REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 357 OF 1983

OKELLO ODERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Senior Resident Magistrate's Court, at Machakos)

JUDGMENT

Okello Odero was charged on three counts with the offence of alarming publications contrary to section 66 (1) of the Penal Code (cap 63). Section 66 (1) reads:

"Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour."

The particulars of the offences state that he on three occasions

"at Donyo Sabuk Trading Centre in Machakos District of the Eastern Province Published a false rumour that the Government of His Excellency President Daniel Arap Moi will be overthrown despite the failure of the attempted *coup de tat* of 1st August, 1982 which was likely to cause fear or alarm to the public or to disturb the public peace."

The alleged publications were on December 7, 8 and 19 of 1982 respectively. In the alternative to the three counts, Okello was charged with the offence of threatening a breach of the peace contrary to section 95(1)(b) of the Penal Code. The particulars of the offence read that he

"on diverse dates between 7th and 19th December 1982 at Donyo Sabuk Trading Centre in Machakos District of the Eastern province created a disturbance in such a manner as was likely to cause a breach of the peace by uttering words to the effect that the Government of His Excellency President Daniel Arap Moi will be overthrown on 12th December 1982 despite the failure of the attempted *coup (de tat*) of 1st August 1982."

After trial and on convictions on the substantive charges in counts one to three, Okello was sentenced to three years' imprisonment on each count, sentences to run consecutively. In effect he was to serve a total of nine years' imprisonment. He now appeals against his convictions and the sentences.

The prosecution case was mainly based on the testimony of William Kiti Waita (PW 1). The witness is the KANU Chairman for Khoko Sub-location of Matungulu Location in Yatta Divison. Waita told the lower court that he knew the appellant for many years. The appellant used to sell newspapers at Donyo Sabuk. On December 7, 1982, Waita bought *Taifa Leo* newspaper from the appellant. Having sold the

newspaper, Waita says that the appellant called him aside and told him:

"Mr Chairman, the 12th of December 1982 will be worse than 1st August 1982".

The witness asked the appellant what he meant and he replied that the Government will be overthrown. The witness then left. The next day the witness met the appellant again at the Trading Centre. The witness asked the appellant whether the frightening information of the previous day was true and the appellant replied in the affirmative. The witness then thought it prudent to pass the information to the security personnel. He later that day made a report to No 123006 PC Samuel Mwangi (PW 3) of the Special Branch section of the Police Force. On December 17, 1982, Waita was summoned to the Special Branch Offices at Machakos, he was instructed to approach the appellant while in company of another independent person who would certify whether the appellant was going to repeat his offending utterances. On December 19, 1982, Waita went to Donyo Sabuk in company of Muli Mwamba (PW 2). They met the appellant in a bar. Waita, in the presence of Muli, asked the appellant why it was that the Government had not been overthrown on December 12, 1982. The appellant replied that the plan was still on, and that many people were involved. Muli, in his sworn evidence, confirms what Waita said about the conversation at the bar.

When he left the bar, Waita made a report of the conversation to PC Mwangi. Mwangi gives more details of what he was told the appellant said. It is not necessary to repeat the details now, except perhaps one aspect where the appellant said that the planned rebellion had the backing of certain personalities who he named and were in President Moi's Cabinet at the time. As a result of all the information he had received on the appellant, PC Mwangi arrested him on February 20, 1983 after which he was charged with the offences herein.

The appellant told the lower court, and us at the hearing of this appeal, that he did not commit the offences. He says that Waita had a grudge against him because he (appellant) has been insisting to have Waita repay a debt of Kshs 21.20 which he owed for newspapers. The appellant further says in his petition of appeal:-

"When I insisted to be repayed he told me that if I play with him he would make me roam the whole of Kenya handcuffed, or I would be taken to my Luo land in a coffin, or I would loose my business."

Having re-evaluated the evidence as is indeed our duty as a first appellate court: see decisions like *Okeno v R* [1972] EA 32 or *Pandya v R* [1957] EA 336 etc, we are satisfied that there was overwhelming evidence against the appellant. We have especially considered the appellant's contention as to a grudge between him and PW 1, but we think there was no such grudge. But even assuming there was a grudge on the part of PW 1, there is still independent testimony of Muli Mwamba (PW 2) and PC (PW 3) which implicates the appellant, especially on count No 3 which relates to the conversation of December 12, 1982 at Super Bar at Donyo Sabuk Trading Centre. We accordingly, must dismiss the appeal against conviction, which we hereby do.

The sentence imposed by the learned trial magistrate has caused us concern. In cases where a person has been charged with and convicted of two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently: see *R v Fulabhai Jethabhai & Another* (1946) 13 EACA 179. We think that in the instant case the three counts for which the appellant was convicted were a series of offences founded on the same facts and committed in the course of the same transaction. That is why the three counts were joined in one charge as is envisaged by section 135(1) of the Criminal Procedure Code (cap 75).

The phrase "same transaction" was considered by the former Court of Appeal in *Rex v Saidi Nsabuga s/o Juma and another* (1941) 8 EACA 81 and explained again by the same court in *Nathani v R* (1965 EA 777). The court said that the proper construction of the phrase "same transaction" is that:-

"if a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction,

then the offences constituted by these series of acts are committed in the course of the same transaction."

In the instant case the series of acts were the rumour-mongering which the appellant indulged in within the proximity of eleven days from the first act of December 7, 1982 to the last one on December 19, 1982. There was continuity of action and purpose, for what the appellant did was merely to repeat publication of the very rumour he spread on the first occasion.

Thus these offences must be said to have been committed in the course of one transaction. For that reason, we hold therefore, that the learned trial magistrate erred when he directed that the sentences will run consecutively. Accordingly we order that the sentences imposed on the appellant shall run concurrently. To that extent only does this appeal succeed.

Dated and Delivered at Nairobi this 14th day of February 1984.

P.S.BRAR **W.MBAYA**

JUDGE **JUDGE**