IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 21 OF 2018

BETWEEN

SIMON NJOROGE WAITHIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nairobi, (A. M. Msagha, J) dated 2nd May, 2013

in

HC.CRA. 405 & 412 OF 2010)

****

JUDGMENT OF THE COURT

This is a second appeal arising from the Judgment of the High Court of Kenya at Nairobi in Criminal Appeal No. 405 of 2010 (**Mbogholi, J**) dated 2nd May, 2013.

The appellant was arraigned before the Senior Resident Magistrate's court at Gatundu with the offence of defilement of a girl contrary to **Section 8(1**) as read with **Section 8(2)** of the **Sexual Offences Act 2006 (SOA)**. The particulars were that on the 19th day of July, 2009 in the **Thika** District in Central Province, he intentionally and unlawfully committed an act which caused penetration to a minor, a girl aged (5) years. The appellant also faced an alternative charge of indecent act with a female contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars were that on the same date and place the appellant committed an indecent act with a minor by touching her genital organs, a girl aged five (5) years. The appellant denied both offences prompting a trial in which the prosecution tendered evidence through four (4) witnesses to establish the charge, while the appellant was the sole witness for his defence.

The brief facts of the appeal are that on 19th July, 2009, **"MN"**, (PW2), the mother to the minor (PW1) left for a funeral wake in the company of appellant's mother leaving PW1 and other children under the care of **"NM"**, a neighbour. She came back and took the children home, without PW1 raising any complaint with her. It was not until the 2nd August, 2009 while bathing PW1 that she complained of pain between her legs. On inquiry from PW1 as to the cause of the pain, the child disclosed to PW2 that she had been defiled by appellant on the day she and appellant's mother had left for a funeral wake. PW2 and her husband took the minor to **Ngorongo Health Centre** but they were referred to **Gatundu General Hospital** where PW1 was treated, a P3 filled by **Dr. Ng'ang'a**, and subsequently tendered in evidence by **Rose Chemurei (PW3)** on his behalf. **Ngorongo** AP Post also referred the incident to **Gatundu** Police Station where investigations were carried out by **CPL Peris Munene** (PW4), following which the appellant was arrested and arraigned in court. In his unsworn testimony, the appellant recalled being arrested on 4th August, 2009 by officers from **Gatundu** Police Station and then arraigned in court for an offence he knew nothing of. He denied defiling the minor alleging fabrication of the case against him by the minor and her mother.

The trial court analysed the evidence and made findings inter alia; that the minor did not strike the court as one who had been couched as she promptly answered questions put to her; medical evidence indicated that her hymen was broken and the vagina opening dilated which in the trial court's view was consistent with vaginal penetration; that appellant took advantage of the absence of PW2 and his own mother, defiled the minor and gave her Kshs.5.00 to buy her silence; the manner in

which the incident came to light ruled out the possibility of appellant being framed with the commission of the offence especially when there was no evidence of existence of bad blood or outstanding grudge between PW1, PW2 and the appellant. The trial court weighed the appellant's defence against the totality of prosecution evidence, and rejected it as a mere denial. On the age of the minor, the trial court relied on the child's clinic card and ruled that the minor was aged five years and about ten (10) months when she was defiled. On account of the above findings, the trial court found the prosecution case proved to the required threshold, found appellant guilty, convicted him on the main charge of defilement and sentenced him to life imprisonment.

The appellant was aggrieved and appealed to the High Court raising various grounds. The Judge re-evaluated the evidence on record and made findings thereon. On the manner the trial court conducted *voire dire* on the minor, the Judge ruled that elaborate procedure in dealing with evidence of a child of tender years laid down by the Court of Appeal in the case of **Johnson Muiruri v Republic [1983] KLR 445** was not mandatory when the Court itself stated that the correct procedure to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth, and then expressed itself as follows:

> ***"In this particular case, the learned trial magistrate had this in mind. The record shows that he recognized the girl before her was a child of tender years. She went on to examine the young girl and concluded that she did not understand the meaning of the oath. What is on record however is that, the minor gave an unsworn testimony but the learned trial magistrate allowed the appellant to cross-examine her. This was irregular but not prejudicial to the appellant."***

On uncalled witnesses, the Judge stated that not all witnesses who witness an offence must be called to give evidence. The omission to call the mother of **"N"** was therefore not prejudicial to the appellant as the complainant never disclosed to her what she had gone through. On production of medical evidence by PW3; that it was not irregular as PW3 had worked with **Dr. Ng'ang'a** who was unavailable for over one year. PW3 was familiar with her handwriting and signature. The foundation for the production of that evidence was therefore properly laid. On account of the above reasoning, the High Court dismissed the appeal and affirmed the appellant's conviction and sentence.

Undeterred, the appellant is now before this Court on a second appeal raising six home grown grounds of appeal, which may be paraphrased as follows: that the learned Judge erred in law by failing to appreciate that:

> ***(1) Particulars of the charge did not demonstrate that penetration was by a male organ.***
>
> ***(2) Evidence of PW1 and PW2 was inconsistent and contradictory.***
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> ***(3) Age and penetration were not proved to the required threshold.***
>
> ***(4) Crucial witnesses were not called to testify.***
>
> ***(5) Burden of proof was shifted on him. Neither was his defence considered.***
>
> ***(6) Mandatory minimum sentence is unconstitutional.***

The appeal was canvassed by way of written submissions filed on 28th October, 2019, adopted by appellant without oral highlighting, and oral submissions through **Mr. O'mirera Moses,** Senior Assistant Director of

Public Prosecution (SADPP). The appellant contended that; PW1's unsworn evidence was uncorroborated for lack of prompt disclosure of the defilement which in the appellant's view was sufficient proof of fabrication of the charge against him especially when crucial witnesses were never called; the P3 did not indicate that penetration was by a male organ; PW4 contradicted PW2's evidence that it is her husband who reported the incident to police contrary to what PW4 stated that it is PW2 who came to the police station with PW1 and narrated what had allegedly happened; the charge was defective for the failure to state that penetration was by a male organ to rule out any inference that penetration could have been caused by other factors other than penile penetration; evidence giving age of PW1 as ranging between 4, 5 - 7 years was inconsistent and should not have been acted upon by the two courts below to find and affirm his conviction.

On his defence, the appellant contended that he was disadvantaged in the presentation of his defence since he was acting in person. His defence of fabrication of the charge against him by PW1 and 2 should not therefore have been rejected for his failure to raise that issue with those witnesses in cross-examination. The approach the two courts below took when rejecting his defence was therefore tantamount to shifting the burden of proof on him to prove his innocence, asserted the appellant. On the constitutionality of the mandatory sentence, the appellant relied on the sentencing policy guidelines, the Constitution of Kenya 2010 and the current jurisprudential trend on minimum sentences as enunciated by the Supreme Court of Kenya in the case **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, and invited us to temper with the minimum sentence should we sustain his conviction.

Mr. O'mirera Moses supported both conviction and sentence contending that: the two courts below gave concurrent findings on facts, which this Court has no mandate to interfere with; the date of the offence was properly ascertained as 19th July, 2009 the date when PW2 left for a funeral wake leaving PW1 under the care of a neighbour. Medical evidence left no doubt that the minor had been defiled and that minor inconsistencies in PW2's evidence did not vitiate the otherwise proven prosecution case; and lastly that the appellants defence was rightly

rejected as it was a mere denial.

In reply to **Mr. O'mirera's** submission, the appellant maintained that the case was a fabrication. The conviction was therefore not safe as it was founded on discrepancies in the prosecution evidence.

This is a second appeal and by dint of the provision of **Section 361** of the **Criminal Procedure Code**, only points of law fall for our consideration. In **Karingo v Republic [1982] KLR 213**, the court stated as follows;-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja versus (1956) 17 EACA 146)"***

We have considered the record and are of the view that the issues that fall for our determination are same as those raised by the appellant in his grounds of appeal.

On the conviction having been founded on an alleged defective charge, the particulars of the charge as set out in the charge sheet do no*t explicitly state that* **"penetration"** was by a male genital organ. **Section 2** of the **SOA** defines:

> ***"Penetration as meaning the partial or complete insertion of the genital organ of a person into the genital organ of another person."* while genital organs are defined to include *"the whole or part of male or female genital organs and for purposes of the Act include the anus."***

Section 8(1) of the same Act defines defilement as follows:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".***

From the above definitions, penetration is established where there is complete or partial insertion of a genital organ of a person into the genital organ of another person. **Section 382** of the **Criminal Procedure Code** provides as follows:

> ***"subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".***

In light of the above threshhold, since the defilement involved the appellant who is a male person possessed of male genital organs and a female child possessed of female genital organs, the penetration referred to in the particulars of the charge could only have occurred as a result of the appellant's male genital organ penetrating the child's female genital organ. The omission to state in the particulars of the charge which genital organs came into contact with each other during the defilement was therefore curable under **Section 382** of the **Criminal Procedure Code**. Neither did the manner of framing of the charge create confusion with the offence provided for in **Section 5** of the **SOA** as PW1 never mentioned in her testimony to court that the appellant used another object or organ other than his male genital organ to penetrate her. Her evidence was explicit that the appellant took her to his house, laid her on the bed, removed her under pant, unzipped his trouser and then inserted his male genital organ between her legs. She felt pain and cried. That is when he released her and gave her Kshs.5.00.

On alleged existence of inconsistencies and contradictions in the prosecution evidence, the approach we take is that taken by this Court in **Joseph Maina Mwangi v Republic – Criminal Appeal No. 73 of 1993,** in which the court held inter alia that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are in consequential to the conviction and sentence."***

The discrepancies and inconsistencies the appellant complained of relate to what PW2 stated in her testimony, that it is her husband who reported the incident to **Kiriko** Police Post from where they were referred to Gatundu Police Station. That is why PW4 stated that it is PW2 who came to the police station with PW1, narrated the incident to PW4, prompting investigation resulting in the arrest and arraigning of the appellant in court. The second related to PW1's testimony that it is **"N"**and **"S"** who disclosed the incident to her mother contrary to what PW2's testimony in which she stated that it was PW1 who disclosed the defilement to her on 2nd August, 2009. Although we find that the above alleged contradictions exist on the record, they are inconsequential to the otherwise proven prosecution case as they do not go to the root of the prosecution's case as to how PW1 was defiled and by who. As stated above, they are therefore curable under **Section 382** of the **Criminal Procedure Code**.

On lack of corroboration for PW1's evidence, the proviso to **Section 124** of the **Evidence Act** provides as follows:

> ***"Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."***

The record is explicit that PW1 was a single witness to the fact of defilement. The proviso to **Section 124** of the **Evidence Act** donated jurisdiction to the trial court to convict on the basis of PW1's sole evidence in the absence of corroboration if satisfied that she was truthful and for reasons to be recorded in the proceedings as to why it was safe to act on that uncorroborated evidence as basis for finding a conviction. In this appeal, it is not disputed that PW1 gave unsworn evidence. That notwithstanding, the trial court allowed the appellant to cross-examine her. Although the High Court termed that procedure irregular, we find the trial court committed no error when it allowed the appellant to cross-examine PW1 on her unsworn testimony.

In **Sula v Uganda [2001] 2 EA 556**, the Supreme Court of Uganda stated inter alia that:

> ***"Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of the oath.***
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> ***A child witness who gave evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."***

In **Nicholas Mutua Wambua & Another v Republic, MSA Criminal Appeal No. 373 of 2006,** the court construed **Section 208** and **302** of the **Criminal Procedure Code** and stated as follows:

> ***"From the foregoing, it is quite clear that an unsworn witness is liable to be cross-examined. What varies is the weight to attach to the evidence given by such a witness who is not sworn. The cross-examination tests the credibility of the witness and a court on being satisfied on the truth of his testimony may, notwithstanding that the child was not sworn, act on his evidence otherwise no purpose will be served by receiving that evidence."***

The trial court upon assessing evidence of PW1 ruled out the possibility of PW1 being a couched witness for the reason that she promptly responded to questions put to her on cross-examination and therefore believed her testimony as truthful, and acted on it as basis for finding a conviction against the appellant, notwithstanding that the trial court did not explicitly indicate on the record that it found PW1 truthful. The very fact that she was found not to have been coached was sufficient basis to indicate that she was a truthful and reliable witness. It was therefore safe to act on her evidence to found and affirm the appellant's conviction.

On proof of elements of the offence of defilement, **Section 8(1), (2), (3) & (4)** of the **Sexual Offence Act** defines the offence of defilement thus:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Sub-section (2), (3) & (4) on the other hand provide as follows:

> ***"A person who commits an offence of defilement with a child aged eleven or less years shall upon conviction be sentenced to imprisonment for life.***
>
> ***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

From the above, elements for proof of the offence of defilement are as follows:

> ***(i) The victim must be a child below eighteen (18) years.***
>
> ***(ii) There must be proof of penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.***

In the case of **Basil Okaroni v Republic [2016]eKLR** the court stated inter alia as follows:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

The court also approved the holding in the case of **Francis Omuromi v Uganda, Court of Appeal of Uganda No. 2 of 2000** for the holding inter alia that:-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

The prosecution relied on the evidence of the minor who said she was seven (7) years as at the time she gave testimony in court on 10th February, 2010. She was therefore about six (6) years and five (5) months as at the time of the defilement. PW2 the mother of PW1, gave PW1's date of birth as 18th September, 2003, supported by an immunization card produced without any objection from the appellant. Going by the date on the immunization card, PW1 was aged five (5) years and ten (10) months as at the time of defilement. The P3 form produced without any objection from appellant by PW3 on behalf of **Dr, Ng'ang'a** who filled it on 2nd August, 2009, gave the approximate age of the minor as five (5) years, which tallies with the age in the clinic card. In the absence of any contrary evidence, the two courts below were entitled to act on that evidence as sufficient proof of age of PW1 and which age brought her within the age bracket for victims of defilement offences. We therefore find that age of PW1 was properly established to the required threshhold.

On penetration, the prosecution relied on the evidence of PW1 herself that the appellant took her to his house, laid her on his bed, removed her under wear, unzipped his trouser and lay on her; that she felt pain between her legs, cried and even bled. There was however no evidence of any blood stains having been detected either on her body or clothes. Medical evidence indicated that the hymen was broken and vaginal opening was dilated which was consistent with a sexual assault. Having ruled out the possibility of PW1's hymen having been broken due to factors provided for in **Section 5** of the **Sexual Offences Act**, the only other probable cause is that provided for in the definition for penetration which when considered in light of PW1's age establishes the offence of defilement, appellant was convicted for by the trial court and affirmed by the High Court.

As for the identification of the perpetrator, the appellant agrees that this was never an issue since PW1 and the appellant knew each other very well and the offence also took place in broad day light. Issue of mistaken identity as correctly put by the appellant did not therefore arise. Since the two courts below believed PW1's evidence on the identification of the appellant as the perpetrator of the defilement on PW1 and gave reasons as to why they acted on that evidence to find and affirm appellant's conviction, and which reasons we find were well founded both on the facts and in law, we find no merit in this ground of appeal which is rejected.

On the failure to call vital witnesses, it is not disputed that the children PW1 was playing with when appellant called her and took her to his house and the mother of the neighbour who allegedly bathed her after the incident were never called to testify. So was the mother of appellant who had allegedly accompanied PW2 to the funeral wake, nor the father to PW1 who reported the incident to **Kiriko** Police Post. **Section 143** of the **Evidence Act** provides as follows;-

> **"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any facts."**

In **Bukenya and Others v Uganda [1972] EA 549** the following guide lines were laid down;

> ***(i) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.***
>
> ***(ii) The court has the right and the duty to call witnesses whose evidence appears essential to the prosecution case.***
>
> ***(iii) Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.***

In **Julius Kalewa Mutunga v Republic, Criminal Appeal No. 31 of 2005**, the court held *inter alia* that:

> ***"as a general principle of law, whether a witness shall be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

In light of the above threshold, we find no basis for drawing an adverse inference against the prosecution for the failure to call the mother of appellant as her testimony would have been limited to confirming PW2's testimony that she accompanied PW2 to a funeral wake; that of the children on the other hand would have been limited to what PW1 said that they were playing together when appellant took her away, while that of **"MN"** would have been limited to what PW1 stated that she bathed her but she (PW1) never disclosed to her the fact of defilement. Appellant's defence was therefore not prejudiced in any way by the failure to call the above persons as prosecution witnesses. Neither is there any basis for us to draw an adverse inference against the prosecution for the failure to call those witnesses.

As for the failure to notice any behavioural change in the child consequent to the alleged defilement, indeed no behavioural change was noted by PW2 in PW1 after the defilement. Neither did she disclose the cause of the pain at the earliest opportunity. Even if any behavioural change on PW1 had been noted and cause of the pain disclosed at the earliest opportunity, that would have been inconsequential to proof of the prosecution case as they are not among the ingredients for proof of the offence of defilement.

As regards the alleged shifting of the burden of proof on him to prove his innocence, the position in law is as was stated in **Sekitoleko v Uganda [1967] EA 531**, that;

> ***"as a general Rule of law the burden on the prosecution of proving the guilt of a person beyond reasonable doubt never shifts whether the defence set up is an alibi or something else ..."***

In light of the threshhold in the **Sekitoleko** case [supra], we find no error in the High Court sustaining the trial court's rejection of the appellant's defence of fabrication which was not only raised belatedly but was also never put to PW1 and 2 in cross-examination. We appreciate the appellant was unrepresented at the trial. The law however allowed him to challenge and prosecution evidence through cross-examination to test the veracity of such evidence. In the absence of such cross-examination, there was no way the veracity of both sides' evidence could have been tested by the two courts' below before drawing a conclusion thereon.

As for the unconstitutionality of sentence, it is not in dispute that **Sub Section 2** of **Section 8** of the **SOA** provides for a minimum sentence of life imprisonment which was handed down against him by the trial court and affirmed on appeal to the High Court. In **Evans Wanjala Wanyonyi v Republic [2019] eKLR**, the court expressed itself as follows on a similar complaint differently raised;

> **"24. On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law, This Court in Christopher Ochieng –vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri –vs- R, Kisumu Criminal Appeal No.**
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> **93 of 2014 considered legality of minimum mandatory sentence under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another –vs- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to confirm to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng –vs- R (supra) stated:**
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> ***In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.... Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another –vs- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court.***
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> **25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another –vs- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – vs- R (supra) and Jared Koita Injiri –vs- R, Kisumu Criminal Appeal No. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September, 2015."**

In light of the above exposition, we agree that the above is the current jurisprudential trend with regard to statutory mandatory minimum sentences. It is the same approach we take. We bear in mind the appellant's mitigating factors, circumstances of the offence namely that the appellant who was an uncle to the minor abused his position of trust and took advantage of a vulnerable child.

The appeal against conviction is dismissed. Appeal against sentence partially succeeds limited to setting aside the mandatory life imprisonment sentence and substituting it with one of imprisonment for 30 years from the date of conviction by the trial Court.

Dated and Delivered at Nairobi this** 24th **day of April, 2020.

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPTY REGISTRAR