



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 301 OF 2007**

**KIHAGI MACHARIA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Judgment and Conviction in the Resident Magistrate's Court at Karatina*

*in Criminal Case No. 1133 of 2005 dated 25<sup>th</sup> October 2007 by Mr. Kimemia B. M. – RM)*

**RULING**

This case amply demonstrates the need for judiciary to be wired in terms of information Technology. An appeal number 307 of 2007 was heard as though it emanated from the conviction and sentence of the appellant herein by the Senior Resident Magistrate's Court, Karatina for the offences of stealing contrary to section 275 of the Penal Code and Being in possession of Bhang contrary to section 3(1) as read together with Section 2(a) of the Psychotropic Substances Control Act. However the party in that appeal was not the appellant. Rather it was one **Antony Nduhiu Gachai**. **Antony Nduhiu Gachai's** appeal has not for all intents and purposes been heard and determined. He had been convicted and sentenced to 7 years imprisonment for the offence of preparation to commit a felony. Clearly therefore there is mistake on the face of the record rendering the proceedings and judgment in criminal appeal number 307 of 2007 a nullity. That mistake ought to be corrected.

**Mr. Makura**, learned state counsel, who appeared for the state submitted that the appeal allegedly heard as this one ought to be declared a nullity. The two appeals should then be heard afresh before another judge. The purported appellant in the criminal appeal number 307 of 2007 who masqueraded as the appellant herein ought to be punished for impersonation and obstruction of justice.

The appellant herein confirmed that his appeal had never been heard. He was thus surprised when informed that the appellant in the criminal appeal number 307 of 2007 had impersonated him and had his appeal heard. He too supported the senior state counsel's position that the proceedings and judgment in the aforesaid appeal be declared a nullity and expunged from the record to enable him prosecute his appeal.

The author of the mischief, **Antony Nduhiu Gachai** submitted that he did not deliberately impersonate the appellant in this appeal in his own appeal. He also concurred that the proceedings and judgment of the impugned appeal be declared a nullity and his proper appeal be fixed for hearing afresh.

As I have stated at the beginning of this ruling, if the judiciary was computer compliant, this mistake may well have been detected in good time and appropriate action taken to obviate it. As it is, the mistake was not captured in good time leading to valuable judicial time being wasted on a matter which for all intents and purposes was a nullity. I am not in position to positively tell whether the culprit deliberately caused the proceedings and record of this appeal to be shuffled. However I have a distinct but distant feeling that he had a role to play in this whole saga. He knew the offence for which he had been

convicted and sentenced. Yet when he appeared for the hearing of his purported appeal, he confirmed that he had been convicted for the offences which would have been the subject of this appeal. He also knew the sentence imposed yet when he appeared before me for the hearing of the appeal he pretended that the sentence imposed was the same as in this appeal. That too was a lie. He then conveniently proceeded to abandon the appeal on conviction and instead pursued the appeal on sentence only knowing very well that I was more than inclined to review the sentence downwards. Indeed I proceeded to reduce the sentence of 2 and 3 years respectively initially imposed to 2 years on each count. The import of that decision was that the appellant had already served the sentence imposed and was at liberty to walk home but for hawk eyed prison officers who detected the anomaly.

For all the foregoing reasons and since the appellant herein and in criminal appeal number 307 of 2007 are all in agreement that the proceedings and judgment in criminal appeal number 307 of 2007 should be expunged from the record as being a nullity, I now do so with the consequence that the proceedings and judgment in criminal appeal number 307 of 2007 are hereby expunged from the record. The appellant herein and in criminal appeal number 307 of 2007 shall have their respective appeals heard afresh on a date to be given by the registry.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of May 2009*

**M. S. A. MAKHANDIA**

**JUDGE**