Osumba v Republic (Criminal Appeal 110 of 2016)
[2021] KECA 292 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 292 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 110 OF 2016

RN NAMBUYE, HM OKWENGU & MSA MAKHANDIA, JJA

DECEMBER 3, 2021

BETWEEN

JARED OTIENO OSUMBA ..... APPELLANT

AND

REPUBLIC ..... REPUBLIC

(Being an appeal from a Judgment by the High Court of Kenya (D. S. Majanja, J.) dated 30th December, 2015 in Homa Bay HC Criminal Case No. 73 of 2013)

JUDGMENT

1. The appeal arises from the judgment of the High Court of Kenya sitting at Homa Bay in Criminal Case No. 73 of 2013 delivered on 30th November, 2015 by D. S. Majanja, J.

2. The background to the appeal is that the appellant was charged before the trial Court with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the information were that on 15th November, 2013 at Pala Village, Upper Kakwajuok Sub-location, North Rachuonyo District within Homa Bay County, the appellant jointly with others not before court murdered Zedekiah Odhiambo Osumba ("the deceased"). The appellant denied the information prompting a trial in which the prosecution called 7 witnesses to prove the information. The appellant was the sole witness in his defence.

3. The prosecution case was that on 15th November, 2013 at around 9.30pm. PW1, Jane Awino Odhiambo, and the deceased who was her husband had just retired to bed when they suddenly heard window glasses on their house being shattered. The deceased got out of bed naked, and went out through the rear door. PW1 made for the sitting room, flashed a torch light through the shattered window panes and identified the appellant among a group of other people assaulting the deceased. She ran to the home of her brother-in-law Wilson Otieno Osumba, PW2 (Wilson) and reported the incident. Wilson and his wife accompanied her back to her homestead. They were followed shortly

thereafter by James Ogega Osuma (James), another brother of the deceased. They found nobody in the compound.

4. They searched for the deceased using torches, and eventually spotted his naked body near a fence in the same compound. They observed several cuts and stab wounds all over the deceased's body. PW2 and PW3 reported the incident first to the clan elder and subsequently to Kosele Police Station. The report was booked by Cpl Felix Mwangi Gachinga, PW4, (CPL Felix). But before PW4 could leave for the scene of the crime, the appellant walked into the police station with a blood soaked jacket and an injury on his head. He reported to PW4 that he had been cut by the deceased who he had fought with. PW4 booked the appellant's report as well. He then left for the scene, where he found the deceased's body as described to him by PW2 and PW3. He also observed several cut and stab wounds on it. He collected the body and took it to Simbiri Hospital Mortuary. Post mortem was subsequently carried out on it by Dr. Peter Ogola, PW5.

5. The findings of the doctor were that there were cuts on the right side of the head, neck, right shoulder, lower arm, anterior chest wall. Deep cuts on the neck up to the spinal column. Internally, the left chest cavity was fractured. Major vessels of the neck had been severed. There was a deep cut on the head extending up to the brain. There was blood collection in the skull. There was a fracture of three spinal bones. PW5 concluded that the cause of death was severe haemorrage and head injury caused by skull fracture due to sharp trauma, caused by a sharp object.

6. PW5 also examined the appellant. He observed a cut wound on the right side of the forehead just below the skull. It was still bleeding. There was also dry blood covering his face. There were human bite marks on the left hand involving the 2nd and 3rd index and middle fingers. The injuries were 12 hours old. The cut and bite marks were stitched. The appellant was treated of the injuries noted above and released back to the police who had escorted him to the police station. The injuries were classified as harm.

7. Investigations into the incident were conducted by PW4 and Cpl Thomas Mbuvi, PW7. A confessionary statement was taken from the appellant by Chief Inspector, Joseph Mutua. The same was tendered in evidence without any objection from the defence. At the conclusion of the investigations, police preferred murder charges against the appellant which he denied. The appellant gave sworn evidence basically rehashing the contents of his confessionary statement to police.

8. At the conclusion of the trial, the learned trial Judge analyzed the record and was satisfied that the death of the deceased had been established to the required threshold by the prosecution evidence tendered through the testimonies of PW1, 2, 3, 4, 6 and 7 as corroborated by the medical evidence tendered through PW5.

9. As to who inflicted the fatal injuries on the deceased, the judge took into consideration the prosecution evidence tendered through PW1, PW4 and PW7 already highlighted above and the appellant's own confessionary statement tendered in evidence without any objection from him, and was satisfied that the appellant's confessionary statement had been recorded in compliance with section 25A of the *Evidence Act* by an officer of the rank of Chief Inspector and above, and in the presence of a witness of appellant's choice, whose contents according to the Judge, the appellant had rehashed in his oral defence, raising a plea of provocation and self defence as justification for the infliction of the fatal injuries on the deceased. On the totality of the above, the Judge ruled that the appellant had been placed at the scene of crime as the perpetrator of the fatal injuries inflicted on the deceased.

10. On the threshold for sustaining a plea of provocation, the Judge construed section 207 as read with section 208 of the Penal Code for elements of provocation and considered these in light of the case of *Weru vs. Republic [1983] E.A 549* and made findings thereon that the implication of section 209 of the Penal Code is that an unlawful killing in circumstances which would constitute murder would be

reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation, which in the Judge's opinion is a question of fact.

11. On self defence, the Judge took into consideration section 17 of the Penal Code as construed in the case of *Ahmed Mohammed Omar & 5 Others vs. Republic NRB C.A Criminal Appeal No. 414 of 2012 [2014] eKLR* in which the decision in *DPP vs. Morgan [1975] 2 ALL ER 347* were approved and the case of *Kanga vs. Republic [1999] I E.A 141* and ruled that the prosecution had an obligation to tender evidence to oust the appellant's plea of self defence.

12. The Judge applied the above threshold to the totality of the record and expressed himself thereon as follows:

> "23. I reject the accused's version of events and his confession and that he could have been provoked or acted in self-defence. The testimony of PW 1 is clear and consistent that the deceased was lured out of his house by the breaking of glass window panes and when he went out he was attacked by amongst others, the accused, who PW 1 saw very clearly. The accused was not under any threat of force. The deliberate action of luring the deceased to his death negates any defence of provocation. In any case, the act constituting provocation occurred long before the attack giving the accused a reasonable time to cool. The accused, having been injured while assaulting the deceased, tried to cover his tracks by immediately reporting to Kosele Police Station and making a confession to turn the tables on the deceased."

13. As to whether the appellant attacked the deceased while he was in the company of other persons, the judge reviewed the record and then rendered himself thereon as follows:

> 24. Counsel for the accused submitted that the prosecution failed to prove that the accused was in the company of other unknown persons. I accept the credible testimony of PW 1 that she saw the accused in the company of other people assault the deceased. The fact that she told PW 2, PW 3 and PW 4 that she had seen several people assault the deceased immediately after the incident lends credibility and consistency to her testimony. Further the multiple injuries sustained by the deceased are consistent with assault by several persons. I therefore find that the accused was part of a gang that acted with common intent to kill the deceased. I would however add that in view of accused's confession that he fought with deceased, a contrary finding that he was alone when he killed the deceased would not absolve him.
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> 25. While it possible that the accused and deceased had a fight, I find and hold that it is the deceased who was trying to defend himself when he cut the accused. The multiple injuries sustained by the deceased also tell a different story. The accused was hacked viciously several times on the front part of his body and once in back fracturing the spinal column. These injuries are in my view inconsistent with self defence as portend excessive force morphing into malice aforethought. Likewise, the nature of the multiple injuries at the front and back inflicted by a sharp object negate the defence of provocation.
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> 26. It is clear that the multiple stab wounds demonstrate malice aforethought as do the extent of the injuries. These injuries could only have been intended to cause the death of or do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of section 206(a) of the Penal Code.

14. The appellant was found guilty as charged, convicted and sentenced to suffer death.

15. The appellant is now before this court on a first appeal. He had initially raised five (5) grounds of appeal but subsequently condensed these into three (3) in his written submissions. It is his complaint that the

learned Judge of the High Court erred in law and fact by failing to evaluate the evidence as a whole resulting in an injustice; the trial court failed to appreciate that the prosecution's case was not proved beyond reasonable doubt rendering the conviction unsafe. Lastly, that the trial court mis-directed itself in law by failing to acknowledge/observe that there were no exhibits produced in evidence linking the appellant to the alleged murder of the deceased.

16. The appeal was canvassed via the Go-To-Meeting platform due to the Covid-19 pandemic challenges in the presence of learned counsel for the respective parties herein through written submissions fully adopted by learned counsel for the respective parties herein without oral highlighting. Learned counsel Mr. Okeyo h/b for Maua appeared for the appellant, while Mr. Ligami Shitsama the learned Prosecution Counsel (PPC) appeared for the State.

17. The appellant relies on section 206 of the Penal Code as construed and applied in the case *Joseph Kimani Njau vs. Republic [2014] eKLR* and *Dickson Mwangi Munene & Another vs. Republic [2014] eKLR* andsubmits that the prosecution failed to prove the actus reus and mens rea which are essential elements for establishing the offence of murder. He also relies on the case of *Nzuki vs. Republic [1993] KLR 171* in which the Court of Appeal set aside conviction for the offence of murder and substituted it with conviction for the offence of manslaughter in support of his submission that on the evidence on record as laid before the court on appeal, it is his position that should the conviction be sustained then the offence disclosed by the evidence is manslaughter and on that basis urged the court to adopt the approach taken by the court in the Nzuki vs. Republic case [supra] substitute the appellant's conviction for thedisclosed offence of manslaughter and re-sentence him according to law bearing in mind the substituted offence.

18. The appellant also relied on case of *Sawe vs. Republic [2003] KLR 364* and *Abanga alias Onyango vs. Republic CRA no. 32 of 1990 (UR)* both on the threshold for admitting and acting on circumstantial evidence as a basis for finding a conviction and reiterated cumulatively that all that the evidence tendered in support of the prosecution case established against the appellant was that there was a land tussle between the appellant and the deceased, a fight ensued between them and since the deceased was armed with a dangerous weapon, the appellant sensing danger to his life was provoked to act in self defence which he also reiterates that it disclosed the offence of manslaughter should the conviction be sustained.

19. In rebuttal, Mr. Ligami Shitsama has relied on the case of *Kamau vs. Mungai [2006] 1 KLR 150* and the case of *Njoroge vs. Republic [1987] eKLR 19* on the mandate of a first appellate court and submits that the Judge properly appreciated the evidence tendered on the record and correctly ruled that element (a), (b) and (c) of section 206 of the Penal Code had been established beyond reasonable doubt.

20. According to counsel, malice aforethought was also established from the conduct of the appellant who went to the deceased's home at night with the intention of causing harm or grievous harm to the deceased. He lured the deceased out of his house by breaking window panes and causing disturbance with the intent of ensuring that the deceased confronted him as he did so the appellant could launch his premediated attack killing the deceased in the process.

21. Counsel also submits that the trial court properly appreciated the record and took into consideration the evidence of PW1 who saw the appellant in the company of a group of other people assaulting the deceased on the material night. PW1's evidence as corroborated by the appellant's own admission in his confessionary statement of being at the scene of crime and having admitted fighting with the deceased, in counsel's opinion were sufficient basis for the trial Judge's finding that the totality of the evidence on the record had placed the appellant at the scene of the crime.

22. On appellant's plea that the sentence meted out against him was not only harsh and excessive but also unconstitutional, counsel submitted that he has no objection to the court applying the guidelines set by the Supreme Court in the case of *Francis Kioko Muruatetu & Another vs. Republic [2017] eKLR* and temper with the sentence as imposed by the trial court and substitute it with an appropriate one bearing in mind interests of justice.

23. This being a first appeal, this Court is required to conduct a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. It must weigh conflicting evidence, make its own findings and draw its own independent conclusion. See *Okeno vs. Republic [1972] EA 32* and *Kiilu & Another vs. Republic [2005] KLR 174*.

24. In re-appraising the evidence, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule therefore, the Court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or that the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. See *Joseph Kariuki Ndungu & Another vs. Republic [2010] eKLR*.

25. We have considered the above mandate in light of the totality of the record, the issues that fall for our determination are the same as those condensed by the appellant in his written submissions namely, whether:

    i. The learned Judge failed to evaluate the evidence as a whole resulting in an injustice.

    ii. The learned Judge failed to appreciate that the prosecution case had not been proved to the required threshold.

    iii. The learned Judge failed to appreciate that there were no exhibits produced in court linking the appellant to the commission of the offence.

26. On the first issue, we have re-evaluated the record on our own and taken into consideration the approach the Judge took in the determination of the criminal case against the appellant, we are satisfied that the summary of the assessment of the record and the Judge's reasoning thereon set out above indicate clearly that the Judge evaluated the record as a whole before reaching the conclusion arrived at in the determination of the criminal proceedings before him. We find no basis for this complaint. It is accordingly dismissed.

27. On proof of the prosecution's case to the required threshold, the approach the Judge took was to address the issue on three fronts namely, first, identification of the appellant at the scene of the murder of the deceased. Second, the import of the confessionary statement admitted in evidence without any objection from the defence. Third, whether circumstantial evidence also relied upon by the prosecution to pin responsibility on the appellant for the murder of the deceased met the threshold for finding a conviction against the appellant based on circumstantial evidence.

28. On identification, the Judge found PW1's evidence credible, based on the fact that the appellant known her, being a brother-in-law. The Judge appreciated that the incident took place at night. The Judge was however, satisfied with PW1's testimony that she used torch light to flash at the group of people assaulting the deceased and was able to recognize the appellant whom she knew very well before as a brother-in-law among them. PW1's evidence had also been corroborated by appellant's own admission, first, to PW4 when he reported the incident to Kosele Police Station and subsequently in his confessionary statement when he confessed that he indeed went to the deceased's home on the material

night, fought with him and fatally injured him. We therefore find no error in the Judge's conclusion that PW1 identified the appellant at the scene of the murder in the company of a group of people assaulting the deceased causing the fatal injuries.

29. On proof of elements of murder, this court has construed sections 203 as read with sections 204 and 206 of the Penal Code, considered these in light of the position taken by the court in *Joseph Githua Njuguna vs. Republic [2016] eKLR* which we fully adopt and considering the same inlight of the totality of the record as laid before us, we are satisfied as did the trial court that the elements (a), (b), and (c) of malice aforethought set out in section 206 of the Penal Code were satisfied. The basis for us reaching the above conclusion is the same as the trial court, namely, that the nature of the injuries inflicted on the deceased as testified to by the prosecution witnesses who observed the deceased's body and as corroborated by the medical evidence already alluded to above, left no doubt in the mind of the trial court and now this court on appeal that the intention of inflicting deep cuts on the vital organs of the deceased by the appellant in cahoots with the other persons who were with him was calculated for the purpose of causing the death of the deceased with the full knowledge that those injuries would be fatal or alternatively did not care whether death would result or not.

30. Second, on the record as laid before us the appellant's confessionary statement was properly recorded and admitted in evidence. Our reasons for reaching the above conclusion are as follows: Article 49 (4) of the *Constitution* guarantees an arrested person inter alia the right to be informed promptly, in a language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; the right to communicate with an advocate and other persons whose assistance is necessary and the right of not being compelled to make any confession or admission that may be used in evidence against him/her. Further, that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. Similarly, Article 50 (2)(1) of the Constitution of Kenya, 2010 guarantees an accused person a right to refuse to give self-incriminating evidence.

31. Section 25 of the *Evidence Act* defines a confession as follows:

> " A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."

Section 25 of the *Evidence Act* was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act, Section 25A which reads as follows:

> " 25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.
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> (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

32. The Rules envisaged under subsection (2) of section 25A are known as the Evidence (out of Court Confessions) Rules, 2009. Rule 4, provides, inter alia, that the Recording Officer:

a. Shall ask and record the Accused Person's preferred language of communication;

b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;

c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;

e. Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

Section 26 of the *Evidence Act* on the other hand provides as follows:

> " A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Section 25A of the *Evidence Act* [supra] introduced by Act No. 7 of 2007 provides in part that for a confessionary statement to qualify for admission as evidence in support of the prosecution case, such a confessionary statement must have been made: "before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector Police, and in the presence a third party of the person's choice." [emphasis ours].

33. The record is explicit that C.I Joseph Mutua recorded the confessionary statement from the appellant in the presence of Dorcas Akoth a cousin to the appellant at the request of the appellant. It is our observation that the recording officer acceded to the appellant's request in compliance with Rule 4(e) of the Out of Court Confession Rules, 2019. In light of the above uncontroverted position, it is our finding that the trial Judge was right in holding that the confessionary statement voluntarily taken from the appellant satisfied the conditions for admission set out in section 25A of the *Evidence Act*, and correctly acted on the same as the bas basis for finding a conviction against the appellant.

34. On circumstantial evidence, this Court in *Sawe vs. Republic* (2003) KLR 364, stated that to pass muster, circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances.

35. Applying the above threshold to the record on this issue, it is our finding, that the circumstantial evidence relied upon by the trial court as additional basis for convicting the appellant, formed a chain so complete that it irresistibly pointed to the guilt of the appellant as the perpetrator of the death of the deceased. This is borne out by the fact that PW1 recognized the appellant at the scene in the company of a group of other people assaulting the deceased. He voluntarily reported to the police while clad in a blood soaked jacket with injuries he alleged were sustained in the cause of a fight between him and the deceased who he confessed firstly orally and subsequently in his confessionary statement that he had killed. It is therefore our finding as did the trial court that the appellant was placed at the scene of crime of the deceased both through direct as well as circumstantial evidence.

36. On alleged nonproduction of exhibits linking the appellant to the commission of the offence, the record is explicit that indeed no exhibits were recovered and handed to police, hence their nonproduction at the trial is inconsequential in the proof of the charge laid against the appellant as the prosecution could not be possibly expected to produce what they had not recovered. It is further our positon on this complaint that lack of recovery of exhibits linking the appellant to the commission of the offence notwithstanding, the totality of the evidence tendered on record in support of the prosecution case as already highlighted above was overwhelming as it pointed irresistibly to the appellant jointly with others not before the court as the perpetrators of the deceased's death. The appellant's conviction is therefore safe and is accordingly sustained.

37. As for the complaint against the sentence meted out against the appellant, we note the position taken by the respondent that they have no objection to the court adopting and being guided by the guidelines given in the case of *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR, and temper with the sentence meted out against the appellant. We go on record as fully adopting the said guidelines.

38. This Court has already expressed itself on the mode of procedure with regard to compliance with the above Supreme Court guidelines on resentencing in circumstances where the Court has affirmed the conviction, but found it prudent to temper with the sentence handed down against an appellant either by a trial court, and or affirmed by a first appellate Court, in instances where the death penalty is the only lawful sentence for the offence such as that which appellant herein was convicted of. We find it prudent to highlight a few of such instances.

39. In *Juma Anthony Kakai vs. Republic [2018] eKLR*, where there was mitigation and the appellant was a first offender, the Court re-sentenced the appellant and substituted the death sentence with a sentence of twenty (20) years imprisonment from the date of conviction. In *Bernard Mulwa Musyoka vs. R. Criminal Appeal No. 25 of 2016*, the Courtintimated that it has jurisdiction to direct a sentence re-hearing by the court (s) below or pass any appropriate sentence that the trial magistrate's court could have lawfully passed. In *Mohammed Hussein Mohammed vs. Republic -Criminal Appeal No. 126 of 2015*, the Court after takinginto consideration the sentencing guidelines as enunciated in the Muruatetu case (supra), deemed it fit to interfere with the death sentence meted out against the appellant with respect to the offence of robbery with violence and substituted the same with a sentence of 20 years' imprisonment which the Court deemed as commensurate to the circumstances of the case and the appellant's culpability. Lastly, in Criminal Appeal No. 6 of 2009-*Yohana Hamisi Kyando Vs. Republic,* the Court remitted the matter back to the High Court for rehearing on sentencing only, consistent with the guidelines pronounced by the Supreme Court in the Muruatetu case.

40. From the above survey of the trend in the Courts' pronouncements on the issue of re-sentencing, it is evident that the determining factor in deciding either to remit the matter to the trial court for resentencing or the court assuming that role and proceeding with the resentencing exercise depends on the peculiar circumstances of each case. In the instant appeal, the appellant was arrested on 15th November, 2013 a period of about seven (7) years ago. He was convicted and sentenced on 30th November, 2015 which is about a period of six (6) years. We appreciate the deceased lost his life in circumstances which could have been resolved through the arbitration process that had been initiated by the clan elder and local administrative leaders to resolve the land tussle between the appellant and the deceased as brothers.

41. At the sentencing, the appellant had no previous record and was therefore treated as a first offenders. When given an opportunity to mitigate, the appellant said that he was a family man with several children. He was the sole bread winner. He was also responsible for his late brother's children.

42. Considering all the relevant factors herein, we are inclined to interfere with the sentence that was passed by the trial court. We have taken into consideration the appellant's mitigation, the circumstances under which the offence was committed, as already highlighted above, fully cognizant that sentencing is a trial court function but, given that mitigation was taken and is on record, interest of justice would demand that we should not remit the matter back to the trial court for resentencing. Instead we should exercise that mandate ourselves.

43. In the result and for the reasons given in the assessment, we dismiss the appeal against conviction. We hereby allow the appeal on sentence, set aside the death sentence and substitute it with a jail term of thirty (30) years from 30th November, 2015 when the appellant was convicted and sentenced.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR