



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 1079 OF 1983**

**DIDACUS OLLACK DIEGO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Magistrate's Court)*

**JUDGMENT**

The appellant, Didacus Ollack Diego, was originally charged with accessory to an act of Mutiny contrary to section 48 (a) of the Penal Code. On September 24, 1982, a new charge was substituted which was then read and explained to the appellant, but he was not required to plead thereto.

On December 23, 1982, a list of three overt acts was produced before the lower court and filed when Mr. Rao for the prosecution said that those three overt acts were the overt acts upon which the prosecution relied in the case against the appellant. The list of three overt acts were then attached to the substituted charge which was read out again to the appellant together with the three overt acts and fully explained to him to which the appellant pleaded not guilty. We think we should set out the substituted charge and particulars: Misprision of treason contrary to section 42(b) of the Penal Code. Didacus Ollack Diego: on divers days between July 24, 1982, and August 1, in Kenya knowing that a person or persons intended to commit treason did not give information thereof with all reasonable dispatch to the Attorney General, an administrative officer, magistrate or an officer-in-charge of a police station or use other reasonable endeavors to prevent the commission of the offence.

We think we should also set out here the provision of the Penal Code which contains the offence charged:

“42. Any person who-

(a)....

(b) knowing that any person intends to commit treason, does not give information thereof with all reasonable dispatch to the Attorney General, administrative officer, magistrate or officer-in-charge of a police station or use other reasonable endeavours to prevent the commission of the offence, is guilty of the felony termed misprision of treason and is liable to imprisonment for life.”

The case commenced to proceed to trial on January 26, 1983, when the evidence of Joseph Awuor Owaga (PW 1) was taken and recorded. Before proceeding further we think we should set out the three overt acts

then laid:

1. On July 24, 1982, the accused informed Joseph Awuor Owaga that a Senior Private in the Kenya Air Force was planning to overthrow the Government.
2. On July 27, 1982, the accused introduced Senior Private Hezekiah Ochuka to the said Joseph Awuor Owaga and told the said Joseph Awuor that Senior Private Hezekiah Ochuka was the person who was planning to overthrow the Government.
3. On July 30, 1982 the accused informed one Peter Muriithi Maragwa that some members of the Kenya Air Force were planning to take over the Government and that they were planning to do so on 31st, 1982.

Owaga told the court that he worked for Pioneer Airlines as a pilot and that before that he had been in the former KAF which he joined in 1968 where he remained until April, 1980, and when he left he was a pilot. He had known the appellant since 1968 when he joined the KAF since the appellant was then already there, and when Owaga left the KAF in 1980 the appellant had already left about a year previously and he had then held the rank of Captain.

Owaga went on to say that he met the appellant in his office at Wilson Airport on July 24, 1982, at about 9.00 am. Earlier that same morning, one of Pioneer Airlines' aircrafts had crash-landed and the appellant had come to investigate the event in his capacity as an accident inspector with the Directorate of Civil Aviation (DCA). Owaga and the appellant drove to the scene of the accident at Sukari Farm near Ruiru in a car with a DCA driver. The appellant and Owaga were seated together on the back seat. It is then recorded:

“The accused asked me if I knew of changing of the Government by Military. He spoke in Luo. I replied negatively – also in Luo. We were conversing in Luo. His words were ‘Have you heard these people want to change the Government?’ I said ‘No’. Nothing else was said at that stage. Later he told me that some young men from the Air Force had told him so. He told me that that young man was a Senior Private in the Air Force, who came from his location and whom he helped to join the Air Force. That Senior Private, he said, was stationed at Eastleigh at that time. That all was said then. He gave no indication at that time as to who was planning to change the Government. I remember asking him who were involved and he said they were some personnel from the Defence Headquarters. He did not say if his informer himself was involved. At that time, he did not appear to be serious. I did not believe what he said, it might be possible. Nothing more happened on that occasion, relevant to the case.”

On July 27, 1982, Owaga visited the appellant twice in his office, once in the morning and again in the afternoon at about 2.00 pm. There were some people in the appellant's office, but the witness could not say how many, but that amongst such people the appellant introduced the witness to one of them as the young man who had told him about the change of Government and said that his name was Ochuka and that his rank was that of Senior Private. Owaga then said he had seen Ochuka's photograph after August 1, 1982 in connection with the inquiry that was going on in Dar-es-Salaam about the events of August.

In cross-examination by Mr. Hayanga for the appellant, Owaga admitted that a Senior Private is a very junior rank and very much junior to that of Captain. It is also recorded in the re-examination of Owaga by Mr. Hayanga:

“I knew the accused. I would know when he was serious and when not, while talking to me. I did not believe the accused when he told me about change of Government. On 24.7.82 in the car on the way to Sukari Farm the accused did not appear to be serious when he spoke to me. I would not make the judgment on our talk that he was doing so flippantly. I do speak Luo.”

The accused spoke to me works like ‘*Bende ise winjie ni jogi dwaro loko Serikali* (Luo).

I would not translate it as you have done ie the Luo statement to mean ‘Might you have heard that these people want to change the Government?’

I would translate

“Have you heard that these people want to change the Government?”

The two Luo statements A1 and its translation we reproduce now which was supplied by the appellant’s counsel:

*Bende ise winjie ni jogi dwaro loko Serikali?* Translated into: “Might you have heard that these people want change the Government?”

While B1 is *Ise winjie ni jogi dwaro loko Serikali?* And its translation is

“Have you heard that these people want to change the Government?”

To continue with what the witness Owaga said in cross-examination by Mr. Hayanga:

“I agree with this translation. I take both two statements ie A1 and B1 to be the same. I agree that the word “*Bende*” implied “might you have”. The translation of A1 given by the defence is a proper one. This is close to what the accused had said. He was asking me a question in that inquiring about it. He asked me a question and followed it up by a statement. Up to that point ie the first question, he was inquiring. That is how I understood it.”

And then later:

“It is correct that at that time he gave no indication as to who was planning the change.”

It is on this evidence of this witness Owaga that the prosecution sought to prove the first two overt acts laid.

The next witness called was Peter Muriithi Maranga (PW 2) in support of the third overt act as then laid. He works with the Directorate of Civil Aviation as an operations officer and had so worked for the past three years, and before that he had worked with the Kenya Air Force before resigning in April, 1978. He knew the appellant who also worked for the DCA and had also served in the Air Force when the witness was there.

The appellant and the witness Maranga shared the same office. He remembered the July 30, 1982 and he remembered discussing current affairs with the appellant during which the witness said he pointed out to the appellant about the students’ ultimatum to the Minister for Higher Education that had appeared in the papers that day or the day before, and they had discussed about the organization in Britain that was fighting for the release of political detainees in Kenya, and the witness said that he might have pointed out about the militancy on the part of students and it was at about this time when the appellant said that he had been told something that had scared him and about which he was not quite sure what to make of it as he had passed some sleepless nights over it. Maranga went on to say that the appellant had told him that some people were planning to overthrow the Government. He continued and said, we quote:

“He said that those people were from the KAF and that they had the support of the Army and the university students and that they were not expecting any opposition from the public and they were confident that their plans were going to go through. He said that that was going to happen the next day ie 31.7.82. That is what I understood him to mean... My reaction was stunned and shocked.”

In cross-examination by Mr. Hayanga, Maranga said that he and the appellant used to discuss newspaper

reports and that they exchanged and analysed views and compared their experiences abroad. Sometimes they were serious and sometimes not, but most of the times the matters discussed were serious. The witness gathered from what the appellant said that he was scared - that he was not quite sure. The words that puzzled him were that some people were planning to overthrow the Government. That was the message. The appellant seemed to be concerned and troubled. The appellant did not tell Maranga how the Government was to be overthrown and then towards the end of his cross-examination it is recorded:

“I don’t remember him asking me questions about the overthrow of the Government.”

This was the evidence called by the prosecution in support of the third overt act then laid.

The next prosecution witness was George Ofungua Makanda (PW 3) who said that he was a retired Army Major who had joined the Army in 1959 and retired on June 30, 1982. As said that on August 1, 1982, he had seen the appellant on the estate in which they both lived. On that day at about 8 am, Major Makanda had gone to see a friend. He had a brief chat with the appellant and then he had seen him join another group of residents who were watching the activities of the rebels and looters. As Major Makanda was on his way home, he saw at a distance of about 50 meters, a white pick-up parked outside the appellant’s house. He saw four persons coming out of it and one of them was in KAF (force) uniform armed with a gun. The others were in civilian clothes and also armed. He then said he saw the man in uniform enter the appellant’s house and the next thing he saw was that the pick-up drove off followed by the appellant’s car – a Volkswagon, white in colour. He said he could see the appellant was driving with a passenger in the passenger’s seat. But he could not see who it was. This was about 10 am. He saw the appellant again at 5.00 pm the same day and went to talk to him. Major Makanda said,

“I wanted to know what has been happening because I saw him being picked up by rebels. I mean that I saw him follow in his car, the rebels-pick-up.”

Then Major Makanda said,

“He told me that the rebels had requested him to go and help them repair a vehicle which had broken down in town. He told me that he was escorted back. He did not say that he had repaired the car. He was not armed. He was calm and normal.”

The case was then apparently adjourned until January 28, 1983, for Mr. Hayanga to cross-examine the witness, but then Mr. Hayanga objected to the evidence given by Major Makanda as his evidence, it was argued, related to a period beyond the charge. Mr. Hayanga argued that the evidence of Major Makanda amounted to a distinct independent charge and so his evidence should be excluded and he referred to *Archbold’s Pleading, Evidence and Practice*, 39th Edition, page 1311, paragraph 3020, and which was referred to by Simpson J (as he was then) in the case of *Republic v Andrew Mungai Muthemba and Dickson Kamau s/o Georges Muiruri* High Court Criminal Case No 25 of 1981. We quote from *Archbold*:

“The evidence must be applied to the proof of the overt act, and not to the proof of the principal treason; for the overt act is the charge to which the defendant must apply his defence. And whether the overt act proved is a sufficient overt act of the principal treason laid in the indictment is a matter of law to be determined by the court. No evidence may be admitted of any overt act not laid in the indictment; that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charge, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid amounts to a direct proof of any other overt act which is laid, it may be given in evidence to prove such overt act.”

Certainly what Major Makanda testified to was not laid in any overt act as originally laid though Mr. R Rao who appeared for the prosecution did contend that the evidence of Major Makanda did show that persons intended to commit treason. Mr. Rao then said that he intended to invoke section 214 of the Criminal Procedure Code to amend the overt acts and then he said that he wanted to amend the charge by substituting the words “the members of the Kenya Air Force” for the words “ a person or persons” and

that he also wanted to amend the overt acts as per his draft.

Mr. Hayanga then asked for time to consider the amendments to which Mr. Rao had no objection. This matter was then adjourned to January 31, when Mr. Hayanga objected to the amendments then applied for and the addition of the new overt act on the ground that it was an injustice to the appellant and that it was prejudicial to his defence and he referred to sections 134 and 137 of the Criminal Procedure Code since he argued that the case was properly set out in the original charges and the amendments were not required.

Mr. Hayanga argued that there was no right to amend the charge under section 214 of the Criminal Procedure Code since the charge was not defective in substance or form and that section 214 of the Criminal Procedure code should be interpreted in favour of an accused person and that the amendments being asked for were being asked for too late and that the addition of the fourth overt act tended to bring in an entirely new charge and should not be allowed to be added and in this regard the court was referred to the case of *Maina s/o Kamunya v Reginam* (1954) 21 EACA 252 which dealt with the provisions of section 271 (2) as it then was, but is now section 275 (2) of the Criminal Procedure Code. In this case, we are dealing with section 214 of the Criminal Procedure Code which forms part of Part VI: "Procedure in trials before subordinate courts", while section 275 of the Criminal Procedure Code forms part of Part IX – "Procedure in trials before the High Court", so that of course the case of *Maina s/o Kamunya v Reginam* can have no application to this case which was tried before the chief magistrate who presides over a subordinate court of the first class. We think and find that the provisions of section 214 of the Criminal Procedure Code are sufficiently wide to cover all the amendments asked for by Mr. Rao, provided that the provisions contained in provisos (i) and (ii) are complied with, as indeed they were, as also was sub-section (3) of section 214 of the Criminal Procedure Code. We have considered and followed what was said by the Court of Appeal (Coram Potter, Hancox JJA & Chesoni AG JA, as he was then) in the case of *Jason Akuma Yongo v Republic*, unreported but being Criminal Appeal No 1 of 1983.

We also think that the charge of misprision of treason as originally framed in the particulars may well have been found to have been defective on the authority of the case of *Mattaka and others v Republic* [1971] EA 495, at page 510, letters E & F since, though the wording of section 41 of the Tanzanian Penal Code is a little differently worded as compared with our section, the point upon which the judges of the Court of Appeal for East Africa came to their decision in this regard was that the use of the words "any person" was too vague for the judges did say in this regard:

"Just as a charge of murder must in the particulars name the person alleged to have been murdered or a charge of theft must specify the property alleged to have been stolen, so here, where the charge is knowledge that someone intended to commit treason, it is essential that that person be named. Without the necessary particulars, it would be impossible for an accused person to prepare his defence."

There was an adjournment from January 28, 1983 to January 31, 1983 since it is recorded by the trial magistrate on January 28, 1983:

"I think the defence needs to consider the legal and factual aspects of the proposed amendments before he can reply to the DPP's application for amending the overt acts and the particulars of the charge. The case is adjourned to 31.1.83 at 9.30 am for arguments only... the case will then proceed on 1.2.83."

Mr. Hayanga having just previously asked for time to consider the amendments. After argument on January 31, 1983, the trial magistrate gave his ruling allowing the State to amend the charge sheet and the overt acts in accordance with the new charge sheet and list of overt acts supplied to the court under the provisions of section 214 of the Criminal Procedure Code.

We now set out the charge, the particulars of the charge and the four overt acts laid and proceeded with:

"Misprision of treason contrary to section 42(b) of the Penal Code. Didacus Ollack Diego:

Between 24th July, 1982, and 31st July, 1982, in Nairobi within Nairobi area of the Republic of Kenya, knowing that members of Kenya Air force intended to commit treason, failed to give information thereof to the Attorney General, an administrative officer, a magistrate, or an officer-in-charge of police station, or use other reasonable endeavours to prevent the commission of the said offence of treason.”

And the overt acts laid were:

1. “On 24th July, 1982, the accused informed one Joseph Awuor Owaga that a Senior Private in Kenya Air Force had informed him that members of Kenya Air Force were planning to overthrow the Government, or words to that effect.
2. On 27th July, 1982, the accused introduced Senior Private Hezekiah Ochuka to the said Joseph Awuor Owaga and told the said Joseph Awuor Owaga that Senior Private Hezekiah Ochuka was the person who had informed him about the people planning to change the Government.
3. On 30th July, 1982, the accused informed one Peter Muriithi Maranga that some members of the Kenya Air Force were planning to take over the Government and that they were planning to do so on July 31, 1982.
4. On 1st August, 1982, the accused during the period of an attempt to overthrow the Government voluntarily accompanied an officer or officers of the Kenya Air Force who were a party to that attempt.”

It will be observed that the fourth overt act refers to August, 1, 1982, while the charge refers to the period between July 24, 1982 and July 31, 1982, however by sub-section (2) of section 214 of the Criminal Procedure Code it is provided:

“Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

We do not find that the appellant suffered any prejudice or this occasioned any failure of justice to the appellant. He knew quite well what he was to meet and defend.

Major Makanda was then cross-examined by Mr. Hayanga on February 1, 1983, while Messrs. Joseph Awuor Owaga (P W 1) and Peter Muriithi Maranga (PW 2) were recalled for cross-examination by Mr. Hayanga on February 2, 1983.

At the conclusion of the evidence of Major Makanda including his crossexamination by Mr. Hayanga, Mohammed Salim Tas Mohamed (PW 4) was called who said *inter alia*:

“I know the accused by face. He is my neighbour. He lives in the house opposite mine.

I am aware of the incident of 1.8.82. I was in the house. I heard gun shots in the morning. I went out to find out and learnt there was some disturbance. I stayed inside the house. I saw the accused at about 10 am. I was in my kitchen. I saw a white pick-up come into our estate. There were some people in it. It was parked outside our house. The pick-up was parked closer to accused’s house. There were four men in the vehicle. They were in civilian clothes and one was in uniform. I think it was KAF uniform. He was armed with a gun. The civilians were also armed. They were seated in the front seats. There were two rows of seats in the driver’s cabin – two were sitting on one and the other two on the other seat.

This driver’s cabin was separated from the body of the vehicle and there was no one in the body. I saw it coming. I was in the kitchen. I went to the bedroom upstairs to see the pick-up at this time, I saw it had already stopped. I saw the man in the uniform come out of it and enter the accused’s house. Others remained in the car. I continued watching. After a few minutes, that man came out and spoke to the men in the vehicle. Then the pick up drove away without the man in uniform.

The uniformed man came out of the house and got in the accused's car which was parked inside the gate in the compound of this house. This car is a whitish Volkswagen. They drove away in the car. The uniformed man was not pointing a gun at the accused. I did not see any use of force against the accused to get into the car."

In cross-examination by Mr. Hayanga the witness said:

"I saw first from the kitchen. I could not see very well what was on the road. I could see the accused standing by the road from my kitchen... There is a fence at the back and a wall in front – with the gate – separating the house from the road. I could not see everything on the road because of the wall. I would not be able to see him if he was obstructed by the wall going out and coming in. I saw the uniformed man come out of the car. I only saw the movements. I don't know why the man came there and why he drove off with the accused. I saw everything that was going on around. I did not see any young African lady... I did not notice a young woman in the Volkswagen in that morning. This was at about 10.00 am."

The witness, Mohamed Salim Tas Mohamed, was called to corroborate what Major Makanda had told the court in regard to the white or whitish pick-up seen outside the appellant's house at about 10.00 am on August 1, 1982, in which there were four people who were all armed and that one of them was in KAF uniform and who entered the appellant's house and then came out with the appellant and that they had both driven off in the appellant's white Volkswagen after the pick-up had also driven off. The next witness to be called was Flanian Maluki (PW 5), an inspector of police, who said that the appellant wrote him a statement which he started at 3.00 pm and finished at 5.00 pm and this was presumable on August 20, 1982, but this statement as far as we can discover was never produced and Mr. Hayanga had no question to ask this witness on cross-examination.

Then Habol Issac Dzombo (PW 6) was sworn to testify, but other than saying he was a Superintendent of Police at CID Western Province but attached to CID Nairobi 1.8.82, he was not called again having been asked to stand down. That apparently no opportunity has been afforded to the appellant or to Mr. Hayanga to cross-examine Habol Issac Dzombo (PW 6) has in fact in no way occasioned any failure of justice to the appellant and in any event no point was ever taken or made of this fact by Mr. Hayanga at the hearing of this appeal.

Then John Peter Nganga (PW 7), another Superintendent of Police at CID Headquarters, was called who said that the appellant made a charged and caution statement which he himself recorded on September 9, 1982, and which was admitted as Ex 2 it not being objected to by Mr. Hayanga. In which reference was made to an earlier statement made by the appellant on August 23, 1982, Ex 3 which statement was also not objected to by Mr. Hayanga. The witness also said that as one of the investigating officers, he had enquired if the appellant had reported any information about the coup to the Attorney-General, administration, police, magistrate or any other officer, but that as a result of his enquiries he found that the appellant had not done so.

This witness also produced a photograph of Ochuka who was identified by Assistant Commissioner of Police, Mr. Awan Mustakeem Khan (PW 8), of CID Headquarters, Nairobi, who identified the photo as that of Senior Private Hezekiah Ochuka.

When Joginder Singh Sokhi (PW 9) was called, he said that on August 23, 1982 he was Assistant Commissioner in charge of Investigations Branch of CID Headquarters, Nairobi and that he had caused the statements Ex 3 made by the appellant to be recorded.

When the appellant came to make his defence he elected to make an unsworn statement. The appellant started his statutory statement by stating that the story he had heard was so far fetched – that his informant was somebody of such a junior rank and not well known to him in that he knew very little about him, his background and character and that in any event he was not the sort of person he would socialize with. The appellant went on to say that he had been a Commanding Officer for over 10 years and as such he had heavy responsibilities to exercise discipline, to command, to give orders and to oversee all directives

given to warrant officers, NCOs and other ranks and that there would be about 8 ranks between that of Captain and Senior Private. He went on to say that he knew well of the training and discipline of the service in which he had served which had the best record in Africa and had been commended by HE the President who had introduced the Chief of General Staff and the Commander of the Air Force to the public as exemplary men. He went on to explain that the discipline of the force was based on the rank system whereby those of senior rank did not mix with those of junior rank and vice versa and officers had power of discipline over junior ranks and the appellant seemed aggrieved as he said he had been charged that a Private had told him that some people were planning a coup and that he had failed to report that fact.

The appellant went on to say that he towards the end of June, 1982 had returned from a course in the UK sponsored by International Civil Aviation on flight safety and accidents and that he was very busy on his return. About July 22, 1982 Ochuka whom the appellant described as “this private” who comes from his location and whom he helped to join the Air Force in early 1977 came to his house where the appellant found him at lunch time playing with his children in the compound, who told him he had news of home as he had been on leave and upon the appellant asking him if he was doing well the Private said that he had been selected to go to America for a technical course that would last 12 months and that because of that he had sold some of his business.

Then just as the appellant was about to enter his house for lunch this Private asked the appellant if he had heard a rumour about a coup and the appellant said “what coup” and the reply was “a coup by Tanzanian or Ugandan army”. Since this was said by a Private, the appellant did not take it seriously. Then the Private drove off in a Peugeot 504.

Then on July 24, 1982 (in the typed copy it is typed 29.7.82, but we have looked at the original manuscript record and the date is 24.7.82) the appellant said early in the morning at about 9.00 am he received a telephone call that an aircraft belonging to Pioneer Airlines had crashed at Sukari Ranch. He went to Wilson Airport where there he met Capt. Owaga and from there they drove to the scene of the accident. On the way the appellant is recorded as having casually asked Owaga whether he had heard a rumour about a coup and Owaga said he had not. Then they reached the site of the accident and the appellant continued with his work. After finishing they both returned.

On July 27, 1982, the appellant was working in his office on the accident when at about 10.00 am Capt. Owaga came with Capt. Kilonza, the pilot of the crashed aircraft, but not all documents required were ready so they were asked to return in the afternoon. When Captain Owaga returned in the afternoon, the appellant said in his statutory statement he was found there with other pilots and co-managers amongst whom was Ochuka who had popped in. As Owaga was handing the appellant his report Ochuka stood up and Owaga took his seat. Then the appellant said he asked Owaga if he had seen Ochuka before and Owaga said no.

Then the appellant said he told Owaga that he was Ochuka a Private in the Air Force and then Ochuka said goodbye and left.

Then on July 30, 1982 the appellant said that he was in his office with Maranga (PW 2) and:

“Towards 4.30 pm Maranga was involved discussing current affairs ie articles in the papers during the week. He was discussing about university being militant and ultimatum. He also talked about Githii’s editorial in the Standard and various issues in the local press. He also discussed about his trip to America. He talked about rumours about policemen raiding estates. Generally he was discussing a lot of things. During this discussion that I remembered about the rumour I had heard from Ochuka and mentioned to Capt. Owaga. I enquired from Maranga whether he had heard such rumour since he seemed to have heard a lot of rumours around. I do not remember him confirming or denying the rumour. At about 4.45. pm we left for our homes.”

Then shortly after the appellant continued with his statutory statement:

“About 8.00 am my sister-in-law, Mrs Ann Dimaco woke me up by ringing the door bell. I went down and opened the gate for her. I had been expecting her because she had sent me a note through her husband who was in Nairobi on 30.7.82 and went back the same night. When I opened the gate for her, I did not see her with any luggage – not even a handbag. I was surprised. She was surprised too. She told me that she had walked all the way from near the university where their Akamba bus had been stopped by soldiers. She said they were told they could collect their belongings later at the bus company’s stage. She came in and we had a normal breakfast. At about 9.00 am most estate residents were out in the streets and surrounding roads. I got out with my young daughter and walked towards the road leading to Phase 2. I noticed Major Makanda sitting outside a house next to the road with his friend.

I said hi to him and said I was surprised because I thought he was still in the Army as he was casually dressed. He told me he had retired from the Army in June. I joined them. We generally talked about NFD days in 1971-72 when I used to be a pilot in Wajir.

I saw looters passing by the roads and he expressed how terrible it was what was going on. He said he knew the Army and Air Force were on an exercise in Lodwar area. He said he expected trouble when the Army comes back. I then joined another group of estate residents standing by the roadside watching looters and KAF soldiers going everywhere and driving around.

After a while I decided to return with my kid to my house. Just before I crossed the road that enters our estate from Phase I and 2, a brand new Datsun pick-up with a double cabin pulled by the Kiosk and stopped. As I was passing by it, the rear door opened and a young soldier whom I recognized as Patrick Lumumba, a relative from home whom I had helped to join the Air Force in 1979 when I had already retired. He asked me if I had seen his uncle by the name, Julius Seje, who lives in Ziwani Estate. He told me he had been there and did not find him. He wondered if I had seen him of late. He knew I had known his uncle because I used to rent his uncle’s sewing machine. I told him I had not seen him since I was in UK. I had not seen him for quite sometime. I looked inside the pick up and saw about 5 young civilians inside including the driver. I remembered my sister-in-law’s problems and told him what had happened. He said he would help her, by taking her where the bus had been stopped. We proceeded to my house. We stopped outside the gate. I went in and asked my sister-in-law she could go and identify the bus and recover her property. The soldier got out and outside the gate he told me the pick-up was going elsewhere and therefore, he could only use my car to take her to the town. We 3 of us – myself, Lumumba and sister-in-law got into my car we drove to the university round-about being directed by sister-in-law where the bus had stopped. We did not find the bus. We then drove back through Akamba Bus Station where there were 4 buses, but the one my sister-in-law had come in was not there. From there we drove back to Kariokor. We left Lumumba at the bus stop as he was returning to Ziwani and we continued back to my house. After lunch about 3.00 pm I joined estate residents on the roads watching looters passing by. About 5.00 pm Major Makanda joined us and we had general talks. He told us that he had been to Pangani Police Station earlier on and he saw Col. Kamunya and saw other Air Force Officers there who had escaped from the coup during the night when the mutiny had started.”

Then the appellant told of how Major Kilonzo had come asking if he could use the telephone and how Major Kilonzo had escaped with other officers through the fence, but that the commanding officer was being held hostage. The appellant said Major Kilonzo wanted to use the telephone to contact Defence Headquarters to get instructions on what to do in helping to suppress the mutiny. Then the appellant, Major Makanda and Major Kilonzo went to the appellant’s house where Major Kilonzo spoke on the telephone to Defence Headquarters while the appellant and Major Makanda listened. Then apparently Major Kilonzo was told that the mutiny had been suppressed at Eastleigh Base and so he could go there as some other officers were returning there and that the Army had taken control of the base.

The appellant claimed in his statutory statement that all he had heard was a rumour from the lowest rank of the armed forces and that that person was on leave. He tried to ask Capt. Owaga who is an ex-Air force Officer, who works with many more air Force officers, whether there was anything in the rumour he had

heard. He repeated that he had been out of the country for 3 months prior to the coup and so he was not well versed with whatever was happening in the country and when Owaga said he had not heard anything about any coup the whole thing melted out of his mind as an unfounded rumour. The appellant went on to say that in his mind and conscience he cannot understand how he knew about the coup since he had never been back since he had retired in 1978 and had never been back to any of the bases at anytime and that he had lost contact with many of the officers. He repeated and emphasized that there was very big difference between commissioned officers and other ranks and that it was a long way from private to captain.

The appellant then had called his sister-in-law, Ann Veronica Atieno Dimaco (DW 1), who said that she was a teacher and she knew the appellant as he was her husband's brother. In July, 1982 she had been told to go to Nairobi by the Ministry of Basic Education to represent Kisii District at the Diamond Jubilee Girl Guides Camp sponsored by the Government, which was to take place in Nairobi from August 14, 1982. She left Kisii on the night of July 31, and arrived in Nairobi at about 6.00 pm on August 1. She traveled by the Akamba bus. While traveling along Uhuru Highway and just before turning into University way the bus was stopped by soldiers, who ordered that everything be left in the bus but that the passengers get out. The passengers got out and sat by the pavement as ordered until 7.00 am when they were told to go to their houses but without their luggage. Then the witness walked to the appellant's house in Racecourse near Kariakor, where she knocked and rang the bell at about 8.00 am. She noticed the appellant's Volkswagen car there. Then at about 10.00 am the appellant came and told Ann Dimaco that there was someone who could help track the bus. Ann Dimaco then said that she followed the appellant outside and by the gate she saw a soldier in uniform who was carrying a gun. Then the appellant got into the front seat while Ann Dimaco got into the back seat and the soldier took the front passenger's seat. Then Ann Dimaco is recorded as having said:

“We went in the accused's Volkswagen. We were going to the place where the bus was stopped. We drove off and just at Kariakor we were stopped but the Soldier explained the situation we went on through the University Way and while we were there I told the accused I could not see the bus. We went to Akamba Bus Station to check where we stopped. I came out and the soldier also came out. We went inside those buses. I came back and told the accused that there was nothing in those buses. We took off and went home. At Kariakor roundabout we were stopped again. One of the soldiers asked for a screw-driver and the accused told them that he did not have one. The soldier dropped there and waved us off. I and the accused proceeded to our house.

I do not remember to have heard any conversation between the accused and the soldier. I was scared all right but I consoled myself by saying that if I have to die I would have died where our bus was stopped. I also felt that as a District Representative I must try to get the things and this gave me a little courage. I do not remember seeing any pick-up outside the house when I came out of the house.

I know that to recover the things was the only purpose for the accused to drive his car out that time, as I was keen to get the children's work from the District. These articles were very important as other countries were invited. They are meant to be exhibited and learn from each other.”

Then in cross-examination by Mr. Rao the witness Ann Dimaco said:-

The soldier who accompanied in the accused's car was wearing greenish uniform. I did not know his name. Accused did not tell me his name. All along the journey from the house and back the accused did not tell me the name of that soldier. I don't know a man called Patrick Lumumba. I don't know if accused has relative in KAF by that name. The soldier never talked to me at all. He had a gun. I do not remember if he used his gun. He did not use it. It would have been difficult for me to remember if he had fired the gun in the situation. The soldier did not come into the house. I did not see him come into the house. I do not remember the soldier telling about his uncle living in Kariakor.

The appellant on August 23, 1982 made a long statement which he recorded in his handwriting and which was produced as Ex 3 without any objection in which he *inter alia* said:

“I first met Ochuka when he joined the KAF. He was recruited in Mombasa but he comes from Nyakach Location. He was an SDA (Seventh Day Adventist) and a teetotaler and preached on Saturday. When I left the Air Force I never met him again until he returned from UK with a Peugeot 504 which he ran as a *matatu*. After another long spell I met him and he told me he had sold the *matatu* and bought sewing machines and was now doing clothing business. This was about a year and half ago. I did not meet Ochuka again until last July.

Before I make the statement I wish to state that the first statement I made at Special Branch, I was under duress and mental shock since the police had just searched my house, my office and my car. Therefore, my memory was not quite clear.”

We mention here that this statement mentioned by the appellant was not produced before the trial magistrate though we think it was just referred to by Inspector Flanian Maluki (PW 5), but to continue with the appellant’s statement of August 23, 1982 he continued by writing:

“I returned from U K on June 27, 1982 after an Aircraft Accident Investigation course. Around the second or third week of July I met Ochuka at my house at lunch time. He told me he was on leave and had been to Nyabondo and everything there is well. He then told me he was supposed to go to USA for a course lasting twelve months from September. He also told me that he now works in a new section in the Air force for equipment test. I then asked him about his business and he surprised me by telling me that he had sold the sewing machines and bought an electrical one from Singer which again he had returned to the company since he will be going to America for a long time, and he cannot leave the business with anybody. He then started to tell me that the Air Force is bad and the soldiers are planning a coup. He said the plan is not a secret anymore and the soldiers are freely talking about it. I told him he must be joking knowing the military discipline and the military intelligence, it cannot be possible. He said that they are planning to do it by the end of the month, and he had come to inform me so that I can arrange for the safety of my family. I then asked him whether there are officers involved but he only said the soldiers only like Col. Kamunyu, Lt. Col. Atambo, Lt. Col. Shiro. When I asked him who else will support them, he said the Army soldiers and university students. He then left in a blue Peugeot 504 Reg KVZ but I could not remember the figures. He told me that is the car he is now driving. I got surprised but I thought he probably bought it when he sold his machines.

On July 24, 1982 I went to Sukari Ranch to investigate an aircraft accident belonging to Pioneer Airlines with Captain Owaga the Chief Pilot. I told Owaga the story and asked him whether he had heard any similar story elsewhere but he said no. I asked him if he thought it was really possible, but he wasn’t sure.

Around the 26th or 27th in the afternoon, Mr. Ochuka popped into my office at DCA headquarters. I was fairly busy and he said he just popped in to say hello since he was proceeding to Kibera to see some people there I asked him again whether he was really sure the soldiers were going to do the coup and he said yes they even had some advice from Uganda and Tanzanian soldiers.

Many people were waiting to get in to see me so he left and in the corridor I met with Capts. Owaga and Kilonzo who was bringing me the accident aircraft documents. I must have showed him Mr. Ochuka. This was the last time I saw Mr. Ochuka.

I was still not sure about this story. So besides Capt. Owaga I must have mentioned this briefly to Capt. Sarro and Mr. Maranga both ex-KAF with DCA. None of them had heard a similar story.

On July 30, 1982 my brother Mr. JP Dimaco was in Nairobi for a meeting at KIE. He is an Education Officer in Kisii District. He left that evening for Kisii and I must have mentioned this story to him because his wife was supposed to come to Nairobi on August 1, for Girl Guide Jamboree at Jamhuri Park. I wanted him to tell her to postpone the coming just in case.

Because I had not received any supporting story from elsewhere I still thought the whole thing was a joke. And since I retired from the Air Force in 1978 I have lost contact since I had never gone back there. Anyway when nothing happened on July 31, 1982 it confirmed to me that it was all a joke.

It was not until I heard the sounds of the gun on Sunday, August 1 that I realised the things were serious. I remained indoors in my bedroom until 8.30 am when my sister-in-law Mrs Ann Dimaco woke me up with the door-bell. I was surprised to see her. She came in and told us how the Akamba bus they came in from Kisii was stopped by the soldiers near the university. They were ordered out and told to go home leaving everything in the bus. She left even her handbag with the money, and walked all the way to my house on foot.

At around 930 am many estate residents were out on the estate roads. I went out and walked towards Phase II where I saw major Makanda sitting outside with a friend. I was surprised to see him because I thought he was still in the Army. We talked briefly about the old days in the NFD and his retirement. He then told me that he knew Army was on an exercise in the Lodwar area and therefore, there will be more trouble when the army returns. He said even some Air Force men were on exercise.

I then left him to return to my house where I met with a pick-up approaching from Phase II full of young boys apparently university students and one young soldier armed whom I recognized as Patrick Lumumba who had joined the Air Force about two years ago. He stopped the pick-up and told me he had gone to Ziwani to check on his uncle Julius Seje but did not find him. He asked me whether I had seen him of late. I told him I had not although I used to rent his sewing machines some years ago. I then told him the story of my sister-in-law and asked for his help.

He agreed to take her provided we used my car because the pick-up was going to Eastleigh. We then took my car and drove with him with my sister-in-law at the back. We got stopped at Kariokor but he explained the case to his mates and we were let go. We drove near the university where they had been ordered out but the bus was not there. We then drove back via the Akamba Bus Station but again missed the bus. We drove back through River Road where there were lots of soldiers firing in the air and scaring *wananchi*. He also fired shots in the air through the window. We got stopped on River Road but they only called him to get them more ammunition from Eastleigh. I could see many other cars and taxis hijacked by the soldiers. At this point I was very scared. When we reached Kariokor Market we were stopped again. There was a yellow 504 broken down and a Land Cruiser filled with soldiers. They asked us for a screw driver which I did not have. Lumumba got out and waved me to continue on to my house. I drove very fast and stayed indoors until around 3.00 pm I told my sister-in-law to assume her things are lost and forget them.

I joined Major Makanda and others on the estate roads and he told us that Col. Kamunyu and some offices were at Pangani Police Station. We watched looters chasing each other all over the place and there was heavy firing at Eastleigh base at that time. At around 5.00 pm Maj. Kilonzo of KAF came from Phase III side and said he wanted a telephone to ring the base. We went to my house from where he rang the base and Ulinzi. He was told by Col. Kiilu from Ulinzi that the firing had stopped and the Army was at control of Eastleigh Base and it was safe for him to go back. Major Kilonzo left and Major Makanda also rang Memorial Hospital because his wife was sick. He was told he could not take her there....

I have just remembered that I introduced Capt. Owaga to Mr. Ochuka in my office and not outside in the corridors. I remember seeing Ochuka off leaving Capt. Owaga in the office, and returned quickly to discuss his business (report on the accident) I hope that if I recollect any information I shall write it down and present it. I have also remembered that Major Kilonzo told us that he and other officers had escaped through the fence during the night and that the soldiers were holding offices hostage.

That is all I can remember.

Signed: D O Diego.

I also forgot to say that Lumumba was wearing KAF combat uniform – that is green trousers, dark brown shirt, a small cap and a G3 gun.

Signed: D O Diego.”

On September 9, 1982 the appellant made a charge and caution statement to Superintendent John Peter Ng’ang’a (PW 7) also which was not objected to by Mr. Hayanga as follows:

**“I, Didacus Ollack Diego, having understood the above charge and caution I wish to state as follows: that I adopt my statement which I made at CID Headquarters on August 23, 1982. I wish further to add as follows: Although I had heard that the Government was to be overturned from Mr. Ochuka, I had not believed him and I wanted to confirm this story before reporting to the authorities. This was the reason why I talked about it with Capt. Owaga, Capt. Sarro and Mr. Maranga trying to find out if they had heard the same story. Mr. Ochuka had told me the coup would take place by the end of the month but did not mention the day. I asked the three whether they had heard that the Government would be overthrown by the end of the month and since they said no, I was unable to confirm the story Ochuka had told me. Mr. Ochuka did not tell me the people involved so I had nowhere else to go for further information.**

**R O C signed J P Ng’ang’a**

**Signed: D O Diego**

**I certify that I have recorded the above statement voluntarily without any force or promise.**

**Signed: D O Diego R O C**

**Signed: J P Nyanga.**

**I certify that the above statement was written by the accused person himself in my presence voluntarily and without any force or promise.**

**ROC Signed : JP Ng’anga”**

The statement as recorded by the appellant on August 23, 1982 is more culpable to himself than his statutory statement to court, for example, what the appellant said in his statutory statement to court regarding what passed between the appellant and Owaga on July 24 was:

While we were driving to the scene that I casually asked Owaga whether he heard a rumour about the coup. He said he had not.

Whilst the appellant in his statement of the September 9, 1982 went somewhat further as we have recorded and this after the appellant had recorded in the statement, also as we have recorded, that he met Ochuka at his house at lunchtime and after discussing other matters Ochuka had said that the Air Force was bad and the soldiers were planning a coup and that the plan was not a secret anymore and that the soldiers were talking about it freely.

Then the appellant recorded that Ochuka must be joking knowing the military discipline and military intelligence such a thing could not be possible, but then the appellant recorded Ochuka had said that they were planning to do it by the end of the month and that he, Ochuka, had come to inform the appellant so that the appellant could arrange for the safety of his family. It seems to us as testified to by Owaga, which

the trial magistrate rejected as he was so entitled to do, that the appellant imparted information to Owaga about an intended coup and that he was not, as argued by Mr. Hayanga before us, merely inquiring and we find as testified to by Owaga that the appellant did introduce to Owaga Ochuka in the afternoon of the July 27, 1982 in his office as his informant about the intended coup.

It is also in evidence by the statement of the appellant of August 23, 1982 that before Owaga was introduced to Ochuka that Ochuka had just before popped into the appellant's office when the appellant asked Ochuka again whether he was really sure the soldiers were going to do the coup when Ochuka said yes they even had some advice from Ugandan and Tanzanian soldiers.

As we have said, it was Mr. Hayanga's argument before us that the appellant in speaking to Owaga was only seeking information as to whether or not there was to be a coup and in any event it had not been proved, as it must be so proved in a criminal trial, that the accused knew that coup was intended.

As regards the events of Friday July 30, 1982, it was again the appellant's contention as argued by Mr. Hayanga that the appellant was only inquiring about the rumour he had heard and the inquiry said to be asked of Maranga (PW 2) goes no way to proving the third overt act as laid. Again the trial magistrate believed and accepted the evidence of Maranga in preference to the statutory statement of the appellant in which the appellant contended that he was only inquiring about the rumour he had heard which the trial magistrate did not believe or accept believing what Maranga had told the court that the appellant had told him as a fact and not as a rumour.

The next witness called was Major Makanda who testified to the fourth overt act in which it was alleged that the appellant during the period of an attempt to overthrow the government, the appellant voluntarily accompanied an officer or officers of the Kenya Air Force who were a party to that attempt.

It was the appellant's defence to this further overt act that he only went in his car with the armed Patrick Lumumba of the KAF to recover his sister-in-law's luggage which she had been forced to abandon earlier in the morning in a bus she had arrived in because of the mutiny which had taken place. However, the learned trial magistrate having heard evidence on the matter testified to by Major Makanda (PW 3), Mohamed Salim Tas Mohamed (PW 4), the appellant and his sister-in-law, Ann Dimaco (DW 1) believed the evidence of the prosecution witnesses and disbelieved the story of the appellant and the evidence of his witness, Ann Dimaco. We can find nothing whatsoever wrong with this finding upon the evidence adduced at the hearing of this case.

It is observed that the trial magistrate believed the prosecution witnesses namely, Major Makanda (PW 3) and Mohamed Salim Tas Mohamed evidence of Major Makanda when he said that when he saw the appellant at about 5.00 pm on August 1, 1982 he went to talk to him as he wanted to know what had been happening because he had seen the appellant being picked up by rebels. He meant he had seen the appellant follow in his car the rebels' pick-up and the appellant had told him that the rebels had requested him, the appellant, to go and help them repair a vehicle which had broken down in town, but apparently the appellant had made no mention to Major Makanda of going to recover his sister-in-law's luggage.

We are quite satisfied upon the evidence on record and which the trial magistrate believed and which we also believe being the prosecution evidence while disbelieving and rejecting the statutory statement of the appellant and the evidence of his witness that the appellant in the first three overt acts was not merely enquiring but was stating a fact that a coup would take place as indeed an attempted coup did in fact take place by members of the then Kenya Air Force and that the appellant knew that such a coup was about to take place the appellant having been so told by Ochuka, a Senior Private in the KAF who had told the appellant that the coup would take place at the end of the month, being at the end of July 1982, and had so informed the appellant to enable the appellant to make arrangements for the safety of the appellant's family, which information the appellant acted upon on the July 30, 1983 by informing his brother to tell his wife, the appellant's sister-in-law, to postpone coming to Nairobi during the night of July 31 and August, 1982 "just in case", we find that the appellant did in fact know that some members of the Kenya Air Force intended to commit treason as charged, as indeed happened on August 1, 1982, but the appellant did not give information thereof with all reasonable dispatch to the Attorney-General,

Administrative officer, magistrate or officer-in-charge of a police station or use any other reasonable endeavour to prevent the commission of the offence as provided for in section 42(b) of the Penal Code which reads:

Any person who:

42(b) Knowing that any person intends to commit treason, does not give information thereof with all reasonable dispatch to the attorney-general, administrative officer, magistrate, or officer in charge of a police station, or use other reasonable endeavors to prevent the commission of the offence, is guilty of the felony termed misprision of treason and is liable to imprisonment for life.

Mr. Hayanga objected to the charge and particulars and the 4 overt acts as finally laid contending that charging the appellant with “knowing that members of Kenya Air Force intended to commit treason” was not enough since such members should and ought to have been named or at least some names ought and should have been given and such mentioned members should, as we understand Mr. Hayanga’s argument the prosecution should also have the case proved against them that they intended to commit treason. We do not find this to be so. We think and find that it is sufficient for the prosecution to show and prove that some members of the Kenya Air Force intended to commit treason and this of course can be done by evidence or by taking of judicial notice of the fact that there was an attempted coup on August 1, 1982 by some members of the Kenya Air Force vide section 59 and 60 of the Evidence Act as indeed there was and so it is not necessary for a person or persons to be named as intending to commit treason. A body of persons such as members of the Air Force, in our opinion is sufficient.

We have given careful consideration to all the cases to which we were referred by Mr. Hayanga during the course of this appeal, but we find that the appellant was rightly and properly found guilty upon all the four overt acts with which he was charged at his trial of misprision of treason contrary to section 42(b) of the Penal Code and on the particulars laid in the charge dated January 31, 1983. Accordingly the appellant’s appeal against conviction is dismissed.

As regards whether the sentence imposed is severe. We see that Mr. Hayanga referred to the sentence imposed on the Air Force General of 4 years imprisonment which matter came before us on appeal the other day. There was no evidence in that appeal that the General had associated with any rebels. The appellant in this case had driven away with an armed member of the Kenya Air Force in his car for the purpose of going to help them repair a vehicle which had broken down in town, and this the trial magistrate found the appellant had done quite voluntarily without in any way having been forced to do so. Though we think the sentence is severe we do not find that the same is so severe as to amount to any miscarriage of justice and as was said in the case of *R v Mohamed Jamal* (1940) 15 EACA 126:

“An appellate court should not interfere with the with the discretion by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.”

We do not find that the trial magistrate has acted on any wrong principle and neither do we find that the sentence imposed in the circumstances is manifestly excessive. The appellant’s appeal against sentence is dismissed.

Before concluding we must, we think, deplore Mr. Hayanga’s reference to the trial magistrate as being biased against his client and his witness. It is recorded as having been said by Mr. Hayanga after he had made his final address to the trial magistrate:

I express my and my friend’s appreciation of the way your Honour has conducted this case with dignity and gave us all the latitude to put our case.

We are unable to find that the trial magistrate was biased against the appellant or his witness in that he was one sidedly inclined against him or his witness or impartial or prejudicial, but note should be taken of

what was said in the case of *Okeno v Republic* [1972] EA 32 at page 35 letter I:

Sarcastic and denigratory remarks in relation to the defence case (or defence witness) have no place in judgment. A dispassionate approach and clearly finding of fact, are more indicative of judicial approach, and do not lay the magistrate open to a charge of possible bias.

We are, however, satisfied upon the evidence we believe as we have said that the case against the appellant on all four overt acts has been properly and correctly proved as required by law. This appeal is accordingly dismissed in its entirety.

**Dated and delivered at Nairobi this 27th day of January , 1984.**

**J.H TODD**

**E.O O'KUBASU**

**JUDGE**

**JUDGE**