



Case Number:	Criminal Appeal 121 of 1983
Date Delivered:	08 Dec 1983
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Zakayo Richard Chesoni, James Onyiego Nyarangi, Alister Arthur Kneller
Citation:	James Nyanamba v Republic [1983] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b>James Nyanamba v Republic</b></p> <p style="text-align: center;">Court of Appeal, at Kisumu December 8, 1983</p> <p style="text-align: center;">Kneller JA, Chesoni &amp; Nyarangi Ag JJA</p> <p style="text-align: center;">Criminal Appeal No 121 of 1983</p> <p><b>Evidence</b> - corroboration - sexual offences - uncorroborated evidence of complainant - how court should deal with such evidence - direction that court should give before acting on such evidence - failure of court to warn itself of danger of acting on such evidence - conviction made on such evidence - whether failure to warn itself may render conviction unsound - failure of court to consider evidence - court considering only prosecution evidence - defence evidence rejected as untrue without giving reasons - how court should consider evidence.</p> <p><b>Judgment</b> - contents of - form of - essential contents of a judgment – what a judgment on conviction must contain - Criminal Procedure Code (cap 75) section 169(1), (2) - effect of failure to comply with section 169.</p>

The appellant was charged, jointly with another person, with two counts of robbery contrary to section 296(1) of the Penal Code (cap 63) and each accused on his own, with one count of indecent assault on a female contrary to section 144(1) of the Penal Code. In respect of one of the counts of robbery, no evidence of force or the threat of it was given and in respect of the indecent assault charge, there was neither medical evidence nor any witness testimony by either complainant on what had happened to the other. The appellant was convicted and sentenced and as his first appeal was unsuccessful, he appealed further to the Court of Appeal.

**Held:**

1. Sexual offences require a careful direction by the trial court that it is unsafe to act on the evidence of a complainant without corroboration but where the court is satisfied that the evidence is reliable, then after paying attention to the warning, it may nevertheless convict the accused.

2. The failure by the court to warn itself of the danger of convicting on the complainant's evidence without corroboration rendered the conviction unsound (*R v Cherop Kinei* (1936) 3 EACA 124).

3. The appellant in his defence had put forward a defence of alibi which was not considered by both the trial magistrate and the first appellate court and as the Court of Appeal could not tell what the lower courts' finding would have been if they had considered it, this was more reason why the appellant's appeal would succeed.

4. According to section 169(1) of the Criminal Procedure Code (cap 75) every judgment must contain, in the case of a conviction, the points for determination, the decision thereon and the reasons for the decision.

5. The failure by the court to give reasons for rejecting the defence as false or look at the evidence as a whole was improper.

6. Section 169(2) of the Criminal Procedure Code requires that in the case of a conviction, the judgment must specify the offence, the section of

	<p>the Penal Code or other law under which the accused is convicted.</p> <p>The omission to comply with section 169(2) in this case occasioned an injustice which could not be cured under section 382 of the Criminal Procedure Code.</p> <p><i>Appeal allowed.</i></p> <p><b>Cases</b></p> <ol style="list-style-type: none"> <li>1. <i>R v Cherop Kinei</i> (1936) 3 EACA 124</li> <li>2. <i>Okale Okethi and Others v Republic</i> [1965] EA 555</li> </ol> <p><b>Statutes</b></p> <ol style="list-style-type: none"> <li>1. Criminal Procedure Code (cap 75) sections 169(1), (2); 382</li> <li>2. Penal Code (cap 63) sections 144 (1), 296(1)</li> </ol>
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**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 8<sup>th</sup> 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**



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