



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Muswahili alias Rodah Muhonja (Criminal Case  
34 of 2016) [2024] KEHC 8901 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8901 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 34 OF 2016  
SC CHIRCHIR, J  
JULY 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**HABIBA MUHONJA MUSWAHILI ALIAS RODAH MUHONJA ..... ACCUSED**

**JUDGMENT**

1. Habiba Muhonja Muswahili alias Rodah Muhonja (The Accused) was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 29th day of May 2016 at Womalalu village, Kidundu sub-location in Vihiga sub-county within Vihiga County, murdered JLM (Deceased)
3. The accused person pleaded not guilty to the charge and the matter went to full trial.

**The Prosecution's Case**

4. PW1, was a minor aged 14 years. She told the court that on 25/05/2016 about 12.00 p.m, she was with her cousin Pamela . They were on their way to fetch firewood. They saw a woman ,who she identified as the one at the dock, carrying a bag with a child walking beside her.
5. She further stated when the two reached some rocks, near a river, they sat down and the woman took a bottle, and gave its contents to the child to drink. She then told the child to go and wash her mouth in the river. The child washed her mouth and came to where the lady was and that they started crossing the river. As they crossed, the child slightly stepped into the water and the woman scolded her , telling her that she does not know how to walk.
6. She testified that two days later, while on her way to school, she overheard about her child who has died after drinking something bad. She then remembered the incident at the river and decided to inform one Ogango. She took Ogango to the spot where she had seen the woman threw the bottle and Ogango



- retrieved the bottle from the rocks. She described the container as a juice bottle, and had a green top. The witness identified the bottle in court as the one which was retrieved. The 250ml bottle with green lid was marked as “MFI”.She identified the Accused as the woman she had seen that day.
7. On cross- examination by the court, she stated that when she saw the woman giving something to the child, she stopped and watched.
  8. During cross examination by the defence, she testified that she had never seen the woman before since she was not from around the area neither did she talked to her. She stated that when she heard about the death of the child, she decided to speak up. It was only later that she learnt that the two were going to Ogango family. She had witnessed the incident on 29 .5. 2016
  9. On re-examination, she stated that she was 8 metres away from the two, when she saw the woman giving the child something to drink. She recorded her statement a week after she talked to Ogango.
  10. PW2, was the deceased’s paternal grandmother. she testified that on 29/05/2016 she arrived home from church at about 4.00 pm . She was informed by her grandchildren that a child had been brought and was in her brother- in- law’s house, the house of Pamela. She went to Pamela’s house and found deceased lying down. She asked her what she had eaten and the deceased told her that her mother Rodah gave her something to drink . She inquired from Pamela why the child was smelling and she told her that it was because she had diarrhoea.
  11. She further stated that she called her daughter, Millicent ( PW3) to go with a motorbike to take the child to the hospital. Millicent came and took the child to Mbale District hospital
  12. She told the court that the minor’s biological mother was one AA . The child’s mother went back to her home and left the child. Her son, PM then married the accused. She identified the accused in the dock and stated that she was the deceased’s step- mother. She further stated that the accused took the child from her in 2014 with a promise that she would go with her to Nairobi. She did not meet the accused on the day the deceased was brought home.
  13. On cross -examination, she testified that the accused had, on 25/05/2016 called her and informed her that the minor was unwell and had been beaten in school; that when she informed the deceased’s father, the father told her to drown the child in river Nzoia. When the witness heard that , she told the accused to take the child to her. She further stated that on the day of the incident the accused had sent her a text message inquiring if the witness was at home.
  14. She testified that she had stayed with the child for 5 months before being taken by the accused to Nairobi. She got reports of the accused assaulting the child but she never witnessed the abuse herself.
  15. PW3 was MM. She testified that on 29/05/2016 at about 4.00 pm, she received a call from her mother (PW2), instructing her to rush home quickly to take the deceased to hospital. She was informed by her mother that the accused had brought the child . She identified the accused in the dock as her sister-in-law. She found the child in a bad state, she had passed stool on herself and was smelling of acid. At the hospital the child was crying and complaining of stomach ache. The doctor asked the deceased what she had eaten and she said her mother had given her something to drink when they got to the river. The child said it was not milk. The child was admitted. The following day PW2 went to the hospital to take care of the child. The next day at 5 am she called her PW2 and PW2 told that the child had died. She recorded her statement on the same day that the child died.
  16. During cross- examination, she testified that when she recorded her statement, she informed the police that the minor had been vomiting and had diarrhoea. She denied allegations that they had fabricated



her testimony against the accused. She stated that although she did not see the accused poison the child, the minor informed the doctor that her mother had assaulted her.

17. PW4 was the Medical Officer from Vihiga County Hospital. He produced the post mortem report dated 02/06/2016. His findings were that the body was that of a female African, aged 9 years; nutrition was not good; her physique was wasted with prominent cheek bones. Externally, the body had blood spots over anterior thighs and other parts of the body. The digestive system showed gaseous distention. He took samples from the liver, blood and intestines and forwarded them for purposes of analysis. He concluded that, subject to the findings of the Government Chemist, the probable cause of death was poisoning. The post mortem report was produced (Pexb. 2)
18. During cross examination, he reiterated that his findings were subject to the findings of the Government Analyst.
19. PW5 was the Government Analyst. He told the court that he has a Degree in Chemistry and has been working as a Government Analyst for the last 26 years. He testified that on 2/6/16 he received a police exhibit memo from Edwin Nyongesa marked with Vihiga police station's OB No. CR 041/39/2016 which he marked H 16 of 2016. The memo was forwarding the following items:
  - a. A plastic bottle containing whitish liquid that was marked "A"- MF1-1
  - b. Three syringes containing;
    - i. A piece of liver
    - ii. Blood sample
    - iii. A piece of intestines - all marked "B"
  - c. A plastic container with a whole stomach and its content marked "c"
20. The items were submitted for purposes of establishing if there was any toxic items in the samples.
21. Upon analysis, he found that:-
  - a). The residue in the stomach and the bottle was diazinon chemical
  - b). There was nothing detected in the blood and the liver.
22. He concluded that diazinon was found in the stomach and in the plastic bottle. He produced his report dated 9/6/2016 (Pexib 3)
23. During cross-examination he testified that there was some liquid in the bottle when it was given to him; that the liquid was whitish in colour, that it was turbid, a colour which is almost white; that when water is added to diazinon, it turns milky; that the mixture of water and diazocine, with time turns almost turbid in colour; that when water is added to diazonid it turns milky but turns to turbid colour with time.

### **Defence Case**

24. The Accused was put on her defence and opted for a sworn statement.
25. She told the court that in May 2016, her husband, PM told her to take the child home from Nairobi and to take her to his parents. He further told her she could not return the child to Nairobi on 28.5.2016. She called her in-law and told her that she will be bringing the child on 29.5.2016.



26. On 29. 5. 2016, they took a vehicle up to Mulango then took a motorbike for the rest of the journey. Her mother in law was not home. She waited up to 12 noon when she was told to take the child to her step- mother in law's house, the house of Pamela. She took the child to her step- mother – law. The child was fine when she left. She further stated that the child had been unwell though and she had taken her to the dispensary. She left the medicine to her step. Mother- in -law , she stated. She further testified that when she reached home , she called her sister-in -law Millicent, her mother-in-law and her husband , but all of them did not receive her calls. On June 2, 2016, she was arrested. She denied ever killing the child. She denied ever giving her anything to drink; that she never stopped on the way to in -law's home. She stated that her relationship with the child , her husband and her in -laws was good.
27. On cross- examination, she stated that she married her husband in December 2013 , and that she stayed with the deceased from 2/4/2014 until 2016 when she took her to her mother-in-law. She stated that she took the child to her in -laws at that particular time because her mother- in -law insisted that the child should be taken there. She stated that her step- mother – law was alone when she left the child with her. She left her in -laws at 3pm and made the calls to them at 5pm. She denied the suggestion that she was calling because she knew something had happened to the child. She stated that she did not see the need to summon her ex-husband as a witness.
28. In re- examination she stated that her reason for not calling her ex-husband was because she was instructed not to interfere with witnesses.
29. The defence closed its case.

#### **Accused's Submissions**

30. It is the accused's submission that PW1, who allegedly saw the accused giving some substance to the deceased was not familiar with the Accused and that no identification parade was held in any event. It is further submitted that none of the other witness saw the accused kill the deceased.
31. She questions why it took the Investigating Officer from 09/06/2016 to 06/03/2018 to submit the exhibit memo and sample for testing and analysis, as testified by PW5. Further , that the results of the chemical analysis show that there was no toxicity in the liver; that the deceased had no reason to kill the deceased as they had a good relationship.
32. She asserts that there was no direct evidence linking her to the killing and that the prosecution's case is primarily circumstantial. She has relied on Criminal Appeal No. 104 of 2018 *David Munyui Chiragu & another vs. Republic* which sets out the three tests that circumstantial evidence must meet before it can be relied on.
33. She further submits that she was arrested and charged merely on suspicion ,since no one saw her commit the offence She further argues that suspicion , however strong can never be a basis of conviction. The case of *Republic vs. Philip Osingo* (2015) has been relied on in this regard.
34. It is further submitted that the the prosecution had failed to prove that there was malice aforethought and quotes extensively the court's finding in the case of *Z K M vs. Republic* (2006) eKLR, to buttress her submission in this regard.
35. The Director of Public Prosecution did not file any submissions

#### **Determination**

36. I have considered the witness testimonies, the documents produced and the Accused's submissions and Authorities relied on.



37. Section 203 of the *Penal Code* defines the offence of murder as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

38. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR the Court of Appeal expounded on what constitutes murder. It stated:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

39. I will proceed to consider whether each of the above elements were proved beyond reasonable doubt.

### **The Death of the deceased**

40. PW4, Dr. Moses Gona Kitsao testified, and produced the Autopsy report. He found that there was gaseous distention in the small and large intestine. He suspected poisoning, but left it to confirmation by Government Analyst. He removed samples for analysis which included a whole stomach tied on both ends. The analysis by the government chemist (PW5) showed the presence of diazinon in the deceased's stomach. In the paragraph 3 of his report (Pexb 3) the Analyst stated that diazinon is an organophosphate and that it is poisonous if taken orally.

41. Thus the Pathologist suspicion was confirmed by PW5; The evidence of PW4 therefore taken together with that of PW5 testify to the fact that the deceased died from diazinon poisoning. The body was identified by PM and AL.

42. It is my finding therefore that the death of the deceased, and its cause was duly proved

### **Whether the Accused herein Caused the Death of the Deceased**

43. I agree with the accused submission that the prosecution's case was based on circumstances as none of the prosecution witnesses, not even PW1 could say that the accused made the deceased to drink poison.

44. But what is circumstantial Evidence? In *Neema Mwandoro Ndurya v. R* CRA.446/2007, the Court of Appeal cited with approval the case of *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.” (Emphasis Added)

45. Further in *Abanga alias Onyango v Republic* Cr. App. No. 32 of 1990(UR) set out certain criteria which circumstantial evidence must meet before it can be relied on. It held: “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;



- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
46. PW1 was a minor, aged 14 years. She testified on oath after being taken through voir dire examination. She testified that she saw the accused sitting near a river with the deceased. They were sitting on stones. She said she was about 8 metres from two. The woman gave the child something to drink and told her to go and wash her mouth in the river. They then went their way and the witness too went her way.
47. Two days later, she heard reports of a child who had died from poisoning. This prompted her to tell one Ogango, from the deceased’s family of the incident she witnessed at the river. She took Ogango to the river, and to the spot where the bottle was drawn. Ogango retrieved the bottle and according to the witness, the said Ogango took the bottle to the police. She further stated that the bottle had a green top and that she could identify the bottle if she saw. A 250ml bottle with a green lid was shown to the witness, and she confirmed that it was the one that was retrieved.
48. When the post-mortem was done, the pathologist removed, among other things, the deceased’s entire stomach for analysis. The bottle content was also subjected to test. The government analyst confirmed that both the chemical found in the stomach and the bottle was the same; it was diazinon an organophosphate. He produced the analysis report (Pexb no. 3). He concluded his report by stating that diazinon is poisonous, if taken orally.
49. Although I did not take the testimony of PW1, I have noted that she was not challenged on cross-examination on whether the bottle she saw on the scene was the one that was produced in court. The questions put to her in cross – examination addressed the content of the bottle, to which she readily admitted that she did not know. In as far as the events she witnessed on the river therefore, I have no reason to doubt PW1.
50. Thus, here is the chain: The Accused is seen with the deceased on the material date; she is seen giving the deceased some drink from a bottle; the bottle is retrieved; the content of the bottle and what was found in the deceased’s stomach turn out to be the same, and the substance is diazinon. According to the Government Analyst, diazinon is poisonous if taken orally. The evidence of the Pathologist, taken together with that of Government Analyst, show that the deceased died of poisoning. The chain is complete.
51. The defence has argued that PW1’s testimony is unreliable as she was seeing the Accused for the first time, and no identification parade was done to identify her. However, the accused told the court that she was with the child on that day, that is May 29, 2016, and she took her to her mother-in law’s home. Her only issue was that she did not give the child anything to drink. To the extent that the accused admitted that she was with the child the very day that PW1 referred to, then identification is really a non-issue. The identification parade would not have made any differences.
52. In her submissions the accused questioned why it took the Investigation Officer from 09/06/2016 to 06/03.2018 to submit the samples to the Government Chemist for analysis. This submission was not based on evidence. The correct position is that the Analyst told the court that he received the exhibits on 2/6/2016 ( paragraph 2 on page 27 of the proceedings); by 9/6/2016 the report of the analysis was ready,( paragraph 2 page 29 of the proceedings). He further stated that he released the results the same day of 9/6/2016 and he did his report the same day. A perusal of the report indeed shows that it was dated 9/6/2016 and signed on the same day, as evidenced by the date of stamping of the document. However he did not know when they were collected.( paragraph 3, page 29 of the proceedings). Thus the delay was on collection of the test results, not submission of the samples to the



Government Analyst. If any delay occurred on collection , it was inconsequential as the analysis had already been done, and a report produced.

53. Was there a break in the chain, that may suggest that someone else and not the accused, could have been responsible for poisoning the deceased?
54. The accused told the court that she left the child with her step- mother in law, Pamela and this was corroborated by PW2 who told the court that when she arrived home, she found the child with Pamela. Pamela was listed as one of the prosecution witnesses but she died in the course of the proceedings. Thus, one may ask could Pamela or whoever else was in the home, be responsible for the poisoning?
55. However this apparent gap does not assist the accused because of the fact that, the content in the bottle identified by PW1 as the one retrieved from where she had seen the deceased being given some content , was same content later found in the deceased’s stomach.
56. Am satisfied that the above stated circumstances taken cumulatively point to the accused as the only person who caused the death of the deceased through poisoning.
57. I have considered the accused defence, she denied poisoning the deceased, denied ever stopping anywhere on their journey, but she did not have a single witness who could have given what I consider to be an alibi to her presence near “ the river” . She also testified that she had a good relationship with the child. But the examination the child’s body by the Pathologist tell a different story. In the post-mortem report, the Pathologist observed evidence of poor nutrition and the fact that the body was wasted. There was also evidence of assault as the body had black spots all over (which the Pathologist explained as being on the anterior and posterior abdominal wall, anterior thighs, bilaterally, and posterior and anterior of the neck.) These were evidence of physical abuse that the deceased had been subjected to.
58. I hasten to add that, there was no evidence that the accused was responsible for the assault on the deceased. However, having been the child’s minder alongside her ex-husband, between the years 2015 to 2016 , the poor nutrition and body wastage negates the accused’s assertion that she had a good relationship with the child. She can not claim to have a good relationship with a child who remained under her care, unfed. She further stated that the child had been unwell and had been taking her to a dispensary but she malice aforethought
59. Section 206 of the [Penal Code](#) defines malice as follows:

“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) .....
- (d) .....



60. The court of Appeal while considering what constitutes Malice aforethought in *Daniel Muthee -v- Republic* CA .No. 218 of 2005 (UR), held:

" When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*."

61. In the present case, the accused's weapon of choice, poison, betrayed her intentions: - She knew that the child's chances of survival were almost non- existent. Am satisfied that the prosecution established malice aforethought.

62. In the end, it is my finding that the prosecution has proved all the ingredients of the offence of murder, beyond reasonable doubt. I find the accused guilty of murder, pursuant to section 203 as read with section 204 of the *Penal Code*, and I hereby convict her accordingly.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JULY , 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin- Court Assistant

Accused- present.

