IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 67 OF 2016

BETWEEN

DICKSON AMALEMBA LISANZA.....1ST APPELLANT

GEOFFREY SHITUKA CHERUTA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being and appeal from conviction and sentence by the High Court of Kenya

at Kakamega (**Sitati & Mrima, JJ**) delivered on 4th February, 2015

in

Kakamega H.C.CR.A. No. 26 & 32 of 2014)

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JUDGMENT OF THE COURT

1. **Dickson Amalemba Lisanza** and **Geoffrey Shituka Cheruta** (1st appellant and 2nd appellant respectively), were jointly tried together with 4 others before the Senior Resident Magistrate's Court at Kakamega, on 6 counts of Robbery with violence contrary to **section 296(2)** of the Penal Code, and 1 count of attempted robbery with violence which was said to be contrary to section 296(2) of the Penal Code.

2. The 1st appellant was convicted on counts 1 and 2 in regard to which he was alleged jointly with others to have violently robbed and injured **Mathew Shilisia Lwoyelo (Mathew**) and **Christine Ina Shilisa (Christine)** respectively, of mobile phones and money in cash, while the 2nd appellant was convicted on count 6 in regard to the attempted robbery charge in which he was alleged jointly with others to have violently attempted to rob **Laban Atsyenda Livingstone M'mayi (Laban**) of cash Kshs 45,000 and shot him dead, and count 7 in regard to which he was alleged to have robbed **Isaac Magani Liyiakha (Isaac**) of Ksh 30,000.

3. The 1st and 2nd appellants were each sentenced to death, while their co-accused were all acquitted under section 210 of the Criminal Procedure Code. The appellants each appealed to the High Court against conviction and sentence. By its judgment delivered on 4th February, 2015, the High Court dismissed both appeals. The appellants are now before this Court with a second appeal.

4. The events leading to the appellant's conviction were triggered by a spate of robberies which took place on the night of 25th February, 2012 at Mukhonje village Lukusi sub-location, Ivihiga location in Kakamega East District. At around 10.00 pm, Mathew who was in bed was woken up by his dogs barking outside. After looking through the window and seeing nothing, he went back to bed but the dogs continued barking. He decided to come out through the back door to check what was going on. It was then that he met three people, one of whom was armed with a panga and a slasher, a second one was armed with a panga and a "staff", and a third one was armed with an AK47 rifle. Mathew tried to retreat back to the house, but one of the robbers hit him on the left side of the face and another cut him with a panga, and ordered him to sit on the ground. He sat down screaming, and his wife Christine and daughter came out of the house.

5. The robbers demanded money and Mathew gave them Kshs. 14,000. The robbers also took Kshs. 30,000 from a drawer in the house. In addition, the robbers took mobile phones from Mathew, Christine and their daughter, and beat Christine demanding some more money before they left. Mathew identified the 1st appellant as the person who cut him, and maintained that 1st appellant was well known to him and he was able to recognize him visually, as well as through his voice. Christine who was also beaten and robbed of Kshs. 10,000 did not see

any of the two appellants among her assailants.

6. Mathew's son **Hardley Muleshe (Hardley**), whose house was within the same compound as his parents, heard screams from his parents' house. He came out of his house intending to go to his parent's house, but as he soon as he came out, he was attacked and hit on the back. Hardley ran towards the gate in a bid to escape. He was surprised to find the 1st appellant standing at the gate. The 1st appellant spoke to him asking him what was wrong and he recognized his voice. Hardley tried to call an AP officer who was known to him but the officer did not pick his call. Some 3 young men who were his friends came but as they were talking, someone beamed a torch at them and they all ran away dispersing in different directions.

7. **Roseline Dina Obima (Roseline**) was at home with her family when they heard screams coming from outside and realized that the screams were from the house of Mathew. Shortly thereafter, she saw Hardley arrive at her house followed by the 1st appellant. They informed him that Mathew's home had been raided by robbers. The 1st appellant claimed that he was coming from the home of David Lwoyero, who is a brother to Mathew.

8. On the same night at about the same time, **Azibeta Kadenyi Ojindo Makami (Azibeta**) and her husband Isaac who operate a shop business at Mukhonje village had just closed the shop and retired to the back of the shop which they used as a residence. The door into the sleeping area was suddenly broken, and two people entered. One was armed with a panga and the other with a gun. Azibeta and Isaac identified the person who was armed with a panga as the 2nd appellant whom they knew well. They did not know the one who was armed with a gun. The person who was armed with a panga cut Isaac on the head. The robbers then took Kshs. 30,000 which belonged to Isaac. The money was handed over to them by Azibeta. They also took a Nokia phone and left for a neighbour's shop.

9. **Esther Khaniri M'mayi (Esther**) and her husband **Laban Livingstone Alienda M'mayi (Laban**) were in their house when Laban received a call from a village elder who informed Laban that there were armed robbers at the shopping centre. Before the two could open the door, they heard a loud voice ordering them to open the door, and saw torches. The door was then kicked open. Laban struggled with the men in an attempt to close the door but the door broke and two men entered the house, one armed with a gun and the other with a Somali sword. The one with the gun shot Laban dead. Esther identified the 2nd appellant as the person who hit her on the abdomen. She recognized him because he was her former student. The robbers did not take any money from her, but said the money will be used to bury her husband.

10. **Boniface Kamuka Shibada (Shibada**) who was at the material time a watchman at Nanjenya bar in Mukhonje area was seated outside the bar when six people emerged. Two had guns and were dressed in police uniform, another had a crowbar, while another had a panga. The one who had a crowbar whom Shibada identified as the 2nd appellant, hit Shibada on the right side with the edge of the panga asking him for money. Shibada told the robbers he had no money and he was ordered to sit down as the robbers continued to hit him. Shibada managed to escape as the robbers were trying to rob the bar attendants.

11. Patrick Mambiri, a Senor clinical officer at Kakamega provincial hospital examined Mathew, Christine, Hardley, Isaac and Shibada, prepared and produced a P3 form in regard to each, noting that each had injuries. **Dr. Dickson Muchana (Dr. Muchana**) of Kakamega Provincial hospital, conducted a postmortem examination on the body of Laban and prepared a report in which he noted that Laban had a cut behind the right eye above the cheekbone, as well as two bullet wounds, and that his death was due to gunshot injuries.

12. **Sgt. Hezron Mukenye (Sgt. Hezron**) was among the officers who went on operation at Mukhonje village, following the spate of robberies. Among the people he arrested was the 1st appellant and the 2nd appellant. The two were subsequently charged together with others who were also arrested.

13. The two appellants each gave sworn evidence in their defence. In addition, the 1st appellant called David as his witness. In his evidence the 1st appellant stated that on the material day at about 4.00 pm. he went to cut napier grass to feed cows. He was employed by David who is a brother to Mathew. He carried the grass on a bicycle and went to David's home where he cut the grass into small pieces and fed the cows. At about 7.30 p.m. David was escorting him when they heard screams from Mathew's homestead. They walked to Mathew's gate where they found 4 young men, one being Hardley, Mathew's son. As they were inquiring what was happening, they saw a group of people approaching them with torches, and so they ran away and converged at the house of Roseline. Hardley tried to call the police, but the call was not going through. Later, David who had hid in the sugar cane called the 1st appellant and he came over to the house of Roseline where they were. They then proceeded to the home of Mathew where they found a crowd of people including Bernard Lwoyelo, David and Doris Lwoyelo. They assisted with first aid until Mathew was taken to hospital, when they dispersed.

14. The 1st appellant claimed that three days before this incident he had had an altercation with Mathew because Mathew asked him to cut napier grass for him but refused to pay. Under cross examination, the 1st appellant denied having been with the 2nd appellant on the material night, and maintained that he was with David who stays about 200 metres away from Mathew's home. He denied having attacked and robbed Mathew.

15. The 2nd appellant in his sworn defence explained that he was at Kipkaren where he sells second hand clothes, on the day that the robbery is alleged to have taken place. He was arrested at Kipkaren on the 4th June, 2012 and taken to his house at Kipkaren where a search was conducted. He was then taken to Kakamega police station. He explained that he used to work at a hotel and Isaac claimed that he was seducing his wife and so he was forced to leave his employment. He denied having cut Isaac and said that the witnesses were framing him.

16. David also testified that the 1st appellant used to help him tend to his cows and that on that day, they were together at David's house when they heard screams coming from Mathew's home. They went to Mathew's home, and when they got near, they saw people with rungus and torches, and so they ran away and scattered in different directions. Later, he called the 1st appellant and learnt that he was safe and they agreed to meet at Mathew's house, where they helped with first aid until Mathew and his wife were taken to hospital. He was surprised when the 1st appellant was arrested the next day, and even his younger brother Bernard was arrested. His brother Bernard was subsequently released. He maintained that the 1st appellant did not participate in the robbery.

17. In its judgment, the first appellate court found that the evidence of the prosecution was properly corroborated and the circumstances for

visual identification were favorable. The court was satisfied that identification of the 1st and 2nd appellant was by recognition because the victims were family members and neighbors, and therefore, identification was safe to found a conviction. The appellants' appeals were therefore dismissed as lacking merit.

18. The appellants have filed a joint memorandum of appeal in which they have raised several grounds. These include, the first appellate court having erred in fact and law in failing: to note that the prosecution failed to prove the ingredients of robbery with violence to the required standard; to note that the allegations of robbery by Mathew and Christine, were not corroborated and/or proved beyond reasonable doubt; that the mandatory death sentence which was imposed against the appellants was arbitrary, inhuman and against the principles of international law; that the evidence that was before the trial court was not sufficient to prove the case against the appellants beyond reasonable doubt and therefore their conviction was unsafe.

19. When the matter came up before us for hearing, the advocates for the appellants and the respondent opted to rely on written submissions which they had duly filed and exchanged.

20. For the appellants, it was submitted that the prosecution failed to prove the alleged robbery with violence against the appellants as no ingredients of the offence of robbery with violence were established. Relying on **Opoya vs Uganda [1967] EA 572**, it was submitted that the word "rob" connotes not simply a theft but a theft preceded, accompanied or followed by the use or threat to use of actual violence to any person or property in order to retain the stolen property. In regard to the ingredients of the offence of robbery with violence, the appellants cited **Erick Amwata Onono v Republic, Criminal Appeal No.17 of 2015 (2016) eKLR** and **Oluoch v Republic [1985] KLR.**

21. It was further submitted that the evidence regarding the identification of the appellants was unbelievable and insufficient to support a conviction, as the witnesses did not give any specific description or point out any special features or marks that could make the identification watertight. Citing **Wamunga vs Republic [1989] KLR 424**, it was argued that the credibility of the victims of the robberies was highly questionable and in dire need of corroboration, as visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. It was pointed out that Christine did not identify the 1st appellant as one of the robbers who attacked them, and Roseline stated that the 1st appellant arrived at her home shortly after Hardley and informed them that the home of Mathew was being raided, and therefore the 1st appellant could not have been one of the robbers. In addition, no ballistic report was produced, nor was the murder weapon found.

22. The Court was urged to allow the appeal and quash the appellants' conviction and sentence. In the alternative, the Court was urged to re-sentence the appellants in accordance with the Supreme Court's decision in **Francis Karioko Muruatetu & Anor vs Republic [2017] eKLR.**

23. For the respondent, it was submitted that contrary to section 361 of the Criminal Procedure Code, the appellants had raised matters of fact in their grounds of appeal and this could not be entertained in a second appeal; and that the Court has to defer to the concurrent findings of fact made by the two courts below unless those findings were not backed by evidence or it is demonstrated that the two courts below acted on wrong principles in making those findings.

24. Regarding the question whether the essential ingredients of the offence of robbery with violence was proved, **Oluoch vs Republic [1985] KLR** was relied upon for the proposition that in such a charge there are three factors, one of which must be present. These are: that the offender was armed with a dangerous or offensive weapon or instrument; that the offender was in the company of one or more person; or that immediately before the robbery, or at the time of the robbery, or immediately after the time of the robbery, the offender used personal violence to any person. It was submitted that according to the prosecution evidence, all these three factors were present as the robbers were armed with dangerous weapons, which included a panga, a crow bar and an AK47 rifle, and that they were more than one person, and the victims of the robberies including Mathew, Christine, Laban, Esther and Isaac were injured during the robberies.

25. Regarding identification of the culprits, it was submitted that the 1st appellant was recognized visually and through his voice by Mathew who knew him well, and that Hardley also spotted him at the gate at the time the attack was going on, while the 2nd appellant was identified by Azibeta, Esther, Isaac and Shibada.

26. It was submitted that the murder weapon was not recovered and without the gun there was no way the ballistic report could have been prepared. As regards the sentence, it was conceded that the mandatory nature of the death penalty was unconstitutional, but maintained that the court had discretion to impose the death penalty taking into account the aggravating factors which included the injuries to the victims of the robberies, and the fact that one of the victims succumbed to his injuries, and that several items were stolen. The Court was therefore urged to dismiss the appeal in its entirety.

27. We have considered this appeal, the rival submissions made by the parties, and the authorities cited. We concur with the respondent's submission that this being a second appeal, this Court is restricted by **section 361 (1) (a)** of the Criminal Procedure Code, to considering only issues of law. The Court is also obliged to respect the concurrent findings of the two lower courts, and only interfere if satisfied that the findings or conclusions are not supported by the evidence or are based on a perversion of the evidence or law. This is a well-established principle as evident from the following quotation from the decision of this Court in **M'Riungu v. Republic [1983] KLR 455**:

> ***"Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".***

28. In our view, four main issues of law arise for our determination namely, whether the identification of each of the appellants was free from error and safe to rely on; whether the ingredients of the offences of robbery with violence were established against the appellants; whether the learned Judges of the first appellate court discharged their mandate by properly re-evaluating and considering the evidence; and whether there is sufficient justification for interfering with the sentence that was imposed on the appellants.

29. From the findings of the two lower courts, it was clear that on the night 25th February 2012, there was a spate of robberies at Mukhonje village in which one person was fatally shot, and several persons robbed and injured. The evidence was clear that the assailants were armed with a gun, panga and crowbar which are dangerous or offensive weapons. The assailants were also more than one person, and P3 forms and treatment notes were produced which showed that several victims of the robberies were wounded during the robbery, and one even killed. Therefore, the ingredients of the offences of robbery with violence were clearly established.

30. The pertinent issue is whether the two appellants were properly identified as having participated in the robbery. The 1st appellant was convicted of robbing Mathew and Christine. Mathew and his wife Christine, who were the first victims in the spate of robberies, testified that the robbers who attacked them in their home were many, and at least three of them were armed with a panga, rungus and a gun. Both Mathew and Christine suffered injuries which included cut wounds, and this confirmed their evidence that the assailants were armed.

31. While Christine was categorical that she did not recognize either of the appellants during the robbery, Mathew was equally emphatic that he recognized the 1st appellant visually and through his voice. The other witness who testified to having identified the 1st appellant was Hardley, who stated that as he ran to the gate in a bid to escape, he found the 1st appellant standing outside the gate to their home, and the 1st appellant whose voice he recognized talked to him, asking him what was wrong. No other witness identified the 1st appellant, but it is clear that the 1st appellant was placed at the scene of the robbery against Mathew. The 1st appellant does not deny having gone to Mathew's home, but explains that he went there as a result of the commotion to find out what was happening. The 1st appellant's defence was supported by the testimoney of David, Mathew's brother who confirmed that he was escorting 1st appellant who had been doing some work for him, when they heard the commotion.

32. In **Wamunga vs Republic [1989] eKLR** this Court stated as follows:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

33. The question that we must examine is whether the 1st appellant was present at the scene as a robber or whether he was there simply as someone who wanted to find out what was going on. The fact that Hardley found the 1st appellant outside the gate as the robbery was going on inside the home, contradicts Mathew's evidence that 1st appellant was one of the assailants who were in the home attacking and robbing him. The 1st appellant did not run away or hide when

Hardley came out, but tried to find out from Hardley what was happening in the home. When Hardley and 1st appellant were confronted and they took to their heels, the 1st appellant joined Hardley at the House of Roseline where Hardley had sought refuge and this was confirmed by Roseline.

34. This evidence, taken together with the evidence of David casts a doubt regarding the identification of the 1st appellant by Mathew. As Mathew's evidence was the only evidence implicating the 1st appellant, it was unsafe for the two courts below to rely on this evidence without considering the evidence of Hardley, Roseline and David.

35. In their conclusion, the learned Judges of the first appellate court stated as follows:

> ***"Finally, we have ourselves considered the appellants' defences and find the same did not in any way shake the prosecution's case against them."***

36. This was a misdirection as the learned Judges appeared to have considered the prosecution evidence and then looked at the defence to see whether it in any way disapproved it, thereby placing the burden of disapproving the prosecution case on the defence. In **Okale vs Republic [1965] EA 555**, the predecessor of this Court addressed a situation where similar comments had been made by the trial court. The Court had this to say:

> ***"We think with respect that the learned Judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v Republic [1965] EACA Criminal Appeal No. 156 of 1964 (unreported), where the trial judge had used similar expressions, this Court said:***
>
> > *'we find it impossible to avoid the conclusion that the learned Judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution. Moreover, we think the learned Judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence….'*
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> ***We think that the observations of this Court in that case apply in equal force to the present appeal."***

37. We note that the learned Judges of the first appellate court did not independently re-analyze and consider the evidence of identification against the 1st appellant, nor the fact that it was only Mathew who purported to have identified him. In addition, the learned Judges failed to give due weight to the evidence of Roseline, David and the 1st appellant. The learned Judges overlooked the fact that the prosecution had the burden of proving the case against the 1st appellant beyond reasonable doubt.

38. The following passage from **United States vs Smith** cited by **Nyakundi, J** in **Republic v Ismail Hussein Ibrahim [2018] eKLR** which we approve, is instructive:

> "To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of **United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring)** the court stated:
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> > ***"The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. …… The state***
> >
> > ***must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."***

39. We are of the view that had the learned Judges properly re-considered and analysed the evidence, they would have come to the conclusion that the prosecution did not discharge the burden of proof against the 1st appellant as there was a doubt regarding his identification. The benefit of this doubt ought to have been resolved in the 1st appellant's favour. For this reason, we find that the prosecution failed to prove its case against the 1st appellant beyond reasonable doubt. The 1st appellant's conviction, anchored on his purported identification by Mathew, was not safe, and cannot stand.

40. As for the 2nd appellant, he was convicted of attempting to rob Laban and also robbing Isaac. Esther who was with Laban at the time of the attempted robbery testified that two robbers kicked open the door to their house and entered. One was armed with a gun while the second one had a Somali sword. The man armed with the gun shot Laban who died on the spot. Esther was at the verandah and tried to escape when the two men moved to the bedroom, but she met a third person who slapped her hard and ordered her to give him money. She identified this third person as the 2nd appellant, a neighbour and a person whom she had known from his childhood. She explained that she was able to identify him with light from a lantern which was on. Esther stated that when she made her first statement, she did not name the 2nd appellant as she was traumatized and terrified, and feared that he might come back to harm her.

41. In regard to count 7, the 2nd appellant was convicted of robbing Isaac. Azibeta and Isaac were in their shop residence, when Isaac opened the back door, as he heard screams from a nearby bar. It was then that the 2nd appellant who was known to both Azibeta and Isaac demanded that he opens the door, and kicked it open. The 2nd appellant who was armed with a panga entered the house accompanied by a tall man who was armed with a gun, and another, armed with a crowbar. The 2nd appellant cut Isaac on the head demanding money, and the robbers only took off after they had robbed Isaac of Kshs. 30,000 and Azibeta, of a phone. Both Isaac and Azibeta maintained that they recognized the 2nd appellant as he was well known to them. Isaac added that 2nd appellant had been working as a bouncer at Nanjenya bar in Mukhonje area.

42. Shibada who was at the material time working as a watchman at Nanjenya bar in Mukhonje area, was also attacked at the material night. He testified that six people, two of whom were armed with a gun, one with a crowbar and another with a panga, accosted him at the bar. He identified the 2nd appellant as the one who was armed with a crowbar and testified that the 2nd appellant hit him on the head with the crowbar. He knew the 2nd appellant well, as he had worked with him at that bar and they were also from the same area.

43. It is evident that 2nd appellant was identified through recognition by four witnesses, that is, Esther, Azibeta, Isaac and Shibada, all of whom testified that he was armed. Esther was able to identify the 2nd appellant using a lantern, while Azibeta and Isaac were able to identify him as they had an electric bulb which was on. Shibada also testified that there were electricity lights at the back and front of the bar where he was seated when the robbers emerged, and he was therefore able to see and identify the 2nd appellant. We are therefore satisfied that the 2nd appellant was properly identified through recognition as one of the persons who was involved in the robberies which took place within the same area within a short span of time. We find that the 2nd appellant's conviction in regard to the attempted robbery of Laban and the robbery of Isaac, were well founded.

44. As regards the sentence, the 2nd appellant was given an opportunity to mitigate but did not say much. While it is true that the Supreme Court in the **Francis Karioko Muruatetu vs Republic** (supra) ruled that the mandatory aspect of the death sentence as provided under section 204 of the Penal Code was unconstitutional, as it denies the Court discretion in sentencing, the Supreme Court did not outlaw the death sentence. It remains a lawful sentence which may be imposed in appropriate circumstances. In this case, the 2nd appellant was involved in a robbery and an attempted robbery. In the attempted robbery the victim was shot dead in cold blood. In the circumstances, the death sentence that was imposed on the 2nd appellant was appropriate.

45. For the above reasons, we allow the appeal against conviction and sentence in regard to the 1st appellant. His conviction is accordingly quashed and sentence of death set aside. He shall be set free forthwith unless otherwise lawfully held. We find no merit in the appeal against conviction and sentence by the 2nd appellant. His appeal is accordingly dismissed in its entirety. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 16th day of April, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTAR