



**Republic v Aluda (Criminal Case 2 of 2019)
[2024] KEHC 3562 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 2 OF 2019**

LN MUTENDE, J

APRIL 11, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

NICKSON ALUDA ACCUSED

JUDGMENT

1. Nickson Aluda, the Accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 13th December, 2018 at about mid-day in Mukuru kwa Njenga Estate in Embakasi Sub-County, within Nairobi County murdered Virginia Mutheo.
2. To prove the case the prosecution called four (4) witnesses. PW1 Mutunga Mutinda Shadrack a neighbour of the accused stated that he went home at 11.00am, on 13th December 2018 and found people having crowded at the house of the accused. The door to the accused’s house was open and on the sofa lay his two months old infant who was dead. Both parents were not present.
3. That he went to report the matter to the Community Policing Personnel but was advised to report to the Police. In the meantime he got a phone call from a neighbour Francisca who informed him that the wife of the accused had returned.
4. Subsequently he returned with the police who took the mortal remains of the child to the mortuary. He went back to work but was later on asked by the Directorate of Criminal Investigations DCI to go and record a statement.
5. PW2 Dr. Sylvester Muingi, a pathologist, conducted a postmortem on the body of the deceased. The body was identified by the accused herein. The body of the child was malnourished, clothing and the body surface were infested with lice. The infant was pale. There were no visible external injuries noted on the body. But upon opening the head the scalp was bruised underneath both on the temple and



entire side of the head. Scalp bones were not fractured with generalized bleeding all over the brain. He concluded that there was intracranial bleeding due to blunt force injury on the head. That considering the age of the child it may have been caused by a fall on the side from a height or onto a surface.

6. PW3 No. 54918 Corporal Anthony Ngatia escorted the accused who was in custody at Mukuru Police Post to Embakasi Police Station.
7. PW4 No. 58495 Corporal Joseph Kibet was at Mukuru Police Station when the accused went to the Police Post and reported that he had a quarrel with his wife and she ran away leaving behind their four (4) months old baby girl. That he put the baby to sleep and in the morning he went to work leaving her under the belief that his wife would return.
8. At the close of the prosecution case the defence filed written submissions that I have duly considered.
9. A prima facie case was defined in the case of Ramanlal Trambaklal Bhatt Vs. R(1957) EA 332, 334 as follows:

“It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”
10. The accused was indicted on a charge of murder that is provided by Section 203 of the Penal Code thus:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
11. This being a criminal case the State has a duty of proving all the elements of the offence beyond reasonable doubt.
12. The State is required to prove
 - i. The fact of death
 - ii. That the death was unlawful.
 - iii. That it was committed by the accused.
 - iv. And, of malice aforethought.
13. A postmortem was conducted on the body of the deceased infant and it was concluded that the cause of death was a head injury secondary to blunt force trauma. The pathologist explained that there was a possibility of the infant who was malnourished and infested with lice and had bruising under the scalp and generalized bleeding. However, externally there were no visible injuries. This was proof of the fact of death.
14. The infant was found on a seat inside the house of her parents, the accused herein being one of them. When PW1 found people gathered outside the house and confirmed that the body of the deceased was lifeless he went to report the occurrence to the police. He returned to the house with four (4) Police Officers and they found the mother of the child. The body was removed from the house and taken to the mortuary but there is no evidence as to what became of the mother of the child who ultimately was not a witness.
15. According to PW4, the accused herein went to the Police Station and he looked confused. He narrated to him what transpired. That he had disagreed with his wife and she abandoned the deceased leaving



- her with him on the previous night. He put the deceased to sleep on the seat and in the morning he left her asleep going to work. Since they had a report concerning death he arrested him.
16. In cross examination he stated that the accused did not relate to him how the deceased met her death. That according to the accused the mother of the deceased was the one taking care of her. That though he wondered who was to blame for the death of the deceased he arrested the accused and handed over the case to the homicide section.
 17. PW4 the Investigating Officer stated that the accused said the child had fever but instead of seeking medical attention he proceeded for casual work and abandoned the deceased on a sofa seat. That he had only fed her on milk. He learnt of the wife having abandoned the child as well but did not pursue that line of investigations.
 18. Murder is committed when a person with malice aforethought causes death of another person.
 19. Malice afore thought is defined in Section 206 of the Penal Code thus:

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; (d) 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. PW2 stated that considering the age of the deceased there was a possibility of the child having fallen. It could have been a case of a fall on the side from a height or onto a surface. On cross examination PW1 stated that Yvonne the mother of the deceased was a drunkard and even while pregnant she used to imbibe alcohol. If the deceased fell and sustained the injury no evidence was adduced to prove when it happened. It could not be stated if it may have happened at the time she was with the mother or the accused.
 21. In the result, no evidence was adduced either direct or circumstantial to prove that the accused herein did commit an act that resulted into the injuries that the deceased sustained and later succumbed to.
 22. Whether or not the accused omitted to act hence the deceased dying would be proved if the injuries were sustained while the deceased was in his custody. There was a possibility of the deceased having sustained the injury while in the custody of the mother hence there is no proof of the accused having had an intent to kill or cause the death of the deceased.
 23. The act of leaving the deceased in the house alone as he went to do casual work may have been neglecting a child which called upon the Police to prefer the necessary charge. The mother of the child equally neglected the deceased which called for criminal sanctions.



24. However, the evidence fell short of proving the offence of murder. Probably the State could have considered interrogating him with respect to the offence of neglecting the child pursuant to Section 127 of the *Children Act*.
25. In a nutshell the prosecution having failed to establish a prime facie case requiring the accused being put on his defence for the offence of murder, he is not guilty and is acquitted pursuant to the provisions of the law as enacted in Section 306(1) of the Criminal Procedure Code.
26. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY
THROUGH MICROSOFT TEAMS AT NAIROBI,
THIS 11TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Kabinga for Accused

Ms. Dela for the State

Court Assistant – Gladys

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