

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 2 OF 2020

JOHN NDUVA MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of the Chief Magistrates Court at Machakos delivered on 6.8.2018 by the Senior Principal Magistrate A. Lorot in Machakos CMCC Criminal Case 388 of 2018)

JUDGEMENT

1. This is an appeal from the sentence of **Hon. A. Lorot SPM**, in Criminal Case **388 of 2018** delivered on 6.8.2018. The Appellant was charged with the offence of escape from lawful custody Contrary to Section 123 as read with Section 36 of the Penal Code. The particulars of the offence are that on the 21st May, 2018 at Machakos law courts Cells in Machakos County being in lawful custody of No.61328 Cpl Peter Njenga escaped from the said lawful custody.

2. The appellant pleaded guilty to the charge; the facts were narrated and he admitted the facts. He was thus convicted on his own plea of guilty and after mitigation he was sentenced to serve seven (7) years imprisonment. He was dissatisfied with the sentence and filed this appeal.

3. The state conceded to the appeal. The appeal was canvassed vide oral submissions.

4. I have considered the respective submissions. The appellant was charged with the offence of escape from lawful custody contrary to section 123 as read with section 36 of the penal code. Section 123 of the penal code provides

“123. Any person who being in lawful custody escapes from that custody is guilty of a misdemeanor.”

5. A misdemeanor is defined in section 4 of the penal code as any offence which is not a felony. The general punishment for misdemeanor is provided for in section 36 of the penal code. Section 36 of the penal code states

“36. Where in this code no punishment is specifically provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or to both”

6. The appellant pleaded guilty to the charge which plea in my view was unequivocal. He can therefore by provision of section 348 of the Criminal Procedure Code appeal on the legality or severity of the sentence. Section 348 C.P.C provides

348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.

7. The state conceded that the sentence of (7) years is excessive. The punishment for the offence of escape from lawful custody being a misdemeanor whose sentence is not provided under section 123 of the penal code, the punishment is thus provided for in section 36 of the penal code. The sentence so provided is for imprisonment of a maximum term of two years, or fine or to both. I therefore find that the sentence of seven (7) years imprisonment imposed is unlawful.

8. Consequently I find the appeal has merit and is allowed. The sentence of seven years is hereby set aside and substituted with a sentence of eighteen months imprisonment from 06.08.2018. As the appellant has served the sentence he be set at liberty forthwith unless he is otherwise lawfully held.

It is so ordered.

D. K. Kemei

Judge