Waiganjo (alias Jackson Ikumbo) v Republic (Criminal Appeal 56 of 2017) [2024] KECA 146 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KECA 146 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 56 OF 2017

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

FEBRUARY 16, 2024

BETWEEN

JOSHUA KARINJAHI WAIGANJO (ALIAS JACKSON IKUMBO) .. APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoli J.) delivered on 7th June 2017 in High Court Criminal Appeal No. 141 of 2015 arising from the original trial in Naivasha Chief Magistrate's Court Criminal Case No. 17 of 2013)

JUDGMENT

1. On 6th October 2015, Joshua Karianjahi Waiganjo alias Jackson Ikumbo, the Appellant herein, was convicted of, and sentenced by the Chief Magistrate's Court at Naivasha (Hon. Mwinzi Ag SRM) for five counts of offences that he had been charged with in Naivasha Chief Magistrate's Court Criminal Case No. 17 of 2013 as follows:

    a. Count III of putting on uniform and designation of a police officer without written authority from the Inspector General contrary to section 101 (1) (a) of the *National Police Service Act*, 2011, the particulars being that on an unknown date within the month of June 2012 at Naivasha Township within Nakuru County, the Appellant put on uniform and designation of a police officer of the rank of Senior Superintendent of Police without a written authority from the Commissioner of Police, and for which he was sentenced to 5 years imprisonment.

    b. Count VI of Personating a public officer contrary to section 105 (b) of the *Penal Code*, the particulars being that on 28th September 2012 at Kikopey Police Station within Nakuru County, the Appellant falsely presented himself to Number 42681 Sergeant Benson Wambua and Police Constable Korir to be a person employed in the public service as an Assistant Commissioner of Police at Anti Stock Theft Unit Headquarters Gilgil ,with a view of taking

disciplinary action against PC Korir a fact he knew to be false, and for which he was sentenced to 1 year imprisonment.

c. Count VIII of being in possession of Government Stores contrary to Section 324 (3) as read with Section 36 of the *Penal Code*, the particulars being that on 31st December 2012 at Njoro Township within Nakuru County, the Appellant was found in possession of one gazetted police officer head cap, one Angola shirt, one jungle trouser, one smoke jacket, one jungle belt, one gazetted officer lanyard, two pairs of badges of rank for Assistant Commissioner of Police and one whistle, all the property of the National Police Service which were unlawfully obtained, and for which he was sentenced to 3 months' imprisonment.

d. Count IX of being in possession of Government Stores contrary to Section 324 (3) as read with Section 36 of the *Penal Code*, the particulars being that on 3rd January 2013 at Njoro Township within Nakuru County was found in possession of two gazetted police officers blue berets and one gazetted police officer Swagger cane, all the property of the National Police Service which were unlawfully obtained, and for which he was sentenced to 3 months' imprisonment.

e. Count X of being in possession of Government Stores contrary to Section 324 (3) as read with Section 36 of the *Penal Code*, the particulars being that on 4th January 2013 at Gilgil Township within Nakuru County, the Appellant was found in possession of one pair of boots and five pairs of Gorges patches, all the property of the National Police Service which were unlawfully obtained, and for which he was sentenced to 3 months' imprisonment.

2. The imprisonment sentences were ordered by the trial Court to run concurrently. The Appellant was also acquitted by the trial Court of five other counts mainly on account of lack of evidence, namely counts I and II, both of robbery with violence contrary to section 296 (2) as read with section 295 of the *Penal Code*, count IV of putting on uniform and designation of a police without written authority from the Inspector General contrary to Section 101 (1) (a) of the *National Police Service Act*,

2011, and counts V and VII both of personating a public officer contrary to section 105 (b) of the *Penal Code* .

3. The convictions were based on the accounts by several prosecution witnesses, of their encounter with the Appellant where he introduced himself as a Commissioner of Police and wore police uniform. The Appellant in this respect introduced himself as the CID boss in Naivasha to Sergent John Kariuki (PW1) who was based at the Anti Stock Theft Unit at Gilgil and while donned in police uniform requested him to accompany PW1 to functions. The Appellant likewise, while in police uniform, introduced himself to PC Joseph Korir (PW2) who was then based at Kikopey Patrol base in Gilgil as an Assistant Commissioner of Police based at the Anti Stock Theft Unit, PC Peter Mwangi (PW3) of CID Nairobi arrested the Appellant, and after a search of his motor vehicles and houses which was also conducted by CIP Richard Kowyer (PW4) who was previously Deputy DCIO Naivasha, found various police uniforms and photographs of the Appellant in police uniform.

4. The Appellant lodged an appeal to the High Court being Naivasha High Court Criminal Appeal No. 141 of 2015, against his conviction and sentence, and the High Court (C. Meoli J.) found that errors had been committed by the trial Court and defects in the trial process and ordered a retrial be held with dispatch, before the Chief Magistrate's Court in Naivasha only in respect of counts 3, 6, 8, 9, and 10 as presented in the amended charge sheet substituted on 28/2/2014, and that the Appellant be produced before the Chief Magistrate's Court, Naivasha for purpose of taking a fresh plea on 13th June 2017.

5. The Appellant has now lodged this second appeal, where he raised four grounds of appeal namely:

a. That the Learned Judge of the High Court erred in law when she ordered for retrial while he had proved his case beyond reasonable doubt.

b. That the learned Judge of the High Court erred in law when she ordered for retrial while he had served for 4 ½ years of the imprisonment which means that he is being punished twice in the same offence

c. That the learned Judge of the High Court erred in law when she made a partial evaluation of the record instead of being impartial.

d. That he be furnished with true copy of the appeal record to enable him raise more reasonable grounds to be presented before the court during the appeal hearing.

6. It is crucial to restate the role of this Court as a second appellate Court at the outset. This role was explained in *Karani v R (*2010) KLR 73 as follows:

> " This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on fact unless it is
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> demonstrated that the trial Court and the first appellate Court considered matter they ought not to have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

7. The main issue of law raised in this appeal is the legality of the order of a retrial. It is notable in this respect that the learned Judge of the High Court in her analysis started by identifying the issues before the Court for determination as follows:

> " 27. As I understood his complaints on this appeal, it is firstly, that the prosecution did not prove the charges upon which he was convicted; that secondly, his documentary exhibit, namely his appointment letter was not treated as an exhibit by the court even though he tendered the same at the trial; thirdly that the court erred by shifting the burden of proof on the Appellant and; finally, that one of the charges for which he was convicted had been earlier withdrawn for being defective and could not be the basis of a conviction."

8. The judgment was based on the findings by the learned Judge on the second and fourth issues, being those of the exhibit tendered by the Appellant and of the defective charge, which were dispositive of the appeal. In this respect, the Judge found as follows:

> " 63. The failure of justice that occurred in this case was primarily caused by errors committed by the trial court. Thus, without even considering the weight of the evidence on record vis-a-vis the convictions, I am satisfied that the foregoing finding disposes of the entire appeal. I will therefore allow the Appellant's appeal on the basis that there occurred a failure of justice. The convictions recorded in the trial are quashed and the sentences and set aside.
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> 64. As a consequence, the question falling next to be determined is what orders ought to be made. It is apparent that most of the procedural errors and omissions in this case were occasioned by the trial court, even though it can

equally be said that the prosecution and defence counsel should also have displayed more diligence in the trial. “

9. The learned Judge was satisfied that it was in the interest of justice and that this was a suitable case for a retrial to be conducted, after considering the circumstances in which the offences were allegedly committed namely the fact that they involve a national security organ which is a matter of public interest, and that “indeed, prior to and during the trial, the general public's attention was riveted on the saga surrounding this and other similar cases which, to some, is reminiscent of Nikolai Gogol's famous satire "The Government Inspector" (now renamed "The Inspector General")”, and also after considering the principles as regards a retrial as set out in the decisions of the Court of Appeal for Eastern Africa and of this Court in *Fatehali Manji v Republic* (1966) EA 343 and *Pius Olima & another v Republic* (1993) e KLR.

10. The learned Judge in this respect found that it was unlikely that the Appellant will suffer injustice thereby, and there was no evidence that witnesses who testified at the trial, most of them being police officers, will not be available to testify again, and that on a proper evaluation of the admissible or potentially admissible evidence a conviction might result.

11. This decision is what gave rise to the appeal before us. We heard the appeal on the Court’s virtual platform on 11th October 2023 and the Appellant, Joshua Karianjahi Waiganjo, was present in person appearing virtually, and was also represented by learned Counsel Mr. Gordon Ogola, while the Respondent was represented by the learned Senior Prosecution Counsel, Ms. Jackline Kisoo who held brief for learned Principal Prosecution Counsel, Mr. Ondimu. The counsel highlighted their respective submissions dated 11th April 2023 and 9th October 2023.

12. Mr. Ogola’s submissions were exclusively on the legality of the order for retrial, and the counsel made reference to section 354 (3) (a) (i) of the *Criminal Procedure Code*, which donates the power to order a retrial and urged that the section does not specify the circumstances, conditions and grounds in which the Court may exercise that power. The counsel drew our attention to the guidelines set out in various decisions of this Court and its predecessor, including Fatehali Manji v Republic (supra), *Philip Kipngetich Terer v Republic* [2015] eKLR , *Ahmed Sumar v R* (1964) EALR 483 , *Samuel Wahini Ngugi v R* [2012] eKLR, *Muiruri v Republic* (2003) KLR 552 and *Mwangi v Republic* (1983) KLR 522 , and summarised the grounds upon which a retrial may not be ordered as:

    a. When the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial (Fatehali Mani v Rep (1964) EA 481),

    b. Where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame (Fatehali Mani v Rep (1964) EA 481)

    c. Where it is not in the interest of justice

    d. If it is likely to cause injustice to the Appellant. taking into consideration factors including, but not limited to, illegalities or defects in the original trial (Muiruri v R (2003) KLR 522)

    e. The length of time which had elapsed since the arrest and arraignment of the Appellant (Muiruri v R (2003) KLR 522)

    f. When Court is of the opinion that on consideration of the admissible or potentially admissible evidence, a conviction might not result (Samuel Wahini Ngugi v R [2012] eKLR)

g. When it would cause irreparable prejudice to the Appellant on the ground that the prosecution may have become wiser and would wish to plug the loopholes already alluded to in the judgment (Issa Abdi Mohammed v Republic [2006] eKLR).

13. Mr. Ogola further submitted that since each case must depend on its own facts and circumstances, and an order for retrial should only be made where the interest of justice require it, the first port of call should be to identify the issues that the first appellate Court faulted and secondly, whether those issues fall within the principles for which orders for retrial would be granted. In this respect, the counsel submitted that the first issue that the Court considered was the failure by the trial Court to call upon the Appellant to plead to all the charges in the amended charge sheet, and the failure to inform the Appellant of his entitlement to recall any witness who had testified before the amendment. Further, that the learned Judge rightly observed that the error was wholly occasioned by the trial Magistrate who failed to abide by the provisions of Sections 207, 208 and 214 of the Criminal Procedure Code and that no blame could be apportioned to the prosecution.

Consequently, and applying the guiding principles, the Appellant's case did not qualify for retrial.

14. The counsel went on to submit that the second issue the trial Court was faulted for was that of the appointment letter the Appellant claimed to have tendered as an exhibit during the hearing of the defence case on 20th July 2015 and which the trial Magistrate stated in her judgment was never produced. That the Judge established from the recorded list of exhibits that the letter was neither marked for identification nor was it produced, and correctly held that it was the duty of the trial Magistrate to ensure that the list of exhibits and witnesses is accurately prepared during the trial. The Appellant submitted that the last issue the Judge faulted was the apparent alterations of the record in this regard, which the Trial Magistrate alluded to in her ruling. According to the counsel, the learned Judge fell in error in applying the guiding principles to the facts and circumstances of this case, in that after correctly concluding that most of the procedural errors and omissions were occasioned by the trial Court, the Judge then apportioned blame on the defence and the prosecution, and did not consider other guiding principles that applied.

15. In particular, it was submitted that the Appellant was in custody from the time he was first arraigned in Court in 2013 until his conviction on 6th October 2015, and had therefore served a period of six (6) months imprisonment on counts 8, 9 and 10; one (1) year imprisonment on count 6 and five (5) years imprisonment on count 3. Accordingly, that when his appeal was allowed on 7th June 2017, he had served the full term on the sentences in Counts 6, 7, 8, 9 and 10 and served more than half of the sentence imposed on Count 3. Counsel urged that if consideration is given to the time the Appellant was in custody, he would have served the entirety of his sentence, and that the High Court erred in failing to consider the length of time the Appellant had served and injustice occasioned to him by the order of retrial. The counsel urged us to consider that the Appellant was in custody for a period of five (5) years from the date of taking plea up to delivery of judgment in the High Court, and that it was over eight years since the Appellant was arraigned in Court.

16. Lastly, the counsel submitted that the Judge ought to have considered the retrial effects on the witnesses, and that there is always a natural reluctances to engage in the strenuous exercise for a second time. He noted that whenever the Appellant took fresh pleas, the matter never proceeded on the grounds of lack of witnesses and it was the counsel's view that the apparent reluctance on the part of the witnesses based on, among other factors, the ordeal of giving evidence for a second time. The Appellant conclude by submitting that considering all the guiding principles for the grant of order for retrial, it was their view that the learned Trial Judge of the High Court was wrong to order for retrial

and he urged the Court to set aside the judgment in that respect and replace the order for retrial with that of acquittal.

17. On her part, Ms Kisoo submitted that the first appellate Court identified two key areas in ordering for a retrial. While relying of the decision in *Pius Olima & Another v Republic* [*supra*) the counsel submitted that in the instant case the 1st Appellate Court considered the issue of failure to plead to charges as an error which required retrial that the offences for which the Appellant was charged, there was a strong prima facie case evidenced by the prosecution and it was a case of great public interest. Further, that while the Appellant raised the issue that he had already been in remand for a period of four and a half years and ordering a retrial would be prejudicial, a conviction on count three would make him liable to pay a fine not exceeding one million or a term of imprisonment not exceeding 10 years or both.

18. Reliance was in this regard placed on section 333 (2) of the *Criminal Procedure Code* and the decision in *Mohamed Salim v Republic* [2020] eKLR for the position that the period in remand should not be a ground to overturn the first appellate Court's orders, and that the sentence already served will no doubt be taken into account if the Appellant was to be convicted after the retrial In conclusion, in urging us to dismiss the appeal, counsel submitted the Appellant had not brought out the evidence that he would be prejudiced by the retrial order by the first appellate Court.

19. The principles that guide the need for a retrial are settled by the various decisions, which were also cited by the Appellant and Respondent's counsel. These principles were restated by this Court in Philip Kipngetich Terer v Republic [supra] as follows:

> " 8. The law as to when a retrial should be ordered has long been settled. In the case of Fatehali Manji v Republic [1966] EA 343 the predecessor of this Court, when dealing with the same issue, gave the following guideline: -
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> > "In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."
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> 9. These principles have been reiterated in several subsequent cases including the cases of *Sospeter Mwangi v Republic*, Criminal Appeal No. 164 of 2005; *Mwangi v Republic* [1983] KLR 522; *Sumar v Republic* [1964] EA 481 and *Muiruri v R* [2003] KLR 552. In *Muiruri v R* [2003] KLR 552, this Court added:
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> > "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala v Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant;

whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

10. In *Mwangi v Republic* [1983] KLR 522 this Court following *Braganza v Republic* (1957) (CA) and *Pyarala Bassam v Republic* [1960] EA 854, stated at page 538 that: -

> "... a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result."

9. From these authorities, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interest of justice on the one hand and those of the accused person on the other."

20. It is not disputed that there were irregularities made by the trial Court as regards the procedure to be employed upon substitution of charges under section 214 of the *Criminal Procedure Code* as noted by the learned Judge of the High Court in her judgment:

> " 46. Two errors however occurred on 28/2/2014 when the final amended charge sheet was presented. The most obvious is the failure by the court to call upon the Appellant to plead to all the charges in the amended charge sheet. The second error was that the court does not seem to have informed the Appellant that he was entitled to recall any of the three witnesses (not one as Mr. Kamau now asserts) who had already testified. Mr. Kamau who attended the session in the lower court did not request to recall any witnesses yet he now asserts that the Appellant was prejudiced by the omission. Obviously Mr. Kamau did not rise up to the occasion. But in light of several previous amendments, it was the duty of the trial court to ensure and record its compliance with Section 214 of the *Criminal Procedure Code*."

21. The main consideration when there is non-observance by a trial Court of the provisions of section 214 of the *Criminal Procedure Code*, and as correctly observed by the learned Judge while citing the decision by this Court in *David Irungu Murage & Anthony Kariuki Karuri v Republic,* Criminal Appeal No.184 of 2004, is whether there was prejudice or failure of justice caused to an accused person in terms of a fair trial. The learned Judge's decision in this respect was as follows:

> "52. In the instant case, the trial court proceeded as if the Appellant had entered a plea of not -guilty to all the charges on the charge sheet presented on 28/2/2014, including those not read out to him. And on the assumption that he did not desire to recall witnesses who had already given evidence. In my considered view, the fact that the substituted charge sheet of 28/2/2014 was the fourth since the arraignment of the Appellant, and included some counts which had previously been the subject of the objections by his former defence counsels, leading to their rejection by the court, is significant.
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> 53. Moreover some key witnesses in the case had already given evidence by 28/2/2014. It is my considered opinion that in the circumstances of this case, the Appellant was prejudiced by these errors. In light of the peculiar

circumstances of this case, it is difficult to say that the court observed the letter and spirit of Sections 207, 208 and 214 of the Criminal Procedure Code."

22. As regards the effects on the Appellant, the learned Judge in this respect did observe at paragraph 39 of the judgment of the High Court that "in his oral submissions on 22/1/2015 Mr. Kamau in arguing a no-case-to answer submitted in respect of the remaining counts, including counts 3 and 4. Thus, his submissions before this court that these latter two counts remained rejected since 29/1/2013 is misleading and not supported by the record of proceedings."; and in paragraph 40 that:

> " As the trial magistrate intimated in her ruling of 29/1/2013, rejection of charges under Section 89 (5) of the Criminal Procedure Code resulted in a discharge and not acquittal. The defence did not object when the amended charge sheet re-introducing the 3rd and 4th count was presented before the succeeding trial magistrate on 28/2/2014. The Appellant's present argument that he was convicted on withdrawn charges (counts 3 and 4) is both erroneous and misplaced. However, upon a careful perusal of the record, this court is disturbed that while ten counts were preferred against the Appellant on28/2/2014, the record of plea taking shows that he did not plead to counts 3 and 7. "

23. It is therefore not evident from the judgment how the Appellant was prejudiced, and particularly in light of the observations made by the learned Judge on the effect of the Appellant not pleadings to counts 3 and 7 which we have reproduced in the foregoing. Bearing in mind that it is the Appellant who raised this as a ground of appeal in the first appellate Court, we note that firstly, the record shows that on the charges were read over and explained to the accused (the Appellant herein), and after recording the Appellant's responses thereto, in which the response to counts III and VII was not recorded, the trial Court recorded that "a plea of not guilty entered on all counts;". Secondly, the Appellant was represented by counsel, who did not raise any objection during the taking of plea and in the ensuing proceedings, and actually submitted on all the counts and evidence adduced thereon at the case to answer hearing and in his final submissions. Lastly, the trial Magistrate also based his conviction and acquittal on the evidence that had been tendered by the prosecution on the two counts.

24. We therefore find that the finding as regards prejudice having been caused to the Appellant by non-compliance of section 214 was not supported both the evidence and the learned Judge's own findings. Similarly, we find no prejudice in terms of the administration of justice or the public interest given that the Appellant was in effect tried and a decision made based on evidence on the two counts whose plea-taking missing from the record.

25. As regards the exhibit alleged to have been tendered by the Appellant, the learned Judge observed as follows:

> " 60. In light of these omissions in the record, it is difficult to tell whether, as the Appellant now asserts, the disputed appointment letter was exhibited before the trial court at the time of hearing. Equally, from the original and typed record it is impossible to confirm the observations of the trial magistrate in his judgment regarding the matter. Particularly, as I note that this may not have been the first contentious alteration of material parts of the record. In the ruling delivered on 29/1/2013, the initial trial magistrate decried the fact that someone had mischievously altered particulars objected to by the defence in count number 1 between the date of the hearing of objections and her ruling."

26. The learned Judge also noted that the Appellant was prejudiced for reasons that the exhibit, which was an alleged appointment letter, formed a key plank in the Appellant's defence and the irregularities by the trial Court in failing to include the letter in the exhibit list or as a document marked for identification could not be cured by Section 382 of the Criminal Procedure Code.

27. The question that we have agonised over, is how a retrial will remedy this particular prejudice, given that the Appellant's case was that the said letter was already produced in the trial Court and the High Court found that the exhibit was missing from the record. We are also minded in this respect that the duty and power of a first appellate court as set out in the case of *Okeno v Republic* (1972) EA 32 is to submit the evidence adduced in the trial Court as a whole to a fresh and exhaustive examination, weigh conflicting evidence and draw its own conclusion. In our view that was an option that the learned Judge did not consider in the circumstances, given the difficulty that a retrial would present with respect to this particular exhibit.

28. The Appellant has also raised a relevant factor that was not taken into account by the learned Judge in ordering for a retrial, namely the time that had lapsed since his conviction and since the trial commenced. The trial commenced on 2nd January 2013, and the Appellant was convicted on 6th October 2015. His first appeal was determined by the High Court on 7th June 2017, almost two years later, and by that date the Appellant had served majority of the sentences imposed upon him by the trial Court, save for the sentence of 5 years' imprisonment imposed for his conviction for count III. In effect, a retrial would then only be possible for Count III, and including a retrial for the other counts was in error.

29. The conclusion we therefore reach is that the order by the High Court for a retrial was not proper or legal in the circumstances. In this respect we note that the learned Judge of the High Court in allowing the Appellant's first appeal also quashed the Appellant's convictions and set aside his sentences. There was no cross appeal filed against these orders by the learned Judge, and in the circumstances, we allow the Appellant's appeal, and order that he be set at liberty forthwith unless otherwise lawfully held.

30. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF FEBRUARY 2024

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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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

Signed

DEPUTY REGISTRAR