



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL 173 OF 2005**

**SIMON IRUNGU WANJIKU..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of E.J. Osoro, Senior Resident Magistrate in Chief Magistrate's Court Criminal Case No. 2436 of 2004 at Nyeri)***

**JUDGMENT**

This appeal was filed on 26<sup>th</sup> July 2005. On being filed it is reported that the original lower court file at Chief Magistrate's Court Nyeri has been misplaced. When the matter first appeared before the Hon. Justice Makhandia on 29<sup>th</sup> May 2007 he ordered that the Executive Officer do appear in court to explain the whereabouts of the file. On 31<sup>st</sup> May 2007 the Executive Officer appeared before court when he informed the court that concerted efforts had been put in place to try and trace the original court record but to no avail. He said that they had made a search at the archives section but had been unable to trace the file. On

that report being made the appeal was fixed for hearing on 25<sup>th</sup> February 2008 the absence of the original record notwithstanding. The appellant's counsel reminded the court that the original lower court record could not be traced. He said that the appellant had been in custody since January 2004. He requested the court to release the appellant who although had a right to appeal could not proceed with the appeal because of the missing lower court file. The state counsel in response said that she conceded to the prayer. The court of appeal in the case of *PIUS MUKABE MULEWA & ANOTHER – V – REPUBLIC CRIMINAL APPEAL NO. 103 of 2001* had to consider the appropriate orders that should be made where the court file of the trial court is irretrievably lost and found that:

***“..... that the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss occurred. Who stands to gain from the loss?”***

The loss of the original Lower Court file cannot on the information before court be blamed on the appellant. We are not certain that there were exhibits that were produced

in the Lower Court. The state counsel did not seek the trial of the appellant. In view of that the order that we make is that the conviction against the appellant be and is hereby quashed and his sentence is hereby set aside. The appellant should be set at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 30<sup>th</sup> day April 2008.***

**MARY KASANGO**

**JUDGE**

**M.S.A MAKHANDIA**

**JUDGE**

