Chirchir v Republic (Criminal Appeal 51 of 2018)
[2021] KECA 1 (KLR) (23 September 2021) (Judgment)

Neutral citation: [2021] KECA 1 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 51 OF 2018

HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA

SEPTEMBER 23, 2021

BETWEEN

MAXWELL KIPLANGAT CHIRCHIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court at Eldoret (G.K.Kimondo, J.) dated 17th January 2017 in HCCR Case No. 51 OF 2009)

JUDGMENT

1. At the heart of this appeal are the circumstances that led to the death of Patrick Shiuma, "the deceased" who died on 11th September, 2009, 3 days after being admitted into intensive care at the Moi Teaching and Referral Hospital. The deceased succumbed to assault injuries allegedly committed on him by the appellant.

2. The appellant was subsequently arrested and arraigned in the High Court of Kenya at Eldoret on an information charging him Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on 7th September, 2009 at around 3.00 p.m. at Cheplaskei Village, Sarayot sub-location, Kipchamo Location in Wareng District within Rift Valley Province, the Appellant murdered the deceased. When he was arraigned before the High Court, he entered a plea of not guilty. However following a full trial the appellant was found guilty of the offence, convicted and sentenced to death.

3. The prosecution called a total of 5 witnesses in support of their case. Daniel Shiuma Wapata, (PW1) told the Court that on 23rd September, 2009 he attended the postmortem examination of the deceased at Moi Teaching and Referral Hospital Eldoret. He was accompanied by a police officer from Kiambaa Police Station and, his sister, Joyce Muteshi.

4. An autopsy on the body of the deceased was conducted by Dr. Francis Maina Ndiang'ui, (PW2). The report revealed that the deceased body had multiple superficial bruises and that there was bleeding under the skin and on the arms which PW2 concluded were an indication of defence wounds. The report further disclosed that the deceased had suffered fractures on the 3rd and 4th ribs and that his brain was swollen and bleeding leading PW2 to form an opinion that the deceased suffered bleeding in the brain occasioned by blunt trauma which was the cause of death.

5. Alfred Kipngetich Taitai (PW3); a village elder, received a call from one, Talam who informed him that the deceased had been assaulted and that while on his way to the scene of the crime, he met the Appellant who told him "ni mimi nimempiga" meaning "I was the one who beat him". He proceeded to the scene which was the appellant's house. He testified that the deceased was still alive but could neither talk nor open his eyes and was lying on the floor with sticks next to his body. A crowd of on lookers was growing at the scene and it was at that time that PW3 called PW5 from Kiambaa Police Station who rushed to the scene and took the deceased to Moi Teaching and Referral Hospital for treatment. As already stated the deceased subsequently succumbed to the injuries 3 days later. Vaiza Chepkorir (PW4), was stood down following discrepancies in her name. In her police statement she had given her name as Joyce Muteshi Shiuma, whereas during the proceedings she claimed to be Vaiza Chepkorir. Police Constable Michael Kithiome (PW5) responded to a distress call from (PW3), which led him and his team of police officers to the Appellant's house wherein they discovered the deceased in dusty clothes, with blood oozing from his mouth and swollen nose as well as scratches on his body. They found the appellant at the scene and he told them that when the deceased rushed into his compound, he naturally thought that he was a thief and consequently responded by beating him. PW5 recovered a long stick from the appellant's house which he told the court may have been used by the appellant in assaulting the deceased. Initially the appellant had been charged with assault occasioning grievous bodily harm. However, with the death of the deceased, the initial count was withdrawn and replaced with the information charging him with murder.

6. At the close of the prosecution case, the trial court found that the prosecution had established a prima facie case against the appellant. While denying the foregoing version of events, the appellant in his sworn testimony in defence stated that at around 3.00pm, he was cultivating his shamba with Evans Kiprotich and Joseph Ewaton (DW2), his workers, when he heard screams from afar. He then saw someone, unknown to him, run into his compound towards the kitchen. He rushed to the compound and stopped him. The Appellant discovered that the person was drunk and bleeding and asked him to leave. The deceased fell at his gate when the Appellant noticed a mob of about 10 to 15 people whom he could not recognize as they were far away pursuing the deceased but did not enter his compound.

7. The appellant proceeded to the village elder, (PW3) who lived 800 meters away to report the incident. PW3 came to the scene while he went to Cheplaskei Centre to get a vehicle to take the deceased to hospital. Since he could not afford to hire the vehicle, he went back home only to find neighbours gathered around the deceased. It was raining when PW3 called the police from Kiambaa at 6:30 pm, the appellant and Ewaton carried the deceased into his worker's house to give him milk. The appellant further testified that he went to his room to wait for the police. At 11:00 p.m. the police came and he led them to the deceased who was unconscious at the time. The appellant accompanied the police to Moi Teaching & Referral Hospital where the deceased was admitted and later succumbed to the injuries he had sustained. He was thereafter arrested and detained at Kiambaa Police Station and was subsequently charged with assault on 8th September 2009. He maintained that PW3 was lying when he testified that he had told him that he had beaten deceased. He further contended that he did not know the 'Tallam' PW3 referred to. The appellant called (DW1) as a witness who stated that he had known the appellant for 10 years. He confirmed that on the material day he was with the appellant in

the farm, when at 3.00p.m. he saw someone being chased by about 10 people. The person came to the appellant's gate. The appellant asked him who he was but the person fell at the gate bleeding from the mouth. He testified that the appellant went to Cheplaskei centre to get a vehicle as he remained in the farm. The deceased did not talk neither did the appellant get a vehicle. He came back at about 5.00 p.m. or 6.00 p. m and went to call the Village elder 'Taitai' who came at about 5.30pm. The appellant asked him to give the deceased milk. The deceased was placed in a room and he left. He learnt that next day the police came and arrested the appellant.

8. In the end the trial Court reached the verdict that the entire corpus of circumstantial evidence pointed irresistibly and exclusively to the guilt of the appellant. That the chain of events were complete and no hypothesis was found by the trial court to exonerate him. Based on the circumstantial evidence, the trial court found the appellant culpable of murder, convicted him for the offence and sentenced him to death.

9. The appellant being aggrieved by both the conviction and sentence, proffered the instant appeal to this Court premised on 6 grounds to wit that the trial court erred in:

    1. Finding against the weight of evidence, that the prosecution had proved its case beyond reasonable doubt;

    2. Failing to appreciate the relevant facts of the case, the applicable law and failing to appreciate that the burden of proof in the case lay with the prosecution;

    3. Failing to properly analyse and scrutinize the circumstantial evidence to the effect that the deceased would have been killed by someone else or people;

    4. Relying on a retracted confession allegedly made to PW3;

    5. Convicting upon weak circumstantial evidence; and

    6. Failing to adequately consider the Appellant's defence.

10. The appeal was canvassed by way of written submissions with limited oral highlights. In urging us to allow the appeal, the appellant through Mr. Mavube, learned counsel, submitted that the entire evidence cast doubt as to who murdered the deceased since the circumstantial evidence relied on did not point irresistibly to the appellant as the only person who had an opportunity to murder the deceased. According to the appellant, the burden of proof was upon the prosecution to prove the information against the him beyond any reasonable doubt. The prosecution should have produced evidence demonstrating that it was the appellant and no one else who assaulted the deceased with the sticks and that the said assault caused his death.

11. The appellant questioned the veracity of PW3's testimony during trial and faulted the prosecution for relying purely on weak circumstantial evidence and not direct evidence to make out a case that the appellant committed the crime. There was no eye witness who saw the appellant assault the deceased. The appellant cited the decisions in Rex v.Kipkering & Another 1949 EACA 135 and Abanga alias Ongango v. Republic Criminal Appeal No. 32 of 1990 (UR)5 in submitting that the prosecution's case failed to meet the threshold required in justifying the inference of guilt against him as the prosecution case hinged largely on circumstantial evidence. The appellant insisted that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: that, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; that, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and finally that the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused

and none else. The appellant referred us to the decision in James Mwangi vs Republic [1983] eKLR in support of these propositions

12. The appellant further submitted that on the day of the incident Mr. Talam, some youths including John and Elijah and other members of the public were present in the appellant's homestead and ought to have been called as crucial witnesses in the case as PW3 and PW5 only came to the scene later in the day. Hence, failure to call the said witnesses broke the chain of evidence and he admonished the prosecution for failing to meet the set standards established in the case of Bukenya & Others -vs- Uganda [1972] EA 549 on failure to call crucial witnesses to testify. In such case where important prosecution witnesses are not called, the court is in law entitled to draw an inference that the evidence of those important witnesses would have been adverse to the prosecution case. To the appellant that profound failure fatally weakened the prosecution case. In concluding, it was further submitted that the prosecution failed to prove that at the time the appellant assaulted the deceased, if at all, he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased. In this case, the appellant pointed out that though the death of the deceased was proved the evidence however pointed to mere assault and not murder. In any event, there was no credible evidence at all as to who started the assault. In view of the foregoing, the appellant submitted that the conviction and sentence was not safe and urged us to allow this appeal.

13. The Respondent on its part through Mr. Okok, learned prosecution counsel, opposed the appeal in its entirety contending that the circumstantial evidence was strong and irresistibly pointed to the appellant as the perpetrator of the crime. The Respondent's case was that the evidence of PW3 was uncontroverted; that the appellant owned up to beating the deceased on suspicion of being a thief and said so to PW3. That the appellant was not coerced into giving the information that pointed to his guilt. It was further submitted that the appellant's defence that the mob may have killed the deceased was not plausible. The defence was in the respondent's view merely an afterthought and fabricated hence the trial court was right in rejecting it. It was further submitted that the post mortem report revealed that the deceased suffered serious injuries. By assaulting the deceased on the head, the intention was to cause grievous bodily harm and thus malice aforethought was established.

14. We have considered the grounds of appeal, submissions in support of and against the appeal thereof and the law. This is a first appeal and our duty is to subject the evidence tendered in the trial court to a fresh analysis before reaching our own conclusions. In so doing, we are obliged to give due consideration to the fact that unlike the trial judge, we have the disadvantage of not hearing or seeing the witnesses as they testified during trial. We cannot therefore differ with the trial court's conclusions on the demeanour or credibility of the witnesses. (See Okeno v. Republic (1972) EA 32. That said, what commends itself to us for determination are; whether; the appellant was murdered, if so, whether circumstantial evidence adduced against the appellant was sufficient to sustain his conviction, whether appellant made a confession admitting the commission of the offence, whether the appellant's defence was considered, whether the failure to call crucial witnesses was fatal to the prosecution's case and whether the sentence meted out against the appellant was lawful in the circumstances.

15. On circumstantial evidence, this Court has over the years developed and distilled the principles applicable in cases turning solely on circumstantial evidence. See for instance Rex v. Kipkering & Another 1949 EACA 135, Teper v. R(1952)AC480,Simoni Musoke v.R(1958)EA71,Abanga alias Ongango v. Republic Criminal Appeal No.32 of 1990(UR)5,Mary Wanjiku Gichira v. Republic (Criminal Appeal No 17 of 1998) (unreported), Omar Mzungu Chimera v. R Criminal Appeal 56 of 1998 and Joan Chebichii Sawe v Republic [2003] eKLR. The principles are that; to justify the inference of guilt, the evidence must irresistibly point to accused as the perpetrator of the crime, that inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any

other reasonable hypothesis than that of his guilt, that the chain of events must be so complete that it establishes the culpability of the Appellant, and no one else. In the words of this Court in PON v Republic [2019] eKLR;

> "To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and continues to stand the test of time."

16. Suppose in absence of the evidence from PW3 and PW5 who came to the scene after the incident, was there any other co-existing evidence that would link the appellant to the death of the deceased? Our answer is an emphatic yes just like the trial court held. We acknowledge though that other than the appellant's admission to PW3 to having assaulted the deceased and despite there being no direct evidence on the appellant's culpability, the circumstantial evidence pointed irresistibly to the appellant's guilt. The circumstantial evidence was the fact that the deceased body was last seen with injuries in the appellant's house; the appellant was in the house alone with the deceased and the stick allegedly used to assault the deceased was retrieved from the appellant's house when PW3 and PW5 arrived at the scene.

17. Section 111. of the *Evidence Act* provides inter alia:

> "(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person inrespectofthatoffence." (Emphasis added)

18. The Supreme Court in the case of in Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR. emphasized the relevance of section 111 of the *Evidence Act* in dealing with burden of proof which comes into play when the prosecution has proved that the accused may have committed offence and part of their case is that of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction. The Supreme Court went on to note that such a situation would arise, for instance, in a murder case where part of the prosecution's case is that, prior to the deceased's death, the accused person is the one who was last seen with him as was the case here.

19. We think that by virtue of section 111 of the *Evidence Act*, the burden of proof shifted to the appellant to give a reasonable explanation as to how the deceased was found in his house with injuries that eventually led to his death. We are however cautioned by the provisions of section 111 of the *Evidence Act* that where the burden shifts to an accused the same shall only be deemed to be discharged if; the prosecution prove beyond reasonable doubt that such circumstances exist and that the accused will only be entitled to an acquittal of the offence where the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person. The appellant did not

discharge the burden of explaining how the deceased found himself in his house, although he claimed that the deceased was being chased by other people and that he fell at the gate of his house.. The fact of the matter is that the deceased was found in the house of the appellant and not at the gate. Neither did the appellant and his witness DW1 claim that they saw the deceased being assaulted by anybody else. Circumstantial evidence is often said to be the best evidence as it is the evidence surrounding the circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. (See. Musili Tulo v. Republic CR. APP. No. 30 of 2013). Given the foregoing we are satisfied just like the trial court that there were no other co-existing circumstances weakening the chain of events relied on by the prosecution and the trial court to find a conviction. The trial court was right in thus convicting the appellant on the basis of circumstantial evidence.

20. On the alleged confession the trial court delivered itself on the issue as follows:

> "I observed the demeanour of the accused and his witness. I did not believe the accused or DW2. I will explain. First, the accused admitted that the deceased entered his compound. He did not know him. He asked him to leave. He says that the deceased then fell at his gate. DW2 said the deceased "tried to escape and fell". The accused could not identify any of the ten or fifteen people chasing the deceased. I believe PW3's evidence. He said that soon after the attack, the accused told him that he is the one who assaulted the deceased. It is also in tandem with the evidence of PW5 that the accused assaulted the deceased because he presumed him to be a thief. The story of a mob chasing the deceased is a creation of the accused to mask the assault."

21. The Appellant's main contention lies solely on the foregoing observations of the trial court based on the argument that there was no eye witness to corroborate the testimonies made by PW3 and PW5 on the admission allegedly made by the Appellant. It is not lost on us the word of caution from the Supreme Court in the case of Ahmed Abolfathi vs Republic [2019] eKLR, which succinctly observed that when a court is confronted with an admission, which does not amount to a confession under section 25A of the *Evidence Act*, it should not base its conviction solely on such an admission, Instead, it should look for clear and credible corroboration of such an admission. The statement by the appellant to PW3 in our view, does not amount to a confession within the confines of section 25A of the *Evidence Act* as the Appellant simply told PW3 and PW5 that he was the one who assaulted the deceased and not that he was the one who had killed the deceased.

22. The trial judge in addressing the same issue foregoing observed as follows;

> .....on 7th September 2009 PW3, a village elder, was on the way to the scene. He met the accused who told him "Ni mimi nimempiga" [I am the one who has beaten him]. The accused in his defence conceded that he met with PW3 on the way. He said PW3 lived about 800 metres from his residence. PW3 found the victim when he was still alive. He was lying down. He had been beaten with sticks; and, there was smell of medicine. The sticks were next to the body."

23. We find no reason to fault the trial court in finding as it did. As regards corroboration the Court went ahead to look for such corroboration which it found in the testimony of PW2 as well as PW5. With regard to the appellant's defence he cannot really contend that the trial court did not consider it. The trial court did subject the defence to exhaustive evaluation and found it wanting. The trial court further noted from the record that the appellant's sole witness was Joseph Ewaton (DW2) yet the appellant failed to mention him while making his statement to the police. Worth noting also is the fact that DW2 reiterated the appellant's version of events but conceded that the farm which they tilling was quite a

distance from the appellant's home. The trial court was right in discounting the appellant's defence and concluding that DW2's evidence was unreliable on that account.

24. The Appellant also raised the issue of crucial witnesses who were not called to testify. He gave the names of the said witnesses as Talam, John and Elijah. The law and practise on the duty of the prosecution when calling witnesses is set out under Section 143 of the *Evidence Act*. It requires no particular number of witnesses to prove a fact. (See. Alex Lichua Lichodo v Republic [2015] eKLR). The evidence tendered was sufficient to find a conviction without the evidence of these witnesses. Whether or not Talam, John or Elijah were called to the stand their evidence would not have changed in our view, the strong prosecution evidence based purely on circumstantial evidence.

25. Needless to say if they were indeed crucial, the appellant was at liberty to summon them during the hearing of his defence. We are satisfied therefore that the evidence adduced was sufficient and convincing and there was no need for the prosecution to call the mentioned witnesses.

26. The appellant also complained that there was no corroboration of the evidence tendered by PW3 and PW5. These witnesses came to the scene after the incident had happened and only testified to what they observed and did. When the appellant mentioned to PW3 about him having assaulted the deceased they were just the two of them. Where would corroboration have come from? Similarly, PW5 merely responded to a distress call from PW3 and came to scene and conducted police work. The fact of him being called to the scene was not denied. This was fairly straight forward evidence that did not require corroboration. We are thus of the view that the evidence of these witnesses did not require corroboration.

27. In a murder case, the burden lies with the prosecution to prove that death occurred, that the death was caused by an unlawful act or omission by the accused person and that the accused person had malice aforethought in committing the unlawful act or omission. Based on the evidence on record we are satisfied that in the case at hand, the appellant assaulted the deceased who as a result succumbed to those injuries. What is left for determination is whether the appellant had the necessary malice aforethought in causing the death of the deceased.

Section 206 of the Penal Code defines malice aforethought as follows;

> "Malice aforethought: 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;
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> 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;
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> c. an intent to commit a felony; 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."

28. This Court in Nzuki v Republic [1993] eKLR expounded further on Section 206 of the Penal Code regarding the ingredients for malice aforethought thus:

> "Malice aforethought" is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670.
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> An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman, [1950] 2 KB 237*.
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> Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
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> i. The intention to cause death;
>
> ii. The intention to cause grievious bodily harm;
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> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.
>
> Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder ..... In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder was unstainable."

29. So did the appellant intend to harm and kill the deceased? We think not especially with regard to the foregoing observations made in Nzuki v Republic [1993] eKLR. The trial judge came to the conclusion that the appellant viciously assaulted the deceased on 7th September, 2009, on the basis of the autopsy report. That the attack occurred in the compound or house of the appellant hence the assault was premeditated and unlawful and as a result the deceased succumbed to those injuries three days later. According to the trial court, this set of facts proved malice aforethought as defined in Section 206 (a) of the Penal Code.

30. We do not share those sentiments. From the record and from both ends of the spectrum, the deceased was an intruder who trespassed into the appellant's house with unknown purpose. Confronted by the appellant he did not offer any explanation as to his presence in his house. The appellant thinking that he was a thief and was up to no good had to take measures which resulted in a fracas that unfortunately resulted in the death of the deceased. We do not think that from the nature of injuries sustained and based on the behaviour of the appellant during and after the incident, the injuries inflicted on the deceased were premeditated or founded on malicious intent to cause death of the deceased.

31. On our part, we are satisfied that the conduct of the appellant and the nature of the injuries which according to PW2 were defensive in nature do not show that that the appellant intended to kill the deceased or to inflict on him grievous injuries. We are therefore satisfied that the prosecution did not prove malice aforethought on the part of the Appellant. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of the murder must fall. The offence disclosed based on the evidence on record is in our view that of manslaughter contrary to section 205 of the Penal Code. Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant in respect of the offence of murder. In lieu thereof we substitute it with the conviction for the offence manslaughter contrary to section 205 of the Penal Code. Having considered the mitigation by the appellant on record and the circumstances surrounding the commission of the offence, the sentence that best commends itself to us is seven (7) years imprisonment effective 17th January, 2017 being the date when the trial court convicted and sentenced the appellant.

32. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE –MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR