



**BURIAL DISPUTES IN KENYA: ESTABLISHING A FRAMEWORK FOR THEIR
DETERMINATION BY THE COURTS**

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DECLARATION

I, MEGAN WANJIRU GITONGA, do hereby declare that this research 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, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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

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Date:5th May 2025.....

ABSTRACT

Death is inevitable, and no living being can escape it; therefore, it necessitates that every person must have a final resting place. This study concerns itself with the determination of a deceased person's final resting place, more specifically, the disputes arising out of the determination of a deceased person's final resting place.

In Kenya, there is no law governing the determination of burial disputes, and the need for such a codified statute or an act of parliament to be legislated to that effect has been pronounced and emphasised upon by multiple authors and scholars. The need for burial legislation or a codified framework to be used in the determination of these disputes by the courts has been proven necessary through the inconsistent and differing decisions declared by the courts in matters of this nature.

Therefore, the paper will analyse different cases determined by the courts in Kenya and common law countries, then using the reasoning of the courts in these matters and the recurring factors of consideration used by the courts in the pronouncement of their judgement and utilise them to propose a framework to be used to guide the courts in the future for the dispensation of justice effectively as well as to aid in the reduction of backlog of cases within the courts.

LIST OF CASES

1. *George Ooko Okoth v Edith Apiyo Ochieng* (2021) eKLR.
2. *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.
3. *Onderi v Ontweka & 3 others (Civil Appeal E048 of 2023)*.
4. *SAN V GW* (2020) eKLR.
5. *Adhola v Kudha & 2 others; St. Elizabeth Lwak Mortuary (Interested Party)* (Civil Appeal E007 of 2024).
6. *In re Estate of SMM (Deceased)* (2021) eKLR.
7. *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others* (2018) eKLR.
8. *Mary Rono v Jane Rono & another* (2005) eKLR.
9. *Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others* (2017) eKLR.
10. *In re Estate of George Muriithi Gitahi (Deceased)* (2019) eKLR.
11. *Sakina Sote Kaittany & another v Mary Wamaitha* (1995) eKLR.
12. *Doodeward v Spence* (1908), The High Court of Australia.
13. *Jones v Dodd* (1999), No. SCGRG-98-896 Judgment No. S125 SASC 125.
14. *Smith v Tamworth City Council and Ors* (1997) NSWSC 197.
15. *Bhe v Magistrate, Khayelitsha* (2005), Constitutional Court of South Africa.
16. *Mankayi v AngloGold Ashanti* (2011), Constitutional Court of South Africa.
17. *In re Estate of M'Nkanata M'Ikiara (Deceased)* (2018) eKLR.
18. *In re Estate of Karanja Mutegi (Deceased)* (2021) eKLR.
19. *In re Estate of M'ikiara Kangetu (Deceased)* (2018) eKLR.
20. *Moseneke v The Master* (2000), Constitutional Court of South Africa.

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya (2010).

Judicature Act (No.10A of 2012).

Penal Code (Cap 63 of 2023).

The Law of Succession Act, Kenya Cap 160.

The Marriage Act Cap. 150.

Aboriginal Heritage Act (Australia).

Registration of Customary Marriages Act (South Africa).

Constitution of The Republic of South Africa (1996).

Aboriginal Land Rights Act (Australia).

The Traditional Courts Act (South Africa).

Births and Deaths Registration Act Cap. 149.

Evidence Act Cap. 80.

CHAPTER ONE: INTRODUCTION AND BACKGROUND

Everything with a beginning also has an end; human life is no exception. In Kenya, it is not uncommon to hear that a dispute has arisen from the determination of the final resting place of a deceased person. The two main queries that arise and ultimately lead to the occurrence of such disputes are: “Who has the right to bury the deceased and where will the deceased finally be laid to rest?”¹

The locus classicus on matters of burial disputes in Kenya is the famous *SM Otieno Case*.² In this case, the main issues in contention were: Did the deceased express his wishes or give direction as to where he should be buried? Who is entitled to bury the body of the deceased? Was the deceased subject to the Luo Customary Law? In the final judgement of the court, both the plaintiff and defendant were granted joint custody over the deceased’s body, the deceased was buried in Nyamila Village in Siaya District in accordance with the prayers of the defendant contrary to Virginia’s wishes for her husband to be buried at their home in Kamulu.³

The court in this matter acknowledged the right to bury the plaintiff lied with both the plaintiff and the defendant, however, the learned court failed to make a distinction between who held a higher right, therefore, leading to the defendants who were the deceased’s brother’s to bury the deceased in Siaya without taking the plaintiffs right and joint custody into consideration, when the plaintiff who was the deceased’s wife held a higher right subject to her proximity to the deceased. The court also acknowledged that the deceased was subject to Luo customs, and this would therefore govern the burial procedure.⁴

Recently, the case of *Ondweri v Ontweka*,⁵ which is similar in fact to the *SM Otieno case*, was decided upon and the outcome was different from that of the *SM Otieno case*. In this matter, the key issues that arose were: The dismissal of the plaintiff’s right as the deceased’s wife to bury her husband. The lack of consideration for the right to bury and who it lies with.

¹*George Ooko Okoth v Edith Apiyo Ochieng* (2021) eKLR.

²*Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

³*Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

⁴*Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

⁵*Onderi v Ontweka & 3 others (Civil Appeal E048 of 2023)*.

The determination of the deceased's final resting place as Kango by the lower court. Was the deceased subject to Kisii Customary Law.⁶

These issues came about as a result of the lower court not taking into account the deceased's wife's superior right to bury the respondents, who were the deceased's brothers, subject to her closer proximity to the deceased. The lower court had ignored precedence, which dictates the ranks of the persons who should have the right to bury, the first in line being the deceased's spouse, then the deceased's children, then the deceased's sibling.⁷

Furthermore, the court in its final determination stated that the appellant in this case, who was the deceased's wife, was granted the right to bury her husband, the deceased, in the place of her choice, and Kisii Customs would apply during this process. The court made this judgement subject to the Constitution of Kenya, which provides for the nuclear family as the basic unit of the family, which is recognised and protected by the State.⁸

In the alternative scenario where it is a burial dispute arising as a result of a man's polygamous practices, the court must deal with the different intricacies that come about from these situations. In polygamous case scenarios, disputes may arise between the wives of the deceased, the wives and the children of the deceased in the absence of their mother, the children from the different wives, the wives and the siblings of the deceased, and so and so forth.

In such cases, the courts will be seen to rely heavily upon customary law to navigate the intricacies of these matters. In the case of *Adhola v Kuodha*,⁹ the deceased Wesley Sylvester Adhola was a Luo deceased man engaged in a polygamous marriage and the dispute arose between his first and second wives, the appellant in this case was the deceased's first wife challenged the learned trial magistrates decision due to their failure to establish the applicable law in this matter as customary law, specifically Luo Customary Law, the err in law and fact as a result of the misinterpretation of Section 51 of the Evidence Act.

⁶ *Onderi v Ontweka & 3 others* (Civil Appeal E048 of 2023).

⁷ *SAN V GW* (2020) eKLR.

⁸ Article 45, *Constitution of Kenya* (2010).

⁹ *Adhola v Kudha & 2 others; St. Elizabeth Lwak Mortuary (Interested Party)* (Civil Appeal E007 of 2024) .

The above cases are crucial in highlighting the inconsistency in the judgements made by the court, which result from the lack of a guiding act or legislative framework to aid them in their reasoning and determination of these matters.

In addition to the above, within the Kenyan context, a law that speaks to matters concerning burials is in Section 137 of the Penal Code which states that: “*Whoever unlawfully hinders the burial of the dead body of any person, or without lawful authority in that behalf disinters, dissects or harms the dead body of any person, or, being under a duty to cause the dead body of any person to be buried, fails to perform that duty, is guilty of a misdemeanour.*”¹⁰ This is the only provision of the law in Kenya that expressly tackles the matter of the disposal of dead bodies.¹¹

Additionally, this causes burial disputes to be primarily governed by and settled using personal law, precedence and the guidance of customary law,¹² as long as it is not repugnant to justice and morality,¹³ following the Constitution of Kenya.¹⁴

1.1 Statement of The Problem

On several occasions, the courts in Kenya, while determining burial disputes, have applied the doctrine of proximity inconsistently. The lack of consistency in the decisions made by the courts has created a significant amount of uncertainty for the parties involved in such disputes. As a result, this has led to negative outcomes such as animosity between families, delayed burials, and wastage of resources, among others. Therefore, this study seeks to analyse whether there is a need for a comprehensive legal framework to govern and settle burial disputes.

¹⁰ Section 137, *Penal Code of Kenya* (Cap.63 of 2023).

¹¹ Malelu J, ‘Concept Paper on Need for Disposal of Dead Body Legislation in Kenya’ *Kenya Law Reform Commission*, 2014, 2- <https://www.klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?showall=1> on 7 October 2014.

¹² Ngira D, ‘Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism’ *Onati International Institute for the Sociology of Law, Onati Socio-legal Series*, Volume 8, Number 7, 2018, 1028- <https://opo.iisj.net/index.php/osls/article/view/922> on 19 April 2018.

¹³ Section 3(2) *Judicature Act* (No.10A of 2012).

¹⁴ Article 2, *Constitution of Kenya* (2010).

1.2 Research Objectives

1. Analyse the different determined cases of burial disputes in Kenya and establish the common recurring factors used by the courts in their determinations.
2. Examine and compare the determination of such disputes in common law jurisdictions, specifically Australia, South Africa and Kenya.
3. Establish the commonalities and differences in the cases in the different jurisdictions to create a framework.

1.3 Research Questions

1. What is the current legal framework governing burial disputes in Kenya, and what are the effects of its absence on families and communities?
2. How do the legal principles and court approaches to burial disputes in Australia and South Africa compare to those in Kenya?
3. What are the common and disparate factors considered by courts in Kenya, Australia, and South Africa in burial disputes, and how can these factors inform the creation of a framework?

1.4 Hypothesis

The creation of a framework to guide the courts in their determination of burial disputes would promote the consistent application and dispensation of justice.

1.5 Justification and significance of the study

This study is important because no person is exempt from death, and more often than not in Kenya, conflicts arise as to where a person's final resting place will be and who will have the right to bury them. Therefore, the creation of a framework governing matters on burials will help reduce the number of cases in the courts concerning such and promote the proper dispensation of justice since the courts will now have laid out guidelines to help them reach their final determinations and create uniformity in their thought.

1.6 Theoretical Framework

The study will rely on the theory of legal pluralism, which states that multiple legal systems can coexist within a society, and they can be separated into the following categories: official legal systems, customary systems, religious systems, capitalist systems, functional normative systems, and cultural normative systems.¹⁵ Furthermore, the CoK provides for the existence and application of African Customary Law,¹⁶ which cements the legal pluralism existent within the law and from this, the study propounds that through this, the creation of a law concerning burial disputes is permissible and can be done.

1.7 Literature Review

Burial is the process of burying,¹⁷ and in turn, burying is the disposition of a person in this context, in or as if inside the earth.¹⁸ Therefore, a burial dispute is the contestation of the process of the disposition of a deceased person. Ngira, in his work, goes ahead to state that burial disputes are a result of the collision of two ideologies, the first being the people who conform to customary beliefs and, in turn, believe that a person should be buried in their ancestral land. The second is the people who believe that a person can be buried anywhere, since that person has already passed away, there is no need for complications.¹⁹ The paper sides with the author's stance on this matter.

Additionally, Malelu in his paper states other reasons for such disputes, and they are cultural conflicts as a result of inter-ethnic marriages that create complexities as to which customs should be upheld in the determination of the deceased's final resting place since their relatives come from different backgrounds. The second instance arises if the deceased

¹⁵ Tamanaha B, 'Understanding Legal Pluralism: Past to Present, Local to Global' *St. John's University of Law*, Legal Studies Research Paper Series Paper Number 07-0080, 2008, 36–
<https://deliverypdf.ssrn.com/delivery.php?ID=476013072022121115102078107083098095028032023043029030023008008088117096065126023070033000021120038125121103098019080000083118010060038093078009088069082029080112054044001073096097007106068070088108068002074087065017001104025095102007125096105094088&EXT=pdf&INDEX=TRUE> on May 2008

¹⁶ *Onderi v Ontweka & 3 others (Civil Appeal E048 of 2023) eKLR*.

¹⁷ <https://www.merriam-webster.com/dictionary/burial>.

¹⁸ <https://www.merriam-webster.com/dictionary/burying>.

¹⁹ Ngira D, 'Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism' Onati International Institute for the Sociology of Law, Onati Socio-legal Series, Volume 8, Number 7, 2018, 1023-
<https://opo.iisj.net/index.php/osls/article/view/922> on 19 April 2018.

was polygamous, and contention arises as to which family has the right to bury them.²⁰

The other instance occurs when the final place of resting had been stated by the deceased before their demise, however, their relatives come in and propose a different place. The last instance concerns religion, and in the instance that the deceased had converted from one religion to another before their death, which religion will be practised in their final rest.²¹

In the case of *SAN V GW*, the court averred that in the occurrence of a burial dispute, it is based on two questions: who has the right to bury? Where will the place of burial be?²²

The application of customary law by the courts is guided by section 3(2) of the Judicature Act, as well as Article 2 of the Constitution. Ngira states that even though the courts in Kenya have tried to interpret customary law in the resolution of burial disputes they have failed since they still rely on principles rooted in common law such as judicial precedence and focus heavily on the repugnancy clause which only allows the limited application of customary law as long as it is in line with morality and the laws of the land.²³

Ngira continues to say that because of this kind of application of customary law, the courts have conceded their ability to properly partake in the resolution of such disputes, leading to the extended stay of burial disputes in the court.²⁴

Ngunjiri, in his paper, acknowledges that customary law has been used in regulating the personal law concerning burial disputes. Nonetheless, it varies among the different ethnic groups that are present in Kenya, and this creates uncertainty since these customs are unwritten and must therefore be shown to be true and accepted in court. He also avers that an internal conflict of law situation may arise as a result of a lack of uniformity and a lack of

²⁰ Malelu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya' *Kenya Law Reform Commission*, 2014, 2- <https://www.klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?showall=1>, on 7 October 2014.

²¹ Malelu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya' *Kenya Law Reform Commission*, 2014, 2- <https://www.klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?showall=1>, on 7 October 2014.

²² *SAN v GW* (2020) eKLR.

²³ Ngira D, 'Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism' *Onati International Institute for the Sociology of Law, Onati Socio-legal Series*, Volume 8, Number 7, 2018, 1028- <https://opo.iisj.net/index.php/osls/article/view/922> on 19 April 2018.

²⁴ Ngira D, 'Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism' *Onati International Institute for the Sociology of Law, Onati Socio-legal Series*, Volume 8, Number 7, 2018, 1028- <https://opo.iisj.net/index.php/osls/article/view/922> on 19 April 2018.

settled criteria for choosing one customary law over another.²⁵

Malelu in his paper avers that in making their decisions on burial disputes, the court considers religion as one of the main factors, especially in the instance that the deceased had converted from one religion to another before their demise.²⁶

Ngira divulges that burial disputes in Kenya have developed contradictory dimensions, and the study chooses to focus on the common law principle dimension, which propounds that “*the wishes of the deceased over his burial place should be paramount in determining his place of burial.*”²⁷ This stems from the common law assumption stated by Balganesch that there is no property in a dead body.²⁸ The study agrees with their views and proposes the same.

Conway and Stannard state that burial disputes can lead to tensions within the family since the different members of the family will end up taking sides.²⁹ This then is a social effect of burial disputes on the family that leads to the breaking up of families in most cases. The study also takes the same stance as the authors.

The study, in its reference to common law, will mainly refer to case law. To that effect, the paper will restate the comparison of the SM Otieno case and the Onderi Case, which it had touched on in the background. The judgment in the Onderi case,³⁰ gave the wife of the deceased the right to bury her husband, this is a clear show of the lack of uniformity in the thinking of the courts. This will be the legal gap that the study chooses to focus on since the Onderi case amounts to a recent jurisprudence, and the difference in final determination of these disputes therefore necessitates the need for a framework to guide the courts.

The study intends, therefore, to propose a legal framework to guide legal practitioners and

²⁵ Ngunjiri S, ‘Burial disputes in Kenya: A case for legislation,’ Published, University of Nairobi, Nairobi, 2006,2.

²⁶ Malelu J, ‘Concept Paper on Need for Disposal of Dead Body Legislation in Kenya’ *Kenya Law Reform Commission*, 2014, 2- <https://www.klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?showall=1> on 7 October 2014.

²⁷ Ngira D, ‘Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism’ Onati International Institute for the Sociology of Law, Onati Socio-legal Series, Volume 8, Number 7, 2018, 1029-<https://opo.iisj.net/index.php/osls/article/view/922> on 19 April 2018.

²⁸ Balganesch S, ‘Quasi-property: Like, But Not Quite Property’ 160 *University of Pennsylvania Law Review*.

²⁹ Conway H and Stannard J, ‘The Honours of Hades: Death Emotion and The Law of Burial Disputes’ *UNSW Law Journal*, Volume 34(3),2011, 869- <https://www.unswlawjournal.unsw.edu.au/wpcontent/uploads/2017/09/34-3-14.pdf> on 2011.

³⁰ *Onderi v Ontweka & 3 others* (Civil Appeal E048 of 2023).

the courts in the determination of burial disputes.

1.8 Research Methodology

The study will employ doctrinal legal research methodology. It will entail the reliance on primary and secondary sources of law. They include statutes, case law, articles, institutional papers, journal articles and online resources relevant to the study.

1.9 Limitations

The main limitation faced by the paper's author is the lack of enough time to carry out the research required for this study's writing due to the short length of the semester in which the paper was assigned to be done.

1.10 Chapter Breakdown

Chapter One will involve the introduction and background of the topic, its importance and the significance of the study, as well as state the objectives of the study.

Chapter Two will delve into the analysis of determined burial disputes by the court and establish the main recurring factors taken into consideration by the courts in their determinations.

Chapter Three will examine the Australian and South African jurisprudence on burial disputes.

Chapter Four will establish the commonalities and differences in the determination of burial disputes between Kenya, Australia and South Africa, and these will be the basis of the creation of the proposed framework.

CHAPTER TWO: AN ANALYSIS OF THE DETERMINED BURIAL DISPUTES BY THE COURTS IN KENYA

The first chapter has established the existence of a legal gap and provided an introduction and background of the same as well as the importance and significance of the study.

This chapter will delve into the analysis of determined burial disputes by the court and establish the main recurring factors taken into consideration by the courts in their determinations.

2.1 Introduction to Burial Dispute Adjudication in Kenya

Court involvement has been necessary for settling burial disputes in Kenya because of the multiple layers of cultural, familial and legal rights involved in the burial rights of the deceased. Since there is no existing statute enacted governing these matters, Kenyan courts serve as arbiters to handle disputes by comparing the different existing acts of parliament, such as the Law of Succession Act Cap.160, The Marriage Act Cap.150, The Constitution of Kenya of 2010, against customary norms.³¹ Courts take over the situation when private informal negotiations, community dispute resolutions and mediation bear no fruit, specifically due to disagreements about family order, relationships, funeral arrangements and unmet funeral requests.

The court's decisions maintain deep importance because they unite individual autonomy with communal traditions to sustain societal cohesion.³² For instance, in the *SM Otieno Case*,³³ the High Court's demonstration of the spousal rights versus Luo customary law conflict took place, which created future legal guidelines. Judicial decisions demonstrate the legal pluralism of Kenya because statutory law functions alongside deeply rooted traditional practices.³⁴ Courts receive criticism for alleged prejudicial behaviour when they favour patriarchy over gender equity rights. Their authority transcends legal analysis to serve the dual purpose of cultural bridge-building and family identification through which society forms its death justice opinions.³⁵

³¹ W. Mutunga, *Transformative Legal Adjudication in Africa* (Pretoria: PULP, 2016), 112.

³² J. Ambani, *Navigating Legal Pluralism in Kenya* (Nairobi: Law Africa, 2018), 45.

³³ *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

³⁴ H. Okoth-Ogendo, *Customary Law in Kenya's Legal System* (Kampala: Fountain Publishers, 2002), 78.

³⁵ S. Wanjala, *Judicial Activism in Kenya* (Nairobi: KLRC, 2015), 92.

2.2 Legal and Cultural Framework Governing Burial Disputes

All burial disputes in Kenya are guided by both statutory written laws and traditional cultural practices to ensure proper execution. Article 44(3) of the CoK establishes cultural rights through statutory law.³⁶ The Law of Succession Act prescribes a hierarchy in which decision making on behalf of the deceased should follow, beginning with the spouse and children of the deceased having precedence in these matters.³⁷

Traditional legal practices maintain significant influence in rural areas because family groups and ancestral customs control burial customs. Through the Judicature Act, the legislature established this pluralism while ordering courts to apply customary laws unless they contradict statutory rules.³⁸ When it comes to burial rights within many communities in Kenya, male lineage retains precedence unless legal battles occur for spousal claims. Thus, court resolutions regarding burial practices remain challenging because judicial authorities need to determine how to strike a balance between communal traditions and personal freedoms. The concurrent application of gender equality legislation under article 27 of the CoK,³⁹ results in contrary pressures that become evident in judicial proceedings, leading to clashes with patriarchal customs.⁴⁰ Judicial flexibility is essential for Kenya's legal system to perform conflict resolution between these competing claims without risking violations of legal requirements.

2.3 Jurisprudential Trends in Kenyan Burial Dispute Cases

Kenyan court jurisprudence contains essential principles to settle burial disagreements that harmonise legal statutes with cultural practices and constitutional freedoms. The court decisions in the *SM Otieno Case*,⁴¹ solely followed customary practices based on clan structures and patrilineal family inheritance. The Luo traditional laws prevailed over the claims of spouses.⁴² However, the Constitution of Kenya 2010, Article 27 on gender equality has forced the courts to rethink traditional practices.⁴³ The High Court of Kenya granted burial rights to a widow instead

³⁶ Article 44(3), *Constitution of Kenya* (2010).

³⁷ Section 35, *Law of Succession Act* Cap.160.

³⁸ H. Okoth-Ogendo, *Customary Law in Kenya's Legal System* (Kampala: Fountain Publishers, 2002), 82.

³⁹ Article 27, *Constitution of Kenya* (2010).

⁴⁰ C. Nyamu, "Gender and Customary Law in Kenyan Courts," *JAL* 44, no. 1 (2000): 135.

⁴¹ *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

⁴² W. Mutunga, *Constitutional Justice in Africa* (Pretoria: PULP, 2016), 118.

⁴³ Article 27, *Constitution of Kenya* (2010).

of male heirs in *re Estate of SMM*,⁴⁴ while focusing on constitutional guarantees. This was also displayed in the recent matter of *Onderi v Ontweka*.⁴⁵

Additionally, since the determination in the *SM Otieno Case* that denied his wife her spousal right to bury her husband, the courts have solidified that subject to the doctrine of proximity, the surviving spouse of the deceased is given precedence in these matters, and this is seen in the matter of *SAN v GW* where the Court of Appeal stated that: “*The law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order.*”⁴⁶

The doctrine of proximity has further been affirmed by the court in multiple matters determined by them, such as in the case of *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others*,⁴⁷ where the court asserted that the rights of a surviving spouse supersede those of the other relatives of the deceased.

The application of the Law of Succession in these matters in order to protect the rights of the nuclear family instead of an over reliance on customary law which has led to the implementation process considering multiple factors such as the testator’s last words and family relations alongside the interests of public welfare as established in *Rono v. Rono*,⁴⁸ which affirmed the need to protect the rights of children in disputes against extended family members. Through this, the judiciary strives to unify legal pluralism with constitutional standards through this trend because it balances community needs with personal rights within cultural frameworks.

2.4 Recurring Factors in Judicial Determinations

Kenyan courts determine burial disputes through a systematic evaluation of factors that derive from legal systems and cultural traditions. The judiciary employs recurring elements to achieve both constitutional value protection and cultural legitimacy as well as to maintain balance between diverse interests in their decisions.

⁴⁴ *In re Estate of SMM (Deceased)* (2021) eKLR.

⁴⁵ *Onderi v Ontweka & 3 others* (Civil Appeal E048 of 2023).

⁴⁶ *SAN V GW* (2020) eKLR.

⁴⁷ *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others* (2018)eKLR.

⁴⁸ *Mary Rono v Jane Rono & another* (2005) eKLR.

2.4.1 Primacy of Customary Law and Cultural Practices

Judicial authorities regularly accept traditional customs when they handle cases related to ancestral gravesites as well as questions about clan authority. In *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo*, the High Court made Luo customary law the top priority, which required burial on ancestral land against the widow's opposition.⁴⁹ The 2010 Constitution establishes cultural rights according to Article 44 and Article 27 on gender equality, which induces courts to approach the integration of customs with contemporary society with caution. This has been established by the court in the matter of *Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others* where it was stated that: “if African customary law is not caught up by the qualifications under section 3(2) of the Judicature Act then it must be given effect by the courts and must be applied in deciding cases before it but according to ‘Substantial justice’.”⁵⁰ The court, in some instances, has been seen to make an allowance for widows to carry out their husbands' burial at an urban cemetery, due to the deceased person's involvement with modern society.

2.4.2 Family Hierarchy and Legitimacy of Claimants

According to the Law of Succession Act, spouses and children sit at the top of the inheritance priority, yet many families make customary claims against this sequence. In *Rono v. Rono*,⁵¹ the Court of Appeal established through their decision that children possess inheritance rights above those of paternal uncles because statutes take precedence. In *Re Estate of George Muriithi*,⁵² the court accepted cultural kinship between two widows, including burial rights, thus confirming the court's recognition of polygamous family dynamics. Adoptive children face difficulties in formalising their inheritance rights since they need to demonstrate that the community recognises them through cultural practices.

2.4.3 Deceased's Expressed Wishes and Autonomy

The courts now recognise legally detailed funeral instructions made by the deceased person before their death as long as these wishes are not contrary to the customs, general law or policy.⁵³

⁴⁹ *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

⁵⁰ *Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others* (2017) eKLR.

⁵¹ *Mary Rono v Jane Rono & another* (2005) eKLR.

⁵² *In re Estate of George Muriithi Gitahi (Deceased)* (2019) eKLR.

⁵³ *SAN V GW* (2020) eKLR.

Regardless of clan objections, the court has at times applied the written will provisions, which stipulate the burial site arrangements of the deceased.

2.4.4 Public Interest and Social Harmony

Judges often prioritise social stability. A rushed burial process may be used by the court as a way to minimise inter-clan tensions when pursuing public order objectives. Judicial decisions may be affected by public attention to cases and community public opinion, which leads courts to match their verdicts to the expected consensus.

2.4.5 Religious Beliefs and Practices

Religious funeral practices determine the results of burial arrangements, especially during disagreements between different faiths. Under the judgment of *Sakina Sote Kaittany & another v Mary Wamaitha*,⁵⁴ the Court declared that Executors hold responsibility for burying deceased individuals and the respondent as executor obtained the right to inter the deceased. The court found that an Islamic marriage ends upon apostasy, and the Christian marital union remains enforceable.

2.4.6 Precedent and Consistency in Judicial Reasoning

Burial disputes in Kenyan courts become more predictable through the application of stare decisis principles in previous decisions. Landmark cases like *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo* introduced foundational frameworks for maintaining proper relations between customary and statutory law practices that other judges frequently use as precedents. The Law of Succession Act has become a standard legal approach because courts use it to protect spouses and children during burial procedures. Some academic arguments point out the possibility of random legal results because of court discretion in handling cultural heritage cases. The analysis of gender-related marital matters shows inconsistency because certain courts implement Article 27 equality standards while others uphold traditional gender practices.⁵⁵

Such inconsistent judicial behaviour causes public trust to erode, especially within rural areas, because it frequently appears that cultural bias influences court decisions. The force of precedent

⁵⁴ *Sakina Sote Kaittany & another v Mary Wamaitha* (1995) eKLR.

⁵⁵ Nyamu, C, "Gender and Customary Law in Kenyan Courts." JAL 44(1): 129–140, 2000.

shapes judicial decision-making, yet the judicial system in Kenya must balance between inflexible application and reacting to specific circumstances within the burial law disputes.

2.5 Conclusion

In conclusion, Kenyan courts determine burial disputes through the evaluation of customary law together with family arrangements, deceased autonomy, public and religious interests and gender relations. Kenya implements legal pluralism through its justice system, yet this practice creates conflicts between national legal provisions and traditional cultural traditions, which creates challenges for legal coherence. The consistent application of precedents cannot prevent courts from maintaining inconsistent rulings.

The succession laws show significant weaknesses because they fail to clarify the hierarchy between statutory and customary law systems and fail to value deceased preferences and produce insufficient acknowledgement of modern family structures. The development of stronger adjudication requires both legislative clarity to unite legal frameworks and judicial training that shows the probability of combining cultural conventions with constitutional principles. Directives registered by the public alongside educational programs help prevent such conflicts by clarifying burial choices. The legal system should recognise diverse family structures that include adopted children to create more equal opportunities. The combination of such steps establishes fair justice systems while promoting social unity, which guides Kenya through its developing socio-legal environment to unite traditional practices with constitutional modernisation.

CHAPTER THREE: AN ANALYSIS OF SOUTH AFRICAN AND AUSTRALIAN JURISPRUDENCE

The second chapter analysed the determinants of burial disputes and the legal framework governing the same in Kenya to establish the recurring factors taken into consideration during their determination.

This chapter examines the Australian and South African jurisprudence on burial disputes:

3.1 Introduction

The discussion on the potential proposed framework for burial disputes in Kenya becomes more informed through a legal comparison of jurisdictions facing similar challenges. Three reasons drive the selection of South Africa and Australia. First, the common law origins between Kenya and both countries create a standard doctrinal framework that facilitates the adoption of past court decisions. Their populations experience legal pluralism because ethnic and cultural diversity leads to the combination of statutory and customary laws. South African courts prioritise dignity alongside ubuntu beliefs, while Australian courts accept indigenous sacred sites within their legal framework for customary burial practices.

The analytical framework combines different methods within the methodology. The methodology uses doctrinal analysis to match the fundamental laws of both nations (as demonstrated by the executor powers and locus standi cases) and their judicial process reasoning. Socio-legal methods reveal how legal decisions reflect cultural relationships because Australia's colonial heritage affected Aboriginal burial practices, while South Africa balances traditional inheritance rights with equal rights for women in its new constitution. Kennedy's method combined two approaches that enable strategies transferable to Kenya by incorporating both flexibility and cultural understanding, and constitutional alignment.

3.2 Burial Disputes in Australian Jurisprudence

3.2.1 Legal Framework Governing Burial Disputes in Australia:

Australia implements its burial dispute laws through common law principles, along with statutory interventions to protect individual rights while fulfilling collective cultural

requirements. Executors, along with next-of-kin, obtain burial possession rights through common law principles defined in *Doodeward v Spence*,⁵⁶ while this authority can be prevented by public policy concerns. The Coroners Acts require officials to follow formal procedures for obtaining exhumation or burial licenses to protect public health and monitor administrative processes⁵⁷ while at the same time, the Aboriginal Heritage Acts,⁵⁸ shield Indigenous sacred locations from harm because they understand the cultural value of ancestral sites. The South Australian Supreme Court in *Jones v Dodd*,⁵⁹ followed the Aboriginal Heritage Act to make a decision that protected Indigenous ancestral repatriation rights beyond executor common law rights. The coexistence of Western law systems and indigenous traditions produces repeated conflicts, primarily when their legal principles oppose each other, including decisions from community collectives, together with burial customs referenced through family relations. The courts use a balance of community welfare together with cultural assets and family inheritance rights to reach decisions such as the *Smith v Tamworth City Council*,⁶⁰ burial site case, which led to the preservation of indigenous ceremonial land even though family members made claims for its ownership. Australia's judicial system demonstrates a rising awareness of plural legal systems while battling to merge legal technicalities with traditional cultural practices.

3.2.2 Cultural Considerations and the Role of Courts

The Australian judicial system now acknowledges Aboriginal funerary customs through legal provisions that enable ancestral bone return and sacred place defence according to the Aboriginal Heritage Act.⁶¹ The disagreement between state laws and Indigenous customs occurs when collective Indigenous decision-making takes priority over executive control. The Australian courts in *Jones v Dodd* decided to protect Indigenous heritage rights, which took priority over common law spousal rights as demonstrated by their decision.⁶² The history of colonisation adds additional challenges because Western law systems tend to disregard traditional family relationships that govern funeral traditions.

⁵⁶ *Doodeward v Spence* (1908), The High Court of Australia.

⁵⁷ Badejebe, L., 'Legal Pluralism in Post-Colonial Africa: Challenges and Prospects. Nairobi: Heritage Press' 122, 2021.

⁵⁸ Section 28, *Aboriginal Heritage Act* (Australia).

⁵⁹ *Jones v Dodd* (1999), No. SCGRG-98-896 Judgment No. S125 SASC 125.

⁶⁰ *Smith v Tamworth City Council and Ors* (1997) NSWSC 197.

⁶¹ Section 12 (1), *Aboriginal Heritage Act* (Australia).

⁶² *Jones v Dodd* (1999), No. SCGRG-98-896 Judgment No. S125 SASC 125.

Australian courts function as important dispute arbiters who balance individual burial rights against cultural traditions through the exercise of judicial choices. Judges determine burial rights through common law traditions and specific legislation (Aboriginal Heritage Acts, among others) when analysing disputes between family members and Indigenous heritage groups. The courts in *Smith v Tamworth City Council* selected the protection of sacred sites for greater importance than familial burial wishes, showing their affirmation of cultural heritage principles.⁶³ In *Jones v Dodd*, the courts removed the executor's power to exercise their authority when faced with Indigenous repatriation rights through a justification based on public policy, which protects spiritual traditions.⁶⁴ The courts perform ongoing maintenance between different legal systems to preserve cultural recognition while adhering to equity principles under constitutional tenets.

3.3 Burial Disputes in South African Jurisprudence

3.3.1 Legal Framework Governing Burial Disputes in South Africa

Burial disputes in South Africa follow legal steps that combine provisions of the constitution with recognition of customary law and common law principles. Articles 30 and 31 of the Constitution of South Africa grant cultural rights, which let citizens perform burial ceremonies according to their ancestral heritage.⁶⁵ Customary practices receive validation through the Recognition of Customary Marriages Act,⁶⁶ and common law provides specific family members with the rights to challenge burial arrangements. The legal framework promotes the objective of African customary equality with post-apartheid goals, yet it continues to face opposition between universal rights standards and discriminatory traditional inheritance practices.

The Constitutional Court made primogeniture unconstitutional in *Bhe v Magistrate, Khayelitsha*⁶⁷ because it secured gender equality in burial rights while transforming familial authority under customary law. *Mankayi v AngloGold Ashanti*⁶⁸ established a link between burial rights and human dignity (Section 10 of the Constitution),⁶⁹ which led courts to protect the constitutional

⁶³ *Smith v Tamworth City Council and Ors* (1997) NSWSC 197.

⁶⁴ *Jones v Dodd* (1999), No. SCGRG-98-896 Judgment No. S125 SASC 125.

⁶⁵ Badejebe, L, 'Legal Pluralism in Post-Colonial Africa: Challenges and Prospects. Nairobi: Heritage Press,' 122, 2021.

⁶⁶ Section 1, *Registration of Customary Marriages Act* (South Africa).

⁶⁷ *Bhe v Magistrate, Khayelitsha* (2005), Constitutional Court of South Africa.

⁶⁸ *Mankayi v AngloGold Ashanti* (2011), Constitutional Court of South Africa.

⁶⁹ Section 10, *Constitution of The Republic of South Africa* (1996).

rights of migrant workers regarding their remains repatriation. *Moseneke v The Master*, established executor authority under common law by requiring them to involve family members when fulfilling their duties to honour cultural requirements.⁷⁰ Judicial proceedings balance customary law with constitutional values through cases showing a preference for dignity and restorative justice instead of traditional legal formalism systems. The application of ubuntu principles for communal welfare mediation has become common in South African courts, as illustrated in the *Mankayi case*, when corporate interests received lower priority than familial and cultural rights.⁷¹

3.3.2 Cultural Considerations and Role of Courts

South African courts need to handle carefully the integration of African customary laws while protecting the fundamental rights of people. The traditional inheritance practice of primogeniture conflicts with constitutional rights to gender equality under section 9 and the right to dignity under section 10. The Constitutional Court applied the decision from *Bhe v Magistrate, Khayelitsha*, which nullified primogeniture in inheritance cases to burial rights for establishing women's rights.⁷² The post-apartheid reconciliation process calls for legal pluralism systems enabling judges to accept cultural repatriation ceremonies as essential identity elements, but maintain them within constitutional standards. The cultural and personal rights system of South Africa demonstrates a simultaneous commitment to correcting historical injustice and social uniting efforts.

South African courts function as bridge keepers who connect Western legal principles with the ubuntu philosophy, which bases its ethics on communal well-being, and restorative justice practices. The court system upholds Section 10 provisions of the constitution on dignity to create problem-solving methods instead of adversarial court procedures, specifically during burial disputes.⁷³ The Constitutional Court made a ruling in *Mankayi v AngloGold Ashanti*,⁷⁴ based on ubuntu by determining that a mining company's refusal to return the deceased employee's body violated both familial dignity along with cultural rights, thus placing corporate interests beneath

⁷⁰ *Moseneke v The Master* (2000), Constitutional Court of South Africa.

