IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL No. 52 of 2016

SILVIAN OUMA OWINO.....1st APPELLANT

JOSHUA OMONDI OKELLO.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kisii, (Wakiaga, J.) dated 6th May 2015

in

HC Cr. Appeal No. 150 of 2012)

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JUDGMENT OF THE COURT

1. The appellants were charged with trafficking in narcotic drugs contrary to **Section 4 (a)** of the **Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994**. The particulars were that on the 3rd day of April 2009 at Obwari Market in Nyamira District within Nyanza Province, jointly with another not before court, being in motor vehicle KAW 369X Toyota Corrolla 110, they were found trafficking cannabis sativa (bhang) *to wit* 1565 stones.

2. The prosecution case was grounded on *inter alia* the evidence of PW1 Phillip Masange, the Assistant Chief of Bokurati sub-location in Ekerenyo Division. PW1 was among the persons who arrested the appellants. He testified as follows:

> *On 3rd April 2009 at around 2.00 pm, I was at Ekerenyo market and I heard some gun shots. Then shortly, I saw a police officer on top of a motor bike going towards the D.O.'s office. Upon inquiring, I heard there was a car that was being chased and it had bhang. I went to where the vehicle was and I saw police officers. Then the D.O. for Ekerenyo came to the scene. I heard that the suspect escaped on foot and we were directed to pursue the suspect. I saw the car. It was Registration No. KAW 396X a saloon car.*
>
> *The vehicle had been abandoned and had bhang inside. We started to search for the suspects. I saw two people who were running and were suspicious and they were making telephone calls. I was on a motorbike. I called John Rioki the Chief and informed him I had spotted the suspects. We rode upto Nyageita and drove past the two suspects. At Nyageita, I mobilized the youth and after a while the two suspects appeared. We gave chase and one of the suspects was arrested. The 2nd accused was the first to be arrested. The 1st accused was arrested after running for some distance. I searched the suspects…. We tied them with ropes and took them to the police officers….*

3. PW2 AP Constable Robert Nyangeresi testified as follows:-

> *I am no. 8007590 AP CPL Robert Nyangeresi attached at Gatere AP post. Before this I was at Matongo AP Post. On 3/04/2009 I was coming from Chabera market. Then on reaching near our camp I met a motor vehicle KAW386X Toyota Corolla Saloon which had been parked off the road. I saw some 3 people repairing a puncture. I was in civilian and I suspect the vehicle was carrying bhang and I smelt it.*
>
> *Then I proceeded to our camp and alerted APC Nyamanga. I told him to wear uniforms and we took weapons to go. We even met the car at the scene and we started to look for that vehicle. We went and reported the matter to Magwagwa AP Camp. We then returned*

to our camp.

At around noon the said vehicle appeared. We saw it was our camp and near the road. The men hired motorbikes and started to chase the said vehicle up to Ekerenyo.

The said vehicle diverted towards Nyamusi and it lost control 3 suspects came out of the vehicle and started to escape on foot. We guarded the vehicle and the assistant chief came and we started to mobilize the members of public.

Later 2 suspects were brought. Inside the vehicle there were stones of bhang wrapped in khaki paper. The D.C also came and O.C.S Nyamira police station and other officers. The bhang is in court (MFI). The vehicle was later taken to Nyamira police station.

I also escorted the said bhang and it was counted. It was 1565 stones – MFI – 1 which was wrapped in khaki papers. It is before court. I saw two suspects. They are the ones before this court.

That is all.

4. PW3 APC Wilfred Omboga Nyamage testified as follows:

On 3rd April 2009 at 10.40 am I was at my place of work at the camp when Cpl. Nyangaresi came and he told me he had seen a vehicle carrying bhang. He asked for reinforcement so that we could arrest the vehicle. We took out our guns and we proceeded to where my colleague had spotted the vehicle. Wanainchi laid ambush for the vehicle. We sent a person to go and see if the vehicle was still at the scene but we were told it had left. We started to search for the vehicle but we never saw it. We then told the motor cycle operator to alert us when they spot the vehicle. After some minutes, one of the operators came and informed me he had spotted the said vehicle. I armed myself and proceeded to the road. I saw the vehicle approach and I stopped it. It was grey in colour Registration No. KAW 396X. The vehicle did not stop but instead sped off. I rode on the motor bike and I chased the vehicle. On reaching Magwagwa I asked for reinforcement. I chased the vehicle up to Riomego. I was still on top of the motor bike and I could clearly see the vehicle ahead. The said vehicle then lost control and entered into a ditch. Three people came out of the vehicle and started running away on foot. One of the suspects pulled out a pistol and then I fired two shots. The third suspect escaped…Also the Assistant Chief told other members of the public after a short while. After mobilization and manhunt for the suspects after some hours, two suspects were arrested and brought to the scene. Inside the vehicle there were 1565 stones of bhang.

5. After PW3 had testified, the prosecution made an application to amend the charge sheet. The application was to amend the Registration Number of the Motor Vehicle from KAW 369X to read KAW 396X. The trial magistrate allowed the application to amend stating that this was an error on the face of the record. The magistrate allowed the appellants to recall any witnesses who had testified.

6. PW4 PC Igaad Kiplagat attached to Nyamira Police Station testified that he was the investigating officer in the matter; that during the investigation, he obtained a car hire agreement from Crane Tours and Travel Company. The agreement showed that the motor vehicle Registration No. KAW 396X was hired by a one Benson Alex Muriithi. At the time of hire, Benson was accompanied by another person Mr. Silvian Ouma; both Benson and Ouma left copies of their national identity cards with the car hire company; PW4 tendered in evidence the car hire agreement and copies of the national identity cards that he obtained from the Crane Tours & Travel Company; he further testified that he was informed that the car was to be returned to the car hire company on 23rd March 2009 but was never returned until it was found in the ditch with bhang at Ekerenyo.

7. PW 5 Gregory Auyo testified as the Government analyst. He stated he examined samples of the items sent to him and he prepared a report indicating the items were cannabis sativa. He produced in court the analysis report.

8. The 1st appellant in his sworn statement of defence stated that on 3rd April 2009, he had gone to work and after work in the evening, he met a group of people who arrested him; that at the time of his arrest, he was told that there had been a robbery 6 km away and he was suspected of being one of the robbers; that he was taken to Nyamira Police Station and later charged with the present offence. The 2nd appellant denied the charge citing contradictions in the prosecution evidence.

9. Upon hearing the evidence, the trial magistrate convicted the appellants and sentenced each one of them to a fine of Ksh. One Million in addition to imprisonment for 30 years.

10. In convicting the appellants, the trial magistrate expressed himself thus:

For the accused to say members of the public arrested them after a robbery was committed in the area is not to be believed. Also the conduct of the accused before trial began of absconding after being granted bail is not consistent with their innocence. It is only after they were arrested elsewhere that their trial commenced. After considering the evidence as a whole, I find the prosecution proved its case beyond any reasonable doubt and that the accused persons were ferrying the 1565 stones of cannabis sativa in motor vehicle registration No. KAW 396X. The drug is prohibited under the laws of this country and in particular Section 4 (a) of Drugs and Psychotropic Substances (Control) Act 1994. The accused are therefore convicted under Section 215 of the Criminal Procedure Code…...

11. Aggrieved by the judgment of the trial court, the appellants lodged a first appeal to the High Court. The High Court (Wakiaga, J) dismissed their appeal and upheld their conviction and sentence. Further dissatisfied, the appellants have lodged the instant appeal to this Court citing the following grounds of appeal in their memorandum:

(i) The learned judge erred in upholding conviction of the appellants based on a defective charge sheet contrary to **Section 214** of

the **Criminal Procedure Code**.

(ii) The judge erred in dismissing the appeal based on erroneous visual identification that did not meet the legal standard.

(iii) The judge erred in failing to find the appellants' constitutional right to a fair trial was violated.

(iv) The judge erred in failing to find that the credibility of the prosecution witnesses was impeached.

(v) The judge erred in failing to find that crucial witnesses were not called to testify.

(vi) The judge erred in failing to find the sentence meted on the appellants was harsh.

(vii) The judge erred in failing to evaluate the alibi defence raised in the matter.

12. At the hearing of the instant appeal, learned counsel Mr. K. O. Kowinoh appeared for the 1st appellant. The 2nd appellant appeared in person. The State was represented by Mr. Kakoi, the Principal Prosecution Counsel. Whereas the 1st appellant did not put in written submission, the 2nd appellant and the respondent filed submissions in the appeal. All parties made oral submissions in the appeal.

APPELLANTS' SUBMISSIONS

13. Counsel for the 1st appellant submitted that central to this appeal are two main issues namely identification of the appellants and the defective charge sheet.

14. On defective charge sheet, counsel submitted that the initial charge sheet indicated the motor vehicle that was alleged to contain the bhang was registration number KAW 369X; that after PW1 and PW2 had testified, the charge sheet was amended on respect of the motor vehicle registration number to read KAW 396X; it was submitted that upon amendment of the charge sheet, the trial magistrate did not comply with the mandatory provisions of **Section 214** of the **Criminal Procedure Code** that required the charge and particulars of the offence to be read afresh to the appellants. Counsel submitted that failure by the trial magistrate to comply with Section 214 of the CPC was fatal to the prosecution case.

15. On the issue of identification, it was submitted that the evidence tendered by the prosecution did not identify the appellants as the persons who had possession of the bhang; that the judgment of the two courts below on identification of the appellants is based on an erroneous finding that the chain of events was not broken from the time PW2 saw a motor vehicle puncture being repaired to the time of arrest of the appellants. That there was lapse of time from the time the motor vehicle was being repaired to the time of arrest of the appellants; that PW3 testified there was a lapse of about two hours; that whereas PW2 testified that he gave chase to the motor vehicle, there is no evidence on record that he properly identified the appellants; that PW2 did not state from what distance he saw the vehicle being repaired; that the motor vehicle was not produced in court as an exhibit.

16. On his part, the 2nd appellant acting in person submitted that there was contradiction in the prosecution evidence; that the registration number of the motor vehicle as per the original charge sheet and the prosecution evidence is different.

17. Both appellants submitted that the trial court failed to accord them a fair trial; that their constitutional rights enshrined in **Articles 19 (2) (3); 21 (1); 24 (1); 25 (c) (d); 27 (1); 39 (1) (2) (3); 49 (1) (f) and 50 (2) (p) (4)** of the Constitution were violated. It was submitted, the judgment of the trial court does not contain the points for determination and the market value for the narcotic drug was not established. For the foregoing reasons, the appellants urged us to allow the appeal.

RESPONDENT'S SUBMISSIONS

18. The respondent in opposing the appeal submitted that pursuant to **Section 361** of the **Criminal Procedure Code,** this Court can only entertain a second appeal on matters of law. Submitting on the defective charge sheet, it was urged that **Section 382** of the **Criminal Procedure Code** cures any irregularity or defect in the charge sheet; that when the charge sheet was amended, the appellants were given an opportunity to re-call and cross-examine any witnesses; that there was no prejudice or miscarriage of justice occasioned to the appellants due to non-compliance with **Section 214** of the **Criminal Procedure Code.**

19. On the issue of alleged violation of the appellants' constitutional right to fair trial, it was submitted that this ground was not raised before the two courts below; that the contestation their constitutional rights were violated is therefore an afterthought.

20. Addressing the issue of identification of the appellants as the persons who committed the alleged offence, the respondent submitted that the offence was committed during broad day light; that the appellants were arrested during the day; that from the time the appellants were first sighted by the police officers to the time they were arrested, the chain of events was continuous and there was no mistaken identity; that PW3, a police officer, narrated how he chased the appellants while on a motor cycle; that PW3 identified the appellants as the persons who were with the vehicle ferrying the narcotic drugs.

21. Responding to the ground that the prosecution did not call all relevant witnesses, the respondent cited **Section 143** of the **Evidence Act** and submitted that no particular number of witnesses is required to prove any fact in issue.

22. On the alibi defence raised by the appellants, it was submitted that the prosecution discounted the alibi through evidence of PW2 and PW3 which placed the appellants at the scene of crime; that the evidence of PW4 indicated he had obtained a hire agreement for the subject

motor vehicle and which agreement was signed by the 1st appellant; that the hire agreement placed the 1st appellant at the scene of crime and the two courts below properly drew an inference that the appellant was the person who had possession of the said vehicle with bhang as its cargo.

ANALYSIS and DETERMINATION

23. This is a second appeal and we are enjoined by ***Section 361 of the Criminal Procedure Code*** *to consider only matters of law***.** As was re-stated in ***Njoroge vs Republic, [1982] KLR 388:***

> *"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence."*

24. In this appeal we are satisfied that the two main grounds on the alleged defective charge sheet and identification of the appellants are indeed points of law. The gravamen in this appeal is that the first appellate court did not properly evaluate the evidence on identification of the appellants.

25. This Court has stated before, on the persuasive authority of the Ugandan Supreme Court decision in ***Uganda Breweries Ltd –v- Uganda Railways Corporation, [2002] 2 EA 634,*** that there is no set formula to which a re-evaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstance of each case and the style used by the first appellate court. A first appellate court is expected to scrutinize and make an assessment of the evidence, but not necessarily write a judgment similar to that of the trial court. As a different Court stated in ***Odingo & Another vs Bunge, No.10/89*****:**

> *"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."*

26. In the instant appeal, when considering the issue of identification of the appellants, the learned judge expressed himself as follows:

> *20. On the issue of identification of the appellants, PW1 in his evidence stated that he saw two people who were running and were suspicious and were making telephone calls. He mobilized the youth and were able to arrest the two at Nyageita. PW3 was able to identify the appellants as those he had seen near their post where the 1st appellant was in the group of three who had hired the subject motor vehicle for which he had presented his identity card. It is therefore clear that there was no mistaken identity as regards the appellants herein.*

27. In their submissions, the contestation by the appellants is that the two courts below erred in law in finding that the chain of events was not broken; that there was continuous chase of the appellants from when the motor vehicle was spotted being repaired to the time of arrest.

28. It is the appellants' case that there was no continuous chase; that PW1 who was among the persons who arrested the appellants was never at the scene of crime; that PW2 who allegedly saw three people repairing a puncture of the motor vehicle did not identify the appellants as the persons he saw repairing the puncture; that both PW2 and PW3 simply stated that after the chase, two suspects were brought; that in their testimony, both PW2 and PW3 did not confirm whether the two suspects (appellants) who were brought to them were indeed the persons who were in the motor vehicle or if indeed they were the persons who were repairing the puncture of the motor vehicle.

29. In **Wamunga vs. Republic, [1989] KLR 424** it was stated that:

> *"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."*

30. We have examined the record to determine if indeed there was continuous chase of the appellants from the scene of crime to the time of their arrest. PW2 testified that he saw three people repairing a puncture of a motor vehicle tyre. He did not give any description of those people; he stated he proceeded to the AP camp and sought reinforcement. On his part, PW3 testified that he gave chase to the motor vehicle. The evidence indicates that up to the time he was giving chase while riding on a motor bike, he had not seen the occupants of the motor vehicle; he thus could not identify the persons inside the vehicle. PW3 further testified that when the vehicle lost control and landed in a ditch, three persons escaped and ran away on foot; in his evidence, PW3 does not give description of any of the persons; he does not for instance say what type or colour of clothing any or each of them was wearing; PW3 does not give any specific description of the persons said to have escaped and ran away from the motor vehicle. Both PW2 and PW3 testified that after a while, when the Assistant Chief PW1 had mobilized the youth, two suspects were brought. There is no cogent evidence on record showing the persons arrested were the persons who were in the motor vehicle. Indeed, PW1 testified he arrested the appellants because they '*looked suspicious'*. Had the High Court conducted a re-assessment of the evidence on record, it would have found there was no continuous chase by PW2 and PW3. We find the two courts below erred in finding that the chain of events was not broken.

31. Further, on his part, PW1 was among the persons who arrested the appellants; they were arrested because they were suspicious looking; what made them suspicious is not stated. Suspicion does not prove that a person has committed an offence. This Court in **Sawe –vs- Rep**, **[2003] KLR 364** stated:

> *"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."*

32. In this matter, PW1 did not participate in the continuous chase of the appellants from the scene of crime. We are thus satisfied neither PW1, PW2 nor PW3 could with certainty and without error identify the appellants as the persons who were in possession of the subject motor vehicle and the bhang that was found therein. The identification of the appellants as the persons who committed the alleged offence was not therefore to the required standard. We reiterate that suspicion however strong, cannot take the place of evidence.

33. We observe that for there to be a positive and credible identification based on continuous chase of a suspect, the following conditions *inter alia* must be proved;

a) The suspect must be placed at the scene of crime and must be connected to the crime.

b) If the suspect runs away from the scene of crime, there must be a continuous chase.

c) The chase must never be broken and the person chasing, must never lose sight of the suspect up to the point and time of arrest.

d) There must be no intervening obstructions or interruptions during the continuous chase that cause the chaser to lose sight of the suspect.

e) There must be consistency of the identity of the suspect during the continuous chase. Therefore the chaser must testify to a unique feature(s) of the suspect such as the clothing he was wearing or a distinctive physical feature(s).

f) If the evidence of continuous chase is given by more than one witness, they must all testify that the chase was continuous, uninterrupted and that they never lost sight of the same suspect by identifying the same unique feature(s) of the suspect such as the clothing he was wearing or distinctive physical feature(s).

34. On the issue of defective charge sheet, the learned judge expressed:

19. Whereas it is true the charge did not indicate the nature of trafficking, the evidence tendered shows that the appellants were trafficking the drug by conveyance since the same was found in motor vehicle registration no. KAW 396X. I am therefore persuaded that the charge sheet was defective by the said omission. I am also alive to the fact that under Article 159 (2) of the Constitution, in exercising judicial authority, justice should be administered without undue regard to procedural technicalities. It is further clear the appellants were aware of the charge they were facing and were able to offer an appropriate defence and therefore the omission to indicate the mode of trafficking did not prejudice the same.

35. The appellants' case in this appeal is that when the charge sheet was amended, **Section 214** of the **Criminal Procedure Code** was not complied with. The Section provides for what should happen if the charge sheet is altered or amended. The Section provides:

'214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i)Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii)Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (I) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is so the opinion that the accused has been thereby mislead or deceived, adjourn the trial for such period as may be reasonably necessary.

36. We have given due consideration to the appellants' submission that **Section 214** of the **Criminal Procedure Code** was not complied with. We have also considered the respondent's submission that **Section 382** of the **Criminal Procedure Code** cures the irregularity of non-compliance with **Section 214** of the **Criminal Procedure Code**.

37. In **Harrison Mirungu Njunguna v. Republic Criminal Appeal No. 90 of 2004** (unreported) this Court held that *".....the right to hear the witness give evidence afresh on the amended charge or to cross examine the witnesses further is a basic right going to a root of a fair trial". It was further stated that* the failure of the trial court to inform the accused of his rights given to him by **Section 214** of the **Criminal Procedure Code** was not a procedural technicality which could be cured under the provisions of **Section 382** of the **Criminal Procedure Code**. The foregoing case of **Harrison Mirungu Njunguna** (supra) was further discussed by a differently constituted bench in the case of **Joseph Kamau Gichuki v. Republic, [2013] eKLR,** where **Mwera, GBM Kariuki** and **M'Inoti, JJ.A** on 26th day of July, 2013 had the following to say:-

Before we leave this point, we would like to observe that the case of HARRISON MIRUNGU NJUGUNA V R (supra) relied upon by the appellant is not a relevant authority in the present appeal. That case involved amendment of a charge under Section 214 of the Criminal Procedure Code. The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as a mended and to be cross-examined. (Emphasis supplied)

38. We are cognizant of the decision of this Court in **Josphat Karanja Muna -vs- Republic, [2009] eKLR** where one of the grounds of appeal was non-compliance with **Section 214** of the **Criminal Procedure Code**. This Court stated:

"On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant."

39. In this matter, the record of appeal clearly shows that when the charge sheet was amended, the fresh charge as amended was not read to the appellants; the appellants were not required to take a fresh plea to the amended charge sheet. Compliance with **Section 214** of the **Criminal Procedure Code** is mandatory. The proviso in **Section 214** is worded in mandatory terms and it stipulates that when a charge is altered or amended "the court shall thereupon call upon the accused person to plead to the altered charge." We find the failure by the trial court to read the amended charge and to require the appellants to take a fresh plea rendered the trial process defective. In **Yongo – v- Republic, [1983] KLR 319** it was held that it is a mandatory requirement that the court must not only comply with **Section 214** of the **Criminal Procedure Code** but the court shall record it has so complied.

40. In the final analysis, we find that non-compliance with **Section 214** of the **Criminal Procedure Code** vitiates the trial of the appellants. Likewise, we find that the prosecution evidence did not identify the appellants as the persons who committed the alleged offence. The appellants were arrested merely on suspicion. Suspicion however strong, is not proof of identity. There was no continuous chase of the appellants. No witnesses testified that he never lost sight of the appellants until the time of their arrest. The upshot is that we hereby allow the appeal, quash the conviction and set aside the sentence meted upon the appellants.

41. The appellants be and are hereby set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR