



**Omeny v republic (Criminal Appeal 59 of 2020)
[2025] KECA 992 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 992 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 59 OF 2020
HA OMONDI, LK KIMARU & WK KORIR, JJA
MAY 30, 2025**

BETWEEN

MESHACK OPONDO OMENY APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment of the High Court at Siaya (R.E. Aburili, J.) dated 29th October 2019 in HCCRA No. 112 of 2017)

JUDGMENT

1. The appellant, Meshack Opondo Omeny, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge stated that on 26th June 2016 at around 5.00 pm at Ajigo sub-location in Bondo Sub-County of Siaya County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.R.A, a child aged 11 years. Arising from the particulars of the main charge, the appellant faced an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act* by touching the vagina of E.R.A. After a full trial, the appellant was convicted of the main charge and sentenced to life imprisonment. His first appeal to the High Court was dismissed on the issue of conviction and the sentence of life imprisonment substituted with 70 years' imprisonment.
2. The appellant raised 11 grounds of appeal in the amended memorandum of appeal dated 25th March 2024, which we condense hereunder: that the High Court did not live up to its mandate as a first appellate court; that the prosecution did not call important witnesses; that his alibi defence was wrongly rejected; that section 200 of the *Criminal Procedure Code* (CPC) was not complied with; that the charge was not proved; that his right to be presented in court within 24 hours of arrest was contravened; and that the sentencing principles were not considered when passing sentence.



3. In a nutshell, E.R.A (PW1) in her sworn testimony stated that she was 12 years old and in class 5. She recalled that on 26th June 2016, after returning from church with her brother, she went to fetch firewood while her brother remained at home. On her way back, she met the appellant, whom she referred to as “Baba Linda” (Linda’s father), returning home with his cows. Her testimony was that the appellant pushed the firewood from her head, forced her to the ground, removed her clothes, and defiled her. After the ordeal, which she described as painful, she returned home, warmed water, and bathed. She did not disclose the incident to anyone. Later that evening, her parents quarrelled, and she left with her mother to her maternal grandparents’ place. After some time, her grandmother confronted her about a foul smell, and that is when she disclosed the defilement by the appellant. She was taken to Rera Hospital, from where she was transferred to Bondo Sub-County Hospital, where she was tested and put on medication. PW1 stated that the appellant had defiled her several times and denied ever having a boyfriend.
4. Harun Chebon (PW2), a clinical officer at Bondo Sub-County Hospital, attended to the complainant on 25th June 2016. His examination revealed that she had a broken hymen with multiple old bruises on her labia minora and labia majora. He also noticed a milky discharge from her vagina. Pus cells were present in her urine. He produced the complainant’s P3 form, the laboratory results form, and the treatment sheet as exhibits. He testified that he was unaware that the complainant had been seen at Rera Health Centre. Further, that he also examined the appellant on 29th August 2016.
5. L. A. (PW3) testified that she gave birth to E.R.A. on 7th February 2005. She recalled that on 26th June 2016 at about 5.00 pm, she onboarded the complainant and her brother on a matatu to head home while she proceeded to her place of work. On 28th June 2016, when she returned home, she disagreed with her husband. She took her children and returned to her mother’s house, where they all lived. She stated that on 16th August 2016, she was called by a doctor from Rera Health Centre, where the complainant had been taken to after complaining of abdominal pain. Upon arriving at the hospital, she was asked to escort the minor for further treatment. It was then that the complainant informed her that she had been defiled by the appellant. She alerted the village elder and took the complainant to Bondo Sub-County Hospital for further treatment. She also reported the matter to the police.
6. (PW4) recalled that her daughter (PW3), together with her two children, visited her on 29th June 2016. She remained with the children while PW3 returned to her workplace. On 16th August 2016, she detected a foul smell from the complainant and upon interrogating her, she disclosed that she had been defiled and was having an injury to her private part. She escorted her to Rera Health Centre, where it was confirmed that she had been defiled, after which she called PW3 and informed her of the matter.
7. Police Constable Godfrey Ngaira, who testified as PW5, gave an account of his investigations into the matter. After the case was assigned to him, he interviewed the complainant and PW3, and thereafter escorted them to Bondo Sub-County Hospital where the complainant was examined, treated, and a P3 form filled for her. He arrested the appellant after recording the statements of the witnesses. The witness produced the complainant’s birth certificate showing that she was born on 7th February 2005.
8. In his defence the appellant who testified as DW1 stated that the complainant was her cousin. He recalled that on 26th June 2016 nothing out of the ordinary occurred after he returned from the church at about 5.00 pm with the members of his family. However, he was later arrested and escorted to Bondo Sub-County Hospital, where he was subjected to medical examination. He produced his P3 form as an exhibit. While admitting that he was also known as “Baba Linda”, he denied herding his cows on the material day.



9. S.A. (DW2) testified that she arrived home from the church with her husband (the appellant) and their daughter at about 5.00 pm on the material day. She also stated that their son did not accompany them to church as he, and not the appellant, was the one herding the cattle.
10. R.N. (DW3) was the appellant's 13-year-old daughter. She stated that she accompanied her parents to church on the material day, from where they returned home at 5.00 pm. She further testified that it was her brother and not the appellant who was looking after their cows on that Sunday.
11. C.A. (DW4), the appellant's 12-year-old daughter, testified that on the material day she went to church with her parents, her sister and one B. From the church she proceeded to the home of E.R.A. who was with them. At the home of E.R.A. she told E.R.A. she wanted to go and fetch firewood. They went together and at about
6. 00 pm she escorted E.R.A. back to her home. She stated that the appellant did not herd cows on that day.
12. When this matter came up for hearing on 5th February 2025, the appellant was virtually present from Kisumu Main Prison, while Senior Principal Prosecution Counsel (SPPC), Mr. Okango, represented the respondent. The appeal was canvassed through the written submissions already filed.
13. Relying on his submissions dated 25th March 2024, the appellant submitted that the learned Judge of the High Court abdicated her duty as established in *Kiilu & Another vs. Republic* [2005] KLR 174 by not subjecting the record to a fresh and exhaustive examination in order to reach her own independent conclusion.
14. Turning to the ground of appeal that the prosecution's case was marred with contradictions, the appellant submitted that the perpetrator was only identified as Linda's father, which, according to him, was not conclusive on the issue of identification. According to the appellant, his alibi defence ought to have been accepted once it became apparent that identification was doubtful.
15. The appellant argued that his alibi defence was erroneously rejected and adverted to *Kiarie vs. Republic* [1984] KLR 739 for the holding that an accused person does not bear the burden to prove the sufficiency of the alibi defence but once the defence creates doubt in the mind of the court, the court ought to accept it as credible.
16. Still urging that the ingredients of the offence were not proved, the appellant submitted that owing to the fact that the complainant was medically examined over two months after the alleged defilement and considering that no spermatozoa was seen, the evidence of penetration was inconclusive.
17. Regarding his claim that section 200 of the CPC was not complied with, the appellant argued that after taking over the matter from Hon. E.A. Wasike (RM), Hon. M. Obiero (PM) did not abide by the provided procedure, thereby occasioning miscarriage of justice. He referred to *Ndegwa vs. Republic* [1985] KLR 554 for the argument that section 200 of the CPC should only be invoked where the ends of justice would not be met by the succeeding magistrate starting the trial afresh. According to the appellant, the provision should not be invoked where the passage of time between the first trial and the trial before the succeeding magistrate is short or where witnesses are easily available.
18. On an issue not traceable to his grounds of appeal, the appellant contended that it was erroneous for the complainant, who was a child of tender years, to be allowed to give sworn testimony without compliance with section 19 of the *Oaths and Statutory Declarations Act*. Reliance was placed on *Franisio vs. Republic* [1961] E.A. 260 to assert that before receiving the testimony of a child of tender years, it is necessary to conduct voir dire examination.



19. Turning to a different ground of appeal, the appellant submitted that the failure to call the complainant's father, her teachers, the village elder and the children's officer as witnesses vitiated the prosecution's case, as they were vital witnesses who had also been identified by the defence counsel at the trial. Reliance was placed on *Bukenya vs. Uganda* [1972] EA 549 in support of the argument.
20. Finally, the appellant asserted that the courts below did not adhere to the sentencing policy guidelines and legal provisions, thereby arriving at a manifestly excessive sentence. During the hearing of his appeal, the appellant urged us to consider that at 78 years, he was elderly, and we should therefore allow his appeal and set him free.
21. On the other hand, learned SPPC, Mr. Okango, relied on the submissions dated 4th February 2025 to oppose the appeal. Counsel took off by referring to section 361 (a) of the CPC and *Njoroge vs. Republic* [1982] KLR 388 for the proposition that on second appeal, the Court should focus on points of law, accepting and being bound by the concurrent findings of fact by the two courts below. He also referred to the decision of the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) to urge that issues not raised and addressed at the High Court are not open for our determination.
22. Turning to the substance of the appeal, counsel urged that the first appellate court correctly appraised itself on its duty by elaborately setting out the evidence adduced at the trial before deeply interrogating the issues raised in the appeal. According to counsel, the learned Judge confirmed that the age of the victim, penetration, and the identity of the perpetrator, being the ingredients of the offence of defilement, had been proved. He submitted that there were no contradictions in the evidence adduced and that the appellant did not point to any particular contradictions.
23. On identification, Mr. Okango urged that PW1 knew the appellant, hence identification was by way of recognition, and therefore, the allegation of mistaken identity did not arise.
24. Regarding the appellant's claim that section 200(3) of the CPC was not complied with, counsel submitted that the provision was not applicable in this case as no evidence had been taken before another magistrate when the trial commenced before the convicting magistrate. Mr. Okango submitted that the provision only applies where the trial has been partially heard by a different magistrate.
25. Responding to the appellant's claim that the prosecution failed to call critical witnesses, Mr. Okango urged that the issue was not available for our determination as it had not been raised before the High Court. Further, that when the issue was raised before the trial court, the learned magistrate held that the named witnesses were not relevant or necessary.
26. Finally, on the issue of sentence, counsel referred to *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (supra) to submit that the sentence of life imprisonment passed by the trial court was legal. Counsel, however, submitted that since he had not challenged the substitution of the life sentence with a prison term of 70 years by the High Court, he would leave the issue at that. Consequently, Mr. Okango urged us to find no merit in the appeal and dismiss it.
27. We have reviewed the record and considered the submissions by both the appellant and Mr. Okango. We start by observing that in a second appeal, like the one before us, our focus is on matters of law, as the facts are deemed settled by the two courts below. Our intervention on issues of fact is only permitted where it is demonstrated that, based on the evidence on record, the courts below were plainly wrong as a result of misapprehension of the evidence, or exclusion of relevant issues, or incorporation of irrelevant issues. In such circumstances, it is said that the decision is bad in law. That is the import of section



361(1)(a) of the CPC, which the Court has explained in several decisions. For instance, in *Dzombo Mataza vs. Republic* [2014] KECA 831 (KLR) it was held that:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno vs. Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

Additionally, the reach of our jurisdiction is limited to addressing issues already canvassed through the relevant appellate system - (see *Republic vs. Ayako* [2025] KESC 20 (KLR); and *Republic vs. Manyeso* [2025] KESC 16 (KLR)).

28. Adhering to the aforesaid principles the issues that call for our determination in this appeal are: whether the learned Judge abdicated her responsibility as a first appellate court; whether there was failure to comply with section 200 of the CPC; whether the offence of defilement was proved; and, if the conviction is upheld, whether a basis has been laid for our interference with the sentence.
29. Issues not canvassed on first appeal are not within our remit. Upon perusing the record, we find that the questions of whether there was a failure to call crucial witnesses and whether the appellant was not brought to court within the constitutionally prescribed period are being raised for the first time before us and will therefore not merit our consideration. The issue of alleged non-compliance with the provisions of section 19 of the *Oaths and Statutory Declarations Act* suffers the same fate for not only having not been raised at the High Court but also not being raised through the grounds of appeal before us, but in the submissions.
30. The introductory issue, which in our view is a jurisdictional question, is the appellant’s claim that there was no compliance with section 200 (3) of the CPC. Under this section, where evidence has been partly heard and there has been a change in the magistrate hearing the case, the succeeding magistrate must explain to the accused person his/her right to demand that any witness who has testified be re-summoned and reheard. A perusal of the record discloses that the circumstances that prevailed in this case are similar to those that faced the Court in the case of *Kangogo vs. Republic* [2023] KECA 28 (KLR), where the Court, in rejecting the appellant’s plea of non-compliance with section 200(3) of the CPC, held that:

“27. From the wording of Section 200(1) and (3) of the *Criminal Procedure Code* as well as this Court’s opinion in *Abdi Adan Mohamed* (supra), the operative words with regard to this provision is “evidence”. It then follows that this section is more concerned with the proceedings in relation to recording or taking of evidence by a trial court. Back to the proceedings before us, we note at page 7 of the record of appeal that on July 9, 2009, Mr. Mbogo ordered that the matter was to be heard before Court No 6. Consequently, the matter took off on December 15, 2009 before Mr. Owiti. The record is clear that the hearing or taking of evidence up to the delivery of judgment in this matter was conducted by Mr. Owiti. We do not see how Section 200 of the *Criminal Procedure Code* could have been applicable in the circumstances. We agree with the position taken by the respondent that the provision was not applicable



in the circumstances. This ground of appeal is therefore without merit and is rejected.”

31. Likewise, in the appeal before us, we find no fault in the finding of the learned Judge of the High Court that section 200(3) of the CPC was inapplicable. The record shows that despite the appellant being charged before Hon. E. N. Wasike (RM) on 30th August 2016, the case was allocated to Hon. M. Obiero (PM) for hearing. The latter magistrate approved the surety, took the appellant’s plea to the amended charge on 13th December 2016 and proceeded to hear the case to conclusion. The appellant’s plea that section 200 (3) of the CPC was not complied with is therefore without basis, and we find no merit in this ground of appeal.
32. The appellant has faulted the learned Judge for failing to perform her duty as a first appellate judge by not reappraising the evidence in order to arrive at her own independent conclusion. As a starting point, it is important to appreciate that there is no specifically prescribed method on how a first appellate court should conduct its mandate. Thus, in *David Njuguna Wairimu vs. Republic* [2010] eKLR, it was observed that:

“In *Okeno vs. R* [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”
33. Having gone through the judgment of Aburili, J., we find that at paragraphs 4 and 5, she referred to *Okeno vs. Republic* [1972] E.A. 32, *Pandya vs. Republic* [1957] E.A. 336, and *Shantilal M. Ruwala vs. Republic* [1957] E.A. 570 to underscore her role as a first appellate judge. The learned Judge determined all the issues raised by the appellant in his grounds of appeal, and specifically analyzed the evidence adduced in support of each element of the offence of defilement before affirming the judgment of the trial court. In our view, the record speaks for itself; the learned Judge was alive to her mandate as a first appellate court and correctly executed her duty as a first appellate court. We, therefore, do not find any merit in the appellant’s claim that the learned Judge abdicated her responsibility.
34. As regards the appellant’s assertion that the offence was not proved, we note that the appellant having been charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*, the prosecution was called upon to prove the age of the complainant, penetration and the identity of the perpetrator. Regarding the age of E.R.A., she herself testified that she was 12 years old. Her mother, PW3, gave her date of birth as 7th February 2005, and this was corroborated by the birth certificate produced by PW6. We therefore do not find any misapprehension of the law insofar as proof of the complainant’s age is concerned. We must observe that the complainant was approximately 11 years and 4 months old at the time of the offence. Even though not raised by the appellant, we find it prudent to point out that she was still within her 11th year and had not attained 12 years, so that it could be said that the sentence against the appellant had transitioned to that provided



in section 8 (3) of the *Sexual Offences Act*. In *Serem vs. Republic* [2023] KECA 30 (KLR), the Court, faced with similar circumstances, held that:

“We note that the appellant did not advance any grounds or submissions on the sentence. The birth certificate produced in evidence on behalf of the minor indicates that she was born on 24th August, 2001 and was therefore a few months shy of her twelfth birthday at the material time. Therefore, although the charge sheet indicates that she was a child of twelve years of age she was not quite there yet.

The age bracket of “a child age eleven years or less”, which the minor was transitioning from required the appellant to be charged under section 8 (2) SOA, which carries a sentence of imprisonment for life upon conviction. The appellant is lucky to have been charged under section 8 (3) SOA, which covers the age bracket of “a child aged between the age of twelve and fifteen years”, and which provides for a sentence of not less than 20 years imprisonment. We have therefore, not interfered with the sentence visited upon him.”

35. Turning to the ingredient of penetration, the appellant submitted that the evidence was not conclusive. He also argued that the medical examination was conducted a few months after the offence, hence not reliable. The evidence of E.R.A. was that she was defiled on the material day and a few times before that day, but that she did not report the matter immediately. Her grandmother, PW4, became aware of the ordeal when the complainant started emitting a foul smell from her private parts. Upon interrogation, E.R.A. opened up and shared what had transpired. PW2 examined E.R.A. and found that she had a broken hymen with multiple old bruises on her labia minora and labia majora. He also noticed a milky discharge from her vagina. There were also pus cells in her urine. She had a sexually transmitted disease. PW2 concluded that the complainant had been defiled. In our view, this evidence proved beyond reasonable doubt that E.R.A. had been defiled.
36. The final element of the charge the prosecution was required to prove is that the appellant was the defiler. From the evidence on record, it is not contested that the appellant was the complainant’s cousin. The appellant and DW2 conceded to the existence of that relationship. He also stated in cross-examination that he was commonly referred to as “Baba Linda”, meaning Linda’s father. We are therefore not ready to accept his averment that his identity as Linda’s father was inconclusive, and we find that the appellant was well-known to the complainant.
37. Additionally, the appellant raised an alibi defence. He averred that on the material day, he was in church with the members of his family until 5.00 pm. Further, that it was his son who was herding his livestock on the material day. One of his daughters, C.A. (DW4), also testified that she escorted the complainant to fetch firewood and later escorted her back to their home. The law is that the burden to disprove the alibi and establish the appellant’s guilt lay throughout on the prosecution. Affirming this position of the law, the Court in *Joseph Waiguru Wang’ombe vs. Republic* [1980] KECA 6 (KLR), while appreciating the difficulty of the prosecution in countering an alibi defence sprung at the defence stage through unsworn testimony, held that:

“The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances, the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it.”



38. And, in *Juma Mohamed Ganzi & 2 Others vs. Republic* [2005] KECA 338 (KLR), the Court stated that:

“She weighed the defence of alibi of each appellant against the weight of the prosecution evidence. This is the correct approach where the defence of alibi is first raised in the appellant’s defence and not when he pleaded to the charge – see *Wang’ombe vs. The Republic* [1980] KLR 149.”

39. From the foregoing, it is clear that even though it is good practice that an alibi defence ought to be raised at the earliest opportunity, at whatever stage the defence is raised, the court is obligated to consider it alongside the other evidence on record.

40. We have reviewed the judgment of the trial court and the first appellate court on the issue of the alibi defence. From the record, it is not true that his alibi defence was not considered, as alleged by the appellant. It is clear that it was considered and disregarded as it did not shake the cogent evidence tendered by the prosecution pointing to the appellant as the perpetrator of the offence. In our review of the evidence, two things stand out. First, although the alibi defence came out at the defence hearing, the appellant conveniently brought his daughters to the stand, not his son, who was purportedly herding the cows on the material day. Secondly, even though DW4 was alleged to have fetched firewood with the complainant at the material time, such information, having been in their knowledge, did not form part of the cross-examination of the complainant. We therefore find no basis for faulting the conclusion of the two courts below that the alibi defence was an afterthought and was completely dislodged when weighed against the evidence of the prosecution witnesses on record.

41. In the result, we find that all the ingredients of the offence of defilement were proved beyond any reasonable doubt. We thus find no reason to interfere with the findings of fact by the two courts below and conclude that the appellant’s conviction is safe.

42. The final issue relates to the sentence. Under section 361(1)(a) of the CPC, the severity of sentence is a matter of fact outside the scope of a second appeal. This Court can only interfere with a sentence where the first appellate court enhanced it, or where the magistrate’s court had no jurisdiction to pass the sentence, or where the sentence is illegal. In this case, the trial court handed down life imprisonment as provided under section 8(2) of the *Sexual Offences Act*. However, the High Court set aside the life imprisonment and substituted it with 75 years in prison. We cannot blame the High Court for vacating the life sentence in favour of a determinate sentence because that was the jurisprudence prevailing in 2019 when the judgment was delivered.

43. However, the Supreme Court subsequently in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (supra); *Republic vs. Ayako* (supra); and *Republic vs. Manyeso* (supra) has affirmed the legality of life sentence. Additionally, in *Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2021] eKLR, the Supreme Court directed that the holding in *Francis Karioko Muruatetu & Others vs. Republic* [2017] eKLR in respect to the unconstitutionality of the death sentence only applied to the mandatory death sentence provided for murder under section 204 of the *Penal Code*. The conundrum in the appeal before us is that it cannot be outrightly said that the High Court Judge enhanced the sentence to entitle us to interfere with it as a matter of course. We also did not hear the appellant urge us to revert his sentence to the one passed by the trial court. His plea, which was loud and clear, was that we should reduce his sentence to the period already served and let him go home. As already stated, we do not possess the authority to assent to his plea. Mr. Okango appreciated the predicament that we find ourselves in when



he admitted that he never filed a notice of enhancement of the sentence, and neither did he request in writing for a reversion to the correct sentence that had been passed by the trial court.

44. Having not been properly moved by either side, we cannot, in the circumstances, interfere with the sentence passed by the learned Judge. Maybe the justice to the victim of the crime lies in the fact that a jail term of 75 years for a person in his sunset years is as good as a life imprisonment. As it were, there is no difference between the two sentences.

45. Consequently, we conclude that this appeal has no merit and we dismiss it in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

