



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 17 OF 2016**

**REPUBLIC.....APPELLANT**

**VERSUS**

**MAXWEL MUSUNDI.....RESPONDENT**

*(Appeal arising from the sentence delivered by Hon. C. I. AGUTU, Resident Magistrate on 17<sup>th</sup> February 2016 in Busia CM's Criminal Case No. 363 of 2016)*

**JUDGMENT**

1. This is an appeal by the State against sentence only.
2. The Respondent Maxwell Musundi having been convicted for the offence of escape from lawful custody contrary to Section 123 of the Penal Code was warned and discharged by the trial Court under Section 35 of the Penal Code.
3. The State challenges the sentence on the ground that that the trial court did not exercise its sentencing discretion judiciously but instead acted whimsically.
4. When an appellate court is asked to review a sentence, it is guided by the principles laid down in the cases of **Wanjema v Republic[1971] E.A. 494** and **Bernard Kimani Gacheru v Republic [2002] eKLR**. Those principles show that an appellate court can intervene with the sentencing discretion of the trial Court when:
  - (i) the sentence is manifestly excessive in the circumstances of the case;
  - (ii) the trial court overlooked some material factor;
  - (iii) the trial court took into account some irrelevant material; or
  - (iv) the trial court acted on a wrong principle of law..
5. In arguing the appeal, Mr. Owiti for the Appellant admitted that although sentencing is a discretionary power vested in the court, in the instant case, that discretion was not exercised judiciously. He relied on the case of **Solomon Otieno v Republic [2013] eKLR**.
6. He was of the view that the trial court failed to consider two very important issues. Firstly, that the Respondent was someone who was escaping from lawful custody whilst serving a sentence. Secondly, that the Respondent refused to surrender when he was found in his hideout. It was his case that the

Respondent was a repeat offender. He therefore urged this Court to find that the trial Court erred in discharging the Respondent as it did not consider the relevant factors.

7. A person convicted under Section 123 of the Penal Code is guilty of a misdemeanor. This Section cannot be read in isolation but must be read together with Section 36 of the Penal Code which provides that where no punishment is specifically provided for any misdemeanor in the Code, the punishment shall be imprisonment for a term not exceeding two years or a fine, or both.

8. The Respondent was discharged under Section 35 of the Penal Code.

9. In light of the guiding principles set down in the already cited cases of **Wanjema** and **Bernard Kimani Gacheru** can the trial Court be faulted for the sentence it imposed? Can the punishment be said to offend the principles of sentencing? Has the Appellant established a case to warrant this Court to disturb the sentence imposed by the trial Court?

10. Among the purposes of sentencing is deterrence and retribution. Discharge under Section 35 of the Penal Code is only meant for minor offences and is aimed at ensuring that an offender is not incarcerated. In this case the Respondent was already serving imprisonment and was escaping from lawful custody. A discharge under Section 35 of the Penal Code would not have achieved its purpose.

11. Escape from custody though a misdemeanor is a serious act as it may endanger the lives of both the prisoner and the prison officers. Taking into account the law laid in **Wanjema** (supra), I conclude that the trial Court exercised its sentencing discretion erroneously.

12. The upshot is that the appeal succeeds, the sentence is set aside.

13. For the offence for which the Respondent was charged, the law prescribes a maximum of two years imprisonment or a fine..

14. It is noted that the Respondent is remorseful and pleads for mercy. He also admitted to the charges in the trial Court thus saving the Court's time. This Court therefore allows the appeal and sentences him to six months imprisonment to run from the date he completes the sentence. The sentence to which he was initially convicted.

15. It is so ordered.

**Dated, signed and delivered at Busia this 28<sup>th</sup> day of July, 2016.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**