

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 25 OF 2015

COLLINS EYANAE EKITELA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence in original Lodwar PMCR Case No. 701/2015 delivered on 23/10/2015 by I O Odhiambo Resident Magistrate)

JUDGMENT

The appellant **Collins Eyanae Ekitela** 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 3rd day of August, 2015 at Lodwar law courts in Turkana County within the Republic of Kenya being in lawful custody of **No.54610 P.C James Atee and No.95900 P.C Richard Kakai**, escaped from Lodwar Law Courts Cell from the said lawful custody.

The appellant pleaded guilty to the charge; the facts were narrated and he admitted the facts. He was thus convicted on his own plea of guilty and after mitigation was sentenced to serve four (4) years imprisonment. He was dissatisfied with the conviction and sentence and filed this appeal. He raised several grounds in support of this appeal, which though so named were actually mitigation and prayer for leniency as he contended that the sentence meted out was excessive in the circumstances. Appellant filed written submissions where he amplified his grounds of appeal.

Mr. Kimanthi learned prosecuting counsel for the state opposed the appeal in conviction. He contended that the appellant pleaded guilty and was sentenced and by the provision of section 348 of the criminal procedure code cannot appeal against conviction. Learned prosecuting counsel however submitted that the sentence was excessive as the offence was a misdemeanor and the appellant should not have been sentenced to imprisonment for more than one year.

I have considered the respective submissions. 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. Section 123 of the penal code provides

123. Any person who being in lawful custody escapes from that custody is guilty of a misdemeanor.

A misdemeanor is defined in section 4 of the penal code as any offence which is not a felony. The general punishment for misdemeanor is provided for in section 36 of the penal code. Section 36 of the penal code procedure

36. Where in this code no punishment is specifically provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or to both”

The appellant pleaded guilty the charge which plea in my view was unequivocal. He cannot therefore by provision of section 348 challenge on appeal his conviction. The appellant can however appeal on the legality or severity of the sentence. Section **348 C.P.C** provides

348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.

Mr. Kimanthi for the state conceded that the sentence of (4) years is excessive. The punishment for the offence of escape from lawful custody being a misdemeanor whose sentence is not provided under section 123 of the penal code, the punishment is provided for in section 36 of the penal code. The sentence so provided is for imprisonment of a maximum term of two years, or fine or to both. I therefore find that the sentence of four (4) years imprisonment imposed is unlawful. Consequently I allow the appeal against sentence, set aside the sentence of four years imprisonment. I hereby direct the appellant to serve **two (2) years** imprisonment from the date of sentence on 23/10/2015.

Dated and signed at Lodwar this 10th day of September, 2016.

S RIECHI

JUDGE