



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NUMBER 7 OF 2014

REPUBLICPROSECUTOR

VS

JACKSON NGARA NDERITU.....ACCUSED

RULING

The accused in this case faces the charge of murder contrary to section 203 as read with section 204 of the Penal Code.^[1] It is alleged that on the 1st day of March 2014 at Gakanja Village, Endarasha Location within Nyeri County murdered **Philip Irungu Muturi**.

Hearing commenced before me on 18th July 2016 when the prosecution called its first witness a one **Purity Wambui**. Immediately after the said witness was sworn and before she could commence testifying counsel for the accused **Mr. Njuguna Kimani** raised an objection stating that the said witness is a wife to the accused and therefore not a competent witness to testify for the prosecution. Counsel premised his objection on the provisions of section 127 of the Evidence Act^[2] and also cited the case of *Norman Ndirikan Mungai & Another vs Republic*^[3] where **Makhandia J** (as he then was) ably discussed the provisions of section 127 (2) (ii) of the Evidence Act^[4] and held that a wife is not a competent witness to testify against her husband. The learned judge correctly held that the said provisions are couched in mandatory terms. Section 127 (2) of the Evidence Act^[5] provides as follows:-

“ 127(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), 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.

(b) With offence under the Sexual Offences Act, or

(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.

In response to the said objection, the prosecution did not argue or prove that the fact of death the subject of the charges falls within the exceptions provided under section 127(3) of the Evidence Act.^[6] As provided under section 127 (3) cited above, it was therefore necessary to obtain the consent of both the accused and the said witness before putting her into the witness stand to testify against the accused who is her husband. Failure to take this precautionary measure offends the above clear and mandatory provisions of the law and as such I find that she is not a competent witness for the prosecution. A similar position was reiterated by the court of appeal in *Joseph Munyoki Kimatu v Republic*^[7]

Counsel for the DPP argued that article 159 (2) (d) of the constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of section 127 cited above are very clear on the exceptions under which spouse can testify against his or her spouse. The prosecution cannot seek refuge under Article 159 (2) (d) of the constitution under the present circumstances in view of the mandatory and express provisions of the above sections.

It has been long undisputed that at common law a spouse was incompetent to give evidence at a criminal trial against his or her spouse. The various authorities supporting that proposition are detailed in the judgement of Lord Wilberforce in *R v Hoskyn*.^[8] Guided by the above clear provisions of the law and relevant decided cases, I find that PW1 is not a competent witness for the prosecution and her evidence cannot be received in this case. I therefore uphold the preliminary objection raised by the defense counsel.

Signed, Delivered and Dated at Nyeri this 28th day of September 2016.

John M. Mativo

Judge

^[1] Cap 63, Laws of Kenya

^[2] Cap 80, Laws of Kenya

^[3] Criminal Case No. 61 of 2008

^[4] Supra

^[5] Supra

^[6] Supra

^[7] {2014} eKLR - Nambuye JA, Kariuki JA & Mohammed JA

^[8] [1979] AC 474, 484-6 (Lord Wilberforce).

