Pola & 3 others v Republic (Criminal Appeal 6 of 2019)
[2021] KECA 66 (KLR) (8 October 2021) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 6 OF 2019

MSA MAKHANDIA, DK MUSINGA & SG KAIRU, JJA

OCTOBER 8, 2021

BETWEEN

KARISA KATANA POLA ..... 1ST APPELLANT

KAHINDI KATANA POLA ..... 2ND APPELLANT

MWALIMU KATANA POLA ..... 3RD APPELLANT

KENGA KATANA POLA ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chepkwony, J.) dated 5th June 2018 in HC CR. Case No. 73 of 2012)

JUDGMENT

1. The 1st, 2nd, 3rd and 4th appellants (hereinafter collectively referred to as "the appellants"), who are brothers, were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, Cap 63 Laws of Kenya. The appellants jointly with other persons who were not present before the trial court were alleged to have murdered Kazungu Ndoro (the deceased) on the 18th day of October 2012 at 8.30 a.m. at Makwala village, Makwala sub-location, Bamba location in Ganze District within Kilifi County.

2. The prosecution called 11 witnesses while each of the appellants gave unsworn evidence and called no witnesses. On 5th June 2018, the trial judge (Chepkwony, J.) found the appellants guilty as charged, convicted and sentenced each of the appellants to life imprisonment, thereby precipitating this appeal. The undated memorandum of appeal filed jointly by the appellants raises five (5) grounds of appeal which are as follows:

a) That the learned trial judge erred in law and in fact in relying on inconsistent testimony from the witnesses,

b) That the learned trial judge erred in law and in fact in failing to note that no exhibits were produced in this matter,

c) That the learned trial judge erred in law and in fact in failing to consider and accept the fact that the arrest of the appellants was done two months after the commission of the offence and no explanation was given for it,

d) That the learned trial judge erred in law and in fact in failing to consider the fact that the results of the analysis of the exhibits sent to Government Chemist for analysis were not produced,

e) That the learned trial judge erred in law and fact in failing to consider that there were other persons who could have taken advantage of the situation to harm the deceased.

3. Before we consider the grounds of the appeal, it is important to highlight the evidence that was adduced before the trial court.

4. PW6, Henry Ngala Charo, who was the Assistant Chief, Makwala sub-location where the offence took place, told the court that there existed a dispute between two clans known as the Amwakithi clan and the Akize cha Mwawale clan over a parcel of land. Each of the clans claimed ownership of the parcel of land. The deceased was spearheading talks between the two clans on behalf of the Akize cha Mwawale clan while the father of the four appellants represented the Amwakithi clan and that the dispute had been heard by Lands officers and a decision made to the effect that the clan of Akize cha Mwawale were the rightful owners of the land. PW6 produced a copy of a ruling by the Lands Committee as Prosecution Exhibit 3.

5. On the date of the incident, PW6 was in his house at around 10.00 a.m. when he received a telephone call from a village elder informing him that he (the village elder) in the company of the deceased and another elder would visit the parcel of land in dispute. PW6 would later receive information that the deceased had been attacked by people of the Amwakithi clan with bows and pangas and had died. PW6 visited the scene of the incident and found the body of the deceased lying on the ground. PW6 also saw a bow and arrows on the ground. It was PW6's further testimony that in the company of other villagers, he visited the disputed parcel of land on the same day of the incident and after the attack on the deceased had taken place and found a place where the attackers were hiding that morning.

6. PW2, Gabriel Kahindi Bihonde, had accompanied the deceased to visit the disputed parcel of land when they met with a group of people who were armed with bows, arrows and pangas who chased after them. PW2 stated that the deceased ran into the homestead of a neighbour identified as Kitsao Kilunga Nyoka, (PW9) while he ran into his own house and called the police. PW2 in the company of other neighbours went to the homestead of PW9 and found that the deceased had already been killed. PW2 was not able to identify any of the men who had chased him together with the deceased or any of the persons who attacked the deceased since he was not at the scene when the deceased was being attacked. PW2 stated that policemen came to the scene and collected the body of the deceased which had deep cuts on the hands and on the head. The police also collected from the scene one bow and three arrows which had been left behind by the attackers.

7. On his part, PW1, Kadenge Ngolo Ndolo, told the trial court that on the date of the incident at around 9.00 a.m. he was in his home resting when he saw the four appellants chasing after a man he did not know. The four appellants were armed with bows and arrows. The man being chased entered the homestead of a neighbour and the four appellants followed suit. PW2 heard screams coming from his

neighbour's house and decided to go and see what was happening. When he got to his neighbours homestead, he found the four appellants demolishing the neighbour's house with their pangas. The appellants managed to demolish the house and found the deceased and shot him with an arrow and the deceased came out running from the house. The deceased fell on the ground and the 3rd appellant cut him on the hand. The 2nd appellant cut the deceased on the ribs while the 1st appellant cut the deceased on the face and hit the deceased with a piece of wood until he died. The attackers left one bow and three arrows at the scene. The bow was marked and introduced as Prosecution Exhibit 1, while the three arrows were introduced as Prosecution Exhibit 2.

8. PW3, Chief Kitsao Kilunga, told the trial court that on the date of the incident he was working in his shamba when at 10.00 a.m. he saw the deceased running towards his house. Upon inquiry as to why he was running, the deceased told him that the people of Wamakiti clan were coming. PW3 told the court that he saw the four appellants who were in a group of other people chasing the deceased. The four appellants were armed with bows and arrows. They went to the house where the deceased was hiding and started demolishing it so as to get hold of the deceased. It was PW4's testimony that the appellants shot the deceased with arrows and when the deceased came out of the house, they cut him with pangas. PW3 identified before the court the bow and arrows left at the scene by the attackers as Prosecution Exhibits 1 and 2 respectively. On re-examination, he stated that the house in which the deceased hid was not his but belonged to his brother, PW9.

9. PW4, Changewa Charo Kidoti, was in his house when he heard screams from the house of PW9. He rushed to the house of PW9 and found a group of men who included the four appellants herein armed with arrows and pangas. He found them demolishing the house of PW9 and at this time, PW4 did not know who was inside. The appellants and the other men in their company managed to demolish the house and that is when the person who was inside the house (the deceased) ran out. The deceased fell on the ground and was cut with pangas. PW4 was able to identify the four appellants as among the persons who attacked the deceased.

10. On his part, PW5, Changawa Mkawa, told the court that he had interacted with the deceased on the day of the incident at around 9.30am. PW5 told the court that the deceased had visited the disputed parcel of land which is adjacent to a construction site where he (PW5) was working. The deceased inquired from PW5 who had cultivated the disputed parcel of land and PW5 confirmed having given the deceased twelve (12) names of the persons who had cultivated the land. A group of men who included the four appellants went to the disputed parcel of land and began chasing the deceased who was in thecompany of PW2. PW5 told the trial court that he saw the 1st appellant shoot the deceased on the neck with an arrow while the 3rd appellant cut the deceased on the neck with a panga. PW5 told the court that the attackers left one bow and three arrows at the scene.

11. PW7, Rehema Kitsao, is the owner of the house where the deceased hid and which was demolished by the attackers. PW7 was not in the house when the attack on the deceased was taking place. When she came back, she found the body of the deceased lying on the ground. Her house had also been damaged by poking holes on the walls and the door had been removed. She told the trial court that she found three arrows lying on the ground.

12. PW8, Kisiwa Ndoro, testified that he was in the house when he heard screams and went to check what was going on. When he got to the scene, he found the deceased lying on the ground dead; that he saw the four appellants with bows and arrows. The 1st appellant was armed with a bow and arrows while the rest of the appellants were armed with pangas.

13. The evidence of PW9, Kitsao Kilunga Nyoka, was that he was working in his shamba when he saw the deceased running towards his house and a group of men closely following him. This was around 9.30

a.m. PW9 was able to identify the four appellants from the group and that they were armed with bows and arrows. The witness told the court that the appellants shot the deceased while he was hiding in the house and when he came out they killed him by cutting him severally on the body.

14. Dr. Awadh Faraj Tahim testified as PW10. He told the trial court that he conducted postmortem on the body of the deceased on 19th October 2012. The body was identified by two of the deceased's sons. There were deep cut wounds on the back of the deceased's head which extended to the rib cage.

    There were deep wounds on the head extending to the brain matter. There were also deep cut wounds on the forehead. According to PW10, the cause of death was severe hemorrhage due to deep cut wounds and trauma to the head. The postmortem report was produced by the prosecution as Exhibit 4.

15. The last witness who testified for the prosecution was Chief Inspector Josphat Shairi who testified as PW11. He told the court that he was attached to Bamba Police at the time of the incident; that he received a call from PW6 notifying him of the incident; and when he got to the scene of the incident, he found the body of the deceased lying on the ground. He also collected 1 bow, 3 arrows and 2 pieces of sticks from the scene which he sent to the Government Chemist for analysis. Thereafter, he caused the arrest of the appellants. PW11 confirmed that no identification parade was held and that he was able to know the persons who committed the offence fromstatements made by various persons who had witnessed the incident.

16. At the trial, the appellants gave unsworn statements and denied committing the offence. The 1st appellant testified that he was in the shamba working when he saw a group of men who were armed with pangas, bows and arrows approaching him; that he shouted for help and some men who were digging a water basin on a shamba nearby came to his rescue and the group of men ran away. The 1st appellant testified that he learnt of the deceased's death two days after the date of the incident. The 2nd, 3rd and 4th appellants gave evidence similar to that of the 1st appellant.

17. The trial judge, upon weighing the evidence on record was convinced that the prosecution had proved its case and proceeded to convict each of the appellants.

18. This being a first appeal, this Court is under a duty to re-evaluate and re-analyse the facts and evidence which resulted in the decision of the trial court and reach its own independent decision on the same. As stated in the case of *Okeno v Republic* :

> " 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 v. R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R.[1957] EA 57). 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 findings and conclusions; 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 v Sunday Post [1958] EA 429."

19. When this matter came up for hearing on 3rd May 2021, both Mr. Gisemba on record for appellants and Mr. Yamina on record for the State chose to rely on their written submissions. Mr. Gisemba, vide his submissions dated 25th April 2021, submitted that the evidence adduced before the trial court was inconclusive to warrant a conviction. In particular, Mr. Gisemba singled out the evidence tendered by PW11 whom he noted was transferred before he could complete the investigations into the incident.

He noted that PW11 did not produce the results from Government Chemist, photographs of the scene were not produced and that the police officer who took over the file from PW11 was not called to testify.

20. Mr. Gisemba also submitted that it had not been proved by the prosecution that it is the appellants who caused the death of the deceased. Further, that there were inconsistencies in the testimonies of the various witnesses which were not reconciled. Additionally, the court appeared to shift the burden of proof on the appellants, which is improper in law.

21. Mr. Yamina on his part submitted that the prosecution had proved all the ingredients of murder. The respondent conceded to the failure by the prosecution to produce some of the exhibits and submitted that such failure was not fatal to the prosecution's case as there was strong evidence in support of the information and conviction of the appellants. With regards to the sentence imposed on the appellants by the trial court, the respondent submitted that the death sentence was still available in the statutes and that the trial court misconstrued the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* when itsentenced the appellants to life imprisonment.

22. We have considered the record, submissions by both parties and the law. As per the evidence of PW10 and the postmortem report dated 19th October 2012, the cause of the deceased's death was severe hemorrhage due to deep cut wounds and trauma to the head. There is therefore no doubt that the deceased's death was caused by a person or persons who intended to kill him or occasion him grievous bodily harm. The main issue for consideration in this appeal is whether the prosecution discharged the burden of proving the guilt of the appellants beyond reasonable doubt to sustain the information of murder.

23. To prove an information of murder, the prosecution has a duty to establish the following elements:

    i) The death of the deceased and the cause thereof;

    ii) That the accused caused the death through an unlawful act or omission; and

    iii) The accused possessed the intention to cause harm or kill (malice aforethought).

24. The appellants faced an information of murder contrary to section 203 of the Penal Code which section provides:

> " 203: Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

25. Malice aforethought is a very important ingredient for the offence of murder. The prosecution has to establish malice aforethought. Section 206 of the Penal Code defines malice aforethought as follows:

> " 206. 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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused or not, or by a wish that it may not be caused;
>
> c) .....;

d) ....."

26. On whether the prosecution proved the death and the cause of death of the deceased, the postmortem on the body of the deceased was carried out by PW10, Dr. Awadh Faraj Tahim and his report was produced in court as Prosecution Exhibit 4. As per the evidence of PW10, the deceased's body had various deep cuts on the hands, head and face. The cause of death was said to be severe hemorrhage due to deep cut wounds and trauma to the head. We agree with the trial judge that the evidence of all the prosecution witnesses save for PW10 that the deceased died as a result of being shot with arrows and pangas was not challenged by the appellants.

27. The witnesses presented by the prosecution confirmed that indeed the deceased died on 18th October 2012 and save for PW10 and PW11, the rest were able to identify the deceased since he was a person well known to them. The death of the deceased is therefore not in dispute as the appellants also confirmed learning of the deceased's death two days after the incident took place. We therefore find that the postmortem and the evidence of other witnesses presented by the prosecution proved the death of the deceased and the cause of the death beyond a shadow of doubt.

28. On whether the appellants caused the death of the deceased, the prosecution presented 11 witnesses. PW1, PW3, PW4, PW5 and PW9 testified that they witnessed the attack on the deceased. PW2, PW6, PW7 and PW11 arrived at the scene after the deceased had been killed and found him lying on the ground dead. On his part, PW8 testified that when he got to the home of PW9, he found the deceased dead. The appellants were holding some weapons. The 1st appellant was holding a bow while the 2nd, 3rd and 4th appellants were holding pangas.

29. PW1, PW3, PW5 and PW9 saw the appellants in a group of other persons chasing after the deceased while armed with bows, arrows and pangas. PW1, PW3, PW4, PW5 and PW9 testified to having witnessed the appellants commit the offence. PW1 told the court as follows:

> " He (the deceased) was shot with an arrow he came out running and got hold of the 1st accused (1st appellant). The 3rd accused (3rd appellant) shot the deceased on the chest. He got hold of the 1st accused's (1st appellant's) bow and arrows. The 3rd accused (3rd appellant) cut the deceased on the hand. Karisa (the 1st appellant) cut him on the face. He got hold of a piece of wood and hit the deceased till he died."

30. On his part, PW3 testified in part as follows:

> " They shot the deceased. He came out of the house and they cut him with pangas till he died. Karisa (the 1st appellant) is the one who finished the job by killing the deceased with clubs."

31. PW4 stated:

> " I saw the deceased run out of the house but he was not fast enough. He was being cut with pangas. He fell outside the house. He was being cut by a group of people including Mwalimu Katana (3rd appellant), Kenga (4th appellant),
>
> Karisa (1st appellant) and Kahindi Katana (2nd appellant). The ones I have mentioned are in court..... Karisa (1st appellant) did aim arrows at the deceased. Mwalimu (3rd appellant) did cut the deceased with a panga. The others also cut the deceased."

32. From the witness accounts appearing above, it is evident that the injuries inflicted on the deceased and which led to his death were inflicted on him by the appellants and other persons who were not presented before the trial court.

33. The appellants in their defence denied that they killed the deceased and in fact alleged that they learnt of his death two days later. PW1, PW3, PW5 and PW9 on the other hand positively identified the appellants as the persons who attacked the deceased. The evidence of these witnesses not only places the appellants squarely at the scene but also points to them as being the perpetrators.

34. The identification of each of the appellants herein by the eye witnesses was through recognition. As stated by this Court in *Hamisi Swaleh Kibuyu v Republic* :

> " Conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit."

35. The factors to be observed when testing the evidence of recognition were laid out in the case of *Republic v Turnbull & Others* thus:

> " ... The Judge should... examine closely the circumstances in which the identification of each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

36. In this case the appellants were well known to PW1, PW3, PW5 and PW9 who witnessed the offence being committed. Both PW1 and PW4 identified the appellants as their neighbours. In fact, according to PW4, the land in dispute was between PW4's land and another one belonging to the appellants' family. According to the evidence presented before the trial court, there is no doubt that the appellants and PW1, PW3, PW5, PW8 and PW9 hailed from the same village and knew each other very well. In fact, this could be the only reason why the witnesses were able to identify by name who among the appellants was holding which weapon and who struck the deceased with which weapon at what time and stage. This could not have been possible if the appellants and the witnesses did not know each other very well. In *Anjononi & Others v Republic [1980] eKLR* (quoted by the trial court)this Court held:

> " This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of that assailant in some form or other..."

37. In *Peter Okee Omukaga & another v Republic* this Court dealt with a case of recognition at night and had this to say on the evidence of recognition:

> " We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

38. The incident in question took place between 9.00 a.m. and 10.00 a.m. in broad daylight when visibility could not have been said to have been inhibited in any way. In our view, there were no factors upon which it could be said that the recognition of each of the appellants by the witnesses was unsafe.

39. On whether the accused had malice aforethought, the prosecution was required to establish facts that were consistent with existence of malice aforethought on the part of the appellants. The Eastern Africa Court of Appeal in the case of *Republic v Tubere S/O Ochen* in determining whether malice aforethought had been established considered the following elements:

a) The nature of the weapon used.

b) The manner in which it was used.

c) The part of the body targeted.

d) The nature of the injuries inflicted either a single stab/wound or multiple injuries.

e) The conduct of the accused before, during and after the incident.

40. There is overwhelming evidence that the appellants were armed with bows, arrows and pangas which they used to shoot and cut the deceased on his hands, ribs, face and head. The deceased was unarmed and did not in any way provoke the appellants. The manner in which the appellants chased after the deceased and PW2 with weapons and even pursued him after he sought refuge in the house of PW9 shows that the appellants were determined to accomplish their pre-meditated agenda. The appellants took their time to demolish PW9's house in order to get the deceased, shot arrows at the deceased and when he came out they cut him with pangas indiscriminately. These are actions of persons who had clear motive of either killing the deceased or inflicting grievous bodily harm on him. We agree with the trial judge on her finding that the appellants knew in their minds that their actions would lead to grievous bodily harm on the deceased or ultimately to his death. In short, the appellants had the requisite 'mens rea' for this offence.

41. Ultimately, we agree with the trial judge that the prosecution proved all the ingredients for the information of murder beyond any reasonable doubt. The argument by the appellants that the evidence produced before the trial court was inconclusive to warrant a conviction is therefore without basis.

42. With regard to the inconsistencies in witness testimony pointed out by the appellants, we do not think they were material. According to the appellants, the inconsistencies relate mostly to the occurrence

of the events of the day. It is our view that the inconsistencies were not material as to warrant a disturbance of the conviction by the trial court. In *Philip Nzaka Watu v Republic* , this Courtdiscussed the discrepancies between witnesses as follows:

> " It must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

43. The corroborative evidence in this case points out to the guilt of the appellants. As far as the argument by the appellants that the prosecution did not produce some of the exhibits in court, we agree with the respondent's argument in their submissions that the appellant needed to demonstrate to this Court that as consequence of the non-production of the exhibits there was insufficient evidence on record to support the appellants' conviction on the charge of murder. This is not the case as there was overwhelming evidence in support of the appellants' conviction and therefore the non-production of the exhibits was not fatal to the prosecution's case. In *Peter Kihia Mwaniki v Republic* this Court held thus:

> " Regarding the alleged failure to produce certain essential exhibits, we say this. The exhibits complained about are Hansa's car which the robbers escaped in and which was recovered abandoned about 4 kilometres away from the locus in quo, and the appellant's clothes, which he allegedly left behind after he put on the clothes he allegedly stole from his employer. It would have been proper to avail those exhibits for the court's observation. However, a failure to produce the same was not fatal to the prosecution case. There were other exhibits which were more incriminating which the prosecution produced. We do not think there was a failure of justice arising from the omission to tender those exhibits in court."

44. In the end, we are satisfied that the prosecution proved beyond any reasonable doubt that the appellants murdered the deceased. The appellants were rightly convicted, hence their appeal against conviction fails.

45. With regard to the sentence meted on each of the appellants by the trial court, we have noted that mitigation was proffered on behalf of the appellants and that the ultimate sentence imposed on each of the appellants involved a thorough consideration of the circumstances of the deceased's murder and the mitigating circumstances. The offence for murder under section 204 of the Penal Code attracts the death penalty. We agree with the trial judge that the Supreme Court of Kenya in the Muruatetu case (supra) declared as unconstitutional the mandatory nature of the death sentence as provided for under section 204 of the Penal Code.

46. In this case, the trial judge after taking into consideration the relationship between the two clans sentenced each of the appellants to life imprisonment. In *Daniel Kipyegon Toroitich v Republic* where the appellant had been convicted for the offence of murder and sentenced to life imprisonment by the trial court, this Court made reference to the case of *Jared Koita Injiri v Republic* where it reduced a life imprisonment sentence to 30 years' imprisonment and accordingly allowed the appeal on sentence.

47. Taking into consideration the above mitigating circumstances, we are inclined to allow the appeal against sentence. We hereby set aside the sentence of life imprisonment against each of the appellants and substitute therefor a sentence of 30 years' imprisonment for each of the appellants from 4th May 2018 when the appellants were convicted by the trial court.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL