



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL REVISION NO. E026 OF 2021**

**LUCY WANGARI KIMANI.....APPLICANT**

**VS.**

**REPUBLIC.....RESPONDENT**

*(Being an application for Revision of the Ruling in Criminal Case No. 2892 of 2018*

*made at the Chief Magistrate's Court at Thika E. Riany, SRM dated 10<sup>th</sup> March, 2020)*

**RULING**

1. There is pending before the Thika Chief Magistrate's Court the trial of three accused's persons for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. One of those accused persons is **Lucy Wangari Kimani, (Lucy)**. On 5<sup>th</sup> March, 2020 the prosecution called one of its witnesses to testify, namely **Simon Kimani Wachira**. The proceedings of that day shows the learned counsel **Mr. Mwaura** for Lucy made the application for the exclusion of the said prosecution's witness. The totality of the application of **Mr. Mwaura** on that day is as follows:-

***"We are making an application the witness Simon Kimani Wachira and (sic) under Section 127 CPC (sic) so don't (sic) competent to testify before court as he is the husband of 3<sup>rd</sup> accused (Lucy)..."***

***There are no ongoing divorce proceedings."***

2. The prosecution responded to that application by opposing it on the basis that the section relied upon is not absolute and because there was no evidence of marriage. Prosecution without explaining why submitted that the charges Lucy was facing was likened to a charge of an assault by one spouse against the other.

3. The trial court delivered its Ruling on 10<sup>th</sup> March, 2020. By that Ruling, the trial court Magistrate referred to a question put to the witness, by the court, whereby that witness confirmed Lucy is his wife but that they were not living together. The trial court therefore made a finding in that Ruling, **"there was marriage between the witness and the third accused,"** Lucy. The trial court also noted that the witness stated that he was the complainant in the criminal case.

4. It was on the basis of that witness response to the court's question that the trial invoked the provision of **section 127(3)(c)** of the Evidence Act. The trial court finally made the following findings:-

***"The offence herein is robbery with violence contrary to Section 296(2) of the Penal Code. Further, if a complainant is not allowed to testify then there is no need for charging any accused person. With that, this Court does find Mr. Simon Kimani Wachira as a competent to (sic) testify."***

5. Lucy has applied to this Court for the revision of order of the trial court of 10<sup>th</sup> March, 2020. The application is by her advocate's letter dated 16<sup>th</sup> March, 2021. Lucy has presented the following grounds for revision:-

*a) That there is undisputed fact that the witness is the husband of the 3<sup>rd</sup> accused (Lucy);*

*b) That being her husband that witness is not competent or compellable witness for the prosecution;*

c) That the trial court in questioning the witness, on whether he should testify ceased being independent and impartial arbiter and erred to find the witness was the complainant;

d) That the witness and Lucy were living together.

6. Lucy has moved this Court under **Section 362** of the Criminal Procedure Code which provides:-

***“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”***

7. The respondent opposed this revision by citing **Article 50(1)** of the Constitution and on reliance of **Section 127(3)** of the Evidence Act. The respondent also opposed the revision on the grounds that spousal privilege did not extend to Lucy’s co-accused.

#### ANALYSIS

8. Lucy objected, before the trial court, to the receipt of the witness testimony who she alleged was her husband. **Section 127 (2)(ii)** of the Evidence Act prohibits compelling a person to testify as a witness at a criminal trial where a wife or husband is charged with a criminal offence, except it is on application of the person charged with the offence. **Section 127(3)** provides for circumstances under which such a spouse would be competent and compellable witness for the prosecution. This is what Section provides:-

***“In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution 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. In the case **REPUBLIC VS. MAXWELL KIPRUTO & 2 OTHERS (2019) eKLR** the court considered that provision and stated:-

***“...learned editors of Phipson on Evidence 16<sup>th</sup> Ed. (2005) write as follows:-***

***‘The restriction on the compellability of a wife or husband apply only while the marriage continues. A person who has been but is no longer married to the defendant can be compelled to give evidence as if they had never married. The restrictions remain despite a decree of judicial separation. A bigamous marriage is no marriage in this context. A court might also feel able to disregard a wholly sham marriage, where the only purpose was to avoid criminal responsibility and there was no intention of fulfilling the mutual obligations of care and support. The former privileges of a spouse not to disclose matrimonial communications or give evidence of marital intercourse were abolished by the police and criminal evidence Act 1984’.***

10. Lucy having moved the trial court for the exclusion of the witnesses’ evidence bore a burden of proof to prove the allegation that the witness was her husband. The burden of proof was on a balance of probability. In the Canadian case **R. V. LAYTON, 2009 SCC (CanLII) (2009) 2 SCR 540** the court had this to say on that standard of proof.

***“4. What does “proof on a balance of probabilities” mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”***

11. My perusal of the lower court’s proceedings fails to show what proof was brought to the attention of the trial court. What however I note is that the learned trial magistrate noted that the court put a question to the witness who confirmed that the 1<sup>st</sup> accused was his son and Lucy was his wife but that they were not living together. That is not reflected on the proceedings but I am prepared to accept that the witness stated so. On who is a husband and a wife is resolved by **Section 127(4)** of the Evidence act which provides:-

***“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”.***

12. Whether the witness when he acknowledge that Lucy was his wife was referring to a marriage which by law is binding during their lifetime is anybody’s guess. The reality however is that Lucy, the mover of the objection did not prove there existed a marriage envisaged by **Section 127(4)**. It is because of the above that I beg to differ with Lucy’s ground in this Revision that there is undisputed fact that witness is Lucy’s husband. I respond to that ground by stating that there is no evidence presented which proved the witness was Lucy’s husband. It follows that the provisions of **Section 127** of the evidence act do not apply to the case before Thika chief Magistrate’s court. There is

therefore no basis of revising the trial court's order in the ruling dated 10<sup>th</sup> March, 2020.

13. Before ending this Ruling, I need to state that I find no grounds that show the trial court was partial in stating the witness was complainant. Justice R. Nyakundi examined the law and authorities in his quest to determine who is a complainant and I am of the view that, because of Lucy's ground that the witness was not the complainant, it will be beneficial to consider what the learned Judge stated in the case **REPUBLIC VS. FAITH WANGOI (2015) eKLR** as follows:-

***“25. It therefore follows that on one hand the complainant is one who lodges a complaint with the police or any other lawful authority that some offence or criminal act has been committed.***

***The second limits of the word complainant and application of the meaning has been clearly restated by Judges of the High Court in Kenya.***

***In the case of REPUBLIC VS. MWAURA 1979 KLR 209 the High Court held that a complainant included the public prosecutor.***

***Further in RUHI VS. REPUBLIC 1985 KLR 373 the High Court held as follows:-***

***‘We must state at the onset that we are satisfied that the term complainant in Section 208(1) of the Criminal Procedure Code includes; the prosecution as well as the person so described in the particulars of the charge.’***

***26. The word complainant in Criminal Proceedings seems sometimes to cause misunderstanding in our courts as to exact meaning and application.***

***In the case of ROY RICHARD ELIMMA & ANOTHER VS. REPUBLIC CR. APPEAL NO. 67 OF 2002. The court of appeal in considering Section 202 of Criminal Procedure Code dealt with the issue of complainant and stated:-***

***‘The parties named in Section 202 for example, are all complainants and the accused person if the complainant is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “complainant” in this contest has been interpreted to mean the “Republic” in whose name all Criminal Prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic.’***

14. It also needs to be stated that Lucy inordinately, without explanation, delayed approaching this court for this Revision. She delayed for one year. Delay can defeat the ends of justice.

## **CONCLUSION**

15. In the end, there is no ground presented to this Court to justify the alteration or reversal of the trial court's Ruling of 10<sup>th</sup> March, 2020. The application for Revision by ***Lucy Wangare Kimani*** is dismissed.

**RULING DATED AND DELIVERED AT KIAMBU THIS 14TH DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Ndege

For the Applicants: No appearance

For the Respondent : Mr. Kasyoka

## **COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**