REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 259 of 2002

BERNARD OMUNDA MARICHUADA & 2 OTHERS.....APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi & Mbito, JJ.) dated 3rd October, 2002

in

H.C.CR.A. NOS. 243, 245 & 247 OF 1997)

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JUDGMENT OF THE COURT

This appeal arises out of an unfortunate incident in the last century when a group of people stormed into the residence of one, ***Mrs. F.O.*** on the night of *23rd August, 1995* at about 8:00 p.m. and subjected the lady, her children and relatives to an orgy of violence, beatings, rape and stealing. At the end of that reign of terror, the victims were left with various injuries which led to the death of one of the victims. The assailants left in a motor vehicle belonging to FO in which they carried numerous household goods and personal effects of the victims. In order to create fear and despair in the minds of the victims, the assailants armed themselves with pistols (*which were later confirmed to be toys*), simis and knives. The victims of rape also gave evidence of their respective ordeals at the hands of the invaders and the medical evidence confirmed that the victims had, indeed, been raped. A number of the victims were able to identify some of the assailants.

This incident was reported to the police and as a result ***Supt. Henry Nyaosi*** *(PW16)*, the then District Criminal Investigations Officer, Kilimani Division, swang into action with his team that same night. On the following day (*24th August, 1995*), ***Supt. Nyaosi*** and his team recovered a motor vehicle registration number KAA … a Peugeot 504 abandoned at Kawangware near Bora Bora Club. This vehicle was the same one stolen during the robbery incident at F.O.'s house. As Supt. Nyaosi proceeded with his investigations, he received information that some people were celebrating in a certain house not very far from where the stolen vehicle had been abandoned. Supt. Nyaosi and his team surrounded the said house in which they found seven men drinking dry gin, whisky and other spirits. Those seven men were

also eating and watching T.V. In the house a large number of items were recovered which were later identified by the victims of the robbery of the previous evening. All the seven men were arrested and taken to Muthangari Police Station and eventually arraigned before the Principal Magistrate's Court at Kibera in *Criminal Case No. 11575/95*. The seven men appeared in the charge sheet as follows:-

1. PETER MUSANGO MANGATE

2. PASCAL TAABU OSINYA

3. DAVID ONYANGO

4. JOHN OUMA ANJALA

5. MOSES WAKULWA OPAYE

6. BERNARD OMUNDA MARICHUADA

7. JACKSON MUCHOMBA JOEL

The seven people were jointly charged on five counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code and on two counts of rape contrary to ***section 140*** of the Penal Code. They also faced alternative counts of handling stolen goods contrary to ***section 322(2)*** of the Penal Code.

During the trial in the Principal Magistrate's Court at Kibera the 1st appellant herein, ***Bernard Omunda Marichuada*** (*also known as Marijuana*) was the 6th accused, while the 2nd appellant, ***Moses Wakulwa Opaye*** was the 5th accused and the 3rd appellant, ***John Ouma Anjala*** was the 4th accused. The others who started this journey in Kibera Principal Magistrate's Court, have all died along the way to this Court. We are sorry to note that even out of the three who have reached this Court, one of them, ***Bernard Omunda Marichuada*** has been reduced to a wheel chair.

The trial of the seven people commenced before the learned Principal Magistrate at Kibera (Mrs.Ondieki) on *19th October, 1995* and prosecution closed its case on *26th July, 1996*. The learned Principal Magistrate then ruled that all the accused persons had a case to answer but before they could defend themselves the 1st accused, Peter Musango Mangate passed on. Hence it was the remaining six who defended themselves by way of unsworn statements.

The learned trial magistrate considered the evidence placed before her and in the end came to the conclusion that the remaining six accused persons were guilty on counts 2, 3, 4, 6 and 7. Counts 2, 3 and 4 related to robbery with violence in which the complainants were ***F.O.*** *(PW1)*, ***N.O.*** *(PW5)* and ***J.O.*** respectively. Counts 6 and 7 related to rape in which the complainants were ***V.O.*** *(PW3)* and ***E.O.*** *(PW4)* respectively. In concluding her judgment, the learned trial magistrate said:-

"***It is clear from the evidence on record that the robbery at the house of PW1 was accompanied by a lot of violence and indeed what I would call senseless violence. One of the guests one Patience Phoebe Khamala died during the robbery. The doctor who did a post mortem testified that she died from asphyxia due to manual strangulation and blunt head injury. They also raped the young daughters of the family. I find that the prosecution has proved its case against accuseds beyond all reasonable doubt on the offences on counts 2, 3 and 4. I convict them of the same under section 215 Criminal Procedure Code. There is no complainant on the 5th count. I also find that the prosecution has proved its case against 6th accused on the 6th count and 4th accused on***

the 7th count. They were properly identified.

Accordingly, I find them guilty of the offences they are charged with on these counts and I convict them of the same under section 215 Criminal Procedure Code."

After considering mitigation from each of the remaining six accused persons, the learned trial magistrate proceeded to sentence them as follows:-

"***Sentence:*** *On counts 2, 3 and 4 the accuseds are sentenced to death as is by law required on each count.*

On count 6, *accused is sentenced to serve 10 years imprisonment with hard labour and to receive 10 strokes of the cane subject to medical fitness.*

On count 7, 4th accused *is sentenced to serve 10 years imprisonment with hard labour and to receive 10 strokes of the cane subject to medical fitness.*

Prison sentences to run concurrently.

Right of Appeal 14 days."

The six convicted persons exercised their right of appeal to the High Court and filed separate appeals which were consolidated into *Criminal Appeal No. 243 of 1997*. By the time the appeal came up before the High Court on *5th June, 2001* two of the remaining six had died. These were **Pascal Taabu Osinya** (originally 2nd accused at the trial) and ***David Onyango*** (originally 3rd accused at the trial). It is therefore the remaining four (the three appellants and ***Jackson Muchomba Joel*** - now deceased) whose appeal was heard by the superior court (Msagha and Mbito, JJ.). The learned Judges of the superior court considered the appeal before them and came to the conclusion that the appellants had been properly convicted and that their appeals lacked merit. In concluding their judgment in which they dismissed the appeals by the four appellants before that court, the learned Judges expressed themselves thus:-

"***The charges, in our judgment were proved beyond reasonable doubt. The convictions were well founded that we see no reason to differ with the learned trial magistrate. The appeals have no merit and are accordingly dismissed."***

Being dissatisfied by the foregoing the remaining three, ***Bernard Omunda Marijuana*** (1st appellant), ***Moses Wakula Opaye*** (2nd appellant) and ***John Ouma Anjala*** (3rd appellant) now come to this Court by way of second and final appeal. That being so only matters of law fall for consideration – see ***section 361*** of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see ***CHEMAGONG V. R [1984] KLR 611.*** In ***KAINGO V. R.*** **(1982) KLR 213 at p. 219** this Court said:-

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

And in ***KIARIE V. R.*** **[1984] KLR 739 at p. 743** this Court said:-

"***We say, at the outset, that it is not every misdirection or non-direction that would entitle this court to upset a finding of fact by the trial or the first appellate court. Paragraph 918 on page 942, Archbold, Criminal Pleading, Evidence and Practice, 40th Edition states the approach thus:-***

'*Misdirection as to the evidence to be of any avail to an appellant must be of such nature and the circumstances of the case must be such that the jury would not have returned their verdict had there been no misdirection.'*

So errors of law, if there be any, affecting the issue of identification and or recognition and the defence of alibi must attain the degree just stated."

As indicated at the commencement of this judgment, the facts of this case are both disturbing and distressful. A gang of robbers raided the house of F.O. and subjected her and her children together with her visitors to a reign of terror in which two of her daughters were sexually assaulted. However, due to the defective charge sheet the offences in counts 6 and 7 of the charge sheet could not be proved as framed. The learned Senior Principal State Counsel conceded the appeal in respect of counts 6 and 7 on the ground that the charges were defective as they purported to charge more than one person for "*jointly"* raping a victim. There can be no question of two or more people "*jointly raping a victim."* For that reason the two counts relating to rape contrary to ***section 140*** of the Penal Code must be allowed. It follows that the conviction and sentence in respect of these two counts must be and are hereby quashed and set aside. Our perusal of the record shows that ***J.O.*** the complainant in count 4 did not testify and no evidence was led in support of that count. In absence of evidence in support of count 4 the conviction and sentence in respect of this count cannot stand. Consequently the conviction in count 4 is hereby quashed and the sentence of death set aside.

This leaves counts 2 and 3 in which as we have already stated the complainants were ***F.O.*** and ***N.O.*** respectively. These are the counts that we shall be concerned with in this appeal. The remaining three (*the appellants before us*) were convicted (*and their convictions upheld by the High Court*) on these three counts upon the evidence of identification and recent possession of the property stolen during the robbery. It was the prosecution case that the appellants were identified by the victims during the robbery and that there was sufficient light to facilitate a correct identification. It was also the prosecution case that the appellants were found in joint possession of most of the property stolen during the robbery when the police pounced on them (*and their dead colleagues*) when they were arrested in a house at Kawangware. The two courts below were satisfied that the three appellants were, indeed, properly identified by the victims during the robbery and that the three appellants were found in recent possession of the items stolen during the robbery.

The appellants, through their respective counsel, have now come to this Court challenging those findings. When this appeal came up for hearing before us on *1st July, 2009*, Mr. K.A. Nyachoti, appeared for the 1st appellant, (*Bernard Omondi Marichuada*) while Mr. Evans Ondieki, appeared for the 2nd appellant, (*Moses Wakulwa Opaye*) and Mr. A.O. Oyalo, appeared for the 3rd appellant, (*John Ouma Anjala*). The State was represented by Mr. J. Kaigai, (Principal State Counsel).

In his submissions on behalf of the 1st appellant, Mr. Nyachoti contended the trial court proceeded without indicating which language was used during the proceedings. As regards the charge sheet Mr. Nyachoti contended that it was defective for failing to include the words "*offensive or dangerous."* On that ground alone, so submitted Mr. Nyachoti, his client should be set free. On the issue of identification, Mr. Nyachoti submitted that as the robbers were violent and ordered the victims to lie facing down, his client could not have been properly identified. He pointed out that the identification parade had the same members hence the 1st appellant's identification was unsafe. On the rape charges, it was contended that there was no

corroboration, but since the appeal has been allowed as regards counts 5 and 7 (*the counts relating to rape*), we need not say any more on these charges. Finally, Mr. Nyachoti submitted that his client's defence was not properly considered. For all these reasons, Mr. Nyachoti asked us to allow the appeal in respect of the 1st appellant.

In his submissions, Mr. Ondieki associated himself with the submissions of Mr. Nyachoti as regards the issue of language used at the trial, and an alleged defective charge. On the issue of identification Mr. Ondieki submitted that his client was convicted on the evidence of identification by a single witness which evidence, in his view, was unsafe to sustain a conviction. To buttress his submissions on this ground Mr. Ondieki relied on various decisions of this Court. As regards statement under inquiry, Mr. Ondieki faulted it on the ground that *Inspector Mateche* who recorded the statement had interrogated all the seven suspects. On the defence by the 2nd appellant it was Mr. Ondieki's contention that the trial magistrate did not consider it despite the fact that the 2nd appellant even produced a bus ticket to prove that he had, indeed, just arrived in the city when he was arrested. On the issue of recent possession it was Mr. Ondieki's contention that there was no evidence that the 2nd appellant was in possession of the recovered items. Lastly, Mr. Ondieki faulted the superior court for having failed to re-evaluate and analyse the evidence.

In his submissions, Mr. Oyalo dwelt mainly on the issue of identification of his client, the 3rd appellant. Mr. Oyalo reminded us that conditions for identification were not favourable for a correct identification. He pointed out that the 3rd appellant was convicted on the evidence of a single witness which in his view was insufficient to sustain a conviction. Mr. Oyalo took issue with the evidence of ***S.O.*** *(PW4)* who was aged 14 years and in his view this was a child of tender age. For that reason the trial magistrate ought to have ascertained whether she understood the meaning of an oath.

Mr. Oyalo further submitted that the statement under inquiry was used against all the accused persons and yet the 3rd appellant was not mentioned in that statement. Finally, Mr. Oyalo associated himself with the submissions of Mr. Ondieki that the learned Judges of the superior court failed in their duty as the first appellate court as they did not re-evaluate the evidence. Mr. Oyalo referred to various authorities in support of his submissions.

On his part, Mr. Kaigai submitted that the case against the appellants and their co-accused was proved to the required standards. On the issue of the charge, he contended that the charge was not defective as the assailants were armed with pistols and knives.

On the issue of language used during the trial Mr. Kaigai pointed out that the record showed that there was a court clerk present during the trial and that all the accused persons cross-examined the witnesses. As regards evidence of identification, Mr. Kaigai drew our attention to the fact that the 1st appellant was identified by ***F.O.*** *(PW1)* and ***V.O.*** *(PW3)* whose evidence was supported by the evidence of ***N.O.*** *(PW5)*.

As regards the 2nd appellant, it was Mr. Kaigai's submission that the 2nd appellant was found in possession of stolen items and that his defence was considered and properly rejected.

As regards the 3rd appellant, Mr. Kaigai conceded that this appellant was identified by PW4 who was 14 years old but in his view, this was not a child of tender years since from her testimony it was clear that she was sufficiently intelligent to testify on oath.

On the issue of recent possession of stolen items, Mr. Kaigai submitted that the evidence of ***Supt. Nyaosi*** *(PW16)* clearly proved that all the seven suspects were found in the house in which most of the items stolen during the robbery were recovered and that this recovery was less than 24 hours from the time of the robbery. Mr. Kaigai therefore asked us to dismiss this appeal.

The appellants (*and their deceased co-accused*) were convicted essentially on evidence of identification and being found in recent possession of a large portion of items that had been stolen during the robbery. It must be remembered that the robbery took place on the evening of *23rd August, 1995* and the appellants and their confederates were arrested on the following day in a house where items stolen during the robbery were recovered. Each appellant gave an explanation in a bid to distance himself from the recovered stolen items but their defences were rejected by both courts below.

Counsel appearing for the three appellants before us raised various grounds of appeal some of which, in our view, were of little substance. For example, there was the question of the language used during the trial. The record of the trial court clearly shows that on the very first day the appellants appeared in court though before a resident magistrate, the language of interpretation is shown as "*English/Swahili*". In their unsworn statements, each one of them addressed the magistrate in Swahili. There can be no doubt that the appellants participated fully and understood what was going on during the proceedings in the trial court. There was then the issue of a "***defective charge sheet"***. There is no substance in that ground. The particulars in the charge sheet clearly stated that the accused with others not before court while armed with pistols, knives and pangas, robbed the complainants and in doing so, used violence on the victims even killing one of the victims. What more did the appellants want to be stated in the charge sheet?

In our view, the main points of law raised in this appeal relate to identification and the doctrine of recent possession. As we have already stated elsewhere, the conviction of the appellants was based essentially on the evidence of being found in possession of some, nay, most of the goods stolen during the robbery. In this appeal, the two courts below made the concurrent findings that the appellants had been properly identified by some of the victims of the robbery. Then there was evidence of recent possession. How should the evidence of identification be approached? In ***ABDALLA BIN WENDO AND ANOTHER V. R.*** **(1953) 20 EACA 166** the predecessor of this Court said:-

"***Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

The above was cited with approval in ***RORIA V. R.*** **[1967] E.A. 581** and subsequent decisions of this Court. In the famous case of ***R. V. TURNBULL*** **[1976] 3 ALL E.R. 549** at pp. 551-52 the Court of Appeal in England stated:-

"***Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.***

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or

identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

Applying the foregoing to the facts of the appeal before us, we find that the learned trial magistrate was alive to the issue of identification and how the same ought to be handled. In the course of her judgment, the learned trial magistrate said:-

"***As for the offences under count 2, 3, 4 and 5, the accused's are jointly charged with the offences of Robbery with violence contrary to section 296(2) of the Penal Code on each of these counts. The offences were all committed in the course of the same transaction i.e. robbery at the house of F.O. (PW1) on 23rd August, 1995. The offence was committed at night. The house, as per the evidence of the prosecution witnesses, was very well lit. The question therefore arises, were the accuseds properly and positively identified? Could they have been mistaken identity? (sic). In robbery cases, the issue of identification is very vital. The court should examine closely the circumstances in which the identification by each witness came to be made. Various questions should be considered. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impended in any way e.g. by a press of people, trees, passing traffic? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long a period elapsed between the original observation and the subsequent identification to the police? In relation to the latter question, I have in mind the identification of an accused at an identification parade and not dock identification. In this instant case, the evidence of F.O. (PW1), her children and guest is to the effect that the house was brightly lit as it was at night. That the sitting room has a main light with 6 lights hanging on (****I believe she meant a chandelier from this description****) 2 fluorescent tubes and 2 small lamps on the wall side. This is the sitting room where the robbers first entered when the robbers entered."***

In view of the foregoing, we are satisfied that the learned trial magistrate had the correct approach in dealing with the issue of identification. We have considered the submissions by counsel appearing but bearing in mind the approach by the trial court as confirmed by the superior court, we are unable to fault the two courts on the issue of identification.

Mr. Oyalo submitted that the 3rd appellant was identified by PW4 who was a child of tender years. But the learned trial Magistrate who had the advantage of seeing the witness was of the view that the witness was sufficiently intelligent and hence saw no reason to subject her (the witness) to examination. Indeed, in ***KIBANGENY ARAP KOLIL VS. R.*** **[1959] E.A. 92** at p. 94 the predecessor of this Court had the following to say on the same issue:-

"***There is no definition in the Oaths and Statutory Declaration Ordinance of the expression "child of tender years" for the purpose of section 19, but we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under***

fourteen years; although, as was said by LORD GODDARD, C.J. , in R. V. CAMPBELL (1), [1956] 2 ALL E.R. 272,

"*Whether a child is of tender years is a matter of the good sense of the court. ……."*

where there is no statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender years.

Section 19 (1) provides, as we have seen, that where such a child does not in the opinion of the court understand the nature of an oath his evidence may be received unsworn if the court is satisfied of his intelligence and that he understands the duty of speaking the truth. This necessarily implies that before the child can be allowed to give evidence upon oath (or affirmation) the court must satisfy itself that he does understand the nature of an oath. Such was the interpretation placed on the passage by this court in the recent case of NYASANI S/O BICHAN V. R. (2), [1958] E.A. 190 (C.A.), where after reciting the section we held:

"*It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding of this question is in the negative, to satisfy itself that the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."*

In view of the foregoing, we cannot fault the trial Magistrate for accepting the evidence of PW4 on oath. The witness was said to be fourteen years, not under fourteen.

Apart from the evidence of identification, the appellants and their co-accused were found in a house where, according to ***Supt. Nyaosi*** *(PW16)* they were celebrating, drinking, eating and watching T.V. In that house, a large number of items stolen during the robbery were found. The appellants did not have acceptable explanation on how they came to be in that house. In ***ANDREA OBONYO V. R.*** **[1962] E.A. 542** at p. 549 the predecessor of this Court said:-

"***All criminal charges must, of course, be proved beyond reasonable doubt. As was pointed out in KANTILAL JIVRAJ V. R. (2), the presumption which arises from the possession of property recently stolen is merely an application of the ordinary rule relating to circumstantial evidence. Where the evidence is circumstantial, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.***

When a person is charged with theft and, in the alternative, with receiving, and the sole evidence connecting him with the offences is the recent possession of the stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more probable or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be some doubt as to which of the two offences he has committed. That position is justified because the decision is not between guilt or innocence, but between whether he is guilty of theft or receiving, it having been proved that he is guilty of one of the other."

In view of the foregoing, we are of the opinion that the two courts below were entitled to find that the seven suspects in the house at Kawangware were in joint possession of the property which had been recently stolen during the robbery at the residence of F.O.. They offered no explanation as to how they had come by the items and in those circumstances, the courts below were entitled to conclude that they had participated in the robberies.

An issue was raised regarding the duty of the first appellate court. It is true that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld – see ***OKENO V. R.*** **(1972) E.A. 32**. In the present appeal we are of the view that although the first appellate court did not properly re-evaluate the evidence, nonetheless, that court considered the salient points raised in the appeal before it and came to the same conclusion as did the trial Magistrate that there was sufficient evidence of identification and recent possession of property stolen during the robbery. It must be remembered that even in **OKENO case** (supra) although the first appellate court was found wanting in its duty to re-evaluate the evidence, the Court of Appeal dismissed the appeal.

For all the foregoing reasons, we are satisfied that the appellants were convicted on very sound evidence. As regards sentence, we note that the appellants were sentenced to death on the three counts (*2, 3 and 4*). One can only die once and as we have pointed out in earlier judgments, the proper approach is to impose a death sentence only on *one count* leaving the sentences on other counts in abeyance. We order that the appellants will be sentenced to death only on one count **(second count)** leaving the sentence on *count 3* in abeyance. For avoidance of doubt, the convictions on *counts 4, 6 and 7* are quashed and the sentences imposed thereon set aside.

These shall be our orders.

Dated and delivered at Nairobi this 17th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR