



**Republic v Fasilio (Criminal Case 42 of 2019)  
[2023] KEHC 24528 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24528 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE 42 OF 2019  
EM MURIITHI, J  
OCTOBER 31, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AGNES GAKIRU FASILIO ..... ACCUSED**

**RULING**

1. The accused raised a preliminary objection dated April 4, 2023 in terms that –  

“The accused objects to one Fasilio Ikunda M’Arithi from testifying against her in this criminal trial on the grounds that he is the husband /spouse of the accused hence not a competent witness for the prosecution by dint of section 127 (3) of the *Evidence Act*.”
2. It is common ground that the proposed witness is the husband of the accused and that the deceased in this case is their child. See evidence of the area Chief PW1 and Accused’s daughter PW2.
3. With respect, it would appear that the submission by Counsel for the accused that a spouse is only compellable witness for the defence is faulty. Counsel writes –  

“[W]e further submit that section 127 (3) [of the *Evidence Act*] was not available for the Prosecution. Under the aforesaid section, the witness who is a spouse is only compellable witness on behalf of the defence and the defence shall call one Fasilio as one of their witnesses.”
4. This submission by the defence fails to distinguish between the compellability of witnesses under subsection (2) and (3) of the *Evidence Act*. Indeed, Counsel for the Accused then proceed to quote section 127 (2) in support of his submission, ignoring completely the provisions of section 127 (3) of the *Evidence Act*. The two subsections make provisions for the compellability of accused’s spouse by only



the defence on the one hand, and by the both Prosecution and the Defence on the other, in different circumstances as follows:

“ 127.

- (2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that—

- i. the person charged shall not be called as a witness except upon his own application;
  - ii. save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
  - iii. the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.
- (3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—
- (a) with the offence of bigamy; or
  - (b) with offences under the *Sexual Offences Act* (No. 3 of 2006);
  - (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.”

5. It is not correct that the compellability of a witness under section 127 (3) is only relevant to the case for the defence. Under section 127 (2) a spouse is at all times a compellable witness for the defence except where the circumstances set out in that subsection apply. The right to compellability is available to both the Prosecution and the Defence in the circumstances stated in the sub-section (3).
6. Here the accused’s spouse is compellable witness is under section 127 (3) of the *Evidence Act* a compellable witness for both the prosecution and the Defence as the offence relates to a child of both of them. The spouse of the accused is in this case involving the death of their child a compellable witness under section 127 (3) of the *evidence Act*. What the Prosecution may, and needs to consider, is whether the husband’s evidence is necessary to secure a conviction against the wife and, if not, the Prosecution should omit him in the interests of maintaining marital harmony between the two spouses, which evidence so far suggests exist.



## Orders

7. Accordingly, for the reasons set out above, the court does not allow the application by preliminary objection dated 4/10/2023, and the same is declined.
8. The case shall proceed to trial and the proposed witness Basilio Ikunda shall be available to testify for the Prosecution, unless the Prosecutor in his discretion under section 143 of the [Evidence Act](#) determines otherwise.

Order accordingly.

**DATED AND DELIVERED ON THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Masila for DPP.

Mr. Ngugi for the Accused.

