



**Director of Public Prosecutions v Maero (Criminal Case E011 & E012 of 2022
(Consolidated)) [2022] KEHC 12236 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 12236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E011 & E012 OF 2022 (CONSOLIDATED)**

WM MUSYOKA, J

JUNE 29, 2022

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

FERINE PINQUETT MAERO ACCUSED

RULING

1. On 10th June 2022, Mr. Kituyi, Advocate for the accused, addressed me orally on the matter of Mitto Rodney, one of the witnesses proposed to be called by the prosecution. I was informed that he was the husband of the accused. My attention was drawn to section 127(2)(ii) of the *Evidence Act*, Cap 80, Laws of Kenya, which I was told stated that the spouse of a person facing a criminal charge should not be called as a witness in the matter except on the application of the person charged. Mr. Kituyi submitted that Mitto Rodney was a spouse of the accused person, yet the State had listed him as one of the prosecution witnesses to testify against her. It was urged that he was not a competent witness in the matter. Mr Kituyi also applied for an extract of the Police Occurrence Book (OB) for 6th March 2022, as it related to the accused, and the person who made the report.
2. Mr. Malenya, Advocate, appearing with Mr. Kituyi, added to the application, by stating that section 127 of the *Evidence Act* states the Common Law position, that a spouse was not a competent witness to testify in a criminal trial unless the spouse was being called as a defence witness, or where he testifies in a sexual offence case, or a crime involving property. He asserted that it was obvious that the State ought to withdraw Mitto Rodney, as he could not be a prosecution witness.
3. Ms. Challa, for the Republic, urged that the defence ought to file a formal application on that issue, as the Republic intended to table evidence on the matter of the marriage between the accused and the said Mitto Rodney. Ms. Mburu, Advocate watching brief for the family, said the matter had been raised in the fashion of an ambush, and asked for time to respond.



4. I adjourned the matter to 16th June 2022, to give time to the Republic and Ms. Mburu to prepare a reply.
5. On 16th June 2022, it was Mr. Kiprop who appeared for the Republic. He cited section 127(3) of the Evidence Act, and argued that the charges before the court related to offences against the children of the two parties, and, therefore, the spouse of the accused was a compellable witness for the State. He urged me to find that the spouse of the accused was a relevant witness, and that he ought to testify before the court, so that the ends of justice are seen to be met. He submitted that the interest was the justice, and that the father of the children was equally interested in seeking that justice was done.
6. Ms. Mburu cited Mathias Obuya Aringo vs. Republic [2020] eKLR (Musinga, Murgor & Kairu JJA), and submitted that the Court of Appeal had dealt with the contradiction that would appear to be there between section 127(2)(a) and section 127(3) of the Evidence Act. She asserted that Mitto Rodney was a competent witness in the matter.
7. In rejoinder, Mr. Kituyi submitted that section 127(2) (iii) (c) of the Evidence Act referred to properties and not otherwise. He cited Julius Mwita Range vs. Republic [2003] eKLR (Tunoi, O’Kubasu JJA & Onyango-Otieno Ag JA), saying that the Court of Appeal had found the wife of the accused person, in that case, was properly married to the accused, and she was, therefore, not a competent witness. He stated that the authorities cited by the Republic and the family were distinguishable.
8. The ideal starting point ought to be section 127 of the Evidence Act. Let me recite that provision in its entirety. It states:

127. Competency of parties and spouses

(1) In civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

(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;
- (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 a person or the children of either of them, and not otherwise.

(4) In this section “husband” and “wife” mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”

9. Section 127(2) of the *Evidence Act* states the general principle in criminal proceedings on competence and compellability of spouses as witnesses in cases where the other spouse is charged. The principle is that the accused person and the husband or wife of the accused person are competent witnesses for the defence at every stage of the proceedings, regardless of whether the person is charged alone or with another. See *Prosecutor vs. Dedan Ouma Sweta* [2019] eKLR (F. Ochieng J). However, although the spouse of an accused person is a competent witness for the defence, he or she cannot be compelled to give evidence, in defence, unless on the application of the accused person. Equally, an accused person cannot testify in defence of a co-accused spouse, unless the accused person himself or herself consents to giving such evidence.
10. Section 127(3) of the *Evidence Act* states the exceptions to the general rule or principle stated in section 127(2), that a spouse of an accused person is a competent witness in the defence of the accused, but with the consent of the accused. The position under section 127(2) is that the spouse of the accused is a competent but not compellable witness, and he or she can only be called as such, in the defence of the accused person, on the application of the accused or with his consent. He or she cannot testify in such defence without the consent of the accused. The exception in section 127(3) is to the effect that the spouse of an accused person would be a competent and compellable witness, either for the prosecution or the defence, and will not need the consent of the accused for such testimony, in a small defined class of cases. One would be where the accused person faces a charge of bigamy. Two is where the charge he or she faces is in respect of an offence under the *Sexual Offences Act*. Three is where the charge relates to offences against the person or property of the spouse or of the children of either spouse.
11. In the instant case, from the material that has been lodged herein, as the evidence that the prosecution proposes to lead at the trial, and which bundle of evidence has been availed to and shared with the defence, Mitto Rodney is portrayed as the husband or spouse of the accused person, and the father of the two minor victims of the double homicide, who are the biological children of the accused. The alleged fact of that marriage, and of the fact that the two minors were children of either spouse, was not contested by either side, in their respective addresses to me, when the application was argued orally. That being the case, the two murder charges relate to offences touching on the persons of the children of both the accused and the said Mitto Rodney, or either of them. Murder or homicide is a crime against the person. That would bring the two cases under the exception stated in section 127(3) (c) of the *Evidence Act*. It would make Mitto Rodney a competent and compellable witness for either side, that is the prosecution or the defence. He is, therefore, competent to testify for the prosecution, and he can be compelled to so testify, and the consent of the accused person, on the matter of his testimony, does not arise. See *Republic vs. Lucy Wangari Mathenge* [2011] eKLR (Sergon J) and *Mathias Obuya Aringo vs. Republic* [2020] eKLR (Musinga, Murgor & Kairu JJA).
12. *Julius Mwita Range vs. Republic* [2003] eKLR (Tunoi, O’Kubasu JJA & Onyango-Otieno Ag JA) is not relevant to this case, as it did not relate to the accused person, in that case, being charged with killing his child. The allegation was that he killed a man who he alleged to have found with his wife. It did not turn on section 127(3) of the *Evidence Act*, but section 127(2) of the Act. Julius Mwita Range



vs. Republic [2003] eKLR (Tunoi, O’Kubasu JJA & Onyango-Otieno Ag JA) is in the same class with [Republic vs. Maxwell Mwaingolo](#) [2021] eKLR (Ong’injo J), where the victim of the alleged murder was a brother of the accused, and it was said that section 127(3) did not apply, but section 127(2) did. [Republic vs. Lucy Wangari Mathenge](#) [2011] eKLR (Sergon J) and [Mathias Obuya Aringo vs. Republic](#) [2020] eKLR (Musinga, Murgor & Kairu JJA) are relevant, as section 127(3) of the [Evidence Act](#) was applied, because the victims of the homicide, in both cases, were the children of the accused persons.

13. By way of emphasis, I will recite section 127(3)(c) of the [Evidence Act](#) once more, it says:

“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) ...

(b) ...

(c) in respect of an act or omission affecting the person or property of the wife or husband of such a person or the children of either of them, and not otherwise.”

14. In my understanding, what the defence appears to be doing is to cite section 127(2) of the [Evidence Act](#) in isolation of section 127(3), instead of reading the two provisions together. One of the principal rules of construction is that statutory provisions ought not to be read in isolation of one another, for the meaning of one provision is necessarily dependent on another provision within the same statute. The defence is harping on the general rule, without paying regard to the exceptions. The two cases before me fall under the exceptions. The advantage that the accused would have enjoyed, under section 127(2) of the [Evidence Act](#), was lost the moment it was alleged that the victims of the crimes, she is alleged to have committed, related to the persons of her own children or the children of her husband, and, therefore, bringing the matters under the exceptions created under section 127(3) of the [Evidence Act](#), and removing them from the realm of section 127(2).

15. There is no merit, therefore, in the objection raised by the defence, with respect to the competence and compellability of Mitto Rodney as a witness for the prosecution. That objection is overruled. On the application to be furnished with extract from OB for 6th March 2022, as it related to accused and the report made of the incident, I do hereby allow the same. Let the Republic furnish the accused with same within 14 days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF JUNE 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Kiprop and Ms. Challa, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Kituyi and Mr. Malenya, Advocates for the accused person.

Ms. Mburu, Advocate watching brief for the family of the victims.

