



**Republic v Lwande (Criminal Case E011 of 2023)  
[2023] KEHC 21327 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21327 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E011 OF 2023  
WM MUSYOKA, J  
JULY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MOSES QKEEN LWANDE ..... ACCUSED**

**RULING**

1. Section 127 of the *Evidence Act*, cap 80, Laws of Kenya, provides for competency of spouses as witnesses in court proceedings.
2. The general principle, with regard to criminal proceedings, is stated in section 127 (2), that a spouse is a competent witness for the defence in any case where the other spouse is the accused, whether charged alone or jointly with another. The implication is that a spouse is not a competent witness for the prosecution in a case where the other spouse is the accused.
3. Under Section 127(3), the spouse is both a competent and compellable witness, both the prosecution and the defence, where the other spouse is the accused person in a select number of cases, namely (a) bigamy, (b) offences under the *Sexual Offences Act* (No. 3 of 2006), and (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 the instant case, this is not a case of bigamy or an offence under the *Sexual Offences Act*. I will have to consider whether it falls under section 127(3)(c) in respect of an act of omission affecting the person or property of the other spouse. The act in question should be the act of the other spouse, the one accused.
5. The prosecution seeks that I compel Agnetta Wafula to attend court and testify against the accused person, who is her husband.



The background is that the deceased sent a text message to the mobile phone of Agnetta Wafula, something which incensed the accused, who then killed the deceased.

6. The act in respect of which the accused is charged is the killing of the deceased. The deceased was not a spouse of the accused. The act of his killing did not affect the person or property of the spouse of the accused. The act or omission causing the death did not affect the person of Agnetta Wafula. It had something to do with her mobile phone, but the accused person did not do any act to her phone, leading to the death of the deceased.
7. Consequently, section 127(3)(c) does not apply in this case, to warrant Agnetta Wafula being compelled to testify, for she is not a compellable witness for the State in the circumstances.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 25TH DAY OF JULY 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Arthur Etyang, Court Assistant.**

**Appearances**

**Mrs. Chepkonga instructed by the Director of Public Prosecutions, for the Republic.**

**Ms. Nabalindo, Advocate for the accused person.**

