



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 256 OF 2011

BETWEEN

1. OMAR ALI HARIBAE

2. JAMES MOHAMED MWOYUAPPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Omondi & Odero, JJ.) dated 7th July, 2011 in

H.C.Cr.A. No. 118 of 2008)

JUDGMENT OF THE COURT

Stephen Maina Njuguna (PW1) “Njuguna”, his sister **Mary Wambui Kihika** (PW2 “Kihika” and **Paul Kimani** “deceased” were neighbours back home in Kipini area of Lamu County. On 26th May, 2003, Njuguna and Kihika bumped into the deceased at Miti ni Dawa Pub in Mpeketoni Town of Lamu County. Having sufficiently imbibed the local brew they set for home riding their bicycles. Njuguna rode his bicycle with Kihika as his pillion passenger. Njuguna had a luggage consisting of flour and mangoes and requested the deceased to ferry it on his bicycle. They left at about 5.30 p.m. On reaching Bopwe on the way the trio at the request of Kihika diverted into a “Mangwe” den where locals take traditional brew known as *Mukoma* wine. They ordered for their drinks which they took. In the process the appellants entered, ordered a bottle of the brew which they shared. As they were drinking, Njuguna recognized the 1st appellant whom he had known since 2002 when he started residing in Kipini. He knew him by the street name “Jay” or “J”. The appellants were carrying a panga each and had a small sack. At about 6 p.m., they left as the trio continued drinking. Soon thereafter the deceased informed Njuguna and Kihika that he was leaving. Njuguna remained behind waiting for Kimani to finish her drink. Five minutes later Njuguna and Kihika left cycling very fast so as to catch up with the deceased. However, this was not to be as their bicycle soon thereafter suffered a puncture. They opted to proceed to Kalondo Shopping Centre to have the puncture fixed. They walked towards the shopping centre as they pushed the bicycle. However as they approached Kangawati area, they saw the appellants squatting on both sides of the road. Though it was beginning to get dark, they were able to recognize the appellants. They were still in the same clothes they had last seen them in at the Mangwe den. The appellants approached them and

tried to persuade Njuguna to leave with them, Kihika. Njuguna was not amused by the request but nonetheless politely told them if indeed they wanted her, they would have to escort them home. The appellants then told them to proceed on and they will follow them later. However, they had hardly covered ten metres of the walk, when Njuguna noticed the deceased's bicycle on the right side of the road with his luggage intact and informed Kihika. Kihika prompted him to ask the appellants the whereabouts of the owner of the bicycle but Njuguna decided against it. They proceeded and a while later they heard two bicycles approach them while being ridden very fast. They gave way only to notice that in fact they were the appellants who proceeded to inform them that they will find them ahead as they rode past them. At about 9.15 p.m. Njuguna and Kihika eventually arrived at home. When Njuguna asked members of his family whether the 1st deceased had come calling and left his luggage, he was told no such thing happened.

At about 7 a.m. the following day, they contacted the 1st deceased's brother, **Michael Gichobi Kamau** (PW7) "**Kamau**". They learnt from him that the 1st deceased had not come home the previous night. For a while nobody knew where the 1st deceased was. Fearing for the worst, a manhunt was launched for him. Many days later his body was found about 100 metres into the bush at the beginning of Kangawati forest. Next to the body in a paper bag was flour, T-shirt and cooking fat which had been part of the luggage he had entrusted the deceased to ferry for him. The body had no head or limbs – only the torso remained. The torso was ferried by the police to the deceased's father **Charles Kimani** (PW2) "**Kimani**" who positively identified it as belonging to the deceased. He did so through the clothes and also the sandals that had been found near the body.

Around about the same time and on 26th May, 2003 to be precise, **Joseph Ngige, Cigua** "**2nd deceased**" according to his brother **Julius Kimuha** (PW3) "**Kimuha**" left Kipini for Lamu. He never came back. Together with his father, **Daniel Shigwe** and another brother **Michael Gichobi Kamau** (PW7) "**Kamau**" reported the disappearance of the 2nd deceased to Mpeketoni Police Station who promised them assistance in looking for him. The assurance notwithstanding, they also launched their own search. They were joined by the 2nd deceased's wife, **Lucy Marigi Ngige** (PW6) "**Ngige**" and Kihika. On the second day of the search, they stumbled upon a headless and limbless body of a human that was decomposing. They could not easily identify the body. Accordingly, they contacted Mpeketoni Police Station who collected the body. About ½ km away but in the same Mkangawati forest the limbs and a head were found in various stages of decomposition. This body was subsequently identified as that of the 2nd deceased.

The two cases were assigned to **IP. Jackson Kieta** (PW5) "**Kieta**" of Lamu Police Station to investigate. In the course of his investigation he came by information that two suspects in connection with the above deaths had been arrested by officers from Mpeketoni Police Station and two bicycles belonging to the deceased persons recovered. He proceeded to the Mpeketoni Police Station on 11th June, 2003 and re-arrested the appellants. He also took possession of the bicycles and two pangas, a shirt, trouser and sandals belonging to the deceased. Ngige wife of the 2nd deceased positively identified the shorts, long trouser, one of the bicycles and shoes as belonging to the 2nd deceased. Those items were similarly identified as belonging to the 2nd deceased by Kamau. The bicycle was further identified by **James Maina Kamau** (PW8) "**Maina**" a brother in-law to the 2nd deceased.

The bodies were subsequently subjected to postmortem examination by **Dr. Kombo Mohamed Mbwana** (PW9) "**Mbwana**". He found the two bodies almost completely decomposed. What was left was joint skeletons. It was therefore a rather difficult postmortem. He however concluded that the probable cause of death of the deceased were multiple injuries.

How then were the appellants first arrested? On 9th June, 2003 **Pc. Cosmas Mwanja** (PW10) "**Pc. Mwanja**" was at Mpeketoni Police Station when at about 12.30 p.m. received information that the appellants who were suspected to have participated in the grisly robberies were at Kareni. He proceeded there in the company of **Pc. Kimeu** whereat they found the 1st appellant armed with a panga. He had been pointed out to them by an informant. They duly arrested him. About 800 metres away they came across

the 2nd appellant whom they duly arrested. From there they proceeded to the house of the 1st appellant where they recovered a bicycle. The following day the 2nd appellant offered to take him where the other bicycle was. That bicycle which had been freshly painted black was recovered in a certain forest in Pangani area. Both those bicycles were identified positively as belonging to the deceased whereas Maina identified the other bicycle as belonging to the 2nd deceased.

Having pieced all these information together IP. Kieta then preferred charges against the appellants' two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. In respect of the 1st deceased, it was alleged in the particulars thereof that the two appellants on 26th May, 2003 between 5 and 7 p.m. at Ukangawati forest in Mpeketoni Location in Lamu District within Coast Province, jointly while armed with offensive weapons namely pangas, robbed Paul Kimani of a bicycle valued at Kshs.6,000/= and at or immediately before or immediately after the time of such robbery murdered the said Paul Kimani. In respect of the 2nd deceased, the particulars were that at the same date, time and place and in similar fashion robbed Joseph Ngige of a bicycle valued at Kshs.6,000/= and in the process similarly murdered him.

The appellants denied both counts and the case proceeded to hearing. In their defences which were unsworn, the 1st appellant proclaimed his innocence by stating that on the day of his arrest, he had just come from his farm when he was confronted by police who asked him which ethnic community he belonged to. Upon learning that he was a Pokomo, they ordered him to accompany them to the police station claiming that they had received a report about Pokomo. He accompanied them and upon reaching Mpeketoni Police Station he was locked and later charged for an offence he knew nothing about.

As for the 2nd appellant he stated that while carrying out his routine chores, police officers approached him, snatched his panga, beaten and bundled in a motor vehicle. He found himself at Mpeketoni Police Station. He was later charged for the offences he knew nothing about.

