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BURIAL RIGHTS AND RITES: SAFEGUARDING A KENYAN AFRICAN WIDOW'S POSITION UPON TERMINATION OF A CHRISTIAN MARRIAGE BY DEATH

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Abstract

The absence of a clear legislative framework on burial that was decried by the Court of Appeal during the SM Otieno case persists over thirty years on. There has, however, been marked progress in reform of marriage laws following the promulgation of the 2010 constitution and the enactment of the family law statutes. The Marriage Act unbundles the different categories of marriages and the mode of terminating them along the contours of personal law. These contours are, however, not always maintained when it comes to termination of marriage through death. This article focusses on this inconsistency faced by widows in Christian marriages and makes a case for extension of the legal protection afforded to wives during the termination of marriage through divorce and nullification to termination through death, rather than default to automatic application of customary law for Christian widows.

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I. Introduction

> '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. It is now clear to us that it is not sufficient to write wills. There often are disputes about burials'.[1]

The above statement was made over 37 years ago by Justices of the Court of Appeal, which was the apex court in Kenya then. It was the closing statement in a judgment of a drawn out much-publicized landmark burial dispute discussed in greater detail later in this article. The paucity of legislation on burial that was decried then remains unchanged. Not even the law reform moment instigated by the promulgation of a new constitution in 2010 succeeded in eliciting the enactment of burial laws. What is undeniable, however, is that the new constitution triggered an extensive review of family laws especially the consolidation of laws regarding marriage. The resultant Marriage Act (2014)[2] recognizes five types of marriages: African customary, Christian, Civil, Hindu and Islamic. This categorization follows the contours of personal law. The statute goes further to provide for the different ways in which these marriages can be dissolved. This includes through divorce, nullification, presumption of death and death.

This article discusses the gap left by the absence of express statutory law on burial and makes proposals toward filling that gap. It does so by interrogating death as a mode of dissolution of marriage, hence situating burial within the ambit of marriage laws. While admitting that burial disputes arise from varied circumstances, the discussion in this article is limited to sepulchral rights of a widow in a Christian marriage. The term sepulchral rights refers to the spectrum of rights incidental to the control of a dead human body, ranging from exhumation, possessory rights of a corpse, notification of death, to the right to determine the time, place, and manner of burial.[3] The article does not focus on the entire spectrum of rights. Rather, it limits itself to the issue of who has the right to bury, where, when and how. The aim of the article is to present a solution to the perennial problem of the incongruity of default application of customary law principles to determine disputes over the body of a deceased person who during their lifetime had chosen Christianity as their way of life, and therefore their personal law.

This article is divided into six sections. The section following this introduction lays out the contextual and philosophical basis of burial disputes. This is followed by sections 3 and 4 which examine the contours of personal law as drawn out by the Marriage Act, and death as a mode of termination of a marriage respectively.

1 *Virginia Edith Wambui Otieno v Ochieng Ougo & Anor* [1987] KEHC 1 (KLR) (hereinafter SM Otieno case).
2 Marriage Act, 2014 (Cap.150, Laws of Kenya) (hereinafter Marriage Act, 2014).
3 Remigius N Nwabueze, 'Securing Widows' Sepulchral Rights Through the Nigerian Constitution' (2010) 23 *Harv Hum Rts J* 141 [hereinafter Nwabueze, Securing Widows' Sepulchral Rights].

Section 5 discusses the emerging jurisprudence on burial, while section 6 contains the conclusion and proposals of a way forward.

II. Contextual and Philosophical Underpinnings of Burial Disputes

In most sub-Saharan African communities, including Kenya, death catalyses a myriad of challenges and uncertainties that the bereaved must navigate during an already difficult time. The challenges are normally more aggravated where the bereaved is a widow.[4] The modern-day African widow is generally treated unjustly which is often rationalised as cultural and normalised in the patriarchal society. This is well documented in studies of various communities across Africa.[5] The violations include oppressive and obnoxious ones like levirate marriage, shaving of hairs, stipulated periods of mourning, wearing black clothes, drinking bathed corpse water, sitting and sleeping on the floor, and seclusion.[6] One of the main injustices is centred around her sepulchral rights. In the African society, contestation around these rights range from seemingly minor issues of who will dress the deceased, who manages the funeral budget, to more significant decisions regarding the place of burial, the person in charge of the burial, and the specific rites to be observed. It is around these questions that disputes arise. The disputes often pit the widow against her in-laws, the deceased's children, or co-widows, including post-humous contenders to the status of 'widow'.[7]

Several authors have written on the right to bury both globally and in Africa. Outside Africa, Muinzer flags a gap in burial laws in the United Kingdom with regard to an individual's power to determine what happens to their organs and tissues upon death.[8] Conway proposes a human rights approach in the determination of burial disputes by courts in order to cushion close relatives from the effect of dogmatic application of the law.[9] In Africa, no burial dispute has generated as much literature as that of *SM Otieno*. These include numerous scholarly journal articles, books

4 Ibid 142.

5 Rhoda Makanga, 'Lived Experiences of Widows in Kabula Ward, Bungoma County, Kenya' PhD diss., University of Nairobi, 2022; Eleanor Williams and Justus Musya, 'Widowhood Rituals versus Widows' Rights,' (2024) 7(1) *JJEOSHS*, 1-13.

6 Dominic Obielosi and Victory Okeyi, 'Christian Impact on Obnoxious Traditional Widowhood Practices in Nigeria' (2023) 4 (3) African Journal of Contemporary Research 121.

7 Nwabueze, Securing Widows' Sepulchral Rights (n 3) 143. Regarding post-humous contention for widow status, section 3(5) of Kenya's Law of Succession Act recognises, for purposes of intestate succession, the claim of any woman who can show that she was married to the deceased under a system of law that recognises polygamy, notwithstanding that the deceased was in another marriage, including a statutory monogamous marriage. For detailed discussion of the problems arising from section 3(5) see Ali Elema Fila, Patrick Omwenga Kiage and Celestine Nyamu Musembi, 'Partition in Life and in Death: Intestate Succession after the Matrimonial Property Act, 2013' [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 135.

8 Thomas L. Muinzer, The Law of the Dead: A Critical Review of Burial Law, with a View to its Development (2014) 34 (4) Oxford Journal of Legal Studies 791-818.

9 Heather Conway 'Whose Funeral? Corpses And The Duty To Bury' (2003) 54 (2) *Northern Ireland Legal Quarterly* 183.

and theses.[10] Most of this literature is around the tension between customary and received law. None of the existing literature specifically focuses on death as a mode of termination of a Christian marriage and the incidental legal issues on who has the right to dispose of the body of the deceased husband. Without expressly relying on the *SM Otieno* case, Ngira has made a case for embracing legal pluralism in settlement of burial disputes.[11]

With regard to the nexus between marriage and burial, Nwabueze has argued that in the case of intrafamilial burial disputes, a person's burial wishes should be recognised and enforced by law and where the deceased does not leave any burial instructions, then the law should empower the surviving spouse or civil partner to determine the time, place and manner of burial.[12] Njogu *et al* have described the issue of termination of a marriage through death as one that presents the sharpest spousal inequalities.[13] She argues for recognition of the marriage union as establishing a priority right of burial ahead of any other claimant.[14] Njogu highlights the 'nexus of grief' theory that has often been used by the courts to determine the person with the right to bury.[15] This resonates with the proposition in this article that recognizes the wife as the closest person to a husband in a Christian marriage both in life and in death.

The subject matter in 90 per cent of burial cases is usually the body of a man. Most involve a widow against her adult children, her co-wife/wives, her husband's family, or her husband's clan. Cases in which a husband has to deploy state machinery through a judicial process to bury his wife are rare.[16] The script of a widow's marginalization in decisions around the time, place, and manner of her husband's burial replays itself with different casts with notorious frequency in sub–Saharan Africa. The protagonists in the typical scenario are a nuclear family in which the couple contracted a Christian marriage. In their day to day running of the family, they are guided by Christian norms and rites. This includes the naming of their children, initiating them into adulthood and even marrying them off. They maintain essential contact with the extended family who otherwise play no part in

10 Jackton B. Ojwang, JN Kanyua Mugambi, and G. O. Aduwo, *The SM Otieno Case: Death and Burial in Modern Kenya* (University of Nairobi Press, 1989); ES Atieno Odhiambo and David W. Cohen, *Burying SM: the Politics of Knowledge and the Sociology of Power in Africa* (J. Currey, 2006); Blaine Harden, 'Battle for the Body', in Blaine Harden (ed) *Africa: Dispatches from a Fragile Continent* (Harpercollins, 1992) 95; Patricia Stamp, 'Burying Otieno: The Politics of Gender and Ethnicity in Kenya' (1991) 16(4) *Signs: Journal of Women in Culture and Society* 808; Awino Okech, 'Burying SM: Simply Complex' Available at <https://www.pambazuka.org/burying-sm-simply-complex> accessed 21 June 2025.

11 David Otieno Ngira, 'Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism' (2018) 8 (7) *Oñati Socio-legal Series* 1021 https://doi.org/10.35295/osls.iisl/0000-0000-0000-0982 accessed 24 June 2025.

12 Remigius Nnamdi Nwabueze, 'Legal Control of Burial Rights' (2013) 2 (2) *Cambridge Journal of International and Comparative Law* 196.

13 Roseline K. Njogu, Patricia Kameri-Mbote and Nkatha Kabira, 'The Wife of Law: Equality and Its Discontents', (2023) *East African Law Journal* 178-210 (hereinafter Njogu *and others*).

14 Ibid 209.

15 Njogu *and others* (n 13) 209.

16 Ibid 207.

the running of the nuclear family. All this changes as soon as the male head of the nuclear family is declared dead. The extended family that never featured in the nuclear family's decision-making processes during the lifetime of the male spouse immediately appear on the scene to assert burial rights justified as customary.

The interests of the widow and the extended family are usually diametrically opposed, hence the conflict. While the widow may be concerned with proceeding to manage the burial under Christian norms and rites, the extended family enter the scene as gate keepers of customary norms with little regard for the interests of the widow and children. Their primary concern tends to focus on upholding patriarchal traditions rather than nurturing the well-being and survival of the bereaved nuclear family. The focus lingers more on fulfilling ancestral expectations for burial than on ensuring that the living, such as the widow and her children, receive the support they need to continue thriving in the aftermath of their loss. The end result is often a supremacy battle between the rights and interests of the nuclear family on one side and community expectations and interests represented by the extended family on the other. The latter's main goal is usually to bury the deceased in a place and in a manner they consider consistent with customary law.[17]

Disputes such as the one hypothesised above often end up in court. Although the Kenyan legal landscape over the last decade boasts of statutes governing personal law in the area of marriage, divorce, probate and matrimonial property, the area of burial practices has been neglected. The only mention of burial in the statutes is under the Criminal Procedure Code[18] and the Public Health Act[19], and these do not deal with burial rights. The Maputo Protocol, which Kenya has ratified, and is therefore part of the Kenyan laws by virtue of Article 2 (6) of the Constitution, provides for the protection of widows' rights but is silent on their right to bury their deceased husbands.[20] The glaring absence of specific laws governing burial rights has been a topic of contention since the landmark *SM Otieno* case.[21] Kenyan courts have turned to various legal frameworks including customary law, common law, marriage law, succession law, human rights law, and land law when presented with burial disputes. There exist no identifiable guiding principles in determining burial disputes. Parties who approach the court for determination of these disputes do so from a point of uncertainty.

17 Ngira (n 11) 1023.
18 Criminal Procedure Code, 1930 (Cap. 75 Laws of Kenya) s 388.
19 Public Health Act, 1921 (Cap. 242 Laws of Kenya) pt XIII. (Hereinafter Public Health Act 1921).
20 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005), -, African Union, 11 July 2003) arts 20- 21 https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf accessed 24 June 2025 (Hereinafter Maputo Protocol).
21 *SM Otieno* case (n 1).

By their very nature, sepulchral rights fall within the domain of personal law as they regulate an individual's private civil affairs.[22] Other areas of personal law include marriage, divorce, succession, rites of passage, and naming. When someone is alive, they are able to express their personal law by the lifestyle choices they make. One such choice is the type of marriage they opt to contract. This article argues that a good indicator of the law that should govern a person in death is the choices they made in their lifetime regarding their personal law. This is nothing new as it is the norm for those whose personal law is Islam.[23] Where for instance a deceased person opted to establish their family on the basis of customary law, then the same norms should be applicable in death. In the same vein, a deceased person who in their life time clarified their choice of personal law by establishing a family through a Christian marriage should have their choice of personal law over their family respected in death. Where a deceased person leaves behind a widow, marriage and burial laws ought not to be dealt with in isolation from one another. The marriage laws that protected the sanctity and privacy of the nuclear family during the lifetime of the husband in a Christian marriage ought to be available to a widow when the marriage comes to an end through death.

The plight of the African widow in a Christian marriage is best understood when examined through the lens of legal pluralism and feminism. Kenya, like many former British colonies found herself with a pluralistic legal framework. Legal pluralism is the co-existence of two or more distinct legal systems within the same political community.[24] For purposes of this article, it refers to 'the encounter between western legal culture based on written rules and the oral African tradition' resulting in a form of 'legal syncretism' comprising western and African customary norms.[25] This has developed organically from our colonial history. The state law is therefore not the only relevant and effective legal order in people's lives.[26] Indeed, the constitution acknowledges this by clarifying that the extent of applicability of customary law is subject to it being consistent with the constitution.[27] Further, the constitution includes the promotion of traditional dispute resolution mechanisms as one of the principles of judicial authority. This again is subject to its alignment with the bill of rights, the constitution itself, written laws and justice and morality.[28] In the area of family law, the Constitution mandates parliament to enact laws that recognize customary marriages as long as they are consistent with the Constitution.[29]

22 Samuel E Agbi, 'What is Personal Law? (Academia.edu undated) https://www.academia.edu/20065275/what_is_personal_law accessed 24 June 2025.

23 Abdulkadir Hashim, 'Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation' (2005) 25 (3) *Journal of Muslim Minority Affairs* 449.

24 John Griffiths, 'What is Legal Pluralism?' (1986) 18 (24) *The Journal of Legal Pluralism and Unofficial Law* 1.

25 Salvatore Mancuso, 'African Law in Action' (2014) 58 1 *Journal of African Law* 12.

26 International Council for Human Rights Policy (ICHRP), 'When Legal Worlds Overlap: Human Rights, State and Non-State Law' (2009) https://reliefweb.int/report/world/when-legal-worlds-overlap-human-rights-state-and-non-state-law-0 accessed 24 June 2025.

27 Constitution of Kenya 2010, art 2 (4).

28 Ibid art 159 (2) and 93).

29 Constitution of Kenya 2010, art 45 (4).

There is no area where legal pluralism thrives more than in the realms of personal law. Death and burial particularly resonate with the pluralistic environment because the physical, spiritual and intellectual experiences of grief and bereavement are often shaped by the 'context of social norms, personal styles and cultural prescriptions'.[30] Unfortunately, while the existence of multiple legal orders provides the citizenry with choice of forum in dispute resolution based on their personal law, it ends up being fertile breeding ground for discord. It has been held responsible for incidents of social tension, conflict and confusion.[31] In burial cases, conflict arises from many fronts. First and foremost, the customary approach to death is group-based, through the community lens, while the formal statutory approach is individual rights-based.[32] Secondly, customary law is rooted in patriarchy where the concerns of female family members may not be on the front burner[33] while the received law seeks, on the face of it, to advance individual agency, and may accommodate the interests of the widow. Lastly, outcomes under customary law are mainly restorative in nature and prioritize the cohesion of the extended family and broader community at whatever cost, including sacrificing the rights of the widow and the nuclear family. The conventional justice system, on the other hand, on account of its adversarial nature, generates 'winner takes all' outcomes. These are the battle lines that characterize burial disputes.

It is impossible to understand the terrain in which a widow navigates her sepulchral rights without appreciating her lived experiences. The idea of taking a widow's lived experience as the starting point finds resonance with feminism whose aspiration is a social order in which women's experiences are brought to the fore as opposed to being suppressed.[34] The general consensus around feminism is that women suffer injustices because of their sex. Though various strands of feminism part ways on the reason behind the injustices and gender inequality, they all offer varying suggestions on ways out of the injustices in their different strands.

Liberal feminism focuses on the promotion of individual rights and the concepts of equality, justice and equal opportunities. It places hope in law and policy interventions as tools for engineering women's equality with men.[35] This resonates with the overall aim of this article which, while highlighting the importance of enacting legislation on burial, seeks to find interim solutions to burial disputes in existing marriage laws. This article calls for just treatment of widows in a Christian marriage. This includes according them the same rights as widowers in the same

30 *Ontweka & 3 others v Ondieki* (Civil Appeal E692 of 2023) [2024] KECA 11 (KLR) [41]. (Hereinafter referred to as *Ontweka* case).

31 Ngira (n 11) 1024.

32 Nwabueze, Securing Widows' Sepulchral Rights (n 3) 141.

33 Mary Nyangweso, 'Religion, Human Rights, and the African Widow' (2017) 1(3) *Peace Human Rights Governance* 370.

34 Patricia Smith (ed) *Feminist Jurisprudence* (OUP (1993) and K Daly and M Chesney-Lind, 'Feminism and Criminology' (1988) 5 *Justice Quarterly* 498.

35 Bilmer Eyayu Enyew and Alemeneh Mihrete, 'Liberal feminism: Assessing its Compatibility and Applicability in Ethiopia Context' (2018) 10 (6) I*nternational Journal of Sociology and Anthropology* 59.

circumstances. Widowhood attracts many problems. It is impossible to address all of them in this article. There is need to clarify the scope of this article. This article is not concerned with property rights of a widow; neither does it focus on the entire scope of sepulchral rights of a widow. It is only confined to the right to make decisions concerning burial.

III. Contours of Personal Law as Presented in the Marriage Act

People marry for diverse reasons which ultimately shape the type of marriage they settle for. Brake unpacks two viewpoints of marriage; the institutional and the contractual view.[36] On the one hand, marriage is regarded as a social institution, meaning that those who enter the status of 'married' find that it comes with pre-set norms of conduct that govern the behaviour and expectations of the parties to it. On the other hand, it is seen as a private union solely governed according to the terms agreed upon by the relevant parties, and the state's proper function is to enforce agreements between the parties, simply applying the laws of contract.[37] This proverbial tension between status and contract in marriage is reflected, to a certain degree, in the marriage legal framework in Kenya. It attempts to provide a menu of choices of personal law by which people may opt to regulate their marriages, but once in, one finds a mix of pre-set norms and freedom to set terms. A person desirous of entering into a contract of marriage in Kenya is therefore spoilt for choice. Annette Mbogo has coined an apt slogan, 'My Marriage My Choice'.[38] The choices include Civil marriage, Christian marriage, Customary marriage, Hindu marriage and Islamic marriage.[39]

The Marriage Act draws out contours for each regime of family law then spells out qualifications for each lane. A civil marriage is open to all regardless of faith or custom. This is subject to criteria for validity stipulated by the statute.[40] A Christian marriage is available where one or both parties profess the Christian faith.[41] It is officiated by a licensed church minister.[42] A Hindu marriage is for persons who profess the Hindu faith and is officiated in accordance with Hindu religious marriage rituals.[43] Islamic marriages are only for those who profess Islamic faith and are officiated by a *kadhi*, *sheikh* or *imam* in accordance with Islamic law.[44] Finally, customary marriage is also available and is celebrated in accordance with the

36 Elizabeth Brake, 'Marriage and Domestic Partnership' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016 edn) https://plato.stanford.edu/archives/win2016/entries/marriage/ accessed on 24 June 2025.
37 Ibid.
38 Annette Mbogo, 'My Marriage My Choice' 18 (1) *Journal of Comparative Law* 1.
39 Marriage Act 2014, s6.
40 Ibid s 24.
41 Marriage Act 2014, s 17.
42 Ibid, s 18.
43 Marriage Act 2014, s 46 and 47.
44 Ibid, s 48 and 49.

customs of the communities of one or both of the parties to the intended marriage.[45] Christian, Hindu and Civil marriages are monogamous while customary and Islamic marriages are polygamous or potentially polygamous.[46]

Apart from demarcating the lanes for each regime, the Marriage Act grants parties to a marriage the leeway of shifting from one lane to the other by making provision for conversion from a potentially polygamous marriage to a monogamous marriage.[47] There is however no provision to facilitate the conversion of a monogamous marriage into a polygamous or potentially polygamous one. This may be a carry-over from the colonial approach in the repealed African Christian Marriage and Divorce Act that facilitated the conversion of customary marriages into the seemingly more 'progressive' monogamous Christian marriages and not vice versa.[48] It may also be to avoid the injustice a conversion from monogamous to polygamous would visit on a wife who enters into a monogamous marriage with no intention of ever being a party to a polygamous one. It could also be in consideration of the aspiration of the Maputo Protocol which mandates states to take measures that signal that monogamy is the preferred form of marriage.[49]

The conversion from potentially polygamous to monogamous marriage must be done voluntarily by both parties and is subject to the husband having only one wife at the time of conversion.[50] Conversion from an already polygamous marriage to a monogamous one is not allowed. The rationale behind the restriction is obvious- monogamous marriage can only involve one woman, so the remaining one(s) would lose their legal status and protection[51] The provision for conversion is to facilitate change of lane in case of voluntary change of personal law.

All categories of marriage, parties thereto and the families they establish enjoy constitutional protection. The family is recognized as the natural and fundamental unit of society and the necessary basis of social order and is entitled to recognition and the protection of the State.[52] This constitutional provision resonates with international human rights provisions in Article 23 of the ICCPR, Article 10 of the ICESCR, and Article 18 of the African Charter. The Constitution further establishes equality between parties to a marriage by providing that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.[53]

45 Marriage Act 2014, s 43.
46 Ibid, s 6.
47 Marriage Act 2014, s 8.
48 African Christian Marriage and Divorce Act 1931 (Cap. 151 Laws of Kenya) (Repealed), s 9. (Hereinafter the African Christian Marriage and Divorce Act 1931 (repealed).
49 Maputo Protocol (n 20), art 6 (c).
50 Marriage Act 2014, s 8(2).
51 Mbogo (n 38) 255.
52 Constitution of Kenya 2010, art 45.
53 Ibid, art 45 (3).

As expounded in the section below, death is one of the modes of dissolving a marriage. Discrimination in the management of the death of a spouse by denying a widow rights that would otherwise be extended to a widower is therefore unconstitutional, as it negates the principle of equality at the dissolution of the marriage.

The same constitution safeguards the freedom of conscience, religion, belief and opinion.[54] This includes protection from compulsion to act, or engage in any act, that is contrary to the person's belief or religion.[55] This is an important safeguard for widows in a Christian marriage who may experience denial of the right to bury their husbands in accordance with the common faith they set out to jointly embrace at the time of contracting the marriage.

