



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 7 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

ZAMZAM MALIO.....ACCUSED

RULING

1. Under section 127 (2) (ii) Evidence Act the law is;

“In every proceedings every person charged with an offence and the wife or husband of the person charged shall be a competent witness....at every stage of proceedings whether that person is charged alone or jointly with others provided that:

i.

ii. Save as provided by subsection 3 the wife or husband of such a person charged shall not be called as a witness except upon application of the person charged.”

2. Subsection 3 of the same section is not applicable in this case. However section 127 (4) defines husband and wife and states:

“(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.”

3. In the case of *Julius Mwita Range vs Republic [2003] eKLR* the Court of Appeal held:

“The marriage between the Appellant and Elizabeth was a marriage covered by section 127 (4) and Elizabeth was in law still the wife of Appellant notwithstanding that they were living separately. She was competent witness but could not be called as witness upon application of Appellant who was a person charged. She was called by prosecution and this was not proper as that was making her a compellable witness.

The defence did not apply for her to be called nor did defence apply for her to proceed with her evidence now that she had been called and was thus made available.....”

4. In our instant case, it is not denied by the prosecution that the accused is in polygamous marriage with witness PW1 Mohamed Ali who was stood down.

5. Various witnesses have referred to the accused as the wife of the Mohamed Ali including PW8 NM 11 year old daughter of deceased and the Mohamed Ali who referred to Act as, “*mama mdogo*.” Step mother.

6. In sum the witness unless on application of the accused, he cannot therefore testify against the accused as their marriage subsist and he is her husband unless and until their marriage is lawfully dissolved.

7. Orders accordingly.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE