REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 20 OF 2016

REPUBLIC...................................PROSECUTOR

VERSUS

BARRE OSMAN ADAN.....................ACCUSED

(Arising from Judgment dated 15th March, 2013 in Thika Criminal Case No. 289 of 2011by Hon. M.W. Mutuku, Ag. Principal Magistrate)

JUDGMENT

A. INTRODUCTION

1. Barre Osman Adan alias Mohammed ("Appellant") was arraigned before the Thika Chief Magistrates' Court and charged with three counts as follows:

Count I

Preparation to commit a felony contrary to section 308(1) of the Penal Code.

Particulars of the offence: Barre Osman Adan Alias Mohammed: On the 14th day of January 2011 at Makongeni area along Garissa/Nairobi road in Thika District Kiambu County was found armed with a dangerous weapon namely two pistols make Tokalev serial No. 5524440 and another with serial No. not visible, with 28 rounds of ammunition of 7.62x25 MM in circumstances that indicated that was so armed with intent to commit a felony namely robbery with violence.

Count II

Being in possession of a firearm without certificate contrary to section 4(1) (2) (a) 3(a) of the firearm Act Cap 114 Laws of Kenya *Particulars of the offence*: Barre Osman Adan Alias Mohammed: On the 14th day of January 2011 at Makongeni area along Garissa/Nairobi road in Thika District Kiambu County was found in possession of two Tokalev pistols firearms serial No. 5524440 and another Tokalev with serial No. not visible, without a valid firearm certificate.

Count III

Being in possession of a firearm without certificate contrary to section 4(1) (2) (a) 3(a) of the firearm Act Cap 114 Laws of Kenya *Particulars of the Offence*: Barre Osman Adan Alias Mohammed: On the 14th day of January 2011 at Makongeni area along Garissa/Nairobi road in Thika District Kiambu County was found being in possession of 28 rounds of ammunition of 7.62 x25 MM without a valid certificate.

2. After a fully-fledged trial, the Learned Trial Magistrate acquitted the Appellant in Count I but proceeded to convict him on Counts II and III. There are typographical mistakes in the judgment as the Learned Trial Magistrate's judgment reads that:

> At the time of the arrest, he [Appellant] was peacefully seated in the bus and at no time was evidence brought in the effect (sic) that he was preparing to attack or rob anyone. As that (sic) I find that Count 1 has not been proved to the required standards and I hereby acquit the accused on Count 1 under section 215 for lack of sufficient evidence.
>
> However, I find that Count 1 and Count 2 have been proved beyond reasonable doubt. Accused Person was in the bus no question (sic) and was found in possession of the bag on his lap. I hereby find accused guilty and convict on Count 3 & 3 (sic) under section 215 CPC.

3. The Learned Trial Magistrate proceeded to sentence the Appellant to serve fifteen (15) years imprisonment for each of the two counts the Appellant was convicted of – but the sentences to run concurrently. Again, a typo in the proceedings indicates that she sentenced the Appellant for "count 2" and "count 2".

4. While these obvious errors on the face of the record are regrettable, it is clear that the Learned Trial Magistrate convicted in Counts 2 and 3 and sentenced the Appellant to serve 15 years imprisonment for each count. The Appellant was aggrieved by both the convictions and sentence hence this appeal.

5. The Petition of Appeal raised twelve grounds of appeal as follows:

> a. The Learned Magistrate erred in Law and fact in convicting the Appellant against the weight of the evidence.
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> b. The Learned Magistrate erred in Law and fact by accepting the evidence of the prosecution witnesses without giving sufficient reasons to that effect.
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> c. The Learned Magistrate erred in Law and fact by failing to consider the Appellant's evidence.
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> d. The Learned Magistrate erred in Law and fact in finding the Appellant guilty yet all the ingredients of the offence were not proven.
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> e. The Learned Magistrate erred in Law by shifting the burden of proof to the Appeallant in respect of the charges against the Appellant in contravention of trite law.
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> f. The Learned Magistrate erred in law and fact by failing to appreciate and find that the prosecution had failed to prove its case beyond any reasonable doubt.
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> g. The Learned Magistrate erred in Law and fact by finding the Appellant guilty yet the Prosecution did not call passengers of the bus as witnesses.
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> h. The Learned Magistrate erred in Law and fact by failing to consider that the evidence of the driver was inconsistent with that of the Police Officers.
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> i. The Learned Magistrate erred in Law and fact by failing to weigh the credibility of the Prosecution witnesses thereby causing and allowing incredible evidence to form the basis of the conviction.
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> j. The Learned Magistrate erred in Law and fact by convicting the Appellant on insufficient evidence without warning himself of the dangers therein.
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> k. The Learned Magistrate erred in Law by failing to comply with the mandatory requirements of section 169(1) [of the Criminal Procedure Code] regarding the contents of the judgment by failing

to set out the point or points for determination, the decisions thereon and the reasons for the decision thereby rendering the judgment a nullity in law which could not be the basis for meting out a sentence.

l. The Learned Magistrate erred in Law and fact by sentencing the Appellants on both counts 2 and 3.

6. During the oral hearing, Ms. Abongo appeared for the Appellant and she was not too keen to pursue all the grounds of appeal. Instead, she collapsed her arguments on appeal into four heads thus:

a. That there were material contradictions and inconsistencies in the Prosecution case that should have entitled the Appellant to an acquittal.

b. That the evidence of PW2 – the driver of the bus – was incredible and should not have been believed;

c. That, in view of (b) above, the Prosecution should have called at least one other passenger from the bus to corroborate the Prosecution evidence.

d. That the Learned Trial Magistrate shifted the burden of proof to the Defence.

7. As contracted, these four arguments traverse the principal issues on appeal and I will analyse each of the heads below but will combine points (b) and (c) since they are related.

8. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

9. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

C. THE EVIDENCE PRESENTED IN THE TRIAL COURT

10. The Prosecution evidence which was accepted by the Trial Court was as follows: Chief Inspector Zabedi (PW1) testified that they received a tip-off from an informer that there was a suspect who was illegally transporting firearms and that person was a passenger in a City to City bus registration number KBN 784A heading to Nairobi from Garissa. The information mentioned the Appellant by name – and CI Zabedi knew the Appellant as they had had an encounter earlier. Together with other Police Officers (Corporal Mbogo, Corporal Muthee, and Ali) , CI Zabedi lay an ambush on the bus and stopped it as it approached Makongeni Police Station on the Garissa-Thika Road. CI Zabedi then testified that he go on the bus, called the Appellant by name and approached him. The Apellant was, according to CI Zabedi, seated on the 2nd seat from the back of the bus. He had a green bag on his lap. As CI Zabedi approached the Appellant, the Appellant stood to block CI Zabedi from reaching the bag but CI Zabedi held the Appellant by the other hand and grabbed the bag. CI Zabedi, then, handed over the green bag to Corporal Muthee who was a step behind him in the bus. When the green bag was searched, the two fire arms which form the basis of Count 2 and the 28 rounds of ammunition which form the basis of Count 3.

11. Sergeant Peter Muthee testified as PW3 and confirmed much of CI Zabedi's account. He testified that CI Zabedi was leading the way and he saw him take the bag from the Appellant and hand it over to him (Sergeant Muthee). He also reported seeing the short struggle between CI Zabedi and the Appellant.

12. On the other hand, PC Jeremiah Mugambi, who testified as PW5, recounted that they flagged the bus as it approached Makongeni Police Station and motioned to the driver to drive into Makongeni Police Station. PC Mugambi then got into the bus together with other Police Officers where they came across the Appellant seated on the second passenger seat from the rear. He testified that he was one of the Police Officers who boarded the bus and he saw the Appellant resisting to hand over the bag to CI Zabedi but that he was forced to do so after a brief scuffle.

13. Peter Karungo Hura testified as PW2. He was the driver of the bus. His testimony was that on the material day, he had driven the bus from Garissa but found a Police Road block near Makongeni Police Station where the bus was directed to the Police Station. He testified that the Police asked everyone to alight from the bus and everyone came out with their belongings. According to Mr. Hura, the Appellant, who Mr. Hura remembers as having sat somewhere in the middle of the bus but was not sure, came out with a green bag which the Police Officers took and inspected. It is upon inspection of the green bag that they found the contrabands.

14. Chief Inspector Harun Karimi is a Firearms Examiner/expert and testified as PW4 - and confirmed that the firearms and ammunition allegedly found in the green bag were certified firearms and ammunition. The other two witnesses – PW6 and PW7 – were formal witnesses: PW6 took photographs of the bus and the recovered items and presented the photographs in evidence. PW7 was the Investigating Officer who produced the exhibits.

15. In his sworn statement, the Appellant conceded that he was in the bus when it was stopped by the Police Officers but denied having possession of the firearms. The Appellant's evidence, which was rejected by the Trial Court, was that he was only arrested because he was of Somali origin and did not have an original Identity Card.

D. REVIEWING THE TRIAL DE NOVO THROUGH THE GROUNDS OF APPEAL

16. It seems that it was a contraction of the Grounds of Appeal into four by Ms. Abongo was a wise decision on her part since the twelve grounds of appeal are mainly repetitive. Some are clearly un-availing to the Appellant. The last two grounds of appeal, in my view can be disposed off peremptorily since they require little analysis:

17. The Complaint that the judgment does not confirm to the requirements of section 169of the CPC is unavailing. Section 169 of the CPC provides that:

> (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

18. The Learned Magistrate's judgment, in my view, substantially abides by this section. It delineates the key points for determination, enunciates the decision and proffers reasons for the decision. It is also dated and signed by the Learned Trial Magistrate. In any event, even if there was non-conformance with the section my conclusion would be that there would be no miscarriage of justice if the non-conformance with section 169 was remedied at this stage through a re-evaluation and reconsideration of the case. See ***Hawaga Joseph Ansanga Ondiasa V R Criminal Appeal No. 84 Of 2001***and ***Samwiri Senyange V R [1953] 20 EACA***. Given this Court's duty as a first appellate court, these failures to comply with section 169 of the CPC will need to be remedied in the judgment here. This is because our standard of review in criminal cases is, in essence, *de novo* review. In other words, the technical failures of the judgment itself do not, in this particular case, vitiate the trial itself.

19. The Appellant has also complained that it was improper for the Learned Trial Magistrate to sentence him on both counts 2 and 3. I am unsure what the gravamen of this complaint is. The Appellant's advocate did not take advance the argument during the oral hearing and the memorandum of appeal did not have any further explanation. I can only imagine that the Appellant is suggesting that where a person is found in the possession of both a firearm and ammunition, that person should not be charged and sentenced with two counts of possessing both the firearm and ammunition but only one count.

20. In my view, that reading of the statute is incorrect. Section 4(2)(a) of the Firearms Licencing Act is in the following terms:

> (2) If any person…(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized… he shall, subject to this Act, be guilty of an offence

21. The plain terms of the statute imply that a person can be charged of possession of a firearm or ammunition or both. In this case, the Appellant had possession of both and he was, therefore, charged with two counts. This was proper in the circumstances.

E. WAS THE PROSECUTION EVIDENCE CONTRADICTORY AND PLAGUED BY FATAL INCONSISTENCIES?

22. The Appellant's first substantive complaint is that the evidence presented was full of contradictions. Firstly, she argued that it was an error for the Trial Court to convict on the Prosecution evidence which was full of inconsistencies and contradictions. She raised three particular contradictions:

23. Primarily, Ms. Abongo argued that PW 1, PW2 and PW6 gave different accounts of what happened during the arrest of the Appellant. Ms. Abongo argued that PW 2, the driver of the bus in which the Appellant was a passenger when he was allegedly found in possession of the firearms, told the Court that the Appellant alighted the bus at the Police Station holding the green bag in which the contrabands were found. However, PW1, Issa Zabedi, testified that they stopped the bus and he entered the bus and found the Appellant with a green paper bag on his lap which he retrieved from him after some struggle and handed it over to Cpl. Muthee. Ms. Abongo also argued that the narrative of PW5, Jeremiah Mugambi, gave yet another version of the story. In another point of departure, Ms. Abongo pointed out that PW2 stated that the Appellant was seated somewhere in the middle while the PW1 and PW5 both testified that the Appellant was seated two rows from the rear of the bus. Ms. Abongo's point is that PW1, PW2 and PW5 said different things about the same thing - the green bag and where it was found. This was complete contradiction which, Ms. Abongo argued, the Learned Magistrate should not have entertained and should have resolved in favour of the Appellant.

24. Mr. Kinyanjui opposed the Appeal on behalf of the State. He submitted that the conviction was proper based on the law as was the sentence. The trial was fairly conducted and the Accused was at no time forced to prove his innocence or guilt.

25. Mr. Kinyanjui argued that indeed the evidence of the Appellant complemented the prosecution evidence in his sworn statement; that the narrative from the Appellant are consistent with those of the prosecution witness.

26. On the issue of inconsistency of the witnesses, Mr. Kinyanjui submitted that firstly there were no contradictions. There were only disparities in giving details of the account. It was Mr. Kinyanjui's position that these minor disparities were not material enough to afford the Appellant any benefit of doubt. He argued that it is common knowledge that witnesses cannot recall with specific details what happened and that disparities are always expected in testimonies. The only question is whether those disparities are major. His opinion is that the disparities here are not major at all.

27. Mr. Kinyanjui argued that the evidence is clear that it is the Appellant who had the bag and it was

taken by PW1 who handed it over to PW7. Thus, Mr. Kinyanjui argued, possession of the firearm was established as all the witnesses - including the driver - were unanimous that the Accused had the bag.

28. I have now had the opportunity to carefully review the evidence in the matter. I am unable to agree with the Appellant that the evidence presented in the trial was so full of contradictions so as to conclude that it was unsafe to convict in the circumstances. Indeed, I find that the Trial Court, in its judgment, showed that it applied its mind in the proper manner to all the material issues which were under determination – including its reasons for its acceptance of the Prosecution narrative and rejection of part of the testimony of the Appellant.

29. It is important to point out that there was remarkable concurrence in the narratives of the four witnesses (including the Appellant) on what happened on the material day: All are in agreement that the Appellant was a passenger in the bus. All are in agreement that the Appellant had, in his possession, a green bag. All are in agreement that a search on the green bag was conducted at the Makongeni Police Station.

30. The point of departure – which the Appellant calls a contradiction – comes from the part of the testimony of the driver, PW2, who testified that all the passengers alighted with their belongings and that the Appellant alighted with the green bag which was then taken by the Police Officers after he had alighted. This is inconsistent with the testimony of the three officers who testified that they boarded the bus and found the green bag with the Appellant inside the bus.

31. The Appellant also complains that the driver claimed that he was seated in the middle of the bus while the other witnesses testified that he was seated at the rear of the bus.

32. In my view, after carefully parsing through the record, the Learned Trial Magistrate was not in error to ignore these inconsistencies as minor and immaterial. Inconsistencies are common in criminal trials both because of lapse of memory as well as other factors especially when there has been a substantial lapse of time between the event and the date of the testimony.

33. As noted by the Uganda Court of Appeal in ***Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6*** it is not very contradiction that warrants rejection of evidence – see **Erick Onyango Ondeng' v Republic [2014] eKLR *Criminal Appeal No. 5 OF 2013*.** As the court put it:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

34. The inconsistencies in question here are not material at all and they can, in my view, be explained by passage of time or lapse of memory. It should be recalled that the driver had since left his employment and that, respecting where the Appellant was seated, he qualified it by stating that he was not quite sure he could remember. In any event, on the key issues of the case – presence of the Appellant in the bus and his possession of the green bag where the contrabands were found – all the witnesses were unanimous. Even the Appellant concedes that he was a passenger in the bus and that he had the green bag. He only contests that the green bag had the contrabands as alleged.

35. Hence, the case turns on whether to believe the narrative given by the four Prosecution witnesses that the Appellant's green bag had the firearms and ammunition or whether to believe the story of the Appellant that his green bag contained none of those contrabands but that the Police arrested him for not having a National Identity Card and later concocted the story about the contrabands in order to frame him.

36. The Learned Trial Magistrate who heard and saw the witnesses disbelieved the Appellant on the question whether he was found in possession of the firearms and ammunition. She, conversely, believed the prosecution narrative. She found the Appellant's story – that he was arrested because he did not have

a National Identity Card and then the Police chose to frame him afterwards – as improbable and incredible.

37. I do not think there is any basis to fault the Learned Trial Magistrate in this finding of fact. Looking at the totality of the evidence in context, it was safe to reject the Appellant's story as incredible and a fabrication. Several factors point to this direction. First, the strong concurrence of material details in the accounts of the Prosecution witnesses is a good pointer to the truthfulness of that narrative. Second, there is no hint of motive for the Police to want to frame the Appellant and no evidence was adduced to that effect. Third, even if the theory of conspiracy by the Police Officers to frame the Appellant was taken seriously, it cannot account for the evidence of PW2 – the Bus driver. This witness is not a Police Officer and has absolutely no connection with the State – but he considered it his civic duty to come back and testify in the case even though he had long stopped working for the bus company that had employed him at the time the event occurred.

38. Consequently, in my view, tested against the inherent probabilities, the Appellant's story is so improbable that it cannot reasonably possibly be true. While the Prosecution case had some blemish in the form of the inconsistencies discussed above, the question is whether those aspects which are unsatisfactory are material enough to affect the Court's evaluation of the inherent probabilities that the witness' narrative is true. The law requires the witness to be satisfactory. It does not require the witness to be perfect.

F. <u>WAS IT FATAL THAT OTHER PASSENGERS IN THE BUS WERE NOT CALLED TO SHORE UP THE EVIDENCE OF PW2 (THE DRIVER)?</u>

39. Under her second head of argument, Ms. Abongo argued that the Prosecution failed to call crucial witnesses. In particular, she argued that no passengers in the bus was called.

40. Ms. Abongo's third head of argument is related to the second: she argues that the only other independent witness to be called by the Prosecution (other than the Police) was the Driver who should not be treated as a reliable witness. This is because, Ms. Abongo argued, it is doubtful whether he was the driver of the bus at all. She impugns his credibility as the driver because, she says, he was unable to remember the registration number of the bus. Further, he did not produce any documents to prove that he had been employed by the owner of the bus to drive that vehicle. In view of these doubts, Ms. Abongo felt that the prosecution should have called other crucial witnesses such as passengers and the failure to do so should be lead the Court to make a negative inference against the Prosecution case.

41. As for credibility of PW2, Mr. Kinyanjui argued that the witness gave a proper explanation why he could not recall the Registration number of the bus. The issue of calling a witness to prove that PW2 was the driver, that was never an issue at trial. They are arising now on appeal. Even if pursued, Mr. Kinyanjui argued, they would lead to the same conclusion.

42. I have already made a finding that the inconsistencies in the Prosecution evidence were minor and immaterial. This included PW2's testimony that he was not exactly sure where in the bus the Appellant was sitting. The Appellant, however, raises the spectre that PW2 was not even the driver of the bus; that he is likely an impostor. He pivots this point on the fact that PW2 could not remember the registration number of the bus.

43. During cross-examination, PW2 explained that he had left the employment of the bus company two years prior as the reason he would not recall the registration number. I do not think that this is a reasonable explanation. It is not many people who would recall the registration number of a vehicle two years after they last saw it. I do not, therefore, find that there were any credibility problems with PW2 on this score.

44. This would explain why the Prosecution did not have to call any other passenger to prove that the Appellant was a passenger in the bus or that he was found in possession of the green bag that contained the firearms and ammunition. The Prosecution called four witnesses who were at the scene and whose

evidence principally tallied. There was no need to call a multiplicity of witnesses on the point.

45. The Appellant sought to bring himself within the holding in ***Bukenya & Others Vs Uganda (1972) EA 549***where the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

46. However, in this case, it cannot be said that the passengers in the bus were in any sense essential witnesses or even useful witnesses to advance the Prosecution case. As the Court of Appeal stated in ***Keter V Republic [2007] 1 EA 135***,

> *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."*

47. Here, I find that the fact that the Appellant was a passenger in the bus and that he was the person that had possession and control of the contrabands was well proven by the cumulative evidence of PW1, PW2, PW3 and PW5. It would have been unnecessary for the Prosecution to call another passenger merely to prove a fact that had already been established by the other witnesses with remarkable consistency.

G. APPEAL AGAINST SENTENCE

48. The circumstances upon which an appellate court will interfere with a sentence lawfully imposed by a trial Court are circumscribed. It will only do so if it is evident that the trial Court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or lenient as to amount to a miscarriage of justice. Lastly, an appellate Court can interfere with sentence a Trial Court has imposed a sentence that is demonstrably unfit in the given circumstances. It is not enough that the appellate Court would have imposed a different sentence if it was sentencing in the first place. See: ***Ogalo s / o Owora vs. R [1954] 24 EACA 70***.

49. In this case, I cannot say that any of these factors are present. The Learned Trial Magistrate addressed herself to all relevant factors and it cannot be said that she acted on any wrong principles. Further, the sentence of fifteen years imprisonment for the offence, though the maximum possible, cannot be said to be excessively harsh given the seriousness of the offence and its potential impact on the society. Consequently, I will leave the sentences imposed intact: Both sentences to run concurrently.

H. CONCLUSION, DISPOSAL AND ORDERS

50. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is dismissed and the convictions are hereby affirmed.

b. The sentence imposed by the Trial Court of fifteen (15) years' imprisonment for each of the two counts convicted is affirmed. The sentences will run concurrently.

51. Orders accordingly

Dated and delivered at Kiambu this 13th day of January, 2017.

JOEL NGUGI

JUDGE