



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Case 20 of 2007

REPUBLIC

VERSUS

TAUSI SAID HASSAN ACCUSED

RULING

1. The accused person herein, Tausi Said Hassan is charged with the offence of murder contrary to section 203 and 204 of the Penal Code. It is alleged that **“on the 16th day of April 2005 at Kathemboni Estate in Machakos District within Eastern Province, jointly with another not before court murdered Mwakavi Mumbua.”**

2. The hearing commenced before me on 3/6/2008 and the evidence was as follows:-

PW1, Maria Loko Wambua, PW2, Sylvia Mumbua, PW3 Winfred Ngina Munyao and PW5 Hamisi Said Hassan as well as the deceased and accused and were all within Zanze Bar, Eastleigh, Machakos on 16/4/2005 at about 7.30 – 8.30 p.m. when PW1 and one Seif, brother of the accused person picked a quarrel. The four witnesses all said that the cause of the quarrel was a statement that Seif made to PW1 that as an old woman she had no business being in a bar at that hour of the night. PW1 in her evidence said that she responded that even Seif’s mother goes to bars and that he had no reason to call her a prostitute as he apparently had.

3. It was the evidence of PW1 and PW2 that when Seif became violent, PW2 pulled PW1 out of the bar and walked her part of the way to her house but PW1 asked her to go and call her son, Chester and PW2 did so. PW1 in her evidence then said that the accused and her brother, Seif, followed her and beat her up but when her son Chester appeared, the two ran away. She went back to Zanze Bar and found her brother lying on his back 20 metres from the bar. She went to report to the accused’s mother, then went to sleep. The next day at 1.00 p.m, the deceased called for her and told her that Seif had kicked him in the stomach and he was not feeling well. He was taken to hospital but died on 18/4/2005 while undergoing an operation.

4. As for PW2, she said that when she was sent to call Chester, she did so and on her way to the bar, she met Maria, PW1, going home and then a short distance further she saw the deceased lying outside a kiosk. She helped him home and left him on a sofa before she left. She did not see him alive again.

5. PW3 on her part did not know what happened to the deceased on the material night because it was here evidence that the fight in the bar was between Seif and PW1 and the deceased was not involved in it. The next day however, she went to see the deceased who was her boyfriend’s brother and he told her that Seif had injured him in the stomach but did not tell her how the injury had been inflicted. She denied

the involvement of the accused in the fight at Zanze Bar.

6. PW5, who was the bar man at Zanze Bar said that when Maria went out with PW2, Seif followed her out, then the accused also went out and the deceased left last. That during the fight, the deceased only told Seif not to beat his sister but did nothing else. He did not know what happened after the deceased left the bar.

7. The evidence of PW4, John Mulwa, a watchman at Zanze Bar is crucial because as is apparent from the evidence of PW1, PW2, PW3 and Pw5, none of them saw any person assaulting the deceased but infact PW4 did. He said that at the material time, he was sitting outside the bar and saw Seif assaulting the deceased with his fist and feet. He intervened and held Seif and that is when the deceased ran away and when PW4 released Seif, the latter followed the deceased. The accused was not there according to PW4 and did not engage in the fight. PW4 did not know what happened to the deceased after he ran away but he was told that he died later.

8. PW6, Dr John Mutunga who performed the postmortem on the deceased's body found that the deceased had a recent surgical repair of his abdomen but had died of an infection in the gut and his abdominal cavity also had blood. That the infection was repaired otherwise had it been arrested early by surgery, it would have not have caused the death of the deceased.

9. The evidence of PW6 is consistent with that of PW1 who said that the deceased was taken to hospital the day after the alleged injuries and died while undergoing surgery in hospital.

10. Can this evidence be sufficient for me to say that the Republic has made out a prima facie case and that the accused should be put on her defence? I think not. I say this because at this stage, the Republic must show that there is an evidential connection between some act or omission on the part of the accused which then led to the deceased's injuries and thence his death. In this case, save for the fact that the accused was at Zanze Bar on the material night as were all the witnesses save PW6, it is unclear what she actually did to the deceased. PW1 is the only one who said that the accused joined Seif in beating the deceased but her evidence-in-chief on that point changed at cross-examination and again at re-examination. She said that the deceased told her so but later when her statement to the police was read to her, she confirmed that it was written as if she saw the accused hit the deceased and later she changed her story and said that the deceased in fact told her so. In any event, her evidence as I saw and heard it was rather fantastic and she was so inconsistent as to be incapable of being believed. What is true however is that she and Seif caused the tragedy that befell her otherwise innocent brother, the deceased, when they picked a drunken illogical quarrel.

11. The totality of the evidence before me leads me to believe PW2, PW3 and PW4 who all said that in fact Seif is the one who hit the deceased, in the stomach, and the injuries inflicted later led to his death as was confirmed by the doctor PW6. There is nothing before me to suggest that the accused alone or together with Seif caused those injuries. Her presence at the bar and the fact that she reacted when Maria, PW1 mentioned her mother as one who also goes to bars is not enough to lead me to conclude that she had a hand in the deceased's death. Even if she may have joined in assaulting Maria which is neither here nor there that fact has nothing to do with the charge before me.

12. In the end, there is no reason to find that the accused has a case to answer and she must be acquitted at this stage. She will be released unless she is otherwise lawfully held.

13. Orders accordingly.

Dated and delivered at Machakos this 12th day of **August** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr O'Mirera for Republic**

ISAAC LENAOLA

JUDGE