



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM, J.J.A)**

CRIMINAL APPEAL NO. 130 OF 2009

BETWEEN

**GEOFFREY KIPKORIR TANUI
BENARD KIPLANGAT TANUI APPELLANTS**

AND

REPUBLIC RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Kericho
(Koome, J.) dated 25th June, 2009*

in

H. C. Cr. C. No. 44 of 2005)

JUDGMENT OF THE COURT

The appellants, **Geoffrey Kipkorir Tanui** and **Benard Kiplangat Tanui**, were tried by the superior court (Koome, J) at Nakuru on a charge of murder, contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge were that on the 22nd day of November, 2005 at Kapkisiara Village in Bureti District within Rift Valley Province jointly murdered SIMON KIRUI.

The evidence adduced against the appellants was that on the 22nd November, 2005 at about 2.30 pm Fiona Chebet (PW 2) (Fiona) was on her way home, walking with the 1st appellant (Geoffrey), who is her uncle. She was carrying some pineapples on her head. They met the deceased, who on seeing Fiona, demanded repayment of Kshs.20/= owed to him by Fiona, in respect of some sugar that Fiona had purchased from the deceased's shop. Geoffrey asked the deceased to leave Fiona alone, but the deceased was persistent in his demand. At that point, Geoffrey asked Fiona to drop her pineapples on the ground, and to go home. She did exactly that. Meanwhile, there was an altercation between Geoffrey and the deceased, and Geoffrey hit the deceased with a stick on his head. At this point, Reuben Kiprono Chepkwony (PW 1) (Reuben), a neighbour, who heard the two quarreling, arrived at the scene and saw Geoffrey hit the deceased twice on the head with the stick. He then saw the 2nd appellant (Benard) arrive with a metal bar, followed by Charles Kirui (PW 5) (Charles), the brother of the deceased. Charles tried to separate Geoffrey and the deceased, but Benard hit Charles, and then proceeded to hit the deceased's head with the metal bar. Another neighbour, Hannah Koech (PW 5) (Hannah) also arrived at the scene and saw Benard hit the deceased with a metal bar. The deceased fell on the ground, bleeding profusely, and was taken to the hospital, but was pronounced dead on arrival. Geoffrey was arrested by members of the

public, who handed him over to PC James Oroo of Itain Police Station, while Benard was arrested the following day.

The trial Judge heard and recorded the evidence from nine prosecution witnesses, while both the appellants gave unsworn statements, denying the charge. However, at the end of it all, the trial Judge believed the prosecution case; rejected the appellants' testimony; convicted both the appellants and duly sentenced them to death. Aggrieved by that verdict, the appellants are before us in this final appeal. The original memoranda of appeal were filed by the appellants in person. However, the appeal was taken over by M/s Ogeto & Ogeto Advocates, who relied on the supplementary memorandum of appeal filed by them on the 19th April, 2011, raising essentially two grounds: the defence of provocation and arguing that the learned Judge's decision was based on contradictory evidence.

In his submissions before us, Mr. A. M. Murindi, learned counsel for the appellants, argued that in insisting on repayment of his loan from Geoffrey's niece, the deceased provoked Geoffrey into hitting him. Secondly, he argued that Fiona's evidence was inconsistent in that she claimed not to have seen anything after she left, while in cross examination she said she "saw" Geoffrey hit the deceased. He submitted that Fiona's testimony was unreliable, creating a doubt about the guilt of the appellants.

Mr. Omutelema, learned Senior Principal State Counsel, on the other hand, submitted that the evidence was watertight, and that the defence of provocation was misplaced.

We are in complete agreement with Mr. Omutelema that the prosecution case was proved beyond reasonable doubt, and that the appellants were properly convicted for this brutal and senseless killing of an innocent man who simply demanded repayment of his money. Geoffrey engaged him into an altercation, hit him with a stick twice on the head in full view of at least four witnesses; as if that was not enough, he watched his brother Benard arrive at the scene with a metal bar, and hit the deceased's head with the same, ripping through his brain, and leaving him on the floor bleeding profusely. Geoffrey was caught in the act, arrested by members of the public, who handed him over to the police. Benard, who disappeared momentarily after the incident, was arrested the following day, and both properly tried and convicted of the offence charged. In convicting the two appellants, the learned Judge stated, in part, as follows:

"It is evident from the prosecution's evidence that the 1st accused person was seen assaulting the deceased by PW1, PW2, PW4 and PW5. They all testified that the 1st accused person was armed with a jembe stick which he used to strike the deceased several times. PW1 also testified that the 2nd accused person was armed with a metal bar and he saw him beat the deceased. This was also repeated by PW4 who even tried to strangle (*sic*) with the 2nd accused person to dis arm him of the iron bar and in the process the 2nd accused person hit PW4. By that time the 1st accused person continued hitting the deceased with the jembe stick. The deceased died as a result of these injuries inflicted by the accused persons and those injuries were confirmed by PW3 who conducted the post mortem examination on the body of the deceased.

This is direct evidence by several witnesses who witnessed the assault. I have also considered the defence by the accused persons which defence is a mere sham and has not dented the otherwise strong prosecution's case."

We are in agreement with the learned Judge that the prosecution case was proved beyond reasonable doubt; that there is no basis to the defence of provocation; and that any contradiction in Fiona's evidence was not material to alter the final decision which was based on eye-witness accounts of four people.

Accordingly, we find the convictions to be safe and we dismiss these appeals. Orders accordingly.

Dated and delivered at Nakuru this 10th day of June, 2011.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR