IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 19 OF 2016

BETWEEN

DENNIS OKELLO MATEBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega,

(Njoki Mwangi, J.) delivered on 18th December 2015

in

H C Cr. Appeal No. 110 (B) of 2014)

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JUDGMENT OF THE COURT

1. Dennis Okello Mateba, the appellant, was charged with defilement contrary to **Section 8 (1)** as read with **Section 8 (2) of the Sexual Offences Act**. The particulars are that on the 20th day of December 2011 at [Particulars Withheld] village in Bunyala West Location in Navakholo District within Western Province, the appellant intentionally caused his penis to penetrate the vagina of LW, a female child aged 13 years old. The appellant faced an alternative count of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars were that on the 20th day of December 2011 at [Particulars Withheld] village in Bunyala West Location in Navakholo District within Western Province, intentionally touched with his penis the vagina of LW. a female child aged 13 years old.

2. The prosecution case was founded on the testimony of various witnesses. After *voire dire* examination, the complainant PW1 (LW) in relevant excerpts testified as follows:

> *My name is LW I am 14 years old. At the time of the offence I was thirteen years old. I was born on 5th March 1998. I have a birth certificate serial No. [....]. I wish to produce it in court as an exhibit.*
>
> *On 20th December 2011 at around 3.00 pm, I was at home. I was with my cousin L. I was preparing supper. Dennis came. I did not know him before. He came and said he was a pastor. He came on a motor cycle to the front of our house. He sat on a chair outside. We came and greeted him and went back to the kitchen. I had seen him on two previous Tuesdays at home. He had come to see my mother. On the third occasion I learnt that he exorcises demons. He was talking to himself when he said so. He called me by my name W. He told me to enter the house to remove demons from my vagina. He told me it was my boyfriend who had done that to me yet I had no boyfriend. After I resisted, he brought some herbal concoction which he made me drink. I drank in the house of my parent. My mother had gone to attend a funeral. After I took that herbal medication, I was confused and although I had refused to undress, when I came to my senses I found myself on the floor of the bedroom on a sack near the bedroom door naked. I had no recollection of what transpired. I found him outside the house. I recall I was seated in the sitting room. When I woke up I was bleeding from my vagina and I was in a lot of pain. I woke up. I tied a lesso around my waist and found water my cousin had placed there. I took a bath and waited for my mother. He called my cousin and went with her to the shop by way of motor cycle. He came with Fem Plan tablets which he told me to take one daily every morning and evening. I thought to myself it will be evidence to my mother. I wish to produce it (the tablets) as exhibit in court. They are 28 tablets in all. I told my cousin I will tell my mother. My mother came at 5.00 pm. After I told her she took me to the pastor's place but he denied any wrongdoing. We all went to Khaunga Health Centre. We waited for 10 minutes. The accused ran away leaving us behind. We decided to come to Kakamega Hospital for*

checkup. I was treated and filed a report at the police station. This is the P3 Form. Before this incident, I had sexual intercourse in 2002 when I was young.

3. PW2 (L.) a young girl child 12 years old after *voire dire* examination testified as follows:

On 20th December 2011, I was in the kitchen with the complainant (L) and we were cooking vegetables. The accused Dennis called L. into the house. L entered the house. I did not know Dennis before. He came with a motor cycle. I remained in the kitchen area for a little while. After a while L started crying in the "big house." I went there and found Dennis had closed the door from inside. I went to the window; it was not closed. They were in the bedroom. I went to the bedroom window. It is a glass window. I could see both of them. I saw Dennis sleeping on L. L was facing up. They had not covered themselves. When Dennis saw me he stood up. He had a long trouser. L was only wearing a skirt. L was crying. Dennis came out and asked me to accompany him to the shop. He bought some medicine and came back home. He gave L. Dennis left afterwards. L's skirt was blood stained. The clothes are at home. They are not blood stained. I washed them. When I saw the two in the bedroom they were lying on a sack. The sack had blood stains. I cannot tell where the blood came from.

4. PW5, Dr. Milcah Olando, testified that she examined the complainant, two days after the alleged incident and filled the P3 Form. Upon examination, she found that; the complainant had a blood discharge which appeared to be menstruation; her labia vagina and cervix were normal and she had a foreign epithelia cells in her fluid indicating sexual assault. She assessed the injury as sexual assault and harm.

5. In his defence, the appellant denied committing the main offence as well as the alternative offence as charged. He gave a sworn testimony that on 20th December 2011 at around 2.00 pm, he went to the home of PW3 EN (the complainant's mother) for a church group meeting. That upon reaching her home, he found that the meeting had been cancelled. That he found the complainant (PW1) and her sister (PW2) who told him that their mother had gone to a funeral. That later that evening, PW3 called him asking what he had done to her daughter (PW1). He denied doing anything to her daughter. After one month, he was arrested and charged with the offence.

6. Upon evaluating the evidence on record, the trial magistrate convicted the appellant for the offence of defilement as charged. Having found the appellant guilty of the main charge, the magistrate made no finding on the alternative charge. On 13th August 2014, the trial magistrate sentenced the appellant to a term of twenty (20) years' imprisonment.

7. In convicting the appellant, the trial magistrate stated as follows:

My findings therefore are that although the complainant was not in a state of mind to decipher whether the accused penetrated or not, and further although she had taken a bath and washed the underwear and the skirt and blouse she wore, it is my view that a high vaginal swab done on the date she presented herself to the hospital clearly show sexual assault. So even with the absence of eye witnesses evidence by PW1 and PW2, laboratory tests corroborate their evidence in so far as defilement is concerned.

I have also considered the circumstances surrounding the accused's action namely lying on top of the complainant as she lay naked with her legs astride on the sack in the "big house;" the accused's action of taking PW2 to the shops buying her Femi plan tablets and instructing her to take one daily; and his escape when they got to Khauga health centre…… are all indications and a pointer to the guilt on the part of the accused…… The accused's conduct was that of someone who had planned his actions very well.

8. Aggrieved by the conviction and sentence by the trial magistrate, the appellant lodged a first appeal in the High Court. The appeal was dismissed. In dismissing the appeal, the learned judge expressed herself as follows:

[29] The evidence of PW2 was to the effect that she peeped through the glass window of the bedroom of the "big house "and saw the appellant lying on top of PW1 with his legs astride. PW1's legs were also astride. The evidence of PW2 shows that the perpetrator of the defilement was none other than the appellant. This explains why PW1 was bleeding from her private parts and was in pain when she came to, after the incident….

[31] Further corroboration of the appellant's commission of the offence is to be found in his conduct. The appellant requested PW2 to accompany him to a shop where he bought Femi plan tablets which he gave to PW1…. This court looked at the Femi plan tablets produced in court…. The very act of the appellant buying the tablets and giving them to PW1 is inconsistent with his innocence and a clear indicator that he had defiled PW1 as a result of which he expected her to take the Femi plan tablets to counter her becoming pregnant….

[33] The conduct of the appellant of disappearing from Khaunga General Hospital. is also indicative of his guilt.

[37] The defence put forward by the appellant shows that his visit to PW3's house gave him an opportunity to commit the offence in the absence of PW1's parents. Although mere opportunity to commit an offence does not in itself amount to corroboration, the opportunity may be of such character that taken together with other circumstances may in itself amount to corroboration (See ***Malonza – v- R, 1986 KLR 426)*** *….*

[41] I find that the prosecution proved its case beyond reasonable doubt….

[42] The minimum sentence provided by law for the offence of defilement of a child between the age of twelve and fifteen years is twenty (20) years imprisonment. The sentence imposed on the appellant was the minimum sentence for the said offence.

[43] The court finds the appeal herein is without merits. I hereby dismiss it in its entirety.

9. Aggrieved by the dismissal of his appeal, the appellant has lodged the instant second and perhaps last appeal to this Court citing the following grounds:

> (i) The two courts below erred in not making a finding that this was a case of sexual assault contrary to **Section 5 (1) (a) (b)** of the **Sexual Offences Act** and make a finding of a minimum sentence of ten (10) years imprisonment under **Section 5 (2)** of the **Penal Code.**
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> (ii) The two courts below received evidence of the minors witnesses without any independent corroboration and without the necessary cautions, skepticism and circumspection by the trial magistrate.
>
> (iii) The two courts failed to take into account the contradictions in the evidence of PW1, PW5 and PW2.

10. During the hearing of the instant appeal, the appellant urged additional grounds of appeal namely:

> (i) That he was charged under **Section 8 (1)** as read with **8 (3)** of the **Sexual Offences Act** instead of being charged under **Section 8 (2)** of the **Sexual Offences Act**.
>
> (ii) That two courts below erred in considering the evidence of a minor PW1 to be corroborated with the evidence of another minor PW2.
>
> (iii) That there was no sufficient evidence to prove penetration.
>
> (iv) That the two courts below erred in ignoring the medical evidence of PW5 Dr. Milcah Olando that the blood from the complainant could have been from her menstruation.

11. At the hearing of this appeal, the appellant appeared in person. The State was represented by the Senior Prosecution Counsel, Ms Peris Gathu. All parties had filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

12. The appellant urged that the medical evidence tendered before the trial court by PW5 Dr. Milkah Olando was unreliable. That PW5 stated she classified the complainant's injuries as harm due to sexual assault. That there was no basis of such classification as no physical injury was found on the complainant. That the only medic's evidence that was relied upon was the presence of epithelial cells. That there was no medical proof of penile penetration like presence of spermatozoa. That the complainant was medically examined after two days yet the sperm cell is known to be alive in the genitalia for three (3) days or 72 hours.

13. On the issue of penile penetration, it was submitted that the evidence of PW2 was not sufficient to prove penetration. That PW2 testified she saw the appellant lying on top of the complainant with her legs astride. That the space in the house as stated by PW2 was too small to support evidence of lying with legs astride. That the appellant could not penile penetrate the complainant with his legs astride. That there was no proof that the appellant bought the alleged Femi plan tablets. That there were no receipts produced in court to show who sold, who bought and from where the Femi Plan tablets were sold. In addition, the chemist shop keeper was not called to testify. That no exhibit memo was produced from the police station.

14. It was further submitted that the two courts below erred in receiving uncorroborated evidence of PW1 and PW2 who were both minors. That the trial magistrate did not warn herself of the dangers of relying upon uncorroborated evidence of the minors. That the demeanor of PW1 and PW2 showed that they were not telling a plausible story.

15. The appellant further submitted that the testimony of PW1 and PW2 were contradictory. That PW1 testified that after taking the herbal concoction she was confused while PW2 testified that PW1 was crying. That PW1 testified that when she woke up she was naked while PW2 testified that when PW1 woke up she was wearing a skirt. It was further urged that the two courts below did not consider that the presence of epithelial cells is normal in a vagina without injuries; that the two courts did not give weight to the complainant's evidence that she had a broken hymen since she had already engaged in sexual intercourse with her boyfriend in 2002. Based on the foregoing contradictions, the appellant urged us to allow the appeal against conviction and sentence.

RESPONDENT'S SUBMISSIONS

16. The respondents urged that this was a second appeal that must be confined to matters of law. That in this matter, the prosecution had proved its case beyond reasonable doubt. That all the essential ingredients for the offence of defilement were proved. That the age of the complainant was proved to be thirteen years at the time of the offence. That the evidence of penetration was led and there was a positive identification of the appellant as the person who committed the offence.

17. The respondent emphasized that PW1 produced her birth certificate which indicated she was born on 5th March 1998. She was 13 years old at the time of the offence. That PW1 further positively placed the appellant at the scene of crime. That PW2 positively recognized the appellant, placed him at the scene of crime and testified that she saw the appellant lying on top of PW1. That the testimony of PW1 was corroborated by the evidence of PW2. That from the accounts given by both PW1 and PW2, identification of the appellant as the person who committed the offence is not in doubt. That the trial court properly warned itself on the evidence of PW1 and PW2 who were both minors.

18. As regards penetration, it was submitted that both PW1 and PW2 placed the appellant at the scene of crime. That PW5, a doctor, who medically examined PW1 concluded that a sexual assault was committed on PW1.

ANALYSIS and DETERMINATION

19. We have considered the record of appeal as well as submissions by the appellant and respondent. This is a second appeal that must be confined to questions of law. In ***M'Riungu - v- Republic*** ***[1983] KLR 455***, this Court expressed:

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

20. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two courts below in the following terms:

> *"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See* **Aggrey Mbai Injaga – v – Republic, [2014] eKLR**'.

21. In **John Mutua Munyoki - v- Republic, [2017] eKLR**, this Court stated that under the **Sexual Offences Act**, the main elements of the offence of defilement are as follows:

> *(i) The victim must be a minor,*
>
> *(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.*
>
> *(iii) The accused must positively be identified as the person who committed the offence.*

22. In the instant case, there is no doubt that the age of the complainant (PW1) was proved beyond reasonable doubt. PW1 tendered in evidence her birth certificate which showed that she was born on 5th March 1998.

23. The appellant further urged that the two courts below erred in failing to find that the prosecution did not prove there was penetration of the appellant's genitalia into the female genitalia of the complainants. The pertinent legal issue is whether there was penetration by the appellant into the genital organ of PW1. In **F O D -v- Republic, [2014] eKLR,** it was stated that in order to secure a conviction for the offence of defilement under the **Sexual Offences Act**, the prosecution must establish that the person has committed an act which causes penetration with a child.

24. Proof of penetration is established either by the victim's evidence, medical evidence or any other cogent evidence, (See ***Remigious Kiwanuka –v- Uganda; S. C. Crim. Appeal No. 41 of 1995 (****Unreported).* **The slightest penetration is enough to prove the ingredient of the offence of defilement. In the persuasive case of Michael Kihara Kariuki - v –Republic, [2017] eKLR**, it was correctly stated that proof of defilement and the key ingredient of penetration is dependent on whether there was cogent, consistent and reliable evidence adduced by the prosecution witnesses to prove the offence.

25. In the instant case, PW1 testified that she felt dizzy and confused after taking the herbal concoction given to her by the appellant. That when she woke up, she found herself naked with blood coming from her private parts. On her part, PW2 testified that when she peeped through the glass window of the "big house" she saw the appellant lying on the complainant. That both were not covered. PW2 further testified that PW1 skirt's was blood stained. That the sack on which the appellant and complainant lay was blood stained.

26. We are satisfied that the evidence on record from the testimony of PW1 and PW2 not only places the appellant at the scene of crime, it also proves that PW1 had blood oozing from her private parts. The evidence of blood coming from the private parts of the complainant is circumstantial evidence that goes towards proving full or partial penial penetration. The evidence that the complainant was naked is proof that the appellant was the person who undressed her while she was in a stupefied state. We are cognizant that the complainant was in a dazed state of mind that she could not tell whether she had been penetrated or not. The only circumstantial evidence on record is the testimony by PW2 that she saw the appellant lying on top of the complainant. The medical evidence tendered before the trial court by PW5 corroborates the fact of penetration. In the medical report, it is indicated that the presence of foreign cells in the complainant's fluids were a sign of assault. On his part, the appellant contended that the blood from the private part of the appellant was menstruation. The appellant's assertion of menstruation is discounted by the testimony of PW5, who testified that the menstruation began hours after the assault. If the menstruation was at the time of the assault all the clothes that PW1 had on would have been blood stained.

27. We have considered the submission by the appellant that there was no proof of penetration and that the blood found on the private part of the complainant was menstruation. In the case of **Kassim Ali - v - Republic, Cr. App. No. 84 of 2005 (Mombasa)** it was stated:

> **"…** *[The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."*

28. In the instant matter, whereas the medical report tendered in evidence does not conclusively prove penetration of the complainant's vagina, we find that the purchase of the Femi plan tablets by the appellant is circumstantial evidence that points towards penetration. The tablets are used to prevent pregnancy. It is reasonable to infer that the appellant purchased the tablets to prevent the complainant from

becoming pregnant. Why would the appellant go this far if there was no penetration and perhaps ejaculation? In our considered view, the medical report coupled with the appellant's conduct of buying the Femi plan tablets provides circumstantial evidence that proves penile penetration by the appellant. This is in addition to the vivid legs astride position in which PW2 saw the appellant and complainant.

29. The appellant has further urged that the two courts below did not consider contradictions and inconsistencies in the testimony of PW1, PW2 and PW5. We have considered the inconsistencies as enumerated by the appellant. The alleged inconsistencies and contradictions are not material as they neither prove nor disprove the essential ingredients of the offence of defilement. The identification of the appellant and the corroborative evidence on record overwhelmingly outweigh any inconsistency in the evidence on record. We find that the inconsistencies neither dent, dislodge nor cast doubt on the prosecution case. In arriving at our decision, we are persuaded and guided by the decision of this Court in ***John Nyaga Njuki & 4 others –v-R, [2002] eKLR*** *where it was stated:*

> *"But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."*

30. Another ground urged is that the two courts below erred in relying on the testimonies of PW1 and PW2 who were both minors. That the evidence of the two minors required independent corroboration and the evidence of one minor cannot corroborate the testimony of another minor. This Court in **J.W.A -v- Republic *[2014] eKLR*** held that corroboration in sexual offences is not mandatory.

31. The non-mandatory requirement for corroboration in sexual offences is aptly captured in the proviso to **Section 124** of the **Evidence Act**. The proviso states that:

> *"Provided that where in a Criminal case involving a Sexual Offence, if the only evidence is that of a child of tender years who is the alleged victim of the offence, the Court shall receive the evidence of the child and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the child is telling the truth."*

32. The law on the point that the court can convict on the evidence of a single minor's witness was settled in the case of **Chila -v- R, [1967] EA 722 at 273** that:

> *"The law of East Africa on corroboration in Sexual Offences is as follows: -*
>
> *The Judge should warn the assessors and himself of the danger of acting on the uncorroborated Evidence testimony of the complainant, but having done so he may connect in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the Appellate Court is satisfied that there has been no failure of justice. In this case, as earlier stated, the trial Magistrate after conducting that "I have assessed the minor and I find her fit to proceed with this trial. She can be sworn." In her assessment of the Prosecution's evidence, she stated.*
>
> *The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence."*

33. In the instant matter, we are satisfied that the trial magistrate was aware that both PW1 and PW2 were minor witnesses. Out of abundance of caution the magistrate warned herself and emphasized the need for corroboration. The trial magistrate expressed *"I do warn myself on the evidence of PW1 and PW2 both minor (sic) and witnesses to this case as well as the need for corroboration." As for PW1, the trial magistrate stated "I am further convinced that the complainant was honest when she readily admitted she had sexual intercourse in 2002 with a boy."* The learned judge upon re-evaluating the foregoing statements by the trial magistrate held that the magistrate did not err in convicting the appellant after taking into account the proviso in **Section 124** of the **Evidence Act**.

34. On our part, the appellant has not demonstrated to our satisfaction that PW1 and PW2 were not credible witnesses. We find that the two courts below properly convicted the appellant in light of the proviso to **Section 124** of the **Evidence Act**.

35. We have considered the additional grounds of appeal urged by the appellant. It was submitted that the two courts below erred in not making a finding that this was a case of sexual assault contrary to **Section 5 (1) (a) (b)** of the **Sexual Offences Act** and make a finding of a minimum sentence of ten (10) years imprisonment under **Section 5 (2)** of the **Sexual Offences Act.**

36. In our considered view, it is not for the appellant to determine under which provision of law he should be charged and or sentenced. A given set of facts and circumstances in an alleged offence can support a charge under several statutes and provisions of law. The prosecution has the discretion to draw the charge sheet against an accused person and identify the relevant Act or provision of law that supports the charge. If at all the appellant was aggrieved by the charge as drawn, he should have raised any objection before the trial court.

37. The appellant further urged that he was charged under **Section 8 (1)** as read with **8 (3)** of the **Sexual Offences Act** instead of being charged under **Section 8 (2)** of the **Sexual Offences Act** (sic). This ground raises the issue of defective charge sheet. We have considered the ground and find it has no merit. The appellant has not demonstrated to our satisfaction any prejudice or miscarriage of justice that he suffered as a result of being charged under **Section (8) (3)** of the **Sexual Offences Act**. In any event, the issue was not raised before the two courts below. Nonetheless, this was a defect curable under the provisions of **Section 382** of the **Criminal Procedure Code**. We do not find any error or matter of law on the other grounds urged by the appellant.

38. On sentence, the appellant was sentenced by the trial court to the minimum term of twenty years' imprisonment. In ***Bernard Kimani Gacheru –v- Republic, Cr App No. 188 of 2000 t***his Court stated thus:

> *It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.* (Emphasis supplied: *See also* ***Wanjema v. Republic*** ***[1971] E.A 493)*****.**

39. In the instant matter, the appellant has not demonstrated that the minimum sentence of twenty (20) year term of imprisonment was harsh or excessive. We have found no iota of evidence that the two courts below overlooked some material matter or took into account some wrong material or even acted on a wrong principle. We are cognizant of the Supreme Court decision in **Francis Karioko Muruatetu & another -v– Republic, [2017] eKLR** which underscored the unconstitutionality of mandatory sentences.

40. On our part, we have examined the record of appeal and the mitigation offered by the appellant. Recalling the manner in which the complainant was stupefied with herbal concoction and noting that the appellant masqueraded as a pastor and preyed on the honesty and innocence of the minor complainant, we are persuaded that the minimum twenty-year term of imprisonment meted upon the appellant was proper and appropriate. We decline to interfere with the sentence.

41. In the final analysis, from our consideration of the grounds of appeal, the evidence on record and the relevant applicable law, we find that this appeal has no merit. We affirm and uphold both the conviction and the twenty-year term of imprisonment meted upon the appellant. This appeal be and is hereby dismissed.

42. This judgment is delivered pursuant to rule 32 (2) of the Court of Appeal rules as Odek, J.A passed on before the delivery of the Judgment.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.