



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Murder Case 119 of 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ZACHARIA BOGONGO OGUTU.....ACCUSED**

**JUDGMENT**

1. The accused herein **Zacharia Bogongo Ogutu** was arraigned before **Makhandia, J** on 21<sup>st</sup> January, 2011 on 2 counts of murder. In count 1, it was alleged that on the 7<sup>th</sup> day of December, 2010 at Nyabiosi village, Riosugo sub-location in Nyamache District within Kisii County, he murdered **Norah Emily Mochere**. In count II, it was alleged that on the same day and at the same place, he murdered **Edwin Omanga Mochere**. He denied both counts, forcing the prosecution to proceed with the case in which they called 8 witnesses.

2. Briefly, the facts of this case are that on the 7<sup>th</sup> December, 2010 the body of the 1<sup>st</sup> deceased was found lying inside the accused's house by one **Emily Nyabera Busera(PW4)**. On discovering the body, Emily ran towards the main road and informed **Grace Kerubo Nyabera, PW1** and **Alice Moraa Makori, PW3**. PW1 and PW3 accompanied Emily back to the house and they too saw the body of the 1<sup>st</sup> deceased. They entered the house and on searching the rooms they discovered the body of the 2<sup>nd</sup> deceased also lying in one of the rooms. The 1<sup>st</sup> deceased was wife to the accused while the 2<sup>nd</sup> deceased was son to the accused.

3. When the bodies were discovered, the body of the 1<sup>st</sup> deceased had a piece of cloth around its neck while that of the 2<sup>nd</sup> deceased had marks and bruises around the neck and on the face. A report was made to Nyangusu Police Station and investigations commenced. In the course of the investigations, it was established that the two deceased persons lived with the accused as wife and child respectively. It was also established that the accused had run away from the home after the deaths of the two deceased persons. He did not inform any one why he left the home where he was living with his wife and child.

4. On the 11<sup>th</sup> December, 2010, the accused was arrested in Lolgorian township while trying to escape. He was taken to Nyangusu Police Station and placed in custody. He was subsequently arraigned before court on these two counts of murder.

5. PW1 was **Grace Kerubo Nyabera(Grace)**. On 7<sup>th</sup> December, 2010 at about 6.00p.m., she was returning home from her farm. She was accompanied by **PW3, Alice Moraa Makori (Alice)**. As they walked **PW4, Emily Kerubo Bisera** came running towards them and told them how, when she went to fetch her brothers' ball from the home where the accused and the deceased persons lived, she had seen the leg of the deceased protruding through the doorway of the house. The three of them ran to the home and upon arrival, both Grace and Alice confirmed what **Emily** had told them. **Grace** and **Alice** entered the house and saw the back of the 1<sup>st</sup> deceased leaning against the wall. **Grace** and **Alice** then screamed when they noticed the 1<sup>st</sup> deceased bleeding from the face. Among those who answered the screams were **PW4, Wesley Nyaberi Bisera (Wesley)** a security guard at Nyabiosi Primary school.

6. When cross examined, **Grace** testified that the accused was an employee of one **Kennedy Kiseru**, a police officer working in Narok. She also said that the 1<sup>st</sup> deceased had 3 children, the eldest of whom is the 2<sup>nd</sup> deceased herein. **Grace** could however not say how the deceased had met their death. **Alice** also stated on cross examination that when she and **Grace** arrived at the home of the deceased, she only saw the legs of the 1<sup>st</sup> deceased but never moved near it.

7. **Emily** testified that on the material day at about 6.00p.m., her 2 brothers **Jackson** and **Amos** were playing football in their compound when the 2<sup>nd</sup> deceased came over and dispossessed the 2 brothers of the ball and went with it into the compound where the accused and the deceased lived. She went over to collect the ball for her brothers. When she called the 2<sup>nd</sup> deceased, he did not answer. She went and knocked on the door of the main house but what she saw sent her running towards the main road. **Emily** saw the leg of the 1<sup>st</sup> deceased. When she got to the road she told Grace and Alice about what she had seen. They ran back to the home of the accused together.

8. During cross examination, **Emily** stated that the 2<sup>nd</sup> deceased, whom she knew very well had taken the ball much earlier than 6p.m. on that fateful day. She also said that on seeing the 1<sup>st</sup> deceased's leg she just ran off without entering the house. She however stated that **Grace, Alice** and one **Rose**(not called as a witness) touched the 1<sup>st</sup> deceased's body.

9. **Wesley** stated that he ran to the home of the accused and the deceased when he heard screams at about 6.00p.m. on 7<sup>th</sup> December, 2010. On arrival at the home, **Wesley** touched the body of the 1<sup>st</sup> deceased and confirmed that indeed she was dead. The 1<sup>st</sup> deceased(Norah)was wife to the accused while the 2<sup>nd</sup> deceased (Edwin) was the son. The home where the accused and his family lived belonged to **Kennedy Bisera** who was brother to Wesley.

10. On seeing what he saw, **Wesley** ran and reported the matter to the Assistant Chief of Riosugo sub-location, one **Kennedy Kaunda Kenani** who testified as PW6(**Kenani**). Wesley said that the accused had stayed at Kennedy Bisera's home for about 2 years prior to the incident, while Norah had joined the accused some 4 months prior to the incident. **Wesley** said he was not aware of any dispute between the accused and **Norah**. He however stated that on the evening of the incident, the accused was not present in the home. **Wesley** stated further that 2 days after the incident, the accused telephoned him and enquired whether anything bad had happened at home, and when he was informed that **Norah** had died, he asked if he could be allowed to come around. Though Wesley answered the accused in the affirmative, the accused did not come as he said he had no transport. According to Wesley, his other brother **Moturi Kiseru** made arrangements for the accused to come home, whereupon on reaching Lolgorian, the accused was arrested. Later on, **Wesley** learnt of **Edwin's** death, but he could not say what had caused the death of the two.

11. **Wesley** was cross examined at length by defence counsel Mr. Bigogo. On cross-examination, **Wesley** admitted that he did not indicate in his statement to the police that he spoke with the accused some 2 days after the incident. He denied a suggestion by the defence that he had been instructed by the police to tell the court that he had spoken with the accused. Wesley stated that though the accused worked

for **Kennedy Bisera**, he (**Wesley**) did not know of any disagreement between the accused and his family. Wesley could also not say whether **Kennedy Bisera** paid the accused well.

12. PW5 was **Dr. Ezekiel Ogando Zoga**. He carried out post mortem examination on the body of Norah who was only in her mid-20's. Externally Norah had bruises on the face and some blood clots in the nostrils as well as cyanosis of the extremities and tongue. There was also a light piece of cloth around her neck. He found congested lungs but no pregnancy. There was bleeding under the skin of the head. **Dr. Zoga** opined that Norah died from cardio pulmonary arrest following upper airway obstruction of the neck by a piece of cloth. The Post mortem report on Norah was produced as PExhibit.1.

13. Regarding **Edwin Dr. Zoga** stated that he had bruises on the neck and that the neck bones were fractured and the lungs were congested. **Dr. Zoga** formed the opinion that Edwin died of strangulation by the neck. The Post mortem report on **Edwin** was produced as pExhibit.2.

14. During cross examination **Dr. Zoga** stated that the alterations appearing on PExhibits 1 and 2 with regard to the names of the deceased were made by himself and countersigned. He said a confusion arose because he carried out the postmortems on the same day. He said that the possibility of suicide could not be ruled out though he could not advance such a theory because there was evidence of a struggle and external injuries. **Dr. Zoga** also stated that the injuries suffered by Norah could not have been caused by the deceased herself as she seems to have struggled to untie the piece of cloth that was found around her neck.

15. PW6, **Kennedy Kaunda Kenani(Kenani)** was Assistant Chief of Riosugo-Sublocation. At about 7.00p.m. on 7<sup>th</sup> December 2009, he received a report from Wesley concerning the death of **Norah** and **Edwin**. On receipt of the information, **Kenani** contacted the OCS of Nyangusu Police station. Together with the OCS, **Kenani** visited the scene of crime where they found the bodies of Norah and Edwin lying in the sitting room and bedroom respectively. While Norah had visible injuries on the face, saliva was oozing from Edwin's mouth. Kenani said that he knew the accused before although he was not around when the police and Kenani visited the scene of crime. When cross –examined, Kenani stated that he was not aware of any wrangles between the accused and his wife.

16. PW7 was **James Mochere Seme(James)** the father of Norah. He identified the two bodies at Gucha District Hospital for post-mortem.

17. PW8 was **Number 84417 Police Constable Leonard Rutu Kaperur** of Nyangusu Police Station, crime branch station. At about 23.05 on 7<sup>th</sup> December, 2010, he accompanied the OCS, Nyangusu police station to the scene of crime, which was the home of **Kennedy Bisera**, a police officer. PW7 and his team entered the house where the deceased's bodies were lying. The bodies were lying in one of the houses in the compound. PW7 stated that Norah's body was lying diagonal to the door with the head facing the door and had a piece of cloth tied tightly around the neck. Blood was oozing from the mouth and nose. PW7 stated that he found out that Edwin was not biological son of the accused. As the accused was not present, investigations into his whereabouts commenced.

18. PW8 stated that during interrogations of the people in the vicinity, it was established that only the accused, his wife and children stayed in the home where the murders took place. The bodies of both Norah and Edwin were removed to Keroka Private Mortuary and later to Gucha District hospital for the postmortem examination. PW8 also stated that the accused was arrested at Lolgorian Market as he tried to escape to an unknown destination. Though the piece of brown cloth was found tightly tied around Norah's neck, it was never taken to the government chemist for analysis. In PW8's view, it was not necessary to take the piece of cloth for analysis. PW8 also testified that Norah had a small cut on the forehead which cut was oozing with blood. The brown piece of cloth was produced as PExhibit.3. It is PW8 who decided to charge the accused with murder.

19. During cross-examination, PW8 admitted that at no point during his investigations did he interview

the owner of the home where the accused and his family lived and worked , though it was clear that the said owner was a well known police officer, working in Narok. He said he untied PExhibit 3 from around Norah's neck after post-mortem but agreed that chemical analysis and finger print examination would have boosted his case. He however explained that in the circumstances prevailing where other people had already disturbed the scene before the police arrived, chemical analysis and fingerprint examination would have been futile; although admittedly if he had had the analysis and the examination done, the fingerprints of the accused would have been seen if they were there.

20. At the close of the prosecution case and despite a spirited fight by the defence to have the case against the accused terminate under **Section 306(1)** of the **Criminal Procedure Code**, the accused was put on his defence. The accused elected to make a brief unsworn statement in which he told the court that the allegations that he murdered Norah and Edwin were baseless. He admitted that he was working for Kennedy Bisera at his home. After about one year at Kennedy Bisera's home, he was allowed to move his family from Iyabe location in Suneka Division to live with him in the home where he worked. He said that after his family joined him, he asked for permission from his employer to look for some other work and that is when he secured a job as a mason at Lolgorian. He would work out there for 2 weeks and come back to Nyabiosi for another 2 weeks. He said that on 1<sup>st</sup> December, 2010, he set out for Lolgorian leaving his family in **Mr. Bisera's** home and was away for about 6 days. On 10<sup>th</sup> December, 2010, he woke up and went to the stage at Lolgorian after breakfast. While at the stage, some two people whom he could identify by appearance only approached him and one of them greeted him. Then the other person said "**Ndiye huyu**" or "**this is the one**". The two people arrested him and took him to Lolgorian Police Station where he was asked to record a statement concerning the death of his wife and son.

21. The accused declined to write a statement on grounds that he had left his wife and son well. He was put in cells until 11<sup>th</sup> December, 2010 when he was arraigned before court on the two counts of murder. The accused denied any knowledge of those allegations. He also denied ever telephoning Wesley as alleged. He denied that he had gone to hide in Lolgorian, the truth being that he was working in that place.

22. I have now analyzed the evidence that is before me and the two main questions that arise for determination are:- (a) *were Norah and Edwin murdered and*(b) *was it the accused who murdered them?* Murder is defined simply as causing the death of another by malice aforethought and by means of an unlawful act or omission. Murder is thus the intention to kill another person deliberately and by an unlawful act or omission. Malice aforethought is established in any of the circumstances set out in **section 206** of the **Penal Code, Cap 63 Laws of Kenya**, namely:-

*"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*

- a) *An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b) *Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c) *An intent to commit a felony;*
- d) *An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

23. In the instant case, there is no doubt that both Norah and Edwin died **Dr. Zoga** testified to this fact and gave the cause of death through PExhibits 1 and 2. The bodies of the two were discovered lying dead in the house where the accused lived

with his family by **Emily; Grace, Alice, Wesley, James** and **Kenani** also saw the dead bodies. James identified the two bodies for post mortem examination. What happened after Emily discovered Norah's body in the house as Norah's leg protruded outside is already part of this story.

24. It was suggested during cross-examination of the prosecution witnesses that the deceased might have committed suicide. **Dr. Zoga** and PW8, discarded that theory. It is in evidence that Norah was found with the piece of cloth PExhibit 3, tied tightly around her neck. It is inconceivable how suicide could have happened. **Dr. Zoga** ruled out the possibility of suicide out because of the presence of a struggle before both persons died. Norah had bruises on her face and a small cut wound on the forehead. Edwin appeared to have been strangled and the neck bone was also broken. A close analysis of the evidence shows beyond peradventure that the death of **Norah** and **Edwin** was not due to suicide.

25. There is evidence, though circumstantial, that the accused was at home earlier on during the day of the incident. There is also evidence established by PW8, that **Edwin** was not the biological son of the accused. So the question is: Did the accused and **Norah** differ over **Edwin** as a consequence of which one of them decided to break **Edwin's** neck and do away with him? From the record, Norah was killed by somebody other than herself. It is also clear from the evidence that whoever killed Edwin intended that he should have no chance of survival, by going even further and hiding his body in an inner room away from where Norah lay next to the main door of the house in the sitting room.

26. I am aware that a court must carefully scrutinize circumstantial evidence before deciding to convict on the strength of such evidence. This court must satisfy itself that

the circumstances relied upon are incompatible with innocence and incapable of explanation other than guilt. See **Paul –vs- The Republic [1976-80] KLR 1622 and Sawe –vs- Republic[2003] KLR 364**. Indeed the prosecution case is anchored on circumstantial evidence, the particulars of which are that:-

- *The deceased persons lived with the accused as wife and son respectively up to the day they were found murdered in the same house where they all lived;*
- *Immediately the deaths occurred the accused was nowhere to be seen.*
- *The 2<sup>nd</sup> deceased, Edwin Omanga Muchere was not a biological son of the accused and had only come along with Norah some 4 months before the two met their brutal death.*
- *The owner of the home was a police officer based in Narok and was not at home at the time of the murders.*

27. The prosecution argued, and urged me to be so persuaded by their argument that the only person who can explain how Norah and Edwin died is the accused. The prosecution also submitted that through the testimony of Wesley the accused who was ordinarily resident in the home of his employer was nowhere to be seen on the material day and only called Wesley some two days after the incident to find out whether anything bad had taken place at home. Such a question in my view was strange since the normal thing that people who have been away from home do is not to ask about the bad things that may have happened but start with the good side of life in the hope always that all is well. From this conduct, I am satisfied that the accused simply fled the scene after committing the brutal acts of murder.

28. The accused has put forward a defence of alibi. He says that he left Nyabiosi village on 1<sup>st</sup> December, 2010 for Lolgorian and stayed there for 6 days. The time between the 7<sup>th</sup> and 10 day when he says he was arrested at Lolgorian stage is not accounted for. It is the prosecution's case that on the 7<sup>th</sup> December, 2010, he committed the murders then ran away into hiding until 10<sup>th</sup> December, 2010 when he was arrested at Lolgorian as he tried to flee to some unknown destination. It is trite law that the burden of disproving an alibi defence always remains on the prosecution and never shifts to an accused. See **Kinyua –vs- Republic [2003] KLR 30**. I have considered the accused's defence of alibi against the circumstantial evidence that is on record and find that the same cannot be believed. I am also persuaded of two things:-

one is that there was sufficient motive for the accused to kill Norah and Edwin. Edwin was not the accused's biological son and he had to get rid of him. Two, he also had to get rid of Norah so that the death of Edwin would not look suspect. In the circumstances of this case, I have no doubt in my mind that the accused committed the two acts of murder against Norah and Edwin and then ran off. As a husband and father, his conduct of running away from home and enquiring from afar off if anything was amiss at home, was not consistent with his innocence.

29. Consequently, I am convinced that the prosecution has proved its case beyond any reasonable doubt on each of the two counts of murder. I find him guilty on each count and convict him accordingly under Section 322(1) of the Civil Procedure Code.

30. Finally, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July, 2012

31. It is so ordered.

**Dated and delivered at Kisii this 4<sup>th</sup> day of October, 2012.**

**RUTH NEKOYE SITATI,  
JUDGE.**

**In the presence of:-**

Mr. Mutai (present) for state.

Mr. Kaburi for Bigogo (present)for Accused.

Mr. Bibu Court Clerk.

**RUTH NEKOYE SITATI,  
JUDGE.**