



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. CRIMINAL APPLICATION NO.135 OF 2018

MORRIS MAWIRA MUGAMBI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 632 of 2017 of the Senior Principal Magistrate's Court at Chuka).

RULING

1. The applicant herein, Morris Mawira, was convicted for the offence of Escape from Lawful Custody contrary to **Section 123** of the **Penal Code** vide **Chuka Senior Principal Magistrates Criminal Case No.632 /2017**. The particulars for the offence as per the charge sheet were that on 24th July, 2017 at 7.10 am at Chuka prison the applicant while being a convict undergoing a sentence of 1 year four months for the offence of creating disturbance in a manner likely to cause a breach of peace, escaped from such lawful custody.
2. The applicant upon conviction sentenced to serve two years imprisonment. The applicant has now brought a motion for review of the sentence stating that he has since reformed after transformation he has undergone while in prison.
3. This court called for the lower court file for perusal and consideration pursuant to **Section 362** of the **Criminal Procedure Code**. I have noted that at the material time the applicant was in prison serving sentence of one year for willing obstructing and resisting arrest apart from the 4 months sentence in count 1 which was for resisting arrest. The two sentences were running consecutively which meant that in total he was serving a sentence of 1 year 4 months when he committed the offence of trying to escape from lawful custody. The offence of escape from lawful custody attracts a penalty of a maximum two years because it is a misdemeanour.
4. The trial court while passing the sentence appears to have missed one important aspect in the sentence which was an order that the sentence meted would either run concurrent which the initial sentence or consecutive. Under **Section 38(b)** of the **Penal Code**, the law states as follows:-

"When sentence is passed under this code on an escaped convict, that sentence:-

(a) If of death, or fine, subject to the provisions of this code, take effect immediately.

b) If of imprisonment, shall run consecutively or concurrently as the court shall order, with the unexpired portion of the sentence which the convict was undergoing when he escaped."

The trial court apparently failed to make any order either way as provided by the law which call into question the legality of the sentence meted out against the applicant. This court is empowered under **Section 364** with revisionary powers to make any such orders as provided under that section which includes reversing the sentence and meting out an appropriate sentence.

5. I also listened carefully to the applicant during the hearing of this application. He told this court that he was actually attempting suicide and had hoped that by trying to openly escape from custody, he would be shot and die. This he said was because of the fact that he had not recovered fully from drug abuse and as such was afflicted with the disease of the mind.

I have considered the social inquiry report which I had directed to be filed and I am satisfied going by the report and what the applicant stated that he has transformed and has recovered. He should be given a chance to be a useful citizen with the social support the probation officer and the community.

In the premises I am inclined to allow this application by reversing the sentence meted out against the applicant. The sentence should have run concurrently with the sentence of 1 year 4 months meted out against him vide **Chuka Senior Principal Magistrate's Court Criminal**

Case No.1118/2016. And since that sentence ran from 8th March 2017, the applicant is considered to have already served his sentence and more importantly to have learned his lessons. He shall be set free forthwith unless otherwise lawfully held but in order to ensure that he fully reforms from his old bad habits of drug abuse, I shall place him on probation for four months.

Dated, signed and delivered at Chuka this 24th day of January, 2019.

R. K. LIMO

JUDGE

24/1/2019

Ruling signed, dated and delivered in the open court in presence of Momanyi for Respondent and Applicant in person.

R.K. LIMO

JUDGE

24/1/2019