

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 193 of 2008

ELIJAH MURIITHI MATHAI.....APPELLANT

VERSUS

REPUBLIC.....

.....RESPONDENT

JUDGMENT

The Appellant was, upon trial, before the Principal Magistrate at Nyahururu, for capital robbery convicted and sentenced to death. He has appealed to this court against that conviction and sentence. We do not have his lower court record. Despite studious efforts made by his counsel, Mr. Mongeri, the court file cannot be traced. The Deputy Registrar of this court has also written to the Nyahururu court for that record but the same is unavailable. Mr. Mongeri said that the Appellant's file must be one of those that were destroyed when an inferno gutted down part of Nyahururu Law Courts.

Mr. Njogu, learned state counsel, conceded that the file cannot be traced and urged us to order a re-trial of the Appellant. He said that the prosecution will be able to get the witnesses and have the Appellant tried once again. Mr. Mongeri for the Appellant strongly opposed that and urged us to set the Appellant free.

It is trite law that a re-trial is ordered when no prejudice will be caused to the accused and when the interests of justice so demand. This is how the Court of Appeal expressed itself on this point in **Muiruri Vs R [2003] KLR 552:-**

“It [a retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (*See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980)*); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s.”

In this case the offence is alleged to have been committed in 1997, more than ten years ago. We doubt if the prosecution will be able to marshal its witnesses and even if it does, their memory must have by now faded. This is further compounded by the fact that not even a charge sheet has been traced. In the circumstances, a re-trial will be quite prejudicial to the Appellant. In the circumstances we have no choice but to release the Appellant and we therefore order his immediate release unless he is otherwise lawfully held.

DATED and delivered at Nakuru this 11th day of December, 2008.

M. KOOME

JUDGE

D. K. MARAGA

JUDGE