REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & GATEMBU JJ.A)

CRIMINAL APPEAL NO. 384 OF 2010

BETWEEN

HENRY KARANJA MUIRI …… APPELLANT

AND

REPUBLIC…… RESPONDENT

(APPEAL FROM A JUDGMENT OF THE HIGH COURT AT NAIROBI BY (LESIIT, J.) DATED 16TH SEPTEMBER 2010

In

HC.CR.C. NO. 100 OF 2010)

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JUDGMENT OF THE COURT

This appeal is by **HENRY KARANJA MUIRU** against the judgment of the High Court (Lesiit, J.) on 16th September 2010 by which the appellant was convicted and sentenced to death for the murder on 1st November 2008 of **JESSE GITAU KABIRU** and **KEZIAH WAIRIMU KARATU**.

In challenging the conviction and sentence, the appellant's advocates M/s Wandugi & Co. have filed a Supplementary Memorandum of Appeal raising some eighteen grounds of appeal. With all due respect, we find it necessary to state, as we have done on many occasions in the recent past, that it is critical that counsel re-acquaint themselves with the legal requirements for memoranda of appeal. The controlling notion, as captured in **Rule 64(2)** of the Court of Appeal Rules is **conciseness** which is best obtained by focus and brevity. The sub rule is simple and mandatory;

"(2) the memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact … which are alleged to have been wrongly decided."

(Our emphasis)

From the unduly lengthy memorandum of appeal filed on the appellant's behalf, the issues that emerge are in fact few, namely;

(i) Whether the appellant was properly identified as the shooter of the two deceased.

(ii) Whether the learned trial judge properly and impartially analyzed and considered the evidence before her.

iii. ***Whether an adverse inference should have been drawn from the prosecution's alleged failure to call a vital witnesses***

iv. ***Whether the learned judge shifted on to the appellant the burden of proving his alibi.***

v. ***Whether the prosecution evidence was vitiated by numerous contradictions.***

When he rose to argue the appeal, Mr. Wandugi, the appellant's learned counsel commenced by submitting that the appellant's conviction on both counts was unsafe as the evidence was insufficient. He laid particular emphasis on the fact that none of the witnesses who testified saw the actual shooting of the deceased. He took the view that in so far as the judgment of the learned trial Judge seemed to suggest that certain witnesses had actually seen the shooting itself, she fell into the grave error of creating direct evidence of the commission of the crime, unsupported by actual evidence on record before her.

Counsel also took issue with what he submitted to have been the failure of the trial Judge to comply with the law by not having **PW1** recalled to testify after she (Lesiit, J.) took over the conduct of the trial from M. Apondi, J.. Counsel submitted that the said non compliance with that aspect of procedural law was prejudicial to the appellant in that it compromised his fair trial rights. Even though he conceded that the defence never raised the issue of recalling of the witness with the trial court, Mr. Wandugi nevertheless took the view that the entire trial was vitiated and should be declared a nullity.

Mr. Wandugi next submitted that the evidence tendered by the prosecution was riddled with contradictions and should not have been relied on to found a conviction. He pointed at the evidence of **PW1** who at one point had stated that she saw a man and a woman walk into Jesse's butchery only to later say that she did not see them. Counsel also pointed at the description of the appellant which **PW1** at first gave as that of a brown man wearing a jacket and trousers yet in her statement she had stated he had a cap on. Counsel contended that evidence marked by such contradictions could not be relied on as the court could have no basis upon which it could prefer and choose one version over the other.

Turning to the issue of identification, Mr. Wandugi submitted that although PW1, PW3, PW4 and PW7 all testified that they had identified the appellant at the scene, it is only the **PW1** who attempted to give a description of the assailant. These witnesses were able to pick out the appellant at subsequently mounted identification parades but counsel urged us not to place much weight on such identification evidence as it had not been preceeded by the witnesses' description of the assailant. To support this line of argument Mr. Wandugi cited to us this Court's decision of **GABRIEL KAMAU NJOROGE Vs. REPUBLIC** [1982-88] IKLR 1134.

Mr. Wandugi next submitted that the learned trial Judge erred in rejecting the appellant's defence which was in the form of an alibi. It was counsel's contention that the appellant's report to the police that he

had been car-jacked and taken to a forest on the material day was plausible and was raised at the earliest opportunity and was worthy of exploration as opposed to being lightly and peremptorily rejected to his prejudice under circumstances suggesting that the learned Judge had wrongly shifted on to the appellant the onus or burden to prove the alibi defence.

Counsel for the appellant concluded his submissions with the contention that the prosecution case was fraught with many grey areas that rendered the conviction unsafe. Not even the offence of manslaughter stood proved, Mr. Wandugi submitted, as he urged us to allow the appeal, quash the conviction and set his client, who has been in custody since 2008, at liberty.

When he stood up in opposition to this appeal, the learned Senior Principal Prosecuting Counsel, Mr. Monda, took the position that the conviction should be upheld not for murder, but for the lesser offence of manslaughter. He did not support the description of how the offence occurred. Counsel submitted that he had great difficulty accepting that the appellant could have been talking to his wife before inexplicably following her to the butchery manned by Jesse then shooting the two to death.

Mr. Monda referred to this case as ‘a very strange affair’ and therefore took the view that it called for manslaughter as opposed to a murder conviction.

Mr. Monda submitted that it was the appellant who shot the two – his wife and Jesse the butchery owner to death. Four spent cartridges were collected at the scene of the shooting and they were traced to the appellant’s licensed gun. He urged us to reject, as did the trial court, the appellant’s claim that he had been car-jacked on the material day and could not therefore, ostensibly, have been at the scene of the crime at the time it was said to have been committed. Counsel urged that apart from the evidence of identification that placed the appellant at the scene of the fatal shooting, there was other compelling circumstantial evidence sufficient to form a firm basis for the conviction of the appellant albeit, in his submission, for manslaughter.

Regarding the complaint that the appellant’s rights under **Section 200** of the Criminal Procedure Act were violated and negated, Mr. Monda’s contention is that the appellant was at all times represented by able counsel throughout the trial and it behoved counsel to point out any procedural omissions to the court but they did not. Mr. Monda contended further that the failure to recall PW1 occasioned the appellant no prejudice and there was, moreover, other evidence sufficient to establish that the appellant was the culprit in the unlawful killing of the deceased.

In a brief reply, Mr. Wandugi sought to dismiss as in-admissible the evidence of PW4 to the effect that the appellant had presented himself to the Buru Buru police station and essentially admitted the charge. Mr. Wandugi submitted that such self incriminating evidence ran afoul the provisions of the Evidence Act. He also assailed the evidence of the ballistic examiner as being unreliable since the examiner did not bring before the trial court the bullets that he had test-fired. He rested his response by terming the appellant’s conviction unsafe and beseeching us to quash it.

As this is a first appeal, our approach to all the evidence has to be fresh, and exhaustive before reaching our own independent conclusions as demanded of a re-hearing with the rider that we have not had the benefit of hearing or observing the witnesses who gave evidence before the learned trial Judge.

This Court has expressed itself time without number on the duty it bears when dealing with a first appeal and the concomitant right and expectation of an appellant. In **ANN WAMBUI MUTHONI Vs. R** Criminal Appeal No. 91 of 2011, (unreported) for instance, we expressed ourselves as follows;

"This being a first appeal, it is our bounden duty and the appellant is entitled to expect from us a fresh, thorough and exhaustive assessment, appraisal and analysis of all the evidence that was before the trial court so as to reach our own independent conclusion on the guilt or otherwise of the appellant. This is in actualization of the appellant's right under Article 50(2) (q) of the Constitution and is in consonance with Rule 29 (1) of the Court of Appeal Rules which donates to us power to reappraise the evidence and to draw our own inferences of fact."

Similarly, in **CHRISTOPHER MURAYA MUTAHI Vs. REPUBLIC** Criminal Appeal No. 266 of 2010, (unreported) we delivered ourselves thus;

"The principles that we bear in mind while exercising our jurisdiction in this regard are now old hat as can be seen from such cases of notoriety as PANDYA Vs. R [1957] EA 336 and OKENO Vs. R [1972] EA 32. More recently, we restated the same principles in the case of SUSAN MUNYI Vs. KESHAR SHIANI; Civil Appeal No. 38 of 2002 (unreported) as follows;

'As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and make our own independent conclusions.

In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect to disturb them.'

The uncontested facts in this appeal are that on 1.11.08, JESSE GITAU (JESSE) was at his butchery at Ndero Shopping Centre. At about 1.00pm, a man and a woman walked into the butchery. Moments later, shots rang out in the butchery. In their wake, JESSE and KEZIAH WAIRIMU GITAU (KEZIAH), the woman who had walked into the butchery in the company of a man, lay in pools of blood by the counter.

The man who had walked into the butchery with Keziah was then seen, walking out of Jesse's butchery. The man's walk was described by PW1, PW3, PW4 and PW7 as slow and unhurried. It was in fact a majestic and confident stride out of the butchery, gun in hand. He was described as tall and brown. He took his time before getting into a motor vehicle and driving off towards the Steel Rolling Mills.

There is no dispute that following the shooting, JESSE and KEZIAH were put in a matatu and rushed to Thogoto Hospital where the former was pronounced dead on arrival. Keziah was transferred to the Kenyatta National Hospital for further and better treatment but she, too, succumbed to her injuries and expired. The post-mortem examination conducted on the bodies of the two deceased persons showed that they died from gunshot wounds. DR. FRANCIS MAINA NDIANGUI (PW16) established that Jesse had been shot on the left chest cavity, the fatal bullet damaging the heart and left lung before lodging in the spinal column and thoracic spine. A second bullet had been aimed at the head entering by the mouth and into the brain through the base of the skull. The cause of death was brain laceration and chest haemorrhage due to gunshot wounds. On his part, DR. PETER NDEGWA (PW14) found that KEZIAH'S death was due to head and spinal injuries due to double gunshots which fatally lacerated the brain and severed the cervical spinal code.

The evidence of ALEX ONDINDI MWANDAWIRO (PW13) a firearms examiner based at the CID ballistic laboratory, was to the effect that he received a number of exhibits for purposes of his expert examination. These included fired bullets recovered from the bodies of the two deceased persons, some unspent cartridges, as well as Zech Republic – manufactured CZ2075 RAMI Pistol Serial Number A178269. Upon test firing the bullets and making microscopic comparisons, he concluded that the recovered fatal bullets were fired by the same pistol.

It is common ground that the appellant was licensed to hold the gun in question. Indeed, he did produce to the Police Firearm Certificate Number 4260 granted on 4.8.06, Ex 1(b). He had renewed it by payment of the requisite fees for subsequent years.

The central question in this appeal is whether the trial court was correct in finding and holding that the appellant is the man who walked into Jesse's butchery with Keziah behind him on the fateful afternoon before using the gun to shoot both her and Jesse in circumstances disclosing the offence of murder. The answer to that question turns on the correctness or otherwise of the alleged identification of the appellant at the scene. In assessing the evidence of identification that was presented before the trial court, we bear in mind the caution expressed by the full court of the English Court of Appeal in **R Vs. TURNBULL AND OTHERS** [1977] Q.B. 224 AT 228-231 as follows;

"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" If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given."

The fatal shooting of the deceased occurred in broad day light at 1pm. Even though we do not have testimony of any person who witnessed the actual pulling of the trigger in the shooting, there is evidence of witnesses who said the person walked out of the butchery where the shooting occurred seconds later and while still holding the gun. Moreover, one of the witnesses, JENNIFER WAIRIMU GACHORU (PW1), who was Jesse's wife, testified quite creditably that she did see a man pointing a gun at the counter where Jesse was. Her testimony was as follows;

"We left my husband alone in the butchery. Before entering the car, we heard gunshots. When I turned I heard four more gunshots from the butchery …. I saw a man armed with a gun pointing at the counter of the butchery. After he was through, the man walked away without being in a hurry

… I looked at the man who did the shooting. The man was brown and was wearing a jacket and trousers. When he left the butchery, the man was still holding a gun."

When under cross-examination by Mr. Wamwayi before the trial court, the witness was emphatic that she "was able to identify the [shooter] through his face" and in answer to Mr. Wandugi's questions she repeated that she did see somebody pointing the gun at the counter.

The evidence of ZAKAYO MBUGUA KIMANI (PW3) was to the same effect as that of PW1. PW3 was Jesse's friend from childhood and had gone to the butchery so as to accompany his friend on a cow-buying mission that was not to be. He had been in the butchery for about half an hour when the shooting occurred and his evidence was that after Jesse had served a known customer,

"…another man came in while followed by a woman. After a minute, I heard two gunshots. On looking back I found the man holding a pistol. Thereafter the gunman started walking away from the butchery … I saw clearly the man who was holding the pistol. He is the accused in the dock (touching the accused physically)."

He repeated in reexamination that he did see the person who fired holding the pistol while facing the counter.

MARGARET WAMBUI (PW4) is PW1's mother and therefore Jesse's mother-in-law. She was with PW1 and the latter's two children and they stopped by Jesse's butchery en route some family function. After chatting with Jesse, they returned to the vehicle. She narrated what next transpired thus;

"On reaching the vehicle, I opened the door and the children entered. While standing there, I heard a gunshot inside the butchery. In total, I heard three gunshots. Eventually, I saw somebody leaving the butchery while carrying a pistol. On the left hand, he was carrying something that I could not see clearly. Since he was walking slowly, I had the opportunity of seeing him clearly."

She repeated and maintained her having seen the shooter, who was the appellant when cross-examined by Mr. Wandugi for the appellant.

GRACE WANJIRU KARANJA (PW7) is a sister of PW4 and she, too, recounted to the trial court how she was in a party of eight that was going on a dowry-giving mission before they stopped by JESSE's butchery. She heard a sound like the bursting of something inside the butchery. She then saw a person walk out of the butchery. He was a brown man and was not in any hurry.

What emerges from the various witness accounts is that the conditions were certainly conducive to a positive identification of the gunman. It was broad day light. He walked at a slow, unhurried and quite brazen walk reminiscent of the Wild West. He afforded the witnesses a long as opposed to a fleeting look at him. He made no effort to conceal his identify. He was bereft of any fear or concern that he might be identified. There was neither human nor vehicle traffic or any other physical object for that matter to obstruct the witnesses' visual sighting and observation of the gunman. In short, there was nothing in the conditions to lessen the quality of the identification evidence. Ironically, it is that sheer audacity of the gunman that provided the best opportunity for his positive identification.

As regards PW1 in fact, her testimony was more of recognition as opposed to identification of the appellant as the shooter as she had seen him in the neighbourhood before. In answering Mr. Wamwanyi's questions in cross- examination, she stated;

“I have seen the accused before on Kari road. I have seen him on a few times while driving. Usually I used to see him driving a white saloon whenever I take my children to school. His face is not new.”

This being a case of recognition, it lends a greater measure of confidence that the appellant was the shooter. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in **ANJONONI AND OTHERS Vs. THE REPUBLIC** [1980]KLR 59 AT 60;

“This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”

That is not to suggest of course, that cases of misrecognition cannot occur (See **KARANJA & ANOR Vs. R** [2004] KLR 140) and courts are still duty-bound to examine such evidence with great care.

Other than the multiple identification of the appellant as the gunman by PW3, 4 and 6 coupled with his recognition by PW1, the witnesses attended identification parades where they were able to pick him out. Superintendent of Police ABDI KADIR AHMED (PW17) testified as to the manner in which he conducted the identification parades. From that testimony, which withstood searching cross examination by the appellant’s advocate, it seems clear to us that the parades were properly and fairly conducted. The identifying witnesses PW1 and PW7, together with another whose testimony was expunged from the record (PW5) were able to point out the appellant as the person they had seen at the scene of the incident.

The appellant did not raise objection to the manner in which the parades were conducted. In fact, he intimated satisfaction with it and proceeded to sign the Parade Forms in signification of that satisfaction. As for the Form respecting the parades conducted by Acting Chief Inspector ODHIAMBO MAKORI (PW12), the appellant made no comment but proceeded to sign. He had been picked by two other witnesses MARGARET WAMBUI GACHORO (PW4) and ZAKAYO MBUGUA KIMANI (PW3).

PW12 in his testimony stated that the members of the parade were nearly of the appellant’s appearance and age and generally of his height and class of life. Both officers who mounted the parades denied the appellant’s suggestion that he stood out in the parade by being different in height, complexion as well as being shabby from six days in the cells without a change of clothes. To the contrary, it was asserted that he had a regular change of clothes.

On our own assessment of the testimony of the officers who mounted the parades and of the identifying witnesses themselves together with the parade forms, we are satisfied that the parades were well and properly conducted. They buttressed the eventual dock identification of the appellant by the witnesses thereby adding value and worth as contemplated by this Court in **GABRIEL KAMAU NJOROGE Vs. REPUBLIC** [1982-88] 1 KLR 1134 in holding that;

“Dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and the police should then arrange a fair identification parade.”

We are satisfied that there was sufficient compliance with this requirement. Whatever discrepancies

there were in the descriptions given by the witnesses appear to us minor and ultimately immaterial. Human observation and expression is often coloured by individual and personal circumstances. It is not an accurate science and in the end a court must weigh the totality of the evidence to ascertain truthfulness. It is well-nigh impossible to attain a precision of description to the last minute detail.

