



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 26 OF 2012**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**ISAACK KAGUNZA OKWERO.....ACCUSED**

**RULING**

1. This court was informed on 16<sup>th</sup> April 2012 that the accused **ISAACK KAGUNZA OKWERO** had murdered **RHODA WERUNGA** (“the deceased”) jointly with other not before the court on 13<sup>th</sup> April 2012 at Bandani Slums in Kisumu District. He pleaded not guilty and the prosecution called three witnesses.

2. The death of the deceased was not disputed. Corporal Phares Nyakongo Mosei (PW2) recalled that at about 11.00am on 14<sup>th</sup> April 2012, he received a report from one Joan Namukuru (“Joan”) that her sister, the deceased, had been gang raped at Bandani. He proceeded to the scene and found the deceased lying on the ground naked and unconscious with saliva oozing from her mouth. Together with other officers, they took her to Jaramogi Odinga Oginga Teaching and Referral Hospital (JOOTRH) where she was admitted. On the following day, Joan called to inform him that the deceased had passed away. He later organized a post-mortem on the deceased’s body which was conducted by Dr Dixon Mchana Mwaludindi on 17<sup>th</sup> April 2012. The doctor concluded that the deceased had died of a closed head injury in the cause of suspected sexual assault.

3. PW 2 told the court that Joan informed him that she was on the way home with the deceased when a gang of four men attacked them and grabbed the deceased. As Joan was running away, she heard them say that they had been sent by the accused. Following this revelation, he proceeded to investigate the matter. The only other witness who testified was Amos Matuti Werunga (PW 1) who told the court that on the material night, Joan came to his home and told him that the deceased had been assaulted. He told the court that he knew the accused as he had been involved in a relationship with the deceased but that they had separated. He told the court that the accused had assaulted the deceased two months prior to the incident.

4. I am required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them **Ramanlal Trambaklal Bhatt v R [1957]EA 332**, **Wibiro alias Musa v R [1960]EA 184** and **Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

5. The prosecution did not lead any evidence to connect the accused with the death of the deceased. The accused was not placed at the scene of the incident on the material night nor were the assailants who attacked the deceased identified or connected to the accused. The prosecution did not call Joan who would have shed further light on the incident. Any suspicion against the accused outweighs the evidence implicating him hence he cannot be called upon to answer to the charge. Even if he elected to remain silent, the prosecution case would fail.

6. Under **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of Laws of Kenya)*, I am required to enter a verdict of not guilty which I hereby do against **ISAAC KAGUNZA OKWERO**. He is therefore acquitted and set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 6<sup>th</sup> day of February 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochuka, Advocate for the accused.

Ms Wafula, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.