



**Republic v Hadijah (Criminal Case 33 of 2016)  
[2024] KEHC 2853 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL CASE 33 OF 2016**

**PJO OTIENO, J**

**MARCH 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SARAH HADIJAH ..... ACCUSED**

**JUDGMENT**

1. The Accused, Sarah Hadijah, is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on diverse dates between 27<sup>th</sup> and 29<sup>th</sup> May, 2016 at Ebwi village, Eshisiru Sub Location, Busotso Central Location, Kakamega Central District within Kakamega County, the Accused person murdered Faith Asati.
2. The Accused person pleaded not guilty to the charge.
3. In order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from six witnesses who testified as below.

**The Evidence**

4. PW1, Erick Opwondo Mukhabana, gave evidence that the Accused was his wife and the deceased was his daughter. He stated that on 27/5/2016 he left for his jua kali work and returned home in the evening. He found his wife had not cooked and so he got eggs from his mother's house which the Accused still refused to cook and so he prepared dinner, ate after which he took a shower and went to the bedroom to sleep. As he prepared to sleep, he smelt something and when he asked the Accused, she told him that it was paraffin. The deceased who was two years old was sleeping on the bed and so he decided to check on her and noticed the smell was coming from her. He described the smell as that used to spray cattle. He took the child to his mother who informed him that the child had been given poison and so he rushed the deceased to Kakamega County Hospital where she was admitted. The following day his mother informed her that the Accused had burnt his house and he reported



the incident at the Kakamega Police Station and the Accused was arrested and he later returned to the hospital. The child died on 29/5/2016 at 4 a.m. On 20/5/2016 he attended to the child's post mortem and the Doctor indicated to him that the child had died of poison. He further stated that he had not quarreled with the Accused.

5. On cross examination he stated that he married the Accused in the year 2014 and that they had had another child who had earlier died of natural causes. He said that though he did not see the Accused administer poison to the child, the child was under the care of the Accused throughout the day.
6. PW2, Rosemary Nashirumbi, testified that PW1 was his son, the Accused was her daughter in law and that the deceased was her grandchild. She stated that on 27/5/2016 she was in the house sleeping when PW1 knocked at her door at 9 p.m. holding the deceased. PW1 informed her that the Accused had given the deceased poison and when she smelt the deceased, she smelt cattle dip drug on the child. She then advised PW1 to take the deceased to hospital which he did. She decided to go to PW1's house and on her way, she saw his house burning. She called for the Accused but she did not respond and looked for her in the maize plantation in vain. The next day at 6 a.m. she went to the hospital and informed PW1 that his house had burnt into ashes. She stated that the child died on 29/5/2016 at 4 a.m. at the Kakamega County Hospital.
7. On cross-examination she stated that she did not see the Accused administer poison on the deceased. She further stated that the Accused loved the deceased and that PW1 and the Accused lived in harmony.
8. PW3, Phanice Anindo stated that PW1 was his relative and that traditionally the Accused was her mother in law. She claimed that on 27/5/2016 at about 2 p.m. she met with the Accused on her way to the market and that the Accused asked her where she could buy a cattle dip to spray her cattle to which she directed her to where an agrovet shop was. The Accused bought the dip while she bought sugar from the adjacent shop and they parted ways. The following morning, she heard that the Accused had given poison to the deceased and burnt down her house. The Accused was arrested and after a short distance she began to vomit. She later learnt that the deceased had died.
9. On cross-examination she stated that she did not see the Accused administer poison to the deceased and that she did not see the drug that the Accused bought from the agrovet.
10. PW4, Dr. Dixon Mchana testified that he conducted an autopsy on the body of the deceased on 30/5/2015 after the body was identified by Erick Opwondo and Gaetano Sechere. He stated that externally, the nails, lips and tongue appeared dark bluish in color and that there were no visible external injuries aside from a dry froth coming from the mouth and nostril. Internally, in the chest, there was a dense consolidation involving more than 80% of the lungs, the stomach was nearly empty with a strong chemical smell, the liver appeared faulty and the bowels contained yellowing blue diarrhea. He formed the opinion that the deceased's cause of death was failure to breath secondary to chemical poisoning. He then handed over samples for toxicology to the investigating officer for onward transmission to the government chemist. He produced the post mortem report which was marked as PExh 1.
11. On cross examination he stated he was yet to receive a report from the government chemist and that the report is important to determine the chemical used.
12. PW5, Stephen Matinde Joel, a Government Chemist with over 20 years' experience testified that on 16/6/2016 he was on duty when an officer by the name of PC Samson No 59307 from Kakamega Police Station forwarded the following samples that belonged to Faith Asati for examination accompanied by an exhibit memo;

A-Empty brown bottle



B-Liver sample

C-Stomach sample

D-Kidney sample

E-Intestine

13. He stated that he examined the items and found that there was Amigrax which is an insecticide in the stomach and liver sample of the deceased to suggest that the deceased had ingested pesticide that led to her death and that the traces were also the same as that in the empty bottle. He further stated that he conducted the analysis on 17/7/2018 and prepared a report which he produced as PExh 2B while the exhibit memo was produced as PExh 2A.
14. On cross-examination he stated that once samples are received at the laboratories they are properly preserved hence no chance for contamination. He further stated that Amigrax is a poison which is readily available in the chemists and agrovetts.
15. PW6, No 58569 Corporal Ibrahim Karanja attached at the Kakamega Police Station testified that he took over from PC Bor who was the Investigator and that according to police file, the deceased who was aged one year eight months was under the care of her mother and was suspected to have ingested poison with the incident having occurred between 27<sup>th</sup> -29<sup>th</sup> May, 2016. He further stated that the Accused attempted suicide and was treated at the Kakamega General Hospital where she was arrested and where the deceased died.
16. On cross-examination he stated that though the offence occurred on diverse dates between 27<sup>th</sup> to 29<sup>th</sup> May, 2016, the deceased died on 29/5/2016.
17. The evidence of PW6 marked the close of the prosecution case and the court ruled that a prima facie case had been established against the Accused person and she was thus placed on defense.
18. The Accused testified as DW1 without calling any other witnesses and gave a sworn testimony and denied the charges stating that on 26/5/2016 while assisting her husband's sister plant beans, her husband, PW1, sent her to the Center to buy dip chemical to spray on animals. On that day she was unable to buy the dip and the next she met with Dickson's wife who offered to buy for her the dip and she gave her the money and she later delivered the dip to the Accused. She returned home and made supper and when her husband returned he informed her that he had eaten at his mother's house. He then asked her for the dip which she gave him after which he took a panga and forced her to give the child the dip which she did then she also took the remaining chemical as commanded by her husband. The husband then took the child with him from the house and she was taken to hospital the next day when she got to learn that her child had died. She stated that she did not plan to kill her child and asked the court for forgiveness. She claimed that she left the house intact and she loved her husband though he would beat her and that he had beaten her three times during their marriage.
19. On cross-examination she stated that she had been married to PW1 for four years and that she did not quarrel with PW1 the day he sent her to buy the dip. The two only quarreled on 27/5/2017 after he learnt that she had not bought the dip. She further stated that she did not quarrel with PW1 on the day she gave the chemical to the child. On re-examination she stated that PW1 told her that he no longer loves her.
20. with the defense having closed its case, parties filed their respective submissions which the court has benefitted from reading.



21. The prosecution contends that it has proved the offence of murder against the Accused in that the death of the deceased was proven by the post mortem report which was produced by PW4 and two people including PW1 identified the body of the deceased during post mortem. On whether the death of the deceased was occasioned by unlawful acts, it is submitted that it was the opinion of Dr. Dixon Mchana in the post mortem report that the deceased's cause of death was failure to breath secondary to poisoning. On whether the Accused person was properly identified as the person who injured the deceased leading to his death, they argue that they rely on circumstantial evidence since none of the witnesses saw the Accused give the deceased poison. They argue that the deceased was under the care of the Accused and the evidence tendered shows that the Accused bought the poison that was found to have been ingested by the deceased and that even the Accused herself admitted during defense hearing to the fact that she gave the deceased poison though she indicated that she was threatened by the husband to do so.
22. On the last element of malice aforethought, it is argued that the act of the accused in administering poison to the child and attempting to take her own life by ingesting the same poison shows that she was tormented and malice can therefore not be inferred in which regard they cite the case of *R v JMM* (2018) eKLR. They further argue malice cannot be inferred for the other reason that PW1 painted a picture that him and the Accused had not differed in any way and the actions of the Accused came as a surprise to him.
23. It is the submission by the Accused that none of the prosecution witnesses witnessed the incident of murder and that there was no corroboration evidence to link her to the offence of murder. She argues that PW1 forced her to give the deceased dip while armed with a panga and that she was a victim of gender-based violence in which regard she cites the case of *R v Truphena Ndonga Aswani* (2021) eKLR. She contends that she was arrested, charged and prosecuted merely on suspicion and that suspicion however strong cannot provide the basis for inferring guilt and cites the case of *R v Philip Osingo* (2015) eKLR in that regard.

### **Issues, Analysis and Determination**

24. The offence of murder is defined in section 203 of the *Penal Code* to be committed when a person, who of malice aforethought, causes death of another person by an unlawful act or omission.
25. Therefore, for the prosecution to achieve a conviction, all the ingredients of the offence coded in section 203 of the *Penal Code* ought to be proved beyond reasonable doubt.
26. That being the command of the law, the court trying an Accused for murder is duty bound to pose and answer affirmatively the questions whether the named deceased is indeed dead, whether the death was occasioned by acts or omission by the accused and, lastly, if the Accused in so conducting himself was propelled by malice aforethought.

### **Is Faith Asati deceased?**

27. There is no contention that Faith Asati is deceased and her death is confirmed by the autopsy report dated 30/5/2016 prepared by Dr. Dixon Mchana in which he captures that the deceased died on 29/5/2016 at 0400hrs. The death of the deceased is further confirmed by both PW1 and the Accused in their respective testimonies. The only contention is whether the administration of the poison on the deceased was deliberate on the Accused or if she was compelled by PW1.
28. According to the autopsy report, the deceased died due to respiratory failure secondary to chemical poisoning rendering her death unnatural thus unlawful.



### **Did the accused kill the deceased?**

29. The totality of the evidence leaves no doubt that the deceased died of poisoning. The administration of the poison by the Accused is itself admitted. The dispute is whether in administering the poison, the Accused acted out of own will or desire, as may be inferred from the evidence, or if it was out of compulsion by the PW1.
30. The chain of events leading to the death of a two-year-old girl under the care of her mother, the Accused, is not complicated. PW3 told the court that on 27/5/2016 she met the Accused on her way to the market and that the Accused informed her that she was looking for a cattle dip to spray on cattle and PW3 directed her to an agrovet where she bought. The Accused in her defense admits to having met one Dickson's wife on 27/5/2016 and that she helped her buy a cattle dip which she needed to spray the cattle and concedes that she indeed gave the deceased the cattle dip which she also took thereafter. PW1 testified that he took the deceased to Kakamega General Hospital and that the doctor informed him that the deceased had ingested poison and it is that poison that led to the death of the deceased on 29/9/2016.
31. It was the testimony of PW4, the Pathologist that he handed over some samples from the deceased's body to the Investigating Officer and PW5, a Government Chemist testified that he received an exhibit memo form from one PC Samson which comprised of an Empty brown bottle, Liver sample, Stomach sample, Kidney sample and Intestine belonging to one Faith Asati, the deceased herein. He stated that he examined the items and found that there was Amigrax, an insecticide, in the stomach and liver sample of the deceased to suggest that the deceased had ingested pesticide that led to her death and that the traces were also the same as that in the empty bottle. This evidence confirms that it was the Accused that caused the death of the deceased.
32. To determine whether the Accused acted freely or she was under compulsion, this court must weigh the evidence of the Accused against that of PW1. According to PW1 there was no altercation between him and the Accused that fateful night and that he was alerted by a smell in the house. His evidence shows that by the time he came into the house the poison had been administered. On her part, the Accused having said that she was compelled to administer the poison on the child and herself, she decamped from that position during cross-examination by stating that the two, her and Pw1 never quarreled on the day she administered the poison on the child.
33. The court had the advantage of hearing and observing the two witnesses, PW1 and DW1, testify. The court considers the evidence of PW1, from his demeanor, to have been truthful and candid. To the contrary, the court viewed the testimony by the Accused to have been inconsistent and evasive. It is therefore the finding by the court that the Accused did administer the poison on the child without any compulsion from PW1. It is also the inescapable finding by the court that the deceased died due to the poisoning administered by the accused. She did cause the death of the deceased.

Was the accused actuated with malice aforethought in causing the death of the deceased?

34. Malice aforethought is defined and coded, by section 206 of the *Penal Code*, to be capable of being inferable, where, among other things, there is demonstrated intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not, or the presence of 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, is sufficient proof.



35. That the Accused conceived the idea that she could administer poison on her child and herself must have been deliberate to cause death to both. The court thus finds that the Accused was propelled by malice aforethought and thus premeditated her actions and the expected consequences.
36. It is thus the finding of the court that the prosecution has proved its case against the Accused beyond reasonable doubt. Accused is thus convicted of the offence of murder as charged.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 13<sup>TH</sup> DAY OF MARCH, 2024.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

No Appearance for Osango advocate for the Accused

Court Assistant: Polycap

