



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRC NO. 51 OF 2017

REPUBLIC.....PROSECUTOR

=VERSUS=

MAXWELL KIPRUTO.....1ST ACCUSED

SIMON KIBET KIBOR.....2ND ACCUSED

BONENGRS KIPRUTO SALGONG ALIAS ABUBAKAR...3RD ACCUSED

RULING

1. By a preliminary objection dated 26/10/2018, the 3rd accused has objected to one Joan Jeptoo Kiprof testifying in the criminal trial on the ground that she is “*the spouse and/ or wife of the accused hence she is not a competent witness to testify for the prosecution*” and reliance is placed on section 127 (3) of the Evidence Act. Counsel for the accused cited Julius Mwita Ranga v. R, Court of Appeal at Kisumu Criminal Appeal No. 150 of 2003 and R v. Jackson Ngaru Nderitu High Court at Nyeri Criminal case No. 7 of 2014. The applicant, consequently, sought that the witness’s “*partial testimony ought to be expunged from the Court record.*”

2. In response to the Preliminary Objection, the prosecution filed a Replying Affidavit by the very said Joan Jeptoo deponing as follows:

1. ***THAT I am a witness in Criminal case no. 51 of 2017 in Kabarnet High Court where my husband EDWIN KHAMALA BARASA is the deceased.***
2. ***THAT I was married to the accused BONENGRS KIPRUTO SALGON in 2011 and we were blessed with a baby boy in October the same year.***
3. ***THAT we disagreed with Bonengers in February 2014 and we separated.***
4. ***THAT in the same year July 2014, I got married to the deceased EDWIN KHAMALA BARASA.***
5. ***THAT at the time of his demise on 2nd May 2015, we were living with the deceased as husband and wife.***
6. ***THAT the deceased left me one month pregnant with his baby at the time of his death.***
7. ***THAT I gave birth a baby girl for the deceased in January 2016 and she is currently three years.***
8. ***THAT I therefore state that the accused was my former husband who we separated and the deceased was my only husband at the time of his death.***

The accused did not controvert the affidavit.

3. Counsel for the 3rd accused and the DPP made respective submission on the Preliminary Objection as follows:

“Mr. Chebii

Preliminary Objection dated 26/10/18.

Mr. Abwajo

I am ready to proceed with Preliminary Objection.

Mr. Chebii

Preliminary Objection dated 26/10/18 objected under section 127 (3) of the Evidence Act against testimony of Joan Cheptoo (Pw1). The ground is that Joan is a spouse of the 3rd accused, and is therefore a compellable witness to testify for the prosecution against the husband.

We shall seek consequential order for expectation of her testimony. Joan is the wife of the 3rd accused. She got married to the accused in 2011. They have one issue born on October 2011. They lived together until February 2014 when they had a disagreement and briefly separated. We submit that the marriage has not been dissolved and the witness is still the wife of the 3rd accused person.

Before the incident in this case on 2/5/2015, it was a period with the separation period but marriage was still on and the parties were trying to settle their marriage.

We rely on 2 authorities CA. Kisumu Cr. Appeal No.150 of 2003 Mwita Range v. R and Nyeri H.C. Cr. Case no. 7 of 2014 R v. Jackson Ngara Nderitu.

The facts of the Kisumu Court of Appeal are similar to this case. The wife is not a compellable witness, and the Defence has not applied for her to testify.

Replying Affidavit of Joan Cheptoo she reiterates that she got married and they were blessed with a boy. She alleges to have entered into a similar marriage with the deceased when she was living at the time of his death. We oppose. We consider that the period was the separation period. It has not been dissolved.

The Prosecutor has not shown that there is dissolution of marriage. There is existing marriage. The parties had not separated long enough for the marriage to have broken down irretrievably urge that the objection be upheld.

Mr. Abwajo

We apply to have witness conclude her testimony, based on the following facts.

