



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.222 OF 2015**

**PETER MUTHUI MWENGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Peter Muthui Mwenga was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The Applicant was convicted on 18<sup>th</sup> December 2009. The proceedings of the subordinate court have not been availed to this court for the purpose of the hearing and determination of the appeal. The Applicant claimed that the case was heard before the Chief Magistrate's Court at Kibera. He gave the Number of the file as **Criminal Case No.3092 of 2000**. The Deputy Registrar of this court wrote to the said court to avail the file for the purposes of the appeal. The records of the said court indicate that the accused in **Criminal Case No.3092 of 2000** were Simon Moiti Tiwa and King'ombe Hussein Fred. Both had been charged with burglary contrary to **Section 304(2)** of the **Penal Code**. They were convicted and sentenced to serve a term of probation on 24<sup>th</sup> August 2000. This court was not availed the particular file because it was destroyed pursuant to **The Records Disposal (Courts) Rules**. The Notice of destruction of the said files was given vide Gazette Notice No.6301 of 11<sup>th</sup> August 2006. This court cannot therefore confirm whether the file the Applicant claims was the one he was tried in is the particular file or not.

On further perusal of the petition of appeal filed by the Applicant, it is apparent that the Applicant alleges that his criminal case was heard before the Chief Magistrate's Court at Thika. The **Criminal Case No.3092 of 2000** could therefore have been filed before the Chief Magistrate's Court at Thika. The court notes that the judgment that is intended to be challenged on appeal to this court is the decision of the then Chief Magistrate Mrs. U.P. Kidula. Incidentally, she served in both stations *i.e.* Thika and Kibera. The Applicant claims that the hearing of his appeal has been frustrated because he has been unable to access the proceedings of the trial court for the purposes of this appeal. It is clear to this court that the Applicant is not being candid in regard to the specific court case number relating to his trial before the subordinate court. Before this court can make any orders in regard to the Applicant's application, it must confirm with the Thika Chief Magistrate's Court whether the Applicant was tried before the said court. The Applicant is urged to be truthful and indicate to the court the specific file relating to his appeal. For the avoidance of any doubt, this court will not make any decision in respect of the appeal until the proceedings of the trial court are either availed or established to be completely missing. And if the latter is the case, the only order that this court can legally make in such circumstances is for the Applicant to be retried. So, if the Applicant thinks that he can conceal the number of the criminal case that he faced before the trial court, he is not helping his case at all.

In the premises therefore, the Deputy Registrar of this court is ordered to write to the Chief Magistrates of Kibera and Thika Law Courts with a view to ascertaining once and for all the status of the proceedings of the trial court of the Applicant's case. In that regard, the criminal Registers of the respective courts should be checked to confirm the information given by the Applicant. This matter shall be mentioned after thirty (30) days of today's Ruling to confirm compliance with the orders of this court. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2015**

**L. KIMARU**

**JUDGE**

**G.W. NGENYE – MACHARIA**

**JUDGE**