



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

**Criminal Appeal 409 of 2002**

**CHARLES GITHINJI MURUMIA.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

*(Being appeal from the conviction and judgment of S. A. Okato, Resident Magistrate, in the Principal Magistrate's Criminal Case No. 3493 of 1998 at Kerugoya)*

**RULING**

At the 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 was convicted by the Kerugoya Magistrate's Court on 11<sup>th</sup> October 2002 of stealing by director of a company and for escape from lawful custody. He was sentenced to two (2) years on count I and one year on count II both sentences to run consecutively. He has now appealed to this court. When the aforesaid fire occurred the Appellant had obtained the typed proceedings. But the exhibits produced in the lower court trial were destroyed in the fire. This was a case involving several documents because the Appellant was charged with theft, where it was stated the theft was by means of cheques. Those cheques together with other exhibits are not available to this court while considering the appeal. The Appellant by an application sought the orders that the court will find the charge was defective and that since the exhibits were destroyed in the file the directions be given on the hearing of the appeal. When the matter came before court, appellant's counsel prayed that the conviction be set aside and that there be no retrial. He said that the Appellant has served five (5) year jail term and if retrial is ordered the prosecution may seek to mend the trial. In the case of **PIUS MUKABE MULEWA & ANOTHER -V- REPUBLIC CRIM APP. NO. 103 of 2001** the Court of Appeal 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 State did not seek for retrial. The Court cannot in any way blame the Appellant for the fire that occurred. It is correct as stated by the Appellant's Counsel that to allow an appeal the prosecution may take it as an opportunity to perfect the trial. Accordingly the orders are that; the conviction against the Appellant hereof is set aside; the Appellant is hereby discharged and is hereby set free unless otherwise lawfully held.

***Dated and delivered at Nyeri this 20<sup>th</sup> day of July 2007.***

MARY KASANGO

JUDGE