



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kabwere v Republic (Criminal Appeal E044 of 2023)  
[2024] KECA 1470 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1470 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL E044 OF 2023  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**SAID BAGALA KABWERE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at  
Malindi (R. Nyakundi, J.) delivered on 23rd October 2019 in HC)*

**JUDGMENT**

1. The appellant, Said Bagala Kabwere, was charged before the Mariakani Senior Principal Magistrate's Court in SO Case No. 371 of 2013 with the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that, on diverse dates between 6<sup>th</sup> July 2012 and 25<sup>th</sup> August 2013 within Kwale County, he intentionally caused his penis to penetrate the vagina of MT, a child aged 14 years. He faced, in the alternative, the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006, the particulars being that, on the same day and location, he intentionally and wilfully caused his penis to touch the vagina of MT, a girl child aged 14 years. The appellant pleaded not guilty and the matter proceeded to hearing and, at the conclusion, the learned trial magistrate found the appellants guilty on the principal charge, convicted him accordingly, and sentenced him to 20 years imprisonment.
2. Aggrieved by the said decision, the appellant lodged an appeal to the High Court vide Malindi High Court Criminal Appeal No. 56 of 2018. Upon determination of the appeal, the learned Judge, on 23<sup>rd</sup> October 2019, upheld both the conviction and sentence. It is that determination that provoked this appeal.
3. In order to determine the appeal, albeit being a second appeal, we find it necessary to set out in summary the evidence adduced before the trial court.



4. After voir dire examination, MT (PW1) testified that she was born in 1999 and was 16 years old; that the appellant was known to her, and that she started having sexual relationship with him on 6<sup>th</sup> July 2012; that, in August 2013, they had sexual intercourse many times at Mwache River, which was their rendezvous, and that as a result, she conceived; and that, when the appellant wanted to terminate the pregnancy, she reported the matter. PW1's father (PW2) testified that, on 25<sup>th</sup> August 2013, he arrived home from work at 6.00 PM and found that PW1 had gone to fetch water at the river; that PW1 did not return home till 8.00 PM; that, when asked where she was all that time, PW1 initially declined to explain her whereabouts; that after some beatings, PW1 disclosed that she had sex with the appellant by the river, and that she had been having a sexual relationship with the appellant for a while; that, in the company of PW1, the appellant and the appellant's mother, proceeded to the local chief, who referred them to the police; and that he took PW1 to Rabai Health Centre where she was examined and found to be pregnant. PW3, PC Bernard Mwaura attached to Taru Police Station, confirmed that, on 4<sup>th</sup> September 2013 when he reported to work at 7.50am, he found that a report of defilement had been made at the station the previous day; that the complaint was in respect of PW1, who was 15 years old having been born on 15<sup>th</sup> April 1998; that PW1 later returned to the station where he took her statement in which she disclosed a case of continuing defilement since 2012; that PW1's father also recorded his statement; that, by then, the appellant was already in police custody; that he sent PW1 to the Hospital for examination which confirmed that she was pregnant; and that he issued PW1 with a P3 form.
5. PW4, Rose Mwaki, a Clinical Officer at Samburu Health Centre, testified on behalf of her colleague, Dr. Thuo, who prepared a P3 form for PW1. According to the report, which PW4 exhibited, PW1, a girl aged 15 years, was brought to the Health Centre on 4<sup>th</sup> September 2013 with a history of having been sexually defiled by a person known to her; that PW1 had last menstruated on 24<sup>th</sup> July 2013; that there was no hymen, although there was no discharge and no injuries noted; that, upon examination and tests undertaken, PW1 was found to be 14 weeks pregnant; and that there was a secondary penetration evidencing defilement.
6. PW5, APC Kipkorir Leonard's evidence was that, on 3<sup>rd</sup> September 2013 at around 11.30 am, he received the appellant who was brought to the police station by an Assistant Chief, Kasemeni, on allegations that he had an affair with a class 7 pupil.
7. When placed on his defence, DW1 denied the allegations made against him. It was his evidence that PW1 was initially reluctant to disclose the person who defiled her, but that she was told to say that it was the appellant who was responsible because the appellant was the sole breadwinner of his family. It was his evidence that, as a mature person, he could not get involved with PW1.
8. The appeal before the High Court was based on the grounds that: the learned trial magistrate did not consider that the charge sheet was defective for omitting the word "unlawfully"; that the learned trial magistrate erred in law and fact in failing to find that the victim was not a straight forward person hence the admission of her evidence in accordance with section 124 of the *Evidence Act* was bad in law; that the learned trial magistrate erred in law and in fact in failing to consider that DNA test in this case was useful to ascertain the paternity of the child; that the learned trial magistrate erred in law and fact by not considering that the prosecution did not prove their case beyond reasonable doubt; and that the learned trial magistrate erred in law and fact in not considering that his defence was reasonable.
9. In his appeal, the appellant urged us to allow the appeal, set aside his conviction and quash the sentence on the grounds that the learned Judge erred in law: by upholding his conviction on the basis of a charge that was not proved; by upholding his conviction, and yet the prosecution failed to prove their case beyond reasonable doubt; by failing to find that penetration was not proved as required in law; in failing



- to appreciate that the conduct of PW1 did not paint a picture of someone who was defiled; in failing to appreciate that the medical evidence was not produced in court by the maker and the appellant never consented to the production; in failing to appreciate that both the appellant and PW1 were age mates and, as such, the appellant should not be severely punished for an act done in the mystery of growing up which is a process and not a series of disjointed leaps; by affirming the sentence as imposed by the trial court, and in failing to find that it was imposed in mandatory terms without consideration of the appellant's mitigation or the unique facts and circumstances of the offence; and in failing to find that the mandatory sentence was unconstitutional as it deprived the trial court and the learned Judge their legitimate powers and the discretion conferred by sections 216 and 329 of the *Criminal Procedure Code* to take into consideration the mitigation or the unique facts and circumstances of the offence.
10. We heard the appeal on the Court's GoTo virtual platform on 21<sup>st</sup> May 2024 when the appellant appeared in person from Manyani Maximum Prison while learned Prosecution Counsel, Ms. Valarie Ongeti, held brief for Ms. Nyawinda for the respondent. Both the appellant and Ms. Ongeti relied entirely on their written submissions.
  11. In his submissions, the appellant cited: section 2 of the *Sexual Offences Act*, the *Oxford Dictionary* and *Black's Law Dictionary*, highlighting what amounts to penetration; *Julius Kioko Kivuva v R* [2015] eKLR, submitting on the necessity for the victim of defilement to give sensory details such as what actually happened in the act of having sex; *Evans Wanjala Wanyonyi v R* [2019] eKLR; and *Ambrose Mwawindo Ngwatu v R* [2016] eKLR, clarifying that, in offences of defilement, what is to be proved is penetration and not pregnancy; *Re Winship* 397 US 358 [1970]; and *IOO v R* [2015] eKLR, stressing on the standard of proof in criminal cases; *Eliud Waweru Wambui v R* [2019] eKLR, submitting on the need to have a re-look at the sentences under the *Sexual Offences Act*; *Hamisi Bakari & Another v R* [1987] eKLR; *Francis Opondo v R* [207] eKLR; *BW v R* [2019] eKLR; *Christopher Ochieng v R* [2018] eKLR; *Jared Koita Injiri v R* KSM Criminal Appeal No. 93 of 2014; and *Joshua Gichuki Mwangi v R* [2022] KECA 1106 (KLR), submitting on the proper exercise of discretion in sentencing; and *Peter Saikipor Naivioma v R* [2019] eKLR where the sentence was reduced from 20 years to 1 year in a case where the complainant and the appellant were in a relationship
  12. In their submissions, the respondent cited section 361(1) of the *Criminal Procedure Code* and the case of *Moses Nato Raphael v R* [2015] eKLR, submitting on the mandate of this Court on second appeal; *Bassita v Uganda* SC Criminal Appeal No. 35 of 1995, highlighting the fact that penetration may be proved by circumstantial evidence and not necessarily by oral and medical evidence; *Muganga Chilejo Saba v R* [2017] eKLR, highlighting that the use of euphemisms is acceptable as evidence by children of the act of penetration; *Nzau v R* [2022] KECA 502 (KLR), clarifying that DNA testing to probe penetration is not a mandatory requirement; and *Bernard Kimani Gacheru v R* [2002] eKLR, stressing that sentence is a matter that rests in the discretion of the trial court.
  13. This being a second appeal, our mandate under section 361(1)
    - a. of the *Criminal Procedure Code* is limited to matters of law as reiterated by this Court in *Karingo v R* [1982] KLR 213 in which it was held that:
 

“ A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karoti S/O Karanja versus Republic [1956] 17EACA 146).”



14. We are therefore not entitled to interfere with findings of fact unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that, looking at the evidence as a whole, they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere with the decision. In such appeals, the position of this Court as stated in *Nyale v Republic* [2023] KECA 1081 (KLR) and *Rashid v Republic* [2023] KECA 596 (KLR) is that we are enjoined to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless, on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to interfere. See *Adan Muraguri Mungara v R* [2010] eKLR.

15. In this appeal, just like in any other appeal, we can only address ourselves to the findings of the learned Judge based on the grounds that were placed before him, unless it is contended that the learned Judge did not address himself to the grounds urged before him. In other words, we cannot, in all fairness, fault the learned Judge in respect of grounds not the subject of the appeal before him, but which are urged before us for the first time and which the learned Judge had no opportunity to address himself on. The practice of taking, for the first time on appeal, a matter not taken up before the courts below, save for jurisdictional matters, was deprecated by the predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 in which it was held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.”

16. A consideration of the grounds of appeal before the High Court and the grounds before us reveals that the matters which we can properly consider are: whether the prosecution proved its case beyond reasonable doubt; and whether the sentence was lawful. Regarding the first ground, the learned Judge, after setting out the ingredients required to be proved in order for the offence of defilement to be proved, held that:

“From the charge sheet and opening statement of the complainant at the time of the trial she was aged 15 years...As stated by the complainant, PW1, she had sexual intercourse with the appellant on several occasions. That piece of evidence was corroborated by the medical report produced by PW4 Rose Mwaki a clinical officer at Samburu Health Centre on behalf of Dr. Othuo pursuant to Section 77(1) as read in conjunction with Section 33 (1) (b) of the *Evidence Act*. According to PW4 the complainant’s medical examination showed a ruptured hymen and 14 week old pregnancy. Though there was no DNA report with regard to the pregnancy, PW4’s testimony corroborated the evidence of complainant that she had sexual intercourse which was not controverted by the appellant...At the trial the



complainant testified that she did not know her age but her father PW2 produced exhibit 2 to demonstrate that she was born on 15<sup>th</sup> April, 1998. The P3 form also assessed her age at 15 years which corroborated PW2's testimony. It is clear therefore the complainant was aged 15 years old. Referring to the record the complainant's age was proved by documentary evidence and that of her father, PW2. The actual age of the complainant was therefore proved beyond reasonable doubt...In support of her evidence on identification, PW 1 told the trial court that this was a long standing romantic relationship accompanied with series of sexual intercourse experience. It is relevant that complainant was not a stranger to the appellant. She had interacted with her before on several occasions.”

17. It was submitted by the appellant that penetration was not proved since PW1's evidence was not clear that the appellant inserted his genital organs into her genital organs; and that PW1 did not explain what she meant by having sex as she did not explain what she saw, heard, felt or even experienced. The respondent, on the other hand, submitted that PW1 knew the appellant and stated that it was the appellant who impregnated her; and that PW2 stated that she was told by PW1 that they were at the river and had sex while the Clinical Officer produced a P3 Form which established that PW1 was 14 weeks pregnant from a secondary penetration.

18. As we have stated above, this Court, in this appeal, is barred from delving into matters of fact unless there was no evidence to prove that fact. In this case, PW1 testified that:

“We had sex in August 2013. We had sex many times at Mwache River. He used to go wait for me there and I used to go to him...He knew that I was pregnant and he wanted to remove it so I reported.”

19. From the findings of the learned Judge reproduced above, it is clear that the learned Judge, as was the learned trial magistrate, was satisfied that there was evidence of penetration. While we agree with the decisions in *Evans Wanjala Wanyonyi v R* (*supra*) and *Ambrose Mwawindo Ngwatu v R* (*supra*) that pregnancy or conception of a child is not an ingredient of the offence of defilement, in this case PW1's evidence was not just that of pregnancy. There was evidence independent of the pregnancy of sexual encounters between the appellant and PW1 spanning a considerable period of time. Both findings of the trial court and the first appellate court were supported by the evidence of PW1 and PW4. We therefore have no basis for reaching a different conclusion from the concurrent findings by the two courts below on the act of penetration.

20. The appellant submitted that their relationship with PW1 was consensual; that PW1 had not been forced into it, and that it was only reported because PW1 got pregnant; that it was unfair to impose 20 years imprisonment when the complainant was enjoying the relationship; and that the appellant fell within the defence under section 8(5) of the *Sexual Offences Act*.

21. We take to mind the fact that the critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant. Consent or lack of it is not one of the ingredients of that offence. Once the said ingredients are proved, the offence of defilement is complete and the appellant faces conviction unless the circumstances permit for the invocation of the statutory defence of apparent age in section 8(5) of the *Sexual Offences Act*, which provides that:

It is a defence to a charge under this section if—

- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and



- b. the accused reasonably believed that the child was over the age of eighteen years.
22. In his submissions, the appellant contends that he fell within that defence. This submission is being made before us for the first time. The appellant’s defence before the trial court was that he never defiled PW1. He stated in his own words that:
- “I am a mature person with experience and I can’t go with such a person.”
23. The defence of apparent age, having not been placed before the trial court, the learned trial magistrate stated that:
- “The accused has not raised the defence contemplated by section 8 of the *Sexual Offences Act* No. 3 of 2006. In any event, the girl having been 13 years at the onset of defilement, and the two having known each other as residents of the local area, it cannot be averred that the accused mistook the complainant for an adult.”
24. The defence cannot be raised at this stage. As this Court, faced with similar circumstances in *Alfayo Gombe Okello v Republic* [2010] eKLR, held as follows:
- “...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”
25. In view of the foregoing, the ground of appeal relating to the alleged deception fails.
26. According to the Appellant, being unrepresented, he was not given an opportunity to object to production of the P3 Form by PW4 who was not the maker as the trial Court ordered that it was a public document. The respondent did not submit on this issue. Our perusal of the record of the proceedings before the trial court shows that the appellant was not asked whether or not he was objecting to its production before it was admitted in evidence. The learned trial magistrate, in our view wrongly concluded that being a public document, the same could be admitted without seeking the appellant’s view. Since the document in question was being produced by a person other than its maker, we are of the view that the appellant ought to have been given an opportunity to comment on its admissibility before it was produced. The learned Judge does not seem to have addressed himself to this issue but simply mentioned that:
- “As stated by the complainant PW1, she had sexual intercourse with the appellant on several occasions. That piece of evidence was corroborated by the medical report produced by PW4 Rose Mwaki a clinical officer at Samburu Health Centre on behalf of Dr. Othuo pursuant to Section 77(1) as read in conjunction with Section 33 (1) (b) of the *Evidence Act*.”
27. We agree that the manner in which the P3 form was admitted was irregular and that the learned Judge erred in not addressing himself to the issue. That said, the irregularity is only material if it occasioned prejudice to the appellant. Otherwise it would be curable under section 382 of the Criminal Procedure Code. In this case, since PW1’s evidence was that the defilement had been going on for a very long time, the irregular admission of the P3 form was, not prejudicial to the appellant because as held by the Supreme Court of Uganda in the case of *Bassita v Uganda* S.C. Criminal Appeal No. 35 of 1995:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and



corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

28. It was also submitted by the appellant that the mandatory minimum sentence imposed was harsh and excessive, and that it infringed on the appellant's right to fair trial under Article 50 of the *Constitution* and Article 14 of the *International Convention on Civil and Political R* (ICCPR). In response, the respondent submitted that the sentence imposed was not unconstitutional.
29. Regarding the issue of the severity of the sentence, we take to mind the provision of section 361 of the *Criminal Procedure Code*, which reads:
1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
    - a. on a matter of fact, and severity of sentence is a matter of fact;
30. This Court's position was reiterated in *Robert Mutungi Muumbi v Republic* [2015] eKLR that:

“Section 361(1)(a) of the *Criminal Procedure Code* restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing. In *Bernard Kimani Gacheru v Republic*, CR APP. No. 188 of 2000 (Nakuru), the Court reaffirmed the principle thus:

‘It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.’”

31. In its recent decision, the Supreme Court in Petition No E018 of 2023 – *R v Joshua Gichuki Mwangi* held that:

“Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or



commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

32. We cannot therefore address ourselves to the severity of the sentence at this stage.
33. In this appeal, apart from the severity of the sentence, it was submitted that the sentence infringed on the appellant's right to fair trial under Article 50 and Article 14 of ICCPR. While the legality of a sentence, as opposed to severity thereof, may, if properly taken, be interrogated by this Court, the Supreme Court has held that it would be inappropriate to take up such an issue when the same was not raised before the two courts below. In *R v Joshua Gichuki Mwangi*, (*supra*), that Court expressed itself as follows:

"(61) ...we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. That is why the Supreme Court of the United States, which has actively challenged mandatory death sentences since the early twentieth century, ruled in *Miller v Alabama*, 132 S. Ct. 2455 (2012) that imposing mandatory life imprisonment without parole for juvenile offenders at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Similarly, the European Court of Human Rights has on several occasions applied the "grossly disproportionate test," for instance in the cases of *Harkins and Edwards v United Kingdom*, 2012 ECHR 45 and *Murray v Netherlands*, 2016 ECHR 408 where the court found that mandatory sentences of life imprisonment without the possibility of parole go against Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition from torture and inhuman and degrading punishment. Canada has also actively struck down minimum mandatory sentences and recently a 9 Judge bench of the Supreme Court of Canada in *R. v Safarzadeh Markhali*, 2016 SCC 14, reiterated its Constitutional commitment for proportionality in sentences. In Australia, in the case of *Magaming v The Queen*, (2013) 253 CLR 381 the High Court struck down minimum mandatory sentence in the Migration Act finding that the statute usurped judicial power by granting the prosecution office the discretion to determine the minimum penalty to be imposed by allowing them to elect which offences to charge suspects with.

(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in *Murutetu* which must remain binding to all courts below."



- 34. Mindful of that decision, it is clear that this Court cannot take up the issue of the constitutional validity of minimum or mandatory sentences other than for the offence of murder, unless the issue is properly placed before the High Court and escalated through the appropriate channels to this Court.
- 35. In sum, the appeal against the conviction and sentence is without merit and as such, we dismiss the appeal and uphold the judgement of the High Court of Kenya at Malindi (R. Nyakundi J.) delivered on October 23, 2019 in HCCRA No. E056 of 2016.
- 36. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**G. v ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

