



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

(Madan and Kneller JJA & Platt Ag JA)

Criminal Appeal 62 of 1983

(Appeal from the High Court at Nairobi – Sachdeva and Abdullah, JJ)

NOBERT OLUOCH OBANDA V REPUBLIC

Cases

1. Kichingeri v R [1908] 3 EACA 1
2. Kalma Prasad v Sital Prasad 28, Calcutta 339
3. R v Wanjeri 1 EACA 93
4. Canisio Walwa v R [1956] 23 EACA 453
5. R v Mills
6. R v Rose [1962] 3 AER 298
7. R v Kray [1970] 1 OB 125
8. R v Ludlow [1971] AC 29
9. R v Boardman [1975] AC 421
10. R v Blackstock [1979] 70 CAR 34
11. Rep v Zacharia Shilisia Ageyo Cr App 64 of 1979
12. R v Mcglinchey [1983] The Times October 12

Advocates

B Chunga & Miss L Mbarire for Respondent

November 18, 1983. The judgment of the Court was delivered by Kneller JA

Norbert Oluoch Obanda was convicted of three counts of corruption contrary to Section 3(1) of the Prevention of Corruption Act (Cap 65) by a Nairobi senior resident magistrate on June 30, 1982 and sentenced to a total of four years imprisonment.

He appealed against the convictions only and his appeal was dismissed by the High Court (Sachdeva & Abdullah JJ) on May 12, this year.

There was, in the alternative to the first count, a charge of demanding with menaces contrary to Section 302 of the Penal Code on which the magistrate made a finding that it was proved beyond a reasonable doubt but did not convict and the judges declared that was the correct course to follow, and we agree.

He has now come to this court with an appeal against both conviction and sentence. So far as the convictions are concerned, because this is a second appeal, it is only matters of law with which we can deal and because the sentences were lawful we cannot interfere with them. Section 361(1) Criminal Procedure Code. The magistrate and the High Court judges made these findings. At the material time Obanda was a Senior Superintendent of Police in the Directorate of Criminal Investigation in the Ministry of Constitutional and Home Affairs so he was an officer in a public body. On June 27, 1981 at Nairobi he corruptly solicited for himself from Hermanus Phillipus Steyn Kshs 40,000 as an inducement or reward for himself to terminate or otherwise assist Steyn in a matter the Director of Criminal Investigations in the National Central Bureau Tanzania was making and in which the Kenya Directorate was concerned. That was the first count. He corruptly received for himself Kshs 7,000 on the same day for the same purposes. This was the second count.

On July 5, 1981 he corruptly received for himself another Kshs 5,000 for the same reasons. That was the third, and last, count.

Obanda was proved to be a Senior Superintendent of the Kenya Police attached to the headquarters of this country's Criminal Investigation Department and under the command of its Director. He was, also Chief of the National Central Bureau of Interpol for East and Central Africa and operated in and from Nairobi. His card (Exhibit 10) reveals that in this capacity he went by the name of Norbert Oluoch.

The Republic maintained that as the local or regional Interpol representative he dealt with correspondence and requests for help in their investigations from other branches of Interpol and police departments in other states and in minor or routine matters he acted on his own initiative but important and sensitive ones he had to and did refer to the Director of the Kenya CID.

Obanda maintained, however, as the senior police officer of Interpol here he could and did act independently of the Kenya Police Commissioner and Director of CID but Miss Kaindi (PW 13) of the Kenya CID, his deputy who has succeeded him went no further than this:

"Our Interpol section has investigative powers. It depends on the request.

Sometimes we investigate and sometimes we entrust the investigation to our local CID".

and Obanda's very experienced advocate did not cross-examine her on this.

Steyn, according to the evidence, was a Kenya Citizen, farmer, businessman and game hunter here

at Muita Estate in Karen and in Tanzania where he also had the status of a resident, with a farm between Moshi and Arusha. At one time he was a member of the Kenya Police Reserve. During June 1981 he was a director of a Tanzanian concern, the Rift Valley Seed Company Limited, of Arusha, and of Kenya one, the Wananchi Game (Africa) Company Limited in Nairobi. A six seater aircraft 5Y AKX was registered in Nairobi in the name of the Kenya company.

Someone chartered it on February 16, 1981 to fly out with seven million six hundred and fifty thousand Tanzanian Shillings on board from Kilimanjaro to Bujumbura and Nairobi and its pilot was Captain Albert John Metzger, a Canadian, who died in Steyn's house on March 31, 1981 of pulmonary thrombosis. There may or may not have been a passenger in it at the time.

On June 6, 1981 the Tanzanian Interpol representative, whose writing Paper is headed with an Interpol crest and the address of the Tanzanian CID, sent a letter (Exhibit 4) to the Director of the Kenya CID (not Interpol), asking for answers to questions about who owned that plane, the money, who piloted the plane and who collected the money and where and when. Attached to the letter were three documents sent by the Burundi Commissioner of Customs. They were date stamped June 22, by the local CID staff but not entered in Obanda's Interpol section register.

They were recovered on July 4, 1981, said SSP Wambua, in Obanda's built-in safe in his house in Harambee Estate, Eastlands, Nairobi. They were to be returned to Interpol Tanzanian. Obanda maintained they were in his office.

During June 1981 Obanda was involved in some investigation about an alleged terrorist in Nairobi from Italy and his deputy. Grace Kaindi was escorting the first lady of Burundi round Kenya.

Obanda received and acknowledged a letter on June 15, 1981 of the same date from the DCI Kenya telling him not to investigate or enquire into any matter without permission.

There was no precedent for this.

A week later he sought out Steyn for his answers to these questions from Tanzania Interpol and he claims it was his duty to do so and so he was entitled to do so because he was the head of the Interpol in this part of the world.

Steyn returned from Tanzania to Karen on June 25 and Mecha his servant, told him someone with a name like Oluoch from the CID here in Nairobi, had telephoned three times during his absence and wanted to see him.

Steyn met Obanda for the first time at his CID office the next day where he was lectured on the worldwide importance of Interpol and Obanda's position in it and shown red and blue files and finger print certificates so Steyn asked why Obanda sent for him and Obanda outlined the questions the Tanzania police wanted answers to and flourished the Burundi customs form (Exhibit 5). Obanda already had the answers to some of them from Njiru of the Kenya Director of Civil Aviation's licensing staff.

Steyn said at once he knew nothing about the money but within the hour he could find out in which country his company's aircraft was registered and who chartered and flew it from Kilimanjaro to Bujumbura to Nairobi. Obanda's reply was that Steyn was responsible in any event whoever flew it and he had the power to take away his passport and have his Kenya citizenship revoked. He added that most people who came into his office crawled on their knees and would pay any sum to keep their name clear which was what a director of an important company had done recently. He handed Steyn one of his

official Interpol cards and told him to return the next day with his passport. Steyn was unnerved by Obanda's behaviour during this long interview.

Steyn had the answers that same Friday June 26, to all the other questions save for who owned the Tanzanian money and to whom, where and when it was handed over. He telephoned someone he knew in the State Security Office in Dar-es-Salaam who promised to look into the matter. The next morning at 8.30 am his contact telephoned and said he had no news but asked Steyn to send his contact telephoned and said he had no news but asked Steyn to send copies of the documents which Obanda had.

On June 27 he handed Obanda his passport and his Passports and his written answers (Exhibit 8) to some of some of the questions of June 26 in the CID offices. Obanda then reminded Steyn of his importance and of his power to arrest him and the aircraft. Steyn told him the pilot paid for the fuel for the aircraft and its landing fees but not that the pilot had hired it. This is in his written answers (Exhibit 8). He added that the pilot was dead but Obanda said this was irrelevant.

Steyn asked if he could read the documents (Exhibit 4, 6 & 8) which he held but Obanda said he could not do so. Steyn asked if he might have copies but Obanda said it would take too long to get them done. He had not seen them before the trial began.

Then Obanda said he could help Steyn but it would mean a lot of work and be very expensive. Obanda claimed he merely told Steyn to apply to the court for an order for copies of the documents and warned him it would be an expensive manoeuvre but Steyn denied this.

Obanda then asked Steyn, according to the latter, how much he had in the bank and when Steyn said about Kshs 8,000 to Kshs 9,000 Obanda was most upset and told him to return on Monday to have his statement recorded which would probably take the entire day. He asked Steyn what the aircraft was worth. Steyn was by then very worried because he was being threatened by Obanda and he thought Obanda was going to arrest him. He could not defend himself until he knew what the other documents contained. He knew it was illegal to buy them from Obanda and there was no need to offer him any money.

Nevertheless, he asked Obanda how much he wanted and Obanda asked for his card back and wrote on it at the back Kshs 50,000 or some such sum. Steyn asked what that was for and Obanda took it back crossed out that figure and wrote Kshs 40,000 and said it was the minimum. This is the subject of the first count and the alternative to it. When Steyn balked at the size of it they argued until Obanda tore the card and flung it in the waste basket.

He then told Steyn to guide him to his Karen home by leading the way in his car which he did.

