LEGISLATING OVER THE DEAD: REVISITING THE S. M. OTIENO CASE

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DEDICATION

I dedicate this dissertation to my mother. Her zeal, diligence and foresight in life serve as the fuel that drives me. May God grant her life to see me conduct other studies at higher levels of learning.

I also dedicate this dissertation to all families that have lost a loved one and have had to experience the additional anguish of dealing with a burial dispute. May this study contribute to expedient burial dispute resolution.

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DECLARATION

I, **WAMBUA MISHAEL MUSILI**, do hereby declare that this dissertation is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....
Dr. Peter Kwenjera

LIST OF CASES

1. *Anne Nyathira v Samuel Mungai Mucheru & 3 others*, [2016] eKLR (CoA) [22-28].
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10. *Isaiah Otiato and 6 others v County Government of Vihiga*, [2018] eKLR (ELC).
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13. *Lucy Kemboi v Cleti Kurgat & 5 Ors,* [2012] eKLR (HC) 8.
14. *Ludindi Venant & another v Pandya Memorial Hospital*, [1998] eKLR (HC)
15. *Martha Wanjiru Kimata & Anr v Dorcas Wanjiru & Anr,* [2014] eKLR (HC) [13-19].
16. *Mary Nyang'anyi Nyaigero and another v The Karen Ltd. and another*, [2016] eKLR (HC) [18-19].
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19. *Ruth Anyolo v Agnetta Oiyela Muyeshi*, [2019] eKLR (HC) [28].
20. *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge*, [2004] eKLR (HC).
21. *Sakina Sote Kaittany and another v Mary Wamaitha*, [1995] eKLR (CoA)
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23. *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another,* [1987] $eKLR_3$ 18.
24. *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another,* [1987] $eKLR_4$ (CoA).
25. *Williams v Williams* [1882], United Kingdom High Court.

LIST OF LEGAL INSTRUMENTS

1. Constitution of Kenya (2010).
2. Judicature Act (Act No. 14 of 1977).
3. Marriage Act (Act No. 4 of 2014).
4. Penal Code (Act No. 81 of 1948).
5. Succession Act (Act No. 21 of 1990).

LIST OF ABBREVIATIONS

Anr	Another
CoA	Court of Appeal - Kenya
CoK	Constitution of Kenya
HC	High Court of Kenya
Ors	Others

Abstract

Death is the end of life. More than this, however, it is (especially in Africa) a rite of passage. Unfortunately, in spite of its significance in the African context, it remains to be (at least in Kenya) a matter that brings along uncertainty especially where burial conflicts arise. Such uncertainty results from the inadequate burial legislation. Regrettably, courts faced with questions of burial conflicts have not resolved them in a uniform manner and at times have wrongly applied common law and African customary law in an attempt to resolve such disputes. Consequently, the precedents developed by the courts have been insecure and unpredictable. While there have been attempts by scholars to write on the need to enact burial legislation, this study considers a much less publicized topic. The study analyses the application of the common law 'no – property' rule alongside African customary law. It is argued that under African customary law, there *is* property in a corpse and that an analysis of precedents from the courts and practice from communities confirms the same. The study then concludes that a finding that there *is* property in a corpse, can offer some pragmatic solutions to the burial conundrum.

Keywords: Burial legislation, burial conflicts, burial rites, customary law, 'no – property' rule.

CHAPTER ONE

INTRODUCTION

1.1 Background

In many African cultures, death marks the beginning of a new type of existence: spirituality and ancestry.[1] This renders it a critical occurrence in the lives of those whose doors it unlocks especially given the African context. Burial legislation (and/ or burial rights) is an area that has arguably been long bereft of secure and predictable jurisprudence at least in Kenya. Though burial conflicts are not new (nor are they about to go away) their adjudication seems to pose a challenge to the judiciary. A cursory glance at precedents developed by the judiciary reveals a non-uniform, unsecure and unpredictable mechanism of resolving burial conflicts.[2] So much so that Abdullahi posits that by failing to develop cogent precedents, the judiciary lacks sound legal principles and policy considerations to employ in resolving burial conflicts.[3]

Despite having gained independence in 1963; or having promulgated the new Constitution on 27th August 2010, the Kenyan legal system still grapples with the uncertainty that comes with burial conflicts. Where a family is in dispute as to where to bury their dead, or what customs or traditions to employ in burying the deceased, they sometimes turn to courts to resolve such disputes.[4]

Courts adjudicating over burial conflicts have a herculean task in their hands. This is because, in resolving such disputes there is limited legislation they can rely on, and the legislation that is available does not adequately provide the framework needed to resolve such disputes.[5] This leads to the development of unclear jurisprudence. Some courts have held in favour of customary law being the applicable law in resolving burial conflicts; whereas others have held

[1] Wiredu K, 'Death and the afterlife in African culture' in Wiredu K and GyeKye K (eds), *Person and community: Ghanaian philosophical studies I,* Council for research in values and philosophy, Washington D C, 1992, 197.
[2] See *Lucy Kemboi v Cleti Kurgat & 5 Ors* [2012] eKLR (HC) 8; *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* [2004] eKLR [612]; *Eunice Moraa Mabeche & Anr v Grace Akinyi & Ors* [1994] unreported; *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another* [1987] eKLR3 18.
[3] Abdullahi A, *Burial conflicts in Modern Kenya: Customary Law in a Judicial Conundrum,* 1, University of Nairobi, Nairobi 1999, 2.
[4] https://www.nation.co.ke/lifestyle/dn2/Burial-battles-that-tested-common-law/957860-2040310 ia751cz/index.html- accessed on 1 September 2018.
[5] Constitution of Kenya (2010), Judicature Act (Act No. 14 of 1977), Marriage Act (Act No. 4 of 2014), Succession Act (Act No. 21 of 1990), Penal Code (Act No. 19 of 2014).

in favour of common law; whereas others are guided by the limited statutes that are available such as the Marriage Act. This multiplicity in the application of laws leads to contradictory rulings.[6]

Nonetheless, the common thread that weaves through these cases is the suggestion, though not express, that there is some form of property in a dead body.[7] Property in a corpse (or even in a living body) has been the subject of serious debate with some of the arguments against the idea being based on moral implications.[8] Other arguments are based on the question of what constitutes property? While there seems to be a general consensus that property is a collection of legal rights held by a person (or people) in relation to others with respect to some object, and states enforce those rights[9]; the debate is whether those rights should collectively amount to full commercial ownership for there to be an affirmative finding of proprietary rights.[10] If in African societies proprietary rights need not amount to full commercial ownership, then this study will investigate if -in African societies- there can be property rights in a corpse.

Precedents from Kenyan courts would be more secure, predictable and efficient if courts apply laws that reflect actual human actions in the given society, rather than copying and pasting laws from societies that do not mirror our own such as the English law that there is no property in a corpse. It is against this background and in revisiting the *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another* (*S.M. Otieno*) Case that this study will assess whether there is

[6] See *Lucy Kemboi v Cleti Kurgat & 5 Ors* [2012] eKLR (HC) 8 (This case related to a burial dispute in respect to the place of interment of Lucy's late husband. The Plaintiff sought to have the deceased buried in their homestead which was registered in her father-in-law's name. The Respondents sought to have him buried in his father's home citing Keiyo customary law. The court found in favour of the Respondents.); *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* [2004] eKLR [612] (This case related to burial dispute in respect to the place of interment of Jemimah's late husband. The deceased was alleged to have married Ruth under African customary law, and Jemimah under a Christian marriage. The court averred that the first in line of duty in relation to burial is the person closest to the deceased in legal terms.); *Eunice Moraa Mabeche & Anr v Grace Akinyi & Ors* [1994] unreported (In this case, the court validated the wishes of the deceased and underlined the right of an individual to make a will. The dispute involved the widow to the deceased and some members who had agreed that the deceased be buried at a Muslim cemetery in conformity with Islamic rights. The deceased's mother on the other hand insisted that he be buried in Kisii as a Christian and insisted that the deceased had never converted to Islam.).

[7] See *Lucy Kemboi v Cleti Kurgat & 5 Ors* [2012] eKLR (HC) 8; *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* [2004] eKLR [612]; *Eunice Moraa Mabeche & Anr v Grace Akinyi & Ors* [1994] unreported; *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another* [1987] eKLR$_3$ 18.

