



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Nyarangi, Gicheru & Kwach, JJA)

CRIMINAL APPEAL NO 17 OF 1989

Between

CLAY GODWIN WAMBULWA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

December 6, 1989, **Nyarangi, Gicheru & Kwach, JJA**, delivered the following judgment.

There is before us an appeal from the judgment of the Commissioner of Assize. Behan delivered on 17th June, 1988 dismissing the appellant's appeal against conviction and sentence.

The appeal before us is based on the five grounds of appeal the substance of which is that the appeal was heard in the appellant's absence notwithstanding that he wished to be present.

There is a matter touching on section 359(1) of the Criminal Procedure Code which goes to the root of the appeal. Shields, J acting on a direction by the justice directed that this appeal be heard by two judges. However, on 1May 11, 1988 Mbogholi, J and Commissioner of Assize Behand, purported to vacate the order of Shields, J and as a consequence the appeal was heard by the Commissioner of Assize. With utmost respect, the subsequent direction was an error of law. The two did not have the authority of the chief justice in writing to direct as they purported to do. It follows therefore that the proceedings presided over by the Commissioner of Assize, Beham are a nullity in law.

There is one more matter of relevance. The appellant indicated that he waited to be present at the hearing of the appeal and an order was made for his production at the hearing. On the hearing date, the appellant was absent and unrepresented. That is an incurable irregularity.

For the reasons already stated we set aside the judgment and orders of the High Court and we order that the appeal be herd with dispatch by a bench of two judges other than the two who have dealt with the matter. It follows that the appeal will be heard at Kisumu High Court.

To that limited extend the appeal succeeds. The appellant shall remain in custody until his appeal is heard and determined.

Dated and Delivered at Kisumu this 6th day of December, 1989

J.O NYARANGI

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR