



REPUBLIC OF KENYA



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**Komu v Republic (Criminal Appeal 1 of 2017)
[2022] KECA 758 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 758 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 1 OF 2017
K M'INOTI, S OLE KANTAI & KI LAIBUTA, JJA
JUNE 24, 2022**

BETWEEN

ISAACK KIRUGO KOMU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Nairobi
(Ombija, J.) dated 24th September, 2015 in HC. CR.C. No. 88 of 2008)*

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Nairobi (Ombija, J.) delivered on 24th September, 2015. The appellant had been charged on two counts in the Information dated 14th October, 2008 – murder contrary to Section 203 as read with Section 204 of the *Penal Code* particulars being that on diverse dates between 8th and 13th September, 2008 at Kihara Shopping Centre in the then Kiambu District he murdered Jane Wanjiru Kagoya. Count 2 related to an offence of attempted suicide contrary to Section 226 of the Penal Code, it being alleged that on 15th September, 2008 at the said shopping centre he attempted to kill himself by taking poison.
2. Prosecution witnesses were called in support of the case, and the appellant (Isaack Kirugo Komu) gave a sworn statement in defence and, in the end, the trial Judge found that the case by the prosecution had been proved to the required standard. The appellant was convicted on both counts; he was sentenced to death on the murder charge and the sentence on attempted suicide was suspended.
3. Being a first appeal, the law requires that we reappraise the evidence and reach our own conclusions of facts, but remembering that we do not have the advantage of the trial court of seeing and hearing the witnesses and observing their demeanour, and we must therefore give due allowance for that. In



the oft-cited case of *Okeno v Republic* [1972] E.A. 32, the predecessor of this Court stated as follows on the duty of a first appellate court:

“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 vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 570). 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 finding and conclusion; 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 vs. SUNDAY POST* [1958] E.A 424.”

4. It was a murder most foul. Part of the body of the deceased was recovered in a well or borehole and the legs, which had been chopped off, were recovered a few days later in a pit latrine. Like in most such cases, nobody witnessed the killing of the deceased, and what was presented to the trial court by the prosecution was circumstantial evidence, it being alleged that there was a love triangle gone sour involving the deceased, her boyfriend of 6 years (Kenneth Thuku Mungai – PW7 (Thuku) with who they had a son) and the appellant who had come into the scene and attempted to dislodge Thuku from the relationship with the deceased.
5. Let us go through that evidence to see whether it met the threshold for a conviction beyond reasonable doubt for the serious offence of murder.
6. Agnes Wanjiku Machua (PW1 – Wanjiku) was employed as a teacher by Joyous Nursery School and she testified that there was a water well at the school. On 12th September, 2008 at 1 p.m. she went to the well to draw water but, when she lowered a bucket to do so, it got stuck which action surprised her. When she looked inside the well, she saw a white object, which was what was blocking the well. She called the landlord Leonard Mungai Ngere, who came to the scene, observed what Wanjiku had seen and told her to report to police. She reported the matter at Kihara Police Post, police officers visited the scene and part of the body of the deceased was recovered wrapped in plastic paper bags.
7. Meanwhile, the deceased had been reported missing. Her father, Robert Kagoya Wambugu (Wambugu – PW2) a cattle trader who owned a butchery at Gachie and had employed the appellant in that butchery for about 3 years, testified that the deceased was attending French classes and also sold Safaricom cards; that her boyfriend was Thuku with who she had a son. He knew the appellant as they hailed from the same home in Nyahururu; that he employed him at his butchery and even when employment ceased the appellant was a constant visitor at his home as he remained a family friend; that his deceased daughter used to wash the appellant’s clothes at a fee, but he did not know whether the two had any other relationship.
8. Wambugu had been away on a business trip and got back home on 8th September, 2008, but the deceased did not come back home by 7 p.m. as expected and he rang her several times but without any answer. At 9.15 p.m. he got an SMS from her phone with the message “Niko na mimba and I fear you”) (I am pregnant and I fear you) and he replied to the effect that he had no issues about his daughter’s pregnancy his only concern being whether she was safe. She did not answer her phone and, later, he received another SMS from her phone “... tutaonana kesho ...” (we shall meet tomorrow). He continued calling her number but she did not answer.



9. In the days that followed, he mounted a party to search for the deceased in friends and relatives' homes, but the search was unsuccessful, making him report the disappearance of his daughter at Gigiri Police Station. Incidentally, the members of the search party included the appellant. On 13th September, 2008 Wambugu received information that a body had been recovered at Joyous Nursery School, and it was confirmed that the body was that of the deceased. Burial arrangements were made but, in the process, it was reported to Wambugu by neighbours, who suspected that the appellant was involved in the murder of the deceased, visited the plot where the appellant had moved to. A search of a toilet revealed human legs, which had been chopped off from the body of the deceased.
10. Margaret Nyokabi (Nyakabi – PW3) mother to the deceased sold shoes at market places and kept proceeds of sale of Safaricom cards by the deceased. On 8th September, 2008 she received Ksh.13,000 which she was holding for her daughter and escorted her to the gate where the deceased informed her that she was going to collect money from shops where she had sold cards. She engaged in her business that day but, when she got back home, the deceased did not come back as expected and calls to her number went unanswered before the phone was finally switched off. Her daughter disappeared and was finally found dead. In July of that year (2008), Nyokabi had been told by Thuku that the appellant had threatened to kill him (Thuku) over his relationship with the deceased. She was unable to resolve the issue, but confirmed that the deceased used to wash the appellant's clothes at a fee.
11. Sospeter Kamau Gachohi (Gachohi – PW6), who participated in the search for the deceased, informed Nyokabi that the appellant had fallen ill and he (Gachohi) was one of those who took him to hospital. He also informed her that he participated in the recovery of the deceased's limbs from the toilet. One of the items recovered from the appellant by Gachohi when the appellant was admitted in hospital was a phone which Nyokabi had bought for her daughter, the deceased. It was make Nokia 1600 black in colour and she (Nyokabi) knew that it was the phone she had bought for her daughter because, in addition to recognizing it, when it was switched on the message that came on the screen was "KEVO SON". Kevo was son of the deceased. She produced a receipt issued when she purchased the phone at Vexsons Electronics Limited dated 5th September, 2007 with a serial number SM356423/01/286026/2 and a 1-year warranty.
12. Gachohi was Wambugu's partner in business and Wambugu informed him of the disappearance of the deceased on 11th September, 2008. When the body of the deceased was found he (Gachohi) visited the scene and witnessed its retrieval from the well. As they arranged for burial, he received information that the appellant was sick, unconscious in his house. He visited the house with others; the door had to be broken; they took the appellant to hospital and while being admitted at the hospital a phone, identified by Nyokabi as belonging to the deceased, fell from the appellant's pocket. Gachohi picked it up as was witnessed by Francis Wanyoike Njoroge (Njoroge – PW12). Gachohi also participated in the retrieval of the deceased's lower limbs which were found in a toilet and, according to him, the appellant had a relationship with the deceased as he had witnessed intimate conversations between the two on various occasions.
13. Lucy Wairimu Kagoya (Wairimu – PW5), a sister to the deceased, knew that the deceased had a relationship with Thuku with whom they had a child and that the appellant was a family friend who had worked in their butchery. She confirmed that the deceased owned a Nokia 1600 phone which, when opened, displayed "KEVO – SON", son to the deceased. She used the phone often to talk to her friends as her deceased sister would leave the phone with her when she visited Thuku. The deceased would refuse to take calls from the appellant. Before the deceased disappeared Wairimu saw a message on the phone from the appellant telling the deceased to go and collect her money from the appellant the next day. On 7th September, 2008 Wairimu, the appellant and the deceased were to visit a friend in



- Githurai but the trip was cancelled because there was a ceremony at Thuku's home where his mother was hosting visitors, and the deceased was asked to assist with cooking. The witness was one of those who participated in searching for the deceased until the body was found on 13th September, 2008.
14. Sylvia Wanjiku Wambui (PW6 – Wambui), a friend of Wairimu and the deceased, met the deceased on the day she disappeared. She observed her clothing and identified the body at City Mortuary.
 15. Thuku (PW7) testified that the deceased was his girlfriend with who they had a child. He knew the appellant as a family friend of the deceased. In July 2008 he received calls and messages from an unknown phone number threatening that he would be killed because of his relationship with the deceased. He recognized the voice as that of the appellant, a person well known to him. He informed the deceased about the threats and when she decided to confront the appellant about it he (Thuku) followed the deceased to the appellant's house where the appellant assaulted him. He left and reported the incident to the deceased's mother (Nyokabi), who discouraged him from reporting the matter to the police as she would try to resolve the matter. He told the deceased to stop washing the appellant's clothes. He confirmed that he had on 7th September, 2008 requested the deceased to go to his home to assist in cooking as his mother had visitors and, on that day, the deceased informed him that she was pregnant, expecting a child. She intended to go to France to join up with her sisters; she did not intend to carry the pregnancy, she was going to abort. He gave her money for that purpose; the abortion was to be done the next day 8th September, 2008 but his calls to her went unanswered the whole day. That evening he received a message from the deceased's phone telling him that they would meet the next day, but this did not happen and all efforts to trace her were in vain until her body was found in a well at Joyous Nursery School.
 16. The next witness was Joyce Wangui Nganga (Wangui – PW8) who stated that the deceased was her best friend of 14 years. She knew that Thuku was the deceased's boyfriend and they had a child. In August 2008 the deceased requested her to accompany her to Eastleigh where she was to procure an abortion; they went there and met a doctor who cited the fee required for the process. The witness did not accompany the deceased when she went to procure an abortion and she later learnt that the deceased had been murdered.
 17. Then there was Dr. Zephania Kamau (PW9), who examined the appellant to assess his age and mental status after being given a history of attempted suicide by the appellant. He found that the appellant was 25 years old, was emaciated, had been admitted at Kenyatta National Hospital and was fit to plead.
 18. The prosecution also called PC Livingstone Lishanda, then attached to Scenes of Crime, Nairobi Area. On 15th September, 2008 after being summoned by Gigiri Police Station he visited Kihara Shopping Centre where he was shown body parts of the deceased composing of 2 legs cut from the knee joint and the rest of the body. He took photographs of the same which he produced as part of the evidence.
 19. Stephen Gachina Ngugi (Ngugi – PW11) was the owner of the plot where the deceased's legs were recovered in a toilet. He saw the legs being retrieved from the toilet.
 20. Also called as a witness was Francis Wanyoike Njoroge (Njoroge – PW12) who testified that he had rented a house at Kihara Market where the appellant used to frequent as he (the appellant's) house had burned down. On 15th September, 2009 he went to the house and found it locked from inside; he and others had to break the door and they found the appellant in bed unconscious; they hired a taxi and took the appellant to hospital where he was admitted.
 21. The pathologist, Dr. Johnson Odiwuor (PW13) performed post mortem on the body of the deceased on 15th September, 2009. He found a decomposed body; it was pale meaning that there was loss of blood; both legs had been amputated below the knee; the uterus was large meaning that the deceased



- had been pregnant and the foetus had been removed; there was scalp haematoma on the left side of head caused by blunt trauma.
22. John Nderitu Norman (PW14) was one of those who assisted in taking the appellant to hospital. He noted that a phone, later identified as belonging to the deceased, fell from the appellant's pocket as he was being admitted to hospital.
 23. Dr. Kinoti Ndege of Kenyatta National Hospital attended to the appellant, who had been transferred from ICU to Ward 7 of that hospital on 15th September, 2008 and he managed him until he was discharged from hospital on 4th October, 2008 and attended him on follow up outpatient visits. The doctor testified that the appellant had suffered organ phosphate poisoning which "... means that he had taken a chemical which could cause poisoning if ingested or exposed on the skin ...". The appellant had been admitted at the ICU while in a coma after being transferred from Kihara Sub-District Hospital.
 24. Chief Inspector Duncan Mulitani, then Deputy OCS, Gigiri Police Station, received a report on 10th September, 2008 that the deceased was missing. On 13th September, 2008 he received a report that part of the body of the deceased had been found. He visited the scene and saw a decomposed body without lower limbs; later the missing limbs were found in a toilet.
 25. That was the case made by the prosecution. The trial Judge found that there was a case to answer and the appellant, in a sworn statement testified that he worked at a butchery in Kihara Market owned by the father of the deceased. He later left that employment but remained a family friend of the deceased. The deceased used to wash his clothes at a fee; he did not know that the deceased and Thuku were lovers; he participated in searching for the deceased when she disappeared and was present when part of the body was recovered from a well or borehole. Later he was walking at Kihara Market when he suffered a "black-out"; he did not know what happened. He had taken tea at California hotel and did not know how he had ended up at Kenyatta National Hospital. He denied the offences. He denied committing the offences. He also denied threatening or assaulting Thuku.
 26. The trial Judge analyzed the whole case and as we have seen found that the prosecution had proved its case and the appellant was convicted; findings which the appellant disagrees with and hence this appeal.
 27. In the Supplementary Memorandum of Appeal drawn for the appellant by his lawyers M/S Pauline Irungu & Company Advocates 10 grounds of appeal are raised to the following effect: that the Judge erred in law and fact by basing conviction on circumstantial evidence that did not meet the legal threshold; that the prosecution case was not proved to the required standard; that the prosecution case was full of contradictions; that essential witnesses were not called contrary to Section 150 of the Criminal Procedure Code; that the Judge erred by drawing wrong inferences to the appellant's detriment; that the Judge was wrong to find that there was malice aforethought; that the sentence was harsh and excessive; that the appellant's defence was not considered and, finally, that the Judge erred in law and fact by failing to comply with provisions of Section 200 of the Criminal Procedure Code.
 28. When the appeal came up for hearing before us on a virtual platform on 22nd March, 2022 learned counsel Miss Pauline Irungu appeared for the appellant while learned counsel Miss Nyalyuka appeared for the office of the Director of Public Prosecutions. Both counsel had filed written submissions which they fully relied on and which we have considered.



29. To prove a case of murder the prosecution must establish beyond reasonable doubt that the accused person killed the deceased, and that he had malice aforethought when he committed the offence. Malice aforethought is defined in Section 206 of the [Penal Code](#) as:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

30. Starting with the complaint that Section 200 of the [Criminal Procedure Code](#) was not complied with, the section provides that a magistrate (or Judge under Section 201 of the said Code) who takes over a matter that has been partly heard by a previous magistrate shall explain to the accused person that he has a right to recall a witness or witnesses who had already testified before the previous magistrate.

31. In the case at hand, the record shows that the trial began before Lesiit, J. (as she then was) who took the testimony of 3 prosecution witnesses. On 4th September, 2010 the matter was before Ombija, J. when the State Counsel requested that the matter proceed before a different Judge under Sections 200 and 201 of the [Criminal Procedure Code](#). Counsel on record for the appellant (Mrs. Kinyori) replied that she had no objection to the case proceeding before a different Judge under the said provisions of law. It was so ordered. In the case of [Kossam Ukiru v Republic](#) [2014] eKLR, this Court held that where the lawyer on record for the accused answered the question whether the case should proceed from where it had reached that was adequate compliance with Section 200 of the said [Code](#). We said:

“The record shows that Muneeni (PM) informed the appellant of the above provisions upon which his counsel informed the court that the case proceeds from where the other court left. In our view, there was adequate compliance with the provisions of Section 200 (3) of the Criminal Procedure Code aforesaid. The record does not show that the appellant by himself or through his counsel requested for recall of any witness who had previously testified. In our view the appellant's complain that the provisions of the above section were not explained to him suggests want of candour on his part. His complaint in that regard is rejected.”

32. In [Shikari v Republic \[2021\] KECA 302](#) this Court held that where an accused is represented by a lawyer the lawyer has instructions from the accused and is possessed of relevant instructions to answer the question on Section 200 of the said Code. The Court stated:

“Two facts are evident from the proceedings. The first is that the court discharged its duty and explained directly to the appellant his rights under section 200 of the Criminal Procedure Code. Second, since Mr. Mushelle was the appellant's counsel in the trial court, this court



can only infer and conclude that he had instructions and authority from the appellant as regards on how to proceed. In any event, under article 50

(2) of *the constitution*, an accused person has a right to legal representation and to choose, and be represented by an advocate, who in law is deemed to be his or her agent.”

33. The lawyer for the appellant in our case applied that the succeeding Judge continue the case from where it had reached. There was no application to recall any witness. The succeeding Judge then ordered as per the application, and we think that there was compliance with the law and the complaint has no merit and is dismissed.
34. The main issue in this appeal, is that there was no direct evidence and that the prosecution relied on circumstantial evidence which we have set out in full in this Judgment.
35. There was a relationship between Thuku and the deceased that resulted in the birth of a son. Then the appellant comes into the scene first employed at the butchery of the father of the deceased and, after about 3 years, he opened his own butchery. The trial Judge analyzed that evidence and came to the conclusion in the said Judgment:

“Even with the full knowledge of the relationship between Thuku and the deceased it would appear that the accused was also smitten and was also eyeing the deceased to forge a relationship. Towards that end, the accused managed to persuade the deceased to wash his (accused) clothes periodically at a token of sh.150/= or 100/= per session. In the fullness of time the relationship between the accused and the deceased matured into a clandestine love affair. Henceforth the deceased was dating both Thuku (PW7) and the accused at the same time.

However, on the evidence, it would appear that the deceased loved Thuku more.

This did not go down well with the accused who became extremely jealous. Matters came to ahead when accused threatened Thuku in a text message during the month of July, 2008 and eventually physically attacked him (Thuku). The tension was eased when Thuku, on the one hand, and the accused, on the other hand, resolved the issue under the chairmanship of their common mother-in-law (PW3). But even then if Thuku thought the matter was over he was in for a rude shock.

It come to pass in the month of September, 2008 that the deceased became pregnant. She confided in Thuku or 6th September, 2008, the fact of this pregnancy and sought from him some financial assistance to procure an abortion. Thuku gave her sh.3000/= towards the end. On her own she had sh.5000/= making a grand total of sh.8,000/= which the doctor who was to procure the abortion had demanded as his professional fees.”

36. There was evidence that the appellant threatened Thuku; the appellant beat up Thuku because the appellant disliked the fact that the deceased had a love affair with Thuku; he wanted the deceased to be his lover; the torso (legs) of the deceased were found in a latrine where the appellant resided. When the appellant was rescued after taking a chemical in an attempt to commit suicide, a phone which was positively identified by the deceased’s mother and sister as belonging to the deceased, fell from the appellant’s pocket. That phone had been used to send messages to Thuku and to the family of the



deceased when she was missing between 8th and 13th September, 2008. In the case of *PON v Republic* [2019] eKLR, this Court observed on direct and circumstantial evidence:

“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 V. Republic* Criminal Appeal No. 30 of 2013,

“It 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.””

37. This Court in *Josephat Manoti Omwancha V Republic* [2021] eKLR stated the considerations on circumstantial evidence as:

“On circumstantial evidence, the approach we take is that now forming a well-trodden path of this court in numerous of its decisions. We take it from *Sawe vs. Republic* [2003] KLR 364 (supra);

Wambua & 3 Others vs. Republic [2008] KLR 142; *Mwendwa vs. Republic* [2006] 1KLR 137, *Kipkering Arap Koskei & Kirire Arap Matetu* [1949] EACA 135), *Peter Mugambi vs. Republic* [2017] eKLR, and *Dorcas Jebet Ketter & Another vs. Republic* in which the following guiding principles were crystallized, namely:

- (i) The inculpatory facts must be incompatible with the innocence of the accused.
- (ii) They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.
- (iii) There must be no other existing circumstances weakening or destroying the inference.
- (iv) Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.”

37. The trial Judge found on the evidence and we agree, that the appellant and the deceased were lovers; that the deceased and Thuku were lover’s and parents of a baby son; that the appellant was unhappy that he did not have full attention of the deceased who was more romantically involved with Thuku; that the appellant thought that the pregnancy the deceased carried was his but, when the deceased decided to abort the pregnancy this infuriated the appellant who decided to kill her. The phone owned by the deceased was found with the appellant (it fell from his pocket), which leads to the irresistible conclusion that the appellant was the last person to be with the deceased. He sent messages from that phone when he had already killed the deceased, dismembered her body and dumped part of it at Joyous Nursery School, which was near his residence and the other part (legs) in a latrine at his compound. There can be no other explanation to all these factors than to lead to the conclusion that the appellant killed the deceased, and the manner he did it shows that he had malice aforethought as defined by Section 206 of the Penal Code. This Court in the case of *Geoffrey Cheruiyot Chirchir v Republic* [2013] eKLR stated on the issue of an appellant’s conduct who had hidden in a house refusing to report to police:

“The appellant’s conduct cannot be explained on any other hypothesis other than that of guilt. The inculpatory facts are incompatible with the innocence of the appellant and are



incapable of an explanation upon any other reasonable hypothesis other than his guilt. The circumstantial evidence points to the appellant as the person who inflicted the fatal injuries on the deceased to the exclusion of any other person. There are no co-existing factors or circumstances demonstrated by the facts on the record which tend to weaken or destroy the inference of the appellant's guilt.

We have keenly examined the inculpatory facts and have accordingly ruled out any suspicion which may cast doubt on the appellants' guilt. There is nothing either from the evidence of the prosecution or the defence which has tended to weaken the inference of guilt drawn by us."

38. The facts in the appeal before us fall on all fours with the facts in the *Geoffrey Chirchir* (supra) case. There can be no other hypothesis here. The appellant was infuriated that the deceased continued the relationship with Thuku. The appellant thought that the pregnancy the deceased carried was his but, when she informed him that she carried a pregnancy by Thuku, he could not take it at all. He invited her to his house, killed and dismembered her body and then sent messages from her phone which he had taken from her, messages to mislead Thuku and her family that she was well. He even participated in searching for her well knowing that she would not be found as he had killed her. All the circumstances as laid down by the prosecution showed that it was the appellant and none other person who killed the deceased. When the noose was tightened by the impending recovery of the body of the deceased, the appellant panicked and took a chemical to end his life, but he was saved when he was rushed to hospital and finally admitted at ICU of Kenyatta National Hospital.
39. The prosecution proved its case to the required standard and the manner in which the deceased was killed and the body mutilated called for the sentence imposed by the trial court. This appeal has no merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

Dr. K.I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

