



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 35 OF 1984

PANCRAS OTEYO AKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Conviction and Sentence of the Court Martial at Langata Barracks, Nairobi)

JUDGMENT

The appellant Ex-No. 021597 Senior Seargent Pancras Oteyo Akumu of the Kenya Air Force, Nanyuki, a serviceman of the Armed Forces, being subject to the Armed Forces Act, cap. 199 under section 7(1) of that Act, was charged with:-

Committing a civil offence, contrary to section 69(1)(a) of the Armed Forces Act, that is to say, treason, contrary to section 40(1)(a)(iii) and (b) of the Penal Code

in that he on diverse days between the month of March, 1982 and August 1, 1982 at various places in Kenya, being a person owing allegiance to the Republic of Kenya compassed, imagined, invented, divided or intended, jointly with other persons not before the court, the overthrow by unlawful means of the Government of Kenya and expressed, uttered or declared such compassings, imaginations, inventions, divides or intentions by overt acts the details of which were :-

1. On 1st August, 1982 at Nairobi the appellant armed himself with a submachine gun.
2. On 1st August, 1982 at Nairobi the appellant jointly with other persons forced Mr Crescent Were, a Voice of Kenya technician, to go with them from his, the said Mr Were's house to the Voice of Kenya Langata Transmitting Station and switch on the said station.
3. On 1st August, 1982 in Nairobi the appellant ordered the said Mr Crescent Were to switch on the machines at the Voice of Kenya Langata Transmitting Station.
4. On 1st August, 1982, at Nairobi the appellant told the said Mr Crescent Were to go and switch on the Voice of Kenya Transmitting Station at Ngong.
5. On 1st August, 1982, at Broadcasting House in Nairobi the appellant and other persons forced Miss Pamela Mburea, a Voice of Kenya announcer, to announce over the General Service of the Voice of Kenya that the Government had been taken over by the armed forces.
6. On 1st August, 1982, at Broadcasting House in Nairobi the appellant announced over the General Service of the Voice of Kenya that the Government had been overthrown by the armed forces.
7. On a number of occasions on 1st August, 1982 the appellant went to the Voice of Kenya's Broadcasting House in Nairobi.
8. On 1st August, 1982 the appellant went to a certain house situated along Ngong Road near

- Adam's Arcade in Nairobi which house was then being used as the headquarters of the People's Redemption Council, an organization of which he, the appellant, was a member and whose aim was to overthrow the Kenya Government.
9. On 1st August, 1982 the appellant in execution of the coup to overthrow the Kenya Government, travelled to various places within Nairobi including the General Post Office and the Kenya Air Force Station at Eastleigh.
 10. On an unknown date in March, 1982 or thereabouts the appellant and one Sergeant Joseph Ogidi Obuon asked Captain Jeclin Carey Agola to assist them in their plan to overthrow the Government by recruiting officers, specially pilots, to help them carry out the said plan.
 11. On or about 4th May, 1982 or thereabouts the appellant with other persons attended a meeting in the house of one Senior Private Hezekiah Ochuka Raballa at Umoja Estate in Nairobi at which meeting progress reports regarding the coup plot were discussed.
 12. During or about the month of May or June, 1982 the appellant travelled to Kisumu and met in a certain house for purposes connected with the planning and execution of the plot to overthrow the Kenya Government.
 13. During or about the month of May or June, 1982 at the Kenya Air Force, Eastleigh base in Nairobi the appellant told Sergeant Samuel Okoth Opiyo to tell Senior Private Ochuka that he the said Senior Private Ochuka, should not contact one Captain Pala again about the coup plot as it had been known that the said Captain Pala had been passing information about the said coup plot to higher authorities in the Kenya Air Force.
 14. On 20th June, 1982 or thereabouts the appellant with other persons attended a meeting in the house of the said Senior Private Ochuka at Umoja Estate in Nairobi at which recruitment of personnel for the coup plot was discussed.
 15. On 17th July, 1982 or thereabouts at Nakuru Town the appellant told some Army soldiers, including one Senior Private Abich of 81 Tank Battallion, Lanet, to support the Armed Forces to overthrow the Government.
 16. On 18th July, 1982 or thereabouts at Nakuru town the appellant told some Army soldiers, including one Senior Private Abich of 81 Tank Battallion, Lanet, that on the coup day they, the said soldiers, should support the coup by taking over Nakuru Town.
 17. On 19th July, 1982 or thereabouts at Nanyuki the appellant told some Army soldiers from the 1st Battalion, Kenya Rifles, including one Private Tom Ouru Okwengu that, the accused, and other members of the Kenya Air Force wanted to overthrow the Government.

Before the commencement of the trial at Langata Barracks on March 20, 1984, the prosecutor applied and was allowed to withdraw overt acts Nos 2 and 7 under rule 80 of the Armed Forces Rules of Procedure. By the end of the trial, the prosecution had not adduced any evidence in support of overt act No 5. As a result, we are on this appeal, seized with the remaining 14 overt acts on which the prosecution adduced evidence in support thereof.

Addressing the Judge-Advocate at the opening of the case for the prosecution, Major Mbewa, then prosecuting, gave the background to the case against the appellant, then accused, as follows:-

“Sometimes in March, 1982, a small secret and subversive group of airmen at the Kenya Air Force Base, Nanyuki started to forment a plot to overthrow the Kenya Government. The accused before you Sir and one Sergeant Ogidi were the founding fathers of this group and between March, 1982 and 1st August, 1982, the group expanded rapidly in membership due to a spirited recruitment drive conducted by the accused, Ogidi and others in every Unit of the Kenya Air Force as well as in other Units of the Kenya Army. In due course, one Superintendent Ochuka of the Kenya Air Force Eastleigh emerged as the leader of that group which was known as the People's Redemption Council. The accused also simultaneously emerged as the second in command of that group and also a member of the inner nucleus of it. The sole objective of this group was to overthrow the Kenya Government by force of Arms which, needless to say, was unlawful. In order to achieve this objective, the accused and other senior NGO's who were members of this group made several journeys up and down the country to various places looking for financial and material support, recruiting new members into the group, attending briefings and meetings

at various places and administering oaths to the new recruits, thus binding them not to leak out the existence of the group to authorities and not to pull out of it.

These plans culminated in the attempted coup of 1st August, 1982 which you are only too aware of. Sir, on 1st August, 1982, the first priority of this group was to capture the Voice of Kenya, that is Broadcasting House Nairobi and to announce to the Nation the overthrow of the Government. Evidence will be adduced by the prosecution to show that the accused before you, whose Unit was Kenya Air Force, Nanyuki, had purposely travelled down to Nairobi about two days earlier to join the other members of the People's Redemption Council and co-operated with them in execution of the plot to overthrow the Government. Further evidence will be adduced to show that on 1st August, 1982, the accused was extremely active in furthering the plans to overthrow the Government by his activities and utterances."

We now would first like to summarize the evidence in support of overt acts Nos. 10 to 17 (*supra*), which relate to the activities of the appellant before the 1st of August 1982. In due course we will then indicate when we will be moving to his activities of the 1st of August 1982 and thereafter.

The earliest involvement of the appellant in the plan towards overthrowing the Government was at Nanyuki Air Base. Captain Jeclin Cavey Agola PW 3 testified that on a Sunday morning in March or April 1982, the appellant and one Sergeant Okidi called at his house within the KAF compound at Nanyuki. The visitors told him PW 3 that they had come to see him on some matter. They explained that they were not happy with the way the Air Force and the Government were being run, and as such they had a plan to overthrow the Government. So they were requesting PW 3 to join them and help in recruiting other officers, especially pilots, to join in the plan. Because PW 3 was not willing to join in the plan, he told his visitors that he would report them to higher authorities, but they pleaded with him not to do so. They then left. On or about 4th May, 1982, also a Sunday, there was another meeting in the house of one Spte. Ochuka at Umoja Estate in Nairobi which was again attended by the appellant, and where the plans to overthrow the Government were discussed. This was stated in evidence by Sergeant Samuel Okoth Opiyo PW 21. PW 21 was that morning invited by Ochuka to the latter's house K 27, Umoja Estate. The witness obliged and on arrival at the house he found a group that comprised of the appellant, Corporal Odera, Sergeant Okidi and Corporal Ombok playing cards. PW 21 knew only Corporal Odera. The rest were introduced by Ochuka. Ochuka also introduced PW 21 to the group. After the introduction, Ochuka opened the meeting by giving his report on the progress of the plans to overthrow the Government. Said the witness PW 21:-

"Ochuka said that he had not been able to get the communication equipment and that during the coup day they would use the normal communication equipment used in the Armed Forces..... After he had finished giving out his report, he told Sergeant Akumu (appellant) to give out his Nanyuki report."

The appellant then reported that his group had finished the plans for Nanyuki Air Base and that during the coup day they would use the radios fitted in the fire vehicles. After the appellant completed making his report, Ochuka advised him to go back, work harder, and come out with a better report. Corporal Ombok also gave a progress report of his group at the Embakasi Air Base.

On 20th June, 1982, there was yet another meeting at Ochuka's house. Once again it was Ochuka who invited PW 21 to the house. When PW 21 arrived he found a group which included the appellant, Ogidi and Ombok. They were reading newspapers in the sitting room. Said the witness PW 21:-

"Then when I entered the house Ochuka told them that 'this is the gentleman I was talking about' Then he asked me to produce the list of the people he had told me to recruit. I told him that I had not recruited anybody."

PW 21 then testified that he had previously been instructed by Ochuka to recruit KAF soldiers at Eastleigh into the organization that was planning to overthrow the Government. The witness explained to

the gathering that he could not produce any list of recruits because he had not found suitable persons to recruit. Ombok got annoyed and spoke to Ochuka implying that his (Ochuka's) recruitment of the witness into the organization was a poor choice. A hot debate then ensued concerning what type of people Ochuka was recruiting. PW 21 then left after informing Ochuka that he did not wish to associate with the activities of the group.

On 8th May, 1982, there had been another gathering in a house in Kisumu. This meeting is the basis of overt act No. 12. During the trial, and at this appeal, the State applied for the evidence relating to this overt act to be taken in camera to prevent any possible endanger to national security. The application was made under section 92(2) of the Armed Forces Act, Cap. 199 and was duly granted on both occasions. We will, therefore, on this meeting in Kisumu say no more than that there is evidence of PW 21 and Spte. Charles Abich Owiti PW 7 to the effect that the meeting took place, and that the purpose of it was to plan the execution of the plot to overthrow the Government. The meeting was attended by, besides the two witnesses, a group that comprised the appellant, Ochuka, Ogidi, one a Mr Langi, an old man, and the owner of the Kisumu house.

The last piece of evidence given by PW 21 was that relating to overt act No 13. It concerns an incident in the Sergeants' Mess at Eastleigh Base in Nairobi which took place sometime in May or June, 1982, at lunchtime. PW 21 narrated the incident as follows:-

“..... the accused (appellant) said that he had something to tell me and he called me aside and went into the verandah. There the accused told me that I should go and tell Spt. Ochuka not to contact Captain Pala again because it had been known that Capt Pala was passing information of the coup to higher authorities.”

Now we move into the activities of the appellant in the month of July, 1982. On 17th July 1982 at Nakuru Town, the appellant told a group of young soldiers which comprised of PW 7, Spte. Aggrey Oduor Odhiambo PW 5 Spte. John Onyango Maroko PW 6 and Pte Jphn Ouma Agallo PW 9, all of 81 Tank Battallion, Lanet, to support the Armed Forces to overthrow the Government. The group met at Salwe Bar and Restaurant in Nakuru, and extended their meeting afterwards to Shirikisho Lodging, also in Nakuru, where the appellant also administered an oath to PW 7 and PW 9 so that the latter two could support the plan to overthrow the Government.

The next day ie 18th July, 1982 PW 7 and PW 9 met the appellant outside the Amingos Bar at Nakuru. The appellant told the two witnesses that on the day of the coup, they should not oppose the coup but rather they should capture Nakuru town as soon as they learn that the coup was taking place.

The last incident in the month of July involving the appellant took place at Nanyuki Air-Base on July 19, 1982. Pte. Tom Ouru Okwengu PW 4 testified that the appellant told him and other soldiers that members of the KAF, including himself (ie appellant) wanted to overthrow the Government. PW 4 says that others who heard the appellant say so included Spte. Juma Ooko, Spte. Akoko, Spte. Odhiambo and Spte. Joseph Awaka. Besides the talk, the appellant and Ogidi gave the group entertainment in from of drinks and food as an inducement to get their support for the plant to overthrow the Government. The appellant and Ogidi also oathed members of the group, and threatened them with death in case they disclosed the plot. PW 4 also testified that the appellant gave Kshs 11,000 to one Pte. Obell for the purpose of luring recruits into the coup group. PW 4 refused to be given any part of the money.

The day to execute the plan to overthrow the Government happened to be August 1, 1982. Now this evidence relates to overt acts Nos 1 to 9. That day, at about 2.00 am Sergeant Martin Japheth Barasa PW 8, then working in the Motor transport section of GADU at Embakasi Air Base, was awakened by gunshots. He dressed up and went outside his room to ascertain what was happening. Outside he was confronted by a serviceman who he later knew to be one Spte. Robert Odhiambo. Odhiambo, who was armed with an SMG gun, ordered the witness to get ignition keys of one landrover. PW 8 obeyed the order, which extended to driving Odhiambo around the streets of Nairobi where it became apparent there was a mutiny taking place. As it transpired, PW 8 and Odhiambo were to later be joined in the landrover they were driving in by the appellant. We shall revert to that incident in due course.

Meanwhile, at about 2.30 am, Elijah Kithuma PW 16, was on duty at the VOK's Broadcasting House, Nairobi. PW 16 is a News Editor. Other people on duty with him were William Wambaa (PW 13), and one Mr Chai, the latter two being translators. As he was working with his telex machine he heard a gun shot from outside. Within no time, some persons, some of who were dressed in Air Force uniforms, some armed stormed into the newsroom and ordered the witness and his co-employees to raise their hands. The intruders then proceeded to make arrangements to broadcast the intended overthrow of the Government. The appellant was one of the intruders. He was with an SMG gun.

As the VOK newsroom was being raided, Peter Wainaina Mwaura PW 14, a VOK driver, was asleep in the van he drives which was parked in the compound of Broadcasting House. He was waiting to collect VOK employees who would be coming for duty on the next shift. All of a sudden he was rudely awakened by commands of KAF soldiers who inquired as to whether he was a radio announcer. He said he was not, and when asked, he said he did not know where one Mr Mambo, a VOK radio announcer lives. The group of soldiers, which included the appellant, said they wanted someone to broadcast the overthrow of Government. Then the group ordered PW 14 to take them to the house of a VOK engineer Mr Crescent Were (PW 15). The group proceeded to Muranga Road in Ngara Area where PW 15's house is situated. There PW 14 was ordered by the appellant to awaken Were PW 15. When he had been awakened, he was ordered into the vehicle the group had come in. The appellant informed PW 15 that the Government had been overthrown, and that he (PW 15) was required to go and switch on VOK's Langata Transmission Station. The group proceeded to Langata where PW 15 switched on the transmission station under the orders of the appellant. Thereafter, the appellant again ordered the witness to proceed to switch on the machines at VOK's Ngong Transmission Station. PW 15 said he does not work there, and thus he had access to the latter Transmission Station. The time PW 15 was picked from his house, was estimated to be around 5 am.

It was around that time that David Gichira Mbogo (PW 11) a VOK technician, and Miss Pamela Mburea PW 22, a programme producer and announcer, were arriving at the gate of Broadcasting House to report for duty. They were in company of Mr Swaheli Athumani, also an employee of VOK. According to Pamela, when they arrived at the gate they found many armed soldiers. Others were inside the VOK compound. Pamela and his two co-employees were ordered out of the vehicle they had come in, and were further ordered to kneel down on the tarmac, hands raised. The poor three stayed for sometime in that position, until they were later ordered at gun point to get into Broadcasting House to make announcements. Athumani and Pamela went straight to National Service Studio, which they opened and started transmissions. Both were ordered to make several announcements which were dictated by the armed soldiers who had led them to the studio at gun-point. The announcements in Kiswahili were to the effect that the Government had been taken over by the Military and that the people were to stay indoors. At about 6.20 am Athumani and Pamela were escorted to the neighbouring General Service Studio, which transmits in the English Language to repeat the similar announcements they had made on the Kiswahili service. Besides Athumani and Pamela, some soldiers also made announcements in the radio. One was the appellant, who Pamela identified as bald-headed, and was wearing a blue short sleeve shirt, and a brown trousers. Said Pamela of the announcements by appellant :-

“In the announcements he outlined the reasons why it had become necessary that the Government be overthrow. He gave reasons like corruption, nepotism etc and he said that, he repeated a after each announcement, that people should stay indoors and there should be no panic because the new Government was going to maintain law and order. He made three announcements to that effect, the first of which was longer than the others.”

We pause here to state that a tape Exh.1 was played to Pamela in court and she identified the three Broadcasts as those made by the voice of the appellant. The transcripts of the tape was produced in evidence as Exh.2. We would like to also state that the tape was played to us too when we heard this appeal.

After the appellant made his three announcements, he left the studio. Pamela remained in the studio guarded by armed soldiers. She went on playing military music which she had been ordered to obtain from the Music library. At some stage a crowd of university students entered the studio shouting Power!

Power! They congratulated the soldiers who were present.

It appears from the evidence that before and after his broadcasts from the VOK, the appellant made trips to a few places within the town. According to his own statement (Exh.3) he went to a certain house in Adam's Arcade along Ngong Road which he says was the headquarters of the People's Redemption Council the organization which he was a member and whose aim was to overthrow the Government. The appellant also drove to several other places which included the GPO and the KAF base, Eastleigh.

Between 9.00 and 9.30 am the appellant happened to be near the 680 Hotel. He stopped the landrover then driven by PW 8 and Odhiambo, as stated earlier, and after jumping into it, ordered PW 8 to drive him to Broadcasting House. This must have been one of his several trips to Broadcasting House. But it appears to have been his last, for as soon as the landrover arrived at the VOK compound, it was hit by gun-fire, apparently from the loyal forces that rescued the situation. Says the witness PW 8 :-

“On reaching the compound and on looking on my right, I saw a uniformed Air Force man lying dead on the ground with his gun stuck in the ground by the bayonet. At the same time ex-spte. Odhiambo also saw the corpse and got surprised and he appeared to want to ask me what was wrong but I never answered him. Then we heard bullet fire from the side of Uhuru Highway and some of the bullets riddled the left hand tank fuel of our landrover. From that time onwards we were all in great panic. Pancras Oteyo Akumu (appellant) and Robert Odhiambo, I believe, escaped before me from the landrover. There was a series of bullets and one of them missed me narrowly by inches. During that time Oteyo and Odhiambo had fled into hiding for safety I did not go far but jumped out of the landrover and hid myself by the rear right wheel of the landrover. When the firing subsided I just thought that I should run away from the landrover. Which I did past the main gate of VOK. There were about two to three soldiers there, who asked me why I was running away but I never talked to them. On getting out of the VOK premises, I saw Spte. Odhiambo afar and he beckoned me. He was still holding the SMG. I advanced towards him. He ordered me to go and find any vehicle available and then drive it to him, something which I never did.”

The appellant must indeed have thought it wise to escape from the gunfire at the Broadcasting House. He left for KAF Eastleigh Air Base. According to Corporal Ezekiel Mbae Mwarania (PW 17) and Lieutenant Charles Odhiambo Ondiek (PW 18) the appellant arrived at the Military operations radio room at Eastleigh by 10.00 am. The appellant told PW 18 the appellant that he had been chased away from VOK where he had been making announcements, and that he wanted to contact KAF Nanyuki to send aircrafts so that they could go and threaten those who had chased him from VOK so that he would resume his announcing duties there. He ordered PW 18 to call KAF Nanyuki for the aircraft. Before PW 18 could contact Nanyuki Ochuka arrived at the operations room and told the appellant:-

We should get some aircraft from Nanyuki to come and over fly Nairobi area and if possible to bomb VOK, State House and Army Headquarters.”

After a while, some aircrafts actually overflew the city. They were from KAF Nanyuki Base. Following that, the appellant and Ochuka continued to contact Nanyuki Base by direct telephone in order to secure some Aircraft for bombing certain strategic places in Nairobi ie VOK, State House, Army Headquarters, Langata Barracks, GSU Headquarters, Ruaraka and GSU Embakasi. But by midday there was no aircraft from Nanyuki. By then the appellant and Ochuka became aware that their plans had been failed by loyal troops of the Kenya Army who were in the process of capturing the Eastleigh Air Base. In desperation Ochuka and the appellant proceeded to the hangars at the Eastleigh Air Base and hijacked a Buffalo Aircraft No 210 for escape out of the country. Both appellant and Ochuka forced Major William Jack Marende PW 20 and Lieutenant Colonel Leshan to fly the aircraft to Tanzania. On arrival in the Tanzania the appellant and Ochuka were allowed to remain in that country. Thereafter the Kenya Government applied for their extradition. The application resulted to a trial commencing on August 19, 1982 before the Chief Magistrate's Court at Kisumu, Dar-es-Salaam, which in the end granted both the appellant and Ochuka asylum.

All the extradition proceedings were witnessed by Awan Mustaqim Khan (PW 2) then an Assistant Commissioner of Police in the Kenya Police Force. The verdict of the court at Kisumu put a stop to Kenya Government's efforts to have the appellant and Ochuka brought back home for trial. But it was just a matter of time. By November 1983, Tanzania was willing to hand over the appellant and his colleagues back to the Kenya Government. So on November 11, 1983 Captain Charles Diffu PW 1 proceeded, on instructions of the Government to the Kenya Tanzania Border at Namanga and was handed over a group of prisoners who included the appellant. The appellant was then held at Naivasha Maximum Security Prison. On January 16, 1984 he made the detailed confession statement, Exh.3, to Supt. Mbuvi. In the detailed statement, he admitted to having been involved himself in the treasonable activities which are alleged against him. We think the statement is true, and will be commenting on it later. The confession of the appellant very much strengthens the evidence of prosecution witnesses which we have already outlined. It must also be remembered that, according to the evidence of PW 2, the appellant made the same admissions as are contained in his confession at his extradition proceedings in the Chief Magistrate's Court at Kisumu, Dar-es-Salaam. The above was the prosecution case.

In his defence, the appellant made un-sworn statement which we reproduce and which reads as follows:-

“Your Honour, Sir, before 1st August, 1982, I had information that Njonjo was planning to overthrow the Kenya Government and he was going to use the Kenya Air Force as one of his instruments to do that. This is when I started to consider the position of the then Kenya Air Force and the General lack of commitment to duty which existed at that time in the national Air Force. There were people who were placed in position of trust in Kenya Air Force and they never exercised their duties to report to take any steps to curtail what was going on to bring a lot of disorder in the country. This showed clearly that the top echelons in the Kenya Air Force at that time were not happy with the rule of His Excellency the President, Daniel Toroitich Arap Moi. If they were, they could have shown that in deed. I, therefore, came to the conclusion that Charles Njonjo who wanted to overthrow the Government wanted to use the then Air Force as an instrument. He had influenced Kenya Air Force Officers and, therefore, I made my own resolutions to destabilize the Kenya Air Force so that if that alleged coup of Charles Njonjo's came in swing, there would be no Kenya Air Force for him to use. Your Honour, I never, ever intended to overthrow the Kenya Government and at all times I believed my actions were only meant to destabilize the Kenya Air Force, thereby rendering it incapable of being used by Charles Njonjo to stage his coup. I did not and I do not believe that I could overthrow the Government by using small arms like sub-machine guns, self-loading rifles, etc while I knew that the infantry had more sophisticated weapons. I had no intention to overthrow the Government and that is why I never could have visited important installations like Army Barracks, police stations, General Post Office and the leaders' residences. Never at any time did I say or assign anybody to go and arrest the leaders or the President of this country. It never came to my mind that anybody could overthrow the Government without arresting national leaders or the President for that matter. I acted in such a way as to prevent the coup which was to take place between 3rd and 6th August, 1982. My actions were never motivated by any instinct. I was being patriotic for my country. And, Your Honour, Sir, if this court martial finds me guilty, I will have to suffer death but I have destabilized the Kenya Air Force. I have prevented the coup which was to take place but never took place. I placed an arrest barrier against certain things which were going to happen to our country and that arrest barrier arrested them. They never took place, Your Honour. And if I shall die because I raised that arrest barrier to a disaster which was imminent because I stopped the Kenya Government from being overturned, then I must, therefore, pray hard for the country of my heart, the country I love. I believe, as Mark Twain said, that in the long run, we shall all die. I deny all the Overt Acts instituted against me. Thank you very much, Your Honour.”

We would like to comment here that we think that the Court must have rejected the defence in total because it cannot stand in the light of the evidence as a whole. The crux of the defence is that the

appellant intended not to overthrow the Government but to destabilize the KAF in order to pre-empt an imminent plan by Mr Charles Njonjo, the former Minister for Constitutional Affairs, who the appellant alleges was about to use the KAF to overthrow the same Government. As we shall comment later and as is probably clear so far, the conduct, the activities and the utterances of the appellant throughout demonstrates a clear intention to overthrow the Government and not to do anything of the sort like destabilizing the KAF. As Major Mbewa rightly submitted, if the appellant had the concern for this nation and wanted to protect it from the alleged machinations of Mr Njonjo then he should have reported Mr Njonjo to higher authorities. It was also submitted by counsel for the appellant that because the recent Judicial Commission of Inquiry at para 173 of its report made a finding, that Mr Njonjo might have had something to do with the August 1st 1982 disturbances, that lends credence to the appellant's defence. We do not think so, and we would not like Mr Njonjo's name to be dragged in any more because there is no evidence to suggest that Mr Njonjo had anywhere acted in common with the appellant.

At the end of the trial, the Court Martial deliberated before they gave their verdict. They found the appellant guilty, convicted him, and sentenced him to death. He now appeals against his conviction.

The appellants grounds of appeal are in summary that (1) his inquiry statement under charge and caution, Exh.3, was not made voluntarily and that it was not properly admitted in evidence; (2) that some of the evidence against him was that of accomplices and did in law require corroboration to sustain conviction; (3) that the prosecution did not prove intention on his part to commit the offence charged; (4) that his conviction was against the weight of evidence before the Court martial; (5) that there were contradictions and inconsistencies in the prosecution case, and lastly, that none of the overt acts were sufficiently proved, and in particular, beside those conceded by the State not to have been proved, overt acts Nos. 8 and 12. We shall deal with the grounds of appeal, as far as is practicable, in that order.

The appellant's statement (Exh.3) was recorded under the usual charge and caution by Supt. Peter Mwaura Mbuvi (PW 23) at Naivasha Prison. As stated earlier, it is a confession, full of details, in which the appellant gives an account of his activities, the subject matter of these proceedings. Now it is submitted by learned Counsel for the appellant, Mr Simiyu, that the statement, which the appellant retracted at his trial was not voluntary in that it was made under threats and inducement. There was a trial – within – a trial at the Court Martial, which was concluded with the following summing up by the Judge-Advocate:-

Presiding Officer, Sir, members of this court martial, for the purpose of this trial within trial, it is now my duty to advise you as to the law on the admissibility of a confession statement and briefly to comment on the evidence that you have heard. Let me first say, although it was not mentioned by the Defence Counsel, that it is for the prosecution to satisfy the court that any statement made by the accused is admissible.

By section 26 of the Evidence Act, cap 80, a confession of an accused person has been threatened or induced to make that statement is inadmissible. It is therefore for the prosecution to satisfy you in this case that there was no inducement which operated on the accused's mind at the time he made the alleged statement and that there was no any threat which similarly was made. If the prosecution fails to satisfy you on that then you must rule this statement inadmissible. The prosecution called one witness, Supt. Mbuvi, and the defence called one witness, the accused.

The Superintendent said that the statement was recorded in a friendly atmosphere, just the two of them being present, that it was taken in accordance with the Judges Rules. The accused said basically three things. Firstly, he said that he had been induced to return voluntarily to Kenya in order to give evidence in a certain other judicial proceedings and had got an assurance that he would be treated well. Secondly, he said that the conditions in his prison were such as to place him in fear and operated upon his mind to make him do that which the Superintendent wanted him to do and, thirdly, he said in effect that the Judges Rules were not complied with in that (a) He was not cautioned. (b) That which was recorded was not always what he had said (c) That the statement was not read back to him

and (d) that he was not given an opportunity to add, alter or amend anything in the statement.

A ward or two on the law. If a statement is made by the accused, he having been induced to make it, that statement as I have said, is inadmissible. If, however, an inducement has been offered and the time between the offering of the inducement and the making of the statement is such that you feel the inducement no longer operated on his mind, then the statement is no more inadmissible. Subsequently, if it was true what the accused said that promises were made to him in Tanzania, do you think he would have been influenced by those promises some two or three months later after he had spent at least two months in a high security prison? It would appear obvious that the promises in question, if you believe there were any, had ceased to operate in his mind by then.

Secondly, do you think that the conditions of which the accused complained, if you think they are possible, may be true, would they operate on his mind to force him to sign the statement which was not his? And thirdly, do you think that there is any possibility that the Judges Rules were not complied with as the accused claims? Remember, Presiding Officer, Sir, members of the court martial, it is not for the accused to prove that his statement is not voluntary, it is for the prosecution to prove that it was voluntarily made and if they fail to prove that the statement is inadmissible. I will leave you to consider this matter in closed court and if there is any matter on which you may require my advice, you may recall me to give the advice in open court, otherwise I leave the deliberations to you.”

At the end of their deliberations the Court Martial reconvened and ruled that the statement was made voluntarily and was therefore admissible in evidence. We have reproduced the detailed advice of the learned Judge-advocate because we with respect think that he properly directed the Court Martial on the law relating to the admission or otherwise of such a statement. On our own assessment of the evidence given at the trial – within – trial, and also taking into account the contents of the statement in relation to the entire evidence in this case, we are satisfied that the statement, Exh.3, was voluntarily made by the appellant. Further, we are satisfied and hold in this case that the retracted statement cannot but be true, in which case, after a proper warning over the dangers, a trial court can properly find a conviction on it as the only evidence without need for corroboration; see—*Ogero Omurwa v R*. Court of Appeal Criminal Case Number 14 of 1979 (unreported) where the case of *Tuwamoi v Uganda 1967 EA 84* was also considered. In the instant case, and upon the above considerations, the appellant’s confession, Exh.3, was alone sufficient to sustain his conviction. But along with the confession there was other independent evidence of witnesses which we have already summarized herein above.

In the next ground of appeal it is complained that some of the evidence needed corroboration as it was from witnesses who might be said to have been accomplices in that they were involved as was the appellant, in the plans to overthrow the Government. It is true that some witnesses were even questioned by police and were thus suspects. We would say that the soldier witnesses, such as PW 4, PW 5, PW 6, PW 7, PW 9, PW 10 and PW 21 were indeed accomplices. But there was corroboration of their evidence by the contents of the statement of the appellant, Exh. 3, which we have already ruled was a true confession. In any case, even if there was no this independent evidence of corroboration, we would like to record that the learned Judge-Advocate properly directed the Court Martial on how they could even have convicted on the basis of the accomplice evidence without the need for corroboration by detailing to the Court the conditions under which that may occur as laid down in *Canisio v R (1956) 23 EACA 453*. As we leave this ground of appeal, let us also state for the record that several of the witnesses, especially the civilians, were in no way accomplices.

Mr Simiyu next contends that it was not proved that the appellant had the intention to commit treason. With respect, that is far from what is contained in evidence. As submitted by Major Mbewa here and at the Court Martial, the contents of the appellant’s statement abundantly shows his treasonable intention. Besides, there is evidence, which we do not wish to reproduce, of how the appellant held several meetings between March and 1st August, 1982 during which he recruited persons bluntly for purposes of overthrowing the Government. Again we must look at his conduct and his activities on August 1st 1982

and thereafter. They demonstrate treasonable intention. In all we have no hesitation in saying that the appellant had the intention to commit the offence with which he was charged.

On the ground of appeal that there are contradictions and inconsistencies in the prosecution case, we must say that such were minor indeed and were not substantial as submitted. The alleged contradictions relate as to where the appellant was at dawn on August 1st 1982. One witness PW 15 said he was at Langata VOK transmitting Station at about 5.30 a.m., whereas Miss Mburea (PW 22) saw him at the Broadcasting House at about 6.30 a.m. We hold that the times were mere estimations and the minor inconsistencies were inconsequential to the outcome of this case. Mr Simiyu also submitted that the prosecution witnesses only identified the appellant in court as the person who committed the offence because of seeing his photographs in the press, and after reading the adverse publicity against him. It is true that the witnesses may have come across such news, but there is ample evidence of other reasons on the basis of which the witnesses identified the appellant.

Finally, we will deal with the allegation in the petition of appeal that the appellant's conviction was against the weight of the evidence before the Court Martial and that not a single overt act was proved. We again with respect, do not agree with the propositions. There is no need to refer again to the evidence which we already have outlined in the earlier stages of this judgment, except we will say that, as the 1st, and in this case, the last appellant court, we have subjected the whole evidence to a fresh exhaustive examination as we are required to do: see the case of *Sammy Mbera Kioko v R* H.C. Cr. Apo. No. 491 of 1977 (unreported) in which were cited *Okeru v R* 1972 E.A 32, *Pandya v R* 957 E.A 336, *Shantalah Rumala v R* 1957 E.A 366, and *Peter v Sunday Post* 1958 E.A 424, and our conclusion is that the evidence against the appellant is overwhelming, and we have not the slightest doubt he was properly convicted.

Accordingly this appeal is dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of February , 1985.

W. MBAYA

J.E GICHERU

JUDGE

JUDGE