

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)**

**CIVIL APPEAL NO. 305 OF 2019**

**ADELA DAMIAN MSANYA..... APPELLANT**

**VERSUS**

**TANZANIA ELECTRICITY SUPPLY CO.LTD.....RESPONDENT**

**(Appeal from the Ruling and decree of the High Court of Tanzania (Labour Division) at Moshi )**

**(Dr. Fauz, J.)**

**dated the 12<sup>th</sup> day of August, 2016**

**in**

**Labour Revision No. 28 of 2017**

**-----**

**JUDGMENT OF THE COURT**

16<sup>th</sup> & 22<sup>nd</sup> February, 2022

**MUGASHA, J.A.:**

In this appeal, the appellant is faulting the decision of the High Court which was made in favour of the respondent on the fair termination of the appellant from the employment. A brief background of the appeal goes thus, between 1/4/2005 and 6/10/2014, the appellant was employed as an accounts clerk by the respondent. The employment was brought to a halt following termination from the employment on allegations that, she had forged a form four secondary school academic certificate. The termination

was preceded by a formal charge on the forgery which was denied by the appellant in her answer to the charge. Subsequently, a disciplinary inquiry committee was convened, a hearing conducted and upon being found guilty, she was terminated from the employment.

Aggrieved, the appellant referred the matter to the Commission for Mediation and Arbitration (CMA) challenging her termination on the ground that it was procedurally unfair. Before the CMA, the respondent paraded two witnesses namely: Nelson Mefaly Mhanze (DW1), the Examination officer at the National Examination Council of Tanzania (NECTA). He recounted that the certificate bearing index No. 133/21 of 1988 was forged on account of the following: **one**, the examination centre coded S133 is of Minaki Secondary School and not Kirua Secondary School; **two**, index number 133/21 in CSEE 1988 belongs to Daudi Bura and not Adella Msanya; **three**, the printing paper used to make the certificate differs from the certificates that were issued to candidates who sat for CSEE 1988; **four**, there is no school called Kirua Vunjo rather Kirua Secondary school. This was opposed by the appellant who in her evidence, claimed to have graduated at Kirua Vunjo Secondary School as per statement of results from the NECTA which showed that her index number was S. 372/01 and as such, she maintained

that the NECTA official made errors by issuing her a certificate with index number S.133/21.

In resolving the issue as to whether the termination was procedurally fair or not, the arbitrator held in favour of the appellant having reasoned that, the appellant was denied time to organise her evidence which entailed a follow up at the NECTA and as such, she was denied her fundamental right to be heard. As to the issue surrounding the validity or otherwise of the certificate at the time of being employed, the arbitrator right away ruled that she had none because the certificate presented to the respondent was not valid. That notwithstanding, the arbitrator concluded that there was no fair reason for terminating the appellant's employment and thus proceeded to give her the award of being reinstated without loss of remuneration or else the respondent pays to her a total of TZS 24,000,000/= for unfair termination.

Undaunted, the respondent lodged an application seeking the indulgence of the High Court to revise the decision of the CMA. The High Court (Twaibu, J as he then was) after hearing the parties' submissions and re-evaluating the evidence on the record reversed the CMA's award having decided that, the termination was procedurally fair considering that the appellant was

given about four months to prepare herself before the hearing at the disciplinary committee and as such, she had opportunity to liaise with the NECTA regarding the questionable certificate. The learned High Court Judge further reasoned that, in the event the CMA held that the appellant did not possess a valid certificate at the time of securing employment, her termination on the ground of forgery was justified and as such, the termination was fair both substantively and procedurally. Consequently, the application for revision was granted and the CMA award was set aside, hence this appeal.

