



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 30 OF 2009**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOHN OMONDI OMUNGI ..... ACCUSED**

**JUDGMENT**

1. **JOHN OMONDI OMUNGI** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that 23<sup>rd</sup> July 2009 at Nyawita Sub-location of Bondo District within Siaya County, he murdered his sister, **FELIGONA AUMA** (“the deceased”). The prosecution case was as follows.

2. On 23<sup>rd</sup> July 2009, the accused and deceased’s mother, Grace Akinyi Omungi (PW 4), was at home at about 6.30pm, when she heard the deceased insulting the accused and telling him that he was not married and that he was disturbing her. The accused, who she recalled was drunk at the time, started beating the deceased with a stick all over the body. When she saw what was happening, she raised alarm causing neighbours to come. PW 4’s sister in law, Millicent Atieno Migai (PW 1), who lived next door, heard PW 4 screaming, “*John is killing Feligona.*” She went there and found the accused beating the deceased with a stick. By that time she arrived, the deceased was lying on the ground bleeding from her ears, nose and mouth.

3. The accused’s father, Charles Omungi Oburu (PW 2) also responded to the alarm and when he arrived he found the accused standing by the lifeless body of the deceased holding a stick. He sensed that the accused was drunk and when he asked him what had happened, the accused responded, “*I have killed her.*” PW 2 called his son Moses, who came and took the deceased to the hospital at Bondo. The accused thereafter went into his house and locked himself in.

4. Chief Inspector Alexander Murugu (PW 3) was informed of the incident and when he arrived at the homestead, the deceased had already been taken to hospital. The accused had locked himself in the house and in order to gain access, he had to break the door. He found the accused sleeping on his bed and arrested him. Later on, PW 3 organised for post-mortem to be done on the deceased body. Dr Tanui conducted the autopsy on 24<sup>th</sup> July 2009. He observed 3 cut wounds on the back side of the head. Internal examination of the head revealed massive bleeding and as a result he formed the opinion that the cause of death was the result of a severe head injury.

5. In his sworn testimony, the accused admitted that on the material day, he assaulted the deceased when she started insulting him about being a drunkard. He told the court that he started caning her on her, legs, waist and head. He told the court that on the material day, he did not intend to kill the deceased and that he was remorseful for the incident.

6. The prosecution witnesses admit that the accused was drunk when he arrived home. He was insulted by his sister, who had some mental incapacity, whereupon he took a stick and started beating her all over the body including the head. It is the head injury that caused her death. The prosecution therefore proved that the deceased died as a result of a head injury inflicted by the accused.

7. What is in dispute is whether the accused committed the act with malice aforethought. In determining whether there is malice aforethought, the court is entitled look at the circumstances including the nature of the injuries and how they were inflicted and the behaviour of the accused before and after the incident.

8. There is evidence that accused was drunk and the deceased provoked him by abusing him. In a fit of anger, he started beating the deceased and when he realised what had happened he stopped, went to his house locked himself in and slept. His conduct negates malice aforethought. Furthermore, under **section 13** of the *Penal Code*, the court is entitled to take into account whether the accused was intoxicated in determining whether the accused formed an intent to commit the offence. I therefore find that the prosecution failed to prove malice aforethought.

9. I therefore find the accused, **JOHN OMONDI OMUNGI** guilty of manslaughter for the unlawful killing of **FELIGONA AUMA** contrary to **section 202** of the *Penal Code* and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 25<sup>th</sup> day of May 2017.**

**D.S. MAJANJA**

**JUDGE**

Ms Aron, Advocate for the accused.

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