Honourable D.W. Nyambu, the Principal Magistrate having carefully considered the evidence on record and appraised herself of the applicable nonetheless came to the conclusion that the appellants were guilty of the offences preferred. In convicting the appellants, the learned Principal Magistrate rendered herself thus:

“... I am satisfied that indeed PW1 and PW4 positively identified the accused persons when they met at the Mangwe Club, later at Kangawati and that it was indeed the accused persons who passed PW1 and PW4 on the way. They exchanged pleasantries. I am satisfied that the 1st accused was riding the bicycle of Paul Kimani who (sic) he passed PW1 and PW4.

... The 2nd accused was at all material times in company of the 1st accused. Though he was not riding the bicycle of the late Paul Kimani he and the accused were together in the evening of 26th May, 2003. The accused persons' activities riding the bicycle of Paul Kimani are an excellent circumstantial proof of linkage between the accused and the death of the deceased person ... Had the accused persons not been found in possession of the bicycles exh.1 and 2 then they would have been charged with murder. The fact that they were found with recently stolen bicycles where the owners had been killed then that would link the accused persons with robbery with violence ...”

Upon convicting the appellants, she sentenced them to the mandatory death sentence. Aggrieved by the conviction and sentence, the appellants individually and separately lodged appeals to the High Court on the grounds that their constitutional rights were violated, **section 200(3)** of the Criminal Procedure Code was not adhered to, prosecution case was not proved beyond reasonable doubt, appellants were not positively identified, key witnesses had not been summoned to testify, the doctrine of recent possession was inappropriately applied and lastly, that their defences were rejected for no apparent reason(s).

The two appeals were subsequently consolidated by **Omondi & Odero, JJ.** for ease of hearing and as they had arisen from the same trial in the lower court. Upon hearing the appeals in the plenary, the two Judges were satisfied that the decision of the trial court could not be impugned on any of the grounds advanced by the appellants. On the question of violation of the appellants' constitutional rights they agreed with the appellants that they had been detained in custody in excess of fourteen days then permissible under the retired Constitution. However, in their reading of the said Constitution, their remedy lay in seeking compensation by way of damages and not acquittal. This is indeed correct proposition of the law.

With regard to non-compliance with **section 200(3)** of the Criminal Procedure Code, the Judges appreciated that the trial commenced before **Hon. Ogembo** (*Senior Resident Magistrate*) who was transferred before he concluded the case. **Hon. Ochenja**, Senior Resident Magistrate then took on the case and whereas one of the appellants wanted the case to start *de novo*, the other wanted the case to proceed from where Hon. Ogembo had stopped. Hon. Ochenja exercised his discretion and directed that the case proceeds from where Ogembo had stopped. Hon. Ochenja having heard only two witnesses, he too suffered the same fate of transfer. It was that Hon. Nyambu Principal Magistrate took over, heard the defence, crafted and delivered the judgment, having at first explained to the appellants in detail, the purport of **section 200(3)** of the Criminal Procedure Code and the appellants opted to proceed from where Hon. Ochenja had left.

On identification, the Judges were unanimous that the trial court had properly considered the opportunities available to the witnesses for identification and arrived at a safe conviction. The trial court had considered several other factors which persuaded it that the appellants had been sufficiently identified.

On the question of key witnesses not have been called, they were satisfied that the witnesses called by the prosecution were sufficient to dispose of the case. The prosecution did not have to call a superfluity of witnesses, some whose roles are so minimal that it becomes insignificant and only goes to prolong a hearing unnecessarily.

As for the application of the doctrine of recent possession, they were of the view that the trial court properly invoked the doctrine of recent possession and correctly observed that the circumstances inculpably pointed to the appellants as the culprits.

It would appear the question of the appellants' defences not being given due consideration by the trial court was sufficiently addressed by the High Court. However given the conclusion that the High Court arrived at it does not require a magician to conclude that the High Court was less than impressed by the argument.

On the basis of all the foregoing, the appeals were dismissed both on conviction and sentence. Aggrieved by the dismissal, the appellants lodged this second and perhaps the last appeal on similar grounds that the appellate Judges erred in accepting that the doctrine of recent possession was properly invoked; that the informer who led to their arrest was never called as a witness, that the offences that they were convicted of were never reported to the police, their defences were never considered and finally, that their constitutional rights to a fair trial were compromised by their long detention in custody after arrest before they were presented in court.

At the plenary hearing of the appeal on 26th June, 2014 the appellants were represented by **Mr. Gicharu Kimani**, learned counsel whereas the State was represented by **Mr. Oyiembo**, learned Assistant Director of Public Prosecutions. In supporting the appeal, Mr. Gicharu submitted on only two issues of law that he had identified in the appeal, *viz* identification of the appellants and the application of the doctrine of recent possession. However, he limited his submissions on the question of identification to the 1st appellant. He submitted that from the evidence of PW1 and 4, they are the only ones who claimed to have known the 1st appellant. PW3 never knew him. Their meeting during the encounter was therefore a chance meeting. The circumstances of the incident and considering that it was right, were such that positive identification of the 1st appellant was well-nigh impossible. Positive identification was even compounded by the fact the appellant were wearing jackets.

With regard to the doctrine of recent possession, counsel submitted that it was not in dispute that bicycles belonging to the deceased were recovered. However there were immaterial contradictions by the witnesses as to the mode of their recovery rendering the application of the doctrine suspect. Indeed there was no evidence that the appellants were found in possession of any of the bicycles. Much as the 1st appellant is said to have led the police to the recovery of one of the bicycles found hidden in the bush that act did not amount to possession. In the premises he urged us to allow the appeal.

Responding, Mr. Oyiembo submitted that the two counts below treated the issue of identification seriously. They were in agreement that PW1 and 4 had on the material day encountered the appellants at least three times, first, during the day in the drinking den, second, along the road as dusk was beginning to set in and lastly, when the appellants sped past them telling them that they had gone ahead. These witnesses could therefore have been mistaken in the identification of the appellants.

Besides visual identification of the appellants, there was also evidence that they had been found in possession of bicycles which belonged to the deceased. The totality of evidence lends to no other conclusion but that the appellants were the robbers. Though there are contradictions in the prosecution case, counsel submitted that they were minor, immaterial and did not affect the strength of the prosecution. He therefore urged us to dismiss the appeal.

This is a second appeal. By dint of the provisions of **section 361(1)(a)** of the Criminal Procedure Code, our jurisdiction is circumscribed to not considering matters of fact but law only unless we are satisfied that the first appellate court and the trial court failed to consider matters they should have or matters they should not or that looking at their decision as a whole it was plainly erroneous in which case such matters cease to be matters of fact and become matters of law to which our jurisdiction at this level as already stated is limited to considering. It is in the light of this that we propose to consider this appeal.

With regard to matters of identification there is a litany of case law from this Court to the effect, in such a matter, the court must be alive to the need for testing with care and closely examine the circumstances under which is alleged to have been visually identified. The objection is to reduce chances of mistaken identity that may well lead to a miscarriage of justice. The duty is even more pronounced where such identification in difficult circumstances. In such case what evidence, be it direct or circumstantial would be necessary. See ***Rona v R* [1967] EA. 583**, ***Kiarie v R* [1984] KLR 741** and ***Maitanyi v R* [1988-1992] 2 KAR 75**.

In this case the identification of the appellant was by two witnesses Njuguna and Kihika, at different times and locations. Their first encounter was at the Mangwe den. The appellants who did not deny having been at the said Mangwe den entered the same time at about 6 p.m. Dusk had not set in yet. Considering the manner they were dressed the 1st deceased suspected them to be police officers and enquired as much from Njuguna who assured him that they were not. Njuguna had known the appellant for more than two years as a wine tapper in the neighbourhood and even used to visit them at home. Clearly then this was a case of recognition as opposed to visual identification of the appellant. He knew this appellant as Jay. At the den they did sit far from each other. Indeed between Njuguna, Kihika 1st deceased and the appellants, it was hardly five metres. They stayed in the den for a while before they left at about 6 p.m. As the two courts correctly observed, this afforded Njuguna and Kihika ample time to observe and recognize and or identify the appellants.

The second encounter was along Kipini road at Kangawati forest at about 7 p.m. Again according to Njuguna and Kihika, this was just before dusk. They were able to see and recognize/identify the appellants who were each squatting on either side of the road armed with a panga. The appellants approached Njuguna and Kihika menacingly but since Njuguna had recognized them, he called out the name of the 1st appellant and he responded ***“kumbe in were sako”*** (*Oh! it is you sako!*). The 2nd appellant then joined them and they all engaged in a banter ending with a request that Njuguna should be magnanimous enough to entrust them with his sister, Kihika. When Njuguna turned down the request, they were told by the appellants to proceed on and they will catch up with them on the way. From this encounter it cannot be said that it was a mere fleeting chance. Indeed the 1st appellant were buddies with

Njuguna. As the 2nd appellant was always in tow with the 1st appellant, his identification could not have been mistaken for anybody else.

The third and last encounter was when the appellants sped past Njuguna and Kihika, so soon after parting ways with them and assured them that they will join them later on the way.

We have reproduced the relevant portion of the evidence and the concurrent findings of the trial court and the first appellate court on the sequence of events that left no doubt that the appellants could not have been victims of fake or mistaken identity despite the submissions by the appellants to the contrary. The concurrent findings were based on solid facts and we have no reason to differ.

Let us not switch gears somewhat and tackle the question of the application of the doctrine of recent possession in the circumstances of this case. As we understand it, the doctrine of recent possession and how is it invoked? As we understand it, the doctrine of recent possession is a rule of law that permits an inference to be drawn that where it is proved that property was stolen and the same property, recently after the robbery, is found in the exclusive, physical or constructive possession of another person, that person is deemed or presumed to have participated in the crime that resulted in the theft or robbery of that property. This doctrine is buttressed further by the provisions of **section 119** of the Evidence Act. The presumption is however a rebuttable one but the burden shifts to the accused person as soon as all the elements are proved to properly invoke the doctrine. To invoke the doctrine, the State must prove beyond reasonable doubt each of the following four elements:-

- *That the property was stolen*
- *That the stolen property was found in the exclusive, physical or constructive possession of the accused*
- *That the property was positively identified as the property of the complainant; and*
- *That the possession was sufficiently recent after the robbery. As to what constitutes “recent” possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels, the property’s character, and so forth.*

See **R v Loughlin** in **35 CR App. 1269; (1951) WN 325; 49 LGR 545** and **Matu v Republic** [2001] **I KLR 510**.

Once the foregoing ingredients are proved, the burden shifts from the prosecution to the accused to explain his possession of the item complained of. The doctrine is a rebuttal presumption of facts. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do then an inference is drawn that he either stole or was a guilty receiver.

How then does the doctrine fit the facts of this case? There is sufficient evidence on record that the appellants were found in possession of a bicycles belonging to the deceased. For the 1st appellant, upon his arrest by police officers led by Mwanja, he led them to his house and upon search a bicycle was recovered. This bicycle was positively identified by Njuguna, Kimani, Kihika and Kamau as the bicycle belonging to the 1st deceased. As for the bicycle belonging to the 2nd deceased, it was discovered in the forest freshly painted. It was the 2nd appellant who once again led Mwanja and his team to the forest where the said bicycle was recovered. In law, much as the second bicycle was not recovered in his exclusive physical possession, he is nevertheless deemed because of the knowledge of its whereabouts to be in constructive possession. In other words, the fact that the 2nd appellant led the police to a forest from where a bicycle was recovered, it can safely be concluded that he had exclusive knowledge of the whereabouts of the bicycle and thus in law was in constructive possession of the same. Indeed the definition of the word “*possession*” in **section 4** of the Penal Code contemplates such scenario. By that definition, a person who is not in personal possession is nevertheless deemed to be in possession if he

knowingly has anything in the actual possession or custody of any other persons or if he has anything in any place (*whether or not occupied by him*) for his use or benefit or for use and benefit of any other person. Further by **section 31** of the Evidence Act which was operative at the time but was subsequently repealed provided:-

“Notwithstanding the provisions of sections 26, 28 and 29, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, maybe proved.”

We hope that these observation answers sufficiently, the 2nd appellant’s submission that he was never found in physical possession of the bicycle was positively identified as belonging to the 2nd deceased by Kimuha, Ngige and Kamau.

It is noteworthy the identification of the bicycles was by members of their respective families and friends through specific physical features, colour, prolonged interaction with the bicycles, some parts being purchased in presence of some of the witnesses and specific distinct features which consistently stood out in the physical character of the bicycles.

The recoveries were made on 9th and 10th June, 2003 respectively. This was about 11 days after the deceased disappeared with Njuguna’s luggage that he had entrusted him to ferry. It is also instructive to note that it was at this same time that the 2nd deceased disappeared enroute to Kipini from Mpeketoni. However Njuguna and Kihika had seen 1st deceased’s bicycle with the luggage on the ground with the 1st deceased missing during their second encounter with the appellants. A bicycle is not the kind of merchandise that can easily exchange hands. Consequently, in so far as the recovery of the bicycles was concerned was recent.

However, were those bicycles stolen? The evidence on the record tend to suggest that perhaps only the 1st deceased’s bicycle suffered that fate. As already stated, Njuguna had asked the 1st deceased to carry his luggage on his bicycle as he carried his sister Kihika. They rode together from Mpeketoni to Bopwe where they entered the Mangwe den. After having drinks, they parted company and the deceased rode ahead. Five minutes later Njuguna and Kihika left the den in pursuit of the 1st deceased. At Kangawati they came across the 1st deceased’s bicycle with the Njuguna’s luggage. However, the deceased was nowhere to be seen. After their encounter with the appellants and as they proceeded on, the appellants shortly thereafter spade past them on the 1st deceased’s bicycle. The body of the deceased was shortly thereafter found in the forest minus the bicycle and Njuguna’s luggage. His bicycle was subsequently found in the house of the 1st appellant. Given the scenario, it is safe to conclude that the appellants robbed the deceased of the bicycle and the luggage. After all, during their second encounter with the appellants, Njuguna and Kihika had seen the appellants and in particular the 2nd appellant feasting on the mangoes from the luggage. The two courts therefore were correct in drawing concurrent inferences from the conduct of the appellants that were in joint possession of the stolen bicycle of the 1st deceased’s. Consequently the two courts below correctly invoked the doctrine of recent possession in respect of count I and there will be no basis of our interference.

However we cannot say the same in respect of count II. The last time that the 2nd deceased was seen riding his bicycle was at about 5.30 p.m. by Kamau. When he left home on the material day he had told Kimuhu that he was proceeding to Lamu. He was in the company of another person who Kimuha in his evidence simply referred to as “another Kamba man”. Much as the 2nd deceased’s bicycle was found with the assistance of the 2nd appellant, could this mkamba man have been involved in the disappearance of the 2nd deceased? That the possibility cannot be ruled out since the Kamba man was never traced nor did he testify. Again when the 2nd deceased was parting company with Kamau, he indicated to him that he would use the Nairobi ranch-Kipini road. Whether this was the same road as Mpeketoni-Kipini road and whether this was the same road, the appellants took after they were done with at Mangwe den, the

court was not told. Neither was their evidence that when the 2nd deceased left other the bicycle he was riding, he was carrying any other valuables. It may be well be a case where the 2nd deceased was killed by another person(s). After all the bodies of the deceased's were discovered in the same forest, they were miles apart.

The bottom-line is that the two courts were right in applying the doctrine of recent possession against the appellants in respect of count I. However there is doubt in respect of count II given what we have already stated in this regard. If the police were minded to prefer a charge(s) against the appellants on account of the recovery of the 2nd deceased's bicycle in possession of the 2nd appellant, perhaps they should have considered the offence of handling stolen goods under **section 322** of the Penal Code.

In the final analysis we are satisfied that the appellants were convicted on sound evidence in respect of count I and not so in respect of count II. The conviction and sentence in respect of count I shall remain. However, in respect of count II we would allow the appeal, quash the conviction and set aside the sentences. We could have as already stated considered the substitution of the 2nd count with one of handling stolen goods and impose appropriate sentence. However, this is not necessary in view of the conviction in the first count. Those shall be the orders of this Court in this appeal.

Dated and delivered at Malindi this 25th day of September, 2014

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR