



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 20 OF 2018

PROSECUTOR.....REPUBLIC

VERSUS

DEDAN OUMA SWETA.....ACCUSED

RULING

This is a Ruling on an Objection which has been raised by the accused, **DEDAN OUMA SWETA**.

1. The objection was raised when **PW4, EVERLINE AKINYI OWITI**, was testifying in a case in which the accused had been charged with the offence of Murder.
2. It was the contention of the accused that Everline was not a Competent Witness, because she was a spouse to the accused.
3. On the other hand, the prosecution submitted that the lady was a Competent Witness pursuant to **Section 127 (3) (c)** of the **Evidence Act**.
4. The Court was told that the witness was not the spouse of the accused.
5. The prosecution said that the accused and the witness lived at separate dwellings, and also that no marriage ceremony had ever been conducted between them.
6. In any event, the prosecution deemed a spouse to be a compellable witness pursuant to **Section 127 (3)** of the **Evidence Act**.
7. The response of the accused, to that statement was that **Section 127 (3)** was not available for the prosecution. He submitted that a spouse was only a compellable witness on behalf of the defence.
8. The accused added that the only exception to that provision was in respect to offences committed against the spouse or against the property or the child of the spouse.
9. Pursuant to **Section 127 (2)** of the **Evidence Act**;

“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 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.”

10. In a nutshell, if a person is charged with a criminal offence, his or her spouse shall be a competent witness for the Defence.

11. In so far as the witness in this case had been called by the prosecution, I find that **Section 127 (2)** is not applicable to her.

12. Meanwhile, pursuant to **Section 127 (3)** of the **Evidence Act**;

“In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution without the consent of such person, in any case where such person is charged –

(a) with the offence of bigamy; or

(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

person or the children of either of them, and not otherwise.”

The authors of the statute found it necessary to give, within **Section 127 (4)** of the **Evidence Act**, the meaning of the words “*Husband*” and “*wife*”. Therefore, for the purposes of that 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.”

13. In the case of **JOSEPH MUNYOKI KIMATU Vs REPUBLIC, CRIMINAL APPEAL NO. 130 OF 2013**, the Court of Appeal made the following pronouncement;

“the fact of death or injury to one’s parent does not fall within the exceptions in Section 127 (3) of the Evidence Act. It was therefore necessary for the Court to obtain the consent of both the Appellant and PW3 before putting PW3 into the witness stand to testify against the Appellant, her husband. Failure to take this precautionary measure was fatal to the prosecution case.”

14. Similarly, I find that in this case, the prosecution for the offence of Murder does not fall within the exception to the provisions of **Section 127 (3)** of the **Evidence Act**.

15. In the case of **RANGE V REPUBLIC [2003] KLR 692**, the Appellant had been convicted for Murder.

16. The first prosecution witness was Elizabeth, who testified that she and the Appellant had been married. However, by the time when the Appellant was on trial, Elizabeth and the Appellant had been separated.

17. When determining the appeal, the Court of Appeal held as follows;

“We are certain in our minds that the marriage between the Appellant and Elizabeth Nyaitoto was a marriage under Section 127 (4) and thus Elizabeth Nyaitoto was, in law, still the wife of the Appellant notwithstanding that they were living Separately.”

18. The Court of Appeal upheld the decision by the trial court, which had stopped Elizabeth from continuing to give evidence, after it had become clear that Elizabeth was the wife of the Appellant.

19. In the case of **ALEX MWANGANGI MICHAEL V REPUBLIC HCCRC NO. 32 OF 2017** (at Makueni) Kariuki J. held that as the relevant Kamba traditional ceremonies were never performed;

“There is therefore no basis to conclude that there is a valid Kamba customary marriage.

On the other hand both parties seem to have cohabited for a considerable length of time. Evelynne said they had 2 children but the accused did not comment about children.

The question which begs is whether cohabitation alone is sufficient to presume marriage between the parties. Presumption of marriage is a common law concept which must be established through evidence.”

20. In this case, it does appear that the witness, Everline and the accused had lived together, and they had at least one child, Ashley.

21. Nonetheless, there is no evidence before the court, concerning the circumstances in which Everline and the accused had cohabited.

22. In the case of **REPUBLIC V GEORGE MWANGI KABIRA & 2 OTHERS HCCRC NO. 9 OF 2016** (at Nanyuki), Kasango J. held as follows;

“To underscore the necessity of complying with customary rites in marriage I shall refer to Sections 43, 44 and 55 of the Marriage Act No. 4 of 2014. Section 43 provides that for a marriage to qualify to be under custom, it must be celebrated in accordance to the custom of both or one of the parties to the marriage. Section 44 requires parties to such a marriage to notify the Registrar of Marriage of such a marriage.

Section 55 provides that the Registrar of Marriage shall issue a marriage certificate once the provisions of Section 43 and 44 are fulfilled.”

23. In that case, the learned Judge came to the following conclusion, after giving due consideration to the evidence tendered before the court;

“As stated before, it became clear that their relationship is what is called ‘come we stay’, and it has no binding force in law.

It is a relationship which is ‘here today, gone tomorrow’, with no legal repercussions on either Grace or 1st accused.”

24. Having given due consideration to the evidence presented to this court, I find that there is insufficient evidence to prove that Everline and the accused are married.

25. Therefore, at this stage, I overrule the objection made by the accused, as to the competence and compellability of the witness.

26. However, if evidence should later prove that Everline and the accused were husband and wife, the evidence may either be expunged from record or, (depending at the stage of the trial when that determination is made) the proceedings may be rendered fatally defective.

DATED, SIGNED and DELIVERED at KISUMU

This 26th day of **November** 2019

FRED A. OCHIENG

JUDGE