

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT TAVETA

MCCR/E086/2021

REPUBLIC..... DPP

VERSUS

KELLY ADUO..... 1<sup>ST</sup> ACCUSED

FRANCIS AUMA..... 2<sup>ND</sup> ACCUSED

ALEX NZASI..... 3<sup>RD</sup> ACCUSED

ROPHUS NGURE..... 4<sup>TH</sup> ACCUSED

MOHAMMED ALI..... 5<sup>TH</sup> ACCUSED

SHARLLET NDIGA..... 6<sup>TH</sup> ACCUSED

CECILIA MUKONYO..... 7<sup>TH</sup> ACCUSED

MARIAM KIEMA MATIKU..... 8<sup>TH</sup> ACCUSED

JUDGMENT

BACKGROUND

Count 1

The accused persons were jointly charged with taking part in an unlawful assembly contrary to section 78(1) as read with section 79 of the penal code.

The particulars are that on the 4<sup>th</sup> day of March, 2021 at about 0930 hours at Taveta Airstrip area in Taveta Sub County within Taita Taveta county, took part in an unlawful assembly

Count 2

The accused persons were jointly charged with prohibition of gathering contrary to rule 7(2) as read with rule II of the public health (covid 19 restriction of movement of persons and related measures) rule 2020

The accused persons pleaded not guilty on count 1. The second count was withdrawn before the accused persons pleaded. What remains for determination is Count 1.

### EVIDENCE

In order for the prosecution to prove their case beyond reasonable doubt three witnesses were availed.

PW1 was number 238862 Inspector Gabriel Telewa the deputy officer commanding station Taveta Police station.

According to him on 4<sup>th</sup> March, 2021 he was on patrol together with P.C Koech, P.C Kimanzi, corporal Shughuli when they received a tip off from members of the public that there was an assembly of about 100 people and there were rowdy boda boda riders who were hooting. They went to Taveta airstrip and on arrival they found the group. They asked for the leadership of the group and Kelly and Francis went where he was. He asked them the purpose of the demonstration and Kelly informed him that it was about the dilapidated conditions of Taveta Sub County Hospital. He inquired if they had notified the relevant authorities and Kelly showed him a letter addressed to the OCPD. The OCPD replied and the notification was declined and the reasons given as to why the demonstrations could not be allowed. The letter had been signed by the OCPD and stamped.

According to him, the condition in which he found the demonstrators in was not proper. They managed to arrest the eight suspects and charged them with the offence herein.

They seized placards which were marked as PMFI 1

They also recovered one burner which was marked as PMFI 2

He also referred to a letter dated 1<sup>st</sup> March, 2021 addressed to the OCS. The letter was marked as PMFI 3. He stated further that the accused persons claimed that they had a right to demonstrate. He identified the first accused as Kelly and the second accused as Francis.

On cross examination by Chenze for the accused persons he stated that he has worked as a police officer for thirteen years. He claimed that he went to the Taveta Airstrip and found the suspects were rowdy and had placards but did not conduct a search to ascertain whether they had weapons. He stated further that none of the suspects resisted arrest and that he is the one who escorted them to the police station. He stated further that he is aware of the public order Act which provides for a requirement of a notification and that there are any security threats then the notification can be rejected citing reasons.

On reexamination he stated that they can issue permits or fail to. He claimed that the reasons why the demonstrations could not go on had been given by the OCPD.

PW2 was number 67789 Corporal Mwinyi Shughuli based at Taveta police station for the last three years and that on 4<sup>th</sup> March, 2021.

According to him on 4<sup>th</sup> March, 2021 at 9.00am he was on patrol together with Inspector Gabriel, Justus Msoma, Nicholas, Victor Langat, Patrick Kipkoech and Wanjohi while using the station motor vehicle being driven by Police constable Ratema.

They received information that people had gathered at the air strip. They went at the scene and found a group of about one hundred people. Inspector Gabriel Loro called Francis and Kelly who

claimed were leaders. They produced a letter that had been rejected and claimed further that they had not complied with covid protocol. The in charge directed them to arrest them and they managed to arrest eight people while the rest disappeared.

He identified Kelly Aduo as the first accused and Francis as the second accused. He identified the letter dated 1<sup>st</sup> March, 2021. According to him the notification was rejected by the OCPD on the reasons that there are no meetings and advised them to visit the relevant offices for any burning issues.

On cross examination by Chenze for the accused persons he stated that there was a notification that was given to the police and that they accused persons informed them that they had gathered because of the poor health services at the facility in Taveta. According to him they had pluck cards but he did not read them. He stated further that the accused persons had no weapons and that the group was of about one hundred people but they did not take any photographs.

PW3 was force number 261068 P.C Nicholas Kimanzi based at Taveta police station for the last four years. According to him on 4<sup>th</sup> March, 2021 at 0900 hours while on patrol led by Inspector Gabriel received information that people were picketing and carrying placards. He went to the scene with other officers and found a group of 100 people. One inspector Gabriel asked for their leaders and that is when Kelly and Francis came out and said they were concerned with challenges at Taveta Sub-county hospital. It is then that Kelly produced a letter that had been rejected. He referred to the later and noted it was a notification of a peaceful demonstration which was received and a note written declining the letter.

He produced the notification as Exhibit 3.

He stated further that six individuals were holding one banners and eight placards.

He produced the eight placards as exhibits 1(a) –(h)

Burner exhibit 2

He identified the first accused as Kelly and the second accused as Mr. Ouma.

On cross examination by Chenze for the accused persons he stated that he is the investigating officer and that Mr. Kelly Aduo is not a criminal and that members of the public were afraid of the gathering. According to him, vide the letter dated 1<sup>st</sup> March, 2021 they had gone to the police station to notify the police about the intended assembly.

He stated further that no demonstrations took place and as such no other crimes were committed. At the time of arrest, the accused persons were not armed and did not resist arrest. He stated further that he could not tell the condition at the facility as he has never been attended to at the facility.

On re-examination he said he went to ensure the property of the public is safe.

The prosecution closed their case after the three witnesses. A ruling on case to answer was made and the accused placed on their defence.

### **DEFENCE CASE**

DW1 was Kelly Aduo who works with MUHURI as a field officer and deal with human rights and related issues. According to him on 4<sup>th</sup> March, 2021 they had planned to take a petition to the governor's office as the doctors had gone on strike and there were no services offered. He stated that he had been affected as his child fell sick and could not be attended to. They issued a notification to the OCPD who advised them to visit the senator's office. Together with his team

of about six people, they went to the airstrip and began preparing placards so that they can go to the senator's office and that is when they were arrested.

On cross examination by the state counsel he stated that he took the notification to the police and were told no gatherings was allowed and that if they had any concerns they should go to the senator's office. According to him they were stopped from proceeding to the senator's office by the police officers when they were arrested.

DW2 was one Francis Auma who works with Muhuri and is in charge of rapid response and helps those whose rights have been violated. According to him he had received complaints from Kelly about poor health services at Taveta sub county hospital as he had also been affected and lost his child. They decided to find a way of helping the locals and on 4<sup>th</sup> March, 2021 they assembled at the airstrip so as to find a way to the senator's office. They were seven people in total. Kelly was helping people to prepare placards and while still in the process the police arrived and arrested them. He stated further that they had no ill intentions and did not incite anyone.

On cross examination by the state counsel he stated that they had not assembled and they were still preparing the placards. He stated that they were to take their petition peacefully but the police stopped them claiming that they had no permit. According to him the notification permitted them to go to the authority and as they were preparing they were arrested.

DW3 was one Alex Nzasi. According to him on 4<sup>th</sup> March, 2021 he was at the airstrip preparing placards as they intended to protest over the poor health services. The police arrived as they were still preparing and arrested them.

On cross examination by the state counsel he stated that he was at the airstrip preparing placards and that they had a letter and was not aware that their meeting had been stopped.

DW4 was one Rophus Ngure a farmer who claimed that on 4<sup>th</sup> March, 2021 he was from his home to town and while at the airstrip a police vehicle arrived and he was arrested. He claimed that he did not know why he was arrested.

On cross examination by the state counsel he said that he was a passerby and was not associated with the group.

DW5 was one Mohammed Ali from Taveta and a farmer. According to him on 4<sup>th</sup> March, 2021 at 9.00am he was arrested at the airstrip while preparing placards as the health services in Taveta had deteriorated. Before they could finish the police arrived and arrested them.

DW6 was Sharrlet Ndiga from Taveta and does farming to earn a living. According to her she was from Russia village heading to Riata village and while at the air strip, she saw Kelly together with other people and moved closer to see what they were doing since Kelly was well known to her. In a short while the police vehicle arrived and she was arrested.

On cross examination by Tomno for the state he stated that she moved where Kelly was so that she could get the right information and that is when she learnt that they were meeting because of the poor health services at the facility in Taveta.

DW7 was one Cecilia Mukonyo from Lessesia. According to her, on 4<sup>th</sup> March, 2021 she was from her home going to the farm when she saw Kelly at the airstrip and moved closer. It is then that she saw placards being prepared. She claimed she was just a passerby.

PW8 was one Mariam Kiema Matiku from Mzunguni village and does farming to earn a living. According to her she had gone to the market and passed through the airstrip and saw Kelly. In a short while the police vehicle arrived and she was told she had gone against Covid 19 regulations. She claimed she had gone to greet Kelly.

On cross examination by Tomno for the state she stated that they were told that they had gathered contrary to covid 19 rules.

The defence case was closed after the eight witnesses. The defence filed written submissions and urged this court to acquit the accused persons as the prosecution had failed to discharge their duty of proving their case beyond reasonable doubt.

#### **ANALYSIS OF EVIDENCE AND DETERMINATION**

It is the law in Kenya as entrenched in the constitution under Article 50(2)(a) that an accused person is presumed innocent until the contrary is proved by the prosecution beyond reasonable doubt. The prosecution bears the burden of proof on every element in a criminal charge beyond reasonable doubt.

The well-established jurisprudence on the doctrine that the prosecution bears the burden of proof was stated in Lord Oputa of the supreme court of Nigeria in the case of **Bakare Versus State (1985) 2NWLR** adopted the statements as follows;

*“Proof beyond reasonable doubt stems out of compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond*



*reasonable doubt means just what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”*

Similarly, in Miller vs Minister of pensions (1947) ALL ER 372-373 Lord Denning stated as follows

*“that degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt nothing short will suffice”*

The Evidence Act Cap 80 of the Laws of Kenya at section 107(1) provides;

*“Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist”*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”*

Section 109 states; *“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person”*

In the case of Pius Arap Maina Vs Republic (2013) eKLR (Criminal Appeal No. 247 of 2011), Court noted that;

*“it is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused”*

In this case the accused persons were charged with taking part in an unlawful assembly contrary to section 78(1) as read with section 79 of the penal code.

Section 78 of the penal code states;

*“when three or more persons assemble with intent to commit an offence or being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the persons so assembled will commit a breach of peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly”*

Section 79 states;

*“Any person who takes part in unlawful assembly is guilty of a misdemeanour and is liable to imprisonment for one year.”*

From the above section of the law and the evidence on record as well as the submission filed by the Advocate representing the accused persons, the following issues arise for my determination.

- i. Whether the assembly was of three or more people
- ii. Whether the persons had assembled with intent to commit an offence
- iii. Whether they conducted themselves in such a manner as to cause persons in the neighbourhood reasonably fear the persons so assembled will commit a breach of peace

### **Whether the assembly was of three or more people**

It is the evidence of PW1, PW2 and PW3 that they went to the Taveta Air strip after a tip off and found a group of about 100 people who had assembled. They managed to arrest the eight accused persons and charged them with the offence herein.