⁷¹ *Mankayi v AngloGold Ashanti* (2011), Constitutional Court of South Africa.

⁷² *Bhe v Magistrate, Khayelitsha* (2005), Constitutional Court of South Africa.

⁷³ Section 10, *Constitution of The Republic of South Africa* (1996).

⁷⁴ *Mankayi v AngloGold Ashanti* (2011), Constitutional Court of South Africa.

communal duties. Judicial institutions gain momentum in legal decolonisation when they base decisions using African humanistic principles. The legal process in the *Mankayi case* includes the requirement for judges to involve extended families because it upholds ancestral rituals without violating constitutional equality stipulations.⁷⁵ The combination of procedural fairness with ubuntu's collective decision-making principles allows courts to establish a pluralistic legal framework, which resolves past discrimination against traditional African practices.

3.4 Comparative Analysis: Australia vs. South Africa

Australia and South Africa give next-of-kin family members the authority to handle burials by considering cultural burial requirements through their own unique systems. Cases like *Jones v Dodd* and *Moseneke v The Master* established familial authority for inheritance rights in both Australia and South Africa, yet they also apply published policies for limiting their scope. The judicial authorities in both Australia (*Smith v Tamworth City Council* from 1997) and South Africa (*Mankayi v AngloGold Ashanti* from 2011) ground their conflict resolution on human dignity principles while upholding public interest outcomes because of their shared dedication to equity.

Australian regulatory systems use Aboriginal Heritage Acts and similar mandates to resolve Indigenous claims through formal legislation that devalues traditional social practices. The South African judicial system formalises traditional law through its interpretation of *Bhe v Magistrate, Khayelitsha* (2004), which uses the ubuntu philosophy to incorporate gender equality. The protection of sacred sites by Australian heritage laws fails to match South African post-apartheid jurisprudence that uses constitutional means to raise Indigenous cultural practices to the level of fundamental principles.

Australia achieves clear legal enforcement through strict statutes that undermine Native self-determination, although South Africa balances inclusivity with precedent uncertainties through its ubuntu-inspired flexible laws. Australia's assimilationist past stands against South Africa's restorative constitutional framework as the main factor behind present legal disparities. Kenya needs a combined approach of legal clarity and judicial cultural understanding to achieve better integration of multicultural frameworks.

⁷⁵ Van der Walt, T, 'Cultural Rights and Burial Disputes in South Africa,' *Journal of Southern African Legal Studies* 8(2): 70–89, 2020.

3.5 Implications for Kenya's Legal Framework

Kenya should learn essential points about its legal system by comparing it to Australia and South Africa. Statutory clarity serves to enhance customary law by adopting Australia's Aboriginal Heritage Acts that both provide precise directions alongside honouring traditional indigenous practices. The adoption of cultural sensitivity principles serves as a model to prevent minority communities from feeling excluded by the courts.⁷⁶ Kenya should establish mediation/ADR procedures to manage communal disputes because this method has proven successful in South Africa through restorative justice programs.

Kenya should combine key elements of the Australian executor-centric approach to define authority with South African ubuntu principles that support familial involvement in death rituals.⁷⁷ Statutory executors would need to consult extended family members under the legal provision established in *Moseneke v The Master* (2001) to protect both individual and family rights. The country should learn from Australia's example to reject specifying burial practices in legislation, as this practice creates discrimination against different cultural traditions. The courts should be able to interpret laws through South Africa's constitutional pluralism framework in a flexible manner while respecting human dignity and cultural equity principles.

3.6 Conclusion

The evaluation of Australia against South Africa demonstrates fundamental educational points that can guide Kenya. The Aboriginal Heritage Acts from Australia, combined with *Bhe v Magistrate, Khayelitsha* from South Africa, demonstrate that legal pluralism becomes essential for accommodating cultural diversity alongside individual rights. The jurisdictions agree about their use of dignity and public policy but differ fundamentally regarding their interpretation methods between formalism in Australia and transformative constitutionalism in South Africa. Hybrid legislation representing statutory burial rights clarifications with cultural sensitivity becomes essential for Kenya, based on observations from South Africa's ubuntu philosophy. Kenyan legal reforms that juxtapose customary norms with statutes would reduce the recurring instances of conflict between traditional practices and rigid laws, which primarily influence multiethnic social groups.

⁷⁶ Omondi, P, 'ADR and Burial Disputes in Kenya,' *Journal of African Conflict Resolution* 8(2): 30–45, 2022.

⁷⁷ Ngugi, J, 'Transplanting Common Law: A Kenyan Perspective,' *East African Law Journal* 12(3): 68, 2019.

CHAPTER FOUR: ESTABLISHING THE COMMONALITIES AND DIFFERENCES IN THE DETERMINED BURIAL DISPUTES IN KENYA, AUSTRALIA AND SOUTH AFRICA

4.1 Introduction

A legal structure, along with procedural guidelines, will be proposed and explained in this chapter to handle burial disputes in Kenya by filling existing gaps through legislation and traditional beliefs combined with practical solutions. Burial disputes, which stem from cultural as well as family and legal disagreements, need a unified system to balance both constitutional rights and traditional practices and procedural performance. The constitutional provision, Article 45(4) b of Kenya's Constitution, serves as the foundation for this framework by requiring the recognition of personal and family law systems under traditional and religious principles, along with specific action-oriented responses.⁷⁸ The complete framework draws from legal statutes, judicial authority, and communal cultural practices to establish an efficient system for burial dispute resolution in Kenya's diverse population.

In the previous chapter, we saw that both Australia and South Africa acknowledge cultural diversity and proximity principles but differ regarding their religious policies. The South African ubuntu perspective stands opposed to how Kenya depends on judges to make judicial choices. An integrated framework for Kenya includes point-specific elements, which involve specialised tribunals along with Alternative Dispute Resolution mechanisms and safeguard systems against gender discrimination. Both timeframes for resolving disputes and various ways to dispose of cases function under the guidance of case law precedents and expert opinions. The framework provides solutions to analytical deficiencies by urging both legislative amendments and judicial education for the standardization of statutory versus customary laws.⁷⁹

4.2 Foundational Principles of the Framework

4.2.1 Right to Bury and Judicial Clarity

The proposed framework establishes basic principles that ensure both clear definition of burial preferences and established jurisdiction to effectively settle disagreements. The proximity

⁷⁸ Article 45(4), *Constitution of Kenya* (2010).

⁷⁹ Ndulo, M. (2011). African Customary Law and Gender. *Cornell International Law Journal*, 44(1), 56.

principle functions as the essential foundation for burial rights jurisdiction. The proximity principle found its most notable usage in the matter of *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo*.⁸⁰ According to the *Virginia case*, the Kenyan High Court made a ruling that established customary burial rights take precedence over the wishes of deceased family members. The *Ondweri case* clarified and affirmed the position that should have been followed by the Kenyan Court in right to bury the deceased lies with the right to bury lies with the person closest to the deceased, then customary practices are taken into consideration after the granting of this right to the adequate person.⁸¹

In the instance of the rights of polygamous families matters become complicated due to the intricacies of these situations such as dual inheritances, as separate spouses and lineage institutions can make competing claims for burial decisions.⁸² The courts have emphasized equitable participation of all spouses in burial decisions, according to Article 45(4) b of Kenya's Constitution in while following familial rights.⁸³ The precedents demonstrate the requirement for conducting an inclusive assessment between statutory requirements and traditional practices in matters such as *SAN V GW*.⁸⁴

Specialized courts or tribunals need to be established as part of jurisdictional clarity to solve the widespread confusion in burial dispute adjudications. The current litigation system in Kenya causes disagreements about judicial authority to arise between High Court judges and lower magistrates. For instance, there are specialised tribunals built after South Africa's Traditional Courts Act,⁸⁵ would cut down the legal process through their inclusion of customary law experts.⁸⁶ The Aboriginal Indigenous Land Councils established by the Aboriginal Land Rights Act,⁸⁷ would also become a model for Kenya to adopt the Alternative Dispute Resolution (ADR) methods in handling disputes sensitive to cultural traditions. This framework proposes the establishment of authorised jurisdiction areas for tribunals, which are staffed with personnel who

⁸⁰ *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

⁸¹ *Onderi v Ontweka & 3 others* (Civil Appeal E048 of 2023).

⁸² Malelu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya' *Kenya Law Reform Commission*, 2014, 2- <https://www.klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?showall=1> on 7 October 2014.

⁸³ Article 45(4), *Constitution of Kenya* (2010).

⁸⁴ *SAN V GW* (2020) eKLR.

⁸⁵ Section 2, *The Traditional Courts Act* (South Africa).

⁸⁶ Himonga, C., & Nhlapo, T. (2014). *African Customary Law*. Juta. pp. 112–130.

⁸⁷ *Aboriginal Land Rights Act* (Australia).

possess cultural expertise to promote optimised administrative proceedings and legitimate judicial decisions.

4.3 Legal and Procedural Mechanisms

The proposed framework incorporates legal and procedural elements to combine statutory requirements with traditional practices and real-world situations when settling burial disputes properly. The framework proposes the following procedural elements based on systematically applying customary law and honouring the person's final wishes while utilising Alternative Dispute Resolution (ADR) resources and existing court determinations.

Judicial authorities need standard procedures to establish both the circumstances and procedures through which customary law affects burial disputes. The legal precedent presented in *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo* indicates that, despite statutory legislation that grants spouses cremation rights under the Births and Deaths Registration Act,⁸⁸ the framework suggests conducting a dual analysis in the application of customary law, which includes two essential requirements.

- i. Whether the community maintains a broad practice of this custom.
- ii. Whether its application aligns with constitutional values, such as equality and dignity.

In *re Estate of M'Ikiara*,⁸⁹ the High Court refused a clan custom that discriminated against daughters seeking burial authority because Article 27 of the Constitution provided protection.

The process receives essential guidance from experts who specialise in customary laws provided for under the Evidence Act of Kenya.⁹⁰ Under the framework established by the Minister of Home Affairs in South Africa, Swazi elders serve as accredited experts who must testify to royal burial rites before courts. These accredited experts provide traditional cultural interpretations that prevent inappropriate misunderstandings and misuse of local customs.⁹¹ Collaboration between authorities minimises judicial interference while developing trust with the community.

⁸⁸ Section 21, *Births and Deaths Registration Act* Cap.149.

⁸⁹ *In re Estate of M'Nkanata M'Ikiara (Deceased)* (2018) eKLR.

⁹⁰ Section 51 (1), *Evidence Act* Cap.80.

⁹¹ Section 14, *The Traditional Courts Act* (South Africa)

4.3.2 Respecting the Deceased's Wishes:

The process of striking a balance between the individual autonomy of the deceased person and community standards continues to create disagreements. The Law of Succession Act gives precedence to written testament documents, yet verbal life expressions about inheritance sometimes carry significant cultural validity.⁹² In *re Estate of Karanja*,⁹³ despite opposition from his widow, the court made a decision to fulfil his husband's end-of-life request for ancestral burial based on verbal instructions. In some cases, the courts have confirmed that death instructions opposing the rules of public health can be disregarded.

The framework promotes a dual approach, where courts should evaluate written documentation along with valid testimonies about wishes, but must respect cultural standards that protect social unity.⁹⁴ The Aboriginal Heritage Act of 2006 of Australia implements a system to balance personal choices against Indigenous collective rights, which guides the paper in making this proposition.

4.3.3 Alternative Dispute Resolution (ADR):

Untreated disputes can be resolved quickly through tribunals and mediation, and Alternative Justice Systems (AJS) help eliminate legal delays. Taking lessons from the Environment and Land Court Act (2015), it demonstrates that when tribunals assisted by cultural mediators specialised handled 60% of land disputes within 90 days in 2020.⁹⁵ Traditional courts in South Africa now use elder participation to run Alternative Dispute Resolution (ADR) systems, thus decreasing both family conflicts and legal expenses.

The framework adopts tribunals for burial disputes based on the Alternative Justice System Policy, which provides training for local leaders in mediation practices.⁹⁶

⁹² Section 5, *Law of Succession Act*, Cap.160.

⁹³ *In re Estate of Karanja Mutegi (Deceased) (2021)* eKLR.

⁹⁴ Ndulo, M, *Gender, Culture, and Law in Africa*, Oxford: Hart Publishing, 2019,34.

⁹⁵ Judiciary of Kenya, Annual Report on Alternative Justice Systems. Nairobi: Judiciary Press, (2021).

⁹⁶ Alternative Justice Systems Baseline Policy and Policy Framework, [Alternative Justice Systems Baseline Policy and Policy Framework – The Judiciary](#).

4.4 Safeguards and Enforcement Provisions

4.4.1 Gender Equality:

Through its framework, the system implements gender equality to combat institutional discrimination of women during burial procedures, as stipulated in Article 27 of Kenya's Constitution.⁹⁷ Traditional patriarchal customs have kept women out of burial rites that are commonly practised in patrilineal tribal communities. The High Court in *In re Estate of M'ikiara*,⁹⁸ declared a prohibition on a daughter's participation in her father's burial ceremonies unconstitutional because it violates Kenyan equality principles. In some instances, the courts have validated a widow's right to bury her husband, despite opposition from male relatives, thus demonstrating the judiciary's dedication to gender equality in rights as demonstrated in the case of *Ondweri v Ontweka*.⁹⁹ The framework requires courts to discard discriminatory actions and establish equal participation rights for all genders through its mandatory directives.

4.4.2 Precedential Guidance

Until the framework obtains formal enactment, courts need to apply existing judicial decisions to maintain consistency. The landmark case of *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo* (1987) established, through its ruling, that burial dispute resolution requires a balance between legal rights and cultural identities. The judiciary demonstrates its capabilities to unite statutory and customary law by issuing this court decision. The judiciary finds clarity through existing precedents. According to Ndulo,¹⁰⁰ precedent reliance delivers essential legal consistency that constitutes substantial legal legitimacy. Through its creation, the framework maintains consistent rulings by enforcing this approach.

4.4.3 Offences and Penalties:

Section 137 of the Penal Code outlines interference with a funeral service as a criminal offence, and such interference with burial proceedings should be punishable as it delays the necessary

⁹⁷ Article 27, *Constitution of Kenya* (2010).

⁹⁸ *In re Estate of M'ikiara Kangetu (Deceased)* (2018) eKLR.

⁹⁹ *Onderi v Ontweka & 3 others* (Civil Appeal E048 of 2023).

¹⁰⁰ Ndulo, M, *Law, Culture, and Gender in Africa*, Oxford: Hart Publishing, (2019) 58.

procedures to be followed.¹⁰¹ On the other hand, the National Health Act (2003) of South Africa serves as an example by enforcing penalties against institutions that cause improper delays. The system outlines escalating sanction options that align with the seriousness of the obstruction, ranging from payment of fines to incarceration.

4.5 Practical Implementation Guidelines

4.5.1 Time Constraints:

Morgue retention periods need to be limited according to the framework in order to prevent prolonged disputes. Under the Public Health Act (Cap 242), all bodies must receive interment within 14 days, except when courts grant permission for a longer delay. Disputes tend to cause continuous delays in mortuary procedures. The framework adopts South Africa's cap of 10 days under the National Health Act (2003) but adds a 14-day maximum, which requires court authorisation for extension. The resolution process should proceed quickly in order to preserve human dignity.

4.5.2 Disposal Methods

Legal approval of multiple burial customs helps create an inclusive society. Under Article 44 of the Kenyan Constitution, citizens maintain cultural freedoms.¹⁰² Through its Aboriginal Heritage Act (2006), Australia regulates Indigenous burial practices, which serves as an example to adopt customs such as Luo teroburu rites or Hindu cremations.

4.5.3 Handling Complex Scenarios

Nationwide disputes with diaspora communities or polygamous family members require comprehensive approaches for proper resolution. The proximity principle features in the legal decision of *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo* emphasised cultural social ties in death through his court decision.¹⁰³ The judiciary acts as a mediator between widows in the estate of the deceased to determine their participation in burial ceremonies according to rights and responsibilities. Regarding Diasporas, there needs to be a framework that follows the legal precedent described in enabled consular offices to organise repatriation activities under familial

¹⁰¹ Section 137, *Penal Code of Kenya* (Cap.63 of 2023).

¹⁰² Article 27, *Constitution of Kenya* (2010).

¹⁰³ *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

consent and that courts make decisions by merging official mandates with local custom through the guidance of customary experts.

4.6 Conclusion

The proposed framework provides an innovative model for burial dispute resolution in Kenya by actively addressing legal, cultural, and procedural issues that continuously damage the system. The framework unites statutory requirements with tradition-based practices to build an organised system for dispute resolution that honours constitutional rules and traditional diversity. Specific systemic gaps, including ambiguous jurisdictions and gender discrimination, as well as delayed morgue holding periods, are addressed through specialised tribunals with explicit protections against gender bias and mandatory time limits for morgue body care. Alternative Dispute Resolution (ADR) tools, in combination with customary law experts, are incorporated into the framework to ensure that efficient resolutions occur within a cultural context.

Such technological advancements require three fundamental recommendations for their successful implementation. The framework must be adopted by legislation. The judiciary requires institution-wide training, which teaches magistrates and judges to handle legal interactions between statutory and customary law. To raise community awareness of their framework rights, public awareness campaigns must begin under the leadership of the judiciary organisations and local governance. These educational efforts will utilise both media networks and traditional leader outreach to explain alternative dispute resolution options while combating patriarchal cultural practices.

The integrated set of measures will strengthen Kenya's legal system to resolve burial disputes with fairness, along with cultural sensitivity and dignity. This framework unites law with tradition and brings Kenya in line with international human rights regulations to demonstrate its dedication to both lifesaving justice and the administration of justice related to death.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The final chapter combines analysis results with recommended solutions. It provides an analysis of the key findings on Kenyan burial conflicts with Australian and South African comparative approaches and structural recommendations. This section presents both conclusions based on identified research findings and applicable ideas to reform laws and policies. This chapter unites all its components to strengthen the proposal's central purpose, which is creating a culturally appropriate legal solution to settle burial disputes in Kenya, to promote justice and social harmony.

5.2 Summary of Key Findings

The primary causes of burial disputes in Kenyan society stem from conflicting legal rights concerning cultural traditions and statutory rules, as well as personal relationship disagreements between family members. The judicial system upholds patriarchal ancestral customs while having trouble between traditional practices and specific constitutional liberties, particularly for female and marginalised communities. From Chapter 3, we have seen how Australia supports Indigenous decisions while South Africa incorporates equality into its cultural rights framework as methods for localised conflict resolution. Chapter 4 introduced a combined approach that merges mediation with judicial directions about cultural awareness and legislative changes to define burial statutes. The findings show that Kenya requires a regulated cultural framework for its judicial system to replace its unsystematic current decision-making processes. Systematic trends within the community highlighted consistent and inclusive deficiencies in the system, yet intellectual comparisons provided vital solutions to blend tradition with human rights protection.

The proposed framework creates institutional mediation combined with standard judicial decisions, while developing court-community partnerships to resolve these gaps. Several interconnected components form a complete approach to address the research problem of an unclear equitable dispute resolution method for burials that leads to judicial inconsistencies and social conflicts. Through comparisons between local conditions and international legal standards, the paper presents an optimal approach to establishing justice in Kenyan burial dispute cases.

5.3 Conclusion

The study sheds light on the complex nature of burial conflicts in Kenya, which are influenced by three fundamental elements: legal uncertainties, traditional customs, and family dynamic pressures. The Kenyan judicial system attempts to support traditional practices through the courts, but faces challenges in reconciling patrilineal systems with women's rights and minority rights protection, as established in the constitution. Jurisdictional decisions regarding burials in Kenya often fail to use well-defined standard procedures, resulting in an inconsistent process that allows discrimination to persist in the system.

The framework developed for this study draws on Kenyan social law considerations, as well as comparative research from Australia and South Africa, which demonstrates practical solutions to these challenges. The presented framework combines mediation systems with cultural awareness, judicial standards, and legislative adjustments to facilitate this transition. Through community involvement and legal measures that balance cultural rights against equality, Australia and South Africa provide applicable solutions that demonstrate how cultural protection can coexist with personal rights in Kenya.

5.4 Recommendations

Research has established great importance for Kenyan jurisprudence by providing an established method for settling disputes that cause conflicts between families and communities. The established framework establishes legal certainty through dialogic practices and equitable mechanisms, which contribute to social harmony. The research serves as a solution to Kenya's justice system gaps, while strengthening African discussions of human rights and cultural pluralism through law-based unification of diverse interests.

First, specific legal transformations must be implemented to resolve burial conflicts in Kenya. The Law of Succession Act and the Judicature Act require revision through amendments to establish burial rights by following documented requests alongside cultural protocols. Specific judicial guidelines modelled on South African rights balancing methodologies would establish uniform methods for judges to consider customary traditions versus gender equality and child rights, which would decrease subjective judicial decisions.

Secondly, judicial training should introduce magistrates and judges to cultural and human rights aspects that influence burial disputes. Similar to Australia's Indigenous cultural competency workshops, educators trained by anthropologists and legal experts would assist judges in making decisions that are more complex.

Moreover, the education of Kenyans about their legal rights and mediation alternatives must be conducted through radio broadcasts, as well as community dialogues and NGO partnerships, as part of public awareness initiatives. Research indicates that incorrect information, in particular, intensifies conflicts, especially in rural regions where people live.

In addition, policy integration requires official cooperation between judicial institutions and traditional leadership organisations, as well as non-governmental agencies. Mediation committees that combine elder wisdom with legal advice have been successful in South Africa when integrating formal and informal justice systems.

Lastly, to evaluate the effectiveness of the proposed framework, it should be tested through monitoring methods, which could begin in the high-dispute counties of Kisumu and Mombasa. The system would adapt with regular checks and performance evaluation methods, as represented by Australia's policy refinement process.

The recommended processes derive from Kenya's social and legal framework and receive further support through international examples to create a system based on fairness and respect for cultural traditions. Through addressing key gaps in law as well as judicial practices and community participation, the framework will convert burial disputes into opportunities for restorative justice, which upholds Kenya's constitutional aims for unity and human dignity.

In conclusion, the research provides an innovative model to handle burial disputes in Kenya through the intersection of cultural traditions and constitutional guidelines. The research achieves this shift by analysing Kenyan judicial patterns while learning from Australian and South African cases to develop a culturally oriented framework. The implemented framework solves systemic issues while providing dignity to marginalised claimants through mediating processes, clear regulations, and sensitive judicial actions to promote social harmony. The research establishes law as a mechanism that unites Kenyan traditional values and present-day practices to enable justice that respects both cultural and constitutional rights to equality and human dignity.

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