



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 27 OF 2018**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**RANDU KATANA KARISA *alias* RAMA..... ACCUSED**

**RULING**

1. The accused, Randu Katana Karisa *alias* Rama was on the 4th of June, 2018 arraigned in court for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 19th day of May, 2018 at Dargube village Ramisi location Msambweni Sub-County within Kwale County murdered Mbache Mwadzombo.

2. The hearing of the case commenced on 21st November, 2018. On 10<sup>th</sup> December, 2018 when PW2, Mesaidi Suleiman Mwalifan was sworn and was in the process of testifying, it was brought to the court's attention that she was the wife of the accused person. Mr. Muthuri, Learned Counsel for the accused person objected to PW2 giving evidence against her husband. He relied on the provisions of Section 127(3) (c) of the Evidence Act. He submitted that she should not testify against him as she was not a competent and compellable witness for the prosecution in this case. He also submitted that she could only testify as a defence witness.

3. He made reference to the case of **Julius Mwita Range vs Republic** [2013] eKLR where the Court of Appeal, held that a wife was a competent witness and could only be called as a witness upon the application of the appellant. The court went on to state that the wife of the appellant therein was not a compellable witness for the prosecution. Mr. Muthuri explained that in the said case, the prosecution had in the trial court attempted to call the wife of the accused as its witness and that the facts therein were similar to this case.

4. On her part, Ms Ogweno, Prosecution Counsel, argued that the provisions of Section 127(3)(c) of the Evidence Act provide that the wife of an accused person is a competent witness for the prosecution without the consent of such an accused person. She submitted that the murder of the deceased herein is a matter affecting the witness and that the deceased was an uncle to PW2. She prayed for PW2 to be allowed to testify.

5. Mr. Muthuri responded by stating that the deceased is still married to the accused and the two have had 10 children together. Further, that there was no blood relationship between the deceased and PW2 save for him being her uncle.

**DETERMINATION**

6. Section 127 of the Evidence Act makes provisions for competency of parties and spouses. The applicable provision in this case is Section 127(3)(c) of the said Act which states as follows:-

***“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 –***

***(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.”*** (emphasis added).

7. To my mind, there is no ambiguity as to the extent of the applicability of the above provisions. They are as clear as day. My understanding of the law with regard to the exception of the provision of a spouse not being permitted to testify against another in a criminal case only applies if the deceased is a spouse of the accused, or is their child. The person who was allegedly killed by the accused in this case was not a spouse of the accused person or their child.

8. The provisions of Section 127(4) of the Evidence Act state that:-

***“Under 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. PW2 testified that she was married to the accused person although she did not disclose if he had paid dowry for her. The two had however lived together since the year 2002 and PW2 had borne him 10 children. In the absence of evidence of a marriage under the law or a tribal custom, it is this court’s finding that the presumption of marriage was proved. I do concur with Mr. Muthuri that the Court of Appeal decision in **Julius Mwita Range vs Republic** [2003] eKLR aptly applies to the circumstances of this case. The Court of Appeal therein held that the appellant’s wife was not competent and compellable to testify against her husband, where he had been charged with murder and the person who had been killed did not fall in the exception to the provisions of Section 127(3)(c) of the Evidence Act. In the said case the appellant and his wife were married under customary law. I however do not agree with Mr. Muthuri that a spouse can only be compelled to testify for her husband or that she or he is only competent to testify on behalf of her/his spouse. The correct position of the law is as captured in the provisions of Section 127(3) of the Evidence Act.

10. It is my finding therefore that PW2 is not a competent witness to testify against her husband and she cannot be compelled to testify on behalf of the State against her husband, the accused person in this case. She is therefore discharged from testifying in this case.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of February, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Muthuri for the accused person

Ms Ogwen, Principal Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant