



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 177 of 2011

MARK OMONDI OOKO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

From original conviction and sentence in Criminal Case number 104 of 2011 of the Principal Magistrate's Court at Siaya – Mr. S. O. Temu Esq)

JUDGMENT

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 eleven (11) day of February 2011 at Siaya Law Courts cells in Siaya District within Nyanza Province being in lawful custody of No. 69066 P C Josphat Nderitu and No. 56021 PC Kibet Kangogo escaped from the said custody.

On his own admission or plea of guilt the appellant was sentence to 1 ½ years imprisonment

His Appeal dated 10th August 2011 basically is a mitigation against the sentence.

The appellant on the material day had been charged with being in possession of bhang and on his own plea had been sentence to three (3) years imprisonment.

In the process of awaiting to be taken to the G. K. Prison he scaled the cells and jumped over the wall and took off. The police officers managed to arrest him and the charges were preferred against him.

I have carefully read the proceedings as well as heard the parties in this appeal. The appellant on his own admission during the hearing of the appeal does not deny the charge. However the State conceded that the trial court erroneously ruled that the 1 ½ years jail term the appellant was sentence should have ran separately and not consecutively. The same was premised on file No. 104 of 2011 and not 102 of 2011.

I fully agree with the State Counsel on this score. Nevertheless does this militate against the appeal? I do not think so. Consequently I shall invoke the provision of Section 382 of the Criminal Procedure Code which states:-

“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error,

ommission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, ommission or irregularly has occasioned a failure of justice;

Provided that in determining whether an error, ommission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”.

I do not see any miscarriage of justice. The court clearly pointed out when the appellant was to run the term. Essentially under the provision of Section 36 of the Penal Code the maximum sentence for a misdemeanor is two (2) years. If it were to run concurrently the sentence in this appeal would expire before the main charge.

However, considering the nature of the trouble the appellant caused on the material day and the risks he put the police officers including their jobs I think the sentence imposed upon him was fair and adequate. I have nevertheless listened to his mitigation and the fact that he was willing to reform and be a good citizen. I shall reduce the sentence to six (6) months custodial sentence which will run consecutively with that under under filed No. 102 of 2011 as observed by the trial court. For avoidance of doubt after serving the jail term under criminal case No. 102 of 2011 the appellant shall serve a further six (6) months in regard to the charge of escape from lawful custody.

Orders accordingly.

Dated, signed and delivered at Kisumu this 21st day of January 2013

**H. K. CHEMITEI
JUDGE**

In the presence of:

..... State Counsel

..... for Appellant

HKC/aa0