REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL APPLICATION NO. 6 OF 1983

JAMES ODEMBA OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Conviction and Sentence of the Court Martial at 7th Kenya Rifles Langata Barracks, Nairobi)

JUDGMENT

The appellant, James Odemba Otieno, was charged and convicted by a Court Martial held at Langata Army Barracks Nairobi with the offence of 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) of the Penal Code in that he on diverse dates between the month of March, 1982 and August 1, 1982 at different places in Kenya, being a person owing allegiance to the Republic of Kenya, compased, imagined, invented, devised or intended, jointly with others not before the court, to overthrow by unlawful means the Government of the Republic of Kenya and expressed, uttered or declared such compassing, imagination, invention, devises or intention by overt acts or deed the details of which are as set out in the list of overt acts namely:-

1. On August 1, 1982, the said Corporal James Odemba Otieno in furtherance of the plan by himself and others to overthrow the Government, forced the Duty Officer GADU Station Lieutenant Alexander Kenduiywa, to surrender the keys to the safe where armoury keys were kept for safe custody.

2. On the same day, the accused threatened to shoot Lieutenant Alexandar Kenduiywa if he failed to co-operate in the plan to overthrow the Government.

3. In execution of the plan to overthrow the Government, the accused on August 1, 1982 unlawfully wore the badges of rank of a Kenya Air Force Captain.

4. The accused on the same day unlawfully armed himself with a submachine gun and a self loading pistol.

5. On August 1, 1982 the accused, in order to overcome resistance to their plan to overthrow the Government, took part in divers activities that is to say:-

(a) He fired at the Rifle Rack locks in the Kenya Air Force Eastleigh armoury with a gun and broke them open.

(b) He unlawfully ordered Private Cleophas Kitetu Musyoka and other servicemen to arm

themselves with guns.

(c) He told Senior Private Edwin Kimutai Maritine that the pass word for the unlawful operations was "NAIROBI – KENYA"

(d) He unlawfully patrolled the streets of Nairobi.

(e) He unlawfully ordered servicemen of the Kenya Air Force to board service vehicles to be transported from Kenya Air Force Eastleigh base to the city centre.

The appellant now appeals to this court against his conviction and sentence of death pronounced on February 3, 1983 having been given leave to appeal to this court on October 11, 1983 upon the 8 grounds as set out in his application for leave to appeal against his conviction and sentence.

It is of course the duty of the prosecution to prove the case against the accused in accordance with Section 45(2) of the Penal Code and beyond reasonable doubt.

It is also the duty of the prosecution to prove the criminal intent of the accused person, that is, the intent to overthrow by unlawful means of the Government and the prosecution must also prove the overt acts being the means by which such intent is to be carried out or furthered vide in the judgment of Erle J in the case of *Reg V Dowling* (1843) 3 Cox's Criminal Cases 509 at page 514., but as is said in *Archbold's Criminal Pleadings, Evidence and Practice* 40th Edition paragraph 3011 at page 1483.

> "Any number of overt acts may be laid in the same count, but proof of any one sufficient overt act will maintain the count."

And of course with this must be read section 45(2) of the Penal Code hence the word "sufficient" in the quotation.

It is not disputed that the accused was a Corporal in the Kenya Air Force and was therefore a serviceman of the Armed Forces and was subject to the Armed Forces Act Section 7(1)(a) of the Act and as such owed allegiance to the Republic of Kenya.

The accused's first ground of appeal namely that:-

> "The charges relating to the overt acts at GADU Embakasi whereby together with others he was accused of capturing the Station Duty Officer and forcing him with keys to the station armoury which was thereby opened for some servicemen to draw arms and ammunitions was NOT proved as the two witnesses concerned with this episode failed to identify positively the applicant as the person who was involved in the capture of the station Duty Officer and/or who was seen in the armoury."

This ground of appeal refers to overt acts 1 & 2 but we would refer to the wording of the overt acts as laid. No reference as it laid in the overt acts that the Duty Officer was captured as such, it is laid in the first overt act that he was forced to surrender the keys to the safe where armoury keys were kept for safe custody and in the second overt act that the Duty Officer, Lieutenant Alexander Kenduiywa, was threatened with shooting by the accused if he did not co-operate in the plan to overthrow the Government.

It was argued by Mr Raballa appearing for the accused that the two witnesses called by the prosecution to prove the first two overt acts did not properly identify the accused. It is true that at the time Lt Kenduiywa (PW 1) did not know the accused's name and that he learned it later, but we have no doubt whatsoever that Lt Kenduiywa was able to positively identify the accused and we are satisfied from reading and considering the evidence of Spte Tom Njura Ogoya (PW 2) that he was also positively able to identify the accused having previously seen him at boxing practice. We have no doubt upon the evidence before court that the accused did force the Duty Officer at GADU station Lt Kenduiywa at gun point to surrender the keys to the safe where armoury keys were kept for safe custody and that at the time Lt Kenduiywa was

threatened with being killed by the accused with the gun he was carrying since we believed and accept that the accused did say to Lt Kenduiywa.

> " If you waste time we can kill you because still we have got the keys."

And there was ample evidence for the Court Martial to believe and accept as we believe and accept that the accused was armed at the time as was his group. And we have no doubt whatsoever from the evidence before court that the accused did what he did as laid in the first two overt acts in furtherance of his intention with others to overthrow the Government by unlawful means.

The accused's next ground of appeal was:-

> "The evidence relating to the overt acts about the applicant being at armoury and/or ordering other servicemen to arm themselves was contradictory and unworthy belief."

This we think refers to some of the overt acts laid in paragraph 5 of the list of overt acts laid.

Mr Raballa argued that the evidence against the accused in regard to all the overt acts laid in paragraph 5 of the list of overt acts was that of accomplice evidence which required corroboration which was lacking in this case. Mr Raballa firstly dealt with overt act 5(b) and argued that Jpte Cleophas Musyoka (PW 3) not only was a convicted servicemen for what he had done on August 1, 1982, but that he was also an accomplice whose evidence even if believed required corroboration similarly so Spte Nicholas Mutua Kiilu (PW 4) and Spte John P Thairu (PW 5) who testified to the accused being in the armoury and who was ordering servicemen to arm themselves including the three witnesses who testified. Though the accused in his inquiry statement admits to going to the armoury as he does in his statutory statement before court he makes no mention of ordering the issue of arms. However he was seen by the witnesses wearing Captain rank which we will discuss later.

The next overt act referred to by Mr Raballa was overt act 5(c) regarding the password NAIROBI – KENYA, and in support of this overt act the prosecution called Spte Edwin Martine (PW 6) who told the court that after having been issued with a rifle and ammunition from the armoury and leaving it the accused came out and told them what the password was namely NAIROBI – KENYA. No other prosecution witness was called to support this and of course Edwin Martine must, but be treated as an accomplice like Cleophas Musyoki, Nicholas Mutua Kiilu and John P Thairu. The accused in his inquiry statement which he retracted before court did refer to a password, so there is some corroboration the accused's retracted statement tending to point to the witness Spte Edwin Martine having received the password NAIROBI – KENYA from the accused which evidence we believe as the Court Martial must also have believed and which we find as must have the Court Martial that such pass word was in furtherance of the coup plan to overthrow the Government by unlawful means.

The next oovert act referred to by Mr Raballa was 5(d) –unlawfully patrolling the streets of Nairobi. In support of this overt act the prosecution called Spte Edward K Magovi (PW 7) who must also be treated as an accomplice who, in his evidence, told the Court Martial when he was at the New Stanley Hotel he saw a military landrover which was hailed and when it approached, Spte Magovi recognised the driver and the accused who was wearing Captain's rank of the Air Force. After which Spte Magovi and his companions entered the landrover which proceeded to be driven about the City of Nairobi as the witness testified to which is corroborated by what the accused said in his retracted inquiry statement and the fact that he was driving around and about the streets of Nairobi is not disputed in his statutory statement and we find as the Court Martial must also have found upon the evidence that the accused was driving about and around the streets of Nairobi in furtherance of the coup plan to overthrow the Government of Kenya by unlawful means.

Like the overt act in paragraph 5(a) Mr Raballa in his address to us at the hearing of this appeal did not specifically mention paragraph 5(e) of the overt acts, but the prosecution did call witnesses in support of such overt act namely Spte John P Thairu (PW 5) and Spte Edwin Martine (PW 6) and the accused in his retracted inquiry statement confirmed that after putting on his Captain rank he had gone around town in

the landrover picking up soldiers who had been placed in various areas in the town.

As we have said Mr Raballa did not specifically deal with paragraph 5(a) of the list of overt acts, but the prosecution did call evidence in support thereof namely Spte John P Thairu (PW 5) who told the court that when he went to the armoury he saw the accused there wearing Captain's rank and he saw the accused firing a rifle at a padlock to force them open so that rifles could be drawn and he saw the accused ordering people to take arms and ammunition. The fact that the accused fired at the padlock on the rifle rack in the Kenya Air Force Eastleigh armoury with a gun and broke the same is confirmed in the accused's inquiry statement which we have said he retracted at his trial in which he is recorded as having said:-

> " I blew open the arms armoury by firing."

We have no doubt upon the evidence produced in court that the prosecution sufficiently and properly proved the overt acts in paragrapsh 5(a), 5(c), 5(d) and 5(e) and we are equally satisfied upon the evidence before court that what the accused is said to have done in paragraphs 5(a), (c), (d) and (e) were acts done in furtherance of his criminal intention with others to overthrow the Government of Kenya by unlawful means.

We will refer to paragraph 5(b) later in our judgment.

Mr Raballa's next ground of appeal:-

> "The Court Martial erred in inferring that the applicants' travelling in a vehicle through the town was for the object of promoting mutinous intention other than merely observing the events of the day like any other soldiers might have done in the circumstances."

After having read and considered the evidence of the prosecution witnesses albeit that they were accomplices, but also taking into consideration the inquiry statement of the accused which he retracted at his trial we have no doubt that the Court Martial was quite entitled to come to the conclusion as we do that the accused's travelling in a motor vehicle through town in the way he did was for the purpose of overcoming any resistance to the coup plan which existed to overthrow the Government by unlawful means.

The next ground taken by Mr Raballa was that:-

> "The court erred in convicting the Applicant on the uncorroborated evidence of accomplices."

It is quite true that Jpte Cleophas K Musyoka (PW 3), Spte Nicholas Mutua (PW 4), Spte John P Thairu (PW 5), Spte Edwin Martine (PW 6) and Spte Edward K Magovi (PW 7) are convicts having been convicted of offences committed, we understand, arising out of events which occurred on August 1, 1982, and they should therefore be treated as accomplices and their evidence should not generally be accepted unless they are believed and that there is some other independent evidence which points to the guilt of the accused, or at least, tends to do so.

What the learned Judge-Advocate advised the Court Martial on the question of accomplices evidence was, we think, quite correct. What is said by an accused in a retracted confession or indeed in a retracted statement made by him which contains admissions may in a proper case be considered as corroboration of an accomplice's evidence vide Sir Alastair Forces VP in the case of *Pyaralal Melaram Bassan and Wathabia s/o Kiambu* (1961) E A 521. Of course an accomplice cannot corroborate an accomplice.

After a careful consideration of the accused's inquiry statement which he retracted at his trial and also the other evidence given by the prosecution witnesses, we think that this would be a proper case to take as corroboration of the evidence of the five prosecution witnesses whose evidence we have just referred to and who should be considered as accomplices but whose evidence we believe what the accused is alleged to have said in his inquiry statement and so as we have already said we find the overt acts in paragraphs

5(a), (c), (d), and (e) properly proved, but though we have no doubt that the accused was behind the issuing of arms and ammunitions to servicemen we do not think it was sufficiently satisfactorily proved that the accused positively ordered Pte Cleophas Kiilu Musyoka and other servicemen to arm themselves and laid in paragraph 5(b) of the list of overt acts as we are unable to find sufficient corroboration for what was said by the prosecution witnesses in regard to overt act 5(b) and so we think that it would be unsafe to hold that what has been alleged in paragraph 5(b) of the list of overt acts has been properly proved.

As regards the next ground taken by Mr Raballa which was:-

> " The Court Martial erred in admitting in evidence and basing its conviction on a retracted statement containing an apparent confession by the application notwithstanding evidence before it that the statement had been forced out of the Applicant while he was unconscious suffering from effects of torture from which he had been drawn and led to make the said statement."

A trial within a trial took place during the hearing of this case before the Court Martial since the accused retracted the inquiry statement it was said he had made to Chief Inspector Antony Nzuki (PW 8). The inspector gave evidence as did the accused. At the conclusion of the trial within a trial the court found:-

> " Having considered the evidence of the accused and the evidence given by Inspector Nzuki, the court is satisfied that the statement was given voluntarily and therefore it is admissible in evidence."

Having considered the evidence given by Chief Inspector Nzuki and also that given by the accused we find that the Court Martial did not error in admitting in evidence the accused inquiry statement to Chief Inspector Nzuki which the Court Martial was entitled to consider since we find as the Court Martial so found that it was voluntarily and properly made and given and not as alleged by the accused in his evidence before the Court Martial or indeed as now claimed in this ground of appeal.

The next ground of appeal taken by Mr Raballa was:-

> " The Court Marial erred in believing the false inference made in overt act charging the applicant with wearing Captain's badges with a view to influence servicemen to mutiny when in fact there was evidence to the effect that the said badges had been forced upon the Applicant by the leader of the mutiny, namely Snr Pte Ochuka and the Applicant was in fear of discording them at that juncture."

There was an abundance of evidence from prosecution witnesses that the accused was wearing the badges of rank of a Kenya Air Force Captain as laid in the third overt act. And in fact in the accused's statutory statement to the Court Martial at his trial the accused is recorded as saying:-

> " I went to the armoury and after getting myself armed as other soldiers were armed, I was given the ranks of a Captain by Spte Ochuka who told me to put them on at the armoury. Now when I asked Spte Ochuka of what was happening he told me to put on the ranks and board a vehicle and that it was high time I should have known what was happening …… Later I boarded a lorry which took us and dropped us at G P O."

and in the inquiry statement which the accused is said to have made to Chief Inspector Nzuki 9 (PW 8) the accused is recorded as having said:-

> " We went to Eastleigh and I found that the guardroom had been captured by the first contingent. We passed straight to the armoury. I found Snr Pte Ochuka who told me to take over around the armoury. He ordered Cpl Ngatia (GG) to go and get Sgt Musyoka or Mutinda to come and open the armoury. At this time I had Captain's ranks which had been given to me by Snr Pte Ochuka, the time I was leaving for Nanyuki to deliver a pass word. I blew open the arms armoury by firing."

It is upon what the accused said in his statutory statement before court and what he said in his retracted inquiry statement we presume that Mr Raballa contends that the accused was forced to wear the badges of rank of Kenya Air Force Captain by Spte Ochuka and that the accused was in fear of discarding them at that juncture.

In this regard we refer to section 16 of the Penal Code:-

> " A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refused; but threats of future injury do not excuse any offence, nor do any threats excuse the causing of, or the attempt to cause, death."

It is quite clear from the evidence on record that not only was the accused wearing the badges of rank of Kenya Air Force Captain in the armoury but he was also wearing them whilst patrolling the streets of Nairobi when Spte Ochuka was nowhere near him and so could not have been issuing threats to instantly kill him or do him grievous bodily harm if he refused. We therefore find as we think the Court Martal must have found that the accused chose of his own volition to wear the badges of rank of a Kenya Air Force Captain and we also find upon the evidence on record that the accused wore illegally and unlawfully the badges of rank of a Kenya Air Force Captain to further the overthrow of the Government of Kenya by unlawful means as he was patrolling and visiting places in the City of Nairobi and visiting servicemen who as the accused himself had said in his inquiry statement had been placed in various areas in town and in this regard we quote from the accused's retracted inquiry statement:-

> " I put on the ranks I had of a Captain and started going around in the town, picking soldiers who had been placed in various areas in the town."

We think and find that the third overt act was sufficiently and properly proved.

The fourth overt act laid which we have already set out was not specifically dealt with by Mr Raballa. There can however be no doubt whatsoever that the accused did arm himself with a sub machine gun and a self loading pistol. This is not disputed by the accused and so we find that this overt act has been properly and correctly proved.

The next ground of appeal taken by Mr Raballa was:-

> " Although there was evidence that applicant had been tricked and forced to participate in the mutiny, the honourable Judge Advocate failed to advise the Court Martial on the defence of compulsion in relating to the charge of treason."

We were not referred to any evidence by Mr Raballa where it was said or could be inferred that the accused was tricked into participating in what the accused was doing on August 1, 1982 as told by the prosecution witnesses and although we have made a search of the record ourselves we have been quite unable to find any such evidence. As we have already said we are quite unable to find that the accused was forced into participating in what he did that day so we do not find that the Learned Judge Advocate was in any way required upon the evidence before Court Martial to spell out the requirements of the defence of compulsion as set out in section 16 of the Penal Code.

The eighth and final ground of appeal taken by Mr Raballa on behalf of the accused was:-

> " The Court Martial erred in convicting the Applicant for treason when the evidence adduced disclosed some other and lesser offence or offences other than treason".

It was one of Mr Raballa's contention at the hearing of this appeal that the accused was taken advantage of and he did not really realise what was going on since neither Sgt Ogidi or Spte Ochuka really talked to

him what they were about. We have carefully perused the whole of the record and studied all the statements made by the accused which were correctly and properly admitted as evidence and we have no doubt whatsoever that the accused, James Odemba Otieno, was properly and rightly convicted of the offence as charged namely 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 as laid notwithstanding that we think and find that overt act 5(b) had not been sufficiently proved, but of course this makes no difference whatsoever to the conviction entered with reference to what is said in *Archbold's Criminal Pleadings, Evidence and Practice.*

Accordingly the appeal of the accused Ex-No 022187 Cpl James Odemba Otieno is dismissed.

Dated and delivered at Nairobi this 25th day of October , 1983.

J.H TODD **E.O O'KUBASU**

JUDGE **JUDGE**