



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL CASE NO. 20 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

FME.....ACCUSED

RULING

1. The accused is alleged to have murdered Valerian Njeri Ndonu in Karagita Location, Naivasha. He was aged 17 years at the time of the commission of the offence on 28th November, 2019.

2. At commencement of the hearing today, the defence counsel made an application under **Section 125 (1)** of the **Evidence Act** seeking to disqualify the giving of evidence by the Accused's mother and father. Counsel noted that the Accused's parents had accompanied the Accused to court for the first day of hearing. Whilst in the premises, they were "*ambushed*" by the prosecutor and required to testify. The father was allegedly threatened with unspecified actions if he did not co-operate.

3. Counsel stated that despite the fact that the parents had recorded statements with the police, they fell into a category under **Section 125 (1)** of the **Evidence Act** where they could be considered incompetent for "*any similar cause.*" They were uncomfortable giving evidence due to the relationship with the accused. He sought their excusal from giving evidence. He suggested that the parents would potentially give evidence for the defence.

4. **Section 125 (1)** of the **Evidence Act** relied upon by the counsel provides as follows:-

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause." (Emphasis added)

5. The DPP opposed the application and alleged that it amounted to witness interference. She explained that she had been conducting pre-trial with witnesses. The Accused's mother co-operated, but the father said he had been advised by counsel that he should not testify. She told him that if he lied to the court, for example, he could be charged with perjury.

6. The DPP further submitted that the state intended to call the accused's parents as witnesses; that they had recorded statements; that they were in fact eyewitnesses. As such they are competent and compellable, and that **Section 125** of the **Evidence Act** is inapplicable to the circumstances.

7. The victim's counsel agreed with the DPP's submissions. Counsel stated that **Section 125** of the **Evidence Act** does not support the Applicant's position in that it relates to incompetence due to reasons such as age, infirmity of body or mind or for similar reasons. The relationship of the witnesses to the accused is not a ground that is covered under **Section 125** of the **Evidence Act**.

8. In response, the defence counsel argued that any similar cause is broad enough to cover the parents and in any event they are the ones who stood surety for the accused.

Analysis and Determination

9. **Section 125** of the **Evidence Act** concerns competence of witnesses. The starting point is that all witnesses are competent to testify unless the court considers they cannot be competent for the following reasons:

That they are prevented from:

a - understanding the question put to them; or

b - from giving rational answers to those questions by or on account of being:

(i) of tender years, or of

(ii) extreme old age, or

(iii) due to disease of body or mind, or

(iv) *For any similar cause.*

10. “Competence” is defined in **Black’s Law Dictionary** as:

“A basic minimum ability to do something; adequate qualification, especially to testify. The capacity to do something.”

“Competency” is described in **Black’s Law Dictionary** as:

“The mental ability to understand problems and make decisions.”

11. Since **Section 125** of the **Evidence Act** provides that all persons are competent witnesses, it is for the person alleging incompetence to demonstrate or provide proof of incompetence. Such incompetence must fit the categories of exception mentioned in the Section by which the person sought to be declared incompetent is shown to be incapable of understanding the question put to them, or of giving rational answers to those questions. No such demonstration of incompetence of the Accused’s father and mother is alleged or demonstrated.

12. Indeed, **Section 125 (2)** of the **Evidence Act** further adds that mental impairment or lunacy of a person does not, of itself, render a person incompetent, unless the condition prevents him from understating the questions put to him and giving rational answers to them. **Section 125 (2)** of the **Evidence Act** provides:

“A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”

13. Even a dumb person does not, by virtue of inability to speak, become incompetent, as he may give his evidence in any other manner in which he can make it intelligible. This is the substance of **Section 126 (1)** of the **Evidence Act**.

14. With regard to competence in respect of relationships, only the husband or wife of an accused may not be called to testify against the other, except on the application of the person charged (**Section 127 (2) (ii)** of the **Evidence Act**). Thus, a wife or husband is incompetent to testify in criminal proceedings unless the charged person applies to court for such testimony.

15. Having carefully considered the question of competence under **Section 125 (1)** of the **Evidence Act**, and the defence counsel’s oral submissions in respect thereof, I am not satisfied that any situation or circumstance has been put forward under which the accused’s parents cannot testify, or are incompetent to testify.

16. **Section 128** of the **Evidence Act** instead reinforces that a witness shall not be excused from answering any question as to any matter relevant to the questions in issue in any civil or criminal proceeding, even on grounds that the answer may potentially incriminate them. Even then, self-incrimination is only outlawed under **Article 50 (2) (1)** of the **Constitution** in respect of evidence of an *accused person*. Accordingly, every such person is compellable as a witness.

17. In light of the foregoing, application is denied and the Accused’s parents shall testify if called upon by the prosecution to testify. The DPP shall, in this regard, not be under the direction or control of any person or authority.

18. The proceedings shall continue as previously scheduled.

Administrative directions

19. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

20. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

21. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 25th Day of November, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Mr. Bogongo for the Accused
3. Mr. Mwesigwa for the Victims
4. Court Clerk - Quinter Ogutu