Ochieng v Republic (Criminal Appeal 136 of 2019)
[2024] KECA 1822 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1822 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 136 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

DENNIS OCHIENG OCHIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Siaya (J. A. Makau, J.) dated 12th April 2018 in HCCR No. 11 of 2016)

JUDGMENT

1. The appellant, Dennis Ochieng Ochieng, was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code at the High Court at Siaya, in High Court Criminal Case No. 11 of 2016. It was alleged that on the night of 14th and 15th May 2016 at Madede village, Nyandiwa Sub-Location within Siaya County, he murdered his wife, Linet Akinyi. He pleaded not guilty to the charge and the matter proceeded to trial. In the impugned judgment dated 12th April 2018, Makau J, convicted the appellant of the offence and sentenced him to life imprisonment.

2. Dissatisfied, the appellant preferred the present appeal faulting the learned judge for failing to find that the offence was not proved to the required standard, convicting the appellant on circumstantial evidence, shifting the burden of proof to the appellant, relying on contradictory evidence and in imposing a harsh and excessive sentence.

3. Briefly, the facts of the prosecution case were that, Fredrick Odhiambo, a child of both the deceased and the appellant aged 10 years was at home with his grandmother, his uncle Evans Odhiambo Owuor (Evans), Sammy, Justus, his grandfather, and his siblings, when the appellant in the company of his friends came for his wife (the deceased), but left without her and the children. Before the appellant left the deceased and his children at the deceased' parent's home, he had discussions with the deceased's parents who included Evans Oiambo (PW2), Monica Awuor Owuor (PW3), Samuel Owino Gondia

(PW4), Florence Anyango Owuor (PW5), and Clement Olango Onyango (PW6). The deceased had gone back to her parent's home after some wrangles with her husband. After discussions, the appellant told the deceased's parents that if the deceased accompanied him back or returned to the maternal home, she would not return alive. On 11th May 2016, the appellant went back to the deceased's parent's home at Sigomere, sought forgiveness, and after both sides agreed on the way forward, he was allowed to leave with the deceased. However, after 4 days, on the night of the 14th/15th May, 2016, the appellant reported to Siaya Police Station concerning the death of his wife.

4. PC Sammy Murange Ndungu (PW8), the investigating officer, told the court that on 15th May 2016 at 11:00 am, the appellant reported vide OB No. 8 of 15th May 2016 that during the night of 14th/15th of May, 2016 he had a domestic quarrel with his wife the deceased Linet Akinyi and had a scuffle as a result of which he killed her. He gave his name as Erick Ochieng Ochieng. Together with the appellant, they proceeded to the scene at Madede village where the appellant led the team to where the deceased's body was about 20 meters from the appellant's house. On examining the body, they noted that it had several cut wounds on the head and back and a bruise on the right eye.

5. PC Murange further testified that on proceeding to the appellant's house, they found assorted clothing stained with blood, and there was some blood on the floor and the mattress. Outside the house, they found a broken chair with pieces stained with blood and a one-meter-long piece of wood stained with blood.

6. Further, during his investigation, PC Murange established that Erick Ochieng Ochieng and Dennis Ochieng Ochieng was one and the same person. He confirmed that Dennis Ochieng Ochieng, the appellant herein, was the person who made the report to him.

7. Dr. Philip Brian Okoth conducted a postmortem examination on the deceased's body and opined that the cause of death was due to a head injury with hemorrhage shock secondary to assault (blunt force trauma).

8. Placed on his defence, the appellant opted to give a sworn statement and did not call any witnesses. The appellant testified that the deceased was his late wife having married her in 2005; and that they were blessed with five (5) children. On 10th May 2016 he went to his place of work leaving his family at home. On returning at 5.00 pm, he found no one at home. He then called his wife who told him she had gone to Ugenya at her parent's home and he should talk to her brother, Evans, who after talking to him, asked the appellant why he wanted to establish a family with his sister and yet he had not paid dowry. The appellant, in the company of elders and friends went to the deceased's home arriving there at 7.00 pm. Due to time, they did not conclude the discussions; and he left. On 11th May 2016, he returned to Ugenya, at his wife's parents' home, they discussed the matter and reached an agreement as he offered to take dowry on Saturday of 15th May 2016; and he was allowed to return home with his wife; but the children remained behind. The appellant stated that he was to be accompanied to Ugenya on 15th May 2016 by his brother, George Oloo Ochieng; but when he told him, he asked him to reschedule for the next Saturday as he was busy. He then informed the people of Ugenya.

9. On 14th May 2016, he went to work and on return, he did not find anyone at his home. He took a bath and went to sleep. At around

10. 00 pm he heard the door being knocked and heard his wife's voice. When he opened the door for her, he noted that she was drunk and her clothes were covered with mud. He quarreled her to which she told him not to quarrel with, her as she struggled to reach home. He then undressed her, put her on the bed and they slept. That at 5.00 a.m. he woke up and found his wife sleeping on the floor. She told him she was not feeling well as she was injured requesting him to take her to the hospital.

10. He noted that she had been injured on her cheek where the appellant saw a bruise that had dried blood. Since he did not have money he looked for someone to buy his cow and got one at 7.30 am. On going to his house to check on his wife, he did not find her in the house. He then went to tether his other livestock and while doing so he found his wife lying on the ground in the bush. He checked her and found her dead and naked save for her panty. He then went to the house picked a sheet and covered her body. He went to his brother's home and found nobody, hence he decided to report to Siaya Police Station. He then took police to the scene and showed them where the deceased's body was. The body was collected in his presence and taken to Siaya County Referral Hospital Mortuary. He further stated that on 10th May, 2016 when he went to his inlaws he did not issue threats to the effect that if his wife came to Alego with him, she would not go back to Ugenya alive. He denied having called Evans or telling him he did what he told them he would do to his wife. He claimed that he did not even have his phone with him as it had been taken by police on 20th May 2016. He denied that on 14th May 2016, he assaulted his wife.

11. In support of the appeal the appellant submits that malice aforethought was not established given the extent of the injuries as indicated on the post-mortem report. The doctor opined that the cause of death was head injury secondary to blunt force trauma. On being cross-examined, the doctor indicated that the cause of injury could be consistent with a fall on a hard object.

12. Regarding the contradictory evidence, the appellant submitted that the prosecution witnesses were inconsistent on whether the deceased's son was present during the meeting, and the name of the person who made the initial report, as indicated in the OB. Reliance is laid on the case of Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993.

13. On sentence, the appellant submitted that the sentence meted was excessive in the circumstances of the case; that in sentencing the appellant, the learned judge failed to consider the mitigating factors put forward by the appellant, concluding that the offence was violence against women when there was no evidence of violent acts against the deceased. Relying on the case of Chai vs. Republic [2022] eKLR the appellant prayed that the sentence of life imprisonment be set aside and a custodial sentence of 20 years be imposed.

14. The appeal is opposed by the respondent who contends that malice aforethought was proved to the required standard; that PW1, PW2, PW3, PW4, PW5, and PW6 testified to having heard the appellant threaten to kill the deceased; and that the alleged apology by the appellant was to woo the deceased back to her matrimonial house to actualize his threats.

15. It is further submitted that malice aforethought was also established through the injuries sustained by the deceased. The doctor observed multiple bruises over the right arm and forearm, bruising on the right side of the neck and face among others. Taken in totality, these injuries could not have been occasioned by a fall as suggested by the appellant.

16. Regarding contradictions as to whether the deceased's son was present during the first meeting that took place at the deceased's brother's? and whether the OB extract indicated the person who made the initial report as Eric Ochieng Ochieng, yet the appellant is Dennis Ochieng, the respondent contends that not all discrepancies are fatal to the prosecution case. Further, this case did not turn on the evidence of PW1 alone and secondly, whether the deceased's son was present or not is very remote and does not go to the core of the case to render the trial fatal.

17. As regards the allegation that Erick Ochieng Ochieng is different from Dennis Ochieng Ochieng, it is submitted that the Investigating Officer explained that the person who first reported to the police gave his name as Erick Ochieng Ochieng and was so booked. The police never released him and he

led them to the place where the deceased was. It later turned out that the person's name was Dennis Ochieng Ochieng.

18. On sentence, it is contended that although in his submissions the appellant complains that his mitigation was not considered, it is evident on record that the appellant was represented by counsel who mitigated on his behalf. It is upon the mitigation that the court considered the peculiar facts of the case and meted out a life sentence, which sentence is sufficient and ought not to be disturbed. However, being cognizant of this court's decision declaring the life sentence to mean 30 years' imprisonment, the respondent concedes to the life sentence being substituted with 30 years' imprisonment.

19. This being a first appeal, the Court is obligated to consider the evidence presented before the trial court and arrive at its own independent conclusions. However, the Court must remain conscious of the fact that, unlike the trial court, it did not have the benefit of hearing and observing the witnesses testify in order to gauge their demeanor. In this regard, this Court in Dickson Mwangi Munene & Another vs. Republic [2014] eKLR stated:

> " This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

20. Having carefully considered the submissions by counsel, the authorities cited, and the law, the issues that arise for determination are whether the offence of murder was proved beyond reasonable doubt, to sustain a conviction, and if so, whether the appellant's sentence should be reduced.

21. The appellant was charged and convicted of the offence of murder.

Section 203 of the Penal Code provides as follows:

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

22. To sustain a conviction on the charge of murder, the prosecution must prove that the death of the deceased occurred; that the death was caused by the appellant, and that the appellant had the required malice aforethought. These three essential ingredients must be proved beyond any reasonable doubt as outlined in the case of Anthony Ndegwa Ngari vs. Republic [2014] eKLR as follows:

> " ...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."

23. There is no dispute that the deceased died. The fact was admitted by the appellant himself in his defence when he said he found the deceased outside their house dead. The death was confirmed by Dr. Okoth who conducted the autopsy on the deceased's body and opined that the cause of death was due to a head injury with haemorrhagic shock secondary to assault.

24. The question is who caused the head injury to the deceased? And did the person have any malice aforethought? There was no direct evidence linking the appellant to any act or omission that resulted in the deceased's injury. The evidence against the appellant was, therefore, basically circumstantial.

25. The principles applicable in regard to circumstantial evidence have been developed and distilled by this Court, and its predecessor over the years. In PON vs. Republic [2019] eKLR the Court rendered itself as follows:

> " In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased met her death. There is no such evidence hence the recourse to circumstantial evidence. Though not direct, circumstantial evidence, as this Court stated in Musili Tulo vs. Republic Criminal Appeal No. 30 of 2013:
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> > " ..... is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."
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> To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71.
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> In Rex vs. Kipkerring (supra) the court explained that:
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> > ' In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.'
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> Simoni Musoke vs. R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co- existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of Omar Mzungu Chimera vs. R Criminal Appeal No. 56 of 1998, the Court stated that:
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> 'It is settled law that when a case rests on entirely circumstantial evidence, such evidence Must satisfy three tests:
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> i. the circumstances from which an inference of guilt is to be drawn, must be cogently and firmly established;
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> ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
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> iii. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

26. In Republic vs. Mohammed & Another (Petition 39 of 2018) [2019] KESC 48 (KLR) the Supreme Court addressing the application of circumstantial evidence, cautioned that;

> " 58 However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The court "should proceed with circumspection when drawing firm inferences from circumstantial evidence." The court should also consider circumstantial evidence in its totality and not in piecemeal. As the Privy Council stated in Teper vs. R [1952] AC at p. 489
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> > " Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."
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> 59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable, and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another vs. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence, "...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, ..."
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> 60. As was further stated in the case of Musili vs. Republic CRA No.30 of 2013 (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

27. The circumstantial evidence implicating the appellant was, first and foremost, that of Evans, the deceased brother, and Sammy Murage, the investigating officer. Their evidence was that on 16th June 2016, the appellant called Evans and informed him that he had killed his sister as he had threatened. Further, in their evidence Fredrick, Evans, Monica, Samuel, and Florence all confirmed being in the meeting held on 14th May 2016 in which the deceased and the appellant sought their dispute to be resolved and heard the appellant issuing threats that if the deceased would go to his area of Alego, he would kill her.

28. According to Sammy, the appellant came to the police station and reported that he had murdered his wife. He took the police to the site where the deceased's body was found naked with physical injuries. When Sammy visited the appellant's home, he noted that the appellant stayed alone. Inside the house, they recovered the deceased's blood-stained clothes and blood-stained mattress, and noted that there

was blood on the floor. No explanation was offered by the appellant on how the items came to be at his home and where the blood came from. Section 111 of the *Evidence Act* provides inter alia that:

> "(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

29. By virtue of section 111 of the *Evidence Act*, the burden of proof shifted to the appellant to give a reasonable explanation as to how the deceased blood-stained clothes were found in the appellant's house.

30. The Section further provides that where the burden shifts to an accused the same shall only be deemed to be discharged if; the prosecution proves beyond reasonable doubt that such circumstances exist and that the accused will only be entitled to an acquittal of the offence where the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person.

31. The appellant did not offer any explanation as to what happened to the deceased or what could have led to the deceased's body being found in the bush. In light of the evidence that was before the trial court, the only rational conclusion is that the appellant was the one who caused the deceased the head injury and threw her body in the bush.

32. The circumstances that were established before the trial court were incompatible with the innocence of the appellant, and are not capable of explanation upon any other hypothesis, other than that the appellant was the person who caused the injury to the deceased resulting in her death and disposed of the body in the bush.

33. The appellant did not discharge the burden of explaining how the deceased's blood was found in his house but only claimed that on the fateful night, the deceased came home drunk with an injury on her cheek. During the night, the deceased fell sick and since he did not have money, he went to look for someone to buy his cow to get money to take the deceased to hospital. On coming back, he did not find her in the house, only to find her lying naked and dead in the bush. The trial court was justified in rejecting this defence as it was completely displaced by available prosecution evidence.

34. The circumstances in which the injury was inflicted on the body of the deceased and the manner in which the body was disposed of, left no doubt that the person who inflicted the injury and disposed of the body, intended to cause the deceased's death and therefore malice aforethought can be inferred under Section 206[1] of the Penal Code.

35. Circumstantial evidence is often said to be the best evidence as it is the evidence surrounding the circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. (See. Musili Tulo vs. Republic CR. APP. No. 30 of 2013). Given the foregoing just like the trial court holding, there are no other co-existing circumstances weakening the chain of events relied on by the prosecution and the trial court to find a conviction. The trial court was right in convicting the appellant based on circumstantial evidence.

36. The appellant raised the issue that the prosecution evidence was contradictory and inconsistent. In his submissions, the appellant stated that the inconsistencies were with respect to whether the deceased's son was present during the meeting and the name of the person who made the initial report as indicated in the OB.

37. These contradictions were minor and did not shake the overwhelming evidence adduced by the prosecution witnesses. The discrepancies are not on material particulars. They are minor contradictions that have not changed the strong prosecution case and have not prejudiced the appellants in any way. The Court of Appeal in Erick Onyango Ondeng vs. Republic (2014) eKLR, cited with approval the holding in Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003) UGCA, 6; where the court stated:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

38. Similarly, in Joseph Maina Mwangi vs. Republic [2000] eKLR, this Court (Tunoi, Lakha & Bosire JJ.A.) stated:

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

39. The appellant argued that the OB extract indicated the person who made the initial report as Eric Ochieng Ochieng yet he is Dennis Ochieng. In his determination, the learned judge noted the following;

> " PW8 further stated that in the course of his investigation, he established that Erick Ochieng Ochieng and Denis Ochieng Ochieng is the same and one person. He identified the OB. No. 8 of 15th May 2016 of 11:00 am as MFI-P3 and OB No. 37 of 16th May 2016 at 5:15 as MFI-P4. He identified the person who made report to him as Dennis Ochieng the accused."

40. Be that as it may, the minor discrepancies alluded to by the appellant in his submissions did not affect the overwhelming evidence presented by the prosecution. An evaluation of the evidence of each of the prosecution witnesses discloses that it was clear, consistent, and cogent with each testimony and, to a large extent, corroborating the other. Any minor flaws in the evidence were curable by section 382 of the Criminal Procedure Code. The appellants' conviction was therefore safe.

41. Finally, the appellant complains that the sentence imposed is harsh and excessive in the circumstance. it is important to note that this court can only interfere with a sentence passed by the trial court if it is satisfied that the trial court erred in the exercise of its discretion. In Ogolla s/o Owuor vs. Republic, [1954] EACA 270 the East African Court of Appeal stated thus:

> " The court does not alter a sentence unless the trial judge acted upon wrong principles or overlooked some material factors. To this, we would add a third criterion namely, "that the

sentence is manifestly excessive in view of the circumstances of the case (R vs. Shershowsky (1912) CCA 28TLR 263)."

42. From the record, the appellant was sentenced to life imprisonment which sentence he complains to be harsh and excessive in the circumstances. On its part, the respondent concedes to the appeal on sentence owing to the emerging jurisprudence declaring the life sentence to mean 30 years' imprisonment.

43. The appellant has urged the Court to reduce the life imprisonment imposed by the trial court and sentence the appellant to 20 years' imprisonment. This Court in the case of Evans Nyamari Ayako vs. R Kisumu Cr.A No 22 of 2018 held that:

> "... we are in agreement that an indeterminate life sentence falls afoul the provisions of Articles 27 and 28 of our Constitution purposively interpreted. We also find that there is an emerging consensus that the evolving standards of human decency and human rights to which Kenya has agreed to adhere to by virtue of Articles 2(5) and 2(6) of *the Constitution* that indeterminate life imprisonment is a cruel and degrading punishment which violates our constitutional values. Our conclusion is based on the consistent trend in many states towards abolition of life imprisonment or its re-definition to a term sentence... This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

44. By parity of reasoning, the appeal on sentence be allowed to the extent of ordering that the sentence of life imprisonment imposed on the appellant shall translate to 30 years' imprisonment from when he was convicted. In all other aspects the appeal on sentence fails.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR