



**Onzere v Republic (Criminal Appeal 166 of 2016)
[2023] KECA 643 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 643 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 166 OF 2016
W KARANJA, F TUIYOTT & JM NGUGI, JJA
JUNE 9, 2023**

BETWEEN

CYRUS KAVAI ONZERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kakamega (Kimaru & Thurania, JJ.) dated on 7th December, 2011 in High Court Criminal Appeal No. 184 of 2009)

JUDGMENT

1. The appellant, Cyrus Kawai Onzere, was the accused person in the trial before the Senior Resident Magistrate's Court at Vihiga in Criminal Case No. 727 of 2008. He was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on the 14th day of May, 2008 at about 2.00am at Mudete village, Mudete sub location, North Maragoli in what was then known as Vihiga District within the then Western Province, Cyrus Kawai Onzere, jointly with another not before the court, while being armed with offensive weapons, namely, pangas, robbed Gerald Musalia Akuyava, of two Nokia mobile phones make 3110 and 1110, a CD player make Royal, one radio cassette make Atacha, one brief case, 10 CD compact, five long trousers, four shirts, three caps, one speaker, an amplifier, a driving license and a waist belt made of leather, all valued at kshs. 46,000/=, and at immediately after the time of such robbery, wounded the said Gerald Musalia Akuyava. The appellant also faced an alternative charge of handling stolen goods contrary to section 322(2) of the *Penal Code*. The particulars of the offence are that on the 14th day of May, 2008, at 2.30am at Mudete village, Mudete sub location, North Maragoli location in Vihiga District within Western Province, Cyrus Kawai Onzere dishonestly undertook the retention of driving license, knowing or having reason to believe it to be stolen goods.



2. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant of the main count and sentenced him to death as provided for by the law.
3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.
4. The High Court (L. Kimaru, J. and B. Thurania, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 7th December, 2011.
5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. In his homegrown Amended Memorandum of Appeal which was not dated, the appellant raised eleven (11) grounds of appeal. However, the appellant later filed a Memorandum of Appeal dated 17th November, 2022, through his advocate, raising only one ground of appeal which is that:
 1. The sentence meted out to the appellant was harsh in the circumstances.
6. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Mr. Ariko appeared for the appellant, whereas learned counsel, Mr. Okango appeared for the respondent. Both parties relied on their submissions.
7. Mr. Ariko contended that the sentence of death penalty was harsh in the circumstances. He argued that during the course of trial, the appellant's age was never established and the only attempt to establish the same was at mitigation stage when the appellant stated that he had not yet obtained an identification card. He further argued that even though the trial magistrate considered the appellant's mitigation that he was still very young, the lower court held that its hands were tied as there is only one mandatory sentence of death provided for the offence of robbery with violence. Thus, it could not give a lesser sentence. He submitted that despite the penalty being a death sentence, courts now have discretion to consider the circumstances of each case and apply the appropriate sentence in accordance with the law.
8. To support his argument, counsel relied on the High Court decision in *James Kariuki Wagana v Republic* [2018] eKLR in which Joel Ngugi, J. (as he then was), observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. The learned judge noted that while force was used by the appellant in that particular case, it could not be said that he used excessive force, nor did he "unnecessarily injure the complainant during the robbery" and he was not armed during the robbery. As a result, the Learned Judge reduced the appellant's death sentence to a prison sentence of fifteen (15) years, from the date of conviction. Counsel also relied on the decision in *Leonard Kipkemoi v Republic* [2018] eKLR in which the court (Mumbi Ngugi, J. (as she then was) cited the decision in *James Kariuki Wagana v Republic* (*supra*) and reduced the death penalty to a prison sentence of twenty (20) years from the date of sentence of the lower court.
9. Counsel added that the appellant has been in custody since 9th June, 2008 and has so far served a term of fourteen (14) years, during which he has learnt to be a good citizen and has acquired skills to enable him survive in the community and live peaceably with others. He urged that this court has discretion to interfere with the appellant's death sentence and prayed that the appeal be allowed and the death sentence be reduced to a prison term of fifteen (15) years from 9th June, 2008.
10. In citing both *James Kariuki Wagana Case* (*supra*) and *Leonard Kipkemoi Case* (*supra*), counsel for the appellant did not observe that both were decided before the Supreme Court handed down its



guidelines in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (2021) eKLR (hereinafter “Muruatetu 2”). We will say more on this case below.

11. Opposing the appeal, Mr. Okango rejected the appellant’s counsel submissions and stated that the only legal sentence provided for the offence of robbery with violence is the death sentence. In this regard, he relied on the Supreme Court directions in Muruatetu 2 wherein the Supreme Court stated that its pronouncement in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, (hereinafter “Muruatetu 1”) did not apply to robbery with violence cases. He thus argued that the discretion this Court is being urged to exercise is not available to it, not unless the appellant can show that in exercising its discretion in sentencing, the trial court acted whimsically or ultra vires; which was not the case in the present appeal. Therefore, he urged that the appeal be dismissed and the death sentence be upheld.
12. This being a second appeal, our jurisdiction is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong vs. R.*, [1984] KLR 611.”
13. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.
14. In considering the issue of sentencing, we take note that the Supreme Court in *Muruatetu 1* held as follows with regard to death penalty:

(66) It is not in dispute that article 26(3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50 (1) of the *Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”
15. Before reaching this conclusion, the Supreme Court had done a majestically painstaking historical parsing of our jurisprudence on the death penalty. It considered that, at some point, the Court of Appeal, then the highest Court in the land, had, on 30th July, 2010 (even before the promulgation of the Constitution of Kenya, 2010) in *Godfrey Mutiso Ngotho Mutiso v Republic* [2010] eKLR, delivered a three-judge unanimous decision holding that the mandatory death penalty in section 204 is “antithetical to the constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial”, as it does not provide individuals concerned with an opportunity to mitigate their death sentences. However, in *Joseph Njuguna Mwaura & 2 Others v R* [2013] eKLR, a five-judge bench of the Court of Appeal seemed to claw back on the strident findings of the Court in the *Godfrey Ngotho Mutiso Case*. The *Joseph Njuguna Mwaura Case* concerned robbery with violence. The appellants in the case, unlike in the *Godfrey Ngotho Mutiso Case* (and, later, *Muruatetu 1*), attacked the death penalty as unconstitutional (rather than the mandatory nature of the death penalty in the statute which was the issue in both *Godfrey Ngotho Mutiso Case* and *Muruatetu*



- 1). The Court of Appeal held that the statutes were clear that both robbery with violence and murder carried the mandatory sentence of death and that “the Court cannot purport to be ahead of the people of Kenya or Parliament....[and that] it is not the role of the judge to engage in wandering and wilderness interpretation of what the law ought to be [since] to do so would amount to deciding and designing the correct size of the clothes and shoes that the people of Kenya wear.” The Court was of the opinion that “to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the [Penal Code](#) and the [Constitution of Kenya](#), 2010 [since] if the people of Kenya intended, in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.”
16. It is important to recall that one of the Petitioners’ express prayers to the Supreme Court in [Muruatetu 1](#) was for the Court to overturn the decision rendered in the [Joseph Njuguna Mwaura Case](#) on the grounds that the Court failed to find that the mandatory nature of the death sentence set out in section 204 of the [Penal Code](#) was unconstitutional.
 17. As aforesaid, in [Muruatetu 1](#), the Supreme Court found that section 204 of the [Penal Code](#) is inconsistent with the [Constitution](#) and invalid to the extent that it provides for the mandatory death sentence for murder. This was the narrow holding in [Muruatetu 1](#). In that sense, [Muruatetu 1](#) explicitly overruled [Joseph Njuguna Mwaura Case](#) with respect to the mandatory nature of the death penalty stipulated in section 204 of the [Penal Code](#).
 18. However, in [Muruatetu 2](#), the Supreme Court guided that its decision in [Muruatetu 1](#) did not apply to robbery with violence cases, sexual offence cases and other offences in which the statute provides for mandatory sentences. It directed that the application of the judgment was limited to murder cases falling within its scope and stated as follows:

To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the [Penal Code](#), that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases. (emphasis ours)
 19. The Supreme Court further clarified that its decision in [Muruatetu 1](#) applied only in respect to sentences under sections 203 as read with section 204 of the [Penal Code](#), and did not invalidate all mandatory or minimum sentences in the [Penal Code](#), the [Sexual Offences Act](#) or any other statute.
 20. Our understanding of the Supreme Court’s guidelines in [Muruatetu 2](#) is that it limits the direct applicability of [Muruatetu 1](#) in re-opening cases which had been decided as the law stood before [Muruatetu 1](#) was enunciated. Differently put, the Supreme Court’s guidelines in [Muruatetu 2](#) preclude the deployment of [Muruatetu 1](#) in a manner akin to a cause of action to retroactively apply to cases already decided by the different layers of the Court system as at the time of the decision. In our view, the Supreme Court guidelines ringfence the applicability of [Muruatetu 1](#) retroactively to such cases because [Muruatetu 1](#) not only decided the case that was before it and announced new decisional law (on mandatory death sentence for the offence of murder and the constitutionality of section 204 of the [Penal Code](#) but it also functionally announced a new avenue in which persons that had already gone through the different layers of Court system and exhausted them, could go back and re-open their cases for re-sentencing. In a sense, therefore, the Supreme Court innovatively created a new cause of action for prisoners who had been mandatorily sentenced to death for murder under the law as it then stood.



This new “cause of action” which was famously animated in the form of resentencing applications and petitions in the High Court was backward-looking: *Muruatetu 1*, unusually for decisional law, was to apply retroactively.

21. At the same time, however, the Supreme Court, in *Muruatetu 1*, announced a new rule of law respecting the constitutionality of the mandatory death sentence in murder cases. This new rule of law, in keeping with Common Law principles, was prospective: it would apply to all future cases; and would also bind all courts other than the Supreme Court – as required by the doctrine of stare decisis which is constitutionalized in Kenya in article 163(7) of the *Constitution*. The narrow holding as announced by the Supreme Court – that mandatory death penalty for murder as stipulated in section 204 of the *Penal Code* is unconstitutional and consequently that trial courts must hold a sentencing hearing to determine the appropriate sentence in murder cases – is binding on all courts other than the Supreme Court in all cases which are on all fours with the case determined. Differently put, the narrow holding in a case is a straitjacket which applies to all cases which fit within the category of the case decided by the Supreme Court.
22. It is important to recall, however, that in-built in *Muruatetu 1* was also a broader holding: this is typically the reasoning which led the Court to reach the narrow holding. Common Law typically grows by Courts – including courts lower than the apex Court -- extending and distinguishing – the applicability of the narrow holding using the reasoning embedded in the broader holding of a precedent. This is what jurists call analogous reasoning.
23. The narrow holding in *Muruatetu 1* was that the mandatory death sentence for murder prescribed by section 204 of the *Penal Code* is unconstitutional because it impermissibly stripped the sentencing court of the discretion to determine the appropriate sentence as a function of the crime committed; the individual circumstances of the offender and the environment; and the impact on the victims and society. This narrow holding is sometimes called the descriptive ratio decidendi of the case. The rare case on the same facts must be decided in exactly the same way.
24. The broad holding in *Muruatetu 1* was that that the mandatory death penalty is “out of sync with the progressive Bill of Rights” in *Kenya's 2010 Constitution* (para. 64) and an affront to the rule of law. The Court also relied on global death penalty jurisprudence to find the mandatory death sentence “harsh, unjust and unfair” (para. 48). This broad holding is sometimes described as the prescriptive ratio decidendi of the precedent. The Supreme Court’s prescriptive ratio decidendi is based on the constitutional impermissibility of the legislature denying a sentencing court the discretion to impose a sentence commensurate with the crime, the circumstances and the offender; the structure of our bill of rights – and, in particular, articles 28 and 50 of the *Constitution*; and the emerging norms of global norms of common decency discoverable from comparative law. It is important to quote the Supreme Court’s reasoning in extenso:
 48. Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the *Constitution*; an absolute right.
 49. With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors.



