



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 91 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

ARAFAT DAUDI.....ACCUSED

SUMMING UP

The accused **ARAFAT DAUDI** is charged with the murder of **SONOSI YUSUF SONOSI**, contrary to Section 203 as read with Section 204 of the penal Code, Cap. 63, Laws of Kenya. The offence allegedly took place on 3/2/2005 at about 7.30p.m. at Kibera Makina, within Nairobi.

At the end of the prosecution case, during which they called 8 witnesses, the accused, through his defence lawyer, submitted that the state had not made a **prima facie** case to warrant putting the accused on his defence.

However, after reviewing the prosecution evidence and receiving and considering submissions from learned Counsel for both sides, this court found and held, on 1/7/2008, that prosecution had made a **prima facie** case and the accused had a case to answer, and he should prepare his defence case for hearing on 7/10/08.

On the 7/10/08, the accused, led by Defence counsel Mr. Kenyatta, gave an unsworn statement, and he called no other witness, apart from himself.

The gist of the unsworn statement by the accused was a denial of having committed the alleged offence of murder. He told the court that on the material date – 3/2/05 at 3.30p.m. he was going for his practice on his Mountain bike, when on the Road to Kibera court, he met the deceased who had a push cart. They talked with the deceased during which talk the deceased asked accused whether he would have time, on Friday morning to help him (the accused) in fetching water for two hotels, as there was water shortage.

They agreed that the accused would pass by at the deceased's place after the exercise, which he did at 6.30p.m and found the deceased with the Push cart, with 4 youths, one of whom told the accused what the deceased had said, that is that the accused follows the deceased to Wambui's Bar. The accused obliged, followed the deceased and parked his bike outside the Bar. The door to the Bar had no curtain.

As the accused parked his bike, the deceased told him not to go in, as the deceased wanted to see him

outside. The deceased came out of the Bar and explained to the accused what they had touched on, that is going to fetch water the following morning. The deceased gave him the key to the Push Cart, as they agreed to meet at 5a.m. at the Kibera Round About, the following morning.

The accused then left on his bike, leaving the deceased with his friends.

At about 8p.m. that same evening, the accused heard members of the public shouting. He got out to hear what was wrong. There and then two members of the public arrested him and took him to the Kilimani Police Station, for a matter he claims he did not know.

That is the defence by the accused, through his unsworn statement.

The assessors will know that the accused was not cross-examined by the prosecution counsel, as the law does not permit cross-examination of accused persons who choose to give their defences through unsworn statements.

At the close of the unsworn statement by the accused, both counsels – for the prosecution and for the defence – made their final submissions.

At this crucial stage of the case, neither of the counsels who had gone through the prosecution evidence – Mr. Ndemo and Mr. Macharia – was present. Mr. Macharia was represented by Mr. Kenyatta; while Mr. Ndemo – for the state, was represented by Ms. Wafula.

During the critical Final Submissions again the counsels who dealt with the evidence by the 8 prosecution witnesses – Mr. Ndemo for prosecution, and Mr. Macharia – for the defence were not present. Mr. Ndemo was represented by Mr. Imbali, while Mr. Kenyatta held brief for Mr. Macharia, for the accused.

Mr. Kenyatta submitted that the prosecution had failed to prove the guilt of the accused, and that the evidence had fatal gaps which can't be cured by way of amendments. However, the defence counsel was unable to explain or give any example of the gaps he referred to. The defence went further and submitted that the prosecution had failed to prove **mens rea** and **actus reus**.

It was also the defence submission that there was no eye witness who saw the accused stab the deceased as alleged, and no murder weapon was produced in the court as an exhibit.

The defence counsel faulted the prosecution saying that **PW 1** told the court that the accused had quarreled with the deceased, and the two went outside the bar; and that when deceased came back he collapsed and died and that that is the time the stab wounds in the stomach were noticed. **PW 1** is said to have testified that she saw the knife while **PW 3** did not tell the court that she saw the knife. Yet both were at the scene; and that **PW 4** testified that the place was too dark.

The defence concluded that the prosecution evidence was purely circumstantial, and it was not corroborated. He concluded that lots of doubts exist in the prosecution case, and the benefit of the doubt should go to the accused. "The accused should be acquitted for lack of evidence" concluded the defence counsel.

For the State, the State Counsel submitted that the state had produced strong circumstantial evidence. But he did not elaborate on that submission. All he said was that the circumstantial evidence pointed at the accused, and to no other person. That was sufficient to convict the accused, continued the State Counsel.

As alluded to earlier on, the above submissions by Learned Counsel for both sides suffer from the fact that the counsels who made the final submissions were not the counsels who conducted the proceedings during the testimony by the prosecution witnesses. Accordingly, lots of important issues are missing from the submissions by both counsels.

The court has had, nonetheless, to closely go through the testimony of all the prosecution witnesses and those facts are now taken into account in this Summing Up.

On the defence submission that there was no eye witness when the alleged stabbing took place, and that **PW 1** and **PW 3** contradicted one another by one saying she saw a knife while the other did not see the knife, that submission is based on failure of the counsel to appreciate who said what. The submission is based on incorrect grasp of the evidence on record in the court file.

First, P.W. 1, Dr. Jane Wasike Simiyu, was the pathologist who carried out the Post Mortem, and was not at the scene of the crime, and did not say she saw the knife. Her evidence is that the deceased died of multiple injuries on the belly, inflicted by a sharp instrument.

The circumstantial evidence is based on the testimony of **PW 2 – Foster Aswani Mwadishi** and P.W. 4 – **Gladys Nyawira** who was the Bar maid at Wambui's Bar. These are two key witnesses who were at the scene. **PW 2** was sitting with the deceased at the Bar when according to his testimony, the accused came in and tried to take the beer in the glass of the deceased, and also tried to sit between the deceased and **PW 2**. It was from that conduct that the quarrel between accused and deceased started, culminating in accused asking the deceased to go out so that they could sort out the problem. The two went out of Wambui's Bar and they were there for about three minutes before deceased came back. When the deceased tried to sit down where he had been with **PW 2**, he collapsed. **PW 4** witnessed that, and asked **PW 2** and the other customers to undress the deceased to facilitate circulation of fresh air. It was in that process that **PW 2** and the others noticed that the intestines were flowing from the belly of the deceased, even though there was no blood coming out.

There is no evidence on record that **PW 4** said it was dark both inside and outside the bar. Nor is it true from the unsworn statement by the accused that it was dark inside. He did not even get inside the bar, according to his own statement.

The testimony of **PW 4** – the Barmaid – is that there were lights in the Bar, when the accused and deceased went outside and when they came back and the accused stood at the door. She, and **PW 2**, saw the accused putting back the knife in his right-hand back pocket of his trousers. It was at that time that **PW 2** heard the accused saying 'NINGEKUGWARA' (I would have scratched you), just before the deceased tried to resume his seat and collapsed.

You will need to consider whether or not the evidence of **PW 2** and **PW 4** support each other, or are contradictory.

On **mens rea**, or the state of the accused's mind, there is evidence from **PW 2** that the accused sparked-off a quarrel with the deceased by his taking and drinking the beer in the glass of the deceased, without the consent of the deceased. The accused then dared the deceased to go out, which the deceased did, and three minutes later the deceased came back and collapsed as he tried to sit down.

It is clear that the accused acknowledged that he was at the Wambui's Bar, on the material day when the incident occurred. He even conceded having talked to the deceased, although he said that he did so, outside the bar.

To that extent, the evidence led by the prosecution was direct.

However, as regards the questions as to whether the accused person entered the bar or did not do so, you, the assessors need to weigh the evidence adduced by the prosecution, against the evidence adduced by the accused.

Secondly, and in any event, it is evident that none of the prosecution witnesses saw the accused stabbing the deceased. It is alleged that the incident occurred outside the bar, whilst all the prosecution witnesses had remained inside the said bar. To that extent, the evidence about the actual act which resulted in the death of the deceased, was of a circumstantial nature.

In that regard, the law is that the evidence adduced by the prosecution must link the accused, and nobody else, to the killing of the deceased. If there are any doubts as whether or not the accused is the person who stabbed the deceased, such doubt must result in the acquittal of the accused.

Finally, assuming that you, the assessors, are satisfied that the accused person is the one who stabbed the deceased, and that there is no doubt in that respect, you need to bear in mind the definition of the offence of murder, as stated in the Penal Code.

Murder is defined as the unlawful act or omission, by a person who has malice aforethought, which results in the death of another person. The term malice aforethought ordinarily means that the person who causes the death of another, had intention to do so. However, the law also states that an accused person will be considered to have had malice aforethought if he had the intention to do grievous harm to any person; or an intention to commit a serious criminal offence (which is, in law, categorized as a felony); or if his intention was to facilitate the escape from custody, of someone who had committed or was about to commit a felony.

An accused may also be said to have had malice aforethought if he knows that his action or omission will probably cause death or grievous harm, but he then does not care whether or not death or grievous harm will be occasioned to the other person.

In this case, both the accused and the deceased had been drinking alcohol, immediately before the incident. That is a factor to be taken into account, by you, when assessing whether or not the accused person had malice aforethought. But it is only so, if you believed the prosecution's evidence, to the effect that the accused went into the bar, and was observed by them, to have been drunk.

If you form the opinion that the accused never entered the bar, but only spoke to the deceased outside the door to the said bar, then you would come to the conclusion that the prosecution had failed to show that the accused had any reason to stab the deceased.

You now have the obligation to consider the evidence as herein above summed up for you, and apply the law as herein-above explained to you, and return to this court with your verdict as to whether or not the accused is guilty of the offence of murder.

You may now retire to consider your verdict.

It is so ordered.

Dated, Signed and delivered at Nairobi this 1st day of July, 2009

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FRED A. OCHIENG

JUDGE