

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 313 OF 2016
(Arising from Kampala High Court Criminal Session Case No. 104
of 2015)

UGANDA **APPELLANT**

VERSUS

NABIKOLO SARAH SEBUNYA **RESPONDENT**

(Appeal from the decision of the High Court of Uganda at Kumi, before Hon. Justice Wilson Masalu Musene, dated 12th October, 2016).

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE HELLEN OBURA, JA
HON. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

This is an appeal against the Judgment of the High Court in which the trial Judge acquitted the respondent of the indictment of murder, contrary to sections 188 and 189 of the Penal Code Act.

Background to the Appeal:

The facts of this case are that on 17th October, 2014 at about 6:30am, a one Sebunya Bugembe alias Kasiwukira was knocked dead by a vehicle at Diplomatic Zone, Muyenga. Information received by police from eye witnesses was that the deceased was knocked down by a vehicle which had earlier been seen parked at the road side and when the deceased went to the road jogging, the said car slowly drove towards him, then accelerated and knocked him down, and proceeded unstopped. In the course of the investigations, it was established that the respondent, who was a wife to the deceased, was having marriage issues with the deceased. This was based on suspicion that the deceased had bought 'Mayembe' (evil spirits) which were disorganizing the home, hence the plot to kill him. It was the

prosecution case at trial that the respondent then hatched a plan together with Nakungu Sandra her cousin sister and a one PC Jaden Ashraf to kill the deceased. The unlawful purpose was eventually executed on 17th October, 2014, by knocking down the deceased with Sandra Nakungu's motor vehicle which resulted into his death.

Nakungu Sandra and PC Jaden Ashraf were on the 12th October, 2016 convicted of murder of the deceased and sentenced to 20 years imprisonment by the trial Court. However, the respondent was acquitted of the offence and set free by the same Court.

Being dissatisfied with the decision of the trial Court acquitting the respondent, the State appealed to this Court on the following grounds:

Grounds of Appeal:

1. The Learned trial Judge erred in law and fact when he failed to judiciously scrutinize and evaluate the evidence on record and thereby wrongly acquitting the respondent; and
2. The Learned trial Judge erred in law and fact when he failed to adequately appraise the evidence in relation to the doctrine of common intention which resulted in a gross miscarriage of justice.

At the hearing of the appeal, Assistant DPP Semalembe S.P appeared for the appellant while Learned Counsel Macdusman Kabega appeared for the respondent.

Counsel for the appellant and the respondent filed written submissions in support of and against the appeal respectively. Both grounds of appeal were argued concurrently.

We are alive to the duty of a 1st appellate court being to re-appraise the evidence adduced at trial and draw inferences there from, bearing in mind that this Court did not have the opportunity to observe the demeanor of witnesses at the trial. (***See Kifamunte Henry Versus Uganda, SC***

Criminal Appeal No.10 of 1997, Bogere Moses Versus Uganda, SC Criminal Appeal No.1 of 1997).

Regarding the offence of murder contrary to Section 188 and 189 of the Penal Code Act for which the respondent was charged but acquitted, the prosecution/appellant had a duty to prove the following ingredients beyond reasonable doubt at trial:

- i. Death of a person named in the indictment;
- ii. The death was unlawful;
- iii. The death was caused by malice aforethought;
- iv. The accused participated in causing the death.

From the evidence on record, it was not contested that the deceased died of multiple crash injuries owing to him being knocked down intentionally by a motor vehicle. We are satisfied that the deceased was maliciously killed unlawfully. Therefore, the first three ingredients were proved beyond reasonable doubt at trial. What is contested was the participation of the respondent in maliciously causing the death of the deceased.

In his written submissions, counsel for the appellant made reference to the evidence of PW12 that sometime in 2013, the deceased called him and informed him that there was no harmony in his house and that the respondent was quarrelling all the time. Further, that the respondent told him that the deceased was sharing food with the 2nd wife and that she was tense. Counsel further made reference to the evidence of PW12 during cross examination that he could not confirm, whether or not the deceased and the respondent were living happily at the time the deceased died. In counsel's view, the deceased and the appellant were not living happily from 2013.

Counsel further made reference to the evidence of PW13 that in September 2014, the deceased had hired him to monitor the movements of the respondent and her cousin sister Nakungu Sandra. Further, that the deceased had informed PW13 that Nakungu Sandra was taking the respondent to native doctors. Upon the respondent discovering that PW13

was following them, that she attacked him and abused him in the presence of Nakungu Sandra. Counsel further submitted that the respondent had acknowledged her strained relationship with the deceased during her defence. This was owing to the fact that the deceased had got a second wife. In counsel's view, the evidence of PW13 showed that there was a strained relationship between the respondent and the deceased at the time of his death.

Basing on the above, counsel for the appellant submitted that the learned trial Judge erred in finding that respondent did not have a strained relationship with the deceased at the time of his death.

Counsel further submitted that the learned trial Judge erred in failing to adequately appraise evidence in relation to the doctrine of common intention, which resulted into gross miscarriage of justice.

Counsel made reference to the evidence of PW20 that around the month of June and July 2014, Jaden Ashraf (Co-accused with the respondent and convicted) offered him a deal to kill the deceased, and told him to go and meet Madam Kasiwukira, who is the respondent. However, that they did not meet the respondent but met Sandra Nakungu. Further, that Sandra Nakungu informed PW13 that they had decided to kill the deceased because he had brought 'Mayembe' (Evil spirits). Further, that PW20 testified that Sandra Nakungu did not disclose the "other person" involved in the plot to kill the deceased but in one of the subsequent meetings, Jaden revealed to him that the other person was the respondent. It was counsel's contention, that it could be inferred from the evidence of PW20 that Jaden Ashraf used to refer to the respondent as "Madam" during the meetings.

It was counsel's submission that the respondent had always been part of the plan together with Jaden Ashraf and Sandra Nakungu to kill the deceased. In his opinion, they all acted with a common intention to prosecute an unlawful purpose which resulted into the death of the deceased. Counsel relied on ***Lt. Stephen Misango & Anor Versus Uganda, Court of Appeal Criminal Appeal No. 52 o 2001***, for the above submission.

Counsel further submitted that it is a correct position of the law that lies on the part of an accused person can be used to corroborate his/her guilt. In the present case, that the respondent lied to Court that she did not know Jaden Ashraf who was a lover to Sandra Nakungu, her cousin. In addition, that the respondent denied having attacked PW13 but conveniently accused him of stealing her mother's generator.

It was counsel's submission that the above pieces of evidence irresistibly point to the respondent having had common intention with Jaden Ashraf and Sandra Nakungu in the murder of the deceased.

Counsel prayed for the appeal to be allowed and for the order for acquittal to be substituted with a conviction order against the respondent.

In his written submissions, counsel for the respondent raised a preliminary objection on grounds that the appeal was incompetent and offended rules 66(1) and 66(5) of the Judicature (Court of Appeal) Rules Directions. He pointed out that while the record of proceedings in the appeal was served upon the appellant on 15th January, 2019, the appellant's memorandum of appeal was filed on 28th February, 2019. This was a month from the date of service of the record of appeal and no application was made by the appellant to seek for extension of time to file out of time. Counsel prayed for the appeal to be dismissed for being incompetent.

In the alternative, counsel for the respondent submitted that from the evidence on record, there was no eye witness who identified the respondent as one of the killers of the deceased and no single witness placed the respondent at the scene of the murder.

Counsel made reference to the submission of counsel for the appellant that the respondent had a strained relationship with the deceased, and therefore, the respondent had a hand in the murder of the deceased. Counsel submitted that the learned trial Judge made an evaluation of the evidence of PW12 as against the evidence of the respondent and came to the right conclusion that much as there was disharmony at one time between the

deceased and the respondent, there was a reconciliation thereafter which created doubt in the appellant's attempt to implicate the respondent in the murder.

Counsel further made reference to the evidence of PW20 and submitted that the said witness did not mention in his evidence that he ever met the respondent or ever talked to her. Further, that neither Sandra Nakungu nor Jaden Ashraf ever mentioned to PW20 that the respondent was part of the plot to kill the deceased. In counsel's view, the prosecution case was purely based on suspicion. There was no evidence of witchcraft and the recording of a conversation between PW13 and Jaden Ashraf never proved that the respondent was involved in the plot to kill the deceased. Counsel relied on ***Sawe Versus Republic (2003) 1EA 280***, for the submission that suspicion, however strong, could not provide a basis for inferring guilt which must be proved by evidence.

It was counsel's further submission that the learned trial Judge came to the correct finding based on evidence that the respondent did not participate in the murder of the deceased, after proper scrutiny of the evidence.

With regard to the doctrine of common intention, counsel submitted that PW20 did not give any evidence indicating that he had ever met the respondent or ever talked to her. Further, that PW20 testified that Sandra Nakungu never disclosed the other person who was part of the plot to kill the deceased and that PW16 also testified that he never met or saw the respondent. In counsel's view, the prosecution failed to bring forward any useful evidence that could link the respondent to the alleged involvement in the crime.

Counsel submitted that there was proper evaluation of evidence by the trial Court in light of the alleged doctrine of common intention and that the trial Court rightly came to a conclusion that there was no link to the respondent with the planning or execution of the offence charged. It was counsel's further submission that even if the alleged lies pointed out by counsel for

the appellant existed, they were not evidence to prove that the respondent was involved in the murder of the deceased.

Counsel prayed for the appeal to be dismissed.

In his rejoinder, counsel for appellant submitted that the appeal was properly before this Court. He admitted that the memorandum of appeal in this matter was filed on 28th February, 2019. However, that the record of proceedings which were served on the appellant were in respect of ***Criminal Appeal No. 311 of 2016 PC Jaden Ashraf & anor Versus Uganda***, which was cause listed for hearing on 5th March, 2019. The present case was not cause listed and there was no record of proceedings at the time.

Counsel further submitted that upon receipt of the record of proceedings in Criminal Appeal No. 311 of 2016, a letter dated 28/02/2016 was written to this Court requesting for the present case and Criminal Appeal No. 311 of 2016 to be consolidated since they arose from the same trial. Further, that the appellant also went ahead and lodged a memorandum of appeal on 28/02/2016. When the matter came up for hearing, the application for the consolidation of the present case and Criminal Appeal No. 311 of 2016 was disallowed by the Court on 5th March, 2019.

It was counsel's submission that by the time the Court disallowed the application for consolidation of the two cases, the appellant had already filed its memorandum of appeal although the record of proceedings that was received was in respect of Criminal Appeal No. 311 of 2016.

In counsel's opinion, the respondent's preliminary objection was misconceived and ought to be dismissed.

Counsel for the appellant further submitted that in the alternative and in the event that this Court does not find the respondent guilty of murder, it instead finds her guilty on the charges of conspiracy to commit murder contrary to sections 87 and 132(2) of the Trial on Indictments Act, Cap 23.

In the respondent's rejoinder in respect of the preliminary objection, it was submitted that whether or not the appellant intended for the two matters to be consolidated, it was not an excuse for filing the memorandum of appeal out of time. Further, that there was no application for extension of time on record.

Counsel reiterated his prayer for the appeal to be dismissed for being incompetent.

We have considered the submissions of Counsel of either side and carefully perused the court record and the Judgment of the trial court in regard to the preliminary objection and the two grounds of appeal which were argued concurrently. We shall first address the preliminary objection raised by counsel for the respondent as it has the possible effect of disposing of the appeal.

Preliminary objection by the respondent

In his written submissions, learned counsel for the respondent raised a preliminary objection on a point of law that this appeal is incompetent and ought to be dismissed because it offends the mandatory provisions of **Rules 66 (1) and 66 (5) of the Judicature (Court of Appeal Rules) Directions**. Counsel contended that from the record of this court, the Record of Appeal was served on the appellant on the 15th January, 2019. The appellant's memorandum of appeal was filed on 28th February, 2019 which is well over a month from the date of service of the Record. Counsel submitted that since no application was made by the appellant for extension of time, this appeal is incompetent and must be dismissed.

The Appellant's submissions in reply to the preliminary objection.

Counsel for the appellant admitted that the memorandum of appeal was filed on 28th February, 2019 and the Record of Appeal had been served on the appellant on 15th January, 2019. Counsel however submitted that the Record of Appeal that was served on 15th January, 2019 was in respect of another matter, that is to say, **Criminal Appeal No. 311 of 2016; PC Jaden**

Ashraf & Anor versus Uganda. Counsel pointed out that as of 15th January, 2019 the present appeal was not cause-listed for hearing and therefore there was no Record of Appeal in respect of the same; and that when the present appeal came up for hearing on 5th March, 2019, the appellant made a formal application to consolidate the present appeal with **Criminal Appeal No. 311 of 2016**, which application was rejected by this Honourable Court. It was after the rejection of the said application that the Registrar was ordered to avail the Record of Appeal for the present appeal.

Counsel submitted that by the time this Honourable Court ordered for separate trials of the above appeals on 5th March, 2019, the appellant had already filed their memorandum of appeal on 28th February, 2019 although the Record of Appeal received by the appellant was in respect of **Criminal Appeal No. 311 of 2016; PC Jaden Ashraf vs Uganda**. He then concluded that the respondent's objection was misconceived and ought to be dismissed.

The respondent's rejoinder

In rejoinder counsel for the respondent submitted that the appellant's counsel admitted to both having been served with the Record of Appeal on 15th January, 2019, and having filed the memorandum of appeal on 28th February, 2019. In counsel's view this was clear evidence that the appeal was filed out of time. Counsel rejoined further that the issue of consolidation of files did not justify the appellant's late filing of the present appeal, and since no application had been made under **Rule 66(5) of the Judicature (Court of Appeal Rules)** for extension of time or for validation of the appellant's memorandum, counsel urged Court to dismiss this appeal.

Ruling on the preliminary objection

The question for this Court's determination is whether the present appeal was filed in contravention of the provisions of Rule 66 (1) of the **Judicature (Court of Appeal Rules) Directions**, and was therefore incompetent.

Rule 66 (1) of the **Court of Appeal** rules provides that:

"In this Part of these Rules, every appellant shall, within fourteen days after service on him or her of the record of appeal, lodge a memorandum of appeal in nine copies with the registrar, or the deputy registrar at the place where the appeal is to be held by the court, if the Chief Justice orders circuits by the court under article 135 (3) (b) of the Constitution."

It's not in dispute that the Record of Appeal was served on the appellant on the 15th of January 2019 and that the appellant's memorandum of appeal was lodged in this court on 28th February, 2019 some 43 days after the Record of Appeal was served on the appellant's counsel. Counsel for the appellant submitted that the Record of Appeal which was served on 15th January, 2019 was in respect of another appeal but ironically it's the same Record of Appeal that was relied upon to file the late memorandum in this case. It is therefore, evident, and we so find, that the memorandum of appeal in the present appeal was lodged in this court outside the required time of 14 days after service of the Record of Appeal on the appellant.

Having found that the memorandum of appeal was lodged in this court outside the prescribed time, we shall proceed to determine the fate of this appeal.

Rule 66 (5) of the **Court of Appeal Rules** provides that:

"If no memorandum of appeal is lodged within the prescribed time, the court may dismiss the appeal or may direct that it be set down for hearing; except that where an appeal is dismissed under this sub rule, the appellant, if he or she can show sufficient cause, may apply to the court to restore it for hearing."

Rule 5 of the **Court of Appeal Rules** is also instructive, and it provides:

"The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to the time as extended."

Furthermore **Rule 2 (2) of the Court of appeal Rules** provides as follows:

"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay."

We find that the sum total of the aforementioned provisions is that where an appellant lodges a memorandum of appeal in this Court out of time, this Court may either dismiss the appeal or make orders to validate the appeal. **See: Godfrey Magezi & another versus Sudhir Rupaleria Supreme Court Civil Application No. 10 of 2002** where court held that the legal effect of extending time to file an appeal out of time when the appeal had already been duly filed albeit out of time is to validate that appeal or to excuse the late filing of that appeal.

We find that the power of this Court to validate a memorandum of appeal which was filed out of time is part of the inherent powers bestowed on this Court by the Court of Appeal Rules. However this Court has to determine whether there is sufficient ground for so doing. We find counsel's contention that the Record of Appeal served on the appellant on 15th January, 2019 was in respect of another appeal in contradiction to counsel's earlier admission in his main submissions in rejoinder that the Record of Appeal was served on him on 15th January, 2019. We have found no valid excuse for failure by the appellant to file the memorandum of appeal in time.

Be that as it may, we find that the failure by the appellant to comply with the rules of this Court in the present case is attributable to counsel for the appellant who neglected to lodge the memorandum of appeal within the prescribed time. In our view those errors should not be visited on the appellant. We find this to be a proper case for the application of **Article 126 (2) (e)** of the Constitution which enjoins courts in adjudicating cases to administer substantive justice without undue regard to technicalities. We so hold because despite the late filing of the memorandum of appeal, there is no indication that there was any prejudice to the respondent. We therefore

overrule the preliminary objection and proceed to determine this appeal on its merits in the interests of justice for the reasons given above.

Resolution by Court

From the evidence adduced at the trial, the prosecution case in relation to the participation of the respondent in the murder of the deceased was largely circumstantial evidence. In reaching his decision, the learned trial Judge was alive to this fact and he stated as follows:

"I wish to point out that the prosecution evidence in this regard is partly direct identification and largely circumstantial evidence".

Regarding circumstantial evidence, the court in ***Byaruhanga Fodori Versus Uganda SC Criminal Appeal No.18 of 2002***, stated as follows;

"It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt.

At trial, the prosecution/appellant relied on the evidence of several witnesses to prove the respondent's participation in the murder of the deceased.

In an attempt to prove that the respondent had a strained relationship with the deceased who was her husband, the prosecution relied on the evidence of John Gayyi Bugembe (PW12) and Habimaana Sylver Adam (PW13).

PW12, brother to the deceased, testified that the relationship between the deceased and the respondent was a good one until 2013. At one time, the deceased and the respondent called him and the deceased informed PW12 that there was no harmony in his home and that the respondent was quarrelling all the time. The respondent also informed PW12 that the deceased had got a second wife with whom he was sharing lunch.

Thereafter, the deceased apologized to the respondent and that PW12 asked them to reconcile. PW12 further testified that after the said meeting, he would meet the deceased and the respondent and they looked to be okay. However, that he could not conclude whether or not the respondent and the deceased were living happily.

PW13, a boda boda motorist testified that he used to work at the deceased's home between 2001 and 2004 until he purchased a boda boda. Sometime in September 2014, the deceased called him and gave him an assignment of following the respondent and Sandra Nakungu to wherever they went on suspicion that Sandra was taking the respondent to native doctors. PW13 testified that he kept following the respondent and Sandra Nakungu until the respondent found out. Further, that respondent then found him at the boda boda stage and abused him that he was stupid for following her.

In regard to common intention, the prosecution relied on the evidence of Byamukama Richard (PW20). He testified that around June or July 2014, Jaden Ashraf called him and informed him that he wanted to use him to kill the deceased. Jaden Ashraf then told PW20 that they had to go and meet madam Kasiwukira. Upon them going to Zimwe road in Muyenga, that they found a motor vehicle parked which they entered and sat in front and a lady was sitting at the back. Jaden Ashraf then introduced the lady as Sandra. Further, that PW20 demanded for UGX 50,000,000/= from Sandra who informed him that she would have consultations. Sandra informed PW20 that the deceased had bought 'Mayembe' (Evil spirits) to sacrifice the children and that they had decided to kill the deceased since he was an old man. PW20 testified that after the said meeting, he informed his boss. Further, that Jaden Ashraf called him and told him that they were going to meet Sandra but it was not possible to meet the third person. During the meeting, Sandra informed PW20 that she had agreed with her sister to give him UGX 20,000,000/=. He then asked for a deposit with the intention of getting evidence. PW20 further testified that Jaden had told him that the third person in the plot to kill the deceased was Mrs. Kasiwukira. After a while before the deposit could be paid, the deceased was killed. PW20 was given

a recorder which he used to record his conversation with Jaden Ashraf on the murder of the deceased. PW20 testified that Jaden talked of madam, whom he thought was Mrs. Kasiwukira.

The recording was then given to Uganda Broadcasting Services and was listened to and transcribed by PW19 and tendered in Court as an exhibit (P.EXH.12).

On her part, the respondent denied participation in the murder of the deceased. She stated that it was true that in 2013 she had misunderstandings with her husband the deceased after him informing her that he had a girlfriend. That was the reason why she invited PW12 where upon the deceased apologized to her and she forgave him. She testified that even after the misunderstandings between her and the deceased, she never attacked his second wife. The respondent further testified that she never attacked PW13 *as such* as was alleged, but called him to the side as she was passing by.

The prosecution relied on the evidence of PW12 in an effort to prove that the relationship between the respondent and the deceased was a strained one, pointing to the intention of the respondent to murder the deceased. However, the above evidence was not conclusive. PW12 testified that he did not know the *nitty gritty* of the relationship between the deceased and the appellant after 2013. In his statement to Police, he stated that the deceased was living happily with the respondent. In our opinion, PW12 was not sure of how well the deceased and the respondent were relating after meeting with them and the deceased apologizing to the respondent.

We also find that the evidence of PW13 did not in any way point to the respondent's participation in the murder of the deceased unless the said evidence was corroborative to some other independent evidence linking the respondent to the murder of the deceased. In regard to the same evidence of PW13, the learned trial Judge found as follows, and we agree:

"Whereas I hold that it was true the trailing of A3 took place, and even quarrelling between A3 and PW13, never the less it did not bring out a clear connection of planning the murder of the deceased by A3. It was in my view part of the normal wear and tear of marriage life whereby married couples are jealous and suspicious of each other's movements without necessarily wishing death to each other".

The prosecution also relied on the evidence of PW20 to prove that the respondent together with Sandra Nakungu and Jaden Ashraf formed common intention to murder the deceased.

We associate ourselves with the decision of Court in ***Simbwa Paul Versus Uganda, Court of Appeal Criminal Appeal No.023 of 2012***, in relation to common intention, where it was stated that:

"The case of Kisegerwa and Another v. Uganda Criminal Appeal No. 6 of 1978 (Court of Appeal) elaborates on the above provision thus: In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence...an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.

In the testimony of PW20, he indicated that he never met the respondent and that Jaden Ashraf never mentioned the name of the 3rd person who was in the plan to murder the deceased. While PW20 testified to having met Sandra Nakungu and Jaden Ashraf on several occasions, he never met or spoke with the respondent. The video recording where the murder of the deceased is discussed, there is also no mention of the respondent's name. The voices refer to 'Madame' and we do not find it reasonable to presume that the person being referred to is the respondent. PW20 testified that Jaden talked of madam, whom he thought was Mrs. Kasiwukira. This was

inconclusive evidence since suspicion cannot be based upon to support a conviction.

Neither of the prosecution witnesses at trial made any direct reference to respondent as one of the persons who were involved in the plan or actually murdered the deceased. The circumstantial evidence sought to be relied upon by the prosecution to connect the respondent to the murder was farfetched and could not be relied upon to irresistibly point to the guilt of the respondent.

Accordingly, we find no merit in the appeal and it is hereby dismissed. We uphold the acquittal of the respondent as found by the trial Judge.

It is so ordered.

Dated and signed this 15th day of July 2019

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Elizabeth Musoke
JUSTICE OF APPEAL

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Hellen Obura
JUSTICE OF APPEAL

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Ezekiel Muhanguzi
JUSTICE OF APPEAL