Musa v Republic (Criminal Appeal 18 of 2020)
[2023] KECA 262 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 262 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 18 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

MARCH 17, 2023

BETWEEN

ALI IBRAHIM MUSA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya, (Ombija, J.) dated 9th October, 2014 in Milimani HCCR. Case No. 80 of 201)

JUDGMENT

1. On October 9, 2014, the High Court (Ombija, J.), in the exercise of its original criminal jurisdiction, convicted and sentenced the appellant, Ali Ibrahim Musa, "the appellant", to death for the offence of murder.

2. Aggrieved by the decision, the appellant lodged the instant first appeal and invited us, on the basis of his eight grounds of appeal in the supplementary memorandum of appeal dated October 19, 2020 which we shall consider shortly, to find that his conviction was based on errors of fact and law and to allow the appeal, quash the conviction and set aside the sentence. The respondent thinks otherwise and contends that the conviction and sentence was well founded, merited and unimpeachable.

3. The information upon which the appellant was tried and convicted charged him with the murder of Yusuf Hussein Ali, ("deceased"), on October 3, 2010 contrary to section 203 as read together with section 204 of the *Penal Code* at Bulla power area in Mandera Township within the former North Eastern Province.

4. The prosecution case was founded on the evidence of eight witnesses. Briefly stated, Ali Maalim Abdikadir, PW1 stated, on the October 3, 2010 at around 8.00pm while at home, the deceased who was his brother came crying for help and picked a rungu and ran back to where he was coming from. He ran after him and by the time he got to him, he found the appellant stabbing him before he fell

down instantly. That when he tried to lift him up, the appellant stabbed him on the neck too and he became unconscious and only regained consciousness while in hospital. A week later, he learnt that the deceased had passed on.

5. According to the evidence of Hussein Mohammed Gurash, PW2, on the fateful day whilst at home at around 8.00 pm, he heard screams from a distance and came out to find out the cause. It was then that he saw the appellant stabbing the deceased about two metres from where he was standing. That he also saw PW1 go to the scene and upon arrival, the appellant stabbed PW1 as well. The appellant thereafter ran away when he saw the neighbours approach the scene while threatening anyone who would follow him with unknown consequences.

6. Hussein Osman Ibrahim, PW3 while he was in his house, heard screams from about 100 metres away, and when he got out to find out what was happening, he saw the deceased lying on the ground and the appellant had escaped while PW1 had been injured and was lying on the ground as well. That he organized for the two injured brothers to be taken to hospital and later made a report at Mandera Police Station. Efforts to arrest the appellant the same night hit the brick wall as he was violent and stabbed PW3 on the neck and also tried to stab the arresting police officer whereupon he escaped again. That the appellant was a person well known to him since birth though.

7. Aden Khalif Hassan Mohammed PW4, whilst in the company of PW1 at home, heard the deceased crying and picked a rungu. Together with PW1, they tried unsuccessfully tried to restrain the deceased. On nearing the scene, he heard the deceased cry in Somali language saying that he was dead. At the scene, they found the deceased lying on the ground with blood oozing from several parts of his body whilst the appellant took off upon noticing PW1 was after him. That he had known the deceased since childhood.

8. Yusuf Ibrahim Said PW5, a police officer attached to Mandera Police Station received a report that two people had been attacked, stabbed and taken to Mandera District Hospital. In the company of Sgt Swaleh and Cpl Ngua, they went to the hospital and found the deceased had serious stab wounds on the cheek, stomach and armpits and PW1 had stab wounds on the back and the head. They were informed that the attacker was the appellant. They booked the report and started looking for the appellant. They unsuccessfully laid an ambush for his arrest, but in the process, the appellant stabbed PW3 injuring him on the cheek and hand. He confirmed that the deceased died on October 4, 2010.

9. Dr. Simon Martin Maina, (PW6) conducted a post-mortem on the deceased's body and concluded that the deceased died of cardiac pulmonary arrest, secondary to exsanguination. Equally, he conducted a mental assessment on the appellant, who was later arrested, and found that he was fit to stand trial.

10. PW8 Sabib Hussein, PW7 the father to the deceased attended the postmortem and identified the deceased's body on October 4, 2010.

11. The respondent's last witness was chief inspector Kingsford Nyaga, PW8, the investigating officer in the matter. It was his evidence that he received a call on October 3, 2010 at around 8.30 pm from an informer that two brothers had been stabbed within Bulla-Power Estate and that they were in critical condition at Mandera District Hospital. He visited the hospital and found PW1 in a stable condition. PW1 told him that he had been stabbed by the appellant. While still at the hospital, he received information that the appellant had been spotted at Manyatta near Bulla-Power Estate. He mobilized police to arrest the appellant. In no time, he heard some screams and it transpired that his informer who was to identify the appellant had been assaulted by the appellant and was bleeding on the neck. That the deceased died on October 4, 2010, and the appellant was arrested on the same day after a raid was carried out by police officers PW8 had mobilized. After the arrest, he went to the scene of crime and drew a sketch plan. In the process of his investigations, he found out that the deceased had

met the appellant near the deceased's house and a row ensued because the deceased flashed his torch directly in the appellant's face.

12. After the hearing, the trial court determined that the prosecution had made out a prima facie case against the appellant who was subsequently placed on his defence. He elected to give sworn evidence and indicated he would call one witness but that was never to be.

13. It was his evidence that on October 3, 2010 while at home in Bulla-Power Estate in Mandera waiting for the deceased who was to sell him a cell phone but he backtracked. That the deceased went to his house and came back with a rungu and another boy whereupon a scuffle ensued between the three and in the process, PW1 stabbed the deceased by accident. Thus, he denied killing the deceased.

14. Satisfied that the prosecution had proved its case beyond reasonable doubt, Ombija, J. convicted the appellant and sentenced him to death as already stated. That conviction and sentence is the genesis of this appeal. Through Ms. Calvince Alala Sigomac Advocates, the appellant claims that the learned Judge erred by: misdirecting himself on the law when he disregarded the need for the proof beyond reasonable doubt of the very essential ingredients of the offence of murder; relied on the extent of injuries inflicted upon the deceased to find the existence of malice aforethought; failed to find that the appellant was acting in self defence; failed to find that the appellant had not been accorded a fair trial and arriving at the conviction without sufficient evidence; basing the conviction and sentence on contradictory evidence; and lastly, that the sentence of death meted out on him was excessive, arbitrary and inappropriate given the circumstances of the case.

15. At the virtual hearing of the appeal, the appellant's counsel relied on his written submissions dated 20th October, 2020 with limited oral highlights. Mr. Sigomac, learned counsel for the appellant condensed the grounds of appeal into five thematic areas, that is: whether the prosecution proved all the ingredients of the offence of murder; self-defence, the contributory factor by the deceased; the contradictory and inconsistent evidence tendered by the prosecution; and lastly, whether the sentence imposed was excessive, arbitrary and or inappropriate.

16. Counsel submitted that the offence of murder was not proved to the required standard as the ingredients of death of a person, the cause of that death, whether it was proved that the deceased's death was due to the unlawful act or omission of the appellant, and, whether the unlawful killing was with malice aforethought. That the trial court did not consider the fact that the fight was between three people and the person who caused the death of the deceased would not automatically have been the appellant alone. Further, malice aforethought in all its four perimeters in terms of section 206 of the *Penal Code* were not proved at all.

17. As to whether the unlawful act or omission was proved, the appellant submitted that this too was not proved. Therefore, the trial court erred in finding that there existed a positive intention to cause the death of the deceased through unlawful act or omission by the appellant and that he engaged in an act that was unlawful that led to the death of the deceased. That from the evidence of PW1, the deceased would not have died if he had restrained himself from running towards the appellant and that the evidence that the deceased had gone to get a rungu, meant that he had the intent of harming the appellant which evidence ought to have discounted the guilty verdict imposed on him.

18. It was his submission that the use of force against the deceased was in self-defence and cited the case of *Lucy Mueni Mutava v Republic* [2019] eKLR which outlines what an accused person must prove in order to benefit from that defence. That being faced with imminent danger of being harmed by the deceased who had armed himself with a rungu and who was in the company of his brother should have informed the trial court that indeed there existed a real danger hence the defence of self-defence was available to the appellant.

19. It was submitted that the appellant was not accorded a fair trial as the specific elements as contained in section 203 of the *Penal Code* were not explained to him and equally they were not stated in the particulars of the information. This lapse made it impossible for the appellant to prepare his defence effectively and assert his right to self-defence as provided for by the law. Further, that his advocates were never availed witness statements before trial thus his trial was by ambush.

20. On sentence, the appellant submitted that given the circumstances of the case, the sentence imposed was manifestly harsh, excessive and inappropriate. That this court in the event that it dismisses the appeal on conviction, should reconsider the sentence, revert to and apply the principles set out in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR that declared the mandatory nature of the death sentence under section 204 of the *Penal Code* to be unconstitutional.

21. Mr. Oketch, the learned Assistant Director of Public Prosecutions submitted that the essential ingredients of the offence of murder were proved. That the death of the deceased was proved by the evidence of PW1 who witnessed the appellant stab the deceased repeatedly. This was corroborated by the evidence of PW2 and PW3 who witnessed the appellant stabbing the deceased under favourable lighting conditions. They recognized the appellant because they were neighbours and had known each other since childhood.

22. On proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the appellant, it was submitted that there was no doubt from all the evidence on record that the death of the deceased was caused directly by the actions of the appellant, who stabbed him with a knife. PW1, PW2, PW3, and PW4 all knew the appellant very well and witnessed him stab the deceased repeatedly. Thus, this was a case of recognition as opposed to identification of a stranger. In any event, the appellant admitted to have been at the scene of crime and that indeed the deceased was stabbed, not by him but by PW1. Therefore, the question of mistaken identity cannot arise.

23. As to proof that the said unlawful act or omission was committed with malice aforethought, it was submitted that the very act of the appellant stabbing the deceased with a knife repeatedly, causing the deceased to die as a result of cardiac pulmonary arrest secondary to exsanguination, was a clear act of malice aforethought. He intended to, at the very least, cause grievous harm to the deceased. His action was clearly premeditated. The case of *Rex v Tubere s/o Ochen* [1945] 12 EACA 63 was relied on for the proposition that, a court has the duty in determining whether malice aforethought has been established to consider the nature of the weapon used, the manner in which it was used, the part of the body targeted (sensitive or vulnerable), the conduct of the accused prior, during and after the killing and the nature of injuries suffered. In this case, by the appellant stabbing the deceased repeatedly with a sharp knife and targeting the cheek, stomach and armpits, which are vulnerable parts of the body, the appellant intended only one consequence, death of the deceased.

24. In conclusion, it was submitted that the prosecution's case was not shaken at any time during the trial and therefore, the conviction of the appellant was safe and even the sentence that was meted out was as provided for in law, hence the appeal ought to be dismissed in its entirety.

25. This being a first appeal, this Court is under duty to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the trial court and reach its own independent conclusion on the same. As stated in the case of *Okeno v Republic* [1972] E.A. 32:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.* [1975] EA 57). It is not

the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See *Peters v Sunday Post* [1958] EA 429."

26. In re-appraising the evidence, the Court should however bear in mind and take cognizance of the fact that it did not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule therefore, the first appellate court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. See *Joseph Kariuki Ndungu v Republic* Cr. App. Nos. 183 & 186 of 2006.

27. Upon our consideration of the record, the submissions by the respective counsel and the law, the issues we discern that will resolve this appeal are, whether: the offence of murder was proved before the trial court, secondly, whether the defence offered by the appellant rattled the prosecution's case, and lastly, whether the sentence imposed was harsh and excessive.

28. From the evidence on record, it is common ground that there was a fight between the appellant and the deceased. Apparently, the deceased and the appellant met at around 8.00 pm on a path and the deceased flashed a torch on the face of the appellant which act did not go down well with the appellant. As a result, a fight ensued. The deceased sensing that the appellant was overpowering him ran home for assistance and when it was not forthcoming, picked a rungu and came back to confront the appellant. The aftermath of that confrontation was the death of the deceased. PW1 to PW3, the appellant and the deceased were people known to each other and were indeed neighbours. They all testified as to what they saw. They all saw the appellant and the deceased engaged in a fight. Indeed, the appellant himself admits in his defence that he was at the scene of crime and was involved in a fight between himself, the deceased and another person that resulted in the death of the deceased. However, he attributes the death to PW 1 as opposed to himself. So that though the crime was committed at night at about 8pm the involvement of the appellant in the crime cannot be discounted on account of identification, mistaken or not.

29. The offence of murder is committed when according to *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the death of the deceased occurred; the accused committed the unlawful act, which caused the death of the deceased; and, that the accused had malice aforethought when he committed the offence.

30. Dealing with the first ingredient, there is no doubt that the deceased passed on. This was proved by the evidence of PW1 to PW7, who all saw the deceased's body with a deep cut on the neck and by the postmortem report tendered in evidence by PW5. That report confirmed that deceased died of cardio-pulmonary arrest secondary to exsanguination. The appellant too confirmed the death of the deceased in his own defence.

31. Did the appellant commit the unlawful act which caused the death of the deceased? From the record, it is clear that there was death which occurred following a fight between the appellant and the deceased after the appellant repeatedly stabbed the deceased in the full glare of some of the witnesses who were called by the prosecution. The appellant was placed at the scene of the crime by the evidence of PW1, PW2, and PW3 all of whom knew the appellant as they were neighbours. The appellant also placed himself at the scene of crime. The appellant was said to have escaped with two knives when confronted by neighbours. The fact that the appellant had knife which he used to stab the deceased repeatedly was in itself an unlawful act. PW5's evidence confirmed that the deceased succumbed to those injuries

occasioned by the stab wounds which calls into question why he was carrying a knife in the first place. Stabbing the deceased severally, was a clear indication of the appellant's intention to kill because the act of stabbing cannot be said to be a legal act.

32. We are satisfied just like the trial court that, the prosecution proved beyond reasonable doubt that the appellant did the unlawful act, which caused the death of the deceased.

33. How about malice afterthought? Under this head, the trial court had to determine whether the appellant had an intention to kill, for that is what entails malice aforethought. The intention to inflict injuries that resulted in the death of the deceased. The importance of malice aforethought in the case of murder was reiterated in the case of *Roba Galma Wario v Republic* [2015] eKLR where the court held that:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

34. Malice aforethought was defined in the case of *Nzuki v Republi*c [1993] KLR 171 where this Court held that before an act can be termed as murder, it must be aimed at someone and in addition, it must be an act committed with the following intentions, the test of which is always subjective to the actual accused. These are:Intention to cause death;Intention to cause grievous bodily harm; andWhere appellant knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

35. Further, in the case of Daniel Muthee v Republic Criminal Appeal No. 218 of 2005 (UR) cited in the case of *Republic v Lawrence Mukaria & Another* [2014] eKLR, Bosire, O'kubasu & Onyango Otieno, JJ.A., while considering what constitutes malice aforethought observed as follows:

> " When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*."

36. This is precisely what happened here. When the appellant repeatedly stabbed the deceased in the vulnerable areas of the body, and when PW1 sought to intervene only to also be stabbed in the neck, the appellant knew or must have known that those actions would result in death or at the very least, grievous harm. The essence of malice aforethought was thereby manifested.

37. The appellant raised the issue of self-defence saying that he was defending himself after the deceased went for the rungu. The defence of self-defence was discussed in the case of *Ahmed Mohammed Omar & 5 Others v Republic* [2014] eKLR where this court held as follows:

> " What are the common law principles relating to self defence" The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in *PALMER VS R* [1971] AC 818. The decision was approved and followed by the Court of Appeal in *R v McINNES*, 55 Lord Morris, delivering the judgment of the Board, said:
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> > "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular

> facts and circumstances Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence.
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> ..... The defence of self-defense either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

38. In assessing "reasonableness" of the act of the appellant, it is important to consider the circumstances of the case. In the case of *Njeru v Republic* [2006] 2 KLR 46, the court in dealing with self defence held:-

> " 1. Killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.
>
> In this case, it was the duty of accused to show that at the time of cutting the deceased's neck, he was in the course of averting a felonious attack and that no greater force than necessary was applied. Accused was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.By virtue of section 17 of the Penal Code, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances."

39. We are aware that where the appellant raises the defence of self-defence, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the appellant was not provoked or that he did not act in self-defence. In other words, the prosecution should disprove the defence of self-defence and it must discharge this burden beyond reasonable doubt. In the case of *Beckford v R* [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defense:-

> " It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

40. We have considered the evidence on record. We are of the view that the appellant was not in any immediate danger of a felonious attack on him by the deceased. As we have already stated, the appellant had ample time to leave the scene of crime when the deceased went for the rungu but did not for reasons best known to himself. One cannot leave an adversary to go and arm himself and when he returns and resumes the fight from where they had left off and then raise the defence of self-defence. Considering the injuries occasioned to the deceased, clearly, the attack on him was so vicious that one would really wonder whether it was actually an act of self-defence. The evidence on record points to the appellant as the aggressor who awaited the deceased and stabbed him to death after an earlier encounter.

41. In our considered view, the prosecution evidence was overwhelming and effectively dislodged the defence offered by the appellant. The trial court had made an observation that it had considered the demeanour of the appellant and was of the opinion that he was economical with the truth. This is a finding on the demeanour of a witness which we cannot interfere with. Having said as much, we do not find anywhere in the judgment of the trial court where it erred as the evidence was short, straightforward, concise, clear and pointed to the appellant and no one else as having caused the death of the deceased.

42. As regards the sentence, sections 216 and 329 of the *Criminal Procedure Code* empower the trial court, before passing sentence to receive such evidence in mitigation as it thinks fit in order to inform itself as to the proper sentence to be passed. Although the above provisions are couched in permissive terms, this Court has held over time that it is imperative for the trial court to afford an accused person an opportunity to mitigate before he or she is sentenced, even with regard to offences where the prescribed sentence is death. For example, in *Amos Changalwa Juma v Republic* [2009] eKLR, this Court stated:

> "Before we conclude this judgment, we must say something about the manner the learned Judge dealt with the sentence. We have reproduced the concluding paragraph of the learned Judge's judgment and it is clear that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was clearly improper. As we have stated previously in other judgments, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person (or his counsel) before sentencing him/her. This obtains even in the cases where death penalty is mandatory. The reasons for requirement are clear in that when the matter goes to appeal as this matter has come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing appropriate sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal, or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for clemency. Thirdly, matters such as age, pregnancy in cases of women convicts may well affect the sentence. It is thus necessary that mitigating factors be recorded even in cases of mandatory death row sentence."

43. It is a principle of sentencing that a sentence must reflect the accused's blameworthiness for the offence. See *Omuse v Republic* [2009] KLR 214, where it was held that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence.

44. From the record, and contrary to the appellant's submissions, it is sufficiently clear that the appellant was offered an opportunity to mitigate before sentencing. He indeed, presented his mitigation statement which was considered by the court before it meted out sentence. In meting out the sentence,

the trial felt that its hands were tied since it was a mandatory sentence. With the advent of the Muruatetu case, [supra], this is no longer the case. Trial courts can now impose any other suitable sentence other than death in cases of murder as has subsequently been clarified in *Francis Karioko Muruatetu & Others vs. Republic* [2021] eKLR.

45. Considering the circumstances of this case, we are satisfied that the sentence imposed was undeserving and we will interfere with it. Clearly, this was a fight between the appellant and the deceased, whereby the deceased was overpowered by appellant. We would therefore dismiss the appeal on conviction. We nonetheless allow the appeal on sentence to the extent that we substitute the sentence of death with that of 35 years' imprisonment with effect from the date of conviction and sentence.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR