



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA,  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 116 of 2003**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 1896 of 2000 of the Chief Magistrate's Court at Makadara)**

**SAMUEL GICHUKI KIMOTHO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**SAMUEL GICHUKI KIMOTHO** had been sentenced on 15<sup>th</sup> January 2003 to 5 year's imprisonment for **BEING IN POSSESSION OF A FIREARM** contrary to **Section 4(2)** of the Firearms Act and **PREPARATION TO COMMIT A FELONY** contrary to **Section 308** of the **Penal Code** going by the petition of appeal.

The Appellant lodged his appeal to this court on 12<sup>th</sup> February 2003 by filing a petition of appeal challenging both the conviction and sentence on both points of law and fact. The trial court record was however never received at the High Court Criminal Appeals registry despite numerous letters to the Nairobi Chief Magistrate's Court registry. This is amazing considering that both registries are housed in the same building. After numerous letters and the total failure of the lower court's registry to avail the original record of the proceedings before it, the appeal was finally set down for hearing on 2<sup>nd</sup> May 2006.

On 2<sup>nd</sup> May 2006, the Appellant was minded to withdraw his appeal on the ground that he had only 13 days to go before completing sentence. The court could not however hear of it as it was quite clear that the Appellant could not be blamed for the obvious loss of the lower court's file and the subsequent delay in the disposal of this appeal.

This court has decided many cases on this point. I will quote one: **YUSUF LUMBAMBO MWANGI vs. REPUBLIC HCCC No. 1193 of 2000** which considered the Court of Appeal holding in **JACKSON MUTHARIA MWAURA** alias **KAMANDE & ANOTHER vs. REPUBLIC CA No. 58 of 1989**. In that case it was held that where the appellate court has nothing to go by in determining the Appellant's fate on appeal the proper order to make is to set aside the judgment entered by the trial court in the original trial. Accordingly I set aside the judgment of the lower court in Appellant's original trial and the sentence thereon.

In the same **YUSUF MWANGI's** case, *Supra*, after considering several cases on the point, I concluded that an order of retrial could not be made because of two reasons. One there was no suggestion that the trial before the lower court was defective. Two there were no copies of all the proceedings, judgment and sentence of the lower court available, whether certified or otherwise and therefore the order of retrial would be academic and an exercise in futility. Considering all these factors I find that the proper order to make in this case is to set the Appellant free. Since the order was made on 2<sup>nd</sup> May 2006, I need not repeat it.

These are the reasons therefore at arriving at the order to release the Appellant.

Dated at Nairobi this 31<sup>st</sup> day of May 2006.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

.....

**LESIIT, J.**

**JUDGE**