



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Appeal 271 of 2003**

**JAMES MAINA MUGA.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

*(Being appeal against the conviction and judgment of the Principal Magistrate's Court Criminal Case No. 220 of 2002 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.

Appellant was convicted by the Kerugoya Court with Robbery Contrary to Section 296(1) of the Penal Code on 12<sup>th</sup> June 2003. He was sentenced to 12 years and to receive eight (8) strokes of the cane. The original trial court's file was destroyed in the afore stated fire. The cause of the fire or who was responsible to date has never been known. When the appeal came up for hearing the State informed the Court that witnesses can be traced and therefore he sought that an order be made for retrial. 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?"*

The Appellant cannot at all be blamed for the fire that destroyed the original file. If retrial is ordered, since the original record is not available the prosecution may very well try to perfect their case. That I think would be unjust to the Appellant. Accordingly the Court does hereby set aside the conviction of the Appellant at the Kerugoya Court. The Court does hereby discharge the Appellant and he 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**