



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 376 of 2003**

**FRANCIS CHEGE KIRORI.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

***(Being appeal against the conviction and judgment of the Principal Magistrate's***

***Court Criminal Case No. 1451 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 herein was convicted on 10<sup>th</sup> December 1998 of robbery with violence by the Kerugoya Magistrate's Court. The original trial court's file was destroyed in the fire mentioned herein before. When the appeal came up for hearing the State Counsel informed the Court that he would seek a retrial and that the records are with the Police. As stated before the original record was destroyed in the fire and the proceedings had not been typed. Accordingly this appeal cannot proceed for hearing. In the case of **PIUS MUKABE MULEWA & ANOTHER –V- REPUBLIC CRIM. APP. NO. 103 OF 2003** the court of appeal had to consider the appropriate order that should be made when the original trial court's record is irretrievably lost. The court found:

*“.....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 exact cause of the fire is to date unknown and the court finds no reason to lay any blame for that fire to the Appellant. The Appellant was tried in 1998 and it can be assumed, since the original records are not available, that the crime was committed either in 1998 or before. That is nine (9) years ago or longer. The State did not address the Court properly on whether all the witnesses are traceable and available. It may very well be that the exhibits, if any, are unavailable. I find that injustice may well fall on the Appellant if retrial is ordered. Accordingly these are the orders of the court; that the conviction against the Appellant in Crim. Case No. 1457 of 1998 Kerugoya Court be and is hereby set aside; the court does hereby discharge the Appellant and set him free unless otherwise lawfully held.

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

MARY KASANGO

JUDGE