**IN THE COURT OF APPEAL**
**AT NAKURU**

**CORAM: BOSIRE, WAKI & NYAMU, JJ.A.**

**CRIMINAL APPEAL NO. 223 OF 2008**

**BETWEEN**

**PETER KINGORI GITAU …………….....……….. APPELLANT**

**AND**
**REPUBLIC ……………………..…………… RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nakuru (Koome, J) dated 14th November, 2008**
**in**
**H.C.CR.C. NO. 19 OF 2008)**
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## JUDGMENT OF THE COURT

The appellant was convicted by the High Court (Koome, J, as she then was), on two counts of the offence of murder contrary to ***Section 203*** as read with ***Section 204 of the Penal Code***. It was alleged in the first count that on 28th day of January, 2008, at Momoi Area in North Nakuru District, he murdered ***NNK***. The particulars of the second count are the same but the deceased was ***WWK***. NNK (***N***), was the appellant's wife while WWK (***MW*** ) was his uncle. The uncle was elderly but unmarried and stayed in a separate room in the same house as the appellant and his wife who had no children. Upon his conviction, he was found to have been insane at the time of commission of the offence and was, therefore, sentenced to detention at the President's pleasure as the law requires of such finding.

The facts are fairly straightforward and they came from five witnesses called by the prosecution, most of whom were close relatives of the appellant, and police officers. None of those witnesses was an eyewitness to the killing of the two deceased and therefore, the evidence relied on was circumstantial.

On the evening of 28th January, 2008, Elizabeth Nyambura Githinji (PW 3), who was the wife of the appellant's brother, and therefore his sister-in-law, met the deceased, N at 6pm as they walked together from their respective neighbouring gardens in [particulars withheld], Subukia. They found the deceased MW at the appellant's house and he asked them who had made a fire so that the house was about to burn. On checking the house, N found it was locked and she called out her husband, the appellant, but he was nowhere. She went to PW 3's house which was 600 metres away and stayed there until 9 pm when the appellant went to pick her up. Nancy walked away with the appellant and that is the last day PW 3 saw her alive.

The following day at about 6am, an aunt of the appellant, Linda Wambui Wanjinji (PW 2), woke up from her house which was about 200 metres away from the appellant's house, and was going to fetch milk

from a neighbour. On the way, she saw a goat in her garden and decided to chase it away. In the process, she stumbled on some dead body of a man and started screaming. As she ran off, she stumbled on another body of a woman. The bodies were outside the house of the appellant and her fear was that the appellant and his wife had been killed. Her screams attracted other relatives and neighbours to the scene and among the first to arrive was PW 2's husband, Joseph Kingori (PW 4), who was the appellant's uncle. They confirmed it was the two deceased who had injuries on their heads. PW 4 saw a blood stained metal bar, a knife and a *panga* near the bodies. Joseph, together with relatives and neighbours went to an AP's camp nearby, and some officers from that camp went to the scene and preserved it. The relatives also went to Muteithia Patrol Base and reported. CIP Oswald Gitonga (PW 1) of that base, accompanied by other officers went to the scene and found the two bodies. CIP Gitonga saw the body of Mzee Wang'ombe had deep cut injuries on the head while Nancy's had blunt injuries on the head. The appellant was nowhere to be found. He learned that the appellant was at Muteithia Trading Centre at about 8.30 pm that day but when he went there with his officers, the appellant ran away into the bush. They could not trace him despite attempts. The following morning at 4.30 am, CIP Gitonga heard a knock on the door of his house at the Patrol Base and he opened it only to be astonished to see the appellant. The appellant was dripping wet in slippers, and was holding a blood stained rope. He claimed he was being chased by members of the public. CIP Gitonga arrested and placed him in the cells. He retrieved the rope and slippers and later handed them over to the investigating officer.

The investigating officer was PC Raphael Kwambai (PW 6; *ought to have been PW 5*); of Subukia Police Station. He was asked by CIP Gitonga to go to Muteithia Patrol Base which he did at 11 am on 30th January, 2008, and found the appellant in cells and interviewed him. The appellant allegedly told him he had killed the two persons because he found his uncle sleeping with his wife. He went to the scene and took possession of various items which had been collected from the scene; a blood stained stick and a blood stained metal rod. PC Kwambai also stated that the appellant informed him about a jacket he was wearing which he had thrown away and which they found 6 kms away from the scene. It is the same jacket the appellant's uncle, PW 4, said he spotted and recognized as the deceased's as he drove with the police towards Nyahururu.

The two bodies were taken to Nyahururu District Hospital where a post mortem was carried out by Dr. Kiuna, who was not able to testify and his report was produced under ***Section 77 (1) of the Evidence Act***. It confirmed the injuries on the two deceased and the opinion on the cause of death was that they died of cardio pulmonary arrest secondary to severe head injuries caused by blunt and sharp trauma. Blood samples were taken and together with the blood stained items collected by PC Kwambai; the stick, metal rod and jacket, they were submitted to the Government Chemist for analysis. The analysis confirmed that the bloodstains matched the blood group of N

The appellant was also examined by Dr. Kiuna soon after the commission of the offence and the conclusion made was that he was of unstable mind. The Doctor recommended psychiatric help in a mental institution before trial.

In his defence, the appellant said he was sleeping in his house on 30th January, 2008, but when he woke up in the morning, he saw a body lying outside and started screaming. Neighbours then streamed in to his compound and alleged he could have done the killing. He then ran away and surrendered to the police. He was with the police when they returned to collect the bodies but on the way, the police found a jacket which they claimed was his. He was charged with the offence.

The trial court considered the entire evidence on record and found no difficulty in believing the circumstantial evidence tendered through the prosecution as establishing that it was incompatible with the appellant's innocence and incapable of explanation on any other hypothesis than his guilt. The court also rejected the appellant's defence stating in part as follows:

*"It is clear from the prosecution's evidence that there was no eye witnesses who saw the accused person killing the two deceased persons. This case is based on circumstantial evidence that on the material day, the accused person left with the 1st deceased person at 9.00 pm. The accused person was living with the two deceased persons in the same compound. When their bodies were discovered in the morning with*

*deep cuts the accused person was nowhere to be seen. The accused person surrendered himself to PW 1. The accused persons offered a defence which is preposterous in the face of the evidence on record by the prosecutions witnesses particularly, PW 2, PW 3 and PW 4. The defence that the accused person started screaming when he saw the bodies of his wife and uncle murdered and neighbours pointed an accusing finger at him of being responsible is completely at variance with the evidence by PW 2, PW 3 and PW 4 who were the first people to see the bodies. By that time the accused was not at the scene."*

It continued:

*"In this particular case, it is the accused person who was last seen with the two deceased persons. All the three were living in the same compound, the accused with the 1st deceased and the 2nd deceased was living in an adjacent room.*

*When the bodies of the deceased persons were found murdered, the accused person was not at the scene. He later surrendered himself to the police. These facts are incompatible with the accused person's innocence."*

The report on the appellant's state of mind was also believed as there was no other report to the contrary, hence the finding of *"guilty but insane"*.

It is those findings that the appellant challenges before us in this first appeal. He drew up a homemade memorandum of appeal containing eight grounds which learned counsel for him, Mr Rubua Ngure adopted and argued as two grounds. Mr Ngure submitted that the case was not proved beyond reasonable doubt because there was no credible evidence to connect the appellant with the bloody jacket allegedly connected with the offence; there was contradiction between PW 4 and PW 6 on the recovery of that jacket when PW 4 said they stumbled on it while PW 6 said the appellant led them to it; and the multiplicity of the murder weapons found at the scene suggested several persons had committed the offence and yet the appellant was found insane and could not, therefore, conspire with anyone else. He further submitted that it was in the public domain that the day the killings were perpetrated was at the height of post election violence and it was necessary, therefore, for the police to extend investigations to eliminate other hypotheses, consistent with the appellant's innocence. It was particularly plausible, in his view, that the appellant went to surrender to the police for fear of public wrath considering that the Government analyst did not find any connection between his blood group and the bloodstains found on the murder weapons or find any injuries on the appellant. As for the appellant's state of mind, Mr Ngure submitted that the burden of proof imposed on him is lighter and is discharged by lack of any motive on his part to commit the offence since no prior disagreements with his wife or uncle had been alleged or proved by the prosecution.

In response to those submissions, learned state counsel Ms Nerolyne Idagwa, submitted that the circumstantial evidence adduced did not admit of any other conclusion than that of the appellant's connection with the killing. He was the last person to be seen with N alive but gave no explanation about what happened to her. The evidence was that they stayed in the same room, while the uncle slept in another. He lied that he was the first to scream when the only evidence of screaming which attracted other relatives and neighbours came from PW 2. He only surfaced in the early hours of the following day when he surrendered to police after first escaping arrest by police which conduct betrayed his connection with the offence. Ms Idagwa also submitted that the bloodstains of his wife could only have been found on his jacket because he came into contact with her. The recovery of the jacket, she submitted, was made possible by the appellant who had special knowledge of its whereabouts.

We have considered those submissions and the evidence on record which we must, as the first appellate court, analyse and re-evaluate to reach our own conclusions, but always remembering and allowing for it that the trial court had the added advantage of seeing and hearing the witnesses. The trial court appreciated, and correctly so, that the case rested on circumstantial evidence and it cited the relevant authorities establishing that principle including ***KIPKERING ARAP KOSKE & ANOTHER VS R* 16 EACA 135** and ***SIMONI MUSOKE VS R* [1958] EA 715**.

We are in no doubt that the appellant was the last person to be seen with the deceased, Nancy, on the night of 28th January, 2008, before Nancy's body was found at 7 am by PW 2 outside the same house she slept with the appellant. It was incumbent on the appellant by dint of ***Section 111 of the Evidence Act*** to explain what happened to Nancy but the appellant feigned ignorance stating that he was the one who found the body and screamed. The only screams were from PW 2 and the appellant was nowhere in sight. On the evidence which was believed by the trial Judge, he was found at the local market by police in the evening but escaped into the bush only to surrender to the same police in the wee hours of the following morning. The conduct of running away, taken together with the medical connection of the murder weapons and his jacket with the deceased's blood group, strengthens the prosecution evidence about his involvement. We find no justification in challenging the evidence on the finding of the jacket. Both PW 4 and PW 6 were together in the police vehicle when the jacket was found and PW 4 confirmed it belonged to the appellant. The appellant's own brother and neighbor would surely know the clothes worn by the appellant. There was no evidence on record that any of the prosecution witnesses who were closely related to the appellant had any grudge against him or had any reason to lie against him. Nor is there any evidence that the events of post election violence were responsible for the two deaths. In all the circumstances, his defence was properly rejected and we uphold the rejection. In the absence of any medical report confirming that the appellant was of sound mind at the time of committing the offence, we also uphold the sentence. The upshot is that this appeal has no merit and we order that it be and is hereby dismissed.

**Dated and delivered at Nakuru this 23rd day of February, 2012.**

**S. E. O. BOSIRE**
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**JUDGE OF APPEAL**

**P. N. WAKI**
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**JUDGE OF APPEAL**

**J. G. NYAMU**
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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**