

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Case 29 of 2008

REPUBLIC PROSECUTOR

VERSUS

JUDITH NANCY GACHERI MWANGI ACCUSED

RULING

The accused, Judith Nancy Gacheri Mwangi is charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. During her trial, she objected to one witness by the name of Charles Mwangi Kinyua giving evidence on the basis that he was her husband. Section 27 of the Evidence Act Cap 80 provides that a husband or a wife of one charged with the criminal offence is a competent witness for the defence;

“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; or*
 - (b) with offences 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,*
- (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.”*

Because of that objection by the accused against the court receiving the evidence of Charles Mwangi Kinyua who was to be the prosecution’s witness, I ordered that there be a trial within a trial to determine whether the said Charles Mwangi Kinyua was a husband of the accused. In evidence in support of her claim, the accused said that Charles Mwangi Njine was her husband. It is interesting to note that she called him Njine rather than the name he himself gave, Kinyua. She said that the said Mwangi was her husband and that he had paid part of the dowry according to the Kimeru custom called “*Mwati*” to her mother. At first the accused said that “*Mwati*” is a sheep but later she was not sure whether it was a sheep, a goat or a cow. She said that she went into Mwangi’s house on 26th July 1999. Thereafter, in that

year, Mwangi went to her mother's home to pay dowry. That her mother requested Mwangi to build her a house which he did and spent Kshs. 130,000/=. This was to be part of the dowry. The accused said that Mwangi comes from Nyeri Tetu but she was not aware of the name of his village. That she and Mwangi had built a house in a shamba of Mwangi's parents. The two were blessed with a baby girl Faith Wanjiku who was born on 14th February 2006. After attending her mother's home, she and Mwangi had a ceremony in Nkubu where they resided together which was a ceremony to welcome her mother to their home. At that ceremony they slaughtered a goat and made a cake for her mother. She referred to a picture which showed her mother, Mwangi and herself. That picture was not produced in evidence because the photographer was not called. At that ceremony, there was also present there her uncle Francis Mburugu. Francis Mburugu is a brother to her mother. The ceremony took place in August 2007. On being cross examined by the learned state counsel, the accused said that she got married to Mwangi in 1999. She first saw the mother of Mwangi in March 2001. She last saw her, the mother of Mwangi, when they visited her home during Christmas in 2007. She however was unable to give a name to the village where the mother of Mwangi comes from. Under cross examination, she reconfirmed that the dowry, "*Mwati*", was paid by Mwangi the equivalent of Kshs 15,000/= to her mother in 1999. It was given to her mother because her father was deceased. Her father, however, had a surviving brother but who died in the year 2006. At the ceremony which she said was held by her and Mwangi at Nkubu, they had invited her mother and Mwangi's mother. Mwangi's mother was unable to attend. On being questioned why the surviving sister of her father did not attend that ceremony, she stated that on the material day, she was unwell. That although Mwangi was a Kikuyu by tribe, their marriage ceremony was conducted according to the Kimeru custom. She stated that when they got married she stayed a long time without conceiving and as a result Mwangi summoned her mother and brothers and said to them that the accused had refused to have his children. It was thereafter in the year 2006 that they were blessed with a child. Second witness was the mother of the accused. On being questioned whether she knew the second name of Mwangi, she said that she did not know it. She however said that Mwangi and the accused got married according to the Kimeru custom and to that end she received the dowry that is, "*Mwati*" and a pot of honey. Further Mwangi constructed a house for her. That he built a wooden house. When Mwangi brought the dowry, present was herself and her brother Francis Mburugu. She however confirmed that Mwangi did not bring the dowry with his parents or elders. Thereafter, instead of her going to Mwangi's home, Mwangi made a party for her in his compound. She also referred to the photograph showing that ceremony. The party, she said, was in her honour. On being cross examined by the learned state counsel, at first this witness refused to acknowledge that there are relationships that are called "*come we stay*". On being pressed, she responded by saying that she had never heard of such relationships. She further stated that once the "*Mwati*" is paid, the couple is regarded as having being married. She did accept it is the procedure that elders must always be present when the dowry is agreed. She further said that Mwangi, when he came to pay the dowry did not come with his relatives. That she received the dowry together with her brother Francis Mburugu and that she did not wish to involve her late husband's family. On being pressed, she was unable to say when the dowry was paid. She however said that the accused lived with Mwangi for a long time before Mwangi came to her home to pay dowry. She also stated that it was at the party held in her honour that she requested Mwangi to construct a house for her. Again she accepted that the dowry negotiations under the Kimeru customs are undertaken by the parents of the couple. On being asked about the party held in her honour, she contradicted what the accused said by saying that her late husband's sister was present in that party. The third witness was Francis Mburugu. He confirmed that Mwangi was married to the accused according to Kimeru custom. That he had paid Kshs. 15,000/= to pay "*Mwati*" and had agreed to build a house for his sister. He also held a party to welcome his sister to their home. He too confirmed that Mwangi's parents did not attend the dowry negotiation. Present were only the accused mother, her family and himself. The brothers to the accused father although alive at that time they lived far away and could not therefore attend the dowry negotiations. He too was unable to say the village from where Mwangi comes from. The fourth witness was the sister to the accused person. She said that she knew Mwangi by the name he is referred to as *Baba Faith*. She knew that the accused and Mwangi were friends from 1999. She said that Mwangi did not go to pay the dowry to the accused parents in 1999. At that time, the accused and Mwangi were merely friends. This witness contradicted the other witness when she said that when Mwangi gave "*Mwati*" both brothers of her late father were dead. The state called Charles Mwangi Kinyua as a witness. He said that he was a black smith residing at Nkubu and was not married. He said that the accused was a friend they got to know each other in 2005. At that time she was a bar maid and he used to

patronize the bar where she worked. He admitted that he went to the accused parent's home but denied that there were negotiations of dowry that took place. Even up to the time that the accused gave birth to their daughter they were living apart. He denied that he had built a house for the accused mother. He even said that he did not know the accused mother by name but only by physical appearance. The ceremony referred to by the accused and her witnesses he said that it was the accused birthday party which she requested him to hold outside the compound where he had rented a home because the accused's compound was too small. He denied that the party was to welcome the accused mother. It is clear from the evidence that was adduced before court that there is no clear evidence to prove that a marriage took place between the accused and Mwangi. There were just too many contradictions to lead this court to find otherwise. There is first of all the contradiction of when the dowry was paid, there is contradiction of whether or not the brothers of the late father of the accused were alive or death when the dowry was paid. There is also the disturbing fact that the accused does not know the full names of Mwangi she continually refer to him as Mwangi Njine. He, on the other hand, said that his name was Mwangi Kinyua. He was not even cross examined by the accused counsel in respect of the difference in the name. I formed the opinion that the accused was untruthful. All in all, there is no basis to find that accused was married to Charles Mwangi Kinyua. The finding of this court is that the accused had failed to prove that Mwangi was her husband as required by Section 127(4) of the Evidence Act. Accordingly, the court finds that Charles Mwangi Kinyua is a competent and a compellable witness to give evidence on behalf of the state.

Dated and delivered at Meru this 25th September 2009.

MARY KASANGO

JUDGE