There Obanda in his small white Peugeot would not leave it so Steyn left his vehicle and they chatted there for sometime. This is on Saturday June 27, at lunch time and Steyn's watchman Endo Ngula confined this.

Obanda told Steyn he could arrest him. Steyn then offered him Kshs 7,000 because Obanda for Kshs 40,000 and for copies of the documents so Obanda opened the glovebox of his car and Steyn put that sum in notes in it. This is the subject of the second count.

Steyn asked when Obanda would hand him copies of the papers from Tanzania and Obanda told him to meet him at 6 pm on Monday June 29 at Adam's Arcade Post Office.

Monday morning Steyn told his advocate that Obanda was harassing him and the advocate told Irwin, the Deputy Director of CID, and they decided Steyn should go to Dar-es-Salaam and see what the authorities there knew about it all. Steyn did not tell them he had paid Obanda Kshs 7,000 outside his Karen house on the previous Saturday at lunch time. At 6.15 pm Obanda and Steyn met as arranged after a preliminary trip up to Dagoretti Corner and back to Adam's Arcade and there Obanda opened the boot of his small white Peugeot and told Steyn to put the balance in his briefcase but Steyn asked for his papers and at that moment the wailing of a siren on a passing police car made Obanda leap into his car and tell Steyn to do so and away they drove.

Obanda did not try to contact Steyn for three days and when he did, which was on Wednesday July 1, he was told by his servant, Mecha, at his Karen house, that Steyn had flown to Dar-es-Salaam so Obanda left another card (Exhibit 10) with notes on it asking for the name of Steyn's farm in Tanzania, the shareholders in his two companies and the pilot's death certificate. (Exhibit 21). There was no demand for any, money on it and no reference to the Tanzanian documents.

Steyn met the Tanzanian authorities by appointment, and they threw no light on these troubles so Steyn came back to Nairobi land Karen on Friday July 5 to begin a trip to Europe. Mecha showed him Obanda's card and said he had told Obanda what Steyn's plans were and Obanda said he would come to Steyn's house at 7 pm.

Then Steyn believed Obanda was coming to take away his passport and or arrest him on some charge so he told his advocate who told Irwin who sent SSP Sokhi to see Steyn at his advocate's office where he took rough notes (not a formal statement) of Steyn's account of his dealings with Obanda.

Sokhi went away and came back with four bundles in rubber bands of what seemed to be currency notes totalling Kshs 40,000 and a microphone and tape recorder. Some notes were false ones but details of those and the genuine ones were written down (Exhibit 12) at 4.00 pm by Sokhi in the presence of SSP Rowe.

Then Steyn, his advocate, Sokhi, Rowe, SP Maragua and SP Kariuki went to Karen Motor Works where they dropped off the advocate and then travelled on to Steyn's house where they fitted up Steyn with the notes and microphone leading from the taperecorder which Rowe had and then they all waited for Obanda.

He came at 7.30 pm and Sokhi, Rowe and Endo Ngula confirm this. Steyn met him and Obanda remained in his vehicle. Obanda asked him for the balance and Steyn went to his car and came back with the bundles of for them in cash which was in his car to which Obanda made no reply. He was playing him along. Steyn suggested the hand-over should take place in the woods near the racecourse on the way to Karen and Obanda agreed to follow him there but he turned at the Dagoretti roundabout and set off for Nairobi. Steyn caught up with him at the City Mortuary and waved to him to halt but Obanda would not do so and Steyn gave up at the Nairobi Hospital. Obanda pursued Steyn for answers to the Tanzanian queries because that is what Interpol representative must do. He found out Steyn was off to Europe on July 5 and he went to see him. Steyn asked him why he did not accept the Kshs 40,000 on June 29 and Obanda said he had been ore-occupied with another later appointment he had and he did not like discussing his work outside his office. He asked who the Tanzanian enquirer was and Obanda told him he was called Mwachojo.

Then Steyn went to his car and returned with an envelope and said, as if talking to himself, he still had the money he wanted to give him on June 29 and did he not remember he had already been given Kshs 7,000 before that"

Obanda expressed his surprise at such a false suggestion and said he would send what information he had to Tanzania and Steyn should see him when he came back from Europe.

He was not-chased round Nairobi and there were no notes in his vehicle which had not been planted by Steyn and Sokhi.

Apart from matters which the Republic proved beyond any reasonable doubt, and the appellant admitted, the senior resident magistrate and the High Court judges had two different stories to ponder. The first was that of the Republic. Obanda demanded Kshs 40,000 and was paid Kshs 7,000 and then another Kshs 3,000 all in June 1981 when he was the Senior Superintendent of Police in Kenya's CID to help Steyn fob off questions the Kenya CID was asked to answer about him and his aircraft and what it was doing on February 16, 1981 flying out of Tanzania over 7 million Tanzania shillings to Burundi and or Kenya. He accompanied this by telling Steyn he was a man who could arrest him and his aircraft, take away his passport and deprive him of his citizenship. The second was that of Obanda who said he never asked for a penny from Steyn and when Steyn offered him Kshs 40,000 for copies of the documents the Tanzania CID sent him about this aircraft and the questions they asked Obanda to answer he led Steyn to think he would supply copies of the documents in due course because he wanted to find out these answers and whether or not Steyn was an international smuggler of currency and or a dangerous man but he never, for one moment, asked for or agreed to take any reward for helping him.

These two accounts were set out and analysed as a whole by the two courts at greater or lesser length. Both found the witnesses for the Republic told the truth and Obanda did not do so.

Obanda, in this court, made an allegation that the trial magistrate was paid to convict him willy-nilly but there was nothing to support it and we reject it.

He claimed Sokhi was out to erase him on July 3, 1981 when he followed him into Nairobi. This was because he was jealous of Obanda's success in the Interpol section and for other reasons he specifically mentioned but there was nothing to support these allegations. They would not cover the evidence of his other colleagues in the CID, namely, Rowe, Maragua and Kariuki.

Obanda went on to declare his trial and conviction were the result of the machinations of unnamed Kenyans who were bent on encouraging or dealing with international terrorists, smugglers and 'dangerous' businessmen and resented Obanda's interference in the cause of preserving the tranquility hitherto enjoyed by the people of this country. We did not consider this one way or the other because it was all so vague.

Steyn he maintained was a liar. He did not reveal at once to Obanda that the pilot of this aircraft died in his Karen house on March 31, 1981 and he did not at first tell his advocate when he made his report he had already paid Kshs 7,000 to Obanda.

Our view is his testimony covered facts which were really weighty and in all appears to have been exceptionally cogent. He did not in the end shield himself or behave mischievously. He was not asking for a pardon and, so far as the record goes, he was not a bad character. There was no reason why the magistrate should not believe him, when he had considered all the evidence. *Kalma Prasad v Sital Prasad*, 28 Calcutta 339; *Rex v Wanjeri* (1934), 11 EACA 93, 95 (CA-K).

Obanda's advocate in his submissions to the trial magistrate reminded him he should ask himself first whether or not what Steyn alleged was the truth and if he were persuaded it was he should treat him as an accomplice and not act on his evidence unless it was corroborated.

The magistrate did not, in so many words, do this but it is clear from his judgment that he set out the evidence against and for Obanda very fully and then on the whole of it found Steyn was telling the truth. He then looked for corroboration of his testimony, which means he treated him as an accomplice.

The High Court judges took the same steps but specifically described Steyn as a statutory accomplice. We find, with respect, he was a real accomplice for the charge relating to the Kshs 7,000 and a statutory one for the one involving payment of the Kshs 3,000.

This was not a case where the circumstances and relation of the accomplice to the offence justified the magistrate in acting upon Steyn's evidence without corroboration. *Kichingeri v R* (1908), 3 EACA 1; *Canisio Walwa v Reginam* (1956), 23 EACA 453. The High Court judges were right to look for corroboration. *R v Zacharia Shilisia Ageyo Cr App 64 of 1979 (CA-KSU) January 23 1980 (unreported)*.

Steyn's report about Obanda to Endo Ngula, Sokhi, Maragua and Kariuki were hearsay and not corroboration but they showed consistency.

The paraphernalia of tape-recorder, cassette, transcript and translation amount to no more than an aide memoire for a witness as a notebook does for police officers *R v Mills*; *R v Rose* [1962] 3 All ER 298 (C Cr A).

Steyn in his conversation with Obanda outside his house on July 3 was bent on getting Obanda to accept Kshs 33,000 and to make remarks which revealed Steyn's report to Sokhi was correct. The police use tape-recorders on these occasions to see if the accomplice's report is true.

Sokhi transcribed the recording on and off between July 14 to July 17 and Wambua amended it later. The transcript has, as usual, revealed that the speakers do not make speeches that come trippingly off the tongue but blurt out short unfinished phrases and interrupt one another, and do not speak at all for some time. The transcript (Exhibit 17) was not seriously challenged by Obanda's very seasoned advocate.

Obanda says the tape was not played in the trial or the first appeal and, although the record of the evidence of Steyn and Sokhi suggest it was, we will, assume in Obanda's favour it was not played at the trial and it is clear the appeal judges did not hear it and were not asked to do so. We declined the invitation to hear it in this court.

The former Supreme Court of Kenya (O'Connor CJ, De Lestang and Edmonds JJ) in *The Queen v Raojibhai Girdharbai Patel and Another* [1956], 29 KLR 112 dealt with the admissibility in evidence of a recorder, recording and transcript. There were two transcripts produced in that case; one by the complainant and one by the investigating officer. It was held, among other things, that all were admissible provided there was evidence to show the machine worked properly, and the people whose speech was recorded or who heard it identified the voices. It is in principle undesirable that the magistrate (or judges) should decide whether a recorded voice is that of a witness or defendant heard in court and this should be done by a witness familiar with the voices recorded and the playback of them, which would carry more weight than the evidence of those whose words were recorded since some people are unable to recognise their own recorded voices (pp 116, 117). They were also of the opinion that the recording may be played back in a court if a proper foundation has been laid. This could include evidence of the recording having been made on the recorder, the nature of the matter recorded and evidence of the identity of the voice or voices of the person or persons recorded with the sound of the voice or voices being played in court. The opinion of the magistrate, judge or assessors would not do (p 118). We endorse all this.

Here, in this appeal, there is evidence that Steyn and Obanda spoke to one another about these documents, the Tanzanian authorities and the balance of the Kshs 40,000. Sokhi and Rowe overheard them do so. Sokhi went out to check that the recording was of Steyn and Obanda. Sokhi and Rowe knew Obanda and his voice well and Sokhi heard Steyn's complaint that day. Steyn identified his voice on the tape, Obanda did not deny his was also recorded and Sokhi identified each when the recording was played. The transcript showed the machine was accurate and consistent and this was not challenged at the trial.

So the paraphernalia was properly admitted and used as an aide memo ire for Steyn, Sokhi, Rowe and Obanda. There is corroboration, then, of Steyn's allegations in the evidence of Sokhi and Rowe that on that evening Steyn said:

"What do you ... do you want now Kshs 33,000 or do you want it when I come back"

and Obanda replied

"No. If you have it, then finish up early the whole story ... In fact, the longer you wait to reply to these fellows they will think - what is happening"

There is also corroboration of it in Obanda's desperate foolhardy flight in his car from his colleagues in the one behind him which followed him out of Steyn's house at Karen that evening.

And there are the same loose notes or bundles in rubber bands on the near side seat of his car during and after the chase.

Obanda or his advocate has submitted in all three courts that he was an Interpol officer investigating an alleged offence outside Kenya and not a "public servant" or a member of a "public body" so none of these charges were proved. The fact is he was a Kenya CID officer and could not be an Interpol chief here unless he were, he was in charge of the Interpol section of the Kenya CID and he was answering questions addressed to the Director of the Kenya CID. These concerned the use of an aircraft registered and based in Kenya to smuggle Tanzanian cash from Tanzania to Burundi and or Kenya. The magistrate and judges were right to find Obanda was at the relevant time a public servant and an officer of a public body within the meanings ascribed to them in Section 2 of the Prevention of Corruption Act (Cap 65).

Obanda drew attention to the difference in where the onus of proof lay in the offence of demanding with menaces and corruption and claimed they should not have been joined in one charge sheet. His advocate raised it but did not press it at the trial and it was a ground of appeal in the High Court but the same very experienced advocate abandoned it.

Two different offences may constitute a series and their joinder is possible even if they do not arise out of the same acts or from part of a system of conduct but one requirement is that a sufficient nexus must exist. This would exist if the evidence of one is admissible in the trial of the other. An alternative rule is that the two or more offences should exhibit such similar features that they could conveniently be tried together in the general interest of justice which would take account of the interest of the accused, witnesses and police. See Section 135 Criminal Procedure Code (Cap 75); R v Kray [1970] 1 QB 125; R v Ludlow [1971] AC 29. If there are some special features which make joinder prejudicial or embarrassing to the accused or the offences are too numerous or complicated the magistrate should in his discretion sever them and order separate trials. R v Boardman [1975] AC 421; R v Blackstock (1979), 70 Cr App R 34; R v McGlinchey, The Times October 12, 1983 CA.

The offences to which Obanda pleaded not guilty before the trial magistrate were not too numerous or complicated and there was no special feature about them which prejudiced him or embarrassed him or his advocate so there was no call for them to be severed.

Obanda harped on the discrepancies in the evidence of the witnesses for the Republic but these were not numerous or of any significance.

He also insisted that the question to ask was-what did Steyn hand over these sums for"

But the magistrate and the High Court judges were right to make findings on whether or not it had been proved that Obanda asked for one and received the other two"

At the end of all this, thereof re, we have to say this appeal must be dismissed and that is the order of this court.



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