



**Republic v Aswani alias Gilly (Criminal Case 45 of 2012)
[2025] KEHC 8198 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 45 OF 2012**

**AC BETT, J
JUNE 10, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD ALUBOKHO ASWANI ALIAS GILLY ACCUSED

JUDGMENT

1. The Accused person, Bernard Alubokho Aswani alias Gilly is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It is alleged that on 28th August 2010 at Emauko village, Shitembe Sub-location, Marama South Location in Butere District within Kakamega County, the Accused murdered Ernest Oingo Oniango.
2. On 3.12.2012 the Accused pleaded not guilty to the charges and the case was then fixed for hearing. The prosecution called seven witnesses in a bid to prove its case.
3. PW1, was Emily Mukhwana Oniango, the mother of the deceased. She testified that on 27.8.2010 she had a ceremony at home which was attended by many people. Between 2am and 3am, she saw the deceased run into the house. She followed him. She saw another known as Gilly following the deceased while armed with spear and he stabbed the deceased who then fell down. Benard Mwakha followed and put off the lamp to allow the assailant to escape. Gilly ran away leaving Mwakha in the house. Mwakha was arrested and charged for the murder of the deceased in High Court Criminal Case No. 31 of 2010 but was later released. Gilly was arrested 2 years later. The witness identified the Accused on the dock as Gilly.
4. On cross-examination, PW1 said that Bernard Mwakha Aswani who was charged and released was a brother to the Accused. She further said that there were only young children aged around 5 years in the house at the time of the assault.



5. PW2 was Sergeant Godfrey Chachilu who said that when he reported at Butere Police Station as the In-charge Crime Branch in 2010, he found the case ongoing and it was handed over to him although he was not the investigating officer. He said that after the Accused was arrested, he requested for statements to be recorded and had the matter filed in court. According to him, when the Accused was arrested, he gave his name as Benard Alubokho Aswani alias Gilly. On cross-examination he said that the Accused did not have an identity card.
6. PW3 was Zachariah Nzambayi Otwoma, a village elder of Emauko village who testified that on 27.8.2010, he was in the home of the late Oniango attending a ceremony until 10 pm when he left for another ceremony nearby. At midnight, he left for a third ceremony and was there for 3 hours. While in the third ceremony, he received a call from the area Chief, Joel Kataka who informed him that there was an incident in the first home and asked him to check what was happening. He went back and found the deceased being removed from his mother's house. He was bleeding in the abdomen. PW3 said that he tried to call the Assistant Chief but his calls went unanswered. He went to his home and on missing him, proceeded to the nearest Administration Police Camp where he was informed that the police had already responded and taken the deceased to hospital. PW3 further stated that he heard people say that Gilly was responsible for the attack and he knew Gilly to be the Accused whom he identified on the dock.
7. According to PW3 who stated that in cross-examination that he has known the Accused for more than 15 years, the Accused's main name was Bernard Alubokho variously referred to as Cleophas.
8. PW4 was Rogers Oingo, a mason from Nairobi who recalled that on 28.8.2010 at about 10 pm he was attending a function at his late sister's home which it was attended by many people. According to the witness, a scuffle broke out among the young men. He intervened and they left. At about 3am they came back and the Accused's brother hit a burning lantern and they started chasing the deceased. The accused and his brother entered the house while holding an arrow. He used it to stab the deceased. The other person was beating his brothers and sisters. The Accused stabbed the deceased before the lamp went off. The witness said that they took the deceased to hospital but he died on the way. The Accused, who had escaped from the area was arrested in 2012.
9. Cross-examined by the Accused person's advocate, PW4 said he did not know anyone by the name Benard Alubokho Aswani and that on 27.8.2010 at around 10pm, there was commotion between Gilbert Alubokho Mwakha and Namayi and that Namayi is the brother to the Accused.
10. PW5, was Willington Musungu Wamboko who testified that on 27.8.2010, he was at the home of Oniango attending a memorial service for their child when a fight broke out between Namaya, Gilbert Alubokho alias Gilly and Benard Mwakha. According to him, the deceased intervened and took away a panga from the three and the young men went away. At around 3am on 28.8.2010, Benard Mwakha and Gilbert Alubokho came back around with a short spear and a panga. He was able to see well since there was a pressure lamp. The duo asked for the deceased who was asleep in his house. They proceeded to the deceased's house and woke him up and demanded their panga. The deceased asked them to come back the following day. Instead, Bernard beat the deceased with the flat side of the panga. The deceased ran to his mother's house and was followed by the two young men. Gilbert Alubokho struck the deceased with the spear on the buttocks and the lights went off. PW5 said that the APs were summoned and then took the deceased who was bleeding profusely to Butere Hospital where he died while undergoing treatment.
11. On cross examination PW5 said that he followed the young men wherever they went in an effort to forestall any ill action. He stated that there was a pressure lamp at the venue as well as light in the deceased mother's house.



12. Alice Andeso Malaika testified as PW6. She recalled that on 27.8.2010 she was attending her sister's memorial at Emauko. Her cousins Gilbert and Benard caused chaos in the home and the deceased took away their panga and promised to hand it over to them in the morning. The two lingered around and about 3am they came and demanded their panga while causing chaos. The deceased ran to his mother's house to avoid the chaos but Gilbert threw the spear at the deceased and it struck him on the buttocks. Benard stood at the door to block people from entering the house and while inside hit the lamp with the panga whereof the lamp went off.
13. PW6 said that they screamed for help and the deceased was taken to St Mary's Hospital where he died while undergoing treatment. Benard was arrested in the morning while Gilbert fled. She identified Gilbert on the dock.
14. On cross-examination, PW6 said that on the material day, they were using a generator since their home does not have electricity. She said there were also pressure lamps and other lanterns in the houses. There was a lantern in her mother's house and she was seated outside that house when Benard entered the house.
15. The last witness PW7, was Dr. Juma Khayombe from St. Mary's Hospital Mumias, who produced the post-mortem report on behalf of Dr. Manase Rotich Kipsang whom he said was not easily available to testify. The postmortem report which was produced as PExh2 was in respect of Ernest Oyiko Oniango whose body was identified by Julius Maende Silo and Rogers Oingo Oniango.
16. According to the report, the examining doctor conducted a post-mortem on the body of the male adult and found a deep cut wound on the medial aspect of the right glutens extending approximately 12cm deep with a rapture of a major right lower limb blood vessels. The doctor formed the opinion that the cause of the death was hypovolemic shock secondary to excessive haemorrhage caused by a sharp object.
17. PW7 clarified that the deceased died after excessive bleeding due to a deep cut wound on the buttocks. He confirmed that he knew the handwriting and signature of Dr, Kipsang as they had worked together for two years.
18. At the end of the prosecution's case, the Accused was placed on his defence and he gave a sworn statement but did not call any witnesses.
19. The Accused who testified as DW1 said that on 28.8.2010, he was at Alupe doing his work as a machine operator when he received a call that his brother had been arrested by the police that morning. His brother's name is Laban Mwakha. He travelled home and on 29.8.2010, together with his father they visited Laban while in Butere Police Station and even after he had been charged in court for the murder of the deceased.
20. The Accused said that he visited his brother severally in prison and was arrested in 2012 after a police officer had called him and informed him that investigations had revealed that he had killed a man.
21. The Accused denied killing the deceased and that he is also called 'Gilly'. He said that at home he is referred to as Aswani.
22. During cross-examination, the Accused said that he knew the village elder Zachariah Nzambayi Otwoma, who also knew him well. He claimed not to be aware that the said village elder who testified as PW3 said that he knew him as 'Gilly'. The Accused also said that he knew Rodgers Oingo PW4 who is a neighbor and he has no grudge against him. Re-examined by his counsel, the Accused said the village elder knew him by the names Benard Alubokho Aswani and that he is not known as Gilbert.



23. At the close of the case, the parties were given time to file their submissions but by the time of writing of the judgement there were no submissions in the court file.
24. The ingredients of the offence of murder are set out in section 203 of the Penal code which states that: -
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
- The prosecution therefore needs to establish beyond reasonable doubt, that the person named as deceased is dead, that his death was as a result of an unlawful act or omission, that the Accused is responsible for the unlawful act or omission and that the Accused caused the death with malice aforethought.
25. The death of Ernest Oingo Oniango was proved by the production of a post-mortem report which indicated that death certificate No. 093897 had been issued in respect of the deceased. The body had been identified before the autopsy by two people. PW1, PW4, PW5 and PW6 also confirmed that the deceased passed on after being assaulted. There was conclusive evidence of death which was not disputed by the Accused.
26. The second ingredient calls for an interrogation of the evidence in order to establish whether the death was as a result of an unlawful act. It is well settled that no person should be deprived of his life intentionally except to the extent authorized by *the Constitution*. In *Guzambizi Wesonga v Republic* [1948] EACA 55, the court of Appeal held that: -
- “Every homicide is presumed to be unlawful except circumstances make it excusable or where it has been authorized by law. for a homicide to be excused, it must have been under justifiable circumstances, for example self-defence or in defence of property.”
27. According to the post-mortem report, the deceased died of hypovolemic shock secondary to excessive haemorrhage caused by a sharp object. The evidence was that the deceased was attacked by a group of men and one of them threw a spear which struck the deceased on the buttocks. The autopsy established that indeed there was cut wound on the buttocks of the deceased which led to the extensive blood loss. The act of throwing a spear at the deceased was an act of assault. There was no suggestion that the assailant was acting in self-defence or in defence of property. Consequently, I am persuaded that the prosecution proved to the required standard, that the cause of death was unlawful.
28. As to the identity of the person who did the unlawful act, the prosecution relied on recognition by witnesses who were familiar with the Accused and even knew him by name. It was the Accused person’s earlier submissions before he was placed on his defence that Gilbert and Alubokho are two separate persons as testified by PW4 and he therefore cannot be the one who is being referred to as Gilly.
29. For the case against the Accused to be proved, the prosecution must prove that the Accused was properly identified and not a victim of mistaken identity. In *Republic v Turnbull & others* [1976] 3 ALL ER 549, Lord Widgry CJ stated that a distinction must be drawn between identification and recognition.
30. An analysis of the evidence shows that the incident occurred around 3 am during a night vigil. There were pressure lamps that were alight to assist the attendants of the night vigil, as well as electric lights that were powered by a generator. Inside the house where the deceased was struck was a lantern. There was a consensus among the witnesses that the Accused, whom they referred to as ‘Gilly’ chased the deceased into the room and struck him with a spear after which his brother hit the lantern and consequently it went off. The commotion commenced outside where there was sufficient light and



ended at the house which had a lantern. There was no possibility of error of the four eyewitnesses, who knew the Accused to the point of knowing his alias (Gilly). PW4 said that the Accused was a neighbor whom he has known him since childhood. He knew the Accused as Gilly. PW6 referred to the Accused as Gilbert. It was not put to her that the Accused was a stranger at the time of the incident. The identity of the Accused was confirmed by PW5, the village elder who testified that he knew the person who was known as 'Gilly' to be the Accused as he has known him for more than 15 years. He stated that the Accused's main name was Benard Alubokho whereas he is also variously referred to as Cleophas a clear indication of a person who knew the Accused very well.

31. In the premises it is apparent that the deceased's identity was settled by recognition. In *Reuben Taabu Anjanoni & 2 others v Republic* [1980] eKLR the Court of Appeal considered the issue of recognition and held as follows: -

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

32. On considering the evidence regarding recognition, I find that the conditions were conducive for proper recognition of the Accused by the witnesses.

33. Additionally, in the case of *Peter Musau Mwanzia v Republic* [2008] eKLR, the Court of Appeal stated as follows: -

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.”

34. In his defence, the Accused tendered an alibi. He claimed to have been away during the date of the incident. A defence of alibi once raised does not obligate the Accused to prove it. The prosecution still bears the burden of proving the charge beyond reasonable doubt. In *BNT v Republic* [2025] KECA 643 (KLR) the Court of Appeal at Kisumu rendered itself thus:-

“It is true that an accused person does not assume the burden of proving his alibi; the prosecution bears the burden of proving all aspects of the charge beyond reasonable doubt – and this includes dislodging the accused persons' alibi defence. In *Kiarie v R* [1984] KLR this Court laid down the following principle:

“An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

However, it is also an established principle that where an accused person fails to disclose an alibi at a sufficiently early time to permit it to be investigated by the police, this is a factor which may be considered in determining the weight given to the alibi defence. An alibi defence will only prevail



where it successfully raises reasonable doubt about the probability whether it is the accused person who committed the offence. The trial court is expected to evaluate the evidence in its totality; to weigh up all the elements; and consider the inherent probabilities. In doing so, as aforesaid, the trial court is entitled to take an adverse view of the fact that an accused person failed to raise the alibi defence at the earliest opportunity.”

35. The Accused did not raise his alibi defence at the earliest opportunity. Although he claimed to have been in Busia, he did not put any questions to the witnesses who identified him to suggest he was not at home at the material time. His defence can therefore be deemed to be an afterthought. In any case, his defence was dislodged by the overwhelming evidence adduced by the prosecution. I therefore find that the prosecution proved to the required standard, that it was the Accused who threw the spear that fatally, injured the deceased.

36. Malice aforethought is defined under section 206 of Penal code 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)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.”

37. In considering whether malice aforethought has been proved, the old case of Republic v Tubere s/o Ochen [1945]12 EACA comes to mind. Citing it with approval in Carilus Omondi Mboga & Another v Republic [2019] eKLR, the Court of Appeal stated:-

“The court acknowledged that in determining whether malice aforethought has been proved the following elements should be considered:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

38. The deceased was said to have been unarmed when the Accused and his team arrived and attacked him and despite his attempt to flee to safety he was assaulted by the Accused using a spear. A spear is a lethal weapon which causes serious injury. After the deceased had been injured, the Accused’s brother perhaps in a bid to create confusion so that the deceased would not be saved, destroyed the lantern that was lighting the room. After the incident, the Accused fled the scene and was arrested after two years. The entire circumstances surrounding the case point to an intention to maim the deceased. The Accused knew or ought to have known that throwing a spear at the deceased would result in grievous



harm particularly when aimed at the buttocks. In *Bonaya Tutu Ipu & another v Republic* [2015] KECA 333(KLR) the Court of Appeal stated that:-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *CHESAKIT V. UGANDA*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *REX V. TUBERE S/O OCHEN* (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

39. Being guided by the above authorities, I do find that the vital ingredient of malice aforethought was properly proven. Consequently, I am satisfied that the charge against the Accused has been proved beyond reasonable doubt. Accordingly, the Accused is convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal code.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Mr. Getanda for the Accused

Court Assistant: Polycap

