



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTOR

versus

GEORGE MWANGI KABIRA.....1st ACCUSED

KENNETH KIMATHI KARIUKI.....2nd ACCUSED

DANIEL KOOME MARETE.....3rd ACCUSED

RULING

1. This is a Ruling of a trial within a trial. The issue for determination is whether Grace Waruguru Mwai (P W 14) is competent to testify in this matter in view of the provisions of **Section 127 of the Evidence Act Cap 80**. Section 127 of the Evidence Act is in the following terms:

(2) 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 the 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.

(3) 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 –

(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.

(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

2. George Mwangi Kabira (1st accused) is charged together with his two co-accused with the **offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of that offence are that he and his co-accused on 27th June, 2012 at Mwireri Village in Laikipia County within the Republic of Kenya murdered Josphat Maina Kamura.

3. Although that offence occurred in the year 2012 prosecution’s case did not commence until October 2016. Since that date the prosecution has called a total of thirteen witnesses. The fourteenth witness that prosecution wished to call is called Grace Waruguru Mwai (**Grace**). The accused, and more particularly the 1st accused, objected to her testifying on the basis that she was his wife and that he had not consented, as provided under **Section 127 of Cap 80**, to her testifying.

4. Grace, in the trial within a trial stated under oath that

“I am not married ‘saa hii’ (right now). I was married to George Mwangi (1st accused) but [we] are now separated”.

Grace further stated that she and the 1st accused had not under gone any traditional rites of marriage. They had lived together for 10 years. They were blessed with two children. But they separated, due what Grace termed as difficulties. They however according to her, had not been divorced but she was emphatic and even shook her head to emphasis that 1st accused was not her husband.

5. Grace on being cross examined stated that she had been arrested by police in order to get her to record a witness statement. It is not clear what she meant that she was arrested because she did not elaborate other than that she said she was placed in the police cell. She also stated that she was forced to attend court on 20th June, 2017.

6. The 1st accused stated under oath that Grace was his wife of 10 years. They were blessed with two children with the first born being named after his father Lazarus Kabira and the second born being named after Grace’s father Samuel Mwai in keeping with the Kikuyu custom. That when they were married they went to visit the parents of Grace who gave them their blessings. The 1st accused denied that he was separated with Grace.

7. On being cross examined 1st accused said that he married Grace according to the Kikuyu Custom but that they did not undertake any rites under that custom nor did they marry in church.

8. Learned Counsel Mr J.M.Mwangi for 1st accused, while being supported by counsels Mr Mwangi Kariuki for 2nd accused and Mr Chweya for the 3rd accused, submitted that Grace was not a competent witness in this case in the absence of her husband’s (1st accused) consent. That since no divorce proceedings had been initiated there was still a marriage between them and the provision of **Section 127 Cap 80** applied. Learned Counsel submitted that:

“If two parties live together and get children that becomes a marriage both under customary [and] also under common law, also under the doctrine of presumption of marriage. Even the long period of separation does not amount to a divorce”.

9. Learned Principal Prosecuting Counsel Mr. Tanui submitted that there was no marriage between Grace and the 1st accused since both of them had acknowledged that there was no formal or customary marriage.

ANALYSIS AND DETERMINATION

10. The contention of the 1st accused is that Grace is his wife and he was unwilling to give consent, as per **Section 127 of Cap 80**, for her to testify in this case. 1st accused supported that denial of consent on the basis that they had cohabited together for ten years and were blessed with two children and were therefore husband and wife.

11. Until the enactment of the Marriage Act whose date of commenced was on 20th May, 2014, marriage amongst Africans was regulated under the African Christian Marriage Act and Divorce Act Cap 151 (now repealed) and under the parties respective tribal customs. According to the 1st accused and Grace their marriage (if one can call it so) was not celebrated in a church as provided under the repealed **Cap 151** and also nor was it celebrated under the Kikuyu Custom, their respective tribe. Learned Counsel for the 1st accused hinted that their marriage was under the ‘doctrine’ of presumption of marriage. Is it indeed a doctrine. I am not certain about that. Justice S. Chitembwe had occasion to discuss the presumption of marriage in the case **MILENA BORA V LIANA TAMBURELLI [2016] eKLR** where he stated:

“Clear to me that due to her alleged long period of cohabitation with the deceased, the objector would like to be presumed to be the deceased’s second wife. In the objector (sic) would like to be presumed to be the deceased’s second wife. In the case of HARTENSIAH WANJIKU YAWE VS PUBLIC TRUSTEE, CA Civil Appeal No. 13 of 1976, the court stated as follows on the issue of presumption of marriage.

