



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE (MURDER) NO. 11 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WESLEY PATRICK EYANAE.....RESPONDENT

JUDGMENT

1. The accused Wesley Patrick Eyanae was charged with the offence of **Murder Contrary to Section 203 as read with Section 204 of the penal code.**

The particulars of the offence are that on the 2/2/2018 at Shalom Village, Umoja Location in Rongai Sub-County within Nakuru County he murdered Gilbert Kipyegon Koech. He pleaded not guilty to the offence.

2. The prosecution called nine witnesses.

3. **PW1** Mary Wanjiku Chege described herself as wife to the accused, having known him for about two years and had sired two children together.

It was her testimony that on the material date, the 2/2/2018, she was with the accused, her husband, in their house. She then proceeded to testify against him, in respect of the murder charges facing the accused with whom they sired two children and proceeded to testify against the accused.

The accused in his defence confirmed that PW1 was indeed his wife with whom they had two children, but that at the time, they had differed, though still living together as husband and wife.

4. At this juncture, I am obligated to interrogate whether PW1 was a competent and compellable witness for the prosecution, and the fate of her evidence against the accused.

Both the prosecution and the defence counsel failed to submit on the question of the competence and compellability of a spouse to testify against the other in a criminal trial.

5. **Section 127 (2) of the Evidence Act** provides as follows:

“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 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 the section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;

6. The question as to whether the accused and PW1 were married does not arise here as both confirmed in their evidence that they were married to each other. It is therefore safe for the court to treat the accused and PW1 as having been married, and therefore a couple.

Section 127(3) provides for instances when a spouse is a competent and compellable witness for the prosecution without consent of the accused spouse. These include the offence of bigamy, offences under **Chapter XV of the penal code** (which relate to certain offences against morality) or in offences affecting the person, or property of, or children of the couple.

7. The offence facing the accused is not one of the above, being murder.

Due to the special relationship between a wife and husband, it is morally and legally unattainable that either is a competent witness against the other, unless upon application and consent of the accused spouse. There is a string of judicial decisions that uphold the above and the precautionary measures to protect the institution of marriage.

8. The **Court of Appeal in Joseph Musyoki Kimatu Vs. Republic (2014) e KLR** rendered that

“-----it was necessary for the court to obtain 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 measure was fatal to the prosecution case”.

Even when the wife and husband are separated, neither is a competent or compellable witness against the other, a position taken by the Court of Appeal in the case **Range Vs. Republic (2003) KLR 692**, and cited in the case **Prosecutor Vs. Dedan Ouma Sweta (2019) e KLR**.

9. Further, the **Court of Appeal in Kisumu in Julius Mwita Ranga Vs. Republic (2019) e KLR**, reiterated that evidence of a spouse against the other ought to be expulged from the record, and or quashed when it is taken without the consent of the accused spouse. See also **Republic Vs. Jackson Ngara Nderitu (2016) e KLR**, and **Republic –Vs- Calvin Okoth & Marryanne Mumbi (2019) e KLR**.

10. In the present case, the accused person did not apply or consent to his wife, PW1 to testify against him. No application was made to that effect.

Thus, without a doubt, unless the accused consents to his wife to testify against him in a criminal case, any evidence adduced by the wife ought to be quashed or expulged from the court record. That would however depend on the stage or level of the proceedings. In instances when the witness has not testified, and the fact of the relationship is brought to the court's attention, the said witness would be prohibited from testifying against the accused spouse.

11. Coming to the case before me, PW1 testified, and was cross examined. She had recorded a statement at the police station. Her evidence was substantively referred to and cited by other prosecution witnesses, notably the Investigating Officer (PW 8) who was lead to the scene of crime, the house of the accused by the wife. This lead to the alleged recovery of a radio from the couple's house upon allegation by the wife (PW1) that the accused had in his possession a radio that she alleged to have stolen or belonged to the deceased, and PW6, who testified that it had gone missing from his house.

12. Further it was PW1 who testified of a blood stained Tshirt that belonged to the accused in their house. Every other prosecution witness testified to having seen the said blood stained Tshirt in the accused's house.

In the circumstances, to attempt to interrogate the evidence further would be in contravention of the law as stated in **Section 127 of the Evidence Act**.

13. To that end, the only logical thing to do, upon considering the provisions of **Section 127 (3)** and the exemptions stated under **Section 127 (4)** which do not apply to the circumstances hereto, is to expulge the evidence of PW1 from the record. That I proceed to do.

14. What then would be the fate of the rest of the evidence by the prosecution witnesses?

I have stated earlier that the prosecution did not bring the salient facts under interrogation to the court's attention during the trial.

It is at the time of preparing this judgment that, upon reading through the totality of evidence, that I realised that indeed PW1 and the accused were a married couple.

15. I have also stated that steps direction the investigations took leading to the arrest and arraignment of the accused was at the direction of the accused's wife, PW1. It also became very clear that PW1 is the one who directed the police officers to arrest the accused as she called him to go home, where the police officers were waiting to arrest him. She too lead the police to their house where a radio, one of the items found in their house was alleged to have been the property of the deceased, and later a telephone handset allegedly recovered from the accused pockets.

16. I have further stated that the investigating officer (PW8) relied heavily on the statement of PW1 to mount a case against the accused, and the prosecution.

17. In the circumstance, to expulge the evidence of PW1 only will not suffice, as every other evidence by the prosecution witnesses substantively relied on PW1's statement and evidence against the accused.

The **Court of Appeal in the case Joseph Musyoki Kimatu (supra)**, rendered that evidence taken of a wife against the accused

husband dealt a fatal, blow to the prosecution's case.

17. Of importance here is that the conduct of the wife, PW1, removing of her household goods a day after the murder, with help of her brother, then calling the accused to go home, where the police were waiting to arrest him compounded with his own evidence in defence that he had a disagreement with the wife is sufficient to persuade me to find and hold that the evidence of PW1 dealt a fatal blow to the prosecution's case.

18. In the case **Prosecutor Vs. Dedan Ouma Sweta (Supra)**, Ochieng J rendered that depending on the stage of the trial when it is discovered that a wife has testified against the husband in a criminal trial without his consent, evidence may either be expunged from the record or the proceedings may be rendered fatally defective.

For this court to sustain the proceedings and proceed to analyse and evaluate the evidence of the rest of the prosecution witnesses would be prejudicial, for reasons stated above.

20. Consequently, I find and hold that the proceedings hereto are fatally defective and cannot be sustained against the accused person.

I proceed to acquit the accused for the offence of murder as charged.

The accused is therefore set at liberty unless otherwise lawfully held.

Orders accordingly.

Delivered, signed and dated at Nakuru this 2nd Day of April 2020.

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J.N. MULWA

JUDGE