IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 20 OF 2017

BETWEEN

NANYUKI WATER AND SEWAGE COMPANY LIMITED.............APPELLANT

AND

BENSON MWITI NTIRITU...1ST RESPONDENT

ANTHONY KIBUCHI MURIUKI...2ND RESPONDENT

MOSES BUNDI NKANATA..3RD RESPONDENT

JESEE WAWERU KIAMA...4TH RESPONDENT

JORAM GATARA MACHARIA..5TH RESPONDENT

(*An appeal from the Judgment and Orders Employment & Labour Relations*

Court of Kenya at Nyeri (Byram Ongaya, J) dated 24th March, 2016

in

ELR Cause No. 64 of 2013)

****

JUDGMENT OF THE COURT

Does ***section 37*** of the ***Employment Act (No. 11 of 2007)*** **('the Act')** automatically convert casual employment into a regular contract of service, or permanent employment? Put differently, what is the true construction and objective of ***section 37***? Under what circumstances should an order for reinstatement of an employee be made? What remedies are appropriate in the event of termination? Those are the main issues raised in the appeal before us.

The five respondents herein were the claimants before the Industrial Court in Nyeri, now the Employment & Labour Relations Court **(ELRC).** They filed a statement of claim on 14th June, 2013, pleading that they had variously been employed by the appellant in its maintenance and repairs section between 2006 and 2009 and had worked throughout those years, receiving monthly salaries. Despite that, they claimed, they had been treated as casual labourers and had never been given written contracts , annual leave, housing, medical, water, food and other basic needs. The appellant had also failed to remit any NSSF or NHIF statutory requirements. All that, they contended, was illegal. They amended the claim on 2nd October, 2013 to assert that the appellant had engaged in unfair labour practices and they sought the following orders:

> ***a) A declaration that the plaintiffs are permanent employees of the defendant and the contracts of employment of the plaintiffs to the defendant to be reduced into writing or into permanent employment.***
>
> ***b) <u>In the alternative</u> and without prejudice, the claimants be deemed to have been unlawfully or illegally terminated and they be awarded damages and full terminal benefits.***

c) A declaration that the respondent has engaged in unfair labour practices in respect of the claimants.

d) Payment of salary in lieu of annual leaves not granted.

e) Provision of an allowance for housing, medical, water and food to be backdated to the dates when the plaintiffs began to work.

f) General damages plus interest.

g) Costs of the suit and interest at court rates.

In its defence, the appellant denied that the respondents were its employees as claimed or at all and put them to strict proof. It contended that the claim was incompetent, unfounded, premature, and brought in bad faith in abuse of court process. It sought dismissal of the claim.

All the respondents, except the 3rd respondent, filed affidavits in support of the claim on which they were cross examined. Indeed, the 3rd respondent's case was never heard and an order was made by the trial court that it would be heard separately, unless it was compromised. This appeal does not therefore concern or affect the 3rd respondent.

In his two affidavits, the 1st respondent, **Benson Mwiti Ntiritu,** said he was verbally employed on 12th May, 2008 on a daily salary of Sh.172 payable at the end of each month after signing a muster roll. He worked up to June 2013 when the appellant locked him out on 1st July, 2013 without payment after learning that he had filed this claim. He also swore that there was an order of the court made on 18th September, 2003 compelling the appellant to retain him, as well as the other respondents, in employment until the case was heard but the appellant was in contempt as they were never reinstated or paid their dues.

Cross examined, Ntiritu referred to copies of muster rolls for over 40 casuals where the number of days worked each month were recorded and payment calculated accordingly. He and the other respondents had somehow obtained the copies from the appellant's offices and attached them to their claim. However, he admitted that the records showed that in some months he worked for as short as four days. Shown some written contracts for casual employees, Ntiritu countered that they started being issued in 2013 but not when he was employed in 2008. He added, surprisingly in the same breath, that his last day at work was 30th June, 2013 and that he left work in February 2013.

The 2nd respondent**, Anthony Kibuchi Muriuki**, deponed in his affidavit that he was employed verbally in October 2009 at a monthly salary of Sh.5,984 which rose to Sh.15,300 per month as at the end of June 2013 when he was locked out by the appellant despite a court order for maintenance of the *status quo* made on 18th September, 2013. Cross examined, he admitted that his name was not in the muster roll for the year 2009. It first appeared in January 2010 when he worked for 4 weekends in December; 4 days in 2011; and no record in 2012.

The 4th respondent**, Jesse Waweru Kiama,** swore that he was employed in August 2006 as a casual at Sh.172 per day payable at the end of the month and was earning Sh.15,300 by June 2013 when he was locked out despite a court order. Cross examined, he stated that the days he worked were being recorded in a muster roll and payments made for the days worked. He had also worked for the Municipal Council of Nanyuki during that period. He conceded that the documents showed that his last working month was February 2013 , but insisted that he worked up to June 2013.

Lastly, the 5th respondent, **Joram Gataro Macharia,** in his affidavit deponed that he was employed under a verbal contract in August 2006 at a daily salary of Sh.172 and was earning Sh.15,300 by the time he was locked out in June 2013. Like the others he was paid in cash through a muster roll in which the days he had worked were recorded. The documents however showed that he had worked up to February 2013.

For its part, the appellant simply filed a bundle of muster rolls for its casual employees for the years in question and summarized the number of days the respondents had worked and been paid as casuals. It adduced no oral evidence but simply relied on its pleadings and written submissions of counsel. The main contention was that there was no evidence to prove the cases put forward in the pleadings or that there was any relationship of employer/ employee as at the time of filing the claim.

The trial court **(Byram Ongaya, J.)** did not delve into minute analysis of the documentary and oral evidences, but in a short judgment simply stated that it had considered both before making the following findings in respect of the four respondents:

"a) The claimants have established that the respondent employed them on terms of service considered by the respondent to be casual employment. The muster roll filed showed that the claimants worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Indeed, the work of maintenance and distribution was an on-going undertaking in the respondent's enterprise and the respondent continues to engage in such works. The court finds that in terms of section 37 of the Employment Act, 2007, the claimants' terms of service converted from casual to a contract of service where wages are payable monthly and section 35 (1) (c) applies. While making that finding the court considers that the claimants' evidence cannot be faulted that they worked for the respondent and the respondent failed to specifically traverse the averments set out in the amended statement of claim.

b) As submitted for the respondent, the particulars of the special damages were not pleaded and the claimants would not be entitled as per the details in their submissions.

c) In view of the orders on status quo pending the hearing and determination of the suit, the claimants are entitled to all remuneration and benefits under the Employment Act, 2007 throughout the period the suit had not been determined and to continue in employment with such full remuneration and benefits unless lawfully terminated from employment."

Judgment was accordingly entered as follows:

a) The declaration that the plaintiffs are permanent employees of the defendant and the contracts of employment of the plaintiffs to the defendant to be reduced into writing or into permanent employment in accordance with the provisions of the Employment Act, 2007.

b) The declaration that in view of the orders on status quo pending the hearing and determination of the suit, the claimants are entitled to all remuneration and benefits under the Employment Act, 2007 throughout the period the suit had not been determined and to continue in employment with such full remuneration and benefits unless lawfully terminated from employment; and for that purpose the claimants to report to the respondent's managing director not later than 01.04.2016 at 8.00a.m for appropriate deployment.

c) The declaration that the respondent has engaged in unfair labour practices in respect of the claimants' service.

d) The declaration that the claimants are entitled to payment of salary in lieu of annual leaves not granted.

e) The declaration that the claimants are entitled to provision of an allowance for housing, medical, water and food to be backdated to the dates when the plaintiffs began to work and in accordance with the Employment Act, 2007 or such better terms offered by the respondent to its employees at all the material time.

f) The respondent to effect all the due outstanding payments declared due under this judgment by 01.05.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

g) The respondent to pay the claimants' costs of the suit."

Those are the findings, declarations and orders that aggrieved the appellant which laid out 13 grounds of appeal in its memorandum. However, the grounds were urged in six tranches as follows:

(i) Grounds 1, 5 and 8 on the interpretation of section 37.

(ii) Grounds 2, 3 and 4 on the order made by the trial court for maintenance of the status quo on 18th September 2013.

