, between the marriage law and the succession law and he held:

It is the marriage regime rather than the succession regime that should prevail in determining questions of burial. The applicant's claim to the body of the deceased is therefore not as strong and authentic as the claim such as should be made by the respondents¹¹

Judicature Act does not therefore provide a clear and complete basis of conflict resolution in Kenya legal system.

Where customary law has been applied in burial cases, it is that of the deceased person. However, it is not the deceased who goes to court to assert a right and of course, being dead he or she cannot be able to assert any right in his or her personal capacity. Those who do so are normally persons related to the deceased in various ways, for example, due to marital relationship, kinship relationship, religious relationship e.t.c. It would appear prudent that the law would better serve the interests of justice by applying the customary law of the person who invokes the court's jurisdiction asserting the existence of a legal right. Considering the cultural diversity of the Kenyan people it would be extremely difficult, if not impossible, to resolve on the issue of which custom to apply. No wonder, Okech Owiti writes:

In the context of Kenya, and countries with similar socio-economic formation, homogeneity of culture is a total myth. Persons belonging to different socio-economic categories, and, therefore, undergoing different experiences in the process of life, are

¹⁰ (2004) 1 KLR 61.

¹¹ *Ibid* at 612.

unlikely to develop homogeneous cultures. The differences will manifest themselves – in differing degrees – in dissimilar attitudes with regard to dead bodies and burials.¹²

Kuria G. K. supports the idea of internal conflict of laws within a unitary state and hence he writes in respect of marriage laws thus:

The conflicts in marriage laws in the independent country in English speaking Africa are reflected by four things. The first thing is the courts and the legislature's attitude towards the conversion of the marriage law from one system to another. The second thing is the vision of the good life that the law reform reflects. The third and fourth things deal with the conflict between the customary and Islamic Marriage Laws with the English or Roman Dutch marriages laws.¹³

Eugene Cotran supports this view and hence he writes in respect of Kenya succession laws: -

The existence within Kenya of this variety of succession laws creates numerous problems of conflict and administration.¹⁴

The existence of a variety of laws governing the same subject matter, like marriage or burial, thus creates an internal conflict of laws situation.

As the law stands today in burial matters it does not offer guidance on the law to be applied in internal conflict situations. The term 'customary law' refers to several systems of local customary law operating within the same territorial jurisdiction. Choice of law problems sometimes emerge between one system of customary law and another. A ruling that customary law applies is therefore an inadequate basis for resolving internal conflicts.¹⁵

¹² M. D. Okech – Owiti, "Some Social-Legal Issues" in J. B. Ojwang and J. N. K. Mugambi (Eds.) *The S. M. Otieno Case: Death and Burial in Modern Kenya* (1989), 11 at 25.

¹³ Kuria, G. K., *Internal Conflict of Marriage Laws in English Speaking African Countries* U. O. N. (1978).

¹⁴ Eugene Cotran, *Restatement of African Law: 2, Kenya II, The law of Succession*, (Sweet & Maxwell 1969), 6.

¹⁵ A. Okoth – Owiro, "The Burial Law of Kenya: Do We Need a Statute?" in J. B. Ojwang and J.N.K. Mugambi (Eds.) *The S. M. Otieno case: Death and Burial in Modern Kenya* (1989), 116 at 120.

3.2 SOURCES OF 'INTERNAL CONFLICT OF LAWS' IN BURIAL CASES

The phrase 'internal conflict of laws' is employed herein to refer to cases where a judge is required to choose between two or more bodies of law which apply in the same country.¹⁶ In determining burial disputes in Kenya, judges often find themselves in an arena of choice of law. There is invariably a conflict between various choices posed by the existence of a variety of regimes of laws all of which have some relevance or application in the same dispute. These regimes of law are the customary law, the common law and the written law.

Under customary law the dispute may involve members from different tribes who also practice different customs which are not in agreement with each other. This poses yet another problem of conflict within the customary law regime itself.

The majority of burial disputes arise as a result of conflict between traditional culture and modernity.¹⁷ A funeral is a ceremony marking a persons death. Funerary customs comprise the complex of beliefs and practices used by a culture to remember the dead, from the funeral itself, to various monuments, prayers and rituals undertaken in their honour. These customs vary widely between cultures and between religious affiliations within cultures. In some cultures the dead are venerated; this is commonly called ancestor worship. The word comes from the Latin *funus* which had a variety of meanings, including the corpse and the funerary rites themselves. Funeral rites are as old as the human race itself.¹⁸

Burial, also called interment and (when applied to human burial) inhumation, is the act of placing a person or object into the ground. This is accomplished by digging a pit or trench,

¹⁶ This is the definition adopted by Professor Allot in his *New Essays in African Law* (London, Butterworths 1970), 111.

¹⁷ In old days,, long before colonization which polluted Kenyan culture with Western culture Kenyans used to throw the dead to the forests. There would have arisen no such thing as a burial dispute since the practice of burial never existed. See, E. Cotran, *Restatement of African law: 2, Kenya 11, the Law of Succession*, London Sweet & Maxwell (1969)

¹⁸ Funeral, *Wikipedia, the free encyclopaedia*. <<http://en.wikipedia.org/wiki/funeral>>. (Accessed on 20th September 2006).

placing the person or object in it, and replacing the soil. Human burial practices seek to demonstrate respect for the dead, for the following reasons:

- i) Respect for the physical remains is considered necessary. If left lying on top of the ground, scavengers may eat the corpse, which is considered disrespectful to the deceased in many (but not all) cultures.
- ii) Burial can be seen as an attempt to bring closure to the deceased's family and friends. By interring a body away from plain view, the pain of losing a loved one can be lessened.
- iii) Many cultures believe in an afterlife. Burial is often believed to be a necessary step for an individual to reach the afterlife.
- iv) Many religions prescribe a "right" way to live, which includes customs relating to disposal of the dead.¹⁹

. The cases analyzed in chapter II herein clearly support this view.

There are many other examples. For example, during the burial of Kenya's vice-president Wamalwa Kijana, culture stood firm against a state burial proposed by the government. Kijana, who died in a London hospital on 23rd August 2003, was buried on 6th September 2003.²⁰ Traditionalists insisted that he had to be buried on his farm, 340 kilometres west of the capital Nairobi. They got their way and Kijana was laid to rest –lying on his left side with his back facing the homestead, "so that his spirit does not return to disturb his family".²¹

Traditional rites had to be observed, and could only be performed at his rural home.

In 1990s an urban Kenyan, Peter Okondo, died having written a will that his body be cremated upon his death. His non-Kenyan wife religiously followed her late husband's wish and had him cremated. She was chased away by the husband's clan on grounds that she had been disrespectful for having burned the body of their son. The clan ignored the will and

¹⁹ Burial, *Wikipedia, the free encyclopaedia*. <<http://en.wikipedia.org/wiki/burial>> (Accessed on 20th September 2006).

²⁰ Joyce Mulama, "Culture Kenya: The last Stand against Modernity", in *Inter Press Service News Agency*. <<http://www.ipsnews.net/africa/interna.asp?idnews=20393>> (Accessed on 5th August 2006).

²¹ *Ibid.*

went ahead to bury a banana stem as a symbolic burial ceremony of their son, Okondo. This way, they had observed full traditional rites.²²

Cultural activists reckon that Kenyans lead two lives with one foot at their urban settings and the other at their ancestral homes such that when they die, their relatives do what it takes to perform cultural rites.²³

Despite these strong cultural beliefs Kenyan society, like elsewhere in Africa, is changing. With the youth constituting sixty (60) per cent of Kenya's population and getting educated, change which is sweeping across the East African country – seems irreversible.²⁴

Religion is a constitutional right and it plays a cardinal role in ones personal life and decision-making which includes burial aspects. This may be reflected in wills, oral wishes of the deceased or may be deduced from the general beliefs of the religious organization in which the deceased belonged. However, Kenyans' lack unity of faith and conflicting religious beliefs provides another source of potential conflict in burial disputes.

Even within the same religion there are always disparities in faith. David C. Sperling, for example, posits that Islamic religion in Kenya is plagued by internal conflicts and disunity.

He writes:

The Muslim peoples of Kenya are a diverse, heterogeneous, minority population weakened by internal divisions. One factor relevant to an understanding of their disunity is the existence of what we may call "ethnic Islam", that is, the existence of numerous distinct Muslim Communities, in rural and urban areas, each with its own blend of ethnic, racial and sectarian traits.²⁵

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ David C. Sperling, *Islam and the Religious Dimension of Conflict in Kenya*. <
<http://payson.tulane.edu/conflict/c5%20st/SPERLFINS5.html> > (Accessed on 23rd June 2006).

Though Muslims in Kenya generally get along well with Christians and are not characteristically hostile to Christianity, there are occasional incidents (such as the burning of a Christian church in Siyu in 1990) that reveal Muslim-Christian tensions in specific localities. Christian – Muslim disagreements have also occurred over the burial of persons whose religious affiliation is the subject of dispute.²⁶

When applying common law the general rule is that the duty to bury a corpse rests on the administrator or the executor. In case of intestate succession, there may be more than one administrator and each administrator may hold a different view from the other over the place of burial or the mode of disposal of the remains of the deceased i.e. whether by way of burial or by way of cremation. Hence common law by itself is not conflict-free.

There is no written law directly on burial but parties in dispute normally invoke Marriage Law²⁷ and the Law of Succession.²⁸ Stephen Cretney commenting on internal conflict of laws within marriage law regime poses this question:

The Kenyan African may marry monogamously, or he may marry, under African Customary Law, polygamously. Can he do both, and either marry polygamously having been through a monogamous form of marriage, or can he marry someone else monogamously if he has already a wife acquired in polygamous ceremony?²⁹

A deceased person may have contracted a statutory marriage but at the same time he may have undergone customary marriage with another or other female(s). He may further have had a relationship with another or other women. The long relationship would make the female or females' concerned wife or wives of the deceased through the operation of the common law doctrine of marriage by repute and cohabitation. Now that all these are wives of the deceased with competing and differing interests on the burial of the body of the

²⁶ *Ibid.*

²⁷ The Marriage Act, Cap 150 Laws of Kenya and also African Christian Marriage and Divorce Act, Cap 151, Laws of Kenya.

²⁸ Cap 160, Laws of Kenya.

²⁹ Stephen Cretney, "Some problems in the Marriage Laws of Kenya ", *East African Law Journal*, Vol. 3 (March 1967).

deceased, how do you discriminate any of them and yet it was the wish of the deceased to have them all and they all qualify to be called wives of the deceased? Monogamous marriage bars one from contracting another marriage. But under the law of succession Act polygamy is allowed! Also under customary law polygamy is allowed. The broad spectrum of the matter and indeed the reality is that, despite the legal technicality the deceased went ahead to contract other marriage or marriages and those subsequent marriages may not have known “each other” until death of the deceased which eventually brings them together in the griever of mourning.

Under the Succession Act polygamy is recognized and dependants of the deceased includes children of the deceased.³⁰ Under the said Act, dependants, generally have equal rights to inherit the property of the deceased and the Act does not discriminate between male and female or between married or unmarried. There is nothing in law to prohibit a dependant from asserting that he has a right to bury the deceased from whose estate he or she has an equal right to benefit from. How, then, do you resolve these competing and differing interests of the dependants in the absence of any legislation?

Proprietary rights over proposed burial site has also been an influential factor in deciding some burial disputes. If a body is buried in a particular place it may as well confer some proprietary rights to other person through application of societal custom. This is, perhaps, why the issue of ownership of the proposed site is so crucial in a burial dispute. That *per se* may not be hard to resolve. But the problem comes into play when the deceased had various parcels of land and different parties to the dispute propose different sites. What criteria does one apply to prefer one site as against another and yet all are properties of the deceased?

3.3 CONCLUSION

Although we support the school of thought which posits that there is internal conflict of laws in Kenya, the divergent views by various scholars clearly shows that a better or alternative terminology had rather be adopted and used instead of internal conflict of laws! The scenario which is described by the term ‘internal conflict of laws’ in Kenya is actually a

³⁰ SS. 29 and 40 of Cap 160, Laws of Kenya.

reflection of Kenya's legal system which is both juristic and diffuse. In defining juristic and diffuse legal system, P. Kameri – Mbote writes as follows:

[legal pluralism] denotes a unified system of rules which are enforced through state machinery Legal pluralism may be divided into two, namely, juristic and diffuse. Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal orders. For example, a constitution may provide for the operation of certain religious, or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which was common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviours whose operation is neither sanctioned nor emanates from state law. While the assumption is that Kenya has a unified law of succession, the reality is that plural systems of law are in operation. We have both juristic and diffuse legal pluralism since the law recognizes different laws for different people.³¹

In addition to internal conflict of laws, diversity in cultural practices and beliefs is the dominant force behind burial disputes in modern Kenya. In the absence of a clear law specifically addressing the issues that arise or may arise in burial disputes, the courts' decisions will largely be decided on basis of judicial discretion and continue to suffer from the obvious weakness of such method of adjudication which includes bias, lack of uniformity, uncertainty and lack of precedent value. Why should such a state exist in Kenya, a country currently believed to have the most learned parliamentarians in Africa?

³¹ P. Kameri –Mbote, *Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences* (2002). < <http://www.ielrc.org/content/a0205.pdf>. > (Accessed on 10th September 2006).

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSIONS

4.1 INTRODUCTION

The state of the law governing burial disputes in Kenya is far from being clear and settled. A litigant who moves the court is uncertain on the law the court will finally prefer and adopt. The courts, depending on the facts of the case, chooses to apply either of the following regimes of law, i.e. constitution (in this sense as supporting the wishes of the deceased and his freedom of conscience), the personal law of the deceased (which is basically the customary law), the common law, the marriage law and the law of succession. Extra legal considerations also play a role in the process of adjudication and in particular a belief that it is unethical to keep a corpse lying in the mortuary for long. A deceased may not be buried in a parcel of land which he had not owned before his death.

The practice of burying the dead... is arguably the most constant physical means by which humans express their cultural and spiritually beliefs.¹ Bearing in mind that burial practice is a diverse and continuously evolving social and cultural practice of fundamental interest to all, we believe that legislation would need to be based on the idea of establishing a broad framework of common principles within which different religious, cultural and customary traditions could flourish. Such a framework would thus enshrine the principle of allowing cultural diversity and tradition to continue to evolve, rather than making 'exceptions' for particular groups.² Since religious, spiritual and cultural considerations and practical health and safety issues apply both to burial practices and the ethics and practicalities of exhumation, there is good argument for more unified legislation covering all aspects of disposing of and recovering remains of the dead (especially as issues of both burial and exhumation do arise for cemeteries in use).³

¹ Council for British Archaeology, *Burial Law and Policy in the 21st Century*.
< <http://www.britarch.ac.uk/conservation/Consultations/Burilas.doc>.> (Accessed on 22nd September 2006).

² *Ibid.*

³ *Ibid.*

4.2 RATIONALE FOR NEW LEGISLATION

Institutionally the process of law reform should take the form of an informed inquiry by the Kenya Law Reform Commission,⁴ which has the capacity to undertake the most detailed research before the proposed legislation can be tabled in parliament.

The idea underlying a statute may arise from many different sources: a court in deciding a common law case may suggest that judicial decisions would profit from legislative reform or in interpreting a statute may indicate that further statutory clarification is needed; a special commission of enquiry may develop facts revealing starkly a contemporary problem demanding solution through legislative action; a private individual or group may desire a clarification or change in the law to further its own interests; or the political leadership in the executive branch of government may need new legislation for the implementation of its own programme. In the East African Countries more of these sources may provide the initiating stimulus for a new statute.⁵

Generally, there are at least three independent justifications for law reform. First, new law may be introduced to fill a *lacuna* in existing law. In burial matters *lacunas* are manifestly evident. There is no written law governing burial disputes. Customary law does not fill in the gap since there are various systems of customary law which depends on the cultural practices of the tribe or tribes involved in the dispute. Thus P. Kameri – Mbote observes:

... there [are] as many customary laws as there are tribal communities and despite general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify.⁶

⁴ Established under Cap. 3, Laws of Kenya.

⁵ W. B. Harvey, *Introduction to the Legal System in East Africa*, East African Literature Bureau (1975), 853.

⁶ P. Kameri-Mbote, *Gender Dimensions of Law, Colonialism and Inheritance in East Africa* (2002). < <http://www.ielrc.org/content/a0205.pdf>. > (Accessed on 10th September 2006).

With modernization, many people proclaim that they are not bound by custom. Yet the Court of Appeal in *Otieno v. Ougo & Another (No. 4)* held:

An African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal.⁷

This is really disturbing since in practice an African citizen of Kenya has an inherent right to change at least some aspects of his personal law – even if that includes divesting himself of the association with the tribe of his father. This may occur in several ways. The first is religion. The constitution of Kenya protects freedom of conscience as a fundamental right:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.⁸

A change in religion is a significant change in personal law.

The second way of changing personal law is through marriage. Kenyan law recognizes at least four systems of marriage.⁹ An individual has a choice as to which system of marriage he will follow. A statutory marriage, for example, rules out the applicability of customary law.¹⁰

The third example is the law of domicile. The relevant statute is premised on the recognition of domicile of choice, which in turn selects for one the personal law that shall apply to him.¹¹

⁷ (1987) KLR 407 at 408

⁸ S. 78(1), *The Constitution of Kenya*, Revised Edition 2001 (1998).

⁹ See (i) *Marriage Act* (Cap. 150), (ii) *Hindu Marriage and Divorce Act* (Cap. 157), (iii) *Mohammedan Marriage, Divorce and Succession Act* (Cap. 156) and (iv) *Judicature Act* (Cap. 8) Laws of Kenya.

¹⁰ In the case of *Njoroge v. Njoroge & Another* (2004) 1 KLR 611 the widow who had been married under The Marriage Act was held to have overriding rights over the one who asserted a subsequent marriage under customary law.

¹¹ *Law of Domicile*, Cap. 37, Laws of Kenya.

Another problem posed by the application of personal law is the difficulty of identifying the personal law of the deceased. Take, for example, a child who is abandoned by both parents and grows up in a cosmopolitan town in Nairobi. He knows no vernacular language and to him Nairobi is his ancestral home area. Upon death, an attempt to apply his personal law can prove to be extremely difficult. Indeed it is impossible since the deceased has none.

Thus there are Kenyans who do not have a system of customary law to fall back on. These are not just the non-indigenous Kenyans; this category includes urban Kenyans born and bred outside the operation of any known system of customary law.

Another purpose of legislation of new law is consolidation. Consolidation merely casts into shape the law as already written in many existing statutes.¹² In burial matters, the fact that customary law, common law and other bodies of personal law can all be resorted to in matters of burial supplies good evidence in support of codification.

New law may be introduced to modify or change existing law. This occurs when the law is in unsatisfactory state. No doubt the law on burial in Kenya is not satisfactory since it is not written and there is a host of legal regimes to work with. There is no clear way of resolving internal conflict of laws situation like when different customs are at crossroads. Moreover, although customary law is recognised to be changing on an on-going basis, the present law contains no in-built device for gauging developments in customary law, and thus facilitating their incorporation into the main-stream of judicial application. In the *Otieno case* the Court of Appeal observed as follows:

The elders, who are the custodians of African Customary Law, assisted by the intelligentsia, by the church and other organizations owe it to themselves and to their communities to ensure that customary laws keep abreast of positive modern trends so as to make it possible for courts to be guided by customary law.¹³

The question that naturally follows is – if the court recognizes that customs must keep abreast of ‘modern trends’ as a precondition of their application by the courts, does not the

¹² *Wharton's Law Lexicon* 12th Ed. (1916).

¹³ *Otieno v. Ougo & Another (No. 4)* (1987) KLR 407 at 425.

individual Kenyan have the liberty of abandoning custom on the same grounds, i.e. that it has failed to keep abreast of ‘modern trends’? Must an individual change his entire ethnic community if he does not like their customs?

Customary law lacks a stable source and homogeneity. P. Kameri – Mbote succinctly summarizes this point as follows:

Customary law is the law of small scale communities which people living in these communities take for granted as part of their everyday experience but it excludes outsiders who to get any account of it have to either be told about it or read about it. Whether read about or narrated, customary law is once removed from the source. Thus the written accounts there are of customary law are not direct accounts of community practice but the work of informants each of whom, in recounting a particular rule brings to bear on the subject his/her preconceptions and biases. It would be easy to understand the ramifications of customary law, if it was only one. However, there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community way of life can identify.¹⁴

African customary law features prominently in its application in burial cases. Commenting on customary law generally, P. Kameri – Mbote writes:

The hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors. Allied to this is the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendant and descendants and more than one wife in polygynous unions. An outsider looking at these societies’ structures may aver that women have no rights under customary law.¹⁵

Further, the said writer goes on:

The breakdown of community institutions and the fact that customary law is not written has led to changes in custom and uncertainty as to the customary law norms to be applied. This problem is more pronounced with respect to inheritance and burial laws.... Men as the heads of households hold most positions of authority within communities. When courts are invited to decide on customary law matters, the witnesses and “experts’

¹⁴ P. Kameri-Mbote, *Gender Dimensions of Law, Colonialism and Inheritance in East Africa* (2002). < <http://www.ielrc.org/content/a0205.pdf>. > (Accessed on 10th September 2006).

¹⁵ *Ibid.*

of customary law are invariably men. This has ensured that the views of customary law that find their way into courts are male-centred and female views are rarely if ever heard.... The hiatus created by the breakdown of customary institutions has led to increased participation by the state in matters of personal law even where the applicable law is customary law. This explains the increased instances of inheritance and burial disputes filed in courts of law today.¹⁶

The *Otieno case*¹⁷ prompted *National Council of Women of Kenya* (NCWK) to launch a campaign dubbed: “One-Million Signatures.” NCWK was to collect signatures from the public in support of the enactment of a Burial Law that would govern the internment of the spouse.¹⁸

A. Abdullahi supports the view that burial law is discriminatory against women and hence he writes:

In mistreating women in burial disputes the courts use two impressive customary means of attack. First, the court looks for all conceivable obstacles in the common law tradition that can be used against the widow in stopping her from burying her deceased husband. Being a system of law with ancient traditional and ritual roots, it is usually not difficult to find some legal obstacles against the widow. Second, the court simultaneously looks for traditional African customs and rules that can frustrate the rights of the widow. Considering the low esteem some African customs hold women in, again it is not difficult to find such customs convenient and effective. Both tools were in use in the *Otieno case*, and both were irrelevant in our view, but since the courts had their own judicial bearing, those rules and techniques were found most useful in defeating the genuine claims of Mrs. Otieno.... The courts should respect the rights of the widow and stop looking for archaic rules of common law and African customs to lay hurdles on the path of the widow.¹⁹

¹⁶ *Ibid.*

¹⁷ *Otieno v. Ougo & Another (No. 4)* (1987) KLR 407.

¹⁸ Kenya: Lilian Mwaura – *Soldier for Women’s Legal Rights*.
<<http://allafrica.com/stories/20060870392.htm/?page=2> > (Accessed on 10th September 2006).

¹⁹ A. M. Abdullahi, *Burial Disputes in Modern Kenya: Customary Law in a Judicial Conundrum*, U.O.N (1999), 201-202.

The scathing attack on the courts is perhaps unwarranted as the same ought to have been directed to the poor state of the law. The courts do not always suppress the 'rights' of the widow. For instance, in the case of *Njoroge v. Njoroge & Another*, Justice J. B. Ojwang held:

I would prefer ultimately to have found the outcome of this case, even if it is in favour of custom, on slightly different grounds.... This is in particular because, such a stark differentiation of gender roles no longer approximates to reality in all cases, quite apart from the valid objection on grounds of gender equity which may jolly well be raised.²⁰

The legal status of the wishes of the deceased requires clarification. In life, an individual is free to change many aspects of his personal law through an expression of his wishes. But in death, the common law position is that the wishes of the deceased, though deserving of respect, do not carry the force of law. There is a general trend by the courts of enforcing the wishes of the deceased only if they are in conformity with the customary law of the deceased, otherwise, the deceased wishes would be ineffectual. It is contradictory to allow an individual to change his personal law in life, but deny him a similar freedom in death.

Burial law ought to be codified in order to avoid burial rites and practices which are unhealthy. Some burial rites and practices have been attributed with spread of Human Immuno-Deficiency Virus (HIV), Ebola and other diseases. In a study conducted to find out the cultural link to Ebola in Northern Uganda, it was found out that burial practices such as washing the body of a deceased person and touching the body contributed to transmission of Ebola hemorrhagic fever (EHF).²¹

Wife inheritance and ritual cleansing are highly risky practices for both the widows and the communities they live in, and are certainly contributing to the spread of HIV and Acquired Immuno-Deficiency Syndrome (AIDS).²²

²⁰ (2004) 1KLR 611 at 627.

²¹ Hewlett B. S, Amla R. P, *Cultural contexts of Ebola in Northern Uganda*. <<http://www.cdc.gov/ncidod/EID/vol10no10/02-0486.htm> > (Accessed on 10th September 2006).

²² Gender: Aids widows, Panos features. <<http://org.uk/global/featuredetails.asp?featureid=123&ID=1005>> (Accessed on 21st August 2006).

Morality plays a formidable role in making the law efficacious and hence any legislation on burial matters must take peoples religious beliefs into account. For instance, a major issue of concern to Muslims is being allowed to follow Islamic law, particularly as it relates to marriage, divorce, inheritance and burial. When the *Law of Succession Act*²³ came into effect on the 1st July 1981, it applied to all citizens of Kenya irrespective of ethnic or religious affiliation. On the 13th December 1990, after numerous requests from Kenya Muslims, the Kenya parliament allowed the law of succession to exempt Muslims from the law and to allow them to follow Islamic law in all matters related to inheritance.²⁴

On burial matters the Anglican Church of Kenya (ACK), Kenya's second largest Christian denomination (after the Roman Catholics), has said:

Although Kenya is a multi-cultural society, which makes it difficult for the synod to have a policy on funerals compulsory to every culture, Christians could agree on a common ground based on cultural aspects on which the New Testament is silent.²⁵

The Church criticized use of expensive coffins, transportation of bodies to ancestral homes, even in the face of meager funds, heavy expenditure on vehicles, feasting and the buying of expensive clothes for the dead. According to the church bodies should not be kept for more than seven days before burial.²⁶

4.3 SOME CRUCIAL ISSUES THAT OUGHT TO BE ADDRESSED BY LEGISLATION

In this part we are not going to draft a bill in its classical sense since we do not have the resources required either in monetary terms or even in drafting skill. However, we wish to highlight some of the cardinal areas which such a bill should cover and offer an opinion on the content and form thereof.

²³ Cap.160, of the laws of Kenya.

²⁴ Act No. 21 of 1990. Muslims are subject only to Islamic laws on succession.

²⁵ Church issues new rules on funerals, *Daily Nation*, 4th August 2000. < <http://www.nationaudio.com/News/DailyNation/04082000/News/news34.html> > (Accessed on 23rd June 2006).

²⁶ *Ibid.*

(a) **The Legal status of a corpse**

It has already been pointed out that at common law there can be no rights over the corpse, which itself necessarily means that there can be no rights regarding burial.²⁷

According to Bhalla:

A dead man is no longer a person in the eyes of [the] law. He has no interest, advantages or a will, among others, and therefore, no rights and duties. [The] Law, however, gives protection to the dead man's body and his wishes to some extent. This is because [the] living people identify themselves with the dead. Their life-long affinities survive with the dead man's memory. To protect this interest of the living in the dead, [the] law protects a dead man's reputation. In fact, this protection is extended not to the dead but to the living, to protect their feelings, sentiments and their respect for the dead.²⁸

Internationally, the need to recognize and protect the dignity of the dead and offer them a respectful burial is recognized. For example, principle 16 of Guiding Principles on Internal Displacement provides:

16 (3) The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.

(4) Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the gravesites of their deceased relatives.²⁹

Condemning exhumation of 127 bodies in Meru the Standard Newspaper Group remarked:

The two bizarre incidents in Meru where 127 bodies have been exhumed in one week must be condemned irrespective of the grouses of those who have perpetrated the heinous acts The acts have shocked and angered the residents. One, it goes against the

²⁷ Williams and Mortimer, *Executors, Administrators and Probate* (London, Stevens and Sons, 1970), 57.

²⁸ R. S. Bhalla, *Concepts of Jurisprudence*, 21 (1990).

²⁹ Office for the Coordination of Humanitarian Affairs, Guiding Principles on Internal Displacement, in B. S. Chimni, *International Refugee Law: A Reader*, (Sage publications) 423 at 429.

culture and morality of the local people, where the dead should be given their respect. The epitome of this is to let them lie in peace in their final repose.³⁰

In Kenyan context the burial ceremonies signify the importance of burial and the believe of continued affinity with the deceased.

A corpse should therefore be treated as property capable of possession for purposes of burial.

(b) Rights of possession and disposal of a corpse

The core problem in burial disputes rotate on who has a right to bury the deceased. We have opined that a corpse is capable of possession. It then follows that the person in possession should have the right to bury the corpse. Who then should take possession of the corpse?. The person, upon whom the *Law of Succession Act*³¹ gives priority in petitioning for letters of administration should take possession of the corpse and have a right to bury the corpse. For purposes of burial, it matters not whether or not a grant has been obtained. To establish this right of possession all what a claimant ought to do is to establish that he or she is the one entitled to obtain a grant under the *Law of Succession Act*. In case where there is a will then the executor should have the right of possession of the corpse and the attendant right to bury the corpse. In case of a polygamous marriage, all wives should have an equal right of possession and burial of the corpse. In case of disagreement among the wives the Burial Tribunal should determine such dispute and make such orders as it deems fit. The Burial Act should thus establish a Burial Tribunal. Any widow protected under any statutory marriage should have overriding rights over any customary marriage. In any event when it is not possible to determine who ought to be a legal representative or executor or where there are several legal representatives who cannot agree on the place or mode of burial then the Burial Tribunal should determine such dispute and make such orders as it deems just in the circumstances.

³⁰ Commentary & Analysis: Stop exhumation of bodies , let the dead lie in peace, *The Standard*, 19th September 2006, 12.

³¹ Cap 160, Laws of Kenya.

(c) **Place of burial**

The deceased should be buried in any of his parcels of land and in the event of any dispute as to which parcel of land to be buried on the preferred site should be the one closest to where the corpse is. This is aimed at minimizing expenses. Where that criterion is not capable of being used as where the various parcels of land are adjacent to each other then the Burial Tribunal shall have power to summarily decide the issue on affidavit evidence of the respective parties. Where the deceased had no land of his own the administrator or executor shall bury the corpse at a public cemetery unless any of the deceased's family members volunteers to provide a burial site free of charge.

In case the deceased had expressed an oral wish or had a written will directing the place and manner of disposal of his remains then the wish or will should be followed unless it is contrary to any written law.

In case the deceased was a member of a recognized religious association in law and which has rules on disposal of the deceased then those rules should be followed and such an organization should have prior right over any other person apart from an executor in the event a will expresses the deceased wish as to the mode and place of burial. This is meant to safeguard the deceased freedom of conscience which he or she held whilst being alive. A certificate issued by the religious organization should be sufficient proof of membership of the deceased to that organization. However, in the event various religious organizations put up a claim over the right to bury the deceased, the Burial Tribunal shall determine such disputes and shall have powers to take possession of the body and bury it in a public cemetery.

The mode of disposal should be by way of inhumation unless the deceased had expressed a wish or written a will preferring cremation or unless the deceased was a member of a

religious association who's recognized mode of disposal is that of cremation or any other form of disposal.

Where an administrator or executor or religious organization is of the opinion that the personal law of the deceased should be applied then it should only be applicable if no dispute arises and in the event of a dispute arising then the Burial Tribunal should determine the dispute. In making such determination all aspects of customary law which discriminate against women or permit other forms of discrimination should be regarded as invalid.

d) **Locus standi**

There appear to be no rule on locus standi in burial disputes today. However, as has already been pointed out, such locus standi ought to vest on the person preferred as the proposed administrator of the estate of the deceased in accordance with the Law of Succession Act or the executor or a religious organization that is recognized in law. This, by itself, would drastically reduce the number of burial disputes.

(e) **Time limit for determining Burial Disputes**

It is ethically unacceptable to keep a corpse in the mortuary for too long while a dispute is raging. We have already argued that this is an extra legal factor, which the courts look at while determining burial disputes. Currently it is only the High Court, which has jurisdiction to determine burial disputes. In the case of *Kiplangat Korir v. Dennis Kipngeno Mutai* the learned judge held:

Having carefully considered the argument made on the issue whether the Resident Magistrate Courts have jurisdiction to hear customary disputes, I am inclined to agree with the appellant. A Resident Magistrate's Court can only hear Customary Law Disputes as specified in section 2 of the Magistrate's Court's Act. A Resident Magistrate cannot extend jurisdiction and hear matters which are not specifically provided for in the said Section 2 of the Act. Such disputes, including in this case, a customary burial dispute, shall be heard by the High Court only (see section 3 (2) of the Judicature Act).³²

³² Kericho HCCA No. 52 of 2005 (2006) eKLR <www.kenyalawreports.org> (Accessed on 7th August 2006).

Considering the backlog in the High Court it is undesirable to oust the jurisdiction of Magistrate Courts in burial matters. However, considering the intense emotions portrayed in burial disputes and sometimes the political dimension of such disputes particularly in case of intermarriage where the body politic may use a burial dispute to divide and rule the different ethnic communities, it is suggested that a magistrates court is not a proper forum for determining a burial dispute. Though not without exception, lower courts judicial officers lack the calmness usually portrayed by the majority of the High Court and Court of Appeal judges. There ought to be established a Burial Tribunal in each district to determine burial disputes. The tribunal should be presided over by a person who is qualified to be appointed as a High Court judge. There should be a right of appeal to the High Court and such an appeal should be final.