“Long cohabitation as man and wife gives rise to a presumption of marriage and that only cogent evidence to the contrary can rebut such presumption”.

Similarly, in the case of **MARY WANJIRU GITHATU V ESTHER WANJIRU KIARIE CA CIVIL CASE NO. 20 OF 2009 (ELDORET)** Justice Bosire J.A stated as follows:

“In the circumstances where parties do not lack capacity to marry, a marriage may be presumed if the fact and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife”.

The court also stated the following:

“It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognised form of marriage, then a presumption of marriage arises. If the woman is left stranded either being cast away by the “husband”, or because he dies, occurrences which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband”.

12. What is clear from the above discussion by Justice S. Chitembwe is that presumption of marriage occurs when, firstly a party seeks the court to so presume, and secondly when a party is seeking relief to obtain inheritance or in matrimonial property action. However when it comes to Section 127 of Cap 80, the Section itself defines who is a ‘husband’ and a ‘wife’. For clarity I will again reproduce **Section 127 (4) of Cap 80**.

“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”. (emphasis mine)

13. Grace in her testimony when asked if she was married she responded partly in Swahili saying:

“I am not married saa hii (right now)”.

She continued to say that she had been married to 1st accused but was now separated from him. The 1st accused in response to cross examination stated that he married Grace according to Kikuyu customs but on being questioned further said that they did not undertake the traditional rites of Kikuyu marriage and they were not married in church.

14. That evidence juxtaposed with the provisions of Section 127 (4) brings out a different picture to that which was argued by the 1st accused. Subsection (4) of Section 127 in the relevant portion provides:

“..... which by law binding during the lifetime of both parties”.

15. The type of relationship which both Grace and the 1st accused were in was not one which by law was binding during their lifetime. It is clear that there would be no impediment, in law, which would prevent either Grace or 1st accused entering into a marriage with other persons because their union is law is not binding for their lifetime. Simply put their relationship was a ‘come we stay’ relationship.

16. I have considered the authorities cited on behalf of the 1st accused namely **JOSEPH MUNYOKI KIMATU – V- REPUBLIC [2014] eKLR, JULIUS MWITA – V- REPUBLIC [2003] and REPUBLIC –V- JACKSON NGARA NDERITU [2016] eKLR.** In those cases the fact that there was a marriage binding in law was not in contest. It follows they were not useful in the determination of the issue in this case but they indeed correctly expounded the law as provided under Section 127 of Cap 80.

17. To underscore the necessity of complying with customary rites of marriage I shall refer to **Section 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 provisions of Section 43 and 44 are fulfilled. I will reproduce those Section for clarify below.

Governing law for customary marriage.

Section 43:

(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.

Section 44 Notification of customary Marriage:

The parties to a Customary Marriage shall notify the Registrar of such marriage within three months of completion of the relevant ceremonies or steps required to confer the status of marriage to the parties in the community concerned

Registration of Customary Marriage

Section 55

(1) Where the parties to a marriage under Part V have completed the necessary rituals for their union to be recognised as a marriage under the customary law of any of the parties both shall apply to the Registrar within six months of their marriage for a certificate and both shall appear in person before the Registrar to be issued with the

certificate of marriage.

(2) Where the Registrar is satisfied that the parties to a marriage under Part V have complied with the provisions of this Act, and the parties have appeared before him in person, the Registrar shall register the marriage and issue the parties with a certificate of marriage.

18. The above Sections only go to show that where parties alleged they entered into a customary marriage there is orderliness in such a marriage. That is for example if dowry is payable then proof of such payment should be availed. That was not the case for Grace and the 1st accused. 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 repercussion on either Grace or 1st accused. No wonder Grace said that she was not married ‘right now’ to 1st accused.

19. It is because of the above finding that I declare that Grace Waruguru Mwai is a competent and compellable witness in this case.

Dated and Delivered at Nanyuki this 2nd August 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

George Mwangi Kabira : 1st Accused

Keneth Kimathi Kariuki :2nd Accused

Daniel Koome Maret: 3rd Accused

For 1st accused

For 2nd Accused

For 3rd Accused

For state:

Language

COURT

Ruling delivered in open court

MARY KASANGO

JUDGE