Wamboi v Republic (Criminal Appeal 72 of 2022)
[2026] KECA 542 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 542 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 72 OF 2022

AK MURGOR, F TUIYOTT & P NYAMWEYA, JJA

MARCH 13, 2026

BETWEEN

SAMUEL MUHURI WAMBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (R. Nyakundi J.) delivered on 27th October 2021 in Criminal Case No. 12 of 2018)

JUDGMENT

1. Samuel Muhuri Wamboi, the appellant herein, is aggrieved by his conviction for the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentence of 30 years imprisonment by the High Court of Kenya at Garsen (Nyakundi J.) . The trial in the High Court commenced before R. Lagat Korir J., who heard seven prosecution witnesses, and was thereafter taken over by R. Nyakundi J., who heard the remaining three witnesses and the appellant's defence. Nyakundi J. was satisfied, after considering the evidence, that the appellant murdered Janet Wambui Nyaga ("the deceased") on 10th October 2018 at Gadeni Village of Langoni Location of Lamu West Sub County within Lamu County.

2. The evidence of the ten prosecution witnesses in summary, was that on 10th October 2018 Anne Njeri Ndung'u (PW4) was at her place of work, the Pentagon Bar at Kibaoni in Lamu, together with Samuel Waihenya Kinyanjui (PW 5) and Mohamed Sahal Ndomole (PW6), when the appellant came and asked to talk to PW4. The appellant then told PW4 that "hii maneno siwezi nyamaza' (I cannot keep quiet about this matter), and that "he had finished the deceased". PW4 informed PW5 what the appellant had told her, whereupon PW5 restrained the appellant and called the police. PW4 thereupon called Lucy Wathimu Njogu (PW1), a sister of the deceased, and told her to come to the bar and hear what the appellant had to say. On arrival, PW4 told PW1 what the appellant had said, but upon being asked by PW1, the appellant denied it.

3. PW1 in turn called the police and Geoffrey Mureithi Kaburi (PW2). On arrival PW2 found that the appellant had been arrested by members of the public for killing the deceased. The appellant then told PW2 that he had killed his wife at 8.00 am that morning, and asked PW2 to take him to the police station. PW1, PW2 and PW4 further testified that the appellant and deceased had been living together as man and wife, and when they went to the appellant's house, they found that the deceased's body had been removed by the police and taken to Lamu hospital. PW2 and PW4 went and saw the deceased's body at the hospital, and PW2 testified the body had knife cuts on the head and a wire around the neck.

4. The recovery of the deceased's body was made by Inspector Michael Lemasi (PW7), who received a call from the OCS Mpeketoni, Chief Inspector Odenyo on 11th October 2018 informing him that members of the Kenya Police Reserve and of the public had brought the appellant to Mpeketoni Police station and that upon interrogation, the suspect said that he had strangled his wife in their rental house in Gadeni, Lamu. PW 7 mobilized officers from Lamu and proceeded to Gadeni and located the appellant's house, which was locked with a padlock and there were keys on top of the door. The opened the house and found the body of the deceased lying on the floor lying behind a curtain that was used to subdivide the room. They then removed the body to Lamu Hospital Mortuary and also recovered a curtain wire from the deceased neck and a mosquito net which was tied to the wire.

5. This account of events was reiterated by Cpl David Odero, (PW 10) who accompanied PW7 to the scene, and he testified that he thereupon re-arrested the appellant. The removal of the deceased's body from the appellant's house was also witnessed by Benson Mwangi (PW9), a neighbour, who saw the injuries on the deceased's head, face and neck and a rope. PW9 was also present when the post mortem examination on the deceased took place.

6. The post mortem examination was conducted on the deceased on 16th October 2018 and Eunice Mwaura Nyaga (PW3), the deceased's sister, went to Mpeketoni sub district hospital to identify the body to the doctor who conducted the post mortem. Dr. Samuel Kimani (PW8) produced the post mortem report dated 16th October 2018 prepared by Dr. Khalifa, whom he had worked with previously, and who had since proceeded for further studies.

7. In his defence, the appellant stated that on 10th October 2018, the deceased, Janet Wambui, sent him to get milk, and when he went back home the deceased was standing at the window, and he called her by name but there was no response. He then found that she had tied herself with a rope connected with a metal bar of wood and tried to remove her body. He testified that he then reported the matter to the police and explained the circumstances of the deceased's death to the police and the deceased's parents.

8. After considering and analysing the evidence, Nyakundi J. held that there was sufficient proof that the death of the deceased was unlawfully caused by strangulation, and it was impossible in this respect that the death was by suicide. In addition, from the admissions made by the appellant to PW1 that he had finished his wife, he had intended not to occasion harm but terminate the deceased's life. Further, that the account by the appellant that the deceased committed the suicide, was in contrast with the evidence given by PW7 and PW10 in regard to the surrounding circumstances at the scene, which corroborated the admitted facts by the appellant that he had killed his wife. Lastly, that there was no evidence that the deceased had hanged herself to a device which could have resulted in the death being occasioned by suicide.

9. The appellant was aggrieved by these findings and lodged this appeal. We heard the appeal on the Court's virtual platform on 25th March 2025. The appellant, Samuel Muhuri Wamboi was present appearing virtually from Malindi prison, learned counsel Mr. Adala holding brief for learned counsel Mr. Wamotsa represented the appellant, while learned counsel Mr. Omariba, appeared for the

respondent. The counsel relied on their respective written submissions dated 7th March 2025 and 28th January 2025.

10. As this is a first appeal, the mandate of this Court is well articulated in the often-cited decision of the predecessor to this Court in the case of Okeno vs. Republic [1972] EA 32, thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

11. The appellant has raised a total of fourteen (14) grounds of appeal, three of which were set out in his initial memorandum of appeal filed in this Court on 24th May 2024, and the remaining eleven grounds are in a supplementary memorandum of appeal his advocates filed dated 7th March 2025. The appellant's advocate collapsed these grounds into four main issues in the submissions dated 7th March 2025, namely that the trial of the appellant was unlawful and infringed on his right to a fair trial as it did not comply with the provisions of section 200 as read with section 201(1) of the Criminal Procedure Code ("CPC"); the production of the postmortem report and scene of crime reports did not comply with the mandatory requirements of sections 33, 72 and 77 of the *Evidence Act*, and no certificate accompanied the scene of crime report; the finding that the death of the deceased was caused by the appellant was not supported by the evidence on record; and lastly that the prosecution did not disprove the appellant's alibi defence.

12. On the first issue of compliance with sections 200 and 201 of the CPC, the appellant's advocate submitted that when Nyakundi J. took over the hearing of the trial, Lagat Korir, J. had already heard seven (7) witnesses and the succeeding Judge merely recorded that section 200 of the CPC was complied with, but there is no evidence from the record to show that the trial court explained to the appellant his right to demand the recall and rehearing of any witness or his right to elect how to proceed from where the hearing had reached or start de novo, or the appellant's response, as was required of the judge pursuant to Section 200(3) of the CPC. The decision of this Court in Bob Ayub vs Republic 2010 KECA 321 (KLR) and of the Supreme Court in Hussein Khalid and 16 others vs Attorney General & 2 others [2020] eKLR were cited for the submission that it was not sufficient for the succeeding judge to state that section 200 of the CPC was complied with, and that the compliance needed to be demonstrated by the evidence on record.

13. The respondent's counsel on his part did not address this issue in their submissions. We in this respect noted that the respondent's advocate appeared to have only addressed one issue in his written submissions, being whether the evidence on record supported the finding that the death of the deceased was caused by the appellant. This was the main ground of appeal raised in the appellant's initial memorandum of appeal, and while the respondent's advocate indicated that he had not been served with the appellant's submissions, he nevertheless chose to rely on the written submissions he had filed.

14. Coming back to the issue of non-compliance with section 200 of the CPC, we note that the appellant's advocate largely relied on the proceedings recorded at page 24 line 11 of the record of appeal. We have perused the record of appeal, and note that the said proceedings at page 24 in lines 11 to 13 referred

to an order made by the trial Court on 3rd November 2020, which was incomprehensible and stated as follows:

> "Section 5 200 of the CPC read over to of the accused 13 witnesses of this were producing which were producing when the arose witnesses rec our witnesses (sic)".

15. We also note that a number of sections of the typed proceedings had similar grammatical errors and gaps. Accordingly, and pursuant to the inherent jurisdiction of this Court under section 3A and 3B of the *Appellate Jurisdiction Act* and overriding objective to ensure a just determination of the appeal before us, we called for the original record of the trial from the High Court to confirm the proceedings that were the subject of the typed record. We were able to decipher from the trial Judge's original court notes that on 3rd November 2020, when the matter came up for hearing before Nyakundi J., Mr. Lughanje, the advocate appearing for the accused person (the appellant) sought compliance with section 200 of the CPC and indicated that they were amenable to proceeding further with the remaining witnesses. The trial Court then recorded that "section 200 of the CPC explained to the accused person and the accused is desirous of proceedings with the case and witnesses without recalling the other witnesses".

16. It is evident from the record that the advocate for the appellant expressly elected to proceed with the case from where it had reached, and that this was recorded by the trial Court after explaining section 200 of the CPC to the appellant. We therefore find that there was compliance with section 200 of the Criminal Procedure Code, and no miscarriage of justice caused to the appellant to warrant a declaration that the trial was a nullity or a finding of infringement of his right to a fair trial

17. The second issue raised by the appellant is as regards non-compliance with section 33, 72 and 77 of the *Evidence Act* in the production of the post mortem report by PW8 and the scene of crime report by PW10. As regards the production of the post mortem report, the appellant's counsel submitted that the trial judge failed to properly analyse and evaluate the evidence of PW8 and to reach a finding that the report was inadmissible in evidence and hence unreliable. In particular, that the post mortem report was produced by a doctor (PW8) other than the one who conducted the post mortem and prepared the report; and there is no evidence from the record showing that the prosecution laid a basis for admission or production in evidence of this report. Further, that the prosecution did not lead evidence through PW8 to state the place and how he worked with Dr. Khalifa and when and how long he knew Dr. Khalifa; whether he saw Dr. Khalifa write and sign documents; whether he could identify Dr. Khalifa's handwriting or signature; whether the handwriting appearing on the postmortem report was Dr. Khalifa's handwriting, and whether the signature appearing on the said report was Dr. Khalifa's.

18. Section 77 of the *Evidence Act* in this regard provides for production of documents made by any medical practitioners by persons other than their maker and section 77(2) of the *Evidence Act* specifically in this respect presumes the signature on the document by a medical practitioner to be genuine. Therefore section 72 of the *Evidence Act* which requires proof of the handwriting of the person attesting a document if that person cannot be found; and section 33 of the *Evidence Act* which regulates the admissibility of evidence of a witness who is dead, cannot be found, has become incapable of giving evidence or whose attendance cannot be procured, or cannot be procured without an amount of delay or expense; are not applicable where section 77 applies. It is also noteworthy that the appellant did not object to the production of the post mortem report by PW8, nor seek to have the maker of the report summoned for cross-examination, and it is too late in the day to object to the production of the said report. The post mortem report in this respect indicated that the cause of death of the deceased was strangulation.

19. As regards the issue of similar non-compliance with section 33, 72, 77 and 105 of the *Evidence Act* in the production of the scene of crime report, the appellant's advocate submitted that PW10 testified on a scene of crime report, yet the maker of the report was not called to testify and no reason was led by the prosecution for not calling the witness to testify for the prosecution. Further, that no foundation was also laid to have PW10, who was the investigating officer, produce the report, and PW10 did not testify on the handwriting or signature of the author of the report to form a basis for admission of the report. Lastly, that there is no evidence in the certificate accompanying the scenes of crime report to show that the scenes of crimes expert complied with the mandatory provisions of section 106B of the *Evidence Act*.

20. The production of scene of crime photographs and reports is governed by section 78 of the *Evidence Act* which allows for the admissibility of photographic evidence via a certificate signed by an authorized officer. Sections 33, 72 and 77 of the *Evidence Act* are accordingly inapplicable. PW10 in this respect testified that he was producing both the photographs and the report on behalf of the scene of crime officer. Under section 78(2) and (3) of the *Evidence Act*, it is not necessary for the maker of the report to produce it in court, as the court presumes that the signature to any such certificate is genuine, and if it thinks it fit, can summon and examine the person who gave it and in this case, the appellant did not seek that the author be summoned to produce it.

21. In addition, there is a report dated 5th February 2020 on record, that accompanied the photographs that were produced by PW10 as exhibits, and which included a certificate stating that " I No. 63790 Cpl John Wambua a Crime scene investigation officer an officer appointed by Attorney General under section 78 of *Evidence Act* CAP 80 Laws of Kenya Gazette Notice number 4562 of 2003 do certify that both the printing and processing of the prints was done under my supervision, they are in safe custody and can be produced whenever required." There was therefore compliance with section 106B of the *Evidence Act* with respect to the certificate required to accompany electronic evidence. The certificate and accompanying photographs are considered evidence of the facts stated therein and their goal is to provide a true and accurate representation of the scene of crime. The appellant's grounds as regards the production of the post mortem report and photographs of the scene of crime are therefore found not to be merited, and did not create any doubt as regards the death of the deceased.

22. This finding leads us to the third issue raised by the appellant, namely whether the findings by the trial Court as regards the said death were supported by the evidence on record. The appellant's advocate in this respect submitted that the trial judge found that the deceased died due to strangulation and ruled out death by suicide or by other person other than the appellant, and stated that the possibility of the deceased having killed herself was very remote and was a hypothesis being propagated by the appellant with no support of credible evidence. According to counsel, this finding and observations by the trial Court amounted to shifting the legal and evidential burden of proof placed on the prosecution to the defence. In addition, while the cause of death was indicated in the postmortem report as strangulation, no medical evidence was led by the prosecution to rule out suicide, and the doctor who performed the postmortem was the only witness who was in a position to testify whether the strangulation was by suicide or another person, and having not done so, the finding by the trial Judge ruling out suicide as the cause of death of the deceased was therefore not based on the evidence on record.

23. Furthermore, the exhibits recovered at the scene namely the blood, curtain wire that was tied around the neck of the deceased, a piece of mosquito net, the wooden bar recovered on the mattress where the body of the deceased lay were not taken and subjected to forensic examination, and no finger-lifting/ finger-dusting was done on the exhibits or DNA evidence extracted to place the appellant at the scene of crime or rule out the possibility that someone else other than the appellant committed the offence.

24. The respondent's counsel on his part submitted that the appellant himself gave self-incriminating information to PW4, the appellant failed to direct questions whether there was any evidence of the possibility of a suicide during the cross-examination of PW7, PW 8 and PW10, and that the corroboration by the witnesses together with the evidence of PW 8 who produced the post-mortem report was sufficient and no finger dusting was required.

25. From the evidence tendered before the trial Court it is evident that none of the prosecution witnesses witnessed the death of the deceased, or the appellant's participation in the death, and, as a consequence, there was no direct evidence linking the appellant to the death of the deceased. The prosecution case on this aspect was therefore hinged on circumstantial evidence. We, in this respect, adopt the various findings made by this Court on the application of circumstantial evidence. In the case of Ahamad Abolfathi Mohammed and Another vs Republic [2018] eKLR, this Court held that circumstantial evidence can found a conviction for murder and held as follows:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.' "

26. The conditions for the application of circumstantial evidence to sustain a conviction in a criminal trial were laid down in Abanga alias Onyango vs Republic CR. App NO. 32 of 1990(UR) as follows:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

27. Similarly, in Sawe vs. Republic [2003] KLR 364, this Court amplified on the above tests as follows:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

28. What was the circumstantial evidence linking the appellant to the death of the deceased in the present appeal? The prosecution witnesses, namely PW1, PW2, PW4, PW5 and PW7 all testified that the

appellant told them that he had killed the deceased. These statements were made voluntarily by the appellant. The statements were therefore legally confessions by the appellant, and were properly admitted in evidence as confirmed by this Court in Sango Mohamed Sango & another vs Republic [2015] KECA 178 (KLR) as follows:

> " In our view, that contention is not correct, and subject to the normal safeguards, a confession to a private citizen is admissible and may be proved in evidence against an accused person. The same argument was presented and rejected by this Court in MARY WANJIKU GITONGA V. REPUBLIC, CR. APP. NO. 83 OF 2007. The appellant in that appeal was charged with the murder of her husband. The High Court admitted in evidence a confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession was challenged. This Court held firstly that the statement was admissible under section 63 of the *Evidence Act* as direct evidence of what the witness had heard and secondly that to treat such statements as inadmissible "would be enlarging the provisions of section 25A (of the *Evidence Act*) beyond reasonable limits."

29. On the amendments made to the *Evidence Act* as regards the taking of confessions, the Court noted in the above-cited case that the said amendments were informed by the prevailing concern arising from consistent claims of use of torture by the police to extract confessions from suspects and proceeded to find as follows:

> "We do not see anything in the *Evidence Act* as amended that prohibits an accused person voluntarily making a confession to a private citizen. Indeed if the intention was to introduce a general prohibition of confessions even to private citizens as the appellant's claim, there would have been no need to retain the provision in section 26 of the *Evidence Act* which specifically prohibits confessions made to persons in authority.
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> Peter Murphy, in his book, A Practical Approach to Evidence, Blackstone Press, 2nd Edition, 1985, page 201, states as follows regarding confessions:
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> > "A confession, like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the maker. Usually, confessions are made to police officers or other investigators as a result of interrogation, but may equally be made to the victim of an offence, a friend or relative or any other person."

30. In the present appeal, it is on the basis of the confessions made by the appellant that PW7 and PW10 went to the scene where the deceased was found dead. Lastly, PW8 testified as to the cause of death, which was strangulation. The circumstances in which the deceased body was found as described by PW7, PW8 and PW10, namely, that the body was lying on the floor behind the curtain that was used to sub-divide the room, there was a wooden bar lying next to the body, there was a wire round the neck of the deceased, and there were several deep cuts on the body including a deep wound on the head, all pointed to death being caused by the unlawful act of another person with malice aforethought, and not by suicide as alleged by the appellant. In light of the facts that the body of the deceased was in found in the house in which she lived with the appellant, he was the last person to have seen her alive, and he admitted to having killed her to a number of witnesses, we are satisfied that the circumstantial evidence formed a complete chain that pointed towards the participation of the appellant in the death, and of his guilt. The trial Court therefore did not err in its findings in this respect.

31. On the last issue of the alibi defence, the appellant's advocate submitted that the appellant raised the defence of alibi in his testimony, being that he left his home on the material day and when he came back,

he found that the deceased had committed suicide. However, that the Appellant's alibi defence was not investigated by the police, and reliance was placed on the decision of this Court in Erick Otieno Meda vs Republic [2019] eKLR. According to counsel, the trial Court misdirected itself when it disregarded the alibi in the absence of evidence proving to the contrary that the alibi defence was false; that in the absence of evidence disproving the alibi, the prosecution shifted the burden of proving that the alibi defence was true to the appellant.

32. The respondent's counsel submitted that there was no evidence of the alibi of the purchasing of milk called by the defence or informed to the investigating officer for investigations to be carried out. Rather, that the issue of an alibi was raised way late in the day at the defence hearing stage, and could only be construed to be an afterthought.

33. This Court has held in the cases of Kiarie vs. Republic [1984] KLR 739 and Karanja vs Republic [1983] KLR 501 that an alibi raises a specific defence and an accused person who puts up an alibi in an answer to a charge does not in law thereby assume any burden of proving that answer. Further, that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, and that it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. In Victor Mwendwa Mulinge vs Republic [2014] eKLR, this Court, while referring to the decision in Karanja vs Republic [1983] KLR 501 held that:

> " In a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."

34. A defence of alibi asserts that the accused was at a different location from the scene of crime when a crime was committed, and there is no obligation of the accused to prove the alibi, the objective is to raise reasonable doubt. The burden remains on the prosecution to prove guilt beyond a reasonable doubt, including disproving the alibi. While an alibi can be raised at any time, it should ideally be raised at the earliest opportunity during investigation, and a delayed alibi may be viewed as an afterthought, although it must still be considered by the court against the evidence adduced by the prosecution. This is because, if not raised at the investigation stage, the investigator is deprived of an opportunity of investigating the alibi , either confirming or discrediting it.

35. In this respect evidence was adduced by the appellant that he was sent by the deceased to buy milk from the road on the material day, and when he came back home he found the deceased hanging from the window. However, he did not provide specific details nor any evidence about his location, including the person he bought milk from and the timelines, to substantiate his alibi and enable investigations as regards his whereabouts. It is thus our conclusion that the alibi defence was an afterthought, and moreover, did not cause any dent on the overwhelming evidence from his confession and the circumstances surrounding the death of the deceased, nor raise any sufficient doubt as regards the time the offence occurred. The trial Court therefore did not err in finding that the alibi defence to be false.

36. Lastly, on the legality of the sentence, the maximum sentence for murder under section 204 of the Penal Code is death, and after the judgment by the Supreme Court in Francis Muruatetu & Another vs. Republic [2017] eKLR the death sentence is no longer mandatory, and a trial Court has discretion to impose other sentences, based on mitigating factors. The trial Judge in this respect considered the said decision, the aggravating and mitigating factors and time the appellant had spent in custody in imposing the sentence of 30 years' imprisonment. We therefore have no basis to set aside or interfere with the sentence.

37. For these reasons, we uphold both the conviction of the appellant for the offence of murder, and sentence of 30 years' imprisonment. This appeal is accordingly dismissed in its entirety.

38. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 13H DAY OF MARCH, 2026

A.K. MURGOR

..... JUDGE OF APPEAL

F. TUIYOTT

..... JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

P. NYAMWEYA

..... JUDGE OF APPEAL