



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Masime JA, Gicheru & Kwach Ag JJ A)**

**CRIMINAL APPEAL NO 2 OF 1988**

**BETWEEN**

**ZEPHANIA OLANG' KIYANA..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction and sentence of the High Court at Nairobi, Dugdale J, dated 6th December 1987*

*in*

*High Court Criminal Appeal No 1367 of 1987)*

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**JUDGMENT**

July 14, 1989 the following Judgment of the Court was delivered.

Section 67 (b) (ii) of the Kenya Railways Corporation Act, Chapter 397 of the Laws of Kenya, the Act, provides that:

“Any person who being on any premises occupied by the corporation or upon any train, vessel or vehicle of the corporation is in a state of intoxication or behaves in a violent or offensive manner to the annoyance of any other person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both.

Zephania Olang' Kiyana, the appellant, was charged in the court of first instance with the offence of being in a state of intoxication contrary to section 67 (b) (ii) of the Act the particulars whereof read as follows:

“On the 30th day of October, 1986 at about 6.10 p.m. at Nairobi Railways Station, within Nairobi area, being a guard of BO5 Nairobi/Kisumu passenger train, was found in state of intoxication while on duty causing the passenger train to suffer to delay of 25 minutes. The train was supposed to leave at 5.30.”

These particulars did not allege that the appellant's state of intoxication was to the annoyance of any other person. Indeed, the entire proceedings in the court aforementioned made no reference to this factor. The said proceedings contented themselves with the appellant having been found in a state of intoxication while on duty.

Being in a state of intoxication *per se* does not constitute an offence under section 67 (b) (ii) of the Act. The state of intoxication must be to the annoyance of some other person. This must not only be charged but must also be proved against an accused person beyond reasonable doubt before a conviction for this kind of offence can be founded. The appellant's state of intoxication to the annoyance of some other person was neither charged nor proved against him beyond reasonable doubt in the court of first instance. Indeed, it is doubtful whether the appellant was in a state of intoxication for the Report of Government Analyst which was relied on by the aforesaid court in this regard was based on the analysis of urine sample allegedly obtained from the appellant on 30th October, 1986 by a Government Pathologist who never testified in this connection and which said urine sample was not received by the Government Analyst until 12th November, 1986 with no explanation given for the delay and thus rendering it suspect as to its having been obtained from the appellant on the date mentioned above.

Neither the trial court nor the first appellate court was alive to the foregoing factors. Had either of them directed itself to the said factors, we are certain the appellant would not now be before us appealing against his conviction. The appellant's appeal must therefore succeed. Accordingly, we allow the appellant's appeal, quash his conviction and set aside his sentence of a fine of Shs 800/= or in default 45 days imprisonment. The fine of Shs 800/= if paid shall be refunded to the appellant forthwith.

**Dated and delivered at Nairobi this 14th day of July , 1989.**

**J.R.O. MASIME**

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**JUDGE OF APPEAL**

**J.E. GICHERU**

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**AG. JUDGE OF APPEAL**

**R.O. KWACH**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**



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