

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
Criminal Case 25 of 2005

REPUBLIC.....PROSECUTOR

V E R S U S

NEEMA MWANDORO NDURYA.....ACCUSED

R U L I N G

On 3rd April, 2006 the prosecution called a witness and no sooner had he taken the witness stand than the learned counsel for the accused person raised an objection arguing that the would-be witness is the husband of the accused counsel submitted that only with the accused person's consent can the witness testify against the former and that no such consent had been given. In response learned counsel for the state argued that the witness and the accused are divorced. He further submitted that even if they are married, the witness can nonetheless testify against the accused person since she has been charged with an offence involving a child of the marriage.

I have considered these arguments. To begin with, it was for the defence to establish the existence of a marriage between the accused and the intended witness.

Whatever the case, as a general rule all persons are competent witnesses unless, of course the court considers that they are prevented from understanding questions put to them or from giving rational answers to those questions by reason of being of tender years, old age or disease.

However, in criminal proceedings a spouse is both competent and compellable witness for the prosecution and defence without the consent of the spouse charged where the offence in question is

- (i) bigamy, or
- (ii) offences against morality, such as rape, indecent assault, defilement unnatural offence, incest etc; or
- (iii) 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.

Only in the three instances enumerated above can a spouse testify against another spouse.

The issue in the instant case being the murder of the accused person's baby, if the intended witness is the former's husband then he is competent to testify. For that reason it is ordered that he will testify for the prosecution.

Dated at Malindi this 10th day of April, 2006.

W.OUKO

JUDGE