

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 158 OF 2013

MARTIN MWEMA MUTUKU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

As soon as this court delivered the judgment herein and a release order was prepared and sent to the prison, the prison wrote a letter dated 31st July, 2017. It is referenced KAM/PRIS/DOC/26/Vol.1/3474 signed by H.K. Kisingu OGW (SACP), the in-charge of Kamiti Main Prison. The letter was addressed to the Deputy Registrar of this court. Its content is that the appellant had previously appealed to the High Court vide **Cr. Appeal No. 177 of 2012** and the appeal was dismissed on 28th July, 2015. Subsequently, he lodged an appeal to the Court of Appeal but which to-date has not been allocated a serial number by that court. He thereafter filed the instant appeal whose judgment was delivered on 27th July, 2017 by which the conviction was quashed and the sentence set aside. The prison in the letter has requested the court to give directions in view of the prevailing contrasting judgments. The Deputy Registrar has accordingly brought to the attention of the court the letter written by the prison.

This court has called for the first appeal file and noted that the appellant appealed **vide Cr. Appeal No. 279 of 2012 and not 177 of 2012**. The judgment of that court was delivered on 28th July, 2015 and the appeal was dismissed. It follows that the appellant was not entitled to a second appeal before the High Court. He knew the status of the previous appeal but deliberately failed to disclose to the judge hearing cr. Appeal No. 158 of 2013. In the view of this court, the appeal itself, the proceedings recorded therein and the judgment arrived at are therefore a nullity. This court on its motion must move to correct the situation. I consequently issue the following orders;

- a. Cr. Appeal No. 158 of 2013 – Martin Mwema Mutuku vs Republic is a nullity and is hereby set aside.
- b. All proceedings recorded in that file are expunged from the file.
- c. On its own motion, this court also sets aside its own judgment in the appeal dated and delivered on 27th July, 2017.
- d. The file in Cr. Appeal 158 of 2013 should forthwith close.
- c. The appellant has 14 days right of appeal.

Dated And Delivered at Nairobi This 1st Day of August, 2017.

G.W. NGENYE-MACHARIA

JUDGE