

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 64 of 2004

WILSON GATHERU MAINA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against the conviction and judgment of the Principal Magistrate's Court 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 25th June 2003 of grievous harm and was sentenced to seven (7) years. His file was one of the files destroyed in the fire. It is not clear if the cause of that fire has ever been resolved. The Appellant preferred this appeal to this court. When the appeal was fixed for hearing the State Counsel informed the Court that the original record of the trial court was unavailable and that the proceedings had not been typed. He stated that the State would not be seeking retrial if the conviction was set aside. 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 where the original trial court's record is irretrievably lost. The court 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”

As stated before, the exact cause of the fire to date is unknown. It is also unknown who, if any, caused the fire. I find that the appropriate order hereof, taking into account that the Appellant has already served four (4) years of the seven (7) years sentence, is that the conviction of the Kerugoya Court be and is hereby set aside and I do hereby discharge the Appellant and set him free unless otherwise lawfully held. Those are the orders of this court.

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

MARY KASANGO

JUDGE