THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Richard Buteera DCJ, Christopher Gashirabake and Oscar John Kihika, JJA.)

CRIMINAL APPEAL NO. 0033 OF 2020

MUKISA WAHABU::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala delivered by His Lordship Hon. Justice Stephen Mubiru, J delivered on 22nd January, 2020 in Criminal Session Case No. 0412 of 2018.)

JUDGMENT OF THE COURT

INTRODUCTION

The appellant was indicted, tried and convicted of the offence of aggravated defilement contrary to sections 129(3) and 4(a) of the Penal Code Act (Cap 120) by the High Court (Stephen Mubiru J.). He was sentenced on 22nd January, 2020 to 17 years and 10 months' imprisonment.

BACKGROUND

The facts of this case as ascertained from the court record are that S.K and his elder brother P.W.4 Shamran Nsereko were frequent visitors to the home of the appellant where they played computer games at his play station. On the morning of 14th December, 2017 after the morning prayers at the local mosque, the appellant went

back home at around 8:00am with the victim S.K and his elder brother P.W.4 Shamran Nsereko. As P.W.4 Shamran Nsereko played a game on the appellant's computer, the appellant and the victim lay on a mattress in the appellant's room and covered themselves under a blanket. P.W.4 Shamran Nsereko went back home briefly at around midday to run an errand for his mother and on return, found the victim and the appellant still covered under the blanket. He uncovered them and found the two naked. The appellant was lying on his back with the victim's head between the raised legs of the appellant. The victim appeared to be sucking at the penis of the appellant. P.W.4 Shamran Nsereko reported what he had seen to his mother who in turn reported to the victim's father P.W.5 Shamshudiin Kibombo who reported to the police. The appellant was arrested.

The appellant denied having committed the offence. After a full trial, he was convicted as charged and sentenced to 17 years' and 10 months' imprisonment.

Dissatisfied with the decision of the trial court, the appellant appealed to this Court on four grounds namely;

1. *That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus occasioning a miscarriage of justice to the appellant.*

2. *That the learned trial Judge erred in law and fact when he initially ignored the appellant's defence of Alibi which was plausible.*

3. *The learned trial Judge erred in law and fact when he tried to sentence a juvenile on a wrong charge sheet even after receiving confirmation from the appellant's mother thus occasioning a gross miscarriage of justice to the appellant.*
4. *That the learned trial Judge erred in law and fact when he imposed a sentence deemed harsh and excessive given the appellant's age and remorsefulness leading to a miscarriage of justice.*

The respondent opposed the appeal.

LEGAL REPRESENTATION

At the hearing, Dr. Daniel Walyemera Deogratious, represented the appellant on State Brief.

Mr. Ssemalemba Simon Peter, Assistant DPP represented the respondent.

The appellant was present in Court.

Counsel for both parties filed written submissions. They prayed to court to have them adopted as their final submissions. The prayer was granted.

SUBMISSIONS

Appellant's submissions

Ground 1:

That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus occasioning a miscarriage of Justice to the appellant.

It was submitted for the appellant that during the evaluation of evidence, the court is legally bound to evaluate the evidence the of the prosecution and the defence together as a whole but in this case the learned trial Judge considered the evidence of the prosecution in isolation from the evidence of the defence which is contrary to the principles of evaluation of evidence. The case of **Bogere Moses & Anor Vs. Uganda, SCCrA No. 1 of 1997** was cited in this regard.

Counsel for the appellant submitted that the learned trial Judge concluded that it is the accused who committed the offence basing on the evidence of PW 3 and PW 4. That according to the record, the victim (PW 3) testified that it was the appellant who called him to his place at 7:00 am whereupon entering, the appellant told PW 3 to undress and suck the appellant's penis. In cross-examination, PW 3 testified that he did not know that PW4 (his brother) had followed him.

It was submitted that PW 4 whose evidence was corroborative of that of PW 3 in cross-examination testified that the appellant never called the victim but it is PW4 who suggested that they go to the appellant's home and they went together.

It was submitted that the apparent difference in the testimonies of the two witnesses casts the prosecution evidence in serious doubt and it is safe to contend that the sexual act never happened. That PE 1

certifies the appellant's claim that he did not commit the said offence as there was no sign of an unlawful sexual act on the victim.

Counsel submitted that the learned trial Judge did not examine the appellant's defence of alibi that he had raised which was corroborated by evidence of his friend DW 2 with whom they had attended football training that morning when the offence was committed. That the learned trial Judge erroneously examined the law on the identification of witnesses and concluded in favour of the prosecution evidence on identification.

Counsel cited the case of **Bogere Moses (Supra)** and submitted that it is incumbent upon the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. That the trial Judge had considered the prosecution evidence in isolation and he had totally ignored the appellant's testimonies.

Counsel submitted that the learned trial Judge considered the evidence of the prosecution in isolation of the evidence of the defence which is contrary to the principles of evaluation of evidence.

He submitted that the apparent difference in the testimonies of the two prosecution witnesses clearly casts the prosecution evidence in serious doubt.

Ground 2

That the learned trial Judge erred in law and fact when he initially ignored the appellant's defence of Alibi which was plausible.

It was submitted for the appellant that the record of appeal reveals that not only did the appellant deny having committed the said offence but also adduced evidence of a friend D.W.2 in support of his defence of alibi.

It was submitted for the appellant that the prosecution failed to discharge their burden of putting the appellant at the scene of crime and the learned trial Judge erred when he held that the appellant's alibi had been discharged through proper identification of the appellant. The case of **Mushikoma Watete alias Peter Wakhokha &3 Ors Vs. Uganda (SCCrA No. 10 of 2000)** was cited to support the appellant's contention that when the accused puts up a defence of alibi, he does not assume the duty of proving it. The burden to discredit it still rests on the prosecution.

It was submitted that it was a misdirection to rely on the evidence of two identifying witnesses to prove that it is the appellant who committed the offence. That PW 3 and PW 4 testified that they were with the appellant from 8:00 am to around midday while the appellant testified that he is a footballer who left early for training and came back at around 10:00am. That the learned trial Judge had ignored the appellant's evidence of alibi without the prosecution discrediting it.

Counsel for the appellant prayed that this ground of appeal be allowed.

Ground 3

The learned trial judge erred in law and fact when he tried to sentence a juvenile on a wrong charge sheet even after receiving

confirmation from the appellant's mother occasioning a gross miscarriage of justice to the appellant.

It was submitted for the appellant that the learned trial Judge disregarded the evidence of D.W.3, the mother to the appellant who testified that she gave birth to the appellant on 11th March, 2001 and that this was corroborated by a short birth certificate marked D. Ex1 and that the appellant was 16 years at the time of committing the said offence.

Counsel for the appellant submitted that the learned trial Judge was alive to the law regarding determination of the age of a child. The learned trial Judge instead misdirected himself in applying the said law. That as a result the appellant was sentenced on a wrong charge sheet.

Ground 4: That the learned trial Judge erred in law and fact when he imposed a sentence deemed harsh and excessive given the appellant's age and remorsefulness leading to a miscarriage of justice.

It was submitted for the appellant that the learned trial Judge did not cite any reason for such harsh and excessive punishment and that the sentence lacked factual, authentic and statistical basis. That the appellant is a remorseful young boy who needs an opportunity to reform and turn into a good citizen and that this opportunity would be wasted if the long custodial sentence of 17 years and 10 months is not quashed or substituted with a lenient one.

Counsel for the appellant relied on the case of **Kato Sula vs Uganda, C.A Cr Appeal No. 30 of 1999** where the Court of Appeal upheld a sentence of 8(eight) years' imprisonment for a teacher who defiled a primary two school girl.

He also relied on the case of **Kawesa Ivan vs Uganda, CACA No. 404 of 2019,** where court held that a sentence of 15 years imprisonment is appropriate for aggravated defilement;-

Counsel prayed that this Court allows the appeal, quashes the conviction and sets aside the sentence. In the alternative, Counsel prayed that if the conviction is upheld, this Court invokes the provisions of Section11 of the Judicature Act to further reduce the sentence as shall be considered appropriate in the circumstances.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent argued grounds 1 and 2 together and grounds 3 and 4 separately.

Grounds 1 and 2

That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus occasioning a miscarriage of Justice to the appellant.

That the learned trial Judge erred in law and fact when he initially ignored the appellant's defence of Alibi which was plausible.

It was submitted for the respondent that learned counsel for the appellant's contention that the contradiction between the evidence of PW3 and PW4 as to whether it is the appellant who called the

Cheborion JA.

victim is minor and does not go to the root of the case as it is abundantly clear that PW3 and PW4 testified that they went to the place of the appellant to play video games as they always did.
It was submitted that the learned trial Judge considered the evidence and rightly concluded that the prosecution case was that the sexual act complained of was oral sex rather than anal sex.

Counsel submitted that the question of mistaken identity could not arise in the circumstances. He submitted that the learned trial Judge considered the evidence of a grudge put forward by the appellant and rightly concluded that the prosecution's evidence had squarely put the appellant at the scene of crime.

Counsel submitted that the learned trial Judge properly considered the prosecution case along with the defence case and rightly came to the conclusion that the appellant was known to PW 3 and PW 4 and the offence was committed in broad daylight.

Ground 3

The learned trial Judge erred in law and fact when he tried to sentence a juvenile on a wrong charge sheet even after receiving confirmation from the appellant's mother occasioning a gross miscarriage of justice to the appellant.

It was submitted for the respondent that it is abundantly clear from the record of proceedings that a medical report was tendered in court which showed that the appellant was above 18 years at the

time of examination and that the report is dated 19/04/2018, this is three months after the appellant's arrest in December 2017.

It was submitted that there was medical evidence to show that the appellant had earlier been examined on 20th December, 2017 and that the physical and dental assessment showed that the appellant was above 18 years.

It was submitted that the learned trial judge dealt with the issue of the appellant's age basing on scientific evidence before him and rightly came to the conclusion that the appellant was above 18 years at the time of commission of the offence.

Ground 4

That the learned trial Judge erred in law and fact when he imposed a sentence deemed harsh and excessive given the appellant's age and remorsefulness leading to a miscarriage of Justice.

It was submitted that the sentence of 17 years' imprisonment passed against the appellant was neither harsh nor excessive. That while arriving at the sentence imposed on the appellant, the learned trial Judge took into account the fact that the appellant was a first offender and was relatively of youthful age and that he took into account the aggravating factors and the period spent on remand by the appellant before sentencing him to 17 years' imprisonment.

Counsel for the respondent relied on the case of **Mutebi Ronald Vs. Uganda (Criminal Appeal No. 383 of 2019)** where the appellant was sentenced to 23 years' imprisonment by the High Court and on appeal

to the Court of Appeal he was resentenced to 20 years' imprisonment after deducting 2 years and 6 months the appellant had spent on remand.

Counsel submitted that the learned trial Judge sentenced the appellant to 17 years and 10 months' imprisonment after deducting the 2 years and one month being the period the appellant had spent on remand.

Counsel prayed that this Court dismisses the appeal and upholds the sentence passed against the appellant.

APPELLANT'S SUBMISSIONS IN REJOINDER

Counsel for the appellant submitted on grounds 1 and 2 jointly. Grounds 3 and 4 were submitted on separately in rejoinder.

Grounds one and two

That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus occasioning a miscarriage of Justice to the appellant.

That the learned trial Judge erred in law and fact when he initially ignored the appellant's defence of Alibi which was plausible.

It was submitted for the appellant that the contradictions in the evidence of PW 3 and PW4 are major because they raise a lot of doubt as to whether PW4 actually witnessed the events on the fateful day. That PW3 (the victim) testified that he never went with his brother (PW4) that morning to the appellant's place and that

this raises a substantive doubt in the prosecution's case which the learned trial Judge ought to have ruled in favour of the appellant. Counsel relied on the case of **Obwalatum Francis vs Uganda, Supreme Court Criminal Appeal No. 30 of 2015,** where it was held that the law on inconsistencies and discrepancies in the prosecution case unless satisfactorily explained ought to be ruled in favor of the appellant. Counsel prayed that this court decides this contradiction in favour of the Appellant.

Counsel submitted that there wasn't any unlawful sexual act and that this is premised on the medical report which clearly indicates the fact that no sexual act was performed and the corroborative evidence of PW 4 to that effect was marred by major inconsistencies and contradictions.

Counsel submitted that the appellant raised the defence of alibi which was totally ignored by the learned trial Judge.

Ground 3

The learned trial judge erred in law and fact when he tried to sentence a juvenile on a wrong charge sheet even after receiving confirmation from the appellant's mother occasioning a gross miscarriage of justice to the appellant.

It was submitted for the appellant in rejoinder that it is trite law that the most reliable way of proving the age of a child is by production of a birth certificate followed by the testimony of the parents. That in this case, the learned trial Judge disregarded the evidence of DW3 the

mother of the victim which was corroborated by a short birth certificate D.EX1. That this evidence demonstrated that the appellant was 16 years old at the time the offence was committed.

Counsel for the appellant submitted that the learned trial Judge ought to have invoked the provisions of the Children Act in regards to conviction of a child.

Counsel prayed that this Court re-evaluates the evidence and makes a finding that the trial Court inadequately evaluated the evidence on record as regards the age of the appellant and that court quashes the conviction and sets aside the sentence.

Ground 4

That the learned trial Judge erred in law and fact when he imposed a sentence deemed harsh and excessive given the appellant's age and remorsefulness leading to a miscarriage of Justice.

Counsel for the appellant submitted that the learned trial Judge did not give adequate weight to the fact that the appellant was of youthful age of 19 years at the time of commission of the offence and therefore had room to reform. Counsel prayed that this Court invokes the provisions of Section 11 of the Judicature Act if the conviction is upheld to further reduce the sentence as shall be considered appropriate in the circumstances.

RESOLUTION BY THE COURT

We have carefully studied the record of appeal and considered the submissions of both counsel as well as the law and authorities cited to us plus those not cited but which we find relevant to this appeal.

We are alive to the duty of this Court as a first appellate court to review the evidence on record and reconsider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See ***Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10; Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997.***

We shall resolve grounds 1, 2, 3 and 4 separately.

Ground 1

That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus occasioning a miscarriage of justice to the appellant.

It is settled law that the burden of proof in criminal cases lies on the prosecution and never shifts to an accused person save in a few statutory exemptions. See **Woolmington Vs DPP [1935] AC 462.**

The offence with which the appellant was charged is created under Section 129 (3) and (4) of the Penal Code Act. It provides:-

"(3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

(4) The circumstances referred to in subsection (3) are as follows—
(a)where the person against whom the offence is committed is below the age of fourteen years;
(b)where the offender is infected with the Human Immunodeficiency Virus (HIV);

(c)where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed;
(d)where the victim of the offence is a person with a disability; or
(e)where the offender is a serial offender."

It was submitted for the appellant that the learned trial Judge evaluated the evidence of the prosecution alone without considering that of the defence leading him to only consider the evidence of the prosecution.

In this case it is alleged that the appellant performed a sexual act with S.K (the victim). The victim testified as PW3 to the effect that he entered into the appellant's room that fateful morning and the appellant instructed him to undress and suck his penis. On the other hand, PW 4 testified that he was with both the appellant and the victim in the appellant's room earlier in the morning and left to run an errand for his mother. On returning, he found the appellant and the victim on a mattress covered in a blanket with the victim's head between the raised legs of the appellant.

The evidence of PW 3 and PW 4 contains contradictions as to how the two witnesses went to the home of the appellant. PW 3' version is that the appellant called him. It would suggest that he did not arrive there with PW 4. PW 4's version is that it was his suggestion that they should go to the appellant's home and that they went there together.

The appellant went for prayers that morning and PW 3 and PW 4 attended the same prayers at the same mosque. The appellant, PW 3 and PW 4 all resided in the same locality.

The law on inconsistencies and contradictions was stated in

OBWALATUM FRANCIS VS UGANDA (SUPREME COURT CRIMINAL APPEAL NO. 30 OF 2015) where it was held that;

"The law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses

which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained"

We are of the view that the sequence within which the witnesses went to the home of the appellant is not of great significance to the offence with which the appellant was charged.

The totality of the prosecution evidence is that the appellant and the victim were at the home of the appellant and in his room on the morning of 14th December, 2017 when the offence was allegedly committed. These facts were established to the standard required by law.

In the Supreme Court Case of **Ntambala Fred vs Uganda, Criminal Appeal No. 34 of 2015,** it was held that;-

"...a conviction can solely be based on the testimony of the victim as a single witness, provided the Court finds her to be truthful and reliable.

This Court in **Sewanyana Livingstone Vs. Uganda (SCCA No.19 of 2006)** stated "what matters is the quality and not quantity of evidence".

What is vital is the fact of commission of a sexual act by the appellant on the victim.

Section 129 (7) provides;

"sexual act" means-

(a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ;

PW 3 testified that when he arrived at the home of the appellant in the morning he was told to undress and suck the appellant's penis.

There is no evidence on record to suggest that he had any ill intentions of making such a grave allegation against the appellant who from the evidence was his acquaintance. In this case, we are satisfied about the truthfulness of PW 3.

The evidence of what PW 4 saw in the afternoon was also not discredited by the defence at trial. He found PW 3 sucking the appellant's penis under a blanket. The evidence of PW 4 was cogent enough and did not seem to contain any untruthfulness or evil intent.

This proves that on that day, the appellant committed a sexual act with the victim. We find that the trial Judge properly evaluated the evidence on record. His conclusion did not occasion any miscarriage of justice to the appellant.

This ground of appeal fails.

Ground 2

That the learned trial Judge erred in law and fact when he initially ignored the appellant's defence of Alibi which was plausible.

The defence of alibi is raised by an accused person where he or she testifies that they were not at the scene of crime when the crime was committed. It is a complete defence when successful.

An accused person who raises the defence of alibi has no duty to prove the alibi. His duty is to raise it and the prosecution has the duty to discredit the defence of alibi and place him or her at the scene of crime.

Counsel for the appellant submitted that the trial Judge misdirected himself by considering the law on identification to discredit the appellant's alibi rather than evaluating it on the principles of law that relate to the same.

In the **Mushikoma Watete alias Peter Wakhokha & 3 Ors Case (Supra),** the Supreme Court held that;

"The law is well settled, that an accused person who puts forward an alibi to an answer to the charge against him, does not assume any burden of proving that answer. The burden remains on the prosecution to prove that the accused was at the scene of crime and not at the different place where he claims to have been"

In **Sekitoleko vs Uganda (1967) EA 531**, it was held that; "It is settled law that the burden of proving an alibi does not lie on the prisoner beyond reasonable doubt".

In **Moses Bogere and Another v Uganda Supreme Court Criminal Appeal No. 1 of 1997,** it was held that;

"Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted."

In evaluating the appellant's alibi, the trial judge considered the fact that the appellant was well known to the victim. The appellant and the victim had been together on the fateful morning for a longtime. The appellant, the victim PW3 and the victim's elder brother PW4 left the mosque together having finished attending prayers. He judiciously weighed both versions of evidence from the prosecution and defence as by law required before coming to his conclusion. It is our view that he did not rely on identification evidence of PW3 alone but rather on the whole evidence as to the appellant's physical location that was presented by the prosecution. The trial Judge also considered the defence raised by the accused and found it to be incredible.

We find that the trial Judge was not in error to come to the conclusion that he arrived at. The prosecution evidence adduced about his whereabouts at the material time in issue sufficiently destroyed his defence of alibi. He was squarely placed at the scene

of crime and the conclusion of the learned trial Judge cannot be faulted. This ground fails.

Ground 3

The learned trial Judge erred in law and fact when he tried to sentence a juvenile on a wrong charge sheet even after receiving confirmation from the appellant's mother thus occasioning a gross miscarriage of justice to the appellant.

We have carefully reviewed the record of appeal and found that the appellant was medically examined on the 20th December, 2017. The medical examination report was admitted as P.EX.2.

The learned trial Judge relied on the evidence contained in the medical examination report before him to conclude that the appellant was above 18 years of age at the time of commission of the offence. We have found that this piece of evidence was not contested as it was an agreed fact.

Section 66 (3) of the Trial on Indictments Act provides:-

"Any fact or document admitted or agreed (whether the fact or document is mentioned in the summary of evidence or not) in a memorandum under this section shall be deemed to have been duly proved; but if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved."

The learned trial Judge cannot be faulted for relying on the agreed (uncontested) medical evidence regarding the age of the appellant at the trial of the appellant. (See S.66 of the T.I.A).

It is our finding that the admission of PE 2 at the preliminary hearing was sufficient proof of the appellant's age. We do not see any miscarriage of justice that was caused to the appellant by the trial Judge relying on it for purposes of ascertaining the appellant's age.

Ground 3 is devoid of merit and the same must fail.

Ground 4

That the learned trial Judge erred in law and fact when he imposed a sentence deemed harsh and excessive given the appellant's age and remorsefulness leading to a miscarriage of justice.

We have carefully examined the sentencing proceedings before the learned trial Judge and found that he took into consideration the aggravating and mitigating factors including the youthful age of the appellant and arrived at a sentence of 20 years from which he deducted a period of 2 years and 1 month that the appellant had spent on remand consequently sentencing the appellant to a final term of 17 years and 10 months' imprisonment.

It is well settled law that an appellate Court will only alter a sentence imposed by the trial Court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is

illegal or manifestly low or excessive in view of the circumstances of the case.

(See Livingstone Kakooza vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993 and Jackson Zita vs Uganda Supreme Court Criminal Appeal No. 19 of 1995).

As to whether the sentence is harsh or excessive, we shall consider the range of sentences in similar offences.

In Kisembo vs Uganda, Criminal Appeal No. 411 of 2014, the Court of Appeal set aside the sentence of life imprisonment and substituted it with a sentence of 18 years' imprisonment for an appellant who was convicted of the offence of aggravated defilement.

In Mutebi Ronald vs Uganda, Court of Appeal Criminal Appeal No.0383 of 2019, this Court sentenced the appellant who had defiled a 6-year-old victim to 20 years and 6 months' imprisonment.

In Tatyama vs Uganda, Criminal Appeal No. 35 of 2018, the Supreme Court confirmed a sentence of 17 years and 4 months' imprisonment against an appellant who had been charged with aggravated defilement.

From the authorities cited above, we find that the sentence meted out by the learned trial Judge was not harsh and excessive and we find no reason to interfere with and or set aside the trial Court's sentence.

The appeal is hereby dismissed. The conviction and sentence of the trial court is upheld.

We so order.

Dated at Kampala this 7th day of NOV 2023

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Richard Buteera
DEPUTY CHIEF JUSTICE

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Christopher Gashirabake
JUSTICE OF APPEAL

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Oscar John Kihika
JUSTICE OF APPEAL