



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 4 OF 2019

BETWEEN

MARY SYEVUTHA PETER.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

Mombasa (Ong'udi, J.) dated 26th October, 2018 in H. C. Cr. A. No. 24 of 2016)

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JUDGMENT OF THE COURT

1. It goes without saying that in criminal law, save in exceptional circumstances, the burden of proof always lies with the prosecution to establish each and every ingredient that constitutes an offence preferred against an accused person. As Lord Sankey put it in the often cited case of **Woolmington vs. DPP [1935] UKHL 1**:

“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt ... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.” [Emphasis added]

2. It is also common ground that the requisite standard of proof is that of beyond reasonable doubt as appreciated by Lord Denning in **Miller vs Ministry of Pensions [1947] 2 ALL ER 372** in the following terms:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.” [Emphasis added]

3. At the heart of the appeal before us is whether the prosecution discharged the aforementioned burden to warrant the appellant's conviction of one count of making a false document contrary to **Section 357 (a)** of the **Penal Code**, two counts of uttering false documents contrary to **Section 353** of the **Penal Code** and obtaining land registration by false pretence contrary to **Section 320** of the **Penal Code**.

4. The circumstances which resulted in the above mentioned charges revolved around transactions carried out with respect to a leasehold described as Mombasa Block XIX/315 (suit property). At all material times, the certificate of lease to the suit property was registered in the names of Abdulrazak Umar Haji Hussein (PW4) and Mariam Kassim Said as tenants in common. According to Bonny Okemwa (PW5), an advocate practicing in the firm of Siocha Okemwa & Company Advocates, on 27th April, 2010 Paul Outa, who he described as a court clerk as well as a friend, approached him regarding a conveyance of the suit property. Okemwa advised Paul to prepare the necessary documentation for his approval and attestation.

5. Upon his return, Paul brought a sale agreement and transfer of lease both dated 28th April, 2010 where Mariam Kassim Said and **Mary Syevutha Peter** (the appellant) were the vendor and purchaser respectively whilst the disclosed purchase price was Kshs.3,000,000. In addition, Mariam was described as also acting on behalf of her co-proprietor by virtue of a power of attorney dated 7th April, 2010 donating such authority. Strangely, Okemwa who did not know the parties to the transaction attested both the sale agreement and the transfer of lease without either of the parties appending their signature before him.
6. Okemwa testified that the appellant confirmed the terms of the sale agreement and transfer of lease through a telephone conversation. More startling was that telephone conversation referred to was between Paul and the appellant, which conversation Okemwa claims to have listened to since Paul had turned on his mobile phone speaker. He stated that the agreed fee for his services was Kshs.5,000 for the sale agreement and Kshs.2,000 for the transfer of lease of which he was only paid Kshs.5,000. Thereafter, he released the documents to Paul and his role with regard to the transaction ended there.
7. It would appear the documents were lodged at Mombasa Lands Registry and a certificate of lease was issued on 26th May, 2010 in favour of the appellant. Subsequently, the appellant sold the suit property to Rosh Motors Limited for a consideration of Kshs.28,500,000 and a certificate of lease was issued to that effect on 29th July, 2010.
8. A couple of months later, Jaffer Abdulrehman Kassim (PW2) lodged a complaint with the Central Investigation Department (CID) at Mombasa alleging that there had been fraudulent dealings with the suit property which he maintains belongs to him. The basis of his complaint was that he had purchased the suit property in the year 2002 from Hussein Noor Mohamed (PW2) at a consideration of Kshs.750,000. He then had the title over the suit property registered in favour of his sister, Mariam and nephew, Abdulrazak on 18th December, 2002. Nonetheless, the suit property belonged to him hence the reason why both Mariam and Abdulrazak had donated a power of attorney over the suit property in his favour. He later erected a go-down therein.
9. He was taken by surprise when he learnt that the title to the suit property had been transferred to Mary and then Rosh Motors limited. More so, because he still held the original certificate of lease in his custody and had not authorized such transactions. He believed that at the center of the said fraud was the appellant. Apparently, he had leased out the suit property to the appellant for a monthly rent of Kshs.45,000 vide a lease agreement dated 5th July, 2005.
10. Consequently, CPL Andrew Mateba (PW6) commenced investigations over the issue. He retrieved from the lands registry all the documents and clearances submitted for purposes of facilitating the transfer of the title to the appellant. The authenticity of the certificate of lease in favour of Mariam and Abdulrazak which was surrendered at the lands registry became an issue of interest.
11. The then Land Registrar, Mary Ngai, whose signature appeared on the said certificate disowned the same. As a result, the certificate in question as well as samples of the said land registrar signature were taken for forensic examination. In the opinion of Immanuel Kenga (PW9), a forensic document examiner, the signature on the certificate varied with the signature samples of the land registrar.
12. Furthermore, there were also two sets of revocation of power of attorney dated 7th April, 2010 executed by Mariam and Abdulrazak whose effect was to rescind the power of attorney initially donated to Jaffer. Abdulrazak denied executing the said revocation of power of attorney let alone donating a subsequent power of attorney to Mariam. He also testified that he neither gave his consent nor was he aware of the purported sale of the suit property to the appellant.
13. Based on the foregoing, the appellant was arrested, arraigned and charged with four counts in the Chief Magistrate's Court at Mombasa. The first count was making a false document contrary to **Section 357 (a)** of the **Penal Code**. The particulars thereunder were that on 23rd April, 2010 at an unknown place in Mombasa District within the then Coast Province, jointly with others not before the court, with the intent to deceive and without lawful authority or excuse she made a certain false document namely transfer of lease of the suit property purporting it to be a genuine transfer of lease made and signed by the purported owner Mariam Kassim Said.
14. The second count was in relation to uttering false documents contrary to **Section 353** of the **Penal Code**. The details were that on 26th May, 2010 in Mombasa District within the then Coast Province, she knowingly and fraudulently uttered a certain forged transfer of lease for the suit property to John Gichuki Wanjohi, Senior Land Registrar for registration purporting it to be a genuine and valid transfer made and signed by Mariam Kassim Said.
15. The third count was in respect to forgery of official documents contrary to **Section 351** of the **Penal Code**. The particulars thereof read that on unknown date and at unknown place in Mombasa District within the then Coast Province, jointly with others not before court, she forged a certain document namely, certificate of lease for the suit property bearing the names of Abdulrazak Umar Haji and Mariam Kassim Said, being an official document of the Government of Kenya.
16. The fourth count was also for uttering false documents contrary to **Section 353** of the **Penal Code**. However, the particulars were that on 26th May, 2010 at the Lands Office in Mombasa within the then Coast Province, she knowingly and fraudulently uttered a certain forged certificate of lease for the suit property bearing the aforementioned names to John Gichuki Wanjohi, Senior Land Registrar for transfer of ownership purporting it to be a genuine and valid certificate of lease made and signed by the Land Registrar of titles.
17. The fifth and last count was for obtaining land registration by false pretence contrary to **Section 320** of the **Penal Code**. The information thereunder was that on 26th May, 2010 at the Lands Office in Mombasa within the then Coast Province, she willfully procured registration of the suit property by falsely pretending that she had purchased the said property from Mariam Kassim Said, a fact she knew or believed to be untrue.
18. The appellant entered a plea of not guilty on all counts. In her sworn statement she testified that she met Mariam in the year 2004. Mariam represented herself as the owner of the suit property and offered to sell the same to her. Eventually, they agreed on a purchase price

of Kshs.3,000,000 and Mariam gave her the relevant documents which she forwarded to her advocate. However, before the transaction could be completed she went on vacation for four months to the United States of America and left her brother to handle the matter. Upon her return she learnt that her brother had paid Mariam a sum of Kshs.450,000 and had moved into the suit property.

19. It was her evidence after the relevant conveyance documents were ready for execution Mariam was nowhere to be found. Be that as it may, Jaffer emerged claiming to be Mariam's brother and altered the purchase price to Kshs.6,000,000. Towards that end, she took him to her advocate's offices, Messrs Karie Kariuki & Company Advocates, wherein Jaffer promised to avail a power of attorney authorizing him to act on behalf of the registered owners to facilitate the transaction. The next time they met at her advocate's office Jaffer had a change of heart at least with respect to the purchase price which he wanted adjusted to Kshs.9,000,000, but she would have none of it.

20. According to the appellant, her advocate suggested that they should consider entering into a lease agreement over the suit property instead. She agreed to that suggestion mainly because she wanted to protect her interest over the property taking into account she had already paid Mariam Kshs.450,000. She admitted that a lease agreement dated 5th July, 2005 was executed by Jaffer on behalf of the then registered proprietors. Later, she refused to pay the monthly rent of Kshs.45,000 because her request for repairs to be undertaken on the suit property went unanswered and she believed that the rent in question should be offset from the amount she had already paid to Mariam.

21. Jaffer then engaged auctioneers to distress for the rent arrears but the appellant obtained reprieve from the court on the condition that she deposited the rent in court pending the determination of the suit. Out of nowhere, Mariam resurfaced in the year 2010 and indicated her willingness to still go through with the sale of the suit property under the initial terms. The appellant agreed and withdrew her suit. Mariam sent her to her advocate, Okemwa where she executed a sale agreement and a transfer of lease. She paid for stamp duty as well as other requisite outgoings and the suit property was transferred to her. She denied engaging in any fraudulent act.

22. In the end, the trial court acquitted the appellant for the offence of forgery of official documents but still convicted her of one count of making a false document, two counts of uttering false documents and obtaining land registration by false pretence. Ultimately, the appellant was sentenced to 4 years imprisonment for each of the offences save for the offence of obtaining land registration by false pretence where she received 8 months imprisonment. The sentences were to run concurrently.

23. Aggrieved by both her conviction and sentence she lodged an appeal in the High Court which appeal was dismissed. Though the High Court (Ong'undi, J.) substituted the sentence meted out by the trial court. In doing so, the learned Judge discharged the appellant under **Section 35 (1) of the Penal Code** for the offence of obtaining land registration by false pretence and imposed a fine of Kshs.3,000,000 for each of the other three counts and in default, a term of imprisonment of 2 years for each count.

24. Unrelenting, the appellant is now before us seeking a second chance at the seat of justice. Her appeal is premised on the grounds that the learned Judge erred by-

a) Failing to appreciate that the prosecution had not availed crucial witnesses in support of its case rendering the appellant's conviction unsafe.

b) Failing to appreciate that Abdulrazak Umar was not a credible witness.

c) Finding that Jaffer Abdulrehman Kassim purchased the suit property without evidence to that effect.

d) Making a decision against the weight of the evidence and the law.

25. At the plenary hearing, Mr. Gikandi, learned counsel for the appellant, relied on the written submissions on record and also made oral highlights. In his opening remarks, counsel was at a loss as to why the learned Judge confirmed the appellant's conviction in the absence of evidence from material witnesses. In his view, Mariam was the most important witness with respect to the charges leveled against his client.

26. Further, the clerk, Paul Outa, alleged to have brought the transfer and sale agreement to Okemwa, was a necessary witness to shed light on the circumstances under which the transfer in favour of the appellant was executed and registered. Equally, the testimony of Gladys K. Ogoti Advocate would have been of great value since she witnessed the revocation of the power of attorney in favour of Jaffer Abdulrehman Kassim and the power of attorney donated to Mariam. Placing reliance on the case of ***William Cheruiyot Kandie vs R [1997] eKLR***, counsel urged us to draw an adverse inference against the prosecution for not availing essential witnesses.

27. As far as Mr. Gikandi was concerned, the two courts below shifted the burden of proof to the appellant contrary to **Sections 107 & 108 of the Evidence Act**. He emphasized that the burden of proof lay with the prosecution to prove the appellant's guilt beyond reasonable doubt. He also submitted that the learned Judge ignored the appellant's defence, *to wit*, that Mariam, the then registered proprietor, sold the suit property to her.

28. In particular, the learned Judge failed to appreciate that there was no evidence that Mariam contested appending her signature on the transfer document or that the signature thereunder was a forgery. Therefore, how did the courts below conclude that the transfer was a forgery? Be that as it may, Mr. Gikandi argued, if the prosecution considered the transfer to be false, why then was Okemwa who admitted to have appended his signature thereon as a witness not charged with fraud?

29. In counsel's opinion, Abdulrazak was not a truthful witness because his evidence was marred with inconsistencies. He urged that his dishonesty was apparent from the different names he went by in the certificate of lease and his alien identification card. Likewise, his testimony to the effect that he held an Indian Passport at the time the suit property was transferred to him yet he claimed to be a Somali refugee and registered as such in Kenya by the UNHCR raised questions on his credibility. Accordingly, Mr. Gikandi stated that the two courts below erred in relying on his evidence.

30. Challenging the sentence imposed on the appellant, counsel posited, it is trite that justice should not only be done but must always be seen to be done. Expounding further, he took issue with the learned Judge's finding that the probation report, which he admitted was not before him, 'could not have been a positive one'. In Mr. Gikandi's opinion, those sentiments exhibited bias on the part of the learned Judge.

31. More so, because it was clear from the record that the trial court never made any negative comment with respect to the probation report. He posed the question, what was the basis of the said finding? He went on to state that a court of law is under an obligation to rely only on the evidence before it and the converse would render the decision unreliable. Towards that end, reference was made to the case of ***Sheikh ta Hasa Hauliers vs Highway Carriers Ltd [1988] eKLR***.

32. Still on the sentence, the learned Judge was faulted for not inquiring into the appellant's capacity to pay a fine before he imposed a cumulative fine of Kshs.9,000,000. To buttress that proposition, the persuasive decision of the High Court in ***Karanja vs R [1985] KLR 348*** was cited. In Mr. Gikandi's words, the fine was exorbitant.

33. In conclusion, Mr. Gikandi urged us to allow the appeal and overturn the appellant's conviction which he believed was not based on any cogent evidence. In alternative, he asked us to interfere with the sentence meted against the appellant.

34. Mr. Isaboke, Senior Prosecution Counsel, conceded to the appeal. He explained that his position was informed by the fact that the prosecution had failed to call crucial witnesses to testify and as a result, the basic ingredients of the charges against the appellant were not established. In his view, Okemwa admitted that he neither saw the appellant nor talked to her but that it was Paul who brought the sale agreement and transfer of lease to him. Therefore, Paul's evidence was crucial to establish any impropriety on the appellant's part. Additionally, Mariam's evidence was indispensable.

35. The parameters of our jurisdiction in a second appeal is succinctly set out under **Section 361** of the **Criminal Procedure Code** as limited to points of law only. We are therefore obligated to give deference to the concurrent findings of facts by the two courts below for the obvious reason that we did not have the opportunity to observe the witnesses as they testified. Even so, we are not bound by such conclusions where we are satisfied that the two courts below either considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, they were plainly wrong in their decision, in which case such errors would be treated as matters of law. See this Court's decision in ***Ahamad Abolfathi Mohamed & Another vs R [2018] eKLR***.

36. The offence of making a false document is provided under **Section 357 (a)** of the **Penal Code** as follows:

"357.

Any person who, with intent to defraud or to deceive-

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; ..."

37. Our perusal of the record reveals that the appellant's conviction for the above offence was based on circumstantial evidence. As the trial court correctly observed, there was no direct evidence linking the appellant to what it found to be a false transfer of lease. However, the two courts below were of the view that the evidence of the surrounding circumstances pointed to the appellant.

38. The evidence in question was that the appellant confirmed the terms of the transfer of lease before Okemwa attested the same and the transfer was utilized in her favour. Further, as per the two courts below, the appellant did not give an explanation of how she came into possession of the transfer document or if any consideration was paid. There was also no evidence adduced by the appellant to verify that Mariam was aware of the transfer of lease or that she had paid consideration for the transfer to Mariam. Did the foregoing evidence justify the inference of guilt against the appellant?

39. It cannot be gainsaid that a conviction can be properly founded on circumstantial evidence. See this Court's decision in ***Makau & Another vs R [2010] 2 EA 283***. However, to form the basis of a conviction, the circumstantial evidence must satisfy several conditions. It must be incompatible with the innocence of the accused person; incapable of explanation upon any other hypothesis than that of guilt of the accused person; and there must be no other existing circumstances, which could weaken or destroy the inference of guilt. See this Court's decision in ***Sawe vs R [2003] KLR 364***.

40. We find that the evidence relied on by the two courts below fell short of the above mentioned threshold. As a whole, the evidence adduced by the prosecution left a lot to be desired. To begin with, there were gaps in the prosecution's case which rendered the evidence tendered disjointed. For instance, in as much as Okemwa denied preparing the transfer of the lease more was required to warrant the inference that one, the transfer was false, and two, that it was the appellant and no one else who made it.

41. As such, Paul's evidence was necessary to shed light on the circumstances surrounding the preparation of the transfer of lease. Without his evidence, a number of questions arise namely, who prepared the transfer of lease? Was there a possibility that the same was prepared by Okemwa as opposed to the appellant? Was Mariam aware of the transfer and did she execute the same?

42. In our view, the two courts below by calling upon the appellant to tender an explanation as to how she came into possession of the transfer of lease or establish that Mariam was aware of the transfer of lease shifted the burden of proof to the appellant contrary to the law. As we noted in the opening paragraphs of this judgment the burden of proof to establish the appellant's guilt always lay with the prosecution. In other words, the burden lay with the prosecution to prove that the chain of events of the circumstantial evidence relied on pointed to the appellant's guilt. See this Court's decision in ***Bakari John Juma & Another vs R [2018] eKLR***.

43. This Court while discussing the components of the offence of making a false document in Joseph Muerithi Kanyita vs R [2017] eKLR expressed:

“That offence is committed by the making, signing or executing a document, electronic record or writing, for or in the name of another person. In addition the making, signing or execution must be without lawful authority or excuse, and with the intent to defraud or deceive.”[Emphasis added]

44. Therefore, proof of the said offence, such as in this case, entailed the prosecution to firstly establish that the transfer document was made and/or executed without the lawful authority of the other party thereto, that is, Mariam and then secondly, that the appellant did so with the intent to deceive. Were these ingredients established? The answer is a resounding no.

45. As regards the first ingredient, the only person, in our view, who could have rightly denied or led evidence that Mariam had not executed or authorized the transfer document in issue was Mariam herself. It is not in dispute that Mariam never testified or lodged a complaint with the police. In any event, we agree with counsel for the appellant, the prosecution did not adduce any evidence to suggest that the signature on the transfer was not Mariam’s or that she was not party to the same.

46. Consequently, without establishing that the transfer of lease was made without the authority of Mariam an inquiry as to the maker’s state of mind to establish whether the intent was to defraud is rendered moot.

47. **Section 320** of the **Penal Code** which establishes the offence of obtaining land registration by false pretence prescribes that:-

“Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”

Section 312 of the same Code on the other hand, defines “false pretence” as:

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.”

48. The basis of the said charge as against the appellant was that she procured registration of the title to suit property by falsely pretending to have purchased the same from Mariam while knowing or believing the same to be false. In finding that the appellant was aware that the transaction was false, the two courts below relied on a number of factors. First, that the transfer of lease was false which finding we have found in the preceding paragraphs of this judgment had no basis.

49. Second, that the suit property belonged to Jaffer to whom the registered proprietors had donated a power of attorney. Jaffer had not authorized the sale and subsequent transfer of the suit property to the appellant. Even assuming that Jaffer had an interest in the suit property, we cannot help but note that power of attorney issued in his favour by the initial registered proprietors was rescinded by a revocation of power of attorney dated 7th April, 2010 executed by Mariam and Abdulrazak. In that regard, Abdulrazak denied executing the revocation of power of attorney.

50. Nonetheless, the appellant contends that Abdulrazak was untruthful and the two courts below should not have relied on his testimony. It is settled that an appellate court should not interfere with findings of the trial court which are based on the credibility of witnesses unless no reasonable tribunal could have made such a finding or it was shown that there existed errors of law. See this Court’s decision in James Mwebia M’irware vs. R [2016] eKLR. While we are cognizant of that principle, there are certain aspects of Abdulrazak’s testimony which cannot escape our minds.

51. It is instructive to note that Abdulrazak stated that the certificate of lease was issued in his name as it appeared in an Indian passport he held at the time. The name thereunder was Abdulrazak Umar Haji Hussein. However, in his testimony he stated that his name changed to Mistri Abdulrazak Omar when he was issued with a Kenyan alien identification card following his registration as a Somali refugee by the UNHCR. How did he transition from holding an Indian passport to being a Somali refugee? Why the change of name? He also testified that the suit property was registered in his name solely for purposes of enabling him to obtain a visa to travel abroad. In our view, such admission would undermine the credibility of the particular witness.

52. Having expressed ourselves as herein above, we find that more was required to establish that the revocation of power of attorney and subsequent issuance of the power of attorney in favour of Mariam was not genuine. Once again, Mariam’s evidence would have been instrumental in determining that issue. Better still, perhaps the evidence of the advocate who attested the said revocation of power of attorney and subsequent grant power of attorney in favour of Mariam, one Gladys K. Ogoti, would have been essential to shed more light on the true grantee (if any) of the power of attorney.

53. Even assuming that the authenticity of the revocation of power of attorney and the subsequent power of attorney donated to Mariam was in question, was there any evidence to suggest that the appellant was aware of the same? There was none.

54. Third, the two courts below found that the appellant had surrendered a certificate of title which was fake to obtain registration in her favour. It is not in dispute that despite the trial court finding that the certificate of lease was a forgery there was no evidence connecting the appellant as the person responsible for the falsification hence her acquittal of the offence of forgery. Be that as it may, it was equally not established that she was aware of the fabrication of the title when the same was surrendered to facilitate the transfer of the suit property to her. Consequently, there was no basis for her conviction for this offence.

55. On the offence of uttering a false document, this Court addressed its mind on the same in the case of *Kepha Moses Mogoi vs. R* [2014] eKLR wherein it held:

“The offence of uttering a false document under section 353 of the Penal code is proved if a person knowingly and fraudulently utters the document.”

56. Taking into account the foregoing, we find that for the offence to be established two elements must be proved; that the document is false and that the accused person was aware of the same. Were those elements established? In our view, they were not. We say so because firstly, with respect to offence of uttering the transfer of lease, as we rendered ourselves in the preceding paragraphs of this judgment, there was no proof that it was a forgery, particularly as Miriam did not testify that she was not the maker. Secondly, as it relates to the forged certificate of lease, the same fails since, as we have found it was not established that the appellant was aware of the same.

57. All in all, we find that the prosecution did not prove the offences in question as against the appellant to the requisite standard. Granted, the circumstances under which the transactions took place raised more questions than were answered. As it stands the evidence against the appellant was based on suspicion which was not sufficient to justify her conviction.

58. For the aforesaid reasons, we have said enough to demonstrate that the findings by the two courts below were not supported by evidence. Accordingly, we find that the appeal has merit and is hereby allowed. We quash the appellant’s conviction on all the charges and set aside the sentences imposed upon her.

Dated and delivered at Mombasa this 25th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR