IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 329 OF 2006

PAUL THUO MBURU

DANIEL NYORO MAKUMI.....APPELLANTS

AND

REPUBLIC .....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 14th December, 2005

in

H.C.CR.A. NO. 779 & 780 OF 2003)

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JUDGMENT OF THE COURT

This is the second and last appeal by *Paul Thuo Mburu* (*Mburu*) and *Daniel Nyoro Makumi* (*Makumi*) or "*the appellants*" against their conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code and for rape contrary to section 140 of the Penal Code. Mburu was the second accused and Makumi was the first accused when they were tried before Nairobi Principal Magistrate, Mrs. Mutoka, on two counts of robbery with violence and one count of rape each. They were convicted on both counts of robbery but the rape charges were reduced to indecent assault for which they were duly convicted. On appeal to the superior court, they were both acquitted on one count of robbery but were convicted on the other. The superior court however reversed the finding on indecent assault and convicted the two appellants on the original charge of rape. They were then sentenced to death on the robbery charge while the sentence on the rape charge was, quite properly, left in abeyance. They now come before us, as stated earlier, on their last appeal.

The facts and circumstances of the case as found by the two courts below are quite distressing. At about 5.30 p.m. on 8th July, 2001, ***I K M*** (PW1) (I) was in his house at Kikeni Road in Karen, Nairobi. With him were his friend, ***JM*** (PW2) (J), his girlfriend, ***JZ*** (PW3) (JZ), and his house-help. The three were watching television in the sitting room while the house-help was busy with house chores in the kitchen. Suddenly four men entered the house and confronted them. The leading one had a firearm which he aimed at the trio ordering them to lie face down. The armed man then yanked out the T.V. cable and used it to tie up I wrists behind his back. The other three assailants tied up J (PW2) and the house-help as the gang started ransacking the house collecting clothing and other household items and

packing them into Ian's car, Reg. No.[particulars withheld] which was parked outside. The armed leader of the group, identified by JZ as ***Mburu***, grabbed her hand and tried unsuccessfully to remove her ring. He pulled her up and demanded money asking her where her husband was but she said he was not present. The man then placed the gun on her temple and pushed her towards the bedroom. Inside a small bathroom there, he ordered her to strip naked, which she did, as he still held the gun at her face. He took a belt and tied up JZ's right leg to the toilet sink whereupon he ordered her to bend and touch the floor while facing the toilet bowl. He unzipped his trousers and raped her, while cautioning her of dire consequences if she made any noise. When he was done, he ordered her to sit on the floor and he took her shorts, wiped his penis with it, and ordered her not to look at him or he would kill her. He walked out and gave the firearm to another man who also entered the bathroom and forced JZ to perform oral sex on him. At that time JZ was crying uncontrollably. The man ejaculated into JZ's mouth and she started vomiting. When he finished, he ordered her to wipe her mouth with her shorts which he threw at her. As the man walked out, another man, identified by JZ as ***Makumi***, took over the gun and commanded her to shut her eyes and lie down on her back. With half closed eyes, JZ saw him lower his trousers upto to the knees and he lay on top of her. He too raped her. He rose up to go after wiping himself and ordered JZ to sit up as she continued weeping so hard that she did not see him going out. A fourth man then entered the bathroom and he too wanted oral sex. He ordered her to open her mouth, which she did, and he inserted his penis. JZ was however crying so loudly at the time that the man pulled out his penis and left. Mburu then returned to the bathroom and commanded her to dress up. He removed her into the bedroom where he tied her ankles with a belt and the wrist behind her back with a T-shirt and tied the two together. He left and locked the bedroom door.

The ordeal for the house occupants lasted about ten minutes according to James. The gang then drove off in Ian's vehicle which, together with the other stolen items, were valued at Shs. 607,755/=. Soon after, I, J and JZ were able to untie themselves and scream for help. JZ disclosed that she had been gang-raped and a neighbour offered to take her to hospital in his car. On the way they met police officers to whom they reported the incident. The officers, however, took them back to the house where they took statements. On the advice of I, who feared an infection on J, she took a shower before they proceeded to Hardy Police Station where P3 forms were issued and she was medically examined the same evening at about 8 p.m. by ***Dr. Zephania Kamau*** (PW. 10). She told the police she could identify at least three of the assailants if she saw them again.

About ten days after the robbery, on 17th July, 2001, four police officers from Lari Police Station were on foot patrol along Thika flyover road at Kamae. Among them were ***Pc. Alex Mureithi*** (PW6) and ***Pc. Samuel Kungu*** (PW8). They flagged down a motor vehicle Reg. No.[particulars withheld] which had been circulated to all police stations as a stolen vehicle. Mburu was driving the vehicle while Makumi was seated at the back. With them was a third person seated at the front. The driver was ordered to get out and open the boot. As he got out of the car in obedience to the order, Makumi and the third person also got out of the car and suddenly the third person pulled out a gun and shot at Pc. Mureithi. He missed. Pc. Mureithi was faster and more accurate. He returned fire and shot the gunman dead. Mburu and Makumi took to their heels heading towards a maize plantation off the road but the officers chased and caught them. They were taken to Kiambu Police Station where various charges were subsequently laid against them.

On 19th July, 2001, the investigating officer in this case, ***Sgt. Micah Chekpkwony*** (PW12) went to Kiambu Police Station and interrogated the two appellants. Later, on 26th July, 2001, he took the two to Langata Police Station for further investigations and on 1st August, 2001 identification parades were arranged to see whether the three witnesses, I, J and JZ, could identify the suspects. I and J were unable to. JZ however identified Mburu as the leader of the gang who raped her first, and Makumi as the third rapist. The two were then charged with the offences stated earlier, and appeared in court for plea on 8th August, 2001.

In his defence, Mburu said he was a wholesale vegetable seller at Korogocho, Gikomba and Githurai in Nairobi. On 17th July, 2001, he was harvesting some vegetables from a shamba near Thika flyover road, when he heard gun shots from the road. Shortly thereafter he saw many people accompanied by

policemen. The policemen then arrested him on suspicion that he was a robber despite his protests. He was taken to Kiambu Police Station, then Langata Police Station where identification parades were conducted, and later he was charged with offences he knew nothing about. He claimed he was mistakenly identified by JZ.

Makumi for his part said he was a taxi diver and a part-time preacher of the Akorino sect. On the alleged day of the robbery, 8th July, 2001, he was meeting some three people in Kiambu town where one of them agreed to buy his car. They drew an agreement that afternoon and he was paid a deposit. He denied committing the offence and challenged his identification by JZ as mistaken. He also denied the details of his arrest at Thika on 17th July, 2001. Finally, he referred to other criminal cases in Kiambu court where he had been acquitted for lack of evidence.

Both courts below appreciated, and correctly so, that the case for the prosecution stood or fell on the evidence of JZ (PW3). She was the only identifying witness who connected the two appellants with the offences charged. It is also evident from the record that the two courts below were properly guided on the law relating to evidence of a single witness on visual identification and were cautious in the manner they evaluated that evidence. In the end JZ's evidence was believed as credible and reliable, hence the convictions now challenged before us.

As this is a second appeal, only matters of law may be raised – see ***Section 362*** of the Criminal Procedure Code. Mburu drew up his own memorandum of appeal raising four grounds but an advocate was subsequently appointed to act for him. The advocate, Mr. Evans Ondieki, raised 8 grounds in a supplementary memorandum of appeal, but he argued them in clusters as four grounds. We shall deal with these grounds first.

The first cluster in grounds 2 and 3 relates to identification. In his submission, Mr. Ondieki asserted that the visual identification made of the appellant by JZ was not free from any possibility of error. That is because the circumstances under which she purported to identify Mburu were stressful and the lighting in the small bathroom where she was gang-raped was not sufficient. The source of lighting was described as "*sunlight filtering through a window which illuminated the faces of the attackers*." In such circumstances, he submitted, other independent evidence was necessary but was lacking. As for the identification parade arranged to test the veracity of JZ's identification at the scene, Mr. Ondieki submitted that it was of no probative value since JZ had seen photographs of Mburu in the print media the day following his arrest at Thika. JZ, in his view, may have been honest, but as it happens in real life, she may have been mistaken. He also attacked the manner in which the identification parade was organized by ***IP. Jimmy Kigogo*** (PW4).

We have carefully examined this aspect of the matter and the analysis of it made by the two courts below. In their re-evaluation of the evidence, the superior court (Lesiit and Makhandia, JJ.) stated as follows: -

"In this case and as correctly submitted by learned State Counsel, we note that the offence was committed in broad daylight so that the question of lighting conditions at the scene cannot possibly arise. The issue is whether PW3 had an opportunity to observe any of the appellants as to be able to comfortably identify them subsequently. According to the recorded evidence none of the robbers were disguised. PW3 had three encounters with the 1st appellant during the incident. The first encounter is when he tried to remove the ring from the index finger of PW3 to no avail. He then pulled her up and ordered her to proceed to the bedroom. According to PW3 she: -

".....looked at his face and marked his appearance. He asked me where the money was and where my husband was. I told him my husband had gone to town. By this time I was standing and facing him....."

In our view it would appear that PW3 spent sufficient time with the appellant during this encounter as to be able to notice his appearance. They even engaged in a discussion. The 2nd encounter was in the bedroom PW3 testified: -

".....when we entered the bedroom others joined them and he ordered me to sit down on the floor and shut my eyes and face the wall while the gun was trained at my temple....."

It would appear again that as PW3 was being dragged into the bedroom, she was in a position to observe the 1st appellant, for it she was not seeing him, it would not have been necessary for the 1st appellant to have ordered her to shut her eyes and face the wall. Finally, the last encounter was in the bathroom when the 1st appellant raped PW3. According to PW3: -

".....the bathroom is very small. He was very close to me and was ahead of me pointed the firearm at my forehead....when he finished he told me to sit down and I sat on the floor. He picked my shorts and wiped his penis with it and ordered me not to look at him or he would kill me with firearm while he pointed at me....."

The 1st appellant it would appear noticed that PW3 was looking at him and that is why he ordered PW3 not to look at him. When appellant cross-examined PW3 she stated that:-

"....it was you who was with me for a long period of time. I can never forget you at all. I marked your height, your complexion, a facial appearance especially facial appearance. I marked the appearance of your beard I was able to describe you to the DCIO and he said he would refer me to the CID to draw a sketch...."

From all the forgoing we are satisfied as indeed was the trial magistrate that PW3 had sufficient time with the 1st appellant as to be able to subsequently identify him. In coming to the conclusion that the identification of 1st appellant was proper, the learned trial magistrate correctly applied the principles set out in the case of WANGÓMBE VS REPUBLIC (1988) KLR 149. The trial magistrate also came to the conclusion that this particular witness was credible and reliable. This is a finding based on the demeanor of the witness which we cannot fault on appeal as we did not have the opportunity to observe her as she testified unlike the trial court. From the recorded evidence, we agree with the trial magistrate that this witness was alert during the ordeal. She observed each and every move of the 1st appellant."

We make no apology for reproducing that excerpt *in extenso* because we think it puts the matter of Mburu's identification to rest. Needless to say we agree with the analysis of the evidence and have no reason to differ with the findings of the two courts below on identification of Mburu at the scene. As regards the supporting evidence from the identification parade, the superior court rejected the complaints that the parade was not properly organized; that JZ had seen the photographs of Mburu in the print media; that JZ was shown to Mburu before she proceeded to identify him; and that there was no description of the suspects in the first report made to the police by JZ. The reasons given for rejection of all those contentions were, in our view, well founded on the evidence on record. JZ's identification of Mburu at the scene was therefore well supported by her positive identification of him at the identification parade. In the circumstances we find no error of law in relying on the totality of the sole evidence of JZ to convict the appellant Mburu. That ground of appeal fails.

Mr. Ondieki, in his second cluster of grounds of appeal Nos. 6 and 8, submitted that the superior court did not analyse the evidence on record. If the court had done so, it would have noticed that Mburu was deprived of an opportunity to defend himself when some court files he had demanded for his defence were not availed. That submission was obviously made in ignorance of the record that all the files demanded by the appellant had been availed except one which was withheld by the trial magistrate in Kiambu who was writing the judgment in the matter. The files which were produced by the appellant confirmed that he had been acquitted in various cases and such acquittals were considered in the analysis of the evidence on record in this case. We find no prejudice to the appellant and we dismiss that ground of appeal also.

The third ground was based on ground 4 of the supplementary memorandum of appeal to the effect that the appellant's constitutional rights were breached and therefore his trial was a nullity. The basis for

that submission was the indication made on the charge sheet that the appellant was arrested on 17th July, 2001 but was taken to court for plea on 8th August, 2001, after a period of about 22 days. ***Section 72 (3) (b)*** of the Constitution was thus contravened.

We are fully aware of the gravity of the provisions of ***Section 72 (3) (b)*** of the Constitution as read with ***Section 77 (1)*** thereof. The consequences of breach of those provisions have been repeatedly stated by this Court and Mr. Ondieki referred us to recent authorities in that regard, among them **Albanus Mwasya Mutua v. R. Cr. A. No. 120 of 2004 (unreported)** and **Gerald Macharia Githu vs. R. Cr. A. No. 119 of 2004 (unreported)**. The case before us would have attracted such consequences if the circumstances of arrest and arraignment fell within those constitutional provisions, but they do not. On the evidence on record, the appellant was arrested on 17th July, 2001 on suspicion of having committed other offences and indeed, it was his evidence that he was charged with various offences before other courts, records of which he relied on in his defence. He was thus in lawful police custody when the investigating officer in this case went for him and eventually decided to charge him with the offences referred to earlier after the identification parades organized on 1st August, 2001. Within one week the appellant was in court for plea. The complaint has no factual or legal basis and we reject it.

Finally, Mr. Ondieki argued grounds 1 and 5 as one. It relates to failure to apply legal principles and in the process dismissing the appellant's defence of *alibi* without any basis. The main defence of Mburu as stated above was that he was innocently in a shamba near the scene of his arrest on 17th July, 2001 when he was mistaken for a robber and was arrested. He said nothing about his whereabouts on the day of the robbery and was under no obligation to say anything. His evidence was considered in the totality of other evidence on record and was rejected by the two courts below. The superior court stated: -

"We also note that the alibi defences were raised during the defence hearing. It was never raised early enough to accord the prosecution opportunity to investigate the same. .....

As for the 1st appellant he merely stated: -

".....the charge I knew nothing about and I do not know where it happened....."

The rest of his statement relates to the circumstances under which he was arrested. Throughout the trial the 1st appellant never indicated that he had an alibi defence. It was sprung on the prosecution during the defence hearing."

We agree with the conclusion by the superior court that the *alibi* was an afterthought and was properly rejected owing to preponderance of credible prosecution evidence to the contrary.

The upshot is that the appeal by the appellant, Mburu, has no merits and is dismissed in its entirety.

As for the appeal by Makumi, ten grounds were raised in a memorandum of appeal drawn in person and argued by learned counsel, Mr. Ntenga Marube. The main ground relates to identification of Makumi by JZ (PW3) who, as stated earlier, was the sole identifying witness. Mr. Marube particularly took issue with the conduct of the identification parade in which Makumi was picked out by JZ and submitted that it was conducted in flagrant disregard of the rules and in particular ***Standing Order 6 (iv) (d)*** of the Police Standing Orders. He referred us to the identification parade forms exhibited on the record and the evidence of ***CIP Peter Oruko*** (PW11) who conducted the parade. The forms indicate that the parade was conducted on 1st August, 2001, ten minutes after the parade in respect of Mburu was conducted. The same members of the parade were used on both occasions and it was conceded, even by the prosecution, that Makumi was the only person in the parade with a visible wounded face and swollen eye. While CIP Oruko recorded that Makumi was standing between members 7 and 8, he testified instead that he stood between 4 and 5. The officer also lied about the time the parade was conducted as 4.15 p.m. to 4.30 p.m. while the exhibits produced by him indicated 3.30p .m. to 3.40 p.m.

The shortcomings in the identification parade were indeed appreciated by the superior court which stated that they were "not without merit." The court however continued: -

"Although the omission by the parade officer was most unfortunate, we are nonetheless able to hold that the appellant was not thereby prejudiced, since all the witnesses to the crime did not say that one of the robbers had a swollen face and wounded eye during the incident. That omission would have been material if that was the case. In any event PW3 did not testify that he identified the appellant courtesy of the swollen face and wounded eye. Finally it would be purely speculative if the appellant maintained that, that was the basis of his identification."

With respect, we think the superior court did not seriously and properly evaluate that issue. The same issue recently arose in **David Mwita Wanja & 2 others v. R. Cr. A. No. 117/2005 (unreported)**, and this Court stated as follows: -

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under *section 5* of the Police Act *Cap 5* Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, *Standing Order 6(iv) (d)* and *(n)* state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail:- …….....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

The parade conducted in respect of Makumi clearly served no purpose if the same members of the parade used in another parade ten minutes earlier were used for the same witness to pick out the suspect.

Unlike the earlier parade in respect of Mburu, which we have held was properly conducted, Makumi was the only strange person in the parade and was easily identifiable. The fact that he had visibly different features on his face only compounded the issue. It is also apparent that the parade officer lied about the details of the parade. The value of the parade thus conducted was irreparably compromised and we would for ourselves have found, and now do find, that the parade was of no evidential value. We agree with Mr. Marube that such evidence was for rejection.

But that is not the end of the matter. The identification evidence of JZ at the scene of crime is still on record and she did point out the person in the dock referred to as the 1st accused as the third person who raped her. That evidence was believed by the trial magistrate and the superior court and on that basis, Mr. Kivihya, learned state counsel, pleaded with us to accept the evidence as the sole basis in support of the conviction and dismiss the appeal. For his part, Mr. Marube submitted that it was not safe to do so as the possibility of a mistake cannot be ruled out. Firstly, because the robbery and rape took barely 10 minutes and the prevailing circumstances were not conducive to positive identification. When JZ made contact with the third rapist, the only time she did so, in the small dimly illuminated bathroom, she was in deep distress after the ordeal from the first two rapists. She was vomiting and crying profusely and stated in her evidence:-

"So when he finished I was still crying. He ordered me to wipe my mouth or wash it. I used a khaki short (MFI -2) belonging to Ian to wipe myself. Just then a 3rd one entered as I was still wiping my mouth. He ordered me to lie down facing up. I was looking at him and he had the same gun that the 1st and 2nd one had used. They would each take the gun from the other while leaving and entering variously. So this 3rd one pointed the gun at my face and ordered me to shut my eyes but I never shut them completely. Then I saw him pull down his trousers and he was naked right up to the knees. He then lay on top of me and inserted himself into me. He inserted his penis into my vagina. When he finished he rose up and used the short (MFi-1) to wipe himself and he ordered me to sit down. I was now weeping hard and did not look at him but he walked out."

That was all the evidence connecting Makumi with the offences of robbery and rape and, in Mr. Marube's submission, the circumstances were so stressful for JZ that the possibility of mistaken identity cannot be ruled out.

The issue, as far s we can see it is this: in a case where no identification parade is carried out to test the veracity of the witness's assertion that the accused was at the scene of crime, or where, as in this case, there was an identification parade which was botched up and was thus discounted, would the sole evidence of the witness be ineffectual or insufficient to sustain a conviction? We have agonised over the issue given the finding made by the two courts below that the sole witness, JZ, who connected the appellant Makumi with the offences charged was found to be credible and reliable. The law is also clear that there is no particular number of witnesses required for proof of any fact (Section 143, Evidence Act) and that, subject to well-known exceptions, a fact may be proved by the testimony of a single witness – **Abdalla bin Wendo & Anor v. R. (1953) 20 EACA 166**. On the other hand, the burden weighs heavily on any court considering the solitary evidence of a witness in respect of identification. The caution in the ***Abdalla bin Wendo*** case is that such evidence must be tested with the greatest care. Even where a witness is found to be honest, the possibility of a mistake must be carefully scrutinised and excluded. As this Court stated in **Roria v R [1967] EA 583** at pg. 584: -

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity."

There is also a line of authorities, some of which were cited before us, which have held that *"dock*

identification is generally worthless" in **Ajode v Republic 2004 2KLR** and that *"such identification is almost worthless without an earlier identification parade"* in **Kiarie v Republic [1984] KLR 739.**

We have considered these and several other decisions and in the end, we have come to the conclusion that each case must rest on its own peculiar facts and circumstances. The case of **R. V. Turnbull [1977] QB 224**, decided by the Court of Appeal in England, which has been cited in our courts with approval, provides useful guidelines. The court stated: -

"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. [.....]

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

We have no quarrel with the assessment of JZ's evidence as reliable and credible. We have reproduced it above as the only evidence upon which the life of the appellant hangs. The pun is unintended. It would perhaps have been different if the charges did not attract the ultimate penalty of death. But, in the circumstances of this case, we have reluctantly come to the conclusion that it was necessary to examine other evidence, circumstantial or otherwise, supportive of JZ's assertion in respect of the identity of the appellant, Makumi. Such evidence was lacking in view of our finding that the identification parade was botched up by the parade officer. It is regrettable that CIP Oruko did not live up to his duties in investigation of this crime.

In the result we allow the appeal, quash the conviction of the 2nd appellant, ***Daniel Nyoro Makumi***, on the two counts of robbery and rape and set aside the sentence of death imposed against him. He shall be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 25th day of April, 2008.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OFA PPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR