IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KNELLER JA, CHESONI & NYARANGI Ag JJA)

CRIMINAL APPEAL NO 121 OF 1983

JAMES NYANAMBA …… APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant, James Nyanamba and another man called Yuvenalis Miruka were jointly charged with two counts of robbery contrary to section 296(1) of the Penal Code and James was charged separately in count three with indecent assault on a female contrary to section 144(1) (ibid) and Yuvenilas was charged alone with a similar offence in count four.

There was a number of defects in the evidence in the trial. There was no evidence, for instance of robbery as defined in section 296(1) of the Penal Code on count two. It was a case at most of theft because no force or threat of force was used. On counts three and four, there was no medical evidence nor any observation of what happened to each complainant by the other to afford corroboration. These latter offences, being sexual offences, require a careful direction by the magistrate that it is unsafe to act on the evidence of a complainant in such a case without corroboration but that if the magistrate is satisfied that the evidence is reliable, then after paying attention to the warning, he may nevertheless convict. There was no such warning in this case and the absence of such a warning may render the conviction unsound. *R v Cherop Kinei* (1936) 3 EACA 124.

It may be that the magistrate failed to appreciate these substantial defects in the evidence because of his incorrect approach to it, the form of his judgment and the defence. The trial magistrate after outlining the evidence of the prosecution witness as stated that he believed their evidence but gave no reason for believing it apart from saying that they had no reason for lying. The judgment failed to comply with the provisions of section 169(1) of the Criminal Procedure Code which requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision. It was after the trial magistrate had considered and decided on the prosecution evidence, that he rejected the defences as false, again without giving any reasons. He should have considered the evidence as a whole; see *Okale Okethi and Others v Republic* (1965) EA 555.

At the end of his judgment the trial magistrate said:

“I am satisfied beyond doubt the charge on all 4 counts was proved against the two accused. I therefore find the two accused guilty of the offences charged and I convict them accordingly.”

Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.

In his defence the appellant made an unsworn statement in which he said:

“I have nothing to comment on the allegations against me as I was at Nubian village.”

The appellant therefore put forward a defence of alibi. This defence does not appear to have been considered by the magistrate at all. These matters were not dealt with by the learned judge who heard the appellant’s first appeal. We cannot say what the lower courts’ finding would have been on the defence of alibi and the appellant’s defence of alibi has not occasioned a failure of justice. For the foregoing reasons, we allow the appeal, quash the convictions, set aside the sentences and order that the appellant be set free forthwith unless he is otherwise lawfully detained.

Dated and Delivered at Kisumu this 8th December, 1983,

A.A.KNELLER

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

J.O. NYARANGI

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Ag JUDGE OF APPEAL