(iii) Ground 7 on the order of reinstatement.

(iv) Ground 11 and 12 on failure to analyze the facts and evidence on record.

(v) Ground 13 on traverse of the respondents' amended claim.

(vi) Grounds 9 and 10 on the inconsistency of granting prayers on special damages after dismissing the same prayer.

As stated earlier in the opening paragraph, the main issues relate to the interpretation of ***section 37***; the order for reinstatement; and the propriety of the remedies granted. In our view, a decision on those issues will be dispositive of the appeal and, therefore, the rest of the issues urged above will be considered peripherally. At the hearing of the appeal, the appellant was represented by **Mr. J. M. Mwangi,** instructed by M/s J. M. Mwangi & Company Advocates; while the respondents appeared in person.

Section 37 of the Act which came into effect on 2nd June, 2008 provides as follows:-

(1) Notwithstanding any provisions of this Act, where a casual employee-

(a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month;

(b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

(2) In calculating wages and continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would be entitled to under this Act had he not initially been employed as a casual employee.

> ***(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.***

> ***(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply".***

In both written and oral submissions, Mr. Mwangi contended that the section does not create permanency in employment. In his view, the section basically provides for the manner of conversion of casual employment to a term contract, and the intention of Parliament was merely to protect the employee on the length of notice necessary to terminate the employment, that is to say, 28 days as provided for in ***section 35 (1) (c)*** of the Act. That is the only order the trial court should have made in this case, he asserted. Counsel urged that there was evidence that the respondents were receiving their salary at the end of the month and therefore the issue of conversion of employment did not arise. Furthermore, he submitted, the respondents pleaded and testified that they were casual employees under an agreement reached between the parties and it was erroneous, therefore, for the trial court to impose a different contract or permanency of employment on the parties. The respondents on their part, in brief oral submissions, supported the findings and declarations made by the trial court on that issue.

We have anxiously considered this issue and have formed the following view of it. An employer and an employee are at liberty, according to their needs, to enter into a ***"contract of service"*** which has a specific meaning under the Act as follows:

> ***"….. an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies."***

As clarified by this Court in the case of ***<u>Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others</u> [2017] eKLR:***

> "***The Employment Act recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.............The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."***

As long as such contracts are compliant with the law, the courts have no reason to interfere. The case pleaded by the respondents in this case is *'casual employment'*. A ***"Casual employee"*** is defined in ***section 2*** of the Act as:

> ***".. an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time".***

Casual employment thus entails engagement for a period not exceeding 24 hours at a time and payment made at the end of the day.

In the case of ***<u>Josphat Njuguna vs High Rise Self Group</u> [2014] eKLR,*** **Abuotha, J.** had this to say on the construction of ***section 37***:

> ***"It is a misinterpretation of section 37 (1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.…The provisions of section 37 (1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates."***

This Court, in the case of ***<u>Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited</u> [2015] eKLR*** was sympathetic to that view, and added, albeit *obiter dicta*, that:

> ***"With the enactment of the Employment Act 2007, considerable attention is paid to provisions of section 37 thereof which provides for conversion of casual service to permanent employment. In particular, subsection 37 (5) provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee."***

The same Court also approved of *dicta* in ***<u>Silas Mutwiri vs Haggai Multi-Cargo Handling Services Limited</u> [2013] eKLR*** that:

> ***"The Employment Act, 2007 has now created a fundamental shift from the previous Employment Act, Cap 226 with regard to who a*** **casual employee** ***is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as*** **casual workers or casual labourers.** ***This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and coverts such casual employment into term contract status."***

Finally, among the authorities we have considered on this aspect, this Court in ***<u>Chemelil Sugar Company vs Ebrahim Ochieng Otuon & 2 Others</u> [2015] eKLR*** was of the view that employees who, on the facts of that case, were initially engaged as casual employees and worked

in various capacities for periods ranging between one year and fifteen years, had their respective contracts of service converted to term contracts by operation of law under ***section 37*** of the Employment Act. The Court stated:

> ***"Those provisions are self-explanatory. The respondents' employment with the appellant were automatically converted into term contracts by operation of that provision."***

Adverting now to the facts of this case, the respondents pleaded and testified that they were initially engaged as casual workers and were to be paid on daily rates but were paid monthly. They also pleaded and testified that they had variously worked for periods in excess of 30 days over a period of four to seven years. They pleaded unfair labour practice in the failure by the appellant to comply with ***section 37*** and instead terminating their services without compliance with ***section 35*** of the Act.

The defence, and the reply to the amended claim, which the appellant filed simply amounted to a denial that the respondents or any of them was its employee and put them to strict proof. With respect, that defence was an idle one. Among the documents put forward by the respondents were the appellant's own muster rolls, apparently obtained by the respondents without the appellant's consent. Instead of rejecting that evidence altogether, the appellant's concern in cross examining the respondents was confined to demonstrating that the number of days worked by each respondent over the years were not as claimed by them. Indeed, the appellant filed as part of the defence, a summarized form of the muster rolls showing the number of days each respondent had worked for several years. That was a clear admission that the appellant had at least engaged the respondents in its employment. It would have served the appellant better if it went ahead and submitted to cross examination in order to give clarity to the terms of engagement with the respondents but, in its wisdom or lack of it, it did not testify orally. ***Section 10*** of the Act requires the contract of service to have certain prescribed particulars including the job description of the employee. ***Section 10 (7)*** provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in ***subsection (1)***, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. There was a clear burden of proof on the appellant which it did not discharge.

The manouvre adopted by the appellant in declining to testify served only to give credence to the respondents' version of events, and we do not blame the trial court for its summary conclusion that the respondents were engaged as casual employees and that they had worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Consequently, we find and hold, as the trial court did, that the contracts of service of the respondents assumed permanency and were *"deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service"* in terms of *section 37.*

The second main issue relates to the order of reinstatement. It is tied up with the finding by the trial court that *'in view of the orders on status quo pending the hearing and determination of the suit, the claimants are entitled to all remuneration and benefits under the Employment Act, 2007 throughout the period the suit had not been determined and to continue in employment with such full remuneration and benefits unless lawfully terminated from employment.'* Counsel submitted, firstly, that the finding had no factual basis since the respondents were not the employees of the appellant by the time they filed their claim; and secondly, that reinstatement should only be ordered in very exceptional cases. The case of ***J. W. N. vs Teachers Service Commission*** ***[2014] eKLR*** was relied on for that submission.

We have examined the record on the order made on 18th September, 2013 by the trial court at the time **(Abuodha, J.)**. The respondents were contending that the order made earlier *ex parte* was on the basis that they were in employment, while the contention by the appellant at the *inter partes* hearing was that the respondents were not in its employment. In view of those contentions, the court made the following order:

> ***"Considering the position taken by the respondent that the claimants are not its employees hence the status quo ordered by the court is that they remain as such. If the court comes to the conclusion that they were employees an order for reinstatement is possible."***

Clearly then, the *status quo* maintained was that the respondents were not in employment as at the time they filed their claim. That must be so otherwise their prayer that *"they may be re-instated to their employment or in the alternative they be deemed to have been unlawfully/illegally terminated"* would not make sense. Although the respondents insisted that they were terminated in June 2013, the oral testimony by two of them that they left employment in February 2013 left the matter in limbo. The bottom line is that they were terminated before the filing of the claim and the only issue is whether the termination was lawful, and if not, whether reinstatement was the most efficacious remedy.

On the basis of the finding made above that the respondents' contracts of service were governed by ***section 37***, it was incumbent on the appellant to comply with ***section 35 (1) (c)*** which provides for the manner of termination of various forms of employment in the following terms:-

> ***"35 (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be – ...***
>
> ***(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing."***

Other provisions of the Act relating to termination of employment should also have been complied with. It is common ground that no notice was served pursuant to ***section 35*** above. Indeed, the appellant whose legal duty it was to keep records relating to its employees produced no records relating to termination. The termination was therefore unlawful, and we so find. We also affirm the finding by the trial court that the appellant had engaged in unfair labour practices.

Was reinstatement the proper remedy?

Reinstatement is a lawful remedy which a trial court can grant as spelt out in ***section 12 (3)*** of the **Employment and Labour Relations Court Act**. It must, however, accord with written law and the relevant provision is ***section 49 (4)*** of the **Act** which lists no less than 13 factors to be considered by the court before reinstatement is ordered, to wit:

> ***"a. The wishes of the employee;***
>
> ***b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and***
>
> ***c. The practicability of recommending reinstatement or re-engagement;***
>
> ***d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;***
>
> ***e. The employee's length of service with the employer;***
>
> ***f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;***
>
> ***g. The opportunities available to the employee for securing comparable or suitable employment with another employer;***
>
> ***h. The value of any severance payable by law;***
>
> ***i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;***
>
> ***j. Any expenses reasonably incurred by the employee as a consequence of the termination;***
>
> ***k. Any conduct of the employee which to any extent caused or contributed to the termination;***
>
> ***l. Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and***
>
> ***m. Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."***

See also the ***J. W. N. case (supra).***

None of those factors were considered by the trial court. There was, therefore, no factual or legal basis for the order made on reinstatement and it cannot stand. As this Court emphatically stated in the case of ***Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR,*** the remedy of reinstatement should not be given except in very exceptional circumstances. In our own assessment of this case, the confidence between the employer and employees had irretrievably broken down and there was no inquiry as to whether the same or similar posts still existed with the employer. We agree with the appellant that an order for reinstatement in this case would be an imposition of an employee on an unwilling employer by the court, contrary to the laws of contract.

Finally on the third issue; the appropriate remedies. The basis for the complaint laid by the appellant is the declaration by the trial court that '*the claimants are entitled to provision of an allowance for housing, medical, water and food to be backdated to the dates when the plaintiffs began to work and in accordance with the Employment Act, 2007 or such better terms offered by the respondent to its employees at all the material time.'* The challenge to that declaration is made on two planes: firstly, that the claims were in the nature of special damages which the trial court had already declined to grant as they were neither pleaded nor proved; and secondly, because there was no pleading or evidence from the respondents that their contracts provided for provision of housing, water, food and medication. At any rate, the appellant argued, no monetary value could be attached to those items and it was inconceivable how these could be backdated to the respective dates of employment of the respondents.

It is indeed correct that the respondents in their statement of claim did not particularize the special damages they were entitled to. They merely prayed for provision for *'housing, water, food and medical'* without pleading them. Instead, they particularized these, among others, in their final submissions and claimed a sum in excess of Sh.18 million. The claim was however dismissed by the trial court stating:

> ***"As submitted for the respondent, the particulars of the special damages were not pleaded and the claimants would not be entitled as per the details in their submissions."***

There is no cross appeal on that finding, and that is why the appellant wonders how claims that were dismissed could be granted in the same breath. It was contradictory.

We have considered the issue and we think there is merit in the appellant's complaint. A claim for special damages is one that is ascertainable and quantifiable in monetary terms at the time of institution of the suit. There is a plethora of authorities stating that they must be specifically pleaded and strictly proved. See for example, the case of ***Maritim & Another vs Anjere [1990-1994] EA 312.*** The dismissal of the claim by the trial court for want of compliance with the principles was correct and, in any event, is not challenged by the respondents. That ground of appeal also succeeds.

In sum, the appellant is partly successful in this appeal. Only the challenge on the interpretation of ***section 37*** of the **Act** fails. On the other issues, we allow the appeal and set aside the declarations and orders of the trial court. In the end, these are the final orders and declarations in the appeal:

> ***(i) A declaration that Section 37 of the Employment Act, 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies.The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.***
>
> ***(ii) A declaration that the respondents' employment was unlawfully terminated.***
>
> ***(iii) An order that the respondents and each of them shall be paid one month's salary in lieu of notice.***
>
> ***(iv) An order that the respondents and each of them shall be paid salary in lieu of leave not taken.***
>
> ***(v) A declaration that the appellants had engaged in unfair labour practices.***
>
> ***(vi) An order that the respondents and each of them shall be paid compensation equivalent to three months salary.***
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> ***(vii) Each party shall bear its own costs of this appeal***

Dated and delivered at Nyeri this 11th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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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.

DEPUTY REGISTRAR