



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL CASE NO. 26 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

LUCY WANGARI MATHENGE.....ACCUSED

RULING

LUCY WANGARI MATHENGE, is before this court on the information of the Honourable Attorney General, to face a charge of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars of the offence are that on the 7th day of April 2009 at Wiyumiririe farm in Laikipia East District within the Rift Valley Province, she is alleged to have murdered James Maina.

On 9th November 2010, Miss Ngalyuka, learned Senior State Counsel, sought for leave from this court to summon the accused's husband to testify against her. Mr. Njuguna Kimani, learned advocate for the accused, opposed the application on the ground that it is contrary to the provisions of *Section 127(3)* of the Evidence Act. This ruling is the outcome of the aforesaid application. It is the submission of Miss Ngalyuka that the accused's husband is a compellable witness under *Section 127(3)(c)* since deceased (victim) was their child. Mr. Kimani was of the view that the section only applies to a situation where the victim is a child of either of them and not a situation where the victim is their common child.

I have carefully considered the rival submissions. There is no dispute that James Maina, deceased, was a child born out of the relationship between the accused and the witness sought to be introduced. The duo are husband and wife. *Section 127(3)* of the Evidence Act provides as follows:

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 an offence under Chapter XV of the Penal Code (which relates to certain offences against morality);

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.”

The victim in this case was the child of the duo. The accused has been accused for the murder of James Maina. Under *Section 127 (3)(c)* of the aforesaid Act, it is obvious that the husband of the accused is a competent and compellable witness. In my view, it does not matter whether the victim was their child in common or for either of them. The accused's person's objection can only be sustained if the case fell within that defined under *Section 127(2)*. The aforesaid sub-section provides as follows:

“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.”

In the end I see no merit in the objection. It is overruled. Consequently the prosecution is granted leave to summon the accused's husband to testify as their witness.

Dated and delivered at Nyeri this 25th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Makura for the State and Mr. Njuguna Kimani for the accused.

COURT: This case is fixed for hearing on 6th July 2011.

J. K. SERGON

JUDGE