The appellant has presented a memorandum of appeal fronting nine (9) grounds as follows:

- 1. That, the learned Honourable Judge of the High Court sitting on revision erred in law and in fact by failure to hold that the appellant was denied her fundamental right of fair hearing at the disciplinary Committee held on 19/9/2014 despite her explicit request that the employer should adjourn hearing to wait statements of Result from National Examination (NECTA); which conduct ultimately led to denial of right to be heard which is contrary to rules of natural justice.*

2. *That, the learned trial judge of the High Court erred in law and in fact by failure to find that the appellant was denied her statutory right to be represented under section 62(4) (a) of the ELRA, 2004, whereas she was entitled to have a representative from her trade union (TUICO) or her fellow employees of choice and that one Daniel Gwatu was not her representative of her choice rather a person brought at the disciplinary committee to serve interest of the respondent.*
3. *That the learned Judge erred in law and in fact by holding that the appellant was given four months and a half to prepare for disciplinary hearing while there is no evidence to show that she was indeed informed of any disciplinary hearing or given notice of hearing four months and half prior to the date of disciplinary hearing.*
4. *That, the learned Judge erred in law and in fact by failure to hold that there is unfairness in procedure after having clearly found that the proceedings of the disciplinary committee did not show whether the committee explained to appellant her right to appeal to Director General; whereas that is mandatory requirement under Rule 13(10) of the Code of Good Practice Rules 2007 G.N. No. 42 of 2007.*

5. *That, the learned trial judge of the High Court erred in law and in fact by holding that the appellant's certificate was a forgery without comparing those certificates and on disregarding of direct evidence before the CMA that there is no forgery rather than there are humanitarian errors committed by NECTA itself where in the certificate the school centre No. was wrongly written, which fact was latter verified certified and informed by E.G. Kasuga head of the Examination Council at NECTA.*
6. *That, the learned trial judge of the High Court erred in law and in fact by conclude that the appellant's name was not in the list of students sat for CSEE in November, 1988 while Mr. N. M. Muhanze failed to produce the said list of 1988 before the CMA and instead produce irrelevant list of 1989.*
7. *That, the learned trial judge of the High Court erred in law and in fact by easily believing the allegation of N.M. Muhanze examination Officer who said E.G. Kasuga who he admitted was a senior officer and head of the examination department at NECTA, was not among officers of NECTA who signed statement of results in October 2014, while there is no evidence to suggest that Mr. Kasuga was not an authorised to sign as he deed, also no evidence that officers of NECTA signs statement of results by roster*

8. *That, the learned trial judge of the High Court erred in law and in fact by holding that the CMA did not passionately and correct considered the matter, whereas there was clear evidence that the CMA properly had both parties and considered the matter carefully in light of evidence before it and find that disciplinary committee conducted hearing unfairly and contrary to procedures and with apparent biasness and disregard of request of the appellant to occasion adjournment which act ultimately led to injustice to towards in appellant.*
9. *That, the learned trial judge of the High Court erred in law and in fact by failure to explain right of appeal to the appellant, where appeal to this court is her constitutional right."*

At the hearing, the appellant who was present in Court had the services of Mr. Elibahati Thomas Akyoo, learned counsel whereas the respondent was represented by Mr. Karonda Kibamba, learned Principal State Attorney who was assisted by Messrs. Peter Musetti, learned Senior State Attorney and Rashid Mohamed and Thomas Mahushi, both learned State Attorneys.

Before the hearing commenced, with leave of the Court Mr. Kibamba was allowed to withdraw the notice of cross appeal which he said was

inadvertently filed. Then, upon a dialogue with us on the dictates of section 57(1) of the Labour Institutions Act which enjoins the Court to entertain only questions of law, Mr. Akyoo abandoned the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> grounds of appeal which happened to challenge the factual account at the CMA and which was determined before the High Court.

In addressing the 1<sup>st</sup> ground of appeal, it was contended that, the appellant was denied a fundamental right to be heard, as disciplinary committee without any justification, declined her request to adjourn the hearing to avail her more time to wait for statement of results from the NECTA and instead, proceeded to terminate the appellant from the employment which was unfair in the circumstances. To back her arguments, the appellant referred us to the case of **PATROBERT ISHENGOMA VS KAHAMA MINING CORPORATION LTD (BARRICK TANZANIA BULYANHULU), MINISTER FOR LABOUR EMPLOYMENT AND YOUTH DEVELOPMENT AND THE ATTORNEY GENERAL**, Civil Application No. 172 of 2016 (unreported).

The other complaint from the appellant in the 2<sup>nd</sup> ground of appeal is to the effect that, she was denied to be represented by a representative of her choice from Tanzania Union of Industrial and Commercial Workers (the



TUICO). Apparently, in the appellant's written submissions nothing more was canvassed in relation to the 2<sup>nd</sup> ground of appeal. Thus, having argued the two remaining grounds of appeal, the appellant's counsel urged the Court to allow the appeal, quash and set aside the decision of the High Court and restore the decision of the CMA.

On the other hand, the appeal was strongly opposed by Mr. Kibamba who supported the verdict of the High Court. He contended that, the appellant was accorded a right of hearing as she was present before the disciplinary committee and allowed to present her case. He added that, prior to the hearing, the appellant had four months from the date she was charged, and that was ample time for her to furnish a valid certificate but never utilised such period. Instead, she raised the matter at the hearing of the Committee and sought adjournment which was declined which was proper because the requisite evidence ought to have been earlier filed before the hearing of the disciplinary committee.

In respect of the 2<sup>nd</sup> ground of appeal, Mr. Kibamba submitted that, it is untrue that at the hearing the appellant had no representation of a trade union official. On this he pointed out that, the appellant was represented by one Gwatu, a member of TUICO at the work place as reflected at page 137

of the record of appeal. As such, he argued that the appellant's complaint that she was not represented is farfetched. Mr. Kibamba concluded his submission by urging the Court to dismiss the appeal and sustain the verdict of the High Court.

Having heard the contending submissions from the learned counsel, the issue for determination is whether the termination of the appellant from the employment was for valid reasons and if the procedure was complied with. We shall determine the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal together considering that the entire complaint of the appellant hinges on what transpired at the hearing of the disciplinary committee.

The fairness of procedure in disciplinary matters is regulated by rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice No, 42 of 2007 (the Code of Good Practice.) Of relevance in this particular matter, are sub rules (1), (2) and (3) of Rule 13 which stipulate as follows:

*"13 (1) – The Employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*

*(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.*

*(3) the employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours."*

We shall be guided by the stated position of the law. What transpired in the matter under scrutiny and which is not disputed by the appellant is that, after the respondent got a wind that the appellant's certificate was probably forged, embarked on investigation with the NACTE officials and the appellant was informed accordingly. Later, as the respondent was satisfied with the investigation and having ascertained that there were sufficient grounds for a hearing before the disciplinary committee, formally charged the respondent and served her with the charge on 28/4/2014 contained in a letter with Reference MOS/PF/I.882 tendered as exhibit B4 as hereunder:

*Our Ref*

*MOS/PF/1.882*

*Date*

*28.04.2014*

Adela Damian Msanya  
Tanesco Ltd,  
**MOSHI.**

YAH: **TUHUMA DHIDI YAKO**

*Tafadhali rejea somo tajwa hapo juu.*

*Kutokana na kazi ya kuhakiki vyeti vya shule na taaluma kwa wafanyakazi lilyofanywa na Shirika mwaka 2014 na kutokana na matakwa ya sheria ya kazi na mahusiano kazini No. 6/2004 (The Employment and Labour Relations Act 2004), kanuni za ajira na mahusiano kazini (kanuni za utendaji bora) 2007 pamoja na kanuni za mwenendo wa maadili za TANESCO, unatuhumiwa kama ifuatavyo: -*

#### **TUHUMA**

*Kukosa uaminifu kwa kiasi kikubwa kwa mwajiri wako kwa kuwasilisha cheti cha kughushi (cheti kisichokuwa halali). Kitendo hicho ni ukiukwaji mkubwa wa kanuni ya 12(3) (a) ya kanuni za ajira na mahusiano kazini (kanuni bora za utendaji kazi) 2007, pia ni kosa kwa mujibu wa makosa ya jumla katika kipengele 9(5) ukurasa 74 wa kanuni za ajira na mahusiano kazini (kanuni bora za utendaji kazi) 2007 na ni kosa kwa mujibu wa kifungu 2.4 cha kanuni za mwenendo na maadili za TANESCO.*

#### **MAELEZO YA TUHUMA**

*Katika hali inayoonyesha kukosa uaminifu kumbukumbu zinaonyesha mwaka 2012 wakati wa mchakato wa ajira yako uliwasilisha cheti cha kidato cha nne (4) chenye namba S133/21 cha mwaka 1988 kinachoonyesha ulisoma shule ya Sekondari ya Kirua Vunjo ambacho ni cheti ghushi.*

*Kutokana na uchunguzi uliofanyika mwezi Juni, 2013 cheti hicho ulichowasilisha kimeonekana ni cha kughushi. Hivyo basi kitendo hicho ulichokifanya kinaenda kinyume na kanuni ya 12(3) (a) ya kanuni za ajira na mahusiano kazini (kanuni bora za utendaji kazi) 2007, pia ni kosa kwa mujibu wa makosa ya jumla kaika kipengele 9(5) ukurasa 74 wa kanuni za ajira na mahusiano kazini (kanuni*

*bora za utendaji) 2007 na ni kosa kwa mujibu wa kifungu 2.4 cha kanuni za mwenendo na maadili TANESCO.*

### **UTETEZI**

*Kwa kutumia sheria ya kazi No. 6/2004 (the employment and labour relations Act 2004). Kanuni za ajira na mahusiano kazini (Kanuni za utendaji bora) 2007 na kanuni za uendeshaji wa maswala ya kinidhamu za TANESCO (Disciplinary Operating Procedure) unatakiwa utoe maelezo yako ikiwa kama utetezi dhidi ya tuhuma inayokukabili.*

*Maelezo yako yamfikie aliyesaini barua hii ndani ya siku saba za kazi baada ya kupokea barua hii.*

*Endapo maelezo yako hayatatufikia ndani ya muda uliotajwa hatua nyingine zitaendelea bila taarifa yoyote za ziada.*

*Wasalaam,*

*Kny: SHIRIKA LA UMEME TANZANIA*

*Mhandisi Martin Kasyanju*

**MENEJA WA MKOA – KILIMANJARO**

*MYK/PS/an*

*Nakala: Meneja Mwandamizi Rasilimaliwatu – Makao Makuu(Dar)*

*Nakala: Meneja Mwandamizi wa Kanda – (K) Tanga*

*Nakala: Mwenyekiti wa TUICO – Tawo la Moshi.”*

In summary, the appellant was accused to have used a forged certificate to secure employment which was dishonesty and breach of the disciplinary code of TANESCO, the ERLA and the Code of Good Practice. Also she was notified to answer charges in writing within seven days. Two days later the

appellant obliged and gave her written answer to the charge contained a letter dated 30/4/2014 as hereunder:

*"Adella Damian Msanya,  
Tanesco Limited,  
Moshi.*

*30/04/2014*

*Meneja wa Mkoa,  
Tanesco Limited,  
**Moshi.***

**YAH: TUHUMA DHIDI YANGU**

*Tafadhali rejea barua yako Kumb. Na. MOS/PF/1.882 ya tarehe 28/04/2014. Katika barua hiyo nimetuhumiwa kwamba nimeghushri cheti cha kidato cha nne (4) chenye namba S133/21 cha mwaka wa 1988 kinachoonyesha kuwa nilisoma katika shule ya sekondari ya Kirua Vunjo kinyume na sheria ya kazi na kanuni zake na kutakiwa nitoe utetezi wangu ndani ya muda wa siku saba (7) tu tangu nipate barua hiyo dhidi ya tuhuma hiyo.*

*Utetezi wangu ni kwamba tuhuzi hiyo siyo ya kweli kwa sababu zifuatazo:*

- 1. Cheti change cha Kidato cha nne kilichonukuliwa katika barua yako, namba S133/21 cha shule ya sekondari ya Kirua Vunjo ni halali na nimefuatilia huko sheuieni nilikosoma ili kupaa uthibitisho kwamba nilisoma katika shule hiyo hadi kidato cha nne na nilitunukiwa cheti hicho kutoka Baraza la Mitihani la Taifa kupitia katika shule hiyo na hapa nimeambatanisha udhibitisho huo kutoka katika shule hiyo kama inavyosomewa katika nakala ya rejista ya wanafunzi wa mwaka huo waliosoma katika shule hiyo na jina langu lipo.;*
- 2. Iwapo maelezo yaliyoandikwa cheti changu ni sahihi usahihi au la mimi siwezi kujua kinatakiwa kiandikwe na kwa namna gani, mimi*

*nillpoona kimeandikwa jina langu, jina la shule na kimetolewa na Baraza la Taifa la Mitihani niliamini kiko vizuri, hivyo basi kama kuna kasoro yoyote kaika cheti changu anayepaswa kuwajibika ni shule yangu na Baraza la Mitihani la Taifa kwa sababu wao ndio wanaotakiwa kujua ni kitu gani kiandikwe kwenye cheti hicho na walitakiwa wafanye kazi yao ya kuandika kwa usahihi kwa mujibu wa sheria na taratibu zilizowekwa.*

- 3. Aida nimewasiliana na Baraza la Mitihani la Taifa kuhusu tatizo hili ambapo nilitakiwa nitue uthibitisho kutoka shele ya sekondari Kirua Vunjo kuwa nilisoma katika shule hiyo; nikaenda shuleni na nikapewa uthibitisho ambao nakala imeambatanishwa katika barua hii nikatuma kwa baraza na nikaambiwa watahughulikia tatizo hilo kwa sababu uchunguzi wao umeonyesha kwamba Baraza ndilo limesababisha tatizo hilo kwa sababu wakati wa kujaza vyeti vya 7kuhitimu kidato cha nne walichanganya namba senta za mitihani ambapo cheti changu kimendikwa namba senta ya mitihani ya shule ya Sekondari Minaki badala ya ile ya shule yangu kwa makosa ya walioandika;*
- 4. Niliambiwa kwamba watawasiliana na mwajiri wangu Tanesco Ili kumjulisha hali hiyo na kumthibitishia kwamba ni kweli kuwa nilisoma katika shule ya sekondari Kirua Vunjo na nimefuzu kidato cha nne nilipewa cheti hich kihalali na Baraza hilo ijapo kimeandikwa kwa makosa ambayo watayarekebisha kwa jinsi watakavyoona inafaa.*
- 5. Kwa muda mfupi nilopewa nimejitahidi kwa nguvu zangu zote kufuatilia jambo hilo katika ofisi zinazohusika na nimebahatika kupaa uthibitisho kwamba nimemaliza kidato channe katika shule ya Kirua Vunjo na cheti nilichotoa wakati wa kuajiriwa sikukighushi, nilitunukiwa kihalali na mamlaka zilizowekwa kwa mujibu wa sheria na kama kina kasoro yoyote wanapawa wao kuwajibika na siyo mimi kuadhibiwa kwa makosa yao.*
- 6. Naomba ieleweke wazi kuwa wakati nawasilisha cheti changu nilichotunukiwa kihalali niliamini kwamba kipo sahihi kabisa na hakina kasoro yoyote kwa vile kilitolewa kihalali na mamlaka ya kisheria kufanya hivyo, sikukusudia kutenda kosa nililotuhumiwa nalo wala kosa jingine lolote.*

*Nawasilisha na naomba tuhuma hizo zitupiliwe mbali na nionekane sina kosa lolote na nitendewe haki.*

*Mtumishi wako mtiifu*

.....  
***Adella Damian Msanya***

*Nakala:*

- 1. Meneja Mwandamizi Rasilimaliwatu – Makao Makuu Dar*
- 2. Meneja Mwandamizi wa Kanda – (K) Tanga*
- 3. Mwenyekiti wa TUICO – Tawi la Moshi.”*

In summary, apart from denying the charge, she maintained that the certificate with Index No. 133/21 from Kirua Vunjo is valid and was obtained from the NECTA through the said school. Also she contended that, she should not be punished for whatever errors or mistakes in the certificate in question and instead, the respective authorities should be put to task.

About more than four months later, the appellant was notified to appear before the disciplinary committee to have her case heard. According to exhibit B6, the appellant was represented by one Daniel Ngwatu, a fellow employee and member of TUICO at the place of work. This is cemented by the appellant's own account who at page 25 of the record of appeal because when cross-examined as to who was Daniel Gwatu, she said that he was her representative.



At the hearing before the disciplinary committee, apart from pleading for mercy, the appellant requested for more time to make a follow up on the certificate. This was declined by the Committee which was finally satisfied that the appellant had used a forged certificate to secure the employment. We were perplexed having gathered what the appellant stated at paragraph 5 of her letter in answer to the charge. She stated as follows:

*"Katika muda mfupi niliopewa nimejitahidi kwa nguvu zangu zote kufuatilia jambo hili katika ofisi zinazohusika na **nimebahatika kupata uthibitisho kwamba nimemaliza kidato cha nne katika shule ya Kirua Vunjo na cheti nilichotoa wakati wa kuajiriwa sikukighusi, nilitunukiwa na mamlaka zilizowekwa kwa mujibu wa sheria na kama kina kasoro yoyote wanapaswa wao kuwajibika na siyo mimi kuadhibiwa kwa makosa yao.**"*

The unofficial translation is rendered as follows: Given a short period, I have followed up the matter and was lucky to get a confirmation that I completed form four at Kirua Vunjo and the certificate I produced at the time of being employed was not a forged one, as it was rendered by lawful authorities and if it has any errors, the respective authorities should be made

accountable instead of punishing me for the fault which is not of my own making.

In the event of the appellant's own confirmation when answering the charge that the certificate was valid, then what was the essence of requesting to be given more time to follow up the certificate at NECTA? In our considered view, apart from the appellant being all out to deploy delaying tactics, as according to her written defence, she had already presented a valid certificate and as such, there was nothing more to be followed. This tells that, indeed the certificate was forged as cemented by the evidence of Nelson Mefaly Mhanze (DW1) the examination officer from NACTE who gave the details substantiating the manner in which then certificate was forged and used by the appellant to secure employment. In the premises, the appellant was not denied a right to be heard as she was given ample time to follow up the matter before the hearing was conducted. On this we agree with the learned Judge of the High Court who at page 135 of the record of appeal said:

*".... a period of four and a half had expired from when the respondent was charged to the date of hearing was conducted. She thus had ample time to*

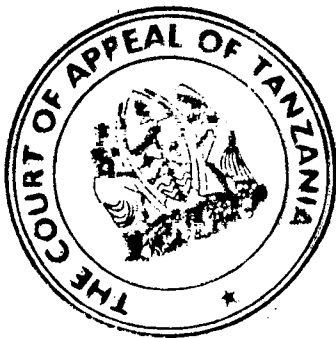
*follow up on her certificate. The Disciplinary Committee there, had exercised its duty and there was no denial of the right to be heard on the part of the respondent. I so hold."*

Therefore, in the event the appellant was not denied the right to be heard, the case referred to by the appellant in **PATROBERT ISHENGOMA VS KAHAMA MINING CORPORATION LTD (BARRICK TANZANIA BULYANHULU), MINISTER FOR LABOUR EMPLOYMENT AND YOUTH DEVELOPMENT AND THE ATTORNEY GENERAL** (supra), is not applicable here because in the said case, the Court addressed the effects on denial of a right to be heard which is not the case here. Moreover, the appellant had a representative of TUICO at the hearing before the disciplinary committee as opposed to what she claims.

In the circumstances, sub rules (1), (2) and (3) of Rule 13 of the Code of Good Practice was complied with to the letter by the respondent. This renders the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal not merited. In view of what we have endeavoured to discuss, we are satisfied that the termination of the appellant was for valid reasons as it was established that the appellant had breached the disciplinary code of TANESCO having used a forged certificate

to secure employment. Thus, we do not find cogent reasons to vary the decision of the High Court. As a result, the appeal is not merited and it is hereby dismissed in its entirety.

**DATED** at **ARUSHA** this 22<sup>nd</sup> day of February, 2022.



S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

L. G. KAIRO  
**JUSTICE OF APPEAL**

This Judgment delivered this 22<sup>nd</sup> day of February, 2022 in the presence of Appellant in person unrepresented and Ms. Zamaradi Johanes, learned State Attorney for Respondent, is hereby certified as a true copy of the original.

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a horizontal line.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**