



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 48 OF 2015

REPUBLICPROSECUTOR

VERSUS

HENRY NYABUTO ARORI

HARON NYABUKA ARORIACCUSED

JUDGMENT

1. **Henry Nyabuto Arori** (first accused) and **Haron Nyabuka Arori** (second accused), are charged with murder, contrary to S. 203 read with S. 204 of the Penal Code. It is alleged that the two jointly murdered John Mose Nyangau (deceased) on the 18th May 2015, at about 1900hrs at Riongonjo Village Nyamache District within Kisii County.

2. It was the prosecution case that the two accused are brothers of the deceased and on the material date at about 7.00 pm they proceeded to his home and slashed him with a machete (panga). The house was equipped with a lantern lamp which had been lit at the time. After accomplishing their unlawful mission the two accused went away leaving the deceased critically injured on the head and chest. He was taken to hospital where he died while undergoing treatment for his injuries.

3. The autopsy report (P.Ex 2) revealed that the deceased died from severe intracranial haemorrhage secondary to blunt/sharp trauma to the head. The two accused were initially arrested and charged with the offence of assault but the charge was enhanced to that of murder after the deceased died.

4. The defence by both accused was a denial of having killed the deceased. They indicated that they were summoned to the office of their assistant chief on the material date and informed that the deceased had made an assault report against them. They were then arrested and arraigned in court at Kilgoris. They were however released on bond and later heard that the deceased had again been assaulted and fatally injured by unknown people. It was thereafter alleged that they had killed the deceased. The charge of assault facing them was upgraded to murder. They contended that they did not assault or kill the deceased as alleged.

5. From the foregoing facts, the issue springing up for determination is whether the deceased was murdered and if so, whether the two accused were responsible for the offence.

The post mortem report (P.Ex 2) indicates that the deceased died from severe head injury after being assaulted on a date which appears to be the 1st June 2015. The report also indicates that the deceased was on that date found inside his house after having been injured by unknown people. He was taken to hospital but died while undergoing treatment for those injuries.

6. It is apparent that in assaulting the deceased using crude weapons the intention of the assailant or assailants was to kill the deceased or occasion him grievous harm. It would follow therefore that the deceased was actually murdered.

The accused were suspected of having committed the offence but they vehemently denied the fact. They admitted that they were previously arrested and charged with an offence of assault against the deceased but they denied even that fact and were released on bond. They implied that the deceased died from injuries inflicted on him by unknown people while they were on bond awaiting the finalization of the assault case against them in a Kilgoris Court.

7. The evidence implicating the accused with the initial assault against the deceased was that of the deceased's son (PW 1) and wife (PW 2) and to some extent the brother in law (PW 3).

However, these witnesses referred to the incident which occurred on 18th May 2015 as opposed to the incident which occurred on or about the 1st June 2015 and which actually resulted in the death of the deceased.

8. The post mortem report (P.Ex 2) strongly implied that the deceased died from injuries inflicted on 1st June 2015 and not any other day.

Therefore, even if the accused were arrested and charged with assaulting the deceased on 18th May 2015, there was nothing to show that he died from the injuries inflicted on that day as implied in the particulars of the charge and the evidence by **Morris Oyaro Mose (PW 1)**, **Josephine Monyenche (PW 2)** and **Oenga Waka Stephen (PW 3)**.

9. **Evans Sawe Mose (PW 4)**, merely identified the body of the deceased on the 26th June 2015, for post mortem purposes. He had earlier been informed that his father (deceased) was assaulted and injured by thugs.

10. The investigations officer, **P.C Festus Musembi (PW 5)**, acknowledged that the deceased was assaulted a second time and implied that the later assault proved fatal. He then went on a wild goose chase by saying that there were allegations from witnesses that the deceased was fatally assaulted on a second occasion by the two accused. However, no such witness was called to testify in that regard.

11. It is apparent that the two accused were suspected of having murdered the deceased just because they had been previously arrested and charged with assaulting him. In fact, the assault case at the Kilgoris Court had not been concluded when the deceased was attacked a second time and killed.

In any event, the accused had pleaded not guilty to the charge and were thus presumed innocent until proved otherwise. They could not therefore be held responsible for assaulting the deceased on any of the two occasions.

12. And, if they indeed assaulted the deceased on a first occasion, he did not die from injuries inflicted upon him on that occasion as implied herein by the prosecution witnesses.

For all the foregoing reasons, this court must find and hereby finds that the two accused were not responsible for murdering the deceased. They are not guilty as charged and are acquitted accordingly.

[Delivered and signed this 4th day of May 2017]

J. R. KARANJAH

JUDGE

In the presence of

CC Mohe/Dorothy

State Counsel – Mr. Otieno

Accused 1 – 2

Mr. Okenye for both accused