



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**

**HC.CR.APPEAL NO.77 OF 2011**

**GEORGE OMONDI ORENGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

The appellant Philip Ogola Okello Ooko was convicted by Busia Senior Resident Magistrate of the Offence of Escape from lawful custody contrary to Section 123 of the Penal Code. He was sentenced to serve two years (2) imprisonment and a fine of sh.50,000/- with a two-year imprisonment sentence in default of the fine.

The appellant has clearly stated in his petition of appeal that he is only aggrieved with the sentence. During the hearing, the appellant explained that he has no problem with the first limb which is two years imprisonment. It is the second limb of sh.50,000/- and in default two years imprisonment which he feels is harsh and excessive.

The State Counsel Mr. Okeyo opposed the appeal. He told the court that the two-tier sentence is provided by the law and should not be interfered with.

I make reference to the relevant section of the Penal Code which provides:

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

Section 4 of the Penal Code defines a “misdemeanor” as “any offence which is not a felony.”

The general punishment for misdemeanors is provided for under Section 36 of the Penal Code as

follows:-

**“When in this code no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment or with a fine, or with both.”**

This Section is applicable to the offence committed contrary to Section 123 of the Penal Code. The matter was reported to Busia Police Station who mounted an operation and arrested the appellant and another. The two were jointly charged in court.

The circumstances are that the appellant and others were held as suspects in prison awaiting trials of their cases. The plan to escape from prison in a group of more than ten people is not a mean plan. It is in itself a risk to public security. At the time the appellant was convicted, he was a convict in a robbery with a violence case contrary to Section 296 (2) of the Penal Code. This may have influenced the sentence the court gave of both fine and imprisonment. In the circumstances the sentence imposed was not excessive or harsh save for the defaulter’s sentence of two years. For this reason the State Counsel argued that the law provides for a sentence of both fine and imprisonment. In any case where fine is imposed, a defaulters sentence must be imposed. Any defaulters sentence shall run consecutively with any other sentence. In the case before me, the appellant is required to spend four (4) years in prison if he fails to pay the fine. This will be a combination of the two years imprisonment and the defaulters sentence of two (2) years. It has been established that the sentence is lawful. However, this court has a duty to probe into the question of whether the sentence is reasonable in the circumstances of the offence.

The accused pleaded guilty to the charge and facts of the case were read to the court. The accused was held as a suspect in Busia G.K. Prison on the 03/10/10. Together with eleven (11) other suspects, they planned to escape successfully executed their plan. I review the two year defaulter’s sentence to be one (1) year. In effect the appellant will spend three years in prison if he does not pay the fine of sh.50,000/-. The sentences will be two (2) and one (1) year consecutively.

The appeal is successful only to that extent.

Judgement dated and delivered in open court at Busia on the 8<sup>th</sup> day of November 2011 in the presence of the appellants and the State Counsel Mr. Okeyo.

**F.N. MUCHEMI**  
**J U D G E**