



REPUBLIC OF KENYA



**Hassan v Republic (Criminal Appeal 104 of 2017)
[2025] KECA 168 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 168 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 104 OF 2017
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
FEBRUARY 7, 2025**

BETWEEN

KASSIM SHEIKH HASSAN APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Meru,
(Kiarie W. Kiarie, J.) dated 19th April 2017 in HCCRC NO. 20 OF 2007)*

JUDGMENT

Background

1. Kassim Sheikh Hassan (the appellant) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars in the information were that between 29th and 30th November, 2012 at Moyale Township in Moyale District, within Marsabit County, the appellant murdered Aster Mangacha (the deceased).
3. In a bid to prove their case against the appellant, the prosecution called eight (8) witnesses. At the end of the trial, the appellant was found guilty, convicted, and sentenced to death.
4. As this is a first appeal, we are mandated to re-evaluate and re-analyze the evidence before the trial court, while bearing in mind that we did not have the occasion to see or hear the witnesses. In the case of Chiragu & Another v Republic [2021] KECA 342 (KLR), this Court stated that:

However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno V. R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive



examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw and observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also *Erick Otieno Arun V. Republic* [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary.”

5. A brief summary of the prosecution evidence is that Elizabeth Jaldo Jara (PW1) testified that she met the appellant in October 2012 in Ethiopia. They became friends and started living together as boyfriend and girlfriend. That she later introduced the deceased to the appellant and the two became good friends. It was her further evidence that the appellant took her to his sister’s home in Bole and upon her return, her neighbours informed her that the appellant had carried all their household goods and her clothes and gone to Kenya in the company of the deceased.
6. It was PW1’s further evidence that subsequently, the appellant returned her clothes to her and they stayed in a lodging for a couple of days. It was her testimony that nine days later, the appellant informed her that his shop in Kenya had been broken into and he travelled to Kenya and returned to Ethiopia the following day. It was her testimony that he then asked her to accompany him to Kenya and while in Kenya as she was sweeping their house, she saw some clothes in a bag under the bed but before she could ascertain the contents, the appellant telephoned her from a police station requesting her to take some clothes and shoes to him as he had been arrested.
7. It was PW1’s further evidence that while at the police station, although she was not allowed to speak to the appellant, he signaled for her to go back to Ethiopia. It was her testimony that when she looked for the bag that she had earlier seen under the bed, she found it missing but found the deceased’s clothes in a paper bag. It was her evidence that when she asked the appellant what the deceased’s clothes were doing in his house, he asked her to stop inquiring about the deceased as he and one Tariku had killed her.
8. It was PW1’s further evidence that she felt afraid and asked the appellant that they return to Ethiopia. PW1 testified that on their way back, the appellant was telephoned and informed that the girl he had been with earlier had been killed. It was PW1’s further evidence that the appellant asked her to go to Ethiopia, but she was arrested at the Kenya/Ethiopia border.
9. According to Abdul Wario (PW2), on 6th December, 2012, he was at the no man’s land along the Kenya/Ethiopia border when he detected a foul smell near a well. It was his evidence that he raised an alarm and police officers from Kenya and Ethiopia went to the scene. A suitcase was retrieved from the well and was found to contain the body of a female. It was PW2’s testimony that the face of the deceased was tied with a cloth and the suitcase had two big stones tied to it. It was his further evidence that he later identified the body as that of the deceased who was well known to him.
10. Fatuma Noor Mumin (PW3) was the appellant’s landlady. She testified that on 1st November, 2012 the appellant and the deceased introduced themselves to her as husband and wife when they were looking for premises to rent. It was her evidence that she knew the deceased as she had previously employed her for a period of about a year. It was her further testimony that on 7th December, 2012 while at Moyale she was informed that the deceased had died whereupon she recorded her statement at Moyale Police Station.
11. PC Titus Gitonga No. 82137 (PW4) testified that on 6th December, 2012 he was stationed at Moyale Police Station. It was his evidence that while on duty he was called by Cpl Edwin Langat (PW6) at the border post and informed that the body of a female had been retrieved from a borehole on the Kenyan side of the border. It was his evidence that the hands of the deceased had been tied to the back using a



- rope. Further, that there was a big travelling bag, which had been tied to a big stone. It was his further evidence that they took the body of the deceased to the mortuary.
12. It was his further evidence that they received information that a woman who had been staying in the deceased's house was planning to travel to Ethiopia. It was his evidence that on their way they met a motorcyclist and the passenger was identified as the woman who had been staying in the deceased's house. It was PW4's evidence that they arrested the motorcyclist and the woman passenger and took them to the police station. PW4 subsequently produced the post mortem report and testified that he had escorted the relatives of the deceased for the post mortem examination.
 13. CPL Collins Kiogora Kirema, No. 75701 (PW5) testified that he was stationed at Moyale Police Post. That on 6th December 2012 at about 2.20 pm Cpl. Langat (PW6) called him from the police border post and informed him and his colleagues, PC Gitonga, PC Chelimo and the Officer Commanding Station (OCS) that there was a bag in a well which was emitting a foul smell. It was his evidence that they retrieved the bag from the borehole and found the body of a female whose hands were tied to the back. It was his further evidence that the body of the deceased was taken to the mortuary.
 14. CPL Langat Kemboi Edwin, No. 71933 (PW6) testified that on 6th December 2012 he was the officer in charge of Moyale Police Border Post. It was his evidence that at about 2pm he was informed by PC Ouko who was at the Kenya/Ethiopia border that he had received information that there was a suitcase floating in a well. It was his further evidence that he assisted in pulling out the suitcase from the well where the body of the deceased was found. He observed that the neck of the deceased was tied with a piece of cloth and her legs and hands were tied with a sisal rope. It was his further observation that the body of the deceased was placed inside two sacks before it was placed in the suitcase.
 15. Chief IP Jared Gichaba Nyaose, No. 233895 (PW7) testified that he was the OCS and an Inspector at the time he recorded his statement. It was his evidence that on 6th December 2012 while at Moyale Police Station he received a call from Cpl. Langat (PW6) who reported that a body had been spotted inside a well. It was his further evidence that he proceeded to the scene and found the body of a female had been removed from a well. That he saw the decomposed body, two sacks and a stone. It was his further evidence that they removed the body to Moyale District Hospital.
 16. It was PW7's further evidence that they received information from a 'good Samaritan' that a lady was preparing to leave the house where the deceased had been living. That they saw the lady by the name of Elizabeth (PW1) on a motorbike, stopped her, arrested her and took her to Moyale Police Station. It was his evidence that Elizabeth (PW1) informed them that one Sheikh Kassim (the appellant) had telephoned her and informed her that she should travel to Ethiopia.
 17. It was PW7's further evidence that they proceeded with Elizabeth (PW1) to the house where the deceased had been living where they found many paper bags containing women's clothes. That they took the paper bags to the police station and the sister of the deceased identified the deceased's clothes. It was PW7's further evidence that Elizabeth (PW1) had in her possession the appellant's clothes. It was his further evidence that PW1 confirmed that the suitcase where the deceased's body was found had been in the appellant's house. It was his further evidence that the appellant had previously lived with the deceased before he started living with PW1. It was PW7's further evidence that the appellant was arrested.
 18. PC Titus Nzioka, No. 76147 (PW8) testified that he was attached to Moyale Police Station and that he performed anti-crime duties. It was his testimony that he prepared the exhibit memo containing 3 photographs of the body of the deceased which he produced together with the certificate as exhibits. That he produced the exhibits on behalf of the officer who was said to be away in Malindi.



19. From the record, the post-mortem report was produced with the consent of the parties without calling Dr. Sirong the doctor who performed the post mortem examination. The post mortem report indicated that the body of the deceased was decomposed and had a foul smell. There was skin loss, a deep wound on the head, blunt injuries on the frontal chest wall, and swollen orbital region with haematoma and a deep cut wound. Doctor Sirong was of the opinion that the cause of death of the deceased was cardiopulmonary arrest secondary to a stab wound to the face and blunt injuries to the head, with loss of blood.
20. When put on his defence, the appellant gave sworn evidence and called one witness. The appellant testified that on 5th December 2012, the deceased went to Ethiopia to purchase shop items, but she never returned. It was his evidence that he alerted his neighbours that the deceased was missing. He stated that since there was fighting in Ethiopia he went to Ethiopia to search for the deceased. It was his testimony that his efforts to find the deceased were unsuccessful until her body was found in a well. He stated that he was subsequently arrested.
21. Jama Sheikh Hassan (DW2) gave sworn evidence and testified that he is the appellant's brother. That he was called and informed that the appellant had been arrested in Ethiopia as he had fought with one Girma Mwangasha. It was DW2's evidence that he returned to Kenya and left the appellant in Ethiopia.
22. Upon the conclusion of the trial, the High Court (Kiarie. W. Kiarie, J.) held that he had no doubt in his mind that the appellant participated in the killing of the deceased. In dismissing the appeal, the trial court found as follows:

“...If the killing of the deceased could have been on 5th December, early on the 6th December, 2012 then the decomposition of her body would not have set in when the body was retrieved from the well at about 2pm on 6th December, 2012.

The other issue that displaces the defence of the accused is the suit case in which the body was found. Evidence on record indicate that this suit case was previously in his house before the body of the deceased was found in it.

Without an explanation from the accused how it left his house without his knowledge, then the logical inference to make is that it must have left the house with his knowledge.

The conduct of the accused before the discovery of the body of the deceased makes him a suspect. We get most of it from the evidence of Elizabeth Jaldo Jara (PW1). This witness testified that he asked her to take her clothes and return to Ethiopia and claimed that the issue of the dead girl was going to pursue him. If there were any doubts in the utterances attributed to him by (PW1), then his conduct erased them. I have no doubt in my mind that the accused participated in the killing of the deceased. In the instant case...the killing of the deceased was skilfully planned and executed. This amounts to murder. All the ingredients of the offence have been proved beyond reasonable doubts. I therefore find that the accused herein was the key schemer of the offence. I find him guilty and accordingly convict him.”

Consequently, the trial court sentenced the appellant to death.

23. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal in which he raised seven grounds of appeal to wit that:
 - a. The trial court erred in law and in fact in convicting the appellant based on circumstantial evidence that did not meet the required standard;



- b. The trial court erred in law and fact in convicting the appellant based on evidence that was inconsistent and full of contradictions;
- c. The conviction was against the weight of evidence;
- d. The ingredients of the offence of murder were not proved;
- e. Shifting the burden of proof on the appellant;
- f. Convicting the appellant based on evidence of suspicion;
- g. Convicting the appellant based on extraneous matters and advancing his own theory in the judgment.

The appellant urged this Court to allow the appeal, set aside the conviction, quash the sentence and he be set at liberty.

Submissions by Counsel

- 24. When the appeal came up for hearing, Ms. Nelima was holding brief for Messrs. Kaberia Arimba & Associates Advocates who were on record for the appellant while Ms. Nandwa, learned Prosecution Counsel was on record for the State. Counsel relied on their written submissions with brief oral highlights.
- 25. Ms Nelima submitted that the circumstantial evidence relied upon by the trial court did not meet the threshold required by law. While relying on the case of *Abang'a alias Onyango v Republic*, Criminal Appeal No.32 of 1990, counsel submitted that the trial court was selective in its analysis of the evidence and that had it properly analyzed the evidence, it would have found loopholes in the evidence of PW1.
- 26. Counsel further submitted that PW1 also had a motive to kill the deceased as the appellant had left her for the deceased. Further, that the evidence of PW8 pointed to PW1 as the perpetrator as she was running away from Kenya when she was arrested at the Ethiopia/Kenya border. Further, that based on the decision of the Supreme Court in *Francis Karioko Muruatatu & another v Republic* [2017] eKLR (the Muruatetu case), this Court should find that the sentence meted out against the appellant was too harsh in the circumstances. Counsel urged us to reduce the sentence and take into consideration the time that the appellant has already served in custody.
- 27. Opposing the appeal, Ms. Nandwa submitted that there was no dispute that the deceased died. A post-mortem was conducted and the doctor who carried out the post mortem examination was of the opinion that the cause of death was cardiopulmonary arrest.
- 28. While citing the cases of *Republic v EKK* [2018] eKLR and *Stephen Haruna v The Attorney General of the Federation* [2010] 1iLAW/CA/A/86/C/2009, counsel for the respondent submitted that the appellant was the last person to be seen with the deceased. According to PW3, on 1st November, 2012, the appellant and the deceased rented premises from her for three months.
- 29. Counsel further submitted that the deceased's clothes were found by PW1 in a paper bag in the appellant's house. Counsel asserted that nonetheless, the deceased sustained grievous injuries, which led to her death. Counsel submitted that malice aforethought was proved through the evidence adduced which pointed to the fact that the appellant had planned to kill the deceased and hide her body. Counsel further emphasized that the deceased tied a big stone to the suitcase to prevent it from floating when he threw it into the well.



30. In counsel's opinion, if there were any inconsistencies, the said inconsistencies did not go to the root of the prosecution case. Counsel asserted that the appellant was not convicted on suspicion but on circumstantial evidence. Counsel further submitted that the appellant's defence was an afterthought and a mere denial.
31. As regards the sentence meted out against the appellant, counsel submitted that the manner in which the deceased was killed was brutal. Counsel urged that in the circumstances, the death sentence be upheld.

Determination

32. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. We discern the issues for determination to be; whether the prosecution case was proved beyond reasonable doubt; and whether the death sentence meted out against the appellant was lawful in the circumstances.
33. Section 203 of the Penal Code under which the appellant was charged provides that:
34. It follows, therefore, that to sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.
35. It is not in dispute that the deceased died. The prosecution witnesses testified that the body of the deceased was found in a suitcase inside a well. The foul smell emanating from the said well is what drew the attention of PW2 and others to discover the body of the deceased.

Further, the post-mortem report indicated that the deceased had died as a result of cardiopulmonary arrest secondary to a stab wound to the face and blunt injuries to the head, with loss of blood.
36. The questions that beg to be answered are; did the death of the deceased occur as a result of the unlawful act or omission of the appellant, and was there malice aforethought?
37. It is common ground that the appellant was convicted on the basis of circumstantial evidence as none of the prosecution witnesses saw him kill the deceased. There was therefore no direct evidence linking the appellant to the death of the deceased. The prosecution case in this regard was therefore based on circumstantial evidence.
38. The conditions for the application of circumstantial evidence to sustain a conviction in a criminal trial have been laid down in several authorities of this Court.
39. This Court in the case of *Ahamad Abolfathi Mohammed and Another vs Republic* [2018] eKLR stated as follows regarding circumstantial evidence:-

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: -

“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.”

40. This Court in *Sawe v Republic* [2003] KLR 364, stated thus:

“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.”

41. The question that we need to determine is whether the circumstantial evidence presented by the prosecution before the trial court was sufficient to return a verdict of guilty. In the impugned judgment, the trial court stated as follows:

It is not in doubt that the accused was staying with the deceased in Kenya and held her out as his wife. This came from the evidence of Fatuma Noor Mumin (P.W 3) who was their landlady. She testified that when they were looking for a business premises they introduced themselves to her as husband and wife though previously she had employed Aster where she worked for her for about one year. The accused confirmed the relationship in his evidence.

The body of the deceased was pulled out of the well on 6th December 2012 at about 2 p.m. The foul smell emanating from the well is what attracted members of the public to the well. They eventually called the police. The stench was a sign of decomposition of the body. The post mortem report was produced by consent without calling the doctor who performed the post mortem. Doctor Sirong made the following relevant observations:

- (1) He noted decomposition of the body with foul smell
- (2) Skin loss
- (3) Deep wound on the head
- (4) Blunt injuries on the frontal chest wall
- (5) Swollen orbital region with haematoma and a deep cut wound

He formed an opinion that the cause of death was cardiopulmonary arrest following the stab wound to the face and blunt injuries to the head with loss of blood.

The contention of the accused that the deceased left for Ethiopia on 5th December, 2012 cannot therefore be true. If the killing of the deceased could have been on 5th December or early on the 6th December 2012, then the decomposition of her body would not have set in when the body was retrieved from the well at about 2pm on 6th December, 2012.

The other issue that displaces the defence of the accused is the suit case in which the body was found. Evidence on record indicate that this suit case was previously in his house before the body of the deceased was found in it. Without an explanation from the accused how it left his house without his knowledge, then the logical inference to make is that it must have left the house with his knowledge.



The conduct of the accused before the discovery of the body of the deceased makes him a suspect. We get most of it from the evidence of Elizabeth Jaldo Jara (P.W 1). This witness testified that he asked her to take her clothes and return to Ethiopia and claimed that the issue of the dead girl was going to pursue him. If there were any doubts in the utterances attributed to him by (P.W 1), then his conduct erased them. I have no doubt in my mind that the accused participated in the killing of the deceased.

Did the killing of the deceased amount to murder? Murder is defined in section 203 of the Penal Code as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

In the case of Republic vs. Andrew Mueche Omwenga [2009] eKLR Maraga J (as he then was), referring to the above Penal Code definition went on to say:

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

42. Our analysis of the evidence leads us to find that the offence of murder was established. There was sufficient evidence to that effect. All witnesses attested to the death of the deceased, which was corroborated by the production of the post mortem report.
43. The big question that we must answer is whether the appellant was responsible for the death of the deceased. Alternatively, did the prosecution prove beyond reasonable doubt that it was the appellant and nobody else who committed the unlawful act, which led to the death of the deceased?
44. The prosecution relied on the doctrine of “last seen with” as proof that the appellant was responsible for the death of the deceased. The prosecution relied on the case of Stephen Haruna v The Attorney General of The Federation (2010) I iLAW/CA/A/86/C/2009 where the Nigerian Court of Appeal held that:

The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

45. The only circumstantial evidence tending to link the appellant to the crime was that of PW3 who testified that she was with the appellant and the deceased on 1st November, 2012 when they went to rent premises from her. From the record, the deceased died between 29th and 30th November and that her body was retrieved from the well on 6th December, 2012. Other than PW3 seeing the appellant and the deceased together on 1st November, 2012 there is no other evidence linking the appellant to the murder of the deceased.



46. In the case of Ramreddy Rajeshkhanna Reddy & Another V. State of Andhra Pradesh, JT 2006 (4) SC 16 the Court in India held as follows:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

47. This Court in Chiragu & Another v Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment) stated as follows:

Locally, this doctrine has been invoked in the case of Republic v EEK [2018] eKLR. The prosecution adduced evidence on this aspect through PW1. She confirmed that indeed the deceased was last seen alive in the company of the appellants. Her evidence was not corroborated at all by any other witness (ess), as required being a minor. This requirement is statutorily underpinned by section 124 of the *Evidence Act*. The appellants contested that evidence by stating that in fact, at the particular time they were asleep in their houses. This being the case, it was absolutely necessary for the trial court to look for corroboration or other evidence implicating the appellants. No such attempt was made by the trial court. We are persuaded by the holding in Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is desirable to exercise caution and look for some other corroborative evidence. The trial court having failed do so in the circumstances of this case, it erred.”

48. By parity of reasoning, we find that the doctrine may not suffice in the circumstances of this case, as there was a time difference of three (3) weeks between the time PW3 saw the appellant and the deceased together and when the deceased was killed. The date and time of death of the deceased was critical to link the death of the deceased to the appellant. It is instructive that her body was discovered in a well at the Kenya/Ethiopia border on 6th December, 2012 and the body was in a decomposed state. There was no evidence regarding when the deceased was murdered. Is it possible that someone other than the appellant murdered the deceased? This issue casts doubt that perhaps the appellant was not with the deceased shortly before her death contrary to the findings of the trial court. PW1 testified that the suitcase that the body of the deceased was found in was the same one that she had seen in the appellant’s house. There is, however, no evidence adduced linking the suitcase found in the well and the one that PW1 testified that she saw in the appellant’s house.

49. It is also notable that the circumstantial evidence linking the appellant to the crime was that of a single witness (PW3). The evidence required corroboration. In the absence of any corroboration, PW3’s evidence was of little probative value and watered down the circumstantial evidence relied on by the prosecution.

50. We have taken into account the totality of the evidence and the principles regarding when a court can rely on circumstantial evidence. In the circumstances of this case, we are constrained to find that the circumstantial evidence on record did not meet the criteria enunciated in the case of *Sawe vs Republic* (supra). As correctly submitted by counsel for the appellant, there were many gaps as not to make such evidence unerringly point to the guilt of the appellant.

51. In the circumstances, we are satisfied that the appellant’s appeal against conviction has merit and we allow it.



52. The upshot is that we allow the appeal, quash the conviction and set aside the death sentence imposed on the appellant. He shall be set at liberty forthwith unless otherwise lawfully held.

53. We so order.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF FEBRUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