An assured finding that the appellant was the same one who shot the deceased to death would by necessary and logical implication mean that his alibi defence to the effect that he was nowhere near the locus in quo but was in fact the unwilling captive of car jackers at the material time is fully displaced. At any rate, an examination of that carjacking story only ends up lending greater credence to the prosecution case that the appellant was in fact at Jesse's butchery shooting to kill. The learned Judge was categorical that she did not believe that there was any carjacking incident involving the accused. We are equally incredulous.

We are satisfied that the learned Judge approached the alibi defence quite properly by weighing it against the prosecution evidence whereafter she found it, as we have, to flounder or be displaced in line with this Court's decision in **WANGOMBE Vs. REPUBLIC** [1980] KLR149. We are satisfied that the judge was fully mindful of the law as set out in a long line of authorities including **REPUBLIC Vs. JOHNSON** [1961] 3 ALL ER 969, **KIARIE Vs. REPUBLIC** [1984]KLR 739 and **BENSON MUGO MWANGI Vs. REPUBLIC** [2010] eKLR that an accused person who raises *an alibi* defence does not thereby assume a burden of proving it.

The evidence that the prosecution relied on, and which the learned judge believed, was in character direct evidence and it sufficed to prove that the shooting was the work of the appellant. Even were we to assume, as we were urged by Mr. Wandugi, that the case depended on circumstantial evidence, we would still find it sufficient to found a conviction. The circumstance of the appellant being sighted at Jesse's butchery; his being seen, identified and recognized walking away at a slow, leisurely pace gun still in hand; his being a licenced holder of the 9mm RAMI Automatic Pistol Serial No. A178269; that very gun being established to have fired the bullets that fatally wounded the two deceased; his marital connection to Keziah; his knowledge of Jesse; his improbable and incredible story of being car-jacked in a taxi he could not give details of notwithstanding his claims that he had used it on other occasions before; his being positively picked out by several witnesses at identification parades – all point irresistibly to the fact that the appellant is the person who shot the deceased duo to death.

While accepting the principles that guide a court's interaction with circumstantial evidence as laid down in such cases of note as **REX Vs. KIPKERING ARAP KOSKE & KIMURE ARAP MATATU** 16 EACA 135; **SIMONI MUSOKE VS. R** [1958] E.A. 715 and more recently **SAWE Vs. R** [2003] KLR 364, their application to the appeal before us provides no succour to the appellant. The inculpatory facts established lead irresistibly to the conclusion of the appellant's guilt. They are not capable of explanation on any hypothesis of innocence. There are no co-existing facts that weaken the inference of guilt. There are no exculpatory facts and there is an undeniable cogency compelling the conclusion that the appellant was in fact the shooter. Moreover, given the cogency of the evidence presented, the complaint that the learned Judge should have drawn an adverse inference from the alleged non-calling of some witnesses as held in **BUKENYA Vs. UGANDA** [1972] EA. 549, does not hold.

The only issue that now remains for our determination is whether, having accepted that the appellant was the shooter, the killing amounted to murder, as the learned Judge found, or manslaughter, as Mr. Monda contended. With due respect to Mr. Monda, we are unable to accept that merely because the shooting was "a strange affair" as he put it, or appears inexplicable or apparently lacking in motive in the ordinary and popular sense of the word, then its legal character changes.

There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. All that the prosecution needs to show by way of "*mens rea* is malice aforethought" defined at **Section 206** of the Penal Code as follows;

"…malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

a. ***An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

b. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

c. ***An intent to commit a felony;***

d. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

Bearing that provision in mind, we find no fault with the learned Judge's handling of the issue as follows;

"The prosecution was not able to show the motive for the attack. That is however not mandatory in a murder case. It is however clear that the accused person formed an intention to cause either the death or grievous harm of the deceased persons. He armed himself with a dangerous weapon, a fully loaded gun; walked all the way to the butchery owned by JESSIE, the first deceased; fired shots at him and at his (accused) wife at very delicate parts of the body, the neck, head and chest; and left them for dead."

In the result, we are satisfied, and so hold, that the offence of murder was proved beyond reasonable doubt and the appellant's conviction on both counts was safe and proper. The learned Judge correctly sentenced the appellant to death on both counts but, as he can die but once, also properly suspended the second death sentence.

This appeal therefore fails notwithstanding Mr. Wandugi's great industry and learning in urging it, and it is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 20th day of December, 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR