REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 88 OF 2012

REPUBLIC.....……….....PROSECUTOR

-VERSUS-

EMMANUEL TOIKAN MPAAYEI……...……ACCUSED

RULING

1. The accused was charged with the offence of Murder contrary to **Section 203 as read with Section 204 of the Penal code,** in that on the 6th November 2012, at Twenty Acres Village Niarege-Enkare location in Narok North District he murdered M L with others not before the court.

2. The prosecution called 4(four) witnesses in support of the charge. After close of its case, I was urged by the defence to find that the accused had no case to answer.

3. In his submissions, Mr. Ombati Advocate stated that the prosecution has not established a *prima facie* case to warrant the accused to be put on his defence He poked holes in the evidence stating that it was contradictory, and that it would be unsafe for the court to rely on a dying declaration that was not collaborated, and cited the cases of **Lichokitan Leswakeri -vs- Republic Criminal Appeal No. 520 of 2010 and Alex Mzee Landi -vs- Republic - Criminal Appeal No. 219 of 2007.**

4. The Director of Public Prosecutions(DPP) was of the contrary opinion. Mr. Motende learned state counsel urged that there was enough evidence to persuade the court to require the accused to defend himself.

5. I have considered the prosecution evidence.

PW1 Consolata Wambui Ngugi mother to the deceased was not at the scene of crime where it was alleged the deceased was assaulted with a *panga* and his legs and hands cut by the deceased.

She testified that the accused called her and told her that he had disciplined her son, the deceased, and later at the police station, it was her evidence that she found the deceased locked up in the cells yelling that he was in pain. She denied that the son was mentally unsound. She testified that the deceased told her that he was assaulted by the accused, his uncle and that she did not want to know or hear what happened from other people or neighbours who were at the homestead during the incident.

6. **PW2 – Joseph Mpaayei** was the father to the deceased. He too did not witness the assault as he was

away at Makindu. He termed the accused as his true son, but in reality was his younger brother. Upon cross examination, he acknowledged that his late son was mentally unsound but denied allegations that his two other sons **Reuben and Lasit** could have killed the deceased and further testified that he did not want to know what the investigating officer (PW4) found or what anybodyelse had to say as it was his wish that the family be left at peace after losing his son.

7. **PW3 Dr. Titus Ngulungu** produced his post-mortem report (PExt 1) on the deceased body. It is dated 12th November 2012. He formed an opinion that the cause of death was "***Head injury with hemorrhage from sharp/blunt head and leg trauma in keeping with homicide***." Upon cross examination, the doctor stated that on the deceased's body,

> ***"There were no signs of sharp injury on the head, and that the injury had some aspects of sharp trauma due to medical intervention."***

8. **PW4 was the investigating officer, P.C. Dan Opiyo**. He knew both the accused and the deceased before the incident. His evidence was that he had handled several complaints of causing disturbance by the deceased who he knew to have been mentally unsound, and that on the material day, it is the accused who called him to go to their homestead where he found the deceased tied with ropes. He did not find out who had tied him, and if he did, that information was withheld from the court.

His evidence was that the deceased was bleeding from the knee and claimed to have been assaulted by his two brothers Lesit and Reuben and his uncle, the accused. He did not mention any head injury nor did he mention or bring to court the murder weapon.

9. It was his evidence that he took the deceased to a dispensary after which he took two, the accused and deceased to the police station where he locked up the deceased in the police cells, and let go the accused after recording his statement.

It was his evidence that he wanted to arrest the deceased's two brothers Reuben and Lesit but they absconded. He did not tell the court what attempts he took to have them arrested.

10. On cross examination, the investigating officer testified that at the accused's homestead, the scene of crime, he found the accused's wife and houseboy but did not record their statements. He also did not say whether he found the murder weapon at the scene, or not.

11. It is upon the above evidence that the prosecution urged this court to find that the accused has a case to answer. On the other hand the defence has urged for an acquittal under **Section 306(1) of the Criminal Procedure Code.**

12. The deceased is alleged to have told his mother and father **(PW1 and PW2)** that he was beaten by his uncle the accused. On the day of the assault before he died while being operated at the hospital. No other person testified to that. None of the persons at the scene of crime, alleged to be the accused's homestead were called to testify.

It is on record that both parents testified that they did not want to hear anything from neighbours or any other persons who may have witnessed the incident that apparently lead to the death of their son. While the mother of deceased (**PW1**) denied knowledge that their son was of an unsound mind, the investigating officer **(PW4)** and his father (**PW2)** confirmed that the deceased was of unstable mind and had been under treatment at Mathare Mental hospital at two occasions. This is not to say that a person of unsound mind's life is not precious. It ought to be protected.

13. The investigating officer failed to record statements of those who were at the scene of crime yet he knew them. Other than the two parents who were not at the scene of crime, no other person testified as to what happened to their son, and who could have been liable. The eye witnesses were not brought to court

to testify. The assault/murder weapon was not recovered. No evidence was led as to who or why the deceased was tied with ropes and by who, leave alone who assaulted him.

14. **Dr. Titus Ngulungu(PW3)** who conducted the post-mortem did not authoritatively make a finding as to what weapon could have caused the injuries that caused the deceased's death. Upon cross examination he stated that there were no signs of a sharp injury on the head yet his conclusion was that the injury could have been caused by a sharp/blunt head injury. The investigating officer talked of seeing a bleeding knee, and never mentioned having seen a head injury when he found the deceased tied with ropes at the accused homestead.

15. **A dying declaration** by the deceased that he was assaulted by his uncle the accused was not collaborated at all. This may be so because the parents of the deceased (PW1 and PW2) did not want to be informed or hear what had happened that lead to his death by anybody else, including neighbours and family members including the accused's wife.

That in my view lead the investigating officer not to follow up to arrest the deceased's two brothers who absconded and was left with the accused at large whom he arrested after two weeks yet it was his evidence that the two brothers had assaulted the deceased.

16. I must state that the police investigation was very shoddy and too thin for any court to find anything sensible to require the accused person to answer to the charge. Knowing the deceased family as he told the court, he ought to have done a better job of finding out why the deceased was assaulted and by whom. He failed in his duties.

In the case **Ramanlal Trambaklah Bhatt -vs- Republic (1957) EA 334**, the court held that:

> ***"the question is whether there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence."***

17. The deceased's denying declaration must be viewed with a lot of caution especially when it is not collaborated, and more so when the father of the deceased(PW2) confirmed that his son-(deceased) to have been of unsound mind, and having been treated at Mathare Mental hospital on two occasions.

18. The Court of Appeal in **Lchokitan Leswakeri -vs- Republic – HCCR No. 122 of 2003** had the following to say - Paragraph 14:

> ***"---- A trial judge should appear on the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross examination, unless there is satisfactory collaboration."***

19. In the present case there was no collaboration at all as those who ought to have done so did not record any statements nor called to testify. In my considered opinion, there is insufficient evidence direct or circumstantial connecting the accused to the murder of the deceased - **Republic -vs- Kyalo Musili Musyimi (2016) e KLR.** In the result, this court is unable, from the prosecution evidence tendered, to place the accused on his defence as no *prima facie* case was established against him. A *prima facie* case under **Section 211 of the Criminal Procedure Code** is established when at the conclusion of the prosecution case, the evidence adduced is sufficient to require the accused to make an answer thereto - **Criminal Murder Case No.7 of 2013 Republic -vs- Dennis Muchra Muchiri (2016) e KLR.** It would be unsafe to put the accused to his defence solely on the uncollaborated alleged dying declaration which only the parents of the deceased heard and which were made in the accused's absence. **Oketh Okale & Others -vs- Republic (1965) EA 555**.

20. For the above reasons, the accused **Emmanuel Tokan Mpaayei** is hereby acquitted of the murder charge under **Section 210 of the Criminal Procedure Code.** He is let at liberty unless otherwise

lawfully held.

Dated, signed and delivered this 20th Day of June 2018.

J.N. MULWA

JUDGE