REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

October 24, 1983

J H S Todd, E O'Kubasu, JJ

Court Martial Criminal Appeal/Application No 3 of 1983

Obuon v Republic

October 24, 1983, Todd & O'Kubasu JJ made the following Judgment.

The appellant Joseph Ogiddy Obuon was charged and convicted by a Court Martial held at Langata Barracks with the offence of committing a civil offence contrary to section 69(i)(a) of the Armed Forces Act, chapter 199, Laws of Kenya, that is to say, treason, contrary to section 40(1)(a)(iii) of the Penal Code chapter 63 Laws of Kenya, in that he on diverse days between April 9, 1982 and the August 1, 1982 at different places in Kenya, being a person owing allegiance to the Republic of Kenya, compassed, imagined, invented, devised or intended jointly with others not before the court, the overthrow by unlawful means of the Government of the Republic of Kenya, and the overt acts of the said treason were:

1) On several occasions, during the month of, April 1982, the said Sgt Obuon visited the house of Sergeant Richard Obuon Guya in Gilgil where he discussed the recruitment of Armed Forces personnel into a plan to overthrow the Government of Kenya by unlawful means.

2) Towards the end of the month of June, 1982 the said Sgt Joseph Ogiddi Obuon introduced Spt Ochuka to Sgt Richard Obuon Guya.

As regards the fourth overt act the prosecution adduced evidence through Pte Bernard Obunga Otaro (PW 2) and the appellant's own inquiry statement and his unsworn statement in the court martial. The appellant in those two statements admitted visiting 78 Tank Battalion at Isiolo and being introduced to Pte Bernard Obunga Otaro (PW 2) testified how the appellant said that they had organised to take over the Government.

That was on appellant's first visit to Isiolo. The appellant's remarks disturbed PW2 who reported the matter to Cpl Opiyo of 78 Tank Battalion "A" Squadron. As regards the fifth overt act prosecution relied on the evidence of SSgt Edward Gichuru Ngechu (PW 5) and appellant's unsworn statement and inquiry statement.

As regards the last overt act prosecution relied on the evidence of WO II Julius Ouko Nyamuti (PW 7) and Cpl Charles Kiptun (PW 8); and also appellant's own inquiry statement and unsworn statement.

Mr Oraro for the appellant opened his address by telling us that none of the overt acts had been proved. Before we deal with Mr Oraro's submissions we wish to consider the fifth act which was to the effect that on August 1, 1982 in the execution of the final part of the plan to overthrew the Government of Kenya the appellant and others guarded communication equipment set up in a house along Ngong Road in Nairobi.

The evidence in support of this particular overt act was that of PW 5 (SSgt Edward Gichuru Ngechu), the appellant's inquiry statement. The relevant portion of PW 5's evidence in respect of this overt act was:

We were in the lorry and so the officer went inside the compound and stayed there for about 20 minutes and when he came he was with 2 other men and when they came, I could see them talking at a distance. They were 3 of them.

In the evidence of PW 5 there was no mention of communication equipment. This witness (PW 5) testified that the was along Ngong Road but he remained in the lorry by the roadside and also he did not know what was happening inside the compound where the appellant and others went. We have then to consider what the appellant said in his inquiry statement as regards the house along Ngong Road. In his inquiry statement the appellant said:

I had carried two servicemen in the Land Rover. I drove to Council Headquarters who were supposed to guard the Council Headquarters who were armed. I had carried them from KAF Eastleigh. S/pvte Ochuka went away and came back again. We then stayed for a while and again S/pvte Ochuka left accompanied by Raila Odinga. They did not come back. Raila had two cars, so he and Ochuka left in one of them and later Ssgt Oteyo and the journalist left in the other car saying that they were going to go and look for Raila and Ochuka so that they can arrange how to announce at the Voice of Kenya about the coup. They also never came back. It was now almost 7.00 am in the morning of August 1, 1982 and by this time I had already heard over the radio that the Armed Forces had taken over the Government. We then continued waiting at the Council Headquarters ...

Hence, in that statement the appellant does not say that he was guarding any communication equipment. The nearest evidence as regards this overt act of guarding communication equipment is to be found in the appellant's unsworn statement to the court martial. In that statement the appellant said, inter alia:

Your Honour at this time, I tried to inquire from my friend Oteyo what was happening but he did not tell me but before he could explain, S/pte Ochuka told me to jump into a vehicle and it was driven to somewhere at Ngong Road. Here I was told to stick around with the other people who were there and I stuck there the rest of the night until the following day. I was told to remain there with some other airmen who were also armed and I was told to guard that place with others.

Your Honour, I was told that it was a military take over of the Government and so being a soldier of course and everybody else was armed, I had to comply because people around me were also armed and there was nothing I could do. Your Honour, so it happened that the two gentlemen Ochuka and Oteyo drove to town and left me to guard that place and so did not come back and so I asked another man who had a car to drive me to KAF Eastleigh. He told me that he was driving through the VOK to find out where the other guys were. Your Honour, we drove the two of us in the vehicle and when we got near Grosvenor Hotel I got arrested by Kenya Army personnel.

In the above statement the appellant talks of being told to guard that place. He does not mention communication equipment. It was upon the prosecution to prove the overt act as laid. We are satisfied that the fifth overt act was not proved to the required standard. That however is not the end of the matter. We must now turn to the other grounds of the appeal. We wish to deal with grounds 3 and 4 of the application for leave to appeal against conviction and sentence which are as follows:

3) The Court Martial erred in admitting the inquiry statement taken without a proper caution.

4) That the said inquiry statement was not admissible in evidence.

Mr Oraro argued that the inquiry statement of the appellant could only have been taken by a police officer if the police officer was investigating the case within the meaning of section 22 of the Police Act, and that caution could only be administered when the police officer had decided to prefer a charge against the appellant specifying particulars of the overt act so that the appellant could have acknowledged of the overt acts. Mr Oraro for the appellant went on to state that a police officer was not empowered to take

inquiry statement as he was not the investigating officer and that if he had powers to record a statement, then no proper caution was administered.

Section 80 of the Armed Forces Act (cap 199 Laws of Kenya) is as follows:

Where a person subject to this Act is accused to an offence under Part V the accusation shall be reported in the form of a charge to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.

In our view, before there can be any accusation resulting in a charge there must be an investigation and by section 14 of the Police Act (cap 84 Laws of Kenya) it is provided:

The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and enforcement of all laws and regulations with which it is charged. It seems to us therefore that it would be the duty of the police force to investigate this case to ascertain in conjunction with all sources if necessary and desirable such as for example some section of the Central Bank in the case of a currency offence or indeed the police sections or other sections of any branch of the Armed Forces as to whether or not an accusation can be made against a person subject to the Armed Forces Act sufficiently to support a charge which would then be reported in the form of a charge to the appellant's commanding officer.

The procedure seems to us to be similar to the police procedure in any criminal case involving any person. The police investigate the case and after having done so they prepare a charge which is filed in the magistrate's court, the magistrate would then either hear the case himself or if it was a case triable by the High Court he would investigate the same and if he is satisfied that there is sufficient evidence to do so would commit such persons for trial by the High Court.

The procedure under the Armed Forces Act is really very similar where the police either in conjunction with other bodies and sources investigate the case then an accusation is made reported in the form of a charge and the case is either heard by the commanding officer vide section 81 of the Armed Forces Act and vide rules 7 and 8 of the Armed Forces Rules of Procedure or if it is a charge to be tried by a Court Martial, such as treason then the provisions of rule 9 of the Armed Forces Rules and Procedure are applicable and so the accused person is made fully aware of the charge and evidence which will be brought against him.

We wish to stress here that section 80 of the Armed Forces Act only begins to apply after the case has been investigated by the police in conjunction with others and an accusation properly made in the form of a charge which probably cannot be done until an initial investigation of the case has been made as we have said.

Having so said, we can see nothing improper in the action taken by Supt Peter Mwendwa Mbuvi (PW 9) inviting the appellant to make a statement in the way he did on September 30, 1982 at 10.00 am at GK Prison Naivasha and we can see nothing wrong in what Supt Mbuvi (PW 9) said to the appellant as believed and accepted by the Court Martial and we do not find that it was at all necessary at that stage for Supt Mbuvi (PW 9) to have specifically mentioned the overt acts since the case was still being investigated and we can see nothing wrong with the caution administered which, in our view, is the usual caution administered in these circumstances. The appellant was clearly cautioned that he was not under any obligations to say anything. But he chose to make a long and detailed statement.

The inquiry statement tendered was objected to on the grounds that it was not voluntarily made and that it was obtained by means of inducement and/or threats. A trial within a trial was properly conducted and the Court Martial found that the statement of the appellant was given freely and voluntarily and ruled that it was to be admitted as evidence.

We find nothing whatsoever wrong with this ruling, and so we are unable to find any merit in the fifth and third and fourth grounds of the appellant's application for leave to appeal against conviction and sentence.

We therefore, find that the inquiry statement made by the appellant on September 30, 1982 to Supt Peter Mwendwa Mbuvi (PW 9) was admissible in evidence.

We wish now to deal with the second, fifth and sixth grounds in the appellant's application for leave to appeal against conviction and sentence. These three grounds relate to the summing up by the judge advocate. Rule 78(4) of the Armed Forces Rules of Procedure reads as follows:

4) After the closing addresses, the judge advocate shall sum up the evidence and advise the court upon the law relating to the case before the court close to deliberate on their findings; and if in the course of deliberating on their findings, the court required further advice from the judge advocate they shall suspend their deliberation and ask and be given such advice in open court. And in the Manual of Military Law Part 1 at page 54 rule 73 provides: When the closing addresses (if any) have been made, the judge advocate if any, will sum up the evidence and advise the court upon the law relating to the case.

The judge advocate will maintain an entirely impartial position but he may, in his own discretion, comment on the failure of the accused or his wife to give evidence.

From the above it is clear that the duty of the judge advocate at the close of the case is to sum up the evidence and advise the court upon the law relating to the case before the Court Martial.

Mr Oraro complained that the summings up by the judge advocate was so adverse that the court martial had no alternative but to find the appellant guilty.

We have considered the summing up by the judge advocate and while we agree that the same unfortunate remarks were made we find that the judge advocate reminded members of the court martial that they were judges of facts. In his opening remarks the judge advocate said:

Mr Presiding Officer, Members of the Court, as provided in rules 62 and 78(4) of the Armed Forces Rules of Procedure it is now my duty to advise you on the law relating to this case and to comment on the evidence. I have had occasion to advise you before on the law of treason and perhaps do not need to be now as detailed as I was in the earlier cases. However, I must make it clear again that you are not in any way bound to accept my advice but you may only disagree with it, weighty reasons. As far as the facts are concerned however, you are the sole judges of fact and you will determine that is to say make your finding of facts on the basis of the evidence produced before this court. I must remind you that in criminal cases such as this one, the burden of proof if always on the prosecution and the standard is beyond reasonable doubt. (emphasis ours)

And then in concluding his summary up the judge advocate said:

If you are satisfied as a result of considering the evidence that each of the overt acts has been sufficiently proved and the evidence of the witnesses sufficiently corroborated, you will find the accused guilty. If however, you entertain the slightest doubt, you will give the accused the benefit of doubt.

From the above we are satisfied that the judge advocate, left the issues for determination to the members of the Court Martial. The important point here to be considered is whether the judge advocate left the issues of facts for determination by the Court Martial.

On this issue of summing up we have found some assistance from the case of Leo George O'Donnell 12 Cr Appeal R 219 in which the Lord Chief Justice held:

A judge obviously is not justified in directing a jury or using the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their

decision and therefore this point also fails.

We have also considered what was said in Walter Beeby 6 Cr Appeal R 138 at page 141 Walter James Frampton 12 Cr Appeal R 202 at page 203, John West 4 Criminal Appeal R 179 at page 180 and John Canvy 30 Criminal Appeal r 143.

Having considered the evidence adduced before the Court Martial and the summing up by the judge advocate and having regard to the duties of judge advocate and comparing his duties to those of a judge in a trial by jury and in view of the few decided cases we have considered we are satisfied that the judge advocate expressed himself strongly on the case but he left the issue of fact to the members of the Court Martial. We now come to the last ground which was the seventh ground in the appellant's application for leave to appeal against conviction and sentence, which was as follows:

7. The conviction was against the weight of evidence before the Court Martial.

We have considered the evidence before the Court Martial as adduced by the prosecution and we are satisfied that there was ample evidence to show that the appellant was involved in the plan to overthrow the Government of Kenya by unlawful mean. If we may say so, the evidence before the Court Martial clearly proved that the appellant was deeply involved in this plan. He travelled to Gilgil, Nakuru, Nanyuki, Isiolo and Nairobi and Kisumu either alone or with others and all these journeys were connected with the plaintiff to overthrow the Government of Kenya by unlawful means.

We think that we have dealt with all the points raised by Mr Oraro at the hearing of the appellant's appeal before us. The conviction of the appellant was certainly not against the evidence which was accepted and believed by the Court Martial and so the appeal of the appellant is dismissed. Orders accordingly.