[8] Scarmon M, 'Brotherton v. Cleveland: Property Rights in the Human Body-Are the Goods Oft Interred with Their Bones?' 37(1), *University of South Dakota Law review*, 1992, 436.

[9] Waldron J, 'Property Law' in Patterson D (ed), *A companion to philosophy of law and legal theory,* 2, Blackwell Publishing, Oxford, 2010, 8 - 12.

[10] Mathews P, 'People as property' 36(1), *Current legal problems,* 1983, 195 – 197.

indeed no property in a corpse, (and) especially from an African perspective.[11] Reliance is placed upon this case because, not only did the Court of Appeal have to grapple, at length, with the place of customary law and common law in Kenya's legal system; the Court also had to deal with questions on the battle between modernity and the preservation of cultured integrity, the individual and the clan, and Christianity and African custom.

1.2 Statement of the problem

Kenya lacks legislation to resolve burial conflicts. Courts faced with such disputes apply personal law (African Customary Law) or common law.[12] Even when applying African Customary Law, principles of common law are still applied. One such principle is that there is no property in a corpse.[13] The African Customary Law position seems to suggest otherwise. In combining it with the 'no – property' rule in common law, therefore, courts seem to be contradicting themselves.[14] Therefore, the problem that arises is whether there is property in a corpse and whether a finding in the affirmative would help in resolving burial conflicts.

1.3 Objectives of the study

The general objective of this study is to revisit the S.M. Otieno case in light of the 'no - property' rule and African Customary Law practice. The specific objectives are to:

i.) Demonstrate the insecure, unpredictable and contradictory jurisprudence on burial conflicts;

ii.) Examine the application of the 'no - property' rule from the S.M. Otieno Case and African Customary Law; and

iii.) Establish if property exists in a corpse and how an affirmative finding can help resolve burial conflicts.

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[11] eKLR4 [1987] 407.

[12] Ngunjiri S, 'Burial conflicts in Kenya: A Case for Legislation', published LLM Thesis, University of Nairobi, Nairobi, 2006, 12.

[13] Waldron J, 'Property Law' in Patterson D (ed), *A companion to philosophy of law and legal theory,* 2, Blackwell Publishing, Oxford, 2010, 9; [1987] eKLR3 18.

[14] Abdullahi A, *Burial conflicts in Modern Kenya: Customary Law in a Judicial Conundrum,* 1, University of Nairobi, Nairobi 1999, 2.

1.4 Hypotheses

This study will test the following hypotheses:

i.) The current jurisprudence on burial rights from Kenyan courts is insecure, unpredictable and contradictory;

ii.) The application of the 'no - property' rule in the *S.M. Otieno* case was contradictory and differed from African practice; and

iii.) There is property in a corpse, and such a finding can help resolve burial conflicts.

1.5 Research Questions

This study is aimed at answering the following questions:

i.) Is the current jurisprudence on burial rights insecure, unpredictable and contradictory?

ii.) Was the application of the 'no – property' rule in the *S.M. Otieno* case contradictory and different from African practice?

iii.) Is there property in a corpse and can such a finding help resolve burial conflicts?

1.6 Justification of the study

This study is justified on the basis that there is no legislation governing burial conflicts. Therefore, courts adjudicating over burial conflicts are left with too much discretionary power which often leads to contradicting rulings. A cursory glance, however, shows courts regurgitating the 'no – property' rule in their judgments without much analysis of the same then going ahead to make a finding that suggests otherwise.[15] There have been attempts to discuss property in the body and its parts.[16] These attempts have tried to make a case for property in body parts by showing the absurdity of the converse. Say for example a chief government pathologist steals a heart from a cadaver; can they be convicted of stealing? Well for a layman, the direct answer is yes but under the law, the answer is no. Stealing is defined as fraudulently and without claim of right taking anything capable of being stolen (property).[17] Given that there is no property in a body or its parts, it therefore follows that a body part cannot

[15] *Martha Wanjiru Kimata & Anr v Dorcas Wanjiru & Anr* [2014] eKLR (HC) [13-19]; *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* [2004] eKLR 12 - 18; *Apeli v Buluku* [1980] eKLR 5 – 6 (In this case, the court was being asked to effect a clear intention of the deceased at the request of the deceased's widow to have his remains disinterred and taken elsewhere for reburial. The court averred that in such a case, a court will not hesitate to order for such exhumation if it is desirable or imperative, taking into account the reasons for doing so).

[16] Scarmon M, 'Brotherton v. Cleveland: Property Rights in the Human Body-Are the Goods Oft Interred with Their Bones?; Mathews P, 'People as property' 36(1).

[17] Section 267 – 268, *Penal Code*, (Act No. 81 of 1948).

be stolen. While the purpose of this study is not property in body parts, this goes to show how the view may be misleading in different perspectives. Although there have been attempts to highlight how the view is misconceived, no attempts have been made to study the 'no – property' rule from an African perspective which can then form a strong base to agitating that the same be reconceptualized. This study will finally fill this gap and help courts resolve burial conflicts, through its recommendations, thereby bringing certainty and predictability to litigants and the legal system.

1.7 Literature Review

There exists some literature on burial rights and disputes from a common law perspective as well as from an African perspective. Many important aspects of this study, relating to form and substance, have been crafted with heavy reliance on the existing literature.

With respect to burial rights and disputes from a common law perspective, the work of Heather Conway will be relied on. In her book, *The law and the dead*, Conway sets out how burial rights are vested from a common law perspective. First, for adult testate deaths, the deceased's executor will have possession of the body.[18] Second, for an intestate death, it is the highest ranking next of kin who will be entitled to bury the deceased.[19] Lastly, for cohabitees, none of them are right holders in so far as burials are concerned.[20]

Moreover, the English case, before the House of Lords, that (arguably) established the 'no - property' rule was *Exelby v Dr. Handyside*.[21] It is noteworthy, however, that the second-rate reporting of the case has led to criticism over its authority. In the case, the plaintiff brought an action against Dr. Handyside for taking away his two female still-born infants upon birth. Lord C.J. Willes held, 'the action would not lie, as no person had any property in corpses.'[22]

Paul Mathews posits that a determination of property rights in a body (whether living or dead) is mainly hinged on what definition is attached to property. He goes on further to argue that whilst it may be difficult to consider a buried corpse as property, there is less difficulty in conceiving part of a human body as property. He argues that contemplating the latter warrants

[18] Conway H, *The Law and the Dead*, Routledge, Belfast, 1, 2016, 19 - 21.
[19] Conway H, *The Law and the Dead,* 20.
[20] Conway H, *The Law and the Dead,* 21.
[21] Mathews P, 'People as property' 208 – 210.
[22] Mathews P, 'People as property' 208 – 210.

less morbid and sentimental considerations.[23] Though he is generally making a case for parts and products of living people; his work is persuasive while making considerations of what constitutes property.

From an African perspective, as Cotran observes, social organisation in African communities is such that communal responsibility and authority have preference over individual autonomy which is subject to the recognized social practices of the community or the tribe. The social practices of most communities are to the extent that, at least by implication, a corpse is treated as property: communal property.[24]

Ngunjiri in attempting to make a case for the need to enact burial legislation, notes that as a result of the dynamic nature culture has, court cases decided based on customary law do not automatically have precedent value. Litigants must satisfy courts that the customs they are invoking actually exist and are applied. This, he argues, poses uncertainty in the law.[25]

In the *S. M. Otieno* case, the court applied Luo customary law in resolving the dispute. It, however, invoked the 'no - property' common law rule in stating that, '… a corpse does not fall in the category of property…'[26] The court then went on to identify who had the legal right to the exclusion of all others, of deciding where S. M. Otieno would be buried[27]; and whom the deceased's body should be handed over to (transferred).[28] In doing so the author argues that the court contradicted itself because going by African custom, there appears to be property in a dead body. Therefore, by ruling that there is no property in a dead body then proceeding to aver that Luo customary law is the applicable law the court contradicted itself.

From the foregoing, it is evident that the English approach to burials and funeral rites differs from the African approach. Moreover, as Winfred posits, courts recognize the complementarity of common law and African customary law but wrongfully conflate the two.[29] Throughout the

[23] Mathews P, 'People as property' 218 – 236.
[24] Cotran E, *Restatement of African law II: The Law of succession.*
[25] Ngunjiri S N, Burial conflicts in Kenya: A Case for Legislation, 12.
[26] [1987] eKLR$_3$ 11.
[27] [1987] eKLR$_3$ 17.
[28] [1987] eKLR$_3$ 18.
[29] Kamau W, 'SM Otieno revisited: A view through legal pluralist lenses' 5(1), *Law Society of Kenya Journal,* 2009, 68.

authors cited, none address the issue of property in a corpse from an African perspective. This is the gap this study seeks to fill.

1.8 Research Design and methodology

The study is qualitative in nature. Data will be gathered from reviewing the literature available in the area. Some of the sources that will be relied on include primary sources and secondary sources. The primary sources will mainly be English and Kenyan cases. The thinking behind the use of English cases is: the confusion and vagueness that bedevils this area of law makes its entrance here (1), there is little to no literature that develops or gives the rationale for the rule (2), and it could be argued that the reason for regurgitation of the rule without any analysis by Kenyan courts is because Kenya is a common-law country(3). The particular English cases that we shall be concerned with are the *Handyside* case and the *Hayne's* case. We shall then turn to Kenyan case law. Our anchor case shall be the *S.M. Otieno* case because majority of courts dealing with burial conflicts post-1987, have turned to the *S. M. Otieno* decision for guidance. It is for these reasons that our investigation begins here before analysing cases after this decision.

Books and chapter in books shall be the secondary sources employed and particularly Eugene Cotran's work on African customary law. Journals shall also be reviewed to buttress arguments. The method that has been used to gather information for this study is research of library and desktop research. The library and desktop research will seek to analyse and interpret burial rights from an African perspective; and the application and relevance of the 'no – property' rule in Kenya.

1.9 Assumptions

The research is guided by the following assumptions:

i. Burial rites and customs have not significantly evolved over the past years since 1969 when the most recent book on African customary law was published; and
ii. Some Kenyans express their wishes, before they die, on how they would like their remains to be interred.

1.10 Limitations

This study is by no means perfect and the author faced a number of limitations. To begin with, the scholarly material tracing the origin or justifying the 'no-property' is scarce and largely unavailable. The author had to use the limited material available in conducting the study. Secondly, in assessing Kenyan burial practices, the author employed Eugene Cotran's 'Restatement of African law II: The law of succession'. This is a book written in 1969 and there is a likelihood that burial practices have evolved since then. To mitigate the harm of relying on the book, the author turned to court decisions to investigate if Kenyan burial practice can be deciphered from court decisions. Unfortunately, courts also rely on Eugene Cotran's work, and those that do not, seem not to deviate from his findings. Finally, jurisprudence from Kenyan courts seems to suggest that the rule on there being no property in a corpse, is trite law. They neither justify this finding, nor do they discuss it.

1.11 Chapter breakdown

The introduction deals with the background of burials and burial rights in Kenya, the objectives of the study and justification on the need to reconceptualize the 'no – property' rule are given. It also provides a review of already available literature which is further enumerated in Chapter two.

Chapter two lays out the theoretical framework for this paper by making a theoretical justification for the finding of property in a corpse. This objective is met through discussing Honoré and Hohfeld's theories of property. It is argued that should a finding of property be made by use of Honoré's theory, then there will be a legal web of relationships created, as per Hohfeld. Lastly, the chapter responds to arguments that economic coercion is a vitiating factor to free will when one is making a choice over the sale of their kidney.

Chapter three examines whether a finding that there is property in a corpse can help resolve burial conflicts. In doing so, the author relies on the analysis of property from chapter two. The study will investigate the origin and justification of the 'no-property' rule by analysing the available literature and a few English cases.

Chapter four goes in depth in analysing the burial legislation in Kenya; and the jurisprudence developed by Kenyan courts on burial rights. It lays down the philosophy that underpins resolution of burial conflicts in Kenya. The chapter goes on to analyse the inconsistency and

contradictory nature in which courts resolve burial conflicts. It is in this chapter that a more elaborate analysis of the *S. M. Otieno* case is conducted. The chapter examines the 'no – property' rule from an African perspective by considering African practice as derived from literature and Kenyan case law.

Chapter five concludes the study and makes a recommendation based on the findings.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

There are over 42 tribes in Kenya.[30] Each tribe is governed by its own set of customary laws. Some of these laws are similar whereas others are completely different. A common feature, however, in these laws/customs is the view of death and funeral rites as a communal matter; with certain rights and obligations over the corpse being conferred upon various individuals.[31] Death, in many an African society, is not just the absence of life. It is an event. Following a person's death, elaborate rites and rituals are undertaken ultimately leading to the interment of the deceased's remains.[32] The rites and rituals are attended by many people, with different individuals within the society undertaking different duties while others enjoy certain rights or powers. In this respect, death is not merely the passing of an individual but an occurrence that evokes certain relationships within a community.

Consequently, it is no surprise that following an individual's death, a conflict may arise within members of the community as regards the burial of the individual. As noted in the previous chapter, burial conflicts are common within the courts of law in Kenya. Another conflict that is also common is the manner in which courts adjudicate over such disputes. This is because different courts apply conflicting laws in order to resolve such disputes.

In resolving disputes, however, we need an appropriate framework within which to work. Arguably, the conflict in court decisions in this area is as a result of lack of framework. Since conflict on burials fundamentally revolves around issues of possession and control, one approach may be to consider a deceased as a self-owner and their body as being subject to the legal property regime as property or at the very least quasi-property.

The concept of property in a corpse or the body as property is sometimes rejected on various fronts. For property in a corpse, there seems to be no justification whereas for property in a

[30] <http://www.knbs.or.ke/index.php?option=com_content&view=article&id=151:ethnic-affiliation &catid=112&Itemid=638 >on 16 February 2019.
[31] See generally Cotran E, *Restatement of African law II: The Law of succession,* 1, Sweet & Maxwell, London, 1969.
[32] Monari E, 'Burial legislation -reflections on the S.M. Otieno Case' 31(1), *Howard Law Journal*, 1988, 668.

body, theorists argue that it would be morally and ethically objectionable to consider a human being as property because of human dignity.[33] It is worthy of note, however, that despite these criticisms depending on the legal definition attached to property, a property framework may lead to effective resolution of burial conflicts and will ensure security and predictability in the legal system.

In trying to analyse the sense of property in a corpse from communal practice, this study will show that if, as Honoré posits, property *is a bundle of sticks'* and that for there to be property one need *not* hold all the sticks, then there *is* property in a corpse.[34] If there is property in a corpse then, as Hohfeld maintains, a legal web of relationships is formed.[35] It is this legal web of relationships that helps solve burial conflicts.

2.2 Property as a 'bundle of sticks'

Honoré argues that property is a 'bundle of rights or sticks'. He arrives at this theory through a review and analysis of jurisprudence. The theory argues that property is comprised of certain central and essential features of ownership.[36] Honoré posits that for the full concept of property to be realised; there must be eleven (11) sticks.[37]

The eleven (11) sticks include: the right to possess (1), the right to manage (2), the right to use (3), the right to income of the thing (4), the right to capital (5), the right to security (6), the right to or incidents of transmissibility and absence of term (7 and 8), the right to residuarity (9), the right to prohibition of harmful use (10), liability to execution (11).[38] From the list, it is self-evident that some sticks cannot be attached to a corpse. These are sticks such as: the right to income of the thing, the right to capital, the right to or incidents of transmissibility and absence of term. I shall therefore restrict my analysis to those sticks that are possibly applicable.

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[33] Foster C, 'Dignity and the Ownership and Use of Body Parts,' 23 (1) *Cambridge Quarterly of Healthcare Ethics*, 2014, 417; Delmonico F and Scheper N, 'Why We Should Not Pay For Human Organs,' 38(3) *Zygon*, 2003; Friedman E and Friedman A, 'Payment for Donor Kidneys: Pros and Cons,' 69(1) *Kidney International*, 2006, 960 – 961.
[34] Honoré A, 'Ownership' in Coleman J (ed), *Readings in the philosophy of law,* Garland Publishing, New York, 1999, 563 – 574.
[35] Hohfeld W, 'Fundamental legal conceptions as applied in judicial reasoning' 27 *The Yale Law Journal,* 1917, 727 – 730.
[36] Honoré A, 'Ownership' 563.
[37] Honoré A, 'Ownership' 563.
[38] Honoré A, 'Ownership' 562 - 574.

The right to possess is the right that an owner can keep and manage property under his ownership.[39] Keeping and managing property means, that an owner has the right to be allowed to manage their property and the right to keep managing it as long as they are the owner. On the face of it, this invokes the question of who confers a right on an individual to manage themselves? The simple answer is, the law as well as ones parents. The law puts restrictions on the rights that can/ cannot be enjoyed by citizens below a certain age limit. Additionally, parents remain 'in-charge' of their children until a certain age limit. Taken together, this study argues that once a certain age limit has been achieved, then the law and one's parents confer the right upon them to 'manage' themselves.

The right to manage is the right to determine how ones property can be used. When it comes to human beings, we have the right to determine to what use we shall put our living body to.

The right to use is the right conferred upon an owner allowing them to exploit utility of their property, and enjoy the fruits and profits from the property.[40] In the definition, exploiting utility of one's property seems to be concerned with management, whereas enjoying the fruits and profits from ones property seems to be concerned with income. In regard to the body, we shall restrict our definition to the first part. It is self-evident that human-beings have the free will to determine how to utilise their bodies.

The right to security is the assurance that a person will remain the owner of their property without being forced to give it up absent compensation.[41] This is applied, for example, where a family is compensated for compulsory acquisition, and one of the factors taken into consideration is the presence of burial sites on their land.[42]

The right to residuarity recognises that sometimes rights of ownership either expire or may be abandoned.[43] The corresponding rights (duties), therefore, become vested in someone else e.g. the state or next of kin. Here considerations such as post-humous rights are brought into play. For example, post-humous personality rights expire after a certain period of time.

[39] Honoré A, 'Ownership' 563 - 574.
[40] Honoré A, 'Ownership' 563 - 574.
[41] Quigley M, 'Property and the body: Applying Honoré' 33(1), *Journal of Medical Ethics*, 2007, 631 – 634.
[42] *Nelson Oduor Onyango and 12 others v Town Council of Awendo*, [2009] eKLR (HC); *Isaiah Otiato and 6 others v County Government of Vihiga*, [2018] eKLR (ELC).
[43] Quigley M, 'Property and the body: Applying Honoré' 631 – 634.

The right to prohibition of harmful use is the duty of the owner not to use the property in a way that harms other members of society. In this case, a deceased would be required not to provide in a will a method of interment that would be contrary to public order or policy, or that would harm the public.

This approach to property has been subject to various criticism. First, scholars argue that viewing property as a bundle of rights risks causing one to lose sight of the connection of those rights to things.[44] Second, focusing too narrowly on any given right to a thing, and conceiving of that right independently from others in the thing, the property institution is bound to fall apart, and be replaced by disaggregated strands of rights and duties among particular people.[45] Modern scholars, however, have picked out specific sticks from the bundle that depict property.[46] These sticks are: right to exclude others; right to possess and use; and right to transfer. This theory will help assess whether there is property in a corpse on the basis of the existence of certain 'sticks' over the corpse.

The author will further rely on the practice of communities in conducting death and funeral rites to justify property in a corpse. The practice as well as African Customary Law recognise, by implication, certain 'sticks' being vested in members of a community over a corpse.[47] The practice will be necessary in examining whether African Societies consider corpse as property.

2.3 Hohfeld's theory of jural correlatives and opposites

The second theory that will be relied on is Hohfeld's theory of jural correlatives and opposites.[48] Hohfeld propounds that property creates certain relationships among people thus creating a complex web of legally enforceable relationships.[49] Under this theory, a property owner can hold four entitlements: rights, privileges, powers, and immunities.[50] Each entitlement has a co-relative counter-part: right – duty; privilege – no right; power – liability; and immunity – disability.[51] Viewing property as a legal structure using the Hohfeldian

[44] Kariuki F, Ouma S and Ng'etich R, *Property law,* 1, Strathmore University Press, Nairobi, 2016,5.
[45] Kariuki F, *et al*, *Property law,*5.
[46] Sprankling J, *Understanding property law,* 4, Carolina Academic Press, Durham, 2017, 6 – 9.
[47] See generally Cotran E, *Restatement of African law II: The Law of succession.*
[48] Bhalla R, *Concepts of jurisprudence,* 1, Nairobi University Press, Nairobi, 72 – 79.
[49] Bhalla R, *Concepts of jurisprudence,* 73.
[50] Kariuki F, *et al*, *Property law,*11 - 12.
[51] Hohfeld W, 'Fundamental legal conceptions as applied in judicial reasoning' 727 – 730.

analysis, creates possible legal expectations in relation to things.[52] This theory as assessed with the 'bundle of rights' theory will enable the author examine whether there can be property in corpse; and how the Hohfeldian analysis would assist in resolving burial conflicts should there be a finding in the affirmative.

2.4 Conclusion

In conclusion, this chapter sought to discuss theories of property as espoused by Hohfeld and Honoré. By relying on Honoré's bundle of sticks theory of property, the chapter sought to show that there are certain sticks that can be identified in a corpse and if therefore, a corpse were to be considered property, then Hohfeld's analysis of jural correlatives and opposites would kick in to determine the nature of the legal relationships that arise.

[52] Ogden C (ed), *Jeremy Bentham: The theory of legislation,* Routledge & Kegan Paul, London, 1931, 111.

CHAPTER THREE

PEOPLE AS PROPERTY: MEANING AND LEGISLATIVE FRAMEWORK

"A man's dying is more the survivor's affair than his own"[53]

3.1 Introduction

The previous chapter sought to elaborate Honoré and Hohfeld's view of property. Particularly, Honoré's theory of ownership and Hohfeld's jural correlatives and opposites – the lens through which this research shall proceed – set the stage for a discussion on property. Property in the human body.

Property, derived from the Latin term '*propius*' (meaning one's own) means different things in different contexts. Nonetheless, in the eyes of the law, it is a recognized concept hence the existence of legal rights such as property rights. Depending on the legal definition attached to the notion of property, the approach of considering whether there is property in a corpse may probably be flawed. The problem lies in the definition and analysis that we attach to property, and the failure to recognize and appreciate the positive consequences, in terms of legal rights, that may arise from considering a corpse as property. So, considering Honoré's and Hohfeld's view of property, were the law to identify property in the human body, it would mean that the drafters of the law have created a web of relationships whereby a party will enjoy the legal right to determine what happens to a corpse.

Legal rights that lack a secure and predictable legal framework to facilitate their full enjoyment and use, are useless. They can only be equated to a dog that barks but cannot bite. The rationale, therefore, for having secure and predictable legal frameworks is to allow right-holders vindicate their rights by enforcing them against duty bearers. It is not enough, however, for the appropriate legal definition of property to be arrived at and for legal rights to be given the force they deserve. The manner in which the law is constructed is also critical.

The construction of the law is guided and influenced by several factors. One of the essential factors is language. That is to say, when language is used as a tool to construct the law, then it

[53] Thomas Mann, -https://quotes.yourdictionary.com/author/thomas-mann/173982- on 28 November 2019.

determines the content of the law. For this reason, this chapter shall examine what constitutes property rights in the eyes of the law, dissect the 'no-property' rule and finally define a legal right and who can be a right-holder.

3.2 Property and law

This discussion analyses what, in the eyes of the law, property means. It then identifies which legal property definition can be contextually applied in the case of corpses. It is important that if we are to find that there can be property in a corpse, then such a finding must be based on the law. At any rate, Bentham notes, 'property and the law are born together, and die together. Before laws were made there was no property; take away laws and property ceases.'[54]

Lord Wilberforce posits that it is only until a right is definable, identifiable by third parties, capable in its nature of assumption by third parties, and has a degree of permanence that it can be admitted into the category of property, or of a right affecting property.[55] The premise relied on by Lord Wilberforce is a common law approach of looking at the rights a person has in respect to the *res*, rather than looking at the *res* itself.[56]

The problem with the approach taken by Lord Wilberforce is, it is too restrictive. By setting the standard as to include alienability, and a sufficient degree of permanence, the subject becomes narrower because considerations such as a subject being property in the ordinary commercial sense or whether it has any value as an article of traffic, come into consideration. Going by this, for example, if one were to look at a human kidney, then it would not qualify as property. If, however, the same kidney is considered as physical matter; its characteristics are similar to those of an animal kidney and there is no debate that an animal tissue is property – at least in the physical sense.[57]

So, the question thus becomes, what characterization should be given to property to avoid the restrictive nature of considering the rights? The line that divides consideration of an animal kidney as property and a human kidney as not, is whether the legal rights held should amount to full ownership in the commercial sense. An animal kidney is alienable and therefore

[54] Bentham J, *The theory of legislation*, 2, Oceana Publications, New York, 69.
[55] *National Provincial Bank Ltd. v Ainsworth* [1965], The United Kingdom House of Lords [1247 - 1248].
[56] Matthews P, 'Whose body is it? People as property' 194.
[57] Matthews P, 'Whose body is it? People as property', 194 – 196.

regarded as property. A human kidney is neither alienable nor is it regarded as property. Since in the animal kidney context property refers to legal rights that amount to and include full ownership in the commercial sense, we must consider whether we would still have property were the commercial sense to be removed from the bundle of legal rights.

3.3 Authorities on the 'no-property' rule

A cursory glance at the literature available in this area reveals that many a scholar, lawyer and judge alike refer to 'no-property' in the human body and its parts without explaining the origin of the term, or at the very least its rationale.[58] It seems to be assumed knowledge that is never questioned to the extent that some judgements read, 'it is trite law that there can be no property in a corpse…'.[59] Well trite as it may be, this research will investigate the origin and meaning of the 'no-property' rule before making an argument on whether there is a rationale to support the rule.

The first port of call shall be English cases. This is for three reasons: the confusion and vagueness that bedevils this area makes its entrance here (1); there is little to no literature that develops or gives the rationale for the rule (2); and it could be argued that the reason for regurgitation of the rule without any analysis by Kenyan courts is because Kenya is a common-law country(3).

One of the earliest English cases is commonly referred to as the *Hayne's* Case.[60] William Hayne's was indicted for larceny. He would dig up graves, remove the bodies, steal the winding sheet that covered the bodies and then re-bury the bodies in their graves. The issue for determination was whether the dead owned the winding sheets. Simply, the question for determination was, whose property had Hayne's stolen? The court came to the finding that the winding sheets were the property of the person who had property in them when the bodies were wrapped simply because a corpse cannot possess rights. Specifically, the court averred, 'but a lump of earth hath no capacity.'[61]

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[58] Matthews P, 'Whose body is it? People as property', 198; George A, 'Property in the human body and its parts. Reflections on self-determination in liberal society' European University Institute, EUI Working paper law No. 8/2001 -https://cadmus.eui.eu/bitstream/handle/1814/172/law01-08.pdf>- on Monday 18th November 2019; *Apeli v Bukulu,* [1980] eKLR (CoA); *Sakina Sote Kaittany and another v Mary Wamaitha*, [1995] eKLR (CoA); *Mary Nyang'anyi Nyaigero and another v The Karen Ltd. and another*, [2016] eKLR (HC) [18-19].
[59] *Ludindi Venant & another v Pandya Memorial Hospital*, [1998] eKLR (HC).
[60] *Hayne's* Case [1614], The United Kingdom House of Lords (unreported).
[61] George A, 'Property in the human body and its parts. Reflections on self-determination in liberal society'

The ruling in the *Hayne's* case does not support the proposition that a dead body is not capable of owning property. To the contrary, the words, '…a lump of earth hath no capacity…' only go to show that a dead body is not capable of owning property and not that a dead body cannot be property in and of itself. Paul Matthews argues that this decision was subsequently taken out of context and so began the 'no-property' rule.[62] Specifically, he observes that classical common-law scholars observe that there can be no property in a dead body but they do not justify or support their arguments with a scholar who extensively wrote on the origin and rationale of the rule, or a case that gave the origin and rationale of the rule.[63]

Similarly, in *Exelby v Handyside*, an English court found that preserved Siamese twins could not be property.[64] The case involved an action for trover brought against Dr. Handyside who delivered still-born conjoined twins. The report of this case states that the ruling was, 'The action would not lie, as no person had any property in corpses.' It is noteworthy that there is a dearth of reporting as regards this case and perhaps the most informative source on this case is Matthews.[65] In undertaking considerable research, in an attempt to narrow the dearth of knowledge of the case, he noted his inability to do so given the scanty reporting and went on to question its usefulness as an authority.[66]

Moreover, in *Williams v Williams* a deceased, via a codicil, had directed the executors of his will to give his body to the Plaintiff for disposal through cremation and provided that she could claim expenses incurred thereof from his estate. The executors, however, had his body buried. The Plaintiff, had the body dug up, and sent it to Milan for cremation because at the time, British laws outlawed cremation. Thereafter she sought reimbursement of the cost she incurred from the estate. The executors refused to reimburse her, and she therefore filed a suit against them. Her claim failed for among other reasons, there is no property in a corpse and a person cannot effectively dispose of it in his will.[67]

[62] Matthews P, 'Whose body is it? People as property', 198.
[63] Matthews P, 'Whose body is it? People as property', 198.
[64] *Exelby v Handyside* [1749], The United Kingdom House of Lords (unreported).
[65] Matthews P, 'Whose body is it? People as property', 198.
[66] Matthews P, 'Whose body is it? People as property', 198.
[67] *Williams v Williams* [1882] United Kingdom High Court.

Given all these English cases[68] recognizing the 'no-property' principle, how can the legal scene in Kenya compare? To answer this question, it might be useful to consider how Kenyans treat the dead before delving into how Kenyan courts deal with questions regarding dead bodies.

Burial conflicts in Kenya are mainly decided upon using customary law.[69] The applicability of customary law as a source of law is governed by the Constitution and the Judicature Act.[70] The nature of customary law, however, is such that it is treated as a question of fact. That is to say, for customary law to apply, a litigant wishing to rely on it must adduce evidence as to its existence before a court of law.[71] With this as our foundation, we must therefore investigate whether the social practices (or culture) by Kenyan communities support a finding that there is no-property in a corpse.

To begin with, it is interesting to note, before Kenya was colonized there were no burial conflicts. This is not to suggest that the Kenyan communities were comprised of such peace-loving individuals that burial conflicts never arose. The reason behind this is, the social practice for treating corpses was throwing them in the forest. After colonization, this practice was polluted by Western culture and so began the practice of having elaborate burial rituals.[72]

Eugene Cotran notes that post-colonisation, Kenyan communities adopted elaborate rituals upon a person's death, that ultimately culminated in burial. These rituals underpinned aspects such as: who bore the *duty* to bury the deceased; who had the *right* to elect the place of burial; who held the *power* to *possess* the body for burial purposes; who *managed* the burial process and disposal of the body. These observations of death and funeral rites are drawn from a multiplicity of Kenyan communities including: Kikuyu, Kamba, Meru, Luo, Nandi, Maasai, Teso among others.[73]

Okoth-Owiro outlines four (4) possible problems that may arise from the application of customary law to burial conflicts. They include: Should there be a conflict between customary

[68] See also *Doodeward v Spence* [1908] High Court of Australia; *Dobson and Dobson v North Tyneside Health Authority and New Castle Health Authority* [1996] United Kingdom Court of Appeal.
[69] Ngunjiri S, 'Burial conflicts in Kenya: A case for legislation' 8.
[70] *Constitution of Kenya* (2010); *Judicature Act* (Act No. 16 of 1967).
[71] *Ernest Kinyanjui Kimani v Muiru Gikanga and another*, [1965] E.A (CoA) (unreported); *Joseph Muchai Gitau and another v Machaga Gachira*, [2017] eKLR (HC) [8].
[72] Cotran E, *Restatement of African law 2, Kenya II, the law of succession*, 3 – 20.
[73] Cotran E, *Restatement of African law 2, Kenya II, the law of succession,* 3 – 20.

law either as among a community or as among one community against another, it is not certain which law should prevail and how should such a decision be arrived at (1), should a custom be found to be repugnant to justice and morality what law would be applicable then, especially considering the fact that common law (which is the other applicable law in such a scenario) does not provide for who has the *right* over a corpse or the *duty* to bury it (2), customary law is only applicable to those subject to it . It is therefore uncertain what law would apply to those Kenyans who are not subject to customary law (3); and customary law is personal law. There is, however, no legal theory or law in Kenya that underpins what personal law should be applied to an individual (4).[74] In sum, the problem with customary law is its uncertainty. This research shall focus particularly on the last problem.

The last problem revolves around how much the force a deceased's wishes carry. It would appear that the position taken by Kenyan courts is that a deceased's wishes are merely that – wishes.[75] The next of kin or personal representatives are under no obligation to follow the wishes of the deceased, even when they are contained in a will, for the simple reason that, 'it is trite law that there can be no property in a dead body.'[76] Some courts, however, have pronounced that a deceased's wishes should be implemented as far as is practicable, so long as it can be proven that they are not contrary to customary law.[77] This therefore, places the burden of proving that a deceased's wishes conform to customary law, on their next of kin and/ or personal representatives. Given all the uncertainty that shrouds this area, perhaps security and predictability in the law would be brought about by establishing a legal framework that guarantees legal rights and their protection.

3.4 Defining a legal right and who can be a right-holder

The concepts of rights, under the law, is one shrouded with varying definitions and attributes so much so that Hohfeld noted the looseness of its usage by authorities.[78] In order to avoid falling into this pitfall, this research shall proceed with a definition of rights as espoused by Beale and complement this definition with Hohfeld's analysis. A right is a legally recognized interest in, to or against a person or thing.[79] It is an affirmative claim against another that creates

[74] Okoth-Owiro A, 'The burial legislation of Kenya: Do we need a statute?' in Ojwang J. B. and Mugambi J. (eds), The S.M. Otieno Case: Death and burial in modern Kenya, 1989, 119 – 125.
[75] *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others*, [2018] eKLR (HC) [52].
[76] *Ludindi Venant & another v Pandya Memorial Hospital*, [1998] eKLR (HC).
[77] *Ruth Anyolo v Agnetta Oiyela Muyeshi*, [2019] eKLR (HC) [28].
[78] Smolensky K, 'Rights of the dead' 37(3) *Hofstra Law Review,* 2009, 766 - 767.
[79] Kariuki F, *et al*, *Property law,*5.

a web of relationships that involves third parties whom either have a duty, privilege, power or immunity in relation to the right.[80]

Proceeding on Hohfeld's analysis of rights, however, is not without criticism. Many a scholar, have criticized the Hohfeldian view for three (3) main reasons: Not every legal relation that can be characterized to fit into one category is necessarily a right (1), some legal relations may involve a combination of rights, powers, privileges, and immunity; and Hohfeld seems to primarily consider legal relations between the living (3). Of particular interest shall be the third criticism (for obvious reasons).[81]

Smolensky observes that Hohfeld considers rights between persons who are presumably living. She adds that his analysis does not take into account the rights of the yet to be born, posthumous rights, or flora.[82] Moreover, Waldron also notes that despite Hohfeld limiting his analysis to persons and not things, his analysis fails to discuss the necessary and sufficient characteristics of right-holders.[83]

In response to this criticism, two schools of thought have emerged. One, in favour, argues that legal rights exist only when one is sentient and capable of making choices.[84] It thereby follows, given that dead people do not make choices nor do they have the capability to do so, then they cannot ne right-holders (perhaps this goes to explain proponents of the no-property rule). The major pitfall of this school of thought would arguably be its non-conformity to social and legal realities.

The other school of thought argues that a person who is unable to make choices can be a legal right-holder.[85] It thereby follows that in some instances, even where a person is dead, they are still legal right-holders whose rights can be protected by their next of kin or personal representatives. This school of thought conforms to social and legal realities e.g. posthumous rights.

[80] Kariuki F, *et al*, *Property law,* 5.
[81] Smolensky K, 'Rights of the dead', 767 – 768.
[82] Smolensky K, 'Rights of the dead', 767 – 768.
[83] Waldron J, 'Property Law' 8 - 12.
[84] Smolensky K, 'Rights of the dead', 768 – 771.
[85] Smolensky K, 'Rights of the dead', 768 – 771.

3.5 Conclusion

This chapter has traced the conflicting framework surrounding the concept of property in a human body by analysing and discussing the scholars and notable case-law in this area. The chapter then analysed how Kenyans treat the dead before delving into the position taken by Kenyan courts with regard to dead bodies. The conclusion considered if at all a human body were to be considered as property, whether there would be a legal right and subsequently a right-holder.

The next chapter will consequently seek to conduct a more detailed analysis of the interpretation by Kenyan courts regarding property in a corpse. The aim will be to determine whether a finding of property in a corpse would aid Kenyan courts in disposing off burial conflicts.

CHAPTER FOUR

BURIAL RIGHTS: REFLECTIONS ON BURIAL CASE LAW IN KENYA

"If the law knows a right, it should provide a remedy"[86]

4.1 Introduction

The law only provides remedies where there is an existing right. The previous chapter sought to elaborate the 'no-property' rule, its origin, as well as its justification (or lack thereof). It was subsequently concluded, that were we to apply Hohfeld and Honoré's theories of property, then it would be possible to make a case for there being property in a corpse. Consequently, a corpse would be protected under the property regime, and an intricate legal web of relationships would guarantee the rights of a deceased.

The guarantee of legal rights comes in the form of protection mechanisms such as courts. Courts play the role of ensuring that citizens' rights are upheld. This, in turn, ensures that a legal system is secure and predictable thus increasing its reliability. For courts, however, to uphold citizens' rights, the said rights must exist. It is therefore the role of the legislature to make clear and concise laws that would allow courts exercise their duty. In the absence of such laws, courts bear the herculean task of construing existing laws in a manner that would uphold citizens' rights. This does not ensure security and predictability in a legal system.

This chapter seeks to investigate burial rights as construed within the Kenyan legal system. It will involve an investigation into Kenyan case law on burial conflicts. The chapter will begin by analysing the landmark S. M. Otieno Case, before proceeding to discuss jurisprudence emerging thereafter.

4.2 S. M. Otieno Case

The case of Silvano Melea Otieno is an important one when it comes to burial rights. This is so for two reasons. First, it considers issues that have been canvassed in chapter 2 and 3 of this dissertation i.e. whether there is property in a corpse, whether a person can dispose of their body through a will, and whether the manner in which Kenyan communities (particularly the Luo) treat the dead. Secondly, majority of courts dealing with burial conflicts post-1987, have

[86] Matthews P, 'Whose body is it? People as property', 198.

turned to the S. M. Otieno decision for guidance. It is for these reasons that our investigation begins here.[87]

i.) Facts

Silvano Melea Otieno was a prominent Kenyan lawyer with a legal practice in Nairobi. Otieno, a Luo by birth, was married to Virginia Wambui Otieno, a Kikuyu. Together they resided in a Villa, built by Otieno, in Lang'ata. They also owned a home in Upper Matasia, Kajiado District (now Kajiado County). Unfortunately, in or about December 20, 1986, Otieno died of acute myocardial infarct, acute coronary occlusion and coronary heart disease. He was survived by his nuclear family as well as his extended family including his brother, Joash Ougo Otieno and his clan – the Umira Kager Clan. Upon his death, a dispute arose.

The dispute arose in a somewhat simple way. Wambui wished to bury Otieno in Upper Matasia or Lang'ata in what she termed as Otieno's wishes. Joash and the Clan, however, wished that he be buried in Nyalgunga, Central Alego, Siaya District – his ancestral home. That being so, Wambui filed a suit which wound up being decided by the Court of Appeal – the highest court in Kenya at the time.[88]

ii.) Issues

The main issues for determination were:

1. Whether Wambui (as being Otieno's widow) or Joash and the Clan (as being Otieno's tribe) bore the duty of burying Otieno,
2. Whether Otieno's wishes were binding upon the court; and
3. Whether English law or Customary law applied, and which law Otieno was subject to.

iii.) Procedural history

The matter first appeared in the corridors of justice when Wambui took a pre-emptive step and sought injunctive orders from the high court, to bar Silvano's brother and clan from interring his body. Justice Frank Shields, a white judge, granted this order. Ougo appealed and the court of appeal allowed the appeal and ordered for a re-trial at the high court before another judge other than justice Shields. When the matte came before the high court again, it was before Justice Bosire who ruled in favour of Ougo and the clan. Wambui appealed this decision and it was brought before the court of appeal again. Before the appeal could be canvassed, Wambui

[87] [1987] eKLR3 17.
[88] [1987] eKLR3 17.

applied for the judges to recuse themselves citing that they had heard the previous appeal and were therefore biased. They rejected her application, went on to entertain her appeal and found in favour of the clan thereby affirming the high court decision.[89]

iv.) Determination

The high court found in favour of the clan arguing that there can be no property in a corpse therefore a person's wishes are not binding upon a family. Moreover, a Kenyan of African descent could not divest themselves from their culture and therefore Otieno was bound by Luo customary law in as far as burial rites and customs were concerned.[90]

From the foregoing, one may be tempted to conclude that in as far as burial rights are concerned, where the litigants are subject to Customary law and where its application does not result in injustice or repugnance to morality, then Customary law will be the applicable law. This temptation, however, should be fought off. It would appear different courts apply different laws perhaps based on subjective whims.

4.3 Other cases

In the *Gachenje* case the plaintiff sought the remains of his daughter for burial purposes. His claim was hinged on the fact that, according to him, his daughter was unmarried as per Kikuyu Customary law. Having died a bachelorette, he argued, he was duty-bound by Customary law to bury her. The defendant contested this. He argued that he was the deceased's husband as they had cohabited for a long period and in a manner to suggest that they were husband and wife. He therefore had the duty to bury her. The main issue for determination was whether the deceased was married as per Kikuyu Customary law and who bore the duty to bury her. The court applied the common law presumption of marriage and found that the defendant was indeed the husband of the deceased and therefore had the duty of burying her.[91]

In *Njoroge v Njoroge and another* the applicant, Ruth Wanjiru Njoroge, sought a temporary injunction restraining the respondents from burying the deceased pending the determination of the suit. The respondent, Jemimah Njeri Njoroge, was the first wife of the deceased. Ruth argued that she was the second wife of the deceased and that they had lived with the deceased as husband and wife for more than ten (10) years. The dispute was centred around the fact that

[89] Monari E, 'Burial legislation -reflections on the S.M. Otieno Case' 668.
[90] [1987] eKLR3 17.
[91] Ibid.

Ruth and Jemimah wished for the deceased to be buried at different sites. Ruth argued that the deceased had expressed his wish to be buried at their home whereas Jemimah argued that Ruth was not the deceased's wife. The issue for determination was whether Ruth could be granted the injunctive relief sought. In denying her application Justice J. B. Ojwang averred that 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.[92] In ruling as much, Justice Ojwang seemed to be moving away from the Kikuyu customary law approach whereby the person with the colour of right to bury the deceased would have been his brother.[93] He, however, still asserted that there is no property in a corpse.

The jurisprudence emerging from recent court decisions is no different than the already established jurisprudence. In *Samuel Mungai Mucheru & 3 others v Anne Nyathira* the high court upheld that there is no property in a corpse thereby a deceased cannot dispose of his body by will. The plaintiffs, three (3) sons and a daughter of the deceased, sought an injunction from the high court against the defendant, who was the deceased's fifth wife. They averred that the defendant had planned on burying the deceased's body to their exclusion. They also contested where the deceased was to be buried arguing that as per Kikuyu customary law, he was to be buried in his ancestral home (a desire which he had expressed). Ann on the other hand argued that while it was indeed true that the deceased had expressed his wish to be buried in his ancestral home, such a desire had been abandoned when he wrote a will and identified a different place to be buried. She urged the court to be guided by the deceased's wishes as recorded in his will. In finding for the plaintiff, Musyoka J averred that there is no property in a dead body to be disposed of by the testator at will (25) and that Kikuyu customary law on the matter was 'notorious'.[94] It is noteworthy, however, that this decision was later overturned by the Court of Appeal though not in favour of the deceased's wishes.[95]

In 2018, the High Court at Eldoret did not depart from this reasoning as per the judgement by Omondi J, in *Ruth Anyolo v Agnetta Oiyela Munyeshi* the matter was an appeal from the Magistrate's Court. Agnetta had sought an order for injunction against Ruth from interring the remains of their late husband, Fredrick Munyeshi. The injunction was to stop Ruth, who was the deceased's second wife, from interring the remains of the deceased at a parcel of land other

[92] *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge*, [2004] eKLR (HC).
[93] Cotran E, *Restatement of African law 2, Kenya II, the law of succession,* 8 – 19.
[94] *Samuel Mungai Mucheru & 3 others v Anne Nyathira*, [2014] eKLR (HC) [17-25].
[95] *Anne Nyathira v Samuel Mungai Mucheru & 3 others*, [2016] eKLR (CoA) [22-28].

than that of the first wife, Agnetta. Agnetta claimed that as the first wife, she was entitled to bury the deceased. The trial court found in her favour. Aggrieved by the decision, Ruth opted to appeal. In upholding the trial court's finding, the high court found that despite there being a valid will, customary law would take precedence over the will. Particularly, because a deceased's body is not his personal property under custom, nor is a funeral and accompanying internment in the African customary setting a private affair to be dictated upon by one who has already exited the stage then customary law would be applied as opposed to the will.[96]

Notably, however, there are cases where courts have upheld a deceased's wishes whether contained in a will, or otherwise. In *Apeli v Buluku*, the widow of the deceased sought an order from the high court to allow her to exhume the body of her husband in order to re-bury it in Bungoma District as per her husband's wishes. His body had been buried in Ebosioli Village by his relatives and clan as per Luhya customary law. The court, in finding for the widow, averred that it was clear that the deceased had expressed where he intended to be buried and in such a scenario the deceased's wishes, though not binding, must as far as possible be given effect to.[97]

Similarly, in *Moraa v Akinyi* the court upheld the wishes of the deceased and underlined the right of an individual to make a will and the need for such a will to be implemented as far as is practicable.[98] More recently, in *Onyango v Wambi*, the high court guided by the Apeli decision granted the wishes of the deceased. Interestingly, in this case the Judge found that despite the customary law evidence adduced, the conduct of the deceased's husband and his family towards the deceased was so undeserving as to deny him the customary claim of burying the remains of his wife. The court arrived at this decision after it considered evidence that had been adduced to the extent that during her life, Veronica had been mistreated by the defendant to the extent that she deserted their matrimonial home.[99]

Conclusively, through the cases analysed it can be summarized that there is no clear position on burial rights as per the jurisprudence developed from Kenyan courts. A court faced with similar facts may not resolve the dispute in the same way. A common thread that weaves

[96] *Ruth Anyolo v Agnetta Oiyela Muyeshi*, [2019] eKLR (HC) [28].
[97] *Apeli v Buluku* [1980] eKLR (HC).
[98] *Eunice Moraa Mabeche & Anr v Grace Akinyi & Ors* [1994] *unreported* (HC).
[99] *Charles Onyango Oduke & another v Samuel Onindo Wambi* [2010] eKLR [17-20].

through the cases, however, is the fact that African custom requires a deceased be treated in a certain manner. It can be deduced from the disputes that African custom recognizes rights such as the right to possess, manage, use, and prohibit from harmful use. On this basis, the study argues that as per African custom, there is property in a corpse. A finding of post-humous rights in a corpse would aid in resolving burial conflicts because the law would recognize the deceased as the right-holder and the executors of his will (if any) as the duty-bearers. In the absence of a will, the law would need to identify who the legal duty bearer in such an instance would be.

4.4 Conclusion

This chapter sought to investigate burial rights as construed within the Kenyan legal system. It found that Kenyan courts contradict each other. Despite the evident contradiction, however, the study found that what courts consider as custom is not contradictory. It was concluded that was is considered as custom actually buttresses the argument that there is property in a corpse and that the courts in the S.M. Otieno case erred by stating that there is no property in a corpse.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study intended to assess whether, given the practice of African communities, there can be property in a corpse, and how such a finding would help resolve burial conflicts. The conflicting court decisions on burial conflicts and the lack of legislation in this area render the resolution of burial conflicts unpredictable and inconsistent.

This chapter will conclude the study and make a determination on the legal effect of finding that there is property in a corpse particularly in resolving burial conflicts. It will also give recommendations.

5.2 Restating the initial problem

Kenya lacks legislation to resolve burial conflicts. Courts faced with such disputes apply personal law (African customary law) or common law.[100] Even when applying African customary law principles of common law are still applied. One such principle is that there is no property in a corpse.[101] The African customary law position seems to suggest otherwise thus in combining it with the 'no – property' rule in common law, courts seem to be contradicting themselves.[102] Therefore, the problem that arises is whether there is property in a corpse and whether a finding in the affirmative would help resolving burial conflicts.