IV. Death as a Mode of Dissolution of Marriage

The Marriage Act recognizes that marriage does come to an end and lists both the intentional and default modes of dissolution of a marriage.[56] Intentional modes of dissolution are divorce and annulment. Compulsory dissolution is where a marriage contract is dissolved automatically and without the will of the parties, such as through death or presumption of death. The Marriage Act lists death first, among the events that terminate a marriage.[57] The priority given to death on that list may not be coincidental, as death of a spouse is the leading cause of termination of marriages.[58] As far as the Marriage legal framework is concerned, death is merely one of the modes of termination of marriage. It is mentioned devoid of the mysticism attached to it, especially by customary norms.

While the law is quite detailed in expounding on the 'how' of other modes of terminating a marriage, it becomes conspicuously muted on the issue of dissolution of marriage through death and especially what should happen thereafter. With regard to annulment, the Act clarifies the grounds, who may file for annulment and the legal effect of annulment.[59] Though the Marriage Act does not expound on presumption of death, the Evidence Act clarifies the threshold of evidence that must be adduced to prove that the person has not been heard of for at least seven years by those who might be expected to have heard of him if he was alive.[60] This ground of termination of marriage has not been known to raise much contention.

The law equally dedicates a lot of time and detail to dissolution of marriage through divorce. In this regard, the Marriage Act resumes the contour approach and

54 Constitution of Kenya 2010, art 32 (1).
55 Ibid, art 32 (4).
56 Marriage Act 2014, s 16.
57 Ibid.
58 In the sense that not all people will divorce, but all people will die. Hasan Mohamadi Ramghani and others, 'The Effect of Death on Dissolution of Marriage Contract with Emphasis on Presumed Death' (2017) 10(1) *Journal of Politics and Law* 1.
59 Marriage Act 2014, ss 73, 74, 75.
60 Evidence Act 1963 (Cap. 80 Laws of Kenya), 118. (Hereinafter the Evidence Act 1963).

provides for the grounds applicable to each type of marriage separately.[61] There is a glaring distinction between the mode of dissolution of a Christian Marriage and that of a customary marriage. The law includes the church as a possible forum for dispute resolution of matrimonial issues for Christian marriages.[62] On the same note, the law recognizes the traditional dispute resolution mechanisms as the natural fora for resolution of disputes in customary marriages.[63] The effort made by the Marriage Act to maintain separate lanes in managing the end of a marriage is evident. Unfortunately, the law is silent on the management of the end of a marriage occasioned by death. It is no wonder that the courts have had to be involved to fill in the vacuum left by the statutory law. In the absence of express statutory provisions, the jurisprudence emanating from the courts has shed more heat than light as the courts 'fumble with the disputes and provide contested solutions'.[64] The Court of Appeal itself has admitted that as far as the jurisprudence on burial is concerned, 'no case is on all fours with another, as each case is determined by the particular circumstances and the evidence that is adduced'.[65] Select court decisions discussed in the following section confirm this.

V. Emerging Jurisprudence

The most notorious burial case in Kenya is the *SM Otieno* case (*Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another*).[66] The deceased, a prominent lawyer of the Luo tribe was married to a wife from the Kikuyu tribe in a civil marriage. They established their matrimonial home in the capital city of Nairobi and rarely visited his ancestral home though he maintained contact with his relatives and attended several burials. He however had no house at his ancestral home. He was described as a Christian, sophisticated and urbanised. When he died intestate, his widow wanted to bury him in their home in the capital city as per his verbalized wishes, while his clansmen insisted on burying him in his ancestral land. The dispute ended up in court, pitting the widow against the deceased's *Umira Kager* clan. It was argued on behalf of the widow and her children that in the absence of a specific statutory law on who decides on burial, the applicable default law was the English common law, while his clan maintained that the applicable default law was customary law. The court went to great lengths to discuss whether there was a hierarchical ranking between common law and African customary law in resolving personal law issues. The court found that the two bodies of law complement each other in the absence of written law and concluded that the personal laws of Kenyans is their customary law in the first instance. Common law would only be resorted to if the primary source

61 Marriage Act 2014, pt X.
62 Ibid, s64.
63 Marriage Act 2014, s68.
64 Ngira (n 11) 1023.
65 *Ontweka* case (n 30).
66 *S M Otieno* case (n 1).

failed. The all-male bench of the Court of Appeal made the now infamous statement that:

> 'At present there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr Otieno having been born and bred a Luo remained a member of the Luo tribe and subject to the customary law of the Luo people. The Luos are patrilineal people.'[67]

The appellate court granted the clan the right to bury. This case was however not devoid of political undertones as the widow was not only from a well-known political family, she was also a vocal politician in her own right and held views that did not resonate with the ruling regime then.[68]

The *SM Otieno* case was preceded by the case of *James Apeli and Enoka Olasi v Prisca Buluku*.[69] In this case, the widow, who had been married in a Chistian marriage, successfully sued her brothers-in-law and obtained orders for exhumation of her husband's body from his ancestral home for re-burial in their matrimonial home. While acknowledging the English common law position that one cannot purport to leave instructions on the disposal of their body by will, the court nonetheless observed that the wishes of the deceased cannot be entirely disregarded and stated as follows:

> 'It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy.'

It is therefore apparent that, long before the *SM Otieno* case, the courts had placed value on the deceased's discernible wishes without relying on customary law where it was proved that the deceased had established his family through a Christian marriage. This case was cited in the *SM Otieno's* case but while admitting that the decision was binding on the court, the Justices went ahead to distinguish it for not having made a decision as to what the relevant customary law was and how it applied to the circumstances of that case.[70]

For a while, the *SM Otieno* decision provided the leading principles on burial disputes and held out customary law as the applicable personal law in burial disputes involving African male deceased persons. The decision also upheld other principles including the age old principle that there is no property in a dead body, and the

67 Ibid, at page 4.
68 Mary Nyangweso (n 33) 366; David William Cohen and E. S. Atieno Odhiambo, 'Burying S M' (1993) 34 (2) *Journal of African History* (Social History of Africa Series) 95.
69 *James Apeli and Enoka Olasi v Prisca Buluku* (Civil Appeal No 12 of 1979) [1985] eKLR 777.
70 SM Otieno Case (n 1).

non binding nature of the wishes of the deceased in resolving a burial dispute.[71] With time, however, the courts gradually departed from the *SM Otieno* decision and started considering other parameters, including marriage. This is probably due to the draconian impact of its strict application. For instance, in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another*[72] the court stopped short of declaring the *SM Otieno* decision bad law and highlighted the relevance of marriage laws in resolving a burial dispute as follows:

> 'The person who is 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 and as the marital union is the closest chain of relationship touching on the deceased, therefore it is only natural that the one who can prove this fundamental proximity to the deceased, has the right of burial ahead of any other claimant.'[73]

The promulgation of the Constitution in 2010 ushered in a new perspective with the post 2010 decisions exhibiting more boldness in disregarding the prominent position granted to customary law in the resolution of burial disputes. *In Re Burial of Musa Magodo Keya (Deceased*)[74], the deceased was a Christian, and head and founder of a Christian denomination. He had however solemnized his marriage as a civil union before the Registrar of Marriages. The dispute was about both the site of burial and in whom the right to bury the deceased vested. The dispute was triggered by the diverging claims of the deceased's immediate family, his extended family and his clan. The court refrained from applying customary law and acknowledged that the deceased had practically removed himself from custom, subscribed to Christianity, and consequently established a church of which he was the Archbishop at the date of his demise. The court went further to find that accepting the clan's wishes would be unconstitutional as it would be in violation of the deceased's freedom of conscience, religion, belief and opinion as enshrined in Article 32 of the Constitution. The court recognised that 'one can arrive at a conscious decision to take themselves out of the ambit of their tribal customary norms, and has the freedom to choose and subscribe to customs which are compatible with their conscience and protects their human dignity.' The court was essentially recognizing the choice of personal law made by the deceased during his life time and extending it posthumously to apply to his widow's sepulchral rights. In addition, the court used marriage laws to restate that proximity to the deceased matters. In granting the widow the right to bury, the court observed as follows:

> 'At the centre of every burial dispute is the issue of marriage and its legality. This is so because of the cardinal principle that the person in

71 *Kandie & 2 others v Beatrice Jepkemoi Cherogony* [2002] KEHC 1175 (KLR).
72 *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & Another* [2004] KEHC 2617 (KLR).
73 Ibid [18].
74 *Re Burial of Musa Magodo Keya* (Deceased) [2021] KEHC 5262 (KLR).

> the first line of duty in relation to a deceased person is the one who is considered to be of the closest legal proximity, who in most instances is the spouse if the deceased was married.'[75]

The court was once again acknowledging the connection between marriage and burial.

In *Ontweka & 3 others v Ondieki* [76], the burial dispute was between the widow and the siblings of the deceased. While admitting that the Kenyan legal system does not have a hierarchy identifying who has the most legitimate interest in a burial dispute, the court stated that the same may be discerned from a claimant's legal proximity to the deceased.[77] The importance of legal proximity had been highlighted earlier by the same court in the case of *SAN v GW*[78] where the court went on to identify those on the priority list as including the spouse, children, parents and siblings. The list has close resemblance to the priority list given in the law of succession in defining dependants.[79]

In *Samuel Onindo Wambi v C O O & another*[80], the deceased was the estranged wife of a widower who was in a vegetative state. The burial dispute concerned who between the deceased's father and her estranged in-laws had the right to bury the deceased. Evidence was adduced to the effect that the deceased had categorically stated in a public forum that upon her death she should be buried on a piece of land she had purchased, and not at her in-laws' home. The court, while complying with her wishes observed that 'a deceased person's burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed.'[81]

While prioritizing marriage relationships, the court has, however, not hesitated to deny estranged spouses the right to bury when the circumstances warranted it. Hence in the *Samuel Onindo* case, the court clarified that a spouse can be disqualified from the priority list based on previous behaviour or incapacity. In this case, the deceased woman had been abandoned by her husband for bearing children with special needs. Her husband was in a vegetative state at the time of her death and therefore incapacitated. His family's assertion of customary burial rights on his behalf could not supersede her clear wishes.

From the above discussion, the courts are yet to offer sufficient clarity on burial rights. There is, however, a discernible trend by the courts to move away from the *SM Otieno* decision and consider the deceased's personal law as expressed in their

75 Ibid [82].
76 *Ontweka* case (n 30).
77 Ibid [51].
78 *SAN v GW (*Court of Appeal in Kisumu Civil Appeal no 1 of 2020) [2020] KECA 46 (KLR).
79 Law of Succession Act 1972 (Cap. 160 Laws of Kenya) s 29. (Hereinafter Laws of Succession Act 1972).
80 *Samuel Onindo Wambi v C O O & another* (Civil Appeal 13 of 2011) [2015] KECA 620 (KLR).
81 Ibid [16].

lifetime through their chosen type of marriage, as well as specific wishes they may have expressed, especially to their spouses. The trend is more evident in the post 2010 judgments. This is a progressive trajectory that is useful in ascertaining the sepulchral rights of a widow in a Christian marriage.

While admitting that there is no uniformity in Christian burials as they differ depending on the particular sect, one common denominator in a Christian burial is the recognition and prioritization of the widow as the closest person to the deceased.[82] This assumption is based on the character of a Christian marriage where the two parties are deemed as one.[83] Where one dies, the proximity of grief approach demands that the surviving one decides on the place and manner of burial. What is also clear is that the ranking of a widow's rights in a Christian marriage is higher than that in a customary marriage.

VI. Conclusion & Recommendations

This article has demonstrated that despite extensive law reform in other areas of family law, litigants and the court itself have been approaching burial disputes with the uncertainty they had 37 years ago in the *SM Otieno* case. There is therefore need for an express statutory framework on sepulchral rights based on personal law. In the meantime, burial disputes will not wait for the legislative wheels to start turning. The article proposes the following as a stop-gap measure:

First, there is a nuanced nexus between marriage and death, both in the marriage laws and in some of the courts' approaches to resolving burial disputes. Marriage is a legal relationship, and all modes of its termination should be midwifed by the law. The contours of the different types of marriages in the Marriage Act are useful indicators of one's choice of personal law. The same statute provides for the process of conversion from one personal law regime to another. This nexus can be utilised as a focal point in resolving burial disputes especially regarding a widow's sepulchral rights. The law already relates the two in intestate succession where the spouse appears at the top of priority list as the most favoured beneficiary.

Second, customary law is certainly not the only personal law for Africans. If it were indeed true that Kenyan Africans share a homogeneous personal law, it would not have been necessary for the Marriage Act to offer the variety of options in type of marriage. The same Act makes provision for shifting lanes from one personal law to another. Ultimately, religion is an expression of culture, intertwining deeply with personal and communal identities. The underlying issue becomes even more complex when individuals actively choose one cultural or legal framework over another. Religion often acts as a catalyst for cultural shifts which involves abandoning cultural norms like initiation rites, naming patterns or even polygamy.

82 Nwabueze, Securing Widows' Sepulchral Rights (n 3) 143.
83 Genesis 2:24; Mark 10:8 (Holy Bible).

The legal process of conversion from one personal law to another (as might be evidenced by choice of form of marriage) can only take place during one's lifetime. The posthumous imposition of norms that a deceased person never regarded in their lifetime violates those they leave behind, especially the widow. The blanket assumption that customary law is the default applicable law for all burial disputes involving Kenyan Africans is therefore flawed. The precedential value of *SM Otieno* is highly suspect, to say the least, and courts are wise to depart from it and should continue to do so.

Third, the logic that preempts the imposition of customary burial norms and expectations on a Hindu or Muslim widow should be extended to the widow in a Christian marriage. The Christian widow, just like her Muslim counterpart need not wait for enactment of burial laws if the court can recognize her family's choice of personal law when the marriage is terminated through death.

In conclusion, aligning burial rights with marriage laws is certainly not the magic wand that will resolve all burial disputes. It also has its own limitations and challenges like where the deceased and widow were estranged at the time of death, where the widow is unwilling to be involved or where the widow and the deceased subscribe to different personal laws. The alignment, however, provides a viable focal starting point in bringing predictability to the uncertain terrain of Christian widows' sepulchral rights.

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