



**Republic v CWM Alias N (Criminal Case 60 of 2020)
[2022] KEHC 3001 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 60 OF 2020**

SN RIECHI, J

JUNE 28, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

CWM ALIAS N ACCUSED

JUDGMENT

1. The accused CWM alias N is charged with offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the offence are that CWM alias N on the 15th day of November, 2020 at [particulars withheld] village in Bungoma South – Sub County within Bungoma County murdered MNS.
3. The case for the prosecution is that on 15.11.2020 CMN the daughter in-law of the deceased MNS was taking a bath in a bathroom outside the house at 6 p.m. when she heard deceased screaming saying N Unataka Kuniuwa? (N do you want to kill me). She observed and so N the accused who is a grandson of the deceased pick a brick and hit her at the back of the head and the deceased fell down. The deceased started bleeding. She called her daughter C and they took her into the house and was later taken to Bungoma hospital where she was admitted. She left her co-wife NS to take care of her at the hospital. The next day she was informed that deceased died at night. Police came to the scene and recovered the blood stained leaves and also the block of stones. The accused meanwhile ran to police for protection.
4. On being cross-examined by Kundu advocate for accused she testified that the bathroom was open at the roof and covered by plastic sheet on the sides and she was standing in the bathroom. When she ran to where the accused had assaulted deceased he found accused being held by his father.
5. PW2 CWS a minor aged 13 years and in class 3 at [Particulars Withheld] International school was at home when she heard the grandmother the deceased screaming. She went there and saw accused



- assaulting the deceased. She went and called Baba A the uncle who came and separated accused from the deceased. The deceased was taken to hospital where she later died.
6. PW4 FN a minor aged 17 years and a student at [particulars withheld] Girls secondary in form 1 was called by C (PW2) and went to where the deceased had been felled by accused. They called Justus who came and removed accused from the deceased and gave first aid. His father was called and took deceased to hospital. She confirmed in cross-examination that she did not see accused hitting the deceased.
 7. PW5 JWM the father of accused and son of the deceased was in the house of deceased at 6.30 p.m. together with deceased when accused came and took an avocado and started eating. Deceased told accused that the avocado was for the children. Accused told her there were more avocados. The deceased then started abusing the accused. The accused clicked his tongue and walked outside. Deceased followed accused outside. He remained in the house. Shortly after he was called and saw deceased lying down and accused sitting on her abdomen. He removed accused from deceased and took deceased to the house. He noticed deceased had injuries on the head. He administered first aid and took her to hospital where she died.
 8. PW6 MS the grandson of the deceased testified that he received information that accused had assaulted deceased. He went to the scene and found her unconscious and bleeding. He then made arrangements and she was taken to hospital. He and one Dominic the assistant chief went and reported to police. Accused later surrendered himself to police after a mob threatened him.
 9. PW8No. 78066 Copl Johana Tanui attached to scene of crime visited the scene on 16.11.2020 and took photograph of the scene which he produced as Exh. 4A -)
 10. PW10 No. 82398 P.C Felix Mbuvi the Investigating officer visited the scene. He recovered a block of stone and blood stained leaves which he produced as Exh. 2 and 1 respectively.
 11. The accused gave sworn evidence in his defence. He testified that on the material day he was called by one Evaline who asked her to go to work. On the way he found the deceased who as his grandmother lying down on the road. He called his father J who took her to the house and accused noticed she had injuries. They called for a motor cycle and she was taken to hospital. The next day while at home he saw people coming to him. He ran to the police station where he was detained. He denied strangling the deceased and stated he only found her lying down. He denied hitting her with a stone block.
 12. The accused is charged with the offence of murder contrary to Section 203 of the [Penal Code](#). Section 203 provides:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
 13. For the prosecution to obtain a conviction for an offence of murder, they have to prove the following ingredients of the offence beyond reasonable doubt.
 - a) The fact and cause of death.
 - b) The unlawful act or omission causing the death
 - c) That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
 - d) That the accused committed the unlawful act with malice aforethought.



14. PW3 Dr. Elly Kosgei who performed the post mortem on the body of the deceased testified that on examination he found that she had skull haematoma and massive right lung collapse. He formed opinion that the cause of death was due to respiratory arrest due to collapsed lung. He filled the post mortem form which he produced as Exh.3. He therefore confirmed the fact and cause of death.
15. PW1 CMN testified that from where she was in the open bathrooms he saw the accused hit the deceased who fell down. She went and called her daughter C whom she sent to call the son to take her to hospital. She said that after accused hitting the deceased who fell down the accused then sat on deceased abdomen. PW2 CWS also testified that she saw accused assaulting the deceased and then sitting on her. She went and called her uncle who came and removed accused from deceased. PW4 FW testified how she responded to screams and saw deceased had been felled down by accused. She then went and called the father who took the deceased to hospital.
16. PW5 JW the son of the deceased and father of accused in his evidence stated:

“On 15.11.2020 at 6.30 p.m. I was in deceased’s house. While there the accused came into the house and took an avocado and started eating. The deceased told him that he should have left the avocado for the children. Accused said there were many more for them to eat. Deceased then started abusing him. The accused then left the house. The accused clicked his tongue. The deceased followed him outside. I remained in the house. Shortly after F came and called me. I went to check and I found the accused was sitting on the deceased on the abdomen. I separated them.”
17. On being cross-examined by Kundu for accused he stated:

“I was called by my brother’s child. On arrival I found deceased lying down and accused seated on her abdomen. My house is about 50 meters from deceased’s house. I had not heard previous grudges between accused and deceased. I had stayed there for 6 months. Is saw the dispute was over the avocado. C (PW1) came later. I was not the first person to reach there. The accused is my biological son. I had not seen this character before. He used to stay with the deceased since childhood.”
18. All these prosecution witnesses are relatives of both deceased and accused. Indeed PW1 C is his aunt, PW2 C and PW4 F re his cousins and PW5 J is the biological father of the accused. They knew accused well and testified that he was present and what he did to the deceased. The accused in his defence while admitting that he was at the scene and saw injuries on the deceased however denied that he is the one who inflicted the same. PW3, Dr. Elly in his post mortem stated that deceased died due to haematoma and massive right lung collapse. These prosecution witnesses testified how accused after hitting the deceased who fell down facing upwards, sat on her abdomen, explaining the fact that she died out of lung collapse. The accused’s defence that he only came in to find that deceased was injured at the road cannot be true in view of the evidence of the prosecution witness evidence. I am therefore satisfied that the accused is the person who inflicted the injuries from which the deceased died.
19. The prosecution must prove in a charge of murder that the accused committed the unlawful act or omission causing death with malice aforethought. Malice aforethought is defined in Section 206 of the [evidence act](#) as:

Section 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;
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.
20. In this case there is evidence that after accused hitting the deceased with a stone and she fell down he sat on her abdomen/chest and that led to the lung collapse. His action therefore reflected knowledge that what he was doing would cause fatal injuries as it did.
21. PW5 Justus the father of the accused and son of the deceased testified that the accused used to stay with the deceased. He testified that he was in the house of the deceased with the deceased and accused when accused took avocado and ate it. A quarrel ensued between deceased and accused. The then stated:
“Accused said there were many more for them to eat. Deceased then started abusing him. The accused then left the house. The accused clicked his tongue. The deceased followed him outside. I remained in the house. Shortly after Fiona came and called me. I went to check and I found the accused was sitting on the deceased on the abdomen. I separated them.”
22. PW5 the son of deceased and father of accused confirmed that there was a quarrel between the accused and deceased over an avocado and when deceased criticized him over eating the avocado meant for children, he clicked his tongue and deceased started abusing him. It is therefore clear that there was a confrontation and that the offence was committed as a result of the provocation. Where an accused commits the offence under those circumstances, Section 207 of the *Penal Code* provides:
207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.
23. After considering all the evidence I find that the prosecution has established an offence of manslaughter against the accused person. I therefore find the accused CWM guilty of the offence of Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* and convict him accordingly.

DATED AT BUNGOMA THIS 28TH DAY OF JUNE, 2022

S.N RIECHI

JUDGE