(f) **Burial rights and succession rights**

Abdullahi asks:

What type of litigants come to court to assert a right or duty of burial over a deceased person, and what are the motivating factors in such contests? Are some of the parties the proverbial professional mourners turned litigants? Are Kenyans coming to court for burial disputes when they are in fact testing the waters for succession claims?³³

To prevent parties coming to court in burial cases with an aim of finally pegging their succession claims on the outcome of a burial case we propose that matters relating to burial be excluded from succession matters completely. Burial of a deceased by any person should not *per se* confer on that person any inheritance rights. The place of burial of a deceased person should be irrelevant for purposes of succession matters.

(g) **Public Health**

For purposes of ensuring and maintaining public health any legislation on burial matters should be subject to the provisions of The Public Health Act.³⁴ Regulation of burials and

³³ A. M. Abdullahi, *Supra*, note 19 at pp 7-8.

³⁴ Cap. 242, Laws of Kenya part XIII of the said Act deals with cemeteries.

management of cemeteries should aim to ensure that burials are made with proper regard for health and safety, and that cultural, and religious values are respected. But the issue of management and maintenance of burial grounds also impinges on the amenity and many other cultural, social, environmental and historical values of cemeteries that are easily ignored if their function is seen primarily as a specialized kind of waste disposal facility which has to be maintained in the most cost-efficient manner possible.

4.4. CONCLUSION

Codification, by way of a Burial Act, would create certainty in burial law. Certainty in the law makes it possible to create precedents for easy determination of future cases. The doctrine of precedent makes the law applicable to future transactions certain and the future decisions of judges predictable. It also gives us justice according to law and not according to the whims of men.³⁵

Law has to be rigid enough to serve stability, constancy, certainty and it has to be flexible enough to serve change and development.³⁶ As Friedman observes:

It will be difficult to deny that in modern circumstances development of law through precedent is slow, costly, cumbersome and often reactionary. It is thus less suitable for a time of fast changes and restlessness such as ours.³⁷

The law as it stands today is discriminatory against women. This violates the basic human rights of women. Lamenting on her experience, Wambui Otieno, remarked:

Every woman in Kenya should look at this case³⁸ keenly. There is no need of getting married if this is the way women will be treated when their husbands die.³⁹

³⁵ Oliphant, "A Return to stare Decisis," 14 American Bar Association Journal 71, 72-73.(1928) in William Burnett Harvey, *Introduction to the legal system in East Africa*, East African Literature Bureau (1975)604 at 605.

³⁶ Gyula Eorsi, Some problems of making the law, *East African Law Journal*, Vol.3,(December 1967),272.

³⁷ W.Friedmann, *Legal Theory*, London (4ed.1960), 492.

³⁸ *Otieno v. Ougo & Another (No. 4)* (1987) KLR 407.

³⁹ Wambui Otieno, Press Conference in Nairobi, 12th January 1987 in Patricia Stamp, *Burying Otieno: The Politics of Gender and Ethnicity in Kenya*. <[http://links.jstor.org/sici?sici=0097-9740\(199122\)16:4<808:botpog 2.0.CO;2-0 & size=LARGE](http://links.jstor.org/sici?sici=0097-9740(199122)16:4<808:botpog 2.0.CO;2-0 & size=LARGE)> (Accessed on 10th September 2006).

Marsha A. Freeman observes:

Women human rights begin at home. They were not invented at Geneva or Banjul or Strasbourg or San Jose, where international bodies meet and lobby and craft the premises of international human rights instruments. What transpires in those centers can happen only because people and organizations at the local and national level identify the problems, develop the issues, and make them known to the public and to policy makers.... Claiming one's human rights is an exercise in democracy even in non-democratic systems. This exercise includes the basic tasks of democratic development: demanding accountability from governments for their treatment of citizens and demanding protection of minority or traditionally marginalized groups from the potential tyranny of the majority. Recognition of the rights of excluded or oppressed groups is a hallmark of a fully developed society – which is why we say that in terms of women every country is still developing.⁴⁰

Rule of law is at the heart of every liberal constitutional democratic state such as Kenya. It rests on the cardinal assumption that there are fair laws which are well known in advance and apply with equal force to all men and women. Lack of codification of burial law in Kenya undermines the operation of the doctrine of the rule of law. Yet rule of law is one of the key components of good governance.

⁴⁰ Marsha A. Freeman, *Women, Law, and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems*, *Human Rights Quarterly*, 16 (1994) 559-575, The Johns Hopkins University Press (1994). <[http://links.jstor.org/sici?sici=0275-0392\(199408\)16:3<559:WLALAT>2.0.CO;2-Y](http://links.jstor.org/sici?sici=0275-0392(199408)16:3<559:WLALAT>2.0.CO;2-Y) & Size = LARGE> (Accessed on 10th September 2006).

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