According to the defence witnesses they do not dispute that they had assembled, the only contention is that they were not more than eight people at the airstrip.

From the evidence by the prosecution and defence it is clear that the people that had gathered were more than three people which is an assembly as per the definition under section 78(1) of the penal code.

### **Whether they had assembled with intent to commit an offence**

According to PW1, PW2 and PW3 the accused had assembled unlawfully as the notification served on the police was declined on the following reasons;

- a) Currently no meetings
- b) If there is a burning issue you go and see the relevant office to address the issue
- c) To reach the senator you can do a write up and take to the office.

The charge against the accused persons is as follows; “taking part in an unlawful assembly contrary to section 78(1) as read with Section 79 of the penal code.”

The particular of the offence are as follows; “on the 4<sup>th</sup> day of March, 2021 at about 0930 hours at Taveta Airstrip area in Taveta Sub county within Taita Taveta county, took part in an unlawful assembly”

The charge, particulars of the offence and the evidence on record do not indicate what offence that the accused persons assembled to commit.

In the case of Adan Vs Republic (1983) eKLR

The court held: *"In the case before us, the charge sheet referred to unlawful assembly. The appellants were not informed of what offence prosecution intended to prove."*

Similarly, in the case of Chandi Bin Khamis Mtumbatu V Republic (1961) EA 587 at Page 588 the court of appeal said *"it will be observed that the appellants were charged with, and convicted of assembling with intent to commit an offence. What offence it was alleged that they intended to commit was not specified either in the charge or in the judgment of the resident Magistrate and, indeed there was no evidence which would enable a finding to be made as to what offence if any they did intend to commit."*

In view of the above I find that the prosecution failed to prove that the accused persons had gathered with intent of committing a crime. None of the prosecution witnesses led evidence to the effect that the accused persons intended to commit a crime.

**Whether they conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear the persons so assembled will commit a breach of peace**

According to P.W1 inspector Gabriel Telewa on 4<sup>th</sup> March, 2021 he was on patrol together with his colleagues when they received a tip off from members of the public that there was an assembly of about one hundred people and rowdy boda boda riders were hooting. They went to the scene at Taveta Air strip and found the group. According to him the condition in which he found them was not proper as the rowdy boda boda riders maliciously destroyed properties.

According to PW2 force number 67789 Mwinyi Shughuli he visited the scene together with PW1 and PW3 and found a group of one hundred people. One Kelly and Francis produced a notification that had been rejected and they had not complied with covid protocols. They arrested the accused and charged them with the offence herein.

The evidence PW3 was similar to what PW1 and PW2 stated in their testimonies. He was the investigating officer in this case. He produced placards as exhibit 1 and one burner as exhibit 2 .

I have carefully evaluated the evidence above and I note that none of the prosecution witnesses showed how the accused persons conducted themselves in a manner that people in the neighbourhood feared that a breach of peace would arise. There was an attempt by PW1 who claimed that the boda boda riders were rowdy and maliciously destroyed properties. He did not state whether among the eight accused persons were any boda boda riders who were allegedly rowdy. Further, no one was brought from the neighbourhood to testify that properties were destroyed or that the members of the public in the neighbourhood feared that there was a likelihood of a breach of peace. In the circumstance I find that the prosecution failed to prove the above ingredient of the offence.

In the end I find that the prosecution failed to prove its case beyond reasonable doubt.

Accordingly, the accused persons are hereby acquitted under section 215 of the criminal procedure code for the offence of taking part in an unlawful assembly contrary to section 78(1) as read with section 79 of the penal code.

SIGNED DATED and DELIVERED in open court this ..... 26<sup>th</sup> ..... day of November, 2021

C. L ADISA

R. MAGISTRATE

MCCR/ E086/2021 REPUBLIC VERSUS KELLY ADUO AND SEVEN OTHERS

In presence of

Accused

Court assistant;

State Counsel

Present:  
Madame  
Tomno.

 20/11/21

ORIGINAL