

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CRIMINAL APPEAL 164 OF 2011

FRANCIS ACHOKA EKALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 1174 of 2011 of the Principal Magistrate's Court at Nyahururu – A. B. Mongare, SRM)

JUDGMENT

1. Francis Achoka Ekale was charged with the offence of Escape from lawful custody, contrary to Section 123 of the Penal Code, (Cap. 63, Laws of Kenya). He pleaded guilty and confirmed the facts relating to the offence and his plea of guilty was confirmed. He was sentenced to four years imprisonment.
2. Section 348 of the Criminal Procedure Code prohibits the court from entertaining any appeal where an accused has been convicted of an offence upon his own plea of guilty. The exception is the extent and the legality of sentence.
3. The Appellant was unhappy with his sentence, and has for that reason come to this court. He said so in his submissions.
4. Mr. Omutelema learned Assistant Director of Prosecutions did not oppose the appeal.
The punishment for misdemeanors is prescribed by Section 36 of the Penal Code -
“where in this Code, no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years, or with a fine or with both.”
Section 123 of the Penal Code provides that any person who being in lawful custody escapes from that custody is guilty of a misdemeanor. By definition a misdemeanor is any offence which is punishable by a sentence of less than three years. A felony is any offence punishable by a sentence of three or more years imprisonment.
5. The sentence of four years imposed upon the appellant was therefore illegal. It is set aside, and substituted with a sentence of 12 months.
6. Appellant was sentenced and committed to jail on 7th June 2011, he has already served that term. Unless there is lawful cause for his continued detention, I direct that he be released forthwith. It is so ordered.

Dated, signed and delivered at Nakuru this 31st day of July, 2012

J. ANYARA EMUKULE

JUDGE