REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 73 OF 2015

REPUBLIC.....PROSECUTOR

=VRS=

EVANS ORERI MBEBI.....ACCUSED

RULING

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 8th April 2012 at Mongoris Sub-location in Nyamira District within Nyamira County, jointly with others not before court he murdered David Nyambega.

The accused pleaded not guilty to the charge. The prosecution then called five witnesses to prove their case but at the close of the case for the prosecution, Mr. Anyona, Learned Advocate for the accused, submitted that the prosecution had not established a prima facie case against the accused person sufficiently to warrant him to be put on his defence. Mr. Anyona submitted that none of the witnesses identified the accused as the person who assaulted the deceased. He stated that the only person who could have been an eye witness was Benard but the prosecution did not call him to testify. He contended that the evidence of Pw1 was not corroborated and the prosecution had not therefore proved its case beyond reasonable doubt and the accused should not be put on his defence.

Mr. Ochieng, Learned Counsel for the Prosecution submitted that the evidence was overwhelming. He submitted that Benard could not be called as a witness as he had fled this jurisdiction and the warrant of arrest issued by this court could not be executed. Counsel submitted that in any case his evidence was covered by other witnesses.

Section 306 (1) of the Criminal Procedure Code enjoins me to consider whether there is evidence the accused committed this offence before I can put him on his defence. The test of what constitutes a prima facie case was settled in **Bhatt Vs. Republic [1957] EA 332** where the court stated: -

> ***"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.***
>
> ***(ii) The question whether there is a case to answer cannot depend only on 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."***

In this case, this court must consider the evidence as a whole before putting the accused on his defence and part of the consideration must be whether there would be sufficient evidence to convict the accused were the court to put him on his defence and he elects to remain silent.

As properly submitted by Counsel for the accused person, there was no eye witness in this case. Of the three **"civilian"** witnesses, only Pw1 seemed to claim to know what had happened and what he told the court was what the deceased allegedly told him. He stated that when he went to the scene the deceased could talk and that he (the deceased) told him that the previous night he was walking home with one Benard when they were attacked by a group of people among them the accused. Pw3 claimed to have been told the same thing by the deceased when he visited him in the hospital. What we have therefore is a dying declaration. In **Choge VS. Republic [1985] KLR I**, the court held: -

> ***"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being at the time of making it, in a hopeless expectation of imminent death."***

I am not sure that the conditions set out in Choge's case were met in this case but we can take it that as the deceased died a few days after the attack, then he made the declaration when he was at the point of death and his mind was induced by the most powerful considerations to tell the truth. Be that as it may, this court must warn itself of the danger of relying only on that declaration to convict the accused person as the offence occurred at night and the deceased could not be cross examined on the issue of identification. I am guided on this issue by the decision of the Court of Appeal in **Aluta Vs. Republic [1985] KLR 543** where it held: -

> ***"2. It is generally speaking unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration."***

In **Kihara V. Republic [1986] KLR 473** the same court Stated: -

> ***"1. Even though there is no rule that a dying declaration must be corroborated, a court needs to caution itself that in order to obtain a conviction upon a dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place, the identification of the assailant and the weapon used."***

This court heard that the deceased was not alone when the attack which led to his death occurred. He was with a person called Benard. The said Benard was not called as a witness and although the prosecution alleges they could not find him, this court makes an inference that the reason he was not called was because his evidence would have been prejudicial to the prosecution's case. This witness would have confirmed the truthfulness of the dying declaration and would have been cross examined to test the evidence of identification. Without his evidence it would be unsafe to convict the accused person solely on the dying declarations.

Accordingly, I find it futile to put the accused on his defence. I enter a finding of not guilty and acquit him under Section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered in open court this 6th day of December 2018.

E. N. MAINA

JUDGE