Omondi & another v Republic (Criminal Appeal 146 of 2016)
[2023] KECA 576 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 576 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 146 OF 2016

PO KIAGE, S OLE KANTAI & F TUIYOTT, JJA

MAY 12, 2023

BETWEEN

COLLINS EVANS OMONDI ..... 1ST APPELLANT

SAMUEL ISINTA NYAKUNDI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Homa Bay, (Majanja & Mwita, JJ.) dated 27th July, 2015 in HCCRA NO. 9 & 10 OF 2014)

JUDGMENT

1. On the night of 29th and July 30, 2012, three women, Lorna Adhiambo Ogolla (PW5), Margaret Achieng Andeta (PW6), and Monica Akinyi Ayuko (PW7) were widowed in the most brutal, inhuman and needless circumstances. On that night, their husbands Samuel Ogolla Ooko, Dickson Andata and Samuel Anguko, respectively, met their deaths in a robbery that had taken place at Shivling Supermarket, at Homabay township in Homabay County.

2. Although there was a fourth death of one Odiwuor Awala Ogenya, the trial court found that he was a watchman at the Council market and was not guarding the supermarket where the robbery took place. Events surrounding the forth death are not therefore the subject of the appeal before us.

3. Regarding the robbery, Collins Evans Omondi (the 1st appellant) and Samuel Isinya Nyakundi (the 2nd appellant) were charged alongside 4 others with four counts of robbery with violence each with similar particulars save for the names of the deceased persons. The particulars were that on the nights of 29th and July 30, 2012 at Homabay township in Homabay county they, jointly with others not before court, while being armed with dangerous weapons namely pangas and rungus robbed Dickson Andata of Kshs 1.4million, assorted mobile phones, TV set, DVD's all valued at Kshs 2.2million and

immediately before the time of such robbery, unlawfully caused the death of Samuel Ogolla Ooko, Dickson Andata, Samuel Aguko and Odiwuor Awala Ogenya

4. The 1st appellant faced two further charges; being in possession of Narcotic Drugs (bhang) contrary to section 3(1) as read with section 3(2) of the *Narcotic Drugs and Psychotropic Substances Act* No 4 of 1994, and handling stolen goods contrary to section 322 (1) (2) of the *Penal Code*. We need not set out the particulars of these two charges as none are the subject of the appeal before us.

5. The 2nd appellant also faced an alternative charge of handling stolen goods contrary to section 322(1) (2) of the *Penal Code.* It was alleged that on August 21, 2012, Samuel Isinta Nyakundi at Nyangusu market in Gucha District in Kisii County, otherwise than in the course of stealing he dishonestly received or retained one mobile phone make Samsung galaxy 2222, one DVD make LG, one TV flat screen make AUCMA, two Benq digital cameras, one LG remote, Astra four ways extension and one roller panel charger all valued at Kshs 31,350.00 knowing or having reasons to believe them to be stolen goods.

6. The three deceased persons, subject of this appeal, were all employed as security guards with a security firm by the name Luore Security Firm. They all worked under the supervision of Maurice Otieno Amollo (PW2) who would from time to time assign them duties. On the fateful night, he assigned Dickson Andata to guard the supermarket while Samuel Ogolla and Samuel Aguko were assigned to Priyu Hardware. The two shops are adjacent and from two contracts, both dated 30th May, 2011 entered with the security firm, the two share a common director Ashwin Patel (PW1). The supervisory duties of PW2 included checking on the guards. On that night PW2 made three visits to the premises which the deceased were guarding, at 19.10 hours, 9.20 p.m. and midnight. On all these occasions he found them on duty. Not so when he returned a fourth time at 4.44am. The front of the hardware was in darkness. When he flashed his torch, he found Ogolla and Andata dead, strangled with ropes and their bodies mutilated. The third guard was also dead with body cuts on several parts of his body. He noticed that the meter box was open and padlocks to doors of the supermarket broken. At this point he telephoned Samuel Odira Odongo (PW3), his manager, and informed him what he had found. On the manager's instructions, PW2 went to Homa Bay Police station and reported the incident, and together with police officers returned to the supermarket. On receiving the sad news of the death of his guards, PW3 informed PW1 of the incident and he proceeded to the supermarket. PW1 too went to the supermarket.

7. At the supermarket, PW1 saw the dead guards and, he and some police officers; CIP Francis Cheboiyo, Deputy DCIO (PW 12), and DCIO Sup. Thomas Nyakundi entered into the supermarket and found that mobile phones, a flat screen TV, D.V.Ds and other electronic goods had been stolen. On checking the counter, he noticed that cash of Kshs 1,400,000.00 was missing. He approximated his total loss to be Ksh. 2,200,000.00. The loss of the stock was supported by Duncan Ochola Asinya (PW4), a supervisor at the shop whose duties included stock taking.

8. It was the testimony of C.I. Joseph Mulatya (PW20), then the officer in charge of Homa Bay police station, that on the night of 29th and July 30, 2012 at about 4.00am, he received a telephone call from PW3 informing him of a robbery at Shivling Supermarket. After informing the DCIO and duty officer, PW20 proceeded to the scene where he found 4 bodies and the main door to the supermarket broken open. The lighting system to the supermarket had been broken. He was later joined by other police officers amongst them P.C. Kiter (PW9) who got to the scene at about 9.00 am.

9. PW9 was at the time attached to the Scene of Crime Department at Kisii. Amongst his duties was to visit scenes of crime, collect evidence and supervise the processing of photographs. On that day he performed two sets of tasks while at the scene. He dusted the scene of crime and was able to lift

finger prints which he later forwarded to CID headquarters Criminal Records office for processing and classification. He also took various photographs of the scene which included the general front view of the supermarket.

10. Done with the scene, PW9, PW20 and the DCIO removed the dead bodies to Homa Bay District Hospital Mortuary. It was at the mortuary where, three days later, on 2nd August, 2012, PW5, PW6 and PW7 undertook the painful task of identifying the bodies of each of their husbands to Dr. Ayoma Ojwang (PW16), a doctor based at Homa Bay District Hospital who conducted post mortem examinations on the four bodies. On Andata's body, he found that he had external injury to his neck, and a crush to the base of his skull which caused bleeding to the brain and neck. He formed the view that the deceased died due to the head injury. Aguko, a male African 50 years, had suffered a stab wound to the right temporal side of the skull which had a large depressed fracture. Similar to Andata, the cause of death was injury to the head. Turning to Ouko, he had injuries to the neck posterior, a light ligature mark around the eyes and severe fracture on the base of the skull. Just like his workmates, the finding of the officer as the cause of death was a head injury.

11. Things moved rather quickly on the investigation front. The investigation of the heinous crime fell to PW12 then a deputy DCIO of Homa Bay District. He too, visited the scene of crime on the morning of July 30, 2012. He was present when PW9 dusted the scene for fingerprints and took photographs. He accompanied the bodies to the mortuary.

12. On August 8, 2012, a mobile phone handset suspected to be one of those stolen was activated and the subscriber was traced. He was Tobiko Mole (the 3rd accused), who was arrested. Upon arrest he told police that the handset belonged to one Daudi alias JJ who had crossed to Tanzania. The 3rd accused was acquitted upon the learned trial magistrate holding that:

> "As pointed earlier this case is purely hinged on circumstantial evidence. The prosecution in that endeavor proceeded to track down the suspects through the mobile phone that had been stolen. In that endeavor they traced the 3rd accused who was previously using a mobile phone that he said he wanted to buy but did not buy as it was expensive. This was the basis upon which the prosecution arrested the 3rd accused. I have gone through the evidence of the 3rd accused and find that there was no evidence upon which I can convict him as he had explained himself and do find that he was not at the scene on the 29th and July 30, 2012."

13. Thomas Adogi Ikaro (PW12) is the father to Maxmilla Musimi Achilu (PW13). His evidence was that sometime in July, 2012, PW13 came home for the funeral of his brother. In the course of the visit, PW12 borrowed a mobile phone handset from her daughter as his was charging. He used the handset by inserting his sim card and made several calls on his mobile number 0722xxxxxx. On August 16, 2012 Administration Police officers visited him and inquired about the mobile phone handset. He informed them that he was given the phone by his daughter. He was later arrested alongside PW13.

14. Before setting out the evidence of PW13, we make some observations. At one point of her testimony, PW13 stated that she was married to the 1st appellant in March 2011 and blessed with a son but at another denied such marriage as no dowry had been paid. When called up to make his defence, the 1st appellant was silent on this issue. Crucial however is that the 1st appellant did not object to PW13 giving evidence on behalf of the prosecution. Important as well is that while he now complains that he was convicted on evidence that breached the provisions of section 127 as read with section 130 of the *Evidence Act*, he did not raise that complaint in his first appeal. The former provision grants spousal testimonial privilege. Save in the limited instances set out in subsection 3 of the section, a spouse of a person charged is not a competent and compellable witness for the prosecution. Section 130 is on

communications during marriages and protects their disclosure save with the consent of the person who made it or in the instances of section 127.The privilege granted by this latter provision is known as marital confidences privilege. We take it that because the 1st appellant did not object to PW13 giving evidence and neither invoked spousal privilege at trial nor raised it in the first appeal, then he was aware or ought to have been aware that he was not eligible for that privilege.

15. On August 16, 2012, another handset suspected to be one of those stolen from the supermarket was activated at Bukura and later at Riat. This handset was traced to PW13 who was arrested by police and detained overnight at Kisumu Police station. Her evidence was that she was given the handset by the 1st appellant in July, 2012. The 1st appellant told her that he had bought it for her. This is the handset that she had lent to PW12 during her visit home. Later, the 1st appellant took back the phone. This was two days before she was confronted by the police officers.

16. It was part of the prosecution's case that Pauline Khamete Babu (PW7) was the landlady of the 1st appellant who at the material time was a tenant in one of her single room houses at Riat. He was paying monthly rent of Kshs 1,500 but appears to have fallen into hard times and into arrears. So, on August 6, 2012, the 1st appellant gave PW7 four new mobile phone handsets but without batteries to hold as security for the due rent. She kept the phones. On August 16, 2012, the 1st appellant informed PW7 that PW12 and PW13 had been arrested by Police and he intended to run away. Later, police officers visited PW7 and demanded for the four handsets given to her by the 1st appellant.

17. A day later she was informed that the 1st appellant was in her rental house. He instructed Bilha who gave her the information to lock the house from the outside as she called the police from Riat. On returning with Police officers, PW7 found the door broken and the 1st appellant had escaped to a house in the neighbourhood where he hid under a bed. The police officers pursued and arrested him. One of the police officers who arrested the 1st appellant was C.I.P Benard Muriuki (PW11). He searched the house of the 1st appellant where two mobile handsets and rolls of some substance which were later tested to be bhang were recovered.

18. Once in the custody of the police, PW20 took a statement under inquiry from the 1st appellant but as the superior court below correctly found the statement to be inadmissible, we shall not rehash the contents. Also while there, PW12 took elimination fingerprints from the 1st appellant and sent them to the CID headquarters. On August 6, 2012, CIP Paul Ndirangu Mburu (PW10), a Gazette fingerprint expert took possession of the scene of crime marks which he was later asked to compare with fingerprints of the 1st appellant. In his opinion one print from the scene matched with the left fore- finger print of the 1st appellant.

19. What was the case against the 2nd appellant? On August 21, 2012, P.C. Sammy Kure Gitwanya (PW18) and P.C. Peter Sugut (PW19) received information (perhaps instructions) from their seniors to assist as undercover police officers to arrest a suspect. When the suspect saw the undercover officers he ran to Akemo Valley Hospital. The officers run after him and arrested him. He had a small bag. Inside it were 2 cameras and 2 mobile phone handsets. The suspect also led them to his house where there was further recovery of 2 more handsets, an extension cable, a DVD player, a solar panel, remote control and cash of Kshs 8,650 in different denominations. The suspect was the 2nd appellant.

20. Some of the items found with the 1st appellant and in his house, and the handsets left by the 1st appellant with his landlady (PW7), together with the items recovered from the 2nd appellant were identified by PW1 as some of the items stolen on the night of 29th and July 30, 2012.

21. That, in sketch, is the prosecution case which the trial court found sufficient to place the appellants on their defence. They gave the following answers.

22. The 1st appellant is a businessman dealing with clothes and hails from Lwanda village situate in the former Mumias district. He does not remember where he spent the night of 29th and July 30, 2012 but has a good memory of the events of August 16, 2012. On this latter day he left for Kibuye as some customers had called him interested in buying clothes. One of them was a nephew to his landlord. He took with him 10 trousers from which the potential customer could select. The customer selected 3 trousers but before he would pay, he saw police officers enter the compound. They were tracking the customer's mobile phone. The officers picked the phone and insisted that the two accompany them to Kondele police station where he found other suspects who included the father of one Edwin and his wife. They were later escorted to Homa Bay police station. It was in this sworn statement that he denied the offence.

23. The sworn defence of the 2nd appellant was that on the night of the robbery he was asleep at home. Days later, on August 21, 2012, at around 3.30pm he was sent by his mother with Kshs 8,650.00 to take to Kwamboka Women Group which she was a member. However, before reaching Akemo Hospital, he encountered 3 men who stopped him but since his bicycle had a mechanical problem, he accidentally hit one of them. Afraid that they would harm him, he ran towards Akemo Hospital as two of the men chased after him. At the Hospital the two disclosed that they were police officers and told members of the public that they wanted him to help them trace his brother Hesborn.

24. He led the police officers to the home of Hesborn where they found his wife who informed them that Hesborn had gone to Kisumu where he works as a driver. The police officers searched the house, removed, and took away certain items including 2 TV set, a gas cooker, and 2 cameras. They also took Hesborn's mobile phone. The police officers asked the 2nd appellant to accompany them to the police station where he surrendered the Kshs 8,650.00 and his mother's mobile phone.

25. In convicting the 2nd appellant, the trial magistrate made the following finding;

> " The accused in his defence said that he was arrested because he hit one of the police officers with a bicycle and that the things were recovered from his brother's house. The accused was expected to avail any of his relatives to support his line of defence. Nothing was picked from the scene to link him with the offence. However, the offence took place on 30th July 2012 but the goods were recovered hardly 15 days after the offence. That period is too short for the goods to have changed hands. The doctrine of recent possession applies and I find that the 2nd accused was at the scene of crime on the night of 29th and July 30, 2012."

26. The first appeal was heard and determined by a bench comprising Majanja and Mwita, JJ. The court observed that the appellants' conviction was primarily on the doctrine of recent possession and that the case against the 1st appellant was buttressed by the finding of his fingerprint at the scene of the crime.

27. The appellants soldier on in the quest to upset the conviction and sentence and are before us on a second appeal. The appeal presents four grounds which seek to impeach the learned Judges' findings on the grounds that they erred in law by:

    i. convicting and sentencing the appellants on a case that did not meet the evidentiary threshold required in criminal cases.

    ii. convicting and sentencing the appellants on a case premised on illegally obtained evidence.

    iii. convicting and sentencing the appellants on a case whose charge constituted a joinder of counts.

    iv. sentencing the appellants to a mandatory sentence contrary to the law.

28. Even as we rehash the arguments for and against the appeal, we observe that on reading the submissions by Mr. Ogeto, counsel appearing for the appellants, and listening to him at plenary, it was apparent that some of the complaints now raised were not taken up at the first appeal and could never be available for discussion or determination in this second appeal. Those need to be called out so that we reserve our energy on what truly belongs to this second appeal.

29. While it is true that the appellants raised the issue of defective charges before the High Court, it was in the context that the particulars of the charges brought against the appellants did not precisely set out the items stolen and recovered and that the items listed in the charge sheet were at odds with the evidence led at trial. That has somehow quickly morphed into a new argument regarding joinder of counts whose thrust is that it prejudiced the appellants because the charges combined the elements of two offences, robbery with violence and murder together.

30. Here, an argument has been made that, without a court order or warrant, the investigative authorities obtained personal data of the appellants in form of their phone signals and sim card lines from Safaricom, locating them, and subsequently making certain recoveries from them. The conduct of the police is assailed as being in breach of the appellants' right to privacy and therefore tainting the evidence recovered as illegally obtained. No such argument arose at the first appeal.

31. It is further contended, and this must be on behalf of the 1st appellant, that he was convicted on the basis of testimony by his wife in breach of section 130 (1)as read with section 127 (3) of the *Evidence Act*. This was not one of the grounds of protest before the High court and needless to say the conviction of the 1st appellant was not based on the evidence of PW13 who he claims to be his wife on a presumption of marriage by cohabitation.

32. We notice a trend where second appeals are cast on grounds never taken up in the first appeal. A second appeal is not a forum to present an appeal that was not before the first appellate court as the role of the second appellate court is to test the correctness or otherwise of the decision of the first appellate court only on the basis of grounds of appeal raised the first appellate stage. When this happens, then the new grounds come out as afterthoughts and on occasion, as a deliberate attempt by an appellant to mislead the Court. This re-engineering of appeals is to be frowned upon.

33. In support of the grounds of appeal that survive, Mr. Ogeto, counsel for the appellants, submits that the only evidence relied on in convicting and subsequently sentencing his clients was tied to recent possession premised on weak and illegally obtained circumstantial evidence. It is contended the courts below gave much weight to evidence of the left fore-fingerprint of the 1st appellant found on a broken window pane at the crime scene and his illegal confession detailing his alleged friendship with the 2nd appellant who was allegedly found in possession of the items said to have been stolen. We are asked to take into account that a supermarket is a public place frequented by many people.

34. On sentence we are asked to follow the decision of this Court in *William Okungu Kittiny v Republic* Criminal Appeal No 56 of 2013 [2018] eKLR in which the Court held that the findings and holding of the Supreme Court in *Francis Karioko Muruatetu & another Vs- Republic* Petition No 15 of 2015 apply mutatis mutandis to section 296 (2) and 297 (2) of the Penal Code. It was submitted that as the conviction of the appellant is based on weak circumstantial evidence, the prudent sentence to impose is a lesser sentence than a death sentence.

35. In response Miss Vitsengwa, prosecution counsel, argued that there was strong evidence linking the appellants to the robbery; the finger print marks lifted from the scene of crime matched that of the 1st appellant; the 1st appellant was found in possession of 2 phones and a Wi-Fi stolen during the robbery

while the 2nd appellant was found in possession of a phone stolen in the same incident and other items recovered from his house.

36. Regarding the assertion that evidence of recent possession of the stolen items was obtained through illegal means, counsel for the Republic argues that the evidence was obtained by tracking the IMEI numbers obtained from mobile phones belonging to PW1 (perhaps the Company that owns the supermarket) which are not the properties of the appellants but rather, properties stolen by them.

37. On imposition of the death sentence, counsel agrees that there is judicial discretion in respect to the sentence to be imposed for the crime of robbery with violence but, argues that there are aggravating factors in the circumstances of this case that makes the death sentence the appropriate one. We are told that the appellants caused the death of three people and were brutal in their assault.

38. This is a second appeal and our remit under section 361 of the *Criminal Procedure Code* is restricted to considering questions of law only. Of this remit, this Court has in *Karani v R* (2010) 1 KLR 73 stated:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court 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 which case such omission or commission would be treated as matters of law." See also Karingo v R (1982) KLR 213.

39. It bears repeating that as regards the 1st appellant it is submitted that the evidence that led to the recovery of some of the items said to have been stolen during the robbery suffered illegality on three counts. First, it was obtained from his spouse in contravention of section 130 of the *Evidence Act*. Second, that it was obtained in violation of the right to privacy. Last, it was obtained through an illegally procured confession. As stated earlier, the first two do not fall for our consideration at all for reasons we have given.

40. It is not contentious that the confession obtained from the 1st appellant was in contravention of section 25A (1) of the *Evidence Act* and as correctly held by the superior court below was inadmissible evidence. We discuss this in more detail presently. Yet, the evidence is that what led to the arrest of the 1st appellant was the tracking of a stolen mobile handset to PW14 who explained that the handset belonged to PW13 who in turn stated that it was given to her by the 1st appellant. It was her further testimony that the 1st appellant had other handsets including those he had given to his landlady as security for unpaid rent. Using this information, the police officers progressed their investigation and were eventually able to obtain some of the stolen items in the possession of the 1st appellant.

41. We now turn to the evidence that led to the arrest of the 2nd appellant. Upon his arrest, the 1st appellant made a statement to the police that not only incriminated him but also the 2nd appellant. As against the first appellant that part of the statement that was self-incriminating was a confession which as we have already observed was obtained in contravention of express statutory provisions. The superior court below explained why the confession made by the 1st appellant was inadmissible;

> " 39. We have considered the evidence of PW 20 and find that though the statement was made before an officer above the rank of inspector, it was not made before a third party of the accused's choice. There is no evidence that the 1st appellant was informed of his right to have a third party present while the statement was being taken. In the circumstances, the confession could not pass the hurdle

erected by the mandatory provisions of section 25A (1) of the *Evidence Act* and it was inadmissible to prove the guilt of the appellants."

And we agree.

42. The argument by counsel for the appellants as regards the confession is this; that because it was to a police officer who was part of the investigating team and second, was not made in the presence of a third party then the confession was illegal, inadmissible and an infringement to the "accused right to fair hearing". This argument does not add any traction to the 2nd appellant's appeal because the impugned confession was at any rate held to inadmissible by the High Court. The evidence against the 2nd appellant is that, acting on information from the 1st appellant regarding the 2nd appellant's participation in the robbery, the police carried out further investigation which led to the recovery of some of the stolen items from the 2nd appellant's house. The information shared by the 1st appellant which incriminated the 2nd appellant was not a confession as against the 2nd appellant and the conduct of the investigating officers as regards the 2nd appellant cannot be impeached. Important is that in the end the conviction of the 2nd appellant was based on the doctrine of recent possession.

43. The law on the doctrine is well settled. This Court in *Simon Kanui Mwendwa v Republic* (2020) eKLR held as follows;

> "As has been stated in various cases before this court, the identification of an accused person may be strongly corroborated by the doctrine of recent possession. In the case of Athuman Salim Athuman v Republic, Criminal Appeal No 44 of 2015, this court quoted the Supreme Court of Uganda in Bogere Moses & Another v Uganda, CR App No 1 of 1997 where it was held that the doctrine of recent possession may be a more reliable form of identification evidence. The court stated:
>
> > "it ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness."

44. The stolen items were found with the appellants four days after the robbery, they did not give an account of why they would be possessing items that had been stolen in most violent and barbaric circumstances. Regarding the 1st appellant, the evidence that the fingerprint properly uplifted from the scene and handed over to the finger print expert for examination matched his fingerprint sealed his fate. This evidence, in addition to the evidence of handling the stolen goods made the circumstantial evidence against the 1st appellant ironclad, firm and secure.

45. Regarding the sentence, we say very little. The death sentence remains in our books as a possible sentence for the crime of robbery with violence under section 296 (2) of the *Penal Code.* Who else would be more deserving of this sentence than these two appellants who for purposes of making a robbery of property worth about Kshs 1,500,000 saw it necessary to end the lives of four people in a most vicious and ferocious attack? We see no reason to review the sentences given the exceptional depravity with which the offence was committed.

46. We would only add that, cognizant that the sentence of death has not actually been executed in our jurisdiction for several decades now, should the appellants' sentences ever be commutted to life imprisonment, we order that they must never benefit from parole.

47. The appeal on both conviction and sentence fails and is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.