



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO 7 OF 2018**

**REPUBLIC.....PROSECUTOR**

**-VS-**

**MAXWEL MWAINGOLO.....ACCUSED**

**RULING**

1. This ruling is with respect to the objection raised by the accused person's Counsel, Mr. Wafula, with regard to the testimony of Amina Suleiman who he contends is the wife to the accused person therefore an incompetent witness in line with the provisions of Section 127 (3) of the Evidence Act, Cap 80 Laws of Kenya-

2. The Accused person was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the charge were that on 30<sup>th</sup> January, 2018 at Kiembeni Bombo Village in Kisauni Sub-County within Mombasa County, the accused person murdered Rama Kombo Malau.

3. The Accused person pleaded not guilty and the matter proceeded to trial. On 22<sup>nd</sup> February, 2021, the prosecution indicated that one of its witnesses is the accused person's wife and the accused person should give consent in order to allow her to testify as a prosecution witness. The accused person's Counsel indicated that they shall not be giving consent to allow the accused person's wife to testify.

4. On 19<sup>th</sup> March, 2021, the prosecution made an application to call an additional witness one Amina Suleiman wife to the accused person based on the provisions of Section 127 (3) of the Evidence Act which provides that, an accused person's wife is a competent and compellable witness where offence relates/affects the person of the intended witness. Prosecution Counsel relied on the Black's Law Dictionary definition of a person which defines a person as one who is subject to rights that can be legally ascribed to him or her.

5. Learned Counsel submitted that in the present case, the said witness recorded a statement with the police, the deceased is her biological brother therefore, her evidence will help the Court bring justice to the case. The prosecution relied on the provisions of Article 29 (d) of the constitution of Kenya, 2010 which entitles every citizen to the right not to be subjected to torture in any manner including psychological torture. It was the prosecution's case that the said witness is currently experiencing psychological torture.

6. Mr. Wafula, Counsel for the accused person submitted that Section 127 (3) of the Evidence Act lists the offences which a spouse can be a competent witness as follows;

**a) Bigamy;**

**b) Offences under the Sexual Offences Act; and**

**c) Children of the spouses.**

7. Learned Counsel submitted that the Court of Appeal in **Joseph Muchoki Kimatu vs Republic Criminal Appeal No. 130 of 2013** dealt with the question of whether a spouse can testify against their spouse. Mr. Wafula also relied in **Republic vs Dedan Ouma Sweta High Court Criminal Case no. 20 of 2018** and submitted that the witness proposed by the prosecution is not competent because the case doesn't fall under the exceptions under Section 127 (3) of the Evidence Act.

**Analysis and Determination.**

8. It is noteworthy that the said Amina Suleiman is married to the accused person therefore, there exists a husband and wife relationship

between the two of them as it has clearly been submitted by the prosecution Counsel and Counsel for the accused person. This leads to the conclusion that the presumption of marriage was proved as per the provisions of Section 127 of the Evidence Act which makes provisions for competency of parties and spouses. Section 127 (3) & (4) are more applicable in the present case, and they state 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 offences under the Sexual Offences Act (No. 3 of 2006);***

***(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.***

9. Section 127(4) of the Evidence Act state that: -

***“Under 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.”***

10. In view of the foregoing, it can clearly be deduced that an accused person’s spouse can only be permitted to testify against another in a criminal case where the deceased is a spouse of the accused, or is their child. In the case before us, the deceased was neither the accused person’s spouse nor his child but was the brother to his wife. I am guided by the Court of Appeal decision in **Simon Nchore Onyiego v Republic [2020] eKLR** where it was held that:

***“We think, with respect, that the learned Judge committed a fundamental error of law in permitting PW1 to be called as a prosecution witness against the appellant who was her husband. She just was not a competent witness against the appellant as the law expressly prohibited her being called at the instance of the prosecution. Section 127 of the Evidence Act, which deals with competency of spouses, provides in clear terms as follows;***

***“Section127***

***(2) 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.***

.....

***(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.”***

***Only if called by the accused person himself is a spouse competent to testify in a criminal trial unless the charge be one of bigamy or an offence under the Sexual Offences Act or in respect of an act or omission affecting the person or property of the spouse or the children of either of them, is the spouse both competent and compellable, and not otherwise. That is the thrust and meaning of section 127(3) of the Evidence Act and the same did not apply to the case before us.***

11. In my mind, Section 127 of the Evidence Act is meant to protect the sanctity of marital communication and confidences between spouses in recognition of the unique bond that exists between spouses where there is total vulnerability and an opening of hearts one to the other, therefore, allowing an accused person’s spouse to testify against the accused is equivalent to an attack on the right to accused persons to remain silent. In the present, case, the accused person categorically declined to give consent allowing his wife to testify against him. It is also clear that the accused person did not call his wife to testify against him.

12. The prosecution submitted that based on Section 127 (3) of the Evidence Act and Article 29 (d) of the Constitution of Kenya, the said Amina Suleiman should be allowed to testify since she recorded a statement with the police and she is the biological sister to the deceased. Counsel also submitted that the said witness is currently experiencing psychological torture. It is this Court’s holding that the prosecution ought to have filed a formal application and/or in the very least filed an affidavit sworn by the said Amina Suleiman deponing to these facts.

In the absence of the said affidavit the allegations by the prosecution are just mere averments and this Court shall treat them as such

13. As it is, this Court is incapable of ascertaining the kind of relationship that existed between the deceased and the said Amina Suleiman and whether or not she is being coerced to testify against her husband the accused person herein. I agree with the decision in **JULIUS MWITA RANGE -vs- REPUBLIC [2003] eKLR**, where the Court held that;

***“Elizabeth Nyaitoto was a marriage covered under section 127(4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness.***

***The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect.”***

14. Similarly, in the case of **Joseph Munyoki Kimatu v Republic [2014] eKLR** the Court of Appeal found that;

***“The fact of death or injury to one’s parent does not fall within the exceptions in section 127(3) of the evidence Act (supra). It was therefore necessary for the Court to obtain the consent of both the appellant and PW3 before putting PW3 into the witness stand to testify against the appellant, her husband. Failure to take this precautionary measures was fatal to the prosecution’s case.”[Emphasis added]***

15. For the reasons explained herein above it is my finding that the said Amina Suleiman is not a competent and compellable witness in line with the provisions under Section 127 of the Evidence Act Cap 80 Laws of Kenya, therefor, she cannot be made to testify against the accused person herein who is also her husband on behalf of the State.

16. The upshot is that this Court finds the application by the state to call Amina Suleiman as an additional witness is devoid with merit and is therefore dismissed. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED ONLINE BY MS TEAMS, THIS 1ST DAY OF JULY, 2021**

.....  
**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**