



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal 141 of 2003

CHARLES KITHINJI KANAKAU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal from Kerugoya Criminal Case No. 1146 of 2001)

RULING

At Kerugoya Magistrate’s Court a new registry was constructed where all the criminal files were kept. In the year 2004 that registry was gutted down by fire thereby destroying all the criminal files in that court except those that were kept at the Magistrate’s Chambers.

The Appellant in this appeal stated in his grounds of appeal that he was sentenced to three years imprisonment and three strokes for shop breaking. Indeed when the State Counsel submitted to the court when this appeal came up for hearing, he stated that the Appellant was convicted for shop breaking. The Appellant in response stated that he was convicted to death. It ought to be noted that the Appellant’s trial court file was burnt in the aforestated fire. It is not possible to confirm what he was convicted for. Indeed it is not possible to confirm how the trial at the lower court was conducted. On a subsequent date when this matter came up for hearing the State Counsel told the Court that the Appellant was charged for robbery with violence. The cause of the fire to date has never been known. The Appellant certainly cannot be blamed for that fire. The Court of Appeal in the case of **PIUS MUKABE MULEWA & ANOTHER -V- REPUBLIC CRIM APP. 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?”

As stated before there is confusion as to the charge the Appellant faced at the trial court. That confusion cannot be resolved because of the lack of original record. The court too cannot confirm whether the lower court’s trial was wanting in any way. Accordingly it is only just that the conviction against the Appellant be set aside. The orders of this court are that the conviction against the Appellant is hereby set aside. The sentence is hereby discharged and the Appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of July 2007.

CRIMINAL APPEAL NO. 139 OF 2003

JAMLICK NJERU IRERI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal from Kerugoya Criminal Case No. 1146 of 2001)

RULING

At Kerugoya Magistrate’s Court a new registry was constructed where all the criminal files were kept. In the year 2004 that registry was gutted down by fire thereby destroying all the criminal files in that court except those that were kept at the Magistrate’s Chambers.

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“.....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?”

As stated before there is confusion as to the charge the Appellant faced at the trial court. That confusion cannot be resolved because of the lack of original record. The court too cannot confirm whether the lower court’s trial was wanting in any way. Accordingly it is only just that the conviction against the Appellant be set aside. The orders of this court are that the conviction against the Appellant is hereby set aside. The sentence is hereby discharged and the Appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of July 2007.

MARY KASANGO

JUDGE