



**Mukangu v Republic (Criminal Case 79 of 2018)
[2024] KEHC 4883 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 79 OF 2018
EM MURIITHI, J
APRIL 18, 2024**

BETWEEN

AMOS KIMATHI MUKANGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a notice of motion under certificate of urgency dated 12/4/2022 pursuant to Section 127(2)(ii) of the *Evidence Act*, the applicant seeks that, “The Honorable court be pleased bar one Rosemary Kawira Muthee from testifying in this matter against the accused.”
2. The application is premised on the grounds that the applicant and Rosemary Kawira Muthee are married and blessed with one issue. The accused learnt that his wife is a prosecution witness and she had been prepared to testify against him in this matter. The applicant has been advised by his counsel that his wife is not a competent and compellable witness to testify against him, and he urges the court to grant the orders sought.
3. The accused swore a supplementary affidavit on 4/3/2024 in support of his application.
4. The respondent opposed the application vide a replying affidavit sworn by Cpl Kenston Miriti, and the investigating officer herein on 11/10/2022. He avers that during the conduct of their investigations, they found out that Rosemary Kawira Muthee and the accused dated, and as a result, Charlton Karlin was sired in 2014, and the accused also has children with other women. Rosemary and the accused lived in the same neighbourhood namely Maundu located in Tigania West. They found out that Rosemary and the accused were not married and there was no traditional wedding ceremony which was conducted. The accused and his relatives have never visited Rosemary’s home in an official capacity to ask for her hand in marriage and they have not sworn an affidavit to show that they are married. The accused and Rosemary never lived together during the course of their relationship although she would



visit him on weekends, and she never met the friends of the accused. The accused has not included Rosemary and her son as dependants in his NHIF card. The accused has never given any money to Rosemary for maintenance, and the two are only co-parents since there is no proof of marriage.

5. The application was urged orally in court and ruling reserved.

Analysis and Determination

6. The sole issue for determination is whether Rosemary Kawira Muthee is a competent and compellable witness for the prosecution.

7. Whereas the prosecution contends that there is no marriage between Rosemary Kawira and the accused, the accused is adamant that Rosemary is his wife and therefore she cannot testify against him.

8. Section 127 (2) of the *Evidence Act* provides that,

“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.”

9. Husband and wife are respectively defined under Section 127 (4) of the *Evidence Act* to mean 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.

10. In *Julius Mwitwa Range v Republic* [2003] eKLR, the Court of Appeal (Tunoi, O’Kubasu JJ A & Onyango-Otieno Ag JA) upheld the trial court’s decision to disallow a wife to testify against her husband, where it was established that they were still legally married as dowry had been paid according to Kuria customs, notwithstanding that they were living separately.

11. While the accused has referred to Rosemary as his wife in his statement dated 26/8/2018, she referred to the accused as her fiancée in her statement dated 8/9/2018 and affirmed that she and the accused lived together in a rented house at Karumanthi area within Makutano.

12. Section 6 of the *Marriage Act* provides for kinds of marriages as follows:-

“(1) A marriage may be registered under this Act if it is celebrated— (a) in accordance with the rites of a Christian denomination; (b) as a civil marriage; (c) in accordance with the customary rites relating to any of the communities in Kenya; (d) in accordance with the Hindu rites and ceremonies; and (e) in accordance with Islamic law. (2) A Christian, Hindu or civil marriage is monogamous. (3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.”

13. Section 43 of the *Marriage Act* provides for governing law for Customary marriage as follows:-

“(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.”

14. As the person alleging that there existed a marriage between him and Rosemary Kawira Muthee at the material time or at all, it behooved the accused to prove that he was married to her by adducing evidence in the form of a marriage certificate, a sworn affidavit or proof of payment of dowry. The presence of a child sired by the accused and Rosemary Kawira Muthee does not bestow upon the parties an automatic right to be recognized as a couple.
15. This court notes the case of *Murui v Republic* (Criminal Case E021 of 2021) [2022] KEHC 433 (KLR), where the court (L.W Gitari J) held that:

“The privilege of a spouse not to testify against a spouse can only stand when there is proof of a marriage relationship. The marriage must be subsistent at the time of the alleged offence to which the spouse seeks to give her testimony.”
16. This court finds that the accused has not established that he was married to Rosemary Kawira Muthee at the material time or at all, to enjoy the privilege illustrated hereinabove.
17. It is this court’s finding that Rosemary Kawira Muthee is a competent and compellable witness in line with the provisions under Section 127 of the *Evidence Act*, and thus she can be made to testify against the accused on behalf of the prosecution.

Orders

18. Accordingly, for the reasons set out above, this court finds the application dated 12/4/2022 to be without merit and it is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

Appearance

Ms. Rita for the ODPP

Kiogora Mugambi for Accused

