



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR. 32 OF 2017

ALEX MWANGANGI MICHAEL *alias* NGANGI.....ACCUSED

-VS-

THE REPUBLIC.....PROSECUTION

RULING

INTRODUCTION

1. This ruling is with respect to the objection raised by the accused’s Counsel, Mr. Makau, with regard to the testimony of Evelyn Mutindi (*hereinafter ‘Evelyn’*). He contends that she is a wife of the accused and that section 127 of the Evidence Act, Cap 80 forbids spouses from testifying against each other.
2. Further, he submits that the deceased is not a relative to either the accused or witness.
3. In response, the state through learned prosecution Counsel, Mrs. Gitau submits that the provisions do not apply where a witness volunteers evidence.
4. On her part, Evelyn states that she was married to the accused before the incident herein under Kamba customary law. She however goes on to say that no ceremonies were conducted and there was no dowry.
5. That they stayed together for 9 years and had 2 children. That after the incident, she ran away and got married elsewhere.
6. On his part, the accused stated that Evelyn was his wife from the year 2002 to 2013. He agreed that no ceremonies were conducted and they only did friendship. After his arrest, she ran away and got married elsewhere.
7. In rejoinder, Mrs. Gitau submitted that there was no marriage between the two.
8. On the other hand, Mr. Makau submitted that the two lived as husband and wife and have not divorced by virtue of Evelyn running away and getting married to another.
9. The capacity of a spouse as a witness in criminal proceedings is provided for in section 127 (2)(ii) of the Evidence Act as follows;

“(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness of the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that:

(i)

(ii) Save as provided in subsection (3), the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged”

(iii).....

Sub section (3) of the same section is not applicable in this case.

10. Section 127(4) defines “husband and wife” as follows:

“(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.”

11. From the submissions of the various parties herein, ***the issue which must be determined is whether Evelyn is a wife of the accused***. To start with, the burden of proving the existence of marriage between the accused and Evelyn is on the defence.

12. Both the accused and Evelyn are in agreement that the relevant ceremonies under Kamba customary law were never performed. There is therefore no basis to conclude that there was a valid Kamba customary marriage.

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

14. 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.

15. Halsbury’s Laws of England 3rd Edition Vol. 19 Par 1323 says:-

“Presumption from Cohabitation

Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary.”

16. In this case, apart from what Evelyn and the accused have stated, there is really nothing to enlighten the Court on the circumstances of their cohabitation.

17. In a nutshell, the information before Court is too scanty to safely conclude that there was a presumption of marriage between Evelyn and the accused.

CONCLUSION

18. The totality of the foregoing is that there is no proof of marriage. Evelyn is therefore competent to testify.

SIGNED, DATED AND DELIVERED THIS 24TH DAY OF SEPTEMBER, 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE