

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 349 of 2003

JAMES KARIUKI NGUU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

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 in 2003 of robbery with violence at Kerugoya court. His file was one of those that were destroyed in that fire. It is not clear if the cause of that fire has ever been resolved. That as it may be, the Appellant being aggrieved by his conviction appealed to this court. When the appeal was fixed for hearing the State Counsel informed the court that the record of the trial court was not available and indeed that the proceedings had not been typed. He however stated that if the court was minded to set aside the Appellant’s conviction that a retrial should be ordered. That the Police had confirmed that the witnesses were available but they were unable to confirm the whereabouts of the exhibits. In response to this the Appellant opposed a retrial and stated that he had been in jail since 2003. He further stated that it was not his fault that the Lower Court file was destroyed.

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?”

As stated before, the exact cause of the fire or who caused it has never been revealed to date. State Counsel in submissions informed the court that the witnesses would be available for retrial but that the exhibits’ whereabouts were unknown. Undoubtedly it does not always follow that where a file is lost it must always be with an acquittal of the Appellant. I find that the circumstances of the loss of the original file hereof cannot in the remotest suggestion, be blamed upon the Appellant. The Appellant has served sentence for now four (4) years. I am of the view that justice would not be served by allowing a retrial of his case, after all since the original record is not available that may very well give the prosecution an opportunity to better present their case the second time round. I accordingly do hereby set aside the Appellant’s conviction by the Kerugoya Court and I do hereby discharge the Appellant and set him free unless otherwise lawfully held.

Dated and signed at Nyeri this 20th day of July 2007.

MARY KASANGO

JUDGE