The privilege of a spouse not testify against under spouse can only stand when there is proof of marriage. The marriage must be subsistent at the time of the alleged offence to which the spouse seeks to give her testimony. Affidavit of Joan Cheptoo shows that the said Joan says that she was married to the accused somewhere in 2011 and they were blessed with one boy. About February, 2014, they had difference leading to their separation and about 5 months down the line, she got into a relationship with one Khamala Barasa. She admits that they got married with Barasa who is now late and she states that they were blessed with a baby girl born on January 2016 a few months after the demise of Barasa on 2/5/2015, about a year after they got married.

The offence before the Court which Joan seeks to testify on occurred 1 year after the date of their separation in with the 3rd accused.

There did not exist a marital privilege as there was no marriage. The accused had not produced any marriage document, to show the marriage was still subsisting.

Mwita's case involved 1 month after separation. In this case, the parties had separated for more than 1 year.

The witness Prosecution seeks to call had married on and engaged in another marriage and there is a child to show for it.

Even if the Defence is given benefit of doubt that there was a marriage indicating the customary marriage, no evidence of the time having as husband and wife by both recording on similar documents. We are asked to assume a marriage where it has not been shown where dowry was paid. In Mwita's case, the 2 had separated and the Court observed that they were in process of returning dowry. In this case there is no evidence of payment of dowry.

The Marriage Act 2014 requires all marriage to be registered but the alleged marriage was before the Act. There must be evidence. The Defence seeks the Court to assume a marriage. There is no evidence to support the marriage out the time of the commission of the offence.

Mr. Chebii in reply

There is an admission by Joan Cheptoo that 3rd accused was her husband. She does not state that the marriage has been dissolved. It is, therefore, subsisting. In Mwita's case the issue was not about time. The Judges observed had 1 month cannot be said that the parties have decided to go separate ways. The deceased cannot be taken to have contracted another marriage when the first marriage was not dissolved.

The deceased entered into a side-show which did not affect the accused's status as the husband of Joan. Living with someone's wife does not destroy the marriage or it does not count as marriage. Mwita's case is to all forms with the present case.

The Prosecution has filed an affidavit by Joan which supports our case as she admits that she was a wife.

Mr. Abwajo with leave of Court

Mr. Chebii relies on the Replying Affidavit of Joan. He only refuses to accept that she separated in 2014 and contracted another marriage. It was a customary marriage. It was dissolved in the same way that the marriage came to be as it was not shown how it came to be. Formal termination was not warranted. There would not have been any divorce or dissolution.

Analysis of Evidence and the Law

4. On the uncontroverted facts before the court the 3rd accused and the prosecution witness (PW1) who was stood down to allow the hearing and determination of this objection were married; they separated in February 2014 whereupon the witness in July 2014 married the deceased who died on 2nd May 2015. The parties had at the time of death of the deceased therefore lived separately for 10 months and on the evidence had not resumed cohabitation and the witness contends that *"the accused was my former husband who we separated and the deceased was my husband at the time of his death"*. The parties have lived separately, therefore, for over 5 years to date but the marriage between them with one child of the marriage is admitted by the witness.

5. Section 127 (2) (ii) of the Evidence Act, which applies to this case provides that *" save as provided in subsection 3 of this section [which does not apply here] the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged."* As noted in evidence for Magistrates, (1969) by Philip P. Durand (KIA) at page 105, the husband –wife exception is founded on the marriage relationship:

"Owing to the nature of the marriage relationship, a group of special rules of evidence have endured where one spouse is accused of an offence and the other is a potential witness, either for the prosecution or the defence. These rules involve both competency and compellability as well as the privilege relatively to the non-disclosure of communication during marriage. The relevant section is Section 127 Kenya Evidence Act".

6. First principles of the husband- wife exception therefore depend on the existence of the marriage relationship and the authorities cited by the Counsel for the accused are right on the facts of the cases. In **Julius Mwita Range v. R**, Supra, the Court of Appeal held that:

"However section 127 (4) defines "husband" and "wife" and it states:

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

We are certain in our minds that the marriage between the appellant and Elizabeth Nyaitoto was a marriage covered under section 127 (4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the 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 the defence apply for her to proceed with her evidence now that she had been called and was thus made available".

7. Considering whether the defence of provocation was available to the appellant by reason of this marriage to the wife in the Julius Mwita Range case, the court said:

"However, we note that the two got married in 1995 and had two children. Joseph Nyamohenga Magibai (Pw5) stated in evidence that the marriage between this daughter and appellant broke down in 1999. He did not give the exact date but the deceased was killed on 6th February 1999. Even if we were to accept for purposes of argument that the marriage broke down early in January 1999, one cannot say with conviction that a period of separation between a husband and a wife of almost one month is long enough for one to conclude that such a marriage has broken down irretrievably".

8. The English position, as noted in Archbold, Criminal Pleading Evidence and Practice 2006, is regulated by section 80 of the Police and Criminal Evidence Act, 1984, sub-section (5) of which provides that:

"In any proceedings a person who has been but is no longer married to the accused shall be.....compellable to give evidence as if the person and the accused had never been married".

9. Discussing the matter at paragraph 9-25 he learned editors of Phipson on Evidence 16th Ed.(2005) write as follows:

*"The restriction on the compellability of a wife or husband apply only while the marriage continues. A person who has been but is no longer married to the defendant can be compelled to give evidence as if they had never married. **The restrictions remain despite a decree of judicial separation.** A bigamous marriage is no marriage in this context. A court might also feel able to disregard a*

wholly sham marriage, where the only purpose was to avoid criminal responsibility and there was no intention of fulfilling the mutual obligations of care and support. The former privileges of a spouse not to disclose matrimonial communications or give evidence of marital intercourse were abolished by the police and criminal evidence Act 1984”.

Determination

10. The husband-wife privilege against competence and compellability of the one spouse against the other is meant to uphold the institution of marriage and the obligations of mutual care and support that it imports, and the restrictions are extinguished upon a valid dissolution of the marriage. As noted in Phipson on Evidence passage cited above, a decree of judicial separation does not suffice. Section 127 (4) of the Kenya Evidence Act is clear that the marriage between the parties must have been “*dissolved according to law*” and *marriage includes a marriage under native or tribal custom*”.

11. The law for dissolution of marriage in Kenya is the Marriage Act, 2014 which came into operation on 20th May 2014, and which provides for dissolution of marriages by Petition to Court in the case of Christian marriage under section 65 of the Act; section 66 in case of a customary marriage; section 70 in case of a Hindu marriage; and section 71 in case of dissolution of a muslim marriage according to Islamic Law. Under section 98 (1), the Act applies to marriages – under written or customary law– subsisting before its commencement.

12. There was no evidence before this court that the marriage between the 3rd accused and the witness Pw1 which is acknowledged and admitted by the Replying Affidavit sworn by the witness herein was ever dissolved by an order of the Court. The marriage between the parties having been admitted by the witness, there was no need for the applicant to further adduce proof thereof.

13. In addition, the separation between the two is stated by the witness to have been only 2 months (from February 2014 – May 2014) before she allegedly “*married*” the deceased and only 1 year 2 months from the date of separation with the 3rd accused and the death of the deceased. In either case, the matter does not qualify under the time qualification of irretrievable break-down of marriage under section 66 (6) (d) of the Marriage Act, which provides that “*(6)a marriage has irretrievably broken down of –*

(d) the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has”.

In any event, an order of the Court is necessary to formally bring the marriage to an end.

14. I would, accordingly, find that the witness Joan Jeptoo Pw1 is prohibited by the provisions of section 127 (2) (ii) of the Evidence Act from testifying against the 3rd accused for reason of having been married to him under a marriage which has not been “*dissolved according to law*” in terms of section 127 (4) of the Evidence Act.

Orders

15. Accordingly, for the reasons set out above, I uphold the objection by the 3rd accused and direct that the proceedings of the court on 25/10/18 when the said Joan Jeptoo testified partially before the objection as to her competence was taken shall be quashed and expunged from the record.

Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mbeche & Co. Advocates, for the 1st Accused.

Mr. Chepkilot for M/S Tarus & Co. Advocates for the 2nd Accused.

M/S Chebii & Co. Advocates for the 3rd Accused.

Ms. Macharia, Ass. DPP for the Respondent