IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 9 OF 2016

BETWEEN

SIMON NCHORE ONYIEGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Migori (Majanja, J.) dated 16th November, 2014

in

HCCR NO. 111 OF 2014

****

JUDGMENT OF THE COURT

The appellant **Simon Nchore Onyiengo** was arraigned before the High Court at Migori on a charge of murder. He denied the information that on or before the 18th day of September, 2013 at Nyamnini village, Bukira West Location, Kuria West District within Migori County jointly with others not before the court, he murdered **Andrew Chacha**.

The trial ensued before Majanja J who, after hearing seven prosecution witnesses and the appellant who gave an unsworn statement, found the offence proved, convicted the appellant and sentenced him to death.

Among the witnesses called by the prosecution was **Elizabeth Nyaboke Chacha (PW1)** who, by her own testimony and that of other witnesses including her mother, **Priscilla Osebi (PW4)** and her uncle **Peterson Mosoti (PW6),** was the appellant's wife. Indeed, the learned Judge accepted that PW1 was the appellant's wife and the two had two children.

Aggrieved by his conviction and sentence, the appellant preferred this appeal against both. In a Supplementary Memorandum of Appeal filed on 22nd October, 2019 by the firm of **Omondi, Abande & Company Advocates**, the appellant complained thus;

> ***"That the trial judge erred in law and in facts by convicting the appellant based on the testimony of PW1 who was the appellant's wife at the time of the commission of the offence contrary to the provisions of section 127(2)(ii) of the Evidence Act."***

That is the one ground that was argued before us by **Mr. Murunga**, the appellant's learned counsel who had previously filed written submissions. He submitted that as PW1 was the appellant's wife, she should not have been called as a witness in his trial unless he called her himself, which he did not do. The case did not fall under the exceptions in **section 127(3)** of the **Evidence Act** either. Counsel contended that without the evidence of PW1, there was not sufficient evidence that would have justified the appellant's conviction and he was entitled to an acquittal. He therefore urged that the conviction be quashed.

The respondent also filed written submissions. In his address before us, **Mr. Muia**, the learned Prosecution Counsel 1 indicated that even though the appellant and PW1 were separated, the marriage did not end, had not been dissolved and therefore subsisted. He conceded that PW1 should therefore not have been called as a prosecution witness and in so conceding agreed that the appeal should succeed but urged us to order a retrial.

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.

This special evidential rule 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. To breach that immunity would be to unleash an improper collateral attack on the right to accused persons to remain silent. It would be a dangerous assault on that notion were the matters heard and observed in the marital space to be used against spouses in criminal trials. The protection initially applied to monogamous marriages only but in Kenya the Evidence Act expands it to cover polygamous marriages such as that of the appellant and PW1. We note herein only that the language employed in **sub section (4)** referring to such marriages as marriages under *"native or tribal custom"* is plainly incongruous in a free, proud, independent and democratic nation.

Be that as it may, the prosecution should not have called and the learned Judge should not have allowed PW1 to testify. In ***JULIUS MWITA RANGE -vs- REPUBLIC [2003] eKLR,*** this Court approved of the action of the High Court Judge who did exactly that in a similar case;

> ***"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."*** (Our emphasis).

Given our finding on PW1's improperly admitted testimony, and considering that a life was lost, we think that this is a proper case for us to order a retrial. The offence is alleged to have been committed in September, 2013 and from the record the appellant was admitted to bail during the pendency of the trial. The time elapsed being relatively short, there is no reason to believe the prosecution, which seeks a retrial, will not be in a position to call the witnesses required should it proceed with the new prosecution. In short, we do not think that a retrial will occasion the appellant any prejudice, less still injustice.

In the result the appeal succeeds to the extent that the conviction is quashed and the sentence of death set aside. The appellant shall be presented before a judge of the High Court at Migori, other than Majanja J, within fourteen days of the date hereof for an expedited retrial on priority basis.

DATED and delivered at Kisumu this 31st day of January, 2020

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.