5.3 Research findings

The study was inspired by the anguish families face when they lose a loved one and the uncertainty, they are forced to grapple with should a burial dispute arise. The study therefore sought to answer one main question: Is there a way of bringing security and predictability to the legal system by applying a framework to resolve burial conflicts. This proceeded from the hypothesis that, the current jurisprudence on burial conflicts is contradictory and that there is indeed no property in a dead body. In confirming this hypothesis, the study sought to answer the following questions: (i) Is the current jurisprudence on burial rights insecure, unpredictable

[100] Ngunjiri S, 'Burial conflicts in Kenya: A Case for Legislation', 12.
[101] Waldron J, 'Property Law' 9; [1987] eKLR3 18.
[102] Abdullahi A, *Burial conflicts in Modern Kenya: Customary Law in a Judicial Conundrum,* 2.

and contradictory? (ii) Was the application of the 'no – property' rule in the *S.M. Otieno* case contradictory and different from African practice? And (iii) Is there property in a corpse and can such a finding help resolve burial conflicts?

5.3.1 Is the current jurisprudence on burial rights insecure, unpredictable and contradictory?

The first concern for this study was whether the current jurisprudence on burial rights insecure, unpredictable and contradictory. In answering this question, this study comes to two (2) conclusions. First, burial jurisprudence emerging from Kenyan courts is contradictory. This is attributable to the lack of legislation governing burial conflicts. In the absence of legislation, the approach taken by Kenyan courts is to apply common law, marriage laws or personal law. Some courts even apply a mixture of common law and customary law e.g. by making a presumption of marriage as per common law then going ahead to decide on the burial rights as per customary law.

The second conclusion is, given the contradictory jurisprudence emerging from courts, it is almost impossible to decide how a court faced by similar facts and applying similar laws would decide upon a burial dispute. This is surprising for a common law jurisdiction where precedents play a significant role in the legal system. The contradiction by courts and the subsequent unpredictability of decisions makes the legal system insecure as regards burial disputes.

5.3.2 Was the application of the 'no – property' rule in the *S.M. Otieno* case contradictory and different from African practice?

The second question the study sought to answer was whether the application of the 'no – property' rule in the *S.M. Otieno* case is contradictory and different from African practice? In order to answer this, the study turned to Eugene Cotran's 'Restatement of African law II: The law of succession' to establish what the African practice on burial is. Going by Cotran's work and Honoré's theory of property, it would appear that, to Africans, there is property in a corpse. This is because African practice recognizes the rights to use, possess, manage, and prohibit from harm as being rights subject to a corpse. Thereby, if as Honoré maintains, not all sticks in a bundle are required for a finding of property, then given the bundle of sticks that a corpse is subject to under African practice, then the high court and court of appeal in *S. M. Otieno*

erred in finding that there is no property in a corpse. The study concluded that these proprietary rights should be considered post-humous rights.

5.3.3 Is there property in a corpse and can such a finding help resolve burial conflicts?

This question follows from the previous research finding that the no-property rule was misapplied in the S.M. Otieno case. The study assesses a number of cases and scholarly works in an attempt to establish the origin and justification for the no-property rule. The study shows that the origin of the no-property rule is unsubstantiated and as a result of misreading a judgement. Also, majority of scholarly authorities on the rule either cite each other or fail, all together, to justify the rule. Following from this, the study finds that if Honoré's theory of property is applied, then indeed there is property in a corpse. The question that remains is, does such a finding make any contribution towards resolving burial conflicts? The answer is, yes. Property, according to Hohfeld, gives rise to a complex web of relationships. It is in identifying these relationships that burial conflicts can be resolved.

5.4 Deduction and suggestions

Conclusively, this study confirms the hypothesis that the current jurisprudence on burial conflicts is contradictory and that there is indeed no property in a dead body.

This study concludes by giving two alternative recommendations. First, the Kenyan legislature must enact legislation underpinning that there is property in a corpse. Such a legislation will be binding upon courts and will underpin disposition of bodies via wills. Alternatively, or conjunctively, Kenyan courts should re-analyse the 'no-property' rule and make a determination that there is indeed property in a corpse thereby allowing persons to dispose of their bodies via wills.

Bibliography

1 Books

Abdullahi A, *Burial conflicts in Modern Kenya: Customary Law in a Judicial Conundrum,* 1, University of Nairobi, Nairobi 1999.

Bentham J, *The theory of legislation*, 2, Oceana Publications, New York, 69.

Bhalla R, *Concepts of jurisprudence,* 1, Nairobi University Press, Nairobi, 1990.

Conway H, *The Law and the Dead*, Routledge, Belfast, 1, 2016.

Cotran E, *Restatement of African law 2, Kenya II, the law of succession*, 1, Sweet & Maxwell, London, 1969.

Kariuki F, Ouma S and Ng'etich R, *Property law,* 1, Strathmore University Press, Nairobi, 2016.

Ogden C (ed), *Jeremy Bentham: The theory of legislation,* Routledge & Kegan Paul, London, 1931.

Sprankling J, *Understanding property law,* 4, Carolina Academic Press, Durham, 2017.

2 Chapter in Books

Honoré A, 'Ownership' in Coleman J (ed), *Readings in the philosophy of law,* Garland Publishing, New York, 1999, 557 – 597.

Ogden C (ed), *Jeremy Bentham: The theory of legislation,* Routledge & Kegan Paul, London, 1931, 111.

Okoth-Owiro A, 'The burial legislation of Kenya: Do we need a statute?' in Ojwang J. B. and Mugambi J. (eds), The S.M. Otieno Case: Death and burial in modern Kenya, 1989, 119 – 125.

Waldron J, 'Property Law' in Patterson D (ed), *A companion to philosophy of law and legal theory,* 2, Blackwell Publishing, Oxford, 2010, 1 - 37.

Wiredu K, 'Death and the afterlife in African culture' in Wiredu K and GyeKye K (eds), *Person and community: Ghanaian philosophical studies I,* Council for research in values and philosophy, Washington D C, 1992, 189 - 210.

3 Journal Articles

Delmonico F and Scheper N, 'Why We Should Not Pay For Human Organs,' 38(3) *Zygon*, 2003

Foster C, 'Dignity and the Ownership and Use of Body Parts,' 23 (1) *Cambridge Quarterly of Healthcare Ethics*, 2014, 417

Friedman E and Friedman A, 'Payment for Donor Kidneys: Pros and Cons,' 69(1) *Kidney International*, 2006, 960 – 961

George A, 'Property in the human body and its parts. Reflections on self-determination in liberal society'

Hohfeld W, 'Fundamental legal conceptions as applied in judicial reasoning' 27 *The Yale Law Journal,* 1917.

Kamau W, 'SM Otieno revisited: A view through legal pluralist lenses' 5(1), *Law Society of Kenya Journal,* 2009.

Mathews P, 'People as property' 36(1), *Current legal problems,* 1983.

Monari E, 'Burial legislation -reflections on the S.M. Otieno Case' 31(1), *Howard Law Journal*, 1988, 668.

Quigley M, 'Property and the body: Applying Honoré' 33(1), *Journal of Medical Ethics*, 2007, 631 – 634.

Scarmon M, 'Brotherton v. Cleveland: Property Rights in the Human Body-Are the Goods Oft Interred with Their Bones?' 37(1), *University of South Dakota Law review*, 1992.

Smolensky K, 'Rights of the dead' 37(3) *Hofstra Law Review,* 2009, 766 – 767.

4 Working papers, dissertations and thesis

George A, 'Property in the human body and its parts. Reflections on self-determination in liberal society' European University Institute, EUI Working paper law No. 8/2001 - https://cadmus.eui.eu/bitstream/handle/1814/172/law01-08.pdf>- on Monday 18th November 2019

Ngunjiri S, 'Burial conflicts in Kenya: A Case for Legislation', published LLM Thesis, University of Nairobi, Nairobi, 2006, 12.

5 Internet Sources

http://www.knbs.or.ke/index.php?option=com_content&view=article&id=151:ethnic-affiliation &catid=112&Itemid=638

https://www.nation.co.ke/lifestyle/dn2/Burial-battles-that-tested-common-law/957860-2040310 ia751cz/index.html.

Thomas Mann, -https://quotes.yourdictionary.com/author/thomas-mann/173982- on 28 November 2019