The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the [Constitution](#) provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.
51. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.
25. There is no doubt that the prescriptive ratio decidendi in [Muruatetu 1](#) applies to cases beyond murder. When the Supreme Court reasons that “the mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”, it applies in equal force to all cases where the mandatory death penalty is imposed. Similarly, when the Supreme Court assails the mandatory death penalty in section 204 of the [Penal Code](#) as “... a mandatory sentence [which] treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them”, that indictment holds with equal force to both section 204 as well as section 296 of the [Penal Code](#) because both sections imposed a mandatory death sentence without individualized sentence hearing. Finally, when the Supreme Court held that “the dignity of the person is ignored if the death sentence, which is final and irrevocable, is imposed without the individual having any chance to mitigate”, that holding is true would be true for all mandatory death sentences – not just for murder. It follows, therefore, that while the Supreme Court was dealing with the narrow question of the mandatory death sentence for murder in section 204 of the [Penal Code](#) in [Muruatetu 1](#), as the principles of Common Law require and it could only determine that narrow question before it, its reasoning is applicable in future cases beyond the narrow confines of section 204 of the [Penal Code](#).
26. The narrow holding in [Muruatetu 1](#) binds all courts in Kenya other than the Supreme Court on all indistinguishable facts to the case before the Supreme Court: a High Court judge, for example, cannot permissibly rule that the mandatory death sentence in section 204 of the [Penal Code](#) is constitutional. It is out of this narrow holding that the Supreme Court crafted the innovative “cause of action” of re-sentencing to apply retroactively. The self-same Supreme Court, in [Muruatetu 2](#), limited the applicability of that new cause of action to only murder cases.
27. At the same time, the broad holding in [Muruatetu 1](#) is permissive in nature: it permits a judge in Kenya, in appropriate cases, to analogously use the reasoning in [Muruatetu 2](#) to kin cases to prescriptively broaden the level of generality of the [Muruatetu 1](#) ratio decidendi. The strict reasoning itself is binding on lower and future courts but the level of generality is determined by how future courts analogize the facts and law of future cases to those of [Muruatetu 1](#). This is, in essence, how the Common Law grows – through the prescriptive ratio decidendi of cases applied analogously to an appropriate level of generality to future cases. A Common Law Court cannot be legally and legitimately curtailed from



applying the prescriptive *ratio decidendi* of a decided case to future cases for that is the essence of judging in the Common Law world. To curtail a Common Law judge from analogously applying the prescriptive ratio decidendi of a precedent (of a higher court) is akin to curtailing the legislature from promulgating statutes. Once a future court has interpreted and delimited or expanded the prescriptive ratio decidendi in a case, it would behoove the higher or apex Court to either affirm the formulation of the prescriptive *ratio decidendi* or to narrow it by way of restatement once the case reaches that higher or apex Court on appeal.

28. Consequently, under the Common Law legal system and our constitutional schema, once a precedent court formulates a rule of law in a case, its descriptive *ratio decidendi* tightly binds the lower courts but in the same vein leaves open the prescriptive ratio decidendi for formulation; distinguishing; clarification; expansion or narrowing by future courts. Indeed, it has been stated that “ultimately, it is for the future court to decide how narrow or wide the precedent ratio ought to be.” This was elaborated in Australia by Gleeson CJ, Gummow, Hayne and Heydon JJ in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA, at [61]: ...if later courts read down the rule of the case, they may treat the proclaimed *ratio decidendi* as too broad, too narrow or inapplicable. Later courts may treat the material facts of the case as standing for a narrower or different rule from that formulated by the court that decided the case. Consequently, it may take a series of later cases before the rule of a particular case becomes settled. Thus for many years, courts and commentators debated whether the landmark case of *Donoghue v Stevenson* was confined to manufacturers and consumers and whether the duty formulated in that case was dependent upon the defect being hidden with the lack of any reasonable possibility of intermediate examination. If later courts take the view that the rule of a case was different from its stated ratio decidendi, they may dismiss the stated ratio as a mere dictum or qualify it to accord with the rule of the case as now perceived.
29. Similarly, in *Povey v Qantas Airways Limited* [2005] HCA, McHugh J said at [76]:
- “Later courts commonly treat the material facts of a case as standing for a narrower or broader *ratio decidendi* than that expounded by the court that decided the case.”
30. We have gone into this jurisprudential terrain in order to make an important point: we do not think that in issuing the guidelines in [Muruatetu 2](#) the Supreme Court aimed to direct or curtail the jurisprudential development of the prescriptive ratio decidendi in [Muruatetu 1](#). Instead, the Supreme Court merely restated, in welcome declamatory fashion, the descriptive ratio decidendi in [Muruatetu 1](#) and clarified that the innovative, retroactive “cause of action” that it formulated in [Muruatetu 1](#) was only to be utilized directly by those prisoners who had been convicted of murder and sentenced to death under section 204 of the [Penal Code](#). Differently put, the Supreme Court, in issuing the guidelines, made it clear that [Muruatetu 1](#) could only be used as a basis for retroactive re-sentencing applications or petitions for persons who had been convicted of murder and mandatorily sentenced to death.
31. As Odunga J., (as he then was) and Mativo J. (as he then was) have made clear in [Maingi & 5 Others v Director of Public Prosecutions & Another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and [Edwin Wachira & 9 Others v Republic](#) consolidated with petition No.88 and 90 of 2021, respectively, the broader reasoning in [Muruatetu 1](#) can be used analogously to find other parts of the [Penal Code](#) or other penal statutes unconstitutional for impermissibly abridging the discretion of judicial officers sitting as sentencing courts to take into consideration the individual circumstances of the offence, offender and victim in prescribing an appropriate sentence. However, such a case has to be properly pleaded and be placed before the court or preserved for appeal in the case of an appellate court such as ours.



32. Though we have gone into this jurisprudential terrain to clarify what we believe is the correct jurisprudential posture and impact of [Muruatetu 1](#) and [Muruatetu 2](#), we must, without relish, find that the appeal in the present case does not come within our remit in order to determine if [Muruatetu 1](#) can analogously apply to it. This is because the appellant did not raise the constitutional issue in the High Court in order to preserve it for determination before us. We are, therefore, precluded from latching on to this constitutional issue on second appeal. To do otherwise will be to assume jurisdiction we do not have. In an appropriate case where the constitutional issue is preserved and appropriately raised, this Court would be entitled to analogously apply [Muruatetu 1](#) to the facts of the case.
33. The upshot is that the appeal fails. In doing so, we echo the remarks of this Court (differently constituted) in [Katana & Another v Republic](#), Criminal Appeal No. 8 of 2019, where S.G. Kairu, Nyamweya & Lessit, JJ. As stated:
32.We are also mindful of the limits of the exercise of our appellate jurisdiction under article 164(3) of the [Constitution](#) and section 3(1) of the [Appellate Jurisdiction Act](#). It is thus our view that the remedy for the Appellants with regards to the issue they raise and arguments they have put forward on the legality and constitutionality of the mandatory death sentence imposed on them, does not lie with this Court, for the reasons we have given.
33. Based on the foregoing, we have no option but to dismiss this appeal in the circumstances. We find it necessary to add that we find this outcome, predicated as it is upon [Muruatetu II](#), to be unfair and disproportionate, in light of the rationale by the Supreme Court of Kenya for declaring the mandatory death sentence unconstitutional in [Muruatetu I](#). There is need for urgent intervention in this regard by way of the necessary legal reforms, or determination by the Supreme Court of Kenya regarding constitutional validity of the mandatory death penalty in such cases as this.
34. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

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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

