

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 12 OF 2012

(FORMERLY KISII HCCR NO.18 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

ISAIAH OCHIENG PERO ACCUSED

JUDGMENT

1. The accused **ISAIAH OCHIENG PERO** is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the particulars, he murdered the deceased, Eunice Atieno Oguta on the night of 14th – 15th June 2011 at Kamasengere West Sub Location, Rusinga Location of Mbita District.

2. The prosecution case was that the deceased's lifeless body was found close to the home of the accused on the morning of 14th June 2011 at about 8.00am. The body lay in a venue a slight distance from the accused's house. According to the post mortem carried out by Dr. Ojwang, the deceased died as a result of a head injury and haemothorax. Dr. Francis Ochieng (PW 3) who produced the autopsy report was of the firm view that the injury must have been inflicted by a blunt object.

3. According to the testimony of Caroline Adhiambo (PW 2), the deceased had been at the hotel at Litare Beach where she was working. The deceased told her that on that night she was going to meet the accused who was her friend. She recalled that the accused came into the hotel and they left together at about 8.30pm on the night before her death.

4. On the next morning she heard that a woman had died near the lake and when she went to check, she confirmed that it was the deceased with whom she had seen the night before. She did not see the accused again.

5. Based on this evidence, I called upon the accused to explain what happened to the deceased since she was the last person seen with her. He elected to give sworn testimony and he presented an alibi in which he stated that at the material time he was in Uganda fishing. He produced two documents. One from Litare Beach BMU dated 20th August 2011 which introduced him as fisherman from Litare and the other one from Singila beach BMU (Uganda) which confirmed that he was a member of Litare Beach BMU and could fish in Uganda at the material time. His case was supported by Semekia Wakiaga Otieno (DW 2).

6. The prosecution case is founded purely on circumstantial evidence. The facts the prosecution relies on are that the deceased did not die a natural death, that she was last seen with deceased a day before her death and thirdly, her body was found in the vicinity of her home. It has been stated that in order to convict on the basis of circumstantial evidence there must be no co-existing explanation of the evidence that is inconsistent with guilt.

7. The accused presented an alibi defence and considering it, the court must weigh it alongside the prosecution case. It must be borne in mind that the defence does not bear the burden of proving the alibi

but rather it is the prosecution that must disprove it beyond reasonable doubt.

8. Taking these two principles, there was sufficient prosecution evidence that the accused was a fisherman working in Kenya and Uganda. He has presented evidence that is on the face regular and proves that he was in Uganda at the material time. The prosecution did not show why since he was well known he was not arrested until 2012. No evidence was led to show that the accused had even been in the area prior to 14th June 2011.

9. The prosecution case does not support a conviction. The alibi raises reasonable doubt. I therefore acquit the accused. He is set free unless otherwise lawfully held. The sureties herein are discharged.

DATED and DELIVERED at HOMA BAY this 12th August 2016

D.S. MAJANJA

JUDGE

Ms Ongeti, Senior Prosecution Counsel, instructed by the Office of the Director of Prosecutions.

Mr Ongoso instructed by Ayoma Ongoso and Company Advocates for the accused.